Law Commission
Reforming the law

Contempt of Court

Chapter 4: Juror Contempt

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CHAPTER 4
JUROR CONTEMPT

INTRODUCTION

4.1 Recent cases have highlighted concerns about juror misconduct during criminal trials.[1] A variety of offences exist in statute and at common law dealing with misbehaviour arising out of participation in jury service. For example, section 20 of the Juries Act 1974 criminalises failing without reasonable cause to attend for jury service, having been duly summonsed in advance; having attended for jury service but without reasonable cause not being available when called to serve; or being unfit to serve through drink or drugs. It is also an offence under section 20 to make, cause or permit to be made any false representation with the intention of evading jury service; to refuse, without reasonable excuse, to answer any question put in respect of such offence or give an answer which is known to be false or given recklessly; or to serve on a jury knowing that one is disqualified.[2]

4.2 Jurors can of course commit other criminal offences relating to the administration of public justice.[3] Additionally, jurors can be held in contempt in the face of the court, for example, for swearing at a judge.[4] Historically, various other forms of juror behaviour have been deemed misconduct, including jurors separating without the court's permission;[5] eating or drinking in court or "before the verdict at

[1] The cases of *A-G v Dallas* [2012] EWHC 156 (Admin), [2012] 1 WLR 991 and *A-G v Fraill* [2011] EWCA Crim 1570, [2011] 2 Cr App R 21 made headlines at the time of the judgments, but there have been many other examples of appeal cases, in particular those involving allegations that research has been undertaken on the internet by jurors as in *Dallas.* See *Karakaya* [2005] EWCA Crim 346, [2005] 2 Cr App R 5; *Smith* [2005] EWCA Crim 2028; *Hawkins* [2005] EWCA Crim 2842; *Pink* [2006] EWCA Crim 2094; *Marshall* [2007] EWCA Crim 35, [2007] Criminal Law Review 562; *Fuller-Love* [2007] EWCA Crim 3414; *Thakrar* [2008] EWCA Crim 2359, [2009] Criminal Law Review 357; *White* [2009] EWCA Crim 1774; *Reynolds* [2009] EWCA Crim 1801; *Richards* [2009] EWCA Crim 1256; *Gibbon* [2009] EWCA Crim 2198; *Bassett* [2010] EWCA Crim 2453; *Thompson* [2010] EWCA Crim 1623, [2011] 1 WLR 200; *McDonnell* [2010] EWCA Crim 2352, [2011] 1 Cr App R 28; *Mpelenda* [2011] EWCA Crim 1235; *Morris* [2011] EWCA Crim 3250; *Yu* [2011] EWCA Crim 2089; *Starling* [2012] EWCA Crim 743; *Gul* [2012] EWCA Crim 280, [2012] 3 All ER 83. Obviously this list only includes those cases that were appealed on the ground of juror misconduct; there are likely to be others where the jury was discharged in the Crown Court (such as in *H* [2008] EWCA Crim 3321).

[2] These offences can be punished on summary conviction with a fine: s 20(1) and s 20(5). Failure to attend or being unfit or unavailable to serve can be treated as contempt in the face of the court as well as being tried summarily: s 20(2).

[3] For example, if a juror tried to sabotage a trial because of a friendship with the defendant, this could amount to intimidating (their fellow) jurors under s 51 of the Criminal Justice and Public Order Act 1994 or to perverting the course of justice at common law.

[4] G S Robertson, *Oswald's Contempt of Court: Committal, Attachment and Arrest Upon Civil Process* (3rd ed 1910) p 70. See Ch 5 at paras 5.17 and following.

[5] *Halsbury's Laws of England*, vol 61 (5th ed 2010) para 841; *Hughes v Budd* (1840) 8 Dowling's Practice Cases 315; *Ward* (1867) 31 Justice of the Peace 791; *Ketteridge* [1915] 1 KB 467; *Goodson* [1975] 1 WLR 549.

the expense of one of the parties";[6] determining the verdict by lot;[7] jurors declining to participate in deliberations,[8] or, when unable to agree, jurors "splitting the difference" to reach a verdict.[9] This chapter is not concerned with these types of misconduct or criminal offences.[10] Instead, the focus of this chapter is on the more immediate practical problem of jurors who seek information related to the proceedings beyond the evidence presented in court (which is contempt of court at common law)[11] or who disclose information related to their deliberations (which is prohibited by section 8 of the 1981 Act).

4.3 Instances of jurors improperly receiving or disclosing information related to their trials are not new.[12] There have been numerous cases of jurors undertaking private visits to the scene of the crime, conducting experiments, researching aspects of the evidence[13] and no doubt speaking to their friends and family about the case that they are trying. As one commentator has explained,

> errant jurors are not novel; independent research by jurors and their disobedience of court orders has been encountered for centuries. What is novel is the use of the internet as a means of communication, research and a mainstream news source.[14]

4.4 Thus, the advent of the internet has had a profound impact on a juror's ability and opportunity to seek or disclose information related to their trial.[15] This chapter considers the present steps undertaken to try to prevent jurors from committing

6 *Halsbury's Laws of England*, vol 61 (5th ed 2010) para 841; *Welcden v Elkington* (1577) Plowden's Commentaries or Reports 516, 518, although it may be questionable whether eating or drinking in court these days could amount to contempt unless the jurors were distracted or the proceedings disrupted: Arlidge, Eady and Smith on Contempt para 10-194; Borrie and Lowe: The Law of Contempt para 12.39. It should be noted that these days jurors are provided with either refreshments at court or a subsistence allowance.

7 *Halsbury's Laws of England*, vol 61 (5th ed 2010) para 841; *Hale v Cove* (1725) 1 Strange's Law Reports 642; *Harvey v Hewitt* (1840) 8 Dowling's Practice Cases 598, although compare *Prior v Powers* (1664) 1 Keble's King's Bench Reports 811. For a more recent example involving jurors consulting a ouija board, see *Young* [1995] QB 324.

8 *Halsbury's Laws of England*, vol 61 (5th ed 2010) para 841; *Schot* [1997] 2 Cr App R 383.

9 *Halsbury's Laws of England*, vol 61 (5th ed 2010) para 841; *Hall v Poyser* (1845) 13 Meeson and Welsby's Exchequer Reports 600.

10 For particularly historic cases, see P Lowe, "Challenges for the Jury System and a Fair Trial in the Twenty-First Century" [2011] *Journal of Commonwealth Criminal Law* 175, 181 to 182.

11 *A-G v Dallas* [2012] EWHC 156 (Admin), [2012] 1 WLR 991.

12 See, eg, *Willmont* (1914) 10 Cr App R 173; *Shepherd* (1910) 74 Justice of the Peace Journal 605; *Twiss* [1918] 2 KB 853; *Brandon* (1969) 53 Cr App R 466.

13 For example, *Davis (No.3)* [2001] Cr App R 8 (site visit); *Thompson* [2010] EWCA Crim 1623, [2011] 1 WLR 200 (exhibits/experiments); *Cadman* [2008] EWCA Crim 1418 (handwriting analysis).

14 C Murdoch, "The Oath and the Internet" (2012) 176 (11) *Criminal Law and Justice Weekly* 149, 149.

15 Indeed, the English and Welsh jurisdiction is not the only one considering how to address this issue. For a comprehensive study of the US approach, see E Robinson, "Jury Instructions for the Modern Age: A 50-State Survey of Jury Instructions on Internet and Social Media" [2011] 1 *Reynolds Court and Media Law Journal* 307, and Appendix C generally.

this type of misconduct. It then examines the problems with the present law and procedure in respect of the separate issues of inappropriate information being sought by jurors and inappropriate information being disclosed by jurors. Finally, this chapter considers the relevant evidential and procedural schemes for dealing with such conduct, and some proposed preventative measures.

JURY INSTRUCTIONS

4.5 In England and Wales, jurors are selected at random from the electoral register for the court's local area.[16] When prospective jurors receive their summons, they are also sent a booklet entitled *Your Guide to Jury Service*, which explains, amongst other things, that during the trial jurors should not "discuss the evidence with anyone outside your jury either face to face, over the telephone or over the internet via social networking sites such as Facebook, Twitter or Myspace" and that if they "are unsure or uneasy about anything", they can write a note to the judge.[17]

4.6 Whilst every court has slightly different procedures, in general, on arrival at court on the first day of service the jury manager explains to the prospective jurors various housekeeping matters. Jurors are shown a video describing in brief terms the court process and their responsibilities as jurors.[18] The video explains that "it is vital" that jurors "are not influenced by any outside factors" so they must not discuss the case with family or friends. Jurors are also told explicitly not "to post details about any aspect of … jury service", including their deliberations, on social networking sites or to disclose their deliberations to anyone. Jurors are also warned that they "may also be in contempt of court if [they] … use the internet to research details about any cases [they] … hear, along with any other cases listed for trial at the court". The video further warns jurors that they are required to ensure that they and their fellow jurors obey these rules and that any concerns should be raised with court staff.

4.7 HM Courts and Tribunals Service guidance requires jury managers to warn jurors about the use of social networking sites, and suggests that jury managers use the following words:

[16] Only those aged under 70 years can be selected, and there are certain other criteria for disqualification: *Halsbury's Laws of England*, vol 61 (5th ed 2010) para 804.

[17] HM Courts and Tribunals Service, *Your Guide to Jury Service* (2011) p 5.

[18] *Your Role as a Juror*, Ministry of Justice, http://www.youtube.com/watch?v=JP7slp-X9Pc&feature=relmfu (last visited 1 Nov 2012).

> The judge will tell you that you DO NOT discuss the evidence with anyone outside of your jury either face to face, over the telephone or over the internet via social networking sites such as Facebook, Twitter, or Myspace. If you do this, you risk disclosing information, which is confidential to the jury. Each juror owes a duty of confidentiality to the other jurors, to the parties and to the court. Jurors can only discuss the evidence when all 12 jurors are in the jury deliberating room at the conclusion of the evidence in the trial.[19]

4.8 We understand that although not obliged to do so, some jury managers supplement that with additional warnings about obtaining information related to the case, including by searching on the internet.

4.9 Different court centres appear to operate different systems in respect of jurors' personal electronic devices.[20] In some courts, jurors are permitted to keep such items with them in the jury assembly area, but the devices must be switched off in court, and are removed when jurors are deliberating in the jury room. We understand that in some court centres, jurors' electronic devices are removed from them for the whole time that they are at court, whilst in other courts, jurors have been able to keep their electronic devices at all times, including during deliberations.[21] The booklet, *Your Guide to Jury Service*, explains unequivocally that "no mobile phones, laptops, iPods or any devices with the capability of connecting to the internet etc can be taken into the jury room".[22]

4.10 We understand that the manager's speech and the jury video are not generally repeated during the period of the jurors' service, although HM Courts and Tribunals Service issues posters for display in the jury assembly area which reiterate the warnings from the video about not researching the cases and not disclosing deliberations.

4.11 From the pool of prospective jurors summoned to the court centre, 12 will be empanelled for each trial.[23] These jurors individually take an oath, aloud, in front of their fellow jurors, the judge, advocates and defendant(s) where they swear or affirm to "faithfully try the defendant and give a true verdict according to the evidence".[24] Once the jury has been empanelled, the judge will give what are colloquially known as "housekeeping directions". As part of these directions, it is

[19] We are grateful to HM Courts and Tribunals Service for providing us with this (emphasis in original).

[20] We are concerned here in particular about devices that are capable of connecting to the internet, including mobile phones, laptops, iPads, iPods, Kindles, and other similar devices.

[21] As apparently happened in *Barrett* [2007] EWCA Crim 1277 and *W* [2007] EWCA Crim 1781.

[22] HM Courts and Tribunals Service, *Your Guide to Jury Service* (2011) p 7.

[23] Jurors normally serve for two weeks, and, therefore, may sit on more than one trial: HM Courts and Tribunals Service, *Your Guide to Jury Service* (2011) p 2.

[24] Consolidated Criminal Practice Direction, 28 Mar 2006 para IV.42.4. Jurors of certain religious faiths can swear their oath to their particular god, whilst those of other faiths and none can "solemnly, sincerely and truly declare and affirm".

essential for judges to warn jurors not to undertake their own research or communicate with others via the internet about the case.[25]

4.12 Specifically, the Crown Court Bench Book advises judges to direct that:

> Jurors should not discuss the case with anyone, not least family and friends whose views they trust, when they are away from court, either face to face, or over the telephone, or over the internet via chat lines or, for example, Facebook or MySpace [or Twitter].[26] If they were to do so they would risk disclosing information which is confidential to the jury. Each juror owes a duty of confidentiality to the others, to the parties and to the court. Furthermore, if they were to discuss the case with others they would risk, consciously or not, bringing someone else's views to their consideration of the evidence. If anyone should persist in trying to engage a juror in conversation about the case the matter should be reported as soon as possible to the judge.
>
> If the case is one which has in the past or may during the trial attract media attention, the jury should remember that the report is only the author's version of past events. It is the jury alone which hears the evidence upon which they must reach their verdict. They should therefore take care to ensure that they do not allow such second-hand reporting or comment to influence their approach to the evidence.
>
> We have a system of open justice in which the parties themselves decide what evidence to adduce at trial. It is upon that evidence alone that the jury must reach their verdict. They should not to [sic] seek further information about, or relevant to, the case from any source outside court, including the internet (for example, Google). If they were to do so it would be unfair to the prosecution and the defence because neither would be aware of the research and its results and, therefore, would be unable to respond to it.
>
> Should any juror have concerns, at any time during the trial, including during their retirement, about any aspect of his or her jury service which are sufficiently important to draw to the judge's attention, the juror should send a note to the judge via their usher or bailiff as soon as possible. Concerns communicated after the trial is over are expressed too late for the judge to assist … . The jury should not visit the scene of the alleged offence (except on a view arranged by the court).[27]

4.13 These instructions are supplemented by the Companion to the Crown Court Bench Book, which provides that:

[25] *Karakaya* [2005] EWCA Crim 346, [2005] 2 Cr App R 5 at [25] to [28].

[26] Twitter has now joined MySpace and Facebook in the first paragraph: *Crown Court Bench Book – Directing the Jury: First Supplement* (2011) p 8. See also the direction provided for illustration in the *First Supplement* pp 10 to 11.

[27] *Crown Court Bench Book – Directing the Jury* (2010) p 9.

> The jury should be reminded that they have taken an oath or affirmation to try the case upon the evidence, which is what they will all hear together in court, and told that it is the essence of the jury system that their verdicts will be based upon their common experience of the evidence and the discussions that they will have about that evidence in their deliberations at the conclusion of the case.
>
> For this reason, the following points cannot be stressed too strongly and should be accompanied with a warning that ignoring them may well (as they have already been informed in their jury instructions) amount to a contempt of court which is an offence punishable with imprisonment:
>
> Until the case has been completed, jurors must not discuss any aspect of it with anyone at all outside their own number or allow anyone to talk to them about it, whether directly, by telephone, through internet facilities such as Facebook or Twitter or in any other way. And, even after they have returned their verdicts, whilst they may then talk about the case with others, they must be careful only to speak about what happened in the court room; they must never in any circumstances disclose anything of their discussions or deliberations.
>
> …
>
> They must not carry out any enquiries or research into any aspect of the case themselves, for example by visiting places mentioned or looking up any information on the internet. They should only work on the case when they are at court.
>
> They must take no account of any media reports about the case.[28]

4.14 Following the judgment in *Thompson*,[29] the Consolidated Criminal Practice Direction now requires judges to emphasise the jury's collective responsibility for trying the case:

> IV.42.6 Trial judges should ensure that the jury is alerted to the need to bring any concerns about fellow jurors to the attention of the judge at the time, and not to wait until the case is concluded. At the same time, it is undesirable to encourage inappropriate criticism of fellow jurors, or to threaten jurors with contempt of court.
>
> IV.42.7 Judges should therefore take the opportunity, when warning the jury of the importance of not discussing the case with anyone outside the jury, to add a further warning. It is for the trial judge to tailor the further warning to the case, and to the phraseology used in the usual warning. The effect of the further warning should be that it is

[28] *Crown Court Bench Book Companion* (2011) pp 1 to 2.

[29] [2010] EWCA Crim 1623, [2011] 1 WLR 200, 203.

> the duty of jurors to bring to the judge's attention, promptly, any behaviour among the jurors or by others affecting the jurors, that causes concern. The point should be made that, unless that is done while the case is continuing, it may be impossible to put matters right.[30]

4.15 At the end of each court day whilst the trial is ongoing jurors are also generally reminded in brief terms about the instructions that the judge gave when they were empanelled.[31]

4.16 Yet, despite the measures we have identified in this brief summary, there is still concern that the message may not be getting through, as Professor Cheryl Thomas' research highlights[32] and the recent case reports show.[33] This may call into question the extent to which the directions to jurors are given consistently and the extent to which jurors understand or accept the directions that they are given.[34] Whilst it is not possible to know for certain the scale and nature of contempt committed by jurors, we consider that a range of measures should be considered when attempting to address these problems.

JURORS SEEKING INFORMATION

Present law

4.17 Jurors who seek information about the case which they are trying, in breach of the directions of the judge, may be in contempt of court.[35] The law in this area was explained in *Attorney General v Dallas.*[36] Whilst sitting as a juror, Dallas undertook internet research into the case and discovered that the defendant had previously been tried for rape (although he had been acquitted). Dallas disclosed what she had discovered to her fellow jurors, who alerted the court usher and subsequently the trial judge. The jury was discharged and there was a retrial.

[30] Consolidated Criminal Practice Direction, 28 Mar 2006. Both the *Crown Court Bench Book – Directing the Jury: First Supplement* (2011) p 7 and following, and the *Crown Court Bench Book Companion* (2011) pp 1 to 2 reiterate this. See also *Lambeth* [2011] EWCA Crim 157 at [7].

[31] The Consolidated Criminal Practice Direction, 28 Mar 2006 explains that "the judge should consider, particularly in a longer trial, whether a reminder on the lines of the further warning is appropriate prior to the retirement of the jury" at IV.42.8.

[32] *Are Juries Fair?* (Ministry of Justice Research Series 1/10, Feb 2010) pp 43 to 44.

[33] See para 4.17 and following below . See also the *Crown Court Bench Book – Directing the Jury: First Supplement* (2011) p 9.

[34] It has been suggested that giving directions to jurors not to look on the internet may encourage them to consider such possibility, although there is no evidence to indicate that this is in fact the case: N Haralambous, "Juries and Extraneous Material: A Question of Integrity" (2007) 71 *Journal of Criminal Law* 520, 533.

[35] Such conduct is deemed contempt in other jurisdictions too: T J Fallon, "Mistrial in 140 Characters or Less? How The Internet and Social Networking Are Undermining the American Jury System and What Can Be Done to Fix It" (2009) 38 *Hofstra Law Review* 935, 960, 967. Jurors may also be in contempt for other forms of misconduct. See, eg, Ch 5 at para 5.17 and following.

[36] [2012] EWHC 156 (Admin), [2012] 1 WLR 991.

4.18 In proceedings before the Divisional Court, the Lord Chief Justice held that Dallas was in contempt of court because:

> The defendant [Dallas] knew perfectly well, first, that the judge had directed her, and the other members of the jury, in unequivocal terms, that they should not seek information about the case from the internet; second, that the defendant appreciated that this was an order; and, third, that the defendant deliberately disobeyed the order. By doing so, before she made any disclosure to her fellow jurors, she did not merely risk prejudice to the due administration of justice, but she caused prejudice to it. This was because she had sought to arm and had armed herself with information of possible relevance to the trial which, although not adduced in evidence, might have played its part in her verdict. The moment when she disclosed any of that information to her fellow jurors she further prejudiced the administration of justice. In the result, the jury was rightly discharged from returning a verdict and a new trial was ordered. The unfortunate complainant had to give evidence of his ordeal on a second occasion. The time of the other members of the jury was wasted, and the public was put to additional unnecessary expense. The damage to the administration of justice is obvious.[37]

4.19 In passing a sentence of 6 months' imprisonment, the Lord Chief Justice explained that:

> Misuse of the internet by a juror is always a most serious irregularity, and an effective custodial sentence is virtually inevitable. The objective of such a sentence is to ensure that the integrity of the process of trial by jury is sustained.[38]

4.20 On informal consultation, some stakeholders criticised this decision on the basis that it is unusual to characterise a direction such as the judge's original jury instruction as a "court order". Furthermore, concerns were raised about the extent to which the current procedure used for this type of contempt protects the alleged contemnor's article 5 or 6 rights under the ECHR.[39] There may also be concerns that there is a lack of clarity about the definition of this contempt. Nonetheless, it is clear from *Dallas* that jurors who deliberately and knowingly disobey the direction of the judge not to undertake research on the internet are in contempt of court.

The problem

4.21 Jurors who seek information from outside the courtroom about the case that they are trying may act from a variety of motives. Evidence of motives can be found in the explanations jurors themselves have given when found to have improperly accessed the internet during trial. In addition, various authors speculate about

[37] *A-G v Dallas* [2012] EWHC 156 (Admin), [2012] 1 WLR 991 at [38]. See also *A-G v Fraill* [2011] EWCA Crim 1570, [2011] 2 Cr App R 21 at [35].

[38] *A-G v Dallas* [2012] EWHC 156 (Admin), [2012] 1 WLR 991 at [43].

[39] See para 4.69 below.

other motives which could be relevant. There is some anecdotal evidence that jurors may do so deliberately because they are keen to find out as much about the case as possible in order to "bolster their confidence"[40] and reach the "right" verdict.[41] They seek to be "good jurors" – thoroughly prepared and well-equipped with the information that will allow them to reach a verdict – but do so in a misguided manner unfortunately, ignorant of the rules of evidence and the necessity to reach a verdict based only on what they have heard in court, even where that evidence might be incomplete or unclear. In some cases, this motivation appears to be connected to the jurors' failure to understand the trial judge's directions on the law: for example, one juror researched joint criminal enterprise on the internet and reported his findings back to his fellow jurors.[42] In a similar vein, some jurors may feel that information is being withheld from them by the parties in the case, and that they need a fuller picture in order properly to reach a verdict.[43] It may be correct that information is being withheld – for example where there is inadmissible bad character evidence – but again these jurors have not appreciated or perhaps accepted the rules of evidence and the rationale for them. Such jurors may have had insufficient explanation of the reason why research is prohibited.[44] There may be yet another group of jurors who did not understand the direction that was given prohibiting them from undertaking research or their role as finders of fact, or perhaps they were unable to translate what the direction meant in practice in terms of what is prohibited and

[40] S Grey, "The World Wide Web: Life Blood for the Public or Poison for the Jury?" (2011) 3(2) *Journal of Media Law* 199, 201.

[41] R Artigliere, "Sequestration for the Twenty-First Century: Disconnecting Jurors from the Internet During Trial" (2011) 59 *Drake Law Review* 621, 639; S Macpherson and B Bonora, "The Wired Juror, Unplugged", *Trial*, Nov 2010; M 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* 577, 585 to 586.

[42] The juror discovered wholly incorrect information about the law on joint criminal enterprise: *Mpelenda* [2011] EWCA Crim 1235. There is some evidence that jurors in the UK and overseas have problems understanding the directions of the trial judge: P Darbyshire, A Maughan and A Stewart, *What Can the English Legal System Learn from Jury Research Published up to 2001?* (Research Papers in Law, Kingston University) p 25; W Young, N Cameron and Y Tinsley, *Juries in Criminal Trials, Part Two: A Summary of the Research Findings* (Law Commission of New Zealand Preliminary Paper 37, vol 2, 1999) pp 51 to 63, http://www.lawcom.govt.nz/sites/default/files/publications/1999/11/Publication_76_159_PP37Vol2.pdf (last visited 1 Nov 2012); M Comiskey, "Initiating Dialogue about Jury Comprehension of Legal Concepts: Can the 'Stagnant Pool' Be Revitalised?" (2010) 35 *Queen's Law Journal* 625, 629 to 643; L Trimboli, *Juror Understanding of Judicial Instructions in Criminal Trials* (Crime and Justice Bulletin, NSW Bureau of Crime and Statistics Research, no 119, Sep 2008); W Young, "Summing Up to Juries in Criminal Cases – What Jury Research says about Current Rules and Practice" [2003] *Criminal Law Review* 665.

[43] P Darbyshire, A Maughan and A Stewart, *What Can the English Legal System Learn from Jury Research Published up to 2001?* (Research Papers in Law, Kingston University) p 58; C M Morrison, "Jury 2.0" (2011) 62 *Hastings Law Journal* 1579, 1585 to 1586; C M Morrison, "Can the Jury Trial Survive Google?" (2010) 25 *Criminal Justice* 4, 6; M 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* 577, 585.

[44] S Macpherson and B Bonora, "The Wired Juror, Unplugged", *Trial*, Nov 2010.

[45] Finally, there may of course be some jurors who ignore the judge's direction simply out of curiosity[46] or even in bad faith.

4.22 Historically, this may have been less problematic than it is today. In the pre-internet age, an unauthorised visit to the crime scene might have involved an inconvenient journey at the end of the court day, with the risk that the juror would be observed making the visit. These days, detailed maps and photographs of street scenes of, not only England and Wales, but almost anywhere in the world, are accessible easily, anonymously and instantly.[47] Likewise, whereas uncovering media reports of a defendant's previous convictions would previously have required a visit to the national newspaper archive at the British Library at Colindale, an internet search engine might now produce scores of results about a particular individual's past misdemeanours within seconds.[48] As we explain in chapter 3, internet access and use is widespread in the UK today.[49] In consequence, insulating the jury from irrelevant material or inadmissible evidence has become significantly more difficult.[50] Indeed, in the US, lawyers have even coined the colloquial phrase a "google mistrial" to identify cases where internet research by a juror led to a retrial.[51]

4.23 Evidence as to the prevalence of this problem is difficult to obtain.[52] There is very limited reliable, empirical, research from overseas,[53] and only two studies in England and Wales have ever been undertaken to examine this issue. Furthermore, different studies have tended to reach very different conclusions. In England and Wales, Professor Thomas found in 2010 that in high-profile cases, 12% of jurors surveyed admitted that they had looked for information on the

[45] S Macpherson and B Bonora, "The Wired Juror, Unplugged", *Trial*, Nov 2010. See also the issues raised in R Pattenden, "Investigating Jury Irregularities: United Kingdom (England and Wales)" (2010) 14 *International Journal of Evidence and Proof* 362.

[46] M 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* 577, 585; E Brickman, J Blackman, R Futterman and J Dinnerstein, "How Juror Internet Use Has Changed the American Jury" (2008) 1(2) *Journal of Court Innovation* 287, 294; N Haralambous, "Educating Jurors: Technology, the Internet and the Jury System" (2010) 19(3) *Information and Communications Technology Law* 255, 256.

[47] E Brickman, J Blackman, R Futterman and J Dinnerstein, "How Juror Internet Use Has Changed the American Jury" (2008) 1(2) *Journal of Court Innovation* 287, 294; N Haralambous, "Educating Jurors: Technology, the Internet and the Jury System" (2010) 19(3) *Information and Communications Technology Law* 255, 256.

[48] For example, *Thakrar* [2008] EWCA Crim 2359, [2009] Criminal Law Review 357. See also A T H Smith, *Reforming the New Zealand Law of Contempt of Court: An Issues/Discussion Paper* (2011) p 40, http://www.crownlaw.govt.nz/uploads/contempt_of_court.pdf (last visited 1 Nov 2012).

[49] See Ch 3 at para 3.2.

[50] See para 4.17 and following above.

[51] E M Janoski-Haehlen, "The Courts Are All A 'Twitter': The Implications of Social Media Use in the Courts" (2011) 46 *Valparaiso University Law Review* 43, 48.

[52] There are various reports of jurors or whole juries being discharged because of researching the case on the internet, including in *Are Juries Fair?* (Ministry of Justice Research Series 1/10, Feb 2010) p 6 at footnote 12; Irish Law Reform Commission, *Consultation Paper: Jury Service* (2010) p 187 and following.

[53] E Brickman, J Blackman, R Futterman and J Dinnerstein, (2008) 1(2) "How Juror Internet Use Has Changed the American Jury" *Journal of Court Innovation* 287, 292.

internet about the case they were trying while it was underway, whilst in non-high-profile cases, 5% admitted doing so.[54] Perhaps equally worryingly, Thomas' study found that "when asked about whether they would know what to do if something improper occurred during jury deliberations, almost half of the jurors (48%) said they either would not know what to do or were uncertain".[55]

4.24 These findings are not necessarily surprising when considered in the context of other earlier research in New Zealand which examined jurors' reliance on material from outside the jury room. This study, undertaken in 1998 before the widespread use of the internet, examined 49 trials and found that there were:

> Five cases in which the jury made any external inquiries about factual material. These inquiries included visiting the scene of the crime and bringing into the jury room explanatory brochures about legal and factual issues.[56]

4.25 The jurors made these enquiries despite a jury video, jury booklet and judge's summing up all explaining that a verdict must be reached by considering only the evidence that was heard in court. The New Zealand research also found cases of jurors undertaking their own research about the law, for example, through the use of a legal dictionary. As the researchers identified:

> While the directions not to conduct external inquiries were adhered to in a majority of cases, there was no evidence that the directions themselves made a difference to the actions of juries in this respect. By and large, juries simply did not seem to appreciate the importance, or did not understand the logic, of restricting themselves to the information presented by the parties and the judge.[57]

4.26 In contrast, a study of 41 trials undertaken in New South Wales, Australia between 1997 and 2000, found that only 3% of jurors deliberately looked for media coverage relevant to the case they were trying (although it did not consider whether the jurors had undertaken other forms of research).[58]

[54] *Are Juries Fair?* (Ministry of Justice Research Series 1/10, Feb 2010) p 43. It was also found that 26% of jurors in high profile cases and 13% in non-high profile cases admitted that "they *saw* media reports of their case on the internet during the trial" which may suggest that some were reluctant to admit having actively looked for such reports (our emphasis).

[55] *Are Juries Fair?* (Ministry of Justice Research Series 1/10, Feb 2010) p 39.

[56] W Young, N Cameron and Y Tinsley, *Law Juries in Criminal Trials, Part Two: A Summary of the Research Findings* (Law Commission of New Zealand Preliminary Paper 37, vol 2, 1999) p 59.

[57] W Young, N Cameron and Y Tinsley, *Juries in Criminal Trials, Part Two: A Summary of the Research Findings* (Law Commission of New Zealand Preliminary Paper 37, vol 2, 1999) p 59.

[58] M Chesterman, J Chan and S Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (2001) p 83. Although, of course, various factors, including whether the trials examined in both studies were of equal high profile and of equal length, may account for the different results between this and the New Zealand study.

4.27 The Criminal Case Review Commission (CCRC) has provided us with anonymous data about cases which the Court of Appeal directed the Commission to investigate under section 15 of the Criminal Appeal Act 1995. This data indicates that there has been an increase in the number of directions which concern allegations involving the conduct of jurors. Between 1998 and 2005, the CCRC recorded four directions involving such allegations. From 2006 until mid-2012, the CCRC has been involved in at least 27 directions concerning such allegations. These have included allegations that jurors used mobile phones in court; that jurors had inappropriate access to certain information about the proceedings and that jurors had inappropriate contact with someone connected to the case they were trying.

4.28 We recognise that empirical studies have limitations because they often rely on jurors self-reporting such behaviour. Thomas suggests that the results of her research are likely to show the "minimum numbers of jurors", given that others may not have admitted to such conduct if they realised that it was prohibited.[59] By the same token, the cases which result in juries being discharged or which reach the Court of Appeal are only those where the juror's behaviour has come to light. We do not know how many jurors engage in this behaviour and go undiscovered.[60]

4.29 Nonetheless, whatever the motives and numbers of those involved, jurors seeking information which goes beyond the evidence heard in court is clearly problematic. As the Lord Chief Justice has explained:

> If material is obtained or used by the jury privately, whether before or after retirement, two linked principles, bedrocks of the administration of criminal justice, and indeed the rule of law, are contravened. The first is open justice, that the defendant in particular, but the public too, is entitled to know of the evidential material considered by the decision-making body; so indeed should everyone with a responsibility for the outcome of the trial, including counsel and the judge, and in an appropriate case, the Court of Appeal Criminal Division. This leads to the second principle, the entitlement of both the prosecution and the defence to a fair opportunity to address all the material considered by the jury when reaching its verdict. Such an opportunity is essential to our concept of a fair trial.[61]

4.30 Indeed, whilst the principles have common law origins, there are also implications for a defendant's article 6 rights where jurors seek external material. Article 6 of the ECHR requires a trial before an independent and impartial tribunal, which is both unbiased in fact and in appearance;[62] a requirement which may be violated

[59] *Are Juries Fair?* (Ministry of Justice Research Series 1/10, Feb 2010) p 43.

[60] G Daly and I Edwards, "Jurors Online" (2009) 173 *Criminal Law and Justice Weekly* 261, 261.

[61] *Karakaya* [2005] EWCA Crim 346, [2005] 2 Cr App R 5 at [24]. See also Chief Justice Spigelman, "The Internet and the Right to a Fair Trial" (2005) 29 *Criminal Law Journal* 331, 332.

[62] The test is the same under the common law: *Lawal v Northern Spirit Ltd* [2003] UKHL 35, [2004] 1 All ER 187 at [14]. See also Clayton and Tomlinson para 11.146 and following.

if a juror obtains prejudicial material about the defendant. Furthermore, article 6 includes an "implied" right to cross-examine witnesses,[63] and a requirement that the court "inform the parties of the evidence taken into account" in reaching its decision, allowing the parties an opportunity to make submissions on the case.[64]

4.31 In some cases, external material which has been obtained by a jury may be insignificant – it could be innocuous and cause prejudice to neither party, or it may be related to an issue which is entirely peripheral to those raised at trial. However, where the material is prejudicial, or where the jury relies on such material in order to reach a verdict, this is likely to amount to a violation of article 6. Here, the prosecution and the defence have been denied the opportunity to challenge such evidence and to address the jury as to the weight to attach to it in their deliberations. As one commentator explained, the parties may be defending against "the unseen enemy of internet gossip and innuendo".[65] Furthermore, the parties have a right to know the basis on which the jury reached its decision.[66] In the absence of the jury giving a reasoned verdict (as a professional judicial tribunal would), the evidence before the court and the judge's summing up become the public record on which the jury must be assumed to have based its decision.[67]

4.32 Whilst jurors have a right to receive information as part of their right to freedom of expression under article 10 of the ECHR, this is clearly subject to protecting the legitimate aims of "maintaining the authority and impartiality of the judiciary" (which includes the jury) and "the protection of the reputation or rights of others" including the defendant's article 6 rights. Additionally, this problem has implications for the confidence of the public in the fair administration of criminal justice through the jury trial.[68]

Proposed reforms

4.33 Elsewhere in this chapter, we have detailed proposals to expand the practical measures, such as information and warnings, that might be used to prevent jurors from engaging in this behaviour.[69] However, since there is no single

[63] Clayton and Tomlinson para 11.178.

[64] Clayton and Tomlinson para 11.180, citing *R v Deputy Industrial Injuries Commissioner ex p Moore* [1965] 1 QB 456, 490.

[65] C M Morrison, "Jury 2.0" (2011) 62 *Hastings Law Journal* 1579, 1624.

[66] S Grey, "The World Wide Web: Life Blood for the Public or Poison for the Jury?" (2011) 3(2) *Journal of Media Law* 199, 199; N Haralambous, "Juries and Extraneous Material: A Question of Integrity" (2007) 71 *Journal of Criminal Law* 520, 524; A T H Smith, *Reforming the New Zealand Law of Contempt of Court: An Issues/Discussion Paper* (2011) p 41, http://www.crownlaw.govt.nz/uploads/contempt_of_court.pdf (last visited 1 Nov 2012).

[67] *Taxquet v Belgium* (2012) 54 EHRR 26 (App no 926/05) (Grand Chamber decision).

[68] *A-G v Fraill* [2011] EWCA Crim 1570, [2011] 2 Cr App R 21 at [29]; N Haralambous, "Educating Jurors: Technology, the Internet and the Jury System" (2010) 19(3) *Information and Communications Technology Law* 255, 261. The public appears to have a high level of confidence in the jury system at present: J V Roberts and M Hough, "Public Attitudes to the Criminal Jury: a Review of Recent Findings" (2011) 50(3) *Howard Journal of Criminal Justice* 247. For more on the human rights aspects of juror misconduct, see Appendix B on contempt by jurors.

[69] See para 4.77 and following below.

solution to this problem, it is necessary to consider what the legal response should be where preventative measures fail, and jurors do undertake research about the case that they are trying. Indeed, some have questioned whether it is realistic to seek to prevent jurors from researching aspects of the case that they are trying on the internet. Preventative measures can only assist those jurors "who are willing to abide by" the judge's directions.[70] The Law Commission in 2002 explained that there were clearly difficulties with preventing jurors from accessing the internet, describing finding information on the web as "characteristic of society today".[71]

4.34 In some ways, this risk can be partially mitigated by imposing restrictions on the media, limiting the information that they have on their internet archives and, therefore, making it less likely that jurors will be able to uncover prejudicial material. Such restrictions were imposed recently through an injunction granted by Mr Justice Fulford in the case of *Harwood*.[72] The injunction ordered certain publishers temporarily to remove material from their websites which had first appeared in advance of active proceedings commencing (and, therefore, at the time, would not have amounted to strict liability contempt by publication) but which had remained on the website once proceedings were active. We consider this issue in more detail in our chapters on modern media and contempt by publication.[73]

4.35 Whilst there may be concerns about the compatibility of such mechanisms with the media's article 10 rights, using such mechanisms in respect of specific webpages, for the limited duration of the trial, would make it more difficult for jurors to find prejudicial material. Such orders are not on their own a panacea. They could not, for example, limit jurors' access to other material on the internet, such as maps, legal dictionaries, scientific explanations, or background material about the parties to the case, nor access to websites run outside of the jurisdiction. Nonetheless, whilst neither warnings to the jury nor orders to remove material from the internet are foolproof, both together could reduce the risk of prejudice.[74]

4.36 A further legal response is to create a specific criminal offence for this type of juror misconduct. This would also help to remedy some of the areas of uncertainty about juror contempt, since any statutory offence would clarify the existing law. Various overseas jurisdictions, such as Queensland, New South

[70] N Marder, "Two Weeks at the Old Bailey: Jury Lessons from England" [2011] *Chicago-Kent Law Review* 537, 572 to 573. See also G Asquith, "Criminal Procedure: Jury Deliberations – Jury Irregularities – Use of Internet" (2011) 16 *Coventry Law Journal* 67, 73.

[71] Defamation and the Internet (2002) Law Commission Scoping Paper, para 5.26. See also Ch 3 at paras 3.1 and 3.2.

[72] *Harwood*, judgment of 20 Jul 2012, http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/simon-harwood-judgment-20072012.pdf (last visited 1 Nov 2012). Compare the Irish case of *Byrne v DPP* [2011] IESC 213, [2011] IR 346.

[73] See Ch 2 at para 2.14 and following and Ch 3 at para 3.55 and following.

[74] See the Australian case of *Perish* [2011] NSWSC 1102, where it was held that making an order and giving appropriate warnings to jurors on their own may not eliminate prejudice but undertaking both together increases the likelihood of the trial being fair.

Wales, Victoria, and Western Australia, have done so.[75] One typical example is the law in New South Wales, which prohibits jurors from making an inquiry about their case, including:

(a) asking a question of any person;

(b) conducting any research, for example, by searching an electronic database for information (such as by using the internet);

(c) viewing or inspecting any place or object;

(d) conducting an experiment;

(e) causing someone else to make an inquiry.[76]

4.37 Likewise, the Irish Law Reform Commission has recommended the criminalisation of "inquiries about matters arising in the course of a trial beyond the evidence presented".[77]

4.38 If our proposed preventative measures do not have the desired effect, and jurors nonetheless undertake research on the internet, there may be an argument for employing the ultimate deterrent, namely introducing a specific offence of juror research, instead of adopting the contempt jurisdiction as in the *Dallas* case. Whilst clearly a last resort, a discrete offence could send an important message to jurors about the seriousness with which such conduct is regarded. It may also have other benefits, such as providing greater clarity about what is and is not permitted than the present law.[78]

4.39 We doubt that such an offence would engage jurors' article 8 and 10 rights, given that a specific offence would fall a long way short of a prohibition on using the internet in and of itself. We of course recognise that such a prohibition would be impossible to enforce and wholly inappropriate, given that access to the internet has, for many, become an essential part of every day living. The offence would only be a prohibition limited in time (the period of jury service) and content (information related to the case the juror is trying). Furthermore, we consider that our proposals in many ways would enhance jurors' confidence in their use of the internet, because there would be greater clarity about what is permitted.[79] In any event, if the prohibition does engage articles 8 and 10, we consider that such a limited prohibition would be a proportionate measure, necessary to protect the

[75] S Grey, "The World Wide Web: Life Blood for the Public or Poison for the Jury?" (2011) 3(2) *Journal of Media Law* 199, 203 and P Lowe, "Challenges for the Jury System and a Fair Trial in the Twenty-First Century", [2011] *Journal of Commonwealth Criminal Law* 175, 193. California has also introduced legislation regulating the use of social media by jurors: C Murdoch, "The Oath and the Internet" (2012) 176 (11) *Criminal Law and Justice Weekly* 149, 150. See Appendix C on juror misconduct.

[76] Jury Act 1977, s 68C(5).

[77] Irish Law Reform Commission, *Consultation Paper: Jury Service* (2010) p 206.

[78] It may also clarify the anomaly raised by A T H Smith in relation to the *Dallas* case, namely whether Dallas' contempt was an offence within the meaning of s 8(2) of the 1981 Act, making admissible the evidence of what occurred in the jury deliberating room: *A-G v Dallas* [2012] EWHC 156 (Admin), [2012] 1 WLR 991.

[79] See also preventative measures, at para 4.77 and following below.

rights and freedoms of others.[80] We also consider that the prosecution of such conduct would be made fairer, and less likely to be subject to challenge on the ground of ECHR incompatibility, by the use of the normal criminal process, instead of the contempt jurisdiction, which we propose below.[81]

4.40 On the other hand, on informal consultation, some stakeholders raised with us concerns that creating such an offence would make jurors more reluctant to admit their misconduct and their fellow jurors more reluctant to report any concerns, which would actively work against uncovering cases of miscarriages of justice. The criminalisation of research by jurors may, therefore, work against the precise interest that the offence seeks to protect, namely the right to a fair trial and the risk of wrongful conviction, if it is more difficult for the courts to discover that the misconduct occurred.[82] Moreover, in jurisdictions that have introduced offences, their success has been doubted. For example, in New South Wales some commentators have argued that it does not appear to have deterred jurors from undertaking their own research.[83] **Do consultees consider that a specific offence of intentionally seeking information related to the case that the juror is trying should be introduced?**

JURORS DISCLOSING INFORMATION

Present law

4.41 Historically, it was assumed that jury deliberations were confidential. Some took the view that this meant that a breach of confidentiality would be contempt at common law,[84] although this was by no means a unanimous opinion.[85] However, following the New Statesman's disclosure of the jury's deliberations in the Jeremy Thorpe trial, which was held not to be in contempt,[86] a specific contempt was introduced as section 8 of the Contempt of Court Act. This provides:

[80] For more on this, see Appendix B on jurors seeking information.

[81] See para 4.69 below.

[82] This was an issue circumvented in *Mpelenda* [2011] EWCA Crim 1235 where "in light of the fact that none of the jurors was being interviewed under caution, the [Criminal Cases Review] Commission explained to juror number four that his answers were being obtained in order to assist the Court of Appeal and could not be used in evidence against him in the course of any criminal proceedings" at [26].

[83] New South Wales Law Reform Commission, *Consultation Paper 4: Jury Directions* (2008), para 5.34.

[84] See Appendix A on confidentiality of jury deliberations.

[85] See the examples in the report of the Criminal Law Revision Committee, Tenth Report: Secrecy of Jury Room (1968) Cmnd 3750 and E Campbell, "Jury Secrecy and Contempt of Court" (1985) 11 *Monash University Law Review* 169, 169 to 176.

[86] *A-G v New Statesman and Nation Publishing Co* [1981] QB 1. See also the House of Lords debate on the Phillimore Report and contempt of court: *Hansard* (HL), 7 May 1980, vol 408, cols 1723 to 1757; G Robertson and A Nicol, *Robertson and Nicol on Media Law* (5th ed 2007) p 452; P Robertshaw, "A Human Rights Conflict: Freedom of Expression versus Non-Disclosure of Jury Deliberations" [2003] *Civil Justice Quarterly* 265, 266; Lord Reed, "The Confidentiality of Jury Deliberations" (2003) 31(1) *The Law Teacher* 1, 8.

8.— Confidentiality of jury's deliberations.

(1) Subject to subsection (2) below, it is a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings.

(2) This section does not apply to any disclosure of any particulars—

(a) in the proceedings in question for the purpose of enabling the jury to arrive at their verdict, or in connection with the delivery of that verdict, or

(b) in evidence in any subsequent proceedings for an offence alleged to have been committed in relation to the jury in the first mentioned proceedings,

or to the publication of any particulars so disclosed.

4.42 Clause 8, as originally introduced in the Contempt of Court Bill, only prohibited disclosure of deliberations which identified either the case itself or the juror, and, therefore, would allow "bona fide" research.[87] That proposal did not survive the Parliamentary debates.[88]

4.43 Various terms within the section are ambiguous. The section only applies to "deliberations" and, therefore, some have argued that it has no application where no deliberations have occurred, for example, if the jury is discharged at the end of the prosecution case.[89] It is not clear whether the limited case law supports such an interpretation.[90] It has been held that "disclose" under section 8 should be given its ordinary English meaning, and that, therefore, it covers both direct and indirect disclosure.[91] The word "solicit" meanwhile is "directed to persons who seek to obtain the information from anyone else who is in possession of it".[92] The mental element for breach of section 8 is intention.[93] However, it remains unclear

87 See the House of Lords debate on the Contempt of Court Bill: *Hansard* (HL), 9 Dec 1980, vol 415, col 664.

88 G Robertson and A Nicol, *Robertson and Nicol on Media Law* (5th ed 2007) p 453. See Appendix A on the need for jury research.

89 G Robertson and A Nicol, *Robertson and Nicol on Media Law* (5th ed 2007) p 455. It has also been suggested that the section would not apply to fabricated disclosures: J Jaconelli, "Some Thoughts on Jury Secrecy" (1990) 10 *Legal Studies* 91, 95.

90 Arlidge, Eady and Smith on Contempt para 11-376.

91 *A-G v Associated Newspapers Ltd* [1994] 2 WLR 277. A subsequent application to the ECtHR was declared inadmissible by the Commission: *Associated Newspapers Ltd v UK* App No 24770/94 (Commission decision). It is not an offence to *offer* to disclose: Arlidge, Eady and Smith on Contempt para 11-375.

92 *Mirza* [2004] UKHL 2, [2004] 1 AC 1118 at [86].

93 *A-G v Scotcher* [2005] UKHL 36, [2005] 1 WLR 1867 at [12]; Arlidge, Eady and Smith on Contempt para 11-388 and following; H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 228.

whether specific "intention to interfere with the course of justice" is required, or merely intentional disclosure or soliciting.[94]

4.44 Human rights challenges have been made to section 8. In *Attorney General v Scotcher*[95] it was argued that a defence of uncovering a miscarriage of justice by protecting the right to a fair trial should be read into section 8 in order for it to be article 10 compliant. The House of Lords held that such a defence was unnecessary because disclosure to a court (even after a verdict) was not prohibited[96] and, therefore, had the juror written to the court or judge, the section would not be breached.[97] Furthermore, section 8 did not preclude the judge from inquiring into concerns which had been disclosed to the court before the verdict was delivered.[98] In consequence, the law was held to be ECHR compliant because the interference through section 8 with the juror's article 10 right was proportionate on account of the importance of the secrecy of jury deliberations in the criminal justice system.[99]

4.45 At the ECtHR, the recent case of S*eckerson v UK* and *Times Newspapers Ltd v UK*[100] considered section 8. Both applicants were fined following publication in the newspaper of Seckerson's concerns about a trial on which he had sat as a juror. The court held that section 8 as an "absolute rule cannot be viewed as being unreasonable or disproportionate" given the importance of promoting "free and frank discussion" through the confidentiality of deliberations.[101] In consequence, there was no violation of article 10. However, notably, the court observed that it was:

[94] Arlidge, Eady and Smith on Contempt para 11-389 to 11-394. In the New Zealand case of *Solicitor-General v Radio New Zealand Ltd* it was held that no specific intention was required: [1993] NZHC 423, [1994] 1 NZLR 48.

[95] *A-G v Scotcher* [2005] UKHL 36, [2005] 1 WLR 1867.

[96] Their Lordships held that disclosure to a court via a third party, such as a lawyer or Citizens' Advice Bureau, would be permitted if it was by sealed letter which "asked them to forward it unopened to the appropriate court authorities" at [27] by Lord Rodger.

[97] This finding was made despite the fact that the juror had never been told he was permitted to disclose his concerns to the court: H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 232.

[98] In consequence, the Consolidated Criminal Practice Direction instructed judges to direct jurors to raise any concerns that they had before the verdict: H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 232.

[99] [2005] UKHL 36, [2005] 1 WLR 1867. It was subsequently held in *Charnley* [2007] EWCA Crim 1354, [2007] 2 Cr App R 33 that a court can investigate concerns by jurors which are raised after the verdict, provided they were raised "at a sufficiently proximate time and place to the events in court", such as with the usher immediately after the verdict has been delivered and the jurors left court, at [28].

[100] *Seckerson v UK* and *Times Newspapers Ltd v UK* (2012) 54 EHRR SE19 (App Nos 32844/10 and 33510/10).

[101] *Seckerson v UK* and *Times Newspapers Ltd v UK* (2012) 54 EHRR SE19 (App Nos 32844/10 and 33510/10) at [43] to [44].

> Not called upon in the present case to assess the compatibility with article 10 of section 8 in circumstances involving a conviction for research into jury methods. Nor is the court concerned with a case where the interests of justice could be said to require the disclosure of the jury's deliberations.[102]

4.46 The interpretation of section 8 is closely related to the issue of the common law inadmissibility of jury deliberations. The inadmissibility rule was explained in *Smith*:

> (1) The general rule is that the court will not investigate, or receive evidence about, anything said in the course of the jury's deliberations while they are considering their verdict in their retiring room … .
>
> (2) An exception to the above rule may exist if an allegation is made which tends to show that the jury as a whole declined to deliberate at all, but decided the case by other means such as drawing lots or tossing a coin. Such conduct would be a negation of the function of a jury and a trial whose result was determined in such a manner would not be a trial at all … .
>
> (3) There is a firm rule that after the verdict has been delivered evidence directed to matters intrinsic to the deliberations of jurors is inadmissible … .
>
> (4) The common law has recognised exceptions to the rule, confined to situations where the jury is alleged to have been affected by what are termed extraneous influences … .[103]

4.47 Therefore, in essence, evidence of jury deliberations is inadmissible in any subsequent proceedings subject to the exception under section 8(2)(b), explained above, and to situations where the jury has been influenced by external material. Clearly, the issue of admissibility of evidence is separate to that of liability of jurors for disclosure, but nonetheless, the two are obviously closely related because the existence of evidence depends on there having been such disclosure.

4.48 In *Mirza*[104] it was held that section 8 did not affect the Court of Appeal's jurisdiction to hear evidence relevant to an appeal (because a court cannot be in contempt of itself), subject to the common law rule on inadmissibility. That rule was held to be article 6 compliant on the basis of the importance of jury secrecy to the legal process and because the trial court can investigate allegations of

[102] *Seckerson v UK* and *Times Newspapers Ltd v UK* (2012) 54 EHRR SE19 (App Nos 32844/10 and 33510/10) at [45].

[103] [2005] UKHL 12, [2005] 1 WLR 704 at [16]. See C Gale, "Juries: Scrutiny of Deliberations" (2005) 69 *Journal of Criminal Law* 397. This principle was recently reiterated in *Thompson* [2010] EWCA Crim 1623, [2011] 1 WLR 200 and *Hewgill* [2011] EWCA Crim 1778, [2012] Criminal Law Review 134, although the term "extraneous" has been criticised: see Arlidge, Eady and Smith on Contempt para 11-370 and R Pattenden, "Investigating Jury Irregularities: United Kingdom (England and Wales)" (2010) 14 *International Journal of Evidence and Proof* 362, 364.

[104] [2004] UKHL 2, [2004] 1 AC 1118.

misconduct or bias before a verdict is returned.[105] This decision was strongly criticised for its reasoning that the "residual possibility of a miscarriage of justice was … the necessary price to be paid for the preservation and protection of the jury system".[106]

4.49 Breach of section 8 is punishable by a fine or imprisonment for up to two years.[107] In the recent case where a juror (Fraill) and one of the defendants in the trial (Sewart) had discussed the jury's deliberations on the social networking site Facebook, Fraill was sentenced to eight months' imprisonment, whilst Sewart received a sentence of two months' imprisonment, suspended for two years.[108]

The problem

4.50 Section 8 has been criticised on a number of levels. It appears that the section may have gone beyond what was necessary to fill the lacuna in the common law uncovered in the *New Statesman* case.[109] In that case, Lord Chief Justice Widgery suggested that some restrictions on disclosure were needed but not that the restrictions had to be absolute. His Lordship acknowledged that there had previously been many unproblematic disclosures where the individuals involved were not identified.[110]

4.51 Additionally, it has been argued that, despite the case law, section 8 may be incompatible with article 10 because its "absolute nature" makes it a disproportionate interference with freedom of expression.[111] This, it is suggested, is particularly so when the disclosure seeks to uncover a miscarriage of justice.[112]

4.52 Aside from concerns about miscarriages of justice, there is an important public interest in subjecting the jury system to scrutiny by the media.[113] Fenwick and

[105] This reiterated the position previously established by *Qureshi* [2001] EWCA Crim 1807, [2002] 1 WLR 518 which held that allegations could only be investigated before the jury returned their verdicts.

[106] H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 231. Lord Steyn recognised this concern in his dissenting judgment. It is unclear whether the Strasbourg court would reach the same decision. In *Miah v UK* (1998) 26 EHRR CD199 App No 37401/97 (Commission decision), a complaint based on the secrecy rule was rejected, but on the basis that there was insufficient evidence of bias by the jury (and therefore there was no requirement that the domestic court investigate it in any event).

[107] Contempt of Court Act 1981, s 14.

[108] *A-G v Fraill* [2011] EWCA Crim 1570, [2011] 2 Cr App R 21 at [57] and [60].

[109] *A-G v New Statesman and Nation Publishing Co* [1981] QB 1.

[110] *A-G v New Statesman and Nation Publishing Co* [1981] QB 1, 11. Consider also the proposal to reform New Zealand law on the prohibition on disclosing jury deliberations by focusing on the mischief caused by the disclosure: J Tunna, "Contempt of Court: Divulging the Confidences of the Jury Room" (2003) 9 *Canterbury Law Review* 79, 109 to 110.

[111] H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 229.

[112] See para 4.44 above. G Robertson and A Nicol argue that it is "absurd" that disclosure to uncover miscarriages of justice is prohibited: *Robertson and Nicol on Media Law* (5th ed 2007) p 454; see also A Ashworth, "Juries: Contempt of Court Act 1981, s 8" [2004] *Criminal Law Review* 1041, 1044.

[113] H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 239 to 240.

Phillipson have even gone so far as to suggest that, in some circumstances, there may be a public interest justification in allowing jurors to disclose details of their deliberations, for example, if a defendant were acquitted of rape because of jurors' sexist attitudes.[114] Allowing for greater public scrutiny of the jury system could lead to its improvement.[115] Robertson and Nicol argue that section 8 is designed to prevent "informed criticism of the jury system, which is precisely why" it offends article 10.[116]

4.53 There is also a public interest in research being undertaken into the system of trial by jury.[117] Academic views on the impact of section 8 on jury research differ, with some arguing it makes such research "impossible"[118] whilst others consider that section 8 "does not in fact prevent most research about juries".[119] Nonetheless, it seems clear that section 8 "has created confusion about what jury research can and cannot be conducted and has contributed to an information vacuum about juries in this country".[120]

4.54 The ECtHR has thus far not needed to address whether section 8 is compatible with article 10 when it comes to disclosure in the public interest, whether in respect of miscarriages of justice or for academic research. However, it has implied that there may be concerns about compatibility.[121] Nonetheless, it has been argued that in an era when the openness and accountability of the judicial system has come to be highly regarded, the secrecy of jury deliberations looks increasingly out of step.[122]

4.55 Various justifications have been put forward in support of section 8. First, it has been argued that jurors must feel that they can express their views, without fear

[114] H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 236 to 238. Although, see the *Crown Court Bench Book – Directing the Jury* (2010) ch 17, which explains the judicial direction to juries not to bring stereotypes into the deliberating room.

[115] "Jury Room Deliberations" (1981) 131 *New Law Journal* 101. See also G Daly and I Edwards, "Jurors Online" (2009) 173 *Criminal Law and Justice Weekly* 261.

[116] G Robertson and A Nicol, *Robertson and Nicol on Media Law* (5th ed 2007) pp 453 to 454.

[117] Lord Justice Auld*, Review of the Criminal Courts of England and Wales* (2001) ch 5, para 82.

[118] H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 228.

[119] C Thomas, "Exposing the Myths of Jury Service" [2008] *Criminal Law Review* 415, 415 at footnote 4.

[120] *Are Juries Fair?* (Ministry of Justice Research Series 1/10, Feb 2010) p 1.

[121] *Seckerson v UK* and *Times Newspapers Ltd v UK* (2012) 54 EHRR SE19 (App Nos 32844/10 and 33510/10) at [45]; *Associated Newspapers Ltd v UK* App No 24770/94 (Commission decision). There are authorities establishing that a prohibition exceeding that which is necessary will be disproportionate, eg, *Open-Door Counselling Ltd v Ireland* (1993) 15 EHRR 244 (App Nos 14234/88 and 14235/88).

[122] Arlidge, Eady and Smith on Contempt para 11-366.

of ridicule or recriminations.[123] Additionally, the jury's verdict should be final. Prohibiting the disclosure of deliberations prevents the reopening of cases[124] and a subsequent "retrial" by media, especially following an acquittal.[125] The privacy and security of jurors also needs to be protected (in particular, where the media may try to contact them).[126] It may also be argued that the fact that a juror can raise concerns with the court, without breaching section 8, is sufficient to establish ECHR compatibility. Finally, there is a risk that jurors could be induced or intimidated into making false disclosures if such evidence were admissible on appeal.[127] It is also notable that the prohibition in section 8 has the support of jurors: Thomas' study found that 82% "felt it was correct that jurors should not be allowed to speak about what happens in the deliberating room".[128]

4.56 Leaving aside whether in principle section 8 should be maintained, there may be concerns that the section is being increasingly flouted. The internet and social media may make it easier for friends, families and others to identify and communicate with jurors to solicit information about their jury service.[129] Likewise, it may be easier for jurors to contact parties relevant to the trial and to

[123] *A-G v Fraill* [2011] EWCA Crim 1570, [2011] 2 Cr App R 21 at [33]; N Haralambous, "Investigating Impropriety in Jury Deliberations: A Recipe for Disaster?" [2004] *Journal of Criminal Law* 411, 415; Lord Reed, "The Confidentiality of Jury Deliberations" (2003) 31(1) *The Law Teacher* 1, 2 to 3, although, as Lord Reed highlights at p 3, there are some situations in which a jury cannot legitimately expect confidentiality to be maintained. See also Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (2001) ch 5, para 79.

[124] N Haralambous, "Investigating Impropriety in Jury Deliberations: A Recipe for Disaster?" [2004] *Journal of Criminal Law* 411, 416; N Haralambous, "Protecting the Secrecy Laws Surrounding Jury Deliberations: The Ongoing Saga" (2008) 172 Justice of the Peace 97; Lord Reed, "The Confidentiality of Jury Deliberations" (2003) 31(1) *The Law Teacher* 1, 4; G Daly and R Pattenden, "Racial Bias and the English Criminal Trial Jury" (2005) 64 *Cambridge Law Journal* 678, 703.

[125] *Hansard* (HC), 2 Mar 1981, vol 1000, col 41 by the Attorney General; Lord Reed, "The Confidentiality of Jury Deliberations" (2003) 31(1) *The Law Teacher* 1, 4. Although it has been argued that there are, in any event, many instances of the media reconsidering verdicts and suggesting they were wrongly decided, such as the BBC television series *Rough Justice*: J Jaconelli, "Some Thoughts on Jury Secrecy" (1990) 10 *Legal Studies* 91, 99 to 100.

[126] Although this seems to confuse the issues of the confidentiality of deliberations and the anonymity of the jurors: P Ferguson, "The Criminal Jury in England and Scotland: The Confidentiality Principle and the Investigation of Impropriety" (2006) 10 *International Journal of Evidence and Proof* 180, 186 to 187. See also N Haralambous, "Investigating Impropriety in Jury Deliberations: A Recipe for Disaster?" [2004] *Journal of Criminal Law* 411, 416; Lord Reed, "The Confidentiality of Jury Deliberations" (2003) 31(1) *The Law Teacher* 1, 3; P W Ferguson, "Jury Secrecy and Criminal Appeals" (2004) 8 *Scots Law Times* 43.

[127] See the House of Commons debate on the publication of jury deliberations: *Hansard* (HC), 16 Jun 1981, vol 6, col 934; Lord Reed, "The Confidentiality of Jury Deliberations" (2003) 31(1) *The Law Teacher* 1, 4.

[128] *Are Juries Fair?* (Ministry of Justice Research Series 1/10, Feb 2010) p 39.

[129] M 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* 577, 588.

communicate anonymously and instantly with them and others.[130] In the USA one study found that nationally a tweet referring to "jury duty" was posted almost every three minutes.[131] Empirical research about the nature and scope of the problem in England and Wales is very limited. A similar survey by The Times "claimed to have found more than 40 examples of public postings and statements that appeared to be in breach of the law",[132] although another study appeared to find fewer cases.[133]

Proposed reforms

4.57 We ask consultees their views about the appropriateness of section 8, dealing first with the issue of miscarriages of justice. In 2005, the Department for Constitutional Affairs consulted on whether the common law on the inadmissibility of jury deliberations as evidence should be relaxed to allow investigations into jury impropriety.[134] Although the consultation only received 41 responses, the majority supported the view that the common law should be left to develop and, therefore, section 8 should not be modified.[135]

4.58 We recognise that reforming section 8 to allow jurors to disclose aspects of their deliberations in order to uncover a miscarriage of justice would necessarily require reform of the admissibility of such evidence. Disclosure would be fruitless if the court were unable to consider it in assessing the safety of the conviction. We consider, despite the finding of the majority of the House of Lords in *Mirza*,[136] that there may be merit in reforming section 8 in order to protect against the risk of a miscarriage of justice. Indeed, as we have explained, it may be necessary in order to render the law ECHR compliant.[137] As Lord Steyn argued when dissenting in *Mirza:*

> There is a positive duty on judges, when things have gone seriously wrong in the criminal justice system, to do everything possible to put it right. In the world of today enlightened public opinion would accept nothing less. It would be contrary to the spirit of these developments

[130] Although in *Fraill* it was said that the problem is not the internet in and of itself but jurors who disregard the defendant's right to a fair trial: [2011] EWCA Crim 1570, [2011] 2 Cr App R 21 at [29].

[131] B Grow, *As Jurors Go Online, US Trials Go Off Track*, Reuters, 8 Dec 2010. A tweet is a short statement available to the public on the website Twitter: see Ch 3 at para 3.2. See also A J St Eve and M A Zuckerman, "Ensuring an Impartial Jury in the Age of Social Media" [2012] *Duke Law and Technology Review* 1.

[132] Editorial, "Jurors and the Internet" [2011] *Criminal Law Review* 591.

[133] M Bromby, "The Temptation to Tweet – Jurors' Activities Outside the Trial", paper presented at the Jury Research Symposium, 25 to 26 Mar 2010, Institute for Advanced Studies, Glasgow, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1590047 (last visited 1 Nov 2012).

[134] Department for Constitutional Affairs, *Jury Research and Impropriety: Consultation CP 04/05* (2005).

[135] Department for Constitutional Affairs, *Jury Research and Impropriety: Response to Consultation CP 04/05* (2005) p 11.

[136] *Mirza* [2004] UKHL 2, [2004] 1 AC 1118.

[137] *Seckerson v UK* and *Times Newspapers Ltd v UK* (2012) 54 EHRR SE19 (App Nos 32844/10 and 33510/10) at [45]. See para 4.51 above.

> to say that in one area, namely the deliberations of the jury, injustice can be tolerated as the price for protecting the jury system.[138]

4.59 It has been argued that in order to prevent a disproportionate interference with article 10, no criminal penalty should be applied to a juror who discloses deliberations in breach of section 8 (that is, disclosure to a party other than a court) in the honest belief that such disclosure will uncover a miscarriage of justice.[139] Fenwick and Phillipson suggest that, so long as the disclosure was to a person who was "a reasonable one to choose in the circumstances" – a defence solicitor perhaps – the juror should not be liable, unless they had been told that any disclosure must be to the court.[140] This would ensure protection for both the juror's article 10 rights, and the defendant's article 6 rights.[141] A defence based on the juror's perception of who it was reasonable to approach may be too vague. A defence could, however, be available if disclosure was to a court official or other specified organisation.

4.60 We have concerns about the extent to which it is clear to jurors at present that they can disclose such matters after the verdict only to a court.[142] Providing more outlets for disclosure could protect well-meaning jurors who disclose their concerns to parties other than a court. It could also act as a further safeguard against miscarriages of justice since jurors would be less likely to keep their concerns to themselves for fear of disclosing to the wrong person in error, and thereby incurring criminal liability. Whilst clearly it is important that the rationale for section 8 is not undermined by a "proliferation" of jurors disclosing their deliberations at will,[143] it is also problematic that such disclosure is currently criminalised, which has the effect of preventing the discovery of wrongful convictions, with all of its serious consequences for the defendant, the victim of the offence and society at large. **Do consultees consider that it is necessary to amend section 8 to provide for a specific defence where a juror discloses deliberations to a court official, the police or the Criminal Cases Review Commission in the genuine belief that such disclosure is necessary to uncover a miscarriage of justice?**

4.61 In respect of undertaking jury research, the same Department for Constitutional Affairs consultation asked for views about whether section 8 should be modified to allow academic research into jury deliberations. A majority of respondents thought that some form of research should be allowed, but that such research

[138] *Mirza* [2004] UKHL 2, [2004] 1 AC 1118 at [4]. See also J Spencer, "Did the Jury Misbehave? Don't Ask, Because We Do Not Want To Know" (2002) 61 *Cambridge Law Journal* 291.

[139] H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 234; N Haralambous, "Investigating Impropriety in Jury Deliberations: A Recipe for Disaster?" [2004] *Journal of Criminal Law* 411, 420 to 421.

[140] H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 234.

[141] H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 243.

[142] G Daly, "The Complaining Juror: Attorney General v Scotcher" (2006) 10 *International Journal of Evidence and Proof* 70, 74.

[143] G Daly, "The Complaining Juror: Attorney General v Scotcher" (2006) 10 *International Journal of Evidence and Proof* 70, 74; E Finch, "Juries: Secrecy of Deliberations" (2005) 69 *Journal of Criminal Law* 484, 488.

would need to be regulated.[144] Suggestions were made that an ethics panel be appointed to oversee the research; that research should only be undertaken in consultation with, or with the consent of, the Lord Chief Justice; that the consent of the jurors would need to be obtained and they would need to be granted anonymity; and that there should be a code of conduct for jury research.[145] However, a majority of respondents thought that researchers should not be allowed access to the jury deliberating room and that there should be a financial penalty for researchers who breach any of the safeguards.[146] The Department responded that it supported the view that more research into juries should be undertaken, but said that section 8 would not be amended until it was clear that there are research questions which cannot be answered without legislative amendment.[147]

4.62 This consultation built on the previous proposals put forward by both the Royal Commission on Criminal Justice in 1993[148] and a House of Commons Select Committee in 2004-5[149] that section 8 be reformed to allow more academic research. Likewise, the Law Reform Commission of Canada proposed an exception to jury secrecy for research authorised by the Chief Justice.[150] **Do consultees consider that section 8 unnecessarily inhibits research? If so, should section 8 be amended to allow for such research? If so, what measures do consultees consider should be put in place to regulate such research?**

EVIDENCE AND PROCEDURE

Present procedure

4.63 The procedure for dealing with jurors who seek external information about the case that they are trying or who disclose information in breach of section 8 is necessarily complicated. There needs to be consideration of what should be done about the initial trial itself before considering what should be done about a particular juror's misconduct.

4.64 Where concerns arise during the trial that may affect the jury's ability to fulfil their oath, the Crown Court Bench Book explains that:

[144] Department for Constitutional Affairs, *Jury Research and Impropriety: Response to Consultation CP 04/05* (2005) pp 8 to 9; Department of Constitutional Affairs, *Jury Research and Impropriety: Consultation CP 04/05* (2005) pp 30 to 32.

[145] Department for Constitutional Affairs, *Jury Research and Impropriety: Response to Consultation CP 04/05* (2005) p 8. H Fenwick and G Phillipson agree that there is a need to preserve the anonymity of jurors: *Media Freedom under the Human Rights Act* (2006) p 242.

[146] Department for Constitutional Affairs, *Jury Research and Impropriety: Response to Consultation CP 04/05* (2005) pp 6 to 8, 11.

[147] Department for Constitutional Affairs, *Jury Research and Impropriety: Response to Consultation CP 04/05* (2005) p 16.

[148] Report of the Royal Commission on Criminal Justice (1993) Cm 2263 (1993) para 8.

[149] *Forensic Science on Trial* (Seventh Report of Session 2004 - 2005) para 166.

[150] M Comiskey, "Initiating Dialogue about Jury Comprehension of Legal Concepts: Can the 'Stagnant Pool' Be Revitalised?" (2009 - 2010) 35 *Queen's Law Journal* 625, 663.

> Jurors are customarily provided with comprehensive warnings against discussing the case with others and against seeking information about the case from extraneous sources. A disregard of those warnings will amount to misconduct.
>
> The judge will need to consider in each case whether, as a result of the eventuality or misconduct, it is necessary to discharge the whole jury. This will not arise if discharge of the individual juror(s) is caused by personal commitment, indisposition or illness, but may be required if there is a risk that information improperly obtained or personal knowledge has been shared with other members of the jury.[151]

4.65 We understand that a protocol is being prepared by the President of the Queen's Bench Division, explaining the procedure to be followed if the trial judge becomes aware of an irregularity concerning the jury, including a possible contempt.

4.66 As with some other forms of contempt, the Attorney General can bring proceedings against the juror or the court can proceed on its own motion.[152] The current procedure falls under Civil Procedure Rule 81 and the related Practice Direction. Proceedings will normally be brought before the Divisional Court's summary jurisdiction.[153] In consequence, the civil rules of evidence apply (for example, evidence is served by affidavit). However, the proceedings are deemed criminal for the purposes of article 6 so the defendant is entitled to the enhanced provisions of article 6(2) and 6(3) (which protect the presumption of innocence and establish certain minimum standards for criminal proceedings).[154] It is unclear whether legal aid is available for contempt by jurors.[155] The only right of appeal is to the Supreme Court.[156]

Problems

4.67 The difficulty with the current procedure is that it is hard to see the justification for treating these forms of conduct differently from other forms of criminal behaviour which interfere with the administration of justice, such as intimidating witnesses or jury tampering. Furthermore, there may be questions about the extent to which the current procedure complies with the requirements of articles 6 and 7 of the ECHR. On informal consultation, some stakeholders raised with us concerns that the Order 52 procedure does not allow the defendant to know the case against which they must defend themselves adequately, because there is no charge

[151] *Crown Court Bench Book – Directing the Jury* (2010) p 383.

[152] The 1981 Act, s 8(3).

[153] Arlidge, Eady and Smith on Contempt para 11-361.

[154] *Daltel Europe Ltd v Makki* [2006] EWCA Civ 94, [2006] 1 WLR 2704 at [29]. See Appendix B discussion on whether contempt is civil or criminal.

[155] Criminal legal aid is available for proceedings for an offence (Access to Justice Act 1999, s 12), but it is unclear whether this would include juror contempts. Civil legal aid is available if "the client may be subject to orders or penalties which are (or which the client is reasonably contending are) criminal penalties within the meaning of article 6" of the ECHR, subject to an interests of justice test (Legal Services Commission, *Funding Code: Criteria*, s 14).

[156] Administration of Justice Act 1960, s 13. Sections 1 and 2 set out procedural aspects.

sheet or indictment. Such stakeholders also had concerns about whether the civil disclosure procedure is appropriate to deal with what is, for article 6 purposes, a criminal penalty carrying a potential prison sentence. Additionally, there may be concerns that, where the trial judge needs to question a juror in order to decide whether to discharge the juror or jury, the juror should be entitled to exercise the privilege against self-incrimination, and/or take legal advice before answering the judge's questions.[157] Finally, it is not clear that the protections of the Bail Act 1976 apply to contempt proceedings before the Divisional Court, which may have implications for a defendant's right to liberty under article 5.[158]

Proposed reforms

4.68 We consider that there may be merit in reforming the law so that breaches of section 8, and (if adopted) a statutory offence of searching for information, are both tried only on indictment. As with the current position, the Attorney General could maintain responsibility for such prosecutions in order to avoid any problems with conflicts of interest if the CPS were to prosecute. One of the advantages of trying such matters on indictment would be that the existing, well-established and familiar rules of evidence and procedure would apply, without needing significant amendment. If both breach of section 8 and seeking information related to the case being tried were classed as criminal offences, the normal criminal procedure would apply as a matter of course. In consequence, police powers of arrest, detention, investigation and charge under the Police and Criminal Evidence Act 1984, the criminal legal aid regime, bail under the Bail Act 1976, the procedure for sending cases from the magistrates' court to the Crown Court under section 51 of the Crime and Disorder Act 1998, the system of disclosure under the Criminal Procedure and Investigations Act 1996, and the criminal rules of evidence would all be applicable.

[157] For example, in Australia, s 55DA of the Jury Act 1977 of New South Wales allows a judge to examine a juror on oath to determine whether there has been misconduct, but such evidence is not admissible in subsequent proceedings against the juror.

[158] It depends on whether contempt proceedings are "proceedings for an offence" under s 1(1) of the Act. If the Act does not apply, the common law of bail may do so, but the lack of legal clarity here could give rise to a breach of article 5. See the Appendix B on article 5 and also the discussion in Ch 5 at paras 5.33 to 5.35.

4.69 The advantage of amending the procedure in this way would be to ensure that those accused of inappropriately disclosing or seeking information would benefit from rules and procedures which fully protect their article 5 rights in respect of bail, and their article 6 rights in respect of the trial process. In respect of the statutory offence of juror research, it would be significantly easier to define this as a criminal offence and employ the existing rules of evidence and procedure, than to try to amend the rules of evidence and procedure to apply to this aspect of the contempt jurisdiction.[159] On the other hand, adopting such a procedure would be a considerable change from the current regime for dealing with such contempts. It would require those prosecuting and defending such cases to adopt criminal procedures which are different to those currently used, and which could be more onerous. **Do consultees consider that breach of section 8 should be triable only on indictment, with a jury? Do consultees consider that, if adopted, a statutory offence of intentionally seeking information related to the case that the juror is trying should be triable only on indictment, with a jury?**

4.70 However, if such cases were tried on indictment with a jury there may be concerns that trial by jury is not the most appropriate mechanism for dealing with such conduct. One obvious difficulty is that if jurors themselves do not understand or accept the prohibition on searching for or disclosing information they may be unwilling to convict other jurors of such offences. The reluctance of jurors to convict could undermine the deterrent effect of criminalising these forms of conduct, which in turn could affect public confidence in the criminal justice system. On the other hand, this concern may prove unfounded given that, as mentioned previously, jurors are very supportive of section 8. One alternative proposal to deal with this concern would be to adopt a trial process incorporating the protections inherent to trial on indictment, such as rules of evidence and procedure, but presided over by a judge alone.

4.71 There are arguments against such a hybrid trial “as if on indictment”. It would be a novel and unique step given that, currently, no other criminal offences are automatically tried as if on indictment without a jury.[160] Whilst legislation allows for trial without jury in exceptional cases where there is a danger of jury tampering, these provisions require the danger to be shown in the specific case, and are not activated by virtue of the offence with which the defendant has been charged, as would be the case here.[161] Conviction after a trial by jury may also carry more stigma than by a judge alone. On the other hand, trial by judge alone could be quicker and cheaper than with a jury.

[159] In particular, the latter course would require a technical bill amending almost every rule of evidence and procedure that would need to apply to juror contempt, whereas creating a statutory offence of juror research triable on indictment would ensure that the related rules of evidence and procedure apply automatically.

[160] Criminal Justice Act 2003, s 43, allowing for trial without jury in certain fraud cases, was never brought into force. It was repealed by the Protection of Freedoms Act 2012, s 113.

[161] Criminal Justice Act 2003, s 44.

4.72 **Do consultees consider that breaches of section 8 should be tried as if on indictment by a judge sitting alone? If consultees consider that it should be a judge sitting alone, should it be a specific level of judge in all cases or should the trial judge be allocated by the presiding judge on a case-by-case basis?**

4.73 **Do consultees consider that, if a statutory offence of intentionally seeking information while serving as a juror were adopted, it should be tried as if on indictment by a judge sitting alone? If consultees consider that it should be a judge sitting alone, should it be a specific level of judge in all cases or should the trial judge be allocated by the presiding judge on a case-by-case basis?**

4.74 **If consultees disagree with the proposal to introduce a juror research offence in statute, should the contempt jurisdiction used in *Dallas* be instead tried by judge alone? If so, how can it be defined with sufficient precision as a form of contempt and how can the procedure be amended to ensure that the alleged contemnor's rights are better protected?**

4.75 At present, sanctions for breach of section 8 are limited to a fine or imprisonment for up to two years. There is clearly a need for the courts to have the appropriate powers to deal with this conduct depending on the circumstances of the offence. It seems illogical for the penalty to be restricted to a fine or imprisonment when in some cases it may be appropriate to have the power to impose a community sentence. On the one hand, a potential sentence of imprisonment for up to two years may be regarded as harsh for breach of section 8 where the defendant's article 10 rights will be engaged. On the other hand, the consequences of committing this offence could be serious, both for the defendant in the original trial and for the public's confidence in the system of trial by jury. **Do consultees consider that the current maximum sentence for a breach of section 8 is appropriate? If not, what should it be? Do consultees consider that community penalties should be available as a sanction for breach of section 8?**

4.76 **Do consultees consider that the current maximum sentence within section 14 of the 1981 Act (a fine or two years' imprisonment) would be appropriate for a new offence of intentionally seeking information related to the case that the juror is trying (if adopted)? If not, what should it be? Do consultees consider that community penalties should be available as a penalty for this new offence (if adopted)?**

PREVENTATIVE MEASURES

4.77 We also consider that there are further practical measures which could be taken to discourage jurors from misconduct during their jury service and help prevent the problems that have been detailed above. It may be important to give jurors more information about what they can and cannot do whilst undertaking jury service, and to explain the reasons behind such restrictions. This is particularly

[162]

Education and pre-trial information

4.78 In general, there may be concerns that incidents of misconduct by some jurors may arise from ignorance about the court process and procedure. This may reflect a general lack of knowledge amongst the public about the operation of the criminal justice system. Whilst steps have been taken in recent years to open up the system to greater transparency and accountability, nonetheless, it is possible that more could be done. In particular, we consider that education in schools could provide greater focus on the role and responsibility of jury service. Whilst the National Curriculum on citizenship currently provides for teaching about the justice system, the programme of study does not specifically mention jury service.[163] **Do consultees consider that the Department for Education should look at ways to ensure greater teaching in schools about the role and importance of jury service?**

4.79 We would recommend that all jurors should be told clearly, specifically, repeatedly and consistently that they must not undertake research or seek out information about any matters related to the trial. Jurors should also be told why this is so.[164] Likewise, jurors should be told that they should not disclose information related to the case, in accordance with the requirements of section 8, and the reasons for this. The warning should be regularly updated in order to take account of technological developments[165] and in a manner which is detailed and gives specific examples in order to help jurors to understand the boundaries of acceptable conduct.[166] Jurors should also be told that failure to adhere to the warnings could result in them being imprisoned. Additionally, jurors should be informed of "what to do about improper behaviour, including when and how to

[162] See para 4.21 and following above.

[163] See, eg, Qualifications and Curriculum Authority, *Citizenship: Programme of Study for Key Stage 3 and Attainment Target* and *Citizenship: Programme of Study for Key Stage 4* (2007).

[164] *Are Juries Fair?* (Ministry of Justice Research Series 1/10, Feb 2010) p 50; S Macpherson and B Bonora, "The Wired Juror, Unplugged", *Trial*, Nov 2010; N Haralambous, "Educating Jurors: Technology, the Internet and the Jury System" (2010) 19(3) *Information and Communications Technology Law* 255, 260.

[165] Warnings in the US appear to be more technologically comprehensive: M 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* 577, 591. We acknowledge that any such warning will need to include a "catch all" provision, to guard against the risk of being too specific and missing out certain social networking sites, websites or software.

[166] L Whitney Lee, "Silencing the 'Twittering Juror': The Need to Modernize Pattern Cautionary Jury Instructions to Reflect the Realities of the Electronic Age" (2010) 60 *DePaul Law Review* 181.

report it"[167] and that jurors have a duty to report such conduct by their fellow jurors.[168]

4.80 To this end, the appropriately drafted warning to jurors should be delivered:

(1) In the guide sent to jurors with their summons;[169]

(2) In the jury video which is shown on the jurors' first day;

(3) In the speech by the jury manager on the jurors' first day;

(4) On eye-catching, memorable and well-designed posters situated around the court building and in the jury box, assembly area and deliberating room;[170]

(5) On conduct cards which jurors should carry with them to use as a reminder.[171]

4.81 We do not consider that introducing such procedures would be significantly more expensive or time-consuming than those already put in place by HM Courts and Tribunals Service.

In-trial procedures and judicial directions

4.82 We consider that the terms of the warning should be repeated in directions given by judges to jurors. It is a matter for the Judicial College and the Lord Chief Justice to consider how best to achieve this. However, we again recommend that jurors should be warned against undertaking research and disclosing their deliberations. The rationale for the prohibitions should be explained. The warning should be technologically up to date, give detail *and specific examples*, and warn of the potential criminal consequences for failure to abide by the prohibitions. We recognise that it is a delicate task to combine two messages, namely that there is a good reason for the prohibitions and they are not imposed unreasonably, but that, even if jurors are unpersuaded of the merits, the prohibition is nonetheless binding. Again, jurors should also be informed about their obligation to report concerns about their fellow jurors, and about appropriate mechanisms for doing this. We consider that judges should issue this warning at the start of the trial and then repeat it in summary at the end of every court sitting day for the duration of the trial.

[167] *Are Juries Fair?* (Ministry of Justice Research Series 1/10, Feb 2010) p 50.

[168] E Brickman, J Blackman, R Futterman and J Dinnerstein, "How Juror Internet Use Has Changed the American Jury" (2008) 1(2) *Journal of Court Innovation* 287, 298; N Haralambous, "Educating Jurors: Technology, the Internet and the Jury System" (2010) 19(3) *Information and Communications Technology Law* 255, 264.

[169] A similar suggestion has been made in the US: American College of Trial Lawyers, *Jury Instructions Cautioning against Use of the Internet and Social Networking* (2010) p 1, http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=5213 (last visited 1 Nov 2012); see also L Lee, "Silencing the 'Twittering Juror': The Need to Modernize Pattern Cautionary Jury Instructions to Reflect the Realities of the Electronic Age" (2010) 60 *DePaul Law Review* 181, 215.

[170] See, eg, the mobile phone poster used in some Californian courts, http://www.courts.ca.gov/documents/Jury_Poster_11x17.pdf (last visited 1 Nov 2012).

[171] *Are Juries Fair?* (Ministry of Justice Research Series 1/10, Feb 2010) p 50.

4.83 Although some judges may be concerned that "there is a tension between making a jury feel at ease at the commencement of the trial on the one hand and delivering a strict warning as to their conduct on the other",[172] it is unfair to hold jurors criminally accountable for their conduct without warning them of those consequences first.[173] **Do consultees agree with our proposals at paragraphs 4.79 to 4.82 for informing jurors, both before and during their service, about what they are and are not permitted to do?**

4.84 At present, jurors undertake an oath where they swear or affirm to "faithfully try the defendant and give a true verdict according to the evidence".[174] Reform proposals in the USA have included asking jurors to sign a written declaration agreeing not to use social networks to disclose information about the case that they are trying.[175] This could help to ensure that jurors understand what their responsibilities are and also that – much like when signing a contract – they have entered into an agreement which imposes obligations on them. On the other hand, there may be concerns that such procedures would be too formal,[176] and could also be time-consuming at the start of every trial. We consider that there may be merit in both amending the oral oath, to include wording which commits jurors to abide by the terms of section 8 and not to undertake research about the case,[177] and to have the oath provided in written form, which jurors can sign after they have spoken it out loud in the usual manner. **Do consultees agree that the oath should be amended? Do consultees consider that it is necessary to go so far as reproducing the oath in a written declaration to be signed by jurors, in addition to being spoken out loud?**

4.85 We also consider that jurors should be given greater encouragement to ask questions during the proceedings about the evidence in the case, in order to

[172] *Crown Court Bench Book – Directing the Jury: First Supplement* (2011) pp 9 to 10. For similar concerns in the US, see M 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* 577, 605.

[173] We do not consider that judges should go as far as one judge in the United States who is reported to have threatened jurors with sequestration should they fail to abide by his directions not to use the internet: R Artigliere, "Sequestration for the Twenty-First Century: Disconnecting Jurors from the Internet During Trial" [2011] *Drake Law Review* 621, 642.

[174] Consolidated Criminal Practice Direction, 28 Mar 2006 para IV.42.4. See para 4.11 above.

[175] E M Janoski-Haehlen, "The Courts Are All A 'Twitter': The Implications of Social Media Use in the Courts", (2011) 46 *Valparaiso University Law Review* 43, 49; American College of Trial Lawyers, *Jury Instructions Cautioning against Use of the Internet and Social Networking* (2010) p 6, http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=5213 (last visited 1 Nov 2012); L Whitney Lee, "Silencing the 'Twittering Juror': the Need to Modernize Pattern Cautionary Jury Instructions to Reflect the Realities of the Electronic Age" (2010) 60 *DePaul Law Review* 181, 218 to 219.

[176] T Hoffmeister, "Google, Gadgets and Guilt: Juror Misconduct in the Digital Age" (2012) 83 *University of Colorado Law Review* 409, 457.

[177] N Haralambous, "Educating Jurors: Technology, the Internet and the Jury System" (2010) 19(3) *Information and Communications Technology Law* 255, 260 to 261.

discourage them from trying to find the information on their own initiative.[178] Clearly there is a risk that if jurors ask too many questions, the trial will be prolonged and distracted. HM Courts and Tribunals Services and the Judicial College could look at ways of informing jurors through information and judicial direction about how they can raise questions during the proceedings. **Do consultees agree that jurors should be given clearer instruction on how to ask questions during the proceedings and encouragement to do so?**

4.86 Various stakeholders raised with us concerns about jurors using internet-enabled devices at court, including mobile phones. On the one hand, it was felt that there could be a symbolic value in prohibiting all jurors from having mobile phones at court at all times, given that it reinforces the message to jurors that they can only consider the evidence they hear in court. That would also reduce the opportunities for jurors to search for information related to their trial or inappropriately to contact friends, family or those associated with the proceedings.[179]

4.87 On the other hand, concerns were raised that removing internet-enabled devices could be frustrating for jurors, particularly as they may spend periods of the day waiting whilst other matters in their trial are dealt with in their absence. Those who have caring responsibilities, particularly for children or the elderly, might also be concerned about being out of touch, and, therefore, would at least require an emergency number for the court to be provided so that they could be contacted.[180] The removing and returning of mobile phones could also be time consuming for jury managers, not least because courts would need to ensure that such items were stored securely when not with the jurors. Additionally, such procedures would do nothing to stop jurors from accessing the internet or speaking to friends and family at home in the evening and at weekends. In consequence, it appears that it may be unwise to adopt a standard practice of removing all internet-enabled devices from all jurors for the duration of their day at court, particularly as mobile phones will be turned off (or at least turned to silent) in the courtroom itself. Some have described such procedures as "too drastic",[181] although all electronic devices have been prohibited from some US

[178] See S Macpherson and B Bonora, "The Wired Juror, Unplugged", *Trial*, Nov 2010; R Artigliere, "Sequestration for the Twenty-First Century: Disconnecting Jurors from the Internet During Trial" [2011] *Drake Law Review* 621; E Brickman, J Blackman, R Futterman and J Dinnerstein, "How Juror Internet Use Has Changed the American Jury" (2008) 1(2) *Journal of Court Innovation* 287, 298 to 299.

[179] As happened in *Mears and Mears* [2011] EWCA Crim 2651, [2011] All ER (D) 78 (Nov).

[180] American College of Trial Lawyers, *Jury Instructions Cautioning against Use of the Internet and Social Networking* (2010) p 4, http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=5213 (last visited 1 Nov 2012).

[181] M 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* 577, 579.

courthouses or removed daily from jurors by the judge.[182] **Do consultees agree that internet-enabled devices should not automatically be removed from jurors throughout their time at court?**

4.88 Even if such devices are not automatically removed, there may be times when it is appropriate to remove internet-enabled devices from jurors for short periods. During our discussions with stakeholders, it was brought to our attention that there were concerns that court staff may not have the power to remove jurors' electronic devices. Whilst, to our knowledge, the matter appears not to have arisen in practice, the question was raised about what would happen if a juror refused to surrender their electronic devices on entering the deliberating room, or at any other time. Whilst the refusal could arguably be contempt in the face of the court,[183] we consider that judges should be empowered to order the surrender of jurors' internet-enabled devices for the time that jurors are present at court (whether in the deliberating room or otherwise).[184] **Do consultees agree that judges should have the power to require jurors to surrender their internet-enabled devices?**

4.89 We consider that it should be standard practice to prevent jurors having access to internet-enabled devices in the jury room whilst they are deliberating. It is at this time that jurors are away from the trial judge and the court proceedings and may be most tempted to undertake research on the internet in order to fill what they may perceive as gaps in the evidence. **Do consultees agree that internet-enabled devices should always be removed from jurors whilst they are in the deliberating room?**

4.90 There may of course be other circumstances where the judge considers that it is necessary to go beyond merely removing internet-enabled devices whilst the jury is deliberating, for example, for the duration of the time that the jurors are at court. We consider that such instances are best left to judicial discretion. **Do consultees agree that whether jurors should surrender their internet-enabled devices for the duration of their time at court should be left to the discretion of the judge?**

4.91 Some stakeholders raised concerns that whistle-blowing procedures for those who feel uneasy about the conduct of their fellow jurors may not be apparent to all jurors. In addition, some jurors may feel intimidated about using them, particularly because they will usually be kept in close proximity to their fellow jurors and, therefore, it may be difficult for them to find the opportunity to report their concerns in private. Peer pressure or a lack of confidence may, therefore,

[182] M 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* 577, 595; E M Janoski-Haehlen, "The Courts Are All A 'Twitter': The Implications of Social Media Use in the Courts", (2011) 46 *Valparaiso University Law Review* 43, 62 to 63; M Dunn, *Jurors' Use of Social Media During Trials and Deliberations* (Federal Judicial Center, 22 Nov 2011) p 8 to 9.

[183] See Ch 5 at paras 5.5 and 5.6.

[184] Such power could be similar to that which allows the removal from those attending court of items such as knives (even if lawfully held) under the Courts Act 2003, s 54 and following.

work against some jurors speaking out, despite their concerns.[185] Whilst, under our proposals (above) jurors will have been informed about how to report their concerns, we consider that all courts should take steps to facilitate such reporting. This might include, for example, having drop boxes into which jurors can places notes for their trial judge,[186] placed in locations that jurors can access in the absence of their 11 colleagues. **Do consultees agree that systems should be put in place to make it easier for jurors to report their concerns?**

4.92 Additionally, we ask consultees for their views about whether other preventative measures should be put in place to assist jurors. These could include, for example, a helpline – whether by phone or email. Jurors could contact the helpline to ask questions about their jury service and to raise any confusion that they have about what is and is not permitted or what they should do if they are made aware of misconduct. A website with jurors' frequently asked questions, established by HM Courts and Tribunals Service, could be another option for helping jurors understand their responsibilities and to clear up any confusion. **Do consultees consider that other preventative measures should be put in place to assist jurors? If so, what should they be?**

[185] R Pattenden, "Investigating Jury Irregularities: United Kingdom (England and Wales)" (2010) 14 *International Journal of Evidence and Proof* 362, 365; G Asquith, "Criminal Procedure: Jury Deliberations – Jury Irregularities – Use of Internet" (2011) 16 *Coventry Law Journal* 67, 73.

[186] Jurors would need to be informed that such notes could not be anonymous, in order to allow the judge to investigate the matter properly and to prevent mischievous false reports from being made.