CHAPTER 9

Jurors as Detectives of Truth and 'Don't Search' Instructions in Sexual Assault Trials

by Jacqueline Horan

• INTRODUCTION •

9.1 The 2022 high-profile trial in Australia of Bruce Lehrmann for the alleged rape of one of his colleagues in Australia's Parliament House was declared a mistrial because a juror defied the judge's instructions not to do their own private online research about the case ('don't search' instructions).[1] The juror's online misbehaviour in the *Lehrmann* trial is not an isolated incident but more reflective of an increasingly common pattern of jury behaviour, particularly in sexual assault trials. This chapter seeks to better understand why some jurors choose to breach 'don't search' instructions and seek out more information they perceive they need by going online. Exploring the root cause of the problem of detective jurors assists us to identify ways in which the justice system can reduce the perceived need of jurors to do their own research. This chapter will explore the issue of jurors doing their own private research in three parts:

1. The problem — what do we know about jurors doing private research about their trial?
2. Causes of the problem — why do jurors look for answers outside the courtroom?
3. Ways in which the problem can be ameliorated.

• THE PROBLEM — WHAT DO WE KNOW ABOUT JURORS DOING PRIVATE RESEARCH ABOUT THEIR TRIAL? •

9.2 In her opening remarks to the jury in the *Lehrmann* trial the judge said:

> [I]f you are learning something about this trial and I am not there, then you should not be doing it. You should only be learning about this trial in this room in my presence. So, if you find yourself getting curious and undertaking internet research or talking to people about their areas of expertise, think to yourself, "Well, Chief Justice McCallum isn't here so I probably shouldn't be doing this." That is not a bad way of testing what you should hear in this trial.

1. *Director of Public Prosecutions (DPP) v Lehrmann (No 5)* [2022] ACTSC 296 (27 October 2022).

> You should only hear the evidence in this trial in my presence when it comes before you in this courtroom.[2]

9.3 Before the jury went home on the first day, the trial judge gave the following instruction:

> It is extremely important that you not undertake any inquiries of your own in relation to these proceedings and you will have heard by now that there has been a lot of media attention to the case. Please don't go Googling Brittany Higgins or Bruce Lehrmann or any of the other people you have heard mentioned. Please don't seek out publicity in relation to this case. For the reasons I explained before, it would be very unfair to the accused if you sought information outside what you are going to hear in evidence in these proceedings.[3]

9.4 The trial judge's instructions were particularly focussed on the plethora of prejudicial publicity available to be accessed by the jurors about this trial. Social and mainstream media had published reports of similar allegations by a number of other women against the defendant.[4] During the course of the trial, the jury were 'given at least 17, and possibly more, warnings or directions as to the prohibition on undertaking any research or inquiries of their own'.[5] The Chief Justice's 'don't search' instructions were generally clear,[6] contextualised and regularly reinforced. However, they were particularly focussed on jurors accessing prejudicial publicity and did not emphasise academic research being forbidden.[7] During deliberations, a juror's folder accidentally fell open and revealed to a court officer, photocopies of three academic articles on the topic of sexual assault that were not part of the evidence. On learning of the discovery, the trial judge abandoned the trial due to the detective juror's online conduct.

9.5 We know from numerous other detective juror incidents reported in the news,[8] that the detective juror in the *Lehrmann* trial is not an isolated incident. There are a growing number of reported cases of detective jurors in several

2. *Director of Public Prosecutions (DPP) v Lehrmann (No 5)* [2022] ACTSC 296 (27 October 2022) [7].
3. *Director of Public Prosecutions (DPP) v Lehrmann (No 5)* [2022] ACTSC 296 (27 October 2022) [8].
4. *Director of Public Prosecutions (DPP) v Lehrmann (No 2)* [2022] ACTSC 92 (29 April 2022) [12].
5. *Director of Public Prosecutions (DPP) v Lehrmann (No 5)* [2022] ACTSC 296 (27 October 2022) [7].
6. The judge uses legal jargon that is likely to be unfamiliar to some jurors. For example, 'It is important that you not *undertake* any inquiries of your own in relation to these *proceedings*' would be more accessible to non-lawyers if the following was said 'It is important that you not *make* any inquiries of your own in relation to this *trial*.' Further, the inclusion of the word 'probably', suggests that the 'don't search' instruction is not mandatory.
7. G Byrne, 'Juries and the "Detective Juror": Improving Public Discussion About Juries and Jurors' (2023) 48(3) *Alternative Law Journal* 185, 189.
8. See, for example, B Powell, 'How Google-happy Jurors are Derailing Ontario Trials', *The Toronto Star*, 21 May 2018 <https://www.thestar.com>; BBC News, 'Former PC Juror Jailed for Causing Trial's Collapse', *BBC News*, 26 May 2023 <https://www.bbc.com>; A Back, 'Juror's

jurisdictions that feature trial by jury. For example, in Victoria, Australia, there were six offences referred to the police for such alleged misconduct over a two-year period 2011–13.[9] Over a one-year period in 2022, five jurors in Victoria, suspected of doing their own research, were referred to the police.[10] In the United States of America, 90 verdicts were challenged on appeal due to online juror research between 1999 and 2010. Of note is that the incidents were accelerating with half of those cases being in the last two years.[11]

9.6 In a 2011 US Federal Judicial Center Survey, 30 of 508 federal judges (6%) had detected social media use by jurors during trials or deliberations.[12] While such official rates of detective juror behaviour seem modest, it is to be noted that these statistics only report those jurors that have been caught doing something illegal or contrary to the judge's instructions. The actual rate of jurors doing private online research is likely to be much higher as it is difficult to detect such behaviour.[13] It is likely that the majority of detective jurors, knowing that they are going beyond their brief, do not bring in evidence of their illegal activity or confess to a fellow juror. For example, in a 2009 Florida trial, a juror was caught engaging in independent research. When the judge questioned the other 11 jurors, eight of them admitted that they too had conducted their own private research.[14]

9.7 Jurors sitting on sexual assault trials are more vulnerable to the lure of Google, due to the evidential difficulties that sexual assault trials commonly pose for decision-makers.[15] First, jurors must apply the concept of 'beyond reasonable doubt' to a situation where it is often 'one word against the other' and there is little hard forensic evidence to support the prosecution's case. The *Lehrmann* trial was a typical trial in this respect. The complainant gave evidence that she was drunk and woke in the middle of the defendant allegedly raping her. The defendant denied raping her, without giving evidence himself. There was no independent eyewitness evidence and little physical evidence to support the allegation. The

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Google Search Causes Mistrial in Sex Assault Case', *Canberra Times*, 25 March 2019 <https://www.canberratimes.com.au>.

9. S Butcher, 'Jurors "Playing Detective" by Searching Internet Costing Taxpayer Millions', *The Age*, 20 September 2015 <https://www.theage.com.au>.
10. Interview with the Juries Commissioner, P Dore, 1 August 2023.
11. B Gow, 'As Jurors Go Online, U.S. Trials Go Off Track', *Reuters*, 9 December 2010 <https://www.reuters.com/article/technology/as-jurors-go-online-us-trials-go-off-track-idUSTRE6B74Z8>.
12. M Dunn, *Jurors' Use of Social Media During Trials and Deliberations: A Report to the Judicial Conference Committee on Court Administration and Case Management*, Report, May 2014. See also Australian examples of social media use in Tasmania Law Reform Institute, *Jurors, Social Media and the Right of the Accused to a Fair Trial*, Final Report No 30, January 2020, 4–6.
13. Victorian Law Reform Commission, *Contempt of Court*, Report, February 2020, [9.27].
14. J Schwarz, 'As Jurors Turn to Web, Mistrials Are Popping Up', *The New York Times*, 18 March 2009 <https://www.nytimes.com>.
15. Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences*, Report, September 2021, [20.4]–[20.5].

prosecution relied upon the complainant's evidence and circumstantial evidence about the drunken night when the alleged assault took place. The jury had to determine whether the evidence of the complainant could satisfy the charge beyond reasonable doubt. This is a common and daunting task for a jury in a sexual assault trial. In a 2008 study of 137 New Zealand child sexual assault trials, the jurors explained that even though they believed the child, they 'required a high threshold of corroborative evidence' before they felt comfortable to find the defendant guilty 'beyond reasonable doubt'.[16] Second, jurors have to resist commonly-held misconceptions about how sexual assault victims behave and remember the alleged assault.[17] The detective juror incident in the *Lehrmann* trial highlights this scenario, with the detective juror downloading academic articles that addressed a commonly-held misconception about sexual assault victim behaviour.[18]

9.8 There is mounting concern about the prevalence of detective jurors from adversarial justice systems worldwide. This is evidenced by increasing public commentary on the issue.[19] For example, the High Court of Australia acknowledged the prominence of the problem in 2022, when they gave leave to appeal a guilty verdict because one juror undertook internet research about the definitions of and sentences for 'rape' and 'unlawful carnal knowledge'. [20] The juror shared this with their fellow jurors. In a 2012 United States study, the surveyed judges and trial lawyers rated juror online behaviour as a moderately severe problem.[21] While few surveyed jurors from that study admitted to conducting online research, 15% wrongly believed that some types of independent research would not violate the judge's instruction and 20% were not sure whether such searches were permissible. Of note is that 14% of the predominantly younger jurors admitted that they could not refrain from all internet usage for the duration of the trial if instructed to do so by the trial judge. Furthermore, over 500 prospective surveyed jurors reported

16. S Blackwell, 'Child Sexual Abuse on Trial in New Zealand', paper presented at the Criminal Law Symposium of the New Zealand Law Society, 14 November 2008 as quoted in Australian Law Reform Commission, *Family Violence: Improving Legal Frameworks (CP 1)*, Consultation Paper 1, April 2010, [17.100].
17. Common memory misconceptions are discussed further in **Chapter 4**. See also J Horan and J Goodman-Delahunty, 'Expert Evidence to Counteract Jury Misconceptions About Consent in Sexual Assault Cases: Failures and Lessons Learned' (2020) 43(2) *University of New South Wales Law Journal* 707.
18. *Director of Public Prosecutions (DPP) v Lehrmann (No 5)* [2022] ACTSC 296 (27 October 2022), [5].
19. See, for example, D Grieve, 'Trial by Google? Juries, Social Media and the Internet', Speech, United Kingdom, 6 February 2013; Tasmania Law Reform Institute, note 12 above.
20. *HCF v R* [2023] HCA 35.
21. P Hannaford-Agor, D B Rottman and N Waters, *Juror and Jury Use of New Media: A Baseline Exploration, Perspectives on State Court Leadership*, 2012 <https://www.ojp.gov/ncjrs/virtual-library/abstracts/juror-and-jury-use-new-media-baseline-exploration>.

they would have liked to use the internet to obtain information about legal terms (44%), the case (26%) and the parties involved (23%).[22]

• CAUSES OF THE PROBLEM — WHY DO JURORS LOOK FOR ANSWERS OUTSIDE THE COURTROOM? •

9.9 Why do some jurors look for answers outside the courtroom when they are told not to? Due to jury room secrecy rules, limited direct research is available that enables us to understand what motivates jurors to breach 'don't search' instructions and become 'detective jurors'.[23] In a 1998 New Zealand jury study, jurors admitted to doing their own research in over 10% of the trials. The New Zealand study concluded that '[b]y 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'.[24] This conclusion identifies a disconnect between legal logic that the courts have developed over the past century and contemporary juror logic. This disconnect can be explained by four factors:

- it is instinctive and easy for contemporary jurors to do their own research about the trial;
- jurors are not getting what they perceive they need from the court process;
- jurors are working under a fundamental misunderstanding of their fact-finding role; and
- a perceived lack of evidence.

It Is Instinctive and Easy for Contemporary Jurors to Do Their Own Online Research

9.10 The contemporary juror is highly educated compared to their predecessors. When trial by jury was introduced in Australia in the early 19th century, the average juror was unlikely to be able to read or write. Consequently, the judge would instruct the jury verbally. An illiterate juror is now rare. Analysis of 115 juror interviews and almost 300 juror surveys in 2012 concluded that Australian jurors are highly educated as they 'engaged in in-depth central processing of the content of the expert evidence and were engaged by their task'.[25] The 2022 Victorian Court Juror Experience Survey confirms the high levels of education

22. Hannaford-Agor, Rottman and Waters, note 21 above, 6.
23. Hannaford-Agor, Rottman and Waters, note 21 above, 2. J Horan and M Israel, 'Beyond the Legal Barriers: Institutional Gatekeeping and Real Jury Research' (2016) 49(3) *Australian and New Zealand Journal of Criminology* 422, 422.
24. New Zealand Law Commission, *Juries in Criminal Trials*, Report No 69, February 2001, [7.45].
25. I Freckelton et al, *Expert Evidence and Criminal Jury Trials*, Oxford University Press, 2016, [9.27].

among jurors; 50% of the jury pool and juries empanelled had a university degree or postgraduate qualification.[26]

9.11 Being virtually connected is no longer a preference but a necessity for day-to-day life in most jurisdictions that feature juries.[27] A 2018 survey reported that over 87% of Australians use the internet at least once per day.[28] More and more 'smartphone users assert that their phone has become an indispensable part of their self'.[29] Over the last three decades, digital native learners have been taught in classrooms and work in businesses where the internet is a primary tool. It is common sense for a juror to refer to the internet to assist them in making such a serious decision as is required of them in a criminal trial. Internet research is also easy for contemporary jurors. A quick Google search of a high-profile defendant's name, such as Bruce Lehrmann, will produce several million 'hits' within a matter of a few seconds.

9.12 The problem of detective jurors is only going to get worse as digital native jurors are growing in representation on juries. A profile of why digital native jurors are more vulnerable to doing private online research about the trial is best understood by comparing how digital native jurors are educated and taught decision-making techniques in real life with how they are required to make their decision in a court case.

Jurors Are Not Getting What They Perceive They Need from the Court Process

9.13 The majority of jurors are used to being in control of how they receive information; a daily newsfeed will pop up on their phone screen in summary form with plenty of spectacular footage to access. An algorithm efficiently filters the news for them according to what interests them. If they become bored, they immediately swipe to find something else that interests them. In a trial, jurors have no control over what they listen to and when. They are unable to rewind the evidence when they lose concentration or miss something important.[30]

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26. Victorian Juries Commissioners Office, *Juror Experience Survey Preliminary Report and Tables*, December 2022, 2.
27. J Goodman-Delahunty and D Tait, 'Juries in the Digital Age: Managing Juror Online and Social Media Use During Trial' in M Camilleri and A Harkess (eds), *Australian Courts, Controversies, Challenges and Change*, Palgrave Macmillan, 2022, 45.
28. Yellow, *Yellow Social Media Report 2018 Part One — Consumers*, Report, June 2018, 4, 9. See further, Tasmania Law Reform Institute, note 12 above, 17.
29. C Park and B Kaye, 'Smartphone and Self-extension: Functionally, Anthropomorphically, and Ontologically Extending Self via the Smartphone' (2019) 7(2) *Mobile Media and Communication* 215.
30. J Horan and M Taylor-Sands, 'Bringing the Court and Mediation Room into the Classroom' (2008) 18(1) *Legal Education Review* 196, 200.

9.14 Electronic devices have been an integral part of the school learning process this century. School libraries are predominantly virtual as course materials are increasingly only available online.[31] Students are expected to conduct online searches as part of their fact-finding tasks. Digital native students (those born after 1980) will seek clarification on Google, if, for example, they are uncomfortable with the terminology being used by the teacher. Tertiary students are often provided with electronic versions of lectures for them to review at their own pace in their own time. Digital natives' use of the internet to extend their learning is so sophisticated that they do not necessarily perceive a meaningful distinction between the sources of the learning.

9.15 Contemporary learners no longer need to memorise their learning as, typically, the lesson is complemented by extensive online course material. Consequently, their working memory is more limited than students who were schooled before internet resources became ubiquitous with classroom learning. Jurors are expected to absorb large amounts of evidence and judicial instructions that are predominantly delivered to them orally. Transcript is sometimes provided to jurors to help them remember evidence during their deliberations, but seldom in an electronic, searchable form.[32] When processing new information delivered orally only, contemporary jurors can experience cognitive overload.[33] If jurors feel overwhelmed, they are more prone to resort to heuristic short-cut decision-making. Studies have found that the more complex the evidence is, the more likely jurors will rely upon peripheral cues (such as the attractiveness of an expert), over the quality of the evidence produced.[34]

9.16 In a courtroom, there is little dialogue between those tasked with informing the jurors and the jurors. By way of contrast, best practice teaching acknowledges that learning is a social activity that involves a dialogue between teacher, fellow students and the learner.[35] The judge or the barristers seldom ask the jury if they are following the processes and do not receive feedback to assist them in ensuring that the information is being properly communicated. Unlike judges and advocates,

31. D Muller, J Eklund and M D Sharma, 'The Future of Multimedia Learning: Essential Issues for Research', paper presented at the Association for Active Educational Researchers, Sydney, 2005 <https://www.aare.edu.au/data/publications/2005/mul05178.pdf>.
32. G Byrne, *A Jury-Centric Approach: A Method for Improving Criminal Laws, Practices, and Procedures to Ensure Fair Jury Trials*, PhD thesis, Monash University, Australia, 2022, 163–5 ('A Jury-Centric Approach').
33. M Rogers, 'Laypeople as Learners: Applying Educational Principles to Improve Juror Comprehension of Instructions' (2021) 115(4) *Northwestern University Law Review* 1185, 1214.
34. J Cooper, E Bennett and H Sukel, 'Complex Scientific Testimony: How Do Jurors Make Decisions?' (1996) 20 *Law and Human Behavior* 379; R Winter and E Greene, 'Juror Decision Making' in F Durso (ed), *Handbook of Applied Cognition*, Wiley, 2007, 744.
35. C Hmelo-Silver, 'Problem-Based Learning: What and How Do Students Learn' (2004) 16(3) *Educational Psychology Review* 235, 236.

if an educator is not explaining a matter well, they will receive feedback from their students (either in the form of questions, bad behaviour or poor reviews). Questions are a common part of the educational interaction. This is in contrast to adversarial notions of justice, where decision-makers are required to be passive participants and therefore questions from the jury are not encouraged.[36]

9.17 Due to jury room secrecy rules, there is limited research into how jurors go about their task.[37] However, courts can learn from the extensive body of psychological and educational communication research[38] in order to improve courtroom communication. For example, widely accepted constructivist learning theory focusses on the learner and their needs and not on the lesson being taught.[39] This is beginning to be acknowledged by justice reformers; emerging legal literature poses that a 'jury-centric' approach to law reform is required if we are to meaningfully improve jury decision-making.[40]

Jurors Are Working under a Fundamental Misunderstanding of Their Fact-finding Role

9.18 Little research is available that enables us to categorically establish the issues that juries struggle with. However, an overview of the publicly available incidents of detective jurors and consideration of common juror questions gives us some insight into what aspects of the trial are likely to trouble jurors. Two common matters that prompt jurors to go online or ask questions are, first, legal principles and terminology and, second, a perceived lack of evidence.

9.19 Jurors have been caught looking up legal principles or terminology on numerous occasions across many jurisdictions.[41] The potential problem with jurors going online to better understand legal definitions is well illustrated by a 2015 detective juror case where an Australian juror looked up several legal definitions in a United States online legal dictionary.[42]

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36. J Horan, 'Empowering Jurors to Ask Questions About the Expert Evidence in Criminal Trials' (2024) 28(3) *International Journal of Evidence and Proof* 1, 8.
37. Horan, note 36 above, 23.
38. For a summary of this research see J Horan, *Juries in the 21st Century*, Federation Press, Sydney, 2012, 105.
39. G Hein, 'Constructivist Learning Theory', paper presented at the International Committee of Museum Educators Conference, Israel, 15–22 October 1991, 1.
40. N Marder, 'Introduction to the Jury at a Crossroad: The American Experience' (2003) 78(3) *Chicago-Kent Law Review* 909–33; Byrne, note 32 above.
41. *Martin v R* (2010) 28 VR 579, [57]–[90]; [2010] VSCA 153; J Horan, 'It Is Wrong to Punish Detective Jurors', *The Sydney Morning Herald*, 11 January 2013 <https://www.smh.com.au>; M Russell, 'Juror Charged with "Playing Detective"', *The Age*, 14 January 2024 <https://www.theage.com.au>; see also J Browning and A Meter, 'Googling a Mistrial; Online Juror Misconduct in Alabama' (2022) 14 *Faulkner Law Review* 67, 71. See further **Chapter 12**.
42. *Marshall and Richardson v Tasmania* [2016] TASCCA 21.

9.20 Research has established that the legal principle 'beyond reasonable doubt' poses challenges for jurors.[43] Even when jurors ask for the meaning of the phrase to be explained to them, courts have declined to do so.[44] Judicial resistance towards explaining the phrase, coupled with juror confusion as to the meaning of the phrase 'might encourage jurors to speculate on the meaning of the phrase and potentially arrive at a wrong conclusion'.[45]

9.21 Legal commentary on the difficulty jurors have with the phrase 'beyond reasonable doubt' provides us with further insight into the problem. One Australian prosecutor from a 2012 study of Expert Evidence and Criminal Jury Trials (2012 Australian Jury Study)[46] explained when interviewed: 'Some of the questions that come up from juries, they're just exasperating. Where have they been? A classic one is what's reasonable doubt? You know you're in for a bit of strife when they're asking that after about two days.'[47] In the high profile UK trial of Vicky Pryce, the jury asked 10 questions which included 'What does 'proof beyond reasonable doubt' mean?' The judge and the prosecutor in the *Pryce* trial criticised the jury for having 'absolutely fundamental deficits in understanding'.[48]

9.22 These legal responses highlight that there can be a difference between what the legal system expects jurors to know and what the jurors actually know. Research confirms that jurors regularly have difficulty understanding and applying judicial directions.[49] For example, in a small Australian study of 33 criminal jurors, the jurors self-reported that they understood the directions about 'beyond

43. This research is summarised in **Chapter 12**. V Bell, 'Reform of the Law Governing Jury Directions and the Determination of Criminal Appeals' (2020) 14 *The Judicial Review* 183, 186–8; B McKimmie, E Antrobus and K Havas, *Jurors' Trial Experiences: The Influences of Directions and Other Aspects of Trials*, Report, University of Queensland, School of Psychology, November 2009, 13–17.
44. New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4, 2008, [4.30]; see, for example, *United States v Lawson*, 677 F 3d 629, 633–4 (4th Cir 2012), cert denied. 133 S Ct 393; *Ladd v R* (2009) 157 NTR 29; [2009] NTCCA 6, [212] (Martin CJ); *R v Wanhalla* [2007] 2 NZLR 573; *R v Dookheea* (2017) 262 CLR 402; 347 ALR 529; [2017] HCA 36. One Australian jurisdiction has responded to the High Court's approach by implementing legislation that required trial judges to explain the phrase to the jury unless there are good reasons for not doing so: Jury Directions Act 2015 (Vic) s 63.
45. New South Wales Law Reform Commission, note 44 above, [4.32].
46. For a summary of research methods and preliminary results of this study, see Freckelton et al, note 25 above. The data presented in this paper is based on research funded by two Australian Research Council grants (LP0990833 and LP120100291), conducted in collaboration with the Australasian Institute of Judicial Administration and the Australian and New Zealand Policing Advisory Agency. The author was the Lead Investigator on these projects.
47. 2012 Australian Jury Study, Prosecutor from Trial 47.
48. C Davies, 'Vicky Pryce Faces Retrial After Jury "Fails to Grasp Basics"', *The Guardian*, 21 February 2013 <https://www.theguardian.com/uk/2013/feb/20/vicky-pryce-retrial-jury>.
49. J Ogloff and G Rose, 'The Comprehension of Judicial Instructions' in N Brewer and K D Williams (eds), *Psychology and Law: An Empirical Perspective*, Guilford Press, New York,

reasonable doubt' and 'burden of proof'. However, when tested, a substantial proportion of the jurors were shown to be mistaken as to the meaning of these fundamental phrases and did not appear to apply those directions in arriving at a decision.[50]

9.23 The critical tone of the above legal commentary, from the *Pryce* trial and the 2012 Australian Jury Study, illustrates why jurors do not feel comfortable asking these lawyers their 'exasperating' questions. Siri never has a critical tone of voice. Jurors feel more comfortable asking Siri their questions instead of asking their questions in the courtroom. Support of this observation is found in the results of a 2012 Australian Jury Study. Of all 296 surveyed jurors, 13% (n = 38) admitted that they did not ask questions as they were worried that their question(s) wouldn't be allowed and 10% (n = 29) did not feel comfortable asking questions. Several jurors when interviewed further explained that they felt 'scared' and 'intimidated'.[51] One foreperson explained: 'I had to interrupt for a toilet break once … I copped the fury of [counsel's] death stare.'[52] When a digital native juror is faced with the option of potential public courtroom humiliation or a quick and easy look online, it is logical that they would choose the latter even though the judge told them not to. Looking up legal definitions is instinctive for digital native jurors and not perceived by them as bad behaviour.

A Perceived Lack of Evidence

9.24 One of the trial judges interviewed as part of the 2012 Australian Jury Study observed that the jury questions they received were:

> [u]sually pretty pithy and sensible questions … they're often about people who haven't been called to give evidence. And there's a good reason why they ask the question, and there's often a good reason why I say, that's a very good question, but in a criminal trial, it's not a search for the truth, you have to make your decision on the evidence. There's no evidence about that, and I'm directing you that you've got to confine your attention to the evidence and not speculate about matters which haven't been the subject of evidence, and they do it.[53]

9.25 This judge identifies a second fundamental problem encountered by jurors. Jurors often want to know why all the evidence that they think is relevant to the case has not been given to them. Jurors are prone to speculating about what

2005, 407; Queensland Law Reform Commission, *A Review of Jury Directions*, Report No 66, September 2009, 174.

50. B McKimmie, E Antrobus and C Baguley, 'Objective and Subjective Comprehension of Jury Instructions in Criminal Trials' 17(2) (2014) *New Criminal Law Review* 163–83.
51. 2012 Australian Jury Study, note 47 above, Juror 3, Trial 16.
52. 2012 Australian Jury Study, note 47 above, Juror 10, Trial 14.
53. 2012 Australian Jury Study, note 47 above, Trial Judge 33.

the missing evidence might be in their search for the truth of what happened. Expert forensic psychologist James Ogloff, who regularly gives evidence in court, observes that:

> the difficulty is that jurors, as lay people, do not understand the distinction between 'justice' and 'truth.' In their misconceived role of detectives of truth, conscientious jurors will not be impeded by their perceptions that they must, to the best of their ability, unearth the truth, even if this means going against the advice of the trial judge and doing their own research. The jurors feel the pressure of getting to the truth as the defendant may go to jail if the truth demands a finding of guilt.[54]

9.26 American criminal justice expert, Christopher E Stone similarly observes the disjuncture between truth finding in and out of the courtroom. It is a:

> dilemma for an institution that is used to insisting on its own ways of knowing things, ways that are different from what ordinary people do. Consider the rules of evidence … we have an institution that is used to telling the whole society, 'Yeah, yeah, you think you learn things this way, but we have different rules for acquiring knowledge in this process'.[55]

9.27 Ogloff notes that the admissibility of evidence is poorly explained to most jurors:

> [Jurors] see their role as finding the truth, not realising that in accordance with justice and the rules of evidence, information needs to be tested in court before it is admissible. The arguments regarding admissibility often occur without the jury present. Admissibility of evidence is seldom explained to the jury, even though the principle underpins the jury decision-making process. The courtroom rules of admissibility are complex and sometimes counterintuitive.[56]

9.28 It is not uncommon for counsel to request that the jury leave the courtroom while the admissibility of evidence is argued. This feeds into juror perceptions that important evidence is being withheld from them.[57] It should not be surprising when a curious juror wants to find out what it is that is being kept from the jury.

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54. J Ogloff, email discussion with the author, 30 October 2022.
55. Transcript 17 April 2010 meeting of the Executive Session on State Courts leaders in the 21st Century, p 43, as quoted in Hannaford-Agor, Rottman and Waters, note 21 above, 5.
56. J Ogloff, email discussion with the author, 30 October 2022.
57. I Cram, 'Dealing with the Googling Juror: A Commentary on Part 3 of the Criminal Justice and Courts Bill' (2014) 19(4) *Communications Law* 110, 112; T Hoffmeister, 'Google, Gadgets and Guilt: Juror Misconduct in the Digital Age' (2012) 83 *University of Colorado Law Review* 409.

• WAYS IN WHICH THE PROBLEM CAN BE AMELIORATED •

9.29 While the trial judge's 'don't search' instructions in the *Lehrmann* trial were relatable and repeated every day of the trial,[58] they were not enough to ensure compliance. The detective juror either failed to understand that the instruction applied to academic research papers or the instructions were not enough to discourage the detective juror from online research. It is contended that in order to promote better compliance with such instructions, the instructions need to be re-shaped so that they respond to the way digital native jurors think and behave. In order to do this, judges need to be trained in contemporary pedagogical techniques. Below are four specific ways in which judges can update their approach to the problem in order to reduce the risk of jurors doing their own research. These four suggestions are predicated upon the overarching conclusion of juror research, that each jury consists of jurors that are diligent, well educated and highly motivated to come to the right verdict.[59]

Provide Jurors With More Information About Their Decision-making Role

9.30 Jurors are told to decide the facts based on the evidence in the trial and based on their factual findings. They then decide whether the accused is guilty or not guilty.[60] The contemporary juror would benefit from instructions that also explain that their job is not to uncover the truth of what happened. The parameters of the jury's decision-making role need to be explicitly explained. Some jurors are motivated by a deep sense of moral duty to get to the truth.[61] The fact that the judge does not expect them to find the truth, will be a surprise to some of the jurors. Judges could embed these fundamental concepts in their 'don't search' instructions, as per the Sample Jury Instruction provided below. If the jury is asked to leave the courtroom while the judge discusses evidential admissibility issues with the parties, it is important that the judge explains the process to the jurors and assures them that important evidence is not being kept from them.

58. See, for example, *Director of Public Prosecutions (DPP) v Lehrmann (No 5)* [2022] ACTSC 296 (27 October 2022), [7] and [8].
59. P Dore, 'The Judge Is Your Google' (2023) 179 *Precedent* 1, 7. See generally, Horan, note 38 above; N Vidmar and V Hans, *American Juries: The Verdict*, Prometheus Books, United States, 2017.
60. See, for example, Judicial College of Victoria, *Bench Book/Criminal Charge Book* <https://www.judicialcollege.vic.edu.au> [1.4.1].
61. K Hogg, 'Runaway Jurors: Independent Juror Research in the Internet Age' 2019 9(1) *Western Journal of Legal Studies* 1, 8–9.

Provide More Explanations About Any Lack of Evidence so as to Avoid Juror Speculation

9.31 Counsel should never assume that diligent jurors will confine themselves to the evidence that is adduced. Some jurors prioritise their misperceived duty to find the truth of the matter over their duty to follow the judge's instructions. As one detective juror explained: 'I only went to the park [where the alleged sexual assault took place] to clarify something for my own mind. I felt I had a duty to the court to be right.'[62] A lack of evidence, such as a failure to call witnesses whom the jurors perceive as relevant, causes juror confusion and frustration.[63] In a United States study of 313 jurors, half of the jurors speculated about why people that they perceived as key characters did not give evidence. A quarter of those jurors admitted that they held this against the party who failed to call the witness or explain their absence.[64] While jurors value judicial instructions,[65] some jurors may flout 'don't search' directions and conduct their own research if they feel it will assist them in coming to the right verdict.[66] The detective juror in the *Lehrmann* trial was caught having conducted private research, trying to fill in a perceived gap in the evidence. The academic articles that the detective juror sourced in the *Lehrmann* trial attempted to quantify the prevalence of false complaints of sexual assault. It analysed the reasons for false complaints and why some are sceptical of complainants who tell the truth.[67] This issue is identified in the literature as a common juror misconception.[68] This juror's behaviour suggests that they had unanswered questions and would have benefited from some judicial guidance on the issue and/or expert evidence that addressed jury misconceptions about rape complainant behaviour. The jury asked few questions throughout the trial and did not ask a question about this misconception.

9.32 By way of contrast, the trial judge in the 2024 defamation trial brought by Bruce Lehrmann, deemed it:

> appropriate to direct myself as to the impact of alleged counterintuitive conduct in a manner consistent with some foundational propositions referred to in the proposed evidence which, it seemed to me, simply reflected the

62. *R v Skaf* (2004) 60 NSWLR 86, [204].
63. W Young, N Cameron and Y Tinsley, *Jury Trials in New Zealand: A Survey of Jurors*, 1999, Wellington; Law Commission, *Juries in Criminal Trials Part Two: A Summary of the Research Findings*, PP37 Volume 2, 1999, 53 [221].
64. J Guinther, *The Jury in America and the Civil Juror,* A research project sponsored by the Roscoe Pound Foundation, 1998, 313.
65. Young, Cameron and Tinsley, note 63 above, 52 [7.3].
66. *Juries in Criminal Trials*, note 24 above, [7.45].
67. *Director of Public Prosecutions v Lehrmann (No 5)* [2022] ACTSC 296 (27 October 2022), [5].
68. P Tidmarsh and G Hamilton, 'Misconceptions of Sexual Crime Against Adult Victims: Barriers to Justice' (2020) 611 *Trends and Issues in Crime and Criminal Justice* 1.

accumulated experience of the common law (seen in standard directions) or in ordinary human experience … Sensibly, both parties agreed, and it became unnecessary to deal with admissibility or discretionary exclusion issues, as the following became common ground as agreed facts pursuant to s 191 EA (Agreed Facts dated 18 December 2023 (**agreed facts**)):

(1) trauma has a severe impact on memory by splintering and fragmenting memories; such that semantic or meaning elements become separated from emotion; and interfering with the timespan memories require to consolidate and become permanent;

(2) due to the potential for cuing of emotional responses to fragmented memories, memory can change, be subject to reconsolidation effects, and even when these effects are not marked initially, memories may remain labile for some time (thus changes in what the person reports as their memory of an event can be expected);

(3) lack of clarity and confused accounts can be expected until such time as the memory has consolidated;

(4) inconsistencies in reporting following a traumatic event are often observed and explicable through underlying theories of trauma and memory function;

(5) omissions can be understood as alterations in awareness due to high arousal at the time of the event that consolidate over time;

(6) inconsistency is often observed in reliable reports of sexual assault and is not *ipso facto* a measure of deception;

(7) in understanding the account of an alleged 'survivor', a person must consider how that account was elicited; this includes the skill and attitudes towards the person by the investigating officers; the time elapsed between the traumatic event and the formal interview; and the psychological/emotional state of the person being interviewed at the time of interview;

(8) the first forensic interview is potentially a trigger for intrusive thoughts that can lead to fragmentation of memory and dissociation; patterns of behaviour such as high confidence and clarity in the account are not helpful in determining whether the account is accurate;

(9) despite the belief that the emergence of inconsistencies across interviews is a sign of lying (people 'can't keep their story straight'), the literature on memory, impacts of trauma and the dynamic between interviewee and the interviewer must be considered; and

(10) multiple interviews are typically necessary to construct a clear narrative of events; however, the consequence of these multiple interviews may be patterns of inconsistency or omissions especially early in the interview process (which need to be carefully evaluated but are not in and of themselves necessarily indicative of deception or accuracy).[69]

69. *Lehrmann v Network Ten Pty Ltd (Trial Judgment)* [2024] FCA 369, [116]–[117].

9.33 These 10 agreed facts underpinned the judge's approach to measuring the credibility of the victim's account and consequently the final determination that, on the balance of probabilities, Bruce Lehrmann raped Brittany Higgins. Lehrmann has appealed against the judgment.[70]

9.34 The *Lehrmann* detective juror's perceived gap in the evidence presented in the criminal trial, was a logical foreseeable gap in the evidence. The jurors should have been given instructions or expert evidence similar to the 10 agreed facts used by the trial judge in the *Lehrmann* defamation trial. While the traditional rules of evidence may prevent such explanations in some jurisdictions,[71] the Victorian Legislature has responded to this juror need by enacting s 388 of the Criminal Procedure Act 2009 (Vic), which provides that evidence of specialised knowledge in certain cases is permitted in sexual offence trials. The court may receive expert evidence addressing:

> the social, psychological and cultural factors that may affect the behaviour of a person who has been the victim, or who alleges that he or she has been the victim, of a sexual offence, including the reasons that may contribute to a delay on the part of the victim to report the offence.

9.35 Despite it being accepted that such counterintuitive expert evidence is needed and permitted, Australian and New Zealand commentary notes that it remains under-used in sexual assault trials.[72]

9.36 In thinking about whether there is a perceived gap in the evidence, it is essential for the judge and lawyers to think about the issues from the jury's perspective, rather than in terms of whether a matter is strictly relevant to the proof of charges. If a potential perceived gap in the evidence is identified, the prosecution should explain the gap (insofar as this is possible) so as to avoid jurors trying to fill the gap through their own quick and easy search online. If, for example, a key witness is unavailable, an explanation needs to be provided to the jury as to why this is the case. Some jurisdictions such as Victoria permit a judge to give an anti-speculation direction where the prosecution has not called a witness that they would be expected to call.[73]

9.37 If this obvious evidential gap is not explained, it is possible that a conscientious juror will search online for that information, even if it means they

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70 *Lehrmann v Network Ten Pty Ltd (Trial Judgment)* [2024] FCA 369, [620]-[621].

71. See further Byrne, note 7 above, 189.

72. *Lehrmann v Network Ten Pty Ltd (Trial Judgment)* [2024] FCA 369, [114]–[115]; New Zealand Law Commission, *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes*, Report No 136, 2015, [6.65]–[6.69]; A Cossins, 'Children, Sexual Abuse and Suggestibility: What Laypeople Think They Know and What the Literature Tells Us' (2008) 15 *Psychiatry, Psychology and Law* 153.

73. Judicial College of Victoria, note 60 above, 4.9 [40]; Judicial College for England and Wales, *Crown Court Compendium*, Part I, June 2023 <https://www.judiciary.uk> [10.4].

are defying the judge's 'don't search' instruction. While the detective juror may not always find information about the missing witness, they are likely to 'happen upon' other information about the trial. This occurred in the English prosecution of the detective juror Mr Beard, who was jailed for two months for using Google to research the fraud case he was sitting on and sharing this information with fellow jurors.[74] Mr Beard told the High Court he only wanted to find out how long the trial would take as the case had gone over the trial duration estimate. The prosecutor and judge had failed to provide an updated estimate, and the juror was worried that it might drag on, affecting his job and his family life.

9.38 Timely, relatable and case specific explanations that address any easily anticipated gaps in the evidence, may discourage detective juror work and may also reduce costly time spent by the jury in the deliberation room on discussing what evidence was not provided and its relative importance to the verdict.

Encourage the Jurors to Ask Their Questions in the Courtroom and Not on the Internet

9.39 Encouraging jury questions is the most useful tool that the justice system has, in preventing detective juror work. Jury questions need to be channelled away from the internet and into the courtroom if we are to meaningfully address the juror's need to gap-fill. Jurors who have been brought up in interactive classrooms are frustrated by their passive role in the courtroom. As one of the jurors from the 2012 Australian Jury Study explained:

> One thing that I found the most frustrating was that there were things that I thought 'But why don't they ask this?', 'Why don't they ask that?', that would be so simple, and there were a lot of questions that we all had … So it was like trying to put a jigsaw puzzle together, we felt, without all the pieces.[75]

9.40 This juror's analogy of putting a jigsaw together without all the pieces is apt. The parameters set on contemporary jurors by the criminal trial rules are nonsensical to a juror educated in the 21st century. Encouraging jurors to ask questions in the courtroom would ameliorate juror frustration and provide jurors with an avenue to channel their desire to make a thorough and rigorous decision.

9.41 Research highlights that jurors feel discouraged from asking their questions in court. Too many jurors are not aware that they can ask questions.[76] Responses from the jurors in the 2012 Australian Jury Study highlight this pervasive problem. Over a quarter of 296 surveyed jurors from 55 criminal jury trials had unanswered question(s). One in five jurors said that they did not know they could ask questions (despite most judges telling the jury at the start of the trial that they could). Some

74. *Her Majesty's Attorney-General v Joseph Beard* [2013] EWHC 2317 (Admin).
75. 2012 Australian Jury Study, note 47 above, Juror 3 from Trial 1.
76. Horan, note 36 above.

of these jurors explained that asking questions wasn't 'one of the options that was really open'.[77] Other jurors said they felt 'scared, felt intimidated'[78] and were hesitant to ask for fear of asking 'stupid questions'.[79] One juror explained that, 'it doesn't quite feel organic to interrupt'.[80] The results of this study identify that the formal atmosphere of the courtroom intimidates some jurors and interferes with their ability to ask questions that they perceive to be important.[81]

9.42 Research highlights that when jurors do actually ask questions, those questions are mostly perceived by the lawyers to be logical.[82] Even if some jury questions are 'silly'[83] and inadmissible, they are still worth getting as they will prompt the judge to explain why the answer to the inadmissible question cannot be taken into account.[84] Jury questions are a first-hand way in which the parties can identify juror comprehension difficulties. As one prosecutor observed: 'One will never know if the jury had difficulty understanding. Except if they have asked any questions.'[85] The jury question instruction has been integrated into the 'don't search' sample instruction provided under the following section.

Varying the Mode of Delivery of 'Don't Search' Instructions

9.43 Judges deliver their 'don't search' instructions at the start of the trial when the jurors are barely familiar with their environment. '[B]ecause it's all delivered orally, it's buried in amongst a lot of other directions about other things, and they're not provided with any written instructions.'[86] Varying the timing and mode of delivery of the initial jury instructions is likely to assist jurors in absorbing the instruction in a way that they best respond to.

9.44 In order to maximise the chance that jurors will follow the oral instructions, such instructions need to be complemented with written versions of the rule. In 2013 the English Court of Appeal advised that oral warnings should be complemented by written warnings so as to avoid juror confusion.[87] Since December 2023, Victorian judges may provide each juror with a written 'Jury Guide' that includes

77. 2012 Australian Jury Study, note 47 above, Juror 1 from Trial 1.
78. 2012 Australian Jury Study, note 47 above, Juror 3 from Trial 16.
79. 2012 Australian Jury Study, note 47 above, Juror 12 from Trial 29.
80. 2012 Australian Jury Study, note 47 above, Juror 10 from Trial 14.
81. 2012 Australian Jury Study, note 47 above. See further Horan, note 36 above.
82. S Diamond, M Rose and B Murphy, 'Jurors' Unanswered Questions' (2004) 41(1) *Court Review* 20, 22; N Mott, 'The Current Debate on Juror Questions: "To Ask or Not to Ask, That Is the Question"' (2003) 78 *Chicago Kent Law Review* 1099.
83. 2012 Australian Jury Study, note 47 above, Judge 53.
84. Horan, note 36 above.
85. 2012 Australian Jury Study, note 47 above, Prosecutor from Trial 49; Horan, note 36 above.
86. 2012 Australian Jury Study, note 47 above, Prosecutor from Trial 36.
87. *Her Majesty's Attorney-General v Joseph Beard* [2013] EWHC 2317 (Admin), [59].

the 'don't search' instructions. The judge references this written guide as the oral instructions are explained. The jury can take the 'Jury Guide' with them and access it in the deliberation room. This provides the jurors with the opportunity to access the written rules at a time when they are not so stressed by their new environment. This will increase the likelihood that jurors can absorb the rationale behind the rule.

9.45 Ideally such a written guide would be taken home and provided electronically. A juror app is a way in which the instructions can be placed at the juror's fingertips, at the time when they are most tempted: when they are online.

9.46 Having the 'don't search' rules on a poster in the deliberation room is another way to maximise compliance with the rule. If a juror starts to share what they have learnt outside the jury room with their fellow jurors, other jurors are able to directly point to the poster in an effort to prevent the juror from 'infecting' their fellow jurors, thereby avoiding a potential mistrial. One Australian judge attempts to encourage juror questions by leaving a blank form headed 'Questions' on the jury deliberation table.[88] Some United States judges require jurors to sign written pledges that they will avoid internet use during trial in an effort to curb the growing incidence of detective juror.[89]

9.47 The tone of delivery of 'don't search' and 'jury question' instructions, is another factor to consider when trying to ensure compliance with the instruction. As one counsel from the 2012 Australian Jury Study observed, there was a wide variation among the Australian judiciary in the tone of delivery of the jury question instructions: 'Some judges … encourage jurors to ask questions, others are pretty much making it sound as though, "oh you can ask questions if you really, Really, REALLY want to, but it's probably best to leave that to the lawyers to do it".'[90] Another Australian judge attempts to relate to contemporary jurors by urging the jury not to compare their roles to that of 'true crime podcast' producers.[91]

Sample Jury Instruction

9.48 While some Australian jurisdictions provide helpful sample jury instructions in their published Criminal Trial Bench Books,[92] the following sample

88. 2012 Australian Jury Study, note 47 above, Trial Judge 35.
89. Hannaford-Agor, Rottman and Waters, note 21 above, 8.
90. 2012 Australian Jury Study, note 47 above, Prosecutor from Trial 3.
91. A Darling, A Burns and T Dalton, 'Rape Trial Abandoned for Third Time After Juror's "Flagrant Breach" of Judge's Directions', *ABC News*, 7 April 2022 <https://www.abc.net.au>.
92. See, for example, Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book*, 15 December 2023 <https://www.judcom.nsw.gov.au>. See also Goodman-Delahunty and Tait, note 27 above.

jury instruction combines the recommendations made in the above four sections, with an emphasis on using plain English (avoiding legal jargon):[93]

> I am about to give you a really important rule that you must follow. If you can't remember everything I say, don't worry. You don't need to write it down because you can refresh your memory about the rule by going to the Juror App. Look under the heading 'Don't search' and refresh your memory anytime about not doing any private research about the case.
>
> You are not a detective, you are a juror. And as a juror, you have been asked to make an important decision in this trial. In your day to day life, you may rely on the internet to help you make important decisions. But, as a juror, you must NEVER go looking for answers on the internet or in books or anywhere else. For example, one Australian juror looked up several wrong legal definitions in an American online legal dictionary. Laws change and the internet is not always up to date, so, it is my job to explain the law to you. For anything to do with this trial, I am your Google.
>
> You must not post to your social media network to find out what your online friends think. Don't discuss the case with your family or friends. Share your thoughts about the trial with your fellow jurors only.
>
> You must stick to the evidence you have been given in Court. None of us were the objective 'fly on the wall' to what happened. Don't be lured into thinking that the truth is out there for you to dig up. You are not investigating the crime. You are the judges of the facts, as they are provided. You must base your verdict on the evidence given to you during the trial only; nothing more, nothing less.
>
> The rule that jurors are forbidden from doing their own private research outside the courtroom, is so important to a fair trial that it is a criminal offence if you do so. You could potentially be jailed if you do switch roles and become a detective. You will also be letting down your fellow jurors. You will also be letting me down. It is possible that I will be forced to discharge the jury at great expense to the taxpayer. It is likely that this would cause a lot of stress to the defendant, witnesses, the complainant and their families.
>
> If, one evening during the trial, you are at home on your phone and you have a question about the case, STOP — don't ask Google your question. Instead, go to the official Juror App that my court staff helped you download. Under the tab 'Private Notes', type your question. This way, you will not forget to ask your fellow jurors for their help next time you see them. Your fellow jurors are the only people you can talk to about this case. If your fellow jurors don't know the answer, ask me. Remember, I am your Google for this trial. Write your question down and hand it to one of my staff to give to me. I will then answer your concerns. In the tab called 'Don't search' you can remind yourself of this 'don't search' instruction that I am explaining to you.

93. The author wishes to thank Matt Weatherson, Judicial College of Victoria and Greg Byrne for their helpful feedback on these sample instructions.

9.49 Ideally, these jury instructions would be pilot tested to ensure that the way in which jurors understand directions, aligns with what is intended to be conveyed.

• CONCLUSION •

9.50 Digital technology has turbo-charged the ability of jurors to access information about their trial online. The logic of restricting jurors only to the evidence presented at the trial is a legal construct. It demands behaviour that is counterintuitive to many contemporary jurors. If jurors identify concerns with or gaps in the evidence, some jurors will instinctively address them by conducting their own research, even if it means ignoring the direction of the judge not to do so. Given that digital native jurors will soon make up the majority serving on juries, the problems that detective jurors are causing for adversarial justice systems is only going to get worse. There is no one-step solution to preventing digital native jurors from doing what is instinctive to them. However, this chapter has offered several ways for the justice system to encourage jurors to channel their concerns back into the courtroom.

9.51 Judges should assume that some jurors will earnestly search for the truth of the matter (albeit misguided). Accordingly, judges need to thoughtfully explain that it is not the role of the jury to search for the truth. Contemporary jurors are well educated and capable of understanding a reasoned explanation as to how the adversarial system works, even if it is counterintuitive to them.

9.52 Further, in order to adequately address what jurors need and want, jury questions should be encouraged. Asking jurors if they have any questions, at the end of a court session or at the conclusion of a witness' evidence, is a timely way in which to encourage jurors to share their concerns. This is a viable way in which the courts can channel jury questions away from the familiarity of the internet and back into the intimidating environment of the courtroom. Research establishes that long-held concerns about the dangers of encouraging jurors to share their questions in the courtroom are misguided. Jury questions are well within the capabilities of all competent judges to manage. While judges may be concerned that they cannot answer every jury question, explaining why they cannot answer a question is preferable to jurors conducting their own research.

9.53 Varying the timing and the form of the 'don't search' judicial instructions is also likely to assist in ensuring that jurors embrace what the justice system requires of them. These steps combined, are likely to reduce the number of costly mistrials caused by detective jurors who have intuitively gone beyond their remit.