JURORS’ NOTIONS OF JUSTICE

An Empirical Study of Motivations to Investigate & Obedience to Judicial Directions

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I wish to thank the current and the former Chief Justices of New South Wales, the Honourable TF Bathurst QC and James Spigelman AC QC, the current and former Attorneys General of New South Wales, the Honourable Greg Smith SC MP and John Hatzistergos, and the Chief Judge of the District Court, the Honourable Justice RO Blanch AM, for their support of this project. I also thank the members of the Jury Task Force. They have supported this project from its inception.

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Finally, special thanks go to the 78 jurors who participated in this project. Each one of them took time and considerable effort to respond to the questionnaire to enable a better understanding of the juror perspective.

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EXECUTIVE SUMMARY

... I really hope we don’t have a Miss Marple or a Hercule Poirot on the jury. This note, which is the jury’s second note today … is [the jury’s] seventh note [in the trial].

Judge Golf

INTRODUCTION

This report of the UNSW Jury Study documents a unique study of actual juror attitudes to ‘fact-finding’ in the jury deliberation process with particular reference to juror views on personal investigation and research. Seventy eight (78) jurors across 20 criminal trials - just under 33% of those sitting on the 20 juries - responded to questionnaires administered post-verdict. The Study is in fact made up of two smaller studies. The first set of 10 trials took place between 2004 and 2006 (referred to as the Pilot Jury Study) and the second set of 10 trials took place in 2011 (referred to as the Jury2 Study). The report draws upon information from trial transcripts and from interviews with all 14 presiding judges and with the vast majority of counsel.

‘Juror sleuthing’, which refers to the conduct of jurors who investigate or research law or facts about a trial before a verdict, is never acceptable. There are no shades of grey. As well as side-stepping exclusionary rules of evidence, juror sleuthing offends the fairness of the trial process because it allows the judges of fact to determine guilt or innocence on the basis of information unknown to the accused person and those tasked with testing evidence, counsel. It undermines the public nature of the taking of evidence in our criminal trials and it converts the trial from one that puts the prosecution to proof to a process where a verdict may be founded on secret, untested and potentially flawed information.

Since late 2004 in New South Wales this form of juror misconduct has constituted a serious criminal offence with a maximum penalty of up to 2 years imprisonment and a heavy fine. In New South Wales, like elsewhere in Australia, jurors are directed by judges not to engage in research and investigation, and juror’s own oath, to ‘give a true verdict according to the evidence’ creates a formal personal commitment to obey the law. Yet case law regularly documents instances of juror sleuths. The findings in this study reveal a need to review current processes and support for jurors and to that end this report concludes with a number of strategies that are informed by the research it documents. These strategies focus on recalibrating how to inform and support jurors.

1 Distributed by Sheriff’s officers to the jurors after each trial. See Appendix C.
in their task. It is suggested that through the recommended modifications, particularly if they are well-informed and properly assessed, significant and important benefits should accrue to the workings of the criminal trial and to enhancing jurors’ experience.

Before summarising the findings it should be acknowledged that this study is best appreciated in the context of the legal and philosophical framework of the Anglo-Australian common law criminal trial by which the prosecutor, as the state’s representative is obliged by law to respect an accused’s presumption of innocence. In its practical expression where criminal charges are contested at trial this presumption embodies a collection of rights such as the right of an accused to remain silent, to call no evidence and to put the prosecution to proof of its criminal accusations. If the prosecution fails to satisfy its heavy burden of proof, a verdict of acquittal does not represent a finding of innocence (though it does restore the presumption of innocence). An acquittal merely indicates that the prosecution has failed to prove its case to the very high standard of beyond reasonable doubt. In other words the verdict in a common law trial represents ‘procedural’ or ‘legal’ truth. It is not the product of an inquiry to determine what ‘really’ happened (that is ‘objective’ or ‘factual’ truth). The verdict is merely a reflection of whether the prosecution case has been successful in legal terms. Further, our system relies on processes that sift the information that enters the courtroom. Rules of evidence can operate fiercely to limit information and because trials rely on parties choosing the evidence they put before the court (in contrast to a system where courts collect evidence to ensure that they are a thoroughly-informed court of inquiry), party selectivity can also contribute to evidentiary gaps in a trial. These gaps are viewed by the law as only notable where they impact on the party bearing the burden of proof, that is, the prosecution.

JURORS’ NOTIONS OF JUSTICE

Jurors arrive in the court precinct with their own preconceptions of criminal trials. Inevitably many will be influenced by media and by fiction. These both tend to present the trial as pivoting around the viewpoint of crime investigators. Typically criminal processes, including the trial, are portrayed as a pursuit of objective or factual truth. This report takes as a baseline that popular culture influences community attitudes to trials and to justice and for this reason it is perhaps understandable therefore to see that this study reveals a clash between jurors’ notions of justice and the fundamental requirements of a common law criminal trial. As juror comments show, this clash places a heavy burden on trial judges to ensure jurors understand and apply the presumption of innocence.

Jurors in this study typically expressed their views on the trial process candidly and often forthrightly. Multiple examples of comments are included in the body of this report. Aside from the juror-as-investigator issue, the themes distilled from juror

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*Discussed in greater detail in Part II of this report.*
comments and discussed in this report were serendipitous to the questionnaire. In other words, no juror was asked to determine whether the trial in which they engaged applied procedural truth or objective truth; none were asked their views of counsel, of judges or of whether they found the process frustrating or stressful. Therefore, where these topics emerged spontaneously from juror comments it is highly probable that they reflect sincerely-held views. Their unprompted appearance in the questionnaires suggests that these views are likely to be also strongly held.

The comments can be divided into two broad groups. The first group (see 1. below), contain jurors’ reactions to the trial process and in particular their potentially diminished respect for elements of that process. The second group (see 2. below), contain views that reflect jurors’ notions of justice that are significant because the misconceptions of the trial expressed by many jurors run counter to the law’s requirements for a fair trial.

**SUMMARY OF CONCLUSIONS**

The Study does not support the assessment that jurors who thought it was acceptable to breach a judge’s direction were renegades or inclined to flout justice. The findings reveal that many jurors were genuinely frustrated by gaps in evidence, by court processes and by legal professionals, who they perceived, did not sufficiently assist jurors to do their job. There may be a small element of defiance but the total picture revealed by juror respondents suggests that they were focused on doing their task well but often with a flawed appreciation of what justice required. Support for this view comes from an additional telling statistic, namely that the dominant priority expressed by jurors\(^3\) was that they should be fair to the accused.

Most jurors in this study found private juror enquiry (that is, investigation or research) unacceptable. Nevertheless the comments to the contrary are of concern because a trial only needs one juror to act on their own information-gathering inclination to create substantial unfairness and a miscarriage of justice. This single juror may, consciously or unconsciously, rely on the information that they have found or they may impart it directly or indirectly to other jurors through conclusions that they have drawn from their private investigation or research, with or without revealing their information source. The information may be inadmissible, incorrect or misleading and an accused may be tried on secret and untested ‘evidence,’ a process that is anathema to any notion of a fair trial. The findings in summary are as follows.

1. In terms of reactions to court process:

   a. Twenty one (21) jurors, over 25% of juror respondents, (across 14 trials) were critical of the effectiveness of counsel and/or police investigator.

\(^3\) Surveyed only in the *Jury2 Study*, see Appendix C, Q 6A.
b. Thirteen (13) of the 78 juror respondents (across 8 trials) expressed stress and frustration. This was typically directed at the process and at times towards counsel or the police.

2. In addition, misconceptions of justice, at odds with the fundamental prerequisites of law’s notion of a fair trial, emerged in relation to approximately half of the 78 jurors (across 17 of the 20 trials):
   
   a. Twenty six (26) jurors, that is, 33% of juror respondents, (from 16 trials) indicated that they treated their task as requiring them to determine objective, not procedural truth.
   
   b. Sixteen (16) jurors, that is, just over 20% of the juror respondents (sitting in 11 trials) either viewed the prosecution and the defence as equal adversaries or they indicated that defence rights were not justified.
   
   c. Twelve (12) jurors indicated (including, in 2 instances by their actions) the belief that juror investigation and research is ‘very acceptable’ where a juror is frustrated with the adequacy of evidence in a criminal trial. An additional 2 jurors were neutral on the topic. These 14 jurors, 18% of juror respondents, were spread over 50% of the 20 trials.

3. It is notable that in the Study there was an increased incidence of juror comments reflecting these misconceptions\(^5\) where trials involved high factual ambiguity and/or raised great emotional stress (or ‘verdict determination challenge’). This is revealed in Table 4\(^6\) where the more challenging trials (Trials 14-20) show heightened repetition of juror misconceptions of the legal process compared to the trials that did not appear to present such pronounced forensic challenges for jurors (Trials 1-7). Table 3\(^7\) shows a similar result with respect to juror comments relating to stress and frustration, criticism of counsel or of police and of defence rights.

4. Juror comments in Table 5\(^8\) reveal a slight tendency for juror misconceptions, expressions of frustration and disparagement of counsel and police to cluster in certain trials. Interestingly, juror acceptance and/or willingness to engage in private enquiry congregated in 10\(^9\) of the 12 trials considered to present jurors with the greatest verdict determination challenge.

5. All juries received clear instruction from the trial judge on the presumption of innocence, the accused’s right to silence and the prosecutor’s obligation to prove its case beyond reasonable doubt. All juries were also directed by the judge regarding the

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\(^4\) Significant because a stance of neutrality indicates failure to accept a judge’s direction on prohibited conduct.

\(^5\) That is, juror comments antagonistic to defence rights, reflecting a view that their goal is to reach a verdict based on objective truth and views that suggest private juror investigation is acceptable.

\(^6\) At page 20.

\(^7\) At page 19.

\(^8\) At page 21.

\(^9\) That is, excluding trials 19 and 20.
prohibition on engaging in investigation and research. However the findings suggest that for at least some jurors the judicial directions fell short of their intended mark:

a. Ten (10) of the 12 jurors who found sleuthing to be acceptable or were neutral on the issue held their view despite themselves acknowledging that they had received clear judicial directions to the contrary. In addition, 6 of these 10 jurors were told clearly and distinctly through judicial directions that such conduct was a crime.

b. Two (2) jurors engaged in their own investigation and research despite clear directions to the contrary.

6. Some interesting observations can be made from the findings with respect to the impact of criminalising juror investigation and research:

a. In more than 50% of the trials, but more predominantly in the earlier Pilot Jury Study trials, presiding judges did not tell the jury that a juror who investigates or engages in research commits a criminal offence.

b. In only 4 trials, all held in 2011, did presiding judges inform the jury that a juror investigator/researcher committed a serious criminal offence.

c. In each of these 4 trials where jurors were told that private enquiry is a serious crime a juror expressed views in total contradiction to the judicial direction. Three (3) of those 4 jurors acknowledged that the trial judges’ directions were clear.

d. In the 2 trials where juror enquiry took place the judge had indicated that this misconduct was a criminal offence. No juror reported the juror investigator to the judge, despite (i) the judge indicating the desirability of doing so to the jury and (ii) juror comments indicating knowledge of the misconduct. One of these comments included the request for ‘[a]n easier way for other members of the jury to talk to someone about anything they have heard another jury member doing’. In the other instance a juror expressed disapproval of reliance on the information improperly obtained, but still said nothing to the judge.

Despite a number of reports of juror misconduct in case law, there have been no prosecutions under section 68C of the Jury Act 1977 (NSW) since it was introduced in late 2004. The above findings, together with the implication that section 68C may be serving a purely symbolic function, suggest that it would be useful to review its benefits. In particular, consideration should be given to whether criminalisation may be inadequate to discourage actions that jurors consider valid and justified (and can do in private) and it may discourage other jurors informing authorities about misconduct, particularly if they fear that someone they consider to be well-intentioned might be severely punished.

In conclusion, this study began as one about juror investigation and research however its findings suggest a more fundamental issue, namely that jurors need more support to appreciate the task at hand. Strategies for how this may be addressed are in the report’s Part IV, Conclusions & Recommendations, pages 41-44.

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10 Figures to September 2012 (communication with BOCSAR, 4th April 2013).
PART I

THE TRIALS & THE JURORS

TRIAL SELECTION & METHODOLOGY

This study was authorised by the Attorney General of New South Wales under sections 68 and 68A Jury Act 1977 NSW. It was originally conceived in 2004 as a Pilot Jury Study of 10 criminal trials to examine two issues. The first was the impact upon jurors of evidence of defendants’ criminal history. This was with hindsight a topic too complex for interrogation by way of juror questionnaire. The second issue in the Pilot Jury Study - juror misbehaviour arising from impermissible investigation and research - revealed far more robust data than that relating to criminal history evidence. The reason for the greater clarity is simple. Unlike the numerous potentially permissible ways jurors may be able to use evidence of an accused person’s criminal history, juror investigation and research is never justified.

In 2011 a follow up study of 10 criminal jury trials (called the Jury2 Study) took place, bringing the total study to one canvassing 20 trials. In the Jury2 Study the primary focus was on collecting juror attitudes to investigation and research and looking to see what motivated them to act in breach of judicial directions. The information base for the Study was collected at the conclusion of each trial. It consisted of:

- juror responses to a questionnaire
- trial transcripts (and some audio recordings)
- interviews with each presiding judge and with most counsel (for baseline opinions on the ‘safety’ of the verdict as well as information on possible trial anomalies not be apparent from transcripts).

This material elicited for close consideration many aspects of the 20 trials that could throw light on understanding pressure points affecting juror attitudes and actions. This included the evidence before the court, the nature and number of charges, the length of the trial and of jury deliberations, jury questions to the judge, whether the accused testified, whether the defence offered evidence and the content of judicial directions to the jury.

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11 Slight changes were made to the questionnaire in the second set of of 10 trials. The most significant are noted in the questionnaire in Appendix C.

12 But not copies of interception recordings or recordings of complainant evidence in sexual assault cases.
This is a significant body of material. However, it is important to note that juries and jury trials inevitably present a complexity of variables. The known and unknown elements that shaped the trials in this study and that shape all trials are immense. In addition to the above considerations there is also the choice and personal characteristics of the witnesses who testify, the personal and professional qualities of investigating police, judges and counsel and the personal, intellectual and professional qualities of jurors. This report has tracked numerous considerations but no study can track all considerations. Even the optimum (and impossible) data collection, recording jurors’ discussions during deliberations, would still miss important juror expressions of opinion and reflections.

In any case, the strength of this study is not in what it might tell us about all or most jurors. The views discussed in this report were not expressed by all juror respondents, let alone all jurors. However, the Study’s trials can be fairly characterised as representing ‘everyday justice’ determined in New South Wales metropolitan higher criminal jury trials and it is reasonable to surmise, allowing for the variations that we see from trial to trial, that the mix of juror views expressed in this study are not atypical.

**Anonymity & De-identification**

The identities of the 78 juror respondents are not known to the researchers. Judges and counsel were interviewed on condition that they were not to be identified. In the text of this report trials are referred to in an anonymised fashion in two different ways. In the text and in Table 1 the trials are described by replacement names based on what is commonly known as the NATO phonetic alphabet: Alpha [A], Bravo [B], Charlie [C] etc. Secondly, for the purposes of Tables 3, 4 and 5 the trials have been given numerical identities from 1-20, reflecting a grading of trials according to verdict determination challenge. Finally, jurors who are quoted in the report are indicated by reference to a further revision to numbers and letters. For example, Juror 16E refers to the 5th juror in trial 16. These juror identifiers are independent of the Alpha [A], Bravo [B], Charlie [C] etc trial labels and the trial numbers used in Tables 3, 4 and 5.

**THE TRIALS**

The 20 trials in this study took place in Sydney, Parramatta or Campbelltown between December 2004 and May 2006 or in 2011. They are described briefly in Appendix A. All trials were selected for inclusion in the Study prior to verdict. The 2011 trials were mostly selected prior to jury empanelment. Other than the Pilot Jury Study trials which were selected to track the impact upon jurors of evidence that the accused had some criminal history, no active choice was exercised over the selection of trials beyond the presiding judges’ willingness to include the trial in the Study.

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13 When referring to jurors trial numbers are from 2-29 and the 12 jurors in each of these trials have identities from A-L.
The 10 trials in the *Pilot Jury Study* took place prior to the introduction of majority verdicts in New South Wales\(^1\) and 9 of the *Pilot Jury Study* trials took place within 18 months of the New South Wales Parliament passing legislation criminalising juror misbehaviour.\(^2\) The 2011 *Jury2 Study* trials took place just under 5 years after the conclusion of the last *Pilot Jury Study* trial. The time difference between the two groups of trials reflected researcher availability but it brought with it the additional advantage of capturing trials 6 years after the introduction of a criminal sanction for juror investigation and research. Apart from the more prominent mention by judges in their directions of the criminal sanction in the later trials compared to the earlier ones there is nothing to indicate that the gap between the 2 sets of trials impacted upon the Study’s findings. In fact the 2 sets of 10 trials and the data from them are remarkably symmetrical.

**TABLE 1: CHARGES AND JUROR RESPONSE RATE**

<table>
<thead>
<tr>
<th>MAIN CHARGE</th>
<th>NO OF TRIALS</th>
<th>NO OF JUROR RESPONSES</th>
<th>TRIAL CODE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sexual assault/minor</td>
<td>9</td>
<td>34</td>
<td>A-E, K-N(^*)</td>
</tr>
<tr>
<td>Sexual assault/adult</td>
<td>3</td>
<td>11</td>
<td>F(^^), G, O</td>
</tr>
<tr>
<td>Murder (incl solicit murder)</td>
<td>3</td>
<td>13</td>
<td>H, I, Q</td>
</tr>
<tr>
<td>Drugs/Fraud</td>
<td>4</td>
<td>15</td>
<td>J, R, S, T</td>
</tr>
<tr>
<td>Other</td>
<td>1</td>
<td>5</td>
<td>P</td>
</tr>
</tbody>
</table>

**TOTAL** 20  78

**KEY:** \(^*\) A-T refer to Alpha, Bravo, Charlie, Delta, Echo, Foxtrot, Golf, Hotel, India, Julian, Kilo, Lima, Mike, November, Oscar, Papa, Quebec, Romeo, Sierra, Tango.

\(^\text{*}\) In Foxtrot, aside from a number of directed acquittals, the judge discharged the jury after the conclusion of the case but prior to verdict.

\(^1\) *Jury Act 1977 (NSW)*, s 55F.

\(^2\) *Jury Act 1977 (NSW)*, s 68C. One trial predated the commencement of this provision.
THE JURORS

As Table 2 indicates, 78 jurors, approximately 33% of the 240 jurors sitting in the trials, responded to the questionnaires. They self-identified as coming from a wide array of vocations including as engaged in home duties, in business or marketing or as an accountant, artist, author, banker, barista, cashier, company secretary, cook, electrician, engineer, IT specialist, nurse, optometrist, office assistant, project manager, scientist, student, teacher, travel consultant or as a retiree. They were a well-educated group, with a significant representation of 45-64 year old, university-educated women. Fifty (50) of the 78 jurors were female and of those women, 54% possessed university qualifications. Of the 28 male juror respondents, 11 (39%) possessed university qualifications. Not surprisingly women16 jurors dominate the comments quoted in this report. If they were unwillingly pressed into service they did not mention it, though one juror complained about the poor pay rates and lost pay as a result of waiting to be allocated to a trial. Jury deliberation varied from extremely short (less than half a day) to just under 5 days.

TABLE 2: JUROR RESPONDENT DEMOGRAPHICS

<table>
<thead>
<tr>
<th>Age &amp; Educational Attainment</th>
<th>Male jurors (28)</th>
<th>Female jurors (50)</th>
<th>Total 78</th>
</tr>
</thead>
<tbody>
<tr>
<td>18-34</td>
<td>5</td>
<td>9</td>
<td>14</td>
</tr>
<tr>
<td>35-44</td>
<td>5</td>
<td>10</td>
<td>15</td>
</tr>
<tr>
<td>45-64</td>
<td>12</td>
<td>25</td>
<td>37</td>
</tr>
<tr>
<td>65+</td>
<td>6</td>
<td>6</td>
<td>12</td>
</tr>
<tr>
<td>School or Technical Certificate</td>
<td>17</td>
<td>23</td>
<td>40 (51%)</td>
</tr>
<tr>
<td>University U/G or P/G Degree</td>
<td>11</td>
<td>27</td>
<td>38 (49%)</td>
</tr>
</tbody>
</table>

In some respects, given the maturity and level of educational attainment, the Study’s juror respondents may have possessed more life experience and had more exposure to formal passive learning environments (like courts) than the average juror.

The mean juror response per trial was 3.9 responses. Juror responses were often lengthy and detailed. The jurors’ views were typically expressed immediately after the trial process had concluded and in every case they represented first-hand experiences of the court and the jury room. A number of jurors spoke positively about their experience and what they had learnt. They typically offered textbook descriptions of tangible tasks. Some jurors referred to needing to examine the necessary components of each of the

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16 It is not clear whether this reflects a bias of women over men responding to the questionnaires or a high percentage of women sitting on the Study’s juries. It was not uncommon for women jurors to outnumber men in the sexual assault cases. For example, in one case a juror noted that there were a total of 10 women and 2 men on the jury.
charges,\textsuperscript{17} to listening to\textsuperscript{18} and to evaluating\textsuperscript{19} evidence (including assessing the veracity of witnesses),\textsuperscript{20} to keeping an open mind until all of the evidence was presented,\textsuperscript{21} to discussing the evidence,\textsuperscript{22} to listening to the views of fellow jurors\textsuperscript{23} and to being fair, impartial\textsuperscript{24} and dispassionate,\textsuperscript{25} to reaching their verdict based only on facts presented in court,\textsuperscript{26} without speculation\textsuperscript{27} but where necessary by drawing reasoned inferences from facts\textsuperscript{28} and to finding guilt only where the evidence satisfied the standard of beyond reasonable doubt.\textsuperscript{29} Some offered suggestions for improving the task for future jurors. A number of these suggestions are discussed in the report’s \textbf{Part IV, Conclusions & Recommendations}.
PART II
KEY FINDINGS

THE LEGAL FRAMEWORK

To understand the significance of the Study’s findings one needs to appreciate the philosophical and legal framework that applies to Anglo-Australian criminal trials. Australian appellate judges typically refer to this framework as ‘accusatorial justice’, a term that embodies the state’s obligation, performed through the prosecutor, to prove every essential legal element of the criminal charge to beyond a reasonable doubt. In the joint judgment of French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ in Hargraves v The Queen; Stoten v The Queen the core task of the jury was described with reference to this fundamental accusatory framework as ‘deciding whether the prosecution has proved the elements of the charged offence beyond reasonable doubt’. To underscore its importance their Honours added that deflection from that task (by judicial misdirection) creates a miscarriage of justice.

Within this accusatorial framework and in pursuit of the goal of minimising the danger of convicting the innocent, the accused person is accorded a set of rights that find expression in the presumption of innocence, the privilege against self-incrimination and the right to silence. In addition, prosecutors in criminal trials have significant obligations placed upon them relating to pre-trial disclosure of their case, to calling material witnesses and to acting with ‘fairness and detachment’ and ‘temperately and with restraint’. This dynamic of prosecutorial obligations and defence rights flows from a philosophical framework of justice that has evolved from its common law roots. Even though no accused person defending criminal charges can approach a trial unfettered by constraint, their obligations and formal limitations are far fewer than those applying to the prosecutor. The rules of evidence and procedure reinforce this embedded imbalance of rights (for the accused) and obligations (for the prosecutor). For example, prosecutors must refrain from any comment about an accused who does not testify and in a number of contexts prosecution evidence must meet a particularly high

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30 See for example, RPS v The Queen (2000) 199 CLR 620 at 630; Dyers v R (2002) 210 CLR 285, per Kirby J at [63]; Hargraves v The Queen; Stoten v The Queen (2011) 282 ALR 214 at [41].
31 That is that ‘a criminal trial is an accusatorial process in which the prosecution bears the onus of proving the guilt of the accused beyond reasonable doubt,’ quoting (and adding emphasis) from RPS v The Queen (2000) 199 CLR 620 at 630, see (2011) 282 ALR 214 at [41].
32 Hargraves v The Queen; Stoten v The Queen (2011) 282 ALR 214 at [45].
33 That is, putting the defence on notice of the prosecution case. See Criminal Procedure Act 1986 (NSW), Chapter 3, Division 3 (for indictable offences).
34 Whitehead v The Queen (1983) CLR 657, 663-64.
36 See Evidence Act 1995 (NSW), s 20.
standard of probative value before it becomes admissible. Conversely, in certain circumstances, defence evidence gains preferential treatment.\textsuperscript{37}

To further highlight that Australian justice does not create a level playing field between the state and the accused it is useful to observe the judgment of Kirby J in the High Court case of Dyers v The Queen where his Honour linked accusatorial justice specifically to accused persons’ rights and the jury’s role observing that,

\[\text{he prosecution is put to the proof. It is important in such circumstances that the reasoning appropriate to an adversarial civil trial should not undermine the accusatorial elements of a criminal trial. Otherwise the cards will be unduly stacked against the accused as the mind of the jury (or judge) is diverted to questions about a failure by the accused to give, or call, particular evidence.}\textsuperscript{38}

A second description of the philosophical foundation framing Anglo-Australian criminal trials is useful because it shines light upon the significance of the findings in this study with respect to the role of the law of evidence. It comes from the former Chief Justice of New South Wales, JJ Spigelman AC QC who observed extra-judicially that,

the idea of an accusatory system is not equivalent to the idea of an adversary system. It has a broader scope. It carries with it procedural and, especially, evidentiary requirements which go beyond adversarial processes. It carries with it a requirement about the onus of proof and, probably, that the onus of proof must be discharged beyond reasonable doubt. Most significantly it carries with it the idea of a formal, separate law of evidence by which numerous matters which pass the test of relevance are not admissible into evidence. \ldots

\ldots The distinction between an accusatorial system and an inquisitorial system was once described, as accurately as shorthand labels can do so, as the distinction between ‘procedural truth’ and ‘fact’.

No doubt from time to time prosecutors experience frustration at the manner in which some of the traditional rules of procedure and of evidence make it difficult to secure a conviction and, accordingly, fail to ensure that the administration of justice attains the actual truth rather than some kind of ‘procedural truth’.\textsuperscript{39}

As the former Chief Justice has indicated, a verdict that flows from an accusatorial trial is often referred to as reflecting ‘procedural truth’. Sometimes it is called ‘legal truth.’ Procedural truth can be contrasted with ‘actual’ or ‘objective truth’. Objective truth in the context of court adjudication has the goal of establishing all ‘true’ facts. In its purest form objective truth is arrived at with the assistance of an information base that is as complete as possible. A trial seeking to establish objective truth is typically inquisitorial in its framework and the exclusionary rules of evidence play a particularly small role.

\textsuperscript{37} See for example Evidence Act 1995 (NSW), s 65(8) (first-hand hearsay, defence evidence); s 101 (prosecution tendency or coincidence evidence); s 137 (prosecution evidence possessing a ‘danger of unfair prejudice to the defendant’).

\textsuperscript{38} Dyers v R (2002) 210 CLR 285, per Kirby J at \[\text{[53]}\] (citations omitted).

\textsuperscript{39} Opening Address, Conference, Australian Association of Crown Prosecutors, Honourable JJ Spigelman AC, Chief Justice of New South Wales, Sydney, July 2007 (citations omitted).
JURORS’ NOTIONS OF JUSTICE

The available indicators suggest that the jurors who contributed to this study were significantly invested in doing their job well. Nothing in the Study’s findings suggested that they did not strive to do their best or to act fairly. For example, juror comments regularly referred to ‘fairness’, sometimes linking it to why none of their number should engage in sleuthing. ‘Fairness’ in this context was articulated by jurors as fairness to both parties or as fairness to other jurors (that is, in the sense that all jurors should have the same information base).

On the topic of fairness, jurors in the 2011 trials were asked to identify the top priorities from a list that described tasks ‘in the jury room’. The largest group of respondents to answer this question – 20 of the 39 jurors, prioritised ‘ensuring fairness to the defendant’. However, a significant amount of ambiguity can surround what a person means by ‘fairness’. For example, in response to a request to prioritise a number of considerations, including the aspirations of ensuring ‘innocent people are acquitted’ and ensuring ‘guilty people are convicted,’ 14 jurors elected to confirm priority to acquitting innocent people (consistent with the presumption of innocence and prosecutors’ heavy burden of proof) but nearly as many jurors – 13 of them – determined that ‘ensuring guilty people are convicted’ was their priority. Some may consider the closeness of juror preferences between these two choices is concerning but the response rate, coming from only the Jury2 Study trials, is insufficient to draw firm conclusions.

With the statements of the High Court Justices and the former Chief Justice of New South Wales in mind it is also useful to remind ourselves that jurors’ knowledge of the criminal trial prior to selection for jury service is highly unlikely to come from legal scholars, High Court judgments or extra-judicial speeches. One would expect that most jurors’ pre-trial understanding of the criminal trial process is likely to be drawn from a mixture of fragmentary general knowledge, perhaps from secondary school through a legal studies course, and for all through the pervasive influence of television, film, the media and novels. But popular culture offers a poor source of information on the workings of real trials. Fictional criminal justice bears no relationship to the slow pace of information-delivery in the real courtroom where the serial presentation of evidence and a pedantic question and answer process dominates. The burden of proof in fiction is not identified with any sort of precision, nor does fiction reflect fair trial ground rules or the prominent role of the law of evidence in sifting information to go before the jury. Instead, in books and on the silver screen the perspective of the chief protagonists (often as a private investigator) tends to inform viewers inerentially of what constitutes a just

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40 See Appendix C, Question 6b, see this report, page 56.
41 A small number of jurors also volunteered being fair to witnesses (1 juror), to a victim (4 jurors) and to the prosecution (3 jurors). Many jurors allocated equal priority to more than one option.
42 Because the framework of criminal trials, accusatorial justice, clearly privileges protection of the innocent over conviction of the guilty.
conclusion to criminal investigations. Self-evidently, entertainment and the media are serving different goals from those of a real criminal trial.

Jurors & Frustration

Jury deliberations can be stressful. There are many causes of stress, some seemingly trite, others readily identifiable. Some jurors referred to conflict in the jury room and some to the emotional pressures of hearing of and dealing with situations revealed by the evidence. The stresses were multifaceted. One juror’s observation that it was a ‘huge responsibility to get it [the verdict] right’ was a sentiment repeated by a number of others. Juror 81 drew the connection between the physical and the mental, reporting that ‘a number of jurors, including myself, felt very uncomfortable being confined to [the jury room] … for the seven straight hours of our deliberation days … it made people really uncomfortable and edgy, and was generally counter-productive’.

In the Study, a number of jurors linked the term ‘frustration’ to a perceived lack of information. Thirteen (13) jurors across 8 trials expressed frustration or distress concerning the trial process. For example, Juror 20I observed that

‘[b]oth the Crown and defence cases left unanswered numerous questions relating to the circumstances of the alleged crime and the people involved, esp. the accused and some witnesses. Our deliberations would have been more productive and focused had this

63 For example, there were references to the poor variety of lunches (in the Pilot Jury Study), to the smallness of the jury room and for Juror 12F a change to the furniture would have enhanced the work environment: ‘[T]he wood would have been more comfortable for the jury had the jury room chairs had the ability to swivel’.  
64 For Juror 12D, the stress in court came from the witnesses: ‘I did not like being on view for the witnesses. They sometimes looked at the jury very hard (almost intimidating)’. Juror 6D expressed concerns that appeared to relate to preconceived notions of the danger of being a juror and noted that he ‘felt protected by not having my name revealed’. Fellow Juror 8H raised the issue of discomfort more emphatically: ‘I think it is unreasonable to not allow the jury fresh air during deliberation. I think that at lunch times jurors should be able to go outside (even if they all must go) as it is unhealthy to be locked in a room with 12 people, no windows for that length of time’.  
65 For example, Juror 12D: ‘I found this experience very mentally tiring and challenging. I found I had to put personal feelings to one side - this was at times difficult’. Juror 12B noted that ‘I was not prepared for the feelings of sadness and feeling sorry for the accused as well as the victim and families’. Juror 24E spoke of the pressures in the context of returning to work: ‘After my jury service ended and having to go back to my office, I found my work relationships with colleagues have taken its toll. Many colleagues spoken as though I had [a] holiday, despite the enormous amount of information and stress I had to endure during the period. One even questioned my verdict we gave in court to the accused, saying we got law terms confused, although he never set foot in a courthouse before’.  
66 Themes linked to frustration follow below see particularly pages 22-25. Table 3 on page 19 tracks the links between stress and frustration and criticism of counsel and/or the police investigation. See also Tables 4 and 5 on pages 20 and 21.  
67 See also ‘[m]ore relevant issues should have been raised but never were’: Juror 4B. Juror 9D was critical of counsel, believing that ‘some of the counts were not pressed enough. On some of the counts the victims were not cross-examined properly’. Similar sentiments by Juror 12D who ‘sometimes felt like asking questions of the witnesses myself’. Juror 11L observed that ‘insufficient evidence was supplied by both barristers’. Another juror was specifically critical of defence counsel observing that counsel ‘harped on … lots of insignificant point … [wasting] an extraordinary amount of time … [and making] us feel very uncomfortable’. 

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additional information been provided. Both sides were inadequate in their running of the trial.\footnote{Juror 20F agreed in similar terms. Jurors 20F, 21I and 27B, in separate trials, also made the same point, with Juror 27B noting that it was ‘very strange that ‘[o]ther persons of interest [\’were\’] not req’d to take the stand or cross-examined by Crown/defence’.} At times it was not just counsel’s calling of evidence that drew criticism. For example Juror 24I complained that she wished on a number of occasions the Crown would supply us with more details and the defence would go down another path, it felt like we as the jurors were being deliberately being confused.

And Juror 23F

‘[f]elt counsel could have explored evidence with more questioning on certain matters.’

Juror 22C attributed the challenge he faced to the adversarial structure of the trial

The decision making process is not easy based upon one barrister’s perspective & facts put forward. My experience was that 12 people (jury) were able to uncover many key points missed by both Crown and defence. If this info was at times available it may assist with some undecided jurors.

These observations, particularly in light of expressions of desire for more evidence and of frustration over missing evidence, suggest some jurors can acquire (potentially through misunderstanding) a diminished faith in parties’ ability to account for evidence that, from these jurors’ perspectives, was important to reaching their verdict. All jurors received clear instruction from the trial judge on the presumption of innocence, defendants’ right to silence and the prosecutor’s obligation to prove its case beyond reasonable doubt.

Juror comments divide into two groups. The first group of comments reflect jurors’ notions of justice and the second group reflect diminished respect for the trial process. The potential link between the two groups is based on the hypothesis that jurors who possess notions of justice aligned to inquisitorialism are likely to have good reason to become frustrated with the accusatorial structure of the trial and with counsel who act within that structure. As a result of their desire to maximise their information base they may incline to find it acceptable to engage in their own investigations and research or to condone such actions by other jurors.
Juror Misconceptions

Juror comments fell within one of three broad categories:

1. Thirty three per cent (33%) of juror respondents (26 jurors) across 16 of the 20 trials indicated in various ways that they perceived that their task was to deliver a verdict that reflected a determination of objective, not procedural truth.

2. Twenty per cent (20%) of juror respondents (16 jurors) across 11 trials expressed views that suggested in various ways that they believed the prosecution and the defence had, or should have, equal rights and obligations. A significant number of these indicated that defence rights should be curtailed.

3. Fifteen per cent (15%) of juror respondents (that is, 12 jurors) across 8 trials expressed the view or acted in ways that indicated that they viewed it as justifiable in certain circumstances to ignore a presiding judge’s direction that a juror must not engage in personal search. An additional 2 jurors in another 2 trials were neutral as to whether juror investigation and research was ‘very acceptable … where a juror felt frustrated with the adequacy of evidence in a trial’.

Tables 3 and 4 below present the spread of juror attitudes mapped from questionnaire comments linked to frustration/stress, criticism of defence rights and antagonism towards counsel or police (Table 3) and to comments linked to the juror sleuthing and objective truth themes (Table 4). In the tables the 20 trials are ranked from 1 to 20 according to an informal calculus of verdict determination challenge. In compiling this ranking of trials no single factor was consistently prioritised over others and each trial was evaluated on its own terms. Factual ambiguity arose most commonly where credibility issues impacted upon key prosecution witnesses and also where police investigations appeared to leave information gaps. Sometimes these considerations pulled in different directions. No claim is made that the grading is perfect, however it is suggested that the assessment is sufficiently robust to be broadly indicative.

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49 Based on indicators of cognitive and/or emotional burdens upon jurors. The intensity of the decision-making challenge was assessed according to a mix of indicators including the nature of the charge, the length of the trial and of deliberations, jurors’ references to challenges and (for the 2011 trials) the opinions of judges and counsel.
TABLE 3: DEFENCE RIGHTS, STRESS & ANTAGONISM TO INVESTIGATORS & COUNSEL

In Table 3 shows some clustering of juror criticisms of counsel/police and of defence rights. In addition, Trials 8-20, (ie, those assessed as involving highly contested facts and/or engendering high emotional stress) tend to have attracted a greater proportion of juror comments compared to the less demanding trials, Trials 1-7.
TABLE 4: JUROR SLEUTHING & MOTIVATION TO SEEK OBJECTIVE TRUTH

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<tr>
<th>Trial 1 (5)</th>
<th>Trial 2 (5)</th>
<th>Trial 3 (4)</th>
<th>Trial 4 (3)</th>
<th>Trial 5 (6)</th>
<th>Trial 6 (5)</th>
<th>Trial 7 (2)</th>
<th>Trial 8 (3)</th>
<th>Trial 9 (3)</th>
<th>Trial 10 (4)</th>
<th>Trial 11 (6)</th>
<th>Trial 12 (4)</th>
<th>Trial 13 (5)</th>
<th>Trial 14 (5)</th>
<th>Trial 15 (4)</th>
<th>Trial 16 (2)</th>
<th>Trial 17 (4)</th>
<th>Trial 18 (6)</th>
<th>Trial 19 (9)</th>
<th>Trial 20 (6)</th>
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<td>Sleuth acceptance</td>
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Note: TRIALS RANKED BY VERDICT DETERMINATION CHALLENGE
( ) bracketed number represents number of juror responses received in each trial.

The Jury Verdict: Proof or Truth?

Quite a few jurors accepted the inevitability of evidentiary gaps in a criminal trial\textsuperscript{50} and others\textsuperscript{51} appeared neutral on the topic.\textsuperscript{52} However, as the green line in Table 4 indicates many jurors across many trials expressed contrary views. Twenty six (26) jurors across 16 of the 20 trials railed at the lack of information placed before them. Many jurors indicated that they wanted more evidence ‘to make a more accurate verdict’, ‘to make the situation clearer’ or to make deliberations ‘more productive and focused’, ‘to process information differently and reach different conclusions’, to ‘make an informed decision’ or ‘to fill the gaps’. Notably there is a tendency for juror comments and actions reflecting non-

\textsuperscript{50} For example, Juror 9L observed that ‘[i]n a trial of this type there is usually a shortage of verifying evidence, eg eyewitnesses etc’. Juror 29G observed that ‘[t]he rules of evidence are there for a reason however frustrating it may be. There is a need to ensure consistency and fairness in the legal process’.

\textsuperscript{51} Such as Juror 8E and Juror 4C.

\textsuperscript{52} For example, ‘[a] few witnesses never showed, but family was strongly talked about but no members of the victim or accused called up’ (Juror 8E) and ‘other people mentioned but not called as witnesses might give more information about the offence to the jury’ (Juror 4C). See also ‘Evidence that is presented is all that a juror requires. Jurors are not qualified investigators’ (Juror 27B).
conformity to the prohibition on private juror investigation and research to cluster in the trials ranked most challenging according to verdict determination factors.

Table 5 combines all juror comments across the trials ranked according to the presence of juror comments and actions to juror sleuthing. Trends in the trials are discernible, particularly across the variables of juror stress, negative attitude to the conduct of police, to counsel and to a focus on objective truth themes.

**TABLE 5: COMBINED JUROR RESPONSES**

![Graph showing combined juror responses](image)

**Note:** TRIALS RANKED BY DISPOSITION TO ACCEPT JUROR SLEUTHING

( ) bracketed number represents number of juror responses received in each trial.

It is useful to repeat the earlier observation that accusatorial justice ‘carries with it the idea of a formal, separate law of evidence by which numerous matters which pass the test of relevance are not admissible into evidence’. This contrasts with the Continental inquisitorial notion of ‘free proof’ where triers of fact can freely (or at least more freely) evaluate information with few evidentiary fetters on the quantum of evidence. As mentioned earlier, a juror working within an accusatorial system with an inquisitorial

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54 That is the free evaluation of evidence with no legal ‘chains’: see MR Damaska, Evidence Law Adrift (Yale University, USA, 1997) at 21.
mindset is bound to find frustrating a process that appears indifferent to information gaps. For example, Juror 23D explained that she had written a note to the judge unsuccessfully seeking an explanation about missing witnesses. In rejecting the acceptability of juror sleuthing she said ‘BUT having been TOTALLY FRUSTRATED with inadequate evidence in our case I could understand why a juror may do THIS’. She went on to express regret that she had not asked the judge about a specific witness to 'verify a fact that 'was the "linch pin" of the whole case to me'. Her reaction that there was additional evidence that was not available, was despairing:

\[w\]e, as a jury, felt absolutely in the dark!! We had no solid factual evidence supported by any witnesses or police statements. We were aware that the victim had made statements to the police, but when we requested them we were told that we were not able to have them.

Notably, her concern about being ‘in the dark’ where missing ‘linchpin’ evidence was not made available is classically cast by her as a search to establish where truth lies. That said, she links her frustration to criticism of the prosecutor, expressing her extreme dismay, frustration in fact anger for being placed in this intolerable position of being on a jury which had to decide someone’s fate with absolutely NO evidence. The ‘evidence’ was the two conflicting statements of the victim and the accused. No witnesses, no police records - even though we asked for them. I must say that as a group, the jury spent the first couple of hours being ‘angry’, and feeling let down by the crown’s lack of supporting evidence. All we could say was doubt, doubt, doubt!

Of course, Juror 23D was not alone. ‘Frustration’ was precisely the term used by Juror 2I who observed pithily that the ‘\[e\]vidence was incomplete, inadequate, frustrating …’. Juror 14L echoed a claim from Juror 4B that the integrity of the verdict required a fuller factual picture because ‘… more evidence can help jurors to make correct decision’. Not all 26 views on this topic are extracted, but in addition to Juror 23D, Juror 2I, Juror 14L and Juror 4B (from four separate trials) a flavour of the views from jurors in another 9 trials shows the remarkable similarity of juror accounts of frustration engendered in this way:

Only about 20% of the story gets told in court. Alleged crimes occurred between people who knew each other very well. It was one person’s word against another’s. We could have understood the people, their relationships and their situations better. We would have liked to hear more in court … .

\textit{Juror 11F}

The truth of the matter was that to make a decision based on very few facts that we had was very hard indeed.

\textit{Juror 10K}

\footnote{Juror 4B also observed, ‘It’s not true justice if all the facts of a case cannot be presented'; ‘… Keeping information from jurors is not a fair trial'; ‘… The extra information would help clarify the story for us'.}
Evidence presented seemed incomplete and gave little strong support to either argument. Character of both accused and victim was very much left to the imagination.

Juror 12F

I felt that the evidence was inadequate – too many gaps – not enough detail.

Juror 20H

We felt much more info could have been obtained although the correct verdict was reached by us.

Juror 23F

If we had more information allowed and not put as MFI’s then we might have been able to process information differently and help us reach different conclusions.

Juror 25D

I had a case with no physical evidence which made it extremely hard to make a verdict. In this case I think learning more about these people may have helped built a better picture of the situation and may have made the decision making process easier.

Juror 27D

[T]here were large holes and uncertainties in areas of the case that were covered in the case and evidence that was presented in court but that I thought were crucial to our final decision as jurors.

Juror 28C

Some people mentioned in evidence were not called as witnesses and as a jury we believed that had this occurred we would have reached our decision far more easily, and perhaps it may have been different.

Juror 28K

Juror 28J observed, ‘I felt frustrated by the presentation of evidence - I think I described it as “shambolic” at the end of the first day’. Like Juror 23D, she linked her frustration to the prosecutor,

It appeared that the prosecution had not done their homework before they came into the courtroom. This led to delays whilst the prosecutor read the statements (to himself) before formulating questions to the witness. Material that was presented in evidence was not readily available, leading to delays in proceedings.

In another trial, Juror 29H summed up where he thought assistance was needed observing that where ‘a lot of evidence was held back or was not presented as relevant …if the jury was to make an informed decision … [i]t might be useful to allow jurors to ask the judge questions and have feedback as to why it may not be relevant or is unknown’. In fact, the jury was told why evidence was or was not called, but in very broad terms only - that is, that it was the parties’ right to determine the calling of evidence.
These juror comments speak to the reactions of people facing the reality of ‘messy’ trials where an evidentiary void is a state of affairs that they must accept, but they do not understand why – or in some cases they do not understand why no one will find out information on their behalf. Instead they are part of a process that requires that they accept passively the limited evidence offered by counsel.\(^{56}\) This is not how popular culture represents the criminal justice system when it focuses on investigation and a can-do attitude to locating evidence. This dynamic is also not the only foreign element in jurors’ new experience. There are also the grim realities of actual crime, of real people and of making a collective decision on behalf of the community that is life-changing to the accused and perhaps to those who have given evidence as victims of crime.

An example of the clash of expectations arose in the Hotel trial where the jury asked about an evidentiary void:

*Phone number XXXX-XXXX, Exhibit X, was this number checked and who does it belong to?*

The contrast of the lawyer’s procedural truth perspective with the juror’s objective truth one is exemplified by the answer given by Judge Hotel. The judge replied conventionally:

*Now, the answer is that there is no evidence as to whether it was checked and there is no evidence as to who it belongs to. That completes the material in answer to the question such as I can give it from the evidence.*

In addition the judge pointed out pragmatically to the jury that,

*_it may be that issues, loose ends will arise and will puzzle you, but eventually you are obliged to deal with the case on the evidence that is called before you. Very often they [that is, counsel] have reasons unknown to you, but good reasons, for the particular way in which they each go about their task. The fundamental rule is that you concentrate on the evidence in this courtroom and everything outside is irrelevant._*

However, for Juror 12H (from another trial) the process was ‘distressing’ because,

... *the process was not about helping the jury come to a decision but about the prosecution and defence arguing a point. If it was about coming to the right decision, the jury would be part of the process and not just witnesses. We would be better served if the process was not only adversarial but sought information and truth.*

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\(^{56}\) Jurors cannot call evidence or question witnesses. They can ask questions through the judge, but the answer may be that there is no evidence on the point.
What Were Counsel Doing?

Juror criticisms of counsel and police investigations were quite numerous, totalling 27% of juror respondents. They were spread across 14 trials. The 21 jurors who expressed negative views about police investigation and/or counsel referred to the poor quality of police investigations, of police notes, of counsel’s choice of evidence, their failure to tender certain evidence and the questions they asked or failed to ask of witnesses. Some jurors referred to the fact that counsel was (in the jurors’ eyes) just ‘not up to scratch’.

Quite a few jurors singled out the prosecutor. One juror who thought juror sleuthing would be very acceptable if a juror was frustrated with the evidence in the trial substantiated this view simply saying’... ['The prosecution seemed inexperienced'...

Others, such as Juror 22L acknowledged that the ‘Crown was very good’ but he considered that his jury had advanced analysis: ‘we found we discovered additional key points in the evidence during deliberation.’ Police investigation for the trial in which Jurors 28C, 28J and 28K were engaged attracted a lot of juror criticism, sometimes drawing complaint about the prosecutor as well as police. From Juror 28K’s perspective, not only was ‘the prosecution case ... not well presented’ but the investigation also received criticism as not ‘carried out to the level I had expected’. Her observation that ‘There was a definite lack of corroborating evidence provided’ inferring a less than realistic appreciation of the constraints applying to police investigation. Her fellow jurors felt the same. Juror 28C observed that ‘the prosecution and relevant police handled it very poorly and left too many holes in the evidence’. Juror 28J’s comments about the ‘shambolic’ prosecution have been quoted earlier.

‘Why Didn’t The Defence Call a Key Witness?’

The presumption of innocence creates the premise that ‘It cannot be said that it would be expected that the accused would call others to give evidence. To form that expectation denies that it is for the prosecution to prove its case beyond reasonable doubt.’ However 16 jurors across 11 trials raised questions about the defence failure to call or respond to evidence. In these instances the rights of the accused were often viewed negatively or the defence was seen to have fallen short of juror expectations to assist with information-gathering. For example, Juror 4B considered ‘the balance is totally tilted in favour of the accused person not having to prove anything except “reasonable doubt”, which is so broad and unfair to the victim, whose character can be challenged so ruthlessly’.

Juror 25D advocated that ‘... some laws should be changed to make sure the defendant does not have as much rights to stop evidence being given to jury.’ A flavour of where the laws might

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57 The term used by Juror 23F.
58 See page 23.
59 The words of Juror 22L.
60 Dyers v R (2002) 210 CLR 285, per Gaudron and Hayne JJ at [10].
61 The juror also added that ‘background knowledge about the victim seems fair game – it should be equal for both parties’.
change was addressed in a separate response where she observed that ‘[sic]he defence objected at many things we would of liked to see’.

Similarly, Juror 27D noted that,

> I wondered if legal loop holes were used to suppress evidence which may have helped with a verdict. The law benefits the accused. Every effort is made to ensure they get a fair trial. We were instructed to find him ‘not guilty’ if there wasn’t enough strong evidence even if we thought he was guilty.

Cavilling at the rights of the accused was sometimes very specific. Juror 8G stated that the factor that influenced his verdict was that ‘the defendant pleaded guilty to ... [another] count ...’. And then there were juror comments apparently founded on flawed assumptions about the burden of proof and placing equal demands on the prosecution and the defence to bring evidence before the court.

> [Without] a clear picture of the accused’s [criminal] history, it is harder to prove him guilty, even though a case may have suggestions of a guilty verdict, if the jury is not convinced with background information then a guilty verdict is much harder to give.

**Juror 8B**

> We felt more questions could have been asked and more witnesses could have been called, especially by the accused to back up his claims.

**Juror 14F**

> Jurors should be allowed to find out more about the accused if the evidence is inadequate.

**Juror 11L**

> The mention about the XXX ... as brought up by the defence really tipped the scales in favour of the accused...? Was that fair? He chose not to testify and pleads not guilty yet gives evidence through his lawyer? I don’t get it!!

**Juror 10K**

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62 Contrary to the judge’s summing up.

63 Similar views to these were expressed by a number of jurors.
Juror Attitudes to Private Enquiry

Jurors’ specific attitudes to private enquiry were revealed through responses to Question 15 in the questionnaire asking jurors to agree or disagree with a hypothetical juror’s situation:

Q 15 If a juror felt frustrated with the adequacy of evidence in a trial and took action outside the trial process to find out more about the accused, witnesses or the circumstances of the crime(s) charged, this action would be very acceptable.

All 78 juror respondents answered this question. Sixty-five (65) jurors, ie, 83% of the responses, expressed the orthodox and appropriate view, namely that it is unacceptable for jurors to take action outside the trial process to find out more. The majority of responses (56%) strongly disagreed with the hypothetical Juror Q15 engaging in sleuthing conduct.

However, as mentioned, despite receiving judicial directions 10 jurors across 7 trials agreed – 2 of them ‘strongly agreed’ - that hypothetical Juror Q15’s actions ‘would be very acceptable’.

In addition to these 10 jurors there were 2 acts of actual juror research and investigation, one of which was revealed in juror responses (about another juror). The other became known to parties and the judge. The 12 jurors with these inappropriate views and actions were spread across 8 of the 20 trials. An additional 2 jurors, coming from another two trials did not acknowledge that it was not ‘very acceptable’ to be a juror sleuth. They were neutral. One of these jurors was young; the other was middle-aged. Their diffidence to this question is slightly puzzling as they both viewed the judge’s direction as ‘clear and persuasive’. One juror added that she appreciated that a breach of the direction could cause the trial to miscarry. However the other made it clear that she did not understand the reason for the prohibition, stating

[...]his is not allowed but I would very much have liked to do my own research. Police and lawyers are allowed to look into things but the jury cannot. I would like to have had the reason for this explained to me.

What appears to be private juror research was reported by a juror through the Study questionnaire. It was shared with the whole jury:

The spoke woman (sic) mentioned 25yrs jail sentence over and over again ... how did she know the penalty for that crime? Did she look it up somewhere? … At the end of the

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64 Jurors 2E, 2G, 4B, 11K, 11L, 20J, 21I, 22C, 22J, 23F. Jurors 8E and 27D were neutral. One juror crossed out ‘very’. In addition, Juror 24E indicated that it was acceptable conduct, but has not been counted because his other comments showed conformity to the obligation not to engage in search. In keeping with a policy of erring on a conservative interpretation of jurors’ views it has been treated as slip. It is however unclear which side of the fence he sat. For example, when asked what aspects of the trial stimulated his curiosity he indicated that ‘I would have liked to examine the crime scene in a “view” under exactly the same circumstances as the night of the incident eg street lights. This way we did not need to rely on our speculation and formed stranger [sic] views for each witness’.

65 It was in a trial where the jury found the accused not guilty.
In the other case of juror investigation, the juror was clearly unaware that his conduct was prohibited.

Bald trial statistical profiles yield an incomplete insight into what might stimulate juror acceptance of personal investigation and research, although it is notable that Table 5 indicates that expressions of juror acceptance of sleuthing and/or actual juror enquiry congregated in 1066 of the 12 trials considered most likely to place the greatest verdict determination challenges on jurors. Other factors considered include the length of jury deliberations, the length of trials or the number of charges. These did not reveal any indicative factors; nor did whether the accused remained silent in court - though there was a slight preponderance of trials where the accused did not testify and jurors reflected favourably on juror investigation and research. However, this could merely reflect coincidence. There was also a greater number of guilty over not guilty verdicts67 associated with these juror views, but again they are explicable as reflecting coincidence.68 In sum, aside from the clustering of 10 out of 12 trials presenting jurors with heightened challenges in verdict determination, aside from the features highlighted from juror comments,69 none of the above factors could be said to reflect increased juror willingness to find juror investigation or research acceptable.

Further, an examination of demographics also adds little. Three (3) of the juror respondents who agreed with the Q15 hypothetical juror were men and seven (7) were women. They came from a slightly older age cohort to the average age of respondents to the questionnaire. Six (6) were over 55 years of age; 2 were between 45 and 54 years, and the remaining 2 were in the 21-44 age brackets. Their educational attainment covered the full spectrum including one juror who had only obtained her School Certificate to 3 jurors with postgraduate qualifications. These statistics broadly reflect the spread of the cohort of 78 respondents, with perhaps a slight tilt towards older female jurors, who were also over-represented in the group as a whole. It is not clear whether, as a demographic category, these women were more inclined than other jurors to possess these views, or whether they were just more open than other jurors to express views that were in fact held more broadly.

66 That is, not Trials 19 and 20. Both these trials involved very serious offences, though they do offer points of distinction in terms of whether jurors may not have been particularly sympathetic to the victims.
67 Relating to the main or key charges.
68 In a number of instances, all perfectly defensible according to the evidence (and trial judges’ observations) not guilty verdicts, guilty in relation to lesser offences or a hung jury occurred despite strong prosecution cases.
69 Pages 16-26.
REASONS VOLUNTEERED BY JURORS FINDING PRIVATE ENQUIRY ACCEPTABLE

All judges in the 20 trials directed the jurors not to engage in investigation or research. There are many indicators that the 10 jurors who were accepting or were neutral to the misconduct, appreciated that it was prohibited. One juror indicated that ‘we were told we could jeopardise the outcome of the proceedings’ if we did so and of the 10 jurors who expressly agreed with the hypothetical juror sleuth, 8 also agreed (with two strongly agreeing) that the judge’s direction prohibiting sleuthing was ‘very clear and persuasive.’

So why did these jurors express views contrary to the judges’ directions? Was it juror curiosity? Not surprisingly, over 33% of the juror respondents were curious about the accused. ‘Witnesses who were not called’ came a close second place in the curiosity stakes. Of course, curiosity alone is innocuous. Seven (7) jurors who accepted that juror investigation and research may be acceptable offered a brief explanation. For Juror 2G the justification was merely pragmatic:

[It is [n]ot practical to think that things like the internet would not be used.]

A slightly different form of pragmatism applied to Juror 11K. He explained his reason for considering this misconduct acceptable as because ‘the prosecution seemed inexperienced’.

Those who gave more detailed reasons for viewing juror sleuthing as potentially acceptable said that they felt that they could do their job as a juror better if more evidence was available to them than that presented during the trial. Five (5) jurors supported their approval of the Q15 hypothetical investigative juror by employing notions of objective truth, including

*If jurors feel s/he needs to know more about anything in order to have better understanding/knowledge about something, then s/he should be able to do so. That might help the juror to have more accurate verdict later on. … Jurors should be able to find out whatever they need as it might help them later on.*

Juror 21I

*There was not sufficient evidence presented.*

Juror 20J

*At any time any additional information either confirming or eliminating believes [sic] would have added impression to one’s thoughts.*

Juror 22C

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70 Juror 4B.
Conclusion

Juror comments bear out the logical connection between regarding evidentiary gaps as obstacles to a robust verdict, believing that a verdict should be a fully-informed judgment by all available evidence and perceiving that a fact-finder’s goal is to determine a verdict based on the goal of establishing objective truth.

The other topics upon which jurors commented potentially add extra and relevant dimensions to understanding these findings. In particular, it could be said that jurors who view the trial process, police or counsel as inadequately assisting them to do their job properly may be less inclined to rely on the process as a whole, including obeying judges’ directions to refrain from sleuthing.

Where jurors feel the need for additional evidence or assistance they can seek help from the judge, but where the response does not fill their perceived needs jurors then have limited choice:

- a juror can accept that the verdict must be built on an imperfect base (as they perceive it);
- he or she can accept that there must be a good reason for the status quo – albeit one they do not know or understand; or
- they can be vulnerable to concluding that it is justifiable to seek additional information themselves, or from other jurors, friends or family, or to turning a blind eye to jurors who make private enquiries.

Occasionally, there may be third acceptable option – such as illustrated by the jury in the Victorian case of R v Chatzidimitriou71 where the foreperson asked the trial judge for a dictionary after hearing the trial judge’s standard anodyne72 response to the request for an explanation about the meaning of the phrase ‘beyond reasonable doubt’.

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72 That is, ‘... those are very plain English words and ought to be interpreted by the jury to mean exactly what they say, namely beyond reasonable doubt. It is impossible to put another definition on them’, with the judge concluding ‘that it does not assist juries to try to interpret those words any more than by what I have said to you’: (2000) 1 VR 493 at [3] quoted by Phillips JA.
Our judge was a man of great personal conduct and charisma. He was very impressive, showing a great deal of wisdom, humanity and incredible kindness. I was determined to do everything he asked me to. I know that my views were shared by other jurors.

Juror 10K

THE JUDGE

Juror 10K also

‘wished he [the judge] could help us in some way because he was certainly the wise one. But he didn’t. He was like this all-knowing father just sitting there looking at us: silly mix of people with no idea what to do next’.

In the context of the instruction that jurors refrain from researching the case themselves, Juror 10K observed that

‘[t]here must be a reason why not all of the information is allowed to enter the court room. The judge is a person of utmost wisdom and experience. If he decides we should only know as much, I am confident that it is enough.’

This eloquently expressed confidence in the presiding judge reflects the general tone of juror comments endorsing what is often observed in other jury studies, namely that the majority of jurors appreciate and rely upon a presiding judge’s guidance. So, whilst judges’ instructions may not be definitive in forming jurors’ views, they are typically treated with respect. Juror feedback on the directions overwhelmingly affirmed that jurors thought the directions were clear and persuasive.\footnote{Across all the trials only two jurors disagreed that a judge’s direction was clear and persuasive. Neither expressed views at odds with the direction.}
THE JUDGES’ ‘PRIVATE ENQUIRY’ DIRECTIONS

As already mentioned, all judges directed, some emphatically, that jurors must determine their verdict solely on the evidence before the court and that jurors were not to engage in extra-curial investigations. One judge, in the Pilot Jury Study group of trials did so only after a prompt from the Crown prosecutor. Each trial judge complied with the first of the three elements described by Wood CJ at CL in R v K that is, that New South Wales trial judges should instruct the jury,

\[i\] that they [the jurors] should not undertake any independent research, by internet or otherwise, concerning the proceedings, or the law applicable thereto,

\[ii\] with a suitable explanation as to why they should not do so.

\[iii\] In the event that [such misconduct be made a criminal offence] ... , then the jury should additionally be informed at the outset that it would be an offence for them to make any such inquiry.

Satisfaction with the second and third of these elements, namely the provision of a suitable explanation and information regarding the criminal status of such conduct is discussed below.

HOW COMPREHENSIVE WERE THE DIRECTIONS?

The depth and breadth of the directions and accompanying explanation varied enormously across the Study sample. By and large the trial directions were more comprehensive in the 2011 Jury2 trials than in the earlier Pilot Jury Study trials. Indeed, the judicial directions in 4 of the 10 trials in the pilot study were remarkably general. Those 4 trial directions aside, judges’ directions typically detailed that the internet should not be used in connection with the trial, nor should the trial be discussed with family and friends, and that no jurors should visit locations connected with the subject-matter of the trial. Trial judges were less uniform in directing jurors against undertaking private experimentation or soliciting another to assist with inquiries or to research on behalf of a juror. Some judges provided written directions.

Over half the judges (in the majority of trials) told jurors to bring to their attention any breach of directions. Interestingly, the trials where sleuthing behaviour occurred were presided over by judges who gave this direction. No jurors came forward.

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74 Not all judges mentioned the internet. All juries were told that undertaking their own research or inquiry was prohibited.

How Comprehensive Were Judges’ Reasons in the Directions?

By and large, juries simply did not seem to appreciate the importance, or did not understand the logic, of restricting themselves to the information presented by the parties and the judge.

W Young et al, Juries in Criminal Trials, New Zealand Law Commission

The findings in this study support this observation that a significant number of jurors did not understand the importance of relying solely on the evidence of the parties for their deliberations. For this reason it is useful to see what judges said to jurors. Judges’ explanations as to why jurors should refrain from private enquiry fall into two broad categories. The first category consists of the procedural consequences of breaching a judge’s direction and includes that:

- the information obtained may be faulty
- parties will be unable to test or point out defects in privately-acquired information
- relying on such information is unfair to parties
- a juror may lose their impartiality once they become an investigator
- it is also inimical to the notion of open justice
- a trial might miscarry before its conclusion, and
- a conviction may be set aside and a retrial ordered.

Second, there are reasons personal to a juror for refraining from engaging in private enquiries during the trial and deliberation process including that:

- in New South Wales the conduct is a serious criminal offence
- the conduct breaches a juror’s oath to ‘give a true verdict according to the evidence’ and
- the conduct involves a breach of probity regarding an important civic function.

The 2011 Jury2 trials tended to be presided over by judges who explained in great detail the reasons for the prohibition. It is possible that the revisions to the Judicial Commission, Criminal Trial Courts Bench Book following upon the Pilot Jury Study (and subsequently) assisted in this respect. The earlier trials contained far greater diversity of detail across a spectrum, ranging from top drawer instructions to one trial judge who

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77 Section 68C Jury Act 1977 (NSW): ‘(1) A juror for the trial of any criminal proceedings must not make an inquiry for the purpose of obtaining information about the accused, or any matters relevant to the trial, except in the proper exercise of his or her functions as a juror’. This section carries a maximum penalty of 50 penalty units and imprisonment for 2 years. It commenced on 15th December 2004. Nine (9) of the 10 pilot study trials were completed after this date.
78 Section 72A Jury Act 1977 (NSW)
79 See Appendix B.
provided no real explanation or reason to obey the instruction other than mentioning that juror misconduct in the past has resulted in ‘big problems’.

The following explanations given by judges to the prohibition in order of their prominence across all 20 trials are, first with respect to procedural consequences:

- **Parties cannot test information:** Across the 20 trials the most common explanation contained in judges’ directions was that as parties would be unaware of the evidence they would be unable to test it. This was stated in 15 of the 20 trials. Reference to fairness was drawn into this explanation on 9 occasions. Often using highly persuasive language, such as referring to ‘a fundamental rule of fairness’ or linking it as a prerequisite for a ‘fair and just outcome’. Irrespective of how it was phrased, the presence or absence of this explanation did not correlate with attitudes or actions associated with juror investigation or research.

- **The information may be faulty or flawed:** In all but 3 trials where the judge explained the disadvantage to parties he or she also included reference to the danger that such information may be incorrect. This was stated in 12 of the 20 trials. Many jurors identified the danger of introducing flawed information into decision-making and a clutch of them referred to the fact that assessing or testing evidence needed expertise that jurors do not commonly possess.

- **A juror investigator is no longer impartial:** This explanation refers to a change in a sleuth-juror’s role in the proceedings and so has elements of the personal as well as the procedural. It was included as an explanation in 8 of the trials, and more predominantly in the 2011 trials. This explanation appeared to resonate with many jurors.

- **The conviction could be set aside:** Judges referred only four times in express terms to the possibility of setting aside a conviction and/or the need for a retrial where juror misconduct of this nature occurs with this explanation being more frequent in Pilot Jury Study trials compared to the 2011 trials.

A number of judges indicated in their opening remarks to the jury that all the information jurors would need ‘will be available to you in this court’, but this was not stated with reference to the prohibition against extra-curial investigation and research. Numerous judges were emphatic about the importance of all discussion including all jurors, with one judge emphasising that feature rather than the danger of speaking to non-jurors. In the context of advising jurors not to talk to anyone about the experience of being a juror numerous (though not all) judges explained that no journalists, family or friends hear all the evidence themselves and so their views cannot assist. Occasionally advice was added that it is more practical with friends and family to remain silent about the trial than to discuss it and then invite discussion of it.

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This does not include reference by judges that ‘unless it is known before the end of the trial, it may not be possible to put matters right’ or that ‘big problems’ have occurred in the past.
Interestingly, the most prevalent reason in terms of procedural consequences nominated by jurors for not engaging in private research was the danger of jurors relying on incorrect or irrelevant information. This was nominated by at least 22 jurors. That it would create an unfair trial, sometimes put in terms of unfairness to parties or integrity of the process was the next most commonly nominated reason by jurors, stated by at least 17 jurors. A smaller number of jurors referred to the need for jury decision making to be a collective responsibility or to the danger of a mistrial.

In judges’ directions across all 20 trials the following 3 explanations referring to personal consequences were equally dominant:

- **The juror oath**: Reference to jurors’ obligations under their oath was included in judges’ directions in 7 of the 10 trials in the 2011 Jury2 Study, but only in 2 Pilot Jury Study trials.
- **Criminal consequences**: The section 68C Jury Act offence was relatively new for most of the Pilot Jury Study trials and its role was referred to by only 3 judges in those trials, and in 6 of the Jury2 Study trials. Only in 4 trials, all taking place in 2011, did a judge indicate that this misconduct was a serious criminal offence.
- **Personal integrity**: Finally, and again more commonly referred to in the 2011 trials, was a direct call by judges to jurors’ sense of fairness and integrity. Interestingly, this element appeared to resonate with quite a few jurors who referred in their responses to personal integrity as reason why they considered it wrong to breach the judge’s direction against investigation. For example, Juror 24A volunteered that in her view ‘the only way to prevent it is the judge’s instruction needs to touch the conscience, honesty and belief in the justice system of all 12 jurors.’

Obviously, the persuasiveness of an explanation to comply with judicial directions is not linked solely to the number and quality of reasons listed by a judge. As we see in the banner quote at the beginning of this section juror respect for the trial judge is significant. It was referred to expressly in the context of this judicial direction by a number of jurors. Some judges harnessed their authority in a compelling manner. For example, in Bravo the trial judge provided a powerful illustration of how flaws in privately-acquired information might go unnoticed by jurors. A number of judges recounted elements of the Skaf case to good effect and/or emphasised the issue of fairness to parties and the importance of jurors acting with integrity, often by reference to the fact that jurors too, like the presiding judge, were judges. Further, some judges repeated the direction at the end of a day, though typically they limited their admonition

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81 One trial pre-dated the criminalisation of the conduct.

82 For example, Juror 20F, ‘I understand & believed the instruction from the judge and I believe that the integrity of the jury system is one that needs to be preserved and treated with respect.’

83 Juror 28J expressed similar sentiments, but in terms of the integrity of the process: ‘The only thing preventing is the commitment of the jury to uphold the rules of the legal process. The jury needs to understand the importance of this to the trial process. Strong direction from the judge and emphasis on the importance of the role of the jury helps with this’. Her sentiments were also repeated by other jurors.

to jurors refraining from discussing the trial with others. A number of jurors commented that they recalled the judge’s emphatic reminders to them.

In sum, in the 20 trials, judges’ most common explanation to jurors to comply with the direction was based on counsel’s need (and so also counsel’s expertise) to test evidence. The persuasiveness of this explanation will depend in large part upon jurors’ respect for counsel’s forensic capabilities. However we have seen already that may juror respondents spread across many of the Study’s trials were dismissive of counsel’s skill and, for jurors in the Study, the dangers of flawed information, its potential irrelevance and its danger of misleading a juror who was unskilled in testing it rated as the most persuasive reasons for not engaging in making private enquiries. Whilst a significant number of jurors also referred to unfairness to parties, none indicated the importance of parties’ own testing processes, despite the prominence this reason had in judicial directions.

Conclusion
What do these dynamics indicate? They suggest that in trial judges’ directions regarding jurors engaging in private enquiries in addition to integrating the trial’s accusatorial justice elements within an explanation of jurors’ roles there is a case for judges to incorporate into their direction how and why the trial process depends on parties’ testing of evidence, and that this explanation would be strengthened with reference to the fact that parties assess evidence in a variety of ways.85 And to address jurors’ frustration at evidence not led or witnesses not called, with respect to the judicial direction, there is merit in including reference to the role of the rules of evidence in excluding evidence that might appear at first blush to be useful but is in fact flawed in ways that can mislead jurors. Given the appeal of anecdote, there may be benefit in judges referring juries to reported acts of juror misconduct to show the dangers of jurors turning into investigators. These should include instances where trials have miscarried or appeals have been upheld through jurors obtaining potentially misleading impressions through visiting locations in changed circumstances86 or using internet research that directed jurors to flawed sources.87

85 Discussed below in Recommendation 2 below.
87 See for example, the New Zealand Court of Appeal case of R v Harris [2006] NZCA 273 where court officers found pages printed from a US Internet site, www.answers.com in the jury room describing ‘beyond reasonable doubt’ and ‘burden of proof’ in ways that did not reflect New Zealand law.
Criminalisation of Juror Investigation & Research

Did jurors know private enquiry was a crime? The Study did not ask jurors directly. Two jurors indicated awareness that juror investigation is a crime. A number of jurors raised the issue of criminal consequences in response to a question seeking suggestions from them on enhancing compliance with judges’ directions. They suggested ‘a stiff fine’, ‘a heavy fine’, ‘some form of penalty or removal from the court’, or ‘an infringement [notice]’ might dissuade jurors. These suggestions infer that they were unaware of the potential two year custodial sentence and large fine that could be applied to an offender under section 68C Jury Act 1977 (NSW).

In more than 50% of the trials judges did not tell the jury that a juror investigator/researcher commits a criminal offence. In only four trials - all 2011 trials - did the presiding judge tell the jury that a juror who acts as an investigator/researcher commits a serious criminal offence. Obviously knowledge of the possibility of criminal prosecution is an important piece of information for jurors to possess, particularly in view of the various indications (supported in this study) that jurors who engage in private investigation are often conscientious and motivated by a desire to ensure that their verdict is ‘right’. Self-evidently the deterrent effect of criminalising conduct relies on knowledge that it is a crime. The reason why all judges did not tell jurors of the full criminal consequences of ignoring their direction against personal investigation has not been explored in this study.

However, it is probably more notable that directions that incorporated reference to the criminalisation of this misconduct apparently had little impact on some jurors. Of the 10 jurors who acknowledged the directions were clear and in the hypothetical fact scenario still found sleuthing to be acceptable (or were neutral on the issue) 6 of them were told clearly and distinctly that such conduct was a crime. In each of the trials where jurors were told that jury enquiry is a serious crime a juror expressed views in total contradiction to the judicial direction. Of those 4 jurors, 3 of them acknowledged that the trial judges’ directions were clear (though it is unclear whether these jurors actually appreciated why fairness and the integrity of the trial process relies on juror compliance to judges’ directions).

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88 Some suggestions were impractical. Two jurors suggested anonymising the names of the accused and witnesses, another four suggested ‘sequestering or monitoring jurors 24/7’.


90 See also Jury Act 1977 (NSW), s 68C (4) ‘Anything done by a juror in contravention of a direction given to the jury by the judge in the criminal proceedings is not a proper exercise by the juror of his or her functions as a juror’. 
Guilty pleas and summary determination resolve the vast majority of criminal charges in Australian courts but jury trials nevertheless serve important symbolic and practical roles. In New South Wales District and Supreme Courts, as is the case across Australia, juries determine the most serious offences in the criminal calendar. The 20 trials that took place from 2004 to 2006 and in 2011 in this study are broadly representative of trials that take place daily in Australia. The charges and the factual circumstances upon which they were based were not striking or unique\(^\text{91}\) and the 78 jurors who responded to the questionnaires were a cross-section of the community and of typical jurors.

In a most practical manner the jury system engages the community to inform the workings of the criminal trial. Jurors’ collective consideration of evidence has the potential to add robustness to the verdict, as does their disinterest in the outcome. Even allowing for the small percentage of determinations by jury, jurors remain at the cutting edge of an important sector of criminal justice. Jury trials are the gold standard of trials, saved for the most serious of offences. And for a number of reasons this lay engagement is important beyond the single trial. For one, jurors are the reason why trials emerged from history and have remained public and accessible to all. They embody the aspiration that the accused person should be tried by his or her peers and they are the reason why neither economic nor political pressures would permit trials to morph into remote bureaucratic decision making. Juries’ important functions are recognised by the relatively recent and widespread adoption of jury systems across the world, including in countries such as Japan, Korea and Spain. This global expansion is somewhat of a paradox because jurors are not experts and, in Australia, like in many other legal systems, nor do they give reasons for their verdicts. Jury trials are not cheap either.\(^\text{92}\) Nevertheless, jurors’ presence in the court system adds significantly to the real and apparent legitimacy of the trial process.

As we have seen, trends in juror views emerged with great consistency across the two sets of 10 trials that make up this study. The questionnaire asked jurors about juror

\(^{91}\) See Appendix A for a description of each of the trials.

\(^{92}\) Though see the efficiency arguments of former High Court Justice Dyson Heydon articulating the case that jury trials mean that (i) verdicts are determined more quickly than in a comparable judge-alone civil case where reserved judgments can be extensively delayed and (ii) juries’ reliance on oral evidence discourages voluminous evidence and hence may shorten trial processes: Heydon D, ‘Juries on trial’, Australian Financial Review (2 August 2013).
investigation and research and, in the 2011 trials, about their understanding of fairness. The other topics on which jurors expressed views (police investigations, counsel, the prosecution, defence rights, the notion that the jury was tasked with establishing an objective truth, and their frustration with the process) emerged spontaneously from comments. The unprompted appearance of these comments in questionnaire responses suggests that they are likely to be sincere and strongly-held views. This report does not purport to claim that the Study’s findings reveal that all or even most jurors hold misconceived views - just too many. It shows that the majority of jurors understood the core expectations of the justice system but that just under 50% of jurors who responded to questionnaires expressed flawed understandings in one or more important respect. The breadth and depth of recurring responses across the themes reflected in the comments and the presence of these themes as serendipitous or collateral findings here and in larger studies\textsuperscript{93} indicates that it is unlikely that this report contains idiosyncratic juror views. Thus it is reasonable to surmise that jurors in similar jury trials determine verdicts regularly applying to their task a mix of attitudes similar to the group in this study. As such, most jurors will conform to expectations but some will reflect views that are significantly at odds with the fundamental requirements of our justice system. Of particular concern is the possibility that jurors might treat the trial as one where they make assumptions that actually stack ‘the cards … against the accused as [they divert their minds] to questions about a failure by the accused to give, or call, particular evidence,’\textsuperscript{94} that they may privately seek out information that remains secret and untested or that they may misunderstand the task at hand believing that they need to establish where truth lies. That it is easy for jurors to act privately and unchecked on their misconceived attitudes heightens concern.

Jurors’ obligation to consider only the evidence led at trial is a difficult and important message for judges to convey effectively for a number of reasons. The jurors in this study were no different from most members of society whose work, study or retirement pursuits reflect a non-legalistic view of decision-making and everyone’s every day experiences endorse thorough research for important decision-making – for choosing a child’s school, buying a car or choosing a job, a career, a new appliance or where to live. Most activities reward diligence in gaining an improved understanding of the world in which decisions are made. Not so jury duty. Further, the potential for popular culture to embed juror misconceptions is strong. Most jurors will commence their civic task with some general knowledge of the system, but the pervasive and compelling representation of canny investigation from modern versions of Agatha Christie’s fertile depiction of sleuths offers dangerous subliminal pre-induction juror instruction because, in its pursuit of quite different goals to criminal justice popular culture often reinforces the misconceptions discussed in this report. Neither fiction nor journalism typically


\textsuperscript{94} Dyers v R (2002) 210 CLR 285, per Kirby J at ["53"] (citations omitted).
identifies the burden of proof or the prominent and important role of the law of evidence in sifting information to go before the jury. Instead, the perspective of the chief protagonist, typically a private investigator or police, tends to inform consumers of fiction and the media inferentially of what constitutes a just conclusion to criminal allegations. Amateur detectives may be pivotal in a genre of drama but they are appallingly incongruous to the mission of our justice system and misplaced altruism does not make juror misconduct any less of a threat to the fairness of a trial.

Juror induction brochures, pre-trial DVDs and web-based juror information have important roles to play but none supplant the authority of appropriate judicial instruction and direction. Both are important. As mentioned earlier, no jurors in this study made negative comments about judges. None was expected. Indeed, in a context where many jurors expressed frustration regarding elements of the trial process, certain counsel and aspects of police investigations, the praise of judges (and of Sheriff’s Officers) stands out. Findings from other jury studies and comments in this report, including the expression of admiration and inspiration of the presiding judge by Juror 10K described at the beginning of Part II of this report, indicate that jurors are typically committed, conscientious, well-intentioned and wish to do their job well. In this study the vast majority of juror respondents presented as conscientious, committed and dedicated. Support for this view can be gleaned not only from juror comments but also from an additional telling statistic, namely that the dominant priority amongst jurors was that they should be fair to the accused. Comments suggest that a number of jurors wanted more support and guidance to enable them to fulfil their good intentions.

There is clearly no easy answer to the problems identified here but as Chief Justice Bathurst has remarked extra-judicially ‘just as the [reasons why juries are] good is no reason to remain uncritical or to not strive for improvement, so the bad is no reason to throw the proverbial baby out with the bathwater’\(^8\). How best to synchronise the criminal justice system’s theory in the courtroom with its expression in the jury room presents a great challenge, one that is unlikely to have a silver bullet solution. Taken as a whole the findings that suggest that many jurors are genuinely frustrated by information gaps in the evidence, by processes and by legal professionals who, they perceive, do not sufficiently assist them to do their job well are not renegades or rogue jurors, inclined to flout justice. The same applies to those jurors who thought it could be acceptable to breach a judge’s direct instructions. The vast majority were just jurors with a flawed appreciation of what the justice system requires of them.

\(^{85}\) Surveyed only in the *Jury2 Study*, see Appendix C, Q 6A.

UNSW JURY STUDY: Jurors’ Notions of Justice

RECOMMENDATIONS

It is fair to say (though outside the terms of this study) that there is broad consensus that juries add great value to our justice system and that jurors deserve to be supported to do their job. In the trials in this study all judges directed juries on the prosecution’s obligations to prove its case and on defendants’ accusatorial rights, and all judges gave directions prohibiting juror sleuthing. However the complexity of misunderstandings revealed in juror comments suggests that a strong and clear judicial direction, including reference to the possibility of serious criminal consequences, may be inadequate while jurors in sufficient numbers believe that they need more information to do their job well. This report concludes with four potentially complementary approaches to addressing the issues raised by the Study.

RECOMMENDATION 1: REVIEWING THE ROLE OF SECTION 68C JURY ACT 1977

1. Section 68C into the Jury Act 1977 (NSW) was introduced following the juror investigation cases of *R v K*97 and *R v Skaf*98 that also prompted this study. Notably, and despite section 68C, the flow of cases where jurors have engaged in private enquiry in New South Wales has continued.99 The problem is not unique to New South Wales. Other parts of Australia100 and beyond101 share the problem. Despite the spike in studies treating social media as integral to this form of juror misconduct, it is not a recent phenomenon.102 That there have been no prosecutions103 in New South Wales under section 68C since it was introduced in late 2004 suggests that the provision may be serving a largely symbolic role on the statute books.

a. It is recommended that a review of the benefits of section 68C Jury Act 1977 (NSW) be undertaken to determine whether the goals of criminalising juror misconduct can be better achieved by other means. Consultation with judges and perhaps also further research regarding the benefits of criminalisation is recommended.

b. Careful consideration should be given to understanding why experienced, thorough and thoughtful trial judges did not inform juries of the serious criminal consequences of

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98 [2004] NSWCCA 37; 60 NSWLR 86.
100 See also in other Australian jurisdictions, *Cant v The Queen* [2002] NTCCA 8; (2002) 12 NTLR 133; *Shrivastava v State of Western Australia* [2010] WASCA 96; *Hansen v State of Western Australia* [2010] WASCA 180, see in particular the strong dissent by Pullin JA.
102 See for example *Perdriau v Moore* [1888] NSWLawRp 22; (1888) 9 LR (NSW) 143; *O’Malley v Elder* [1876] VicLawRp 76; (1876) 2 VLR (L) 117.
private juror enquiry. The inclusion in judicial directions to juries of the significance of section 68C is important but it is not the key issue. The findings from this study show that where even when judges inform jurors appropriately of the serious criminal consequences, too many jurors still considered it very acceptable for a juror to ignore the direction. It is highly possible that criminalisation may have double-edged and counter-intuitive consequences that outweigh its possible benefits. For example, a concern that criminal penalty may be applied to a well-intentioned juror-detective could well discourage other jurors from reporting misconduct.\footnote{As indicated earlier, in this study one juror reported apparent research misconduct by a peer, disapproving of the use of the information in the jury room but, it seems, she did not report it to authorities. In the other trial where juror investigation was revealed to authorities a fellow juror asked if there was ‘[a]n easier way for other members of the jury to talk to someone about anything they have heard another jury member doing’. Cf \textit{R v Sto (No 3)} [2013] NSWSC 1414.}

\textbf{RECOMMENDATION 2: REVIEWING GUIDELINE DIRECTIONS} \footnote{Obviously this report has analysed actual judges’ directions, not guideline directions. The recommendations are cast in terms of guideline directions because that is likely to involve optimum consideration of best practice and compliance with that practice.}

\begin{enumerate}
\item By tradition courts have relied on the integrity of jurors to act in accordance with trial judges’ directions.\footnote{A start in this direction can be found in the 2008 amendments made by the Judicial Commission of New South Wales to its \textit{Criminal Trial Courts Bench Book} to guideline judicial instructions made in response to the \textit{Pilot Jury Study} preliminary report to the Research Director of the Judicial Commission: see Appendix B, where this is discussed further.} The Study’s findings suggest that jurors strive to their best but benefits to the criminal jury trial process are likely to accrue where trial judges revise how they convey to jurors that private enquiry is unnecessary, unfair and wrong,\footnote{There is literature and guidance elsewhere on the topic of juror induction: see New South Wales Law Reform Commission, \textit{Jury Directions}, Report 136, 2013.} particular if the direction builds on robust techniques that assist to explain to jurors that trials do not have the goal of determining the truth. Juror induction should also reinforce these themes.\footnote{Gilbert \textit{v The Queen} (2000) 201 CLR 414, 425 (per McHugh JA): ‘Put bluntly, 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’. See also \textit{Demirok \textit{v The Queen}} (1977) HCA 21; (1977) 137 CLR 20; \textit{R v Perish} (2011) NSWSC 1102 (per Price J); \textit{R v Jamal} (2008) 72 NSWLR 258, 261-62 (per Spigelman CJ).} The findings from this study show that even when judges inform jurors appropriately of the serious criminal consequences, too many jurors still considered it very acceptable for a juror to ignore the direction. It is highly possible that criminalisation may have double-edged and counter-intuitive consequences that outweigh its possible benefits. For example, a concern that criminal penalty may be applied to a well-intentioned juror-detective could well discourage other jurors from reporting misconduct.\footnote{As indicated earlier, in this study one juror reported apparent research misconduct by a peer, disapproving of the use of the information in the jury room but, it seems, she did not report it to authorities. In the other trial where juror investigation was revealed to authorities a fellow juror asked if there was ‘[a]n easier way for other members of the jury to talk to someone about anything they have heard another jury member doing’. Cf \textit{R v Sto (No 3)} [2013] NSWSC 1414.}
\item Judicial directions and induction information should link their explanations of accusatorial justice and the prohibition against extra-curial investigation and research.
\end{enumerate}

\begin{enumerate}[a.]
\item Judicial directions and induction information should link their explanations of accusatorial justice and the prohibition against extra-curial investigation and research.
\item In addition, the explanations should focus upon:
\begin{enumerate}[i.]
\item jurors’ perspectives to explicate legal and abstract systemic reasons for both the prohibition and for the purpose of detailing accusatorialism’s role in the trial; and
\item practical expressions that link the manifestations of accusatorial trial dynamics specifically to jurors’ tasks.
\end{enumerate}
\item How best to achieve this approach requires careful formulation reinforced with consistent messages in other aspects of a judge’s initial remarks. For example, instead of a judge telling jurors to ‘listen to the evidence’, the same instruction could be conveyed
\end{enumerate}
along the lines of an instruction that ‘as well as being attentive to the witnesses and evidence called by the prosecutor to see whether the prosecution case establishes the charges beyond reasonable doubt, jurors should also listen carefully to defence cross-examination of prosecution witnesses, because this questioning is designed to test the prosecution case’.

d. The development and implementation of strategies that build on jurors’ sense of fairness and explicate the relationship between unfairness and miscarriages of justice is also recommended, as is further research to establish how best to explain what is required of jurors who may have pre-existing misconceptions of the task at hand.

e. The study’s findings also support judicial directions regarding private enquiry by jurors integrating specifically how and why the trial process depends on parties’ testing of evidence, perhaps by referring to parties’ repertoire for testing evidence in various ways (such as through pre-trial investigation, forensic testing and advice from specialists in various fields) in addition to in-court witness questioning.

f. To address juror frustration at evidence not led or witnesses not called it would be useful to include in judicial directions that the rules of evidence often apply to information that might appear at first blush to be useful but is in fact flawed in ways that can mislead jurors. This could be also conveyed by anecdote, which seems to have resonated with many jurors in this study.

**RECOMMENDATION 3: DECISION TREES AND JUDICIAL TRAINING**

3. As well as having a good understanding of the trial process many jurors need specific guidance linked to the charges and evidence before them. Three jurors made suggestions in this study consistent with wanting more specific direction.109 To this end an integrated summing up (in the form of a decision tree or question trail)110 offers a compelling way forward. Inevitably judges would need support to introduce this form of assistance into their already demanding roles.

109 Juror 8G wrote, ‘discussion to be more on the facts rather than interpretation of the law’ could be enhanced with the provision of additional written material, namely, ‘I believe that a booklet on the basic guidelines should be given to jurors. This should include:
(1) The law pertaining to the counts in question;
(2) Guidelines on how counts should be judged;
(3) Transcript of the judge’s summing up’.

However, with respect to (3) as revealed in 2 of the Study’s trials, the inability to get a transcript of a judge’s summing up in less than 2 days is a notable logistical challenge to this point. See also Juror 22C who suggested that the jury’s task would be assisted with guidance on ‘[a] process to work with for the decision as it took a lengthy time to get a suitable footprint.’; Juror 22I: ‘Deliberations would have been quicker given direction as everything focused on attempting to find the accused guilty through assumption and gut instinct rather than on the evidence provided’. Juror 10K made similar observations.

RECOMMENDATION 4: FURTHER JURY SUPPORT

4. This study began as one about juror investigation and research, however its findings suggest a more fundamental issue, namely that a significant number of jurors need additional support beyond judicial instruction. One example came from a juror\(^{111}\) who wanted assistance or support that was less public than a judge reading out ‘letters’ [ie notes from the jury] in open court. He wanted to be able to ‘to talk to someone about anything they have heard another jury member doing’. This plea does not invite easy answers, but there may be some simple ways to support jurors and to regulate and shape juror behaviour through group dynamics, without recourse to judicial authority - such as explicitly, through signage\(^{112}\) or with a document that addresses FAQ for jurors in the jury room. These measures can assist to build informed consensus amongst jurors on what is and what is not acceptable. There is benefit in exploring literature on regulation theory to this end as well.

\(^{111}\) By asking for ‘[a]n easier way for other members of the jury to talk to someone about anything they have heard another jury member doing …Court officer cannot be consulted … Judge accepts letters but these are read out with all present … - Jury room monitor’: Juror 22I. In Juror 22I’s trial a juror engaged in their own investigations. It is distinctly possible that this comment could have related to Juror 22I’s own personal circumstances.

\(^{112}\) See New Zealand Law Commission Report. The relevance of signage or documentation is that jurors would be emboldened by this formal confirmation of the rules to call on other jurors to respect and heed them.
REFERENCES

LEGISLATION
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KEY CASES

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_Cant v R_ [2002] 12 NTLR 133
_DTS v R_ [2008] NSWCCA 329
_Demirok v R_ [1977] HCA 21; (1977) 137 CLR 20
_Gilbert v R_ (2000) 201 CLR 414
_Hansen v State of Western Australia_ [2010] WASCA 180
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_R v Belghar_ [2012] NSWCCA 86
_R v Elomar & Ors_ [No 4] [2008] NSWSC 1444
_R v Folbigg_ [2007] NSWCCA 371
_R v Forbes_ [2005] NSWCCA 377

Other

_Attorney General v Dallas_ [2012] EWHC 156 (Admin), [2012] 1 WLR 991
_USA v Lopez-Martinez_ [2008] USCA9 413

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Heydon D, _Juries on trial_’, _Australian Financial Review_ (2 August 2013).
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Spigelman JJ, _The Internet and the Right to a Fair Trial_, 6th World Wide Common Law Judiciary Conference (Washington DC, June 2005).
APPENDIX A

SHORT SUMMARIES OF THE 20 TRIALS

**Alpha** faced numerous counts of sexual and indecent assault upon two complainants, both under the age of 18 years. Alpha was in a position of trust and the alleged assaults occurred over a number of years, approximately 10 years before the trial. Consent was not an issue.

Uncharged acts of sexual behaviour pre-dating the incidents in question were admitted into evidence to show the nature of Alpha’s relationship with the complainants. The judge gave a forensic disadvantage direction to the jury arising from the complainants’ delay in making a complaint.

Alpha testified. He was found guilty on all counts.

**Bravo** was charged with 2 counts of sexual indecency of a minor and with additional counts of sexual assault without consent relating to events alleged to have occurred over a period of years, approximately 10 years before the trial. Bravo and the complainant were related.

Prosecution tendency evidence was admitted that Bravo had previously pleaded guilty to sexually assaulting a minor. The prosecution adduced extensive context evidence that included numerous uncharged acts of sexual assault between Bravo and the complainant. The defence strongly contested this evidence and in cross-examination exposed inconsistencies in the prosecution’s case.

Bravo did not testify or call evidence. He was found not guilty on some counts. The jury was hung on the remaining counts.

**Charlie** was charged with a count of sexual assault and, in the alternative, with one count of sexual indecency. The complainant was a child and did not know Charlie beyond a short family friendship. It was the prosecution case that the alleged assault occurred in the complainant’s bedroom and that the complainant’s father saw the defendant leaving the bedroom. The prosecution led tendency evidence of an uncharged incident of sexual indecency that allegedly took place a number of years previously. This evidence gave rise to a judicial direction relating to forensic disadvantage.

Charlie testified. He was found guilty.

**Delta** faced a number of counts of aggravated sexual assault in which consent was in issue. The complainant testified that she was detained and sexually assaulted by Delta. The defence disclosed Delta’s prior criminal history of violence. The judge directed the jury to disregard this evidence during their deliberations.

Delta testified. He was found guilty of all charges.
Echo faced a charge of assault occasioning actual bodily harm and additional charges of sexual assault. The incidents in question occurred nearly 10 years earlier when the complainant was a teenager. More than 5 years after the incident a cold match of Echo’s DNA, from an offenders’ data base led to the laying of the subject charges. Evidence of Echo’s criminal history came before the jury through the admission of the DNA and police photographs of his appearance at the relevant time. No details of Echo’s criminal record were admitted into evidence beyond an acknowledgement that Echo had never been charged with a sexual assault offence.

The defence case attacked the accuracy of the DNA match submitting that it was possible in the circumstances for a coincidental DNA match to take place.

Echo testified. He was found not guilty.

Foxtrot faced numerous counts of aggravated sexual assault which were alleged to have occurred over an 18 month period. Prior to the jury’s empanelment the accused pleaded guilty to an additional count of assault.

The complainant was alleged by the prosecution to be under Foxtrot’s authority. The defence challenged the complainant’s credibility. In relation to half the counts the complainant failed to come up to proof. Directed verdicts of acquittal were given regarding these counts. With respect to the remaining counts the jury was discharged before the defence case was reached.

Golf was charged with numerous counts of assault, sexual assault counts and detaining for advantage. All counts related to his partner. Consent was at issue with the sexual assault and detaining counts. The prosecution led relationship evidence showed that the complainant and Golf engaged in drug-taking and that Golf was violent, threatening and abusive.

The defence case was that the complainant willingly maintained a volatile sexual relationship with the accused. The defence strongly challenged the complainant’s credibility.

Golf did not testify or call evidence.

Golf pleaded guilty to some counts, one count resulted in a directed acquittal and the jury was hung on another count. He was found not guilty on a small number of counts and guilty on the majority of the counts.

Hotel faced one count of murder by strangulation of his partner. Manslaughter was open as an alternative verdict. The prosecution case was based on circumstantial evidence. The defence consisted of an alibi. It also raised the possibility that the deceased, a sex worker, may have been murdered by an unspecified associate.

Relationship evidence between the accused and the deceased in the form of a number of uncharged acts of violence was admitted as evidence.
Hotel did not testify. He was found guilty of manslaughter.

India faced one count of murder by strangulation of his partner. Manslaughter was open as an alternative verdict. India admitted strangling the deceased, but denied intending to kill her.

The prosecution led evidence showing a volatile and violent relationship, that India regularly accused the deceased of infidelity, that he had threatened her and one month prior to her death he had assaulted her. It was the defence case that the deceased’s drug intake on the evening made her vulnerable to asphyxiation.

India did not testify or call evidence. He was found guilty.

Julian pleaded guilty to cannabis-related charges and was tried for a firearms offence and supplying for reward methyl amphetamine on a number of occasions. In the alternative there were (lesser) multiple counts of supplying methyl amphetamine. The prosecution lead evidence of uncharged criminal acts by Julian contextualising the incidents alleged in the subject charges.

The defence case was that Julian supplied the prosecution witness with cannabis, not methyl amphetamine.

Julian testified. He was found guilty of the lesser drug counts and the firearms offence.

Kilo was charged with sexual offences involving his young teenage daughter. This trial proceeded after decades of delay arising from a significantly delayed complaint.

Kilo did not testify or call evidence. He was found not guilty.

Lima was charged with indecent assault of his teenage relative. The prosecution case was that the incidents occurred over a number of years. The trial proceeded after a lengthy delay due to a delayed complaint. The prosecution case consisted of a number of uncharged criminal acts of a related nature. The defence case was that the allegations were fabricated.

Lima did not testify or call evidence. He was found guilty.

Mike was charged with indecent assault of his teenage relative. The trial proceeded after a lengthy delay due to a delayed complaint. The prosecution case consisted of a number of uncharged criminal acts of a related nature. The defence case was that the allegations were fabricated.

Mike testified. He was found guilty.

November was charged with sexual offences arising from a number of separate incidents, against a child in his extended family.

The defence case included a partial alibi and claims that the allegations were fabrications, instigated by the complainant’s mother and motivated by personal animosities.
November testified. He was found guilty.

**Oscar** was charged with having non-consensual sexual intercourse. It was the prosecution’s case that consensual sex occurred first. The defence case was that sex was consensual and that the complainant’s recollection of the event was flawed due to drugs and alcohol.

Oscar did not testify. He was found not guilty.

**Papa** was charged with intimidation of a witness and related offences. It was the prosecution case that a friend of Papa’s was facing a criminal trial and prior to the trial Papa threatened witnesses to discourage them testifying. The defence was one of mistaken identity.

Papa did not testify. He was found not guilty.

**Quebec** was charged with a number of counts relating to murder, reckless wounding and assault all arising from a single alcohol-fuelled altercation. The prosecution relied on intercept phone call evidence. Identification was the key issue. There was no DNA evidence.

Quebec testified and was found guilty.

**Romeo** was charged with over 10 counts of supplying a prohibited substance and of soliciting murder. The prosecution alleged that the accused was a drug dealer who attempted to incite others (including an undercover police officer) to murder various ex-business associates.

Romeo did not testify and he was found not guilty

**Sierra** was charged with conspiracy to import an illegal substance into Sydney and possession of an unlawfully imported substance.

The prosecution relied on phone intercept evidence. The defence case denied any involvement in drug importation.

Sierra testified. He was found guilty.

**Tango** was charged with break and enter, theft, receiving stolen property, car theft and various other offences. He pleaded guilty to one of the relatively minor offence. The police recovered much incriminating property at Tango’s home.

Tango testified. He was found guilty only on receiving charges.
APPENDIX B

AMENDED CRIMINAL TRIAL COURTS BENCH BOOK GUIDELINES: 2008 AMENDMENTS

In response to the researcher’s preliminary report from the *Pilot Jury Study* in 2008 the Judicial Commission’s Criminal Trial Courts Bench Book Committee revised its Initial Remarks guidelines extracted below (in italics) with a view to linking the features of accusatorial justice with the instruction that jurors refrain from extra-curial investigation and research.

The first addition to the guideline Initial Remarks described to jurors the significance of the accusatorial justice framework to their task. It emphasised that procedural truth does not require determining ‘where truth lies’. It had the strength of empathising with jurors’ possible frustration regarding gaps in evidence. It framed its message by beginning and concluding with a pithy statement of the prosecution’s obligation to prove its case to the requisite standard. It used clear, direct and authoritative language. The reference to unfairness was likely to resonate with lay people. The second revision, namely, the inclusion of a clear statement that jurors commit a serious criminal offence if they disobey the instruction, enhanced the deterrence effect anticipated by the legislation in 2004 of the criminal offence for juror misconduct. Of course, this element also highlighted to jurors the importance of the prohibition. Lastly, the guideline provided a persuasive illustration of the danger of jurors being misled by flawed information. This reinforced the preceding instruction relating to the role of parties in the trial process. Notably, this discouragement to jurors in seeking out additional information by way of example was potentially more effective than merely a bald statement of general danger.

The following paragraphs (in italics) were added in August 2008. Unfortunately these have since changed back to the more conventional serial presentation of trial dynamics and then the listing of reasons why jurors are prohibited from engaging in extra-curial enquiry.

The nature of a criminal trial

… The obligation is on the Crown to put evidence before the jury in seeking to prove beyond reasonable doubt the accused’s guilt. The accused has no obligation to produce any evidence or to prove anything. What all of this means is that it is not your role to try and determine where the truth lies. Jurors have indicated in studies and surveys that have been done in the past that they sometimes feel frustrated by a lack of evidence about some aspect of a case. In some cases it has led jurors to make enquiries for themselves to try and fill in the gaps that they perceive in the evidence. From what I am about to say to you, I trust you will understand that this is absolutely impermissible and that it is unfair to both the Crown and the defence. I want you to clearly understand that making enquiries about anything to do with the case is not

your function. Your function is, as I have said, to decide on the evidence that has been placed before you, whether or not the Crown has proved the guilt of the accused beyond reasonable doubt.

**Prohibition against making enquiries outside the courtroom**

It is of fundamental importance that your decision in this trial is based only upon what you hear and see in this courtroom [if applicable: or at an inspection of a scene]: that is; the evidence, the addresses of counsel and what I say to you about the law. You must not, during the course of the trial, make any enquiries outside the courtroom about any matter relating to any of the issues arising in this trial. In particular you are not to use any aid, such as legal textbooks, to research any matter in connection with your role as a juror.

*It is a serious criminal offence for a member of the jury to make any enquiry for the purpose of obtaining information about the accused, or any other matter relevant to the trial.* This prohibition continues from the time the juror is empanelled until the juror is discharged. It includes asking a question of any person; conducting any research, for example by using the internet; viewing or inspecting any place or object; or conducting an experiment. You are not permitted to have someone else make those enquiries on your behalf.

The reason why you cannot make such enquiries is that you must be true to your oath or affirmation. This means that you are required to give a true verdict, that is one determined solely by reference to the evidence presented in open court, the submissions of counsel and, of course, the directions of law that I shall give you at any time during the trial.

If you were to make enquiries outside the courtroom you would change your role from that of an impartial juror to an investigator. You would be taking into account material that was not properly placed before you by the Crown or the defence. It is the parties that present evidence to the court, not the judge and not members of the jury. It would be unfair to both the Crown and the accused to use any material obtained outside the courtroom because the parties would not be aware of it and, therefore, would be unable to test it or make submissions to you about it. Some experiments may require particular expertise to carry them out and to report on the findings of the experiment for that evidence to be of any use to you.

Yet the result of your enquiries could be misleading or entirely wrong. For example, you may come across a statement of the law or of legal principle that is not applicable in this State. The criminal law is not the same throughout Australian jurisdictions and even in this State can change rapidly from time to time. It is part of my function to tell you so much of the law as you need to apply in order to determine the issues before you. Similarly you could obtain factual material that may be irrelevant to your consideration of any issue before you, or that might be misleading or could be erroneous.
APPENDIX C: CRIMINAL TRIALS JUROR SURVEY

CRIMINAL TRIALS

JUROR SURVEY

IN THE CRIMINAL TRIAL THAT YOU HAVE PARTICIPATED IN THE JUDGE GAVE YOU MANY DIRECTIONS ON LAW AND ON WHAT IS APPROPRIATE AND INAPPROPRIATE FOR JURORS. THIS QUESTIONNAIRE ADDRESSES A NUMBER OF ISSUES REGARDING JUDICIAL DIRECTIONS AND JURY TRIALS. THERE IS EXTRA SPACE AT THE END OF THE QUESTIONNAIRE IF YOU NEED IT FOR ANY OF THE QUESTIONS.
The NSW Attorney-General has given permission for this questionnaire to be given to you with strict conditions to protect your anonymity and the integrity of the jury system. Please note that the information that you provide is strictly confidential. It will be only used to draw general conclusions about the operation of criminal jury trials in New South Wales. Reports of the findings of the research will not comment on specific trials in ways that make them identifiable to readers. You yourself will remain completely anonymous.

Your participation in this research is completely voluntary. You are free to withdraw from it at any time.

Please answer the questionnaire to the best of your ability. There is no right or wrong answer and even if you do not answer all of the questions, your responses will be valuable to us.

We want only to know your thoughts and feelings because we believe that you can provide important information based on your experience of being a juror. For this reason you should answer the questionnaire without consulting anyone else.

Please be assured that your answers will be seen only by researchers who are completely independent of the Sheriff’s Officers and the Police.

YOUR TIME IN ANSWERING THESE QUESTIONS IS GREATLY APPRECIATED.

THANK YOU.
Part A: These questions are designed to gather information about your general views. The questions do not concern the trial in which you were a juror.

Q1. As you may be aware, jurors are expected to draw on their life experience and common sense in their deliberations. We are interested in your views about people with a criminal history.

*Criminal history includes evidence that the accused had acted criminally or improperly, even though there may not have been a formal criminal conviction.*

Please indicate how strongly you agree or disagree with the following statements:

<table>
<thead>
<tr>
<th>Statement</th>
<th>SD</th>
<th>D</th>
<th>Neither</th>
<th>A</th>
<th>SA</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. People who have any prior convictions are more likely to commit further crime than people who do not have any prior convictions</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>b. People who have prior convictions for a particular kind of crimes are more likely to commit the same kind of crimes</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>c. People who have prior convictions for any crimes are more likely to commit any sort of crimes</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>d. People who have no prior convictions but who have a violent, dishonest or immoral past are more likely to commit crimes than people without that kind of a past.</td>
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</tbody>
</table>

Q2a. In cases where the evidence strongly suggests a verdict of guilty, do you think it is important for jurors to know about an accused’s criminal history when deciding whether he or she is guilty?

Yes ☐ No ☐

b. Why do you say that?
Q3. If you knew that an accused person had a criminal history similar to the offence for which s/he was charged, would this knowledge make it easier to remove reasonable doubt that the accused is guilty of the crime charged?

Yes ☐  No ☐

Q4. If you knew that an accused person had a criminal history dissimilar to the offence for which s/he was charged, would this knowledge make it easier to remove reasonable doubt that the accused is guilty of the crime charged?

Yes ☐  No ☐

Part B: These questions concern the trial in which you were a juror.

Q5a. Was your role as a juror explained to you? (Tick yes or no)

Yes ☐  No ☐

b. How?______________________________________________________________________________

c. By whom?__________________________________________________________________________

d. What did you understand to be your role as a juror? __________________________________

___________________________________________________________________________________________

___________________________________________________________________________________________

Q6. Please describe the accused in the trial (Tick boxes as appropriate).

Ethnicity/Race________________________________________

Gender:  Male ☐ Female ☐

Age:  Young ☐ Middle aged ☐ Older ☐

Appearance:  Attractive ☐ Average ☐ Unattractive ☐
6A. [ADDED IN 2011]

From your own experience, what do you consider to be important for being a responsible juror in relation to the **courtroom**?

- [ ] To remember evidence/witness testimony
- [ ] To have good note-taking skills
- [ ] To be accurate
- [ ] To listen carefully to counsels’ questions and submissions
- [ ] To listen carefully to the evidence/witness testimony
- [ ] To listen carefully to the judge's instructions and directions
- [ ] To strive to obey the judge’s instructions and directions
- [ ] Knowing when to obtain assistance from the judge
- [ ] Other __________________

6b. [ADDED IN 2011] From your own experience, what do you consider to be important for being a responsible juror in relation to the **jury room**?

- [ ] To ensure guilty people are convicted
- [ ] To ensure innocent people are acquitted
- [ ] To be fair to the defendant
- [ ] To be fair to ________________
- [ ] To be a good contributor to discussions in the jury room
- [ ] To consider different points of view in the jury room
- [ ] To have good people skills for resolving disagreements in the jury room
- [ ] To cope with stressful decision-making
- [ ] Other __________________
Q7. There was evidence in your trial that the accused had a criminal history.

Criminal history includes evidence that the accused had acted criminally or improperly, even though there may not have been a formal criminal conviction. This misconduct may not have been directly connected to the offence(s) charged.

a. If you recall any evidence concerning the accused person’s criminal history that came out during the trial briefly describe that evidence:

_____________________________________________________________________________________

b. To the best of your recollection, in the trial in which you were a juror, what charge(s)/offence(s) did the accused face and what was the verdict(s)?

For each charge or offence - If the evidence of the accused’s criminal history relates to any charge(s)/offences please tick the box beside the charge(s)/offence(s)

<table>
<thead>
<tr>
<th>Charge(s)/Offence(s)</th>
<th>Verdict</th>
<th>Evidence of accused’s criminal history related to this charge</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(ii)</td>
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<td>(vii)</td>
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<tr>
<td>(viii)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

c. If you have indicated above that the evidence of the accused’s criminal history was related to charge(s)/offence(s), please indicate how strongly you agree or disagree with the following statements:
NOTIONS OF JUSTICE: Juror Motivations to Investigate & Obedience to Judicial Directions

SD indicates strongly disagree
SA indicates strongly agree

SD  D  Neither  A  SA

i) The evidence of the accused’s criminal history was really important in deciding the accused was guilty/not guilty?

ii) The evidence of the accused’s criminal history was really important for other jurors’ in deciding the accused was guilty/not guilty?

d. If there was disagreement in the jury about the important factors influencing the jury's decision that the accused was guilty/not guilty of those offence(s)/charge(s), how was that disagreement resolved?

__________________________________________________________
__________________________________________________________

e. Was the jury’s decision as a whole that the accused was guilty/not guilty of those offence(s)/charge(s) influenced by evidence of the accused’s criminal history?

Yes  ☐  No  ☐

f. If Yes, in what way was the jury’s decision as a whole that the accused was guilty/not guilty of those offence(s)/charge(s) influenced by evidence of the accused’s criminal history?

__________________________________________________________
__________________________________________________________
__________________________________________________________

58
Q8. Answer these questions by focusing on the offence(s)/charge(s) that you indicated in Question 7b. as being related to evidence of the accused's criminal history.

Criminal history includes evidence that the accused had acted criminally or improperly, even though there may not have been a formal criminal conviction.

(i) In relation to your verdict how much do you agree or disagree with these statements:

<table>
<thead>
<tr>
<th>SD indicates strongly disagree</th>
<th>SA indicates strongly agree</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The evidence of the accused’s criminal history...

a. … suggested that the accused was the kind of person who had a tendency to commit the crime(s) charged

b. … suggested the accused’s explanations (for example that his/her conduct was an accident or the prosecution case just showed a series of coincidences) should not be believed

c. … showed that a particular relationship existed between the accused and another person (for example, the victim)

d. … helped me understand the context or circumstances in which the crime(s) charged occurred

e. … showed that evidence indicating that the accused was a person of good character was incorrect, or did not tell the whole story about the accused’s character

f. … supported the view that the accused had a particular intention, attitude, or belief in relation to the crime charged

g. … showed that the victim had a particular intention, attitude, or belief in relation to the crime(s) charged
8 (ii) Now, based on what you understand your fellow jurors thought, how much do you agree or disagree with the following statements concerning the importance of evidence of the accused’s criminal history when they considered their verdict?

SD indicates strongly disagree
SA indicates strongly agree

The evidence of the accused’s criminal history…

SD D neither A SA

a. … suggested that the accused was the kind of person who had a tendency to commit the crime(s) charged

b. … suggested the accused’s explanations (for example that his/her conduct was an accident or the prosecution case just showed a series of coincidences) should not be believed

c. … supported the view that the accused had a particular intention, attitude, or belief in relation to the crime(s) charged

d. … showed that the victim had a particular intention, attitude, or belief in relation to the crime(s) charged

e. … showed that a particular relationship existed between the accused and another person (for example, the victim)

f. … helped them understand the context or circumstances in which the crime(s) charged occurred

g. … showed that evidence indicating that the accused was a person of good character was incorrect, or did not tell the whole story about the accused’s character

Q9a. Overall did you think that the evidence of the accused’s criminal history created: (Tick only one)

□ a really negative impression about the accused

□ a mainly negative impression about the accused

□ a more or less neutral impression about the accused
b. Please explain how this impression was created?

________________________________________________

______________________________________________________________________________________

______________________________________________________________________________________

________________________________________________

Part C: Judicial directions are made before, during and after the trial. They include advice to the jury on how the law requires certain evidence to be used by the jury.

The following questions are designed to find out how useful the trial judges directions regarding evidence of the accused's criminal history were for you and your fellow jurors.

*Criminal history includes evidence that the accused had acted criminally or improperly, even though there may not have been a formal criminal conviction.*

Q10. In the trial the judge gave the jury directions about how to use evidence of the accused’s prior criminal history. Can you tell us to the best of your recollection what was said? (Select one)

The judge said

_________________________________________________________

I can’t remember what the judge said but I remember something was said about this

I have absolutely no memory of this

Q11. At what stage of the trial did the judge give these directions? (Tick only one)

At the time when the evidence was first raised

At the end of the prosecution case

When the judge summarised the case after all the evidence had been given and both counsel had spoke to the jury

After the judge gave his/her summary, and the jury was called back into court
I can’t remember □

On another occasion (please state) ___________________________ ___________________________

Q12. How would you rate the clarity of these directions? (Tick only one)

Very unclear ‘I could not understand the directions at all’ □

Unclear ‘I understood a little’ □

Neither clear or unclear □

Clear □

Very clear ‘I understood the directions precisely’ □

Q13. What did you understand the judge to mean by these directions?
_____________________________________________________________________________________
_____________________________________________________________________________________
_____________________________________________________________________________________
_____________________________________________________________________________________
_____________________________________________________________________________________
_____________________________________________________________________________________

Q14a. Do you think the other jurors had the same understanding of the judge’s meaning?

Yes □ No □ Not sure □

b. If No or Not sure – what do you think the other jurors thought the judge meant?
_____________________________________________________________________________________
_____________________________________________________________________________________
_____________________________________________________________________________________
Part D: These questions concern the adequacy of evidence in the trial.

Q15a. Please indicate how strongly you agree or disagree with the following statements:

SD indicates strongly disagree
SA indicates strongly agree

If a juror felt frustrated with the adequacy of evidence in a trial and took action outside the trial process to find out more about the accused, witnesses or the circumstances of the crime(s) charged, this action would be very acceptable

b. Why do you say that?

Q16a. During the trial were you interested in finding out more than the evidence presented in the trial process about:

- The accused
- The victim
- Other witnesses
- Other people not called as witnesses
- Other aspects of the crime or where it occurred

b. If you answered yes to any of these alternatives can you tell us why you were interested in finding out more than the evidence presented in the trial process? (Note: We are only interested in your motivations, not whether you or any other juror acted on them)
Q17a. What, if anything did the judge tell you about obtaining information about the accused, witnesses or the circumstances of the crime(s) charged which was not revealed in the trial process?

__________________________________________________________________________________________________

__________________________________________________________________________________________________

b. Please indicate how strongly you agree or disagree with the following statements:

SD indicates strongly disagree

SA indicates strongly agree

The judge’s direction about obtaining information not revealed in the trial process was very clear and persuasive.

☐ ☐ ☐ ☐ ☐ ☐

c. Why was that?

__________________________________________________________________________________________________

__________________________________________________________________________________________________

Q18. What if anything, did any court official or court video or document tell you about obtaining information about the accused, witnesses or circumstances of the crime(s) charged which was not revealed in the trial process?

__________________________________________________________________________________________________

__________________________________________________________________________________________________

__________________________________________________________________________________________________

__________________________________________________________________________________________________

Q19. Why do you think jurors are told not to use information from outside the trial process to determine whether the accused is guilty/not guilty of the crime(s) charged?

__________________________________________________________________________________________________

__________________________________________________________________________________________________
Q20. What do you believe would prevent a juror searching for their own information independently of the trial process?

________________________________________________________

________________________________________________________

________________________________________________________

Part E: In this last brief set of questions we are seeking general information about people who sit on juries. The answers to these questions will assist our understanding of the survey results. However, if you do not want to answer a particular question, please feel free not to.

A Are you Female ☐ Male ☐

B To which of these age groups do you belong?

18-24 ☐
25-34 ☐
35-44 ☐
45-54 ☐
55-64 ☐
65 years or over ☐

C What is the highest level of education you have achieved?

Primary school ☐
School Certificate (Year 10/Form 4) ☐
Higher School Certificate (Year 12/Form 6) ☐
TAFE certificate/diploma ☐
Undergraduate university degree ☐
Postgraduate university degree ☐
Other please specify) ____________________________________________

D What is your occupation? ________________________________

E Do you identify as belonging to any particular ethnic or racial group?

Yes (specify)__________________________________________ No ☐
F Have you got any additional comments about your jury experience you would like to make?
______________________________________________________________________________________
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This is the end of the survey.

Thank you very much for making a contribution to the research.