

YESTERDAY IS HISTORY, TOMORROW IS A MYSTERY – THE FATE OF THE AUSTRALIAN JURY SYSTEM IN THE AGE OF SOCIAL MEDIA DEPENDENCY

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I INTRODUCTION

The jury system in criminal trials is based on the principle that the determination of guilt or innocence of an accused should be undertaken by members of the community in order to guarantee a fair trial.¹ The criminal jury, as a fundamental part of the English criminal justice system, was first adopted by the Australian colonies and subsequently integrated into state and territory criminal justice systems.² The Australian Constitution enunciates that a trial on indictment for a Commonwealth offence shall be by jury.³ An essential aspect of the Australian jury system, comparable to other jury systems around the world, is that jurors in criminal trials decide on questions of fact solely based on the evidence placed in front of them during the trial.⁴ They are not allowed to conduct their own research and retrieve outside information on which they base their verdict.⁵ While it is certainly no new phenomenon that some jurors disobey these instructions and conduct their own research,⁶ the risk has increased over the

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1 On Australian jury trials in general, see Anthony Dickey, 'The Jury and Trial by One's Peers' (1974) 11 *University of Western Australia Law Review* 205.

2 For a historical overview of the development of the jury system in New South Wales in general, see J M Bennett, 'The Establishment of Jury Trial in New South Wales' (1961) 3 *Sydney Law Review* 463. See also Michael Chesterman, 'Criminal Trial Juries in Australia: From Penal Colonies to a Federal Democracy' (1999) 62(2) *Law and Contemporary Problems* 69. The right to a jury trial is traditionally associated with chapter 29 of the Magna Carta although this interpretation has been contested by some: see Dickey, above n 1, 206–7.

3 *Australian Constitution* s 80.

4 Juror oaths and affirmations in all Australian jurisdictions enunciate that the verdict will be given based on the evidence presented: *Juries Act 1967* (ACT) s 45, sch 1; *Jury Act 1977* (NSW) s 72A; *Juries Act 1962* (NT) ss 58–9, sch 6; *Jury Act 1995* (Qld) s 50; *Juries Act 1927* (SA) sch 6; *Juries Act 2003* (Tas) s 38, sch 3; *Juries Act 2000* (Vic) s 42, sch 3. For an overview, see also Jodie O'Leary, 'Who's Who in the Legal Zoo: The Jury' (2011) 17 *The National Legal Eagle* 21, 22.

5 *Juries Act 1967* (ACT) s 45, sch 1; *Jury Act 1977* (NSW) s 72A; *Juries Act 1962* (NT) ss 58–9, sch 6; *Jury Act 1995* (Qld) s 50; *Juries Act 1927* (SA) sch 6; *Juries Act 2003* (Tas) s 38, sch 3; *Juries Act 2000* (Vic) s 42, sch 3.

6 See, eg, *R v Skaf* (2004) 60 NSWLR 86 where two jury members visited the scene of the crime to look at the lighting. On appeal a new trial was ordered.

past two decades with the start of the digital age where information is readily and easily available. Relatedly, academic interest in the topic of jurors conducting their own internet research has increased over the past years and the catchphrase of the ‘Googling juror’⁷ or ‘trial by Google’⁸ has been introduced to partially capture this phenomenon. Researchers have long highlighted jurors’ internet research on legal terms or other trial-related information as an area of concern.⁹

Another problematic development is jurors’ use of social media, including Facebook, Instagram and Twitter, during the trial and deliberation process. Jurors are not allowed to disclose any protected information about trial or deliberations, they are not to discuss the case with non-jurors,¹⁰ and must remain unbiased. However, a number of cases have reportedly arisen in Australia and abroad where jurors have breached these duties by using social media. In addition, by simply accessing social network profiles jurors are at risk of being exposed to potentially prejudicial news posted by other users. In this case jurors receive extraneous information incidentally rather than by purposefully conducting trial-related internet research. Jurors’ social media use can therefore have severe consequences ranging from the dismissal of the individual juror over the dismissal of the jury panel to the abandonment of the trial and the appeal of the original verdict leading to its reversal. In addition, an individual juror can face jail time for contempt of court due to their actions. Each comes with its own cost implications.

With growing interest and concern, a number of strategies have been put forward on how to best curtail this phenomenon in common law jurisdictions. The approaches range from jury directions on social media over penalties for misconduct and (virtual) sequestration of the jury, to the introduction of the uncontested right for judge alone trials or abolishing the jury system altogether. This article contemplates whether jurors’ use of social media during trial and deliberations is a frequent occurrence endangering the fair trial principle and whether viable avenues exist to sufficiently address this potential challenge in the Australian context. This article does not consider jurors’ intentional attempts at obtaining extrajudicial information through the use of web-based search engines, including those on social media,¹¹ or the effects of internet pre-trial publicity on

7 David Harvey, ‘The Googling Juror: The Fate of the Jury Trial in the Digital Paradigm’ [2014] *New Zealand Law Review* 203; J C Lundberg, ‘Googling Jurors to Conduct Voir Dire’ (2012) 8 *Washington Journal of Law, Technology & Arts* 123.

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

9 See, eg, John Schwartz, ‘As Jurors Turn to Web, Mistrials Are Popping Up’, *The New York Times* (online), 17 March 2009 <http://www.nytimes.com/2009/03/18/us/18juries.html?em&_r=0>; Douglas L Keene and Rita R Handrich, ‘Online and Wired for Justice: Why Jurors Turn to the Internet (the “Google Mistrial”)’ (2009) 21(4) *The Jury Expert* 14 <<http://www.thejuryexpert.com/2009/11/online-and-wired-for-justice-why-jurors-turn-to-the-internet-the-google-mistrial/>>. For Australian case law on googling jurors see, eg, *Martin v The Queen* (2010) 28 VR 579 (concerned with online research of legal terms).

10 *Jury Act 1967* (ACT) s 42C; *Jury Act 1977* (NSW) s 68B; *Juries Act 1962* (NT) s 49A; *Jury Act 1995* (Qld) s 70(2); *Juries Act 2003* (Tas) s 58; *Juries Act 2000* (Vic) s 78.

11 On this question see Nancy S Marder, ‘Jurors and Social Media: Is a Fair Trial Still Possible?’ (2014) 67 *SMU Law Review* 617, 626.

jurors as this has been discussed extensively elsewhere.¹² When assessing the likelihood of jurors' social media misconduct in practice, existing research studies, as well as incidents reported in the media in the United States ('US'), the United Kingdom ('UK') and Australia are examined. Cases reported prior to 2011, as well as incidents relating to juror misconduct in civil trials, do not form part of the analysis in this article in order to provide a current assessment of the issue in criminal trials.¹³

After a brief introduction, Part II of this article lays out what jurors' social media misconduct entails. It subsequently examines whether this behaviour likely constitutes a risk for the criminal justice system in practice by evaluating existing research and incidents reported in the media since 2011. Part III explores the effectiveness and viability of implemented and suggested approaches aimed at curtailing jurors' social media use in the Australian context. The article concludes, in Part IV, that the effectiveness of many of the suggested approaches remains questionable and that their implementation is politically unrealistic due to cost and time implications for the Australian criminal justice system. It appears that in order for legal solutions to adequately reflect the problem, a more holistic understanding of the underlying motivations of jurors' social media use during trial and deliberation is necessary.

II JURY MISCONDUCT VIA SOCIAL MEDIA DURING THE TRIAL

A What Is Social Media Misconduct?

The below first highlights what type of behaviour can qualify as jurors' social media misconduct before addressing the question of whether jurors' social media use constitutes an actual problem for criminal trials in practice.

In adversarial criminal justice systems, such as Australia's, judges preside over trials and inter alia determine the admissibility of evidence and provide jury instructions regarding the law and legal rules.¹⁴ The jury subsequently delivers the verdict after confidential deliberations. A fundamental rule in all Australian jurisdictions is that the jury must reach its verdict in line with the instructions provided by the judge and solely based on the evidence placed in front of them.¹⁵ In addition, jury members must act confidentially, meaning that jurors are not allowed to share protected information such as statements or opinions of other

12 See, eg, John C Meringolo, 'The Media, the Jury, and the High-Profile Defendant: A Defense Perspective on the Media Circus' (2010) 55 *New York Law School Law Review* 981; Isaac Frawley Buckley, 'Pre-trial Publicity, Social Media and the "Fair Trial": Protecting Impartiality in the Queensland Criminal Justice System' (2013) 33 *Queensland Lawyer* 38.

13 For cases reported prior to 2011, see Peter Lowe, 'Challenges for the Jury System and a Fair Trial in the Twenty-First Century' [2011] *Journal of Commonwealth Criminal Law* 175.

14 In Australian criminal trials, juries play a role only in superior courts and not in Magistrate's Courts.

15 Juror oaths and affirmations in all Australian jurisdictions enunciate that the verdict will be given based on the evidence presented: *Juries Act 1967* (ACT) s 45, sch 1; *Jury Act 1977* (NSW) s 72A; *Juries Act 1962* (NT) ss 58–9, sch 6; *Jury Act 1995* (Qld) s 50; *Juries Act 1927* (SA) sch 6; *Juries Act 2003* (Tas) s 38, sch 3; *Juries Act 2000* (Vic) s 42, sch 3. For an overview see also O'Leary, above n 4, 22.

jurors with members of the public or to discuss the case with non-jurors.¹⁶ Lastly, jurors must remain impartial before seeing and hearing all the relevant evidence in a case and must not prejudge a defendant.¹⁷ Juror misconduct occurs where jurors violate court instructions or applicable laws during and after the trial and deliberation process. Jurors' use of social media at any stage of the jury service has the potential to breach fundamental jury principles and to amount to juror misconduct.

Social media can be defined as 'web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system'.¹⁸ Social media platforms enable people to instantly share information including posts, photos, videos and to view communication by others.¹⁹ The face of social media is constantly changing and evolving with the development of new platforms and the loss of popularity of others.²⁰ Kietzmann et al outline that at the moment a 'diverse ecology of social media sites' exists which do not all have the same scope.²¹ These include social media sites for the masses, such as Facebook, or more specific professional networking sites such as LinkedIn. Some social media sites are designed for sharing photos and videos including Instagram and YouTube. There are general blogs and the possibility to microblog through the use of status updates, for example, on Twitter. Most platforms allow users to select different privacy settings and to choose whether content is visible publicly or privately.

Jurors' posting or tweeting about the case or the accused can be evidence of a juror's bias predisposition towards the defendant or preconceived ideas about the verdict. For example, a juror tweeting that the defendant is guilty before the trial commences suggests the juror has reached a conclusion before the evidence is presented at trial. Posting on social media may also violate the duty not to disclose protected trial information and to refrain from communicating with anyone except for fellow jurors about the trial. Moreover, jurors' communication on social media sites can solicit responses by other social media users potentially highlighting information excluded at trial.²² Third party communication on social

16 *Jury Act 1967* (ACT) s 42C; *Jury Act 1977* (NSW) s 68B; *Juries Act 1962* (NT) s 49A; *Jury Act 1995* (Qld) s 70(2); *Juries Act 2003* (Tas) s 58; *Juries Act 2000* (Vic) s 78.

17 On the obligation of jurors to remain impartial see also Buckley, above n 12, 38.

18 Danah M Boyd and Nicole B Ellison, 'Social Network Sites: Definition, History, and Scholarship' (2007) 13 *Journal of Computer-Mediated Communication* 210, 211.

19 Lorana Bartels and Jessica Lee, 'Jurors Using Social Media in Our Courts: Challenges and Responses' (2013) 23 *Journal of Judicial Administration* 35, 36–7.

20 For example Myspace, once the most popular social media site in the US, has lost much of its initial popularity today: see Marc Schenker, *Former MySpace CEO Explains Why MySpace Lost Out To Facebook So Badly* (12 May 2015) Digital Trends <<http://www.digitaltrends.com/social-media/former-myspace-ceo-reveals-what-facebook-did-right-to-dominate-social-media/#ixzz4cDCvuz8Y>>.

21 Jan Kietzmann et al, 'Social Media? Get Serious! Understanding the Functional Building Blocks of Social Media' (2011) 54 *Business Horizons* 241, 242.

22 For further discussion in the US context see Marcy Zora, 'The Real Social Network: How Jurors' Use of Social Media and Smart Phones Affects a Defendant's Sixth Amendment Rights' (2012) *University of Illinois Law Review* 578, 587.

media, namely befriending and communicating with other trial participants such as the defendant or witnesses, has the potential to violate the obligation to assess the case only in light of evidence presented at trial. Simply accessing social media for non-news purposes can expose jurors to potentially prejudicial information appearing in their newsfeed.²³ Kim, Chen and de Zúñiga explain that the possibilities for exposure to incidental news have increased with the rise of new media.²⁴ Passive news consumption is considered a ‘by-product’ of social media use.²⁵ It is a growing concern that jurors using social media for entertainment purposes may inadvertently consume extrajudicial information, especially in high profile criminal trials which attract a lot of media coverage. For example, while juries are generally not informed about the character of the accused,²⁶ they may be exposed to such information on social media if other users post about the case and the defendant. The question then turns on whether jurors, after reading relevant social media posts or tweets, can remain impartial during deliberations or if this is no longer possible given the information they have already consumed outside of the trial.²⁷

While not all jurors may use social media the number of social network users overall in Australia is drastically increasing every year. The population of Australia is estimated around 24.4 million.²⁸ As of January 2017, there were around 16 million Facebook, 14.8 million YouTube, 5.1 million WordPress, circa 5 million Instagram and 2.8 million Twitter users in Australia.²⁹ Social media access is also not limited to younger web users but the networking platforms appear popular with all generations. The 2016 Sensis report on social media use in Australia identified that 69 per cent of Australians of all ages have a social media profile.³⁰ Similarly research by EY Sweeny on social media use in Australia in July 2015 identified that 78 per cent of 18–34 year olds use Facebook daily as do 60 per cent of 35–44 year olds, 57 per cent of people between 45–54 years of age and 54 per cent of persons between the ages of 55–

23 On incidental news exposure on the internet, see Yonghwan Kim, Hsuan-Ting Chen and Homero Gil de Zúñiga, ‘Stumbling Upon News on the Internet: Effects of Incidental News Exposure and Relative Entertainment Use on Political Engagement’ (2013) 29 *Computers in Human Behaviour* 2607, 2607.

24 Ibid.

25 Ibid 2608.

26 Lowe, above n 13, 181.

27 For discussion on the psychological impact of social media on jurors’ impartiality see Miland F Simpler, ‘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, 282–3.

28 Figures projected for March 2017: see Australian Bureau of Statistics, *Population Clock* (March 2017) <<http://www.abs.gov.au/ausstats/abs%40.nsf/94713ad445ff1425ca25682000192af2/1647509ef7e25faaca2568a900154b63?OpenDocument>>.

29 David Cowling, ‘Social Media Statistics Australia – January 2017’, *Social Media News* (online), 1 February 2017 <<https://www.socialmedianews.com.au/social-media-statistics-australia-january-2017/>>.

30 Sensis, ‘Sensis Social Media Report 2016: How Australian People and Businesses are Using Social Media’ (Report, 1 June 2016) 4 <https://www.sensis.com.au/asset/PDFdirectory/Sensis_Social_Media_Report_2016.PDF>. According to Sensis, social media is used daily by 75 per cent of people between 18–29 years of age as well as by 66 per cent of 30–39 year olds. Around 52 per cent of people between 40–49 years use social media on a daily basis while 38 per cent of 50–64 year olds and 20 per cent of 65 and older engage in daily social networking: at 15.

69.³¹ These figures may be the reason why Keene and Handrich conclude that 'social media is a fact of life'.³²

B Is Social Media Misconduct an Issue in Practice?

The below evaluates whether jurors' social media use during trial and deliberations denotes a prominent issue in practice which holds real risks for the impartiality of the criminal justice system. The assessment is undertaken by evaluating existing research in the field prior to examining incidents of jurors' social networking reported in the media in Australia, the UK and the US since 2011.

1 Studies on Social Media Use during Trials

Only a slim body of research has examined jurors' internet use and even fewer studies have focused specifically on social media. The existing research body can be divided into three different types of research: studies examining jurors' conduct through monitoring actual users in social networks, studies surveying third parties such as the judiciary, court workers and academics on their perception of jurors' social media use and, lastly, studies questioning actual jurors on social media misconduct.

(a) Studies Monitoring Social Media

In 2010, a snapshot study of Twitter-use relating to #juryduty and #juryservice was undertaken for a 24-hour period for one given Monday and 10 twitter accounts were subsequently chosen at random to be followed for a period of seven days.³³ The hashtag 'juryduty' returned 260 hits in a 24 hour period while the hashtag 'juryservice' returned 26 hits. Reportedly, none of the accounts followed for seven days contained any posts which amounted to juror misconduct. Similarly during the 2010 November/December period, Reuters Legal monitored Twitter for the hashtag 'juryduty'. Relevant Tweets came up nearly every three minutes.³⁴ It is reported that a significant number of tweets included statements regarding the defendants' guilt or innocence.

While the snapshot study concluded that juror misconduct did not occur on social media during the time of monitoring, the Reuters Legal study suggests that misconduct may have occurred in cases where comments about the guilt or innocence of the defendant were made. Both studies suffer from the weakness that the monitoring timeframe was very brief and that no avenue exists to verify whether the information tweeted is actually accurate. For example, any user can pretend that they are empanelled and make comments about the guilt or

31 EY Sweeney, 'Digital Australia: State of the Nation 2015–16' (Report, 4 February 2016) 21 <<https://digitalaustralia.ey.com/Documents/SotN-Report-2015-16.pdf>>.

32 Keene and Handrich, above n 9, 15.

33 Michael Bromby, 'The Temptation to Tweet – Jurors' Activities Outside the Trial' (Paper presented at Institute for Advanced Studies, Glasgow, 25–26 March 2010).

34 Brian Grow, 'As Jurors Go Online, US Trials Go Off Track', *Reuters* (online), 8 December 2010 <<http://www.reuters.com/article/us-internet-jurors-idUSTRE6B74Z820101208>>.

innocence of a defendant even if they are not actually a juror.³⁵ In light of these weaknesses the results of the above studies are inconclusive.

(b) Studies Questioning Third Parties

In a 2011 US study, Dunn surveyed district court judges on their experiences with jurors' social media use during trial and deliberations.³⁶ The 508 responding judges indicated that detected social media use by jurors was infrequent. Overall only six percent, that is 30 judges, reported that they were aware of instances in which jurors had misused social media in a trial. Detected misconduct included friending and communicating or attempting to friend participants in the case, as well as divulging confidential information about the case or other jurors.³⁷ The number of surveyed judges who detected jurors' social media misconduct in Dunn's study seems low suggesting that jurors' social media misconduct may not constitute a significant problem in practice. Dunn's study and its results, however, face several limitations. The survey's response rate was relatively low with only 53 per cent of judges responding.³⁸ In addition, judges and therefore third parties were surveyed on their perceptions of jurors' internet misconduct rather than actual jurors themselves. Jurors' social media use is hard to detect for judges where it is not reported to them. For this reason the problem of jurors' social media misconduct may be greater in practice than suggested by Dunn's research.

A 2013 Australian study questioned 62 judges, tribunal members, magistrates, court workers and academics working in the field on their biggest concerns and opportunities regarding social media and the courts.³⁹ The biggest concern raised was juror misuse of social and digital media causing mistrials.⁴⁰ While informative, the study and its findings are limited as the study's sample size is very small and only third parties rather than actual jurors were questioned on the issue.

(c) Studies Questioning Actual Jurors

A study published in 2012 by Hannaford-Agor, Rottman and Waters surveyed US jurors from six criminal and seven civil trials, inter alia, on their

35 Similar concerns were raised in Rachel Dunning, '#Juryduty – Jurors Using Social Media' [2014] *New Zealand Law Students Journal* 211, 213.

36 Meghan Dunn, 'Jurors' Use of Social Media During Trials and Deliberations: A Report to the Judicial Conference Committee on Court Administration and Case Management' (Report, Federal Judicial Center, 22 November 2011).

37 *Ibid* 3.

38 For critique of the study, see also Marder, above n 11, 638.

39 Jane Johnston et al, 'Juries and Social Media – A Report Prepared for the Victorian Department of Justice' (Report, Victorian Department of Justice, 1 June 2013) 9. A summary of the survey is provided in Patrick Keyzer et al, 'The Courts and Social Media: What Do Judges and Court Workers Think?' (2013) 25 *Judicial Officers' Bulletin* 47.

40 Johnston et al, above n 39, 3.

social media use during trial and deliberation.⁴¹ While 86 per cent claimed that they could refrain from internet use during the trial if instructed to do so, 14 per cent admitted they would not be able to do so even if instructed. No juror participating in the study admitted to social media misconduct but 10 per cent admitted to old fashioned misconduct such as talking about the case with family.⁴² A similar 2014 study on jurors and social media use by St Eve, Burns and Zuckerman informally surveyed 583 actual jurors in US federal and state courts in Illinois on whether they were tempted to communicate about the case on social media.⁴³ From the 583 jurors, over 89 per cent indicated that they were not tempted to communicate about the case on social media. Only 8.06 per cent admitted that they were tempted but did not do so because of the judge's directions. Around three per cent did not respond to the question.⁴⁴

The results of the two studies surveying actual jurors suggest that social media misconduct is a very rare occurrence in practice as no juror admitted to actual social media misconduct. However, the results may have to be qualified for the following reasons. Participation in both surveys was voluntary and the studies relied on jurors' self-reporting. It can be imagined that jurors who engaged in social media misconduct during the trial were less likely to participate in the survey and to admit to their wrongdoing in fear of repercussions even if the survey was anonymous. Especially St Eve, Burns and Zuckerman's study suffers from the problem that either St Eve or Burns presided over all trials that led to a post-trial survey.⁴⁵ Jurors may be even less likely to admit to breaching jury directions in a survey handed to them by the presiding judge immediately at the end of their jury service.⁴⁶ The actual occurrence of social media misconduct may therefore be greater than suggested by the two studies.

Due to their limitations none of the existing studies provides comprehensive data on the extent of jurors' social media use in practice. To further trace the phenomenon the below examines incidents of jurors' social media use reported by the media in Australia, the US and the UK since 2011.

2 Media Reports of Jurors' Social Network Use in Australia

In Australia, few cases of social media misconduct during trials have been reported.⁴⁷ The relative silence may mean that social media is unproblematic for

41 Paula Hannaford-Agor, David Rottman and Nicole Waters, 'Juror and Jury Use of New Media: A Baseline Exploration' (Report, National Center for State Courts for the Executive Session for State Court Leaders in the 21st Century, 2012).

42 Ibid 6.

43 Amy J St Eve, Charles P Burns and Michael A Zuckerman, 'More from the #Jury Box: the Latest on Juries and Social Media' (2014) 12 *Duke Law & Technology Review* 65.

44 Ibid 79.

45 Ibid 78.

46 For similar criticism on a 2012 study conducted by St Eve and Zuckerman, see Marder, above n 11, 639.

47 Cases where jurors have used search engines for background searches have been reported more frequently in Australia. For example, in 2014, a Queensland juror conducted Facebook background searches on the accused and the victim during the murder trial for Lawrence Alfred Gaskell. The jury was subsequently dismissed and the trial aborted: see Tony Keim, 'Queensland Murder Trial Aborted as Juror Researches Case on "Facebook"', *The Courier Mail* (online), 8 August 2014 <<http://www.courier>

Australian juries and that properly instructed jurors should be trusted.⁴⁸ Yet especially in recent years the media has reported jurors' social networking in high profile Australian cases more frequently.

In 2013, two jurors in a lengthy fraud trial befriended each other on Facebook and one posted extensively about the trial. The comments posted concerned the nature and length of proceedings.⁴⁹ This conduct almost led to the dismissal of the jury panel two months into the trial.⁵⁰ However, in the end the judge did not find the posts prejudicial and the trial continued.

In mid-2016 in Western Australia, the trial of the so-called 'body in the boot' murder of Travis Mills was scheduled to take place. Mills was beaten unconscious with a baseball bat prior to being placed in the boot of a car which was later set on fire.⁵¹ The day before the trial was about to start a female juror posted on Facebook 'At Perth District Court, guilty!'.⁵² She was subsequently dismissed by the judge after her post was brought to his attention. The judge informed the juror that he could no longer be satisfied that she would be a fair juror. He advised her not to post any additional information about the case on social media. No mistrial was declared in this instance.⁵³

mail.com.au/news/queensland/queensland-murder-trial-aborted-as-juror-researches-case-on-facebook/news-story/efa2ca3f43199b4f04f5fe9bdc6b1b20>.

48 On the ability of jurors to follow instructions in general see, eg, *John Fairfax Publications Pty Ltd v District Court (NSW)* (2004) 61 NSWLR 344, 366 [103] (Spiegelman CJ):

Those cases have decisively rejected the previous tendency to regard jurors as exceptionally fragile and prone to prejudice. Trial judges of considerable experience have asserted, again and again, that jurors approach their task in accordance with the oath they take, that they listen to the directions that they are given and implement them. In particular that they listen to the direction that they are to determine guilt only on the evidence before them.

See also *R v Yuill* (1993) 69 A Crim R 450, 453–4 [6] (Kirby ACJ):

Courts will assume that jurors, properly instructed, will accept and conform to the direction of the trial judge to decide the case solely on the evidence placed before them in the court ... There is an increasing body of judicial opinion, lately expressed, to the effect that whatever pre-trial publicity exists, jurors, when they take on the solemn responsibility of the performance of their duties in the courtroom, differentiate between gossip, rumour, news and opinion which they hear before the case and the evidence which they hear in the court in the trial for which they are empanelled.

Lowe on the other hand argues that the 'institutional integrity of the jury system in common law jurisdictions is under severe threat': see Peter Lowe, 'Problems Faced by Modern Juries' [2012] (Winter) *Bar News* 46, 46. In the US context Artigliere explains that there is a 'landslide' of juror misconduct even though judges appear unwilling to admit this: see Ralph Artigliere, 'Sequestration for the Twenty-First Century: Disconnecting Jurors From the Internet During Trial' (2011) 59 *Drake Law Review* 621, 621.

49 Brenden Hills, 'Jury Getting off Their Facebooks', *The Daily Telegraph* (online), 12 May 2013 <<http://www.dailytelegraph.com.au/jury-getting-off-their-facebook/news-story/26e2549a7d9063ae9dae0e2a27683dce>>.

50 *Ibid.*

51 Joanna Menagh, 'Body in Boot Murder Trial: Woman Says She Was "Sucked In" to Help Kill Travis Mills', *ABC News* (online), 23 August 2016 <<http://www.abc.net.au/news/2016-08-23/justine-campbell-court-travis-mills-body-in-boot-murder-trial/7778034>>.

52 Heather McNeill, 'Calls to Overhaul WA Jury System After Juror Dismissed for Facebook Post', *WAtoday* (online), 13 October 2016 <<http://www.watoday.com.au/wa-news/calls-to-overhaul-wa-jury-system-after-juror-dismissed-for-facebook-post-20161012-gs0wwa.html>>.

53 *Ibid.*

In 2016 in Queensland, the defence motioned for a mistrial due to a juror's Instagram use during the so-called 'tinder date' case.⁵⁴ The defendant Gable Tostee was on trial for murdering Warriena Wright whom he met on Tinder in August 2014 and invited on their only date to his Gold Coast high rise apartment. During the date, Wright died after a fall from the apartment's balcony.⁵⁵ The juror shared her thoughts on being part of the trial with her over 2000 followers on Instagram. Comments included 'I snagged a nasty one, so it's a bit full on,' and 'I took it home with me yesterday and woke quite miserable this morning. Will make sure I leave it behind this afternoon'.⁵⁶ As the juror had not disclosed any specific trial related information on social media, however, the application was unsuccessful.⁵⁷

In February 2017, a murder trial in New South Wales almost had to be aborted after a witness sent one jury member a friend request on Facebook.⁵⁸ However, because the juror informed the judge immediately and deleted the friend request the trial was able to proceed.

3 *Media Reports of Jurors' Social Network Use in the US and the UK*

The phenomena of jurors using social media during criminal trials is not limited to Australia. Cases in the US and the UK have frequently featured in the media.

In January 2017 in Virginia, a female juror in the murder case of Derrick Antonio Morton posted on Facebook that she was on jury duty. Subsequently, her stepfather commented on her post 'guilty, guilty, guilty' to which she replied '[a]t least they give us coffee'. The judge outlined that while the original post was not an issue, the comment and the response to the comment were a cause for great concern as it related to the guilt or innocence of the defendant. For this reason the defendant's motion for a mistrial was granted.⁵⁹

In 2015, a Queens' juror, Kimberly Ellis, posted in detail about the robbery trial she was empanelled for on social media. Her posts included comments and opinions held by other jurors: 'The other jurors don't trust the police and want to outright dismiss the confessions as well as the majority of the rest of the evidence. Tomorrow is going to be a very difficult day'. After one of her

54 'Tostee Case: Juror Almost Caused Mistrial by Posting on Instagram', *SBS* (online), 20 October 2016 <<http://www.sbs.com.au/news/article/2016/10/20/tostee-case-juror-almost-caused-mistrial-posting-instagram>>.

55 For background information on the case see Kristian Silva, 'The Tinder Date and the Fatal Fall', *ABC News* (online), 21 October 2016 <<http://www.abc.net.au/news/2016-10-20/the-story-of-gable-tostee-and-warriena-wrights-tragic-date/7941720>>.

56 'Gable Tostee Verdict: No Action Taken Against Instagram Juror', *Brisbane Times* (online), 21 October 2016 <<http://www.brisbanetimes.com.au/queensland/gable-tostee-verdict-no-action-taken-against-instagram-juror-20161020-gs7gx0.html>>.

57 McNeill, above n 52.

58 Sam Rigney, 'Murder Trial Almost Aborted after Witness Sends Facebook Friend Request to Juror', *The Sydney Morning Herald* (online), 9 February 2017 <<http://www.smh.com.au/nsw/murder-trial-almost-aborted-after-witness-sends-facebook-friend-request-to-juror-20170209-gu9bwa.html>>.

59 Scott Shenk, 'Facebook Post Leads to Mistrial', *fredericksburg.com* (online), 4 January 2017 <http://www.fredericksburg.com/news/crime_courts/facebook-post-leads-to-mistrial/article_11b6041e-5c28-527c-b1d1-94564834972c.html>.

Facebook friends, a District Attorney, pointed out her posts to the judge, she received a \$1000 fine and the judge declared a mistrial.⁶⁰

A year earlier, in a Michigan murder trial the foreman of the jury, Harvey Labadie, declared that he was already predisposed to a verdict before the jury had finished deliberations. He posted on social media: 'Not cool a young man is dead another young man will be in prison for long time maybe'.⁶¹ In this instance, however, the juror's conduct did not lead to a mistrial as the judge considered the posting innocuous.⁶² Also in 2014, Arkansas juror Brittany Lewis used her mobile phone to post on Facebook that she was tired of being in the courtroom during the kidnapping and rape trial of Quinton Riley Jr.⁶³ Posts included '[s]till in the courtroom. Lord I'm ready to go home. I'm sleepy and tired and my red wine is calling my name'. As a result, the defendant's motion for a new trial based on juror misconduct was successful.⁶⁴

In a 2013 trial in the UK, 21-year-old juror Kasim Davey posted on Facebook '[w]ooooow I wasn't expecting to be in a Jury Deciding a paedophile's fate, I've always wanted to F**k up a paedophile &now I'm within the law!'. As a consequence he was discharged from the jury and jailed for two months while no mistrial was declared.⁶⁵

During a 2011 Californian murder trial, a juror complained about the trial length and called the defence lawyers insulting names on his blog. In addition, he posted his research findings relating to medical evidence relevant to the trial and uploaded a photo of the murder weapon he had taken with his mobile phone camera. The defendant was found guilty of murder. After the judge learned about the juror's blog they did not order a retrial as they failed to find the juror's conduct to be prejudicial. This ruling was upheld on appeal.⁶⁶

In addition to posting information on social websites jurors' social media misconduct can occur through third party communication by friending other trial participants. In 2014, a female juror in a Memphis trial for aggravated robbery sent the defendant, Markelvius Moore, a Facebook friend request and engaged in subsequent conversations with him.⁶⁷ The jury found the defendant guilty. After

60 Christina Carrega-Woodby, Chelsia Rose Marcius and Corky Siemazko, 'Exclusive: Queens Juror Fined for Facebook Blabbing', *New York Daily News* (online), 3 November 2015 <<http://www.nydailynews.com/new-york/queens/exclusive-queens-juror-fined-facebook-blabbing-article-1.2421830>>.

61 Frederick Reese, 'ABA Says Lawyers Can Track Jurors' Social Media Activity', *Mint Press News* (online), 24 June 2014 <<http://www.mintpressnews.com/aba-says-lawyers-can-track-jurors-social-media-activity/192917/>>.

62 Associated Press, 'American Bar Association: Lawyers Can Scour Jurors' Tweets, Facebook Posts', *The Florida Times Union* (online), 22 June 2014 <<http://jacksonville.com/breaking-news/2014-06-22/story/american-bar-association-lawyers-can-scour-jurors-tweets-facebook>>.

63 Elicia Dover, 'Juror's Facebook Posts Could Cause Mistrial', *KATV.com* (online), 9 January 2014 <<http://katv.com/archive/jurors-facebook-posts-could-cause-mistrial>>.

64 *State of Arkansas v Quinton Riley*, 4 46 SW 3d 187, 188 (Ark, 2014).

65 Frances Gibb, 'Juror Jailed After Boast on Facebook', *The Times* (London), 30 July 2013, 8.

66 Case discussed in Pamela A MacLean, *Jurors Gone Wild!* (April 2011) The Rosenfeld Law Firm <<http://www.therosenfeldlawfirm.com/article-7/>>.

67 'Juror under Investigation for Friending, Chatting with Defendant on Facebook', *Wmactionnews5* (online), (6 August 2014) <<http://www.wmactionnews5.com/story/26205295/juror-under-investigation-for-friending-chatting-with-defendant-on-facebook>>.

the jurors' conduct became known no retrial was ordered but the juror was held in contempt of court for 10 days (while 9 days were suspended).⁶⁸ Similarly, in 2011, UK juror Joanne Fraill contacted one of the defendants in a drug trial on Facebook and exchanged around 50 messages with him including updates on the jury position. She was sentenced to 8 months imprisonment for contempt of court.⁶⁹ In the same year in the US, one juror, in addition to posting on Facebook, became Facebook friends with another juror in a case concerned with tax evasion and conspiracy. The juror claimed that they never discussed the case outside of the courtroom and that they considered the facts fairly and impartially which the District Court found credible.⁷⁰ The defendant's motion for a new trial due to juror misconduct on social media was ultimately unsuccessful.⁷¹

Not all jurors' social media use discussed above has caused mistrials or reversals on appeal. It appears a blurred line, however, as to what social media conduct will be classified prejudicial and thus misconduct in the legal context.⁷²

4 *Implications from Existing Research and Reported Incidents*

Each of the existing research studies on jurors' social media use faces significant limitations. It is therefore unclear how frequent jurors' social media misconduct occurs in Australia and elsewhere and relatedly, whether a fair trial for the defendant is likely at risk.

The media analysis of reported incidents suggests that said misconduct is not an isolated phenomenon but occurs in different common law jurisdictions around the globe at regular intervals. Connor and Skove contend that 'because juror misconduct is rare, the media report such stories at a very high rate. The public, however, may assume from reading such reports that misconduct is common'.⁷³ While this may be the case for jurors' social media misconduct it could also be that many incidences of jurors' social media use, especially where social networking profiles are set to private, are never brought to the attention of the courts and thus go unreported and unnoticed by the public. The dark figure of jurors' social media misconduct may therefore be much greater than suggested by media reports. The current scope of the problem is unknown and all assumptions remain speculative only.

68 Associated Press, 'Juror in Memphis Communicated with Defendant on Facebook', *Knoxville News Sentinel* (online), 6 February 2015 <<http://archive.knoxnews.com/news/state/juror-in-memphis-communicated-with-defendant-on-facebook-ep-919077549-353589921.html>>.

69 'Facebook Juror Sentenced to Eight Months for Contempt', *BBC News* (online), 16 June 2011 <<http://www.bbc.com/news/uk-13792080>>.

70 *United States v Ganas*, 755 F 3d 125, 131 (2nd Cir, 2015).

71 Ibid.

72 For debate on the difficulty of distinguishing harmless from prejudicial social media conduct in the US context, see David Aaronson and Sydney Patterson, 'Modernizing Jury Instructions in the Age of Social Media' (2013) 27(4) *Criminal Justice* 26.

73 Jacqueline Connor and Anne Endress Skove, 'Dial "M" for Misconduct: The Effect of Mass Media and Pop Culture on Juror Expectations' in Carol R Flango et al (eds), 'Future Trends in State Courts' (Report, National Center for State Courts, 2004) 104–5, cited in Patrick C Brayer, 'The Disconnected Juror: Smart Devices and Juries in the Digital Age of Litigation' (2016) 30 *Notre Dame Journal of Law, Ethics & Public Policy Online* 25, 37.

Despite the unknown extent of the problem, a potpourri of strategies, some of preventative, others of punitive nature, have been implemented or suggested in an attempt to curtail jurors' social media use. The below assesses the effectiveness of said strategies and examines their viability within the Australian context.

III APPROACHES TO CURTAIL SOCIAL MEDIA USE

In Australia, criminal law falls mainly within the jurisdiction of the individual Australian states and territories which is why no uniform jury legislation exists. The below therefore references the situation in different Australian jurisdictions.

A Jury Directions Relating to Social Media Use

The majority opinion within the Australian judiciary seems to be that jurors can be trusted to comply with instructions once under oath and will aim not to deviate from them.⁷⁴ For this reason it has been suggested in Australia, as well as in other jurisdictions including the US, that the problem of juror misconduct and social media can sufficiently be addressed by providing jurors with detailed and reasoned instructions not to conduct any internet research of their own and to stay away from social media platforms where they could be exposed to extrajudicial information.⁷⁵

1 Current Social Media Jury Directions in Australia

Instructions at the beginning of the trial advising jurors to refrain from conducting their own research are already standard practice in Australian jurisdictions.⁷⁶ In addition, New South Wales and Victoria have issued model instructions designed to assist judges in directing the jury on internet research and social media use.⁷⁷ In New South Wales, parts of the suggested oral jury instructions set out that no enquiries can be made outside the courtroom. Where

74 See *John Fairfax Publications v District Court (NSW)* (2004) 61 NSWLR 344, 366 [103] (Spiegelman CJ).

75 See discussion in Roxanne Burd and Jacqueline Horan, 'Protecting the Right to a Fair Trial in the 21st Century – Has the Trial by Jury Been Caught in the World Wide Web?' (2012) 36 *Criminal Law Journal* 103. Social media jury instructions are also available in the US and are considered an effective deterrent by some: see Justin Rice and Kyle Lansberry, 'Don't Let Juror Misconduct Lead to Mistrial or Lawyer Misconduct' [2015] (April) *Young Lawyers* 22, 23; Aaronson and Patterson, above n 72, 35.

76 Burd and Horan, above n 75, 112.

77 Court bench books for civil and criminal trials are available in many jurisdictions. They are issued with the aim to provide guidance for judges, to streamline judicial instructions and minimise mistrials. In the US, in 2013 a section on jury instructions for social media use was inserted into the bench book for US District Court Judges for the first time: see Yurkiw, *Benchbook for U.S. District Court Judges Adds New Section on E-Discovery and Jury Instructions for Jurors' Use of Social Media and Electronic Devices* (8 May 2013) Technology Law Source <<http://www.technologylawsource.com/2013/05/articles/information-technology/benchbook-for-us-district-court-judges-adds-new-section-on-ediscovery-and-jury-instructions-for-jurors-use-of-social-media-and-electronic-devices/>>.

the judge finds it appropriate, special instructions regarding the use of the internet and social media may be given after empanelment in the following suggested words:⁷⁸

You should keep away from the internet and the other communication sources which may pass comment upon the issues in this trial. You may not communicate with anyone about the case on your mobile phone, smart phone, through email, text messaging, or on Twitter, through any blog or website, any internet chatroom, or by way of any other social networking websites including Facebook, MySpace, LinkedIn and YouTube. You should avoid any communication which may expose you to other people's opinions or views.⁷⁹

The above instructions outline clearly that jurors are not only prevented from posting on said social platforms but should stay away from social websites altogether as such communication may expose them to other people's opinions which may compromise a fair trial for the defendant. The New South Wales instructions therefore acknowledge that accessing social media even for non-news purposes holds the immanent risk of being exposed to extrajudicial information and should thus be avoided.

In Victoria, the suggested instructions state that jurors must decide solely on the evidence presented in the courtroom without relying on any outside information.⁸⁰ In regards to internet research and social media the instructions emphasise that:

You must not use the internet to access legal databases, legal dictionaries, legal texts, earlier decisions of this or other courts, or other material of any kind relating to the matters in the trial. You must not search for information about the case on Google or conduct similar searches. You also must not discuss the case on Facebook, Twitter or blogs, or look at such sites for more information about the case.⁸¹

The Victorian instructions also provide reasons as to why jurors should not be conducting any outside research:

You may ask yourself the question: what is wrong with looking for more information? ... acting on outside information would be false to the oath or affirmation you took as jurors to give a true verdict *according to the evidence*. You would cease being a juror, that is, a judge of the facts, and have instead taken on the role of an investigator. If one of your fellow jurors breaches these instructions, then the duty falls on the rest of you to inform me or a member of my staff, either in writing or otherwise, without delay. These rules are so important that you must report your fellow juror ... You must also *avoid talking to anyone other than your fellow jurors* about the case ...⁸²

In contrast to the New South Wales directions, the Victorian instructions focus more on jurors conducting research and posting on social networks but not

78 Judicial Commission of New South Wales, 'Criminal Trial Courts Bench Book New South Wales' (Bench Book, July 2017) 107–15 [1-490] <http://judcom.nsw.gov.au/wp-content/uploads/2016/07/Criminal_Trial_Courts_Bench_Book.pdf>.

79 Ibid 113 [1-490].

80 Judicial College of Victoria, 'Victorian Criminal Charge Book' (Bench Book, 19 September 2013) [1.5.2] <<http://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#1286.htm>>.

81 Ibid.

82 Ibid (emphasis altered).

on the ‘by-product’ of receiving extrajudicial information by simply accessing social networks.

In Queensland, no specific model social media directions exist but jurors are told at the beginning of the trial that they may discuss the case amongst themselves but that they must not discuss it ‘with anyone else and this includes using electronic means’.⁸³ In the Australian Capital Territory, the Jury Handbook states in relation to social media that jurors should minimise their time on social media and not post about the trial,⁸⁴ and that they shall not discuss jury deliberations on Facebook.⁸⁵

Other Australian jurisdictions have not generated model instructions on jurors’ internet and social media use. Whether and how jurors are instructed on these matters is unknown.⁸⁶ The lack of social media jury instructions in a number of Australian states and territories has led some to suggest that social media jury instructions should be adopted in all Australian jurisdictions.⁸⁷

2 Effectiveness of Jury Directions Relating to Social Media

This gives rise to the question of how effective social media jury directions can be in practice. The Western Australian Attorney General, Michael Mischin, is quoted saying that despite greater access to information in the 21st century ‘there is no reason to suppose that jurors take their responsibilities less seriously now than they have done in the past’.⁸⁸

The actual impact of jury directions on jurors’ internet behaviour and the use of social media is under-researched and unclear.⁸⁹ The little empirical research available on the impact of judicial instructions on internet and/or social media use shows mixed results. A 2010 UK study used a multi-method approach

83 Queensland Courts, ‘Queensland Supreme and District Court Benchbook’ (Bench Book, March 2017) 4.6 <http://www.courts.qld.gov.au/__data/assets/pdf_file/0017/86003/sd-bb-4-trial-procedure.pdf>.

84 Australian Capital Territory Supreme Court, ‘Jury Handbook: Supreme Court of the Australian Capital Territory’ (Jury Handbook, January 2016) 12 <http://www.courts.act.gov.au/__data/assets/pdf_file/0011/967646/jury_handbook_as_at_8_june_2016.pdf>.

85 Ibid 14.

86 No information on social media use is provided for jurors in the juror information brochures in South Australia, Tasmania and the Northern Territory: Courts Administration Authority, ‘Jury Service: Helpful Information’ (Brochure) <http://www.courts.sa.gov.au/ForJurors/Brochures/Jury_service.pdf>; Supreme Court of Tasmania, ‘Jury Duty: Your Part in the Administration of Justice in Tasmania’ (Brochure) <http://www.supremecourt.tas.gov.au/__data/assets/pdf_file/0013/331312/317557_SCOT_SUPREME_COURT_JUY_DUTY_NEW.pdf>; Supreme Court of the Northern Territory, ‘Jury Service’ (Pamphlet) <<http://www.supremecourt.nt.gov.au/documents/JuryService.pdf>>.

87 Marilyn Krawitz, ‘Guilty as Tweeted: Jurors Using Social Media Inappropriately During the Trial Process’ (Research Paper No 2012-02, University of Western Australia Faculty of Law, 16 November 2012) 21.

88 McNeill, above n 52.

89 On the effectiveness and jurors’ understanding of jury instructions in criminal trials more broadly, see, eg, Blake M McKimmie, Emma Antrobus and Chantelle Baguley, ‘Objective and Subjective Comprehension of Jury Instructions in Criminal Trials’ (2014) 17 *New Criminal Law Review* 163; Chantelle Baguley, Blake McKimmie and Barbara Masser, ‘Deconstructing the Simplification of Jury Instructions: How Simplifying the Features of Complexity Affects Jurors’ Application of Instructions’ (2017) 41 *Law and Human Behavior* 284; Mauricio J Alvarez, Monica K Miller and Brian H Bornstein, ‘“It will be your duty...” The Psychology of Criminal Jury Instructions’ in Monica K Miller and Brian H Bornstein (eds), *Advances in Psychology and Law* (Springer, 2016) vol 1, 119.

including a case simulation with jurors, a quantitative assessment of court outcomes and a post-trial survey of 668 jurors.⁹⁰ In the context of general internet research the study found that 12 per cent of jurors in high profile cases and five per cent of jurors in lower profile cases undertook internet research despite judicial instructions not to do so.⁹¹ A 2013 study by Hunter surveyed 78 jurors on their attitudes to internet research in general. The study identified that 12 jurors found it acceptable that jurors undertake outside trial research if they are frustrated with the evidence at trial despite clear jury directions on the matter.⁹²

In the US context Dunn found that 54 per cent of participating judges who used model instructions on internet and social media use indicated that no internet misconduct occurred after they gave the instructions. However, 45 per cent of judges stated they had no way of knowing whether misconduct occurred and 1.3 per cent expressed that misconduct arose despite instructions.⁹³ Research by St Eve, Burns and Zuckerman shows that most surveyed jurors who admitted to being tempted to communicate on social media about the case in their study ultimately refrained from doing so because of the judge's social media instructions.⁹⁴ This has led the researchers to believe that jury social media instructions are an effective tool in practice. The weakness of St Eve, Burns and Zuckerman's study and its findings has been pointed out above.

The possibility that jury instructions may have little impact on certain jurors has led some to contemplate how their effectiveness could be enhanced. Bartels and Lee contend that 'simply mentioning the ban of social media in a judge's instructions to the jury may be ineffective'.⁹⁵ They highlight that juries need to be empowered and receive detailed information as to why jurors should not use social media.⁹⁶ In their opinion this could enhance the effectiveness of jury directions. Similarly, Delaney suggests that jurors may be accessing the internet or posting on social media because they do not understand the instructions provided to them and are unaware that this conduct constitutes a violation of their duties. Detailed jury instructions on internet use, so he argues, could educate juries to a greater extent and thus curtail internet misconduct.⁹⁷

The impact of social networking instructions on jurors is ultimately closely entwined with jurors' underlying motives for the use of social networks while

90 Cheryl Thomas, 'Are Juries Fair?' (Research Paper No 1/10, Ministry of Justice, February 2010) <<https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/are-juries-fair-research.pdf>>. The study measured jurors' perceptions of their internet research rather than their actual use.

91 Ibid 43.

92 Jill Hunter, 'Juror's Notions of Justice: An Empirical Study of Motivations to Investigate & Obedience to Judicial Direction' (Study, University of New South Wales Law Faculty, 2013) 27.

93 Meghan Dunn, 'Jurors' Use of Social Media During Trials and Deliberations: A Report to the Judicial Conference Committee on Court Administration and Case Management' (Report, Federal Judicial Center, 22 November 2011) 6–7.

94 St Eve, Burns and Zuckerman, above n 43, 80.

95 Bartels and Lee, above n 19, 54.

96 Ibid 55.

97 Patrick Delaney, 'Sorry Linus, I Need Your Security Blanket: How the Smartphone, Constant Connectivity with the Internet, and Social Networks Act as Catalysts for Juror Misconduct' (2012) 24 *St Thomas Law Review* 473, 500.

sitting and deliberating. The below draws on studies on general social media use in Australia and on social science based research on digital dependency in an attempt to identify potential reasons for jurors' social media use. The question of the effectiveness of jurors' social media instructions is subsequently assessed in light of these findings.

(a) Social Media as a Lifestyle

One reason why some jurors may continue to use social media despite specific instructions may be that constant social media use has become the new normal for many in Australian society and by extension the new normal for many Australian jurors.

The 2016 Sensis study shows that 50 per cent of Internet users access social media sites daily while around 25 per cent check these sites more than five times a day. For 49 per cent social networking is the first thing they do when waking up in the morning and 63 per cent check social networking sites in the evening after work.⁹⁸ Facebook, for example, is visited on average more than 30 times a week by an individual user with the typical usage lasting around 23 minutes.⁹⁹ In 2016, an average Australian social network user had more than 400 followers, friends or contacts on social networking sites which is the highest number yet.¹⁰⁰ Social media is not only accessed at home but also at work, when using public transport, at restaurants, bars and parties as well as in the car.¹⁰¹ Twelve per cent of social network users even access the platforms in the toilet.¹⁰²

Kuss and Griffiths contend that being connected has become the 'status quo' and that social networking taps into very fundamental needs including social support and expression.¹⁰³

(i) The Need for Social Support

Griffiths, Kuss and Demetrovics remark that the phenomenon of social media may have developed to satisfy the basic evolutionary need of having a 'secure and predictable' community in a time where many lead a more individualised life in an urban setting.¹⁰⁴ This supposition is in line with the main reasons for the use of social media reported in Australia: to stay in touch and communicate with

98 Sensis, above n 30, 7, 16, 23.

99 Ibid 22.

100 Ibid 26.

101 Ibid 31.

102 Ibid 32.

103 Daria J Kuss and Mark D Griffiths, 'Social Networking Sites and Addiction: Ten Lessons Learned' (2017) 14(3) *International Journal of Environmental Research and Public Health* [2.3]. According to Maslow, fundamental needs are not isolated but arranged hierarchically in the form of a pyramid: see Giuseppe Riva, Brenda K Wiederhold and Pietro Cipreso, 'Psychology of Social Media: From Technology to Identity' in Giuseppe Riva, Brenda K Wiederhold and Pietro Cipreso (eds), *The Psychology of Social Networking Vol 1: Personal Experience in Online Communities* (Walter de Gruyter, 2015) 4, 7.

104 Mark D Griffiths, Dara J Kuss and Zsolt Demetrovics, 'Social Networking Addiction: An Overview of Preliminary Findings' in Kenneth Paul Rosenberg and Laura Curtiss Feder (eds), *Behavioural Addictions: Criteria, Evidence, and Treatment* (Academic Press, 2014) 119, 120.

family and friends,¹⁰⁵ and to share photos and news about oneself.¹⁰⁶ Brayer highlights that ‘individuals are expecting constant access to the people and information that define who they are and at times, who they want to become.’¹⁰⁷ A modern juror is likely in possession of a digital device that ‘links him or her with a community that brings support, comfort, acceptance, a sense of survival’.¹⁰⁸

Being ordered to stop using social networks during a trial which may take weeks or months means for many jurors, especially younger ones, significantly altering their lifestyle and daily routine, remaining an outsider to their (virtual) community and to suddenly abstain from behaviour that they may have been engaging in extensively previously, ie, over 30 visits on Facebook per week with the average visit lasting just under 30 minutes.¹⁰⁹ ‘Digital isolation’¹¹⁰ during a trial may feel very unnatural and overwhelming to some jurors. When accessing social media during the course of a trial jurors may not be striving to deviate from given instructions, but the use of social media may have become too much of a ‘way of life rather than a tool or toy’¹¹¹ to deter them from its use even with relevant instructions.¹¹²

(ii) The Need to Express Oneself

Kuss and Griffiths contend that users post on social media to satisfy their need for self-realisation.¹¹³ This can be achieved by ‘presenting oneself in a way one wants to present oneself, and by supporting “friends” ... who require help’ on social media sites.¹¹⁴ Morrison points out that ‘[o]nce one has a taste of externalizing one’s thoughts and imagining that others care to ponder them ... thinking that is not externalized seems kind of pointless’.¹¹⁵ Zora highlights that posting on social media about a case can give jurors a sense of empowerment.¹¹⁶

These explanations fit with the reasons provided by Kimberly Ellis, the Queens’ juror who caused a mistrial in 2015 for inter alia posting comments and opinions of other jurors on social media.¹¹⁷ When asked why she posted her comments on Facebook despite having received clear instructions not to use social media during the trial she is reported saying that: ‘Well, I sometimes – I suppose I forget it’s so public and it’s Facebook and it’s something that I use a

105 Mentioned by over 90 per cent of surveyed participants: Sensis, above n 30, 35.

106 EY Sweeney, above n 31, 20. The Report identified that 84 per cent of people used Facebook to keep up to date with family and friends, 73 per cent to communicate with family and friends.

107 Brayer, above n 73, 28.

108 Ibid 26.

109 Sensis, above n 30, 4, 22.

110 Term used to describe the phenomenon by Brayer: above n 73.

111 Artigliere, above n 48, 627.

112 Artigliere considers the use of these devices a lifestyle rather than a choice and explains that some jurors feel addicted to their electronic devices and require constant communication with others: see *ibid* 639–40.

113 Kuss and Griffiths, above n 103, [2.3].

114 Ibid.

115 Caren Myers Morrison, ‘Jury 2.0’ (2011) 62 *Hastings Law Journal* 1579, 1613.

116 Zora, above n 22, 589.

117 Carrega-Woodby, Marcius and Siemazko, above n 60.

lot. And I'm pretty quiet in my day-to-day dealings with people, so its' just a way for me to, you know, express myself".¹¹⁸

A number of psychological research studies have highlighted the positive feelings Facebook use can generate. Research suggests in that context that receiving positive feedback on Facebook is registered in the brain as a reward,¹¹⁹ and that Facebook use correlates with a state of high positive valence and high arousal and therefore constitutes a positive emotional experience.¹²⁰ In addition, it has been suggested that frequent status updates on Facebook can decrease the feeling of loneliness.¹²¹ It may be the positive feeling that compels jurors to post on social media as the joy of a task itself can be considered the main incentive for its repetition.¹²²

How compelling social media use can be for some becomes clear when considering other areas of life where people fail to abstain from social networking despite clear instruction and imminent risks. For example, the use of social media via mobile phones is prohibited by law in many states around the world when operating a motor vehicle as this can have severe consequences for the health and safety of traffic participants. However, since 2015 the hashtag 'whiledriving' has gained popularity on social networks and relates to photos taken from the driver's seat and uploaded onto social media.¹²³ A 2016 study by the US Erie Insurance found that the most popular photos uploaded under this hashtag relate to 'clouds, sunset, sky, nature and sun' suggesting that drivers are using social media to post photos while operating a motor vehicle.¹²⁴ Similarly, a 2016 survey by the US National Safety Council of 2409 drivers of all ages identified that 74 per cent of participants would use Facebook while driving.¹²⁵ A survey by the US Liberty Mutual Insurance of 2500 US High School students found that 68 per cent of teens use apps while driving.¹²⁶ This shows that

118 Ibid.

119 Honor Whiteman, 'Addiction to "Facebook Fame" Explained by Researchers', *MedicalNewsToday* (online), 2 September 2013 <<http://www.medicalnewstoday.com/articles/265509.php>>.

120 Maurizio Maui et al, 'Why is Facebook so Successful? Psychophysiological Measures Describe a Core Flow State while Using Facebook' (2011) 14 *Cyberpsychology, Behavior, and Social Networking* 723, 723.

121 Fenne Große Deters and Matthias R Mehl, 'Does Posting Facebook Status Updates Increase or Decrease Loneliness? An Online Social Networking Experiment' (2012) 4 *Social Psychological and Personality Science* 579, 582.

122 Riva, Wiederhold and Cipreso, above n 103, 8–9.

123 Katherine Shaver, 'A New Low for Distracted Driving: Some Motorists Take Photos and Share Them #whiledriving', *The Washington Post* (online), 31 March 2016 <https://www.washingtonpost.com/news/dr-gridlock/wp/2016/03/31/a-new-low-for-distracted-driving-some-motorists-take-photos-and-share-them-whiledriving/?utm_term=.cc92308855e7>.

124 Leah Knapp, 'Distractions #whiledriving Take a Doubly Scary Turn' on *ErieSense – Car Sense* (5 April 2016) <https://www.erieinsurance.com/Blog/2016/distracted-driving-research?utm_source=erietwitter&utm_medium=eriesocial&utm_campaign=general#prclt-bcxHffg1>.

125 National Safety Council, *Distracted Driving Public Opinion Poll* (March 2016) <<http://www.nsc.org/NewsDocuments/2016/DD-Methodology-Summary-033116.pdf>>.

126 Liberty Mutual Insurance, *Teen Driving Study Reveals 'App and Drive' is New Danger Among Teens, New Worry for Parents* <<https://libertymutualgroup.com/about-lm/news/news-release-archive/articles/app-and-drive>>.

connecting on social media is so compelling to some that they are risking their life and health and that of others to access social media.

Abiding by judges' social media instructions may be easy for some jurors. Yet, for others social networking constitutes such an integral part of their daily routine and lifestyle that they may be unwilling to comply with instructions even if they contain detailed explanations and are repeated frequently throughout the trial.¹²⁷ In this context it is worth noting that in most of the incidents of jurors' social media use analysed in Part II, detailed jury instructions to refrain from social networking would have been provided. This suggests that incidences keep occurring despite jury instructions.¹²⁸

(b) Social Media as Addictive Behaviour

There is a growing body of scientific evidence suggesting that excessive social network use may lead to symptoms that are generally associated with addiction.¹²⁹ While social network addiction is not formally recognised as a clinical diagnosis,¹³⁰ it incorporates 'classic' addiction symptoms such as 'neglecting personal/work life, preoccupation, mood alteration, withdrawal, inability to cut down, and relapse'.¹³¹ Addiction to Facebook has been defined as 'excessive attachment to Facebook that leads to disturbances in everyday activities and problems with interpersonal relationships'.¹³² The Bergen Facebook Addiction Scale, for example, was specifically developed to measure Facebook

127 Agreeing that jury instructions may have no effect on jurors due to social media's pervasiveness is Matthew Agliano, 'Criminalization of Juror Misconduct Arising from Social Media Use' (2015) 28 *Notre Dame Journal of Law, Ethics & Public Policy* 101, 102.

128 This conclusion is based on the fact that incidents continue to be reported despite the introduction of jury directions in the US, the UK and Australia. For example, 12 US jurisdictions have specific social media jury instructions in place: see National Centre for State Courts, *Social Media and the Courts – State Links* <<http://www.nesc.org/Topics/Media/Social-Media-and-the-Courts/State-Links.aspx?cat=Jury%20Instructions%20on%20Social%20Media>>. In addition, 56 per cent of surveyed judges in US jurisdictions use model instructions to address social media and internet use: see 'New Media and the Courts: The Current Status and a Look at the Future' (Paper presented at Conference of Court Public Information Officers, 9–11 August 2010). The UK has non-binding instructions recommended by the Judicial College: see Maddison et al, 'The Crown Court Compendium – Part I: Jury and Trial Management and Summing Up' (Compendium, Judicial College 2017) 3-2 [11].

129 Tracie Ryan et al, 'Who Gets Hooked on Facebook? An Exploratory Typology of Problematic Users' (2016) 10(3) *Cyberpsychology: Journal of Psychosocial Research on Cyberspace* <<https://cyberpsychology.eu/article/view/6172/5901>>. Discussing whether some excessive behaviour such as social media use should even be considered a 'genuine addiction' are Griffiths, Kuss and Demetrovics, above n 104, 119–21. While conduct can be excessive it is not automatically addictive. On methodological problems of studies examining social networking addiction, see Kuss and Griffiths, above n 103, [2.10].

130 Internet or social media addiction is not listed in the *Diagnostic and Statistical Manual of Mental Disorders* (the standard manual for psychiatric diseases): see Agata Błachnio et al, 'The Role of Personality Traits in Facebook and Internet Addictions: A Study on Polish, Turkish, and Ukrainian Samples' (2017) 68 *Computers in Human Behavior* 269, 269.

131 Catherine So-kum Tanga and Yvaine Yee Woen Koh, 'Online Social Networking Addiction Among College Students in Singapore: Comorbidity with Behavioral Addiction and Affective Disorder' (2017) 25 *Asian Journal of Psychiatry* 175, 175.

132 Błachnio et al, above n 130, 269.

addiction.¹³³ Addiction is not limited to Facebook but can also occur in relation to other social networking sites such as, for example, Instagram.¹³⁴ Some researchers therefore refer to the phenomenon as ‘e-communication addiction’.¹³⁵ It has been suggested that addictive social media use may be attributed to ‘fear of missing out’ (so-called ‘FOMO’)¹³⁶ defined as ‘a pervasive apprehension that others might be having rewarding experiences from which one is absent’ and characterised by ‘the desire to stay continually connected with what others are doing’.¹³⁷ Potentially addictive social network use has also been linked with nomophobia defined as ‘no mobile phone’ phobia,¹³⁸ which essentially signifies a mobile phone addiction.¹³⁹ In this context researchers highlight that nomophobia can give rise to impulsive mobile phone use and relatedly may contribute to increased social media use which in turn may enhance the risk of experiencing addiction-related symptoms.¹⁴⁰

The research on social media addiction appears to suggest that there is a ‘fine line between frequent [but] non-problematic habitual use of social media sites and possibly addictive’ social networking.¹⁴¹ As some members of society may be using social media addictively it is possible that by extension some jurors engage in problematic social media use.

A jury instruction to abstain from social networking may not be sufficient to curtail jurors’ frequent habitual, and for some, possibly addictive, social media use. As social media jury instructions may have a limited effect on jurors, scholars and legal practitioners have suggested other avenues to address the issue in the Australian context.

B Introduction of Voir Dire Process Prior to Empanelling the Jury

In order to curtail jurors’ social media use in Australia, some have promoted the introduction of a jury selection process with the possibility to question jurors comparable to the US voir dire.¹⁴² During the voir dire lawyers and judges have

133 See generally Cecilie Schou Andreassen et al, ‘Development of a Facebook Addiction Scale’ (2012) 110 *Psychological Reports* 501.

134 Kuss and Griffiths, above n 103, [2.5].

135 Hasan Latif et al, ‘Perspectives of Generation 2000 and Their Parents on E-Communication Addiction in Turkey’ (2016) 5(11) *International Journal of Humanities and Social Science Invention* 51.

136 Discussed in Kuss and Griffiths, above n 103, [2.6].

137 Andrew K Przybylski et al, ‘Motivational, Emotional, and Behavioral Correlates of Fear of Missing Out’ (2013) 29 *Computers in Human Behavior* 1841, 1841.

138 Nicola Luigi Bragazzi and Giovanni Del Puente, ‘A Proposal for Including Nomophobia in the New DSM-V’ (2014) *Psychology Research and Behavior Management* 155, 156 <<http://pubmedcentral.canada.ca/pmcc/articles/PMC4036142/pdf/prbm-7-155.pdf>>.

139 See discussion in Kuss and Griffiths, above n 103, [2.8].

140 Ibid.

141 Ibid [3].

142 Greg Barns, quoted in Emily Moulton, ‘Legal Fraternity Debates the Relevance of Juries in Light of the Social Media Age’, *News.com.au* (online), 11 August 2015 <<http://www.news.com.au/technology/online/social/legal-fraternity-debate-the-relevance-of-juries-in-light-of-the-social-media-age/news-story/4af1f5cc4315845f191fe07048271c6e>>; also discussed in Burd and Horan, above n 75, 118.

the opportunity to test jurors' suitability and impartiality prior to empanelment.¹⁴³ Prosecution and defence can subsequently challenge jurors for cause before they are sworn in.

Currently in Australian criminal trials, very little information on the jury panel is available to the parties in advance. Provisions on what is to be disclosed to the parties vary between jurisdictions.¹⁴⁴ In some jurisdictions the names on the panel may not be revealed in advance while in others juror's names and occupations are known to the parties. In some jurisdictions prior convictions of jurors may be revealed to the prosecution.¹⁴⁵ No Australian jurisdiction, however, undertakes a voir dire comparable to the US.¹⁴⁶ In Australia, questioning of individual jurors by the judge is rare and questioning by the parties even more so.¹⁴⁷ Introducing a voir dire in Australia, so it has been suggested, may give the opportunity to question individual jurors about their social media and internet use, whether they blog or post online and whether they think that they may be able to abstain from using social media during the trial. This would give parties the opportunity to challenge jurors for cause prior to empanelling.¹⁴⁸

The introduction of a voir dire process in Australian jurisdictions, however, does not come without cost and time implications. Weems explains that the average time to select a jury in New South Wales is less than 30 minutes,¹⁴⁹ while selecting a jury in California can take up to six weeks.¹⁵⁰ The additional cost this approach attracts and the time it adds to trials makes the introduction of a voir dire procedure comparable to the US in Australia politically unrealistic.

C Penalising Jurors' Social Media Use

Based on the assumption that social media instructions on their own may have limited effects on jurors, California passed legislation in 2011 which penalises jurors' social media use.¹⁵¹ Amongst others the law sets out that jurors who wilfully disobey judges' instructions against the use of electronic devices can be charged with a misdemeanour punishable with up to six months jail time or a fine up to \$1000.¹⁵² This includes, for example, jurors who continue to use social media while sitting and deliberating.

143 Claire C Kates, 'Protecting the Impartial Jury: A Solution of Questions' (2016) 35 *Saint Louis University Public Law Review* 415, 432–3; Delaney, above n 97, 494–7.

144 Chesterman, above n 2, 81.

145 Ibid.

146 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper No 99 (2009) 26.

147 Chesterman, above n 2, 90.

148 See Simpler, above n 27, 288–9.

149 Philip R Weems, 'A Comparison of Jury Selection Procedures for Criminal Trials in New South Wales and California' (1984) 10 *Sydney Law Review* 330, 343.

150 Ibid 347 n 109. For detailed criticism of the US voir dire process including the use of jury consultants, see Marie D Natoli, 'Au Revoir, Voir Dire and other Costly and Socioeconomically Unjust Practices' (2013) 47 *New England Law Review* 605, 618.

151 Aglialoro, above n 127, 110.

152 Ibid 112.

Comparable legislation in Australia is not currently in place. Three Australian jurisdictions, Queensland,¹⁵³ New South Wales¹⁵⁴ and Victoria,¹⁵⁵ have enshrined specific provisions in their jury acts penalising juror misconduct relating to outside research including internet research. The various norms only focus on active research, namely, making an inquiry with the purpose of obtaining information. In addition, penalties apply for the disclosure of confidential jury information.¹⁵⁶ Yet, general posts or tweets about trial related matters on social media or receiving information accidentally through accessing social media sites without an intention to search for information are not punishable under current Australian jury laws.

Australian law reform in this area and the introduction of penal norms in the respective jury acts criminalising jurors' social media use, similar to the Californian model, is only sensible if such laws are likely to have an impact on jurors in practice. This is overall questionable as the below outlines.

1 Alleged Benefits

Supporters of said legislation argue that the laws are likely to deter future jurors from social media use to a greater extent.¹⁵⁷ A deterring effect has been linked to, *inter alia*, a high risk for perpetrators of being incriminated and convicted for the criminal conduct.¹⁵⁸ The current legislation in Australian jury Acts penalising jurors' outside research, including internet research, has been applied very sparingly in practice.¹⁵⁹ It has been reported that as of 2016 no juror had been jailed for internet misconduct in Australia.¹⁶⁰ The deterring effect of this legislation could therefore be described as minimal.¹⁶¹ It is unlikely that the introduction of legislation penalising jurors' social media use will produce more convictions for the following reasons.

Jurors can only be punished where social media use is detected. This is the case, for example, where jurors self-report, where jurors report fellow misbehaving jurors or where third parties monitor jurors' use of social media during trials. Especially where penalties are in place it appears less likely that

153 *Jury Act 1995* (Qld) s 69A.

154 *Jury Act 1977* (NSW) s 68C.

155 *Jury Act 2000* (Vic) s 78A.

156 *Jury Act 1967* (ACT) s 42C; *Jury Act 1977* (NSW) s 68B; *Juries Act 1962* (NT) s 49A; *Jury Act 1995* (Qld) s 70(2); *Juries Act 2003* (Tas) s 58; *Juries Act 2000* (Vic) s 78.

157 Aglialoro, above n 127, 113.

158 Detering effect discussed in the context of introducing criminal law to penalise forced marriage in Kerstin Braun, "I Don't Take This Man to Be My Lawfully Wedded Husband": Considering the Criminal Offense of "Forced Marriage" and Its Potential Impact on the Lives of Girls and Young Women with Migrant Backgrounds in Germany" (2015) 16 *German Law Journal* 845, 862.

159 Burd and Horan, above n 75, 117. No penalty was applied in *R v Benbrika* [2009] VSC 142 despite the fact that a legal dictionary was found in the jury room and the jurors had looked up key words.

160 Jacqueline Horan, 'Judge, Jury and Google: Courts in The Digital Age', *Government News* (online), 1 June 2016 <<http://www.governmentnews.com.au/2016/06/digitally-connected-jurors-are-creating-challenges-for-courtrooms/>>.

161 Hoffmeister points out that the laws are either 'extremely effective' or 'dead letter': see Thaddeus Hoffmeister, 'Preventing Juror Misconduct in a Digital World' (2015) 90 *Chicago-Kent Law Review* 981, 985.

jurors will self-report any violations or engage in whistle blowing by reporting their fellow jurors.¹⁶² Krawitz suggests that jurors may be more inclined to report fellow jurors' misconduct if telephone hotlines are in place that facilitate reporting.¹⁶³ It can be imagined, however, that the existence of such hotlines can negatively impact the atmosphere during jury deliberations if jurors have to fear being reported and investigated possibly without cause.¹⁶⁴ For this reason, misconduct hotlines could do more harm than good.

It is theoretically possible that defence, prosecution or the courts could monitor jurors' social media accounts and posts during the entire criminal trial. In practice, however, courts do not have the time and the financial as well as technical resources to monitor the internet activities of 12 jurors.¹⁶⁵ For this reason, it would fall upon prosecution and defence to monitor jurors' networking. Such investigations give rise to ethical questions in the context of jurors' right to privacy which have thus far not been addressed in the Australian context.¹⁶⁶ From a practical perspective it is impossible to monitor social media use where jurors' social networking profiles are set to private, as the access in that case is limited to restricted recipients only, or if jurors network under a different username. Even where profiles are open to the public it is unclear how social media use should be detected if jurors do not post or tweet but simply read the posts of others.

Given that monitoring juror's social media use is difficult and that the detection of violations will likely occur infrequently, few convictions can be expected from the introduction of the new legislation. It is for this reason that penal legislation is likely to have a very limited deterring effect on jurors in practice.

2 *Associated Risks*

While the practical effect of the legislation on juror misconduct may be limited the imminent risks cannot be overlooked. The jury is meant to consist of a cross-section of the Australian public. Yet, the introduction of criminal laws regulating jurors' social media use, a habitual conduct for many, may make jury service more unattractive and dissuade many from taking part. While summoned persons must generally report for jury duty and a fine applies for non-reporting, more and more jurors may fail to report regardless of attached fines where social media use is punished. Failing to report for jury duty is no new phenomenon. In 2009 in Western Australia, for example, 3200 people were fined for not reporting and 1800 people were referred to the state's debt collecting agency for failing

162 Morrison, above n 115, 1612. For an assessment of the challenges of reporting fellow jurors see Hoffmeister, above n 161, 992–3.

163 Krawitz, above n 87, 38.

164 See discussion in Bartels and Lee, above n 19, 48.

165 Similar arguments were raised for the US context in J Brad Reich, 'Inexorable Intertwinement: The Internet and the American Jury System' (2015) 51 *Idaho Law Review* 389, 415.

166 On ethical questions concerning lawyers monitoring jurors' social media in the US context where this behaviour is more common, see Hope Comisky and William Taylor, 'Don't be a Twit: Avoiding the Ethical Pitfalls Facing Lawyers Utilizing Social Media in Three Important Arenas – Discovery, Communications with Judges and Jurors, and Marketing' (2011) 20 *Temple Political & Civil Rights Law Review* 297, 311–12; see also Hoffmeister, above n 161, 990–3.

to pay their non-reporting fine.¹⁶⁷ These numbers could potentially increase. Prospective jurors may also increasingly aim to be excused from jury duty for good cause. A significant number of jurors already attempt to be excused as statistics in Western Australia show. For the calendar year 2008, for example, 52 per cent of people summoned for jury duty in Perth were excused.¹⁶⁸ For Queensland it has been reported that almost 90 per cent of summoned jurors avoided even having to come to the courthouse.¹⁶⁹ Reduced participation rates bring into question whether the Australian jury would continue to represent a cross-section of Australian society.¹⁷⁰

The criminalisation of jurors' social media use appears to offer limited benefits while risks remain, making the introduction of said laws overall undesirable.

D Sequestration and E-Sequestration

Several decades ago the sequestration of juries, namely the physical isolation of the jury until they reached a verdict, was standard practice in Australian jurisdictions.¹⁷¹ However, due to the financial burdens sequestration placed on the criminal justice system it is no longer a common occurrence.¹⁷² With the rise of internet and social media issues, Lowe and Morton suggest that some form of sequestration may be an appropriate tool to eliminate or minimise jurors' misbehaviour.¹⁷³

The traditional form of sequestration is largely economically untenable due to the significant costs associated with accommodation for jurors and, if at all, would be reserved for very limited high-profile cases.¹⁷⁴ Sequestration therefore offers no solution for lower-profile criminal cases. While Hoffmeister points out that sequestration 'provides the court with direct control of the jurors' environment',¹⁷⁵ the control is more limited today than in the pre-digital age era. Special care would have to be taken to ensure that jurors who are sequestered do not keep any electronic devices including smartphones, smart watches and Google glasses.¹⁷⁶ This may be difficult to ensure in practice given the abundance

167 Amanda Banks, 'Jurors Fail to Pay No-Show Fines', *The West Australian* (online), 24 May 2010 <<https://thewest.com.au/news/australia/jurors-fail-to-pay-no-show-fines-ng-ya-211435>>.

168 Law Reform Commission of Western Australia, above n 146, 107.

169 Reported in O'Leary, above n 4, 21.

170 For discussion of the risk in the US context, see Agliandolo, above n 127, 118–19.

171 Burd and Horan, above n 75, 118; Bartels and Lee, above n 19, 52.

172 For example, between 2000 and 2005 jurors in South Australia were sequestered on average once or twice per year: see Jane Goodman-Delahunty et al, 'Practices, Policies and Procedures that Influence Juror Satisfaction in Australia' (Report No 87, Criminal Research Council, 2009) 42.

173 Peter Lowe, quoted in Anne Susskind, 'Technology Undermines Jury System, as Does Complexity' (2011) 49(9) *Law Society Journal* 20, 21; James Morton, quoted in 'Legal Pros Question Jury Guidelines after the Tostee Trial Instagram Drama', *Pedestrian TV* (online), 21 October 2016 <<https://www.pedestrian.tv/news/legal-pros-question-jury-guidelines-after-the-tostee-trial-instagram-drama/>>.

174 Artigliere, above n 48, 623–4 n 12.

175 Hoffmeister, above n 161, 989.

176 On a different note it needs to be taken into account that the reintroduction of sequestration, apart from being financially unrealistic, is problematic as it may increase the unattractiveness of jury duty and may therefore discourage jury service even further: see Bartels and Lee, above n 19, 52.

of existing electronic devices and the possibility to connect to public Wi-Fi hotspots. Thus even where large expenses are incurred to sequester a jury their integrity could nevertheless be compromised.¹⁷⁷

Due to the lack of practicality others have suggested a form of e-sequestration meaning that jurors have to surrender all their electronic devices during the trial and/or deliberation process and receive limited access to the internet.¹⁷⁸ Some Australian jurisdictions already confiscate jurors' handheld electronic devices during all or some stages of the proceedings.¹⁷⁹ Although less cost intensive than traditional sequestration, e-sequestration is an incomplete effort. While taking away electronic devices during the trial may prevent jurors from accessing social media during certain phases of the proceedings nothing prevents individual jurors from using the internet and social media when they return home.¹⁸⁰

What all of the above approaches have in common is that it is unclear whether and to what extent they will curtail jurors' social media use. On this basis legal practitioners have suggested to reduce or abolish jury trials as this constitutes the only avenue that will end the problem of jurors' social media use immediately and definitely while being cost efficient.

E The End of the Jury Trial and the Rise of Judge Alone Trials

Some argue that the age of social media marks the end of the traditional jury system.¹⁸¹ McCusker contends that juries ought to be abolished in Australia as the jury system lacks transparency overall. In relation to social media he contends that jury instructions not to access social media may not have any impact on jurors at all.¹⁸² For this reason he suggests that cases should be decided by a judge or panel of judges instead. Similarly, Barns proposes that defendants should be given the choice to elect for a judge alone trial to address the issues arising in the 21st century.¹⁸³ The right to a judge alone trial also finds support from Percy who

177 See Simpler, above n 27, 288.

178 Anita Ramasastry, *Why Courts Need to Ban Jurors' Electronic Communication Devices* (11 August 2009) FindLaw <<http://supreme.findlaw.com/legal-commentary/why-courts-need-to-ban-jurors-electronic-communications-devices.html>>; James Morton, quoted in Alexandra Blucher, 'Gable Tostee Juror's Instagram Posts a Sign Jury Act Must Roll with the Times, Legal Experts Say', *ABC News* (online), 21 October 2016 <<http://www.abc.net.au/news/2016-10-21/tostee-juror-instagram-posts-sign-jury-act-needs-review/7952550>>.

179 In Queensland, jurors must leave their mobile phone devices with the bailiff if they are empanelled: see Queensland Courts, 'Juror's Handbook' (Handbook) 5 <http://www.courts.qld.gov.au/__data/assets/pdf_file/0007/93814/sd-brochure-jurors-handbook.pdf>. That does not mean, however, that they cannot use their phones during breaks: see Bartels and Lee, above n 19, 50; Johnston et al, above n 39, 22. For an overview of the US situation regarding confiscation of juror's electronic devices, see Brayer, above n 73, 38–9.

180 This would only differ if the trial was one day only. For discussion of this suggestion in the US context, see Morrison, above n 115, 1611.

181 Discussed by Peter Campbell, 'The Jury's Out on Social Media in Court', *The Advertiser* (Adelaide), 4 June 2013, 18.

182 Malcolm McCusker QC, quoted in Moulton, above n 142.

183 *Ibid.*

contends that an ‘alarming’ number of jurors use the internet to post about trial related matters.¹⁸⁴

The right to a judge alone trial is available to defendants in South Australia and to some degree in the Australian Capital Territory.¹⁸⁵ While the defendant can apply for a judge alone trial in Western Australia, New South Wales and Queensland, granting said trial is in the discretion of the judge and not the uncontested right of the accused.¹⁸⁶ The right to request a judge only trial does not apply to Commonwealth indictable offences as they must be tried by a jury¹⁸⁷ and is not available to defendants in Victoria, Tasmania and the Northern Territory.¹⁸⁸

In comparison to the above approaches which may or may not curtail jurors’ social media use, the introduction of the uncontested right to a judge alone trial or the abolition of the jury system altogether is a definite and immediate way to end jurors’ social networking misconduct. Yet it is unrealistic that such a fundamental reform of the Australian criminal justice system will occur.¹⁸⁹ This is particularly the case as the jury system continues to receive great support in common law jurisdictions so much so that some refer to the trial by jury as ‘sacrosanct’.¹⁹⁰ Wright from the NSW Law Society contends for example that being tried by a jury is an essential part of Australian democracy and a part of a fair criminal justice system.¹⁹¹ Similarly, Murphy from the NSW Council of Civil Liberties, a proponent of the Australian jury system, argues that being judged by a large number of people rather than one judge alone serves as a fundamental protection of the accused and abolishing the jury would be harmful to the criminal justice system.¹⁹² The Australian Law Reform Commission has described the jury as ‘a touchstone of the democratic administration of justice’.¹⁹³ Law reform in the Australian Capital Territory in 2012 has limited the right to a judge alone trial and excluded offences such as murder and rape from being tried

184 Tom Percy QC, quoted in McNeill, above n 52.

185 *Juries Act 1927* (SA) s 7; *Supreme Court Act 1933* (ACT) s 68B (only for certain non-excluded offences. Excluded offences are, for example, murder and manslaughter).

186 An application from the defendant must be granted if the prosecution agrees. If the prosecution disagrees it is in the discretion of the judge if it is in the interest of justice to hold a judge alone trial: *Criminal Procedure Act 1986* (NSW) s 132; *Criminal Procedure Act 2004* (WA) s 118. A judge alone trial will only be granted if the judge considers it to be in the interest of justice: *Criminal Code 1899* (Qld) ss 614–15.

187 Section 80 of the *Australian Constitution* stipulates that all Commonwealth proceedings must be tried by a jury. See also *Brown v The Queen* (1986) 160 CLR 171.

188 For detailed comparative analysis of judge alone trials, see Vicki Wayne, ‘Judicial Fact-Finding: Trial by Judge Alone in Serious Criminal Cases’ (2003) 27 *Melbourne University Law Review* 423.

189 Debbie Guest, ‘QC’s Verdict: Abolish Juries for Judge Trials’, *The Australian* (online), 9 October 2009 <<http://www.theaustralian.com.au/business/legal-affairs/qcs-verdict-abolish-juries-for-judge-trials/news-story/97bac5cd29ad2794c2fc17db7328eb91>>.

190 Lowe, above n 13, 175.

191 Pauline Wright, quoted in Moulton, above n 142.

192 Adam Harvey, ‘Judge Wants to Cut Juries from Complex Trials’, *ABC News* (online), 14 December 2011 <<http://www.abc.net.au/news/2011-12-14/senior-judge-wants-to-do-away-with-juries/3730800>>.

193 Australian Law Reform Commission, *Uniform Evidence Law*, Report No 102 (2005) 591 [18.6].

without a jury.¹⁹⁴ This law reform emphasises the perceived importance of jury trials in Australia.

IV CONCLUSION

A number of incidents have arisen in common law jurisdictions including Australia, the US and the UK, in which jurors have used social media during a criminal trial. This conduct has had different consequences for the individual juror and the trial depending on the conduct. While some posts have had no consequences, others have led to the dismissal of the individual juror. Some trials continued after jurors' social media use was detected while others resulted in a mistrial. Jurors' social media use can have severe cost implications for the public especially where a mistrial has to be declared.

Numerous strategies in Australia and elsewhere have been put forward to curb jurors' social media use. Some Australian jurisdictions instruct juries to refrain from conducting internet research on trial matters and to abstain from using social networks where they can be exposed to information. The belief in Australia, especially in the judiciary, appears to be that jurors will comply with jury directions and that only very little social media misconduct, if any, occurs where jurors are properly instructed. In this context, the article examined the scope and extent of social media use in Australian society in general and concluded that social networking is used excessively by a significant number of Australians. Constant social media access constitutes an ingrained part of everyday life for many. Some users may have even developed a social media dependency that has addictive qualities. Expecting jurors to refrain from using social networks because of a jury direction may be naive in light of society's general social media use. While a juror may not strive to intentionally deviate from a trial judge's instruction it is not unconceivable that the attraction of social media may be too compelling for some jurors to refrain from its use. It may therefore be unrealistic to expect that jurors' networking conduct can be minimised or eliminated completely by a jury direction even if this direction is repeated multiple times during the trial.

Acknowledging that jury instructions may not constitute a 'be-all end-all' measure, other strategies have been suggested to address the issue in the Australian criminal justice system. These include the introduction of a voir dire process in Australia, the sequestration or e-sequestration of the jury as well as imposing penalties on individual jurors for the violation of jury directions. The introduction of a voir dire process and the sequestration of the jury appear financially unattainable and politically unrealistic. Electronic sequestration and the application of penalties, while less costly, are more difficult to monitor and are likely to have little effect in practice.

194 'ACT in Defence of Trials by Jury', *The Canberra Times* (online), 23 January 2012 <<http://www.canberratimes.com.au/act-news/act-in-defence-of-trials-by-jury-20120123-1t5dm.html>>.

While the introduction of the unabridged right of the defendant to elect a judge alone trial or the abolition of the jury system altogether would put an immediate end to problems associated with jurors' social media use, there seems little consensus for a holistic overhaul of the criminal jury system in the current Australian climate. The suggestion to abolish or fundamentally reform the Australian jury system without comprehensive empirical evidence supporting the assumption that fair jury trials are no longer possible in the digital age may indeed be too far-reaching at this point in time.

It appears that more comprehensive information on jurors' social media use is required to put into place effective procedures which safeguard an impartial trial for the defendant in the age of social media. Especially research aimed at further exploring the extent of the problem as well as jurors' underlying motivations for social networking during criminal proceedings could advance legal responses to the challenges posed to jury trials by social media use.¹⁹⁵

195 Attitudinal studies, such as the one undertaken by Hunter in 2013, above n 92, explicitly surveying jurors on their motivations for social media use during trials could prove particularly useful precursors to developing effective measures to combat the phenomenon.