LEGAL SYSTEM

The problem of jury misbehaviour in an internet age: recent cases and the Law Commission's consultation

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> "I'm no idealist to believe firmly in the integrity of our courts and in the jury system ... a court is no better than each ...of you sitting before me on this jury. A court is only as sound as its jury, and a jury is only as sound as the men who make it up." (Atticus Finch in *To Kill a Mockingbird* by Harper Lee. (1960))

Introduction

Several recent high profile cases of jury misconduct have recently brought the phenomenon of jury misconduct to the attention of the public and have once again highlighted the need for further research into the jury. Cases which highlight jury misbehaviour - such as jurors violating judicial directions, neglecting their duties or displaying prejudices - harm public confidence in the institution of the jury and pose a substantial risk to the integrity of jury trial. In November 2012, the Law Commission opened a consultation on *Contempt of Court*,[1] part of which explored ways in which reforms could minimise the instances of contempt committed by jurors. The Commission sought opinions on its suggestions for reform and is currently reviewing the responses with a view to publishing a full report in spring 2014.

This article considers some of the recent cases of jury misconduct which formed the background to the Law Commission's Consultation Paper, as well as the Law Commission's suggestions for reform. It is argued that more needs to be done to increase jurors' awareness as to their role within the criminal trial process and their responsibility to refrain from misconduct and to report misconduct by fellow jurors. To this end, many of the proposals suggested by the Law Commission at this initial consultation stage seem sensible and desirable. It is also argued that there is a need for a defence to s.8 Contempt of Court Act 1981 in cases involving jurors who come forward post-verdict to disclose evidence of misconduct where they have a genuine belief that a miscarriage of justice has occurred.

Recent cases of juror misconduct

Reports of jury misconduct frequently appear in the media. However, jury misconduct is not a new issue; in fact jurors have misbehaved for years.[2] Every law student is familiar with "the Ouija board case"[3] - the case of the jurors who decided the case by flipping a coin[4] - and the case of the jurors who (quite rightly) refused to follow the trial judge's directions to convict the defendants despite being locked up overnight

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[1] Law Commission Consultation Paper No. 209, *Contempt of Court*, 28 November 2012
[2] Some of the cases highlighted by the research of the Law Commission date back to the 19th century. *Ibid*. at para. 4.2
[3] *R v Young* [1995] QB 324
[4] *Vaise v Delaval* (1785) 1 TR 11

without food, water and heat.[5] There have also been cases of jurors conducting their own investigations (in strict violation of their oaths as well as the trial judge's directions to decide the case on the evidence before them in court) by visiting the scene of the alleged offence and taking photographs,[6] carrying out experiments on how easily knickers could be torn,[7] as well as other experiments.[8] There have been cases involving allegations of racism and bullying within the jury room,[9] as well as allegations that other jurors were prejudiced against the defendant and that they neglected their duties by changing their vote in order to be able to get out of the jury room and go home.[10] In February 2013, the jury in the first trial of Mrs. Pryce (the former wife of MP Chris Huhne) was publicly vilified by the media after sending a note to the trial judge asking about issues which raised in the judge's mind questions as to their competence.[11] The jury asked the judge ten questions, including asking for a definition of reasonable doubt and for a more detailed explanation as to the definition of marital coercion. They also asked the judge if they were permitted to speculate on various matters and whether they could reach a verdict based upon a reason which was not presented in court and which was not supported by the facts or evidence.

As a result of rather negative and somewhat sensationalist press coverage, the institution of the jury has been subject to public criticism and there have even been renewed calls for the abolition of jury trial.[12] While the jury were publicly berated for their lack of understanding of the phrase "beyond reasonable doubt," academics have long recognised that this term is difficult to define and that it causes confusion amongst jurors.[13]

In today's society, the use of the internet both in fixed locations and on mobile devices, as well as the advent of social networking websites mean that there are numerous methods by which journalists are able to report such cases.[14] The internet

[5] *Bushell's* Case (1670) 124 ER 100
[6] See *R v Patterson* (unreported), 20 Aug 2008 and *R v Davis (No. 3)* [2001] Cr App R 8
[7] *R v Paul Boseley* (unreported), 31 July 2008
[8] See *R v Cadman* [2008] EWCA Crim 1418 and *R v Thompson* [2010] EWCA Crim 1623
[9] See *R v Qureshi* [2002] 1 WLR 518, CA and *R v Mirza; R v Connor & Rollock* [2004] 1 AC 1118, HL
[10] *Attorney General v Scotcher* [2003] EWHC 1380 (Admin)
[11] See "Vicky Pryce Trial: 10 questions jury asked the judge", *The Guardian*, 20 February 2013, available at http://www.guardian.co.uk/law/2013/feb/20/vicky-pryce-trial-10-questions and "Ten questions posed by Vicky Pryce jury", BBC News, 10 February 2013, available at http://www.bbc.co.uk/news/uk-21521460 (both accessed on 3 June 2013).
[12] For example, see "Vicky Pryce trial: have juries had their day in court?", *The Telegraph*, 21 February 2013, available at http://www.telegraph.co.uk/news/uknews/crime/9885995/Vicky-Pryce-trial-have-juries-had-their-day-in-court.html, "The Pryce of a jury's failure", *The Guardian*, 21 February 2013, available at http://www.guardian.co.uk/law/2013/feb/21/vicky-pryce-case-jury-failure and "Our clueless jurors: Two-thirds 'don't understand judge's directions' – and former DPP calls for the entire system to be investigated", *The Daily Mail*, 22 February 2013, available at http://www.dailymail.co.uk/news/article-2282601/Our-clueless-jurors-Tow-thirds-dont-understand-judges-directions--DPP-calls-entire-investigated.html (all accessed on 3 June 2013).
[13] For example, see Whitman, J., "The Origins of 'Reasonable Doubt'" (2005) *Yale Law School Faculty Scholarship Series*, available at http://digitalcommons.law.yale.edu/fss_papers/1, accessed on 3 June 2013 and Tiersma, P., "The rocky road to legal reform: improving the language of jury instructions" (2001) 66(4) *Brooklyn Law Review* 1081 at 1087.
[14] Journalists are now permitted to use live text-based communication to report on cases directly from the courtroom. See the guidance published by Judge LCJ: "Practice Guidance: The use of live text-based forms of communication (including Twitter) from court for the purposes of fair and accurate

has also played a significant role in the most recent cases of jury misconduct: jurors have an enormous amount of information available to them on the internet and easy access to the internet anywhere and everywhere through mobile phones and tablet computers. The recent cases of juror misconduct serve to illustrate that the problem of jury misconduct is a very real one and is deserving of urgent attention if we are to preserve the integrity of the institution of the jury. It is also clear that the Attorney General, Dominic Grieve QC, and Judge LCJ are taking the problem of juror contempt extremely seriously. By prosecuting recent cases of juror contempt and imprisoning guilty jurors respectively, they have made a public statement that they hold such behaviour in serious regard and that there will be serious consequences for guilty jurors. This is a particularly welcome approach in light of the number of cases of jury misconduct reaching the media and the level of media attention that they attract.

In just seventeen months between June 2011 and November 2012, at least four jurors were sent to prison for contempt of court. In June 2011, Joanne Fraill[15] was imprisoned for eight months after she contacted a defendant on Facebook. Fraill was a juror in a multimillion-pound drugs trial. One of the defendants, Jamie Sewart, had already been acquitted of the charges, but Sewart's boyfriend was standing trial when Fraill and Sewart struck up a friendship on Facebook. They had a conversation using the chat feature on Facebook and Fraill disclosed details of the jury's deliberations to Sewart, including the jury's position on the outstanding charges against Sewart's boyfriend. As a result of their behaviour, the trial collapsed. Fraill admitted contempt of court and the High Court declared that Sewart was also in contempt of court under s.8, Contempt of Court Act 1981. In sentencing Fraill and Sewart, Judge LCJ stated that:

> "[m]isuse of the internet by a juror, or contravention of the contempt of court provisions in section 8(1) of the 1981 Act is always a most serious irregularity and contempt. In the context of a two year maximum custodial period, a custodial sentence is virtually inevitable. The sentence is intended to ensure the continuing integrity of trial by jury."[16]

In December 2011, Matthew Banks was sentenced to 14 days in a Young Offender's Institution after skipping a day of jury service in order to go to see a musical. Banks was a juror in a trial at Manchester Crown Court when he telephoned the court and claimed that he was sick and unable to attend. In fact, Banks took a day off and travelled to London to watch "Chicago". He was detected after the court phoned his home and Banks' boyfriend answered the phone and unwittingly notified the court staff about Banks' trip. In January 2012, Dr Theodora Dallas[17] was imprisoned for six months after she conducted research into the defendant on the internet. Dallas was a highly-educated woman and Lecturer in Psychology at the University of Bedfordshire. She violated the trial judge's direction to the jury not to conduct research on the internet by conducting internet searches on the defendant and she then

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reporting" at http://www.judiciary.gov.uk/JCO%2fDocuments%2fGuidance%2fltbc-guidance-dec-2011.pdf (accessed on 3 June 2013).

[15] *Attorney General v Fraill and Others* [2011] EWHC 1629 (Admin)

[16] ibid. at [53]

[17] *Attorney General v Dallas* [2012] EWHC 156 (Admin)

shared the information with other jurors. Her behaviour was reported to the court usher by another juror and this report was then passed on to the judge. Dallas was ultimately brought before the High Court on a charge of contempt of court. She denied the charge and claimed that as a native Greek woman her English was not that good and that she had not understood the judge's directions not to use the internet to carry out research. This defence was not entertained by Judge LCJ who emphasised the fact that Dallas' qualifications, to doctoral level, had all been completed in English and that she currently lectured psychology in English.[18] Finding Dallas in contempt of court, Judge LCJ commented that:

> "Jurors who perform their duties on the basis that they can pick and choose which principles governing trial by jury, and which orders made by the judge to ensure the proper process of jury trial they will obey, or who for whatever reason think that the principles do not apply to them, are in effect setting themselves up above the jury system and treating the principles that govern it with contempt. In the long run any system which allows itself to be treated with contempt faces extinction. That is a possibility we cannot countenance."[19]

His Lordship emphasised again the fact that a custodial sentence was necessary to "ensure that the integrity of the process of trial by jury is sustained."[20]

In November 2012, Stephen Pardon was imprisoned for four months after disclosing details of the jury's deliberations to a defendant and, on a separate occasion two days later, for attempting to disclose details of the jury's deliberations to another defendant.[21] In his defence, Pardon claimed that he was acting in good faith in an attempt to correct a miscarriage of justice. The disclosure related to the reasons for the guilty verdict and the materials considered by the jury during deliberations. Pardon also alleged that the jury had looked at newspaper websites, prompting an investigation of the case by the Criminal Cases Review Commission. The High Court rejected Pardon's defence and he was held in contempt of court. Judge LCJ criticised Pardon for deliberately disobeying the orders of the trial judge about how to deal with concerns about improper conduct by fellow jurors and, referring back to the cases examined above, commented that "[t]his court has emphasised more than once in the recent past the seriousness with which it will respond to any incident which would serve to undermine this system".[22] As to Pardon's claim that he wanted to rectify a miscarriage of justice, Judge LCJ stated that:

> "…we remind ourselves that at the core of the system of trial by jury there remains a simple principle: an individual, whether or not a juror, who, however conscientiously disagrees with the verdict of the jury, whether it is a unanimous verdict or a majority verdict, may not take any steps to derail or undermine the verdict."[23]

[18] *Ibid.* at [10]
[19] *Ibid.* at [41]
[20] *Ibid*. at [43]
[21] *Attorney General v Stephen James Pardon* [2012] EWHC 3402 (Admin)
[22] *Ibid*. at [18]
[23] *Ibid*. at [17]

Pardon and the other jurors serving on this trial had been advised by the trial judge about how to deal with concerns about improper conduct by fellow jurors. It is not clear why Pardon did not follow the judge's directions on this, but some of the measures proposed by the Law Commission in the Consultation Paper are designed to encourage jurors to come forward with their concerns during the trial; these include use of drop boxes for jurors to pass on anonymous notes to the judge and advice helplines.[24]

Finally, on 17 April 2013 the High Court gave the Attorney General permission to pursue a prosecution for contempt against Kasim Davey. Davey had been a juror in a case trying a convicted child sex offender when he allegedly posted a comment on Facebook which read: "Woooow I wasn't expecting to be in a jury Deciding a paedophile's fate, I've always wanted to Fuck up a paedophile & now I'm within the law!" Davey will be prosecuted by the Attorney General in due course. The circumstances of this case differ to the prosecutions mentioned above as this case deals with a revelation of prejudice rather than the revelation of jury deliberations or internet research. This fact is significant only to the extent that, as we shall see later, Davey's case falls outside of the scope of the Law Commission Consultation Paper which focused only on jurors using the internet to conduct research and jurors revealing jury deliberations.

Prejudice or bias among jurors is no new issue; there have been several cases involving allegations of juror prejudice or bias in recent years. Most notably, the case of *R v Mirza; R v Connor and Rollock*,[25] in which the House of Lords considered the common law prohibition on investigating into jury deliberations after a juror made allegations of prejudiced jury deliberations. While Davey's case does involve an allegation of jury misconduct committed via the internet, it is easy to see why this type of case was not the subject of the Law Commission's consultation. The allegation of prejudice in this case does not come from another juror but arises from a statement posted on a public forum. Thus, the investigation into the alleged contempt of court is not dependent upon the revelation of jury deliberations which are subject to the common law secrecy rule.

The cases above received significant media attention[26]and the sentences of imprisonment imposed by the High Court made a clear, bold and much welcomed statement that the Attorney General and the Lord Chief Justice regard jury contempt

[24] See above n.2 at paras. 4.91 and 4.92
[25] [2004] 1 AC 1118
[26] Bailin, A., "Can jurors in the internet age avoid being in contempt of court", *The Guardian*, 5 July 2011, available at http://www.guardian.co.uk/law/2011/jul/05/jurors-internet-age-contempt-court, "Juror Matthew Banks jailed for seeing West End show", BBC News, 21 December 2011, available at http://www.bbc.co.uk/news/uk-england-manchester-16288257, "Juror Matthew Banks says sickness lie 'was; stupid'", BBC News, 23 December 2011, available at http://www.bbc.co.uk/news/uk-england-manchester-16315486, Bowcott, O., "Temptations to trawl internet threaten jury system", *The Guardian*, 9 December 2011, available at http://www.guardian.co.uk/law/2011/dec/09/jurors-tempted-to-go-online, Bowcott, O., "Juror jailed over online research", *The Guardian*, 23 January 2012, available at http://www.guardian.co.uk/law/2012/jan/23/juror-contempt-court-online-research, Halliday, J., "Facebook juror and defendant guilty of contempt", *The Guardian*, 14 June 2011, available at http://www.guardian.co.uk/uk/2011/jun/14/facebook-juror-defendant-contempt, Rozenberg, J., "Theodora Dallas: inside the jury room", *The Guardian*, 24 January 2012, available at http://www.guardian.co.uk/law/2012/jan/24/inside-jury-room-theodora-dallas (all accessed on 3 June 2013).

as a serious matter which is treated as such and will inevitably result in a custodial sentence.

The Law Commission and juror contempt

In November 2012, the Law Commission published its Consultation Paper on *Contempt of Court*.[27] The Consultation Paper addressed four main issues relating to contempt of court, namely, contempt by publication, the impact of new media, contempts committed by jurors, and contempt in the fact of the court. The Commission sought views on a number of proposals and the consultation closed on 28February 2013. The Law Commission aims to publish its full Report in spring 2014. This article is concerned solely with Chapter 4 of the Consultation Paper, which deals with contempts committed by jurors. The Law Commission commented that the need for exploration of this particular aspect of the consultation was highlighted by the case of *Attorney General v Dallas*, above.

The Law Commission acknowledged the prevalence of jury misconduct historically and gave various examples of misconduct, such as jurors separating without the court's permission, eating or drinking in court at the parties' expense, drawing lots to determine the verdict, declining to participate in deliberations, and "splitting the difference" to reach a verdict.[28] However, the Commission indicated that it was not concerned with these types of misconduct and instead focused on two categories of jury misconduct: (i) jurors who seek information relating to the trial; and (ii) jurors who disclose details of jury deliberations.

The first category deals with jurors who conduct research relating to the proceedings. This covers jurors who seek newspaper articles relating to the trial as well as those who conduct research via the internet as in the case of *Dallas*.[29] This type of misconduct is a contempt of court at common law. This is an important category which concerns the use of extraneous material in deliberations in clear violation of both the trial judge's directions at the end of the trial and the oath taken by each juror before the start of the trial. Lord Judge CJ has previously stated that a verdict delivered after consideration of extraneous material "will not be a true verdict according to the evidence; it will be a verdict according to the evidence, as supplemented by the views and comments of outsiders without responsibility for the verdict."[30] This author has previously argued that failure to follow the judge's directions and the consideration of extraneous material effectively renders the trial process and judicial directions futile.[31] Where jurors conduct independent research (whether through the internet or some other means) and rely on or share the fruits of

[27] Above n.2
[28] *Ibid,* at para. 4.3
[29] The Law Commission Consultation Paper notes that there are a variety of motives which may lead jurors to seek information about the case from other sources. These include conducting research deliberately in order to "bolster their confidence", to reach the "right" verdict, due to a failure to understand the judge's directions on the law or directions not to conduct extraneous research, to gain a fuller picture of the case, out of curiosity or in bad faith. See above n. 2 at paragraph 4.21.
[30] *R v Karakaya* [2005] EWCA Crim 346 at [25]
[31] Haralambous, N., "Juries and Extraneous Material" (2007) 71(6) *Journal of Criminal Law* 520, at 524.

their research with other jurors, they also violate two further important principles of open justice and a fair opportunity for both sides to test the material.[32]

The second category deals with jurors who disclose information relating to the deliberations and covers jurors who do so in person, as in the case of *Attorney General v Pardon*, as well as those who do so via the internet, as in the case of *Fraill and Others*. This type of misconduct is a contempt of court under s.8, Contempt of Court Act 1981 which covers acts of obtaining, disclosing or soliciting particulars of jury deliberations;[33] such acts also violate the trial judge's directions. Section 8 has been defended on the basis that it promotes candour in the jury room without fear of reprisals, is consistent with the principle of finality, and that it protects the privacy of jurors.[34]

While jury misconduct is nothing new, it would seem that such behaviour has become significantly easier to commit and more problematic since the growth in the use, functionality and accessibility of the internet.[35] The next part of this paper will examine the various proposals put forward for consultation by the Commission.

The Law Commission proposals

In Chapter 4 of the Consultation Paper on *Contempt of Court*, the Law Commission made a number of proposals for reform. The proposals are divided into two categories: (i) practical preventative measures which are aimed at preventing jurors from conducting research in the first place; and (ii) legal reforms which attempt to deal with the situation when the preventative measures fail.

Practical preventative measures

The proposed preventative measures are practical steps which are aimed at discouraging jurors from conducting research or disclosing deliberations. The Law Commission has identified two forms of such measures, the first covers measures to improve the education of the public about the criminal justice system and the role and responsibility of jurors, and to improve the information which is given to jurors before the trial; the second covers the procedures in place during the trial for preventing misconduct, including the directions given to jurors by the trial judge.

Education and pre-trial information

The Commission suggests that there are steps which could be taken at an early stage to educate school children as to the role and responsibility of undertaking jury service, such as including jury service within the National Curriculum on citizenship.[36] In respect of pre-trial information given to prospective jurors, the Commission states that jurors need to be told "clearly, specifically, repeatedly and consistently that they must

[32] *Ibid.*
[33] Note the Law Commission's discussion of the precise elements of this offence, above n.2 at para. 4.43.
[34] *Ibid*. at para. 4.55. See also Haralambous, N., "Investigating Impropriety in Jury Deliberations: A Recipe for Disaster?" (2004) 68(5) *Journal of Criminal Law* 411 for counter-arguments.
[35] Above n.2. at para. 4.22
[36] *Ibid.* at para. 4.78

not undertake research" and that they should be informed of the reasons for this.[37] In addition, they should also be warned that s.8. Contempt of Court Act 1981 prohibits the disclosure of information related to the case, and they should again be informed of the reasons for this.[38] The Commission acknowledges that such warnings would need to be updated as technology develops and that it might also be helpful to provide jurors with examples of prohibited behaviour as well as warning them that violating these rules could lead to a sentence of imprisonment. It is also suggested that jurors should be informed how to deal with improper behaviour by a fellow juror. The Law Commission proposes that such warnings should be given to jurors at several instances throughout their jury service: in the guide sent to jurors with their summons; in the jury video on the first day of jury service; in the speech delivered by the jury manager on the same day; on posters and notices around the court building and jury areas; and on conduct cards which should be issued to jurors to carry with them throughout their service.[39]

The introduction of a greater degree of education about the jury system, the importance of undertaking jury service and the reasons for the laws on contempt is highly desirable. It is important to ensure that the public as a whole, and more specifically, prospective jurors, are educated as to the importance of the role of the jury and the responsibilities of jurors individually (not to conduct research or disclose deliberations and to follow judicial directions) and collectively (to ensure that fellow jurors follow the same rules and report any instances of misconduct to the trial judge).[40] The focus on repeating these warnings throughout the juror's service must also be supported as a means of further reinforcing the message.

In-trial procedures and judicial directions

The Law Commission further suggested that warnings to jurors should also be repeated by the trial judge in his or her directions to jurors at the start of the trial and at the end of each day during the trial.[41] As stated above, this serves to reinforce the message to jurors throughout the trial process. This will be particularly helpful in lengthy trials in which jurors may begin their deliberations long after the warnings given by court staff on the first day of jury service. The Commission also proposes that jurors should be given greater guidance on how to ask questions of the judge and encouragement to do so in order to prevent jurors from seeking answers on the internet.[42] Such guidance and encouragement can only be beneficial in educating jurors as to the procedures which should be followed in formal and unfamiliar court proceedings, and in demonstrating the support of the court service, court staff and judges in assisting jurors to carry out their role.

Another proposal considered by the Commission is that of amending the wording and format of the oath taken by jurors at the start of the trial. It has been suggested that the oath should specifically warn jurors not to seek information on the internet or disclose

[37] *Ibid*, at para. 4.79
[38] *Ibid.*
[39] *Ibid,* at para. 4.80
[40] In *R v Thompson* [2010] EWCA Crim 1623, the Court of Appeal emphasised the importance of the collective responsibility of the jury.
[41] Above n.2 at para. 4.82
[42] *Ibid*, at para. 4.85

information about the case, and that it should be presented to jurors in written form to be signed at the start of the trial. The Commission acknowledged that there "may be merit" in both of these proposals.[43] The benefits of such an approach are that it formalises and reinforces the importance of the words of the oath.

A more controversial suggestion mooted by the Law Commission involves confiscation of internet-enabled devices from jurors. While the Commission took the view that "it may be unwise to adopt a standard practice of removing all internet-enabled devices from all jurors for the duration of their day at court"[44] it was considered that such devices should be removed from jurors whilst they are deliberating in the jury room.[45] The Commission also thought that it might be appropriate in certain circumstances to remove such devices at other times from jurors and thus proposed that judges should have the power to order the surrender of internet-enabled devices and that this should be left to the discretion of the trial judge.[46]

These suggestions are also sensible. It is submitted that it would be too draconian a measure to automatically remove mobile phones and other internet-enabled devices from jurors for the duration of their jury service. A more sensible suggestion is to remove devices from jurors during the deliberation process. This is the time at which jury questions are most likely to arise, probably as a result of issues thrown up in collective debate, and it is important that jurors ask such questions of the judge rather than seek answers on the internet. This is the point in the process of jury service at which the removal of devices is most justified. While it must be acknowledged that such a measure will not prevent the determined juror who might conduct research on the internet at home (where jury deliberations span more than one day), it is hoped that this measure, coupled with the judge's directions repeated at the end of the day, would help to limit the extent of such conduct by ensuring that the internet is not so readily available during deliberations. Providing judges with the discretion to order the surrender of such devices in exceptional circumstances would serve to ensure that court staff can deal efficiently with jurors who refuse to hand over their devices at this point in time.

Finally, the Commission asked for opinions on the proposals that there should be better procedures to make it easier for jurors to report misconduct committed by their colleagues, for example, through the use of drop boxes for jurors to place anonymous notes for the trial judge,[47] and better advice available to jurors, through the use of helplines via phone or email, and a website containing frequently asked questions.[48] These proposals are not only desirable but are essential in order to encourage and assist jurors to come forward with questions or concerns about their colleagues.

[43] *Ibid*, at para. 4.84
[44] *Ibid*.at para. 4.87
[45] *Ibid*. At para. 4.89
[46] *Ibid* at paras. 4.88 and 4.90
[47] I*bid* at para. 4.91
[48] *Ibid*.at para. 4.92

Proposals for law reform

In addition to the practical preventative measures mentioned above, the Law Commission has asked for opinions on whether reforms to the law are also necessary where practical measures fail to prevent jurors seeking or disclosing information.

Jurors seeking information

In respect of jurors seeking information, the proposals include imposing restrictions on the media so that the courts have the power to order that information held on website archives is temporarily removed for the duration of the trial.[49] The objective of this is to limit the information available to jurors during the trial. Such restrictions might be helpful where a case has received publicity prior to or at the start of the launch of criminal proceedings. The Commission acknowledges that this proposal may have only a very limited effect since it would be impractical to order the removal of all information related to the circumstances of the case and all information related to the accused. While this proposal will not provide a solution for jury misconduct, it might make it more difficult for jurors to access information which would otherwise be readily available.

The Commission also invited comments on the proposal to create a new, specific criminal offence of seeking information. It is hoped that such a move would clarify the law in accordance with the requirements of the rule of law, and provide a clear deterrent to jurors by sending them a message about the severity of such conduct.[50] The Commission notes that this approach has already been taken in various states in Australia and that it has been proposed by the Irish Law Reform Commission,[51] although the Commission does not provide much evidence on the extent to which such a move has been successful in Australia.[52] As is already evident, a juror who seeks information in violation of the judge's directions and the oath he has taken may find himself in contempt of court and at risk of imprisonment, as demonstrated by the case of *Dallas* explored earlier in this paper. Since the current law on contempt has proved to be effective in dealing with such misconduct in recent months, it is submitted that the creation of a new, specific criminal offence relating to jurors carrying out research is unnecessary.

Jurors disclosing information

In relation to jurors who disclose information about their deliberations, the Commission has asked consultees for views on whether there should be a defence to s.8 in cases where a juror makes disclosures to a court official, the police or the Criminal Cases Review Commission "in the genuine belief that such disclosure is necessary to uncover a miscarriage of justice."[53] Such a reform would prevent the

[49] *Ibid*. At para. 4.34
[50] *Ibid*.at para. 4.36
[51] See *ibid.* at para. 4.36 and 4.38 and Irish Law Reform Commission, *Consultation Paper: Jury Service* (2010)
[52] There is merely a passing reference to the fact that some commentators have doubted the efficacy of a new specific offence and that in New South Wales (one of the states in which a new offence has been created) some argue that the offence has not deterred jurors from carrying out their own research (see above n.2 at para. 4.40).
[53] Above n.2 at para. 4.60

conviction and punishment of jurors who come forward to report jury misconduct after the trial has taken place, as occurred in *Attorney General v Scotcher*.[54] It is submitted that such an amendment to s.8 must be strongly supported and this author has argued previously that a limited defence to s.8 is necessary to preserve the moral integrity of the jury system.[55]

The Law Commission also proposed to amend s.8 to create an exception in order to permit academics to carry out research into the jury.[56] This is another unnecessary reform. Section 8 prohibits a person from soliciting the details of jury deliberations from jurors, but it does not prohibit all forms of jury research. Various studies into the jury have already been carried out and others are currently on-going. For example, in 1972, the Oxford University Penal Research Unit carried out a study into acquittal rates by jurors using questionnaires which were handed to lawyers acting in acquittal cases,[57] and in 1975 and 1976, Baldwin and McConville carried out a study into the verdicts of jurors at trials in Birmingham and London, evaluating the verdicts of real jurors using the opinions of lawyers, judges and police officers.[58] More recently, the Criminal Courts Review commissioned empirical research into the jury in 2001 and the findings were reported by Darbyshire,[59] and Thomas has published two reports, both commissioned by the Ministry of Justice, into research conducted using real jurors.[60]

In a recent edition of the *Criminal Law Review*, Thomas reports that the UCL Jury Project is also currently undertaking further empirical research into the jury.[61] Thus, while some academics have argued that s.8 prevents research into jury deliberations,[62] it is clear from the projects listed above that empirical research with real jurors is not only possible, but is currently underway. Since academic research into the jury is not prohibited by s.8, it would therefore seem that the proposal to amend s.8 to allow academic research is unnecessary. However, in light of the apparent confusion and the risk that academics could fall foul of s.8, it might be prudent for clear guidance to be provided to academics by the Ministry of Justice on the extent to which research into the jury may be carried out.

Conclusion

While many of the proposals put forward by the Law Commission are to be commended, there are some which seem unnecessary. The education of jurors as to their role and responsibilities during the trial process is important in maintaining the

[54] [2003] EWHC 1380 (Admin)
[55] See Haralambous, above n.33 for a more detailed discussion on this point.
[56] Above n.2 at para. 4.62
[57] McCabe, S. and Purves, R., *The Jury at Work*, Oxford University Penal Research Unit (1972), Blackwell
[58] Baldwin, J. and McConville, M., *Jury Trials* (1979), Clarendon Press, Oxford
[59] Darbyshire, P., "What can we learn from published jury research?: Findings for the Criminal Courts Review 2001" (2003) *Judicial Studies Institute Journal* 71
[60] See Thomas, C., *Diversity and Fairness in the Jury System* (2007), Ministry of Justice and Thomas C., *Are Juries Fair?* (2010), Ministry of Justice, available at http://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/are-juries-fair-research.pdf (accessed on 3 June 2013).
[61] See Thomas, C., "Avoiding the perfect storm of juror contempt" [2013] Crim LR 483
[62] See Daly, G. and Edwards, I., "Jurors Online" *Criminal Law and Justice Weekly*, 24 April 2009, available at http://www.criminallawandjustice.co.uk/features/Jurors-Online (accessed on 3 June 2013).

integrity of the jury system and many of the practical preventative measures proposed by the Law Commission seem sensible and desirable. This author also supports the proposal to create a defence to s.8. Contempt of Court Act 1981 in respect of jurors who disclose evidence of misconduct during deliberations to a court official, police officer or the Criminal Cases Review Commission post-verdict out of a genuine belief that a miscarriage of justice has occurred.

Thomas urges that any reforms should be postponed until the findings of the UCL Jury Project have been published.[63] Undeniably, empirical research is invaluable and we eagerly await the findings of the Project. However, the fact that there have been cases of jury misconduct, with some leading to convictions for contempt of court, is an inescapable fact even in the absence of empirical findings. In the past two years, two senior judges have also independently publicly voiced their concerns about public confidence in the jury system: Judge LCJ has warned that the recent increase of cases on jury misconduct have put the integrity of the jury system at risk,[64] and Baroness Hale has called for research into the jury.[65]

Such comments from senior members of the judiciary serve to support the real dangers of ignoring an issue that has ignited both judicial and public concern. In light of recent media reports portraying an unfavourable view of some jurors, it is submitted that at the very least practical measures are needed sooner rather than later if public confidence in the jury is to be maintained. Many of the proposals couched in the Consultation Paper represent positive changes to the jury system and there can be no real harm in introducing these simple, practical reforms and monitoring their effect. While it is acknowledged that such reforms come at a cost to the public purse, failing to consider changes to the jury system at this stage risks sacrificing public confidence in the jury.

[63] Above n.62 at 503
[64] Lord Judge CJ, "Court of Appeal (Criminal Division) Annual Report 2011-12", available at http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/COA%20Criminal%20Division%202011-12_web.pdf (accessed on 3 June 2013).
[65] See "Lady Hale calls for more research into jury behaviour", *Solicitors Journal*, 4 April 2013, available at http://www.solicitorsjournal.com/node/15919 (accessed on 3 June 2013).