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GUILTY OF USING GOOGLE:

RECONCILING THE RIGHT TO A FAIR TRIAL WITH THE RIGHT TO FREEDOM OF EXPRESSION AND ADDRESSING JUROR MISCONDUCT IN THE AGE OF SOCIAL MEDIA

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Abstract

It is widely accepted that the right to a fair trial is one of the most important guarantees contained within our legal system. That right is undermined when a jury member conducts his or her own research into a case. This type of juror misconduct constitutes contempt of court. In the light of the fact that the law of contempt is currently the subject of review in a number of jurisdictions, this paper considers how the law of contempt could be adapted to better manage the risk of jurors undertaking independent research. After a discussion of the current law and some problems with it, particularly those created by modern communications technology, this paper considers a number of possible reform options. It makes two broad recommendations. First, that the law should focus relatively more on preventing jurors undertaking their own research than on limiting publication. Second, that independent research by jurors should be the subject of statutory criminalisation, and a range of measures should be adopted to increase jurors' understanding of the importance of not going outside the evidence before them and to minimize any incentives for jurors to conduct their own research.

Key Words

Contempt of court;
Fair trial;
Freedom of expression;
Juries;
Juror misconduct.

I Introduction

The Celebrated English Judge, Lord Diplock, has said that there are three requirements for the due administration of justice:[1]

> ...first that all citizens should have unhindered access to the constitutionally-established courts of criminal or civil jurisdiction for the determination of disputes as to their legal rights and liabilities; secondly, that they should be able to rely on upon obtaining in the courts the arbitrament of a tribunal which is free from bias against any party and whose decision will be based upon those facts only that have been proved in evidence adduced before it in accordance with the procedure adopted in courts of law; and thirdly that, once the dispute has been submitted to a court of law, they should be able to rely upon there being no usurpation by any other person of the function of that court to decide it according to the law. Conduct which is calculated to prejudice any of these three requirements or to undermine the public confidence that they will be observed is contempt of court.

The courts have developed the contempt jurisdiction to protect against this type of conduct. However, the efficacy of the law has come to be questioned in light of cases where jurors have relied on a *ouija* board to determine an accused's guilt,[2] where social media users have published information that was subject to suppression orders or jurors have posted information about the trial on social media,[3] and where instances of jurors conducting their own research on the Internet into the cases they are deciding are becoming more commonplace.[4] All of this conduct is probably prohibited by the contempt jurisdiction.

The offence of contempt of court conflicts with the freedom of expression.[5] It limits individuals' ability to impart information pertaining to a trial and to seek or receive information about elements of a trial. In this paper, I consider whether such restrictions

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1 *Attorney-General v Times Newspapers* [1974] AC 273 at 302.
2 *R v Young* [1995] QB 324.
3 See, for example, Sam Greenhill "Peaches Geldof faces criminal probe after tweeting names of mothers who helped Lost Prophets paedophile abuse their babies" The Daily Mail (online ed, London, 28 November 2013); *Attorney-General v Beard* [2013] EWHC 2317 (Admin) [2013] All ER (D) 391.
4 See, for example, *R v Bates* [1985] 1 NZLR 326 (CA); *R v Harris* CA121/06, 27 September 2006.
5 See New Zealand Bill of Rights Act 1990, s 14.

are justified, as well as how the law of contempt could be improved. I make two major propositions: first, that there should be a greater focus on limiting illegitimate juror research, in favour of greater publication freedom; and secondly, that juror research should be made into a statutory offence, accompanied by educative measures such as stronger jury directions regarding the importance of not undertaking their own research. I also recommend that elements of trial procedure are adapted to minimise incentives for jurors to undertake their own research.

In Part II I explain the relationship between the law of contempt and two important rights: the right to a fair trial and the right to freedom of expression. I note that the right to freedom of expression does not necessarily conflict with the right to a fair trial, and that in many cases it can complement and enhance access to justice. However, for the most part, my paper addresses situations where these two rights conflict - and where the contempt jurisdiction is most relevant. I focus on the two types of contempt that are aimed at limiting the risk of jurors making decisions based on prejudicial information that is not in evidence: publication contempt, and jurors undertaking independent research into the case they are deciding. I consider whether it is justified to limit the right to freedom of expression in these instances, concluding that in some situations it will be preferable to limit temporarily the freedom of expression rights of some person or persons in order to preserve the right to a fair trial and to uphold public confidence in the administration of justice.

In Part III I examine some problems the contempt jurisdiction faces in the modern era. I explain how modern technology makes it increasingly difficult to strike an appropriate balance between these rights, and suggest that the law of contempt needs to be revised in order to meet these challenges. While there are few reported cases of New Zealand jurors undertaking independent research, such conduct is a growing concern overseas and it is important that our laws are equipped to deal with it.[6] I also consider the common law test for contempt - that an action which poses a "real risk" to the administration of justice will

[6] See, for example, *Attorney-General v Fraill and Sewart* [2011] EWCA Crim 1570 at [29].

constitute a contempt of court[7] - and argue that it constitutes too vague a limit on the right to freedom of expression.

I move in Part IV to discussing some options for reform. My analysis focuses on two key issues: whether an option is likely to be effective in preventing prejudice to fair trial rights; and whether an option constitutes a justifiable limitation on the right to freedom of expression. I employ the *Oakes*[8] test, as applied in *Hansen v R*,[9] in assessing whether such limitations are justified. I consider delays or changes of venue; routine and longer-term sequestration; greater use of challenges and juror vetting; improving the quality and consistency of jury directions; amending the juror oath; increasing the ability of jurors to participate and to use information technology during a trial; judge-alone trials; and statutory criminalisation of juror research.

I recommend, in Part V, that a combination of measures is most appropriate and likely to be most effective. In particular, I suggest that codification of offences, as well as educative options such as improving jury directions to make jurors more aware of the contempt jurisdiction and its importance, is likely to be most appropriate and effective. I argue that it may be more palatable, from a freedom of expression perspective, to focus more on preventing jurors from accessing information, than on limiting publication. This is an issue that is under-developed in the current literature. Focusing more on juror misconduct will allow publishers to impart information, and members of the general public to seek and receive information, about a trial or an accused, without causing prejudice to the jury pool. One issue that remains is that publications before the jury is empanelled may still have a prejudicial effect, so I argue that some restrictions on publication are also necessary. However, it is impossible to insulate the jury pool from all publicity relating to a trial, especially for high profile trials. The most the law can do is attempt to mitigate any undue prejudicial effect on potential jurors.

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7 *Television New Zealand v Solicitor-General* [1989] 1 NZLR 1 (CA).
8 *R v Oakes* [1986] SCR 103.
9 [2007] 3 NZLR 1 (SC).

II Contempt of Court: The Conflict between the Right to a Fair Trial and the Freedom of Expression

In this part of the paper, I explain the rationale for the offence of contempt of court and explore the relationship between the right to freedom of expression, and the goal of protecting the right to a fair trial. I also examine how the contempt jurisdiction functions in New Zealand, looking at procedure as well as the key elements of the offence. Finally, I consider whether the current approach to limiting the right to freedom of expression where it conflicts with the right to a fair trial is justified.

A The Purpose of the Law of Contempt of Court

The contempt jurisdiction exists to uphold the rule of law,[10] by criminalising conduct that undermines the administration of justice, or inhibits citizens from availing themselves of the legal system.[11] Lord Diplock's statement of the three fundamental requirements for the administration of justice has been adopted by the New Zealand Courts in *Solicitor-General v Smith*.[12] However, it is not always the case that conduct must be "calculated" to prejudice any of these requirements in order to constitute contempt of court in New Zealand; the offence is strict liability in nature. This will be discussed further below.

There are two key harms that come from contemptuous conduct. The first is harm to a particular trial in the context of which the conduct occurs. There is a risk that if prohibited conduct, such as publication of prejudicial information, or jurors undertaking their own research into the case before them, occurs, then the accused in that case is not receiving a fair trial. Where jurors access information that is unfairly prejudicial to an accused, they may have illegitimate perceptions of guilt, which also breaches the presumption of innocence. It is of fundamental importance in our criminal justice system

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10 David Eady and ATH Smith *Arlidge, Eady & Smith on Contempt* (3rd ed, Sweet & Maxwell, London, 2003) at 55.

11 *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48 (HC) at 53.

12 See *Solicitor-General v Smith* [2004] 2 NZLR 540 (HC).

that people are "tried by the courts, not by the Internet."[13] This is for several reasons, the first of these being that all evidence should be subjected to examination and challenge by both the prosecution and the defendant, usually through their counsel.[14] Another reason is that trials should take place in public and all material relevant to the outcome should be known: everyone has the right to be tried solely according to evidence properly placed before a court.[15] The right to a fair trial, including the right to be presumed innocent, is protected by s 25 of the New Zealand Bill of Rights Act, which provides that:

> Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:
>
> (a) The right to a fair and public hearing by an independent and impartial court:
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> ...
>
> (c) The right to be presumed innocent until proved guilty according to the law.

The second major harm is that contemptuous conduct undermines public confidence in the administration of justice. Public confidence in a particular verdict may be undermined, as may confidence in the jury system in general.

B Relationship with the Right to Freedom of Expression

Limiting conduct that may interfere with any of Lord Diplock's three requirements may have an impact on a large number of activities. For example, publication of prejudicial information, adverse comment on the court or judicial process, certain types of behaviour before the court, disobeying court orders, inappropriate seeking of information by participants in a trial, and disclosure of certain information about the trial process, are all types of conduct that may constitute a contempt of court. In this paper, I focus on the two forms of contempt that are aimed at preserving Lord Diplock's second requirement: the right of citizens to access a decision that is free from bias and based upon only those facts that have been proved in evidence. These are publication contempt and juror misconduct

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13 (24 February 2014) 576 GBPD HC 55.

14 ATH Smith "Reforming the New Zealand Law of Contempt of Court: An Issues/Discussion Paper" (discussion paper presented to the Hon C Finalyson, Attorney-General, 18 April 2011) at 41.

15 At 41; *Solicitor-General v Radio Avon Ltd* [1978] 1 NZLR 225 (CA) at 233.

through independent research. In this section I consider the degree to which these specific forms of contempt limit the right to freedom of expression.

A prohibition on publication of certain information clearly conflicts with the right to impart information, a key element of the freedom of expression.[16] Freedom of expression is protected by s 14 of the Bill of Rights Act, and includes the right to "seek, receive, and impart information of any kind and in any form". "Expression" has been described as being "as wide as human thought and imagination."[17] The type of information that is prohibited from being published is any that creates a "real risk" that publication of the information would be prejudicial to the fairness of a criminal trial.[18] Such information includes offending history, prior guilty pleas, or details that go to a crucial element of the case, such as publishing a photograph where identification is in question.[19] Importantly, as explained in more detail below, in New Zealand it is not necessary, in order to constitute contempt, for the publication to actually have any effect on the trial process – the act of publishing information that could have a prejudicial effect is sufficient.[20]

This conflicts with the idea that the ability of the media to report on court proceedings is important, "not only to the rights of those involved in judicial proceedings to a fair trial, but also to the wider public, which has a legitimate interest in maintaining the integrity of the judicial system."[21] It is important to note that freedom of expression is not necessarily and certainly not always in conflict with the right to a fair trial. Indeed, it is seen as fundamental to our justice system that proceedings are held in an open court, where the

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16 See New Zealand Bill of Rights Act 1990, s 14.

17 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA).

18 New Zealand Bill of Rights Act 1990, s 25(a); *Solicitor-General v Radio Avon Ltd*, above n 15, at 233.

19 *Gisborne Herald v Solicitor-General* [1995] 3 NZLR 563 (CA) at 571; *R v Smail* [2009] NZCA 143 (CA) at [18]; *Attorney-General v Tonks* [1934] NZLR 141 (SC, Wellington) at 146; See also Law Commission *Disclosure to Court of Defendant's Previous Convictions, Similar Offending and Bad Character* (NZLC R103, June 2008); Smith, above n 14, at 25.

20 Law Commission *Contempt in Modern New Zealand* (NZLC, IP36, May 2014) at [4.10]; *Solicitor-General v TV3 Network Services* (1998) 16 CRNZ 401 (HC) at 410.

21 Grant Huscroft, "Freedom of Expression" in Paul Rishworth (ed) *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at 336.

media and the general public can be privy to all important aspects of the proceeding.[22] Lord Diplock explained this in *Attorney-General v Leveller Magazine Ltd*:[23]

> If the way that courts behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness or idiosyncracy and maintains the public confidence in the administration of justice. The application of this principle of open justice has two aspects: as respects proceedings in the court itself it requires that they should be held in open court to which the press and public are admitted and that, in criminal cases at any rate, all evidence communicated to the court is communicated publicly. As respects the publication to a wider public of fair and accurate reports of proceedings that have taken place in court the principle requires that nothing should be done to discourage this.

In *Broadcasting Corporation of New Zealand v Attorney-General*, Richardson J noted that this principle of open justice is of particular importance in criminal proceedings, "where individual liberty is at stake."[24]

While freedom of the press is not specifically mentioned in the Bill of Rights Act, the courts have acknowledged that it is obviously an important aspect of the right to freedom of expression.[25] Freedom of the press covers "not only the right of the press to impart information of general interest or concern, but also the right of the public to receive it."[26] Therefore any judicial interference with press freedom or with the principles of open justice ought not to be taken lightly.

Huscroft argues that the law of contempt has a "chilling effect" on the freedom of expression because of its uncertain scope, and that "the only way to be sure of avoiding a problem, then, is to limit one's expression to a greater extent than may be necessary."[27] The practical consequence of this chilling effect may be that the media are reluctant to report on details of trials or accused persons at all, thus limiting the community's ability

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22 See *Scott v Scott* [1913] AC 417.
23 [1979] AC 440 at 449-450 per Lord Diplock.
24 [1982] 1 NZLR 120 at 132.
25 Huscroft, above n 21, at 334; *Auckland Area Health Board v Television New Zealand Ltd* [1992] 3 NZLR 406 (CA); *Television New Zealand Ltd v Attorney-General* [1995] 2 NZLR 641 (CA).
26 *Schering Chemicals Ltd v Falkman Ltd* [1981] 2 WLR 848 at 865.
27 Huscroft, above n 21, at 343.

to receive information about crime. This may result in the public receiving only part of a story, or accessing information from inaccurate sources. It may also result in negative perceptions of the justice process. The public are less likely to accept the authority of judges' decisions if they perceive that they don't have access to information about the courts.[28] Further, if there was information that some members of the public considered was particularly relevant to their community or to the safety of some members of the community, and they did not receive that information until after the trial had concluded, that might have a serious and negative impact on their confidence in the criminal justice process.

There are certain circumstances where it is recognised that the freedom of the press, and the freedom of expression of other actors, such as jurors, can justifiably be restricted in order to protect the right of an accused to a fair trial by an impartial arbiter, or to protect the administration of justice more generally. For example, conducting certain hearings or allowing certain witnesses to give evidence in closed court, from which the media and general public are excluded, is considered justifiable in protecting the administration of justice and fairness to parties in cases of a particular nature, usually family proceedings or cases involving complaints of sexual violence.[29] However, the question of whether the law of contempt of court in New Zealand strikes the appropriate balance between the right to freedom of expression and the right to a fair trial remains open. The next section of this paper raises some contemporary issues with the law and considers this question in more detail.

The second form of contempt on which this paper focuses is a type of juror misconduct. Where a juror undertakes his or her own research into an element of a case, this conflicts with the principle that trials should take place in public and that all material relevant to the outcome is known.[30] It also undermines the notion that all evidence should be

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28 Peter Carey and others *Media Law* (5th ed, Sweet & Maxwell, London, 2010) at 179; see also Law Reform Commission of Canada *Contempt of Court* (R17, 1982) at 13.

29 Andrew Nicol and Geoffrey Robertson *Robertson and Nicol on Media Law* (5th ed, Sweet & Maxwell, London, 2007) at 464.

30 Law Commission, above n 20, at [5.19].

subjected to examination and challenge by both the prosecution and the defendant.[31] However, preventing independent research limits jurors' rights to seek and receive information, another important part of the freedom of expression.[32] The law currently is unclear, but it would seem that accessing any information that is relevant to the parties, counsel, judge, or issues in the case, or to the trial process generally, is prohibited. This is a substantial limitation on the types of information which jurors may seek and receive. However, there is little literature on this; this may be because it has only become a major issue relatively recently, so there is limited case law; it may be that it is such an inherent part of the juror oath, to try the case only on the evidence, that we do not consider it questionable; or it may be that we choose to focus on publication contempt in order to limit the amount of information available to jurors, so that even if a juror did conduct a search on the Internet, for example, they would not find anything seriously prejudicial to the case.

The extent to which this type of juror misconduct occurs is unclear. This is, in part, because jury deliberations are secret, subject to very limited exceptions,[33] and also because it is difficult to detect when a juror may have conducted their own research. This is particularly so where a juror has used a personal electronic device to conduct research on the Internet. However, there are reported cases in New Zealand where jurors have visited a crime scene,[34] or conducted experiments to determine issues relevant to the case, for example to see how long a car engine takes to cool down,[35] or how much cocaine could be secreted in a pair of shoes.[36] In one drugs case, jurors visited a chemist to inquire about the availability and price of ephedrine.[37] There have also been some instances of jurors looking up information relating to elements of an offence or to the court process. For example in *R v Harris*, printouts containing United States definitions of "burden of proof" and "beyond a reasonable doubt" were found in a jury room.[38] There

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31 Smith, above n 14, at 41.
32 New Zealand Bill of Rights Act 1990, s 14.
33 Evidence Act 2006, s 76; Juries Act 1981, s 29B; *Solicitor-General v Radio New Zealand*, above n11.
34 *R v Gillespie* CA227/88, 7 February 1980.
35 *R v Taka* [1992] 2 NZLR 129 (CA).
36 *R v Sangraksa* CA503/96, 3 July 1997.
37 *R v Bates*, above n 4.
38 CA121/06, 27 September 2006.

are concerns that jurors may believe there is nothing wrong with searching for this type of information, because it is not as clearly objectionable as searching for information about an accused, for instance. However, there is a risk that jurors may access information that is inaccurate, as in *Harris*, where the definitions were from the United States and did not accurately reflect New Zealand law. This demonstrates a need for greater clarity and awareness of the law of contempt as it relates to juror research.

C The Offence of Contempt of Court in New Zealand Law

In this section I outline how the offence of contempt of court functions in New Zealand under the status quo. However, I note that the entire contempt jurisdiction is currently subject to review by the Law Commission.[39]

The offence of contempt of court is contained in the Criminal Procedure Act 2011. Section 365 relevantly provides for a punishment by imprisonment of up to three months or a fine not exceeding $1000 for any person who wilfully and without lawful excuse disobeys any order or direction of a court in the course of the hearing of any proceedings. The three month imprisonment sentence codifies the decision of the Supreme Court in *Solicitor-General v Siemer*.[40] Importantly, however, subs (3) preserves the common law of contempt. This means that publication contempt, although not clearly falling within any of the three categories in subs (1), is still punishable as contempt of court.

1 Scope

The law of contempt is potentially applicable once a case is *sub judice*, or, from the point when the commencement of criminal proceedings is "highly likely".[41] Thus the *sub judice* period may begin before a suspect is arrested or charged. It ends once a verdict has been reached. In general it does not apply to appeals as the relative chance of prejudice is much less after conviction - society has already deemed the person guilty and the appeal is not heard by a jury, so there is unlikely to be any additional prejudicial effect arising

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39 Law Commission, above n 20.
40 [2010] NZSC 54, [2010] 3 NZLR 767, at [67].
41 *Television New Zealand v Solicitor-General*, above n 7, at 3.

from publications on the issue.[42] However, where there is a real risk of prejudice, the restrictions imposed by the law of contempt continue whilst the appeal is addressed.[43]

Because the right to a fair trial is contained in the Bill of Rights Act, which generally applies to organs of the state, there are institutional issues about holding the media and particularly social media users accountable for breaches of that right.[44] However, the New Zealand courts have made it quite clear that no right is more inviolate than the right to a fair trial, and that it is as close to an absolute right as any.[45] This means we have endeavoured to find a way to bring "private" acts of the media that may have an impact on the right to a fair trial within the scope of the Act. It has been suggested that while the initial act of publishing prejudicial material is not affected by the Act, once the trial process is underway, the act of the judge in continuing the trial and failing to assess the fairness issues will be.[46] "The Court will not be impartial if, as a result of the state of mind with which the Judge(s) or jury members approach, or can be reasonably apprehended as approaching, the determination of the particular dispute or disputes which come before them, they are likely to favour one party over another."[47] It follows that as soon as the trial court is aware of the facts that are alleged to pose a risk to a fair trial, for example the existence of prejudicial publications, then the Bill of Rights Act is engaged and the judge must take steps to protect the accused's rights.[48]

2 Actus Reus

The legal test for whether juror misconduct amounts to contempt is whether there is "a real risk as opposed to a remote possibility that the actions complained of would

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42 The Hon Justice AP Randerson, Chief High Court Judge, "Contempt of Court and the Media" LexisNexis Media Law Conference 2008; *Attorney-General v Times Newspapers Ltd*, above n 1, at 301 per Lord Reid.

43 Law Commission, above n 20, at [4.74].

44 New Zealand Bill of Rights Act 1990, s 3.

45 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: a commentary* (LexisNexis, Wellington, 2012) at 328; *A v Wilson & Horton Ltd* (2000) 6 HRNZ 106 (HC); *R v Lord Chancellor ex parte Witham* [1998] QB 575.

46 Butler and Butler, above n 45, at 808.

47 At 884.

48 At 809.

undermine public confidence in the administration of justice."[49] For publication contempts, the test is similarly whether the actions of the accused "caused a real risk of interference with the administration of justice."[50] This is compared to "a remote possibility", demonstrating that there is a threshold requirement as to the degree of risk.[51] There is no requirement as to outcome. This has prompted some concerns, as the test for when something is a miscarriage of justice, and thus whether an appeal will be allowed, imposes a much higher threshold than contempt of court.[52]

3 Mens Rea

Contempt of court is a strict liability offence in that the prosecution does not have to establish that the publisher or the jury member intended to interfere with the administration of justice by means of the publication or the independent research.[53] However, proof of an intention to interfere with the due administration of justice "may assist the conclusion that the publication had the required tendency," in the case of publication contempts.[54] Even under the current law, intention may be relevant to the penalty.[55] For example, if a juror accidentally comes across information, or researches basic information such as legal definitions in an aim to ensure they understand the trial, they may be seen as less culpable that someone who deliberately seeks information that they know is inappropriate, such as previous convictions or other information that would be inadmissible as evidence.

4 Defences

The courts have traditionally held that there is no defence of public interest or fair comment, as there are in some other areas of media law, or as there are under the English

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49 *Solicitor-General v Radio Avon Ltd*, above n 15, at 233.
50 *Solicitor-General v Wellington Newspapers* [1995] 1 NZLR 45 (HC) at 47.
51 *Solicitor-General v Radio Avon Ltd*, above n 15, at 233.
52 Law Commission, above n 20; *Attorney-General v Unger* [1998] EMLR 280 at 291.
53 *Solicitor-General v Radio New Zealand Ltd*, above n 11, at 55; *St James Evening Post* (1742) 2 Atk 469, 24 ER 565.
54 *Solicitor- General v Radio New Zealand Ltd*, above n11, at 55-56
55 At 56.

Contempt of Court Act.[56] However, the issue is not totally clear: the courts seem to accept that there may be a small number of cases where there are strong policy reasons that would permit the publication of information, because the public interest in having the issue discussed "outweighs the prejudice which might be occasioned to a party"[57] in criminal proceedings, particularly where the discussion is general and not explicitly linked to the proceedings.[58]

There may be a limited form of innocent dissemination defence available where a publisher receives a newspaper article, for example, from a third party, and takes all due care to ensure that the article does not constitute contempt of court.[59] This means that publishers will often take steps such as contacting the police to ask whether an arrest has been made, or asking for evidence that the writer has obtained legal advice to the effect that publication will not breach the law of contempt. Even if that legal advice is negligent, the publisher has taken all necessary care, thus they cannot be convicted of contempt.[60]

D The Current Law of Contempt: A Justified Limitation on the Right to Freedom of Expression?

Any limitation on a right that is protected in the Bill of Rights Act must be demonstrably justified. Section 5 of that Act requires that "the rights and freedoms contained in this Act may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Given that the Bill of Rights Act applies to acts of the judiciary, it is important that any judicial decisions as to punishing contemnors stands up to s 5 scrutiny. [61]

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56 See generally Eady and Smith, above n 10, at 339; *Solicitor General v Radio New Zealand Ltd*, above n11, at 56; Contempt of Court Act 1981 (UK), s 5.
57 *Attorney-General v Times Newspapers* Ltd [1973] QB 710, [1973] 1 All ER 815, 821.
58 See *Solicitor-General v Smith*, above n 12.
59 Nicol and Robertson, above n 29, at 432-3.
60 Carey and others, above n 28, at 168
61 New Zealand Bill of Rights Act 1990, s 3(a).

The right to freedom of expression is protected by section 14 of the Bill of Rights Act. The Canadian Supreme Court's test from *R v Oakes*[62] is adopted in order to apply section 5:[63]

> 1. The legislative objective must be sufficiently important to warrant overriding a constitutionally guaranteed right. It must relate to societal concerns which are "pressing and substantial in a free and democratic society."
> 2. The means chosen to advance the legislative objective must be reasonable and demonstrably justified in a free and democratic society. The three components of this assessment are:
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> (a) there must be a "rational connection" between the measures and the objective they are to serve;
>
> (b) the measure should impair "as little as possible" the right or freedom in question; and
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> (c) there must be a proportionality between the effects of the limiting measures and the objective – the more severe the deleterious effects of a measure, the more important the objective must be.

Where the right to freedom of expression conflicts with the right to a fair trial, the courts' usual and accepted practice is to curtail the right to freedom of expression temporarily in order to protect the accused's right to a fair trial.[64] Where a juror undertakes research into matters not in evidence but relevant to the case this undermines the accused's right to be tried solely on the evidence and by an impartial jury, so some limitation on the right to freedom of expression is justified in respect of this type of conduct.[65] Similarly, where prejudicial information is published that may undermine the administration of justice and have an adverse effect on an accused's right to a fair trial by prejudicing the jury pool, it seems that some limitation on publication is justified.

Given the high importance of the right to a fair trial, and the temporary nature of limits to freedom of expression imposed by the law of contempt, in that publication and research

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62 Above n 8, at [138]-[140].
63 *Hansen v R*, above n 9, at [42].
64 *Gisborne Herald v Solicitor-General*, above n 19, at 575; Smith, above n 14, at 28; Eric Barendt *Freedom of Speech* (2nd ed, Oxford University Press, New York, 2005) at 324.
65 Smith, above n 14, at 41.

are permitted at any time outside of the *sub judice* period, it seems that the limit to freedom of expression is justified in many cases. This reflects the traditional common law priorities, and gives effect to the fact that the Bill of Rights Act allows for limitations on rights provided they are demonstrably justified in a free and democratic society.[66] Moreover, the International Covenant on Civil and Political Rights, to which the Bill of Rights Act is designed to give effect, expresses fair trial rights in absolute terms, where the right to freedom of expression is qualified.[67] Judges and commentators have similarly expressed the view that the right to a fair trial is closer to an absolute right than that of freedom of expression.[68]

III Some Problems with Contempt of Court

In this section I consider some contemporary problems with the operation of the contempt jurisdiction. In particular, I outline how the Internet and social media have changed the nature of the way in which information is shared, and discuss some problems arising from the lack of clarity in the law of contempt.

A The Impact of Modern Technology on the Right to a Fair Trial

Today, traditional news media outlets are not the only source of information; the Internet "allows everyone to be a publisher".[69] Further, "communication can be more or less instantaneous, there is no editorial input, and those who use the web may pay no attention to the requirements of responsible journalism."[70] For example, while traditional media outlets are aware of the importance of name suppression in protecting the identities of

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66 New Zealand Bill of Rights Act 1990, s 5.

67 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), arts 14, 19.

68 Smith, above n 14, at 29; *R v B* [2008] NZCA 130, [2009] 1 NZLR 293 at [2] per Baragwanath J; *R v Burns (Travis)* [2002] 1 NZLR 387 at 404 per Thomas J; *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300.

69 *Police v Slater* [2011] DCR 6 at [11], [15].

70 Smith, above n 14, at 23.

victims, many others are not. Peaches Geldof's recent act of "tweeting" the names of women who allowed their children to be abused by Ian Watkins illustrates this.[71]

The Internet also makes a vast amount of information readily available to a large number of people. This is problematic where jurors have been found to have undertaken independent research into elements of a case, as it suggests reliance on untested and potentially inadmissible evidence in reaching their verdicts.[72] Even before the age of social media and widespread Internet usage the courts faced a practical problem in determining "how far it is sensible to give jurors credit for an ability to set prejudice to one side in compliance with their oaths."[73] In *Weatherston v R*,[74] it was argued that the publicity attached to the case and the contemporaneous debate over the legitimacy of the provocation defence had caused an unfair trial. Although the appeal was unsuccessful, it raises important questions about the impact that extrinsic information may have on jurors, and how the laws of evidence and trial procedure can be adapted to mitigate that impact. The nature of modern media also means that traditional methods for avoiding jury prejudice, such as change of venue or postponement of trial, may not be effective.[75]

The issue of jurors searching for external information is not new - but whereas "decades ago they might have sneaked off to look at the crime scene,"[76] the Internet "unquestionably" exacerbates the potential for jurors to undertake their own research.[77] Butler and Butler note that the "nature of potential harms posed by a new technology or social phenomenon are unknown, and are the subject of speculation." [78] The increase in the use of the Internet and Internet-capable devices, such as smartphones, has increased the "magnitude of the risk" that a juror will access information inappropriately.[79]

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71 Greenhill, above n 3.
72 Smith, above n 14, at 41; *R v Karakaya* [2005] 2 Cr App R 5.
73 *R v Hubbert* (1975) 29 CCC (2d) 279 at 291.
74 [2011] NZCA 276, [2013] NZLJ 121.
75 See *Gisborne Herald v Solicitor-General*, above n 19, at 575.
76 (11 March 2014) Public Bill Committee Deb GBOD HC 67, per Professor David Ormerod, Law Commissioner for Criminal Law.
77 Law Commission, above n 20, at [5.5].
78 Butler and Butler, above n 57, at 134.
79 (11 March 2014) Public Bill Committee Deb GBOD HC 67, per Professor David Ormerod, Law Commissioner for Criminal Law.

B Lack of Clarity in the Law of Contempt

It is often said that the law of contempt is problematic because it is not clear whether particular conduct constitutes "contempt", and whether a prosecution will take place.[80] The common law standard in New Zealand is that the conduct must create a "real risk" of interference with the administration of justice; there is no requirement as to the actual effect of the conduct. The Law Commission has suggested two justifications for this. First, "there is no way of establishing empirically whether a jury's deliberations were in fact improperly influenced by exposure to prejudicial" information.[81] Secondly, "this form of contempt is considered to be a prophylactic jurisdiction", concerned with the tendency to cause harm.[82] However, it also notes that the threshold is relatively low, so a large amount of conduct is caught by the law of contempt. [83] In some cases, a particular publication may constitute a contempt, but it may be impossible to demonstrate that the publication actually had any effect on the outcome of the case. This would mean that a person convicted in the case to which the publicity relates is unable to appeal successfully on the ground of miscarriage of justice.[84] This creates an anomaly and is likely to be viewed as unfair by defendants and the general public.

Further, it seems generally accepted in New Zealand that the offence of contempt of court is strict liability.[85] However, there are some cases in the United Kingdom which suggest that an intention may be required: in *Attorney-General v Davey and Attorney-General v Beard*, the Court considered that an intention to prejudice the administration of justice in some way was a constituent element of the offence of contempt of court.[86] In *Attorney-General v Davey*, a juror was found to be in contempt after posting a Facebook update soon after being empaneled, saying "Wooow I wasn't expecting to be in a jury deciding a paedophile's fate, I've always wanted to f*** up a paedophile and now I'm within the

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80 Smith, above n 14, at 24.
81 Law Commission, above n 20, at [4.12].
82 At [4.12].
83 At [4.12].
84 At [4.10]; see also *Attorney-General v Unger*, above n 44, at 291 per Simon Brown LJ.
85 *Solicitor-General v Radio New Zealand Ltd*, above n 11, 48 at 56.
86 [2013] EWHC 2317 (Admin).

law!" In *Attorney-General v Beard*, a juror was held to be in contempt following an allegation that he had undertaken research on the Internet, by typing the defendants' names into a search engine. There are also cases from the same jurisdiction that seem to make it clear that intention is irrelevant. For example, in *Attorney-General v Fraill and Sewart*, a juror contacted a defendant after he had been acquitted to tell him how pleased she was with the verdict. The juror was sentenced to immediate custody for eight months even though it was accepted that she was not involved in any attempt to pervert the course of justice.[87] While *Fraill* more accurately reflects statements of the law in New Zealand than *Davey* or *Beard* do, the fact that our contempt laws are not codified leaves it open for the courts to adopt a different position. As noted above, there are also some unresolved questions as to whether a public interest defence is available and in what circumstances.

Some judges have also identified problems with the terminology of "contempt". Jurors may not understand that conducting their own research into information relevant to a case constitutes a contempt, as the word "contempt" may convey the impression that the offence exists to protect a particular court or judge from insult, rather than aiding in the important objective of preserving the fair administration of justice.[88]

A further area of difficulty is when exactly a person may be liable for contempt, or, in other words, when the *sub judice* period begins and ends. It is recognised that the beginning and length of the *sub judice* period in any given case is variable.[89] It begins at the commencement of criminal proceedings – either with the making of an arrest or the laying of an information. The Law Commission notes that "[t]he precise timing of these events, once they have occurred, may be ascertainable, but is neither predictable in advance nor generally publicly known."[90] This makes it difficult for the media to ascertain when they are allowed to publish certain material, and is therefore likely to have a chilling effect on publication.

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87 Above n 6.

88 See *Attorney-General v Times Newspapers*, above n 1, at 322; *Morris v Crown Office* [1970] 2 QB 114; Frances Quinn *Law for Journalists* (Pearson Longman, England, 2007) at 63.

89 Nicol and Robertson, above n 29, at 426.

90 Law Commission *Juries in Criminal Trials – Discussion Paper* (NZLC PP37, 1999) at 74.

This section has demonstrated that there is a need for greater clarity in the law of contempt of court. The rest of this paper considers how that could best be achieved.

IV Options for Reform

In this section, I consider whether there are alternatives to publication bans that may strike a better balance between the right to freedom of expression and the right to a fair trial. A number of alternatives to using the contempt jurisdiction to ban publications were considered in the Supreme Court of Canada decision in *Dagenais*.[91] In that case, Lamer CJ noted that a hierarchical approach to rights should be avoided if possible, and that publication should only be banned where absolutely necessary and where the meritorious effects of a ban would outweigh the harms caused by limiting expression. His Honour suggested that judges should consider all other options, and determine that no other reasonable and effective alternative is available, before imposing a publication ban. [92]

Our Court of Appeal has rejected many of these options,[93] but if we were to codify the law of contempt there would be scope to reconsider this decision. For example, although juror sequestration is no longer routine, the Juries Act 1981 makes provision for sequestration if necessary in the interests of justice.[94] The Act also provides for challenging potential jury members where their impartiality is in doubt.[95] Both of these mechanisms could potentially be adapted or more widely-used to ensure that jurors were not influenced by prejudicial publicity. In this section I consider these as well as a number of other options. In particular, I discuss: delays or changes of venue; routine and longer-term sequestration; greater use of challenges and juror vetting; improving the quality and consistency of jury directions; amending the juror oath; increasing the ability of jurors to participate and to use information technology during a trial; and judge-alone

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91 *Dagenais v Canadianb Broadcasting Corporation* (1995) 94 CCC (3d) 289 (SCC).
92 At 317.
93 See *Gisborne Herald v Solicitor-General*, above n 19, at 575.
94 s 29A(2).
95 ss 24, 25.

trials.[96] I also consider whether a specific statutory offence of jurors undertaking independent research may be appropriate.

A Delay or Change of Venue

It has been suggested that delaying a trial until the effect of any prejudicial publicity has faded from the minds of the jury pool may be a better solution than limiting the right to freedom of expression. There have also been suggestions that moving the location of the trial to some place where the effect of prejudicial publicity may not have been felt may prevent any risk to a fair trial. [97] However, there are issues with delaying a trial, as this may conflict with an accused's right to trial without undue delay.[98] It may also be problematic for witnesses and victims, whose lives may be effectively "on hold" while they wait for the trial.

Our Court of Appeal has suggested that venue changes are inconvenient to witnesses and others involved, and incur significant expenses. It also noted that there is some value to the community in trying an offence in the area in which the alleged crime occurred.[99] Importantly in the modern era, it is also difficult to see how a change of venue could be effective in limiting the impact of prejudicial publicity.[100] While there may be less interest amongst the community to which the trial is moved in reading about people they do not know or who do not live near them, it is highly likely that members of that community will have been exposed to similar publicity about the alleged crime through newspapers and online media. This is even more so where the alleged crime is particularly shocking to people's sensibilities.

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96 Smith, above n 14, at 34, 36, 42; *R v Johnson* CA 60/04, 29 March 2004; *Dagenais v Canadian Broadcasting Corporation*, above n 91.

97 *Dagenais v Canadianb Broadcasting Corporation,* above n 91, at 337.

98 *Gisborne Herald v Solicitor General*, above n 19, at 576.

99 At 576.

100 Thomas Beisecker "The Role of Change of Venue in an Electronic Age" (1994) 4 Kan. J. L. & Pub. Pol'y 81 at 84.

B Routine, Longer-Term Sequestration

The Court of Appeal in *Gisborne Herald* rejected this option, as it considered that sequestration would add to the existing, sometimes significant, pressures on jurors.[101] The Law Commission has also commented that it would run counter to modern developments to return to routine sequestration for the duration of the trial.[102] For example, we have moved away from confining jurors without food or drink until they reach their verdicts, to allowing them to have refreshments, and generally to return to their homes overnight during their deliberations.[103] Routine sequestration may be seen as an unjustified limit on jurors' freedoms of movement. In the light of the fact that jury service is seen as an unwanted imposition into many people's lives already, we should be wary of adopting measures that make it even more onerous.

It is also important to note that sequestration may not result in less bias or better deliberations. For example, it will not prevent potential jurors from being exposed to prejudicial publicity before they are empanelled.[104] Further, sequestered jurors may feel pressure to come to a verdict quickly, which may impair their ability to deliberate without passion.[105]

C A More Interactive Approach to Empanelling the Jury: Challenges and Juror Vetting

The next two options discussed focus more directly on the harm in question, that of juror bias as a result of prejudicial publicity. The first of these is greater use of challenges for cause, or vetting the pool of potential jurors.

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[101] *Gisborne Herald v Solicitor General*, above n 19, at 576.
[102] Law Commission, above n 20, at [5.45].
[103] James Ogloff and others *The Jury Project: Stage One – A Survey of Australian and New Zealand Judges* (The Australian Institute of judicial Administration Incorporated, Melbourne, 2006) at 3.
[104] Joseph R Mariniello "The Death Penalty and Pre-Trial Publicity: Are Today's Attempts at Guaranteeing a Fair Trial Aequate?" (1994) 8 Notre Dame J L Ethics & Pub Pol'y 371 at 375.
[105] Michael Chesterman "OJ and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury is Dealt With in Australia and America" (1997) 45 American Journal of Comparative Law 109 at 135.

As noted above, the Juries Act does provide for challenging potential jury members where their impartiality is in doubt.[106] It has been suggested in some cases that increased use of challenge for cause may be the most effective way of ensuring that the jury pool is not tainted by prejudicial publicity.[107] New Zealand judges have expressed distaste for the *voir dire* jury selection process often adopted in the United States, however.[108] For example, in *Gisborne Herald*, the Court of Appeal considered that it would be undesirable and unnecessarily time-consuming to cross-examine potential jurors in order to determine whether their minds had been affected by prejudicial publicity.[109] It also noted that in the United States, where jury selection takes place in a lengthy *voir dire* session, or a "system of interrogation where potential jurors are asked questions to determine bias prior to challenge," it may take up to six weeks to select a jury.[110] The delay caused may run counter to the right to trial without delay, or at the very least cause administrative difficulties and incur extra costs.

In *R v Sanders*, the High Court considered that *voir dire* determination of potential juror bias is a waste of time, and an imperfect instrument to secure a fair trial.[111] The Court suggested that prospective jurors could be questioned only if the circumstances were "wholly exceptional",[112] and was clear the judgment did not constitute "a licence to examine and cross-examine prospective jurors as to what they believe or do not believe."[113] The Court also noted that it would be "naive" to expect that it would be possible to select 12 jurors who had not heard anything about a notorious case.[114] It did not consider this to be particularly problematic, however. There are a number of judges who have expressed the view that jurors will heed the warning to avoid prejudice, and

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[106] ss 24, 25.
[107] *R v Kray* (1969) 53 Cr App R 412.
[108] *Gisborne Herald v Solicitor-General*, above n 19, at 575; *R v Sanders* [1995] 3 NZLR 545 (CA); compare *Sheppard v Maxwell* 384 US 33 (1986).
[109] At 19; see also *R v Sanders*, above n 108.
[110] Stephen Dunstan and others "Trial By Peers? The Composition of New Zealand Juries" (1995, Department of Justice, Wellington) at 31.
[111] Above n 108; See also *R v Greening* [1957] NZLR 906, 915 (CA); William Kastin "Presumed Guilty: Trial by the Media – The Supreme Court's Refusal to Protect Criminal Defendants in High Publicity Cases" (1992) 10 N.Y.L. Sch. J. Hum. Rts. 107 at 114.
[112] *R v Sanders*, above n 108, at 517.
[113] At 520, citing *R v Kray*, above n 107.
[114] At 520, citing *R v Hubbert*, above n 73.

that "it is a matter of common experience that in the dignified and dispassionate atmosphere of the Courtroom, any feelings of revulsion against the crimes themselves, sympathy to the victim, or prejudice against the accused, soon disappear."[115] It has also been suggested that, "unless we act on the assumption that criminal juries act on the evidence and in accordance with the directions of the trial judge, there is no point in having criminal jury trials."[116] Richardson J has also commented favourably on jurors' abilities to ignore prejudicial material, in *R v Halkyard and Harawira*.[117] Moreover, studies have shown that potential jurors are more likely to remember general themes of publicity than specific details.[118] However, this must be balanced against research which has demonstrated that publicity which indicates a defendant's culpability is more likely to cause prejudice than bare details of the offence,[119] and that emotive reporting is more prejudicial than factual reporting.[120]

There are also some suggestions that questioning potential jurors to screen for bias will not necessarily result in a jury free of prejudice, as jurors may not admit to their prejudices, in order to appear helpful to the court or to secure a spot on the jury.[121] This suggestion is in contrast with the widely-held view that people generally do not want to do jury service – in a 1993 survey, only 26 per cent of summonsed potential jurors actually reported for jury service.[122] Therefore the extent to which potential jurors may be motivated to lie about their prejudices is questionable. However, there is also an argument that potential jurors may not even be aware of their own bias, and therefore will not report it.[123]

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[115] *R v Hamley* HC Timaru 24 April 1980; R v Hamley CA17/81.
[116] *Gilbert v The Queen* [2000] HCA 15; (2000) 201 CLR 414 at [31]; see also *Montgomery v HM Advocate* [2003] 1 AC 641 at 674.
[117] [1989] 2 NZLR 714, 729 (CA).
[118] Nancy Steblay and others "The Effects of Pretrial Publicity on Juror Verdicts" (1999) 23 Law and Human Behaviour 219 at 227.
[119] Norbert Kerr "The Effects of Pretrial Publicity on Jurors" (1994) 78 Judicature 120 at 122.
[120] TM Honess and others "Empirical and Legal Perspectives on the Impact of Pre-Trial Publicity" [2002] Crim LR 719.
[121] Minow and Cate "Who Is an Impartial Juror in an Age of Mass Media?" (1990-1) 40 ANU Law Review 631 at 650.
[122] Dunstan and others, above n 110, at 43.
[123] Minow and Cate, above n 121, at 651.

It seems that on the whole, questioning potential jurors in order to determine prejudice, prior to a challenge for cause, is not sufficiently effective to make it worth the extra time and distress it may cause to jurors. It is suggested that a *voir dire* where prospective jurors are questioned as to potential biases will be stressful: first because having to go through a process akin to cross-examination is inherently stressful; and secondly because it may result in a challenge for cause. A challenge for cause, unlike a peremptory challenge, has the potential to embarrass the juror as it requires a declaration of the reason for challenge.[124]

However, there is something to be said for a modified form of jury vetting. In *R v Johnson*, the Court of Appeal explained that:[125]

> ... it may be appropriate for the panel to be addressed by the Judge before they are brought into Court. They should be provided with a list of the victims and the witnesses and asked to consider whether there are any reasons which would affect their ability to consider the matter objectively and impartially ... Those members of the panel who do raise relevant matters of concern would then be excused by the Judge before the empanelling itself commences.

This approach was adopted in *R v Skelton*, in which the Judge said that in the course of the empanelling process, potential jurors who have personal relationships with the victims or parties, or who have strong views which would make it difficult for them to sit on a jury with an open mind should be excused from jury duty. [126] This approach is now standard practice in New Zealand courts.

D Better Jury Directions

In *Z v DPP*, Finlay CJ considered that: [127]

> even where there is a real risk of unfairness, that risk does not entail the drastic remedy of a prohibition of the trial unless the likelihood of unfairness is unavoidable by other

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[124] Dunstan and others, above n 110, at 101.
[125] *R v Johnson* CA 60/04, 29 March 2004.
[126] *R v Skelton* CRI-2007-019-6530 (HC) at [118].
[127] [1994] 2 IR 476 (IrSC).

> means. So where, for example, the likelihood of unfairness can be averted by directions to the jury then that is the appropriate way of dealing with the matter.

This section considers the important question of whether jury directions are sufficient to avoid any undue prejudice. Unfortunately, this is a question that probably cannot be given a definitive answer, as there are limitations on the research that can be done: it is prohibited, except in certain circumstances, to speak to jurors about their deliberations, but it is also difficult to obtain accurate data as to jurors' prejudices and understanding of judicial directions when researchers have to rely on self-reporting.[128]

A 2006 research project found that judicial directions as to the need to avoid reliance on material not in evidence varied greatly.[129] For example, 18 per cent of New Zealand judges told jurors, "Do not access the Internet to obtain information about the case", in their opening remarks, whereas 57 per cent said not to conduct their own investigations by doing things like visiting the crime scene.[130] About half the judges surveyed said that they regularly explained to the jury why having conversations with non-jurors would be improper, as would considering material external to the trial.[131]

The researchers considered that "one explanation for these relatively low figures is that judges may be concerned that by telling jurors not to access certain material, at least one of them may be encouraged to do so."[132] This raises an important issue pertaining to jury directions – "the power of suggestion."[133] There is a fairly commonly-held view that "telling the jury not to look at extraneous material is much the same as telling children to walk past a sweet shop without looking inside."[134] If they are not told why they cannot

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[128] Law Commission *Juries in Criminal Trials – Part Two: A summary of the research findings* (NZLC PP37, 1999) at 5.
[129] Ogloff and others, above n 103.
[130] At 12.
[131] At 12.
[132] At 12.
[133] At 12.
[134] Law Commission of England and Wales *Contempt of Court (1): Juror Misconduct and Internet Publications - Responses to Consultation* (LC340, 2013) at [2.157].

look on the Internet for information, for example, they may be given the impression that there is some particularly scandalous information there for them to find.[135]

New Zealand currently has no uniform jury direction in relation to this issue: judges are free to develop their own direction to some extent. For example, one District Court Judge says the following in his first address to the jury:[136]

> There is another very important thing I must tell you. You must not discuss this case with any other person during any adjournment. You must not make any inquiries or investigations of your own. You must not talk about it in public or around the court precincts. Keep your discussions in the jury room. The reason for this is that it is crucially important that you decide whether this defendant is guilty or not guilty solely on the basis of the evidence called in this Court. It would be unfair if something they didn't know about was to be used for or against either the Crown or the accused.
>
> If you were to talk about the case with some other person, that person may know about the case, or even if they don't, may have an opinion on how you should decide the case. That must not happen. You may discuss the case amongst yourselves in the jury room during any adjournment as much as you wish. But until you have delivered your verdict, you must tell anyone who asks that the judge said that you are not to talk about the case until you have delivered the verdict. Please tell a member of the court staff if anyone attempts to speak to you about the case.
>
> The best rule is to keep it in the jury room. We do not want to have to stop the trial and start again with another jury.

However, other New Zealand judges may give more or less detailed directions. It is desirable that all juries are given the same direction. One option for reform would be to include a more detailed direction in the Bench Book for Judges, to ensure greater consistency and informational value of directions. Other jurisdictions may provide

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[135] At [3.212]; Law Commission *Juries in Criminal Trials – Discussion Paper* (NZLC PP37, 1999) at 56.
[136] Email from Judge William Hastings to Emma Smith regarding Jury Directions (4 September 214).

examples or model directions that could be adopted. For example, in Queensland, the Bench Book directs judges to inform the jury that they must:[137]

> Pay careful attention to the evidence, and ignore anything you may hear or read about the case out of court. You may discuss the case amongst yourselves. But you must not discuss it with anyone else. The reason is this: you are the 12 people who are to determine the outcome of this trial; and solely on the evidence presented here in the courtroom. Do not take the risk of any external influence on your minds. So do not speak to anyone who is not a member of this jury about the case. If anyone else attempts to talk to you about this trial, try to discourage them, do not tell anyone else who is on this jury, but mention the matter to the bailiff when you get back to court so that it can be brought to my attention. In the same way if, while you are outside this courtroom, you inadvertently overhear something about this trial, do not tell anyone else on the jury but tell the bailiff so that can also be brought to my attention. And do not attempt to investigate it or to inquire about the defendant yourselves.
>
> It is inherently unjust for you to act on information which is not in evidence and the prosecution and defence do not know you are acting on. This is because they have not had an opportunity to test the accuracy of the information and whether it is applicable to the particular person. Information in the public area is not always accurate. It may be referring to someone else, e.g. with a similar name. The prosecution and the defence have not had the opportunity to test the material as they do with the evidence.
>
> There have been instances where a jury has made private investigations and mistrials have resulted or new trials have been ordered on successful appeals. That illustrates the unfairness. Also private inquiries may lead to inaccuracies, for example, a scene may well have changed dramatically over time. Private investigations would not reveal what changes have occurred.

A jury direction along similar lines would be very likely to prove helpful in educating the jury as to the importance of their role, and the fundamental principle that they must not go outside the evidence.

It has also been suggested that in order for the law of contempt to have the desired effect, it must be explained to jurors what they are being asked to do and why.[138] David

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[137] Queensland Law Reform Commission *A Review of Jury Directions* (Report No 66, Vol 1, December 2009) at 248-9.

Sklansky has argued that jury instructions work better "when the judge gives the jury a reason to follow them."[139] Thus improving jurors' understanding of the purpose of the law will be essential in ensuring compliance. The US Federal Judicial Centre has issued the following guideline direction:[140]

> You must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as the telephone, a cell phone, smart phone, iPhone, Blackberry or computer, the Internet, any Internet service, any text or instant messaging service, any Internet chat room, blog, or website such as Facebook, MySpace, LinkedIn, YouTube or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict. In other words, you cannot talk to anyone on the phone, correspond with anyone, or electronically communicate with anyone about this case. You can only discuss the case in the jury room with your fellow jurors during deliberations. I expect you will inform me as soon as you become aware of another juror's violation of these instructions. You may not use these electronic means to investigate or communicate about the case because it is important that you decide this case based solely on the evidence presented in this courtroom.
>
> Information on the Internet or available through social media might be wrong, incomplete, or inaccurate. You are only permitted to discuss the case with your fellow jurors during deliberations because they have seen and heard the same evidence you have. In our judicial system, it is important that you are not influenced by anything or anyone outside of this courtroom. Otherwise, your decision may be based on information known only by you and not your fellow jurors or the parties in the case. This would unfairly and adversely impact the judicial process.

The Bench Book for New South Wales also refers to the use of other aids, such as legal textbooks, and instructs jurors that they may not have someone else make inquiries or conduct research on their behalf.[141] Many judges also direct jurors to report any of their colleagues who they see conducting their own research.

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[138] Law Commission of England and Wales, above n 134, at [3.296].
[139] David Sklansky "Evidentiary Instructions and the Jury as Other" (2012) 65 Stan L Rev at 8.
[140] Judicial Conference Committee on Court Administration and Case Management *Model Jury Instructions on The Use of Electronic Technology to Conduct Research on or Communicate about a Case* (2012), cited in Law Commission of England and Wales, above n 134, at [3.194].
[141] Judicial Commission of New South Wales *Criminal Trial Courts Bench Book* (Judicial Commission of New South Wales, Sydney, 2000) at 112.

Jury directions may also be utilised in an attempt to minimise the effect of prejudicial publicity.[142] Where a witness gives evidence that is inadmissible, one remedy for this is a direction to the jury to ignore that particular statement.[143] Similarly, where evidence is of dubious accuracy, for example hearsay evidence, a jury direction is often considered appropriate to remind jurors to be careful about giving it too much weight.[144] It may be that where judges become aware of prejudicial information that has caught the jury's attention, or is likely to, that they can simply issue a direction to the jury to put that information out of their minds.[145] This is the approach taken in the United States, where the First Amendment to the Constitution provides for much greater press freedom.[146]

The obvious question that arises in this context is whether jury directions are effective. As Mathieson points out, "no discussion of the law of evidence in criminal cases will ever be completely satisfactory until we have some idea of the extent to which the average jury understands the directions which the law requires the Judge to give."[147] The Law Commission has noted that:[148]

> In some aspects jurors are treated as if they were low grade morons ... They are assumed to have insufficient intellectual capacity to evaluate ordinary hearsay evidence even with the help of counsel who can point out the dangers of uncross-examined material ... On the other hand, they are deemed to have extraordinary intellectual capacity and superlative emotional control. They can refrain from drawing any inference against an accused because of his failure to testify on his own behalf or against a party who claims privilege preventing disclosure of material facts ... Of course, the truth is that the jurors are neither so foolish as some of the rules they are supported to follow, nor so wise or able as other rules assume them to be.

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[142] Nicol and Robertson, above n 29, at 406.
[143] Evidence Act 2006, s 122.
[144] s 122(2)(a).
[145] *Solicitor-General v Fairfax New Zealand Ltd* HC Wellington CIV-2008-485-705, 10 October 2008 at [126].
[146] Eric Barendt, above n 64, at 334; See also *Nebraska Press Assn v Judge Hugh Stuart* 427 US 539; *Near v Minnesota* 283 US 697.
[147] DL Mathieson *Cross on Evidence* (8th ed, LexisNexis, Wellington, 2005) at [3.2].
[148] Law Commission *Evidence Law: Principles for Reform* (NZLC PP13, 1991) at [26], citing Edmund Morgan in *Model Code of Evidence* (American Law Institute, 1946) at 8-10.

Traditionally, the courts have said that they generally trust juries to put prejudicial information out of their minds in response to judicial directions.[149] However, some studies have cast doubt on the validity of this claim, suggesting that jurors "will defy instructions and do their own research if they feel it will assist them in coming to the right verdict."[150] Therefore it seems that better jury directions about not undertaking their own research, and the reasons for such a restriction, may go some way towards improving compliance, but they are not an answer in themselves.

E Juror Oath and Express Acknowledgment

Another option is to require jurors to provide some form of express acknowledgement of their oath, to show that they understand their duty to decide only on the evidence before them. The Law Commission for England and Wales has recently recommended an amendment to the juror oath in those jurisdictions, to include a promise to base the verdict on the evidence presented in court and not to seek or disclose information relating to the case.[151] It has also recommended that jurors be asked to sign a written declaration on their first day of service, acknowledging that they have been warned not to undertake their own research.[152] This would have the dual effect of educating jurors about the contents and importance of their oath, and providing a clear basis for the imposition of sanctions if necessary.

F Greater Jury Participation in the Trial Process

Another suggestion from the Law Commission would involve alterations to the way evidence is presented and the way that a jury participates in a trial, in an attempt to

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[149] See, for example, *R v Kray*, above n 107; Queensland Law Reform Commission, above n 137, at [4.34]; *Yuill v R* (1993) 69 A Crim R 530 at 453-4; *R v Horsham Justices, ex parte Farquharson* [1982] 1 QB 762 at 162.

[150] Law Commission, above n 20, at [5.37]; Law Commission *Juries in Criminal Trials – Part Two: A summary of the research findings* (NZLC PP37, 1999) at [7.44]-[4.45]; see also Cheryl Thomas *Are Juries Fair?* (Ministry of Justice (UK), Research Series 1/10, February 2010).

[151] Law Commission of England and Wales, above n 134, at [5.35]. (Emphasis added).

[152] At [5.40]-[5.41].

obviate any perceived need on the part of jurors to undertake their own research.[153] Specifically, it has suggested that "making it easier for jurors to ask questions and have the judge explain legal and technical matters" may aid in this endeavour,[154] and that "[g]reater deployment of information technology in the courtroom may also be of some assistance as it could meet some of the interactive need and address juror expectations."[155] The Queensland Law Reform Commission has also suggested that frustration at feeling that they are not meaningfully involved in a trial "might well lead jurors to undertake their own enquiries, contrary to the law and contrary to their oath, if they feel that their task is being thwarted,"[156] and that:[157]

> a frustrated jury is more likely to seek outside information about the case or the defendant than one that is satisfied that it has, or will in due course be given, all the information that it needs. Given the ease with which jurors can make their own enquiries of the circumstances of cases that they are trying, every reasonable effort should be made to seek to ensure that they are not motivated to do so by a feeling of frustration with the trial itself.

The first suggestion, of facilitating juror questions better, is sound. However, it is important to note that jurors are currently able to ask questions of the judge, as the New Zealand Bench Book provides that judges must give the jury advice, before the trial starts, "that if the evidence is confusing, unclear or not heard, or if the jury has any other concerns, then the Judge should be alerted as soon as possible. This may be done by a question to the Judge through the foreperson."[158] There is also provision for the jury to put questions to witnesses if they wish, although these are vetted by the judge first.[159] In spite of this, a 2006 study found that only 39 per cent of New Zealand judges discuss with jurors whether they may ask questions, that many judges "do not encourage jurors to ask questions, while some actually discourage them from doing so."[160] It would seem

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[153] Law Commission, above n 20, at [5.43]-[5.44].
[154] At [5.43].
[155] At [5.44].
[156] Queensland Law Reform Commission, above n 137, at [10.168], citing Chris Richardson "Juries: What they think of us" (December 2003, Qld Bar News, 16).
[157] Queensland Law Reform Commission, above n 137, at [10.187].
[158] Email from Judge William Hastings, above n 136.
[159] Evidence Act 2006, s 101.
[160] Ogloff and others, above n 103, at 16.

then that there is merit in the suggestion that judges should be more encouraging of questions from the jury, and this may in fact "reduce any temptation for jurors to make their own enquiries about the case they are hearing, by reducing jurors' concerns or frustration about particular aspects of the evidence that seem to them to be inadequately covered."[161]

In respect of the second suggestion, it has been said that "if courts want to curb access to information outside the courtroom, a better information flow and more engagement within the courtroom is needed."[162] An Australian Judge has also commented that:[163]

> There is something faintly ridiculous about criticising lay people who go to a standard reference source for assistance on a question of fact such as the meaning of an ordinary English word when that is exactly what any reasonable person would expect them to do.

This demonstrates the need for counsel and judges to be clear and comprehensive in their presentation of evidence and information to a jury. Process matters, such as the order that particular witnesses are called, or whether the defence opens immediately after the prosecution, can have a significant impact on jurors' comprehension of the issues in the trial.[164] Other initiatives may also need to be considered, such as providing for the use of a computer in the jury room, or presenting information using a range of media. Both of these may assist the jury's understanding of important terms within the trial, and reduce their need to go beyond the information presented in court.

G Statutory Criminalisation of Independent Research by Jurors

The Criminal Justice and Courts Bill (UK) would amend the Juries Act 1974 (UK) to make it a statutory offence, punishable by a fine or two years' imprisonment, or both, for jurors to conduct their own research into matters relating to trial.[165] New South Wales,

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[161] Queensland Law Reform Commission above n 137, at [10.167].
[162] Jacqueline Horan "Juries in the 21st Century" (Federation Press, Melbourne, 2012) at 198-200.
[163] *R v Benbrika* (Ruling Nos 35.01-35.11) [2009] VSC 142 at [114] per Bongiorno J.
[164] Ogloff and others, above n 103, at 4.
[165] Criminal Justice and Courts Bill (UK) 2013-2014 (192), cl 42. See Appendix.

Queensland, and Victoria already have similar laws.[166] It would also make it an offence to disclose information about the jury's deliberations,[167] and provide for jurors to be required to surrender electronic communications devices, with court officers having search powers to enforce the requirement.[168] In this section I consider whether New Zealand ought to adopt a similar provision.

A major advantage of introducing a statutory offence along the lines of the UK Bill would be to provide for greater clarity for jurors. It is already a contempt of court for jurors to undertake independent research. However, it is not clear whether it is a common law contempt by its own nature, or a contempt pursuant to section 365(1)(c) of the Criminal Procedure Act.[169] The content of judges' directions is not uniform,[170] meaning that it may not always be clear whether section 365 is available to prosecute a juror who is found to have conducted their own research. Further, judicial directions may not be sufficiently explicit. For example, instructing a jury to come to its verdict "on the evidence" would seem to imply that the jury must not consider anything outside the evidence, but it could be clearer. What constitutes "research" or "going beyond the evidence" may not always be clear either – in some cases jurors have thought it was permissible to look up legal definitions, for example.[171]

The UK Bill is very clear - potential or current jurors should be easily able to ascertain what types of conduct are or are not prohibited. Subsection (2) provides that a person "researches" a case only if they intentionally seek information, and that, when they do so, they know or ought reasonably to know that the information may be relevant to the case. For example, subsection (4) lists different types of information that may constitute "information relevant to the case" and includes matters such as the law relating to the case, the law of evidence, and any person involved in any way in the trial. A provision along the lines of the UK Bill would be an improvement on the current law. Jurors will be

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166 Jury Act 1977 (NSW), s 68C; Jury Act 1995 (Qld), s 69A; Juries Act 2000 (Vic), s 78A.
167 Juries Act 1974 (UK), s 45, as amended by Criminal Justice and Courts Bill (UK) 2013-2014.
168 s 40, 41.
169 Law Commission, above n 20, [5.13]-[5.16].
170 At [5.17].
171 Law Commission, *Juries in Criminal Trials – Part Two: A summary of the research findings*, above n 123.

in a better position to appreciate their limitations if this forbidden form of conduct is defined by Parliament.[172]

It would seem obvious that there is a rational connection between the limiting provision and its objective, and it has been noted by New Zealand judges that it would be rare for a court to conclude that the objective of the legislature in criminalising certain behaviour was a policy goal without legitimacy.[173] If jurors are deterred from undertaking independent research because of this legislation, then they are less likely to come into contact with information that may prejudice the fairness of the trial or may adversely affect public perceptions of the court system. For such a provision to be effective, it must be explained to jurors what they are being asked to do and why.[174] If they are not told why they cannot look on the Internet for information, for example, they may be given the impression that there is some particularly scandalous information there for them to find.[175] Improving jurors' understanding of the purpose of the law will be essential in ensuring compliance.

The largest area of concern with respect to statutory criminalisation is likely to be that of proportionality. It has been suggested jury service is already a significant imposition into people's lives, and that exposing jurors to potential statutory criminal sanctions is unwarranted and will result in more people seeking to be excused from performing this civic duty.[176] However, the wording of the provision should alleviate this concern somewhat. For example, it ensures that a juror who accidentally receives information, for example if it is posted by a friend on a social media website, has not committed an offence.[177] It is also possible that a sentencing judge would take into account the degree of effort to which a juror went in order to access the information. Whether or not the

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[172] (11 March 2014) Public Bill Committee Debate GBPD HC 71, per Professor David Ormerod, Law Commissioner for Criminal Law.
[173] *Hansen v R*, above n 9, at [207] per McGrath J.
[174] Law Commission of England and Wales, above n 134, at [3.296].
[175] At [3.212]; Law Commission *Juries in Criminal Trials – Discussion Paper*, above n 90, at 56.
[176] Law Commission, above n 20, at [5.49].
[177] Law Commission of England and Wales, above n 134, at [3.95].

offending juror shared the information with other jurors, or tried to influence them using the information they obtained, may also be a relevant factor.[178]

H Judge-Alone Trials

One option that the Law Commission also considered was "some broadening of the grounds [for a judge-alone trial] to also cover the risk of significant prejudicial pretrial publicity preventing a fair trial before a jury."[179] There are already some jurisdictions that allow a judge-alone trial where there are concerns that there is no way to get around the problem of pretrial publicity. Queensland is one such example, where the Criminal Code Act 1899 specifically lists the danger of pretrial publicity that may affect jury deliberations as a risk factor that a judge can consider when deciding whether a judge-alone trial is appropriate.[180]

Our Law Commission has suggested that a judge-alone trial would be appropriate only where that is "the only effective way to overcome the problem" of prejudicial pretrial publicity.[181] This suggestion is in line with the fact that there are very limited grounds on which a trial judge may determine that there should be a judge-alone trial: the Criminal Procedure Act 2011 only permits a judge-alone trial where the case is long and complex or where jurors have been intimidated.[182] The importance of a jury trial is also recognised in the fact that category four, or the most serious offences, must be tried by a jury.[183] I consider the Law Commission's suggested approach to be appropriate, therefore. It is important that the media do not dictate the mode of trial.[184]

V Recommendations

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[178] See for example, Law Commission, above n 20, at [5.50]; *Attorney-General v Fraill and Sewart*, above n 6, at [55].
[179] Law Commission, above n 20, at [5.54].
[180] Criminal Code Act 1899 (Qld), s 615(4)(c).
[181] Law Commission, above n 20, at [5.54]
[182] Criminal Procedure Act 2011, ss 102-103.
[183] See also *Kingswell v The Queen* (1985) 159 CLR 264, [1985] HCA 72 at [52].
[184] Law Commission *Juries in Criminal Trials* (R 69, 2001) at 48.

In this final section, I make recommendations as to the best options for reforming the law of contempt of court. Primarily, I argue that the focus should be on preventing jurors from undertaking their own research, rather than on prohibiting publication. I suggest that the offence of jurors undertaking their own investigation be codified, along similar lines to the UK Bill. I recommend that statutory criminalisation be accompanied by a suite of measures to improve juror understanding of the importance of not looking outside the evidence, and to decrease any problems that currently exist in the trial process that may prompt jurors to undertake their own research.

New Zealand has not yet experienced major problems with jurors undertaking independent research,[185] and even in the UK research has found that "the overwhelming majority of jurors understand the rules and abide by them."[186] However, in light of our Law Commission's work on contempt of court, and growing concerns around the use of the Internet, it is important that our law is equipped to deal with this problem should it arise. Research carried out in the UK has suggested that up to 23 per cent of jurors are "confused" about the rule that they should not use the Internet to conduct their own research, and at least seven per cent had researched online the case which they were deciding.[187] There are also some reported cases in New Zealand of jurors undertaking their own investigations, as discussed earlier in this paper.

It is also important to recognise that the degree of the problem cannot be accurately assessed as it may be very difficult to detect. There are two main reasons for this: the first is that where a juror undertakes research on a personal electronic device, the court will have no reasonable way of finding out about this. Even if the court orders jurors to surrender their electronic devices while they are present at court, there is nothing to stop them conducting their own research at home later. The second reason is that jury deliberations are confidential. This is mitigated somewhat by s 76(3) of the Evidence Act 2006 which allows a person to give evidence about jury deliberations if the particular circumstances are sufficiently compelling, depending on the judge's assessment of

[185] Law Commission, above n 20, at [5.13].
[186] (13 March 2014) Public Bill Committee Debate GBPD HC 125, per Professor Cheryl Thomas.
[187] Law Commission of England and Wales, above n 134, at [3.29].

balance, between the public interest in confidentiality and the public interest in ensuring justice is done.[188] In *R v Young*, where four jurors met in the hotel where they were staying to conduct their deliberations, and consulted a *ouija* board to contact a murder victim to ask who had killed them, the Judges were concerned about whether it was legitimate for them to consider what the jury had done during their period of sequestration at the hotel room.[189] While they decided that the time the jury spent at the hotel was break time, rather than technically part of their deliberations, so was open to judicial scrutiny and comment, this does illustrate the potential difficulties that could arise with judges interfering with jury deliberations.[190]

The difficulties in conducting research into juror behaviour, and the uncertain degree of the problem, should cause policy-makers to be cautious about the issue of jurors undertaking independent research. Because of the difficulties in detecting misconduct, and because most research into juror behaviour relies on self-reporting,[191] there are probably more cases of jurors undertaking their own research than are reported. It is important therefore to consider how the law could best be adapted to resolve this problem.

A The Law Should Focus on Preventing Jurors Undertaking Their Own Research

The focus of this aspect of the contempt jurisdiction to date has largely been on publishers – we aim to prevent publication of prejudicial information rather than putting the onus on jurors to avoid coming into contact with that information. However, this is flawed for several reasons. First, a focus on publication contempt limits the publishers' right to impart, and the public's right to receive information to a far greater extent than a ban on juror research would. There may be a legitimate public interest in knowing about certain trials, and being able to debate issues arising from those trials.[192] The nebulous

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[188] Evidence Act 2006, s76(3)-(4).
[189] [1995] QB 324.
[190] See also *R v Coombs* [1985] 1 NZLR 318; *Ellis v Deheer* [1922] 2 KB 113, 118.
[191] Law Commission *Juries in Criminal Trials – Part Two: A summary of the research* findings, above n 123, at 5.
[192] *The Sunday Times v United Kingdom* (1979) 2 EHRR 245 at [66]-[67].

nature of the "real risk" test may have a chilling effect on publication beyond what the scope of the law is in fact, meaning that the public is not privy to vast amounts of information that technically could be published. An example of this may be where a newspaper wishes to publish a general comment on an area of the law or a type of offence, but is deterred from doing so because there is a pending or current trial where that area of law is being applied. If we focused more on preventing jurors accessing information, then we might be able to relax the law relating to publication contempt to some degree. This would allow greater freedom of expression for the media and greater access to information for the general public.

Secondly, there are types of information that are unrelated to the types of prejudicial information that may be published by the media but that, if accessed by jurors, may undermine the administration of justice. For example, a juror may prejudice the administration of justice by looking up definitions of legal terms, or by accessing inaccurate information inadvertently. The Law Commission gives the example of a juror googling a defendant with a relatively common name, such as "David Smith", and finding information about another person by the same name.[193] Finally, if it is found that a juror has broken the rules and accessed extraneous material, the trial may have to be aborted. Where this leads to a retrial,[194] significant costs are incurred, and much time is taken up, which also has an impact on witnesses and victims who must go through the trial process once again.[195] In each of these circumstances, public confidence in the administration of justice and the jury system may be adversely affected.[196] The possibility of victims and other witnesses having to go through the trial process all over again is significant, given the high proportion of jury trials that involve sexual offending.[197]

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[193] Law Commission, above n 20, at [5.20].
[194] See, for example, *R v Tainui* [2008] NZCA 119; *Neale v R* [2010] NZCA 167.
[195] Law Commission, above n 20, at [5.21].
[196] At [5.22].
[197] Ministry of Justice *Improvements to Sexual Violence Legislation in New Zealand – Discussion Document* (Ministry of Justice, Wellington, 2008).

Finally, limiting jurors' rights to undertake their own research is more directly focused on the harm in question: that of juror prejudice. [198] Some research has suggested that the extent to which exposure to prejudicial information actually undermines jurors' impartiality is minimal.[199] The fact that judges routinely give directions to juries to disregard evidence offered that turns out to be inadmissible, or to avoid placing too much weight on particular pieces of evidence, suggests that our system places a reasonable degree of trust in the jury to follow instructions and use evidence appropriately in reaching their verdicts.[200] However, there is a greater risk of prejudice or inappropriate use of information not in evidence where a juror actually seeks out the information themselves. The fact that a juror has gone to the effort of searching for information to aid or supplement his or her understanding would suggest that her or she intended to make use of this information in reaching their verdict. Thus the law's interest in preventing jurors from undertaking their own research is stronger than its interest in limiting publication.

On a practical level, it is also proving far more difficult nowadays to control the media, as the Internet "allows anyone to be a publisher",[201] and many modern forms of media such as blogs may not adhere to strict media law or guidelines for publication, and may be less scrupulous about publishing prejudicial or inaccurate information. The proliferation of online fora where information can be imparted also means the courts may not be aware of prejudicial information that is published, and may be unable to prevent certain information being imparted. While this should not mean that the modern media is given absolute freedom to publish, it does bring into focus the need for the law to improve other types of measures designed at preventing juror prejudice.

Of course, a focus on juror research should not mean that there are no restrictions on publication whatsoever. There are two reasons for this: first, that information about a trial or an accused person may be published prior to a jury being empanelled, but may be

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[198] Law Commission of England and Wales above n 134, at [3.12].
[199] Law Commission *Juries in Criminal Trials*, above n 184, at 175.
[200] See also *R v Hubbert*, above n 73, at [33].
[201] *Police v Slater*, above n 69, at [11].

highly prejudicial; secondly, there is still a risk that jurors will accidentally access prejudicial information during the course of the trial. I do not argue in this paper that the offence of jurors undertaking their own research should be strict liability in nature – that would constitute too great a limit on their ability to use information and communications technology and it would be arguably too harsh to impose a punishment on jurors who accidentally access information, especially given that many people view jury service as an unwanted imposition into their lives already.

Judges and commentators acknowledge that jurors are not "blank slates" and that they bring a wealth of personal experience and knowledge with them to their task. Part of the rationale for having juries is that they bring together a range of views from a cross-section of the community.[202] It is implicit in this that we expect jurors to put their life experience and capabilities to use in performing their role. It has also been acknowledged that it would be virtually impossible, or at least "unrealistic" to expect to be able to empanel a jury in which no one was aware of any prejudicial publicity or background information to the case.[203] Thus the objective of the law should be to mitigate any prejudice arising from information accessed either before the trial, or accessed by accident during a trial, rather than to prevent access to that information.

There are a number of options that could be explored to address this concern about prejudicial publicity. One is to require jurors to inform a judge if they accidentally come across external information relating to the case during their term of jury service. For example, if a juror came across an article or opinion posted by one of their friends on a social media site, they may have become privy to prejudicial information unintentionally. Requiring them to inform the judge would necessarily require them to form some appreciation of the risk that such information may affect their ability to be impartial. If they have acknowledged the potential that they may be influenced by this information, and that any such influence would be improper, then they are likely to be wary of using that information in their deliberations. The judge would also be able to assess whether the

[202] See generally Dunstan and others, above n 110.
[203] *R v Hubbert*, above n 73, at [33].

information was of such a degree of prejudice that a mistrial ought to be ordered, or whether an appropriate judicial direction would suffice.

There will inevitably be some information that is so prejudicial that it is not worth the risk to the administration of justice to allow its publication. For example, publishing information about a person's previous convictions, where that information has been found inadmissible at trial because its unfair prejudicial effect is not outweighed by its probative value, should not be published in the lead-up to, or during, a trial.[204] The recommendation I make in this paper is not that there should be no limitations on publication whatsoever, but that publication freedom could be widened, improving the media and the general public's rights to freedom of expression, if there was a greater focus on juror misconduct. It will be open to the courts or the legislature to adopt lesser controls on publication, thus limiting the chilling effect and uncertainty of the law, if the instance of jurors undertaking their own research is curtailed.

B Statutory Criminalisation of Independent Juror Research

In the light of the importance of an accused's right to a fair trial, and of the public's confidence in the administration of justice, it does seem that statutory criminalisation of independent research by jurors would constitute a justifiable limit on the right to freedom of expression in terms of section 5 of the New Zealand Bill of Rights Act. It would be a temporary and clearly-defined limitation that does not infringe on the right to any significant degree more than the current law of contempt. While there may be less punitive alternatives available, such as improving juror education, the common law already seems to prohibit this type of conduct, so there need be no additional impact on freedom of expression. In fact it is better that such conduct is subject to a clear statutory offence rather than judicial discretion. If New Zealand chooses to adopt a similar provision it should be combined with more proactive initiatives to aid jurors' understanding of the law and its purpose in order to encourage compliance.

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[204] Evidence Act 2006, s 8; Law Commission, above n 20, at [4.16].

I argue that a provision along the lines of the UK Bill would be justified in New Zealand because it is narrow and does not impose a much greater limit on the right to freedom of expression than the common law currently does. In fact it may actually result in a lesser practical limitation on freedom of expression, because it is clearly-defined so as to minimise any chilling effect that currently arises from uncertainty in the law. The limitation on jurors' rights to seek and receive information imposed by this measure is not significant. First, the statutory provision is worded in such a way as to limit the right to seek specific types of information relating to the proceedings. Secondly, the limit to the right to seek information is imposed for a defined and finite period of time. The limitation begins once a person is sworn in as a member of a jury, and concludes when the jury is discharged.[205] Outside those times the person is free to seek whatever information they wish to. It is also worth noting here that certain other infringements on the right to freedom of expression are imposed on jurors that are more onerous and long-lasting than this, but are still considered justifiable – for example, jury deliberations being secret.[206] Thirdly, as noted above, the necessary *mens rea* is intention, so jurors who receive information without the relevant intention will not have committed an offence.

The changes in technology and social circumstances justify the introduction of a new statutory offence. Moreover, the creation of a statutory offence is likely to have an educative and a deterrent effect, which would further these important objectives. The only aspect of the UK Bill that would be out of proportion in New Zealand is the two-year sentence of imprisonment; if a similar provision was to be adopted here it would be likely that the maximum penalty would be three months imprisonment, to ensure it was in proportion with other contempt-type offences.[207]

However, there are some problems with the UK Bill in that certain aspects that make the provision less objectionable from a freedom of expression perspective may also limit its efficacy. For example, the offence is limited to where a juror "intentionally" seeks information. While this may be justified in that criminal penalties should not be imposed

[205] Juries Act 1974, s 20A(5), as proposed by Criminal Justice and Courts Bill 2013-2014, cl 42(3).
[206] *Solicitor-General v Radio New Zealand Ltd* above n 11, at 55.
[207] See Criminal Procedure Act 2011, s 365 (2)(b)(i).

lightly and where no relevant *mens rea* exists, it removes any onus on jurors to take active steps to avoid being exposed to certain information, so that they may still scroll through news websites, for example, and not be caught by the provision.[208] The fact that the provision poses an objective standard for knowing that information sought is relevant to the trial goes some way to ameliorating this issue, as it means that a juror cannot plead ignorance of the fact that a particular definition, for example, is relevant.[209] The Law Commission for England and Wales has also noted that although the provision is likely to have a strong deterrent effect, there will still be some sworn jurors who will fail to comply, and so removal of prejudicial publications from the Internet will also be necessary.[210]

C Other Measures to Discourage Jurors From Undertaking Their Own Research

The New Zealand Law Commission has demonstrated a preference for more educative measures, rather than the introduction of a statutory offence.[211] The limit each option imposes on jurors' rights to freedom of expression is comparable, but these options are less punitive. Nevertheless, it recommended a statutory offence to deal with cases where jurors conduct their own research in the face of clear, unequivocal, directions to refrain from doing so.[212] I would similarly suggest that a range of non-punitive measures be introduced in order to minimise juror research.

First and foremost, measures aimed at improving jurors' understanding of the importance of not conducting their own research ought to be adopted. These may include more comprehensive, standardised judicial directions as to precisely what forms of conduct are prohibited, and the reasons for this. An explanation of the importance of an accused's right to a fair trial, the problems with using information that was not subject to evidential inquiries and cross-examination, as well as of some of the additional harms, such as the

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[208] Law Commission of England and *Wales*, above n 134, at [3.10].
[209] Juries Act 1974 (UK), s 20A(2)(b), as proposed by Criminal Justice and Courts Bill 2013-2014, cl 42(3).
[210] Law Commission of England and Wales, above n 134, at [2.124].
[211] Law Commission, above n 20, at [5.55].
[212] At [5.56].

impact on witnesses if they have to go through the trial process again, may also help in this endeavour. The juror oath should also be amended to exclude more explicitly jurors undertaking their own research.

The second general area of reform measures should focus on addressing the reasons why jurors may currently feel the need to undertake their own research. It is suggested that jurors who undertake their own research into a case do so because they feel they are not being given enough information to decide, or because the information is presented to them in a confusing manner.[213] We should not be surprised, then, if a generation of Internet-savvy jurors sees a Google search as the best and most obvious way to resolve any confusion. Specific measures that should be adopted include making it easier for jurors to ask questions during a trial, and providing better access to information about elements of the offence and the court process.[214] One option would be to provide for the use of computers or tablets with locked applications to provide limited information such as definitions of offences, to which jurors can refer. It is suggested that this would be more effective than hard copies of information, as jurors may find it less helpful to sort through large volumes of paper material.

Making jurors aware of the importance of not undertaking their own research, and limiting any perceived need on their part to do so, is likely to have the greatest effect on independent juror research. This is important also because of the difficulty in detecting when a juror has undertaken their own investigations. A criminal offence is likely to be little-used in practice, but combined with educational measures it is likely to have a strong deterrent effect, thus promoting greater protection of the administration of justice.

VI Conclusion

In this I paper have considered the status of the contempt jurisdiction in New Zealand and the issues posed by the development of modern communications technology, as well as

[213] At [5.44]; Jacquline Horan, above n 162, at 198.
[214] Law Commission, above n 20, at [5.43]-[5.44].

suggesting options for reform. The law on contempt of court has the potential to infringe severely on the right to freedom of expression. However, the right to a fair trial is considered to be absolute, and it may be severely undermined where prejudicial information is published on social media or where jurors undertake independent research. The law must adapt to meet the challenges of the social media age. Each of the options discussed has advantages as well as disadvantages, in terms of both efficacy and impact on rights. There is one school of thought that it is impossible for the law to preserve the integrity of criminal trials, as there will always be methods to circumvent the law using modern media.[215] However, given the impact that juror research or jurors being influenced by the media can have on a trial, it is important that the law finds some strategy to deal with modern technology.

In this paper I have highlighted the importance of focusing not just on those who wish to publish information, but on jurors who may be in contempt if they seek out information relevant to a trial. Much of the scholarship to date has focused solely on the freedom of expression rights of publishers. This is unfortunate: while I do not suggest that there should be no limits on publication, I have argued that there should be a greater relative limit on the freedom of expression rights of jurors to seek information, than on the rights of publishers to impart information about trials and those of the public to receive it. The harm that both juror misconduct and publication contempts are seeking to address is that of juror prejudice. Focusing on preventing jurors from accessing prejudicial information is thus more directly targeting the problem. Further, there is the potential for jurors to gain inaccurate understandings of the law from undertaking their own research.

I have recommended that the best approach to reforming the law of contempt is to begin with codification of specific forms of contempt. In this paper I have focused on codification of the offence of jurors undertaking their own research, and argued that the UK Criminal Justice and Courts Bill strikes an appropriate balance between limiting jurors' freedom to seek information, and protecting the right to a fair trial. There are a number of benefits to statutory criminalisation: most significantly, there is scope for

[215] See Smith, above n 14, at 23.

much greater clarity in the law if it is codified, and jurors are likely to have a greater appreciation of the importance of not conducting their own research if it is included in a criminal statute – the corollary is that judges can point to the criminal provision to back up their direction to the jury not to undertake their own research.

The second broad recommendation I have made in this paper relates to more educative measures, aimed at limiting the motivations for jurors to undertake their own research. In particular, measures that will promote greater juror understanding of the importance of not using external information, and measures that will improve the trial process so that jurors do not feel a need to undertake their own research, such as better judicial directions, amending the juror oath to reflect the importance of not looking outside the evidence, greater use of information technology and interactions with jurors, and potentially adopting a more interactive approach to empanelling jurors in some case, will be necessary. This is important because of the difficulty in detecting juror research using modern technology. I suggest that the law will be most effective where jurors understand the reasons for not undertaking their own research and where they feel that they are receiving adequate information during the trial so that there is no need for them to make further inquiries. Statutory criminalisation will have a role to play in educating jurors, but a combination of the other measures I have identified will also be necessary if the law is to meet the challenges of contemporary information and communications technology, and continue to uphold the right to a fair trial.

Word count

The text of this paper (excluding title page, table of contents, footnotes, appendix, and bibliography) comprises exactly 14,999 words.

VII Appendix: Criminal Justice and Courts Bill (UK) (extract)

20A Offence: research by jurors

(1) 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, subject to the exceptions in subsections (6) and (7).

(2) A person researches a case if (and only if) the person—

(a) intentionally seeks information, and

(b) when doing so, knows or ought reasonably to know that the information is or may be relevant to the case.

(3) The ways in which a person may seek information include—

(a) asking a question,

(b) searching an electronic database, including by means of the Internet,

(c) visiting or inspecting a place or object,

(d) conducting an experiment, and

(e) asking another person to seek the information.

(4) Information relevant to the case includes information about—

(a) a person involved in events relevant to the case,

(b) the judge dealing with the issue,

(c) any other person involved in the trial, whether as a lawyer, a witness or otherwise,

(d) the law relating to the case,

(e) the law of evidence, and

(f) court procedure.

(5) "The trial period", in relation to a member of a jury that tries an issue, is the period—

(a) beginning when the person is sworn to try the issue, and

(b) ending when the judge discharges the jury or, if earlier, when the judge discharges the person.

(6) It is not an offence under this section for a person to seek information if the person needs the information for a reason which is not connected with the case.

(7) It is not an offence under this section for a person—

(a) to attend proceedings before the court on the issue;

(b) to seek information from the judge dealing with the issue;

(c) to do anything which the judge dealing with the issue directs or authorises the person to do;

(d) 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;

(e) to do anything else which is reasonably necessary in order for the jury to try the issue.

(8) A person guilty of an offence under this section is liable, on conviction on indictment, to imprisonment for a term not exceeding 2 years or a fine (or both).

(9) Proceedings for an offence under this section may only be instituted by or with the consent of the Attorney General.

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