#JURYDUTY – JURORS USING SOCIAL MEDIA

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Introduction

In New Zealand, it is a fundamental principle of law that an accused has the right to a fair trial. The role of the jury is essential to this principle, and forms the base of the administration of justice and Criminal Law. The jury must be impartial and form opinions based solely on evidence presented in the trial, but if exposed to inappropriate information or communications during the trial, the rights granted in our criminal justice system are endangered.

The introduction and growth of the internet has had a profound impact on a juror's ability and opportunity to receive or disseminate information related to their trial.[1] However, the problem is not the internet but the activities of jurors who disregard the principles underpinning our criminal justice system.[2] inappropriate social media use by jurors is having an increasing impact within courts. This impact includes increasing trial delays, financial burdens and loss of public confidence in verdicts.

Social media is "a group of Internet-based applications that build on the ideological and technological foundations of [the worldwide web] which allows the creation and exchange of user-generated content".[3] There are four main elements that characterise social media; the

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1 United Kingdom Law Commission *Contempt of Court* (Consultation Paper 209, 2012) at 63.

2 *Attorney-General v Fraill* [2011] EWCA Crim 1570, [2011] 2 Cr App R 21 at [29].

3 Andreas M Kaplan and Michael Haenlein "Users of the world, unite! The challenges and opportunities of Social Media" (2010) 53 *Business Horizons* 59 at 61.

creator relinquishes control of the message, there is a participatory culture, it is easily accessible, and interactive and two-way.[4] Internationally, the most commonly used social media platforms are Facebook, Twitter, WordPress, LinkedIn, Pinterest, Google+, Tumblr and Myspace. These forms of social media are accessed equally from personal computers and mobile devices across most cultures and age groups.[5]

Several methods of detection and prevention of inappropriate social media use by jurors have been identified in other jurisdictions. Studies have been conducted in Australia, the United Kingdom and the United States of America, and these sources formed the basis of my research. This paper primarily focuses on the potential impact of jurors' use of social media during a trial and the deliberation process, as opposed to pre-trial social media.

The paper will introduce the prevalence of this issue and examine why jurors use social media. The risks this misconduct presents to the role of the jury and the principles underlying the administration of justice and rights and freedoms are considered.

The paper discusses the potential impacts of the use of social media and the consequences for a trial and individual jurors. The paper presents examples of such misconduct from Australia, the United States and the United Kingdom.

Finally, this paper considers procedural options to assist the court in detecting this juror misconduct and examines potential preventative methods. Those best suited for implementation in New Zealand are recommended.

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[4] Jane Johnston and others *Juries and Social Media: A report prepared for the Victorian Department of Justice* (Standing Council on Law and Justice, April 2013) at 2.

[5] Neilson "State of the Media: The Social Media Report 2012" (4 December 2012) <www.nielson.com>,

II. Jurors and Social Media

A. Is Social Media an Issue for the Court?

As acknowledgement of the use of social media by jurors has grown, international research has been conducted to begin identifying the extent and impact of this issue. To identify if social media is, or will become, an issue for New Zealand Courts, we can look to the findings of this research to recognise any potential implications.

A Reuters Legal Study aptly demonstrated that jurors are among the millions of people that use social media.[6] Reuters Legal staff regularly visited Twitter over three weeks during

November and December 2010, and typed the words "jury duty" into Twitter's search engine.

This produced tweets from people who wrote that they were prospective or actual jurors at the rate of one almost every three minutes. While some tweets were innocuous, complaints by people summoned for jury duty, or jury duty being boring, a significant number wrote statements about the innocence or guilt of the accused. For example, one wrote, "looking forward to a not guilty verdict regardless of evidence".

A notable drawback of the Reuters Legal study is the unknown reliability of the authors of the tweets who wrote about jury duty, and whether these tweeters were actual jurors and if their tweets were factual or fictitious. Nevertheless, assuming that the majority of tweets found were from actual jurors, the frequency of tweets about jury duty

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[6] Brian Grow "As Jurors Go Online, U.S. Trials Go Off Track" (8 December 2010) Reuters

<www.reuters.com>.

appears high.[7]

The United Kingdom Ministry of Justice has recently completed a large study of jurors' internet usage in England and Wales, which showed in standard cases five per cent of jurors sought information about the case while it was ongoing, but almost three times as many on high-profile cases (12 per cent) admitted to doing so.[8] This empirical study is limited as it relied heavily on jurors self-reporting such behaviour, which suggests the actual number may be greater. Also in the United Kingdom, the Law Commission identified at least 18 appeals
in the United Kingdom since 2005 involving juror misconduct from internet access or social media use.[9]

So far no relevant research has been conducted in New Zealand regarding this issue. Nonetheless from these findings it can be inferred that if this issue is not currently a problem for New Zealand courts it will be in the future.

B. Why Do Jurors Use Social Media?

Statistics demonstrate the extent to which social media platforms, such as Facebook, are intrinsic in the daily lives of many people.[10] In 2009 a juror tweeted "Wow. Jury duty. First time ever. Can I be excused

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[7] Marilyn Krawitz "Guilty As Tweeted: Jurors Using Social Media Inappropriately During the Trial Process"

(Faculty of Law Research Paper No 2012-02, University of Western Australia, 2012) at 3.

[8] Cheryl Thomas *Are Juries Fair?* (Ministry of Justice, Research Series 1/10, February 2010).

[9] United Kingdom Law Commission, above n 1, at 62.

[10] Facebook "Key Facts" (June 2013) <newsroom.fb.com>. For example, there were 699 million daily active users on average in June 2013.

because I can't be offline for that long?"[11] While this tweet is a humorous example it exemplifies one of the fundamental reasons why a juror may use social media, being that social media is addictive.[12] This may lead to a juror being unwilling to comply with a court's instructions. Furthermore, jurors may not be aware of, or comprehend, the consequences of using social media while undertaking jury duty, or may not take their responsibilities sufficiently seriously.[13]

For some jurors activities involving social media are so habitual that they are "an extension of thinking, rather than a form of written communication".[14] Social media can be used in an effort to relieve boredom or as an emotional outlet.[15] A juror may be curious about aspects of the case, and with a good intentioned sense of responsibility to ensure that they deliver the right verdict may look online, even if the activity has been forbidden.[16]

These reasons are only a few of the many possible and demonstrate that jurors do not appear to use social media inappropriately to

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[11] Laura Whitney Lee "Comment: Silencing the 'Twittering Juror': The Need to Modernize Pattern Cautionary Jury Instructions to Reflect the Realities of the Electronic Age" (2010) 60 DePaul L Rev 181 at 189.

[12] Jaclyn Cabral "Is Generation Y Addicted to Social Media" (2011) 2(1) The Elon Journal of Undergraduate Research In Communications 5 at 12.

[13] Leslie Ellis "Friend or Foe? Social Media, the Jury and You" (2011) 23(5) The Jury Expert 1 at 4.

[14] Paula Hannaford-Agor "Google Mistrials, Twittering Jurors, Juror Blogs, and Other Technological Hazards"

(2009) 24(2) The Court Manager 42 at 22.

[15] Miland F Simpler III "Student Article: The Unjust 'Web' We Weave: The Evolution of Social Media and its Psychological Impact on Juror Impartiality and Fair Trials" (2012) 36 Law & Psychology Review 275 at 286.

[16] Roxanne Burd and Jacqueline Horan "Protecting the right to a fair trial – has trial by jury been caught in the world wide web?" (2012) 36 Crim L J 103 at 113.

intentionally jeopardise a trial or break instructions. Understanding the reasons for inappropriate social media use can assist in recommending methods of prevention.

C. Principles Underlying the Need to Address this Problem

1. Role of the jury

The jury system is fundamental to the administration of criminal law in New Zealand. Its foundation is the value of a collective decision made by a group of ordinary New Zealanders in accordance with their unanimous opinion on the prosecution brought on behalf of the community.[17] Our justice system depends on the public being confident of the jury's verdict,[18] and the heart of this is the jury's impartiality and freedom from any outside constraint.[19] The concept of trial by jury has always been vulnerable to attack, so if it is to be maintained as an essential element of the criminal justice system, it must be vigilantly protected.[20] The protection of the jury system covers many aspects, not least the candour and full participation of jurors in jury deliberations, privacy of jurors and the finality of jury verdicts.[21]

If a juror writes about a trial on social media, this can affect the confidentiality required of jurors.[22] It challenges "the confidential nature of jury deliberations, may inhibit robust and free-flowing discussion and may have an adverse effect upon the deliberative process."[23] Thus jurors may feel stifled or not participate as they

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[17] *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48 (HC) at 51.
[18] *United States v Siegelman* 640 F 3d 1159 (11th Cir 2011) at 1186.
[19] *Solicitor-General v Radio New Zealand Ltd*, above n 17, at 51.
[20] At 51.
[21] At 53.
[22] *Attorney-General v Fraill*, above n 2, at 62.
[23] David Harvey "The Googling Juror: The Fate of the Jury Trial in the Digital Paradigm" (paper presented at

normally would in the deliberation process if made to feel that their arguments and thoughts may be published to the world. The participation of jurors should be in the certain knowledge that they can express their own views without fear of subsequent exposure.[24] The finality of the verdict and the privacy of jurors are equally important considerations and may be at risk if inappropriate social media use leads to appeals or identification on public platforms.[25]

New Zealand Courts have found that conduct that might undermine the jury system, or public confidence in it, was capable of constituting contempt.[26] Judge Boshier, who is leading the current New Zealand Law Commission "Review of Contempt of Court", has noted that the purpose of the law of contempt is to protect the integrity of the justice system and a defendant's right to a fair trial.[27]

2. Principles of open justice, freedom of expression and fair trial

Social media use by jurors can damage the capacity of courts to maintain an appropriate balance between a number of potentially conflicting rights and principles, many granted by the New Zealand Bill of Rights Act 1990.[28] Foremost of those, which also bear on the proper approach to the jurisdiction to punish for contempt, include open justice, right to a fair trial, and the freedom of expression.

A fundamental aspect of the proper administration of justice is the principle of open justice. Open justice, as relevant to this paper's

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13th International Criminal Law Congress, Queenstown, 13 September 2012).
[24] Caren Myers Morrison "Jury 2.0" (2011) 62 Hastings L J 1579 at 1600.

[25] *Solicitor-General v Radio New Zealand Ltd*, above n 17, at 53.
[26] *Solicitor-General v Radio New Zealand Ltd*, above n 17, at 55.
[27] Law Commission "Law Commission Comments on Juror Contempt" (Press Release, 12 July 2013).
[28] Johnston and others, above n 4, at 3.

discussion, is the concept that all involved in a trial are entitled to know what evidential material is being considered by the decision making body.[29] Whilst this includes both parties and those responsible for the outcome of the trial, the public is also entitled. Inappropriate use of social media may affect a juror's conscious or subconscious mind, and if counsels at trial are unaware of this misconduct, they cannot discuss how the juror was affected at court[30] or cross-examine the juror about it.[31]

A principle responsibility of the courts is protection of the right to a fair trial. This right is affirmed by section 25 of the New Zealand Bill of Rights Act in fulfilment of the obligation under Article 14 of the International Covenant on Civil and Political Rights. The requirement to ensure trials are fair may be met in a multitude of ways. This includes the use of statutory powers, but may also require the court to use its inherent powers to control its procedures and secure the proper administration of justice.[32] These inherent powers can extend to orders against non-parties where such orders are necessary.[33]

Section 14 of the New Zealand Bill of Rights Act encapsulates the right of "[e]veryone" to freedom of expression, "including the freedom to seek, receive, and impart information and opinions of any kind in any form", which relevantly includes the right to impart information about court proceedings.

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[29] *R v Karakaya* [2005] EWCA Crim 346, [2005] 2 Cr App R 5 at [24]-[25].

[30] The Rt Hon The Lord Judge, Lord Chief Justice of England and Wales "Jury Trials" (Judicial Studies Board

Lecture, Belfast, 16 November 2010) at 7.

[31] Thaddeus Hoffmeister "Google, Gadgets, and Guilt: Juror Misconduct in the Digital Age" (2012) 83 U Colo

L Rev 409 at 417.

[32] *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441 at [18].

[33] At [23].

Freedom of expression is a right that is qualified under the International Covenant on Civil and Political Rights.[34] The Covenant identifies multiple justifications for restrictions on free speech including measures to protect the rights or reputations of other and protection of national security, public order, public health or morals. Thus, as the judiciary must observe the New Zealand Bill of Rights Act, a court could only look to restrict a juror's freedom of expression where there was a real risk that the course of justice would be prejudiced.[35] On the other hand, the right to fair trial is not qualified in the International Covenant on Civil and Political Rights. It is an absolute right, not a relative right which must be balanced against other rights and interests recognised by law.[36]

The human rights to a minimum standard of criminal procedure, freedom of expression, and natural justice may be subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" under s 5 of the New Zealand Bill of

Rights Act. Thus Judges in exercising judicial authority are bound to observe the rights and freedoms contained in the New Zealand Bill of Rights Act.[37] However, our Courts have noted that if a conflict should arise between the concepts of freedom of expression and the requirements of a fair trial, all things being equal, the right to a fair trial should prevail.[38]

When considering what methods to implement to prevent inappropriate social media use by jurors, this conclusion should be regarded as an issue of priority.

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[34] Article 19(3).
[35] New Zealand Bill of Rights Act 1990, s 3(a).
[36] *R v Forbes* [2001] 1 AC 473 (HL) at [24].
[37] *Siemer v Solicitor-General*, above n 32, at [22].
[38] *Solicitor-General v Wellington Newspapers Ltd* [1995] 1 NZLR 45 (CA).

III. The Use of Social Media and its Potential Impact

A. Potential Impact

There are four main ways jurors may use social media inappropriately:

- contacting parties, witnesses, lawyers or others in the trial;
- publishing or distributing information about the trial;
- discussing the case or seeking opinions from other people not connected with the trial; and/or
- seeking information about the case from a source outside of the court.[39]

A juror may engage in more than one of these behaviours; for example publishing information about the trial may also involve or invite others' opinions on the trial.[40]

Behaviours of this nature could prevent a juror from returning an impartial verdict in a variety of ways, and all can potentially affect the principles discussed previously.

Further discussions below on these points include examples of jurors using social media in international trials, in an attempt to demonstrate the aforementioned impacts. It is an attempt to classify these types of cases, but is in no way an exhaustive list of the publicised incidents. It

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[39] Ken Strutin "Jury Deliberations in the Digital Age" (20 May 2009) New York Law Journal.

[40] Pat Collins "Prospective Juror Tweets Self Out of Levy Murder Trial" *NBC Washington* (online ed, Washington, 22 October 2010).

is of note that there has been no reported case of this kind in New Zealand so far.

1. Contacting parties, witness, lawyers or others in the trial

Pre-trial jury members are instructed not to communicate with other people about the trial, as discussions and interactions with parties may result in the juror becoming biased.[41] However, jurors may not realise that using social media to contact other parties is as incorrect as communicating with them face-to-face.[42]

The most famous example of misuse of social media during a trial was the case of *Attorney-General v Fraill*.[43] In 2011 London's High Court sentenced Joanne Fraill to eight months in prison for contempt of court for exchanging Facebook messages with the accused in a drug trial while she was serving on the jury. Fraill also searched online for information about another defendant while she and the other jurors were still deliberating. All this activity went against clear instructions to avoid using the internet during the trial. The financial burden of the case for the British government was approximately six million pounds.[44] Hence, while use of social media by jurors to communicate with parties to a case appears to be rare, it is not unheard of.[45]

Another eventuality to be considered are jurors 'friending' or following each other on various social media platforms during a trial and discussing the case both privately and publicly outside of the proper deliberation process.[46] Given it is common behaviour for people to

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41 Ministry of Justice "Jury Service" (Courts 099, September 2010) <www.justice.govt.nz> at 6.

42 Ned Potter "Facebook Mistake: Texas Juror Tried to 'Friend' Defendant" *ABC News* (online ed, 30 August 2011).

43 *Attorney-General v Fraill* [2011] EWCA Crim 1570, [2011] 2 Cr App R 21.

44 Paul Lambert *Courting Publicity: Twitter and television cameras in court* (Bloomsbury Professional, West Sussex, 2011) at 38.

45 Grow, above n 6. See now Courts and Other Legislation Further Amendment Act 2013 (NSW).

46 Johnston and others, above n 4, at 11.

connect with those whom they interact with in many situations on social media, the challenge for the courts is to distinguish the often close relationships formed during an intense jury trial from other social contexts if they wish to establish juror duty as an exception to this common practice.

2. Publishing or distributing information about the trial

Social media allows jurors to "broadcast their deliberations and interact with the general public", instantly communicating about cases and disclosing information with hundreds or thousands of friends or followers.[47] Further, once the information is on the internet, it may be impossible to remove it due to the potentially unlimited sharing process and the fact that information can be stored online indefinitely. This notion is demonstrated most clearly with the knowledge that the United States Library of Congress retains a publicly accessible copy of all tweets since Twitter's inception.[48]

This activity appears to be more common. A juror in the Los Angeles Superior Court tweeted "Guilty! He's guilty! I can tell!" during a criminal trial in that court. The accused in the case was convicted and the court took no action against the juror.[49] A Detroit juror was caught posting on her Facebook page, "Actually excited for duty tomorrow. It's gonna be fun to tell the defendant they're GUILTY". The juror was found guilty of contempt of court and fined.[50]

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[47] Brian Fitzgerald, Cheryl Foong and Megan Tucker "Web 2.0 social networking and the courts" (2012) 35

Aust Bar Rev 281 at 290.

[48] Kathryn K Van Namen "Comment: Facebook Facts and Twitter Tips – Prosecutor and Social Media: An Analysis of the Implications Associated with the Use of Social Media in the Prosecution Function" (2012) 81(3) Miss L J 549.

[49] Grow, above n 6.

[50] Anne Susskind "Technology undermines jury system, as does complexity" (2011) 49(9) LSJ 20.

3. Discussions with others

Jurors who seek the opinion of people who are not present at court, do not understand the case, and have not heard the relevant evidence, may seriously undermine proper legal processes.[51] However, even if jurors do not actively seek the opinions of others, they may be influenced by time spent on social media networks and have their views about the merits of a case altered. This may be unfair to the accused, as they no longer have an unbiased trial based on the relevant admissible evidence.[52]

A UK juror was dismissed from a child abduction and sexual assault trial after she asked her

Facebook 'friends' to help her decide on the verdict. "I don't know which way to go, so I'm holding a poll," she wrote. This was discovered prior to the jury starting its deliberations, and the trial continued in her absence.[53]

4. Seeking information

This paper is principally concerned with jurors' use of social media to communicate about a trial in which they are serving, and therefore does not explore in depth the issue of jurors intentionally conducting their own independent research. Nevertheless it is important to note

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[51] Marcy Zora "Note: The Real Social Network: How Jurors' Use of Social Media and Smart Phones Affect a
Defendant's Sixth Amendment Rights" (2012) 2 U Ill L Rev 577 at 596.

[52] At 579.

[53] Urmee Khan "Juror dismissed from a trial after using Facebook to help make a decision" *The Telegraph*

(online ed, London, 24 November 2008).

that it is possible for jurors to accidentally come across information publicised about the case through activities, discussions and general browsing on social media websites, alongside active research.[54]

The Attorney-General of the United Kingdom used the expression "Trial by Google" in a recent speech to describe jurors' use of internet search tools and social media to conduct their independent investigations into a case.[55] He conveyed a dim view of the practice and referred to a number of cases where jurors were convicted of contempt, including *Attorney-General v Dallas*.[56]

Jurors who seek information from outside the courtroom about the case that they are trying may act for a variety of motives. However, the additional information can result in jurors who are biased and who may fail to judge and form opinions based purely on the evidence presented before them in court.

B. The Potential Consequence for a Trial

If a juror is found to have used social media inappropriately it can increase the length of a trail or delay it, or potentially become a reason for a mistrial or the granting of an appeal.[57]

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[54] Lorana Bartels and Jessica Lee "Jurors using social media in our courts: Challenges and responses" (2013) 23

JJA 35 at 43.

[55] Dominic Grieve, Attorney General United Kingdom "Trial by Google? Juries, social media and the internet"

(speech to University of Kent, University of Kingdom, 6 February 2013). See also Harvey, above n 23.

[56] *Attorney-General v Dallas* [2012] EWHC 156 (Admin), [2012] 1 WLR 991. In that case, a juror was sentenced to six months' jail for contempt of court for conducting research on the internet, including definitions of the word 'grievous' and a newspaper report of an earlier rape allegation against the accused, and had shared this with fellow jurors.

[57] Grant Amey "Student Commentary: Social Media and the Legal

This may inconvenience many of those involved in the first trial by the obligation of appearance at another trial, and may be of particular hardship to victims.[58] Therefore it is in the best interests of all to avoid increasing the length of a trial or delaying it.[59] Ultimately juror misconduct wastes court resources.

Judges greatly differ in their decisions about the consequences for the trial and appear to make decisions on this subject by looking at each case individually.[60] If a court learns that a juror used social media inappropriately and the trial has not concluded, it can declare a mistrial or continue the trial. If the trial has already concluded when a court learns that a juror used social media inappropriately, the court can permit an appeal or let the verdict stand.[61]

In 2010, Reuters Legal using data from the Westlaw online research service compiled a tally of reported US decisions where judges granted a new trial, denied a request for a new trial, or overturned a verdict, in whole or in part, because of juror actions related to the internet. They identified at least 90 verdicts between 1999 and 2010 that were challenged due to juror internet misconduct. They also counted 21 retrials or overturned verdicts in the 2009 – 2010 period.[62] Although this survey relates to United States cases, it can be extrapolated that disruptions due to internet-related behaviour is increasing, and that the

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System: Analysing Various Responses to Using Technology from the Jury Box" (2010) 35 J Legal Prof 111 at 119.

[58] *Attorney-General v Fraill,* above n 2, at 54.

[59] Uli Orth "Secondary Victimization of Crime Victims by Criminal Proceedings" (2002) 15(4) Social Justice

Research 313 at 314.

[60] Emily M Janoski-Haehlen "The Courts are All a 'Twitter': The Implication of Social Media Use in the Courts" (2011) 46 Val U L Rev 43 at 49.

[61] Krawitz, above n 7, at 50.

[62] Grow, above n 6.

costs associated with this would be significant.

1. Mistrial or continue the trial

A judge has the power to declare a mistrial if a juror has been identified as using social media inappropriately.[63] A mistrial occurs when the court stops a trial before it is finished and the trial is continued at a later date, normally with a different jury.[64] However it is possible for the court to continue the trial, with any consequences resting solely on the individual juror concerned. As previously mentioned mistrials have already occurred in the United States.[65]

However this paper would recommend that a mistrial be declared in New Zealand only as a last resort due to the significant resources wasted.

2. Permit an appeal or let the verdict stand

If a court learns of the juror misconduct after the conclusion of a trial, it is possible for the court to grant an appeal or let the verdict stand.[66] The juror's behaviour may not always amount to a miscarriage of justice sufficient to quash a conviction, but it is determined according to how much influence the inadmissible information had on the jury's decision.[67]

The influence on a juror is likely to be greater if the case is discussed with a third party, than when jurors talk among themselves

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[63] Daniel William Bell "Note: Juror Misconduct and the Internet" (2010) 38 Am J Crim L 81 at 86.

[64] Meghan Dunn *Jurors Use of Social Media During Trials and Deliberations: A Report to the Judicial Conference Committee on Court Administration and Case Management* (Federal Judicial Center, November 2011) at 35.

[65] Krawitz, above n 7, at 50.

[66] Krawitz, above n 7, at 51.

[67] *Folbigg v R* [2007] NSWCCA 371.

inappropriately.[68]

Broadly speaking, the courts in common law countries will allow an appeal from a jury verdict when a juror or jurors have accessed extraneous information and it would be unsafe to allow the verdict to stand. There are two decisions, *R v Karakaya* and *Benbrika v The Queen*, that illustrate the considerations involved; a strict approach whereby a juror must not be allowed to introduce entirely new evidence,[69] or a more relaxed approach where the focus is placed more on any endangerment of a fair trial.[70]

C. The Potential Consequence for an Individual Juror

The courts have a range of options available to them in cases where they detect instances of jurors' inappropriate social media use.[71] Specifically they may elect to dismiss the juror and/or jury panel. They may also have the power to find the juror guilty of an offence.[72]

Prejudicial material that appears on the internet may be more amenable to prosecution than material published in traditional media. The weight of authority suggests that material that continues to be accessible on the internet is in a continuous state of publication.[73] If so, prejudicial material that was blogged, posted, or tweeted prior to the commencement of a case, but which remains accessible after it has commenced, may be held in contempt of court.

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[68] *State of Maryland v Dixon* (Circuit Court, Baltimore City, Maryland, 109210015, 21 December 2009).
[69] *R v Karakaya* [2005] EWCA Crim 346, [2005] 2 Cr App R 5.
[70] *Benbrika v The Queen* [201] VSCA 281.
[71] Krawitz, above n 7, at 39.
[72] Bartels and Lee, above n 54, at 46.
[73] *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, (2012) 293 ALR 384; *News Digital Media Pty Ltd v Mokbel* [2010] VSCA 51, (2010) 30 VR 248.

1. Dismiss the juror

Section 22 of the Juries Act 1981 provides for the discharging of a juror or jury, and the court has the power to dismiss. This paper recommends that this consequence for jurors who inappropriately use social media is the most accessible for New Zealand Courts. Other misconduct already can lead to dismissal and this option potentially wastes the least court resources.

Admittedly, this consequence only applies if the trial is ongoing, as opposed to if the court learns about the juror misconduct following the delivery of a verdict.[74]

2. Compel the juror to write an essay

A court may punish jurors who use social media inappropriately by compelling them to write an essay on topics related to the right of a fair trial for the accused. The juror is far more likely to understand the court's reasoning in forbidding the behaviour than if the juror received other types of minor punishment.[75] This consequence may be highly useful in cases where the juror does not think their use of social media during a trial was inappropriate. However, while this type of punishment appears unique and novel, this paper would not recommend it as the best option.

3. Find the juror guilty of an offence

In New Zealand, there is currently no specific statutory offence of breach of jury confidentiality. Nor is there any statutory offence for

[74] Krawitz, above n 7, at 41.
[75] Krawitz, above n 7, at 42.

jurors undertaking their own research. However it has been suggested that given Judges invariably direct juries not to carry out any of this behaviour, offending jurors could be prosecuted for failing to comply with judicial directions.[76] There is further discussion of this possible consequence for a juror under discussion of potential preventative methods below.

IV. Proposed Solutions

A Detecting the Problem Behaviour

A study conducted in the United Kingdom found that "when asked about whether they would know what to do if something improper occurred during jury deliberations, almost half of the jurors (48%) said they either would not know what to do or were uncertain".[77] This belies the requirements in the Consolidated Criminal Practice Direction that judges emphasise the jury's collective responsibility for trying the case. The direction must make the jurors aware that it is their duty "to bring to the judge's attention, promptly, any behaviour among the jurors or by others affecting the jurors, that causes concern."[78] The Jury Instructions in New Zealand contain a similar provision informing jurors they are to tell court staff immediately if another juror has inappropriate or outside knowledge of the trial.[79]

This duty thrust upon jurors' causes concern about the manner in which jurors deliberate and the inefficacy of the process if members of the jury are not relaxed. Thus this paper will recommend two options that remove any undue pressure upon jurors whilst still providing

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[76] Criminal Procedure Act 2011. See ATH Smith "Reforming the New Zealand Law of Contempt of Court: An Issues/Discussion Paper" (2011).

[77] Thomas, above n 8, at 40.

[78] United Kingdom Ministry of Justice *The Consolidated Criminal Practice Direction* (28 March 2006). See also *R v Lambeth* [2011] EWCA Crim 157 at [7].

[79] Ministry of Justice, above n 41, at 7.

channels for the court to detect misconduct.

1. Whistleblower hotline or email

As an alternative to an offence provision, or in association with it, courts might create a hotline or email service that could be used to report cases of jurors accessing social media, or other prohibited research.[80] The anonymous aspect of the hotline may comfort jurors if they are worried that other people may find out that they provided the information.[81] A major potential disadvantages with this approach is the risk that it might cause tension and anxiety within the jury that could inhibit frankness in deliberations. There would also be administrative implications and costs involved, and a risk of unnecessary and malicious reports.[82]

2. Review the jurors' social media pages

Routine screening of the internet including social media is another option to identify potentially prejudicial content and make an application for take down orders.[83] Given the pervasiveness of the internet material, while understandably crucial to undertake in high profile trials, it may be prudent to undertake such monitoring in all trials.[84]

This screening could take place during both the trial and deliberation process. However it raises issues of privacy, by effectively compelling any juror to provide information that would otherwise have remained private. It may also dissuade members of the public from undertaking

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[80] Krawitz, above n 7, at 38.
[81] At 38.
[82] Janoski-Haehlen, above n 60, at 49.
[83] Jacqueline Horan *Juries in the 21st Century* (Federation Press, Annandale (NSW), 2012) at 165.
[84] At 165.

jury service, which is not the intention of these recommendations.

In addition the screening may fail to detect material that may not obviously be prejudicial, but could still have the potential to influence jurors. For these reasons, screening on its own is unlikely to be a full solution to the problem. Continuous monitoring of social media and the internet would be a time-consuming and expensive exercise.[85]

B. Possible Preventative Methods

The following suggested methods to prevent jurors from inappropriately using social media during the trial and deliberation process can be categorised in two generalised types: high interference or low interference.[86] High interference refers to those methods that would interfere greatly with a juror's daily life, contrasted with barely or not interfering as seen with low interference methods.[87] The preventative methods discussed below attempt to spare the court wasted resources and decrease the potential impacts discussed above. Additionally, the paper's focus in this section is to recommend preventative measures most appropriate for the New Zealand Justice System.

1. Jury instructions

The current information written by the Ministry of Justice provided to those serving as a juror contains three important rules.[88] These state that the juror must not talk about the trial to anyone not on the jury, or to anyone connected to the trial other than court staff. Nor are jurors to make their own enquiries about the case. These rules are repeated throughout the document. Mobile phones and other

[85] Burd and Horan, above n 16, at 165 – 166.
[86] Krawitz, above n 7, at 12.
[87] At 12.
[88] Ministry of Justice, above n 41, at 6.

communication devices are banned from the courtroom and jury room.[89]

Removing juror access to mobile phones and other communication devices in the courtroom is unlikely to prevent juror research or dissemination of material. Unless the jury is sequestered for the length of the trial, or the trial is less than a day, it will not prevent them using such devices out of court sitting hours. Such restrictions may also deter people from undertaking jury service.[90]

In Australia, the States and Territories have developed model directions. In New South Wales, the Guide for Jurors includes a warning to jurors not to use the internet to research any matter related to the trial.[91] The Victorian model directions contain a warning against Internet usage, although like the NSW directions, they do not specifically require the judge to address the issue of social media usage.[92] By way of comparison, many of the United States directions contain explicit instructions about social media. The Federal Judicial Conference of the United States Committee on Court Administration and Case Management released model jury instructions.[93] The guidelines provide detailed explanations of the consequences of social media use during a trial, along with recommendations for repeated reminders of the ban on social media usage.

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[89] At 9.

[90] Bartels and Lee, above n 54. Members of the public may require access to a communication device at all times for reasons including family circumstances or work requirements. Although arrangements could be made with the court, it is unlikely to be wholly satisfactory.

[91] Judicial Commission of New South Wales *Criminal Trial Courts Bench Book* (Judicial Commission of New South Wales, Sydney, 2012) at [1-520].

[92] Judicial College of Victoria *Criminal Charge Book* (Judicial College of Victoria, Melbourne, 2010) at 1.5.2.

[93] Judicial Conference Committee on Court Administration and Case Management *Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research On or Communicate About a Case* (June 2012).

Studies conducted that have examined the efficacy of judicial directions indicate that, in general, judicial directions have limited effectiveness. This conclusion is consistent with the findings of the New Zealand Law Commission's 1999 study of juries[94] and research conducted for the United Kingdom Ministry of Justice in 2010.[95] The study in the United Kingdom by Professor Cheryl Thomas, found that jurors admitted checking the internet even when instructed not to do so. Thomas found that written guidelines were twice as effective as oral directions. These findings have been replicated in Australia.[96]

Irrespective of a judicial direction to the contrary, research has demonstrated that jurors are often unwilling, or even unable, to set aside information that they regard to be relevant. This has been termed "reactance" by researchers, referring to a reaction to rules that eliminates the freedom of jurors to decide matters on their own common-sense view of justice.[97] Similarly, increasing incidents of reports of 'online detective juror' show that juries will defy these instructions if they consider they are lacking the necessary information.[98]

One scholar has suggested taking steps to facilitate a view of the court procedures as 'less arbitrary and more reasonable' to reduce feelings of resentment and reactance, which this paper endorses.[99] There are various options to achieve this goal. A judge may provide an explanation behind the reasoning why the decision of the jury is to be

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94 Young, Cameron & Tinsley *Juries in Criminal Trials: Part Two* (NZLC PP37, 1999).

95 Thomas, above n 8.

96 Jill Hunter, Dorne Boniface and Donald Thomson "What Jurors Search For and What They Don't Get"
(UNSW Pilot Jury Study, Law & Justice Foundation, Sydney, 2010).

97 Jack W Brehm *A Theory of Psychological Reactance* (Academic Press, New York, 1966) at 378.

98 Horan, above n 83, at 167.

99 Lisa Eichhorn "Social Science Findings and the Jury's Ability to Disregard Evidence under the Federal Rules of Evidence" (1989) 52 LCP 341 at 353.

based on evidence presented in court and not extraneous information. Directions that place a strong emphasis on procedural fairness and the presumption of innocence may also be useful for controlling the effects of reactance.[100]

Placing posters and other visual aids that state that jurors should not use social media to be placed in the jurors' deliberation rooms may be a useful reminder.[101] Additionally it could be of particular use to jurors who learn visually or who did not pay attention to a judge's oral instructions. This paper recommends that this preventative method is implemented because it is of low interference and low cost.

In addition, this paper recommends research be undertaken in New Zealand to determine what form of written guidelines and judicial directions are most comprehensible to jurors and are most likely to be taken seriously.[102]

2. Legislation

Another potential preventative method that could act as both a deterrence and punishment would be for New Zealand to introduce legislation similar to that of the United Kingdom and Australia. Various statutes could be amended to specifically deal with instances of internet related juror misconduct, potentially being held activity in contempt of court.

In the United Kingdom, a variety of offences exist in statute and common law dealing with misbehaviour arising out of participation in jury service. Misuse of the internet by a juror, or contravention of the

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[100] At 353. "Such an explanation would eliminate some of the conflict experienced by jurors... and [they would be] less likely to view their options as limited" and as a result they would view the court procedures as "less arbitrary and more reasonable".

[101] Krawitz, above n 7, at 35.

[102] Thomas, above n 8, at ix.

contempt of court provisions in section 8(1) of the Contempt of Court Act 1981, is always a most serious irregularity and contempt.[103] In the context of a two year maximum custodial period, a custodial sentence is virtually inevitable. The objective of such a sentence is to ensure the continuing integrity of trial by jury.[104]

In Australia, contempt of court as it affects superior courts exists in common law in much the same form as it did in England and Wales before the Contempt of Court Act, and does not vary significantly among the states.[105] In some states (New South Wales and Victoria), there has been partial codification of the criminal law, but both statutory and common law offences, including contempt of court, continue to exist outside the framework of those Acts.[106] The remaining states, led by Queensland in 1899, have adopted comprehensive criminal codes.[107] To date no Australian State has amended its respective jury act to state that if a juror writes on social media about a trial prior to delivering the verdict it is in contempt of court.[108]

However it has been argued that imposing punishment is contrary to the notion that jury duty is a civic responsibility. Instead focus should be given to encouraging and supporting jurors to complete the process to the best of their ability. It has also been suggested that punishment may be counterproductive, in that other jurors may be less likely to report juror misconduct if they know that this might result in the jury member going to jail.

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[103] *Attorney-General v Dallas,* above n 56.

[104] *Attorney-General v Fraill*, above n 2, at [53]; *Attorney-General v Dallas,* above n 56, at [43].

[105] Under the Australian Courts Act 1828 (UK).

[106] Crimes Act 1900 (NSW); Crimes Act 1958 (Vic).

[107] Criminal Code Act 1913 (WA); Criminal Code Act 1924 (Tas); Criminal Law Consolidation Act 1935 (SA); Criminal Code Act (NT); Criminal Code Act 2002 (Act).

[108] Krawitz, above n 7, at 43.

3. Sequestration

Sequestering a jury for the duration of the trial would provide another method of restricting access to prejudicial material and preventing jurors disseminating material about the trial on social media.[109] Section 29A(2) of the Juries Act allows for a court or Judge to sequester a jury if it is considered required in the interests of justice.

However, this is not a commonly used discretion and if used would be a significant change to how courts currently operate. It is an expensive and time-consuming option that is of high interference and likely unpopular, given the restrictions it imposes on the liberty of jurors.[110]

Its efficacy, for the purposes of deterring social media use by jurors, would also depend on the court's ability to arrange so jurors were unable to access electronic communication devices for the duration of their confinement.[111]

Sequestering jurors is likely the solution that would prove most effective in preventing jurors inappropriately using social media during a trial.[112] However it is also the solution likely to be the greatest interference to their lives, and one that would greatly dissuade members of the public from willingly undertaking jury service. Jurors may resent being sequestered, and sequestration "has shown a tendency to reduce juror motivation, [and] yield hasty

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[109] Johnston and others, above n 4, at 22.

[110] Ralph Artigliere, Jim Barton and Bill Hahn "Reining in Juror Misconduct: Practical Suggestions for Judges and Lawyers" (2010) 84 Florida Bar Journal 8.

[111] Johnston and others, above n 4, at 22.

[112] Hoffmeister, above n 31, at 441.

verdicts".[113] For these reasons sequestering jurors is not a recommended solution for New Zealand courts.

4. Virtual sequestration

A similar preventative method is virtual sequestration.[114] This would allow jurors to return home, but permit the court to observe or block their internet access.[115] This paper does not recommend this preventative method. It would constitute a significant violation of jurors' privacy and be of high interference.[116] Additionally, although potentially less costly than physical sequestration to the courts, it would likely remain considerably costly as the court would require information technology professionals to implement it.[117] Further, if information technology professionals were required, these professionals would gain access to jurors' extremely sensitive and personal information, putting considerable pressure on the courts and the professionals to be highly trustworthy.

Moreover, a juror may easily overcome this preventative method by creating alternative social media accounts. Virtual sequestration may also affect those who share the same computer as the juror if internet access is blocked, and hold no constraint over others allowing the jurors to use their personal devices.[118]

5. Scrutiny in the screening process of juror selection

Modifying the screening process of jurors to include questions of the jury on their access to, and use of social media, could identify any jurors whose use of social media may cause problems before final

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113 Simpler III, above n 15, at 288
114 Hoffmeister, above n 31, at 442.
115 At 442.
116 At 442.
117 At 442.
118 Krawitz, above n 7, at 16.

empanelment.[119] At the same time, this affords the judge the opportunity to introduce to the jury the problems that may arise from access to social media during the course of the trial, to be subsequently reinforced by judicial instructions.[120]

Australian research has considered and largely rejected greater scrutiny of jurors in the selection process.[121] Judges, academics and legislators in Australia and the United Kingdom, have been critical of the use of the jury selection process to detect juror bias largely because of cost, delay and perceived ineffectiveness.[122]

Unfortunately dismissing potential jurors based upon judgements such as extensive use of social media may result in juries that are unrepresentative of the general population.[123]

They may be older and less capable of using technology.[124] As it is important to have juries that are representative of the general population, this preventative method is not recommended without further detailed consideration.[125]

6. Expanded juror training

The introduction of a simple training session for jurors (individually or as a group) would create an opportunity to reinforce prohibitions on social media use.[126] Appropriately used, expanded training would facilitate understanding of, and reasons for, these directions. This would ensure jurors fully comprehend the scope of the restriction of

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[119] Amey, above n 57, at 127.
[120] Johnston and others, above n 4, at 23.
[121] At 23.
[122] At 23.
[123] Zora, above n 51, at 596.
[124] At 596.
[125] At 597.
[126] Johnston and others, above n 4, at 23.

participation on social media use, allowing them to acknowledge and agree to follow the restrictions.[127]

This is highly recommended, as it is of low interference and acknowledges the need to address jurors' concerns as to comprehending the judicial process. There are currently various ways in which training could be introduced before empanelment, or by expanding the orientation process for empanelled jurors to include training specific to social media use.

7. Judge-alone trial

Increasingly using judge-alone trials would have two great impacts on this issue. It would defeat the risk of juror bias resulting from exposure to material on social media (either prior
to or during a trial) and by removing jurors would offer a solution to the problem of dissemination of relevant information to the trial by jurors.[128]

However the concept of the jury trial has been part of the common law justice system since the 14th century.[129] Its foundation rests on the view that jurors serve an important function by enabling community participation in the criminal justice process to ensure that outcomes reflect social values, and is still relevant today.[130] Thus an increase in judge-alone trials would diminish this role. There has also been judicial criticism of judge alone trials particularly for serious crimes.[131] For

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[127] Sarah Tanford and Steven Penrod "Social Inference Processes in Juror Judgements of Multiple-offense Trials" (1984) 47 Journal of Personality and Social Psychology 749.

[128] *John Fairfax v District Court* [2004] NSWCA 324 [65] per Spigelman CJ.

[129] *Cheatle v The Queen* (1993) 177 CLR 541.

[130] The Rt Hon The Lord Judge, Lord Chief Justice of England and Wales "Jury Trials" (Judicial Studies Board
Lecture, Belfast, 16 November 2010) at 1.

[131] *R v Marshall* (1986) 43 SASR 448 (SC) at 497.

these reasons this is not a highly recommended preventative method.

8. Changing the jury model

A radical answer may lie in the concept of the 'mixed jury', that is the "form of jury involves lay assessors sitting alongside professional arbitrators and reaching a verdict together. The professional arbitrators may be trained jurors, assessors, facilitators or judges."[132] Civil Law countries have a long history of using mixed juries, with Japan recently adopting this concept.[133] In this model, the professional jury members would police the lay jury members ensuring no inappropriate material was brought in to deliberation gleaned from own research or outside exposure.[134] The professional could also provide procedural guidance, potentially decreasing the risk and need for jurors to turn to forbidden sources of information.[135]

There are concerns about the use of mixed juries. Firstly the professional member or members of the jury may exert, intentionally or otherwise, undue influence on the lay members.[136] Other concerns relate to increasing costs remunerating professional jury members, and to a risk that "professionalising" the jury may undermine community confidence in the jury system as a whole.[137] This would also prove a major change to trial by jury. As such it is not recommended as a viable short-term solution, but may be worthy of longer-term investigation.[138]

9. Written warning or written oath

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[132] Burd and Horan, above n 16, at 122.
[133] At 122.
[134] At 120.
[135] At 120.
[136] At 119.
[137] At 120.
[138] At 120.

Another possible preventative method is to ensure that an additional warning is given to jurors concerning social media in writing and orally.[139] Additionally jurors could undertake an oath to acknowledge the instructions that the court provided them.[140] This would act to increase jurors' knowledge about the instructions existence, and to increase the potential seriousness of how a court perceived a juror's actions if they subsequently used social media inappropriately.[141]

This is a relatively easy, low interference method to compel jurors to consider sincerely the court's instructions. The warning or oath may cause the jurors to take the instructions more seriously and be more likely to remember them if they see them in writing and swear to uphold them.[142] However, it may not be sufficient to prevent the problem entirely and would only be recommended if combined with other methods.

V. Conclusion

The purpose of this paper was to recommend methods to prevent inappropriate social media use in our courts best suited for implementation in New Zealand. The courts need to find the appropriate balance, in order to protect the administration of justice, while not invading jurors' privacy, personal rights and freedom of information. Approaches to the issue should prevent social media use in the courtroom, deliberation room and impact on jurors' behaviour outside of court. The limitations should also not dissuade members of the public from jury participation.[143]

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139 Krawitz, above n 7, at 33.
140 Hoffmeister, above n 31, at 457.
141 At 457.
142 Krawitz, above n 7, at 33.
143 Justin Whealing and Stephanie Quine "Trial and Error: AIJA Spotlights Holes in Criminal Justice System"
Lawyers Weekly (Online ed, Australia, 14 Sept 2011).

The preventative methods recommended are improved jury instruction and the expansion of juror training. These options are the least invasive on jurors' rights while focusing on educating jurors about the importance and necessity of appropriate behaviour during a trial. In balance, the ease of implementation and potential for immediate positive results are appealing for court administration.

It is crucial that New Zealand Courts actively address the issues mentioned in this paper. The New Zealand Law Commission is undertaking a wide-ranging review of New Zealand's contempt law.[144] This reassessment includes consideration of the rules governing the conduct of jurors and the circumstances in which contempt proceedings could be brought against jurors and the type of penalties that could be imposed. It would be advisable for the Law Commission to consider social media use by jurors as part of this review.

Research should be undertaken to consider the practicalities and implications of implementing the methods discussed in this paper, and means of keeping abreast of technological advances while maintaining the integrity of the court.

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144 Law Commission "Law Commission Commences Review of Contempt of Court" (Press Release, 10 April 2013).