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JURORS CONDUCTING THEIR OWN RESEARCH

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Abstract

This paper analysis the issue of jurors conducting their own research when directed not to. In particular it recommends legislating on this issue to provide clarity and certainty, as well as acting as a deterrent in preventing jurors from offending in the future.

Word length

The text of this paper (excluding abstract, table of contents, footnotes, and bibliography) comprises approximately 7554 words.

Subjects and Topics

Contempt of Court

Jury Trials

I Introduction

This essay will be focusing on the contempt of jurors conducting their own research, such as via google or twitter, when directed not to. It will touch on ways in which this issue can be dealt with and in particular, whether a statutory offence should be implemented. The purpose of the law of contempt of court is to protect the integrity of the justice system, maintain public confidence and impartiality in the justice system. In New Zealand, the High Court has the inherent jurisdiction of the law of contempt. This inherent jurisdiction comes from the Supreme Courts Act 1860[1] which presented the Supreme Court of New Zealand with the same jurisdiction England superior courts had. Section 16 of the Judicature Act[2] now recognises that the High Court has this inherent jurisdiction.

Section 365 of the Criminal Procedure Act 2011[3] is the statutory section on the contempt of court in New Zealand. Prior to the Criminal Procedure Act, the Crimes Act 1961,[4] contained a provision on the Contempt of Court, however this was repealed when the Criminal Procedure Act was introduced. Other than this, the law of contempt remains as common law.

The use of the internet is becoming a 'normal' everyday activity for people, and it has significantly changed the way the justice system can manage jurors conducting their own research. Juries are important as they represent the values and opinions of society as well as finding the verdict of a trial. Jurors carrying out their own research can affect the decision of the jury. This is a problem as a person has the right to a fair hearing,[5] where they are able to contest the evidence they are convicted or acquitted on.[6] The information gathered by the juror may be inadmissible, incorrect or over exaggerated, and if such information is discovered the judge may have to either discharge the particular juror, or if the information was shared between the jury, abort the trial.

Juror research is difficult to detect and is usually by a juror informing the judge or material being discovered in the jury room. It is important that these methods of detection are not made more difficult than they already are. An example of this may be jurors being reluctant to inform on other jurors if they are aware of the punishment of imprisonment. However, this essay will find that this will not have an effect on jurors informing on other jurors and this

[1] Supreme Court Act 1860, ss 4 – 6.
[2] Judicature Act 1908, s 16.
[3] Criminal Procedure Act 2011, s 365.
[4] Crimes Act 1961, s 401.
[5] Bill of Rights Act 1990, s 25(a).
[6] Bill of Rights Act 1990, s 25(e).

can be seen in other jurisdictions such as Australia. This paper looks at the overall issue of jurors conducting their own research, and looks into the different reasons why jurors research and why change is required. The use of internet has become increasingly common in everyday lives and the law must change to keep up with this change.

The issue of juror research in other jurisdictions is also examined, including the United Kingdom, Australia, Canada and America. The United Kingdom has recently passed the Criminal Justice and Courts Act[7] containing provisions regarding juror research and jurors sharing such research. It is for this reason that the paper recently released by the Law Commission of England and Wales[8] is referred to often. There are three states of Australia which have legislated on juror research which are New South Wales,[9] Victoria[10] and Queensland.[11] The application of these statutes are also useful in looking into whether New Zealand should legislate such a provision. Contempt of the court in Canada however still remains in the common law. The jurisdiction of America is also touched on to recognise how this is a significant issue. It is interesting to note how the issue is taken seriously and many trials are aborted if juror research is undertaken.

Legislating the offence of jurors conducting their own research and disclosing this with other jurors, will work as a deterrent to prevent an offence. However other preventative measures should also be adopted such as clear and consistent instructions and explanations given to jurors, reminders of these instructions, changing the oath to include this rule, and including technology in the court room to adapt modern methods and cause jurors to feel less of a need to conduct their own internet search.

This paper then analysis the advantages and disadvantages of legislating jurors conducting their own research. It argues that the advantages of legislating such a provision outweigh the advantages of it remaining in the Common Law. The benefits of clarity, consistency, and accessibility, prevail over the Common Law benefits of flexibility and discretion, as does the integrity of the justice system. Passing legislation in New Zealand may take up time and resources, but this issue is outweighed by the fact that it is such a scrutinised process, and is parliaments purpose.

[7] Criminal Justice and Courts Act 2015.
[8] Law Commission of England and Wales *Contempt of Court (1): Juror Misconduct and Internet Publications* (LC340, 2012).
[9] Juries Act 1977.
[10] Juries Act 2000.
[11] Juries Act 1995.

II Background

Section 365(1)(c) of the Criminal Procedure Act applies if any person "willfully and without lawful excuse disobeys any order or direction of the court in the course of the hearing of any proceedings".[12] However, this section does not appear to have been used for juror research. The Law Commission suggests that this is due to uncertainty in its application.[13]

The case of *R (CA679/2015) v R* is a good example of such uncertainty. During this trial, extrinsic material obtained by the jury was discovered.[14] Most of the material was from the United States jurisdiction, on the definition of rape, consent and penetration.[15] Juror A stated that she had conducted her own research, but had only shared three sentences with the jury.[16] Juror B and the foreperson also admitted that they had also conducted their own research, although they had not shared this with any jurors. In approaching the issue of whether the jurors were disqualified from jury service, the Court did not look at s 365 of the Criminal Procedure Act.[17] Instead the Court looked at s 76 of the Evidence Act[18]

Jurors A and B were discharged as the Court was concerned about their abilities to serve as jurors and was not prepared to run the risk that they had formed views about certain things based on the research undertaken.[19] The foreperson was not discharged, nor the remaining jurors. The Court found that although information had been shared with the jury, the information was not particularly controversial.[20] The foreperson was not discharged as he had only googled the definition of rape in New Zealand and had not found anything controversial.[21] It appears that no further steps were taken by the judge to punish those jurors who had conducted their own research. Was it the uncertainty in applying the law of contempt that prevented the judges from filing proceedings against these jurors? Or was it a reluctance of the judges? As jury service is already such an intrusion on someone's daily life,

[12] Criminal Procedure Act 2011, s 365(1)(c).
[13] Law Commission *Contempt in Modern New Zealand* (NZLC IP36, 2014) at [5.23].

[14] *R (CA679/2015) v R* [2016] NZCA 444.

[15] At [13].
[16] At [19].

[17] Criminal Procedure Act 2011, s 365.
[18] Evidence Act 2006, s 76.
[19] *R (CA679/2015) v R* [2016] NZCA 444 at [36].
[20] At [29].
[21] At [38].

would it seem fair to file proceedings against them? These are the questions this essay will examine.

In 1999 research was undertaken by the Law Commission.[22] Three hundred and twelve jurors were interviewed from forty eight trials and it was found that in five of the trials, jurors had made external inquiries. However, this research was done fifteen years ago. Since then, smart phones have been released, as well as Wikipedia and the frequent use of google. It is becoming a more relevant issue as the internet becomes a more common part of people's daily lives with jurors having easy access to the internet (such as on their smart phones, or tablet). Just one search and a lot of information could easily be presented to the juror. In today's society it has become the 'norm' to google questions or general issues. In the case of *Attorney-General v Davey*[23] the judge, when addressing the jury as to the importance of not using the internet in relation to the trial, stated "If you said to me 'What is the biggest threat to trial by jury in this country?', I would say to you: 'No question: improper use of the Internet by jurors. No question."[24]

III Difficult to Detect

Jurors conducting their own research is very difficult to detect. It tends to be detected by either a juror notifying the judge of another juror conducting research, the jurors themselves informing the judge, or through carelessness of the jury. The New Zealand Law Commission conducted a survey to obtain information from judges on jurors and the use of internet.[25] The survey consisted of fifty nine judges.[26] Fifty eight percent said they have had no reason to believe that jurors had used the internet for information sources, twenty nine percent thought it had happened once or twice, just over ten percent considered they had reason to believe or had suspected a juror may have used the internet in some cases, and 1.7 percent thought it happened in the majority of cases. However when it had actually been detected, it was either due to material being found in the jury room or another juror notifying staff.[27] Therefore, although many judges in this survey had no reason to believe that jurors had conducted their

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[22] Law Commission *Juries in Criminal Trial – Part Two: A summary of the research findings* (NZLC PP37, 1999).

[23] *Attorney-General v Davey* [2013] EWHC 2317.
[24] At [14].
[25] Law Commission *Contempt in Modern New Zealand* (NZLC IP36, 2014).
[26] At [5.30].
[27] At [5.31].

own research, it is difficult to determine whether jurors actually did carry out such an act that was not detected.

There are many ways in which a juror can conduct their own research with such technology available. The justice system does not have a satisfactory method to identify whether a juror has conducted their own research. If a juror and/or jury is careful, it might not be detected. For example, a juror in their spare time could use a computer at an internet café or borrow their partner's smart phone at home to conduct their own research. Therefore, due to the fact that there are currently minimal ways to detect whether research has been conducted, adequate deterrent and preventative measures must be implemented, and will be discussed further below.

IV Why Jurors Cannot Conduct Their Own Research

The New Zealand Law Commission has stated that the main functions of the jury are: being the fact-finders, the conscience of the community, a safeguard against arbitrary or oppressive government, an institution which legitimises the criminal justice system, and an educative institution.[28] A jury that has obtained inadmissible evidence or information through conducting their own research, cannot legitimise the criminal justice system. Evidence tends to be inadmissible due to the fact that introducing it in trial would be so prejudicial, it would prevent a fair trial.[29] The Bill of Rights Act (BORA) is an important piece of legislation when discussing a fair trial and the law of Contempt of the Court. In particular, s 25(a) which states the right to a fair and public hearing by and independent and impartial court.[30] Article 6 of the European Convention on Human Rights also guarantees the right to a fair trial.[31]

Jurors conducting their own research puts the right to a fair trial at risk. The jury will no longer be able to deliver a verdict based solely on the evidence adduced before them and the defendant's right to a fair trial will be prejudiced.[32] Therefore, jurors conducting their own research is a significant issue, not just because it is a breach of the judge's directions, but also

[28] Law Commission *Juries in Criminal Trials: Part One* (NZLC PP32, 1998) at [12].

[29] Allan Ardill "The right to a fair trial: prejudicial pre-trial media publicity" (2000) 2 AltLawJl 25.

[30] Bill of Rights Act 1990, s 25(a).
[31] European Convention on Human Rights, art 6.
[32] The Rt Hon Dominic Grieve QC "Trial by Google? Juries, social media and the internet" (University of Kent, 6 February 2013).

because it undermines our justice system and fundamental human rights. As stated in the case of *Sellman v Slater* "Trial by jury is not the same as trial by media."[33]

All evidence in a trial should have the chance to be challenged in court by both prosecution and defence. In accordance with New Zealand BORA, a person has the right to present a defence.[34] A person should not be convicted on evidence that has not been presented and tested in court. A conviction, or for that matter an acquittal, should be based on evidence adduced in court, in accordance with established rules of evidence, subject to the supervision of the judge.[35] The Court of Appeal in *Thompson & Ors v R* stated that:[36]

> Research of this kind may affect their decision, whether consciously or unconsciously, yet at the same time, neither side at trial will know what consideration might be entering into their deliberations and will therefore not be able to address arguments about it. This would represent a departure from the basic principle which requires that the defendant be tried on the evidence admitted and heard by them in court.

Natural justice requires decision makers to provide those who are affected by the decision with the opportunity to be heard regarding the evidence presented. According to the principle of "open justice", the Bill of Rights Act[37] and the Criminal Procedure Act,[38] every hearing is open to the public and the evidence presented in court on which the decision is based, should be publicly known.[39] Such an open and transparent process preserves public confidence in the justice system. In a speech given by the former Attorney-General of the United Kingdom, the Rt Hon Dominic Grieve QC stated:[40]

> A further facet of the principle of open justice is that evidence can be challenged, probed and questioned. Open justice is scrutinised justice. By definition, that is not so with trial by Google; not only is the basis of the jury's finding unclear, but the parties will have been denied any opportunity to challenge the evidence which the jury itself gathered. This returns us to our original question: is the law of contempt fit for purpose?

[33] Sellman v Slater (No 2) [2016] NZHC 2542 at [15].
[34] Bill of Rights Act 1990, s 25(e).
[35] The Rt Hon Dominic Grieve QC "Trial by Google? Juries, social media and the internet" (University of Kent, 6 February 2013).
[36] *Thompson & Ors v R* [2010] EWCA Crim 1623 at [12].

[37] Bill of Rights Act, s 25(a).
[38] Criminal Procedure Act 2011, s 196.
[39] Note that there are exceptions to this rule, such as s196(2) which states that it does not apply to any hearing on the papers, such as child, youth and family matters
[40] The Rt Hon Dominic Grieve QC "Trial by Google? Juries, social media and the internet" (University of Kent, 6 February 2013).

The purpose of the law of contempt is to preserve integrity and effectiveness of the jury system, and avoid intrusion of any factor that might deter members of the community from serving as jurors or inhibit jurors from reaching a verdict free from outside influences or pressure.[41] Jurors conducting their own research is a common occurrence, it undermines the fairness of the jury system[42] and it most certainly fails to adhere to the purpose of the law of contempt, even more so if it is not detected.

Discovering that jurors have conducted their own research can be a major inconvenience for the court. The court has to assess the situation to decide whether one or two jurors have to be discharged, or whether the trial must be aborted, as jurors conducting their own research will not necessarily mean the trial cannot proceed.[43] It is also important to note that information jurors discover online may be inaccurate. There is a chance of having more than one person with the name "Joe Bloggs" in New Zealand. The information may also be misleading and/or false, over exaggerated or simply incorrect.

V Why Do Jurors Research

There are many reasons as to why jurors research. Sometimes jurors simply do not understand the directions given by the judge and/or do not realise that it is in contempt of court to research. Tobin says that jurors may use social media to add each other as friends then discuss the case and tweet details, seek advice, and search the internet for additional information. She says that "it can also mean that citizens who would never have contemplated criminal activity have found themselves in contempt of court".[44] The Court of Appeal of England and Wales stated that:[45]

> The use of the internet is so common that some specific guidance must now be given to jurors… Jurors need to understand that although the internet is part of their daily lives the case must not be researched there or discussed there.

If the directions given by the judge are not in great depth, jurors may not understand that it is actually a serious offence to conduct their own research. In our modern day "googling" society, it is human instinct to research something that is not completely understood, such as

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[41] *P v R* [2012] NZCA 325 at [14].
[42] *R v Karakaya* [2005] EWC Crim 346 at [11].
[43] *Leeder v Christchurch District Court* HC Christchurch CIV-2006-409-1276, 9 June 2006.

[44] Rosemary Tobin "Contempt of court, the internet and jurors" (2014) NZLJ 366 at 366.
[45] *Thompson & Ors v R* [2010] EWCA Crim 1623 (14 July 2010) at [12].

a term or evidence presented in court. As the Attorney-General of the United Kingdom said "for many, the internet is now the champion of freedom".[46]

In the case of *R (CA679/2015) v R* a juror who conducted their own research stated "I found my quench for needing to know an answer that I had to go and find someone not guilty or guilty on".[47] Jurors want to understand exactly what is going on so they can be sure they are giving the right verdict, and a juror may feel that googling an aspect of the case will assist them in coming to the right verdict. The New Zealand Law Commission recognises that the internet and technology has "changed the way ordinary people obtain, use and share information,[48] and also asserts how the position of juror search is "not entirely clear".[49]

Due to such a significant change and development in researching tools, a statutory offence for jurors conducting their own research is required The law must adapt to keep up with modern day and manage such challenges. Professor Fred Lederer has pointed out that "our courtroom tools are changing. Lawyers must adapt if we are to continue doing our jobs as well as we should".[50]

VI United Kingdom

The United Kingdom has recently passed the Criminal Justice and Courts Act 2015. Section 71, amends the Juries Act 1974 by inserting s 20A, stating that it is an offence for a member of a jury that tries an issue in a case before a court to research the case during the trial period.[51] Section 20B states that it is an offence for a member of a jury that tries an issue in a case before a court intentionally to disclose information to another member of the jury during the trial period.[52] A person researching a case is defined as a person who intentionally seeks information[53] and when doing so knows or ought reasonably to know that the information is or may be relevant to the case.[54] 'Seeking information' is then defined to include asking a

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[46] The Rt Hon Dominic Grieve QC "Trial by Google? Juries, social media and the internet" (University of Kent, 6 February 2013).

[47] *R (CA679/2015) v R* [2016] NZCA 444 at [26].
[48] Law Commission *Contempt in Modern New Zealand* (NZLC IP36, 2014) at [5.1].
[49] At [5.13].
[50] Interview with Fred Lederer Director, Center for Legal and Court Technology (Joe Ford, State Bar of Wisconsin, 16 November 2011).

[51] Juries Act 1974, s 20A.
[52] Juries Act 1974, s 20B.
[53] Juries Act 1974, s 20A(2)(a).
[54] Juries Act 1974, s 20A(2)(b).

question,[55] searching an electronic database (including by means of the internet),[56] visiting or inspecting a place or object,[57] conducting an experiment,[58] and asking another person to seek the information.[59] The former Attorney-General Dominic Grieve stated that "This does not mean that jurors must refrain from reading the news - online or in the traditional way -, nor that they should not use the internet as they would normally. It means that they must not seek out extraneous information about the case they have sworn to try in accordance with the evidence".[60]

The new section also states that information relevant to the case includes information about a person involved in events relevant to the case,[61] the judge dealing with the issue,[62] any other person involved in the trial, whether as a lawyer, a witness or otherwise,[63] the law relating to the case,[64] the law of evidence,[65] and court procedure.[66] Exceptions are also listed, stating it is not an offence if the person; needs the information for a reason which is not connected with the case,[67] to attend proceedings before the court on the issue,[68] to seek information from the judge dealing with the issue,[69] to do anything which the judge dealing with the issue directs or authorises the person to do,[70] to seek information from another member of the jury, unless the person knows or ought reasonably to know that the other member of the jury contravened this section in the process of obtaining the information,[71] and to do anything else which is reasonably necessary in order for the jury to try the issue.[72] The Law Commission has identified at least 18 appeals in the United Kingdom since the enactment of this legislation, relating to juror misconduct during criminal trials, some involving internet access.[73]

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[55] Juries Act 1974, s 20A(3)(a).
[56] Juries Act 1974, s 20A(3)(b).
[57] Juries Act 1974, s 20A(3)(c).
[58] Juries Act 1974, s 20A(3)(d).
[59] Juries Act 1974, s 20A(3)(e).
[60] The Rt Hon Dominic Grieve QC "Trial by Google? Juries, social media and the internet" (University of Kent, 6 February 2013).
[61] Juries Act 1974, s 20A(4)(a).
[62] Juries Act 1974, s 20A(4)(b).
[63] Juries Act 1974, s 20A(4)(c).
[64] Juries Act 1974, s 20A(4)(d).
[65] Juries Act 1974, s 20A(4)(e).
[66] Juries Act 1974, s 20A(4)(f).
[67] Juries Act 1974, s 20A(6).
[68] Juries Act 1974, s 20A(7)(a).
[69] Juries Act 1974, s 20A(7)(b).
[70] Juries Act 1974, s 20A(7)(c).
[71] Juries Act 1974, s 20A(7)(d).
[72] Juries Act 1974, s 20A(7)(e).
[73] Law Commission of England and Wales *Contempt of Court (1): Juror Misconduct and Internet Publications* (LC340, 2012) at [62].

In the case of *Dallas* a juror obtained research regarding the defendants previous convictions.[74] The juror shared this information and one of the jurors notified the judge of this. The High Court found that the juror had caused prejudice to the administration of justice, as she had obtained information that was not adduced in the trial, which might have "played its part in her verdict".[75] The trial was aborted. The juror who conducted research and shared this research with the other jurors, was sentenced to six months imprisonment. In doing so, the High Court noted that:[76]

> We have no doubt that the defendant 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.

A person found guilty under this offence is liable of conviction on indictment, to imprisonment for a term not exceeding two years or a fine or both.[77] In the case of *Fraill* the defendant was sentenced to 8 months in jail by the High Court for exchanging Facebook messages with the accused in a drug trial while serving on the jury.[78] She also search online for information about another defendant while she and the other jurors were still deliberating. The court referred to the two year maximum custodial period, and expressed that such a sentence is intended to ensure the continuing integrity of trial by jury.[79]

Tobin considers that such a sentence is antithetical to encouraging members of the community to perform their civic duty.[80] This issue will be discussed further below under reasons why common law may be preferred, however it is necessary to state here that although a custodial sentence to a juror who is performing their civic duty may seem harsh, it is necessary to maintain the integrity and the effectiveness of a justice system. Jurors must abide by the law and the directions of the judge for the jury system to succeed.

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[74] *Attorney-General v Dallas* [2012] EWHC 156 (Admin), [2012] 1 WLR 991.
[75] *Attorney-General v Dallas* [2012] EWHC 156 (Admin), [2012] 1 WLR 991 at [38].
[76] *At* [38].
[77] Juries Act 1974, s 20A(8).
[78] *Attorney-General v Fraill* [2011] EWCA Crim 1570, [2011] 2 Cr App R 21.
[79] At [53].

[80] Rosemary Tobin "Contempt of court, the internet and jurors" (2014) NZLJ 366 at 368.

In New Zealand the current maximum sentence contained in the Criminal Procedure Act for contempt is three months. The maximum sentence has not changed since the Summary Proceedings Act 1957.[81] The Law Commission states that the maximum sentence in New Zealand is only three months to strike a balance between a civic duty, and to remain proportionate with other contempt offences.[82] However, the Supreme Court in *Siemer* found that the then threshold for electing trial by jury in accordance with s 24(e), was to limit the sentence of imprisonment that could be imposed for common law contempt to no more than three months imprisonment.[83] Since *Siemer*, s 24(e)[84] has been amended to increase the jury trial threshold to offences with a maximum penalty of two years' imprisonment. Does this mean that the sentence for contempt should increase in accordance with such amendments? Perhaps not as the Supreme Court noted that imprisonment for contempt of more than three months would be an excessive punishment in the majority of cases. Was the amendment of s 24(e) merely to allow the refusal of a jury trial to an offence of contempt of Court or was it following the UK in increasing the maximum sentence? The Law Commission states there is a need to strike a balance, but if the maximum sentence is just to be used as a deterrent to uphold and maintain the administration and integrity of the justice system, two years may be adequate.

VII Australia

In 1987, the Australian Law Reform Commission recommended that the common law principles of contempt be abolished and replaced by statutory provisions that would govern all Federal Courts except the High Court, to replace current forms of contempt by criminal offences to clarify the law and limit liability to situations where the conduct is sufficiently severe.[85] Since this recommendation, New South Wales, Queensland and Victoria have legislated on jurors conducting their own research.

Section 68c of the juries act 1977[86] in New South Wales states that states that a juror must not make any inquiry for the purpose of obtaining information about the accused, or any matters relevant to the trial, except in the proper exercise of his or her functions as juror. The

[81] Summery Proceedings Act 1957, s 206.
[82] Law Commission *Contempt in Modern New Zealand* (NZLC IP36, 2014) at [5.50].
[83] *Siemer v Solicitor-General* [2010] NZSC 54, [2010] 3 NZLR 767, (2010) 24 CRNZ 748 at [67].

[84] Bill of Rights Act 1990, s 24(e).
[85] Law Commission *Evidence* (ALRC 38, 1987) at [203].
[86] Juries Act 1977, s 68C.

maximum penalty is 50 penalty united or imprisonment for 2 years, or both.[87] Recent legislation in New South Wales has also prohibited the use of personal digital assistants during and after proceedings in the court,[88] which seems to prohibit jurors using social media during trial.

The legislation in Queensland states that a person who has been sworn as a juror in a criminal trial must not inquire about the defendant in the trial until the jury of which the person is a member has given its verdict, or the person has been discharged by the judge, with a maximum penalty of two years imprisonment.[89] The Juries Act of Victoria is lot more comprehensive, giving an example of exactly what making an enquiry is, stating "Example Using the Internet to search an electronic database for information".[90] The Act states that a person who is on a panel for a trial or a juror in a trial must not make an enquiry for the purpose of obtaining information about a party to the trial or any matter relevant to the trial, except in the proper exercise of his or her functions as a juror. A penalty for imprisonment is not stated, in contrast a penalty of 120 penalty units is required. Although such legislation has been enacted, contempt of court still largely exists at common law, remaining critical to statutory interpretation. New Zealand should also legislate on this issue to clarify the law.

VIII Canada

A more relaxed approach has been taken in Ontario where the courts have considered that such research is now almost inevitable, and that an appellate court must consider not only whether there was such unauthorised research but the extent to which jurors might learn anything prejudicial to the defendant.[91] Contempt of Court in Canada is the only surviving common law offence. Following a report by the Law Reform Commission, a Bill was introduced in 1984 proposing to abolish the common law of contempt and to incorporate it into the Criminal Code. The Criminal Code was to contain three provisions, these being: knowingly making a publication creating a substantial risk of seriously impeding or prejudicing pending proceedings, affront to judicial authority, and disruption of judicial proceedings. However the Bill lapsed when the Government changed and it appears that it

[87] Juries Act 1977, s 68C(1).
[88] Courts and Other Legislation Further Amendments Act 2013.
[89] Juries Act 1995, s 69A(1).
[90] Juries Act 2000, s 68A.
[91] *R v Farinacci* 2015 ONCA 392.

has not be introduced since, due to the adoption of the Canadian Charter of Rights and Freedoms.[92]

IX America

Jurors conducting their own research is also an issue in America. Maryland's Court of Special Appeals, overturned a murder conviction because a juror had searched Wikipedia for the terms "livor mortis" and "algor mortis" on and had taken printouts to the jury room, later discovered by the bailiff. The juror did not consider the action wrong: "To me that wasn't research. It was a definition."[93] The Supreme Court of the United States in 1975 stated that:[94]

> The purpose of the jury is to guard against the exercise of arbitrary power – to make available the common sense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps over conditioned or biased response of a judge. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system.

A jury cannot be impartial and/or uphold public confidence in the fairness of the justice system if inadmissible information is discovered and shared. Jurors conducting their own research is taken seriously in America.

X Preventative Measures

Creating a statutory offence against jurors conducting their own research would have a significant deterrent effect, although there are many people who are sceptical as to whether deterrence is actually effective.[95] The states in Australia who have legislated on juror research have had great results. In New South Wales and in Queensland there has not been any proceedings brought for juror research and in Victoria there has only been one.[96] Since

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[92] Canadian Charter of Rights and Freedoms 1982.
[93] Honorable Dennis M. Sweeney "The Internet, Social Media and Jury Trials: Lessons Learned from the Dixon Trial" (Speech to the Litigation Section of the Maryland State Bar Association, 29 April 2010).
[94] *Taylor v Louisiana* 419 US 522 (1975) at [530].

[95] Michael A Perino "Enron's Legislative Aftermath: Some Reflections on the Deterrence Aspects of the Sarbanes-Oxley Act of 2002" (2002) 76 ST. JOHN'S L. REV. 671.

[96] Law Commission of England and Wales *Contempt of Court (1): Juror Misconduct and Internet Publications* (LC340, 2012) at [3.62].

this is one preventative measure, it is necessary to note other possible preventative measures such as; clear instructions and explanations given by the judge, frequent reminders of what jurors are not permitted to do, changing the oath to include a promise to base the verdict on the evidence presented in court and not to seek or disclose information on the case, and including technology in court rooms to prevent jurors from feeling such a need to access their own technology.

A Deterrence

Legislating the contempt of juror research would have a significant deterrent effect in preventing them from researching. The average person realises that an offence punishable by imprisonment is a serious offence and will be deterred from committing such an offence as they do not want to be imprisoned. The three states in Australia who have legislated on juror research have had great results in deterring offenders. In NSW and in Queensland there has not been any proceedings brought for juror research and in Victoria there has only been one.[97]

B Clear Instructions and Explanations

The directions given by judges in New Zealand are followed by the Criminal Jury Trials Bench Book however each judge can vary in how depth they go in such an explanation, or how often they reinforce rules. Each judge is entitled to their own style, however consistency is an important factor as is a thorough explanation and adequate understanding from the jury. This explanation needs to be a reasonable and clear plain English direction. The Court of Appeal in the UK recommended a direction in which the principle is explained not in terms which imply that the judge is making a polite request but that he is giving an order necessary for the fair conduct of the trial.[98]

If such directions actually required a judge to explain why exactly they are not allowed to conduct their own research, why previous convictions are sometimes inadmissible from trial for example, and the implications of such research were explained, a juror may have more respect for the system, a more sufficient understanding of how serious it is, why they cannot do it and exactly what they cannot do. If the judge put emphasis on procedural fairness the

[97] Law Commission of England and Wales *Contempt of Court (1): Juror Misconduct and Internet Publications* (LC340, 2012) at [3.62].

[98] *Thompson & Ors v R* [2010] EWCA Crim 1623.

jury may be more understanding. The problem being that in modern day searching the internet is an everyday ‘normal’ activity and if not explained in enough depth, a juror may not realise that searching on the internet is actually prohibited. As the Law Commission of the United Kingdom states “…a matter that is likely to have more resonance for those who may have limited understanding of legal terminology”.[99]

In 2010 a study done in the United Kingdom found that 26 percent of jurors research for extraneous material.[100] In 2013, 23 percent of jurors were found to be confused about the rule on internet use.[101] It is clear that in modern day, using the internet has become an everyday activity, and a person tends not to think twice about accessing the internet. In the judicial context however, it must be made clearer that everyday ‘normal’ activities such as google and social media must be restricted when it comes to researching the case or making enquiries into the evidence presented.

Australian states, such as New South Wales have developed directions which specifically require the judge to address the issue of social message usage[102] and include warnings to jurors not to use the internet to research any matter related to the trial.[103] These directions contained in the New South Wales *Criminal Trial Courts Bench Book* are, unlike New Zealand, accessible to the public. The United States Committee on Court Administration and Case Management also released model jury instructions, containing explanations of the consequences of social media use during the trial and recommendation for repeated reminders of this rule.[104]

The Law Commission of England and Wales looked into additional measures to encourages jurors to report concerns that they have about their fellow jurors’ behaviour during the trial process which should work to ease concerns about under reporting. In looking into this, the Commission recommended establishing additional webpages providing advice to jurors about

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[99] Law Commission of England and Wales *Contempt of Court (1): Juror Misconduct and Internet Publications* (LC340, 2012) at [3.17].
[100] Cheryl Thomas *Are Juries Fair?* (Ministry of Justice (UK), Research Series 1/10, February 2010).
[101] Cheryl Thomas “Avoiding the Perfect Storm of Juror Contempt” [2013] Crim LR 483 at 491.

[102] Judicial College of Victoria *Criminal Charge Book* (Judicial College of Victoria, Melbourne, 2010) at 1.5.2.
[103] Judicial Commission of New South Wales *Criminal Trial Courts Bench Book* (Judicial Commission of New South Wales, Sydney, 2012) at [1-520].
[104] Judicial Conference Committee on Court Administration and Case Management *Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research On or Communicate About a Case* (June 2012).

how to resolve any queries they may have about their jury service.[105] This would be a feature New Zealand could also adopt.

C Frequency and Reminders

Another issue is the frequency that jurors are given information and instructions on what not to do. The Ministry of Justice in New Zealand have a booklet they hand out and are read some rules at the beginning of the trial, however it is important to recognise that when a person is selected as a juror, their mind may be elsewhere, worrying about childcare arrangements, work and/or income. It would be a good idea if New Zealand reminded the jury at the beginning and end of each day of the rules. Also, if jurors were able to ask more questions regarding the case they mightn't feel so inclined to search for the answer themselves. As David Harvey states "jurors need not and should not be merely passive listeners in trials but instead should be given the tools to become more active participants in the search for just results.[106] Another useful reminder for jurors may be having posters and other visual aids.

D A Change to the Wording of the Oath

The oath jurors have to swear by In New Zealand is:[107]

> Members of the jury:
>
> Do each of you swear by Almighty God (*or* solemnly, sincerely, and truly declare and affirm) that you will try the case before you to the best of your ability and give your verdict according to the evidence?

The Law Commission for England and Wales has recently recommended amending the wording of the juror oath to include a promise to base the verdict on the evidence presented in court and not to seek or disclose information on the case.[108] The Commission also recommended that jurors be asked to sign a written declaration on their first day of jury service acknowledging that they have been warned not to research. The New Zealand Law Commission has considered these options to be useful in New Zealand too.

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[105] Law Commission of England and Wales *Contempt of Court (1): Juror Misconduct and Internet Publications* (LC340, 2012) at [5.65].
[106] David Harvey "The Googling Juror: The Fate of the Jury Trial in the Digital Paradigm" (2014) NZLR 204 at 222.
[107] Jury Rules 1990, Form 2.
[108] Law Commission of England and Wales *Contempt of Court (1): Juror Misconduct and Internet Publications* (LC340, 2013) at [3.19].

E Including technology in the court room

It has been suggested that the inclusion of technology in the court room will actually cause jurors to feel less of a need to access their own technology to conduct research. An article called 'The Googling Juror: The Fate of the Jury Trial in the Digital Paradigm' states that if courts are going to insist on controlling the flow of information during trial they will need to accept innovations to improve juror comprehension[109] and that the greater utilisation of technology for the communication of information within the trial process would meet digital native juror expectations that up-to-date systems are being employed.[110] Lacy argues that trial procedures and evidentiary rules should take greater advantage of modern methods of communication and recognise modern understanding of how people learn and make decisions.[111]

XI Advantages of Legislation

Legislating this issue of jurors conducting their own research, would preserve constitutional principles, such as the rule of law, which requires the law to be clear, accessible and apply to everybody. Currently the law on this issue is not easily accessible to the general public, and the position at Common Law is not completely clear.[112] It also lacks institutional process and lacks justification. Lord Justice Treacy and Justice Tugendhat of the United Kingdom argue that there is a good cause for the introduction of a statutory offence, as it would recognise that jurors conducting their own research may be as harmful to the integrity of the trial as other forms of misconduct. It will also add clarity which may help to prevent or reduce offending.[113]

Creating an offence which specifically covers jurors who deliberately conduct their own research, when they have clearly been instructed not to, will produce certainty and consistency.[114] Statute offences are also a lot more predictable. The Law Commission for

[109] David Harvey "The Googling Juror: The Fate of the Jury Trial in the Digital Paradigm" (2014) NZLR 204 at 222.
[110] At 222.
[111] Gareth S Lacy "Untangling the Web: How Courts should Respond to Juries using the Internet for Research" (2011) 1 Reynolds Court and Media Law Journal 169 at 189.

[112] Law Commission *Contempt in Modern New Zealand* (NZLC IP36, 2014) at [5.23].
[113] Law Commission of England and Wales *Contempt of Court (1): Juror Misconduct and Internet Publications* (LC340, 2013) at [3.46].

[114] Law Commission of England and Wales *Contempt of Court (1): Juror Misconduct and Internet Publications* (LC340, 2013).

England and Wales considered that "the message would be clearer for jurors if they could be told that such conduct is a crime".[115] It would also be seen as a more serious issue amongst jurors. Lord Justice Treacy and Justice Tugendhat say that it would avoid the potential uncertainty which could arise under the present system where judge's instructions to a jury may take different forms and which run the risk of being misconstrued by jurors as something less than a mandatory court order.[116] Passing legislation also has the advantage of a scrutinised process, where the legislation going through the House is critically examined.

If juror research was to be legislated, it would be desirable if, for the juror to be guilty, he or she had to have intentionally searched for extraneous information knowing or believing that it would be relevant to the case. Such a high threshold would protect those jurors who are carrying out their civic duty without any intention of committing an offence. The New Zealand Law Commission has suggested a maximum penalty of three months and questions whether proceedings should be held by way of judge alone or by jury, as juries may not be willing to find a guilty verdict against other jurors.[117] Lord justice Treacy and Mr Justice Tugendhat however stated that "if a statutory offence of intentionally seeking information were enacted, it would be appropriately triable only on indictment. We see no reason to breach the general principle of trial by jury in this instance. The trial process itself should acquaint jurors with the extent of the prohibited conduct and the rationale for it and they should be trusted to try the matter just as they would ay other serious case. We do not consider that there is any warrant for trial by judge sitting alone".[118] It may be wise for New Zealand to follow the United Kingdom[119] in creating another offence for jurors who disclose the information they gathered from their own research to other jury members.

XII Advantages of the Common Law

The common law of contempt of the court certainly has its advantages. It has the ability to adapt with society which is frequently changing. It is flexible and does not have the risk that a statutory provision may have in it being too narrow, failing to include potential issues such as technological developments. However, the flexibility of the Common Law can also have

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[115] At [3.17].

[116] At [3.46].

[117] Law Commission *Contempt in Modern New Zealand* (NZLC IP36, 2014) at [5.53]

[118] Law Commission of England and Wales *Contempt of Court (1): Juror Misconduct and Internet Publications* (LC340, 2013) at [3.55].

[119] Juries Act 1974, s 20B.

negative impacts, as Nicolas states "the judge has a very broad discretion to fashion an appropriate and responsible procedure to determine whether misconduct actually occurred and whether it was prejudicial".[120] Judges making impulsive decisions with such discretion is a problem.

Passing new legislation in New Zealand can be a very long process. A Bill has to go through its first reading, the select committee, its second reading, the committee of the whole House, the third reading and then finally royal assent. It can take months and may not always be appropriate when there is other legislation to be passed of a more urgent status. Therefore, it can be argued that not legislating this issue of jurors conducting their own research would save Parliament time that is already limited. Members of Parliament also may not want to introduce such legislation that is punishing a citizen when they are undertaking a civic duty. However this paper argues that the purpose of parliament is to pass and amend the law, and it should not be avoided due to time constraints.

Jury service is a significant burden, disrupting the everyday lives of individuals. New Zealand needs to be careful about creating new offences, as jury service should not be made more onerous than it already is. Thus, the New Zealand Law Commission recognises that punishing a citizen when they are undertaking a civic duty would be harsh, especially if the person is trying to be overzealous about trying to do a good job.[121] In the case of *R v Lyttelton* the High Court found that we must place more trust in jurors and the system, stating that:[122]

> If members of the jury were tempted to use the internet to learn more about the case at that time, they will already have received the Judge's initial directions. The Court must proceed on the assumption that jurors will follow those directions and resist the temptation to make their own enquiries on the internet.

Imposing punishment is contrary to the notion that jury service is a civic responsibility and Tobin argues that "we need to do what we can to avoid criminalising those who are performing their civic duty".[123] I do not think the only step that should be taken is to legislate. Efforts also need to be made to encourage and support jurors to complete the

[120] Eboy Nicolas "A Practical Framework for Preventing "Mistrial by Twitter" (2010) 28 Cardozo Arts & Ent LJ 385 at 406.

[121] Law Commission *Contempt in Modern New Zealand* (NZLC IP36, 2014) at [5.49].

[122] R v Lyttelton [2015] NZHC 763 at [21].

[123] Rosemary Tobin "Contempt of court, the internet and jurors" (2014) NZLJ 366 at 368.

process to the best of their ability, with mechanisms such as those discussed under preventative approaches.

Despite the fact that legislating juror research would achieve constitutional legitimacy in that it would be clear and accessible, it may actually be interpreted as an intrusion by Parliament into an area that is traditionally dealt with by the judiciary. In the American case of *People v Jackson,* the Supreme Court found that the right to examine prospective jurors was a matter which courts should regulate using their judicial discretion[124] and that a statute expanding the defendant's right to appeal voir dire decisions was unconstitutional as it encroached on judicial power.[125] It seems that either way, a constitutional issue can be argued, however the importance of the rule of law and the need to balance power to prevent impulsive decisions, outweighs the benefits of judicial discretion.

It has been suggested that jurors will be reluctant to report juror misconduct if they are aware that the juror will be imprisoned,[126] and juror research may not be detected as often. In the case of *Folbigg*[127] a juror researched the defendant's previous convictions, and shared this information in the jury room. A juror, aware of the punishment for such an act, reported the misconduct.[128] Therefore, although a juror's reluctance to report may be a concern, it does not prove to actually have an effect in Australia. Lord Justice Treacy and Justice Tugendhat argue that whilst they "recognise the argument that fellow jurors might be more reluctant to report a breach of which they had become aware, [they] think this is outweighed by the benefits of clarity".[129] In assessing the positives and negatives of statutory law, it seems that on balance, the benefits of implementing a statutory offence outweighs any negative effects.

XIII Conclusion

The issue of jurors conducting their own research when directed not to, is becoming an increasingly more complex issue. The use of the internet and other technology is now an everyday activity for many people and it is important that a stronger emphasis is made on this issue to protect the fundamental right to a fair trial. Many jurors tend not to understand either

[124] *People v Jackson* 371 N.E.2d 602 (Ill. 1977).

[125] At [606].
[126] Dunning, Rachel "#Juryduty - Jurors using social media" (2014) 4 NZLawStuJl 211.

[127] *Folbigg v R* [2007] NSWCCA 371.
[128] At [5].
[129] Law Commission of England and Wales *Contempt of Court (1): Juror Misconduct and Internet Publications* (LC340, 2013) at [3.46].

how serious this issue is, the judge’s directions or do not realise the consequences of their actions and research simply for clarification on what they have heard in court. If judge’s directions are given in greater depth and jurors are able to understand why such a rule is in place, jurors conducting their own research may become a less likely occurrence.

Creating a statutory offence for jurors conducting their own research will work as a deterrent, but more will still need to be done. Other preventative measures should be implemented such as jurors being reminded at the beginning and end of each day of the rules, being encouraged to ask questions, changing the oath to specifically state the rule not to seek or disclose information, and including technology in the court room may also be considered. Preventative methods are important as it is a significant waste of time and money if it is discovered that jurors have conducted their own research and possibly shared this with other jurors or the jury. The court then has to put the trial on hold while the situation is assessed and it is determined whether the trial is to be aborted or jurors to be withdrawn.

Legislating on this issue will make the law accessible to the public, it would be clear, adhere to the rule of law and be much more consistent in its application. New Zealand would be following the legal pathways of other common wealth countries it has in the past such as Australia and the United Kingdom. Such jurisdictions have provided that the benefits of legislating on jurors conducting their own research outweigh the benefits of it remaining in the Common Law. It has worked effectively as a deterrent in New South Wales and Queensland where there has not been any proceedings brought for jurors conducting their own research. It would be necessary for New Zealand to legislate on the act of a juror conducting their own research and the act of the juror sharing this research with other jurors. The benefits of legislating on jurors conducting their own research outweigh the benefits of this rule remaining in Common Law.