

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

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Glossary and abbreviations

Term	Definition
@TEOTD	Acronym for ‘At the end of the day’.
#	See ‘hashtag’.
#nofilter	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.
#motivation	A popular hashtag on social media platforms such as <i>Instagram</i> , <i>Twitter</i> and <i>Facebook</i> which is used to accompany positive, inspirational and uplifting content.
AFAICT	Acronym for ‘as far as I can tell’.
AMA	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.
Back-up	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.
Bio	A short text portion of any digital profile designed to explain who the user is. It is common to all social media platforms.
Block	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.
Blog	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.
Check-in	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.
Clickbait	Something designed to make readers want to click on a hyperlink, especially when the link leads to content of dubious value or interest.
Click-through rate	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).
DAE	Acronym for ‘does anyone else’. Commonly used as the beginning of a discussion thread on <i>Reddit</i> , inviting users to post responses in relation to the relevant topic/experience.

<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.
<i>EOT</i>	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.
<i>Embedded</i>	In the context of digital technology, the term embed refers to placing text, images, sound or computer code in a computer file, HTML document, software program or electronic device.
<i>Facepalm</i>	Used online in written form (including <i>*facepalm*</i> ; and <i>[facepalm]</i>) and can also be visually represented by emojis, emoticons and in memes. It refers to the physical gesture of placing one’s hand across one’s face or lowering one’s face into one’s hand/s, covering or closing one’s eyes. The gesture is commonly understood as a display of frustration, disappointment, exasperation, shock, surprise or incredulous disbelief.
<i>Fake news</i>	Deliberate disinformation or hoaxes spread commonly online and via social media.
<i>Follow</i>	To subscribe to the feed of (someone or something) especially on social media.
<i>FOMO</i>	Acronym for ‘Fear of Missing Out’.
<i>Goals</i>	A common term used in online forums to refer to what a user aspires to.
<i>Handle</i>	User name on <i>Twitter</i> .
<i>Hashtag</i>	A word or phrase preceded by the symbol ‘#’ that classifies or categorises the accompanying text (such as a tweet).
<i>HTH</i>	Acronym for ‘hope this helps’. Commonly used in the course of online communications when a user sends another user information that is thought to be useful, often when answering a question.
<i>ICYMI</i>	Acronym for ‘In case you missed it’. Commonly used on <i>Twitter</i> . Indicating the posting of material that is not new and/or used to draw someone’s attention to something you think they should look at or read.
<i>IDK</i>	Acronym for ‘I don’t know’.
<i>In 140 characters or less</i>	Traditionally the character limit for individual text entries – ‘tweets’ – published on social media platform, <i>Twitter</i> .
<i>Influencer</i>	A person with the ability to influence potential buyers of a product or service by promoting or recommending the items on social media.
<i>IMHO</i>	Acronym for ‘in my humble opinion’. Used in posts on social media and other internet platforms to indicate that material posted is opinion as opposed to objective fact.

<i>Listserv</i>	Email mailing list software that distributes emails to subscribers on an electronic mailing list.
<i>LOL</i>	Acronym for ‘Laughing Out Loud’.
<i>News feed</i>	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> .
<i>OC</i>	Acronym for ‘original content’. Referring to online content that is new, unique and/or original and was created by the user posting it.
<i>Phishing</i>	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.
<i>Pop-up Notification</i>	<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.
<i>POV</i>	Acronym for ‘point of view’.
<i>Privacy settings</i>	Privacy settings on <i>Facebook</i> are settings available to a user to restrict what content is visible and available to other users.
<i>Profile</i>	A <i>Facebook</i> ‘profile’ is an individual’s personal account where that user can share information about themselves, upload photos and videos and post updates and maintain a ‘friends’ list.
<i>Q4U</i>	Acronym for ‘question for you’.
<i>QNA</i>	Acronym for ‘question and answer’.
<i>RBTL</i>	Acronym for ‘reading between the lines’.
<i>Reach</i>	A data metric that determines the maximum potential audience for any given message.
<i>Screenshot</i>	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.
<i>Share</i>	The act of sending photos, videos and other content to ‘friends’ with social media accounts.
<i>Status update</i>	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.

<i>Tag</i>	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.
<i>TBH</i>	Acronym for ‘To Be Honest’ used widely in communications on social media and other internet platforms.
<i>TL;DR</i>	Acronym for ‘too long; didn’t read’. A common comment by readers posted online to indicate that they didn’t read a lengthy online publication. Also used by authors of lengthy online publications to indicate the availability of a summary for readers who do not wish to read the entirety of the publication.
<i>TIL</i>	Acronym for ‘today I learned’. Used in writing, for example on social media, before giving interesting new information.
<i>Timeline</i>	<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.
<i>Trending</i>	Currently popular or widely discussed online, especially on social media platforms.
<i>TTP</i>	Acronym for ‘to the point’.
<i>Wall</i>	A <i>Facebook</i> ‘wall’ is part of a <i>Facebook</i> user’s profile where the user can post status updates and receive messages from friends. The wall is a public portion of a user’s profile, visible to the user’s friends. The wall also shows updates of a user’s recent activity such as comments the user has posted on other friends’ walls, the user’s status updates and who the user has recently friended.
<i>WDYMBT</i>	Acronym for ‘what do you mean by that?’
<i>WOM</i>	Acronym for ‘word of mouth’. A common reference to online sentiment.

Information about the Tasmania Law Reform Institute – ‘*bio*’

The Tasmania Law Reform Institute (TLRI) 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 Final Report and the preceding Issues Paper were authored by Jemma Holt. The community engagement and consultation that was conducted in connection to this project was also undertaken by Jemma Holt.

This project enjoyed the guidance and support of the TLRI Director, Associate Professor Terese Henning. It was assisted throughout by Executive Officer (Administration), Kira White.

The project benefited from valuable collaboration with 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. 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 Plater and the background research of Lucy Line of the Victorian Bar and Victoria Geason of the University of Tasmania.

Both the Issues Paper and the Final Report were edited by Bruce Newey.

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

- ***‘THX’*** (*‘Thanks’*)

Executive summary – ‘in 140 characters or less’

Jurors *do* use social media and/or other internet platforms. They do so in ways which impact their ability as jurors to be impartial and to return a verdict according only to the evidence presented and tested in the courtroom. They thereby adversely affect an accused’s right to a fair trial. This problem has been documented widely by the courts and the media across Australian and international jurisdictions.

There has been one documented case in Tasmania in 2015 of juror/s accessing online information in the course of deliberations. Whilst one isolated occurrence might seem negligible, much remains unknown (and unknowable) about the prevalence of this phenomena and, therefore, the extent of its effect on an accused’s right to a fair trial. All indications are that juror misconduct of this kind is under-reported; 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. However, what does present itself as a constant, known quantity is the gravity of the risk: the risk that an accused’s fundamental right to a fair trial before an impartial jury is adversely affected. The risk exists in every single juror in every single trial. It only takes one act of one juror for the risk to materialise. A risk of such magnitude demands that it be acknowledged and addressed to retain confidence in the administration of justice by jury trial, particularly in circumstances where the general *perception* is that juror misconduct of this kind is prevalent.

The more well-known intentional and defiant ‘*information in*’ scenario of the *errant juror conducting online research* is but one facet of the problem. Significantly, juror misconduct of this kind may be the product of inadvertence alone. Jurors’ use of social media and/or the internet for entertainment purposes may inadvertently expose jurors to passive news consumption, the bias of general online sentiment and/or unsolicited contact that may have an impact upon their ability to perform their role. The reasons why a juror may intentionally go online are not always straightforward either. It may be the product of confusion about and/or frustration with the trial process and/or a genuine belief that their actions are in the pursuit of ‘fairness’ or discovering the truth. Further, jurors’ habitual use of social media and/or other internet platforms may cause jurors to fall into misconduct by way of ‘*information out*’. That is, the desire to continuously share and to be constantly connected causing jurors to publish material online, without fully appreciating the consequences of such behaviour in the context of their role and obligations as a juror.

Despite the wide range of possible juror misconduct of this kind, the apparent focus of any discussion about this type of misconduct remains limited to, or at least focussed on, *the errant juror conducting online research*. It demonstrates a widely held misconception that juror misconduct of this kind is confined to intentional and defiant ‘*information in*’ uses of the internet.

This is a clearly identifiable shortcoming in the way in which this phenomenon is currently viewed and addressed. It is a defect that may be addressed with relative ease by correctly understanding the nature of the problem:

- It may involve **both** the internet **and** social media.
- It may involve **both** ‘*information in*’ **and** ‘*information out*’ uses of social media and/or the internet.

- It may be the product of inadvertence *alone* and/or jurors who believe they are doing the *right thing*.

The Institute recommends that changes to the law are not necessary. Rather, the preferred strategy to address juror misconduct of this kind is to focus on updating and improving juror education. Pre-empanelment training/ information for jurors and post-empanelment directions have been identified as two areas where, in the Institute's view, significant work can be done. This is reflected in recommendations one and two, which, inter alia, recommend that pre-empanelment juror training/information resources are reviewed and updated, and model jury directions are introduced.

Neither should be viewed in isolation. The response cannot and should not consist of any single measure, but rather a suite of measures that form an overall strategy. Pre-empanelment training/information should serve as a foundation for subsequent information provided by the trial judge in post empanelment directions. Both measures should be developed together to ensure consistency in terminology and expression used. Fundamental obligations of '*impartiality*' and '*according to the evidence*' need to be dissected and explained in a way that goes beyond abstract notions of 'fairness'/'a fair trial'/'fairness to the accused' so that jurors can fully grasp the potential implications of '*information in*' and '*information out*' uses of social media and other internet platforms in the context of a criminal trial.

These measures, once updated and implemented, need to be subject to periodic review and updating as required to ensure they remain relevant and effective.

List of Recommendations – ‘@TEOTD’ (*‘at the end of the day’*)

Recommendation 1 – page 74

- (a) The current pre-empanelment training/information for jurors in Tasmania should be updated.
- (b) The pre-recorded induction video should:
 - (i) expressly address jurors’ use of social media and other internet platforms;
 - (ii) specifically cover both ‘*information in*’ and ‘*information out*’ uses of social media/the internet (ie it should not be limited to the well-known ‘*information in*’ scenario of the *errant juror conducting online research*).
 - (iii) provide an explanation of the rationale behind the restrictions in social media/ internet use. This should not be limited to the mention of general notions of ‘fairness’ or ‘fair trial’ or ‘fairness to the accused’. Such concepts need to be explained in more accessible terms.
 - (iv) explain the consequences for the trial participants, for jurors and for the trial of jurors’ inappropriate use of social media/the internet.
- (c) These matters should be reiterated in the course of the subsequent verbal briefing.
- (d) The pre-empanelment training/information materials should be reviewed periodically to ensure they remain current and relevant.
- (e) Jurors should be provided with written materials at the pre-empanelment stage that outline basic information that is contained in the video and briefing.

Recommendation 2 – page 96

- (a) A set of ‘standard’/‘model’ directions to jurors, similar to those used in New South Wales and Victoria, regarding the internet and social media should be adopted in Tasmania.
- (b) They should include:
 - (i) Specific mention of social media;
 - (ii) Examples of prohibited internet and social media platforms, which surpasses simply mentioning *Facebook*;
 - (iii) Examples of prohibited activity, which include both ‘*information in*’ and ‘*information out*’ uses of social media and the internet;
 - (iv) Explanations for the internet/social media restrictions;
 - (v) Warnings about personal consequences for juror misconduct;

- (vi) Reminders to jurors of their obligation to report irregularities and a step-by-step guide of the reporting process;
- (vii) explain the consequences for the trial participants, for jurors and for the trial of jurors' inappropriate use of social media/the internet.
- (c) The above information should be reproduced in written form for jurors to refer to during the course of the trial, both as a written document given to jurors and posters/signage in the court precinct and jury room.
- (d) The oral directions should to be given at the start of the trial and repeated in truncated form before lengthy adjournments and deliberations.
- (e) The model directions should to be reviewed periodically to ensure that the particular social media/internet platforms and activities/uses that are included in the directions by way of examples remain current and relevant.

Recommendation 3 – page 102

The practice of taking mobile phones and other electronic devices away from jurors during the trial and deliberations should continue. Whilst its effectiveness in preventing jurors using social media and the internet is limited, it otherwise minimises the distraction of jurors from having their electronic devices at their disposal.

The dual purpose of this measure should be explained to jurors.

Recommendation 4 – page 125

The Institute does not recommend any reforms to current laws. The current contempt laws, as supplemented by the existing offence provisions within the *Juries Act 2003* (Tas), are adequate for the small role that punitive measures ought to play in addressing this issue.

Additional offence provisions that specifically address jurors' use of the internet and/or social media should not be introduced.

The preferred strategy to address juror misconduct of this kind is to focus on juror education.

Background and Introduction to this Report – ‘ICYMI’ (‘in case you missed it’)

This project was referred to the Institute by Ms Kim Baumeler, an Institute 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.

The Institute released an Issues Paper on 21 August 2019. It sought to elicit open discussion on juror misconduct in this contemporary context. The Institute invited submissions on this topic and 13 questions were posed in the Issues Paper to guide responses. These questions are set out in full in Appendix A of this Report.

The Institute engaged in consultation with stakeholders, interested parties, and the community at large from 21 August 2019 to 4 October 2019. To this end, the Issues Paper was also the subject of public discussion via the media in Tasmania¹ and nationally,² as well as within the legal

¹ Jessica Howard, ‘Tasmania Law Reform Institute releases paper on juror’s use of social media during criminal trials’ *The Mercury* (online, 21 August 2019) <<https://www.themercury.com.au>>; Jemma Holt, ‘Talking Point: Fair Trials Sabotaged in Cyberspace’ *The Mercury* (online, 23 August 2019) <<https://www.themercury.com.au>>; Kasey Wilkins, ‘Social Media, Internet Use of Jurors Researched by Tasmania Law Reform Institute’ *The Examiner* (online, 21 August 2019) <<https://www.examiner.com.au/story/6340334/juror-social-media-internet-use-probed/?cs=12>>; Jemma Holt, ‘Tasmania Law Reform Institute Issues Paper Open For Submissions’ *The Examiner* (online, 23 August 2019) <<https://www.examiner.com.au/story/6331723/social-media-jurors-and-right-to-fair-trial/>>. The Issues Paper was also the subject of discussion on ABC Radio on 21 August 2019 when author, Jemma Holt, participated in an interview with Piia Wirsu on the *Drive* program.

² Emily Baker, ‘Jurors using social media to look up victims and criminals, researcher says’ *ABC News* (online, 21 August 2019) <<https://www.abc.net.au/news/2019-08-21/jurors-using-social-media-to-look-up-victims-and-criminals/11435874>>.

profession via subscription publications in Tasmania³ and South Australia.⁴

In response to the Issues Paper and the subsequent consultation, the Institute received 14 public written submissions and six public verbal submissions. The Institute also received a number of anonymous verbal submissions. The Institute received one confidential submission. These respondents are listed, in accordance with their publication preferences, in Appendix B of this Report.

This Report is an expansion of the preceding Issues Paper. Part 1 assesses, 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 also examines the operation and efficacy of these measures as well as the possible alternatives; and Part 4 discusses where to from here: the recommended reform of the current laws and practices.

³ Jemma Holt, “‘Hey Judge, That’s Just Facebook Stuff’ – Social Media, Jurors and the Right of an Accused to a Fair Trial” (2019) 137 *Law Letter*, Law Society of Tasmania, 20.

⁴ Jemma Holt, ‘Social Media, Jurors and the Right of an Accused to a Fair Trial’ (2019) 41(8) *The Bulletin*, The Law Society of South Australia, 34.

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 Tasmania⁵ and other Australian jurisdictions⁶ and a coronial jury is still available in New South Wales.⁷ It also assumes that, in light of their fundamental and integral role in Australia,⁸ trial by jury will continue in all Australian criminal jurisdictions for the foreseeable future (with or without the option of trial by judge alone).⁹ 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 Report 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.¹⁰

This Report 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 Report 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.

⁵ *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, 2017) 32 <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, 2018) 31 <<https://www.supremecourt.tas.gov.au/wp-content/uploads/2019/02/Supreme-Court-Annual-Report-2017-2018-for-web.pdf>>.

⁶ 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, *Uniform Civil Procedure Rules 1999* (Qld) rr 472, 473 and 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), *Rules of the Supreme Court 1971* (WA), ord 32; *District Court of Western Australian Act 1969* (WA) s 52; *Juries Act 1957* (WA) s 19.

⁷ *Coroners Act 2009* (NSW) s 48.

⁸ 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); *Alduqi v The Queen* (2016) 90 ALJR 711, [127]–[141] (Gaeger J).

⁹ There is no option for trial by judge alone in Tasmania, the 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; ; Qld: *Criminal Code 1899* (Qld) div 9A; SA: *Juries Act 1927* (SA) s 7; WA: *Criminal Procedure Act 2004* (WA) div 7.

¹⁰ 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].

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 proved especially topical of late, particularly as a result of the trial of Cardinal Pell in Victoria, the suppression orders made in the course of that matter, and the associated reporting by both local and international media.¹¹ 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 conscientiously¹² and this Report 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.¹³ 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 Report 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’.¹⁴ Similar offences exist in all other Australian jurisdictions.¹⁵

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

¹¹ 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>>.

¹² See Kate Warner, Julia Davis and Peter Underwood, ‘The Jury Experience: Insights from the Tasmanian Jury Study’ (2011) 10(3) *The Judicial Review* 333.

¹³ The Institute did receive some submissions from respondents on this topic of trial by judge alone. See discussion surrounding these submissions below at [3.13].

¹⁴ *Juries Act 2003* (Tas) ss 3, 58.

¹⁵ 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 As a starting point, this Report assesses the nature and gravity of the problem posed by jurors using social media and/or other internet platforms during criminal trials. It is essential to discern the nature and gravity of juror misconduct of this kind so to be able to determine what is required, if anything, by way of a response.

1.1.2 The right to a fair trial is a ‘central pillar of our criminal justice system’.¹⁶ 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.¹⁷ 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’.¹⁸ The introduction of any extraneous information or influence constitutes an irregularity and undermines the fairness of any trial.

1.1.3 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’;¹⁹ ‘internet-surfing jurors’;²⁰

¹⁶ *Dietrich v The Queen* (1992) 177 CLR 292, 298 (Mason CJ and McHugh J).

¹⁷ See *Murphy v R* (1989) 167 CLR 94, 98–99 (Mason CJ and Toohey J).

¹⁸ *A-G v Fraill* [2011] EWCA Crim 1570, [30].

¹⁹ 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.

²⁰ Brian Grow, ‘As jurors go online, US trial go off track’, *Reuters*, (online, 8 December 2010) <<https://www.reuters.com/article/us-internet-jurors/as-jurors-go-online-u-s-trials-go-off-track-idUSTRE6B74Z820101208>>.

‘trial by google’;²¹ ‘google mistrials’;²² ‘E-jurors’;²³ ‘do-it-yourself or “DIY” jurors’;²⁴ ‘the twitter effect’;²⁵ ‘internet-tainted jurors’;²⁶ ‘digital injustice’;²⁷ ‘wired jurors’;²⁸ ‘sleuthing jurors’²⁹ and ‘rogue jurors’.³⁰ There is no single expression that encapsulates the full range of possible juror misconduct of this kind.

1.1.4 Essentially, the relevant conduct falls within two main categories that may be described simply as: ‘*information in*’ and ‘*information out*’.³¹ ‘*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.

1.1.5 Of course, it is not always as simple as the misconduct being either ‘*information in*’ or ‘*information out*’. In this regard, the Chief Justice of New South Wales, the Honourable Tom Bathurst observed: ‘with social media, content is not merely consumed by users, it is also created, organised and distributed by them’.³²

1.1.6 There have been documented cases of:

- Jurors’ use of the internet to research legal terms or concepts or other information relevant to the trial (‘*information in*’);

²¹ Braun (n 19); 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>>.

²² 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>>.

²³ 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>>.

²⁴ ‘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>>.

²⁵ Hoffmeister (n 22), 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>>.

²⁶ Ibid, citing Daniel A Ross, ‘Juror Abuse of the Internet’, *New York Law Journal* (8 September 2009).

²⁷ Peter Lowe, ‘Problems faced by modern juries’ (2012 Winter) *Bar News: Journal of the NSW Bar Association* 46, 48.

²⁸ 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.

²⁹ Jill Hunter, *UNSW Jury Study: Jurors Notions of Justice* (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)>.

³⁰ 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/>>.

³¹ David Harvey, ‘The Googling Juror: The Fate of the Jury Trial in the Digital Paradigm’ [2014] *New Zealand Law Review* 203.

³² Jane Johnston et al, ‘Juries and Social Media’, 1–29 <https://www.ncsc.org/~media/Files/PDF/Information%20and%20Resources/juries%20and%20social%20media_Australia_A%20Wallace.ashx>.

- Jurors’ use of the internet and social media to research the accused, witnesses, victims, lawyers or the judge (*‘information in’*);
- Jurors’ use of the internet and social media to communicate with people 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’*).

1.1.7 Particular examples of these forms of 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 which affect the outcome 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.

1.2 Examples – ‘[facepalm]’

Jurors’ use of 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.³³ In New South Wales, a juror sitting in a familial sexual assault trial recounted that:

The spoke woman [sic] mentioned 25yrs jail sentence over and over again...how did she know the penalty for that crime? Did she look it up somewhere?...At the end of the deliberation we all realised we were arguing whether or not it was fair to send someone to jail for 25yrs for a sexual encounter with a family member...Perhaps we [should have] analyse[d] the facts instead. We were the jurors – the ones who were supposed to come up with a verdict: guilty or not guilty. Not ‘not guilty’ because the punishment for the crime committed would be too severe.³⁴

1.2.2 Jurors 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).³⁵ Jurors have also been found to conduct internet searches on

³³ 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.

³⁴ Hunter (n 29) 28.

³⁵ See *Hoang v R* [2018] NSWCCA 166.

unfamiliar subject matter peculiar to the factual circumstances of the particular trial (eg the ‘Fa-Long Gong movement’).³⁶ 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 legally relevant. At best, it can distract jurors from the issues they are required to determine. At worst, it can introduce inadmissible and/or prejudicial material into the jury room.

1.2.3 There appear to be many jurors who turn to the internet to research legal terminology and legal principles; both actual and imagined (for example, ‘obligations of law’).³⁷ Jurors have conducted searches of fundamental terms such as ‘murder’ and ‘manslaughter’, and admitted doing so to fellow jurors, whilst reading the material from an iPhone, ‘I’m having trouble determining the difference between murder and manslaughter’.³⁸ A popular search term of jurors is, somewhat unsurprisingly, ‘beyond reasonable doubt’.³⁹ One jury was found to have sourced information on ‘what is meant by beyond reasonable doubt’ from five different websites.⁴⁰ A Tasmanian jury obtained information from a US online legal dictionary website in relation to ‘beyond reasonable doubt’ and ‘circumstantial evidence’.⁴¹ Jurors also tend to resort to the internet in relation to the key terms which make up the elements of an offence (eg ‘sponsor’,⁴² and ‘organisation’, ‘intention/al’ and ‘member/ship’).⁴³ However, their investigations also extend to the definition of plain English terms (eg ‘prudent’).⁴⁴ 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

³⁶ 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.

³⁷ 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.

³⁸ 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.

³⁹ 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.

⁴⁰ In Victoria in 2008, a jury sitting in an armed robbery and drug trial was 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]. The appeal was dismissed.

⁴¹ 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 ‘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.

⁴² 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 (4th Cir 2012); 133 S Ct 393 (2012). On appeal a retrial was granted.

⁴³ 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. The jury was not dismissed.

⁴⁴ 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). The conviction was overturned on appeal.

of the source is unknown. There is also the risk of obtaining information from another jurisdiction on a jurisdiction-specific matter. Further, the accuracy of their searches will depend on their correct identification of the legal term/concept in the first place and, thereafter, not straying once online.

1.2.4 Jurors appear to conduct internet searches with a degree of regularity on matters of expert evidence. They do this, 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,⁴⁵ ‘retinal detachment’⁴⁶ and on scientific terms related to how blood flows after death (*‘livor mortis’* and *‘algor mortis’*).⁴⁷ They have also been found to have searched ‘rape trauma syndrome’ and sexual assault;⁴⁸ ‘The Feminist Position on Rape’ and ‘Rape and the Criminal Justice System’;⁴⁹ as well as information about the types of physical injuries typically suffered by young sexual assault victims.⁵⁰ Jurors have also conducted online research on methylamphetamine production,⁵¹ ‘generalities on drug addiction and usage’,⁵² information about different types of prescription

⁴⁵ 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.

⁴⁶ 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.

⁴⁷ 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.

⁴⁸ 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>>.

⁴⁹ 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.

⁵⁰ In Nevada in 2010, a jury foreperson on 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 20). New trial granted on appeal.

⁵¹ In Western Australia in 2016, a juror on 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>>.

⁵² 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.

medications,⁵³ and mobile phone records.⁵⁴ 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.⁵⁵ Obvious problems arise in relation to the accuracy and reliability of such technical information that is sourced by jurors from unknown online sources. Moreover, the use that potentially inexpert and unassisted jurors make of such information is completely unknown, including whether they disseminate the information to fellow jurors as a source of expert advice.

1.2.5 Despite the ease with which such information may be viewed privately online, such misconduct has been detected in a number of cases as a result of a paper trail.⁵⁶ This arguably provides an indication of the degree to which jurors feel compelled to share such information with fellow jurors once it is sourced.

1.2.6 On occasion, jurors have accessed the internet for the purpose of making *general* trial related enquiries as a precursor to subsequent more targeted online research. For example, in a 2012 English case, a juror conducted an internet search for the meaning of ‘grievous’. On her account, she then conducted a search of the terms ‘Luton’ and ‘crime’, ‘apparently because of her personal concerns about problems with crime in the town’.⁵⁷ As a result of this search, the juror found a Luton newspaper article that revealed the accused’s prior conviction. Because of its highly prejudicial and often minimally probative value such information is generally inadmissible at trial unless it satisfies very stringent criteria. The consequences for the juror in this case were severe.⁵⁸ The juror was convicted of contempt and sentenced to six months imprisonment (three months to serve). The entire jury was discharged, and the case had to be retried.

⁵³ 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.

⁵⁴ 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.

⁵⁵ *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.

⁵⁶ *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 46).

⁵⁷ *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).

⁵⁸ *Attorney-General v Dallas* [2012] EWHC 156, [17].

Jurors’ use of the internet and social media to research the accused, witnesses, victims, lawyers or the judge (*‘information in’*)

1.2.7 Jurors have searched the internet for information on victims⁵⁹ and, more specifically, to locate their information-rich ‘profile’ pages.⁶⁰ Jurors’ curiosity about victims has extended to searching online for photographs of deceased victims. One juror explained this conduct: ‘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.’⁶¹

1.2.8 It appears that jurors have a particular tendency to use the internet to conduct searches on the accused. In this way, jurors have obtained information about an accused’s prior convictions and previous allegations made against accused, including those in respect of which the accused was acquitted.⁶² In many cases, the previous allegations unearthed by jurors were irrelevant and highly prejudicial to the case being tried. For example, in New South Wales in 2002, in a case where the accused was charged with the murder of his first wife, multiple jurors conducted internet searches for information about previous allegations that the same accused had murdered his second wife (for which he was previously tried and acquitted).⁶³ 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. This information had specifically been ruled inadmissible.⁶⁴ Jurors have also obtained highly prejudicial information about unrelated criminal charges that are pending against the accused,⁶⁵ as well as information on an accused’s past outlaw motorcycle gang affiliations.⁶⁶

⁵⁹ In the UK in 2012, a juror sitting in a fraud trial *Googled* information about the victims and 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>>. The jury was discharged. The ‘googling’ juror was convicted of contempt and imprisoned for two months.

⁶⁰ In the US, jurors on a sexual abuse trial looked up the *Myspace* profiles of two victims who had testified. See Lowe (n 27) 48.

⁶¹ 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]. The juror was dismissed and the 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).

⁶² 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.

⁶³ See *R v K* (2003) 59 NSWLR 431.

⁶⁴ See Funcheon (n 53). A mistrial was declared.

⁶⁵ 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/>>.

⁶⁶ 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*

1.2.9 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.'⁶⁷

1.2.10 Some jurors do not discriminate and have been found to have undertaken *Facebook* searches into both the accused and the victim.⁶⁸ Jurors have also conducted online searches on an accused's alleged accomplice to learn that the accomplice had pleaded guilty to the offences charged at an earlier stage.⁶⁹ Jurors' online searches have also located information about the history of the particular prosecution, including the fact that the present trial was a retrial and the reasons behind this, such as a hung jury or a successful appeal against conviction.⁷⁰

1.2.11 It is not always the jurors themselves who undertake 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.⁷¹

1.2.12 Jurors' online inquisitiveness about the parties is not confined to accessing information that pre-dates the current trial. Indeed, other parties in the courtroom invariably have active online presences themselves, which includes, in some circumstances, comment about the trial itself. By way of an example, a prosecutor in a felony trial in Florida in 2010 posted on *Facebook* a 'poem' he had 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 2nd 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, continued til Wednesday and then Thursday with Robyn and Brandon too,

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 remaining jurors were discharged. Both jurors were subsequently convicted of contempt, had convictions recorded and were fined \$3000 each.

⁶⁷ 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>>. The juror was discharged.

⁶⁸ 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 Attorney-General (re potential prosecution).

⁶⁹ 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/>>.

⁷⁰ 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.

⁷¹ See *R v K* (2003) 59 NSWLR 431.

the weasel face, the gang banger defendant, the Judge, clerk, and Ritzline here in St. Lucie.⁷²

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 others involved in the trial.

Jurors’ use of the internet and social media to communicate with people 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 trials and becoming *Facebook* friends.⁷³ It is problematic when a small number of jurors communicate via social media about the trial to the exclusion of other jurors. In some instances, jurors who have been discharged from juries have continued to communicate with the remaining jurors and sought to have an input into their deliberations.

1.2.15 In Pennsylvania in 2011, a juror was dismissed from a 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 ...⁷⁴

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.⁷⁵

1.2.16 Jurors’ communications via social media are also capable of undermining the trial process itself. In New South Wales in 2013, multiple jurors on a long-running fraud trial became *Facebook* friends. They communicated with each other and published material about the case, including ‘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 and gowns,

⁷² 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>>.

⁷³ 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 27) 49; Grow (n 20).

⁷⁴ *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.

⁷⁵ *Ibid.*

the length of the proceedings, joy at having a weekend off and concern at how long the trial might last'.⁷⁶

1.2.17 Jurors have even 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 him 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 ...'⁷⁷ In 2010, an English juror contacted one of the accused via *Facebook* in a multiple accused drug trial. During the trial, the juror and the accused exchanged up to 50 messages via *Facebook*, including details of jury deliberations and updates on the jury's position. While this contact occurred after the accused had been acquitted of all charges relevant to her, the trial was not yet complete in relation to the 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, 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, 'pleeeeee don't say anything cause ... they could call mmisstrial and I will get 4cked toO [sic]'.⁷⁸ 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.'⁷⁹

1.2.19 Jurors have also contacted witnesses both where there was a pre-existing social media connection and where there was not. In New York in 2010, a juror sitting in a negligent homicide and reckless endangerment trial, researched two or three witnesses on *Facebook*. She located the *Facebook* page of a firefighter witness and sent him a friend request.⁸⁰ In Tennessee in 2013, a juror in a murder trial contacted an expert medical witness via *Facebook* after the jury retired to

⁷⁶ 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.

⁷⁷ Yolanda Jones, 'Juror who communicated via Facebook sentenced', *Commercial Appeal* (5 February 2015) <<https://www.commercialappeal.com/>>. 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.

⁷⁸ *A-G v Fraill* [2011] EWCA Crim 1570, [2011] 2 Cr App R 21. At the time when the misconduct was discovered, some verdicts remained outstanding for some defendants. The jury was discharged, and those matters that were still pending were the subject of a retrial. The juror was convicted of contempt and sentenced to eight months imprisonment.

⁷⁹ Robert Eckhart, 'Juror jailed over Facebook friend request' *Herald Tribune* (online, 16 February 2012) <<https://www.heraldtribune.com/article/LK/20120216/News/605194743/SH>>; 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/>>. This juror was convicted of contempt and sentenced to three days imprisonment.

⁸⁰ *People v Rios*, No 1200/06, 2010 WL 625221, (NY Sup Ct Feb 23, 2010). The ground of appeal relating to the juror's misconduct was dismissed.

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.’⁸¹

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 published material on social media platforms which suggests that they have already made their minds up about the guilt of the accused, before they have been empanelled on a particular trial. In 2010, a juror in Victoria posted on his *Facebook* page, ‘everyone’s guilty’;⁸² a juror in the US posted on *Twitter*, ‘Guilty! He’s guilty! I can tell!’;⁸³ 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’;⁸⁴ 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’;⁸⁵ 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’;⁸⁶ in California in 2011, a juror posted on *Facebook*, that she thought the accused was ‘presumed guilty’;⁸⁷ 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’;⁸⁸ 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!’⁸⁹

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

⁸¹ *State v Smith*, No M2010-01384, 2013 WL 4804845 (Tenn Sept 10, 2013) 2. While there was no mistrial in this case, the jury verdict was reversed on appeal.

⁸² 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.

⁸³ 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>>.

⁸⁴ ‘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>>.

⁸⁵ *Shaw v Mississippi*, No 2011-KA-01536-COA, 2013 WL 5533080, 14–15.

⁸⁶ ‘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.

⁸⁷ ‘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.

⁸⁸ 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.

⁸⁹ McNeill (n 51).

a 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.’⁹⁰

1.2.22 In 2007 in California, ‘*The Misanthrope*’ (see [1.2.4] 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*.⁹¹

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 offences trial posted on *Facebook*: ‘Wooooow 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!’⁹² 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 by a photograph that showed images of ‘rooms and implements by which lawful executions are carried out’.⁹³

1.2.24 It should be noted that whether or not the material published by a juror discloses 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. 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.

1.2.25 Jurors have also expressed grievances about their fellow jurors on social media. In California in 2007, ‘*The Misanthrope*’ (see [1.2.4] and [1.2.22] above), described his fellow jurors as ‘liars and bozos’ and said that he had volunteered to be the foreperson to ‘expedite matters’.⁹⁴ 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

⁹⁰ Grow (n 20). The juror was dismissed.

⁹¹ *People v Ortiz*, Crim No B205674, 2009 WL 3211030 (Cal App, 2d Dist 2009). See also MacLean (n 55). The appeal was dismissed, though the court was satisfied that juror misconduct had occurred.

⁹² ‘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.

⁹³ 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).

⁹⁴ *People v Ortiz*, Crim No B205674, 2009 WL 3211030 (Cal App, 2d Dist 2009). See also MacLean (n 55). Appeal dismissed, albeit the court was satisfied that juror misconduct had occurred.

shoes which I am pretty sure are not used for their intended purpose’.⁹⁵ 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 becomes 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 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.’⁹⁶ In 2011, an English juror posted on *Facebook* that the accused was innocent and that her fellow jurors were ‘scum bags’ for convicting him.⁹⁷

1.2.26 Jurors have otherwise turned to the internet and social media to express frustration with and/or lack of interest in 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 [1.2.4], [1.2.22] and [1.2.24] above), posted on his blog comparing court staff to ‘freeway workers ... picnicking alongside the freeway’.⁹⁸ 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’.⁹⁹ 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’.¹⁰⁰ 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’.¹⁰¹ 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.’¹⁰²

1.2.27 Jurors have 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 [1.2.4], [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

⁹⁵ *The OC Register* (n 87). Juror discharged.

⁹⁶ Christina Carrega-Woodby, Chelsia Rose Marcus 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.

⁹⁷ Lowe (n 27) 49.

⁹⁸ *People v Oritz*, Crim No B205674, 2009 WL 3211030 (Cal App, 2d Dist 2009). See also MacLean (n 55). Appeal dismissed, albeit the court was satisfied that juror misconduct had occurred.

⁹⁹ *United States v Ganius* 755 F 3d 125 (2d Cir 2014).

¹⁰⁰ 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.

¹⁰¹ *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.

¹⁰² Carrega-Woodby, Marcus and Siemazko (n 96).

afternoon we will give our verdict to the judge.’¹⁰³ 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 posts were made before the verdict on sentence was delivered.¹⁰⁴ In Pennsylvania in 2012, a juror sitting in a high-profile corruption trial posted on *Facebook* and *Twitter* a running commentary on the jurors’ deliberations during the trial, including, ‘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’.¹⁰⁵ 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).¹⁰⁶

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 probably 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 too hasty. Torcher first, then hang! Lol [sic].’¹⁰⁷

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 ...’¹⁰⁸

1.2.30 However, in other cases, apparently innocuous material posted by jurors may elicit unsolicited and inappropriate replies that may affect the jurors’ impartiality (or perceived impartiality). 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!’¹⁰⁹ In 2013, a juror in Missouri sitting

¹⁰³ *People v Ortiz*, Crim No B205674, 2009 WL 3211030 (Cal App, 2d Dist 2009). See also MacLean (n 55). 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.

¹⁰⁴ ‘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>.

¹⁰⁵ *United States v Fumo*, 655 F 3d 288 (3d Cir 2011), 296–8. Appeal dismissed.

¹⁰⁶ *Dimas-Martinez v Arkansas*, 2011 Ark 515 (Dec 8, 2011), 11–15. Convictions reversed on appeal.

¹⁰⁷ *United States v Ganas* 755 F 3d 125 (2d Cir 2014).

¹⁰⁸ Alexander (n 83). See also Lowe (n 27) 48.

¹⁰⁹ David Ovalle, ‘Florida City Man Wants New Trial Because of Filmmaker Juror’s Tweets’, *Miami Herald* (online, 23 April 2012) <markuslaw.com/userimages/heraldcorben.pdf>.

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’.¹¹⁰ 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’.¹¹¹

1.2.31 In this way, a juror (or jurors) can readily get caught up in online banter that may serve to bring the justice system into disrepute. 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.’¹¹²

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*.¹¹³

¹¹⁰ St Eve, Burns and Zuckerman (n 100) 70–1.

¹¹¹ 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>.

¹¹² *Commonwealth v Warner*, 81 Mass App Ct 689 (2012), 1 February 2012. See <<http://masscases.com/cases/app/81/81massappct689.html>>.

¹¹³ ‘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>>.

1.3 Prevalence – ‘click-through rate’

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

1.3.1 Australia’s current population is approximately 25.3 million.¹¹⁴ Recent Australian survey results¹¹⁵ 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;¹¹⁶ and Australians own, on average, 3.5 internet-enabled devices.¹¹⁷

1.3.2 It is estimated that 88% of internet users have a social media profile,¹¹⁸ and as of September 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;
- 5.3 million Australians are active *Twitter* users; and
- 5.5 million Australians are active *LinkedIn* users.¹¹⁹

1.3.3 *Facebook* is the most widely used social media platform in Australia, with 60% of Australians being considered ‘active users’.¹²⁰

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;¹²¹ and 34% do so more than five times per day.¹²² 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);

¹¹⁴ 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>>.

¹¹⁵ Yellow, *Yellow Social Media Report 2018, Part One – Consumers* (Report, June 2018) 4, 9.

¹¹⁶ Ibid 4.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ David Cowling, ‘Social Media Statistics Australia – September 2019’, *Social Media News* (6 November 2019) <<https://www.socialmedianews.com.au/social-media-statistics-australia-september-2019/>>. ‘Active users’ means users who are active on the relevant social media platform within a one-month period, namely, September 2019).

¹²⁰ Ibid.

¹²¹ Yellow (n 115) 10.

¹²² Ibid.

- 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).¹²³

1.3.5 Whilst social media use and frequency of use is lower in older age groups, surprisingly, it remains quite common.¹²⁴

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.¹²⁵ The average time spent on *Facebook* per visit is 16 minutes¹²⁶ and, it is estimated that the typical *Facebook* user is spending almost 10 hours per week on *Facebook*.¹²⁷ 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.¹²⁸ 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).¹²⁹

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.¹³⁰ As at 30 June 2018, there were approximately 27 million mobile phone subscribers in Australia.¹³¹

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’¹³² and 36% of Australian news consumers say they access online news mainly through mobile phones (‘mobile news consumers’).¹³³ More than half of Australian news consumers

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ Ibid 18.

¹²⁶ Ibid 20.

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ Ibid 19.

¹³⁰ Ibid 4.

¹³¹ 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>>.

¹³² ‘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>>.

¹³³ Ibid.

specifically use social media to access news (52%); 17% use social media as their main source of news;¹³⁴ and social media is the main source of news for those aged between 18–24 years (36%).¹³⁵ The role and impact of non-digital media from traditional media outlets has diminished.

Juror ‘profile’

1.3.10 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.¹³⁶ It is estimated that across Australia over 45,000 persons perform jury service each year.¹³⁷

1.3.11 The jury system is designed to be representative of the community so that a trial by jury is a trial by ‘one’s peers’.¹³⁸ The random nature of the jury selection process is essential to achieving this end.

1.3.12 Tasmanians are liable for jury service if they are enrolled on the State electoral roll¹³⁹ and they are not disqualified¹⁴⁰ or ineligible.¹⁴¹ From this ‘list’ of individuals, the court randomly¹⁴² selects a sufficient number of individuals who are issued a summons requiring their attendance for jury service.¹⁴³ Bar those individuals who are summoned but who are subsequently excused,¹⁴⁴ exempt,¹⁴⁵ or deferred,¹⁴⁶ the individuals who attend court in response to their summons form a ‘panel’¹⁴⁷ from which individuals are randomly selected¹⁴⁸ and, subject to their being excused,¹⁴⁹

¹³⁴ Ibid 14.

¹³⁵ Ibid 9.

¹³⁶ Supreme Court of Tasmania, *Annual Report 2017–2018* (n 5) 31. 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* (n 5) 32.

¹³⁷ 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>>.

¹³⁸ Anthony Dickey, ‘The Jury and Trial by One’s Peers’ (1974) 11 *University of Western Australia Law Review* 205.

¹³⁹ *Juries Act 2003* (Tas) ss 3, 6(1), 19; *Electoral Act 2004* (Tas) ss 3, 30, 32.

¹⁴⁰ *Juries Act 2003* (Tas) s 6(2) and sch 1.

¹⁴¹ Ibid s 6(3) and sch 2.

¹⁴² Ibid s 4.

¹⁴³ Ibid s 27.

¹⁴⁴ Ibid ss 9, 10, 11, 12.

¹⁴⁵ Ibid s 14.

¹⁴⁶ Ibid s 8.

¹⁴⁷ Ibid s 28(4)(a).

¹⁴⁸ Ibid s 4.

¹⁴⁹ Ibid ss 39(2)–(3).

stood aside,¹⁵⁰ or challenged¹⁵¹ as part of that process, they are empanelled as jurors. The jury selection process in other Australian jurisdictions is similar.¹⁵²

1.3.13 Whilst early Australian studies showed significant disparity between the age and gender of jurors and that of the general population,¹⁵³ more recent studies indicate that juries are now a fair and representative cross-section of the community in terms of gender and age.¹⁵⁴ 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.¹⁵⁵

1.3.14 Jurors are, indeed, the person on the street.¹⁵⁶ It follows that they would tweet, blog, post, share, message, chat, like, follow, and comment like everyone else.

Research to Date – ‘TTP’ (*To the Point*)

1.3.15 The studies, surveys and other avenues of inquiry that have been pursued on this topic represent attempts to examine this phenomenon from a wide range of perspectives and a variety of data sources, including:

- asking jurors themselves: United Kingdom (2010);¹⁵⁷ Australia (2004–2006 & 2011);¹⁵⁸ United States (2011–2014);¹⁵⁹ United States (2012);¹⁶⁰ United Kingdom (2012–2013);¹⁶¹

¹⁵⁰ Ibid ss 29(8)(a)–(b), 34.

¹⁵¹ Ibid ss 28(8)(a)–(b), 32, 33, 35, 36.

¹⁵² 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).

¹⁵³ 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).

¹⁵⁴ Ibid.

¹⁵⁵ 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 12) 337.

¹⁵⁶ Patrick Devlin, *Trial by Jury* (Stevens & Sons, 1956) 29.

¹⁵⁷ See 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>>. See also discussion in Tasmania Law Reform Institute (TLRI), *Jurors, Social Media and the Right of an Accused to a Fair Trial* (Issues Paper 30, August 2019) [1.5.3]–[1.5.6].

¹⁵⁸ See Hunter (n 29). See also discussion in TLRI (n 157) [1.5.12]–[1.5.13].

¹⁵⁹ See 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 100). See also discussion in TLRI (n 157) [1.5.26]–[1.5.31].

¹⁶⁰ See Paula Hannaford-Agor, David Rottman and Nicole Waters, *Juror and Jury Use of New Media: A Baseline Exploration* (Report, National Center for State Courts for the Executive Session for the State Court Leaders in the 21st Century, 2012). See also discussion in TLRI (n 157) [1.5.14]–[1.5.18].

¹⁶¹ See Cheryl Thomas, ‘Avoiding the Perfect Storm’ (2013) 6 *Criminal Law Report* 483.

- asking judges: United States (2011 & 2013);¹⁶² United States (2012);¹⁶³ Australia (2013);¹⁶⁴ New Zealand (2014);¹⁶⁵
- asking other key stakeholders in the criminal justice system: United States (2012);¹⁶⁶ Australia (2013);¹⁶⁷
- considering reported judgments that deal with the issue: United States (2010);¹⁶⁸
- monitoring social media platforms for material posted by jurors: United States (2010);¹⁶⁹ United Kingdom (2010);¹⁷⁰ and
- monitoring social media and other internet platforms for material posted by the world-at-large, which may be seen by jurors: Australia (2014).¹⁷¹

Asking jurors

United Kingdom: 2010

1.3.16 In 2010, a study was conducted in the UK with 643 jurors from 62 trials.¹⁷² 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.¹⁷³

1.3.17 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.¹⁷⁴ 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%

¹⁶² See 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) <<https://www.fjc.gov/sites/default/files/2012/DunnJuror.pdf>>; Dunn (n 23). See also discussion in TLRI (n 157) [1.5.19]–[1.5.24].

¹⁶³ See Hannaford-Agor, Rottman and Waters (n 160). See also discussion in TLRI (n 157) [1.5.14]–[1.5.18].

¹⁶⁴ Patrick Keyzer et al, ‘The Courts and Social Media: What Do Judges and Court Workers Think?’ (2013) 25(6) *Judicial Officer’s Bulletin*, 47. See also discussion in TLRI (n 157) [1.5.25].

¹⁶⁵ See New Zealand Law Commission, *Contempt in Modern New Zealand* (Issues Paper 36, May 2014). See also discussion in TLRI (n 157) [1.5.32]–[1.5.34].

¹⁶⁶ See Hannaford-Agor, Rottman and Waters (n 160). See also discussion in TLRI (n 157) [1.5.14]–[1.5.18].

¹⁶⁷ Keyzer et al (n 164). See also discussion in TLRI (n 157) [1.5.25].

¹⁶⁸ Grow (n 20). See also discussion in TLRI (n 157) [1.5.7]–[1.5.9].

¹⁶⁹ Grow (n 20) See also discussion in TLRI (n 157) [1.5.7]–[1.5.9].

¹⁷⁰ Michael Bromby, ‘The Temptation to Tweet – Jurors’ Activities Outside the Trial’ (Paper presented at the Jury Research Symposium, Glasgow, 25–26 March 2010).

¹⁷¹ 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. See also discussion in TLRI (n 157) [1.5.35]–[1.5.39].

¹⁷² Thomas (n 157).

¹⁷³ Ibid 42.

¹⁷⁴ Ibid 43.

admitted to actively seeking out such information.¹⁷⁵ 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.¹⁷⁶

1.3.18 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 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.¹⁷⁷

1.3.19 Whilst all jurors in this study were guaranteed anonymity, it is significant 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.¹⁷⁸ 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.¹⁷⁹

Australia: 2004–2006 & 2011

1.3.20 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.¹⁸⁰ The subject trials occurred in Sydney, Parramatta and Campbelltown in New South Wales.

1.3.21 Of the 78 jurors, 12 jurors (15%) 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.¹⁸¹ An additional two jurors were neutral on this topic. These 14 jurors (18%) were spread over eight of the 20 trials.¹⁸² 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.¹⁸³

1.3.22 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.¹⁸⁴

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid.

¹⁷⁸ Ibid 39.

¹⁷⁹ Ibid.

¹⁸⁰ Hunter (n 29) 8–9.

¹⁸¹ Ibid 5, 27. Indeed, two of these jurors ‘strongly agreed’ that such conduct was ‘very acceptable’.

¹⁸² Ibid 5.

¹⁸³ Ibid 6.

¹⁸⁴ Ibid.

United States: 2011–2014

1.3.23 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 networks, such as Facebook, My Space, LinkedIn, YouTube or Twitter? If so, what prevented you from doing so?’¹⁸⁵

1.3.24 Of the total 583 respondents, 520 jurors (89%) responded that they were not so tempted and 47 jurors (8%) responded that they were.¹⁸⁶ 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.¹⁸⁷

1.3.25 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’).¹⁸⁸

1.3.26 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’).¹⁸⁹

1.3.27 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.¹⁹⁰ Twenty of the jurors

¹⁸⁵ St Eve and Zuckerman (n 159); St Eve, Burns and Zuckerman (n 100).

¹⁸⁶ St Eve, Burns and Zuckerman (n 100) 78. Sixteen jurors (3%) did not provide a response.

¹⁸⁷ Ibid 79.

¹⁸⁸ Ibid 80–1.

¹⁸⁹ Ibid 81–2.

¹⁹⁰ Ibid 85.

who reported no temptation stated that it was due to their minimal or complete lack of social media usage.¹⁹¹

1.3.28 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,¹⁹² though without doing so. Further, it was commented that whilst the informal ‘survey data may be unscientific ... the voices of actual jurors speak volumes.’¹⁹³

United States: 2012

1.3.29 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.¹⁹⁴ 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).¹⁹⁵

1.3.30 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.¹⁹⁶

1.3.31 Of the prospective jurors, 64% had some type of social media account: *Facebook* (54%), *LinkedIn* (20%), *Twitter* (13%) and *MySpace* (11%).¹⁹⁷ 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.¹⁹⁸

1.3.32 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%).¹⁹⁹ 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

¹⁹¹ Ibid.

¹⁹² Ibid 79.

¹⁹³ Ibid 90.

¹⁹⁴ Hannaford-Agor, Rottman and Waters (n 160). Six judges participated from California, Connecticut, Florida, Michigan and Texas. The jurors included trial jurors and ‘alternate’ jurors.

¹⁹⁵ Ibid. In total, 506 ‘prospective jurors’ were surveyed.

¹⁹⁶ Ibid 5.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid 6.

¹⁹⁹ Ibid.

on trials with relatively complex evidence expressed greater interest in using the internet to conduct case-related research.²⁰⁰

1.3.33 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%).²⁰¹

United Kingdom: 2012–13

1.3.34 Between 2012 and 2013, 239 jurors were surveyed from 20 different criminal trials conducted in the Greater London Area. This study was conducted by Professor Cheryl Thomas, who also conducted the abovementioned study that took place in the UK in 2010 (see [1.3.16]–[1.3.19]). The survey asked jurors about their understanding of permissible and impermissible internet usage during trial; their awareness of recent stories about jurors acting improperly involving the internet; and how they used the internet during trial.

1.3.35 The findings demonstrated that 73% of jurors understood how the internet could and could not be used when they were serving on a trial, however, it also showed that 23% were clearly confused, in some way, about internet usage. Of those jurors who were confused: 16% believed they could not use the internet for any reason at all while serving as a juror; 5% believed there was no restriction at all on their internet usage during trial; and 2% believed that they could look up information about the case as long as it did not affect their judgment.²⁰²

1.3.36 Thirty-eight percent of jurors were aware of recent cases in which jurors were prosecuted for impermissible use of the internet, whereas 62% of jurors were unaware of any such cases.

1.3.37 Seventy-eight percent of the jurors used the internet in some way during trial. The most common uses were to check personal emails and other activity unrelated to their jury service (84%); to find out information about the court where they were serving (eg travel routes, contact details etc) (50%); and for information about what was required of jurors in the course of jury service (19%).²⁰³ ‘Only very small proportions of jurors said they used the internet in ways that could potentially be legally problematic’: 3% shared their experience of jury service on social media (eg *Facebook* and *Twitter*); 1% blogged or chatted online about doing jury service; 7% looked up information about the prosecution and/or defence counsel; 7% looked up information about the trial judge; 1% looked up information about parties involved in the trial (other than the defendant); 6% looked up information about legal terms used in the case; and 1% visited the crime scene online (eg *Google Earth*, *Streetview* or other similar site).²⁰⁴

²⁰⁰ Ibid.

²⁰¹ Ibid.

²⁰² Thomas (n 161) 488.

²⁰³ Ibid 490.

²⁰⁴ Ibid 490–1.

Asking judges

United States: 2011 & 2013

1.3.38 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’.²⁰⁵ 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.²⁰⁶ A near identical follow-up survey was conducted in November 2013.²⁰⁷ 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.²⁰⁸ On average, the respondents had 14.8 years of judicial experience.²⁰⁹

1.3.39 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.²¹⁰ In 2011, this figure was 6%.²¹¹ 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.²¹² In both 2011 and 2013, juror misconduct of this kind was more commonly reported as occurring during trials, rather than during jury deliberations²¹³ and it was also far more common in criminal jury trials than civil jury trials.²¹⁴

1.3.40 In terms of the particular social media platforms that were used by jurors, *Facebook* was the most popular in both 2011 and 2013.²¹⁵ In 2011, this was followed by instant messaging services, *Twitter*, internet chat rooms, internet bulletin boards and *MySpace*.²¹⁶ In 2013, instant

²⁰⁵ Dunn (n 162) 1.

²⁰⁶ Ibid.

²⁰⁷ Dunn (n 23).

²⁰⁸ Ibid 3.

²⁰⁹ Ibid.

²¹⁰ Ibid 4: 33 of 494 judges.

²¹¹ Dunn (n 162) 2: 30 of 508 judges.

²¹² Ibid 2. See also Dunn (n 23) 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.

²¹³ Dunn (n 162) 2; Dunn (n 23) 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.

²¹⁴ Dunn (n 162) 2; Dunn (n 23) 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.

²¹⁵ Dunn (n 162) 2–3; Dunn (n 23) 4–5. In 2011, the judges reported nine cases of juror misconduct involving *Facebook*, compared to 17 cases in 2013.

²¹⁶ Dunn (n 162) 2–3; Dunn (n 23) 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*.

messaging services were again ranked second, followed by jurors' personal blogs, *Twitter* and internet chat rooms.²¹⁷

1.3.41 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.²¹⁸

1.3.42 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.²¹⁹

1.3.43 It was concluded that the results of this study indicate that *detected* cases of juror misconduct of this kind are 'not a common occurrence'.²²⁰

United States: 2012

1.3.44 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.²²¹

1.3.45 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.²²²

²¹⁷ Dunn (n 23): 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.

²¹⁸ Dunn (n 162) 3–4.

²¹⁹ Dunn (n 23) 5–6.

²²⁰ Dunn (n 162) 2; Dunn (n 23) 4.

²²¹ Hannaford-Agor, Rottman and Waters (n 160). Six judges participated from California, Connecticut, Florida, Michigan and Texas. The jurors included trial jurors and 'alternate' jurors.

²²² *Ibid* 5.

Australia: 2013

1.3.46 In February 2013, a ‘small research project’²²³ was conducted in Australia to chart the view of ‘key stakeholders’²²⁴ 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’²²⁵ expressed by the participants was ‘juror misuse of social media (and digital media) leading to aborted trials’.²²⁶

New Zealand: 2014

1.3.47 In 2014, the New Zealand Law Commission undertook a survey of District Court judges who regularly preside over jury trials.²²⁷ 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.’²²⁸

1.3.48 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.²²⁹

1.3.49 These results caused the Law Reform Commission to conclude that ‘the issue is not unduly problematic at this stage’.²³⁰

Asking other key stakeholders in the criminal justice system*United States: 2012 (counsel)*

1.3.50 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.²³¹ Surveyed counsel rated the problem of juror use of social media as ‘moderately severe’, albeit with greater variation in their individual ratings.²³²

Australia: 2013 (court staff, academics working in judicial administration)

1.3.51 See [1.3.46] above.

²²³ Keyzer et al (n 164) 48.

²²⁴ Ibid.

²²⁵ Ibid 49.

²²⁶ Ibid.

²²⁷ New Zealand Law Commission (n 165) 43.

²²⁸ Ibid.

²²⁹ Ibid.

²³⁰ Ibid.

²³¹ Hannaford-Agor, Rottman and Waters (n 160). Six judges participated from California, Connecticut, Florida, Michigan and Texas. The jurors included trial jurors and ‘alternate’ jurors.

²³² Ibid 5.

Considering reported judgments that deal with the issue

United States: 2010

1.3.52 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 misconduct;
- 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.²³³ 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.²³⁴

Monitoring social media platforms for material posted by jurors

United States: 2010

1.3.53 In 2010, Reuters Legal ‘monitored’ the social media platform, *Twitter*, over a three-week period in November-December 2010 for tweets that were returned when the term ‘jury duty’ was entered into the site’s search function (‘#juryduty’).

1.3.54 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’.²³⁵ 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!’.²³⁶

United Kingdom: 2010

1.3.55 In 2010, a ‘snap-shot study’²³⁷ 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

²³³ Grow (n 20).

²³⁴ Hannaford-Agor, Rottman and Waters (n 160) 2.

²³⁵ Ibid.

²³⁶ Ibid.

²³⁷ Bromby (n 170).

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.

1.3.56 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 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 eeeeeeeek’. 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 knooooooooow :(’. 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.²³⁸

1.3.57 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.²³⁹ The results speak for themselves in this respect.

Monitoring social media and other internet platforms for material posted by the world-at-large, which may be seen by jurors

Australia: 2014

1.3.58 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* (*‘Baden-Clay’*).²⁴⁰ Automated searches were conducted²⁴¹ 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.

1.3.59 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.²⁴² Approximately 65% of the tweets were posted by ‘professional journalists’, with the remaining 35% posted by

²³⁸ Ibid 2–7.

²³⁹ Ibid 1.

²⁴⁰ [2014] QSC 154. See also Hews and Suzor (n 171).

²⁴¹ Hews and Suzor (n 171). Searches for keywords such as ‘baden-clay’ and hashtags such as ‘#badenclay’ and ‘#gbc’ (including variations such as ‘badenclay’ and baden clay’).

²⁴² Ibid 1620.

other users. Of the 33,067 tweets that were identified as trial-related tweets, 5–7% contained prejudicial information.²⁴³ The prevalence of prejudicial material was far more common in the tweets of users who were *not* professional journalists (86%).²⁴⁴

1.3.60 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.

1.3.61 The prevalence of tweets containing prejudicial material was described as a ‘non-negligible sum of prejudice’.²⁴⁵ 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.²⁴⁶

1.3.62 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.²⁴⁷

‘RBTL’ (‘Reading between the lines’)

1.3.63 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.²⁴⁸

1.3.64 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.²⁴⁹

1.3.65 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.

1.3.66 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.²⁵⁰ Indeed, overwhelmingly, they conceded that they had *no way of knowing* if jurors were using the internet and social media inappropriately.²⁵¹

²⁴³ Ibid 1622.

²⁴⁴ Ibid 1621–2.

²⁴⁵ Ibid 1622.

²⁴⁶ Ibid 1623.

²⁴⁷ Ibid 1627.

²⁴⁸ Braun (n 19); Bartels (n 137).

²⁴⁹ 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.

²⁵⁰ See Dunn (n 162) 4; Dunn (n 23) 6.

²⁵¹ Dunn (n 23) 11.

1.3.67 Very rarely does juror misconduct of this kind involve an overt act in the courtroom that is detectable by the presiding trial judge.²⁵² Internet sources can be viewed and shared easily on a screen or from memory and there is no need to produce a hardcopy of the information and thereby create an easily detectable trace that may be discovered,²⁵³ 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).

1.3.68 As is evident from the cases canvassed [1.2.1]–[1.2.32] 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;²⁵⁴ as a result of post-trial drinks at a hotel with juror/s and defence counsel;²⁵⁵ defence counsel’s son stumbling across material published by a juror on social media;²⁵⁶ a lawyer unrelated to the case coincidentally being a *Facebook* friend with the juror and reporting the publication;²⁵⁷ a juror ‘stalking’ the accused on *Facebook* and accidentally sending a friend request.²⁵⁸ Further, there are examples of reports which belie the extent of the conduct²⁵⁹ and many instances that are not discovered until after a verdict has been delivered.

1.3.69 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.

1.4 ‘Q4U’ (*Question for You*)

1.4.1 To assist the Institute’s inquiry into the nature and gravity of juror misconduct of this kind, the Institute sought advice from the community and key stakeholders on the following questions:

²⁵² 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’: ‘Oregon juror jailed for texting during trial’ *Washington Examiner* (online, 18 April 2013) <<https://www.washingtonexaminer.com/oregon-juror-jailed-for-texting-during-trial>>.

²⁵³ See the ‘final comment’ of Brett J in *Marshall and Richardson v Tasmania* [2016] TASCRA 21, [76].

²⁵⁴ See, eg, *R v Karakaya* [2005] 2 Cr App R 5; [2005] EWCA Crim 346; *Martin v R* (2010) 28 VR 579, [57]–[90].

²⁵⁵ See, eg, *R v K* (2003) 59 NSWLR 431.

²⁵⁶ 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>>.

²⁵⁷ Carrega-Woodby, Marcus and Siemazko (n 96).

²⁵⁸ 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. 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’.

²⁵⁹ See Funcheon (n 53). Where the investigation of reported misconduct by one juror resulted in the discovery of similar misconduct by seven other jurors. A mistrial was, unsurprisingly, declared.

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?

1.4.2 Only two specific examples of *known* juror misconduct of this kind were reported by respondents.

1.4.3 The Director of Public Prosecutions (Tas), Daryl Coates SC, referred to ‘the only known experience’²⁶⁰ of jurors using social media and/or other internet platforms during a criminal trial in Tasmania: the case of *Marshall and Richardson v Tasmania* [2016] TASCCA 21.²⁶¹ In relation to South Australia, William Boucaut QC, a Barrister in Adelaide, spoke of his first-hand experience as defence counsel in a trial where two jurors independently conducted their own internet research in relation to the defendants.²⁶²

1.4.4 It should be noted that both examples deal only with ‘*information in*’ scenarios, and neither involved the specific use of social media, but rather, the internet more generally. Indeed, both examples are of the more well-known type of juror misconduct of this kind: *the errant juror conducting online research*.

²⁶⁰ Daryl Coates SC, Director of Public Prosecutions (Tas), Submission #5 (written) to TLRI, *Juries Social Media and the Right of an Accused to a Fair Trial* (8 October 2019) 1. So too did Jim Connolly, Sheriff, Supreme Court of Tasmania, Submission #7 (written), to TLRI *Juries Social Media and the Right of an Accused to a Fair Trial* (3 October 2019).

²⁶¹ 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 ‘beyond reasonable doubt’ and ‘circumstantial evidence’. On appeal, the court confirmed that a procedural irregularity had occurred, but the appeal was ultimately dismissed.

²⁶² 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* 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 the jury discharged. Both jurors were subsequently convicted of contempt, had convictions recorded and were fined \$3000 each. See William Boucaut QC, Barrister, Len King Chambers (SA), Submission #3 (written) to TLRI, *Juries Social Media and the Right of an Accused to a Fair Trial* (2 October 2019).

1.4.5 However, further responses detail jurors' use of social media and/or the internet during court adjournments and post-trial. The Sheriff of Tasmania, Jim Connolly, responded that 'jurors have only been observed using social media [in the court precinct] prior to entry to the Jury Room, this is normally ... Facebook, or other similar media.'²⁶³ The Legal Aid Commission of Tasmania submitted:

Our lawyers have directly encountered the following internet/social media behaviours in relation to jury trials:

- Jurors sending social media 'friend requests' to witnesses after a trial;
- A juror sending a social media 'friend request' to counsel after a trial;
- A juror commenting on a social media article about the sentencing of an offender.²⁶⁴

'WOM' ('Word of Mouth')

1.4.6 Other responses to this inquiry were anecdotal. The Legal Aid Commission of Tasmania stated:

Our lawyers have heard anecdotal reports of jurors reading articles relating to the trial on Facebook sites that have strongly prejudicial comments attached to them.²⁶⁵

1.4.7 In addition to his first-hand experience of such juror misconduct, William Boucaut QC added, 'I have heard anecdotally that it occurs'.²⁶⁶ Further, a member of the Tasmanian legal profession told of the insight obtained when her husband served as a juror in Hobart. Her husband reported to her that 'every morning and after every adjournment' jurors would share the results of their internet and social media searches; searching the complainant's name and the name of witnesses. They most certainly 'did look up names of those involved to find out more and shared this information with other jurors, publicly'.²⁶⁷ This conduct was not reported, nor did it otherwise come to light.

1.4.8 Other responses to Question 1 had a more speculative basis for *suspecting* juror misconduct of this kind had occurred. A member of the Tasmanian Bar recounted a first-hand experience as defence counsel for a 'notorious' defendant in Hobart. At the time of the trial, the defendant had other pending criminal matters as well as matters that had recently resolved by way of guilty pleas; all of which were 'well known in a small town like Hobart'. The practitioner recounted how the evidence at trial 'did not go well for the Crown', yet the defendant was convicted 'within seconds' by the jury. Thereafter, many members of the jury proceeded to sit in the back of the court for

²⁶³ Submission #7 (n 260).

²⁶⁴ The Legal Aid Commission of Tasmania, Submission #12 (written) to TLRI, *Juries Social Media and the Right of an Accused to a Fair Trial* (October 2019) 12.

²⁶⁵ Ibid 12.

²⁶⁶ Submission #3 (n 262).

²⁶⁷ Anonymous, Submission #21 (verbal, various) to TLRI, *Juries Social Media and the Right of an Accused to a Fair Trial* (8 October 2019).

sentencing, seemingly ‘knowing there would be more to the story, so to speak ... the jury must have known about his other matters, his history’.²⁶⁸

1.4.9 Additional members of the Tasmanian Bar also spoke of their experiences with similarly ‘notorious’ defendants in Hobart, for example, a defendant charged with a particularly well known instance of violent offending: ‘he had many, many other instances of violent offending in the past; his name was everywhere.’²⁶⁹ The suggestion was that it was difficult to imagine the empanelled jurors did not already know this, or otherwise did not come to know this throughout the course of the trial as a result of their active (or inadvertent) use of social media and/or other internet platforms. Another member of the Tasmanian Bar recounted a trial involving a defendant, again, with significant prior convictions. Following the trial of the defendant and his co-accused, the practitioner ‘later heard’ the jurors had been referring to the accused collectively as ‘very bad men’. This comment had ‘made its way back’ to the practitioner.²⁷⁰

1.4.10 In these cases, the suggestion by respondents was that one or more jurors had become privy to information about the accused’s criminal antecedents from a source outside the courtroom, presumed to be via social media and/or the internet.

1.4.11 The Law Society of Tasmania responded that ‘no practitioner was able to suggest or had knowledge of jurors using internet platforms during a trial ... It is within the Society’s experience however that witnesses post on social media from time to time before and after giving evidence on matters relevant to the trial.’²⁷¹ Further, ‘although many practitioners were unable to confidently say they *knew* jurors used internet platforms during a trial, there is a strong consensus that jurors have google searched parties in a trial. Namely defendant and defence witnesses.’²⁷²

‘IDK’ (‘I don’t know’)

1.4.12 Generally speaking, there was a dearth of *known* examples of juror misconduct of this kind reported by respondents.

1.4.13 It follows that, somewhat unsurprisingly, when respondents were asked about their views on the prevalence of juror misconduct of this kind, as a starting point, most prefaced their views with some comment about the fact that it was essentially an unknown quantity.

1.4.14 The Australian Lawyers Alliance commented, ‘the experience of ALA is that use of social media by jurors is rarely admitted or brought forth through ordinary trial procedure in Tasmania. Short of a study surveying juror experiences including use of social media, there is no way of knowing the extent to which jurors use social media.’²⁷³

²⁶⁸ Ibid.

²⁶⁹ Ibid.

²⁷⁰ Ibid.

²⁷¹ The Law Society of Tasmania, Submission #11 (written) to TLRI, *Juries Social Media and the Right of an Accused to a Fair Trial* (8 October 2019) 1.

²⁷² Ibid.

²⁷³ Australian Lawyers Alliance, Submission #1 (written) to TLRI, *Juries Social Media and the Right of an Accused to a Fair Trial* (1 October 2019) 4.

1.4.15 Dr Kerstin Braun, a Senior Lecturer at the University of Southern Queensland, who has researched and published on the topic of social media in the digital age, stated ‘while it is unclear and under researched how prevalent jurors’ social media use is in criminal trials, media reports document that this type of use occurs in different common law jurisdictions on a regular basis. The current scope of the phenomenon, however, remains speculative only.’²⁷⁴

1.4.16 The Sheriff of Tasmania, Jim Connolly, commented, ‘knowledge about jurors using social media ... is obviously very limited’.²⁷⁵

1.4.17 In their submission, Associate Professor Jane Johnston of The University of Queensland, Adjunct Professor Anne Wallace and Professor Patrick Keyzer both of La Trobe University, speak of a ‘widespread *perception* in the Australian criminal justice system’,²⁷⁶ as opposed to an empirical view.

1.4.18 The Legal Aid Commission of Tasmania commented that ‘the behaviour is so difficult to measure or rarely measured’.²⁷⁷

IMHO (‘In my humble opinion’)

1.4.19 Nevertheless, the majority of respondents held views about the prevalence of juror misconduct of this kind.

1.4.20 The predominant view was that juror misconduct of this kind is ‘prevalent’:²⁷⁸ ‘a serious issue facing the criminal justice system’;²⁷⁹ a ‘very real problem’;²⁸⁰ and a ‘widespread problem’.²⁸¹ The Legal Aid Commission of Tasmania submitted it ‘does happen, and happens with some frequency’.²⁸²

1.4.21 William Boucaut QC, drawing upon his first-hand experience of juror misconduct of this kind in South Australia, commented: ‘the fact that two jurors did it in one trial indicates that the practice might be more wide-spread than one would think ...’²⁸³

1.4.22 Many of the respondents who held this view, did so as an extension of their understanding of the use of social media and other internet platforms generally. The Law Society of Tasmania

²⁷⁴ Dr Kerstin Braun, Senior Lecturer, University of Southern Queensland, Submission #4 (written) to TLRI, *Juries Social Media and the Right of an Accused to a Fair Trial*, (19 September 2019) 3.

²⁷⁵ Submission #7 (n 260).

²⁷⁶ Associate Professor Jane Johnston, The University of Queensland (Qld), Adjunct Professor Anne Wallace, La Trobe University (Vic) and Professor Patrick Keyzer, La Trobe University (Vic), Submission #10 (written) to TLRI, *Juries Social Media and the Right of an Accused to a Fair Trial* (2 October 2019) 2.

²⁷⁷ Submission #12 (n 264) 12.

²⁷⁸ Professor Jill Hunter, University of New South Wales, Submission #9 (written) to TLRI, *Juries, Social Media and the Right of an Accused to a Fair Trial* (13 October 2019); Submission #12 (n 264) 12.

²⁷⁹ Submission #10 (n 276) 2.

²⁸⁰ Dr David Plater, Deputy Director of the South Australian Law Reform Institute/Senior Lecturer, School of Law, University of Adelaide, Submission #13 (written) submission to TLRI, *Juries Social Media and the Right of an Accused to a Fair Trial* (8 October 2019).

²⁸¹ Ibid.

²⁸² Submission #12 (n 264) 22.

²⁸³ Submission #3 (n 262).

stated in their submission, ‘the sheer prevalence of social media strongly suggests its inappropriate use’²⁸⁴ by jurors during criminal trials. Further, the Australian Lawyers Alliance responded, ‘it is the view held by ALA, and that held by many barristers and solicitors who practise in the area of criminal law, that social media must be widely used by jurors; simply because of how ingrained its use has become in modern behaviour. It is contrary to human experience to suppose that its use ceases when a person is empanelled as a juror.’²⁸⁵

1.4.23 In the minority were those of the view that the prevalence of juror misconduct of this kind was negligible.

1.4.24 The Director of Public Prosecutions (Tas), Daryl Coates SC, stated:

I accept that the jury system is not infallible and that it is likely that at least some jurors have impermissibly used social media and the internet pre and post trial ... in a digital age the risk ... is greater than ever ... [however] I have no reason to believe that the impermissible use of social media and the internet by jurors during a trial is generally prevalent ... In my experience, jurors approach their duties diligently.²⁸⁶

1.4.25 Similarly, the Sheriff of Tasmania, Jim Connolly, submitted ‘in our experience, inappropriate use of social media and/or other internet platforms during criminal trials is very limited and had little, if any, impact on jury trials.’²⁸⁷

1.4.26 In response to Question 3, again, the majority of respondents were of the view that the prevalence of juror misconduct was such that it was not confined to high-profile cases which have a high level of media coverage and community interest, but that it was also present in a wider range of criminal trials.

1.4.27 The Sheriff of Tasmania, Jim Connolly, offered the simple, yet telling observation that the only known example of jurors using the internet during a criminal trial in the Tasmanian jurisdiction, the case of *Marshall and Richardson v Tasmania* [2016] TASCRA 21, was not a high-profile case.²⁸⁸

1.4.28 The view of Professor Jill Hunter of The University of New South Wales was that juror misconduct of this kind is not confined to high-profile trials. She stated that her response (to this question, amongst others posed by the Institute’s Issues Paper) was informed by her research in this area:²⁸⁹ an empirical study which surveyed Australian jurors from 20 trials in New South Wales in 2004–2006 and 2011. Relevantly, those trials were ‘broadly representative of trials that take place daily in Australia’;²⁹⁰ ‘the charges and the factual circumstances upon which they were based were not striking or unique.’²⁹¹

²⁸⁴ Submission #11 (n 271) 1.

²⁸⁵ Submission #1 (n 273) 4.

²⁸⁶ Submission #5 (n 260) 1.

²⁸⁷ Submission #7 (n 260).

²⁸⁸ Ibid.

²⁸⁹ Submission #9 (n 278).

²⁹⁰ Hunter (n 29) 38, 46–9.

²⁹¹ Ibid.

1.4.29 Similarly, Johnston et al submitted that juror misconduct of this kind, involving both ‘*information in*’ and ‘*information out*’ scenarios, is not necessarily confined to high-profile cases:

research in the UK suggested that such misconduct was more widespread in high profile cases, and media reports of instances of this type of juror misconduct in Australia have often involved high profile cases. However, it is possible that it may have been the high-profile nature of a case which drew the attention of the media to the juror misconduct, and there are other instances of misconduct in lower profile cases that have not received publicity.

The type of information that jurors have been reported to have accessed or posted impermissibly lends some weight to the suggestion that the profile of the trial may not always be an influential factor in contributing to such conduct, at least where it relates to juror misconduct. For example, as noted in the [Institute’s] Issues Paper ... the term ‘reasonable doubt’ appears to be one that jurors commonly search for and is clearly not one that is specific to a high-profile trial. Neither are medical or other specialist terms related to expert evidence. However, it may also be that jurors feel under more pressure in a higher profile case and that may, in turn, increase the temptation to turn to impermissible sources of information when they are struggling to decide.

In terms of jurors using social media to post information about a trial, it might be reasonable to assume that jurors on a high-profile case may also feel that posts about it may be likely to be more interesting to their followers on social media. However, the examples given in the [Institute’s] Issues Paper also illustrate a range of situations where jurors may have simply wanted to reach out to family and friends about their current activities, or to make a connection with, or seek information about, someone in the trial, simply to satisfy their curiosity.²⁹²

1.4.30 The Law Society of Tasmania submitted: ‘The Society is of the view that this conduct is not limited to only higher profile cases although the likelihood of inappropriate conduct and therefore irregularity is higher in higher profile matters.’²⁹³

1.4.31 A distinction that some respondents drew between high-profile trials as opposed to other criminal trials is that jurors involved in high-profile trials are particularly at risk in relation to inadvertent ‘*information in*’ as a result of social media and/or internet use. The Law Society of Tasmania commented:

jury members are more likely to ‘accidentally’ encounter material on the internet and social media in relation to ‘big trials’ that have received significant publicity. However, active searches for online material are just as likely to occur in small trials as they are large trials.²⁹⁴

1.4.32 Dr David Plater, Deputy Director of the South Australian Law Reform Institute and Senior Lecturer at the University of Adelaide Law School, is of the unequivocal view that juror misconduct of this kind ‘extends to the most routine and mundane’ trials. He reasons:

²⁹² Submission #10 (n 276) 4.

²⁹³ Submission #11 (n 271) 2.

²⁹⁴ Submission #12 (n 264) 13.

‘Everyone is now a journalist.’ There are various online forums and blogs and sites that devote themselves to coverage of even the most routine trial or pre court proceedings. The damaging needle in the online haystack is always available and readily discoverable. There are many social media platforms that provide a means for online commentary and ‘research’.²⁹⁵

1.4.33 Even those respondents who were not of the view that juror misconduct of this kind was prevalent, for example, the Director of Public Prosecutions (Tas), Daryl Coates SC, conceded that the ‘risk is naturally increased in high profile cases which generate a high level of media coverage and community interest’.²⁹⁶

1.4.34 Similarly, Dr Braun stated, ‘the risk of inadvertent news consumption may be greater in high-profile cases which generate a significant amount of (social) media attention.’²⁹⁷ However, Dr Braun also explained that, for the very same reasons, the risk of misconduct by jurors by way of ‘*information out*’ is also increased in high-profile cases because ‘jurors may also be more willing to post about their court experiences or statements by other jurors in high profile cases, which may be of greater interest to their social media followers.’²⁹⁸ She concluded ‘the risk of indirect exposure and active social media use giving rise to potential violations of jury obligations may be greater in high-profile cases.’²⁹⁹ Significantly, she concluded, ‘yet, depending on the circumstances of the individual case at hand, social media use in lower profile criminal trials cannot be excluded.’³⁰⁰

1.4.35 The Law Society of Tasmania raised a potential peculiarity in this regard when it comes to smaller jurisdictions such as Tasmania, pointing out that there might not be such a distinction between ‘high-profile’ and ‘low-profile’ trials such that there is the same marked difference in media and community interest. The Law Society of Tasmania submitted:

in Tasmania, almost every criminal trial attracts media coverage and online attention ... [however,] [t]he higher profile cases will also attract greater mainstream media coverage and interest.³⁰¹

1.4.36 Rather, the Law Society of Tasmania was of the view that ‘the reason it is more widely spread is linked to the causes of such conduct’,³⁰² which the Society views as arising from the criminal trial process itself rather than the subject matter. His Honour Justice Pearce of the Supreme Court of Tasmania is of a similar view, and, interestingly, sees this as possible basis for the converse view that juror misconduct of this kind may even be less likely in high-profile trials:

I think the risk of the conduct occurring does not depend on whether a case is high profile or not. It applies across the board. I think that the risk may even be less likely in a high-

²⁹⁵ Submission #13 (n 280).

²⁹⁶ Submission #5 (n 260) 1.

²⁹⁷ Submission #4 (n 274) 4.

²⁹⁸ Ibid.

²⁹⁹ Ibid.

³⁰⁰ Ibid.

³⁰¹ Submission #11 (n 271) 2.

³⁰² Ibid.

profile trial because the evidence is likely to be more extensive and complete, and the importance of compliance is likely to be more apparent to jurors.³⁰³

1.4.37 The Legal Aid Commission of Tasmania concluded that ‘because the extent of such inappropriate use [of social media/the internet] is very difficult (if not impossible) to accurately measure, use should be treated as endemic’;³⁰⁴ ‘the assumption should be that ... inappropriate social media use will occur in every trial.’³⁰⁵

1.4.38 The Australian Lawyers Alliance submitted that juror misconduct of this kind currently poses ‘an unacceptably high risk of miscarriage of justice ... its effect is insidious, and only a relatively small number of jurors need to use social media in order to produce miscarriages of justice, and to erode confidence in the judicial system.’³⁰⁶

1.4.39 The Institute endorses this position. The Institute also highlights that the apparent risk of the inappropriate juror use of social media extends, especially in Tasmania, to both high-profile and routine criminal trials.

1.4.40 In their submission to the Institute, Johnston et al identify the further point that the prevalence of jurors’ use of social media and other internet platforms during criminal trials does not necessarily equate to the prevalence with which an accused’s right to a fair trial is *actually* adversely affected:

the percentage of jurors who use social media and/or internet platforms inappropriately to access information about the trial in which they are serving, does not, in and of itself, indicate whether or to what extent, that information influenced the jury verdict. It might seem a logical assumption that such an influence would follow, but ascertaining the nature and extent of that influence would require further investigation into the process of deliberation...³⁰⁷

1.4.41 The Institute recognises this as yet another unknown quantity in determining the gravity of juror misconduct of this kind.

1.4.42 His Honour Justice Pearce of the Supreme Court of Tasmania stated:

Just because I don’t know about it doesn’t mean it doesn’t happen, although it is impossible to say how often. I think it is unrealistic to think that during a trial jurors don’t sometimes look things up on the internet, or become aware of things relevant to the trial on social media. It is difficult to resist the temptation to look at maps, or to search for information about a subject or person.³⁰⁸

1.4.43 In circumstances where much remains unknown (and unknowable) about the gravity of juror misconduct of this kind, what does present itself as a constant, known quantity is the gravity

³⁰³ The Honourable Justice Robert Pearce, Supreme Court of Tasmania (Tas), Submission #14 (written) to TLRI, *Juries Social Media and the Right of an Accused to a Fair Trial* (November 2019).

³⁰⁴ Submission #12 (n 264) 22.

³⁰⁵ Ibid 12.

³⁰⁶ Submission #1 (n 273) 5.

³⁰⁷ Submission #10 (n 276) 3.

³⁰⁸ Submission # 14 (n 303).

of the risk: the risk that an accused’s fundamental right to a fair trial before an impartial jury is adversely affected. The risk exists with respect to every single juror in every single trial. It only takes one act of one juror for the risk to materialise.

1.4.44 In the Institute’s view, the gravity of the risk posed by juror misconduct of this kind, coupled with the fact that general perception is that such misconduct is prevalent, necessitates that this problem is acknowledged and addressed in order to retain confidence in the administration of justice by jury trial.

Part 2

‘Decoding’: How? Why?

2.1 ‘AFAICT’ (*‘As far as I can tell’*)

2.1.1 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.³⁰⁹

2.1.2 The ensuing discussion of how and why juror misconduct of this kind occurs and its causes and/or motivations is informed by the insights obtained from court reports,³¹⁰ media reports,³¹¹ and research on this topic to date.³¹² The Institute also asked respondents for their insight by seeking responses to the following question:

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?

2.2 The internet is not the (whole) problem

2.2.1 Juror misconduct is not new.³¹³ The internet and social media platforms have simply introduced a new, though dramatically expanded and instantly available, means by which juror misconduct can readily occur.³¹⁴ The principle that a jury’s deliberations, and ultimately its verdict,

³⁰⁹ Braun (n 19) 1636.

³¹⁰ See [1.2] above.

³¹¹ See [1.2] above.

³¹² See [1.3.15]–[1.3.62] above. In addition to this research that has juror misconduct as its focus, this Report also draws upon the insights obtained from research with a different emphasis, but which also provides insight into the ‘jury experience’. See Warner, Davis and Underwood (n 12): 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.

³¹³ 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 19th 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 Geason, “‘The Prisoners could not have that Fair and Impartial Trial which Justice Demands’: A Fair Criminal Trial in 19th-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.

³¹⁴ 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 21st Century: Has Trial by Jury Been Caught

must be based — and exclusively based — on the evidence given in court, applies as much to jurors engaging in ‘old fashioned’ methods of communication as it does to internet-based methods of communication.

2.2.2 In his submission, Daryl Coates SC, Director of Public Prosecutions (Tas), observed, ‘the potential of ‘*information in*’ and ‘*information out*’ is not a new issue, “the possibility that a juror might acquire irrelevant and prejudicial information is inherent in a criminal trial”: *Glennon* (1992) 173 CLR 592 at 603.’³¹⁵

2.2.3 In *A-G v Fraill*,³¹⁶ the English Court of Criminal Appeal, in considering juror misconduct at first instance, commented, ‘the problem is therefore not the internet: the potential problems arise from the activities of jurors who disregard the long established principles which underpin the right of every citizen to a fair trial.’³¹⁷

2.3 The writing is on the ‘wall’

2.3.1 Whilst juror misconduct is not new, there is much that is novel about juror misconduct via social media and/or other internet platforms.

2.3.2 Many respondents, when referring to the nature of juror misconduct of this kind, mentioned only intentional ‘*information in*’ scenarios, in particular, the more well-known type of juror misconduct of this kind: *the errant juror conducting online research*. In the Institute’s view, this highlights the general misconception that juror misconduct that involves social media and/or the internet is confined to intentional conduct on the part of jurors, or, indeed, this particular scenario of ‘*information in*’. For example, the Legal Aid Commission of Tasmania stated:

the general use of social media is not the evil that needs to be cured. The consumption of prejudicial material relevant to the trial is the problem. Normal internet and social media use can occur without problematic material being viewed.³¹⁸

2.3.3 His Honour Justice Pearce of the Supreme Court of Tasmania, stated: ‘In my view, *information in* is by far the most important, and most likely to affect the fairness of the trial ... *information in* is much more important than *information out*, although *information out* may sometimes encourage *information in*.’³¹⁹

2.3.4 Rather, the very nature of social media and the internet is such that juror misconduct of this kind may be the product of inadvertence alone.

2.3.5 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

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] SASCFC 52.

³¹⁵ Submission # 5 (n 260) 1.

³¹⁶ [2011] EWCA Crim 1570. See discussion of misconduct at [1.2.18] above.

³¹⁷ *A-G v Fraill* [2011] EWCA Crim 1570, [29].

³¹⁸ Submission #12 (n 264) 21.

³¹⁹ Submission #14 (n 303).

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*.

2.3.6 A juror can easily be exposed to trial-related news without seeking it out, particularly in high-profile trials which attract considerable 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.³²⁰ Moreover, as previously noted, in smaller jurisdictions such as Tasmania, *all* trials are likely to be the subject of media attention.³²¹

2.3.7 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 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.³²²

2.3.8 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’.³²³ As the former Chief Justice of Victoria has noted, ‘everyone is now a journalist’.³²⁴ In Tasmania, there are *Facebook* pages like *The Vigilante News*³²⁵ and *Crime Watch Tasmania*,³²⁶ 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 October 2019, *The Vigilante News* had 91,579 followers³²⁷ and *Crime Watch Tasmania* had 7,701 followers.³²⁸ Similar groups exist on *Twitter*, such as the non-jurisdiction specific *Twitter* account of *Oz Crime News*.³²⁹

³²⁰ Marilyn Warren, ‘Open Justice in the Technological Age’ (2014) 40 *Monash Law Review* 45, 48.

³²¹ See [1.4.35] above.

³²² ‘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>>.

³²³ Keyzer et al (n 164) 4.

³²⁴ Warren (n 320) 48.

³²⁵ *The Vigilante News* <<https://www.facebook.com/thevigilantenews/>>. ‘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 ...’

³²⁶ *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.’

³²⁷ In June 2019, at the time of writing the preceding Issues Paper, *The Vigilante News* had 85,488 followers.

³²⁸ In June 2019, at the time of writing the preceding Issues Paper, *Crime Watch Tasmania* had 7,190 followers.

³²⁹ *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

‘Fake news’/ ‘#nofilter’

2.3.9 A recent survey of Australian news consumers shows that 73% report having experienced one or more types of ‘fake news’³³⁰ 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 encountered any fake news or not.³³¹ Further, it is estimated that there are 83 million ‘fake’ profiles on *Facebook*.³³²

2.3.10 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*.³³³

2.3.11 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,³³⁴ 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.’³³⁵ The same applies to any other popular social media platform.

2.3.12 The New South Wales Court of Criminal Appeal decision in *Hughes v R*³³⁶ (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 charges 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

being played Australia.’ As at June 2019, *Oz Crime news* had 5,469 followers. As at October 2019, at the time of writing, this account was suspended.

³³⁰ Park et al (n 132). For the purposes of the survey, six types of *fake news* were identified: (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.

³³¹ Ibid.

³³² Dan Noyes, *The Top 20 Valuable Facebook Statistics* (Updated May 2019) Zephoria Digital Marketing <<http://zephoria.com/top-15-valuable-facebook-statistics/>>.

³³³ See, eg, *United States v Lawson*, 677 F 3d 629, 633–34 (4th 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.’

³³⁴ Lowe (n 27) 48.

³³⁵ Ibid.

³³⁶ [2015] NSWCCA 330.

no one could ever recover ... There was a deliberate attempt made by people on social media to poison the well.³³⁷

2.3.13 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.³³⁸ One post, which stated, 'hang the pedo' received more than 220,000 likes alone.³³⁹ 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'.³⁴⁰ Further, it was revealed that the material 'included 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.'³⁴¹

2.3.14 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 him, 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 [sic] undoubtedly tried to seat as many morons as possible in order to confuse them ...'³⁴² 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.'³⁴³

2.3.15 Targeted attempts to interfere with the trial process are not new, nor are they unheard of in Tasmania.³⁴⁴ Indeed, the effects of targeted social media activity in smaller jurisdictions such as

³³⁷ 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>>.

³³⁸ Ibid.

³³⁹ '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>>.

³⁴⁰ Gardiner (n 337).

³⁴¹ 'Hey Dad! star Robert Hughes appeals conviction "poisoned" by social media' (n 339).

³⁴² *United States v Zimny* 846 F 3d 458 (1st Cir 2017), 462–463 <<https://casetext.com/case/united-states-v-zimny-8>>.

³⁴³ Ibid. Court ordered investigation on appeal.

³⁴⁴ 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.

Tasmania can be especially effective and are of particular concern.³⁴⁵ The internet and social media platforms make jurors, and the trial process generally, far more vulnerable to such interference.

2.3.16 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 for the murder of the 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.³⁴⁶

2.3.17 It is clear, however, that the source of some of the most prejudicial material available on social media in relation to an accused in routine cases may simply be the accused’s own social media presence; material which may be sourced by jurors or, as detailed above, sourced for them by others. By way of an example, following a civil personal injury and wrongful death trial in Maine in 2009, 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.³⁴⁷

2.3.18 Further, in the UK in 2010, a juror sitting in an aggravated robbery trial found a photograph of the accused posing with a firearm on a social media page entitled, ‘gangster zone’.³⁴⁸

2.4 ‘Embedded’ behaviour

2.4.1 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?’³⁴⁹ The desire to share continuously and to be connected constantly is the ‘new normal’³⁵⁰ for many social media users and it does not stop just because they commence jury service.

³⁴⁵ 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).’

³⁴⁶ Robinson (n 28) 180–1.

³⁴⁷ *Wilgus v F/V SIRIUS, INC*, 665 F Supp 2d 23 (D Me 2009) 24.

³⁴⁸ Amelia Hill, ‘Judges are resigned to jurors researching their trials online’, *The Guardian* (online, 5 October 2010) <<https://www.theguardian.com/law/2010/oct/04/judges-resigned-jurors-online-research>>.

³⁴⁹ 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.

³⁵⁰ Brayer (n 249) 28.

2.4.2 Dr Braun's submission to the Institute, identifies such habitual use of social media as a key contributing factor to juror misconduct of this kind:

Social media use has become part of modern life. Social media is used to stay connected to friends and family and to express oneself to other users. While there is no formally recognised 'social networking addiction' or 'e-communication addiction' excessive social networking can incorporate symptoms frequently associated with addiction including inability to reduce consumption and relapse. There seems to be a fine line between unproblematic habitual use and possibly addictive networking.

While it may be easy for some jurors to refrain from accessing their social media accounts, others, for whom social networking represents a lifestyle and integral part of their daily routine, may be unable to curtail their behaviour during a criminal trial. Social media may have become too much of a way of life to abstain from its use during criminal proceedings.³⁵¹

2.4.3 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.'³⁵²

2.4.4 In the submission from the Legal Aid Commission of Tasmania, reference was made to 'a cultural tendency to "check out" a given person's online footprint when encountering them for the first time'.³⁵³ Further, William Boucaut QC commented, 'social media and smart phones are so prolifically present in the community that it is second nature to go online if we want to know something'.³⁵⁴ The Sheriff of Tasmania, Jim Connolly, proffered his view of errant jurors' motivation as: 'curiosity ... to ascertain what type of person the accused is...to conduct their own investigation of facts arising on the trial'.³⁵⁵ The Law Society of Tasmania also submitted that a dominant motivation is, 'curiosity on the background of the case, the witnesses and the accused'.³⁵⁶

2.4.5 Johnston et al posited that: 'the impact of social media contributing to a diminution in the boundaries between individuals' public and private personas, peer pressure and, the ubiquitous presence of this technology in the lives of many individuals, may all be factors'.³⁵⁷

2.4.6 Garth Stevens, a Barrister at Liverpool Chambers (Tas), highlighted the fact that the use of social media and/or the internet to satisfy such curiosities 'does not take any real effort [eg unlike old fashioned juror misconduct which required, for example,] physically going to conduct one's own view'.³⁵⁸ The simplicity and ease with which social media and/or the internet may be employed was also the subject of comment by the Australian Lawyers Alliance:

³⁵¹ Submission #4 (n 274) 4–5.

³⁵² *R v K* (2003) 59 NSWLR 431, [81].

³⁵³ Submission #12 (n 264) 13.

³⁵⁴ Submission #3 (n 262).

³⁵⁵ Submission #7 (n 260).

³⁵⁶ Submission #11 (n 271) 2.

³⁵⁷ Submission #10 (n 276) 5.

³⁵⁸ Garth Stevens, Barrister, Liverpool Chambers (Tas), Submission #19 (verbal) to TLRI, *Juries Social Media and the Right of an Accused to a Fair Trial* (4 October 2019).

Social media is easy to use ... a relatively simple tool for a juror to use who wants to find out more information about the defendant and witnesses.³⁵⁹

2.4.7 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 involving variously a judge,³⁶⁰ a lawyer,³⁶¹ a doctor,³⁶² a teacher,³⁶³ a newspaper editor,³⁶⁴ and a television personality.³⁶⁵

2.4.8 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.³⁶⁶ 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

³⁵⁹ Submission #1 (n 273) 5.

³⁶⁰ 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/>. 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.

³⁶¹ *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>. 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’.

³⁶² Daily Mail Australia (n 113).

³⁶³ ‘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/>>.

³⁶⁴ 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’. He was an editor at the local newspaper.

³⁶⁵ 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’.

³⁶⁶ *People v Rios*, No 1200/06, 2010 WL 625221 (NY Sup Ct Feb 23, 2010).

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.³⁶⁷

2.5 ‘#motivation’

2.5.1 Whilst social media and the internet pose new risks for unsuspecting jurors to be lured unwittingly into misconduct, they also provide new and improved means for intentionally errant jurors who are confused and/or frustrated by the trial process to seek information outside of the courtroom.

What can be learned from the humble dictionary?

2.5.2 The intentionally errant juror is nothing new. However, the means available to this class of juror have exponentially increased.

2.5.3 In *R v Benbrika*,³⁶⁸ 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!³⁶⁹ [emphasis added]

2.5.4 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.'³⁷⁰ [emphasis added].

2.5.5 The Court went on to consider the earlier Victorian case of *R v Chatzidimitriou*,³⁷¹ 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

³⁶⁷ Carrega-Woodby, Marcius and Siemazko (n 96).

³⁶⁸ [2009] VSC 142.

³⁶⁹ Ibid [114] (Bongiorno J).

³⁷⁰ *Benbrika v R* (2010) 29 VR 593, [226].

³⁷¹ (2000) 1 VR 493.

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.³⁷² [emphasis added]

2.5.6 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 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.

I don’t ‘follow’

2.5.7 Trial by jury brings members of the public into the criminal courtroom of which they have little to no firsthand experience and where they are likely to feel ‘lost’.³⁷³ 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.³⁷⁴

2.5.8 This sense of bewilderment and intimidation was coupled with the jurors’ feeling a great sense of responsibility and taking their task very seriously.³⁷⁵ Jurors spoke of the ensuing pressure and stress that they experienced. Jurors described a ‘pressure-cooker environment’³⁷⁶ and their experience as ‘very emotional’, ‘traumatis[ing]’, ‘overwhelming’, ‘exhausting’, ‘nerve-wracking’, ‘devastating’, ‘daunting’, ‘mortifying’, ‘horrendous’, ‘very intimidating’, ‘very draining’, and ‘painful’.³⁷⁷ Many jurors identified the responsibility of reaching a decision of guilt or innocence as extremely stressful. Many spoke of taking the stress home with them³⁷⁸ and losing sleep.³⁷⁹

2.5.9 The questions and comments of jurors in the Tasmanian study made it clear that they suffered misunderstandings and/or misperceptions throughout the trial process. In relation to basic

³⁷² Ibid [42] (Cummins AJA).

³⁷³ 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].

³⁷⁴ Warner, Davis and Underwood (n 12) 337.

³⁷⁵ 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 ...’

³⁷⁶ Ibid 359.

³⁷⁷ Ibid 338.

³⁷⁸ 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>>.

³⁷⁹ Ibid.

legal principles: they reported struggling with the meaning of ‘beyond reasonable doubt’³⁸⁰ and the meaning of ‘forensic disadvantage’ when applying the *Longman* direction.³⁸¹ Jurors also perceived defence counsel’s compliance with the rule in *Browne v Dunn* as unnecessarily bullying behaviour towards prosecution witnesses (ie counsel repeatedly suggesting that witnesses were lying).³⁸² 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.³⁸³

2.5.10 Juror bewilderment even extended to housekeeping and scheduling matters. In one juror’s trial, the matter was unexpectedly adjourned to allow the Court of Criminal Appeal to hand down a judgment: ‘suddenly at four, we were ... marched out of the [jury deliberation] 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?’³⁸⁴ 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.³⁸⁵ Indeed, a juror sitting in a 2012 English fraud trial attempted to explain his *Googling* of further 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’.³⁸⁶

2.5.11 Significantly, one juror who participated in the Tasmanian study 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’.³⁸⁷ 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’.³⁸⁸

2.5.12 Such circumstances may prompt even well-intentioned jurors to explore other ‘*information in*’ options in order to keep up. Dr David Plater, Deputy Director of the South Australian Law Reform Institute, aptly describes:

the increasingly complex and convoluted law and resulting judicial directions (both from the High Court and Parliament) and the ever more sophisticated and complex nature of

³⁸⁰ Warner, Davis and Underwood (n 12) 345–7.

³⁸¹ Ibid 349. The *Longman* direction refers to the ‘forensic disadvantage’ occasioned to an accused as a result of delay in complaint. As a result of delay, an accused is denied the chance to assemble, soon after the incident is alleged to have occurred, evidence that would assist to test/meet the complainant’s evidence.

³⁸² 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.

³⁸³ Warner, Davis and Underwood (n 12).

³⁸⁴ Ibid.

³⁸⁵ Ibid.

³⁸⁶ Bowcott (n 59).

³⁸⁷ Warner, Davis and Underwood (n 12) 357.

³⁸⁸ *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.

modern evidence such as DNA and phone intercepts means criminal trials are ever longer and more complex.³⁸⁹

2.5.13 In the submissions received from the Australian Lawyers Alliance, the fact that the trial process is often ‘confusing’³⁹⁰ was listed as a suggested cause of juror misconduct of this kind. In a similar vein, but with greater specificity, the Law Society of Tasmania identified, ‘the inability of the court to explain BRD [beyond reasonable doubt]’³⁹¹ as a possible catalyst.

2.5.14 As an aside, possibly the greatest cause for concern by this indication of jurors’ difficulties in following the trial process is what this means for the accused. As commented by Gaudron J in the High Court case of *Cheng v R*:³⁹²

As Deane J pointed out in *Kingswell*:

A system of criminal law cannot be attuned to the needs of the people whom it exists to serve unless its administration, proceedings and judgments are comprehensible by both the accused and the general public

The participation of ordinary citizens, as jurors in the judicial process renders it necessary that criminal proceedings be understood by all, including the accused. It is, thus, fundamental to the law’s guarantee of a fair trial.³⁹³

‘FOMO’ (*Fear of missing out*)

2.5.15 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.’³⁹⁴ Jurors complained of ‘being sent back to the jury room every five minutes’³⁹⁵ 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’.³⁹⁶

2.5.16 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 defendant] 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.³⁹⁷

³⁸⁹ Submission #13 (n 280).

³⁹⁰ Submission #1 (n 273) 4.

³⁹¹ Submission #11 (n 271) 2.

³⁹² (2000) 203 CLR 248.

³⁹³ Ibid 278.

³⁹⁴ Ibid 338–9.

³⁹⁵ Ibid 339.

³⁹⁶ Ibid 346.

³⁹⁷ Ibid 339.

2.5.17 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.'³⁹⁸

2.5.18 His Honour Justice Pearce of the Supreme Court of Tasmania commented, with respect to the causes and/or motivations of juror misconduct of this kind:

My impression is that, in most cases, it arises because a jury may perceive gaps in the information they are asked to consider. Although jurors are directed that they are to confine their deliberations to the evidence they hear and see in court, there must be a strong temptation to look elsewhere for information they suspect may exist but have not been told about, and to fill in the gaps in the evidence.³⁹⁹

2.5.19 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.⁴⁰⁰ Commentators have highlighted the fact that criminal trials are often unhelpfully portrayed in media and 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.⁴⁰¹

2.5.20 This concept was explored in some detail by Professor Jill Hunter's study of jurors in New South Wales in 2004–2006 and 2011.⁴⁰² Jurors explained their frustrations variously as follows:

'Both the Crown and defence cases left unanswered numerous questions relating to the circumstances of the alleged crime and the people involved, esp. the accused and some witnesses. Our deliberations would have been more productive and focused had this additional information been provided. Both sides were inadequate in their running of the trial.'

'[A juror] wished on numerous occasions the Crown would supply us [the jury] with more details and the defence would go down another path, it felt like we as the jurors were being deliberately confused.'

'[A juror] [f]elt counsel could have explored evidence with more questioning on certain matters.'

'The decision making process is not easy based upon one barrister's perspective & facts put forward. My experience was that 12 people (jury) were able to uncover many key points missed by both Crown and defence. If this info was at times available it may assist with some undecided jurors.'

³⁹⁸ 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).

³⁹⁹ Submission #14 (n 303).

⁴⁰⁰ Caren Morrison, 'Jury 2.0' (2011) 62(6) *Hastings Law Journal* 1579, 1581.

⁴⁰¹ Hunter (n 29) 3.

⁴⁰² *Ibid.*

[Jurors wanted more evidence:] ‘to make a more accurate verdict’; ‘to make the situation clearer’; ‘[to make deliberations] more productive and focussed’; ‘to process information differently and reach different conclusions’; to ‘make an informed decision’; or to ‘fill the gaps’.

‘Only about 20% of the story gets told in court. Alleged crimes occurred between people who knew each other very well. It was one person’s word against another’s. We could have understood the people, their relationships and their situations better. We would have liked to hear more in court ...’

‘The truth of the matter was that to make a decision based on very few facts that we had was very hard indeed.’

‘Evidence was incomplete, inadequate, frustrating...’

‘more evidence can help [jurors to make correct decision ... It’s not true justice if all the facts of a case cannot be presented ... Keeping information from jurors is not a fair trial ... [t]he extra information would help clarify the story for us.’

‘I felt that the evidence was inadequate — too many gaps — not enough detail.’

‘Crown was good ... [but] we found we discovered additional key points in the evidence during deliberation.’⁴⁰³

2.5.21 Indeed, one juror, whilst rejecting the acceptability of jurors conducting independent inquiries, stated, ‘BUT having been TOTALLY FRUSTRATED with inadequate evidence in our case I could understand why a juror may do THIS’. That juror continued, ‘[w]e, as a jury, felt absolutely in the dark!! We had no solid factual evidence supported by any witnesses or police statements. We were aware that the victim had made statements to the police, but when we requested them we were told that we were not allowed to have them.’⁴⁰⁴

2.5.22 Another juror stated that ‘a lot of material was held back or was not presented as relevant ... if the jury was to make an informed decision ... [i]t might be useful to allow jurors to ask the judge questions and have feedback as to why it may not be relevant or is unknown.’ In that particular case, the jury were informed why evidence was or was not called, but only in very broad terms: ‘it was the parties’ right to determine the calling of evidence’.⁴⁰⁵

2.5.23 A juror described the trial process as ‘distressing’ because:

The process was not about helping the jury come to a decision but about the prosecution and defence arguing a point. If it was about coming to the right decision, the jury would be part of the process and not just witnesses. We would be better served if the process was not only adversarial but sought information and truth.⁴⁰⁶

2.5.24 Significantly, those jurors who expressed the view that independent juror inquiries were acceptable reasoned:

‘[It is n]ot practical to think that things like the internet would not be used.’

⁴⁰³ Ibid 16–17, 20, 22–3, 25.

⁴⁰⁴ Ibid 22.

⁴⁰⁵ Ibid 23.

⁴⁰⁶ Ibid 24.

‘the prosecution seemed inexperienced.’

‘If jurors feel s/he needs to know more about anything in order to have better understanding/knowledge about something, then s/he should be able to do so. That might help the juror to have more accurate verdict later on ... Jurors should be able to find out whatever they need as it might help them later on.’

‘There was not sufficient evidence presented.’

‘At any time any additional information either confirming or eliminating believes [sic] would have added impression to one’s thoughts.’⁴⁰⁷

2.5.25 In total, 33% of jurors surveyed (26 jurors) across 16 of the 20 trials indicated that they perceived their task was to deliver a verdict that reflected a determination of objective truth.⁴⁰⁸ Professor Jill Hunter spoke of an ‘ignorance’ on the part of jurors such that they ‘fail to appreciate the legal framework of the trial and ... consider they are seeking objective truth’.⁴⁰⁹

2.5.26 This possible motivation was favoured by many of the respondents to the Issues Paper.

2.5.27 The Australian Lawyers Alliance submitted:

The trial process is ... not adapted to achieve what most jurors might regard as a just outcome. A juror who intends to do what he or she regards as ‘justice’ is therefore in the position of attempting to do so in spite of the obstacles presented by the trial process and judicial direction.⁴¹⁰

2.5.28 The Law Society of Tasmania expressed the view that ‘jurors at times feel that adequate information has not been provided and they have to do their own investigation’. The Society pointed to, ‘ironically, a desire to reach the right decision and that by securing further information they are seeking to determine ‘the truth’ of what occurred as opposed to whether the charge has been proven by the Crown beyond reasonable doubt’.⁴¹¹

2.5.29 The Legal Aid Commission suggested that errant jurors were motivated to use social media and other internet platforms because of ‘frustration on the part of jurors with the artificiality of the criminal trial process and the limitations put on the information given to them by the provisions of the *Evidence Act 2001* ... the “where there is smoke there is fire” view – a belief that the jury is not being told the whole story’.⁴¹²

2.5.30 Relevantly, the Australian Lawyers Alliance reasoned that such conduct ‘is easily justified in the mind of a juror as no more than gathering publicly available information.’⁴¹³

⁴⁰⁷ Ibid 29.

⁴⁰⁸ Ibid 18.

⁴⁰⁹ Submission #9 (n 278).

⁴¹⁰ Submission #1 (n 273) 4.

⁴¹¹ Submission #11 (n 271) 2.

⁴¹² Submission #12 (n 264) 13.

⁴¹³ Submission #1 (n 273) 5.

‘IDC’ (‘I don’t care’)

2.5.31 Some respondents identified the role that defiance alone might play. Garth Stevens, a Barrister at Liverpool Chambers (Tas) commented that it might ‘never have dawned on jurors that they could use the internet and social media to obtain information relevant to the trial until they were told about it’.⁴¹⁴ The Law Society of Tasmania similarly submitted, ‘temptation of the forbidden fruit – some may be drawn to search for information because they have been directed not to’.⁴¹⁵ The Law Society also noted that, ‘a juror’s knowledge that the conduct is unlikely to be detected’ and/or ‘if detected, is unlikely to lead to any significant consequences for the individual involved’⁴¹⁶ may be a further motivating factor of juror misconduct of this kind.

2.6 Fairness ‘goals’

2.6.1 His Honour Justice Pearce was of the view:

It is the obligation of judges to give directions to jurors about proper access to the internet and social media during a trial, and if necessary, to remind jurors of it as the trial proceeds. The most effective direction, as far as I am able to judge, is by resort to notions of fairness to both the accused and the State. In my experience, most jurors appear to take their obligations seriously.

2.6.2 Whilst it is apparent that a high proportion of jurors acknowledge fairness as a key part of their role, it is also apparent that jurors’ understanding of fairness and, in particular, an accused’s right to a fair trial, is often flawed.

2.6.3 Professor Jill Hunter’s study of jurors in New South Wales in 2004–2006 and 2011, concluded:

The study does not support the assessment that the jurors who thought it was acceptable to breach a judge’s direction were renegades or inclined to flout justice. ... There may be a small element of defiance but the total picture revealed by juror respondents suggests that they were focused on doing their task well but often with a flawed appreciation of what justice required. Support for this view comes from an additional telling statistic, namely that the dominant priority expressed by jurors was that they should be fair to the accused.⁴¹⁷

Professor Hunter further observed:

juror comments regularly referred to ‘fairness’, sometimes linking it to why none of their number should engage in sleuthing. ‘Fairness’ in this context was articulated by jurors as fairness to both parties or as fairness to other jurors (that is, in the sense that all jurors should have the same information base).

On the topic of fairness, jurors in the 2011 trials were asked to identify the top priorities from a list that described tasks ‘in the jury room’. The largest group of respondents to answer this question – 20 of the 39 jurors, prioritised ‘ensuring fairness to the defendant’.

⁴¹⁴ Submission #19 (n 358).

⁴¹⁵ Submission #11(n 271) 13.

⁴¹⁶ Ibid.

⁴¹⁷ Hunter (n 29) 4.

However, a significant amount of ambiguity can surround what a person means by ‘fairness’. For example, in response to a request to prioritise a number of considerations, including the aspirations of ensuring ‘innocent people are acquitted’ and ensuring ‘guilty people are convicted,’ 14 jurors elected to confirm priority to acquitting innocent people (consistent with the presumption of innocence and prosecutors’ heavy burden of proof) but nearly as many jurors – 13 of them – determined that ‘ensuring guilty people are convicted’ was their priority. Some may consider the closeness of juror preferences between these choices is concerning but the response rate...is insufficient to draw firm conclusions.⁴¹⁸

2.6.4 This was not the only indication that, despite jurors’ acknowledgement of the importance of fairness, ‘misconceptions of justice, at odds with the fundamental prerequisites of law’s notion of a fair trial, emerged in relation to approximately half of the 78 jurors (across 17 of the 20 trials).’⁴¹⁹

2.6.5 As mentioned above, this included 33% of jurors who believed their task is to deliver a verdict that reflects a determination of objective truth and 15% of jurors who believed that it is justified in certain circumstances to engage in independent juror inquiry. It also encompassed 20% of jurors who believed the prosecution and defence had, or should have equal rights and obligations, including a significant number of jurors who indicated that defence rights should be curtailed.

2.6.6 In relation to the latter, Professor Hunter commented more widely that ‘rights of the accused were often viewed negatively or the defence was seen as having fallen short of jury expectations to assist with information gathering.’⁴²⁰ To this end, various jurors responded as follows:

‘the balance is totally tilted in favour of the accused person not having to prove anything except ‘reasonable doubt’, which is so broad and unfair to the victim, whose character can be challenged so ruthlessly.’

‘some laws should be changed to make sure the defendant does not have as much rights to stop evidence being given to a jury.’

‘[t]he defence objected at many things that we would of [sic] liked to see.’

‘I wondered if the legal loop holes were used to suppress evidence which may have helped with a verdict. The law benefits the accused. Every effort is made to ensure they get a fair trial. We were instructed to find him ‘not guilty’ if there wasn’t enough strong evidence even if we thought he was guilty.’

‘[A factor that influenced one juror’s verdict was] the defendant pleaded guilty to ... [another] count.’⁴²¹

2.6.7 Professor Hunter also identified many juror comments which appeared to be founded on ‘flawed assumptions about the burden of proof and placing equal demands on the prosecution and defence to bring evidence before the court.’⁴²² For example:

⁴¹⁸ Ibid 15.

⁴¹⁹ Ibid 5.

⁴²⁰ Ibid 25.

⁴²¹ Ibid 25–6.

⁴²² Ibid 25.

‘[Without] a clear picture of the accused’s [criminal] history, it is harder to prove him guilty, even though a case may have suggestions of a guilty verdict, if the jury is not convinced with background information then a guilty verdict is much harder to give.’

‘We thought that more questions could have been asked and more witnesses could have been called, especially by the accused to back up his claims.’

‘[J]urors should be allowed to find out more about the accused if the evidence is inadequate.’

‘[T]he mention about [particular evidence] ... as brought up by the defence really tipped the scales in favour of the accused ... Was that fair? He chose not to testify and pleads not guilty yet gives evidence through his lawyer? I don’t get it!’⁴²³

2.6.8 Despite the majority of jurors purporting to acknowledge and undertake their role in relation to ‘fairness’, in ‘too many’⁴²⁴ cases jurors’ understanding of ‘fairness’ does not appear to equate with what the criminal justice system requires of them.

2.6.9 Relevantly, Dr David Plater, Deputy Director of the South Australian Law Reform Institute provides the following insight:

The motivation or temptation for juries to use social media or conduct impermissible research is seemingly not a wish to be perverse. Rather a foray into history is illustrative. Criminal trials until 30 odd years ago were relatively swift and simple ... Juries into the 20th century played an active role in trials and were treated in an inclusive manner as mature adults. Juries report that they are now treated in a patronising and inferior manner and feel like they are treated like children. They are excluded from much of the evidence and much of the proceedings. Jurors resent this and feel frustrated and left out. They are told that, often in a superior manner, they must act only on the material led at trial but are not fully told why this is so important ... The typical judicial warning or admonishment asks juries to act against their modern instinct and understanding and not conduct ... online research or online discussions. There are individuals ... who blatantly flout any order but many of the reported cases of impermissible jury research or commentary that come to light are by individuals who act out of misguided good faith and a genuine desire to find what they think is relevant rather than any perverse or vindictive sense.⁴²⁵

2.6.10 In such circumstances, the discussion of general concepts of ‘fairness’ and ‘a fair trial’ does not necessarily assist jurors in understanding the underlying principles and how they ought to be applied. Indeed, jurors may easily misunderstand such abstract notions so that they may justify accessing social media and/or the internet on the grounds that such behaviour is consistent with and in the pursuit of a ‘fair trial’ and ‘fairness to an accused’.

⁴²³ Ibid 26.

⁴²⁴ Ibid 39.

⁴²⁵ Submission #13 (n 280).

Part 3

‘Screenshot’: Current Laws and Practices

3.1 ‘HTH’ (*‘hope this helps’*)

3.1.1 There are various laws and practices that currently exist which address jurors’ use of social media and/or other internet platforms during criminal trials: those that aim to prevent juror misconduct of this kind (*‘preventative’*) as well as those that exist to remedy and/or otherwise deal with such misconduct after it occurs (*‘consequential’*). Their operation and impact range from well before a jury is empanelled to well after a jury is discharged.

3.1.2 Part 3 of this Report canvasses these laws and practices and examines the operation and efficacy of these measures as well as possible alternatives.

3.2 Pre-trial control of prejudicial material

Suppression orders

3.2.1 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.⁴²⁶ It is not enshrined in statute as it is in other Australian jurisdictions.⁴²⁷

3.2.2 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.⁴²⁸ Suppression orders are *sub judice* laws, designed to operate while a matter is pending.⁴²⁹ A criminal case is said to be pending from the moment that the criminal law is ‘set in motion’,⁴³⁰ either at the time of arrest⁴³¹ or when a warrant is issued for arrest,⁴³² and it remains pending until the accused is acquitted, all avenues of appeal

⁴²⁶ See *Brooks v Easter* [2017] TASSC 44, [7]; see also *Brooks v Easter (No 2)* [2017] TASSC 47, [19] (Blow CJ). See also *Hogan v Hinch* (2011) 243 CLR 506, [26].

⁴²⁷ 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); *Open Courts Act 2013* (Vic).

⁴²⁸ See, eg, *Scott v Scott* [1913] AC 417; *Russell v Russell* (1976) 134 CLR 495.

⁴²⁹ *James v Robinson* (1963) 109 CLR 593, 606, 615.

⁴³⁰ *Packer v Peacock* (1912) 13 CLR 577, 586.

⁴³¹ *A-G (NSW) v TCN Channel Nine Pty Ltd* (1990) 20 NSWLR 368, 374–5.

⁴³² *R v Clarke* [1908]–[1910] All ER 915.

are exhausted or the time to lodge an appeal has lapsed.⁴³³ Suppression orders are not granted in Tasmania with the frequency with which they are in some other Australian jurisdictions.⁴³⁴

3.2.3 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*’.⁴³⁵ Professional and/or experienced journalists have knowledge and training in this area, they are bound by in-house and/or industry wide ethical standards,⁴³⁶ and their publishing practices typically have inbuilt protections to avoid falling foul of court orders of this kind.⁴³⁷

3.2.4 The observation of suppression orders in the ‘new world’ of social media and other internet platforms, however, is a different story.⁴³⁸ 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.⁴³⁹

3.2.5 Whilst non-compliance with suppression orders can amount to *sub judice* contempt,⁴⁴⁰ 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

⁴³³ *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.

⁴³⁴ ‘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) <<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>>.

⁴³⁵ ‘For the Media’, *Supreme Court of Tasmania* <<https://www.supremecourt.tas.gov.au/the-court/media/>>.

⁴³⁶ 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/>>.

⁴³⁷ ‘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 164) 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>>.

⁴³⁸ “‘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>>.

⁴³⁹ 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>>.

⁴⁴⁰ An offence at common law.

jurisdiction, and the sheer number of offending publications can prevent full investigation and prosecution.

Take-down orders

3.2.6 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 material that is available online.⁴⁴¹ The same test of it being ‘necessary for the administration of justice’ applies.⁴⁴²

3.2.7 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 disseminated⁴⁴³ and it thereafter remains accessible in meticulous archived form.

Pre-trial ‘searches’

3.2.8 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;⁴⁴⁴ others believe it should be performed by the court.⁴⁴⁵ 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.⁴⁴⁶

3.2.9 In practice, however, in some cases it has fallen to others involved 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

⁴⁴¹ *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 ...’

⁴⁴² See [3.2.1] above.

⁴⁴³ 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 332).

⁴⁴⁴ 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.’

⁴⁴⁵ 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].

⁴⁴⁶ 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/>>.

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.’⁴⁴⁷

‘QNA’ (*question and answer*)

3.2.10 Respondents were asked the following questions regarding pre-trial 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?

3.2.11 Regarding current practices employed in the Tasmanian jurisdiction to control prejudicial information that is potentially available to jurors, the Director of Public Prosecutions (Tas), Daryl Coates SC, responded:

In most circumstances there is no need to take pre-emptive and precautionary pre-trial measures to control prejudicial material that is potentially available to jurors on the internet and social media platforms at the pre-trial stage ... Where there is a high level of community interest or media interest in circumstances we believe pre-trial publicity will affect the accused’s right to a fair trial, this Office will make an application for a suppression order.⁴⁴⁸

3.2.12 Other legal practitioners also spoke of the practice that has been utilised on a few occasions in Tasmania where the sentencing remarks for a defendant are temporarily removed from the Supreme Court’s publicly available online database when the same defendant is facing trial for new offences,⁴⁴⁹ thus limiting the information available online that discloses the defendant’s criminal antecedents.

3.2.13 Johnston et al argue that the obligation to identify and act upon prejudicial material that is potentially available to jurors on the internet and social media at the pre-trial stage is an ‘ethical duty’ that extends to all parties:

There is a strong argument that the pervasiveness of technology makes technical competence in courtroom technology an ethical requirement for litigators ... We would argue that this duty also extends to knowledge of the implications of internet and social media technology for the fair conduct of criminal trials and extends to lawyers more generally.

⁴⁴⁷ 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>>.

⁴⁴⁸ Submission #5 (n 260) 2.

⁴⁴⁹ Community Legal Centres Tasmania, Submission #6 (written) to TLRI, *Juries Social Media and the Right of an Accused to a Fair Trial* (11 October 2019) 2; Submission #21 (n 267).

Pre-trial measures for controlling prejudicial material that is potentially available to jurors on the internet and social media platforms requires, as a first step, knowledge, and an assessment of, material that potentially falls within that category. Those tasks need to be carried out by individuals with the requisite knowledge and expertise to identify and conduct searches of the relevant platforms. In our submission, initial responsibility for conducting, or arranging for the conduct, of the necessary searches and for assessing the potentially prejudicial impact of such material rests, in the first place, with defence lawyers, as the defence may be assumed to have the most obvious incentive to undertake such inquiries.

It is also strongly arguable that the court has an obligation to ensure that the defence avails itself of any point of law that might be available to them (such as to ameliorate) the effect of any potentially prejudicial material), particularly when a person is unrepresented. It is recommended that this topic could form part of the standard agenda for the initial pre-trial conference in any criminal cases. Given the ethical obligation of the prosecution to act impartially, fairly and assist the court to avoid appellable error, it is also arguable that if the prosecution become aware of such a risk, they should also draw this to the attention of the court.⁴⁵⁰

3.2.14 The Law Society of Tasmania stated that whilst ‘the court has an obligation to ensure that the defendant has a fair trial ... The practical reality is that it will fall to the affected party to seek orders’.⁴⁵¹

3.2.15 Members of the Tasmanian legal profession spoke with the Institute about the ‘very prominent’⁴⁵² role that social media plays in the early stages of being engaged as counsel in both criminal (and family law) proceedings. Practitioners stated that it is ‘important to be across this [online] material’.⁴⁵³ That it was ‘routine to discuss social media with clients’,⁴⁵⁴ including personally viewing what potentially prejudicial material is available online, what privacy settings are in place, and warning the client and the client’s friends and family about the potential consequences of their online activity before/during/after proceedings.⁴⁵⁵

3.2.16 The majority of respondents, however, otherwise identified the flaws inherent in any attempt to control prejudicial material that is potentially available to jurors on the internet and social media platforms at the pre-trial stage (or any other stage of a criminal trial, for that matter).

3.2.17 The Director of Public Prosecutions (Tas), Daryl Coates SC, observed that ‘it would be impossible to meaningfully review all such material’.⁴⁵⁶ Dr David Plater, Deputy Director of the South Australian Law Reform Institute, frankly describes:

The notion of lawyers or anyone else vetting or checking (either before trial or at trial) social media sites ... and the wider internet for prejudicial online material is mission impossible. It is impracticable and unrealistic. The chance of finding all such prejudicial

⁴⁵⁰ Submission #10 (n 276) 6.

⁴⁵¹ Submission #11 (n 271) 3.

⁴⁵² Submission #21 (n 267).

⁴⁵³ Ibid.

⁴⁵⁴ Ibid.

⁴⁵⁵ Ibid.

⁴⁵⁶ Submission #5 (n 260) 2.

material is non-existent? ... [Aside from who would conduct these searches] Who would pay for such a service?⁴⁵⁷

3.2.18 Even if it were possible, as identified in the submission of Johnston et al:

surveys of this kind will not detect material ... that may not be obviously prejudicial, but could still have the potential to influence jurors if they accessed it ... [such as] the social media profile of defendants, victims, witnesses, lawyers or judges ... so it cannot provide a full solution to the problem.⁴⁵⁸

3.2.19 Moreover, the majority of respondents doubted the effectiveness of suppression orders and/or takedown orders generally when it came to the realm of social media and the internet. Dr Plater, Deputy Director of the South Australian Law Reform Institute, described these mechanisms as ‘increasingly futile’⁴⁵⁹ in this forum, explaining further:

It is increasingly difficult to control pre-trial coverage or online discussion. There are huge issues in enforcement and jurisdiction. The problem is not the conventional (or what remains of them) media but rather alternative media and social media. Everyone is now a journalist.’⁴⁶⁰

3.2.20 The Law Society of Tasmania put these general observations into context in the Tasmanian jurisdiction:

Essentially there is little that can be done due to unrestrictive media laws and the global nature of the media environment. Applications for ‘suppression’ and ‘takedown’ to manage material online are difficult to argue and problematic to enforce. Tasmanian courts are extremely conservative when considering these applications according to our members and in the absence of legislative reform it is highly unlikely that these tools will be effective in securing a fair trial for an accused. It is also extremely rare for Tasmanian courts to grant permanent stay orders which is another mechanism by which the trial process can be affected by social media comment.⁴⁶¹

3.2.21 Relevantly, Daryl Coates SC, Director of Public Prosecutions (Tas), stated that the Supreme Court has published only nine suppression orders since September 2014.⁴⁶²

3.2.22 Johnston et al also spoke of the ‘limitations’⁴⁶³ on relying upon suppression (non-publication) and take down orders, detailing that they ‘prove to be unequal to the technology.’ Like other respondents, Johnston et al stated that it is ‘inevitable that efforts to deal with prejudicial publicity will be redirected to the jurors and the manner in which the trial is conducted’.⁴⁶⁴

⁴⁵⁷ Submission #13 (n 280).

⁴⁵⁸ Submission #10 (n 276) 6.

⁴⁵⁹ Submission #13 (n 280).

⁴⁶⁰ Ibid.

⁴⁶¹ Submission #11 (n 271) 2.

⁴⁶² Submission #5 (n 260) 2. See above n 434: 206 suppression orders were made in South Australia in 2014–2015 and 1594 suppression orders were made in Victoria in 2014–2016.

⁴⁶³ Submission #10 (n 276) 5–6.

⁴⁶⁴ Ibid 6.

3.2.23 The Legal Aid Commission provided the following comment, with a similar emphasis on it being a matter to be left to jurors to avoid inappropriate conduct, albeit with the assistance of education in this respect:

There is no feasible, culturally acceptable way to remove all offending material from the internet, or to prevent jurors from seeing material that is currently on the internet. Any move to censor the internet in such a manner would be seen as draconian, very unlikely to be successful, and create unwelcome intrusion on public discussion ... the policing of the internet for prejudicial material is not likely to be an effective strategy for dealing with the problem. The assumption should be that there is material on the internet, while the focus should be on educating jurors about why they should not consume this material.⁴⁶⁵

3.2.24 Similarly, the Sheriff of Tasmania, Jim Connolly, was of the view that the impact of any prejudicial material potentially available to jurors online ahead of trial may be effectively dealt with by the self-reporting of jurors as part of the empanelment process:

There is very little that can be done in relation to the availability and pervasiveness of information on social media. It is best left to the presiding judge to ask if any person empanelled on a jury has any prejudicial knowledge in relation to the case they are on. It should be left to the juror to inform the judge of their possible prejudice.

3.2.25 The Australia Lawyers Alliance raised the possibility of court lists referring to defendants only by their initials and making it an offence to publish the name of a defendant before s/he has pleaded guilty. The intended result being to prevent comment on social media aimed at identifying the accused person ahead of trial and thereby pre-emptively controlling the prejudicial material that is potentially available online to jurors.⁴⁶⁶ Another suggestion was whether trials in their entirety might be conducted, where possible, with the defendant remaining anonymous.⁴⁶⁷

3.2.26 From the outset, the Institute acknowledges that suppression orders (and take down orders) are *but one* preventative measure which may reduce the adverse effects of jurors using social media and other internet platforms inappropriately during criminal trials.⁴⁶⁸ Their interaction with the case for ‘open justice’ necessitates that they are used sparingly and reserved for a select few cases. The Institute also recognises the fundamental flaws in the application and efficacy of such measures in the global digital world. These issues, and the jurisdiction of suppression orders (and take down orders) and *sub judice* contempt, more generally, are complex issues that warrant substantial examination in their own right.⁴⁶⁹

3.2.27 The Institute agrees with the observations of his Honour Justice Pearce that: ‘It is impossible to control the material on the internet and social media. It is only possible to control jurors’ access to it.’⁴⁷⁰

⁴⁶⁵ Submission #12 (n 264) 14.

⁴⁶⁶ Submission #1 (n 273) 5.

⁴⁶⁷ Kim Baumeler, Barrister, Liverpool Chambers (Tas), Submission #15 (verbal) to TLRI, *Juries Social Media and the Right of an Accused to a Fair Trial* (8 October 2019).

⁴⁶⁸ See *Scope of the Reference*, xvii–xviii.

⁴⁶⁹ The Institute understands that this aspect is intended to be examined in 2020 by the South Australian Law Reform Institute as part of its linked work with TLRI in this area.

⁴⁷⁰ Submission #14 (n 303).

3.2.28 In the context of this investigation of jurors’ use of social media and/or the internet, the Institute is of the view that this reinforces the fact that the focus in addressing this problem should, in the usual course, be on the conduct of jurors themselves and equipping jurors with the knowledge and understanding to manage their conduct when it comes to the use of social media and/or the internet, rather than focussing on the unrealistic and futile task of controlling social media and the internet at large.

3.3 ‘TIL’ (*‘today I learned’*) – Pre-empanelment information/training of jurors

Material available to prospective jurors before attending court

3.3.1 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.⁴⁷¹ Information about jury service is also available to prospective jurors in Tasmania on the internet.⁴⁷² This includes three videos entitled, *Coming to Court for Jury Duty – How it Works* (04:31),⁴⁷³ *Being Selected and Serving on a Jury* (08:09),⁴⁷⁴ and *Payments of Expenses* (02:15),⁴⁷⁵ 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*.⁴⁷⁶ Similar online materials for prospective jurors are available in other Australian jurisdictions.⁴⁷⁷

⁴⁷¹ Warner, Davis and Underwood (n 12) 352.

⁴⁷² ‘Jurors’, *The Supreme Court of Tasmania*, (10 December 2017) <<https://www.supremecourt.tas.gov.au/jurors/>>.

⁴⁷³ Ibid.

⁴⁷⁴ Ibid.

⁴⁷⁵ Ibid.

⁴⁷⁶ ‘Jurors’ (n 472).

⁴⁷⁷ 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>. 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>. 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*

3.3.2 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,⁴⁷⁸ and conducting their own research, including via the internet.⁴⁷⁹

3.3.3 In Queensland, both the *Jury Handbook*⁴⁸⁰ and the *Guide to Jury Deliberations*⁴⁸¹ 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.⁴⁸² It is also expressly mentioned in the New South Wales online materials, specifically in relation to ‘*information out*’.⁴⁸³ 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.⁴⁸⁴

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>.

⁴⁷⁸ ‘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.’

⁴⁷⁹ ‘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.’

⁴⁸⁰ ‘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.’

⁴⁸¹ ‘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).’

⁴⁸² See Appendix C.

⁴⁸³ Department of Justice (NSW), Courts and Tribunal Services, *Jury summons checklist* (2016) <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* (2016) <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’.

⁴⁸⁴ ‘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.’

First Day – Induction/Orientation

3.3.4 Most Australian jurisdictions provide introductory orientation material to jurors by way of a video on their first day of service.⁴⁸⁵ Most supplement this with written material, such as a booklet or a handbook.⁴⁸⁶

3.3.5 In South Australia, jurors’ induction takes up to four hours,⁴⁸⁷ this includes a video entitled, *Introduction to Jury Service* (26:25).⁴⁸⁸ 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. Sheriff’s officers have standing orders to distribute this booklet to jurors after empanelment only with the concurrence of the presiding judge.⁴⁸⁹ In Queensland, jurors view an eight-part video series.⁴⁹⁰

3.3.6 In some jurisdictions, this information is also presented orally.⁴⁹¹

3.3.7 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),⁴⁹² 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.⁴⁹³ This affects the consistency of juror induction and orientation across metropolitan and regional locations.

3.3.8 When enquiries were made of Tasmanian jurors, in 2007–2009,⁴⁹⁴ 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.⁴⁹⁵ Indeed, there is a dearth of information about the deliberation process in the juror induction materials across most jurisdictions.⁴⁹⁶ Jurors commented that they were ‘floundering along ... not guided enough ... There’s nobody in the court that you can ask

⁴⁸⁵ Warner, Davis and Underwood (n 12) 352.

⁴⁸⁶ Ibid 352.

⁴⁸⁷ Courts Administration Authority, ‘Jury Service Helpful Information’ <http://www.courts.sa.gov.au/ForJurors/Brochures/Jury_service.pdf>.

⁴⁸⁸ ‘Introduction to Jury Service’ *YouTube* <<https://www.youtube.com/watch?v=Okc8iEgF4Y&feature=youtu.be>>.

⁴⁸⁹ 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>.

⁴⁹⁰ Queensland Courts (n 477).

⁴⁹¹ Warner, Davis and Underwood (n 12) 352.

⁴⁹² 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>>.

⁴⁹³ ‘A Citizens Duty: Jury Service’ (n 378). Eg, courthouses in regional Queensland and Victoria.

⁴⁹⁴ It is to be noted that all online juror related material is dated December 2017.

⁴⁹⁵ Warner, Davis and Underwood (n 12) 342.

⁴⁹⁶ The exceptions being the *Juror’s Handbook* in Victoria and the *Guide to Jury Deliberations* in Queensland.

questions [of]’⁴⁹⁷ and ‘a little booklet would be helpful ... A bit more, yes, sort of discussion with the people, prospective jurors about how it works’.⁴⁹⁸ 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.⁴⁹⁹

3.3.9 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.⁵⁰⁰ 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.

‘QNA’ (*‘question and answer’*)

3.3.10 With respect to pre-empanelment training/information provided to jurors, respondents were invited to respond to the following questions:

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?

3.3.11 In relation to the current practices of pre-empanelment training/information for jurors in Tasmania, Jim Connolly, the Sheriff of Tasmania stated:

All jurors in Tasmania are shown an information video upon arrival and prior to the empanelment process ... those videos can be downloaded from the Supreme Court of Tasmania website at www.supremecourt.tas.gov.au/jurors. [Jurors are also] given a supplementary briefing by the Deputy Sheriff after watching the video...

[The video is] in relation to their responsibilities as a juror, which covers the subject of the use of social media, the internet and jurors not researching. It informs jurors not to watch, or read, news in relation to a case they may be empanelled on.⁵⁰¹

⁴⁹⁷ Warner, Davis and Underwood (n 12) 342.

⁴⁹⁸ Ibid 343.

⁴⁹⁹ Ibid 351–2.

⁵⁰⁰ Ibid 337.

⁵⁰¹ Submission #7 (n 260).

3.3.12 The Legal Aid Commission of Tasmania further added that the pre-empanelment video ‘sets out the requirements of jury service and the basic functions of the judge, jury and other participants in the trial process.’⁵⁰²

3.3.13 In relation to the timing at which juror training/information begins, Mr Connolly explained the difficulty, in his view, with providing jurors with too much information too early: ‘Any information provided to jurors prior to this video, may lead them to looking at the court list prior to attending court, thus allowing them time to research accused persons that may be up for trial.’⁵⁰³

3.3.14 Converse views in this respect were held by other respondents. For example, the Legal Aid Commission of Tasmania suggested that basic information could and should be made available ‘when they [jurors] receive call-up for jury duty’ and should ‘be made available online ... [with] links to relevant resources.’⁵⁰⁴

3.3.15 Mr Connolly stated that the topic of jurors’ use of social media and/or the internet ‘is covered in the jury DVD and ... briefing, although [he acknowledged that] a possible sterner approach during the briefing could also help’.⁵⁰⁵ More generally, Mr Connolly’s view about the current system of pre-empanelment juror training/information is that it is similarly open to improvement:

although I believe the current system is sufficient, we should always be on the look out for ways to improve, or streamline our information/training. Different jurisdictions throughout the world no doubt have similar issues and there is no doubt that possible lessons could be learnt from other jurisdictions. That would mean that some form of interaction, in regards to various other jurisdictions, take place to garner that information.⁵⁰⁶

3.3.16 The current pre-empanelment training/information provided to jurors in Tasmania has a focus on ‘*information in*’ scenarios. Daryl Coates SC, the Director of Public prosecutions (Tas), stated:

During induction jurors are told that they are only permitted to discuss the case with other jurors on the case, that they cannot do their own research, and that in reaching their verdict they must not use any information other than what they see or hear in the court.⁵⁰⁷

3.3.17 Similarly, the comments of the Legal Aid Commission regarding possible improvements to pre-empanelment training/information for jurors had a similar focus on ‘*information in*’ and, in particular, the well-known scenario of the *errant juror conducting online research*:

[jurors should be provided with] more information about their role ... this should include details of the nature of extraneous material on the internet or on social media they should not view, why they must not view that material, and the consequences for doing so.⁵⁰⁸

⁵⁰² Submission #12 (n 264) 9.

⁵⁰³ Submission #7 (n 260).

⁵⁰⁴ Submission #12 (n 264) 10.

⁵⁰⁵ Submission #7 (n 260).

⁵⁰⁶ Ibid.

⁵⁰⁷ Submission #5 (n 260) 2.

⁵⁰⁸ Submission #12 (n 264) 10.

3.3.18 Most respondents agreed that the pre-empanelment of jurors should not only address social media expressly, but also specifically cover both ‘*information in*’ and ‘*information out*’ scenarios and provide an explanation of the rationale behind the restrictions on social media use. Some respondents were of the view that pre-empanelment training/information should be ‘enhanced’ to the point of including an ‘explicit warning’ about social media and/or the internet.⁵⁰⁹

3.3.19 Interestingly, Mr Connolly, was of the view that when it comes to jurors’ use of social media and/or the internet, pre-empanelment training/information should not go into detail:

Extended discussion about information in and information out, as well as an explanation of the rationale behind the restrictions should not be dealt with pre-empanelment, rather this should be left to the presiding judge and directed at the empanelled jury.⁵¹⁰

3.3.20 Professor Jill Hunter submitted that the ‘guiding principle focus’ of pre-empanelment training/information for jurors should be on ‘guiding jurors to do a good job, not controlling them.’⁵¹¹ This would be achieved by placing an emphasis on ‘explaining a juror’s role on the trial [and] understanding concepts of fairness’, rather than merely providing a list of prohibited conduct without context.⁵¹²

3.3.21 Some respondents favoured the idea of further supplementing the video and oral briefing with written materials, for example, a brochure,⁵¹³ a handbook,⁵¹⁴ or other written material that contains a ‘list of instructions ... for all jury members to follow’.⁵¹⁵

3.3.22 Johnston et al recommended the possibility of more fundamental changes to the pre-empanelment training/information for jurors:

a brief pre-trial jury training module [should] be developed which would be administered in the courthouse once the jury has been empanelled. This could be offered ‘live’ by qualified court personnel ... or (less expensively) in the form of a one-hour online module where jurors would complete the package on desktop computers, laptops or tablet devices under the supervision of court personnel. Content would not be trial specific, but would cover the role of the juror, the tasks that each juror must perform, their statutory obligations, fundamental principles like ‘beyond reasonable doubt’ and strong guidelines on access to mainstream and social media as well as the internet both during the trial and after the trial. Examples of misconduct and the consequences would be given. The module would include a self-test of jurors’ understanding of these principles by seeking their responses to ‘rogue juror’ scenarios. Jurors who selected incorrect answers, would receive a response that advised them why their answer was incorrect, be informed of the correct answer and the rationale for the rule or principle they misunderstood and its importance. This training would supplement, rather than replace, the judge’s directions to the jury.⁵¹⁶

⁵⁰⁹ Ibid 11.

⁵¹⁰ Submission #7 (n 260).

⁵¹¹ Submission #9 (n 278).

⁵¹² Ibid.

⁵¹³ Ibid.

⁵¹⁴ Submission #11 (n 271) 3.

⁵¹⁵ Submission #12 (n 264) 17.

⁵¹⁶ Submission #10 (n 276) 7–8.

3.3.23 They also recommended the possibility of the changes to the timing of such training/information:

In our view ... training would be more usefully targeted to jurors who have been empanelled, rather than delivered to a jury pool pre-empanelment, as jurors who *know* they are going to sit on a trial, rather than merely aware of the *possibility* that they will do so, are much more likely to be receptive of the information.⁵¹⁷

3.3.24 Similarly, his Honour Justice Pearce made the following comments about pre-empanelment juror training/information in the context of the subsequent directions from the trial judge post empanelment:

The primary source of information ... should lie with the judge. Jurors listen harder once empanelled ...

Information is and can be conveyed to the entire jury panel before empanelment, but it seems to me that it means more when given in the context of a jury already empanelled.⁵¹⁸

3.3.25 The Institute notes that pre-empanelment training/information for jurors and post empanelment directions to jurors by the trial judge are not mutually exclusive. Regardless of whether one is (or may be) more effective than another, the Institute’s view is that they may both be made more effective if viewed as part of a single juror education strategy.

3.3.26 The Law Society of Tasmania suggested that any pre-recorded training/information material should be reviewed and updated as required, and that the current video used in Tasmania is overdue in this respect:

The pre-empanelment video played to the jury panel should be reviewed regularly to ensure it remains relevant and up to date with modern communication methods. It needs updating to re-enforce the message around social media posting, research and ‘street view’. The role of the juror is explained by the trial judge during opening remarks to the jury including warnings around the use of social media. The need to decide a case only on evidence and that the task is to determine whether a charge has been proved, rather than a fact finding search for the truth, needs clearer explanation at the earlier stages of the trial process.⁵¹⁹

3.3.27 The Institute agrees that the pre-empanelment training/information for jurors in Tasmania should be updated, namely, the content of the induction video and subsequent verbal briefing. Consideration should also be given to the development of written materials that supplement the video and briefing.

⁵¹⁷ Ibid 8.

⁵¹⁸ Submission #14 (n 303).

⁵¹⁹ Submission #11 (n 271) 3.

Recommendation 1

- (a) The current pre-empanelment training/information for jurors in Tasmania should be updated.
- (b) The pre-recorded induction video should:
 - (i) expressly address jurors' use of social media and other internet platforms;
 - (ii) specifically cover both '*information in*' and '*information out*' uses of social media/the internet (ie it should not be limited to the well-known '*information in*' scenario of the errant juror conducting online research).
 - (iii) provide an explanation of the rationale behind the restrictions in social media/ internet use. This should not be limited to the mention of general notions of 'fairness' or 'fair trial' or 'fairness to the accused'. Such concepts need to be explained in more accessible terms.
 - (iv) explain the consequences for the trial participants, for jurors and for the trial of jurors' inappropriate use of social media/the internet.
- (c) These matters should be reiterated in the course of the subsequent verbal briefing.
- (d) The pre-empanelment training/information materials should be reviewed periodically to ensure they remain current and relevant.
- (e) Jurors should be provided with written materials at the pre-empanelment stage that outline basic information that is contained in the video and briefing.

3.3.28 The Institute also agrees with the view expressed by Dr David Plater, Deputy Director of the South Australian Law Reform Institute, that the pre-empanelment training/information for jurors should not be viewed in isolation. Rather, it plays an important foundational role for subsequent information provided to empanelled jurors by the trial judge and can play an important role in jurors' understanding of such subsequent information:

There is a need for effective training and information for jurors. There should not just be reliance upon judicial directions ... The judge's initial warning [to empanelled jurors at the commencement of a trial] should not come as a sudden bolt out of the dark but should build on and develop what the juror has already heard and read before the trial ... the judge's warning or comment [about social media/internet] should confirm and supplement what jurors have already gained from initial resources and training.⁵²⁰

3.4 Juror oath/affirmation

3.4.1 In Tasmania, after all jurors are selected and empanelled, jurors must take an oath or make an affirmation.⁵²¹ 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

⁵²⁰ Submission #13 (n 280).

⁵²¹ *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.

and *[name of the accused]* in this trial and give a true verdict according to the evidence.’⁵²² To which a juror answers ‘I swear’ or ‘I affirm’.⁵²³ Near identical oath/affirmations exist in all Australian jurisdictions.⁵²⁴

3.4.2 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.

3.4.3 The oath/affirmation is likely to be viewed as less than an empty legal adage if it is, for example, taken individually by jurors⁵²⁵ in open court.⁵²⁶ 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.⁵²⁷

3.4.4 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.⁵²⁸ 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:⁵²⁹

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

⁵²² Ibid sch 3.

⁵²³ Ibid s 38(2).

⁵²⁴ 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>: ‘true verdict on the evidence that you hear in court’.

⁵²⁵ 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).

⁵²⁶ 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.

⁵²⁷ See, eg, Dunn (n 162) 8–9; Dunn (n 23) 9.

⁵²⁸ See Hannaford-Agor, Rottman and Waters (n 160) 8. See also Dunn (n 23) 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.

⁵²⁹ St Eve and Zuckerman (n 159) 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.’

anyone to communicate with me. I further agree that I will report any violations of the court's instructions immediately.

JUROR No. _____

3.4.5 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.⁵³⁰

3.4.6 In Tasmania, sworn jurors must also take a 'supplementary' oath/affirmation before leaving court on each occasion when the trial is adjourned.⁵³¹ 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.⁵³²

'QNA' ('question and answer')

3.4.7 Respondents were asked the following questions in relation to the current practices of jurors' oath/affirmation in Tasmania:

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?

3.4.8 As stated in the submission of Daryl Coates SC, the Director of Public Prosecutions (Tas), the juror oath/affirmation in Tasmania is 'a solemn process which ... jurors take very seriously'.⁵³³ In the Institute's view, this is assisted by the formality created by the oath/affirmation being taken

⁵³⁰ 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.

⁵³¹ *Juries Act 2003* (Tas) s 47(6).

⁵³² *Ibid* sch 5.

⁵³³ Submission #5 (n 260) 2.

in open court. However, William Boucaut QC, a Barrister from South Australia, explained that this is not the case in all Australian states:

In South Australia, the oath/affirmation of jurors are taken behind closed doors as part of the general induction process. The accused does not get to hear or see it. This is completely unsatisfactory.

The oath of a juror to properly try the issues in a case should be taken in open court in each individual case a juror is called upon to try. If nothing else, it gives the accused comfort in knowing there is a solemn oath/affirmation by each individual juror. If done in open court before the accused, counsel and judge the process actually takes on a more solemn flavour. This is the practice in Western Australia. I believe firmly that it should be the case in all states.⁵³⁴

3.4.9 Some respondents suggested that the juror oath/affirmation could further benefit by being administered to jurors individually. For example, Dr David Plater, Deputy Director of the South Australian Law Reform Institute, recommended that ‘a personalised and tailored oath is advisable. It may help jurors to appreciate the gravity of their role and why it is important to act only on the evidence presented at trial and refrain from impermissible research or online discussion’.⁵³⁵

3.4.10 There are, of course, obvious time constraints associated with 12 (or more) individual jurors having an individual oath/affirmation administered in turn in open court. Johnston et al submitted an alternate way to personalise the juror oath/affirmation whilst not incurring prohibitive time delays in the process. It draws upon their suggestion for pre-empanelment juror training/information to be digitalised:⁵³⁶

In our view, introducing greater formality into the process by which jurors take their oath or affirmation could contribute to addressing the problem of inappropriate use of social media or other Internet platforms by jurors during trials ... we believe that the juror oath/affirmation could be embedded in the proposed training module undertaken on a computer, Ipad or similar, by every juror. People are used to this technology – and, importantly, regularly tick the ‘I agree’ box – as part of daily life. Moreover, online signatures using a pen or even a finger are now commonplace in social life. As such, we suggest that using a computer interface is a logical way of both providing juror information and seeking their assurance.⁵³⁷

3.4.11 Other respondents shared the view that the juror oath/affirmation ought to include an express ‘promise’ regarding juror social media/internet use during trial. William Boucaut QC, a Barrister from Adelaide, believes:

the time has come to incorporate into the oath/affirmation a publicly made promise by each individual juror that they will not conduct their own enquiries whether it be on the internet or through any form of media. They should be called upon to acknowledge that if they breach this promise they will be held liable to severe penalties, possibly imprisonment.⁵³⁸

⁵³⁴ Submission #3 (n 262).

⁵³⁵ Submission #14 (n 280).

⁵³⁶ See [3.3.22] above.

⁵³⁷ Submission #10 (n 276) 8–9.

⁵³⁸ Submission #3 (n 262).

3.4.12 The Legal Aid Commission shared this view that the oath/affirmation at the start of the trial and at each adjournment ‘be amended to include a promise not to search for or read extraneous material on the internet or social media.’⁵³⁹

3.4.13 Jim Connolly, the Sheriff of Tasmania, agreed that ‘this is an option’ but believed ‘that the judges should make this decision.’⁵⁴⁰ He continued:

This could be achieved by amending the jurors’ oath/affirmation by inserting the words –

‘You and each of you, affirm that you will not discuss with another person, other than another member of this jury, any matter relating either directly or indirectly to the evidence in this trial, or the deliberation. Do you, and each of you, affirm that you will not seek any information from any source (including social media and the internet) about the issues in this trial, and will give a true verdict according only to the evidence given, or adduced on the trial? SAY I SWEAR/AFFIRM’.⁵⁴¹

3.4.14 Whilst Mr Connolly’s suggested amendment highlights the ease with which reference to social media/the internet may be incorporated into the existing oath/affirmation, it also demonstrates the difficulty in settling upon an appropriate expression in this respect. Once again, the above amendment focuses solely on ‘*information in*’ to the exclusion of ‘*information out*’ scenarios.

3.4.15 The Institute favours the option of retaining the current oath/affirmation content and merely providing jurors with greater context and understanding of its application.

3.4.16 His Honour Justice Pearce suggested that:

There is not a pressing need to amend the form of the oath or affirmation. However the procedure and directions given about it are of fundamental importance in preventing [juror misconduct of this kind] ...⁵⁴²

3.4.17 The Law Society of Tasmania suggested that the oath/affirmation be incorporated to a greater extent into the trial directions throughout the trial for greater effect:

The current oath/affirmation requires the juror to decide the case in *accordance with the evidence*. That already entails the need to only take into account evidence admitted on the trial. Referencing the oath[/affirmation] in directions to the jury at the commencement of the trial would be more effective as the judge can use other examples of extraneous materials and how they cause prejudice and place social media in the same context. The direction should be given periodically throughout the trial...⁵⁴³

3.4.18 In a similar vein, Johnston et al suggested that the requirement for the current oath/affirmation be ‘accompanied by some expansion or explanation that drew an explicit connection between the obligation to “give a true verdict *according to the evidence*” [our emphasis]

⁵³⁹ Submission #12 (n 264) 11.

⁵⁴⁰ Submission #7 (n 260).

⁵⁴¹ Ibid.

⁵⁴² Submission #14 (n 303).

⁵⁴³ Submission #11 (n 271) 4.

and the obligation to refrain from ... inappropriate use [of social media/internet].’⁵⁴⁴ However, as Johnston et al continued: ‘whether such reinforcement would be effective in addressing inappropriate use relating to *‘information out’* appears less likely.’⁵⁴⁵

3.4.19 It is possible that a similar approach can be adopted to the reference in the juror oath/affirmation to the obligation for jurors to ‘faithfully and impartially’ try the issues. Such an obligation may easily be connected with a juror’s obligation to be mindful of their *‘information out’* activity on social media/the internet such that it could give rise to actual or perceived bias, prejudice or predetermination.

3.4.20 Some respondents endorsed the idea 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, Johnston et al commented:

The use of the type of pro forma social media ‘status update’ provided by the judge to the jurors at the time of their swearing/affirmation ... [see [3.4.5] above], appears to be a useful, practical suggestion, that could both serve to reinforce the prohibition on any type of social media use related to the trial, and provide jurors with a ready-made tool to apply to avert contact from friends and contract, and to educate those individuals as well.⁵⁴⁶

3.4.21 Once again, respondents noted that any assistance that the juror oath/affirmation could provide when it comes to deterring jurors from inappropriately using social media and the internet during trial is likely to be largely determined by its supplementation with other measures such as pre-empanelment juror training/information and judicial directions to jurors during the course of the trial. In this respect, the Legal Aid Commission of Tasmania concluded: ‘such a promise by itself would not be effective, but should be supported by other measures.’⁵⁴⁷ Similarly, Professor Jill Hunter commented that it should be:

part of a broader repertoire. Turning the oath/affirmation into a process that is based on an educative approach to committing the juror to comply with their obligations.⁵⁴⁸

3.4.22 The Institute prefers this approach. The juror oath/affirmation already contains the necessary references to jurors acting ‘faithfully and impartially’ and ‘according to the evidence’, which, in theory, encompass the full range of possible *‘information in’* and *‘information out’* uses of social media and/or the internet. What is needed is for jurors to understand what acting ‘faithfully and impartially’ and ‘according to the evidence’ means in practice. These terms and concepts need to be explained and applied to real life situations. This is best achieved not by further convoluting the oath/affirmation itself, at the risk of further confusion, but by effectively incorporating the juror oath/affirmation into pre-empanelment juror training/information and judicial directions.

⁵⁴⁴ Submission #10 (n 276) 8–9.

⁵⁴⁵ Ibid.

⁵⁴⁶ Ibid.

⁵⁴⁷ Submission #12 (n 264) 16.

⁵⁴⁸ Submission #9 (n 278).

3.5 Judicial directions

3.5.1 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.

3.5.2 In Tasmania, there are no ‘model’ directions such as those that exist in New South Wales⁵⁴⁹ and Victoria,⁵⁵⁰ as well as in many US jurisdictions. (See Appendix D 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*⁵⁵¹).

3.5.3 The formulation of adequate directions for jurors on the topic of social media and the internet is not an easy task. By way of an example of judicial directions on this topic from a 2014 English case:

Next: use of the internet. There have been problems. Jurors have become detectives in their own court. And here is the sort of problem. Last week, at Kingston Crown Court, a seven-week trial had to be aborted because the jurors started on the Internet and Googling people, and the judge found out because the other jurors reported the errant juror. Seven weeks — I dread to think what it cost, in a country which will ill afford the waste of, say, half-a-million pounds. Now, this case won’t cost that money because it is a very short case, but you see the problem we have ... So don’t Google me, don’t Google the Advocates, don’t Google the Defendant, or any witness in the case because that would be wholly improper, because you would be going outside the observations of your oath or your affirmation (your solemn affirmation) to try the case according to the evidence ... We can all find out vast amounts of very helpful and totally useless information on the Internet. Don’t do it. By all means, do your Christmas shopping on the Internet. Book your holiday (if you are lucky enough to be going on one next year), but don’t use the Internet improperly. The message is loud. It is clear. I don’t propose to repeat it, but I expect you to behave responsibly because you are judges.⁵⁵²

3.5.4 This direction repeatedly mentions the internet, but completely omits any reference of social media specifically. It focuses on the more well-known ‘*information in*’ scenario of the *errant juror conducting online research*. There is no reference at all to ‘*information out*’ uses of social media and/or the internet, nor to the ways in which juror misconduct via social media/the internet may be the product of inadvertence alone. It does not contain any explanation of the reasons behind the restrictions of jurors’ online activity. The only mention as to consequences for juror misconduct of this kind is the public cost of an aborted trial, this is only part of the full consequences for the

⁵⁴⁹ Judicial Commission of New South Wales (n 489). See Appendix E for relevant excerpts.

⁵⁵⁰ 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 F for relevant excerpts.

⁵⁵¹ (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.

⁵⁵² *Attorney General v Davey* [2014] 1 Cr App R 1, [14].

trial participants and for the trial. Indeed, there is no reference to the potential consequences of juror misconduct of this kind on jurors themselves, nor jurors’ obligation to report misconduct. Whilst the delivery of the direction as a ‘one time only’ direction may be designed to elevate the importance of the content and to draw jurors’ attention to the content at that time, jurors need to be reminded about this topic, at the very least, ahead of deliberations (which, in some cases, may be weeks/months after the opening directions).

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

3.5.5 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.

3.5.6 In *Marshall and Richardson v Tasmania*, the jury directions specifically mentioned the internet and demonstrate a particular prohibited ‘*information in*’ example involving the internet platform, ie the use of *Google Maps* in a dangerous driving trial.⁵⁵³ However, there is no express mention of social media, nor do the directions address ‘*information out*’ uses of the internet/social media. Significantly, the directions did not expressly mention online legal reference material, which is the very material that was ultimately accessed by one or more jurors in that case.

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

3.5.8 The New South Wales model directions warn against ‘conducting any research using the internet’:

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.⁵⁵⁴

3.5.9 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. ...

⁵⁵³ Ibid. See also Appendix D.

⁵⁵⁴ Judicial Commission of New South Wales (n 489). See Appendix E: ‘[1-490] *Suggested (oral) directions for the opening of the trial following empanelment*’.

You must not discuss the case on social media sites, such as Facebook, Myspace, Twitter, blogs or anything else like that.⁵⁵⁵

3.5.10 It is accepted that jurors in a criminal trial are out of their comfort zone⁵⁵⁶ 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'.⁵⁵⁷ 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.⁵⁵⁸ 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'.⁵⁵⁹

3.5.11 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 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.'⁵⁶⁰

3.5.12 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.⁵⁶¹

⁵⁵⁵ Judicial College of Victoria (n 550). See Appendix F: '[1.11], Consolidated preliminary directions – No Outside Information, Warnings About Discussing the Case'.

⁵⁵⁶ Warner, Davis and Underwood (n 12) 340.

⁵⁵⁷ Bryan (n 48).

⁵⁵⁸ Grow (n 20). Juror dismissed.

⁵⁵⁹ Lash (n 47).

⁵⁶⁰ *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.'

⁵⁶¹ Hannaford-Agor, Rottman and Waters (n 160) 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 Justice Stephen Estcourt QC, 'Using Social Media in Civil Litigation' *Law Letter* (2016) Spring/Summer 10, 10.

Providing explanation

3.5.13 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.⁵⁶² The rationale being that some jurors simply may not understand. For example, a juror in Professor Jill Hunter’s study stated:

[t]his is not allowed by 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.⁵⁶³

3.5.14 It has also 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.⁵⁶⁴

3.5.15 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 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.

3.5.16 Further, the New South Wales model directions also address some of the underlying motives that have been identified for juror misconduct of this kind and explain 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

⁵⁶² See Dunn (n 23) 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 29) 36.

⁵⁶³ Hunter (n 29) 27.

⁵⁶⁴ See, eg, Artigliere, Barton and Hahn (n 530) 8.

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.⁵⁶⁵

3.5.17 The Victorian model directions provide 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.⁵⁶⁶

3.5.18 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, definitely not in the context of looking on the internet ... You would say someone is “in trouble” and the judge should have said that.’⁵⁶⁷

⁵⁶⁵ Judicial Commission of New South Wales (n 489). See Appendix E: ‘[1-490] Suggested (oral) directions for the opening of the trial following empanelment’.

⁵⁶⁶ Judicial College of Victoria (n 550). See Appendix F: ‘[1.11] Consolidated preliminary directions – No Outside Information’.

⁵⁶⁷ Matharu (n 69).

Personal consequences

3.5.19 Courts have also included directions which alert jurors to the personal consequences of misconduct of this kind (including mentioning any relevant offence provisions).⁵⁶⁸

3.5.20 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 were conveyed. However, there is no warning given routinely to jurors about the potential *personal* consequences for a juror that might engage in such misconduct.⁵⁶⁹

3.5.21 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’.⁵⁷⁰

3.5.22 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.⁵⁷¹

3.5.23 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*.⁵⁷² The incorporation of potential personal consequences would rectify

⁵⁶⁸ Ibid. See also Dunn (n 23): 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 29) 37, 41.

⁵⁶⁹ (2016) 264 A Crim R 448. See Appendix D.

⁵⁷⁰ Judicial Commission of New South Wales (n 489). See Appendix E: ‘[1-490] Suggested (oral) directions for the opening of the trial following empanelment’. See also Appendix G: ‘[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.

⁵⁷¹ Judicial College of Victoria (n 550). See Appendix F: ‘[1.11] Consolidated preliminary directions – Consequences of breaching instructions’.

⁵⁷² See *Attorney-General v Dallas* [2012] EWHC 156, 15.

any such confusion by making it abundantly apparent that compliance is not optional and, further, that there are consequences for non-compliance.

Obligation to report juror irregularities/misconduct

3.5.24 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).⁵⁷³

3.5.25 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.’⁵⁷⁴ There are further, more detailed directions about ‘Notifying the Judge About Irregularities’.

3.5.26 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.

⁵⁷³ 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.

⁵⁷⁴ Judicial College of Victoria (n 550). See Appendix F: ‘[1.11] Consolidated preliminary directions – No Outside Information’.

Repetition

3.5.27 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.⁵⁷⁵

Written directions

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

3.5.29 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 praised written directions in this context as being twice as effective as oral directions.⁵⁷⁶

3.5.30 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.⁵⁷⁷

3.5.31 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’.⁵⁷⁸

Knowledge/understanding on the part of the judiciary

3.5.32 A further factor that has been raised as potentially limiting the effectiveness of jury directions on social media and the internet is a deficiency in judges’ knowledge in these areas. 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.

3.5.33 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 Honourable Beverley McLachlin, ‘[i]n facing the reality of modern communications revolution, it is crucial that we understand the technology and

⁵⁷⁵ See Dunn (n 23) 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 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 160) 8.

⁵⁷⁶ See Thomas (n 157). See also Hunter (n 29) 44.

⁵⁷⁷ Judicial Commission of New South Wales (n 489). See Appendix E: ‘[1–470] Opening to the jury’. See also Appendix G: ‘[1–480] Written directions for the jury at the opening of the trial’.

⁵⁷⁸ *Attorney-General v Dallas* [2012] EWHC 156, 13.

how it is being used — something lawyers and judges, often castigated as Luddites, may not find easy.⁵⁷⁹

3.5.34 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).⁵⁸⁰

3.5.35 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 that you have from time to time, uh, twittered, whatever that is. Have you?’⁵⁸¹ 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+*⁵⁸² 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 wide-spread 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).⁵⁸³

3.5.36 It is easy to see how confusion may result on the part of jurors when judicial officers are drafting and delivering directions on social media and the internet without the 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.

‘QNA’ (‘question and answer’)

3.5.37 The Institute invited responses to the following questions:

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;

⁵⁷⁹ The 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>>.

⁵⁸⁰ Hannaford-Agor, Rottman and Waters (n 160) 5.

⁵⁸¹ *Dimas-Martinez v Arkansas* 2011 Ark 515 (Dec 8, 2011), 12.

⁵⁸² *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.

⁵⁸³ Dunn (n 162) 3.

- (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?

3.5.38 Respondents advised that at least some directions at the beginning of a trial advising jurors to refrain from conducting their own research is already ‘standard practice’.⁵⁸⁴

3.5.39 Jim Connolly, Sheriff of Tasmania, confirmed with respect to the current practice in Tasmania: ‘All jurors in Tasmania are ... briefed by trial judges in every trial, including the prohibition on use of social media or intranet to research the current case’.⁵⁸⁵ In some further detail, Daryl Coates SC, Director of Public Prosecutions (Tas), stated:

In the course of opening directions judges tell jurors that they must reach a verdict based on the evidence they see and hear in the court. Judges generally give examples of what would be impermissible, for example, looking up something on the internet, going to the scene of a crime, conducting an experiment, or speaking to friends and family about the trial. It is common for judges to tell jurors not to use social media to conduct their own enquiries about a case and to limit exposure to media reports generally and to disregard any such report.⁵⁸⁶

3.5.40 The Legal Aid Commission of Tasmania offered:

Though there are no ‘model directions’ to jurors about their role, trial judges [in Tasmania] routinely warn the jury that:

- The must base their decision solely on the evidence they hear in court, and
- The must not discuss with another person, other than a juror, anything about the evidence on trial or the jury’s deliberations on the trial.

Trial judges will also usually warn juries against looking on the internet or social media for information about the trial, although this is not a universal practice.⁵⁸⁷

3.5.41 His Honour Justice Pearce stated:

In Tasmania, in my experience, directions are given although not in ‘standard’ terms. In my view standard directions are not necessary, although most of the matters in ... [question

⁵⁸⁴ Submission #4 (n 274) 5.

⁵⁸⁵ Submission #7 (n 260).

⁵⁸⁶ Submission #5 (n 260) 3.

⁵⁸⁷ Submission #12 (n 264) 9.

eight] should be addressed. In my experience they already are, although not necessarily in the precise terms of the standard directions given elsewhere.⁵⁸⁸

3.5.42 Respondents in consultation generally agreed that directions to jurors could be improved. Daryl Coates SC, Director of Public Prosecutions (Tas), submitted:

having reviewed the extracts from the New South Wales Judicial Commission's 'Criminal Trial Courts Bench Book' and the Judicial College of Victoria's 'Criminal Charge Book' ... [included in Appendices E and F of this Report], I am of the view that [directions on the topic of social media and/or the internet] could be improved in Tasmania.

It would be beneficial for jurors to be advised orally and in writing of the need to reach their verdict solely on the evidence they have seen and heard in the trial, the prohibition against making their own enquiries (including specific reference to the internet and social media) and discussing the case with persons other than another member of the jury (either in person or in writing), the reasons for these requirements and warnings of consequences that may flow from non-compliance.⁵⁸⁹

3.5.43 However, interestingly, Mr Coates SC, was not of the view that the adoption of model directions is the answer:

there are no standard published judicial directions in this State. Thus, I am of the view that it would be inappropriate to have a standard required direction to jurors regarding the use of social media and the internet... To do so, in the absence of other standardised directions, there is no principled reason why this direction should be treated differently to others such as the presumption innocence or standard of proof.

This material could, however, be provided to prospective jurors as part of the general induction given to the jury panel prior to empanelment.⁵⁹⁰

3.5.44 The majority of respondents did favour model directions which addressed social media and/or internet use by jurors being adopted in Tasmania. The Sheriff of Tasmania observed that 'the standard directions of New South Wales or Victoria appear to be a useful, comprehensive guide', but ultimately, whether or not model directions were adopted in Tasmania should be 'a matter for the judges to decide'.⁵⁹¹ It was suggested that any set of model directions in Tasmania should be developed by the Tasmanian Supreme Court in consultation with the legal profession.⁵⁹²

3.5.45 The Legal Aid Commission submitted:

The adoption of model directions, and for those model directions to be made freely available to the public, would assist in addressing this issue.

Despite the lack of a standard set of directions in Tasmania trial counsel are expected to know what directions are needed ahead of time. In practice some counsel use model directions from other Australian jurisdictions, while others rely on their own formulation.

⁵⁸⁸ Submission #14 (n 303).

⁵⁸⁹ Submission #5 (n 260) 3.

⁵⁹⁰ Ibid 3.

⁵⁹¹ Submission #7 (n 260).

⁵⁹² Submission #12 (n 264) 22.

This leads to unnecessary and undesirable inconsistency and may prolong matters where there is a dispute about the wording to be applied ...

Having Tasmanian model directions will likely improve the quality of advocacy and the ability of counsel to accurately make submissions about deficient directions should the need arise ...

The model directions contained in the NSW and Victorian Judicial bench books ... provide good examples of the clearer directions with respect to social media use by jurors. We support the adoption of updated and improved model directions by the Tasmanian Supreme Court.⁵⁹³

3.5.46 Some respondents commented that the adoption of model directions would be a mere formality in many respects as they are ‘essentially already in use’, insofar as judges and counsel in Tasmania routinely refer to such resources on an informal basis.⁵⁹⁴

3.5.47 Model directions which standardise directions on social media and the internet would eliminate variation in directions and a lack of consistency which otherwise necessarily occurs. The Law Society of Tasmania confirms, ‘the Tasmania Supreme Court already gives similar directions but there is no uniformity between the judges. The Society sees the benefit in uniform or standard set of directions which can be added to but not detracted from.’⁵⁹⁵ The Institute agrees with this view.

3.5.48 In the course of Professor Jill Hunter’s juror study, observations were also made in respect of the directions given to jurors on the topic of social media and/or the internet. Somewhat unsurprisingly, the ‘depth and breadth of judicial directions and accompanying explanation varied enormously’ across the trials surveyed.⁵⁹⁶ Relevantly, there was also a marked difference between the directions given in the earlier trials as opposed to the later trials, following revisions to the model directions on social media/the internet. The later trials ‘explained in great detail the reasons for the prohibition ... the earlier trials contained far greater diversity of detail across a spectrum, ranging from top drawer instructions to one trial judge who provided no real explanation or reason to obey the instructions other than mentioning that juror misconduct in the past has resulted in “big problems”’.⁵⁹⁷

3.5.49 In line with New South Wales and Victoria, respondents agreed that model directions should include specific mention social media in addition to the internet generally.⁵⁹⁸ Only one respondent opined that directions that specifically mention social media were ‘not a good idea’. The rationale being that it ‘makes them think about what’s out there’;⁵⁹⁹ it might ‘never [have]

⁵⁹³ Ibid 9–10.

⁵⁹⁴ Submission #21 (n 267).

⁵⁹⁵ Submission #11 (n 271) 4.

⁵⁹⁶ Hunter (n 29) 32.

⁵⁹⁷ Ibid 33–4.

⁵⁹⁸ Submission #12 (n 264) 15; Submission #6 (n 449) 2; Submission #10 (n 276) 9; Submission #11 (n 271) 4; Submission #13 (n 280).

⁵⁹⁹ Submission #19 (n 358).

dawned on them that [they] could [use social media in these ways] until they are told about it ... told not to do it, that's what makes them do it.'⁶⁰⁰

3.5.50 Respondents generally accepted that model directions on this topic should include some sort of elaboration on prohibited internet and social media platforms as well as prohibited activity, namely, because 'often [the directions] don't go further than Facebook.'⁶⁰¹ Moreover, as identified by the Legal Aid Commission of Tasmania, 'a blanket ban on social media or internet use is unfeasible and is likely to be ignored'.⁶⁰² However, any attempt at a comprehensive list of these would be problematic because 'these change with such frequency it is impossible to remain current'.⁶⁰³ Indeed, as highlighted by the Law Society of Tasmania, 'the uniform directions [see [3.5.8] and [3.5.9] above] reveal how quickly out of step the courts can become when referencing social media given that MySpace is a phenomenon of the early 2000's that most people under 25 have never heard of.'⁶⁰⁴ His Honour Justice Pearce said he references 'the usual ones – Google, Facebook, Twitter, Instagram ...'.⁶⁰⁵

3.5.51 Respondents also agreed that any model directions needed to include explanations for the internet/social media restrictions. His Honour Justice Pearce described this as 'the most important direction'.⁶⁰⁶ Jim Connolly, Sheriff of Tasmania, stated 'compliance with directions about social media etc is probably more likely if the rationale is explained. A carrot rather than a stick!'⁶⁰⁷ Similarly, Dr David Plater, Deputy Director of the South Australian Law Reform Institute, reasoned:

The premise must be to support and strengthen the role and effectiveness of judicial directions and to treat jurors in an inclusive manner as mature adults. If you treat someone in a patronising manner as an errant child, they will respond and react accordingly...⁶⁰⁸

3.5.52 Professor Jill Hunter submitted:

In my view the problem is jurors not understanding their task and why limitations apply. You will never completely stop jurors googling, but if they understand why this is unnecessary and why it is dangerous, it may be possible to limit it, and also to limit its impact. The question should be about the type of directions and the focus of the explanations given to jurors.⁶⁰⁹

3.5.53 In terms of what form that explanation might take, the Legal Aid Commission of Tasmania suggested that the directions about social media and the internet:

⁶⁰⁰ Ibid.

⁶⁰¹ Ibid.

⁶⁰² Submission #12 (n 264) 16.

⁶⁰³ Submission #11 (n 271) 4.

⁶⁰⁴ Ibid.

⁶⁰⁵ Submission #14(n 303).

⁶⁰⁶ Ibid.

⁶⁰⁷ Submission #7 (n 260).

⁶⁰⁸ Submission #13 (n 280).

⁶⁰⁹ Submission #9 (n 278).

are couched in terms of ‘fairness’, that it would be unfair for the jury to consider material that is not in evidence to the court because it may contain material that could be adequately addressed by the parties, and comes with a warning that such material may be unreliable ...

[And include] a direct warning that a failure to abide by these directions may result in a mistrial, resulting in delay for the victims, the accused and their families and great expense to the community⁶¹⁰

3.5.54 Dr David Plater, Deputy Director of the South Australian Law Reform Institute, offered:

One suggestion is the practice of the former South Australian Chief Judge to ... explain and personalise the usual warning [regarding social media/the internet]; namely how would you feel if you ended up in Risdon Prison on the basis of prejudicial material found from outside court by a juror and you had no inkling of this. The Chief Judge also spoke of why the notion of a fair trial is so vital and what it involves ... he [explained that] he did not expect juries to stop using the internet during a trial but what was precluded was impermissible research, commentary.⁶¹¹

3.5.55 The majority of respondents were also agreed that any model directions on the topic of social media/internet should include warnings about personal consequences for jurors.⁶¹² His Honour Justice Pearce confirmed that, currently, warnings about personal consequences for jurors are often omitted, ‘[a]lthough warnings are commonly given about [other consequences such as] unfairness and the potential derailment of the trial and the consequences of that for the parties and the witnesses and the public.’⁶¹³ His Honour also commented that warnings such as this need to be tempered or, in his view, omitted from opening directions entirely, given that they may be counterproductive to judge/jury rapport building at this early stage:

Part of the role of a judge is to assist and guide the jury through the trial process, and to earn the jury’s respect. I don’t think that process is assisted by heavy handed threats of sanction for improper conduct, especially as a matter of course at the start of a trial. A proper explanation that a trial may have to be aborted if jurors misconduct themselves is sufficient.⁶¹⁴

3.5.56 In the Institute’s view, his Honour’s comments confirm the need for a wholistic approach to juror education. There would be no need for trial judges to be heavy handed in the content and/or delivery of their trial directions if they are merely confirming and supplementing information that jurors have already obtained through pre-empanelment training/information.

3.5.57 There was also consensus on model directions being repeated to jurors.⁶¹⁵ His Honour Justice Pearce expressed the view that directions should be repeated to jurors only ‘if it appears necessary as the trial proceeds.’⁶¹⁶ Other respondents thought this ought to be done by the trial

⁶¹⁰ Submission #12 (n 264) 15.

⁶¹¹ Submission #13 (n 280).

⁶¹² Submission #10 (n 276) 10; Submission #11 (n 271) 4; Submission #13 (n 280).

⁶¹³ Submission #14 (n 303).

⁶¹⁴ Ibid.

⁶¹⁵ Submission #11 (n 271) 4; submission #13 (n 280).

⁶¹⁶ Submission #14 (n 303).

judge at the very least at the start of each trial and during summing up,⁶¹⁷ others thought it ought to be done as often as on a daily basis.⁶¹⁸ In this regard, Johnston et al suggested that court staff could be of assistance in this respect: ‘jury liaison personnel should remind jurors on a daily basis, using a scripted message, that digital and social media use are forbidden.’⁶¹⁹

3.5.58 Respondents also favoured model directions including reminders to jurors of their obligation to report irregularities.⁶²⁰ Whilst his Honour Justice Pearce stated, ‘Yes. This is already done’,⁶²¹ the Law Society of Tasmania informed the Institute that ‘[j]udges do not give any direction of this nature in Tasmania currently.’⁶²² In the Institute’s view, this apparent difference in experience supports the proposal that, if there is inconsistency in what currently happens, it might be remedied by the introduction of model directions.

3.5.59 Some form of written directions for jurors was recommended by almost all respondents. Notably, his Honour Justice Pearce suggested that written directions should ‘not necessarily’⁶²³ be provided to jurors as a matter of course. Suggestions in this respect ranged from written directions which merely reproduce and thereby ‘reinforce’ oral directions, or written directions in addition to oral directions.⁶²⁴ Johnston et al recommended that any

written materials incorporating jury directions should incorporate simple diagrams to indicate the limits on the use of social media using smart phones, iPads, and other electronic devices; written in plain language and include reference to specific types of commonly used social media; and Jurors should have jury directions with them throughout the trial.’⁶²⁵

3.5.60 Other suggestions for the form/content of written directions for jurors on the topic of social media/internet included a written memorandum provided to jurors prior to final addresses, which includes model directions on social media and the internet.⁶²⁶ Respondents also suggested that ‘consideration be given to adopting the “question trial” method of summing up to maximise the likelihood of the jury understanding the directions given.’⁶²⁷ Other pertinent observations from respondents in this respect included: it ‘depends how long’ the written materials are, and ‘not all jurors can read’, might it be just as effective if the directions were ‘just repeated orally’?⁶²⁸

3.5.61 Respondents’ comments on written materials for jurors also extended to written signs, posters and other visual aids in the jury room and/or court precinct⁶²⁹ ‘signage or ... a document

⁶¹⁷ Submission #12 (n 264) 11.

⁶¹⁸ Submission #10 (n 276) 10.

⁶¹⁹ Ibid.

⁶²⁰ Submission #13 (n 280); submission #12 (n 264) 15.

⁶²¹ Submission #14 (n 303).

⁶²² Submission #11 (n 271) 4.

⁶²³ Submission #14 (n 303).

⁶²⁴ Submission #13 (n 280); submission #6 (n 449) 2.

⁶²⁵ Submission #10 (n 276) 9–10.

⁶²⁶ Submission #12 (n 264) 11.

⁶²⁷ Ibid.

⁶²⁸ Submission #21 (n 267).

⁶²⁹ Submission #6 (n 449) 3.

that addresses FAQ for jurors in the jury room’;⁶³⁰ ‘Jury rooms should be equipped with signage that explicitly prohibits digital and social media use in words and pictures’.⁶³¹

3.5.62 On the topic of judicial directions, respondents were also asked about the role of the judiciary’s underlying knowledge and understanding of the internet and social media. Johnston et al submitted:

judges delivering these instructions should be equipped with sufficient knowledge about the Internet and social media to do so in a way that accords with jurors’ real life experience. In our submission training on this aspect should be freely available through professional development programs run by the National Judicial College of Australia and the equivalent state bodies (where they exist). All judges who hear criminal trials should be encouraged to undertake such training, perhaps delivered through a convenient online module, which should be regularly updated to keep pace with technological developments. As two of us recently observed in the Judicial Officer’s Bulletin:

there is also the need to appropriately resource and support judges to be digitally media literate, as consumers and analysts but also potentially as producers of social media. This requires professional training and development — to understand and apply the critical media literacies that ACMA [the Australian Communication and Media Authority] has identified across any and all professional and personal social media use. It will also require the ongoing review and updating of ethical guidelines.⁶³²

3.5.63 The Law Society of Tasmania was of the view that ‘the judiciary in Tasmania is more than knowledgeable on this issue.’⁶³³ The Society was also of the view that such knowledge/understanding of social media/internet was nevertheless not relevant to the provision of judicial directions on these topics: ‘The court’s role is to ensure a fair trial and it is the control of this activity rather than the specific mechanism of the activity that is relevant to that task.’⁶³⁴ Jim Connolly, Sheriff of Tasmania, contributed: ‘The professional development needs of the judiciary are always a matter for the judges themselves to decide. They should also be aware of improvements in technology’.⁶³⁵ His Honour Justice Pearce commented:

Further education in such matters is never a bad thing. Although most judicial officers these days have a reasonable understanding of the internet and social media, sometimes there are ways in which social media is used which might be worth further explanation. The nature of these things is that they quickly evolve.⁶³⁶

3.5.64 Some respondents highlighted the fact that model directions are not without limitations. Dr Braun commented:

⁶³⁰ Hunter (n 29) 44 (Appendix A).

⁶³¹ Submission #10 (n 276) 10.

⁶³² Ibid.

⁶³³ Submission #11 (n 271) 4.

⁶³⁴ Ibid.

⁶³⁵ Submission #7 (n 260).

⁶³⁶ Submission #14 (n 303).

The impact of social networking directions on jurors is ultimately closely entwined with jurors' underlying motives for the use of social networks while sitting and deliberating. Where social media has become a lifestyle or even an addiction, instructions to refrain from accessing networking sites may have very little impact on some jurors in practice. In this context, it is important to note that although a number of US states have in place specific social media jury directions, episodes of jurors' social media use continue to be reported in the media. This suggests that incidences continue despite jury instructions.

In light of the above, introducing social media jury directions in Tasmania may not have the potential to curtail jurors' social media use during criminal trials and may remain a fruitless exercise.⁶³⁷

3.5.65 Johnston et al commented:

it is important to note that instances of juror misconduct in relation to the use of the Internet and social media have continued to occur, despite the introduction of more explicit instructions on these topics that have been introduced in a number of Australian jurisdictions, again highlighting the point that improved judicial instructions on their own are unlikely to provide a complete answer to this problem.

... we believe that there may be room to improve directions and to position them among a suite of measures that form an overall strategy to address the problem of juror misconduct is a preferable strategy.⁶³⁸

3.5.66 In line with the overwhelming majority of respondents, the Institute recognises the benefit of model directions on the topic of jurors' use of social media and other internet platforms. Such directions would support and strengthen the effect of the present judicial directions in Tasmania on this issue.

Recommendation 2

- (a) A set of 'standard'/'model' directions to jurors, similar to those used in New South Wales and Victoria, regarding the internet and social media should be adopted in Tasmania.
- (b) They should include:
 - (i) Specific mention of social media;
 - (ii) Examples of prohibited internet and social media platforms, which surpasses simply mentioning *Facebook*;
 - (iii) Examples of prohibited activity, which include both '*information in*' and '*information out*' uses of social media and the internet;
 - (iv) Explanations for the internet/social media restrictions;
 - (v) Warnings about personal consequences for juror misconduct;

⁶³⁷ Submission #4 (n 274) 6.

⁶³⁸ Submission #10 (n 276) 9.

- (vi) Reminders to jurors of their obligation to report irregularities and a step-by-step guide of the reporting process;
- (vii) explain the consequences for the trial participants, for jurors and for the trial of jurors’ inappropriate use of social media/the internet.
- (c) The above information should be reproduced in written form for jurors to refer to during the course of the trial, both as a written document given to jurors and posters/signage in the court precinct and jury room.
- (d) The oral directions should to be given at the start of the trial and repeated in truncated form before lengthy adjournments and deliberations.
- (e) The model directions should to be reviewed periodically to ensure that the particular social media/internet platforms and activities/uses that are included in the directions by way of examples remain current and relevant.

3.6 ‘Virtual sequestration’/‘E-sequestration’

3.6.1 Whilst the traditional sequestration of juries is essentially a ‘past practice’⁶³⁹ in Australia, a new form of ‘virtual sequestration’⁶⁴⁰ or ‘e-sequestration’⁶⁴¹ is widely adopted as a preventative measure to control jurors’ use of the internet and social media.

3.6.2 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.⁶⁴²

3.6.3 The same information is included in the *Being selected and serving on a jury* video available online.⁶⁴³

⁶³⁹ *John Fairfax Publications Pty Ltd v District Court of New South Wales* (2004) 61 NSWLR 344, [65].

⁶⁴⁰ Braun (n 19) 1635.

⁶⁴¹ Ibid 1658.

⁶⁴² ‘First Day of Trial’, *The Supreme Court of Tasmania*, (18 December 2017) <<https://www.supremecourt.tas.gov.au/jurors/first-day-trial/>>.

⁶⁴³ ‘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.’

3.6.4 Similar practices are adopted in the Australian Capital Territory,⁶⁴⁴ New South Wales,⁶⁴⁵ Victoria,⁶⁴⁶ and Queensland,⁶⁴⁷ as well as in New Zealand,⁶⁴⁸ and many US states.⁶⁴⁹

3.6.5 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.⁶⁵⁰

3.6.6 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'⁶⁵¹ which may foster jurors' frustrations and alienation from the trial process.

'QNA' ('question and answer')

3.6.7 Respondents were asked the following questions regarding the practice of taking mobile phones and other electronic devices away from jurors during the trial and deliberations:

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?

⁶⁴⁴ 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> 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.'

⁶⁴⁵ 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> 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 483): 'mobile phones may not be used in the courtroom'.

⁶⁴⁶ 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 378): '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 ...'

⁶⁴⁷ Queensland Courts, *Juror's Handbook* <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.'

⁶⁴⁸ Ministry of Justice (NZ) (n 573) 9.

⁶⁴⁹ See, eg, Brayer (n 249) 37–39. See also Dunn (n 23) 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.

⁶⁵⁰ See Dunn (n 23) 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.

⁶⁵¹ Brayer (n 249) 48.

3.6.8 Jim Connolly, Sheriff of Tasmania provided the following insight into the current practices in Tasmania in this respect:

while attending court, jurors are required to surrender their electronic devices by which they could access social media or the internet (the one exception is smart watches, which are difficult to identify). ... Their use of mobile telephone and tablets is limited whilst in the Court precinct. Some jurors are required to surrender phones, tablets and laptops prior to entry into the Jury Room, whereas other jurors are required to surrender their electronic devices at a later time prior to court starting. This difference is only due to logistics. Jurors are allowed to have their electronic equipment back during extended breaks.⁶⁵²

3.6.9 The Legal Aid Commission of Tasmania adds:

Mobile telephones and other internet enabled devices are routinely taken from jurors during the hearing of evidence and during jury deliberations. The devices are returned to the jurors during lunch breaks and at the end of each day.⁶⁵³

3.6.10 Of those respondents who addressed this topic, the majority commented upon the obvious limitations of this practice as a preventative measure to control jurors’ use of the internet and social media.

3.6.11 His Honour Justice Pearce commented:

It is unrealistic to suggest that access to social media and the internet can be entirely prevented during a trial. Phones can be removed during court hours but not otherwise. There will always be ample access when court is not sitting — overnight or at weekends. The only feasible control is by direction to jurors ... [however] ... I do not suggest that the practice of taking phones away during the trial and deliberations should change, but the reality is that the risk is much greater that individual jurors will access information when away from court overnight or at weekends, and that the use of phones to access the internet and social media during deliberations while the jury is together as a group is unlikely.⁶⁵⁴

3.6.12 Dr Kerstin Braun submitted:

E-sequestration does not appear to fully address the phenomenon. While taking away electronic devices during the trial may prevent jurors from accessing social media during certain phases of the proceedings nothing prevents individual jurors from using the internet and social media when they return home (unless proceedings are one day only).

E-sequestration may therefore not be very effective in curtailing jurors’ social media and internet use and few benefits may be derived from the continuation of the practice.⁶⁵⁵

3.6.13 Johnston et al go further and suggest that, in addition to the limitations of the effectiveness of this measure, it may also be counterproductive in other ways:

⁶⁵² Submission #7 (n 260).

⁶⁵³ Submission #12 (n 264) 8–9.

⁶⁵⁴ Submission #14 (n 303).

⁶⁵⁵ Submission #4 (n 274) 6.

In our view, the obvious limitation of this is that it can only deter impermissible use while jurors are actually on the court premises (although it might add value by reinforcing the prohibition against use of social media and the Internet in jurors' mind).

We think that such a prohibition could upset or unsettle jurors who are used to having tactile connection with their phones.

It is our view that as mobile phones become more and more embedded in people's lives, the idea of taking them away from jurors might be considered inflammatory (even undemocratic). It might be sufficient to instead impose a requirement that they are turned off throughout proceedings, have the bailiff check they are turned off, and provide an explanation for this at various times of the day — at the start of the day, prior to lunch, and following lunch. Coupled with the knowledge that many of the reported instances of juror misconduct occur off the premises and out of sitting hours, the idea of what would be seen as 'confiscation' during the court process might do more harm than good and a 'turn off your mobile phone' message — as required to all people on airline flights and in movies — might be more acceptable to most jurors.⁶⁵⁶

3.6.14 Dr David Plater, Deputy Director of the South Australian Law Reform Institute, has a similarly dim view of this practice:

the practice of taking mobile phones from jurors ... is reflective of a wider paternalistic attitude to juries. Juries need to be treated as mature individuals and not distrusted and play an active role in the trial. It is also a simplistic remedy ... at 5:01pm the jurors are given their mobile phones back ... the suggestion is luddite and ineffectual.⁶⁵⁷

3.6.15 The Legal Aid Commission of Tasmania recognised that, at the very least, this practice is effective in limiting the distractions available to jurors during the trial and reducing the risk of misconduct of this kind during deliberations:

This is not an effective strategy ... jurors intent on doing so will do so during those times when their mobile phones are returned to them — be that at lunchtime or at the end of the day. That said, removing mobile phones during the hearing of the evidence remains an important step in ensuring the jury members are focussed on the evidence and not distracted by material coming in on their mobile phones. It goes some way to making it clear that jurors need to carefully consider whether using their mobile phone is permissible. It is also important to keep mobile phones and devices away from the jury during deliberations so as to ensure the integrity of the decision-making process.⁶⁵⁸

3.6.16 Other respondents also recognised the fact that it serves other purposes.

3.6.17 The Law Society of Tasmania was of the view that: 'It is very effective'.⁶⁵⁹ Jim Connolly, Sheriff of Tasmania, responded:

we believe that this practice is essential to assure the general public that they can have confidence that the judicial system is fair. We believe this also relieves the juror of the temptation to utilise their devices whilst in court, or in the jury room deliberating. However,

⁶⁵⁶ Submission #10 (n 276) 10–11.

⁶⁵⁷ Submission #13 (n 280).

⁶⁵⁸ Submission #12 (n 264) 18.

⁶⁵⁹ Submission #11 (n 271) 5.

the Court has no control over jurors’ use of social media, or the internet when they are not attending court.⁶⁶⁰

3.6.18 Daryl Coates SC, Director of Public Prosecutions (Tas), stated:

the practice of taking jurors’ mobile phones and electronic devices during trial and deliberations should continue. It ensures jurors are not distracted and subject to influences outside the courtroom during these times. It is not practicable nor desirable to restrict jurors’ access to these devices outside court sitting times.⁶⁶¹

3.6.19 The Law Society of Tasmania simply concluded that the ‘benefit far outweighs the loss of autonomy that comes from it’⁶⁶² and therefore the practice should ‘most definitely’ continue.⁶⁶³

3.6.20 Professor Jill Hunter described the fact that she ‘struggles with’ this measure. She commented:

It is obviously stopping use of devices during trial and deliberations, but not when jurors are away from the court precinct ... [It should continue] but one needs to reflect on how it is explained to jurors. It is inadequate without reasoned explanation.⁶⁶⁴

3.6.21 The Australian Lawyers Alliance was alone in recommending the rather extreme response of replacing ‘*virtual sequestration*’/ ‘*e-sequestration*’ with actual sequestration:

The Australian Lawyers Alliance submits that the practice of taking mobile telephone and electronic devices from jurors should be strengthened by sequestering jurors during the trial ... the ALA concedes that this measure is among the more extreme options available to law reformers.⁶⁶⁵

In Tasmania, measures have been put in place to mitigate against the use of extraneous information ... Nevertheless, we believe that more can be done, particularly as jurors are not sequestered for the length of the trial and therefore have access to the internet and social media overnight.⁶⁶⁶

3.6.22 The Institute does not 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. The Institute does, however, recognise the utility of taking phones and other electronic devices away from jurors during the trial and deliberations. If anything, it minimises the distraction of jurors having their electronic devices at their disposal. This dual purpose of this practice should be explained to jurors so that they are able to understand the utility of this measure. The Institute is of the view that this practice should continue.

⁶⁶⁰ Submission #7 (n 260).

⁶⁶¹ Submission #5 (n 260) 3. See also submission #11 (n 271) 5.

⁶⁶² Submission #11 (n 271) 5.

⁶⁶³ Submission #7 (n 260). See also Submission #11 (n 271) 5.

⁶⁶⁴ Submission #9 (n 278).

⁶⁶⁵ Submission #1 (n 273) 5.

⁶⁶⁶ Submission #6 (n 449) 2.

Recommendation 3

The practice of taking mobile phones and other electronic devices away from jurors during the trial and deliberations should continue. Whilst its effectiveness in preventing jurors using social media and the internet is limited, it otherwise minimises the distraction of jurors from having their electronic devices at their disposal.

The dual purpose of this measure should be explained to jurors.

3.7 Faith in the jury system

3.7.1 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.

3.7.2 The criminal justice system assumes the efficacy of juries.⁶⁶⁷ In the absence of any evidence to the contrary,⁶⁶⁸ 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 ...’⁶⁶⁹ Such is ‘the experience and wisdom of the law ... that, almost universally, jurors approach their task conscientiously’⁶⁷⁰ and are ‘faithful to their duty’.⁶⁷¹ 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.⁶⁷² Though this proposition is often questioned by commentators, the jury system ultimately depends on this premise.⁶⁷³

‘TBH’ (‘to be honest’)

3.7.3 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.

3.7.4 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

⁶⁶⁷ *Dupas v The Queen* (2010) 241 CLR 237, [29].

⁶⁶⁸ *R v Fuller-Love* [2007] EWCA Crim 3414, [16].

⁶⁶⁹ *R v Yuill* (1993) 69 A Crim R 450, 453–4 (Kirby ACJ).

⁶⁷⁰ *Dupas v The Queen* (2010) 241 CLR 237, [26].

⁶⁷¹ *Gilbert v The Queen* (2000) 201 CLR 414, 440.

⁶⁷² *Dupas v The Queen* (2010) 241 CLR 237, [28].

⁶⁷³ *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.’

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.⁶⁷⁴

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

Going ‘*phishing*’ – Questioning of jurors

3.7.6 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,⁶⁷⁵ 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.⁶⁷⁶ 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 basis made out on a *prima facie* footing to anticipate the probability of prejudice on the part of the individual juror...⁶⁷⁷

[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.⁶⁷⁸

⁶⁷⁴ Whitcourne (n 93). 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).

⁶⁷⁵ 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).

⁶⁷⁶ *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.’

⁶⁷⁷ *Ibid* 98–99 (Mason CJ and Toohey J).

⁶⁷⁸ *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, ‘Voor 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).

3.7.7 There is, however, a rarely invoked power available in Queensland to make inquiries of jurors ahead of their selection if ‘special reasons’ exist.⁶⁷⁹ 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]*⁶⁸⁰ (‘*Dr Death*’) and in the subsequent high-profile trial of *R v Bayden-Clay*⁶⁸¹ in 2014 (although, there have been other unsuccessful applications).⁶⁸² There is no equivalent provision in any other Australian jurisdiction.⁶⁸³

3.7.8 Regardless of any express power to question jurors, jurisdictions such as New Zealand have, more recently, adopted a ‘more interventionist approach to jury empanelling.’⁶⁸⁴ 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.⁶⁸⁵

3.7.9 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.⁶⁸⁶

‘QNA’ (‘question and answer’)

3.7.10 On this topic, respondents were invited to respond to the following questions:

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?

⁶⁷⁹ *Jury Act 1995* (Qld) s 47(1).

⁶⁸⁰ (2013) 2 Qd R 544.

⁶⁸¹ [2014] QCS 154.

⁶⁸² See *R v D’Arcy* [2005] QCA 292; *R v Amundsen* [2016] QCA 177.

⁶⁸³ 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.

⁶⁸⁴ New Zealand Law Commission (n 165) 39.

⁶⁸⁵ *Iti v R* [2012] NZCA 492, [55].

⁶⁸⁶ Reese (n 88).

3.7.11 Daryl Coates SC, Director of Public Prosecutions (Tas) submitted:

In this State prior to empanelment it is the practice for the judge to have the nature of the case and a list of the witnesses who will give evidence on the trial to be stated to the jury. Following that, jurors are asked if there is anything about the matter that would prevent them from impartially trying the issues on the trial. Jurors who have some knowledge of the case, witnesses or for some other reason feel they are unable to be impartial are then discharged (unless there is a reason not to do so). ...

Juror assurances regarding their impartiality and compliance with judicial directions must be accepted at face value. There is no other practical or meaningful way to assess this. Further, it should be assumed that jurors follow the trial judge’s directions and will approach their task in accordance with their oath: *Dupas v R* (2010) 241 CLR 237; *Glennon v R* (1992) 173 CLR 592.

The structure and formality of the jury trial process is such that jurors appreciate and respect the importance of their role in the process ...

The judge’s inquiry regarding jurors’ impartiality is made in open court, and is immediately followed by the jurors being sworn in, ‘a solemn process which ... jurors take very seriously.’⁶⁸⁷

3.7.12 The Australian Lawyers Alliance was in favour of making pre-trial enquiries of jurors’ internet and social media presence, albeit, recognising the ‘extreme’ nature of the measure:

The Australian Lawyers Alliance submits that controlling use of social media is not possible. However, [one of] a number of steps could be taken to disrupt the utility of social media to a juror who wishes to find out information ... is that following arraignment, defendants should be entitled to a limited form of questioning of jurors prior to the use of any challenges. This practice is extensively used in some jurisdictions in the United States, and would assist in identifying those jurors who have used social media in connection with the trial on which they might be empanelled, or who might be inclined to use it despite judicial direction to the contrary ... the ALA concedes that this measure is among the more extreme options available to law reformers.⁶⁸⁸

3.7.13 Johnston et al were of the view that:

There may be value in exercising greater scrutiny of jurors during the selection process, akin to the Queensland provision that permits this type of investigation.

This approach could provide the judge with an opportunity to explain the jury process. Limiting questioning of members of the jury on their access to, and use of, social media to the judge may offer one means of identifying potential problems. It would provide judges with the chance to identify any jurors whose use of social media may create problems of conflict before final empanelment, whilst at the same time affording the judge the opportunity to introduce to the jury the issues of the potential bias from pre-trial access and the problems that may arise from access to social media during the course of the trial. This can then be reinforced by judicial instructions on both prejudicial publicity and social media use. While there would be some additional cost and delay associated with using such a

⁶⁸⁷ Submission #5 (n 260) 3.

⁶⁸⁸ Submission #1 (n 273) 5.

process, those disadvantages should be weighed against the costs associated with a mistrial occasioned by this type of juror misconduct.

Particularly in cases that are high-profile, and/or likely to run for some time, we suggest that this is an option that courts should be open to exploring. The voir dire process which ... is underutilised in Australian jury trials, provides another avenue by which such inquiries could be made of jurors. As we have suggested previously, we regard the obligation to be aware of the risk of impermissible use of social media and the Internet as imparting an ethical duty on defence and possibly also prosecution counsel.

Given the pervasiveness of this technology in our daily lives, there is a strong argument that fulfilling that duty does require actively making enquiries of jurors' internet and social media presence and/or monitoring their activity on those media during the course of the trial; or at least, a potential to do so, which may be a sufficient deterrent. More difficult to answer is the question as to how, and by whom, that activity should be resourced, but at the end of the day the greater responsibility lies with the prosecution to ensure the fair conduct of the trial.⁶⁸⁹

3.7.14 The Law Society of Tasmania 'strongly opposed the voir dire "interrogatory" approach from the United States,'⁶⁹⁰ favouring instead the less invasive measure of simply looking online to obtain an insight into jurors' social media presence:

there is nothing unethical in conducting on-line research of potential jurors from publicly available material. The Society is aware of practitioners who have conducted that research with reference to the jury list to assist in determining whether to challenge a particular juror. This could include online posts about their view of crime as well as revealing prejudices relevant to the accused such as gender, gender identity and ethnicity. It should not be a *requirement* for counsel to do so.⁶⁹¹

3.7.15 The majority of respondents, however, did not endorse such pre-trial measures for various reasons. Daryl Coates SC, Director of Public Prosecutions (Tas), submitted:

I would not support any requirement for counsel to make pre-trial enquiries of jurors' internet and social media presence and/or to monitor juror's internet and social media activity during the course of a trial. To do so would be impractical (many jurors do not use their own names in their profiles and have private settings on their account restricting access) and would lead to other complications, for example a prospective juror's social media use was seen as 'undesirable' the juror may be stood aside or challenged when they may not otherwise have been. It would involve an American-style examination of jurors, such an examination is undesirable as it is intrusive on individual jurors which could lead to public disquiet with the justice system; would dramatically lengthen the trial process; and could lead to jurors not being representative of the community.⁶⁹²

3.7.16 Jim Connolly, Sheriff of Tasmania, considered the practical implications of such pre-trial enquiries:

⁶⁸⁹ Submission #10 (n 276) 11–12.

⁶⁹⁰ Submission #11 (n 271) 5.

⁶⁹¹ Ibid.

⁶⁹² Submission #5 (n 260) 3.

Logistically this would be extremely difficult to implement. Does counsel conduct a random inquiry, or conduct a complete review of all jurors? You must remember that some jurors do not arrange exemptions, or deferment from service until the actual day of reporting for service, so, when you consider 300 people are summonsed and only about 80–100 actually remain on the panel, a lot of time would be wasted checking jurors who will not attend.⁶⁹³

3.7.17 Many respondents expressed ethical concerns in this regard. Mr Connolly, commented, ‘I believe this could lead to a breach of civil liberties.’⁶⁹⁴ Dr David Plater, Deputy Director of the South Australian Law Reform Institute, similarly stated that it ‘seems intrusive and undermines the privacy of potential jurors’.⁶⁹⁵ The view of Dr Kerstin Braun was that:

It is theoretically possible that defence or prosecution could monitor jurors’ social media accounts and posts before and during the entire criminal trial to ensure that no juror social media misconduct occurs. Such investigations, however, give rise to difficult ethical questions in relation to jurors’ right to privacy which so far have not been addressed in Australia. In practice, it is impossible to monitor social media use where jurors’ social networking profiles are set to private or where jurors use a different networking name. Even where profiles are open to the public it is unclear how social media use can be detected if jurors do not actively post but simply read posts, send private messages or request friends.

In light of complex ethical questions and given that monitoring juror’s social media use is difficult in practice, counsel should not monitor jurors’ social media use.⁶⁹⁶

3.7.18 Some respondents were more equivocal. Professor Jill Hunter believed that jurors’ assurances regarding their impartiality and compliance with judicial directions should ‘not necessarily [be] accepted’, but the answer is not for counsel to make enquiries of jurors’ internet and social media presence and/or monitor jurors’ internet and social media activity during the course of a trial.⁶⁹⁷

3.7.19 His Honour Justice Pearce was of the view that there should be some reason to precipitate such enquiries about jurors’ social media/internet presence and/or activity before or during the trial:

If there is a reason to consider that a juror or jurors, during a trial, may have acted in a way which suggests a lack of impartiality or improper access to information, then a trial judge has an obligation to investigate. What form that investigation will take depends on the circumstances of a particular case. In the absence of such a suggestion, there is no alternative than to take a juror’s oath or affirmation at face value.⁶⁹⁸

3.7.20 Ultimately, the Institute does not support the introduction of any formal system which provides for pre-trial enquiries of jurors’ internet and social media presence. This is for many reasons, which include juror privacy and practical considerations such as the widespread doubts as

⁶⁹³ Submission #7 (n 260).

⁶⁹⁴ Ibid.

⁶⁹⁵ Submission #13 (n 280).

⁶⁹⁶ Submission #4 (n 274) 6–7.

⁶⁹⁷ Submission #9 (n 278).

⁶⁹⁸ Submission #14 (n 303).

to the effectiveness of such questioning and time pressures. Such a measure would be likely to add to the cost and length of criminal trial, in the Institute's view, without any justifiable return.

3.7.21 However, it is to be noted that this does not preclude counsel themselves from monitoring jurors' internet and social media presence and activity during the course of a trial in a more informal way. His Honour Justice Pearce, whilst not of the view that such a practice should be endorsed, observes: 'although there is no impediment to counsel doing so now if he or she wishes to do so.'⁶⁹⁹

3.7.22 The Institute views the logistical and practical difficulties of such online searches as simply too arduous for it to be adopted by counsel in any meaningful way. Where such conduct lies with respect to professional ethical guidelines is a live issue. The Institute in mindful of the human rights implications for the right to privacy of such investigations, even in circumstances where it is limited to publicly available information.

'Influencers'

3.7.23 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.

3.7.24 In Tasmania, the Sheriff is tasked with selecting a sufficient number of jurors to form a jury panel.⁷⁰⁰ 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.⁷⁰¹ 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.⁷⁰²

3.7.25 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 consist 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 consist 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).

3.7.26 In circumstances where jurors are empanelled 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.

3.7.27 In this respect, respondents were asked the following questions:

⁶⁹⁹ Ibid.

⁷⁰⁰ *Juries Act 2003* (Tas) s 27(1).

⁷⁰¹ 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>>.

⁷⁰² 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?

3.7.28 In Tasmania, the reality is that the ‘same jurors sit on multiple trials in the same sitting.’ Respondents observed that this did not affect the directions that jurors were given; trial judges were nevertheless ‘very careful to go through directions in full’⁷⁰³ despite the fact that jurors may have been hearing them for a second and/or subsequent time.

3.7.29 Daryl Coates SC, Director of Public Prosecutions (Tas), stated:

jurors who sit on more than one trial will, of course, be more familiar with the process generally, they will be familiar with the trial directions, the court routine and are likely to be aware of matters (such as the ability to give a majority verdict after a period of time) before other jurors. Without specific research it is impossible to know whether this prior experience makes them ‘better’ jurors. I see no reason why jurors empanelled for a second or subsequent times are more or less likely to engage in misconduct by inappropriately using the internet or social media.⁷⁰⁴

3.7.30 Jim Connolly, Sherriff of Tasmania, submitted:

We would say it makes them a better juror, it would make them a more experienced juror in relation to processes and, maybe, understanding certain phrases or words, used by the judge ... No, we do not believe more experience will make a juror less likely to access, or use the internet, or social media. We believe this would be a personal trait if a juror engaged in misconduct by inappropriately using the internet or social media ... We believe that any person who has had previous experience as a juror, may/could influence other less experienced jurors, although this could be overcome with the presiding judge emphasising that each juror must make their own decision in relation to a verdict, after considering all of the evidence ...⁷⁰⁵

3.7.31 The Law Society of Tasmania commented, ‘some practitioners believe that [second/subsequent] jurors will have more experience about the procedure and this will help save time and resources.’⁷⁰⁶ However, ‘whether it be a positive or negative influence depends on [the] individual [jurors].’⁷⁰⁷ Indeed, the Legal Aid Commission of Tasmania warned of encouraging any ‘influence’ by second and/or subsequent jurors on their fellow first-time jurors: ‘the adoption of a

⁷⁰³ Submission #19 (n 358).

⁷⁰⁴ Submission #5 (n 260) 3.

⁷⁰⁵ Submission #7 (n 260).

⁷⁰⁶ Submission #11 (n 271) 5.

⁷⁰⁷ Ibid.

role, other than foreperson, based on previous jury experience suggests an unwarranted authority. The sole authority for directions about social media use ought to be the presiding judge.⁷⁰⁸

3.7.32 His Honour Justice Pearce submitted:

I have no view about whether jurors who sit on more than one trial are better jurors. There are competing factors. On the one hand they are comfortable and familiar with the process, and have directions repeated. On the other hand, some are disgruntled about having been selected again, which carries a risk of reduced attention and reduced impartiality.⁷⁰⁹

3.7.33 Whether or not jurors who have been empanelled for a second or subsequent time are more or less likely to engage in juror misconduct of this kind, his Honour simply observed: ‘I do not perceive any difference.’⁷¹⁰

‘Back-up’ – In-built protections

3.7.34 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.⁷¹¹ 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).

3.7.35 The English Court of Criminal Appeals has described the concept of the ‘collective responsibility’ of jurors as follows:

the collective responsibility of the jury is not confined to the verdict. It begins as soon as the members of the jury have been sworn. From that moment onwards, there is a collective responsibility for ensuring that the conduct of each member is consistent with the jury oath and that the directions of the trial judge about the discharge of their responsibilities are followed. Where it appears that a member of the jury may be misconducting himself or herself, this must *immediately* be drawn to the attention of the trial judge by another, or the other members of the jury. ...The collective responsibility of the jury for its own conduct must be regarded as an integral part of the trial itself.⁷¹²

3.7.36 Integral to the efficacy of these in-built protections is that jurors are aware of their obligation to report the misconduct of fellow jurors.⁷¹³ A 2010 survey of UK jurors asked whether

⁷⁰⁸ Submission #12 (n 264) 20.

⁷⁰⁹ Submission #14 (n 303).

⁷¹⁰ Ibid.

⁷¹¹ See Dunn (n 23) 6. See also Dunn (n 162) 4.

⁷¹² *R v Thompson* [2010] EWCA Crim 1623, [6].

⁷¹³ See discussion above of the desirability of incorporating into judicial directions reminders to jurors of their obligation to report juror irregularities/misconduct: [3.5.24]–[3.5.26], [3.5.58] and Recommendation 2, (b)(vi).

‘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.⁷¹⁴

3.7.37 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.

3.7.38 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.’⁷¹⁵

3.7.39 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.⁷¹⁶

3.7.40 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*.⁷¹⁷ 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.

3.7.41 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’.⁷¹⁸

3.7.42 Similarly, during a rape trial in Massachusetts in 2001, a juror sent multiple trial-related messages via an internet Listserv.⁷¹⁹ She received responses from two members; one was a lawyer

⁷¹⁴ Thomas (n 157) 39.

⁷¹⁵ Hamilton (21 February 2019) (n 65).

⁷¹⁶ See Krawitz (n 650) 38.

⁷¹⁷ *The OC Register* (n 87).

⁷¹⁸ 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.

⁷¹⁹ See *Glossary and Abbreviations*, v–xiii.

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.⁷²⁰

3.7.43 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.'⁷²¹

3.7.44 New South Wales has codified the obligation of jurors to report misconduct of fellow jurors.⁷²²

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)?

3.7.45 Jim Connolly, Sheriff of Tasmania, advises that the 'current system' in Tasmania involves 'the juror having the ability to contact either the presiding judge's staff, or jury co-ordinator, or one of the Deputy Sheriffs, in relation to any complaint.' In his view, that system is 'sufficient' and 'works at the current time'.⁷²³

3.7.46 Similarly, his Honour Justice Pearce observed:

My overwhelming impression is that most jurors take their role and responsibility very seriously. There is a natural disinclination to 'dob', but the fact that matters are raised from time to time by individual jurors indicates to me that they would report if they thought necessary. I have received no reports about social media use, although I have [had] reports occasionally about other juror conduct, or language difficulties, or illness and like.⁷²⁴

3.7.47 Most respondents otherwise identified problems with the current system and/or ways in which it might be improved.

3.7.48 The Legal Aid Commission of Tasmania submitted:

Currently it is very difficult for a juror to raise a problem [regarding either themselves or fellow jurors]. Any such concern raised requires the juror to verbally detail their concerns, in front of the Judge, accused, prosecution, defence lawyers, at least three court staff, any

⁷²⁰ *Commonwealth v Guisti*, 434 Mass 245 (2001), 250. See also *Commonwealth v Guisti*, 449 Mass 1018 (2007).

⁷²¹ *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.

⁷²² *Jury Act 1977* (NSW) s 75C.

⁷²³ Submission #7 (n 260).

⁷²⁴ Submission #14 (n 303).

media present and any members of the public present in the rear of the court, all while either sitting surrounded by other jurors — one or more of whom may be the subject of the concern — or by themselves in the jury box. Many people would struggle to come forward in such circumstances, particularly if the concern is about a fellow juror.⁷²⁵

3.7.49 Such difficulties with the current reporting system appear to be borne out by reported instances of juror irregularities being brought to light mere days after the conclusion of the trial. By way of a relatively recent example in Tasmania, a juror emailed the Sheriff the day after a verdict in a Supreme Court fraud trial, complaining of alleged irregularities by other jurors during the trial and deliberations.⁷²⁶

3.7.50 In Professor Jill Hunter’s juror study, one juror sought, with respect to their trial experience, ‘[a]n easier way for other members of the jury to talk to someone about anything they have heard another jury member doing ... Court officer cannot be consulted ... Judge accepts letters but these are read out with all present ... [the juror suggested a] — Jury room monitor.’⁷²⁷

3.7.51 Community Legal Centres Tasmania also prioritised the ease with which juror reporting should be able to take place:

In our opinion, measures should be implemented to ensure that jurors are able to easily report incidents of juror misconduct. An easy to follow process for reporting juror misconduct is likely to deter jurors from engaging in misconduct due to the risk of detection as well as increasing the chance that jurors do not share the results of their misconduct with other jurors. With research from the United Kingdom demonstrating that almost half of all jurors are unaware of what to do if something improper occurred during jury deliberations we believe that current procedures should be reviewed. Options that could be considered include the installation of a box in the vicinity of the jury room that notes could be dropped into, a hotline that people could call or an email address that anonymous information could be sent to.⁷²⁸

3.7.52 Respondents also favoured anonymity in juror reporting (at least in the first instance) to encourage this practice. William Boucaust QC, a Barrister in Adelaide, stated:

Jurors should be encouraged to report misconduct on the part of their fellow [jurors] but I acknowledge this could cause difficulties because they would not want to be seen as a snitch or whistle-blower by their colleagues. A process should be in place that enables confidential reporting to the trial judge via the Sheriff so that the reporting juror’s anonymity is protected ...

I strongly suspect that all sorts of misconduct goes unreported because of the lack of a process which enables discrete reporting.⁷²⁹

⁷²⁵ Submission #12 (n 264) 19.

⁷²⁶ ‘Daycare fraudster Melissa Higgins calls for retrial due to juror issues’ *The Examiner* (online, 25 November 2018) <<https://www.examiner.com.au/story/5776483/daycare-fraudster-melissa-higgins-calls-for-retrial-due-to-juror-issues/?cs=9397>>.

⁷²⁷ Hunter (n 29) 38, 44 (Appendix A).

⁷²⁸ Submission #6 (n 449) 3.

⁷²⁹ Submission #3 (n 262).

3.7.53 The Legal Aid Commission of Tasmania said:

The ability of jurors to raise concerns in an anonymous fashion, and for those concerns to be communicated to the court by a third party for consideration, may encourage jurors to disclose their concerns.⁷³⁰

3.7.54 However, some respondents also noted the possible negative effects of juror reporting and, in particular, anonymous juror reporting. Dr David Plater, Deputy Director of the South Australian Law Reform Institute, explained:

The suggestion of jurors reporting on their fellow jurors for suspected misconduct has pros and cons. Yes jurors should perform their vital role responsibly but to encourage dobbing or snitching is problematic.⁷³¹

3.7.55 Dr Braun offered:

it can be imagined ... that the existence of juror hotlines can negatively impact the atmosphere during jury deliberations if jurors have to fear being reported and investigated possibly without cause. For this reason, misconduct hotlines and similar efforts aimed at increasing the efficacy of juror reporting could do more harm than good.⁷³²

3.7.56 Further, Johnston et al considered:

Such a service, operating either by phone or email, could be used by jurors to report cases of fellow jurors accessing social media, the Internet, or undertaking other prohibited research. We are persuaded by the arguments put forward from a range of sources this approach involves a number of risks, including creating resentment and tension within the jury, inhibiting frankness in jury deliberations, and enabling vexatious reports. We doubted whether, given the administrative implications and costs involved, that it would be likely to significantly ameliorate the problem and, at best, it could only provide a way of addressing misconduct after the event, rather than averting it in the first place.⁷³³

3.7.57 Respondents were also asked about the possible role of the public at large in reporting juror misconduct if/when they observe irregularities, particularly online. Jim Connolly, Sheriff of Tasmania, responded:

Public awareness of juror misconduct is a viable option, but the approach to this should be done carefully. To engage in contacting/enlisting juror's friends should only be done if the Sheriff is reasonably certain that a juror has/or is suspected of misconduct. This should only be done as part of an investigation by a Sheriff's officer who has been authorised to conduct such an investigation.⁷³⁴

3.7.58 The Law Society of Tasmania pragmatically added:

⁷³⁰ Submission #12 (n 264) 19.

⁷³¹ Submission #13 (n 280).

⁷³² Submission #4 (n 274) 7.

⁷³³ Submission #10 (n 276) 12.

⁷³⁴ Submission #7 (n 260).

Raising public awareness would require an expensive and expansive education campaign. The better approach is to educate the jurors themselves.⁷³⁵

3.7.59 On this point of juror education, the Law Society also identified that, currently, ‘there is no direction given to jurors’⁷³⁶ about their obligation to report, nor the process of how to go about this. Or, at least, there is enough inconsistency between this direction being given and not given. As a result, the Law Society of Tasmania suggested, as starting point:

The Society would strongly support the implementation of such direction in line with other states. It is only through this mechanism that instances of jury irregularity can be better detected and actively discouraged.⁷³⁷

3.7.60 The Institute agrees with this approach. In circumstances where there are deficiencies in jurors’ education about their obligation to report irregularities and the process by which this is to occur, rectifying these matters is an obvious starting point. The recommendation — to include in model directions reminders of jurors’ obligation to report irregularities and a step-by-step guide of the reporting process — is already included in Recommendation 2 (see page 96 above). The efficacy of the system of juror reporting is inevitably dependent upon jurors being aware of the reporting obligation and process. Recommendation 2 reflects that view.

3.8 ‘Pop-up notification’ – Investigation/Inquiry

3.8.1 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.

3.8.2 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.⁷³⁸ 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.⁷³⁹

3.8.3 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.⁷⁴⁰ 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

⁷³⁵ Submission #11 (n 271) 6.

⁷³⁶ Ibid.

⁷³⁷ Ibid.

⁷³⁸ *Webb v The Queen* (1993–1994) 181 CLR 41, 42.

⁷³⁹ Ibid 50.

⁷⁴⁰ 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).

deliberations of a jury.⁷⁴¹ 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.

3.8.4 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.⁷⁴²

3.8.5 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.⁷⁴³

‘WDYMBT’ (‘what do you mean by that?’)/‘JJ’ (‘just joking’)

3.8.6 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’.⁷⁴⁴

3.8.7 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’.⁷⁴⁵

3.8.8 During a rape trial in Massachusetts in 2001, a juror sent multiple trial-related messages via an internet Listserv.⁷⁴⁶ 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

⁷⁴¹ *Juries Act 2003* (Tas) s 59.

⁷⁴² 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.’

⁷⁴³ See 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: [3.5.32]–[3.5.36], [3.5.62]–[3.5.63].

⁷⁴⁴ *Dimas-Martinez v Arkansas*, 2011 Ark 515 (Dec 8, 2011), 11–15, 18.

⁷⁴⁵ *United States v Ganius* 755 F 3d 125, 131 (2d Cir 2014).

⁷⁴⁶ See *Glossary and Abbreviations*, v–xiii.

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.’⁷⁴⁷

3.8.9 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.⁷⁴⁸

3.8.10 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.⁷⁴⁹

3.8.11 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 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’.⁷⁵⁰

Friends or ‘friends’?

3.8.12 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.⁷⁵¹ 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

⁷⁴⁷ *Commonwealth v Guisti*, 434 Mass 245 (2001) 249–250. See also *Commonwealth v Guisti*, 449 Mass 1018 (2007).

⁷⁴⁸ *Boyd v The State of Western Australia* [2012] WASC 388 (19 October 2012) [23]–[24] (Hall J).

⁷⁴⁹ *Ibid.*

⁷⁵⁰ Lowe (n 27) 49; Grow (n 20).

⁷⁵¹ *Sluss v Commonwealth* 381 S W 3d 215 (Ky 2012), 221–2.

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.⁷⁵²

Jurors are not judges

3.8.13 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.’⁷⁵³

3.8.14 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 confront judicial inquiry into juror misconduct.

3.8.15 The recent South Australian Court of Criminal Appeal case of *R v Catalano*⁷⁵⁴ 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.’⁷⁵⁵ 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 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.⁷⁵⁶

3.9 Dismiss juror/s – ‘unfriend’

3.9.1 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.⁷⁵⁷ A criminal

⁷⁵² Ibid 222.

⁷⁵³ Hamilton (21 February 2019) (n 65).

⁷⁵⁴ [2019] SASFC 52.

⁷⁵⁵ Ibid [16].

⁷⁵⁶ Ibid [18].

⁷⁵⁷ *Juries Act 2003* (Tas) s 40(a).

trial may continue to verdict with a minimum of 10 jurors.⁷⁵⁸ Similar provisions exist in other Australian jurisdictions.⁷⁵⁹

3.10 Discharge jury (mistrial) – ‘:(’

3.10.1 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.⁷⁶⁰ The option of discharging a jury and thereby declaring a mistrial is an option of last resort. It is described as a ‘nuclear option’.⁷⁶¹ 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. Such witnesses may be compelled to testify again.

3.11 After the trial has completed – ‘EOT’ (‘end of thread’)

3.11.1 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.

3.11.2 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.⁷⁶² 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.

3.11.3 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 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.⁷⁶³ 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.⁷⁶⁴

3.11.4 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

⁷⁵⁸ 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).

⁷⁵⁹ 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 H.

⁷⁶⁰ *Juries Act 2003* (Tas) s 41(1).

⁷⁶¹ 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.

⁷⁶² See *Criminal Code 1924* (Tas) s 409; *Juries Act 2003* (Tas) s 58(6)(c).

⁷⁶³ *Criminal Code 1924* (Tas) s 402(1).

⁷⁶⁴ *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.

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.⁷⁶⁵

3.12 Punishment (deterrence)

Contempt of court

3.12.1 At common law, the law of contempt has developed to prevent and/or punish conduct that interferes with the administration of justice.⁷⁶⁶ Juror misconduct that compromises an accused's right to a fair trial will interfere with the proper administration of justice.

3.12.2 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.⁷⁶⁷

Specific offence provisions

3.12.3 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;⁷⁶⁸ 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).⁷⁶⁹

3.12.4 Similar specific offence provisions exist in other Australian jurisdictions.⁷⁷⁰ Such provisions are potentially applicable to jurors' '*information out*' uses of the internet/social media, if the content makes express mention of jury deliberations.

3.12.5 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.⁷⁷¹

⁷⁶⁵ Ibid [51]–[52] (Brett J).

⁷⁶⁶ See *Supreme Court Rules 2000* (Tas) div 3.

⁷⁶⁷ Without curtailing the court's common law powers to deal with a contempt of court summarily of its own motion.

⁷⁶⁸ *Juries Act 2003* (Tas) s 58(1).

⁷⁶⁹ Ibid s 58(2).

⁷⁷⁰ 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.

⁷⁷¹ See also s 51 of the *Juries Act 2003* (Tas).

‘DAE’ (‘does anyone else?’)

3.12.6 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

3.12.7 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’.⁷⁷² 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)’.⁷⁷³ The offence is punishable by a maximum penalty of 50 penalty units or imprisonment for two years, or both.⁷⁷⁴

3.12.8 Significantly, juror misconduct under these provisions triggers mandatory discharge of the offending jurors.⁷⁷⁵

Queensland

3.12.9 In Queensland, there is a similar statutory provision which makes it an offence for ‘a juror ... [to] inquire about the defendant in the trial’.⁷⁷⁶ 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’.⁷⁷⁷ The maximum penalty for this offence is two years imprisonment.

Victoria

3.12.10 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’.⁷⁷⁸ This prohibition includes ‘using the internet to search an electronic database for information’.⁷⁷⁹ The offence is punishable by 120 penalty units.⁷⁸⁰

In practice

3.12.11 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.⁷⁸¹ Possible explanations for this approach include:

⁷⁷² *Jury Act 1977* (NSW) s 68C.

⁷⁷³ *Ibid.*

⁷⁷⁴ *Ibid.*

⁷⁷⁵ *Ibid* s 53A(1)(c).

⁷⁷⁶ *Jury Act 1995* (Qld) s 69A(1).

⁷⁷⁷ *Ibid* s 69A(3).

⁷⁷⁸ *Juries Act 2000* (Vic) s 78A.

⁷⁷⁹ *Ibid.*

⁷⁸⁰ *Ibid.*

⁷⁸¹ Johnston et al (n 32) 19.

- 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 or misguided 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.

‘QNA’ (*‘question and answer’*)

3.12.12 Respondents were asked the following questions about punishment for jurors who use social media and/or the internet inappropriately during a criminal trial:

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?

3.12.13 Of the respondents who thought that jurors should be punished for using social media and other internet platforms inappropriately during criminal trials, nearly all believed that such punishment should be reserved for a select few cases.

3.12.14 For example, Daryl Coates SC, Director of Public Prosecutions (Tas), submitted:

In some limited circumstances it may be appropriate for jurors to be punished for using social media and other internet platforms inappropriately pre and post trial or committing other offences under the *Juries Act 2003*. However, for the reasons set out ... [at [3.12.11] above], a juror should only be punished in circumstances where the contravention is serious and/or has caused some real (and not perceived) prejudice to the fair trial.⁷⁸²

3.12.15 His Honour Justice Pearce similarly suggested: ‘[i]t depends on the nature and gravity of the breach, and the effect of it.’⁷⁸³

3.12.16 Dr David Plater, Deputy Director of the South Australian Law Reform Institute, was of the view that:

⁷⁸² Submission #5 (n 260) 3–4.

⁷⁸³ Submission #14 (n 303).

Jurors are performing a vital civic role and they should not be punished with the full force of the criminal law for simply doing their duty as they may perceive it. The criminal law and sanctions such as specific online offences or use of contempt of court is a blunt instrument to deal with a complex problem. Many jurors [who impermissibly use social media and/or the internet] ... are sincere and honestly trying their best to reach a considered verdict as they perceive it ... Jurors should in an appropriate case be punished for errant misconduct but this should be employed as a last resort for the most blatant and egregious misconduct. It should not be the primary solution.⁷⁸⁴

3.12.17 The respondents who agreed that jurors should be punished in select circumstances, offered varied opinions as to the appropriate framework.

3.12.18 Daryl Coates SC suggested the following amendments to the offence provisions contained within the *Juries Act 2003* (Tas):

- The Act does not prohibit making inquiries, including on the internet, about any matters relevant to the trial. The provisions in the *Jury Act 1977* (NSW) provide a good guide as to what is required [eg] s 68C of that Act ... I am of the view that this section should include specific reference to *obtaining information about any witness*.
- The definition of *prohibited matter* could be reviewed ... the definition could be extended to capture ‘how a juror, or the jury, formed any opinion or conclusion in relation to an issue arising in the trial ...’ (the wording of s 68B(1)(b) of the *Jury Act 1977*(NSW)). The current definition does not expressly refer to a juror’s own opinion if that opinion was not expressed during deliberations.
- Consideration could be given to s 58(3) ... Ultimately this is a policy issue, but if the intention is to prohibit disclosure of a prohibited matter *at any time* or for *any purpose* (except for the exceptions provided in subsection (6)) consideration should be given to removing the words ‘*published to the public*’. For example, the equivalent provision in the *Jury Act 1977* (NSW) is ... s 68B(2).⁷⁸⁵

3.12.19 Jim Connolly, Sherriff of Tasmania, submitted that because ‘section 51 [of the *Juries Act 2003* (Tas)] provides for misconduct ... [c]odification of [the] common law is not necessary.’⁷⁸⁶ Dr David Plater, stated: ‘the idea of specific offences for errant misconduct is sound but again such offences should be reserved for the most blatant misconduct.’⁷⁸⁷

3.12.20 The majority of respondents, however, were much more focussed on the shortcomings of punitive measures. Respondents highlighted the fact that jury service was already an ‘onerous task, [which we] want to encourage [and jurors are] already reluctant’.⁷⁸⁸ His Honour Justice Pearce stated: ‘I would regard it as ineffective to control compliance by threatening jurors with punishment, which may also discourage reporting of breach[es] by other jurors.’⁷⁸⁹

⁷⁸⁴ Submission #13 (n 280).

⁷⁸⁵ Submission #5 (n 260) 4–5.

⁷⁸⁶ Submission #7 (n 260).

⁷⁸⁷ Submission #13 (n 280).

⁷⁸⁸ Submission #21 (n 267).

⁷⁸⁹ Submission #14 (n 303).

3.12.21 Dr Braun stated:

It is highly questionable whether such laws will have an impact on jurors in practice. Jurors can only be punished where social media use is detected ... detection of violations will likely occur infrequently [and, therefore] few convictions can be expected from the introduction of the new legislation. Penal legislation may therefore have a very limited deterring effect on jurors in practice. In addition, risks can be attributed to penalizing jurors' social media use during criminal trials. The introduction of penalties for social media use may make jury service unattractive to potential jurors ... The criminalization of jurors' social media use appears to offer limited benefits while risks remain. Specifically penalizing this conduct is therefore overall undesirable.⁷⁹⁰

3.12.22 Professor Jill Hunter also commented on this matter:

No, there is a natural reluctance on the part of the court to engage in investigations of jury misconduct let alone criminal sanction. It would be helpful however to include within the directions given that it is an offence already under the *Juries Act* to disclose information and a contempt of court to breach the oath/affirmation they have made to decide the case according to the evidence. The threat of sanction is a more effective tool than sanction itself in these circumstances. An understanding of the cost and effect of a mistrial would also be helpful as an illustration of the seriousness of misconduct.

I have seen no evidence to support incorporating a criminalising or shaming approach to meeting the problem. Both just send the problem underground, or catch the odd misguided miscreant (which is not the place for the criminal law, or for public shaming).⁷⁹¹

3.12.23 Many respondents used interstate examples to highlight their concerns about the general deterrent effect of specific offence provisions, particularly s 68C the *Jury Act 1977* (NSW). Johnston et al, commented:

[Punitive measures] only provides a way of addressing past misconduct, unless such legislation can be seen as having a deterrent effect. In this respect it is notable that, although some states have introduced criminal penalties for juror misconduct that involves contravening 'not research' instructions, instances of inappropriate use by jurors of Internet and social media have continued to occur. This suggests that the criminalisation of this type of juror misconduct may not have had any significant deterrent effect.⁷⁹²

3.12.24 Relevantly, Professor Hunter made the following observation about what has occurred in New South Wales following the introduction of s 68C:

Notably, and despite s 68C, the flow of cases where jurors have engaged in private enquiry in New South Wales has continued ... That there have been no prosecutions in New South Wales under s 68C since it was introduced in late 2004 suggests that the provision may be serving a largely symbolic role on the statute books.

⁷⁹⁰ Submission #4 (n 274) 6–7.

⁷⁹¹ Submission #9 (n 278).

⁷⁹² Submission #10 (n 276) 12–13.

It is recommended that a review of the benefits of s 68C *Jury Act 1977* (NSW) be undertaken to determine whether the goals of criminalising juror misconduct can be better achieved by other means.⁷⁹³

3.12.25 Johnston et al recommended a conservative approach in circumstances where there are many new (and soon to be) developments in other jurisdictions:

Our submission would be to evaluate how successful the Jury Acts in other Australian states have been, and whether communication to jurors about sanctions should be more clearly spelled out. Following this, it would be prudent to evaluate international developments, such as in New Zealand, to determine their success. ...

New Zealand is moving to codifying the law of contempt, with the Bill currently in its third reading. It notes: ‘The Bill would help to codify the law of contempt by shifting it into a new Act.’⁷⁹⁴

3.12.26 The prosecution and punishment of jurors who have engaged in misconduct via social media and/or the internet should be limited to a select few cases. The Institute agrees with the majority of respondents that this should occur in only the most egregious cases of intentional juror misconduct of this kind. In light of this view, the Institute believes that the current contempt laws, as supplemented by the existing offence provisions within the *Juries Act 2003* (Tas), are adequate for the small role that punitive measures ought to play in addressing this issue. It does not warrant codification of these contempt laws in the form of additional specific offence provisions that address the internet and/or social media, particularly when the effect of such measures in other jurisdictions that have adopted this approach remains to be seen. Moreover, as highlighted by many respondents, the deterrent effect of punitive measures must be doubted in circumstances where much juror misconduct of this kind is not deliberate and intentional, but rather the product of a lack of understanding and/or inadvertence.

3.12.27 Further, the Institute believes that any attempt to settle upon offence provisions which reflect the full range of possible conduct that may amount to juror misconduct of this kind is problematic. The same problems arise as when trial judges attempt to make a comprehensive list of prohibited internet and social media platforms as well as prohibited activity in trial directions: these change with such frequency it is impossible to remain current.⁷⁹⁵

Recommendation 4

The Institute does not recommend any reforms to current laws. The current contempt laws, as supplemented by the existing offence provisions within the *Juries Act 2003* (Tas), are adequate for the small role that punitive measures ought to play in addressing this issue.

Additional offence provisions that specifically address jurors’ use of the internet and/or social media should not be introduced.

The preferred strategy to address juror misconduct of this kind is to focus on juror education.

⁷⁹³ Hunter (n 29) 41.

⁷⁹⁴ Submission #10 (n 276) 13.

⁷⁹⁵ See discussion at [3.5.50].

3.13 Trial by Judge Alone

‘OT’ (‘off topic’)

3.13.1 The scope of this reference states:

This report 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.

3.13.2 However, it is to be noted that some respondents to the consultation on this issue advocated for the introduction of trial by judge alone as an alternative to trial by jury and/or, took the opportunity to make comment on trial by judge alone as a possible alternative to jury trials in Tasmania.

3.13.3 In this regard, the Australian Lawyers Alliance stated:

The ALA notes the lack of any mechanism under the Criminal Code whereby a defendant may elect to be tried by judge alone. The availability of such a mechanism is critical in relatively high-profile cases where the extent of social media comment may be such that the defendant is at a greater risk of not receiving a fair trial.

Such judge alone trials have proven effective in cases such as the murder trial of Lloyd Rayney in Western Australia in 2012. A judge-alone trial is currently sitting in respect of Bradley Robert Edwards for a sequence of alleged murders in 1996–1997. It is difficult to imagine that Susan Neill-Fraser could ever receive a fair trial by a Tasmanian jury if her appeal presently came before the Supreme Court were to succeed.⁷⁹⁶

3.13.4 Dr David Plater, Deputy Director of the South Australian Law Reform Institute, submitted:

Tasmania does not have the option of trial by judge alone. This may be a prudent alternative in cases where there is a fear of intractable prejudicial online material. Judges are not infallible but trial by judge alone may be a preferable alternative option. There could be an option of allowing an accused, as in South Australia, to opt for trial by judge alone.

[There is a] bill presently before WA Legislative Council ... This law has real value. Such a law exists in South Australia ... not undermining the venerated institution of trial by jury. Mr McCusker QC, a former WA judge and Governor, has supported the WA bill and has been publicly reported as highlighting its benefits in high profile sensational trials ... or what he sees as the now routine use of social media by jurors ... undermining jury impartiality.⁷⁹⁷

3.13.5 Dr Braun of the University of Southern Queensland, observed:

Due to the great importance of social media to some in society including jury members, existing approaches to tackling the problem may not have the desired result in practice. It is on this basis that more fundamental change to the criminal justice system in Tasmania,

⁷⁹⁶ Submission #1 (n 273) 5–6.

⁷⁹⁷ Submission #13 (n 280).

including, for example, the option for judge-alone trials in high profile criminal cases, may be required to effect real change.⁷⁹⁸

3.13.6 Finally, various members of the Tasmanian legal profession also commented on the topic of possible legislative reform to introduce trial by judge alone in Tasmania. They advised the Institute that it had ‘already taken five years of discussions and [has progressed] nowhere ... [There was] a meeting five years ago, including the DPP, [and those involved] couldn’t decide form, what type of case/test/election or discretion, who gets to choose, [we are] no closer to mechanism for trial by judge alone [in Tasmania].’⁷⁹⁹

3.13.7 The Institute notes these submissions, which advocate, or otherwise raise the possibility, of trial by judge alone being introduced in Tasmania. The risk of jurors’ inappropriately using social media and other internet platforms during criminal trials is but one consideration which may militate in favour of trial by judge alone being made available, in addition to a trial by jury, for indictable offences in Tasmania.

3.13.8 However, the Institute identifies juror education as the preferred strategy and as an immediate and practical measure to address the issue of juror misconduct of this kind. Although the Institute recognises that juror misconduct of this kind remains, as tempered by these measures, but one of the issues of the contemporary trial by jury that may be remedied by the availability of an alternative of trial by judge alone.

⁷⁹⁸ Submission #4 (n 274) 8.

⁷⁹⁹ Submission #21 (n 267).

Part 4

‘*Status Update*’: Reform?

4.1 Trial by Jury – ‘*timeline*’

4.1.1 The High Court in *Brownlee v The Queen*, commented that:

One of the most significant aspects of the history of trial by jury before, and up to, the time of Federation is that it shows that the incidents of the procedure never have been immutable; they are constantly changing.⁸⁰⁰

4.1.2 At that time, the Court reasoned ‘because the danger itself changes with varying social conditions and methods of communication’.⁸⁰¹

4.1.3 Similarly, extra curially, in 1998, in a speech entitled ‘Speaking to a Modern Jury’, the Honourable Michael Kirby concluded:

At the close of a millennium, it is appropriate to reflect upon the enduring capacity of the jury of citizens to adapt and change and still to be resilient. The advocate and the judiciary will adapt and change in order to fulfil their tasks, so important to a free society. Whilst juries remain part of the court system, it will be the duty and privilege of advocates and judges to speak to them. It will surely not be beyond the skills of advocates and judges of today to adapt to the changes ... But the beginning of wisdom is the recognition of the need for change and of its causes.⁸⁰²

4.1.4 The apparent focus of any discussion about jurors inappropriately using social media and/or the internet during criminal trials is limited to, or at least focussed on, the more well-known ‘*information in*’ scenario of the *errant juror conducting online research*. It demonstrates a widely held misconception that juror misconduct of this kind is confined to intentional and defiant ‘*information in*’ uses of the internet.

4.1.5 In fact, the full breadth of possible juror misconduct of this kind:

- Involves **both** the internet **and** social media
- Involves **both** ‘*information in*’ and ‘*information out*’ uses of social media and/or the internet; and
- It may be the product of inadvertence **alone** and/or jurors who believe they are doing the **right thing**.

4.1.6 The relevant ‘danger’ has, indeed, changed.

⁸⁰⁰ *Brownlee v The Queen* (2001) 207 CLR 278, 286.

⁸⁰¹ Ibid 302.

⁸⁰² The Hon Michael Kirby, ‘Speaking to the Modern Jury – New Challenges for Judges & Advocates’ (Speech, Worldwide Advocacy Conference, The Inns School of Law, London, 29 June–2 July 1998) <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_london.htm>.

4.2 ‘Dropping the pin’: Where to from here?

4.2.1 There is a clearly identifiable shortcoming in the way in which this phenomenon is currently viewed and addressed. It extends to fundamental preventative measures such as juror education. It follows that the Institute’s preferred strategy to address juror misconduct of this kind is to focus on updating and improving juror education in the first instance as an immediate and practical measure.

4.2.2 The response cannot and should not consist of any single measure, but rather a suite of measures that form an overall strategy. This is reflected in recommendations one and two, which, inter alia, recommend that pre-empanelment juror training/information resources are reviewed and updated, and model jury directions are introduced.

4.2.3 Neither recommendation should be viewed in isolation. Pre-empanelment training/information should serve as a foundation for subsequent information provided by the trial judge in post empanelment directions. Both measures should be developed together to ensure consistency in terminology and expression. Fundamental obligations of ‘*impartiality*’ and ‘*according to the evidence*’ need to be dissected and explained in a way that goes beyond abstract notions of ‘fairness’/‘a fair trial’/‘fairness to the accused’ so that jurors can fully grasp the potential implications of ‘*information in*’ and ‘*information out*’ uses of social media and other internet platforms in the context of a criminal trial.

4.2.4 In recommendations one and two, the Institute highlights the importance of periodic review to ensure that the subject technology and its uses of that technology are up to date. One can envisage that further technological advancements will present similar challenges to the relevance and effectiveness of directions to jurors and juror education strategies if they are not monitored and updated in a timely fashion.

Appendix A

Questions posed by the Institute's Issues Paper, released 21 August 2019

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?

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?

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?

Question 6

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

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?

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?

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?

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?

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?

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)?

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 B

Submissions – ‘User-generated content’

The institute received written submissions from the following respondents:

1. Australian Lawyers Alliance, authored by Tasmanian President and Director, Fabiano Cangelosi (Tas)
2. Professor Lorana Bartels, Criminology Program Leader/Lecturer, Australian National University Centre for Social Research and Methods (ACT)
3. William Boucaut QC, Barrister, Len King Chambers (SA)
4. Dr Kerstin Braun, Senior Lecturer, School of Law and Justice, University of Southern Queensland (Qld)
5. Daryl Coates SC, Director of Public Prosecutions, Tasmania (Tas)
6. Community Legal Centres Tasmania, authored by Ben Bartl (Tas)
7. Jim Connolly, Sheriff of Tasmania, Supreme Court of Tasmania (Tas)⁸⁰³
8. Rachael Hews, Director Postgraduate Programs (Acting)/Lecturer/PhD candidate, Queensland University of Technology (Qld)
9. Professor Jill Hunter, University of New South Wales (NSW)
10. Associate Professor Jane Johnston, The University of Queensland (Qld); Adjunct Professor Anne Wallace, La Trobe University (Vic); and Professor Patrick Keyzer, La Trobe University (Vic)
11. The Law Society of Tasmania, authored by Evan Hughes, President of The Law Society of Tasmania (Tas)
12. The Legal Aid Commission of Tasmania (Tas)
13. Dr David Plater, Deputy Director, South Australian Law Reform Institute/Senior Lecturer, School of Law, University of Adelaide (SA)
14. The Honourable Justice Robert Pearce, Supreme Court of Tasmania (Tas)

The Institute received verbal submissions from the following respondents:

15. Kim Baumeler, Barrister, Liverpool Chambers (Tas)
16. Sarah Lucas, Solicitor, Craig Rainbird Barristers and Solicitors (Tas)
17. Philippa Morgan, Barrister, Liverpool Chambers (Tas)
18. Lizzie Phillips, Solicitor, Craig Rainbird Barristers and Solicitors (Tas)
19. Garth Stevens, Barrister, Liverpool Chambers (Tas)
20. Philippa Willshire, Barrister/Solicitor (Tas)

⁸⁰³ Mr Connolly also holds office as the Registrar of the Supreme Court of Tasmania. However, his submission is made in his capacity as Sheriff and is not a submission by or on behalf of the Supreme Court of Tasmania.

The Institute also received a number of anonymous verbal submissions:

21. Various (Tas)

The Institute received one confidential written submission.

Appendix C

Excerpts from the ACT ‘Jury Handbook’⁸⁰⁴

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.

⁸⁰⁴ Supreme Court of the Australian Capital Territory, *Jury Handbook* (n 644).

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 D

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 E

Excerpts from the NSW Judicial Commission's 'Criminal Trial Courts Bench Book'⁸⁰⁵

[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

⁸⁰⁵ Judicial Commission of New South Wales (n 489).

decision and return a 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 F

*Excerpts from the Judicial College of Victoria's 'Criminal Charge Book'*⁸⁰⁶

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

⁸⁰⁶ Judicial College of Victoria, *Victorian Criminal Charge Book* (n 550).

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] 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 is 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 that 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 G

*Excerpts from the NSW Judicial Commission's 'Criminal Trial Courts Bench Book'*⁸⁰⁷

[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

⁸⁰⁷ Judicial Commission of New South Wales (n 489).

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 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 H

*Excerpts from the NSW Judicial Commission's 'Criminal Trial Courts Bench Book'*⁸⁰⁸

[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.

⁸⁰⁸ Judicial Commission of New South Wales (n 489).