#AUSTRALIANJURY#SOCIALMEDIA — NATURAL JUSTICE ON TRIAL

CECILIA ANTHONY DAS, JOSHUA ASTON AND HAYDN RIGBY *

The participation of laypersons in the judicial process is considered essential to ensuring that justice is served in criminal trials. It also aims to render the legal process less intimidating, more accessible, and impartial for the accused, who is judged by a panel of peers. However, today, the question is whether it is indeed fair to have a jury, given that jurors have abundant access to communication technology with far-reaching potential for abuse of their supposed role in the judicial system as impartial finders of fact. Indeed, there is now a serious question of the need or desirability of lay participants as adjudicators in the legal process. An institution initially introduced to make the process more just and fair may now yield the opposite result. This paper explores these issues and proposes recommendations for reform, with its centrepiece being a model of jury education and competence testing.

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* Associate Professor Josh Aston is Associate Dean and Dr Cecilia Das and Dr Haydn Rigby are lecturers in the School of Business and Law, Edith Cowan University.

I INTRODUCTION

A fundamental principle of natural justice in any jurisdiction is that an accused in a criminal proceeding is entitled to a fair trial. A person is presumed innocent until proven guilty, and this fundamental right should not be eroded at any price. The introduction of jurors as representatives of a cross-section of society has ensured that legal outcomes align with community expectations of justice and fairness.[1] Indeed, trial by jury is a mainstay of the notion of a "fair trial" in that it seeks to eliminate bias, which might reside in a single trier of fact (a judge) as opposed to being judged by one's peers.

In Australia, s 80 of the *Constitution* provides that a trial on indictment for Commonwealth offences shall be by jury. Furthermore, the criminal laws across the states and territories govern most criminal offences, with provisions for jury trials in cases involving serious indictable offences. Although a detailed examination of these provisions across jurisdictions is beyond the scope of this article, it suffices to note that the jury system is a well-established and integral feature of the Australian criminal justice system.[2] Accordingly, the presence of juries plays a significant role in maintaining fairness within the system.

However, the widespread use of social media and its extensive real and virtual reach now poses a significant threat to the fairness of jury trials. Online influences have the potential to bias jurors far more extensively than traditional print media due to the constant and pervasive nature of online information. Consequently, the principle of natural justice — access to a fair trial — faces significant erosion when jurors, contrary to their instructions, rely on external online information instead of limiting their consideration to the evidence presented during the trial.

Although the constitutional right to trial by jury for Commonwealth indictable offences is recognised as fundamental, and jury trials are the norm for non-Commonwealth indictable offences across Australian jurisdictions, there remains insufficient regulation of juror conduct in the digital age. While codes of conduct exist, few laws explicitly address the challenges posed by jurors accessing or being influenced by online or social media information during their deliberations.

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[1] Valerie P Hans, 'Jury Systems Around the World' (2008) 4 *Annual Review of Law and Social Science* 275, 276.

[2] Michael Chesterman, 'Criminal Trial Juries in Australia: From Penal Colonies to a Federal Democracy' (1999) 62(2) *Law and Contemporary Problems* 69, 72–4.

Traditionally, conduct rules have focused on ensuring fair reporting by the media to prevent undue influence on jurors.[3] For example, the common law offence of sub judice contempt makes it an offence for a juror to independently investigate or inquire about matters related to a case while it is before the court.[4] Further, traditional media understood that no commentary should be made about the accused's prior criminal history.[5] The status quo of these conventions has been significantly challenged by the ubiquitous use of social media, which has proliferated in both the variety and magnitude of its use and reach.[6]

The High Court of Australia's decision in *Hinch v Attorney-General for Victoria* addressed the concept of responsible behaviour when reporting for traditional media.[7] It was a case of fundamental importance to the media regarding the test employed by the courts to determine contempt of court. In this case, the High Court was careful to ensure a balance between the fair administration of justice and the public interest in freedom of speech. The Court found that the fundamental test for determining contempt was an inquiry into whether there was a real and definite tendency to prejudice the ongoing proceedings.[8] The justices in the High Court emphasised that it was essential to demonstrate a genuine risk of prejudice to a fair trial to constitute contempt.[9]

The rules of sub judice contempt aim to protect a juror from exposure to prejudicial media publicity prior to and during the trial, although such news may be lingering in the minds of those jurors while the case is ongoing.[10] Historically, the rule has tended to be more strictly enforced against the media than against jurors, which may pose a challenge given that jurors have increasingly more access to news through social media and can publish damaging information themselves. It is this possibility that will be explored further in this article. The following sections will address: (1) notable cases involving jury misconduct on social media; (2) the

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[3] Eg Supreme Court of Western Australia, *Guidelines for the Media: Reporting in Western Australian Courts* (25 October 2022) <https://www.supremecourt.wa.gov.au/_files/Guidelines for the Media.pdf>.

[4] *A-G v Times Newspapers Ltd* [1973] 3 All ER 54, 77–8 (Lord Morris).

[5] Jane Johnston et al, *Juries and Social Media: A Report Prepared for the Victorian Department of Justice* (Report, January 2013) 1.

[6] Amy J St Eve, Charles P Burns and Michael A Zuckerman, 'More from the #Jury Box: The Latest on Juries and Social Media' (2013) 12(1) *Duke Law & Technology Review* 64, 67–9.

[7] *Hinch v A-G (Victoria)* (1987) 164 CLR 15, 26–7.

[8] Ibid 34 (Mason CJ).

[9] Ibid 34 (Mason CJ), 86 (Wilson J). See Anne Twomey, 'Derryn Hinch v Attorney-General for the State of Victoria' (1988) 16(3) *Melbourne University Law Review* 683.

[10] Felicity Robinson, '"No, No! Sentence First: Verdict Afterwards": Freedom of the Press and Contempt by Publication in *Attorney-General for the State of New South Wales v X*' (2001) 23(2) *Sydney Law Review* 261, 261–3.

impact of such misconduct on trial outcomes; and (3) the future of trial by jury in the context of social media challenges, concluding with proposed reforms to uphold the integrity of the jury system.

II THE JURY SOCIAL MEDIA CASES

The jury's role is to determine the innocence or guilt of the accused based only on the evidence tendered in a criminal proceeding. This is a fact-finding exercise.[11] It prohibits the jury member from conducting their own research to arrive at their decisions or forming preconceived biases.[12] Although there is such a prohibition, there is evidence, as will be discussed shortly, to suggest that jurors do, in fact, conduct such research. The risk of this unauthorised research ("information in") occurring is becoming more prevalent with the increasing use of social media.[13] Besides this risk, the risk of unauthorised reporting of case proceedings ("information out") is also becoming more prevalent. The latter is a burgeoning concern, and the lack of regulations surrounding this area is problematic.

The prevalence of the risks of "information in" and "information out" can be observed with the increasing number of such cases worldwide. In 2014, the murder trial of Lawrence Alfred Gaskell before the Supreme Court of Queensland had to be abandoned when it became known that one of the jurors had used Facebook to investigate the defendant in that case. According to the law in Queensland, it was a criminal offence for a sworn juror to inquire about the defendant in a trial before a verdict was passed.[14]

In 2016, the Supreme Court of Western Australia dealt with a high-profile case which involved the murder of Travis Benjamin Mills, who was killed with a baseball bat and set ablaze in his car's boot.[15] The day the trial was to commence, Justice Hall had called a juror to the Bench for an explanation of a Facebook post that read, 'At Perth District Court, guilty!' Justice Hall censured the juror by stating that the action was 'inappropriate and foolish'.[16] His Honour added that the juror had

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[11] *Brown v The Queen* (1986) 160 CLR 171, 187 citing *Patton v United States,* 281 US 276, 312 (1930).

[12] Kristin R Brown, 'Somebody Poisoned the Jury Pool: Social Media's Effect on Jury Impartiality' (2012) 19(3) *Texas Wesleyan Law Review* 809, 813–4.

[13] Nancy S Marder, 'Jurors and Social Media: Is a Fair Trial Still Possible' (2014) 67(3) *SMU Law Review* 617, 626–7.

[14] *Jury Act 1995* (Qld) s 69A(1). See also Lucy Thackray, 'Juror could face jail after admitting to researching murder suspect on Facebook: forcing the Supreme Court to abandon trial', *Daily Mail Australia* (online, 9 August 2014) <https://www.dailymail.co.uk/news/article-2720537/Murder-trial-stopped-juror-admits-researching-suspect-victim-Facebook.html>.

[15] See *Ruthsalz v Western Australia* [2018] WASCA 178.

[16] Sol Dolor, 'Are Jury Trials on the Way Out?', *Australasian Lawyer* (online, 6 October 2016)

disrespected the legal process and dismissed her on the grounds that he did not believe she could be a fair juror.[17]

In 2021, a perjury trial of a police officer was aborted in the District Court of Queensland when it was discovered that a juror had acted inappropriately by looking up external sources through his mobile phone, contrary to the directions given by the Judge.[18] In 2022, the High Court in *Hoang v The Queen* unanimously allowed an appeal from the Court of Criminal Appeal of the Supreme Court of New South Wales concerning the discharge of a juror who had engaged in misconduct.[19] The case concerned an indictment for 12 counts of sexual offences against children, allegedly committed when the appellant was a mathematics tutor. During the trial, the prosecution led evidence to indicate that the appellant did not hold a valid Working with Children Check.[20] Later, during jury deliberation, a note was passed to the trial judge stating that a juror had consulted Google to find the meaning of the Working with Children Check and all relevant legislation.[21] By this time, the jury had delivered a verdict for eight counts.[22] It was only before the remaining counts were deliberated on that the juror had Googled for the meaning.[23] The juror concerned was discharged before verdicts on the remaining counts were handed down. The appellant appealed on the grounds of a miscarriage of justice, which the Court of Criminal Appeal dismissed.[24] However, this decision was overturned on appeal by the High Court unanimously, and it was stated that the juror had engaged in misconduct and that the trial judge had erred in considering the earlier verdicts before discharging the juror.[25] Although this case does not explicitly involve social media, it demonstrates how online activity, whether through social media or other digital platforms, can negatively affect the fairness of a trial. This makes the case a

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<https://www.thelawyermag.com/au/news/general/are-jury-trials-on-the-way-out/200902>. See Joanna Menagh, 'Four found guilty in Perth body-in-boot killing', *ABC News* (online, 12 September 2016) <https://www.abc.net.au/news/2016-09-12/travis-mills-four-found-guilty-of-murder/7831936>.

[17] Dolor (n 16); 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>.

[18] Talissa Siganto, 'Jury dismissed in senior police officer's perjury trial after juror "disobeyed" judge's directions' *ABC News* (online, 9 June 2021) <https://www.abc.net.au/news/2021-06-09/qld-court-police-officer-michelle-stenner-jury-dismissed/100201172>.

[19] *Hoang v The Queen* (2022) 276 CLR 252 ('*Hoang*').

[20] Ibid [4].

[21] Ibid [6]–[8].

[22] Ibid [7].

[23] Ibid.

[24] Ibid [9]; *Hoang v The Queen* [2018] NSWCCA 173.

[25] *Hoang* (n 19) [39]–[41], [43].

pertinent example for discussing the broader implications of juror misconduct in the digital age.

This phenomenon is not peculiar to Australian jurisdictions. In the United States city of Baltimore, where the courts were called upon to consider a political corruption trial against the former Mayor of Baltimore, it was discovered that five jurors had accessed social media to discuss the trial while it was still in progress. The former Mayor's conviction was overturned as a result of a challenge to the jury's verdict.[26]

In *Dimas-Martinez v State,*[27] the Arkansas Supreme Court addressed the impact of a juror's posted comments on X (formerly Twitter), including remarks such as 'Choices to be made. Hearts are to be broken. We each define the great line.'[28] Despite being admonished by the trial judge to cease such activity, the juror persisted. Following the jury's guilty verdict and the imposition of the death sentence, the trial court denied the defendant's motion for a new trial.[29] However, the Arkansas Supreme Court reversed the trial court's decision on appeal.[30] The appellate court emphasised the importance of ensuring that jurors refrain from sharing their thoughts or any trial-related information on social media platforms due to the high potential for prejudice.[31] This concern was amplified in that case because one of the juror's X followers was a journalist,[32] allowing the media to receive advance notice of the jury's sentencing decision before its formal announcement in court. The Supreme Court deemed the trial court to have erred in not adequately investigating the extent of the juror's extra-judicial communication as well as its impact on the juror's ability to properly serve as a juror and whether

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[26] See *State of Maryland v Sheila A Dixon: Verdict Sheet* (Circuit Court for Baltimore City, No 110141032, 1 December 2009) <https://msa.maryland.gov/megafile/msa/speccol/sc5300/sc5339/000113/012000/012811/unrestricted/20100688e-003.pdf>. On 5 January 2010, Ms Dixon entered an Alford plea in Baltimore City Circuit Court to one count of perjury. She was given probation before judgment in a plea agreement that required her to resign from office as of 4 February 2010; receive four years of unsupervised probation and not seek another office during the period of probation; contribute 500 hours of community service; and donate $45,000 to charity: see 'Baltimore mayor resigns under plea deal' *NBC News* (online, 8 January 2010) <https://www.nbcnews.com/id/wbna34752353>. See also Julie Bykowicz, '5 Dixon Jurors Recalled As Witnesses' *Baltimore Sun* (online, 30 December 2009) <http://www.baltimoresun.com/news/maryland/baltimore-city/balmd.dixon30dec30,0,92298.story>; David Aaronson and Sydney Patterson, 'Modernizing Jury Instructions in the Age of Social Media' (2013) 27(4) *Criminal Justice Review* 26.

[27] *Dimas-Martinez v State,* 385 SW 3d 238 (Ark, 2011).

[28] Ibid 246.

[29] Ibid 242.

[30] Ibid 243.

[31] Ibid 247–8.

[32] Ibid 248.

such information was shared with other jurors. It was not sufficient to inform the parties once the judge had learned of this activity and then wait for a jury verdict, as happened in that case.[33]

In the United Kingdom, in the case of *R v Karakaya,*[34] which concerned alleged rape and indecent assault of the defendant's daughter, a juror researched the subject 'rape' and brought those materials into the room for jury deliberations.[35] Evidently, the juror was not satisfied with the evidence presented in court and decided to conduct their own research on the matters argued. There have also been instances in the United Kingdom when a juror has been discharged when details of the trial were posted on social media by them.[36]

A few distinct types of conduct can be discerned from the above case discussions. These are that jurors: (1) use the social media platform to research the case and/or the parties ("information in"); (2) establish contact with parties or their legal representatives involved in the case, or discuss the case with jurors in an unauthorised manner (eg outside the jury room) or with persons who are not jurors while the proceeding is still ongoing; and (3) post details concerning the proceedings ("information out"). All these instances are forms of misconduct and breaches of the duty imposed on jurors.

III IMPACT OF SOCIAL MEDIA MISCONDUCT

As alluded to in the discussion above, the internet, technology, and social media present significant challenges in the context of jury trials. The cases discussed illustrate that it is becoming a somewhat Herculean task to prevent a juror from researching the parties, terms, or details of the case, despite strict instructions given by the trial judge prior to the commencement of a trial by indictment. Furthermore, in an era where most connectivity is through social media, the all-too-human urge to connect with various parties on social networks, including those involved in ongoing proceedings, appears too much for some jurors to overcome. From a juror's lay perspective, this may not be an issue as connecting with parties may not seem to be something that will prejudicially impact the jury. Alternatively, it may also be habitual to post almost anything on social media, including court proceedings or even commentaries of the people involved in the process.

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[33] Ibid 247–9.
[34] *R v Karakaya* [2005] 2 Cr App Rep 77 (EWCA).
[35] Ibid [13], [26]–[27].
[36] See, eg, Nicola Haralambous, 'Educating Jurors: Technology, the Internet and the Jury System' (2010) 19(3) *Information & Communications Technology Law* 255, 259.

Such misconduct by jurors through the internet or social media erodes the fundamental principles that govern jury service. These principles are that jurors should only discuss matters concerning the trial during their deliberations in the jury room and not otherwise, and all their decisions must be based on the evidence tendered in court and the meaning they attribute to it, based on their unprejudiced impressions of such evidence.[37] There is no room for any form of research or experiment on the juror's part.[38] These principles are communicated to jurors when the trial judge gives the jury instructions.[39] Misconduct on the part of a juror may increase the risk of a miscarriage of justice in the given trial. A juror may deliver verdicts based on external materials they comprehend poorly or due to the influence of the people they have connected with and deliberated with in a social context, who were not privy to all the evidence tendered in court. The most profound impacts of such misconduct are the potential for a mistrial, which undermines the integrity of the trial court and delays justice for the accused, or, worse, results in a wrongful conviction.[40] The dismissal of one or more jurors from the panel is an option available to judges in cases of juror misconduct.[41] However, suppose this leaves an insufficient number of jurors to deliberate, or that a dismissed juror's misconduct has tainted the deliberations of other jurors; this often also necessitates dismissing all jurors, vacating the trial, and instituting a new one[42] (and only if the prosecution is willing to retry the matter, which is often not the case if key prosecution witnesses, including the complainant, are unable or unwilling to give evidence). This not only results in significant financial and resource burdens on the court and the parties involved, [43] but also extends the

[37] NSW Sheriff's Office, 'Reaching a Verdict' (Fact Sheet, 2025) <https://courts.nsw.gov.au/content/dam/dcj/ctsd/courtsandtribunals/courts-and-tribunals/jury-service/>; Queensland Courts, 'Your Responsibilities as a Juror' (Fact Sheet, 2024) <https://www.courts.qld.gov.au/__data/assets/pdf_file/0003/808590/your-responsibilities-as-a-juror.pdf>. See, eg, Rebecca K Helm, 'Evaluating Witness Testimony: Juror Knowledge, False Memory, and the Utility of Evidence-Based Directions' (2021) 25(4) *The International Journal of Evidence & Proof* 264, 269–270; Jill Hunter, 'The Secrecy of Jury Deliberations' (1996) 1(2) *Newcastle Law Review* 1.

[38] *Jury Act 1995* (Qld) s 69A(1); *Jury Act 1977* (NSW) ss 68B–68C; *Juries Act 2000* (Vic) s 78A; *Jury Act 1967* (ACT) s 42BA. No specific provision is provided in the Jury Acts of WA, SA, NT and Tas.

[39] Greg Byrne, 'Juries and the 'Detective Juror': Improving Public Discussion About Juries And Jurors' (2023) 48(3) *Alternative Law Journal* 185, 186.

[40] Emily M Janoski-Haehlen, 'The Courts are All a Twitter: The Implications of Social Media Use in the Courts' (2011) 46(1) *Valparaiso University Law Review* 43, 45–7.

[41] Nick Taylor and Roderick Denyer, 'Judicial Management of Juror Impropriety' (2014) 78(1) *Journal of Criminal Law* 43, 51.

[42] Paul Dore, 'The Judge is Your Google: Reframing Our Understanding of Juror Misconduct: And How to Manage It' (2023) (179) *Precedent* 4, 5.

[43] Janoski-Haehlen (n 40) 47.

duration of incarceration for the accused,[44] an especially troubling outcome if the individual is ultimately found to be innocent.

Even in the absence of a mistrial, juror misconduct — such as posting updates about the trial — can shape public discourse and potentially impact the parties' litigation strategies, thereby undermining the integrity of the trial process.[45]

IV FUTURE OF A TRIAL BY JURY

Calls for reform of the jury system have intensified amid growing concerns about juror misconduct, particularly the use of social media to access or disseminate extraneous information during trials. Under early English common law, jury instructions were minimal, as jurors were expected to rely on their personal knowledge and community norms.[46] Judicial directions, if provided, were considered merely advisory. However, modern common law has shifted toward a more structured approach, requiring judges to deliver clear, authoritative instructions to ensure the law is properly applied and to uphold the right to a fair trial.

In Australia, enhancing the clarity and delivery of jury directions has been identified as a key measure to mitigate juror misconduct, including improper social media use during proceedings. As former Justice Virginia Bell has noted, the traditional complexity and opacity of jury instructions often undermine their effectiveness.[47] This recognition has led to reform efforts aimed at improving juror understanding and compliance. The Jury Directions Project in Victoria exemplifies such efforts, showing that simplified and repeated instructions — especially those

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[44] Ibid.

[45] Tom Percy, 'Are Jury Trials on the Way Out?' *Australasian Lawyer* (online, 19 October 2016) <https://www.thelawyermag.com/au/news/general/are-jury-trials-on-the-way-out/200902>. As noted by Percy, around the time of the juror misconduct in the Travis Mills trial referred to above, prominent members of the legal profession in Western Australia commented about the end of the jury system being nigh, with Tom Percy QC, the president of Australian Lawyers Alliance, remarking: 'The day of the jury may well be nearly over' and 'It's too seductive for a [juror] to go home at night and go, "geez what about this bloke, Bill Smith, I'll just go and Google him…". They find out about him and what he does, they go on Facebook and look him up there and if they don't disclose that...they are armed with knowledge that's not in evidence at the trial that may well be considerable prejudice [sic] to the accused.'

[46] Eric Robinson, 'Jury Instructions for the Modern Age: A 50-State Survey of Jury Instructions on Internet and Social Media' (2011) 1 *Reynolds Courts & Media Law Journal* 307, 308.

[47] Virginia Bell AC, 'Jury Directions: the Struggle for Simplicity and Clarity' (Banco Court Lecture, Supreme Court of Queensland, 20 September 2018) 4–5, 28 <https://www.hcourt.gov.au/assets/publications/speeches/ current-justices/bellj/bellj20Sep2017.pdf>.

emphasising the prohibition on independent research or information sharing — can positively influence juror behaviour and help preserve trial integrity.[48]

A *Pre-empanelment Information for Jurors*

A recent comprehensive review by the Tasmanian Law Reform Institute ('TLRI')[49] on juries and social media focused on pre-empanelment instructions as well as directions delivered by the Bench at the commencement and throughout the trial. The TLRI's recommendations included ongoing updates to pre-empanelment training and information for jurors, with a pre-recorded induction video expressly addressing the use of social media and other internet platforms by jurors, both "in" and "out". This would include explanations of the rationale behind prohibiting such information (eg notions of fairness and fair trial in terms explicit to a case rather than abstract notions of justice), as well as making clear the consequences of the use of such information (eg mistrial resulting in a waste of time and resources, and also personal consequences such as fines or imprisonment), reiterating such information in subsequent judicial instructions, and providing written versions of this information.[50]

Pre-empanelment information arguably allows key concepts to "sink in" before the judge delivers directions to the jury. This early exposure reinforces those directions and provides a frame of reference that is, by then, familiar to jurors, now understood within the context of the trial rather than as abstract principles.

B *During the Trial: Judicial Instructions*

Although literature suggests that instructions have been given to juries for a long time, there is no evidence to suggest that these have been uniform.[51] These instructions were left to judges' discretion, who drew on their past experiences on the Bench. Due to either juror ignorance or blatant disregard for instructions when given, the courts have over time admonished juries on their duties and responsibilities at the beginning of each trial,[52] and often reminded them of these obligations at subsequent stages of the trial. This is becoming increasingly common with the advent of social media and extensive use of, and access to, internet

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[48] Victorian Law Reform Commission, *Jury Directions: Final Report* (Report No 17, September 2009) 30–1.
[49] Tasmanian Law Reform Institute, *Jurors, Social Media and the Right of an Accused to a Fair Trial* (Final Report No 30, January 2020) ('TLRI'). See also Jemma Holt and Terese Henning, *Jurors, Social Media and The Right of an Accused to a Fair Trial* (Tasmanian Law Reform Institute Issues Paper No 30, January 2020).
[50] TLRI (n 49) 72–4.
[51] Victorian Law Reform Commission, *Jury Directions: Final Report* (n 48) 38, 39.
[52] Aaronson and Patterson (n 26) 31.

services. What is clear is that these instructions need to keep abreast of changes in communications technology and be taken very seriously if the jury institution is to survive the test of time.

Carving out a standard jury instruction can be onerous and challenging, as it requires ensuring compliance across various courts, individual judges, and different jurisdictions. However, it is essential to note that guidance must be provided to jurors, particularly regarding the use of social media during the trial and post-proceedings. The TLRI has recommended implementing a standardised approach similar to that of New South Wales and Victoria, involving standard or model judge's directions to be delivered at the trial's commencement and reiterated in brief before extended trial adjournments and during jury deliberations.[53] These directions could include various aspects: explicit reference to social media usage; identification of prohibited internet and social media platforms (beyond merely 'Facebook'); clarification on forbidden activities related to both information "in"' and "out"; explanations outlining the rationale behind these restrictions; cautionary advisories regarding the repercussions of juror misconduct, emphasising its impact on the trial and the individual juror; and prompts urging jurors to report any irregularities and providing guidance on the reporting process. It was recommended that all this information be compiled in written form, disseminated to individual jurors, and prominently displayed in the jury room.[54]

Bench books in various jurisdictions in Australia provide suggested wording for judges when giving their directions to the jury.[55] Judges are not compelled to use this format and can express their directions in their own words, but the use of the Bench book is recommended for consistency.[56]

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[53] TLRI (n 49) 96.
[54] Ibid.
[55] See, eg, Judicial Commission New South Wales, 'Criminal Trial Courts Benchbook' (2002 updated April 2025) <https://www.judcom.nsw.gov.au/bench-books-resources/bench-books-handbooks/criminal-trial-courts-bench-book> [1.490]; Supreme Court of Queensland, '4B Jury Provided with Transcripts' (29 April 2024) <https://www.courts.qld.gov.au/__data/assets/pdf_file/0004/746518/sb-bb-4b-jury-provided-with-transcripts.pdf> [4B.3]; Supreme Court of Western Australia, 'Equal Justice Bench Book' (2021) <https://www.supremecourt.wa.gov.au/_files/Equal_Justice_Bench_Book.docx> [5.5.10]; Supreme Court of South Australia, 'South Australian Criminal Trials Bench Book' (July 2021) <https://www.courts.sa.gov.au/wp-content/uploads/wp-download-manager files/documents/bench%20books/> [4.12.8B]. See also Jonathan Clough et al, *The Jury Project 10 Years On: Practices of Australian and New Zealand Judges* (Research Paper, April 2019) 36.
[56] Ibid.

It might be suggested that providing jurors with information before their selection and issuing directions during trials about the misuse of social media might unintentionally trigger a 'forbidden fruit' effect.[57] This effect could potentially encourage jurors to pursue inquiries they might not have otherwise considered or felt tempted to explore. However, it is argued that this possible consequence is outweighed by the imperative of ensuring jurors fully comprehend the regulations concerning both "information in" and "information out".[58] Feedback from jurors indicates that explicit directives against social media usage were a primary factor in dissuading them from succumbing to this temptation.[59] Additionally, such instructions prevented inadvertent social media usage due to a lack of awareness about the rules.[60]

Some advocates have called for harsher punishments to address juror misconduct, ranging from steeper fines to a greater willingness by judges to impose incarceration.[61] The English case of *Attorney-General v Fraill*[62] serves as a pertinent example of the latter approach. Joanne Fraill, a juror in a prolonged multimillion-pound drug trial, was sentenced to eight months imprisonment for contempt of court after contacting a defendant, Jamie Sewart, via Facebook and engaging in online discussions, including topics related to jury deliberations. She also conducted independent internet searches on the defendants and other trial participants, introducing external information into the jury process.

While the High Court of England and Wales acknowledged that Fraill's actions were not motivated by malice or an intent to influence the verdict,[63] it concluded that her behaviour fundamentally compromised the principles of a fair trial, which require that the verdict be based solely on the evidence presented in court.[64] The punishment was not for the mere use of social media or conducting research but for her disregard of these foundational principles.[65] In similar cases within Australian jurisdictions, such misconduct could constitute contempt of court under common law or a breach of relevant statutory offences.[66]

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[57] TRLI (n 49) 57.
[58] Ibid 83.
[59] Ibid 22.
[60] Ibid.
[61] Thaddeus Hoffmeister and Ann C Watts, 'Social Media, the Internet, and Trial by Jury' (2018) 14 *Annual Review of Law and Social Science* 259, 267.
[62] *A-G v Fraill* [2011] 2 Cr App R 21 (EWCA).
[63] Ibid [55].
[64] Ibid [29].
[65] Ibid. See also David Harvey, 'The Googling Juror: The Fate of the Jury Trial in the Digital Paradigm' [2014] *New Zealand Law Review* 203, 213.
[66] *Jury Act 1967* (ACT) s 42C(2); *Jury Act 1977* (NSW) s 68B(1); *Juries Act 1962* (NT) s 49A(2);

Some commentators have suggested that jurors sign written statements, possibly under oath, committing to refrain from external research or communication, with the threat of sanctions for non-compliance.[67] However, such measures present significant challenges, particularly in preventing jurors from conducting independent research at home. This approach would only be practical if jurors were fully sequestered for the trial period, including restricted access to their devices—an impractical solution in most cases.[68]

Such punitive measures for addressing juror misconduct may be seen as overly harsh, potentially undermining the perception of jurors as responsible, rational individuals tasked with impartial fact-finding. The TLRI observed that, in practice, prosecutions for juror misconduct, whether under common law or statutory offences, are exceedingly rare.[69] This reluctance to prosecute often stems from several interrelated factors. First, jurors are generally individuals striving to fulfil their civic duties to the best of their abilities, and their misconduct is often the result of misguided or inadvertent actions rather than deliberate wrongdoing. Second, jury service is a fundamental civic responsibility that should be encouraged and supported rather than discouraged by the threat of punitive measures. Third, juror misconduct may reflect systemic shortcomings, such as failures by the court system or trial judges to adequately educate jurors about their duties and the significance of adhering to proper courtroom procedures. Finally, the risk of criminal penalties for misconduct could deter jurors from self-reporting irregularities, reporting others' misconduct, or even participating in jury service altogether, thereby undermining the effective operation of the jury system.[70]

The TLRI acknowledged the limited effectiveness of sequestering mobile phones during the trial day,[71] but recommended continuing this practice. Even if it does not eliminate the risk of jurors accessing external information, it minimises distractions during the trial and deliberations. Additionally, it reduces the temptation for jurors to resort to quick online searches during heated deliberations to resolve disputes, a behaviour commonly observed in social contexts.

Jury Act 1995 (Qld) s 70(4); *Juries Act 2000* (Vic) s 78(1); *Juries Act 2003* (Tas) s 58(1); *Juries Act 1957* (WA) s 56B(1).

[67] Aaronson and Patterson (n 26) 30.

[68] Justin C Dawson et al, *Strategies to Mitigate the Impact of Electronic Communication and Electronic Devices on the Right to a Fair Trial* (Research Paper, Rand Corporation, 2018) 11.

[69] TLRI (n 49) 121–2.

[70] Ibid 123.

[71] Ibid 101.

Ultimately, as the TLRI emphasised and as the authors agree, the solution lies in juror education rather than imposing stricter laws, sequestering jurors overnight, or entirely banning access to electronic devices. Education equips jurors to understand the importance of their role, the necessity of basing their verdicts solely on courtroom evidence, and the risks associated with relying on external information.[72]

C *Trial by Judge Alone?*

Finally, while this may be a subject for future research, it is essential to consider whether juries should be entirely replaced with judge-alone trials. This is possible and available in some Australian jurisdictions for indictable non-Commonwealth (state) offences.[73] The authors reside in Western Australia, where judge-alone trials are available upon application of either the prosecution or the accused.[74] Notably, this region has hosted two notorious and widely publicised judge-alone trials in recent memory, namely the Lloyd Rainey murder trial,[75] and the Claremont serial killer trial.[76] Some Australian jurisdictions have only recently enacted laws for judge-alone trials for indictable offences, such as Victoria in 2022,[77] which was too late for the trial of the late Cardinal George Pell, who was found guilty of five sex offences by a jury on 11 December 2018[78] when judge-alone trials were not available in that jurisdiction. Although a unanimous High Court decision on appeal ultimately exonerated Pell,[79] after an unsuccessful application to the Court of Appeal of Victoria which upheld the conviction in a 2:1 decision,[80] it is tempting to speculate that a verdict of not guilty would have been more likely to be handed down in the first place at a judge-alone trial. Indeed, it is naïve to believe that a juror could be found who had not been exposed to some form of publicity

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[72] Ibid 125.

[73] *Criminal Procedure Act 1986* (NSW) ss 132–3; *Criminal Code Act 1899* (Qld) s 614; *Juries Act 1927* (SA) s 7; *Criminal Procedure Act 2004* (WA) s 118; *Supreme Court Act 1933* (ACT) s 68BA. Judge-alone trials are not generally permitted in Victoria: see *Criminal Procedure Act 2009* (Vic). Temporary provisions introduced during the COVID-19 pandemic have since lapsed. There are no judge-alone provisions for indictable offences in Tasmania or the Northern Territory. For Commonwealth offences, see *Australian Constitution* s 80, which mandates trial by jury for indictable offences.

[74] *Criminal Procedure Act 2014* (WA) s 118(1). Prejudice to an accused is not cited as a specific ground but is covered by the broad term in the 'interests of justice': s 118(4).

[75] *Western Australia v Rayney [No 3]* [2012] WASC 404 (accused acquitted).

[76] *Western Australia v Edwards [No 7]* [2020] WASC 339 (accused convicted).

[77] Justice Legislation Amendment (Trial by Judge Alone and Other Matters) Act 2022 (Vic).

[78] See *Pell v The Queen* [2019] VSCA 186 ('*Pell VSCA*').

[79] *Pell v The Queen* (2020) 268 CLR 123.

[80] *Pell VSCA* (n 78). See also 'The Legal Trials of George Pell: Timeline', *The Guardian* (online, 7 April 2020) <https://www.theguardian.com/australia-news/2019/feb/26/rise-fall-george-pell-timeline>.

surrounding the facts of the case and the controversial figure of George Pell before the trial, even if exposure to extra-judicial information during the trial could be managed.

Of course, a judge-only trial is always only an option; it is not a complete substitute for jury trials, and better jury education is likely to limit the damage of social media abuse by jurors. However, finding an "untainted" juror is impossible for highly publicised trials such as the two Western Australian cases mentioned above (and, arguably, the Pell case in Victoria). Arguably, justice can only be served by a judge-only trial. This conclusion rests on the premise that judges, with their more profound understanding of the legal rules, are less likely to be influenced by social media and are better equipped to act as impartial arbiters in court. Of course, judges, like jurors, are only human and may well hold pre-conceived views that challenge their impartiality. However, unlike jurors, they have years of training to put such views aside when reaching a verdict. This is not the case for jurors who are relatively new to this self-imposed form of cognitive dissonance (giving precedence to facts and logic over feeling), perhaps only becoming aware of this for the first time when they hear the Judge's directions at the beginning of the trial about limiting the information they rely on for their deliberations only to what transpires in those proceedings and nothing whatsoever outside of that.

D *It's Jury Education, Stupid!*

Of all the proposed reforms to the jury system, jury education emerges as the most significant, serving as a foundation that underpins and enhances the effectiveness of other initiatives. An informed juror is less likely to engage in misconduct, whether through ignorance or wilful intent, particularly when reminded of their solemn duties and the potential consequences of non-compliance. Efforts in jury education have traditionally focused on pre-empanelment information and jury directions, as previously discussed. However, it is submitted that a classroom-style educational model, specifically designed to address the challenges that lay jurors face in understanding complex subject matter, is warranted. These challenges stem from the adversarial nature of litigation and jurors' traditionally passive role during trials.[81] This model recommends the appointment of an unbiased educator, selected through a process akin to appointing arbitrators, to provide jurors with foundational knowledge and relevant terminology in a neutral, classroom-like setting before trial proceedings. It is arguable that, particularly in complex litigation, an educational environment encouraging active participation through

[81] Niamh Howlin, 'Passive Observers or Active Participants? Jurors in Civil and Criminal Trials' (2014) 35(2) *Journal of Legal History* 146, 148.

questions, note-taking, and discussions under judicial oversight can equip jurors with the necessary tools to navigate intricate evidence and legal concepts. This approach reduces reliance on instinct and fosters informed and fair verdicts. While there may be concerns about the additional time required for this process, proponents contend that pre-trial education ultimately streamlines trial proceedings by minimising confusion and enhancing overall efficiency.[82] The authors argue that such a model could also mitigate issues of jury misconduct, including inappropriate use of social media, by ensuring jurors are better prepared and fully aware of their responsibilities.

While jury education is undeniably valuable, it does not guarantee that jurors will fully understand the instructions provided to them. There is a dearth of literature evaluating juror comprehension of jury instructions. Existing research highlights that even when simplified, standardised instructions remain challenging for jurors to understand.[83] Current methods for assessing juror comprehension, such as requesting summaries or using multiple-choice tests, tend to focus on memory rather than genuine understanding, potentially overestimating comprehension levels. Researchers have advocated for the use of hypothetical scenarios to evaluate jurors' ability to apply instructions,[84] as application reflects comprehension. Additional barriers, such as a lack of attention, motivation, or alignment with the instructions, may further impede jurors' ability to apply them effectively.[85]

The authors argue that assessing juror competency is a critical reform that warrants serious attention. Other stakeholders in a trial, apart from the parties themselves, undergo rigorous assessments of their professional qualifications. Lawyers must meet stringent standards to practice, and judges are drawn from the senior ranks of the legal profession. It is striking that jurors, who bear the crucial responsibility of making factual findings and determining a verdict, are subject to no formal testing of their suitability for the task. While some might advocate for judge-alone trials as a logical extension of this critique, given that judges are professionally qualified fact-finders, a compelling counterargument is that a jury of peers brings diverse life experiences and societal perspectives that legal professionals alone cannot provide.

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[82] Eg Keith Broyles, 'Taking the Courtroom into the Classroom: A Proposal for Educating the Lay Juror in Complex Litigation Cases' (1996) 64(4) *The George Washington Law Review* 714, 742–4.
[83] Chantelle M Baguley, Blake M McKimmie and Barbara M Masser, 'Re-Evaluating How to Measure Jurors' Comprehension and Application of Jury Instructions' (2020) 26(1) *Psychology, Crime & Law* 53, 60.
[84] Ibid.
[85] Ibid 55–6.

Nevertheless, the authors contend that the gravity of a juror's role necessitates an induction into the hermetically sealed world of the courtroom. This distinct environment operates under its own carefully controlled rules of evidence and often employs counterintuitive logic. An induction program would ensure that jurors understand their role and are equipped to engage meaningfully with the legal process. The authors propose a minimum one-day orientation and a test to evaluate comprehension. While this proposal may seem radical and could result in a reluctance to participate in jury service, it is suggested that even a minimal approach, such as online learning modules with quizzes to assess understanding, should become a standardised requirement. Such measures could be enshrined in legislation or implemented as subsidiary rules of court practice. Excess jurors, who are typically empanelled but not seated, could be discharged if they fail to meet competency standards. Admittedly, this could be a convenient "out" for those who want to avoid jury duty. Still, if they are willing to deliberately flunk a test to evade their civic responsibility of serving on a jury, perhaps they are not the kind of person anyone would want in a jury room anyway. Conversely, it is arguable that if a juror has had to "earn" their spot through passing competency standards, they are likely to be more engaged and take their responsibilities seriously. Testing would not be something designed to trip up potential jurors or try to select the "best of the best", but rather to inform and support them in their role as a juror. A similar approach to online workplace induction programs could be employed, where an inductee has the opportunity to retake the test a limited number of times until they pass it.

An alternative to the proposal for pre-trial induction programs is to integrate jury education into the Humanities and Social Sciences (HASS) curriculum at the high school level. By incorporating it into the syllabus and assessing it through standardised testing, students would gain a foundational understanding of the jury system and their potential responsibilities as jurors. Given that jury service is a compulsory civic duty for citizens,[86] this measure would prepare future jurors in advance, instilling the necessary knowledge and skills long before they are called to serve. This proactive approach not only complements existing education reforms but also ensures that civic education includes practical preparation for one of the most significant participatory roles in a democratic society.

[86] Eg *Juries Act 1957* (WA) s 4. See Jane Goodman-Delahunty, 'The Jury Box and the Urn: Containing our Expectations' (2015) *Pandora's Box* 9, 10–11.

Providing this foundational understanding during high school could alleviate the burden of extensive pre-trial education, and jurors would arrive at court with a baseline competence in legal concepts and the mechanics of jury service. This approach, while ambitious, aligns seamlessly with the overarching goal of enhancing the fairness and efficacy of the jury system. It ensures that jurors are not only representative of society but also adequately equipped to engage thoughtfully and meaningfully with their critical duties, contributing to a more robust and just judicial process. However, a potential drawback of this proposal is that the current pool of eligible jurors may not have benefited from such an education, making the interim measures proposed a practical and necessary solution in the meantime.

E *What a Standard Induction Program Could Look Like*

A standardised induction program might include the following modules:

> **Module 1**: An introduction to the nature of the courtroom and its special form of logic and rules of evidence, which dictate that facts can only be found based on admissible evidence, with illustrated examples of what is considered evidence (exhibits, admissions of fact, things said on oath by a witness) and what is not (judicial directions, assertions made by counsel in their submissions). The rationale for this seemingly strange hermetically sealed environment would be explained (ie preventing information from influencing a proper finding of the fact from sources that might not be reputable or opinions of others who have not had the benefit of being privy to the whole of the facts presented in the case), as would the fact that it is ultimately designed to promote fairness to the accused and ensure they are given a fair trial (which is something all of us would want).
>
> **Module 2**: Education about the types of "information in" which are prohibited, with particular emphasis on speaking to others and consulting social media, given the knee-jerk impulse of most people to consult others and Google information online to find out answers to almost everything. Emphasis must be placed on awareness of this impulse and the importance of keeping it in check in the trial setting.
>
> **Module 3**: Education about the types of "information out", again focusing on communication with others and using social media to report things. For those who have social media accounts, the focus should be on controlling the impulse to post information, for which awareness training is essential.

> **Module 4**: Focus on real-life case studies that illustrate the serious consequences of juror misconduct. These include mistrials, which may have devastating effects on victims who are then faced with the difficult choice of whether to endure the stress of a retrial. Some may ultimately choose not to proceed, denying them closure or justice. The impact on the accused can also be significant, particularly where misconduct results in extended periods on remand, sometimes for months or even years longer than necessary. This is especially troubling in cases where the individual is ultimately found not guilty.

V CONCLUSION

In summary, the hazard of social media for juries cannot be understated. Jury misconduct using the internet and social media has far-reaching impacts. The cost of such actions is dire. Hence, serious efforts should be made to curtail such happening moving forward.

The days of trial by jury in Australia may not be numbered, as it is a constitutional right, at least in Commonwealth indictable offences, and a mainstay of a fair trial for state indictable offences.[87] However, the need to regulate how these trials are conducted must be carefully considered. Given that use of social media is so ubiquitous now, it is difficult to think how a juror can properly discharge their obligations without doing what we all do instinctively every day — looking something up on the net. The temptation must be enormous, and the possibility of an inadvertent slip extremely high. Therefore, it behoves us to front-end jury education as much as possible and assess that the message has sunk in.

While the authors support the recommendations outlined in the TLRI's 2020 report, particularly those on jury education, they advocate for an additional reform: a system of testing to evaluate juror competence. This proposed measure is perceived as a reasonable requirement, drawing parallels to similar induction training and testing practices within organisational workplaces. Such practices aim to acknowledge the potential harm an individual can cause within that space, encompassing aspects like work health and safety, breach of copyright, and damage to the employer's reputation. Similarly, an errant juror's misuse of "information in" or "information out" can significantly impact a criminal trial, leading to substantial time, cost, and immense stress for trial stakeholders or potential personal consequences, including contempt of court charges and potential incarceration.

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[87] See generally Keith Thompson, 'Should We Reform the Jury? An Australian Perspective' (2023) 33(1) *Washington International Law Journal* 165.

Finally, the authors suggest the implementation of a standardised induction training and testing model, aiming for uniform legislation or subsidiary legislation across all Australian jurisdictions. This standardised approach seeks to ensure proven competence among jurors before they undertake their crucial duties. Similar to how individuals must demonstrate competence through obtaining a driving licence before operating a motor vehicle, jurors should also be taught and required to exhibit competence in this vital domain, considering the livelihoods and substantial implications at stake.