



# Final grant report: Juror comprehension and obedience to judicial directions against juror sleuthing

<b>Project title</b>	Juror comprehension and obedience to judicial directions against juror sleuthing
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<b>Project manager</b>	Jill Hunter
<b>Position</b>	Solicitor
<b>Law and Justice Foundation awarded amount</b>	\$18,285.82
<b>Grant period</b>	February 2008 – March 2014
<b>Date of this report</b>	January 2014

## Description of the project

*Describe the project in just enough detail so that anyone can understand it. What was the aim of the project, who was the intended audience and what strategies did you implement to achieve the aim?*

This project sought to improve understanding of why some jurors are motivated to engage in extra-curial private investigation and research despite judicial direction to the contrary. The project draws on findings in the UNSW Pilot Jury Study (Hunter et al).

## The project – what happened?

### *How did the project come about?*

This project was inspired from, and largely replicated, the UNSW Pilot Jury Study (2010), which in turn began with two aims arising because –

- (i) private juror investigation became topical as a result of some key appeal cases in NSW. From late 2004 this misconduct became a criminal offence.
- (ii) of an emerging trend in New South Wales criminal cases for evidence of defendants' criminal history to be admitted under the Evidence Act 1995 (NSW). The project began with the aim of exploring how this evidence and direction was being applied by jurors in actual trials. This aim was not pursued in this project.

The description below has the details of the stages of the project and combines the findings of the UNSW Pilot Jury Study (2010) because the purpose of the current study was to replicate the pilot study and double the sample base.

***Briefly set out the project stages and what happened in each stage.***

**December 2010**

1. Obtained ethics approval through UNSW.
2. Contacted chiefs of jurisdictions (Supreme Court and District Court) to inform them of the project and seek their support.
3. First p/t research assistant employed.

**February/March 2011**

4. Approached District and Supreme Court judges seeking their support to submit a post-verdict survey to jurors.
5. Approached Jury Management officers in courts administration seeking their support regarding the administration of the juror surveys.
6. IT assistance obtained to adjust electronic data base to accommodate additional trial data (and coordinate with pilot study data).
7. Selection of trials and surveying of jurors commenced.
8. Contact with Dept of Attorney General officer to confirm repeat of project was underway and confirm support and cooperation.

**February-December 2011:**

9. 10 trials surveyed; all judges interviewed; 95% of counsel interviewed; most trial transcripts received through judges and judges' associates.
10. Data entry of juror responses, trial details etc substantially undertaken.

**December 2011**

11. Request for no-fee provision of missing gaps in trial transcripts.

**July 2012**

12. Preliminary report (based on available data) delivered to L&J Fdn and Jury Task Force.
13. **Trial transcripts: January 2012-March 2013:** the major source of delay in completion of the project. The trial transcription office is understandably busy; as are judges who need to check transcripts before they could be released. It took until mid-March 2013 for final trial recordings (instead of transcripts) to be received.
14. Data from trial transcripts placed onto electronic data base. All data entry, except that on delayed trial transcripts completed by December 2012.

**December 2012-April 2013**

15. Two p/t research assistants employed.
16. Final data analysis and drafting of report.

**April 2013**

17. Final report submitted to Attorney-General and Chief Justice for confirmation of compliance with de-identification obligations. Unable to disclose findings until confirmation received.

**October 2013:** Confirmation received.

**November 2013-January 2014**

18. Stakeholder consultation.

**If grant materials were produced:**

***How were they distributed?***

- A preliminary report was submitted to the Jury Task Force (a committee of Dept of Attorney General representatives and judges) in July 2012
- An electronic format final report circulated to the Jury Task Force, judges, and counsel in October 2013:
  - 73 pp report entitled, *Jurors' Notions of Justice: An Empirical Study of Motivations to Investigate & Obedience to Judicial Directions* circulated +
  - an extended (9 pp) Executive summary of the above report.

On the basis of this electronic circulation hard copies provided upon request (from March 2014).

***What was the extent of the distribution?***

**Electronic report distribution:**

All judges and counsel who had assisted the study (approximately 14 judges and 35 counsel; Chief judge of District Court, Chief Justice of NSW; Director of Public Prosecutions; Senior Public Defender.

**Hard copies:**

As requested to the above.

***If applicable, at the time of this report, what has been the extent of online use of your publication?***

Not known.

***Now that the project has concluded, how did the implementation and/or the outcome differ from what was originally intended? Did anything surprise you? Were there any unintended outcomes?***

**Implementation and outcome:** The Dept of the Attorney General indicated it would consider the findings of the study when it examined implementing the 2013 NSW Law Reform Commission Jury Directions Report + the Judicial Commission Research Officer wishes to discuss further the report's findings.

No.

No.

**Evaluation**

***What questions did you ask to evaluate whether you had achieved your aim?***

What motivates jurors to engage in improper conduct by way of research and investigation?

Do comprehensive judicial directions dissuade jurors from this conduct?

***What data did you gather to answer your questions?***

- Jurors' views via questionnaires;
- Trial judges' & counsel views via interviews;
- Details of judges' directions to jurors via trial transcripts;
- Details of the cases via trial transcripts.

### ***Did you achieve your aim? What did you find out?***

Yes.

The juror sample was 33% (n = 78) of all possible jurors in 20 criminal trials.

The findings reveal that:

- 18% of these juror respondents consider it acceptable to engage in improper juror research and investigation in certain circumstances (n=12). An additional 2 jurors were unacceptably 'neutral'.
- 33% of juror respondents misunderstood their task and the task of the jury. Their misunderstandings are detrimental to the delivery of a fair trial.
- 20% of juror respondents reacted negatively to defence rights.

Just fewer than 25% of juror respondents expressed criticism of police or counsel.

With respect to judicial direction regarding private juror inquiry:

- >50% of trials the judge did not inform jurors of the criminal consequences of private juror inquiry.
- 10/12 jurors who found this misconduct acceptable considered the judges' directions clear.

A comprehensive judicial direction did not correlate with greater juror compliance with directions.

## **Conclusion and recommendations**

### ***What is your conclusion?***

The findings:

- reveal that it is more common than not for a juror in a criminal jury to misunderstand their task and the task of the jury in ways that can be detrimental to the delivery of a fair trial.
- suggest that these misunderstandings contribute to some jurors believing that frustration can justify improper juror research and investigation;
- jurors' attitudes were not necessarily changed:
  - o by judicial directions directing that jurors must not engage in private investigation
  - o by criminalising private juror investigation.

The study's findings suggest that jurors need additional assistance to structure their decision-making process and to better understand the assumptions embedded in criminal trial processes regarding the presumption of innocence and the obligations on the prosecutor. It also suggests that criminalising of private juror inquiry is ineffective and it may be counterproductive.

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

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

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

highly possible that criminalisation may have double-edged and counterintuitive consequences that outweigh its possible benefits. For example, a concern that criminal penalty may be applied to a well-intentioned juror-detective could well discourage other jurors from reporting misconduct.

## **RECOMMENDATION 2: REVIEWING GUIDELINE DIRECTIONS**

**2.** By tradition courts have relied on the integrity of jurors to act in accordance with trial judges' directions. The Study's findings suggest that jurors strive to their best but benefits to the criminal jury trial process are likely to accrue where trial judges revise how they convey to jurors that private enquiry is unnecessary, unfair and wrong, particular if the direction builds on robust techniques that assist to explain to jurors that trials do not have the goal of determining the truth. Juror induction should also reinforce these themes.

**a.** Judicial directions and induction information should link their explanations of accusatorial justice and the prohibition against extra-curial investigation and research.

**b.** In addition, the explanations should focus upon: (i) jurors' perspectives to explicate legal and abstract systemic reasons for both the prohibition and for the purpose of detailing accusatorialism's role in the trial; and (ii) practical expressions that link the manifestations of accusatorial trial dynamics specifically to jurors' tasks.

**c.** How best to achieve this approach requires careful formulation reinforced with consistent messages in other aspects of a judge's initial remarks.

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

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

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

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

**3.** As well as having a good understanding of the trial process many jurors need specific guidance linked to the charges and evidence before them.

## **RECOMMENDATION 4: FURTHER JURY SUPPORT**

**4.** This study began as one about juror investigation and research, however its findings suggest a more fundamental issue, namely that a significant number of jurors need additional support beyond judicial instruction.

See research report for further detail.

***What are your recommendations for improvements both for the intended audience of your project, and for the strategy you used to achieve your aim? What would you do differently next time?***

**Recommendations** – above.

**Strategy** – keeping judges, court administration, Judicial Commission of NSW and policy officers in the Dept of Attorney-General and Justice informed of study and its results.

**What would I do differently:** Ensure the project is sufficiently resourced for a p/t research assistant to be employed for the duration.