NSW LAW REFORM COMMISSION

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Jury Directions

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Jury directions

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TERMS OF REFERENCE

In a letter to the Commission received on 16 February 2007, the Attorney General, the Hon R J Debus MP issued the following terms of reference:

> Pursuant to section 10 of the Law Reform Commission Act 1967, the Law Reform Commission is to inquire into and report on directions and warnings given by a judge to a jury in a criminal trial.
>
> In undertaking this inquiry the Commission should have regard to:
>
> - the increasing number and complexity of the directions, warnings and comments required to be given by a judge to a jury;
> - the timing, manner and methodology adopted by judges in summing up to juries (including the use of model or pattern instructions);
> - the ability of jurors to comprehend and apply the instructions given to them by a judge;
> - whether other assistance should be provided to jurors to supplement the oral summing up;
> - any other related matter.

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The closing date for submissions is 13 March 2009.

Confidentiality and use of submissions

In preparing further papers on this reference, the Commission will refer to submissions made in response to this Consultation Paper. If you would like all or part of your submission to be treated as confidential, please indicate this in your submission. The Commission will respect requests for confidentiality when using submissions in later publications.

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1. Introduction

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THIS REFERENCE

1.1 Juries play an important role in criminal justice as fact-finders in trials of serious offenders. The trial judge, whose role in a criminal trial is to determine questions of law, must, where necessary, provide instruction to the members of the jury on how they should or should not approach their fact-finding task, and on how they should apply the law to the facts as they have found them, for the purpose of determining whether the accused is guilty or not guilty.

1.2 This reference is about the instructions that a judge gives to a jury in a criminal trial. It arises in the context of a growing concern in Australia and overseas about the problems associated with jury directions.[1] The Victorian and Queensland Law Reform Commissions are undertaking similar projects.[2] These Australian law reform inquiries have been prompted, in part, by the Standing Committee of Attorneys General's recent consideration of "the feasibility of a review of jury directions and warnings, including areas for improved consistency, by reference to one or several law reform commissions".[3]

1.3 In England and Wales, in late 2007, the Lord Chief Justice, Lord Phillips, established a working party under Sir David Latham, a Court of Appeal judge, to consider the simplification of the legal directions judges give to juries.[4]

WHAT ARE JUDICIAL INSTRUCTIONS?

1.4 Judges give instructions to juries throughout criminal trials. These start at the commencement of the trial with the opening remarks to the jury.[5] During the course of the trial, the judge may give instructions in response to the introduction of certain types of

1. See, for example, A M Gleeson, "The State of Judicature" (Speech delivered at the 35th Australian Legal Convention, Sydney, 25 March 2007); N A Phillips, "Constitutional Reform: One Year On" (The Judicial Studies Board Annual Lecture, London, 22 March 2007); N A Phillips, "Trusting the Jury", (The Criminal Bar Association Kalisher Lecture, London, 23 October 2007); New Zealand Law Commission, *Juries in Criminal Trials*, Report 69 (2001); R Auld, *Review of the Criminal Courts in England and Wales* (2001).
2. Victorian Law Reform Commission, *Jury Directions*, Consultation Paper 6 (2008); Queensland Law Reform Commission, "Jury Directions Review" (terms of reference issued 7 April 2008): «*http://www.qlrc.qld.gov.au/publications/Terms_of_reference_Jury_Directions__PDF_version.PDF*».
3. Standing Committee of Attorneys General, *Annual Report 2006-2007*.
4. N A Phillips, "Trusting the Jury", (The Criminal Bar Association Kalisher Lecture, London, 23 October 2007) 6-7.
5. See generally ch 4 and ch 5.

evidence. After all the evidence has been presented and before the jury retires to consider its verdict, the judge gives a summing-up of the case (sometimes also called a "charge").[6] The summing-up contains all the instructions that the jury needs to decide the case, including those that the judge may already have given earlier in the trial. Finally, the judge may give instructions during the jury deliberations if the jurors submit questions to clarify some matter,[7] or are having difficulty reaching agreement.[8]

1.5 Many terms are employed to describe the various types of instruction that the judge gives to the jury, including "directions", "warnings", and "comments".

1.6 "Jury directions" refer to the instructions the trial judge gives during the trial that the jury must follow in deciding the issues of fact in the case.[9] The term "jury directions" includes "warnings". Warnings alert jurors to dangers inherent in certain types of evidence that may not be obvious to them, but which would be obvious to trial judges who are taken to have more experience in such matters and to be more alert to the dangers posed.[10] Warnings are considered to be mandatory, that is, they are something which the law requires the trial judge to give to the jury under certain circumstances, and which the jury must follow.

1.7 In addition to directions, a trial judge may also make comments. The general objective of a judicial comment is to remind the members of the jury about a matter arising in evidence when they will usually have sufficient knowledge and understanding to appreciate its significance, but which they might forget or overlook without a reminder from the judge.[11]

1.8 The High Court, in a case that considered a legislative provision allowing the judge to comment on the failure of the defendant to give evidence,[12] has highlighted the distinction between directions and comments:

> It is ... not the province of the judge to *direct* the jury about how they may (as opposed to may *not*) reason towards a conclusion of guilt. That is the province of the jury. The judge's task in relation

6. See ch 6.
7. See para 10.44-10.51.
8. See para 4.72-4.80.
9. See, for example, *RPS v The Queen* (2000) 199 CLR 620; [2000] HCA 3, [41] (Gaudron ACJ, Gummow, Kirby and Hayne JJ).
10. *R v Stewart* (2001) 52 NSWLR 301; [2001] NSWCCA 260, [83] (Howie J).
11. *Crampton v The Queen* (2000) 206 CLR 161; [2000] HCA 60, [126] (Kirby J); *R v Stewart* (2001) 52 NSWLR 301, [82]-[83] (Howie J).
12. *Evidence Act 1995* (NSW) s 20(2).

> to the facts ends at identifying the issues for the jury and giving whatever warnings may be appropriate about impermissible or dangerous paths of reasoning. That is not to say that the judge may not comment on the evidence that has been given and comment about the facts that the jury might find to be established. But the distinction between comment and direction is important. Telling a jury that they may attach particular significance to the fact that the accused did not give evidence is a comment by the judge. Because it is a comment, the jury may ignore it and they should be told they may ignore it. By contrast, warning a jury against drawing impermissible conclusions from that fact is a direction by the judge which the jury is required to follow.[13]

1.9 The distinction between a direction and comment is important where the circumstances of the case require a warning to be given but the trial judge gives only a comment as, on appeal, this would generally amount to an error of law.[14]

1.10 The justification for warnings and, to a lesser extent, for comments depends on the assumption that trial judges, by their special experience in the criminal law, possess greater knowledge and comprehension in relation to the inherent dangers or particular problems associated with these forms of evidence.[15] Whether that assumption is well-grounded is, at least in some respects, questionable. It is also questionable whether jurors are adequately instructed on the distinction between warnings and comments, and how they should approach each. Much of the necessary information appears to be conveyed indirectly by means of tense and the use of key phrases.

AIMS OF JUDICIAL INSTRUCTIONS

1.11 Judicial instructions should achieve a number of outcomes. First, they should ensure (or at least not detract from[16]) a fair trial for the

13. *Azzopardi v The Queen* (2001) 205 CLR 50; [2001] HCA 25, [50] (Gaudron, Gummow, Kirby and Hayne JJ). See also *Mahmood v Western Australia* (2008) 82 ALJR 372; [2008] HCA 1, [16] (Gleeson CJ, Gummow, Kirby and Kiefel JJ).
14. *Mahmood v Western Australia* (2008) 82 ALJR 372; [2008] HCA 1, [18] (Gleeson CJ, Gummow, Kirby and Kiefel JJ).
15. *Bromley v The Queen* (1986) 161 CLR 315; and *R v Stewart* (2001) 52 NSWLR 301, [72]-[83] and [92]-[98] (Howie J).
16. *Dietrich v The Queen* (1992) 177 CLR 292, 299 states that the accused has the right not to be tried unfairly.

accused.[17] Secondly, they should be accurate and adequate with regards to the law, the alleged facts and the arguments of counsel.[18] Thirdly, they should be understandable to the jurors and assist them in coming to a verdict.[19]

1.12 The High Court has explained the fair trial considerations behind the giving of judicial instructions:

> The fundamental task of a trial judge is, of course, to ensure a fair trial of the accused. That will require the judge to instruct the jury about so much of the law as they need to know in order to dispose of the issues in the case. No doubt that will require instructions about the elements of the offence, the burden and standard of proof and the respective functions of judge and jury. Subject to any applicable statutory provisions it will require the judge to identify the issues in the case and to relate the law to those issues. It will require the judge to put fairly before the jury the case which the accused makes. In some cases it will require the judge to warn the jury about how they should *not* reason or about particular care that must be shown before accepting certain kinds of evidence. [20]

1.13 Numerous judgments have emphasised the need to make instructions understandable so as to assist juries in carrying out their task. For example, Chief Justice Spigelman has observed:

> A summing-up to a jury is an exercise in communication between judge and jury ... It is, as has frequently been emphasised,

17. *RPS v The Queen* (2000) 199 CLR 620; [2000] HCA 3, [41] (Gaudron ACJ, Gummow, Kirby and Hayne JJ).
18. See para 6.9-6.11 and para 6.31-6.37.
19. *Jenkins v The Queen* (2004) 79 ALJR 252; [2004] HCA 27, 257 (Gleeson CJ, Hayne, Callinan and Heydon JJ), citing *Alford v Magee* (1952) 85 CLR 437, 466. See also A M Gleeson, "The State of the Judicature" (35th Australian Legal Convention, Sydney, 25 March 2007), 10; Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria*, Final Report (1997) Vol 3, [2.200]; Law Reform Commission of Canada, *The Jury*, Report 16 (1982), 84; *R v Adomako* [1995] 1 AC 171, 189 (Lord Mackay); *R v Landy* (1981) 72 Cr App R 237; *R v McGreevy* (1973) 57 Cr App R 424, 430, quoting Lord Lowry of NI; "Principles of Summing-up" (1999) 63 *Journal of Criminal Law* 422, 424; *Zoneff v The Queen* (2000) 200 CLR 234; [2000] HCA 28, [55], [65] (Kirby J).
20. *RPS v The Queen* (2000) 199 CLR 620; [2000] HCA 3, [41] (Gaudron ACJ, Gummow, Kirby and Hayne JJ). The High Court has also held that judicial warnings are necessary to uphold the requirement of a fair trial: *Crampton v The Queen* (2000) 206 CLR 161; [2000] HCA 60, [126]-[127] (Kirby J); *Longman v The Queen* (1989) 168 CLR 79, 108 (McHugh J).

> desirable that a judge employs easily understood, unambiguous and non-technical language.[21]

1.14 There is no easy answer when the outcomes in paragraph 1.11 come into conflict. For example, the need to ensure a fair trial will determine what judicial warnings are necessary. Yet a large number of such warnings may make it difficult for jurors to comprehend the directions of law.[22] So too, the requirement of accuracy is thought by some to encourage judges to use the precise language in which a direction or warning has been formulated by an appellate court, in order to "appeal proof" their instructions. Yet the utterance of such "hallowed phrases" may be confusing to a jury because they are couched in the language that would be unfamiliar[23] or that may conflict with everyday non-legal meanings.[24] On the other hand, the need to communicate complex legal concepts simply to lay jurors may lead to a loss of accuracy in statements of law.

1.15 The importance of these aims is underlined by the fact that the jury does not give reasons and its decisions are not generally open to scrutiny. Judicial directions, therefore, have the broad purpose of helping the jury reach the best decision. However, the measures of the jury's performance in reaching the best decision possible are open to debate. Some of these measures could include:[25]

- whether the jury has drawn rational inferences from the evidence before it;
- whether the jurors have adhered to the law, that is, not contrary to any warnings or taking into account any inadmissible material;
- whether it has reached the decision the judge would have reached;

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21. *R v Forbes* (2005) 160 A Crim R 1; [2005] NSWCCA 377, [79] (Spigelman CJ). See also *Re Attorney-General's Reference (No 3 of 1994)* [1998] AC 245, 272F-G; *R v Adomako* [1995] 1 AC 171, 189 (Lord Mackay).
22. G Eames, "Towards a Better Direction – Better Communication with Jurors" (2003) 24 *Australian Bar Review* 35, 45.
23. *Zoneff v The Queen* (2000) 200 CLR 234, [55] (Gleeson CJ, Gaudron, Gummow and Callinan JJ); *Darkan v The Queen* (2006) 227 CLR 373; [2006] HCA 34, [67]. See also I Potas, "Instructing the Jury" in D Challinger (ed), *The Jury: Proceedings of Seminar on the Jury*, AIC Seminar, Proceedings No 11 (1986) 173.
24. For example, "intent" and "doubt" and "concern".
25. See, eg, G Mitchell, "Asking the Right Questions about Judge and Jury Competence" (2005) 32 *Florida State University Law Review* 519, 523-525.

- whether it has accurately convicted an actually guilty accused or acquitted an actually innocent one;[26] and
- whether it has achieved "fairness" according to community standards.

Each one of these measures, insofar as they are considered valid, will involve different considerations when framing directions for a jury.

CHALLENGES

1.16 There are two main challenges in achieving the aims of judicial instructions. The first is to help jurors comprehend their task. This involves overcoming the risk that, no matter how well-crafted a judge's instructions may be, the language, length and complexity will be such that a jury will not understand or correctly apply it. The second challenge is to avoid unnecessary appeals. This relates to the difficulties trial judges experience in summing up a criminal case to a jury. These difficulties are attributable to the numerous and complex directions of law that judges must give concerning the elements of the offence or offences charged, and of any available defences; and also to the several warnings or comments which judges must make in relation to aspects of the evidence presented in the trial.

Achieving juror comprehension

1.17 A number of factors connected with judicial instructions may impede jurors' comprehension of their task, including long and complex sets of instructions, particularly in the context of the summing-up; and the failure to use English that lay people can understand easily.

Long/complex summings-up

1.18 While it is not easy to obtain relevant information in relation to trials conducted in earlier years, it appears to be the universal experience of judges and counsel that summings-up in those times were very much shorter and less complex. Justice Michael Kirby, for example, recounted that when he commenced practice in 1962, "experienced New South Wales judges, such as Clancy J, McClemens J or Brereton J would sum up in a murder case in little more than an hour or so and do it from their head".[27]

26. See, eg, P McClellan, "The Australian Justice System in 2020" (National Judicial College of Australia, 25 October 2008) 3-10.
27. M Kirby, "Why Has the High Court Become More Involved in Criminal Appeals?" (2002) 23 *Australian Bar Review* 4, 16.

1.19 These days, the summing-up takes much longer. Judges in NSW reported in a recent survey that, in trials lasting 20 days, a summing-up takes more than six hours, which is equivalent to at least one trial day.[28] This is substantially longer than that in New Zealand (a jurisdiction with comparable criminal law and procedure) where the summing-up in 20-day trials lasts about one hour and a half.[29]

1.20 The increasing length of the summing-up, and the difficulties experienced by trial judges in formulating them, are substantially attributable to the numerous and complex directions of law that appeal courts and statute law require concerning the elements of the offence or offences charged, of any available defences, and also to the abundant judicial warnings and comments which need to be made in relation to aspects of the evidence presented in the trial.

1.21 It has been observed, for example, that in sexual assault trials, the judge needs to consider at least eight categories of directions, warnings and comments for inclusion in the summing-up in addition to the standard directions given in criminal trials, and any further unreliable evidence warnings which may be required under s 165 of the *Evidence Act*.[30]

1.22 One consequence of instructions that are too many and too complex is that jurors may have trouble comprehending them. The impact of the increasing number and complexity of directions on jurors' comprehension has been raised on many occasions.[31] For example, in 1999, Justice Hayne observed:

> The task of directing a jury in a criminal case is never easy. It would be made no easier (and would serve no purpose) if trial judges were bound to give more, and more complicated, directions than the particular case requires.[32]

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28. J Ogloff, J Clough, J Goodman-Delahunty and W Young, *The Jury Project: Stage 1 – A Survey of Australian and New Zealand Judges* (Australian Institute of Judicial Administration, 2006) 26-27. The summing-up for less complex cases is shorter - more than two hours for five-day trials and three and a half hours for 10-day trials.
29. J Ogloff, J Clough, J Goodman-Delahunty and W Young, *The Jury Project: Stage 1 – A Survey of Australian and New Zealand Judges* (Australian Institute of Judicial Administration, 2006) 26-27.
30. See *R v BWT* (2002) 54 NSWLR 241; [2002] NSWCCA 60, [32] (Wood CJ at CL).
31. A M Gleeson, "The State of the Judicature" (35th Australian Legal Convention, Sydney, 25 March 2007) 9; F H Vincent, "The High Court v the Trial Judge" in *28th Australian Legal Convention* (1993) vol 2, 265.
32. *Melbourne v The Queen* (1999) 198 CLR 1; [1999] HCA 32, [142].

Justice McHugh has also observed:

> The more directions and warning juries are given the more likely it is that they will forget or misinterpret some directions or warnings.[33]

1.23 Senior judges have spoken of their frequent experience, as well as those of their fellow judges, of seeing the jurors with glazed eyes and blank faces as they give a series of directions and comments.[34]

1.24 Doubts have been frequently expressed about juries' ability to understand and apply the instructions that judges currently provide.[35] For example, in 1972, the English Criminal Law Revision Committee observed:

> The present law requires judges to direct juries to achieve certain mental feats which some judges think impossible for any lawyers to achieve; and it is no answer to criticisms of this kind to say, as is sometimes said, that there is no difficulty in directing the jury in the way in which the courts have said they should be directed. There may be no difficulty in saying the right words; the question is what the jury make of them, and nobody can be sure of that.[36]

Some of the empirical studies canvassed in Chapter 2 of this Consulation Paper support the anecdotal evidence from judges that questions the extent to which jurors comprehend judicial directions and comments delivered in this manner.

1.25 On the other hand, there is some survey evidence that jurors do find judicial instructions helpful in coming to an understanding of the case and their task in relation to it.[37] However, the studies that show this generally do not qualify or quantify the extent of the usefulness of the instructions. For example, it would only take one aspect of the instructions to be helpful, such as the elements of the offence charged, for the instructions to be described as of assistance. A recent Bureau of Crime Statistics and Research survey showed that 67.2% of the

33. *KRM v The Queen* (2001) 206 CLR 221; [2001] HCA 11, [37].
34. See J Wood, "Jury Directions" (2007) 16 *Journal of Judicial Administration* 151; G Eames, "Towards a Better Direction – Better Communication with Jurors" (2003) 24 *Australian Bar Review* 35, 39; N A Phillips, "Trusting the Jury" (The Criminal Bar Association Kalisher Lecture, London, 23 October 2007) 15.
35. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria*, Final Report (1997) vol 3, [2.202]-[2.205].
36. England and Wales, Criminal Law Revision Committee, *Evidence (General)*, Report 11 (Cmnd 4991,1972) [25].
37. See NSWLRC, *Criminal Procedure: The Jury in a Criminal Trial: Empirical Studies*, Research Report 1 (1986) [6.49], [6.50].

jurors surveyed found the judge's summing-up helped them "quite a bit" or "a lot" in reaching their verdict.[38] A study conducted for the NSWLRC in 1986 revealed that 95% of jurors surveyed considered the judge's summing-up helped them to understand the case.[39] In New Zealand, a survey showed that over 85% of the jurors surveyed found the judge's summing-up "clear" and over 80% said it was "helpful". However, the same study also indicated that the jurors had "widespread misunderstanding about aspects of the law which persisted through to, and significantly influenced, jury deliberations".[40] The result was that, although they prolonged the deliberation process, they were, for the most part, "addressed by the collective deliberations of the jury".[41] There is also a question as to whether the summings-up assisted jurors in coming to an objective view of the case.[42]

1.26 Studies that indicate that jurors think they had no trouble understanding a judge's instructions cannot show whether jurors in fact understood what the judge said.[43] One judicial commentator has suggested that:

> The real test of comprehension would be to quiz jurors as to the content of the directions, shortly after they were given. I fear that any such exercise might disclose a profound gulf between the protestations of comprehension and the reality.[44]

Cornish, in his book on juries, observed that, in relation to oral directions:

> There is a natural tendency to disregard what is said about things which the jury cannot understand: nice distinctions over

38. L Trimboli, *Juror Understanding of Judicial Instructions in Criminal Trials*, Crime and Justice Bulletin No 119 (NSW Bureau of Crime Statistics and Research, 2008) 7.
39. NSWLRC, *Criminal Procedure: The Jury in a Criminal Trial: Empirical Studies*, Research Report 1 (1986) [6.49].
40. W Young, N Cameron, Y Tinsley, *Juries in Criminal Trials Part 2: A Summary of the Research Findings*, New Zealand Law Commission, Preliminary Paper 37 (1999) vol 2, [7.3].
41. W Young, N Cameron, Y Tinsley, *Juries in Criminal Trials Part 2: A Summary of the Research Findings*, New Zealand Law Commission, Preliminary Paper 37 (1999) vol 2, [7.25].
42. G Flatman and M Bagaric, "Juries Peers or Puppets – the Need to Curtail Jury Instructions" (1998) 22 *Criminal Law Journal* 207, 212.
43. S Lloyd-Bostock and C Thomas, "Decline of the 'Little Parliament': Juries and Jury Reform in England and Wales" (1999) 62 *Law and Contemporary Problems* 7, 33.
44. G Eames, "Towards a Better Direction – Better Communication with Jurors" (2003) 24 *Australian Bar Review* 35, 40.

> the precise meaning of a rule of law, and the judge's assessment of expert evidence may thus pass into oblivion.[45]

1.27 There is also a question of the extent to which the jury's collective deliberations may overcome some of the problems that individual jurors may have with regard to some parts of a judge's instructions.[46] Indeed it has been suggested that it would be unrealistic to expect every juror to understand every aspect of a judge's instructions.[47]

1.28 A question, therefore, arises whether it may be better, at the least, to reduce the content and breadth of some of the instructions that have become the norm to more general and briefer observations. At the least, would it be appropriate for judges to confine their instructions to cases where there is a particular basis for concern as to the witness's credibility or reliability.

1.29 For example, it can be argued that warnings and comments may not be necessary in cases where they merely instruct the jury on matters that they already know, either because of the general experience it is assumed that all jurors possess, or because counsel have alerted them to the issues during the course of the trial. In some instances, such communications have become lengthy dissertations which border on giving judicial evidence, as far as they involve a reference to the experience of trial judges or of courts more generally. Commonly, such directions are supplemented by an observation to the effect that they are routinely given in any case where such evidence is led, and that the jury should not take the direction as conveying any personal conclusion that the judge has reached in relation to the credibility of the relevant witness. Quite what the average juror makes of this observation when given a stern warning that is expected to carry the judge's imprimatur, is another matter.[48] The issue is highlighted when considering the question of judges expressing an opinion on the merits of the case.[49]

1.30 Other directions and comments might be abolished or simplified on the basis that reliance could be had on the jurors' sense of fairness, experience of life and common sense. Courts often ackowledge that the

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45. W R Cornish, *The Jury* (Allen Lane, The Penguin Press, 1968) 114.
46. G Eames, "Towards a Better Direction – Better Communication with Jurors" (2003) 24 *Australian Bar Review* 35, 40.
47. See *Whited v Powell* 285 SW 2d 364 (1956), 368 and W W Steele and E G Thornburg, "Jury Instructions: A Persistent Failure to Communicate" (1991) 74 *Judicature* 249, 250.
48. D Wolchover, "Should Judges Sum Up on the Facts?" [1989] *Criminal Law Review* 781, 792.
49. See para 6.61-6.69.

jury embodies the common experience of men and women of the community, with all the variety of backgrounds, ages and experience of life that such a community possesses, and that their collective knowledge and common sense should not be underestimated.[50] However, there is a view that some of the jury directions and comments formulated by courts, statutes and bench books do in fact underestimate or contradict the common sense of jurors.[51]

1.31 Such an approach would not necessarily extend to all warnings. For example, it could be argued that the average juror could not possibly be aware of the problems of accepting the evidence of prison informers.[52]

Plain English

1.32 The widespread tendency of trial judges to use the highly-technical language of appellate court judgments in framing instructions is the result not only of their desire to avoid appealable errors but also the result of the pressures of litigation. Many judges simply do not have time to turn their minds to whether jurors will understand the language they use.

1.33 A good example of this tendency is the continuing use of a direction that the prosecution must "exclude any reasonable hypothesis consistent with innocence". It is certainly a "hallowed phrase", in that it was used as long ago as 1842, in the 3rd Edition of *Starkie on Evidence*, and adopted by the High Court in 1911.[53] The High Court quoted a version of it without criticism in 1952,[54] but its use as a direction to the jury is inappropriate. The word "hypothesis" has been described as "hardly within the understanding of the average juror",[55] but judges continue to use it, as illustrated by the Court of Criminal Appeal's recent criticism of it as "decidedly non-jury friendly language".[56]

1.34 The use of plain English expression is discussed further in relation to model directions.[57]

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50. See, for example, *BJR v R* [2008] NSWCCA 43, [97] (Latham J); *R v LTP* [2004] NSWCCA 109, [116] (Simpson J); *R v McIntyre* [2002] NSWCCA 29, [49] (Hodgson J).
51. N A Phillips, "Trusting the Jury" (The Criminal Bar Association Kalisher Lecture, London, 23 October 2007).
52. *Pollitt v The Queen* (1992) 174 CLR 558; *R v Clough* (1992) 28 NSWLR 396. See para 7.12-7.16.
53. *Peacock v The King* (1911) 13 CLR 619, 630, 634, 652.
54. *Luxton v Vines* (1952) 85 CLR 352, 358.
55. *R v Walters* (1992) 62 A Crim R 16, 20 (Hunt CJ at CL).
56. *El Hassan v R* [2007] NSWCCA 148, [33] (Hunt AJA).
57. See para 3.14-3.36.

Avoiding unnecessary appeals

1.35 A further result of the increasing number and complexity of judicial directions and comments is the multiplication in the opportunity for appealable error. Often, a trial judge must give careful consideration to whether some matter that might affect the reliability of a particular piece of evidence is such as to require a warning, or whether it can be left to a comment, or left simply as a matter for the jurors to weigh using their own judgment.[58] The decision which the trial judge makes at this point in the context of the trial can be critical since, if it is found to be an erroneous one, it is likely to lead to a successful appeal.[59]

1.36 A substantial number of successful appeals based on misdirections ultimately result in re-trials.[60] The waste of resources – including the costs to the criminal justice budget, the legal costs incurred by both the prosecution and the defence – and the personal strain occasioned to victims, witnesses and persons accused of criminality and their families, resulting from such re-trials, are obvious.

1.37 The increasing incidence of appeals relating to judicial instructions must be viewed in the more general context of increasing resort to appellate courts in criminal matters.

1.38 There has been a significant increase in the involvement of intermediate appellate courts, and of the High Court, in criminal matters in recent decades. This has served to increase the complexity of trials, particularly in relation to the requirements which a judge must satisfy when instructing the jury.

1.39 An analysis of the statistics kept in Victoria and in NSW shows that there has been an increase in conviction appeals, and in the

58. See *Relc v R* (2006) 167 A Crim R 484, [80] (McClellan CJ at CL).
59. *R v Stewart* (2001) 52 NSWLR 301; [2001] NSWCCA 360, [117]-[119] (Howie J).
60. Misdirections play a significant role in appeals in sexual assault trials. The NSW Judicial Comission surveyed sexual offence cases between 2001 and June 2004 and found that the NSW Court of Criminal Appeal allowed 70 of 136 appeals arising from sexual assault trials (51.5%). In a majority (54%) of the successful appeals, the Court allowed the appeal based on misdirection: NSW, Criminal Justice Sexual Offence Taskforce, *Responding to Sexual Assault: The Way Forward* (2006), 89-90. The NSW Judicial Commission is currently undertaking a study of conviction appeals for the period 2001-2007. The study, which is due for publication in 2009, will include an analysis of the role of misdirections in appeals and the number of retrials resulting from successful appeals.

proportion of such appeals that have resulted in appellate intervention.

1.40 Justice Michael Kirby has examined the High Court's increased involvement in criminal appeals, and offered several reasons for the fundamental shift in its attitude to such appeals since the time of its creation at the turn of the 20th century. For the first three-quarters of that century, the Court was generally not inclined to receive conviction or sentencing appeals.[61]

1.41 Justice Kirby has suggested several reasons for this trend, including:

- the fact that, until 1984, the High Court was obliged to hear and determine a large number of civil appeals that could be brought as of right, limiting its capacity to entertain criminal appeals;
- the enactment of criteria providing greater content to the concept of special leave;[62]
- the establishment of intermediate appellate courts whose decisions presented issues of obvious importance for legal doctrine, and hence review by the High Court;
- the changing personnel and judicial attitudes to the criminal law that marked a significant departure from the disinclination of earlier members of the Court to involve themselves in the administration of justice;[63]
- the provision of legal aid for criminal trials and appeals that has led to counsel exploring every possible avenue of defence, becoming more imaginative, raising points previously unthought of, and testing decisions formerly regarded as establishing the law;
- the emergence of a bar specialising in criminal trials and appeals, encouraged also by the flow of legal aid funds; and

61. M Kirby, "Why has the High Court Become More Involved in Criminal Appeals?" (2002) 23 *Australian Bar Review* 4, 7.
62. *Judiciary Act 1903* (Cth) s 35A.
63. As indicated, for example, by the observations of Starke J in *Tuckiar v The Queen* (1934) 52 CLR 335, and in *Sodeman v The Queen* (1936) 55 CLR 192, and in the decision in *Stuart v The Queen* (1959) 101 CLR 1 refusing leave to appeal.

- the stringent interpretation given to the proviso included in most criminal appeal statutes following the decision in *Mraz v The Queen*.[64]

Several of these reasons are equally likely to have contributed to the growth of appeals in the intermediate courts of appeal, and to their focus on a more strict adherence to legal doctrine and observance of procedural requirements.

1.42 In this context, there is a tendency for trial judges to seek certainty through clear-cut rules handed down by appellate courts. Justice Kirby, in discussing the need for a direction on the use of evidence of good character, observed:

> Although there are disadvantages and risks in establishing a "clear-cut rule", for the avoidance of accidental injustice, unnecessary appeals, costly retrials and uncertainty, the recognition of a general rule represents the best and clearest policy. It avoids any suggestion that the availability of the direction depends on a judicial "lottery". It leaves the trial judge in no doubt as to his or her duty... Too much rigidity in judicial obligation in criminal and other jury trials is a burden, it is true. But the other side of the coin is judicial idiosyncrasy, variance and individual inclination. Too much of the latter will diminish the reality of the rule of law and substitute judicial rule and sometimes judicial whim or prejudice. These dangers can be avoided ... by the adoption of a simple and obligatory judicial requirement which, once observed, banishes the leeway for complaint.[65]

This approach, while reducing uncertainty in one respect, may nevertheless lead to a multiplication of instructions and resulting confusion.

1.43 Quite apart from difficulties with individual directions, there is the tangible risk that trial counsel are prepared to remain silent at the trial concerning the lack of or inadequacy of these directions in the confidence that any error will permit a successful appeal – a "forensic culture" which has been described as regrettable.[66]

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64. *Mraz v The Queen* (1955) 93 CLR 493, although see the more recent formulation discussed at para 1.44-1.51.
65. *Melbourne v The Queen* (1999) 198 CLR 1; [1999] HCA 32, [115] (Kirby J).
66. *R v MM* (2004) 145 A Crim R 148, [36] (Levine J). See also *R v Melville* (1956) 73 WN (NSW) 579, 581.

Current appeal procedures

1.44 Intermediate appellate courts do have some power to minimise appeals based on misdirections or failure to give directions. Rule 4 of the *Criminal Appeal Rules* (NSW) provides:

> No direction, omission to direct, or decision as to the admission or rejection of evidence, given by the Judge presiding at the trial, shall, without the leave of the Court, be allowed as a ground for appeal or an application for leave to appeal unless objection was taken at the trial to the direction, omission, or decision by the party appealing or applying for leave to appeal.

1.45 The main purpose of rule 4 is to prevent an accused who has been convicted under one set of issues to have a new trial under a new set of issues which he or she could and should have raised at the first trial, unless there has been a miscarriage of justice. [67]

1.46 The burden is on the appellant to satisfy the court that leave should be granted to argue the point on appeal. The usual test for whether leave should be granted is whether there is an arguable case of error and, if so, whether the error could lead to a miscarriage of justice.[68]

1.47 Even if leave is granted, the NSW Court of Criminal Appeal's power to allow an appeal against conviction is subject to the proviso that the Court:

> may notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.[69]

1.48 Where error has been shown that might amount to a miscarriage of justice, the onus rests on the prosecution to establish that the miscarriage of justice was not substantial.[70] The distinction between a

67. *R v Abusafiah* (1991) 24 NSWLR 531, 536 (Hunt J). See also *R v Wilson* (2005) 62 NSWLR 346; [2005] NSWCCA 20, [23] (Hunt AJA).
68. *R v Wilson* (2005) 62 NSWLR 346; [2005] NSWCCA 20, [19]-[23] (Hunt AJA).
69. *Criminal Appeal Act 1912* (NSW) s 6(1). Similar provision exists in other Australian jurisdictions: *Criminal Code* (NT) s 411(2); *Criminal Code* (Qld) s 668E(1A); *Criminal Law Consolidation Act 1935* (SA) s 353(1); *Criminal Code 1924* (Tas) s 402; *Crimes Act 1958* (Vic) s 568(1); *Criminal Appeals Act 2004* (WA) s 14(2).
70. *R v Asquith* (1994) 72 A Crim R 250; *R v Moussa* (2001) 125 A Crim R 505; [2001] NSWCCA 427, [63] (Howie J).

miscarriage of justice and a substantial miscarriage of justice has been recognised,[71] and is important in applying the proviso.[72]

1.49 The proviso has been applied in cases where the trial judge misdirected the jury in relation to the elements of the offence charged.[73] For example, in *R v Gulliford*,[74] despite its finding that the trial judge's directions as to the element of knowledge of the complainant's lack of consent to sexual intercourse contained several errors and was confusing and incomplete, the NSW Court of Criminal Appeal, by majority, dismissed the appeal on the basis that no substantial miscarriage of justice had actually occurred. The proviso has also been applied where the trial judge's directions regarding identification evidence were found to be inadequate.[75]

1.50 Notwithstanding rule 4 and the proviso, and the stress repeatedly placed by appeal courts on the importance of trial counsel taking objections or seeking redirections in relation to the summing-up,[76] the practice continues unabated of appellate counsel subjecting judicial instructions to a minute syntactical analysis in the hope of finding error.[77] Questions arise as to whether appellate courts should take a different approach in the way in which they deal with these appeals.

1.51 More fundamentally, the question also arises as to whether the formulation of simpler and clearer instructions or the abolition of

71. *Driscoll v The Queen* (1977) 137 CLR 517, 524-525 (Barwick CJ); *Dietrich v The Queen* (1992) 177 CLR 292, 337 (Deane J).
72. The High Court has discussed the meaning of substantial miscarriage of justice for purposes of the proviso in these cases: *Weiss v The Queen* (2005) 224 CLR 300; [2005] HCA 81; *Darkan v The Queen* (2006) 227 CLR 373; [2006] HCA 34; *Libke v The Queen* (2007) 230 CLR 559; [2007] HCA 30.
73. *Kural v The Queen* (1987) 162 CLR 502; *R v Jones* (1995) 78 A Crim R 504; *R v Cao* (2006) 65 NSWLR 552; [2006] NSWCCA 89; *Ka Chung Fung v R* (2007) 174 A Crim R 169; [2007] NSWCCA 250.
74. *R v Gulliford* (2004) 148 A Crim R 558; [2004] NSWCCA 338.
75. *Festa v The Queen* (2001) 208 CLR 593; [2001] HCA 72.
76. For example, *R v Roberts* (2001) 53 NSWLR 138; [2001] NSWCCA 163, [61]-[64] (Carruthers AJ); *R v Fuge* [2001] NSWCCA 208, [41] (Wood CJ at CL); *R v Ita* (2003) 139 A Crim R 340; [2003] NSWCCA 174, [92]-[98] (Ipp JA).
77. This has been, in part, the result of an increasing separation of a criminal trial bar, whose members do not usually conduct appeals, and a criminal appellate bar, whose members rarely run trials: See G Eames, "Towards a Better Direction – Better Communication with Jurors" (2003) 24 *Australian Bar Review* 35.

some instructions will lead to a reduction in the level of appeals dealing with aspects of judicial instructions.

ISSUE 1.1

What problems do the use of judicial instructions present in criminal trials?

ACHIEVING REFORM

1.52 To address the problems associated with judicial instructions, a broad range of reform measures needs to be examined.

1.53 If limits are to be imposed upon any aspect of a trial judge's instructions or if different approaches are to be adopted which are presently forbidden, the question then arises as to how such changes can be achieved.

1.54 Other methods of influencing judicial practice in this area would include providing more appropriate directions in the bench book and educating judges more generally in communicating with juries.

Abolition of some instructions

1.55 One option is to eliminate those directions, by statute, where they are shown to be unnecessary, unhelpful or counterproductive.

1.56 There are a number of examples of legislation making changes to the warnings that a judge may deliver. Some warnings have been abolished because they were based on assumptions that are no longer considered valid in contemporary times. For example, in 1981, legislation abolished the warning that it was unsafe to convict a person on the uncorroborated evidence of the complainant in trials for sexual offences[78] because:

> women are no longer, in the eyes of the law, to be put before juries as persons whose evidence requires corroboration before it is safe to act upon it. That concept which has been in the law for a long time has now gone.[79]

78. The *Crimes (Sexual Assault) Amendment Act 1981* (NSW) inserted s 405C into the *Crimes Act 1900* (NSW) which provided that, on the trial of a person for a prescribed sexual offence, the Judge is not required by any rule of law or practice to give...a warning to the jury to the effect that it is unsafe to convict the person on the uncorroborated evidence of the person upon whom the offence is alleged to have been committed. The abolition of the requirement for the giving of a warning about uncorroborated evidence is no longer confined to sexual offences; it has been extended to all offences by *Evidence Act 1995* (NSW) s 164(3).
79. *R v Murray* (1987) 11 NSWLR 12, 19 (Lee J).

A further example is the legislation prohibiting judges from warning or suggesting that children are an unreliable class of witness,[80] which was adopted in order to reflect contemporary understanding that children's recall skills are not inherently less reliable than that of adults.[81]

Clarifying and simplifying some instructions

1.57 There are some directions and comments that could benefit from legislative clarification, which may be required in view of problems jurors appear to have in understanding and applying or complying with them. These include the direction on "proof beyond reasonable doubt", on which jurors regularly seek clarification,[82] and other directions relating to notoriously complex areas of the criminal law.[83]

1.58 There is also a case for reviewing some of the traditional components of the summing-up, in particular, the summary of the evidence, and summary of the prosecution and defence cases.[84]

1.59 One approach would be to impose limits by legislation, as has already been attempted with regards to summaries of the evidence in NSW.[85] It is generally accepted that such an approach would need to leave a discretion in the judge to ensure a fair trial.[86]

Other approaches

1.60 In considering the necessity for change to the current practice of giving judicial instructions, attention should be given to whether other approaches could be adopted or relied upon to help achieve the same

80. *Evidence Act 1995* (NSW) s 165A.
81. See NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 28 November 2001, Second Reading Speech, the Hon R J Debus, Attorney General, 19037. See also Royal Commission into the New South Wales Police Service, *Final Report* (1997) Recommendation 90; Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process,* Report 84 (1997) ch 14.
82. See *Norris v R* [2007] NSWCCA 235 for a recent example of a case where the jury requested clarification of the legal definition of reasonable doubt, asking whether it means "we need to be one-hundred per cent sure either way". See also para 4.33.
83. See generally ch 9.
84. See para 6.14-6.59.
85. See para 6.21-6.24.
86. For example, the NSW provision dealing with summaries of evidence states that the judge may omit the summary if he or she is "of the opinion that, in all the circumstances of the trial, a summary is not necessary": *Criminal Procedure Act 1986* (NSW) s 161(1).

aims. It can be argued that the need for judicial instructions may be reduced by reliance on other components of a criminal trial. For example, judicial warnings may not be so necessary with respect to the evidence that has been admitted if the application of the rules of evidence filters out evidence of dubious value or prejudicial effect:

> Viewed against the background of the entire trial process, the perceived dangers which underlie judicial warnings have already been adequately allayed by the rules pertaining to the admissibility of evidence. ... In light of this, it could meaningfully be queried whether it is then excessive to further charge the jury regarding the dangers inherent in certain types of evidence.[87]

1.61 Further, where evidence that may require a warning is admitted, it may be unnecessary in most cases for the judge to give a warning since such evidence can be challenged during cross-examination and emphasised again in defence counsel's closing address.[88] That is, at least in cases where the accused has legal representation.[89] For example, it has been suggested that:

> Where identification evidence is admitted it is open for the accused during cross examination to suggest that the identification was unreliable due to such factors as poor memory, fading light and so on.[90]

However, it can be countered that some warning must be given in the case of identification evidence, if only to inform the jury that apparently honest witnesses may still be mistaken in their evidence.[91]

Providing ways of attaining better juror comprehension

1.62 Quite apart from improving the content of the directions and comments, and simplifying the structure of the summing-up, there may be practical ways of assisting jurors to understand judicial instructions better.

1.63 Other options might be to eliminate or modify existing instructions by means of judicial education and/or reform of the NSW

87. G Flatman and M Bagaric, "Juries Peers or Puppets – the Need to Curtail Jury Instructions" (1998) 22 *Criminal Law Journal* 207, 210. See also P Devlin, *Trial by Jury* (Stevens and Sons, 1956) 114-115.
88. G Flatman and M Bagaric, "Juries Peers or Puppets – the Need to Curtail Jury Instructions" (1998) 22 *Criminal Law Journal* 207, 210.
89. F H Vincent, "The High Court v the Trial Judge" in *28th Australian Legal Convention* (1993) vol 2, 265.
90. G Flatman and M Bagaric, "Juries Peers or Puppets – the Need to Curtail Jury instructions" (1998) 22 *Criminal Law Journal* 207, 210.
91. See para 7.26.

Bench Book. There is a need to revise model directions for the purpose of ensuring that they are both legally accurate and in language that jurors can readily understand.[92]

1.64 In recognition that not all people absorb oral material well, consideration should be given to greater provision of written directions to jurors than is currently the practice, the option of using audio-visual aids in the presentation of the summing-up, and allowing jurors to take notes during the trial.

1.65 It may also be worth considering giving greater assistance to the jury during its deliberations through written statements of the issues of the case (which may be given in the form of step directions, issues tables and decision trees), and allowing jurors to ask the judge questions about the directions just before and during deliberations.

ISSUE 1.2

(1) What approaches are available to deal with the problems associated with judicial instructions?
(2) How should any changes to the framing of judicial instructions or the procedures surrounding them be achieved?

92. See para 3.33.

2. Jury research

- Nature and limitations of jury research
- Australian studies
- Overseas research
- Conclusion

NATURE AND LIMITATIONS OF JURY RESEARCH

2.1 This chapter provides an overview of the state of research into jury directions, with particular attention to whether jurors comprehend them. While this growing body of research provides a useful background to various issues examined in this project, its limitations need to be borne in mind.

2.2 In most Australian jurisdictions, there are restrictions on communicating with jurors from actual trials, particularly in relation to what transpires during deliberations. Consequently, the bulk of the jury research consists of jury simulations (sometimes referred to as mock jury experiments). The most important advantage of simulations is what social scientists call "internal validity", which is validity in making causal inferences. The random assignment of participants to different treatments allows researchers to conclude that the only difference between the experimental and the control group is the experimental manipulation.[1] For example, if experimenters give one group of mock jurors both oral and written directions and this group performs better on a comprehension test than the group given only oral directions, the experimenters may conclude that written directions assist comprehension.

2.3 Jury simulations, however, have limitations. Some use students or paid volunteers and, therefore, may not be truly representative in all respects of actual jurors in terms of age, economic, and educational backgrounds, or in the way that the former are expected to fit what may be lengthy jury duty into their lives.[2]

2.4 More significantly, these experiments do not expose the participants to the environment of an actual trial. The directions and case facts are delivered not in live trials but through mock trials, audiotapes or videotapes. Some experiments do not give the participants case facts, which in actual trials give much-needed context to the directions. The stakes in jury simulations are different because, unlike an actual trial, there are no victims and no one's fate is actually in the balance. Finally, these experiments do not always replicate the dynamics of jury deliberations, where some of the jurors'

1. For a general discussion on the different jury research methods, see R Hastie, S Penrod and N Pennington, *Inside the Jury* (Harvard University Press, 1983) 37.
2. See, however, B H Bornstein, "The Ecological Validity of Jury Simulations: Is the Jury Still Out?" (1999) 23 *Law and Human Behavior* 75, a review of 26 studies comparing students and jurors which determined that there were few differences between the decision-making of students and jurors or members of the community.

confusions and misunderstandings might be rectified through discussions with other jurors or requests for further directions.

2.5 To the extent that jury simulations do not replicate the conditions that jurors experience in actual trials, their "external validity" – the degree to which results in the experimental setting can be generalised as being reflective of what does or would happen in actual trials – is weak.[3]

2.6 A second category of jury research consists of surveys which involve questions in writing or interviews with jurors. Jury surveys offer the closest account of whether and how jurors, both individually and as a collegial body, comprehend and use their instructions in their deliberations. However, self-reporting by jurors may produce distorted or incomplete reports. Jurors may not accurately recall events during the trial and deliberations. Further, they may believe they understood the instructions when in fact, based on objective measures, such as tests using true or false and/or multiple-choice questions, they did not.

2.7 As for surveys of judges, the answers on whether jurors understand legal directions are based purely on judges' impressions.

AUSTRALIAN STUDIES

A jury simulation

2.8 A jury simulation was conducted in 1984 to determine whether standard jury instructions developed by the NSW Jury Committee could be regarded as reasonably and substantially intelligible to ordinary people.[4]

2.9 The mock jurors consisted of one group of school students with an average age of 18 years from Stirling College in the ACT. The other group comprised college students ranging in age from 20 to 45 years from the Canberra College of Advanced Education ("the CCAE students"). A script was prepared of a summing-up in a hypothetical case of murder and armed robbery, in which nine instructions on

3. R Hastie, S Penrod and N Pennington, *Inside the Jury* (Harvard University Press, 1983) 37-45. See also M J Saks, "What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?" (1997) 6 *Southern California Interdisciplinary Law Journal* 1, 2-9. But see S S Diamond, "Beyond Fantasy and Nightmare: A Portrait of the Jury" (2006) 54 *Buffalo Law Review* 717 who noted (at 730) that there is "much evidence [to suggest a] substantial correspondence between results from simulations and from other research approaches".
4. I Potas and D Rickwood, *Do Juries Understand?* (Australian Institute of Criminology, 1984).

aspects of the law were given, including self-defence, provocation, good character, common purpose (joint criminal enterprise), identification, alibi and collective verdict. These instructions, along with the facts, were given to both groups. There was a control group which received the facts, but not the instructions on the law. After the script was read, the mock jurors were asked to complete a questionnaire, which required the students to: (1) complete a multiple-choice questionnaire testing their understanding of the instructions; and (2) give an individual verdict. Thereafter, they were broken up into groups of 12 and instructed to elect a foreperson and come up with a group verdict.

2.10 The results of the study showed that participants understood some instructions "much better" than others. The alibi instruction was found to be best understood, while the instructions on common purpose (joint criminal enterprise) and self-defence[5] were the least well-understood. Participants' understanding varied according to the "perceived complexity and effectiveness" of the instructions.[6]

2.11 The CCAE students were better at understanding than the Stirling College students. While all the CCAE students understood the instructions moderately to very well, only about half of the Stirling students understood the instructions equally well. The authors surmised that age (more life experience) and educational status (greater intellectual skills) seemed to be associated with the ability to understand and apply jury instructions, although the study did not specifically measure the correlation of these factors with comprehension.[7]

2.12 The study found that the ability to comprehend and the ability to apply the instructions were strongly associated. The participants who were able to comprehend the instructions were also able to apply them to specific situations and vice-versa.[8]

2.13 Unexpectedly, the control group that did not receive the instructions scored just as well as the others. The authors identified possible reasons for this, including that: most people have some common sense or intuitive knowledge of many legal concepts; the legal

5. Self-defence was then governed by the High Court decision in *Viro v The Queen* (1978) 141 CLR 88, which was extremely technical and complicated, and which was overruled by *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645.
6. I Potas and D Rickwood, *Do Juries Understand?* (Australian Institute of Criminology, 1984) 52.
7. I Potas and D Rickwood, *Do Juries Understand?* (Australian Institute of Criminology, 1984) 52, 56.
8. I Potas and D Rickwood, *Do Juries Understand?* (Australian Institute of Criminology, 1984) 52.

concepts may be attuned to ordinary notions of fairness and morality; perhaps the case study was not sufficiently sophisticated to reveal a difference; or the study was too complex and created information overload, with the result that each group responded to the questions intuitively.[9]

2.14 The authors of the study acknowledged that the results must be interpreted with care due to a number of limiting factors. The sample of students was not representative of people who serve on juries. The students, particularly from Stirling College, were younger and possibly better-educated than the pool of jurors. Women were also over-represented in the study. Further, the testing environment was not comparable with conditions in an actual trial. The participants did not have the usual cues from the observation of witnesses nor did they receive reinforcement of submissions on the points of law from the prosecutor and defence counsel that may contribute to the learning and communication of legal concepts.[10]

A survey by this Commission

2.15 This Commission carried out a survey in 1985 on juries in criminal trials as part of its project to review criminal procedure.[11] A total of 1,834 jurors from 181 juries, 30 District Court judges and 12 Supreme Court judges participated in the survey.

2.16 Of the 42 judges, 71% said that some of the instructions on matters of law are too difficult for jurors to understand. Self-defence stood out as the area considered difficult for jurors to understand. Fifty-two percent considered it conceptually difficult and 26% said it is only made difficult by the required formulation of words.[12]

2.17 Next in order of difficulty was intoxication: 38% of the judges considered it difficult for jurors to understand, with almost all of them saying that the reason for the difficulty was the required formulation of words.[13]

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9. I Potas and D Rickwood, *Do Juries Understand?* (Australian Institute of Criminology, 1984) 52-54.
10. I Potas and D Rickwood, *Do Juries Understand?* (Australian Institute of Criminology, 1984) 53.
11. NSWLRC, *Criminal Procedure: The Jury in a Criminal Trial: Empirical Studies*, Research Report 1 (1986).
12. At the time the study was conducted, the law relating to self-defence was extremely complicated: see *Viro v The Queen* (1978) 141 CLR 88 (overruled in *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645).
13. NSWLRC, *Criminal Procedure: The Jury in a Criminal Trial: Empirical Studies*, Research Report 1 (1986) [6.47].

2.18 The instructions on mental illness, conspiracy, diminished responsibility and provocation were assessed in a similar way by all the judges surveyed. In each case, about one-third of judges considered the area difficult to understand. In each case, a substantial number of judges considered that comprehension is made difficult by the required formulation of words.

2.19 Alibi is the single area in which only one judge considered it difficult for jurors to understand and no judge considered the words required to be given made it difficult for jurors to understand.[14]

2.20 Jurors were asked if the judge's summing-up at the end of trial helped them to understand the case. Of the 1,697 jurors who answered the question, 95% said the summing-up did help them to understand the case.[15]

2.21 There were 65 jurors in the NSW survey who said that the summing-up was not helpful. The reasons and comments they gave were:

- the summing-up was unnecessary because they already understood the law;
- certain points of law were still not understood;
- the summing-up was confusing;
- the summing-up was too long or boring;
- the case was too confusing; and
- the judge was not a clear speaker.[16]

The prejudicial publicity survey

2.22 A more recent NSW jury survey was conducted between 1997 and 2000.[17] The aim of the survey was to understand how prejudicial media publicity associated with criminal trials may affect the perceptions of jurors and the verdicts they reach. While the survey was not primarily designed to examine comprehension of jury

14. NSWLRC, *Criminal Procedure: The Jury in a Criminal Trial: Empirical Studies*, Research Report 1 (1986) [6.48].
15. NSWLRC, *Criminal Procedure: The Jury in a Criminal Trial: Empirical Studies*, Research Report 1 (1986) [6.49].
16. NSWLRC, *Criminal Procedure: The Jury in a Criminal Trial: Empirical Studies*, Research Report 1 (1986) [6.50].
17. M Chesterman, J Chan and S Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (Law and Justice Foundation of NSW, 2001). The researchers selected 41 criminal trials in NSW. In total, 175 jurors, 21 judges, 30 defence counsel, and 24 Crown Prosecutors participated in the study.

directions, some jurors made comments about problems they had about the directions they received from the trial judge. The comments may be summarised as follows:

- In relation to opening judicial remarks, some jurors indicated that there was an inadequate explanation of their role and what constitutes evidence for the purpose of deciding issues of fact.[18]
- Some jurors were confused about the directions in the judge's opening remarks about note-taking during the trial and about requesting transcripts of proceedings for use in their deliberations.[19]
- Some jurors had difficulty with the elements of manslaughter and the meaning of "beyond reasonable doubt".[20]
- There were jurors who, in interpreting directions on unanimity of verdicts, may have "put undue weight on those parts of the direction which exhort the jury to reach a unanimous verdict and insufficient weight on those parts which stress the need for each juror to be sure in his or her own mind that the verdict is the right one".[21]

The most recent BOCSAR survey

2.23 The Bureau of Crime Statistics and Research (BOCSAR) recently conducted a survey of jurors who sat in 112 criminal trials in NSW between July 2007 and February 2008. Of the 112 trials, 103 (92%) were District Court matters, while nine (8%) were Supreme Court matters. A total of 1,225 out of 1,344 jurors (91.2%) from the 112 trials participated in the survey.[22]

18. M Chesterman, J Chan and S Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (Law and Justice Foundation of NSW, 2001) [474]-[475].
19. M Chesterman, J Chan and S Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (Law and Justice Foundation of NSW, 2001) [462]-[471].
20. M Chesterman, J Chan and S Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (Law and Justice Foundation of NSW, 2001) [445]-[454].
21. M Chesterman, J Chan and S Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (Law and Justice Foundation of NSW, 2001) [426].
22. L Trimboli, *Juror Understanding of Judicial Instructions in Criminal Trials*, Crime and Justice Bulletin No 119 (NSW Bureau of Crime Statistics and Research, 2008).

2.24 The survey made the following findings, among others:

- In relation to the judge's instructions on the law, most of the jurors (94.9%) said that they understood them completely or "understood most things the judge said".[23] This result is consistent with surveys conducted in WA[24] and the United Kingdom.[25]
- As to the judge's discussion of the evidence in the summing-up, about 85% said that they understood either "everything" or "nearly everything".[26]
- About 67% said that the judge's summing-up of the evidence helped either "quite a bit" or "a lot".[27]
- Almost all (97.1%) of the jurors said that the judge generally used words in the summing-up that are easy to understand. A few jurors identified specific words with which they had difficulty, such as: "malicious", "intent", "beyond reasonable doubt", "wrongful", "indictable offence", "circumstantial evidence", "word against word", and "supply of prohibited drug", as well as sentences with double negatives.[28]

2.25 The author of the survey acknowledged that, due to the inherent limitation of the self-reporting method it used, it is possible that some of the jurors who answered the survey "may not have been entirely candid in their responses about their levels of comprehension or they may believe that they understood the instructions when perhaps they

23. L Trimboli, *Juror Understanding of Judicial Instructions in Criminal Trials*, Crime and Justice Bulletin No 119 (NSW Bureau of Crime Statistics and Research, 2008) 9.
24. I Vodanovich, *The Criminal Jury in Western Australia* (PhD Thesis, University of Western Australia, 1989), 299 (almost 90% of the jurors in this study said that they had no real difficulty understanding the law as explained by the trial judge).
25. See para 2.38.
26. L Trimboli, *Juror Understanding of Judicial Instructions in Criminal Trials*, Crime and Justice Bulletin No 119 (NSW Bureau of Crime Statistics and Research, 2008) 6.
27. L Trimboli, *Juror Understanding of Judicial Instructions in Criminal Trials*, Crime and Justice Bulletin No 119 (NSW Bureau of Crime Statistics and Research, 2008) 7.
28. L Trimboli, *Juror Understanding of Judicial Instructions in Criminal Trials*, Crime and Justice Bulletin No 119 (NSW Bureau of Crime Statistics and Research, 2008) 7.

did not".[29] The survey did not use objective tests to measure the accuracy of the jurors' self-assessments.

Australian Institute of Judicial Administration survey of judges

2.26 A recent Australian Institute of Judicial Administration ("AIJA") survey provides insights into judges' perceptions of juror comprehension.[30] The study surveyed 185 judges who preside over criminal trials in Australia and New Zealand for the purpose of understanding judges' practices relating to opening remarks, directions during the trial, and summing-up, as well as any other practices they used to communicate with the jury.[31]

2.27 On the issue of jurors' comprehension of the summing-up, the survey found that:

- About 57% of the judges believed that jurors had some or a great deal of difficulty understanding the legal directions in the summing-up.
- 72% believed that jurors had little or no difficulty understanding the summary of counsel's addresses.
- Almost 70% said jurors had little or no difficulty comprehending the summary of the evidence.[32]

2.28 In interpreting these results, the researchers noted that the judges' answers were based merely on judges' impressions, required judges to generalise across jurors, and may have been dependent on whether judges were referring to an "average" or a complex case.[33]

29. L Trimboli, *Juror Understanding of Judicial Instructions in Criminal Trials*, Crime and Justice Bulletin No 119 (NSW Bureau of Crime Statistics and Research, 2008) 11.
30. J Ogloff, J Clough, J Goodman-Delahunty and W Young, *The Jury Project: Stage 1 – A Survey of Australian and New Zealand Judges* (Australian Institute of Judicial Administration, 2006).
31. J Ogloff, J Clough, J Goodman-Delahunty and W Young, *The Jury Project: Stage 1 – A Survey of Australian and New Zealand Judges* (Australian Institute of Judicial Administration, 2006) 9-10.
32. J Ogloff, J Clough, J Goodman-Delahunty and W Young, *The Jury Project: Stage 1 – A Survey of Australian and New Zealand Judges* (Australian Institute of Judicial Administration, 2006) 33-34.
33. J Ogloff, J Clough, J Goodman-Delahunty and W Young, *The Jury Project: Stage 1 – A Survey of Australian and New Zealand Judges* (Australian Institute of Judicial Administration, 2006) 34.

UNSW pilot jury study

2.29 This pilot study, sponsored by the Law and Justice Foundation, examined various aspects of 10 criminal jury trials conducted in the District and Supreme Courts in Sydney from late 2004 to mid-2006.[34] It focused on juror comprehension of and compliance with two specific judicial directions - directions about the limited use of evidence of the defendant's criminal past (either prior convictions or uncharged criminal acts)[35] and judicial directions that jurors refrain from private research and investigations.[36]

2.30 The study's preliminary findings included that the "investigation" directions given in the 10 trials tended to omit one or more of the particularly serious consequences of juror non-compliance. In particular, no judge indicated to the jury that a juror who engaged in extra-curial investigations would commit a very serious crime.[37] Other omissions related to specific ways in which such investigations would compromise the fairness of the trial process and/or create a basis for the trial to miscarry. In addition, the study revealed that juror assessments of the adequacy or otherwise of a judge's "investigation" direction did not necessarily correlate with a juror's belief that the direction should be obeyed. Four jurors who, like the vast majority of juror respondents in the 10 trials, were in agreement that the judge had given clear directions, disagreed that a juror should obey the direction if he or she was frustrated with the adequacy of evidence in a trial. A sixth juror described the judge's direction as unsatisfactory, but her comments indicated that she appeared to disagree with its message, not that it was unclear.[38]

2.31 The study's incidental findings support other studies' findings regarding jurors' express desire and indications of their apparent need for greater guidance of the task at hand and on aspects pivotal to deliberation, including the application of the notion beyond reasonable doubt to the case before them. In this context, the study also revealed that a significant number of jurors appeared to see their task as one of

34. J Hunter and D Boniface, with J Chan, M Chesterman and D Thomson, funded by the Law and Justice Foundation of NSW, awaiting publication, but see J Hunter and D Boniface, "Secret Jury Business: What Jurors Search For and What They Don't Get" (Conference Paper, British Society of Criminology, Huddersfield, England, July 2008).
35. The data on this element is unavailable to the Commission at present.
36. The "investigation" direction. See also para 5.22-5.36.
37. Carrying the possible sentence of two years imprisonment. Three judges indicated that it was a crime, but made no mention that it is a serious crime.
38. She observed that "a juror should be allowed to find out more about the accused if the evidence is inadequate". Another juror reported inadmissible and not admitted evidence being used in deliberations.

determining guilt independently of the evidence in the trial. A number of jurors expressed views in conflict with what can be compendiously described as the accusatorial character of the common law trial.[39]

OVERSEAS RESEARCH

2.32 The bulk of research on jury directions has been conducted overseas. This paper is not intended to be a comprehensive literature review and will canvass only some of the more interesting and well-known studies. The literature is classified according to the country where the research was undertaken.

New Zealand

2.33 The New Zealand Law Commission carried out a jury survey in 1998 as part of its review of criminal procedure.[40]

2.34 Two-thirds of the 312 jurors who participated in the survey described the judge's opening remarks as very helpful; a quarter said that they were somewhat helpful; 8% could not remember them; and only 2% expressed any negative comment.[41] A number of jurors wanted the judge to give more information about the case and also to give them a legal framework during the opening remarks that could help them to organise the evidence as it emerged.[42]

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39. See *Dyers v The Queen* (2002) 210 CLR 285; [2002] HCA 45.
40. W Young, N Cameron, Y Tinsley, *Juries in Criminal Trials: Part Two*: *A Summary of Research Findings*, New Zealand Law Commission Preliminary Paper 37 (1999) vol 2. The Faculty of Law at Victoria University, Wellington conducted the study.
    The study was carried out over a period of nine months from a sample of 48 jury trials from both urban and provincial courts (18 High Court trials and 30 District Court trials). The researchers gave written questionnaires to all potential jurors on their arrival in court at the beginning of a week in which a selected trial was scheduled to commence. The researchers attended the trial and, after the jury retired to consider its verdict, the researchers interviewed the judge. Subject to their consent, jurors were interviewed as soon as possible on the conclusion of the trial on a wide range of issues, such as: the adequacy and clarity of pre-trial information, jurors' reactions to the trial process, their understanding of the law, their decision-making process, and the nature and basis of their verdict.
41. W Young, N Cameron, Y Tinsley, *Juries in Criminal Trials: Part Two*: *A Summary of Research Findings*, New Zealand Law Commission Preliminary Paper 37 (1999) vol 2, [2.23].
42. W Young, N Cameron, Y Tinsley, *Juries in Criminal Trials: Part Two*: *A Summary of Research Findings*, New Zealand Law Commission Preliminary Paper 37 (1999) vol 2, [2.25].

2.35 The survey found that jurors were overwhelmingly positive about the helpfulness and clarity of the judge's summing-up: 80% found it helpful and 85% believed it was clear.[43] Nevertheless, a few of those jurors who had found the judge's instructions helpful or clear also expressed some criticisms. Some found the instructions too detailed or too technical. A few said the judge's summing-up did not have a good structure. Some criticised the presentation of the summing-up, saying that it was boring, delivered in a monotonous voice, and conducive to sleep. Many wanted directions from the judge on the appropriate verdict.[44]

2.36 Despite the large majority of jurors saying that the summing-up was helpful and clear, the study found evidence of widespread misunderstandings about particular aspects of the law. Fundamental misunderstandings of the law emerged at the deliberation stage in 35 out of the 48 trials.[45] Some of the misunderstandings discovered by the researchers included:

- *Ingredients of the offence.* In 19 trials, one or more jurors misunderstood significant aspects of the ingredients of the offence and, in two of these, errors in the judge's summing-up contributed to the problem. Some problems included inadequate understanding of: the distinction between murder and manslaughter; the meaning of "wounding" and "supply"; what was sufficient to amount to "lawful excuse" or "lawful, sufficient and proper purpose"; the difference between "fraud" and "forgery"; and the meaning of "failing to account".[46]
- *The meaning of "intent".* In five trials, juries struggled with the meaning of "intent" (they were unsure about the distinction between purpose and intent). Typically, the judge's summing-up failed to address this issue, as a result of which

43. W Young, N Cameron, Y Tinsley, *Juries in Criminal Trials: Part Two*: *A Summary of Research Findings*, New Zealand Law Commission Preliminary Paper 37 (1999) vol 2, [7.3].
44. W Young, N Cameron, Y Tinsley, *Juries in Criminal Trials: Part Two*: *A Summary of Research Findings*, New Zealand Law Commission Preliminary Paper 37 (1999) vol 2, [7.4].
45. W Young, N Cameron, Y Tinsley, *Juries in Criminal Trials: Part Two*: *A Summary of Research Findings*, New Zealand Law Commission Preliminary Paper 37 (1999) vol 2, [7.25].
46. W Young, N Cameron, Y Tinsley, *Juries in Criminal Trials: Part Two*: *A Summary of Research Findings*, New Zealand Law Commission Preliminary Paper 37 (1999) vol 2, [7.13].

the jurors debated it and misunderstood what the law required them to decide.[47]

- *The meaning of "beyond reasonable doubt"*. Many jurors said that the jury was uncertain what "beyond reasonable doubt" meant. They generally debated in terms of the percentage of certainty required, variously interpreting it as 100%, 95%, or 50%.[48]
- *The meaning of "on the balance of probabilities"*. In four cases where the accused was charged with possession of cannabis, some jurors did not fully understand the implications of the fact that, when the amount of cannabis involved reached the threshold at which sale or supply was presumed, the burden of proof shifted to the accused to prove that the cannabis was not possessed for that purpose.[49] One juror did not know what the balance of probabilities meant; one thought that the standard of proof in relation to the accused was "beyond reasonable doubt"; and one indicated that the jury as a whole was confused about the standard of proof. Another said that several members of the jury did not understand why the onus was reversed and thought it might be because the accused chose to testify.[50]

United Kingdom

2.37 In England and Wales, a survey known as the *Crown Court Study*[51] was conducted in 1992 as part of the Royal Commission on Criminal Justice. The researchers sent questionnaires to judges, lawyers, the police and jurors.

2.38 On the question of whether the jurors found it difficult to follow the judge's directions on the law, 94% said they found it not at all difficult or not very difficult to follow the judge's directions on the

47. W Young, N Cameron, Y Tinsley, *Juries in Criminal Trials: Part Two*: *A Summary of Research Findings*, New Zealand Law Commission Preliminary Paper 37 (1999) vol 2, [7.14].
48. W Young, N Cameron, Y Tinsley, *Juries in Criminal Trials: Part Two*: *A Summary of Research Findings*, New Zealand Law Commission Preliminary Paper 37 (1999) vol 2, [7.16].
49. See para 4.23 and para 9.52.
50. W Young, N Cameron, Y Tinsley, *Juries in Criminal Trials: Part Two*: *A Summary of Research Findings*, New Zealand Law Commission Preliminary Paper 37 (1999) vol 2, [7.18].
51. M Zander and P Henderson, *Crown Court Study* (1993). The study surveyed cases during the last two weeks of February 1992 in every Crown Court in England and Wales.

law.[52] Only 6% found it fairly difficult to do so. However, one-third reported that one or more of their fellow jurors had wanted to ask the judge for further directions.[53]

2.39 A contemporaneous but smaller survey was undertaken at the Belfast Crown Court. Like the *Crown Court Study*, an overwhelming majority (97%) of the jurors reported that they understood the summing-up. However, the author acknowledged the need for caution in respect of jurors' self-assessment of their comprehension of instructions.[54]

2.40 More recent research in England was carried out in 2001-2002 pursuant to a research grant from the Home Office.[55] This survey covered 361 jurors who recently completed jury service at several English courts. The survey found that only 7 out of 110 responses indicated that the summing-up was difficult to understand. The survey made other instructive findings with respect to juror comprehension of court proceedings:

- The main impediment to understanding proceedings was the use of legal terminology.
- Some jurors were confused about the requirement for the jury to leave the courtroom while "points of law" were discussed.
- Some felt that evidence was not always presented in the clearest ways, and that maps, diagrams, photographs and other visual aids were under-used in courts.
- Some were confused about whether or not they should be taking notes.
- There was confusion regarding whether it was appropriate to ask questions during the trial.

United States

2.41 There have been numerous studies on jury directions in the United States. This paper mentions only a few studies to illustrate the consistent findings, particularly in jury simulation experiments, that show low levels of juror comprehension of judicial directions. It cannot,

52. M Zander and P Henderson, *Crown Court Study* (1993) [8.6.2].
53. M Zander and P Henderson, *Crown Court Study* (1993) [8.5.4].
54. J Jackson, "Juror Decision-making and the Trial Process" in G Davis and S Lloyd-Bostock (ed) *Psychology, Law, and the Criminal Justice: International Developments in Research and Practice* (1992) 329-330.
55. R Matthews, L Hancock and D Briggs, *Jurors' Perceptions, Understanding, Confidence and Satisfaction in the Jury System: A Study in Six Courts* (United Kingdom Home Office, 2005).

however, be assumed that the results of these American studies are directly applicable in the Australian context because of the differences in the way criminal jury trials are conducted in the two jurisdictions. For example, unlike in Australia, US jurisdictions generally limit or prohibit judicial comment on the application of the law to the evidence.[56]

Jury simulations

2.42 In a famous jury simulation,[57] the participants obtained a comprehension rate of 70% based on a multiple choice and true/false test of a number of legal directions. The authors of the study described this result as disappointing and worrisome and said that "should 30 per cent of all jurors fail to comprehend important legal requirements, then hung juries may become in part startlingly explainable".[58]

2.43 Some of the other findings of this study include the following:

- After being freshly instructed through a carefully prepared videotape, only 57% correctly believed that a crime could be proved on circumstantial evidence, while the remaining 43% refused to accept circumstantial evidence, would view it with extreme suspicion, would not consider it seriously, or were uncertain about it.
- Only 50% of the instructed jurors understood that the defendant did not have to present any evidence of his innocence and that the prosecution had to establish his guilt beyond reasonable doubt. Ten percent were uncertain as to what "presumption of innocence" meant and 2% maintained the belief that the burden of proof rested with the defendant.
- Despite instructions to the contrary, 26% believed out-of-court statements made by the defendant must always be completely disregarded.

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56. See G Taylor, "Judicial Reflections on the Defence Case in the Summing Up" (2005) 26 *Australian Bar Review* 70, 74-76; N Madge, "Summing Up – A Judge's Perspective" [2006] *Criminal Law Review* 817, 823-824; D Wolchover, "Should Judges Sum Up on the Facts?" [1989] *Criminal Law Review* 781, 784-786. England and Wales, *The Royal Commission on Criminal Justice*, Cm 2263 (1993) 123. For US historical background, see: K A Krasity, "The Role of the Judge in Jury Trials: The Elimination of Judicial Evaluation of Fact in American State Courts from 1795 to 1913" (1985) 62 *University of Detroit Law Review* 595.
57. D U Strawn and R W Buchanan, "Jury Confusion: A Threat to Justice" (1976) 59 *Judicature* 478. This study examined pattern jury instructions used in criminal cases in Florida. The study participants had been summoned for jury duty but had not yet been selected to sit in trials.
58. D U Strawn and R W Buchanan, "Jury Confusion: A Threat to Justice" (1976) 59 *Judicature* 478, 482.

- Jurors were instructed that they were the sole judges of the credibility of the witnesses, and that they could consider, in judging credibility, reputation for truthfulness, prior conviction, and inconsistencies within the testimony of witnesses. Notwithstanding this instruction, 39% incorrectly believed that evidence of prior conviction of a witness would have no effect on weakening the weight of the testimony. Fifty percent incorrectly believed the inconsistency of a witness's statement, when contrasted with the testimony of other witnesses, could not be used to discredit the testimony of the witness. Thirty-three percent erroneously believed that a jury must ignore any attempt to discredit a witness by showing a bad reputation for truth, honesty or integrity.

2.44 Another study asked people called to jury service but who had not yet sat on a trial to listen to a number of pattern instructions and then to paraphrase the meaning of the instruction.[59] To calculate the accuracy of each participant's paraphrases, the researchers developed a score sheet for each instruction that listed the legally significant elements of the instructions. The participants scored poorly. For example, only about 17% of all the paraphrases of the pattern instruction on the presumption of innocence were legally correct.[60] On average, only about 13% of the paraphrases of the five pattern instructions were legally correct.[61]

59. W W Steele and E G Thornburg, "Jury Instructions: A Persistent Failure to Communicate" (1988) 67 *North Carolina Law Review* 77, 88-95. The study used Texas pattern instructions on: new and independent cause; accomplice testimony; proximate cause; presumption of innocence; and negligence.
60. "All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable about. The fact that the defendant has been arrested, confined or indicted for, or otherwise charged with, the offense gives rise to no inference of guilt at his trial. In case you have a reasonable doubt as to defendant's guilt after considering all of the evidence before you, and these instructions, you will acquit him. You are the exclusive judges of the facts proved, and of the credibility of witnesses and the weight to be given their testimony, but the law you shall receive in these written instructions, and you must be governed thereby"; W W Steele and E G Thornburg, "Jury Instructions: A Persistent Failure to Communicate" (1988) 67 *North Carolina Law Review* 77, 92.
61. The researchers rewrote the pattern instructions and the subjects understood the rewritten instructions better. 24.59% of the paraphrases of the rewritten instructions were legally correct: W W Steele and E G Thornburg, "Jury Instructions: A Persistent Failure to Communicate" (1988) 67 *North Carolina Law Review* 77, 90.

2.45 One study used jurors who had already sat in trials.[62] The jurors, who were asked to answer true or false questions about selected pattern instructions, obtained low comprehension scores, averaging less than 5% on the questions involving jurors' duties and procedural rules, and 41% on instructions on substantive law. Further, it would appear that the jurors were not aware or would not admit their lack of understanding since they very rarely chose the "I don't know" option in the questionnaire.

2.46 Another study also conducted a comprehension experiment on jurors who had already sat in trials.[63] It confirmed the results of other studies showing a generally low level of juror comprehension of legal rules used in trials. For example, the participants of this study were confused about reasonable doubt and *any* doubt, with the majority believing that any doubt was equivalent to a reasonable doubt.[64] Moreover, on the question of whether reasonable doubt must be based only on the evidence that was presented in the courtroom and not on any conclusion jurors may draw from the evidence, only 32% gave the correct answer (false).[65]

2.47 The authors of the study cited a number of factors that affect comprehension, based on the data they gathered. First, jurors who were exposed to more instructions generally answered more items correctly, confirming that juror comprehension increased as a function of exposure to instructions. Secondly, the jurors with higher education levels had better comprehension results than those with lower education levels. Finally, the provision of written instructions affected

62. A Reifman, S M Gusick and P C Ellsworth, "Real Jurors' Understanding of the Law in Real Cases" (1992) 16 *Law and Human Behavior* 539.
63. G P Kramer and D M Koenig, "Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Mighigan Juror Comprehension Project" (1989) 23 *University of Michigan Journal of Law Reform* 401.
64 G P Kramer and D M Koenig, "Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Mighigan Juror Comprehension Project" (1989) 23 *University of Michigan Journal of Law Reform* 401, 414.
65. This study administered the same comprehension test to people who had not yet sat on trials and who therefore had *not* been exposed to legal direction from a judge. This group performed better (48% answered correctly) than the jurors (that is, those who had received legal instructions from a judge). This led the authors of the study to conclude that jury instructions are ineffective in assisting jurors understand the law. They offered one possible explanation for the ineffectiveness of instructions, which is that jurors go to court with pre-exiting beliefs about legal issues that are resistant to change. Such beliefs are so entrenched that they act as rules in directing jurors' decisions, in spite of any instructions they receive at the trial that might be contrary or different to their pre-conceived beliefs.

comprehension levels significantly, with those who received written instructions scoring higher than those who did not.[66]

Self-reporting coupled with an objective assessment

2.48 Unlike most of the studies discussed so far, one jury survey[67] used both self-assessment by jurors and an objective test. Immediately after the completion of the trial, jurors were given a questionnaire with questions eliciting subjective responses (for example "How well did you feel you understood the jury instructions that the judge gave you?"). The questionnaire also contained true or false and multiple choice questions designed to test objectively the jurors' comprehension of the instructions they received during the trial.[68]

2.49 Based on jurors' self-assessed answers, the study found that almost all jurors (97% in criminal trials and over 98% in civil trials) felt that they understood the judicial instructions either "completely" or "pretty well".[69] However, their overall mean score on the objective test was only 75%, which led the authors of the study to conclude that the jurors had not understood the directions as well as they thought they had.[70]

CONCLUSION

2.50 The results of a body of jury simulation research raise questions about jurors' level of comprehension of judicial directions. Some of the directions that appear to be problematic include those that are vital to the ability of juries to render correct verdicts, such as the directions on

66. G P Kramer and D M Koenig, "Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project" (1989) 23 *University of Michigan Journal of Law Reform* 401, 425-429.
67. B Saxton, "How Well Do Jurors Understand Jury Instructions? A Field Test Using Real Juries and Real Trials in Wyoming" (1998) 33 *Land and Water Review* 59.
68. B Saxton, "How Well Do Jurors Understand Jury Instructions? A Field Test Using Real Juries and Real Trials in Wyoming" (1998) 33 *Land and Water Review* 59, 79-81.
69. B Saxton, "How Well Do Jurors Understand Jury Instructions? A Field Test Using Real Juries and Real Trials in Wyoming" (1998) 33 *Land and Water Review* 59, 85.
70. B Saxton, "How Well Do Jurors Understand Jury Instructions? A Field Test Using Real Juries and Real Trials in Wyoming" (1998) 33 *Land and Water Review* 59, 86, 88.

proof beyond reasonable doubt, presumption of innocence, onus of proof, use of circumstantial evidence, and self-defence.[71]

2.51 The jury surveys which relied on self-assessment by jurors consistently showed that most jurors believed that they understood the judge's directions[72] and/or found the judge's summing-up very useful.[73] However, the surveys that have gone beyond asking jurors general questions about whether they understood the judge's directions (and/or whether they believed the summing-up was useful) have found that jurors do not have the high level of comprehension they thought they had,[74] or that they did, in reality, misunderstand or have problems with specific directions.[75]

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71. See I Potas and D Rickwood, *Do Juries Understand?* (Australian Institute of Criminology, 1984); D U Strawn and R W Buchanan, "Jury Confusion: A Threat to Justice" (1976) 59 *Judicature* 478; W W Steele and E G Thornburg, "Jury Instructions: A Persistent Failure to Communicate" (1988) 67 *North Carolina Law Review* 77; A Reifman, S M Gusick and P C Ellsworth, "Real Jurors' Understanding of the Law in Real Cases" (1992) 16 *Law and Human Behavior* 539; G P Kramer and D M Koenig, "Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project" (1989) 23 *University of Michigan Journal of Law Reform* 401; B Saxton, "How Well Do Jurors Understand Jury Instructions? A Field Test Using Real Juries and Real Trials in Wyoming" (1998) 33 *Land and Water Review* 59.
72. I Vodanovich, *The Criminal Jury in Western Australia* (PhD Thesis, University of Western Australia, 1989), 299; M Zander and P Henderson, *Crown Court Study* (1993), [8.6.2]; J Jackson, "Juror Decision-making and the Trial Process" in G Davis and S Lloyd-Bostock (ed) *Psychology, Law, and the Criminal Justice: International Developments in Research and Practice* (1992) 329-330; R Matthews, L Hancock and D Briggs, *Jurors' Perceptions, Understanding, Confidence and Satisfaction in the Jury System: A Study in Six Courts* (United Kingdom, Home Office, 2005); L Trimboli, *Juror Understanding of Judicial Instructions in Criminal Trials*, Crime and Justice Bulletin No 119 (NSW Bureau of Crime Statistics and Research, 2008) 6.
73. NSWLRC, *Criminal Procedure: The Jury in a Criminal Trial: Empirical Studies*, Research Report 1 (1986) [6.49]; W Young, N Cameron, Y Tinsley, *Juries in Criminal Trials: Part Two*: *A Summary of Research Findings*, New Zealand Law Commission Preliminary Paper 37 (1999) vol 2, [7.3]; J Horan, *The Civil Jury System* (PhD Thesis, University of Melbourne, 2004) 203; L Trimboli, *Juror Understanding of Judicial Instructions in Criminal Trials*, Crime and Justice Bulletin No 119 (NSW Bureau of Crime Statistics and Research, 2008) 7.
74. B Saxton, "How Well Do Jurors Understand Jury Instructions? A Field Test Using Real Juries and Real Trials in Wyoming" (1998) 33 *Land and Water Review* 59, discussed in para 2.48-2.49.
75. See discussion of the New Zealand Law Commission jury study: para 2.33-2.36.

2.52 The research currently available does seem to point to a need to make jury directions more comprehensible in order to assist juries to render verdicts that are in accordance with the law.

3. Model directions

- Introduction
- Benefits from model directions
- Comprehensibility of model directions

INTRODUCTION

3.1 This chapter examines model directions, which are also known as standard, specimen, or pattern directions. As these labels imply, they are template or sample directions that judges may use to instruct juries after they have been modified to suit the particular circumstances of a case. They have a number of benefits, which are outlined below. There are, however, potential problems in the way they are sometimes used. For example, some judges use model directions without deleting those parts that are not relevant to the particular trial. The focus of this chapter is on the need for model directions that better assist juror comprehension of the law because they are written in language which most jurors would find easy to understand.

NSW model directions

3.2 The Judicial Commission of NSW has published model directions for criminal trials in the *Criminal Trial Courts Bench Book* ("the *Bench Book*"). It has been prepared under the direction of the Criminal Trial Courts Bench Book Committee, which includes judges from the Supreme and District Courts, primarily to assist the judges of these courts in the conduct of trials.

3.3 In 2002, the Chief Justice of NSW launched an extensively-revised version of the *Bench Book* which was made available to members of the public for the first time. The stated purpose of its publication to the public was to enhance further "the contribution of the *Bench Book* to the efficient administration of criminal justice by ensuring that the legal representatives of all parties are aware of what kind of direction is likely and are able to make submissions directed to adapting the standard directions for the particular circumstances of the case".[1]

3.4 In *R v Forbes*,[2] Chief Justice Spigelman explained the legal significance of the *Bench Book* and its model directions:

> It is appropriate to reiterate that the *Bench Book* does not contain an authoritative statement of the law. Practitioners should not act on the basis that a failure to direct in accordance with the *Bench Book* is of itself indicative of legal error for appellate purposes. Authority for what ought to have been in the

1. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (October 2008) Foreword.
2. *R v Forbes* (2005) 160 A Crim R 1; [2005] NSWCCA 377.

> content of a direction in a particular case will need to be identified elsewhere.[3]

The Court of Criminal Appeal in that case held that a trial juge's failure to follow the model directions in the *Bench Book* could not be relied upon as a basis for an appeal.

BENEFITS FROM MODEL DIRECTIONS

3.5 Because the criminal law has become very complex, model directions can be of significant benefit to the trial judge and counsel. First, they are a valuable timesaving device because they reduce the time spent on researching the relevant law, and spare judges from drafting directions from scratch.[4]

3.6 Secondly, the neutral language used in model directions may decrease the likelihood that the directions given to the jury are more favourable to one of the parties to the case than to another. However, this is not to say that bias may not creep back in, if judges use the model instructions only as a basis for their instructions, especially in cases where the judge may have taken into account the submissions of counsel on the content of a particular direction.[5]

3.7 Thirdly, model directions have a theoretical advantage in terms of accuracy over directions written under the pressure of litigation. Because they are usually the product of extensive research and deliberation by committees, model directions are less likely to contain erroneous statements of law than directions that are written under time and other pressures associated with the trial.[6]

3.8 However, model directions have an inherent generality in the way they are written, as they are prepared for use in a wide variety of cases. Hence, they cannot be expected to provide legally accurate directions for every set of circumstances that falls within their coverage. They simply provide the building blocks for the actual

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3. *R v Forbes* (2005) 160 A Crim R 1; [2005] NSWCCA 377, [72]-[73] quoting the Foreword to the *Bench Book*.
4. See R G Nieland, "Assessing the Impact of Pattern Jury Instructions" (1978) 62 *Judicature* 185, 187-188.
5. W W Schwarzer, "Communicating with Juries: Problems and Remedies" (1981) 69 *California Law Review* 731, 738.
6. See, however, R G Nieland, "Assessing the Impact of Pattern Jury Instructions" (1978) 62 *Judicature* 185. The model instructions in Illinois had little effect in reducing the total number of appeals.

directions that the judge gives to the jury.[7] The comments of Justice Hayne in a recent case are relevant on this point:

> Model directions are necessarily framed at a level of abstraction that divorces the model from the particular facts of, and issues in, any specific trial. That is why such directions must be moulded to take proper account of what has happened in the trial. That moulding will usually require either addition to or subtraction from the model, or both addition and subtraction.[8]

3.9 In another case, Justice Hayne prescribed the proper way for using model directions:

> The proper use of standard forms of jury instructions requires the judge first to identify what are the real issues in the case, then to identify the relevant instructions that are to be given to the jury and then, most importantly, to instruct the jury by relating the standard form of instruction to the real issues in the case. The bare recitation to a jury of the relevant sections of a bench book of standard instructions, unrelated to the real issues in the case, does not fulfil the trial judge's task.[9]

3.10 In addition to the benefits canvassed above, model directions have the potential to be advantageous in one important aspect of criminal trials: in assisting jurors to comprehend better the legal directions they need to apply to the case. Trial judges can find it difficult to formulate jury directions that are helpful to jurors because of their overwhelming need to give legally accurate directions and, in particular, to comply with judgments of appellate courts which state the relevant law in language that jurors would find difficult to understand. Model directions can be a means of addressing this problem if formulated in language that reflects the law as established by appellate courts but stated in a way that jurors can easily understand.

COMPREHENSIBILITY OF MODEL DIRECTIONS

3.11 There has been no study, so far, to find out whether jurors are able to understand the current model directions in the *Bench Book*. In contrast, a number of studies in the United States have tested model

7. D Watt, *Helping Jurors Understand* (Carswell, Toronto, 2007) 81-82.
8. *HML v The Queen* (2008) 245 ALR 204; [2008] HCA 16, [120].
9. *Tully v The Queen* (2006) 230 CLR 234; [2006] HCA 56, [93].

directions and found that a substantial number of jurors did not understand them.[10]

3.12 For example, in a study of selected instructions from California's *Book of Approved Instructions*, the subjects obtained a very low score of less than 40% under one measure of comprehension.[11] A study of Texas's model directions yielded very poor results, with the comprehension scores for each of the directions ranging from about 5% to less than 20%.[12]

3.13 While the American studies are not directly applicable to the Australian context because jury trials are conducted differently in the United States – for example, American judges do not assist jurors to apply the legal directions to the particular facts of the case since counsel for each side perform this function – these studies are nevertheless instructive in demonstrating that jurors may find model directions written in highly technical language difficult to understand.

Improving comprehension through better language

3.14 Some studies have found that rewriting model directions using certain linguistic principles improves juror comprehension.[13] In one study, for example, the comprehension rates scored by the participants improved from 51% with the original directions to 80% after the directions were re-written twice.[14] Some of the principles that may be helpful in writing better-understood directions are included in the following paragraphs.

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10. R Charrow and V Charrow, "Making Legal Language Understandable: A Psycholinguistic Study of Jury Directions" (1979) 79 *Columbia Law Review* 1306; W W Steele and E G Thornburg, "Jury Instructions: A Persistent Failure to Communicate" (1989) 67 *North Carolina Law Review* 77; A Elwork, B Sales and J Alfini, *Making Jury Instructions Understandable* (1982) 45; A Reifman, S M Gusick and P C Ellsworth, "Real Jurors' Understanding of the Law in Real Cases" (1992) 16 *Law and Human Behavior* 539.
11. R Charrow and V Charrow, "Making Legal Language Understandable: A Psycholinguistic Study of Jury Directions" (1979) 79 *Columbia Law Review* 1306.
12. W W Steele and E G Thornburg, "Jury Instructions: A Persistent Failure to Communicate" (1989) 67 *North Carolina Law Review* 77.
13. A Elwork, B Sales and J Alfini, *Making Jury Instructions Understandable* (1982) 45; R Charrow and V Charrow, "Making Legal Language Understandable: A Psycholinguistic Study of Jury Directions" (1979) 79 *Columbia Law Review* 1306; L Severance and E Loftus, "Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions" (1982) 17 *Law and Society Review* 153.
14. A Elwork, B Sales and J Alfini, *Making Jury Instructions Understandable* (1982) 45.

Organisation

3.15 The organisation of jury directions determines to a large extent how much information jurors will understand and remember. Hence, one of the most important steps to be taken in rewriting directions is to organise them in the most logical structure possible. Topics that are connected to one another by a common concept may be grouped together. For example, one grouping could include all the directions that explain aspects of how the evidence should or should not be used. Further, the order of ideas may be presented so that each is helpful to understanding the succeeding one.[15]

Sentence length and complexity

3.16 The length and complexity of sentences affect comprehension and recall. As a general rule, longer sentences are more difficult to understand than shorter ones. However, it is the grammatical and semantic complexity of directions — and not necessarily sentence length or the number of words used — that significantly affects their comprehensibility.[16] Hence, directions that contain fewer words are not necessarily more comprehensible.[17]

Active/Passive Voice

3.17 As a general rule, it is better to use the active rather than the passive voice. However, the passive voice is effective in certain instances, such as when there is a need to explain the object of the sentence further.[18] Take, for example, the following passage from an instruction on expert witnesses:

> Of course, the opinions expressed by [GH] based on [his/her] own observations or knowledge and experience (as distinct from those based on facts related by others or assumptions) are to be assessed by you.[19]

15. R Charrow and V Charrow, "Making Legal Language Understandable: A Psycholinguistic Study of Jury Directions" (1979) 79 *Columbia Law Review* 1306, 1317-1318.
16. A Elwork, B Sales and J Alfini, *Making Jury Instructions Understandable* (1982) 150-167; See also R Charrow and V Charrow, "Making Legal Language Understandable: A Psycholinguistic Study of Jury Directions" (1979) 79 *Columbia Law Review* 1306, 1317-1318, 1326-1327
17. See, eg, the rewritten Californian pattern instructions on the presumption of innocence, reasonable doubt and the onus of proof, which are longer than the old directions but in simpler and clearer language: para 3.28-3.29.
18. A Elwork, B Sales and J Alfini, *Making Jury Instructions Understandable* (1982), 175-176.
19. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (October 2008) [2-1110].

By turning the principal verb into the active voice, the sentence can appropriately retain the other passive phrases to explain the object of the sentence, thus:

> Of course, you must assess the opinions expressed by [GH] based on [his/her] own observations or knowledge and experience (as distinct from those based on facts related by others or assumptions).

Negative sentences

3.18 A negative sentence is one that has one or more words using negators (for example, not, never, less than, few) that modify the meaning of the entire sentence. As a general rule, jurors understand and remember affirmative sentences better than negative sentences.[20] For example, it is usually better to tell jurors what to do rather than what not to do.[21] However, there are situations where negative sentences are appropriate. For example, where a series of directions expressed in the positive form are given to the jury, a warning against using certain evidence in a prohibitive way may need to be emphasised by expressing it in the negative form. Double negatives are particularly problematic and should be avoided whenever possible.[22] In explaining the standard of proof, for example, it is often easy to lapse into a confusing use of negatives:

> In other words you should ask yourselves whether there is any reasonable possibility that the accused did not do what the Crown alleges against him/her. Unless the Crown satisfies you that no such possibility exists you must find the accused not guilty.[23]

Legal jargon and uncommon words

3.19 Legal jargon is a common way of expressing precise legal meanings among judges and lawyers but is often completely foreign to jurors. Some social scientists consider the use of legal jargon and unfamiliar words as "one of the worst (if not the worst) problems with [jury instructions] and is responsible for causing a great deal of

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20. R Charrow and V Charrow, "Making Legal Language Understandable: A Psycholinguistic Study of Jury Directions" (1979) 79 *Columbia Law Review* 1306, 1324-1325.
21. A Elwork, B Sales and J Alfini, *Making Jury Instructions Understandable* (1982) 45, 172-173.
22. For an example of a direction containing several negatives and its rewritten version, see para 3.26.
23. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (October 2008) [3-600].

confusion".[24] An example of the use of uncommon words can be found in this explanation of the right to silence:

> It is important therefore that you bear in mind that no *inference adverse* to [the accused] can be drawn from the fact that [he/she] took note of the caution *administered* by the police and chose to remain silent.[25]

Homonyms

3.20 These are words with more than one meaning. They should be avoided whenever possible because they can be a source of confusion for jurors. In one American study many participants thought that the phrase "material allegation" referred to allegations relating to physical evidence. A number of them also believed that the word "Bar" referred to a drinking establishment.[26] The following example has attempted to get around such a problem with respect to the word "immediately" by employing a further technical legal term ("remotely") to distinguish it from its purely temporal meaning. The force of the term "remotely" is unlikely to be appreciated by a non-legal audience:

> The Crown must establish, secondly, that the accused did some act towards committing the intended crime which was *immediately (rather than remotely)* connected with committing that crime, and which cannot reasonably be regarded as having any purpose other than to commit that particular crime.[27]

Synonyms

3.21 The indiscriminate use of synonyms to avoid repetition or for other stylistic reasons may cause confusion because the jurors might assume that the use of a different word is an intentional attempt to distinguish between shades of meaning.[28]

Antonyms

3.22 The use of antonyms formed by the addition of negative modifiers (eg, polite-impolite) should be avoided because research has shown that such antonyms are more difficult to understand and remember than those with a different root (eg, polite-impolite-rude).

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24. A Elwork, B Sales and J Alfini, *Making Jury Instructions Understandable* (1982) 177.
25. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (October 2008) [4-110] (emphasis added).
26. A Elwork, B Sales and J Alfini, *Making Jury Instructions Understandable* (1982) 45, 179-180.
27. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (October 2008) [2-250] (emphasis added).
28. A Elwork, B Sales and J Alfini, *Making Jury Instructions Understandable* (1982) 180.

Hence, it is better to use "ignore" instead of "disregard", which is a negation of the word "regard" and is commonly used in jury directions.[29] An example can be found in this suggested explanation of judicial comment on the evidence in the summing-up:

> If I happen to express any views upon questions of fact, you must *disregard* those views, unless they happen to agree with your own independent assessment of the evidence.[30]

Movement towards plain English directions

3.23 A number of overseas jurisdictions have rewritten their model directions in plain English to make them more understandable to jurors. The largest such project was undertaken in California. In 1997, the Chief Justice of California appointed a 29-member Task Force on Jury Instructions to write legally accurate jury directions in plain English. The civil subcommittee of the Task Force, which consisted of 18 legal professionals, with the assistance of hundreds of California lawyers who were involved in reviewing various drafts, completed a new set of 800 directions for civil cases in 2003.[31]

3.24 Below are sample directions from the old set of directions, the *Book of Approved Instructions* (BAJI), and their equivalent directions from the new set of directions called the *Judicial Council of California Civil Jury Instructions* (CACI).[32]

3.25 BAJI 2.00 reads:

> Circumstantial evidence is evidence that, if found to be true, proves a fact from which an inference of the existence of another fact may be drawn. A factual inference is a deduction that may logically and reasonably be drawn from one or more facts established by the evidence.

The counterpart provision in the CACI (number 202) reads:

> Some evidence proves a fact directly, such as testimony of a witness who saw a jet plane flying across the sky. Some evidence proves a fact indirectly, such as testimony of a witness who saw

29. A Elwork, B Sales and J Alfini, *Making Jury Instructions Understandable* (1982) 180.
30. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (October 2008) [7-020] (emphasis added).
31. See Judicial Council of California, "New Plain-English Jury Instructions Adopted to Assist Jurors in California Courts" (Media Release No 42, 2003).
32. California Courts, "Plain English Examples" in *Guide to California Jury Service: Civil Jury Instructions Resource Center* «*http://www.courtinfo.ca.gov/jury/civiljuryinstructions/plain_english.htm*» at 5 November 2008.

> only the white trail that jet planes often leave. This indirect evidence is sometimes referred to as "circumstantial evidence." In either instance, the witness's testimony is evidence that a jet plane flew across the sky.

3.26 BAJI 2.21 reads:

> Failure of recollection is common. Innocent misrecollection is not uncommon.

The second sentence in BAJI 2.21 contains triple negatives that make the direction confusing and difficult to understand. The counterpart CACI (number 107) avoids these negatives and uses simpler language:

> People often forget things or make mistakes in what they remember.

3.27 In 2005, the Judicial Council of California approved more than 700 new jury directions for use in criminal cases. A committee of between 15 and 18 legal professionals spent hundreds of hours and took eight years to finish the new directions.[33] An example of this work relates to a portion of the old model direction for attempted murder, which stated:

> The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated.[34]

The rewritten direction provides:

> The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated.[35]

3.28 The directions on presumption of innocence, reasonable doubt and onus of proof provide another example. The old directions stated:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether [his] [her] guilt is satisfactorily shown, [he] [she] is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving [him] [her] guilty beyond a reasonable doubt.

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33. "California Jury Instructions Translated into Plain English" (September 2005) *California Bar Journal* (online).
34. CALJIC (California Jury Instructions, Criminal) 8.67.
35. CALCRIM (Judicial Council of California Criminal Jury Instructions) 601.

> Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.[36]

3.29 The rewritten directions are longer but in simpler and clearer language:

> I will now explain the presumption of innocence and the People's burden of proof. The defendant[s] (has/have) pleaded not guilty to the charge[s]. The fact that a criminal charge has been filed against the defendant[s] is not evidence that the charge is true. You must not be biased against the defendant[s] just because (he/she/they) (has/have) been arrested, charged with a crime, or brought to trial.
>
> A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt [unless I specifically tell you otherwise].
>
> Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.
>
> In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant[s] guilty beyond a reasonable doubt, (he/she/they) (is/are) entitled to an acquittal and you must find (him/her/them) not guilty.[37]

3.30 Apart from California, other American jurisdictions that have adopted model directions having a plain English emphasis include: Alaska, Delaware, Michigan, Minnesota, Missouri, and North Dakota. Several other states, such as Arizona, Florida, Vermont, and

36. CALJIC (California Jury Instructions, Criminal) 2.90.
37. CALCRIM (Judicial Council of California Criminal Jury Instructions) 103.

Washington, are rewriting directions specifically with the aim of using plain English.[38]

NSW model directions

3.31 The model directions in the *Bench Book* may contain language that is very difficult to understand. They may contain legal jargon and many words and phrases that are unfamiliar to most people. The studies discussed above have indicated that the use of legal jargon and unfamiliar words is the most common and serious cause of jurors' difficulty in understanding directions. Further, many of the sentences[39] may be too long. Their structures may be complex because they contain too many clauses that embody ideas that repeat, qualify, add to or negate the other clauses in the same sentence. The complex structures of the sentences may make the directions quite confusing and difficult to follow. If the directions are difficult to understand through reading, jurors are likely to find them even more difficult to follow, understand and remember when a judge is reading them out.

3.32 One of the reasons for difficult language in model directions is the desire to be legally accurate. To prevent possible appeals, directions use the language found in case law and statutes. Directions therefore contain complex legal rules and explain concepts in legal language that is foreign to jurors. Efficiency in terms of time-savings and legal accuracy overshadow the aim of ensuring that jurors properly understand the relevant legal rules and concepts.

A need to rewrite the model directions in plain English?

3.33 The Commission considers that jury directions should use language that jurors can understand. This is a key element in enabling juries to make well-informed decisions. Courts have underlined the importance of recognising jurors as the main audience of directions,[40] as well as the desirability for judges to use easily understood, unambiguous and non-technical language.[41]

3.34 The issue arises whether the NSW Judicial Commission should review the model directions in the *Bench Book* to ensure that jurors

38. American Judicature Society, "Plain-English Jury Instructions" «*http://www.ajs.org/jc/juries/jc_improvements_plainenglish.asp*» at 14 November 2008.
39. For example, those in the directions on circumstantial evidence, provocation and self-defence.
40. See *Doggett v The Queen* (2001) 208 CLR 343; [2001] HCA 46, [2] (Gleeson CJ).
41. See *R v Forbes* (2005) 160 A Crim R 1; [2005] NSWCCA 377, [79] (Spigelman CJ).

can understand them. A further question then arises as to which directions need to be rewritten and how best to do so.

3.35 If a rewrite is to occur, the Judicial Commission would need to consult widely, including with people who have expertise in communication, linguistics and psychology, as well as other lay people who may be able to help make the model directions more comprehensible. It may also be useful to conduct empirical tests on the draft directions to ensure that jurors will understand them readily. It is, of course, very important to make sure the new directions are also legally accurate so that they can survive challenges before appellate courts.

3.36 Related issues are how to encourage judges to use model direction regularly; what their status should be; and whether this should be identified in legislation or rules of court.

ISSUE 3.1

(1) What model directions contained in the *Criminal Trial Courts Bench Book,* if any, should be rewritten to make them more understandable to jurors?
(2) What process should a review of the *Bench Book* follow?

ISSUE 3.2

(1) How can judges be encouraged to make wide use of model directions?
(2) What should be the status of the directions in the *Bench Book* and should that status be identified in legislation or rules of court?

4. Directions about trial practice and procedure

- Providing jurors with a framework for deliberation
- The juror's oath
- The opening remarks
- The role of the judge and the role of the jury
- Juror conduct and the trial process
- The onus and standard of proof
- The right to silence
- Leaving alternative verdicts and defences
- Perseverance directions

4.1** This chapter considers directions that aim to give jurors general guidance as to how they go about their task. Many of the relevant directions are contained in the summing-up, but they are often also delivered at other times, including, most importantly, in the judge's opening remarks.

4.2 Before considering the individual directions, a question arises as to when many of them should be delivered to best effect and, in particular, whether judges should be required to give them in their opening remarks

PROVIDING JURORS WITH A FRAMEWORK FOR DELIBERATION

4.3 There is a proliferation of reports indicating that it is common for jurors to misunderstand what is expected of them, and that, while the vast majority of jurors are conscientious and committed, some are inattentive or confused.[1] The *Managing Prejudicial Publicity* study quotes a striking example:

> There was a ... juror who didn't understand what was going on. I had a quiet private conversation with her and she obviously did not understand what were 'facts', what counted as evidence in the case. She thought that evidence was what she thought, not what was presented in court.[2]

4.4 In Chapter 2, we note that a number of jurors in the New Zealand Law Commission study reported wanting an organising framework from the beginning of trial.[3] Similar observations have been made in the *Managing Prejudicial Publicity* study, the UNSW Pilot Jury Study,[4] and in a recent three-State study surveying 600

** *Parts of this chapter (para 4.3-4.6 and para 4.17-4.20) have been contributed by* ***Professor Jill Hunter*** *of the University of NSW.*

1. M Chesterman, J Chan and S Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (Law and Justice Foundation of NSW, 2001); J Hunter and D Boniface, with J Chan, M Chesterman and D Thomson, funded by the Law and Justice Foundation of NSW, awaiting publication, but see J Hunter and D Boniface, "Secret Jury Business: What Jurors Search For and What They Don't Get" (Conference Paper, British Society of Criminology, Huddersfield, England, July 2008); R Matthews, L Hancock and D Briggs, *Jurors' Perceptions, Understanding, Confidence and Satisfaction in the Jury System: A Study in Six Courts* (United Kingdom Home Office, 2005).
2. M Chesterman, J Chan and S Hampton, *Managing Prejudicial Publicity* (Law and Justice Foundation of NSW, 2001), [474].
3. Para 2.34.
4. "For example, I think that a brief set of suggestions about how to manage the discussion should be issued to the jurors. I think we struggled somewhat

jurors, where over a quarter of the 134 NSW juror participants said that they would have valued more guidance on how they should deliberate.[5] This desire for assistance on how to deliberate is not surprising. Jurors have an important task at hand, and studies and anecdote emphasise that jurors mostly take their job very seriously. However, arguably, there is neither need nor justification for seeking information beyond the evidence if jurors understand that the trial is not structured according to norms portrayed through fiction, and that a real criminal trial is not an adversarial contest between the parties. Rather, it puts the prosecution to proof and embeds important rights to the defendant.

4.5 The UNSW Pilot Jury Study explored this particular perspective and uncovered, in relation to 10 trials, a spread and intensity of juror misunderstandings about the lack of obligations upon the defence, and revealed blindness to the right to silence and other fundamental principles of accusatorial justice.[6] These misunderstandings appeared to feed a sense of frustration about in-court processes, and raise concerns about whether some jurors wrongly consider that their task is to ascertain guilt independent of the evidence in the trial. Jury research presents a strong case for acknowledging the links between enhanced judicial instruction on fundamental features of the criminal trial process and jurors' ability and willingness to deliberate effectively, and to conduct themselves according to a set of norms that meet the baseline expectations of a jury trial.[7]

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to overcome split decisions, and we ended up handing in one "undecided" because of this. …. Perhaps a pre-arranged, typed sheet of elements for each charge could be provided, since this was one of our main issues - with the elements and definition on the page, it would rely less on each person hearing and recording accurately": Juror 8I. The UNSW Pilot Jury Study has not yet been published: See para 2.22 and para 2.31.

5. J Goodman-Delahunty, N Brewer, J Clough, J Horan, J R P Ogloff, D Tait, and J Pratley, *Practices, Policies and Procedures that Influence Juror Satisfaction in Australia*, Research and Public Policy Series No 87 (Australian Institute of Criminology, 2008), 139. In Victoria, 23% expressed the same view, with 19% indicating the same in SA.

6. See for example, *Dyers v The Queen* (2002) 210 CLR 285, [53] (Kirby J): "The prosecution is put to the proof. It is important in such circumstances that the reasoning appropriate to an adversarial civil trial should not undermine the accusatorial elements of a criminal trial. Otherwise the cards will be unduly stacked against the accused as the mind of the jury … is diverted to questions about a failure by the accused to give, or call, particular evidence".

7. Consistent views are expressed in M Chesterman, J Chan and S Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (Law and Justice Foundation of NSW, 2001), [532], and in W Young, N Cameron, Y Tinsley, *Juries in Criminal Trials: Part Two*: *A*

THE JUROR'S OATH

4.6 An opportunity for reinforcing important juror obligations arises in the context of the juror's oath and affirmation "to give a true verdict according to the evidence".[8] This short uncomplicated statement formalises and solemnises a juror's undertaking to act with integrity in the task to which he or she has been conscripted. It underscores the obligation to evaluate the evidence with sincerity and honesty, and arrive at a verdict accordingly. For lawyers, the oath *per se* connotes an important commitment, and the words of the oath express the commitment that a juror will give a verdict limited *only* according to the evidence presented by the parties in court. For lay people, these meanings may not be obvious. This raises two matters: first, is there a benefit in recasting the oath so that these features are expressly reinforced for each juror; and secondly, the question whether trial judges should be encouraged to explain to jurors the meaning of the oath and the importance of its expression of commitment to apply sincerely and honestly the fundamental rules and principles of Australia's criminal justice system both during the taking of evidence and during jury deliberations.[9]

ISSUE 4.1

(1) Should trial judges be encouraged to include in their opening remarks an explanation that by taking an oath a juror makes a serious commitment to participate within the legal process and abide by its rules?

(2) Should the juror oath be revised to articulate more expansively the important commitments it embodies?

THE OPENING REMARKS

4.7 In NSW, it has been common practice for about 20 years for the judge to give some remarks to the jury at the beginning of the trial. Prior to this practice, the judge remained completely silent. It was left to the prosecutor, if thought fit, to explain the framework of the case to the jury.

4.8 The opening remarks may include such matters as the respective roles of the judge and jury, the duty of jurors to rely on the evidence presented during the trial and not to examine material from outside

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Summary of Research Findings, New Zealand Law Commission Preliminary Paper 37 (1999) vol 2, [6.7]-[6.11].

8. Pursuant to *Jury Act 1977* (NSW) s 72A.

9. See generally R S Willen, "Rationalization of Anglo-Legal Culture: The Testimonial Oath" (1983) 34 *British Journal of Sociology* 109.

sources such as the media and the internet, the prohibitions regarding conducting independent investigations or discussing the case with non-jurors during the course of the trial, selection of a foreperson, and other matters relating to the conduct of the trial (for example, hours of sitting, likely duration of the trial, and so on). The opening remarks may also cover a few legal concepts such as the right to silence, the presumption of innocence, and the onus and standard of proof.

4.9 The AIJA survey mentioned earlier[10] examined the current judicial practice relating to the opening remarks. It found that about 87% of the 23 NSW judges who participated in the survey discuss legal concepts in their opening remarks. Further, there is a lack of uniformity in the legal concepts these judges cover:[11]

- 78% discuss the presumption of innocence;
- 91% mention the onus of proof;
- 87% identify the standard of proof; and
- 70% discuss the meaning of "beyond reasonable doubt".[12]

The survey also revealed that only 17% of the judges (4 out of 23) give the jury something in writing in support of the opening remarks.[13]

4.10 In light of the AIJA finding that a substantial number of judges do not give legal directions in their opening remarks, an issue that arises is whether it should be mandatory for judges to give certain preliminary directions during their opening remarks for the reasons already discussed.[14]

4.11 The Victorian Court of Appeal, commenting on the desirability of trial judges discussing, during their opening remarks, some of the directions that are subsequently given in the judge's charge, stated that:

10. Para 2.26-2.28.
11. J Ogloff, J Clough, J Goodman-Delahunty and W Young, *The Jury Project: Stage 1 – A Survey of Australian and New Zealand Judges* (Australian Institute of Judicial Administration, 2006), 47.
12. The figure is surprising considering the case law stating that the concept of reasonable doubt is an ordinary phrase and is not to be given technical definition by the judge: see para 4.30.
13. J Ogloff, J Clough, J Goodman-Delahunty and W Young, *The Jury Project: Stage 1 – A Survey of Australian and New Zealand Judges* (Australian Institute of Judicial Administration, 2006), 46.
14. Para 4.4-4.5.

> there is no reason to doubt that the jury, once provided with such a framework, are not only capable of interpreting and applying such instructions, but will benefit from their timely provision.[15]

Consideration should be given to the scope of the preliminary directions, that is, what matters should and should not be covered in the judge's opening remarks.

4.12 This chapter considers directions relating broadly to procedure and practice, including instruction on the juror's oath, the role of the judge and the role of the jury, the trial process and juror conduct, the right to silence, and the onus and standard of proof. Other matters that could also be considered are discussed in other chapters of this Consultation Paper, including directions on the assessment of evidence such as demeanour, circumstantial evidence, and evidence given by Indigenous witnesses.[16] The question of giving preliminary directions on substantive law is discussed in Chapter 9.[17] For example, should there be preliminary directions on basic rules relating to evidence, such as the distinction between direct and circumstantial evidence, and the assessment of the credibility of witnesses?

4.13 A final issue to consider is whether a written copy or summary of the preliminary directions should be given to each juror to assist them in receiving and assessing the evidence before them.

ISSUE 4.2

(1) Should it be mandatory for judges to give certain preliminary directions in their opening remarks to the jury?
(2) If so, what should be included in the judge's preliminary directions?
(3) Should jurors be given a written copy or summary of these preliminary legal directions?

THE ROLE OF THE JUDGE AND THE ROLE OF THE JURY

4.14 The separation of roles, whereby the judge is said to be responsible for determining questions of law and the jury is said to be responsible for determining questions of fact, has a long history.[18]

15. *R v PZG* [2007] VSCA 54, [21] (Vincent, Redlich JJA, and Kellam AJA).
16. See para 8.62-8.69, para 8.73-8.77 and para 8.79-8.87.
17. Para 9.90-9.103.
18. R J Farley, "Instructions to Juries – Their Role in the Judicial Process" (1932) 42 *Yale Law Journal* 194, 195-205; *MacKenzie v The Queen* (1996) 190 CLR 348, 365 (Dawson and Toohey JJ). See also *Jones v The Queen* (1997) 191 CLR 439, 442 (Brennan CJ).

4.15 The *Bench Book* provides judges with a suggested explanation of the respective roles of judge and jury. The trial judge provides this explanation at the commencement of the trial as well as in the summing-up. At the commencement of the trial, the trial judge advises the jurors that they are "the sole judges of the facts" and that he or she will direct them as to the "relevant legal principles" and how they should apply them to the issues the jury will have to decide in arriving at its verdict.[19] In the summing up, the judge again reminds the jurors of their respective roles.[20]

4.16 While it is a "basic assumption" of the criminal justice system that judges and juries do not share the skills used in assessing evidence equally, sometimes, in exceptional cases, judicial experience is accorded greater weight than the experience of a jury. In such cases, a trial judge is required to give the jurors a warning that alerts them to what judicial experience has shown.[21] Otherwise, the courts accept the jury as the possessor of both the skills and the advantages that are required to reach a proper verdict.[22]

ISSUE 4.3

(1) Are the current instructions on the role of the judge and the role of the jury adequate?
(2) If not, how can they be improved?

JUROR CONDUCT AND THE TRIAL PROCESS

4.17 Juror behaviour tends to be notable when it creates a sensation of one form or another. Typically, it will be attended with frenzied media commentary. There are also instances of jurors' in-court conduct that have attracted appellate consideration. These include the trial of Webb and Hay, during which jurors expressed sympathy to the family of the victim,[23] and cases in which it has been alleged that jurors have fallen asleep.[24] Most recently, in NSW, media attention

19. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (October 2008) [1-520].
20. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (October 2008) [7-020].
21. The extent to which judges may or must concern themselves with the jury's role as fact-finders is dealt with in ch 1: para 1.6-1.10.
22. *Jones v The Queen* (1997) 191 CLR 439, 442 (Brennan CJ).
23. *Webb v The Queen* (1994) 181 CLR 41.
24. See, eg, *R v CX* [2006] QCA 409; *R v Yasso* [2007] VSCA 306; *Commonwealth Bank of Australia v Falzon* [1998] VSCA 79. See also *R v Grant* [1964] SASR 331, 338; *Stathooles v Mt Isa Mines Ltd* [1997] 2 Qd R 106, 119.

fixed on juror conduct following the discharge of the jury in the so-called "Sudoku" trial.[25]

4.18 This incident raised questions about the challenges facing jurors, and the potential for juror misunderstandings and lapses in behaviour during long, complex cases and cases where parties extensively rely on electronic surveillance.

ISSUE 4.4

How should the trial judge explain to the jurors the conduct that is expected of them during the trial and their deliberations?

Encouraging juror input into trial times

4.19 Aside from techniques that might promote enhanced juror appreciation of what is expected of them, one potential improvement in the regime of judicial (and other) assistance to jurors is to make sure that jurors are aware that they can, and should, seek a break if necessary. Judicial direction to jurors encouraging them to seek breaks when needed may aid jurors' responsiveness to other directions if, as the New Zealand Law Commission report indicated, jurors respond best to judges "who made it clear that both the court and the court staff were concerned about, and wanted to be responsive to, their needs during the trial".[26]

4.20 On the other hand, there may also be an argument for meeting juror needs in particular cases if they would prefer to sit more hours than those scheduled in order, for example, to reduce frustration about the sometimes apparently inefficient use of their time.

ISSUE 4.5

(1) Should trial judges encourage jurors to make known when they, or some of their number, feel they need a break or their concentration is lapsing?

25. *R v Lonsdale and Holland* (District Court of NSW, Zahra DCJ, June 2008); M Knox, "The game's up: jurors playing Sudoku abort trial", *Sydney Morning Herald* (11 June 2008), 1, 6.

26. W Young, N Cameron, Y Tinsley, *Juries in Criminal Trials: Part Two*: *A Summary of Research Findings*, New Zealand Law Commission Preliminary Paper 37 (1999) vol 2, [2.24]: "Jurors responded best to judges who used their opening to put them at ease, who addressed them directly and at least with the appearance of spontaneity, and who made it clear that both the court and the court staff were concerned about, and wanted to be responsive to, their needs during the trial. Judges were usually seen as doing this well".

(2) Should judges seek other input from jurors about the arrangement of sitting times?

THE ONUS AND STANDARD OF PROOF

4.21 In criminal cases, the "onus of proof" (sometimes also referred to as the "burden of proof") initially rests on the prosecution, who must prove the accused's guilt. The level of proof which the prosecution must attain in establishing the accused's guilt is referred to as the "standard of proof". The standard in a criminal case is beyond reasonable doubt.

4.22 The *Bench Book* suggests the following form of words for introducing the onus and standard of proof:

> As this is a criminal trial the burden or obligation of proof of the guilt of the accused is placed squarely on the Crown. That burden rests upon the Crown in respect of every element or essential fact that makes up the offence with which the accused has been charged. That burden never shifts to the accused. There is no obligation whatsoever on the accused to prove any fact or issue that is in dispute before you. It is of course not for the accused to prove his/her innocence but for the Crown to establish his/her guilt.
>
> A critical part of the criminal justice system is the presumption of innocence. What it means is that a person charged with a criminal offence is presumed to be innocent unless and until the Crown persuades a jury that the person is guilty beyond reasonable doubt.[27]

Onus of proof

4.23 The onus of proof of all matters in issue in a criminal trial generally rests upon the prosecution.[28]

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27. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (October 2008) [3-600].

28. However, there are some matters where the onus of proof will remain with the accused. They include, eg, the defence of substantial impairment by abnormality of mind (*Crimes Act 1900* (NSW) s 23A(4)), the onus of establishing which rests upon the defence, although only on the balance of probabilities: *R v Ayoub* [1984] 2 NSWLR 511; and deemed possession in relation to drug trafficking: *Drug Misuse and Trafficking Act 1985* (NSW) s 29(a). This paper is not concerned with the evidential burden which can rest upon the accused to raise a matter for which the legal onus of proof will then return to the prosecution. The jury does not need to concern itself with the evidential burden.

4.24 The judge's summing-up should always include a direction that the onus of proof rests on the prosecution to prove the defendant's guilt.[29] Whether a judge has adequately instructed the jury on the onus of proof is viewed in the context of the summing-up as a whole.[30]

4.25 Australian courts have accepted that a judge should not sum up in a way that detracts from the critical question of whether the prosecution has proved the guilt of the accused beyond reasonable doubt. Attempts to give further content to the concept of beyond reasonable doubt, or to direct the minds of the jury beyond it, risk confusing or even reversing the onus of proof.

4.26 Inviting the jury to search for a reason why a victim or other witness would make a false accusation may also run the risk of reversing the onus of proof. Without further direction, this could leave the jury with the impression that the accused bears some onus of proving the existence of a motive for the false accusation.[31] For example, a judge should not raise the question in a sexual assault case (where evidence of motive has not been raised) "why would the complainant lie?" in a way that gives the jury the impression that "it was up to the accused to come up with a plausible answer to the question".[32] Such an impression amounts to a reversal of the onus of proof.[33] Justice Sperling has observed:

> To instruct a jury to start with the presumption that a Crown witness is telling the truth is inconsistent with the concepts underlying a criminal trial, embodied in the standard directions concerning the onus of proof and the jury's obligation to consider what evidence to accept and what evidence to reject. ... [Juries] should not be encouraged to begin with a presumption that evidence led against the accused is true for no better reason than that is given on oath.[34]

4.27 Further, it has been held that judges in summing up should not leave the jury with the impression that the case against the accused was proved and that they should convict unless he or she had satisfied

29. *R v Jorgic* (1964) 80 WN (NSW) 761, 762-763; *R v Hepworth* [1955] 2 QB 600, 602. On the onus of proof, see: *Woolmington v DPP* [1935] AC 462, 481.
30. *R v Ho* (2002) 130 A Crim R 545; [2002] NSWCCA 147, [32] Meagher JA.
31. *Doe v R* [2008] NSWCCA 203, [21]-[60] (Latham J).
32. *R v F* (1995) 83 A Crim R 502, 511-512. See also *Palmer v The Queen* (1998) 193 CLR 1, 7-9; *R v Jovanovic* (1997) 98 A Crim R 1; *R v E* (1996) 39 NSWLR 450, 461-466; *South v R* [2007] NSWCCA 117, [36]-[44]; *Doe v R* [2008] NSWCCA 203, [59].
33. *R v E* (1996) 39 NSWLR 450, 464.
34. *R v Jovanovic* (1997) 98 A Crim R 1, 21.

them of his or her innocence, for example, by emphasising the abundant evidence calling for an answer in the prosecution's case and suggesting that the case had been "established".[35]

ISSUE 4.6

Are the standard directions relating to the onus of proof adequate?

Standard of proof

4.28 In Australia, judges instruct the jury that, before returning a verdict of guilty, they must find the accused guilty "beyond reasonable doubt" and generally do so without elaboration or explanation.

4.29 The *Bench Book* suggests the following instruction:

> The Crown must prove the accused's guilt beyond reasonable doubt. That is the high standard of proof that the Crown must achieve before you can convict the accused. At the end of your consideration of the evidence in the trial and the submissions made to you by the parties you must ask yourself whether the Crown has established the accused's guilt beyond reasonable doubt. In other words you should ask yourselves whether there is any reasonable possibility that the accused did not do what the Crown alleges against him/her. Unless the Crown satisfies you that no such possibility exists you must find the accused not guilty.
>
> ... In a criminal trial there is only one ultimate issue that a jury has to decide. Has the Crown proved the guilt of the accused beyond reasonable doubt? If the answer is "yes", the appropriate verdict is "guilty". If the answer is "no", the verdict must be "not guilty".[36]

4.30 Since 1961, when Chief Justice Dixon referred to the formula "beyond reasonable doubt" as "time honoured",[37] appellate courts in Australia have consistently held that it is an expression well understood by ordinary people and that it is a matter for the jury to decide whether a doubt is reasonable in the circumstances.[38] That is, the jury may, but the judge may not, define what is meant by "beyond

35. *R v Bentley* [2001] 1 CrAppR 307, 326.
36. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (October 2008) [3-600].
37. *Dawson v The Queen* (1961) 106 CLR 1, 18. See also *Thomas v The Queen* (1960) 102 CLR 584, 605.
38. *Green v The Queen* (1971) 126 CLR 28, 32-33. See also *R v Chatzidimitriou* (2000) 1 VR 493, 496-498; *Darkan v The Queen* (2006) 227 CLR 373; [2006] HCA 34, [69].

reasonable doubt".[39] The separation of the fact-finding role can also justify the view that the trial judge should not usurp the jury's function in applying the standard of proof by seeking to attribute some content of equivalent level of certainty to the expression "reasonable".[40] For example, the High Court has noted:

> It is, however, not the province of the judge to *direct* the jury about how they may (as opposed to may *not*) reason towards a conclusion of guilt. That is the province of the jury. The judge's task in relation to the facts ends at identifying the issues for the jury and giving whatever warnings may be appropriate about impermissible or dangerous paths of reasoning.[41]

4.31 The appellate courts have also prohibited any directions that suggest a process by which the jury may determine, once they have considered the evidence, whether they have a "reasonable doubt".[42] The High Court in *Green v The Queen* has observed:

> [Jurors] are both unaccustomed and not required to submit their processes of mind to objective analysis of the kind proposed ... "It is not their task to analyse their own mental processes" ... A reasonable doubt which a jury may entertain is not to be confined to a 'rational doubt' or a 'doubt founded on reason' in the analytical sense or by such detailed processes as those proposed ... .[43]

4.32 The courts in NSW have adhered to this approach fairly strictly to the extent that judges are cautioned against even referring to the High Court's observations that the phrase is an ordinary expression well enough understood by ordinary people and that it is up to the jury to set its own standards in determining whether a doubt is reasonable.[44] Justice Hunt has observed:

> It appears to be an ineradicable misconception on the part of some trial judges that, simply because the High Court has on many occasions said that the phrase 'beyond reasonable doubt' is a well understood expression, and that whether a doubt is reasonable is for the jury to say by setting their own standards, it

39. See *R v Chatzidimitriou* (2000) 1 VR 493, 507-508.
40. See, eg, *R v Chatzidimitriou* (2000) 1 VR 493, 498-499.
41. *Azzopardi v The Queen* (2001) 205 CLR 50; [2001] HCA 25, [50].
42. *Thomas v The Queen* (1960) 102 CLR 584, 606 (Windeyer J); *W v R* (2006) 16 TasR 1, [9]-[10]; *Graham v The Queen* (2000) 116 A Crim R 108; [2000] TASSC 153, [68]; *R v Ho* (2002) 130 A Crim R 545; [2002] NSWCCA 147, [27]-[29]; *Krasniqi v R* (1993) 61 SASR 366, 371-375.
43. *Green v The Queen* (1971) 126 CLR 28, 33.
44. *R v Reeves* (1992) 29 NSWLR 109, 117.

> is necessary to tell the jury just that. It is not necessary, nor is it desirable to do so ... The phrase 'beyond reasonable doubt' needs neither embellishment nor explanation. [45]

There is also a danger that, in telling the jury that the phrase requires no explanation, the direction might encourage jurors to speculate on the meaning of the phrase and potentially arrive at a wrong conclusion.

4.33 However, there are circumstances where it is accepted that judges may provide some assistance beyond the conventional direction, for example, where it is necessary to correct an error made by counsel during addresses or where, as commonly occurs in criminal trials, the jury asks for some further explanation of the expression.[46] Other circumstances may include, for example, cases where alibi evidence or negative identification evidence is raised. In these cases, the judge should explain that the prosecution must remove or eliminate any reasonable possibility that the accused was elsewhere or was not the person identified and that, if the prosecution does not do this, then the accused's guilt is not established beyond reasonable doubt.[47]

4.34 Later in this Consultation Paper, we give consideration to the complications which can arise where the prosecution case depends on circumstantial evidence.[48] In that situation, the judge may need to give directions on what is involved in drawing an inference of guilt, and also to deal with the particular requirements arising where some fact constitutes an "indispensable intermediate fact" which needs to be proved beyond reasonable doubt.

4.35 In situations where a jury has asked for an explanation, it has been emphasised that this does not mean that a judge must provide it in a way that steps beyond the accepted limits.[49] The general approach in Australia would appear to be to provide no more elaboration than that a reasonable doubt is a doubt that the jury considers reasonable,[50] or to inform the jury, somewhat unhelpfully, that the

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45. *R v Reeves* (1992) 29 NSWLR 109, 117.
46. *Green v The Queen* (1971) 126 CLR 28, 33. See also *R v Flesch* (1987) 7 NSWLR 554, 556-558 (Street CJ); *R v Reeves* (1992) 29 NSWLR 109, 117; *R v Chatzidimitriou* (2000) 1 VR 493; *R v McNamara* [1998] QCA 405, [19].
47. See *Kanaan v R* [2006] NSWCCA 109, [133] (negative identification); *R v Kanaan* (2005) 64 NSWLR 527; [2005] NSWCCA 385, [135] (alibi).
48. Para 8.62-8.69.
49. *R v McNamara* [1998] QCA 405, [19].
50. *Thomas v The Queen* (1960) 102 CLR 584, 595 (Kitto J); *La Fontaine v The Queen* (1976) 136 CLR 62, 85 (Gibbs J); *Neilan v R* [1992] 1 VR 57, 71.

law does not permit of any further explanation than that given in the initial direction.

4.36 In one recent case where a jury did ask for an explanation of the formula, the Court of Criminal Appeal noted the traditional position that judges should not observe that the words are "ordinary everyday words", since ordinary everyday words do not require explanation,[51] but held that, in the circumstances of the particular case, the jury would not have been misled by the phrase, noting that:

> the words did not detract from the significance or, indeed, the solemnity of the decision which the jury was called upon to make. To describe words as "ordinary everyday words", in the context they were used in the summing-up in the present case, meant no more than that they are words which require no further definition.[52]

4.37 In any event, what the jury needs to consider is not each word of the phrase in isolation but in combination. Justice Callaway of the Victorian Court of Appeal has suggested that it should be possible for a trial judge, if pressed by the jury, to give some guidance as to the meaning of the phrase "without infringing the essential point made in *Green's* case".[53]

Juror comprehension of "beyond reasonable doubt"

4.38 Historically, opinion has been divided upon jurors' comprehension of the phrase "beyond reasonable doubt". From at least the late 19th century in the US, there has been a strongly held belief in some quarters that jurors readily understand the phrase and that there is no need for explanation.[54] For example, in 1886, the Michigan Supreme Court observed:

> We do not think that the phrase "reasonable doubt" is of such unknown or uncommon signification that an exposition by a trial judge is called for. Language that is within the comprehension of persons of ordinary intelligence can seldom be made plainer by further definition or refining. All persons who possess the qualifications of jurors know that a "doubt" is a fluctuation or uncertainty of mind arising from defect of knowledge, or of evidence, and that a doubt of the guilt of the accused, *honestly entertained*, is a "reasonable doubt".[55]

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51. *R v Southammavong* [2003] NSWCCA 312, [17].
52. *R v Southammavong* [2003] NSWCCA 312, [23].
53. See *R v Chatzidimitriou* (2000) 1 VR 493, 503 (Callaway JA).
54. See *Buel v State* 80 NW 78 (1899), 85.
55. *People v Steubenvoll* 28 NW 883 (1886), 885.

The third edition of *Wigmore on Evidence* observed that:

> when anything more than a simple caution and a brief definition is given, the matter tends to become one of mere words, and the actual effect upon the jury, instead of being enlightenment, is likely to be rather confusion, or, at the least, a continued incomprehension.[56]

4.39 In Australia, in 1960, Justice Windeyer picked up on this line of opinion, noting that attempts to explain the phrase "are not always helpful" and suggesting that "it is not desirable that the time-honoured expression 'satisfied beyond reasonable doubt' should be omitted and some substitute adopted".[57] In 1961, Chief Justice Dixon suggested that the expression is "used by ordinary people and is understood well enough by the average man in the community".[58] The High Court has followed this position consistently.[59]

4.40 In recent times, however, a view has been expressed that the time-honoured expression lacks a "common usage and understanding". Courts in New Zealand,[60] Canada, and the US have said this, but not courts in Australia. The Australian approach of refusing to explain "beyond reasonable doubt" runs counter to the position in the US and Canada, where "there is clear authority to the effect that a *failure* to elaborate on and explain the expression constitutes error".[61] The Supreme Court of Canada has held that an explanation of the phrase is "an essential element" of the instructions that a judge must give to a jury".[62] The US Supreme Court has noted:

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56. J H Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (Little, Brown and Company, 1940) vol 9, 319.
57. *Thomas v The Queen* (1960) 102 CLR 584, 604.
58. *Dawson v The Queen* (1961) 106 CLR 1, 18.
59. See, eg, *Green v The Queen* (1971) 126 CLR 28, 32; *La Fontaine v The Queen* (1976) 136 CLR 62, 84; *Van Leeuwen v The Queen* (1981) 55 ALJR 726; 728.
60. *R v Wanhalla* [2007] 2 NZLR 573, [156].
61. *Graham v The Queen* (2000) 116 A Crim R 108; [2000] TASSC 153, [51] (emphasis added). See also *Darkan v The Queen* (2006) 227 CLR 373; [2006] HCA 34, [69] referring to UK, New Zealand, Canada and US.
62. *R v Lifchus* [1997] 3 SCR 320, [22]. The Court did not give a precise formula for the explanation, suggesting amongst other things that "it will suffice to instruct the jury that a reasonable doubt is a doubt based on reason and common sense which must be logically based upon the evidence or lack of evidence". The Court also suggested that a jury should be instructed that a reasonable doubt cannot be "based on sympathy or prejudice" or "imaginary or frivolous" and that "the Crown is not required to prove its case to an absolute certainty since such an unrealistically high standard could seldom be achieved" (at [30]-[31]).

> the argument for defining the concept is strong. While judges and lawyers are familiar with the reasonable doubt standard, the words "beyond a reasonable doubt" are not self-defining for jurors. Several studies of jury behavior have concluded that "jurors are often confused about the meaning of reasonable doubt" when that term is left undefined. ... Thus, even if definitions of reasonable doubt are necessarily imperfect, the alternative - refusing to define the concept at all - is not obviously preferable.[63]

4.41 There is both empirical and anecdotal evidence from studies in both NSW and New Zealand that the use of the unadorned statement has led to some disagreement among jurors as to the meaning of "reasonable doubt".[64]

Explaining reasonable doubt

4.42 Given the High Court's position on explaining "beyond reasonable doubt", there has been little call to consider possible ways of explaining the phrase either by the use of additional words or by analogy.[65] However, various attempts have been made from time to time.[66]

4.43 ***The "important decision" analogy.*** There is some support in England and Wales, based on long practice,[67] for using a direction along the lines of: "a reasonable doubt is that quality and kind of

63. *Victor v Nebraska* 511 US 1, 26 (1994) (Ginsburg J).

64. M Chesterman, J Chan and S Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (Law and Justice Foundation of NSW, 2001), [449] – [454]; J M Robertson, "The Jury Writes Back: Aspects of Jury Management" (Biennial Judges' Conference, Gold Coast, Queensland, 22-26 June 2003), 19-21; W Young, N Cameron, Y Tinsley, *Juries in Criminal Trials: Part Two*: *A Summary of Research Findings*, New Zealand Law Commission Preliminary Paper 37 (1999) vol 2, [7.16].

65. The capacity of courts to give content to the phrase "on the balance of probabilities" by drawing an analogy to weighing the evidence in a pair of scales (see, eg, *Murphy v Nationwide News Pty Ltd* [2000] NSWSC 1251, [20]-[24]), tends to highlight the inability to give content to the expression "beyond reasonable doubt".

66. See *W v R* (2006) 16 TasR 1 for a detailed analysis of several different approaches which have been taken in an attempt to provide a more meaningful explanation of what is involved in proof beyond reasonable doubt.

67. See *R v White* (1865) 4 F&F 383; 176 ER 611, 614-615; *Thomas v The Queen* (1960) 102 CLR 584, 604.

doubt which, when you are dealing with matters of importance in your own affairs, you allow to influence you one way or another".[68]

4.44 The Privy Council has considered that the use of an analogy of this kind is acceptable if the trial judge is of the opinion that there is a danger that the jury might consider their task "more esoteric than applying to the evidence... the common sense with which they approach matters of importance to them in their ordinary lives".[69]

4.45 The Supreme Court of Canada has disapproved the use of the analogy, observing that the standard by which people make everyday decisions is a "standard of probability" and often "at the low end of the scale", concluding that "to invite jurors to apply to a criminal trial the standard of proof used for even the important decisions in life runs the risk of significantly reducing the standard to which the prosecution must be held".[70]

4.46 The New Zealand Court of Appeal has recently, on a number of occasions, also criticised the analogy, giving the following reasons:

- personal decisions requiring serious deliberation are less common in today's society;
- important personal decisions may involve decisions about future action and do not often involve a reconstruction of past events based on conflicting accounts;
- in making such decisions, people will be personally aware of many of the relevant facts and will also be able to undertake their own fact-finding;
- important personal decisions may involve elements of risk-taking, speculation, emotion, hope, uncertainty and prejudice; and
- people will often make important decisions on a standard that falls short of proof beyond reasonable doubt.[71]

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68. *Walters v The Queen* [1969] 2 AC 26, 29. See also the list of alternative phrases in *Buel v State* 80 NW 78 (1899), 84. Fundamentally, as noted in *R v Wanhalla* [2007] 2 NZLR 573, *Walters v The Queen* [1969] 2 AC 26, 30 suggests that judges, drawing on their knowledge of the jury before them, should exercise their discretion in the phraseology they employ.
69. *Walters v The Queen* [1969] 2 AC 26, 30.
70. *R v Lifchus* [1997] 3 SCR 320, [23]-[24]; *Bisson v The Queen* [1998] 1 SCR 306, [6]-[8].
71. *R v Wanhalla* [2007] 2 NZLR 573, [26]-[32], [131]-[134], [166]; *R v Adams* (NZ CA, CA70/05, 5 September 2005), [59]-[64]; *R v Jopson* (NZ CA, CA24/05, 25 November 2005), [28].

4.47 Although the New Zealand Court of Appeal in *R v Wanhalla* concluded that, in the context of all the directions provided by the trial judge, the analogy had not confused the jury, one judgment nevertheless observed:

> it is right to recognise that the analogy has the potential to puzzle jurors and for this reason is not helpful. It should not be used in the future.[72]

4.48 ***What "reasonable doubt" does not mean.*** Generally, it has been accepted that judges should not discuss what "reasonable doubt" does not mean, for example, by suggesting that a reasonable doubt is not a foolish, stupid, whimsical, or fanciful doubt.[73] In Canada, however, judges may say that a doubt must not be "imaginary or frivolous".[74]

4.49 It has been suggested that such explanations may have a "significantly weakening effect upon the precision of this important aspect of the range of matters lying within the consideration of the jury in a criminal trial".[75] However, as already noted, there will be exceptions, especially if counsel raise matters in their addresses to the jury that warrant judicial correction.[76]

4.50 ***Percentages.*** There is evidence that juries in NSW do sometimes consider the question of the standard of proof in terms of a percentage of certainty. In a recent NSW case, the jury requested clarification of the phrase, asking whether it means "we need to be one-hundred per cent sure".[77] There is also some empirical evidence from New Zealand that jurors tend to debate the standard of proof in terms of percentages, with some jurors interpreting the percentage as little as 50% and some as much as 100%.[78]

4.51 The position in Australia is that a trial judge should not instruct the jury on the standard of proof in terms of percentages. If counsel raises such an approach or it arises in a question from the jury, then

72. *R v Wanhalla* [2007] 2 NZLR 573, [56] (Young P, Chambers and Robertson JJ).
73. *Walters v The Queen* [1969] 2 AC 26, 27.
74. *R v Lifchus* [1997] 3 SCR 320, [31].
75. *R v Flesch* (1987) 7 NSWLR 554, 558.
76. Para 4.33.
77. *Norris v R* (2007) 176 A Crim R 42; [2007] NSWCCA 235, [34].
78. W Young, N Cameron, Y Tinsley, *Juries in Criminal Trials: Part Two*: *A Summary of Research Findings*, New Zealand Law Commission Preliminary Paper 37 (1999) vol 2, [7.16].

current authority requires the judge to make it clear that such an approach is inappropriate.[79]

"Sureness" or "certainty" as alternatives

4.52 Other jurisdictions, particularly England and Wales and New Zealand, have departed from the Australian position on "beyond reasonable doubt". They now tend towards instructing jurors that they should be "sure" or "certain" of the guilt of the accused, whether or not they also expressly refer to "reasonable doubt".

4.53 In England and Wales, judges now routinely instruct the members of the jury that they must be "sure" of the defendant's guilt.[80]

4.54 The English Judicial Studies Board has formulated a specimen direction in the *Crown Court Bench Book*:

> How does the prosecution succeed in proving the defendant's guilt? The answer is – by making you sure of it. Nothing less than that will do. If after considering all the evidence you are sure that the defendant is guilty, you must return a verdict of "Guilty". If you are not sure, your verdict must be "Not Guilty".[81]

In circumstances where one of the parties has used the phrase "reasonable doubt" in their address, the following is recommended:

> The prosecution must make you sure of guilt, which is the same as proving the case beyond reasonable doubt.

4.55 Anecdotally, it has been reported that juries rarely, if ever, seek any further explanation of a direction given in these terms,[82] although

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79. See *R v Cavkic* (2005) 12 VR 136, 143. See also *W v R* (2006) 16 TasR 1, [11]-[14].

80. *R v Kritz* [1950] 1 KB 82, 89; *R v Summers* [1952] 1 All ER 1059, 1060 (Goodard LJ); *Walters v The Queen* [1969] 2 AC 26, 30.

81. England and Wales, Judicial Studies Board, *Crown Court Bench Book: Specimen Directions* (June 2007) s 2. See also *R v Bradbury* [1969] 2 QB 471, 474; *R v Quinn* [1983] *Criminal Law Review* 475.

82. But see a journalist's account of his jury service in England in relation to the direction on the standard of proof:

> the judge instructed the jury to convict, not based on the time-honoured formula that they had to be "satisfied beyond reasonable doubt" but "only ... if you are sure, if you are not sure then acquit."
>
> It sounds reasonable, and no doubt the judge was trying to be helpful, but it was clear that these instructions caused the jury great difficulty. After deliberating for almost a day, they came back into the courtroom with a question. They told the judge, according to the note read out to the court, that they were having trouble with the word "sure". Could the judge

some studies suggest that it is not without its problems,[83] and that a direction framed in simple terms requiring the jury to "be sure" is less stringent than one expressed in terms of being "satisfied so that you are sure".

4.56 The general tendency has been to avoid any mention of "reasonable doubt" unless counsel mentions it in their addresses to the jury.[84] However, some judges in England, while using the term "sure", also continue to refer to "beyond reasonable doubt". There is recent evidence of some Crown Court Judges using "sure", "beyond reasonable doubt" and combinations of the two, but with a strong preference for the use of "sure".[85]

4.57 New Zealand has taken an approach similar to that in England and Wales following the decision in *R v Wanhalla*.[86] Subsequent appellate decisions have added that any further attempt to explain "reasonable doubt" may cause jurors to be further confused.[87] In Canada, however, the Supreme Court has stated that reference to the jury being "sure" or "certain" of the guilt of the accused should only be made "*after* proper instructions have been given as to the meaning of the expression "beyond a reasonable doubt".[88]

4.58 A question has arisen as to whether the expression "sure" of the accused's guilt will be understood by juries to involve a higher

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provide some sort of assistance - for example, would reasonable doubt suffice? The judge simply restated the original instruction: "If you are sure, convict, if you are not sure acquit." (I Gaber, "Prejudice beyond reasonable doubt" *The Guardian* (18 July 2001), also referred to in A Phillips, *Lawyers' Language: How and Why Legal Language is Different* (Routledge, 2002), 43.)

83. M Zander, "The Criminal Standard of Proof – How Sure is Sure?" (2000) 150 *New Law Journal* 1517; J W Montgomery, "The Criminal Standard of Proof" (1998) 148 *New Law Journal* 582. But see C N Heffer, "The Language of Conviction and the Convictions of Certainty: Is "Sure" an Impossible Standard of Proof?" (2007) 5(1) *International Commentary on Evidence* (Article 5).
84. See England and Wales, Judicial Studies Board, *Crown Court Bench Book: Specimen Directions* (June 2007) s 2B (note).
85. C Heffer, "Beyond 'reasonable doubt': The Criminal Standard of Proof Instruction as Communicative Act" (2006) 13(2) *International Journal of Speech, Language and the Law* 159, 176.
86. *R v Wanhalla* [2007] 2 NZLR 573.
87. See *R v Adams* (NZ CA, CA70/05, 5 September 2005) and *R v Jopson* (NZ CA, CA24/05, 25 November 2005).
88. *R v Lifchus* [1997] 3 SCR 320, [34].

standard of proof than that required by the expression "beyond reasonable doubt".[89]

4.59 It has been noted with respect to "sure" that there is "no clear evidence that English jurors are indeed applying too high a standard"[90] since, in the context, "100% certainty" cannot be taken in its strictest sense. To do so would essentially equate it with "beyond all doubt" thereby making it a standard that is impossible to satisfy in practical terms.[91] Much will, however, depend upon what conceptions and misconceptions jurors may have about the use of terms that describe varying degrees of chance and probability.

4.60 Although juries are discouraged from consulting dictionaries and requests for their provision are normally refused, it may be noted that standard dictionaries do provide a range of meanings for the expression "sure" not all of which would involve absolute certainty:

- "certain in mind; having no doubt; assured, confident ... Also, convinced, persuaded, morally certain";[92]
- "convinced, fully persuaded, or positive, as of something firmly believed: *sure of a person's guilt*", and "admitting of no doubt or question: *sure proof*";[93] and
- "not open to doubt: *sure proof*" and "admitting of no vacillation or doubt: *he is very sure in his beliefs*".[94]

Dictionary definitions of "certain", on the other hand, possibly contemplate a greater degree of satisfaction:

- "fully confident upon the ground of knowledge, or other evidence believed to be infallible; having no doubt; assured; sure (= 'subjectively certain')";[95]

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89. Two jury simulation studies have found that some jurors considered that the "sure" direction required 100% certainty: M Zander, "The Criminal Standard of Proof – How Sure is Sure?" (2000) 150 *New Law Journal* 1517, 1518; J W Montgomery, "The Criminal Standard of Proof" (1998) 148 *New Law Journal* 582.
90. C Heffer, "Beyond 'Reasonable Doubt': The Criminal Standard of Proof Instruction as Communicative Act" (2006) 13(2) *International Journal of Speech, Language and the Law* 159, 174.
91. See also C N Heffer, "The Language of Conviction and the Convictions of Certainty: Is "Sure" an Impossible Standard of Proof?" (2007) 5(1) *International Commentary on Evidence* (Article 5).
92. *Oxford English Dictionary* (2nd ed, revised).
93. *Macquarie Dictionary* (2nd ed, revised).
94. *Collins Australian Dictionary* (7th ed, 2005), 1619.
95. *Oxford English Dictionary* (2nd ed, revised).

- "having no doubt; confident or assured";[96]
- "positive and confident about the truth of something; convinced: *I am certain that he wrote a book*".[97]

4.61 A recent survey of jurors conducted by the NSW Bureau of Crime Statistics and Research found that 55.4% of the jurors surveyed believed that "beyond reasonable doubt" meant "sure". A further 22.9% believed that the phrase meant "almost sure the person is guilty".[98]

4.62 Ultimately, there may not be much in the choice between "sure" and "certain". The English practice book *Archbold*, which generally prefers "beyond reasonable doubt", has observed:

> it is well established that the standard of proof is less than certainty ... As in ordinary English "sure" and "certain" are virtually indistinguishable, it savours of what the late Sir Rupert Cross might have described as "gobbledegook" to tell the jury that while they must be "sure" they need not be "certain".[99]

ISSUE 4.7

(1) Should judges continue to use the expression "beyond reasonable doubt"?
(2) If so, how, if at all, should they explain it to the jury?
(3) If not, should judges use "sure" or some other expression and how, if it all, should they explain it to the jury?
(4) How should any changes be brought into effect? By legislation, by changes to the *Bench Book*, by judicial education, or by some other means?

THE RIGHT TO SILENCE

4.63 The "right to silence" refers to a group of general and specific immunities that apply to an accused who chooses not to give evidence or to respond to questioning both before and during a criminal trial.[100]

4.64 Of relevance to this paper is the specific immunity that an accused person has during trial "from having adverse comment made

96. *Macquarie Dictionary* (4th ed, 2005).
97. *Collins Australian Dictionary* (7th ed, 2005), 279.
98. L Trimboli, *Juror Understanding of Judicial Instructions in Criminal Trials*, Crime and Justice Bulletin No 119 (NSW Bureau of Crime Statistics and Research, 2008), 4.
99. P J Richardson (ed), *Archbold Criminal Pleading, Evidence and Practice* (Sweet and Maxwell, 2002), 473.
100. *R v Director of Serious Fraud Office; ex parte Smith* [1993] AC 1, 30-31.

on any failure (a) to answer questions before the trial, or (b) to give evidence at the trial".[101] Both categories are governed, in part by provisions of the *Evidence Act 1995* (NSW).

Where the accused exercises the right before trial

4.65 In the pre-trial context, s 89 of the *Evidence Act 1995* (NSW) renders inadmissible evidence that can only be used to draw an unfavourable inference from the fact that a person has failed or refused to answer questions put to them in the course of "official questioning".

4.66 This provision would appear to render it unnecessary, in the general run of cases, to give a direction regarding the exercise of the right to silence in the pre-trial context.[102] However, there will be situations where the evidence of the accused invoking the right to silence will be raised, for example by a co-accused or where, in the course of a recorded interview, the accused answers some questions but declines to answer others. In such cases, the *Bench Book* has suggested that judges deliver the following warning when the evidence is first raised and also in the summing-up:

> [The accused], as you are aware, declined to answer questions put to [him/her] by a police officer at the time of [his/her] arrest. All people in this country have a right, except under certain circumstances not applicable in this case, to refuse to answer questions put to them by police officers. That is the substance and meaning of the caution administered by the police officer when [he/she] sought to question [the accused]. If any inference adverse to [the accused] could be drawn from [his/her] exercising that right, then that right itself would very soon cease to exist. It is important therefore that you bear in mind that no inference adverse to [the accused] can be drawn from the fact that [he/she] took note of the caution administered by the police and chose to remain silent.[103]

It is necessary to give such a direction as soon as the evidence is introduced so that the jurors do not immediately impute guilt from

101. *R v Director of Serious Fraud Office; ex parte Smith* [1993] AC 1, 31.

102. This is similar to the common law position: *Petty v The Queen* (1991) 173 CLR 95, 99.

103. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (October 2008) [4-110].

silence as a result of their natural expectation that the accused would want to prove his or her innocence straight away.[104]

Where the accused exercises the right during the trial

4.67 Issues surrounding the right to silence arise particularly in circumstances where the accused chooses not to enter the witness box and give evidence in the trial. The *Evidence Act 1995* (NSW) makes provision for such circumstances in criminal proceedings for an indictable offence so that:

> The judge or any party (other than the prosecutor) may comment on a failure of the defendant to give evidence. However, unless the comment is made by another defendant in the proceeding, the comment must not suggest that the defendant failed to give evidence because the defendant was, or believed that he or she was, guilty of the offence concerned.[105]

4.68 It has been argued that, without judicial comment on the point, the jury may use an accused's silence in court to his or her detriment. The High Court has observed that such warnings "have long been accepted to be an important warning to the jury... against adopting an impermissible chain of reasoning".[106] The High Court has further suggested that, where the accused does not give evidence at trial, it "will almost always be desirable" for the judge to warn the jury that "the accused's silence in court is not evidence against the accused, does not constitute an admission by the accused, may not be used to fill gaps in the evidence tendered by the prosecution, and may not be used as a make-weight in assessing whether the prosecution has proved its case beyond reasonable doubt".[107]

4.69 One commentator has suggested that "the logic underpinning the cautionary directions as derived from the privilege against self-incrimination in combination with the nature of a criminal trial is inescapable".[108] This is because, without such a warning, a natural

104. *R v Astill* (NSW CCA, 17 July 1992, unreported), 9, referred to in *R v Reeves* (1992) 29 NSWLR 109, 115, followed in *R v Skaf* (2004) 60 NSWLR 86; [2004] NSWCCA 37, [140]-[147].

105. *Evidence Act 1995* (NSW) s 20(2).

106. *RPS v The Queen* (2000) 199 CLR 620; [2000] HCA 3, [15].

107. *Azzopardi v The Queen* (2001) 205 CLR 50; [2001] HCA 25, [51]. But see *R v Wilson* (2005) 62 NSWLR 346; [2005] NSWCCA 20, [15]-[20] in relation to the last two of those warnings.

108. E Dabars and M Hinton, "Comment by an Accused on the Co-accused's Silence in a Joint Trial: R v Tran and To" (2007) 31 *Criminal Law Journal* 307, 309. See also *RPS v The Queen* (2000) 199 CLR 620; [2000] HCA 3, [27]-[30].

reaction to silence would be to conclude that the charge is not disputed, and the drawing of inferences from silence must be impermissible if the right to silence is to have "content and the burden and standard of proof meaning".[109]

ISSUE 4.8

What warnings, if any, should a judge give:
(a) when evidence is admitted that the accused invoked the right to silence during pre-trial investigations; or
(b) when the accused invokes the right to silence during the trial?

LEAVING ALTERNATIVE VERDICTS AND DEFENCES

4.70 In some cases, the trial judge may need to direct the jury on the possibility of alternative verdicts. The question can arise in a number of situations, including where alternative charges for the same act of alleged criminality have been included on the indictment[110] or where they arise at common law[111] or as a statutory alternative.[112]

4.71 A jury should only return a verdict of guilty on a lesser alternative offence when the prosecution has not proved the more serious offence beyond reasonable doubt. Jurors are not expected to compromise any disagreement by resorting to an alternative verdict. The *Bench Book* offers the following instruction on this point:

> This option only arises where you all agree that the Crown has not proved the more serious offence beyond reasonable doubt. However, you should not regard this as an invitation to compromise — supposing, for example, that six of you were for a verdict of "guilty" on the major count and six believed that [he/she] was not guilty of anything at all. It would be quite wrong in these circumstances to compromise by convicting [him/her] on the less serious charge.[113]

The Court of Criminal Appeal has held that such a direction is sufficient to dispel any suggestion that the jury's verdict may have

109. E Dabars and M Hinton, "Comment by an Accused on the Co-accused's Silence in a Joint Trial: R v Tran and To" (2007) 31 *Criminal Law Journal* 307, 309.

110. See *Criminal Procedure Act 1986* (NSW) s 23(3).

111. For example, manslaughter as an alternative to murder.

112. For example, *Criminal Procedure Act 1986* (NSW) s 162, *Drug Misuse and Trafficking Act 1985* (NSW) s 24(3), and *Crimes Act 1900* (NSW) s 34.

113. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (October 2008) [2-200].

been the result of compromise.[114] On one view, such a direction is probably the only way of avoiding the possibility of compromise.

ISSUE 4.9

Is the direction on arriving at alternative verdicts or defences adequate to ensure that the jury's verdict is not the result of compromise?

PERSEVERANCE DIRECTIONS

4.72 In NSW, in proceedings relating to State offences, jury verdicts may, depending on the circumstance, either be unanimous or by majority. Where a jury cannot reach a unanimous verdict, two preconditions must be met before the trial judge may accept a majority verdict of 11 to one.[115] First, the time allowed for jury deliberation must be reasonable, having regard to the nature and complexity of the case, with the minimum time being eight hours.[116] Secondly, the court needs to be satisfied that the jury is unlikely to reach a unanimous verdict after examining one or more jurors on oath.[117] The two provisions need to be followed strictly before a majority verdict can be accepted.[118]

4.73 The availability of majority verdicts in the circumstances prescribed presents particular problems for the perseverance or "Black" directions[119] that the trial judge must give to a jury if the jurors report that they are unable to reach a unanimous verdict.

4.74 A perseverance direction involves the trial judge instructing the jury to continue to deliberate in order to reach a verdict. The model perseverance direction suggested for circumstances where the preconditions for majority verdicts have not been met emphasises that the jury must continue the attempt to reach a unanimous verdict.[120] The trial judge may state that "the circumstances in which I may take

114. *CTM v R* (2007) 171 A Crim R 371, [48].

115. *Jury Act 1977* (NSW) s 55F(2), s 55F(3)(a)(b).

116. *Jury Act 1977* (NSW) s 55F(2)(a).

117. *Jury Act 1977* (NSW) s 55F(2)(b).

118. Simply focusing on the minimum eight hours without regard to the reasonable time for jury deliberation that should be allowed is insufficient: *AGW v R* [2008] NSWCCA 81, [23]; *Hanna v R* [2008] NSWCCA 173, [62]-[72]; *RJS v R* [2007] NSWCCA 241.

119. Derived from *Black v The Queen* (1993) 179 CLR 44, 51.

120. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (October 2008) [8-070].

a majority verdict have not yet arisen and you should still consider that your verdict of guilty or not guilty must be unanimous".[121]

4.75 The encouragement of unanimous verdicts is considered important. Unanimous verdicts promote deliberation and provide a degree of assurance that the opinions of each of the jurors will be heard and discussed. It also reduces the danger of hasty and unjust verdicts.[122]

4.76 There is debate whether it is appropriate for a judge to mention the existence of a majority verdict before the preconditions are satisfied and whether mentioning it constitutes a miscarriage of justice.[123]

4.77 Some cases have considered the appropriateness of the trial judge referring to the imminent approach of the time where a majority verdict may be accepted. For example, in Victoria, it has been suggested that, when the conditions for majority verdicts have not been met, the trial judge may be wiser not to mention "the possibility of taking a majority verdict" when the jury is sent back to persevere in its deliberations.[124] In NSW, it has also been held that the trial judge must not undermine the effect of a Black direction by foreshadowing the possible acceptance of a majority verdict.[125] These decisions are consistent with the position that it is important that the jury be free to deliberate without any pressure being placed on it.[126]

4.78 In a recent Court of Criminal Appeal case, counsel for the accused argued that the judge's use of the word "majority" may have confused the jury.[127] In that case, the trial judge used the term "majority verdict", but later clarified the term by specifying that the majority needed to be 11 out of 12, and twice mentioned that the circumstances in which he could take a majority verdict had "not yet arisen".[128]

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121. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (October 2008) [8-070].
122. *CEV v R* [2005] NTCCA 10, [16].
123. *Ngati v R* [2008] NSWCCA 3, [25].
124. *R v VST* [2003] VSCA 35, [38].
125. *RJS v R* [2007] NSWCCA 241, [22].
126. *Black v The Queen* (1993) 179 CLR 44, 50.
127. *Ngati v R* [2008] NSWCCA 3, [24]. There is no direct reference to the term 'majority verdict' in any of the model directions relating to the jury's verdict that are given before the jury retires: Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (October 2008) [3-600], [7-020], [7-030].
128. *Ngati v R* [2008] NSWCCA 3, [22].

4.79 The Court declined to determine the general question of whether mentioning the existence of majority verdicts in the context of a Black direction could lead to a miscarriage of justice.[129] In the case in hand, the Court held that a simple reference to the availability of a majority verdict in certain circumstances did not undermine the direction to continue to attempt to reach a unanimous verdict. There was held to be no confusion as the trial judge twice informed the jury that the circumstances for a majority verdict had not arisen.[130]

4.80 One outstanding question is whether the existing directions in the *Bench Book*, in not clarifying what is meant by a majority verdict, may also be confusing to jurors, who may, for example, assume that a majority of seven to five may ultimately be acceptable. This may affect the dynamic of their deliberations.

ISSUE 4.10

(1) Are there any circumstances in which a perseverance or "Black" direction should refer to the possibility of a majority verdict?
(2) If so, how should the possibility of a majority verdict be referred to?

129. *Ngati v R* [2008] NSWCCA 3, [25]-[26]. See also *Hanna v R* [2008] NSWCCA 173, [74].

130. *Ngati v R* [2008] NSWCCA 3, [27]-[29].

5. Directions about external influences

- Extra-curial influence
- Extra-curial investigations

5.1** This chapter focuses on judicial directions regarding inappropriate external influence upon jurors.

5.2 Part of the challenge of addressing external influences upon jurors is combating jurors' sense that those outside the trial process, whether it be the media, the internet or friends and family, might usefully contribute to a juror's task. Where jurors otherwise lack a framework and appropriate techniques for filtering, processing and organising evidence pre-deliberation, high quality juror induction may assist them to cope with exposure to large amounts of often contradictory and commonly contested information.[1] Failure to cope in this sense or to understand the process more broadly can affect the quality of jury deliberations and may also give rise to inappropriate juror conduct. For these reasons, there is a strong case for recognising that a judge's opening remarks present the best opportunity for introducing jurors to a criminal trial's basic rules of engagement, and providing useful advice on the task before them.

5.3 Judicial instruction and direction on jury fact-finding requires care.[2] This judicial sensitivity stems from jurors' undeniable autonomy over their deliberations. Jurors may "organise their individual processes of reasoning" and their group discussions "in whatever manner appears to them to be convenient".[3] If a judge intrudes upon the jurors' sole domain, there is a danger that the trial will miscarry. But jurors do not have unfettered latitude on fact-finding. There are some topics that judges are expected to bring to a jury's attention because they address matters that are not negotiable for jurors. For example, in 2003, Justice Wood in *R v K*[4] described as customary that a trial judge should warn jurors to disregard publicity. His Honour indicated that this warning should be supplemented with a judicial direction that jurors not engage in independent research or inquiry.

5.4 Drawing the line between appropriate judicial assistance and unacceptable judicial intervention can be difficult, but there are some well-accepted conventions that operate. In particular, a trial judge must make clear to jurors that, within certain bounds, they are free to

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** *This chapter has been contributed by* ***Professor Jill Hunter*** *of the University of NSW.*

1. That is, other than through the Crown's opening address and where relevant, a defence opening statement.
2. See, eg, *Stanton v The Queen* (2003) 77 ALJR 1151; [2003] HCA 29; *Norris v R* (2007) 176 A Crim R 42; [2007] NSWCCA 235 (Howie J).
3. *Stanton v The Queen* (2003) 77 ALJR 1151; [2003] HCA 29, [35] (Gleeson CJ, McHugh and Hayne JJ).
4. *R v K* (2003) 59 NSWLR 431; NSWCCA 406.

approach their task as they wish, and that judicial suggestions on matters relating to the deliberation process are no more than that. Prescriptive language on matters squarely in the jurors' domain is incompatible with suggestion. Further, judges must ensure that parties' cases are fairly and unambiguously represented to the jury. These are not matters of controversy except in circumstances where a judge errs in the execution of these rules.

5.5 Trial judges are not required to instruct jurors on the basic rules of engagement in a particular way, but, at its most basic, jurors should receive from the judge at the commencement of the trial a statement of core responsibilities. The court in *Black v The Queen* provided a pithy statement of juror obligations, albeit in a context removed from the induction process.

> Each of you has sworn or affirmed that you will give a true verdict according to the evidence. That is an important responsibility. You must fulfil it to the best of your ability. Each of you takes into the jury room your individual experience and wisdom and you are expected to judge the evidence fairly and impartially in that light.[5]

5.6 A more extensive reflection of a standardised judicial instruction at the commencement of a trial is provided in the Judicial Commission of NSW's *Criminal Trial Courts Bench Book* (the "*Bench Book*"). This contains a guideline empanelment instruction that includes general housekeeping matters, introductions to legal personnel, and indicates to jurors their obligation to maintain strict confidentiality and the importance of avoiding speculation, bias and prejudice, including influence from outside sources, such as the media, friends or family.

5.7 An additional aspect relating to the issue of timing of directions is worth mention. This Consultation Paper has focused largely on judicial direction and instruction arising during a judge's summing-up. Because the summing-up is where judicial directions on matters of law and evidence naturally fall, it attracts the greatest concentration of appellate and other commentary. Indeed, but for rare observations such as referred to below in *R v K*,[6] there is relatively little judicial analysis of judicial instruction at the stage when jurors are inducted into the process and commence hearing the taking of evidence. For this reason, jury research studies are particularly important. The Australian Institute of Judicial Administration's (AIJA) study, *The*

5. *Black v The Queen* (1993) 179 CLR 44, 51.
6. See also *R v Skaf* (2004) 60 NSWLR 86; [2004] NSWCCA 37.

Jury Project,[7] provides some useful insight on this phase of judicial instruction to the jury. In addition, research from the New Zealand Law Commission study,[8] the *Prejudicial Publicity* survey,[9] the *Juror Satisfaction* study[10] and the UNSW Pilot Jury Study[11] also offer guidance regarding relevant juror attitudes and judicial practice.

5.8 *The Jury Project* study suggests a surprising diversity of practice regarding judicial induction of jurors across Australia. Noting that the judicial sample for NSW is relatively small,[12] overall judicial feedback on empanelment instruction tends to indicate that NSW trial judges' standard practice is to provide a more comprehensive instruction to jurors than the Australian average in almost every respect surveyed.[13] For example, the 23 NSW trial judge respondents reported almost universally that, like the Victorian judge respondents, their practice was to inform jurors of the nature of the trial and the role of the jury.[14]

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7 J Ogloff, J Clough, J Goodman-Delahunty and W Young, *The Jury Project: Stage 1 – A Survey of Australian and New Zealand Judges* (Australian Institute of Judicial Administration, 2006), 12; J Goodman-Delahunty, N Brewer, J Clough, J Horan, J R P Ogloff, D Tait, and J Pratley, *Practices, Policies and Procedures that Influence Juror Satisfaction in Australia*, Research and Public Policy Series No 87 (Australian Institute of Criminology, 2008).

8. W Young, N Cameron, Y Tinsley, *Juries in Criminal Trials: Part Two*: *A Summary of Research Findings*, New Zealand Law Commission Preliminary Paper 37 (1999) vol 2.

9. M Chesterman, J Chan and S Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (Law and Justice Foundation of NSW, 2001).

10 J Goodman-Delahunty, N Brewer, J Clough, J Horan, J R P Ogloff, D Tait, and J Pratley, *Practices, Policies and Procedures that Influence Juror Satisfaction in Australia*, Research and Public Policy Series No 87 (Australian Institute of Criminology, 2008).

11. J Hunter and D Boniface, with J Chan, M Chesterman and D Thomson, funded by the Law and Justice Foundation of NSW, awaiting publication, but see J Hunter and D Boniface, *Secret Jury Business: What Jurors Search For and What They Don't Get*, Conference Paper, British Society of Criminology, Huddersfield, England (July 2008).

12. See para 9.91.

13. Interestingly, NSW judges appear to be under the national average in jury instruction on the procedure for asking questions – only 26% of judges reported that they included this in their jury instructions, with 74% of judge respondents giving jurors the basic information that they may ask questions. At a national level, 54% of respondent trial judges reported that they inform jurors that they may ask questions, with 43% providing jurors with a description of the procedure for so doing.

14. All include comments regarding the role of the jury and all but two judges (91%) informed the jury on the nature of the trial.

However in SA,[15] just more than half of the 17 judge respondents indicated that they provide the jury with an explanation of the nature of the trial and only three-quarters inform jurors on the role of the jury.[16]

5.9 There are indications in both case law and from jury research studies that the rationale and the practical scope of some very important instructions relating to fact-finding, particularly those relating to jurors not engaging in extra-curial investigations and research, may not be reaching jurors. For this reason, there is a sound basis to believe that current practice may benefit from some reconsideration. Self-evidently, the effectiveness of judicial directions requires that they be comprehensive and that they be delivered clearly. It is particularly important that directions regarding forbidden behaviour and forbidden forms of reasoning be persuasive.

EXTRA-CURIAL INFLUENCE

Prejudicial publicity

5.10 Where jurors are influenced by media commentary, it threatens to rob the process of an intrinsically essential element of adversarial process – the right to test all evidence and to exclude unfairly prejudicial evidence. A package of mechanisms is currently available to limit the adverse impact of prejudicial publicity on the fairness of a trial. Most importantly, the law of *sub judice* restricts the publishing of potentially prejudicial material, ensuring that intense highly prejudicial coverage is relatively uncommon, although it sometimes still occurs.[17] Where the danger of prejudicial reactions by jurors may be intensified by local knowledge of a crime, the victim or the defendant, the court may order a change of venue of a trial.

15. Of 17 respondents, 55% informed the jury of the nature of the trial and 75% informed jurors of the role of the jury. Jurors in SA are, however, given general directions by a judge at the commencement of their jury duty and before being selected for any particular trial. WA judges responded indicating that, of 16 respondents, 63% informed the jury of the nature of the trial and 94% informed jurors of the role of the jury.
16. For the 49 New Zealand judicial respondents, the figure was 94% informed the jury of the nature of the trial, and 100% informed jurors of the role of the jury.
17. See generally M Chesterman, J Chan and S Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (Law and Justice Foundation of NSW, 2001).

5.11 Internet publications are the latest new-generation development in the area of external influence prejudicing jurors.[18] They can escape the notice of counsel and a trial judge. Obviously, where this occurs, there is no scope for legal sanction or corrective action such as specific judicial direction or submissions from counsel regarding threats to the fairness of proceedings.

Underbelly, prejudicial media and the Internet

5.12 In early 2008, there was no danger of the Victorian Supreme Court in *R v A* missing the 13-episode television series, *Underbelly*.[19] Its broadcast was preceded by an extravagant publicity campaign marketing its impending national broadcast just as the murder trial of a defendant described as A was about to commence. *Underbelly* depicted fictionalised versions of gangland killings and related crimes occurring in Melbourne some years earlier. It was promoted as a factual account, and it was found by the court that it relied upon dialogue that merged fact and fiction.[20] The series sought to explain why the deceased, referred to as "B", was murdered. The Victorian Court of Appeal held that *Underbelly* "depicted in detail the parts allegedly played by the accused [A], the deceased and a major witness in the intended trial".[21] It ordered that the applicant not publish the series in Victoria until the conclusion of A's trial.[22]

5.13 The situation following this ruling underscores the fact that, with the mass availability of Internet access and modern technology, the law's reach is less than that of a juror. The first episode broadcast in all states except Victoria in mid-February 2008.[23] It apparently attracted well over a million viewers across Australia. Internet commentator *Crikey* reported[24] that, within two hours of its first episode, one file-sharing network had already attracted more than

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18. See also, J J Spigelman, "The Internet and the Right to a Fair Trial" (6th World Wide Common Law Judiciary Conference, Washington DC, June 2005); V Bell, "How to Preserve the Integrity of Jury Trials in a Mass Media Age" (Supreme and Federal Courts Judges' Conference, January 2005).
19. From J Silvester and A Rule, *Leadbelly: Inside Australia's Underworld Wars* (Floradale Productions/Sly Ink, 2004).
20. *General Television Corporation Pty Ltd v DPP* [2008] VSCA 49, [32].
21. *General Television Corporation Pty Ltd v DPP* [2008] VSCA 49, [37].
22. The Court of Appeal noted that any person who, with knowledge of this order, sought deliberately to frustrate the effect of it could be liable for contempt of court, [65], [67].
23. The last episode was broadcast in early May 2008.
24. "A Torrent of Interest in Downloading Underbelly" (14 February 2008) Crikey «*http://www.crikey.com.au/Media-Arts-and-Sports/20080214-A-torrent-of-interest-in-downloading-Underbelly.html*» at 26 November 2008.

6,500 downloads. *Crikey*[25] observed that their own online poll on 5 May 2008 attracted 263 Victorian responses in a day, with 69.8% saying that they had seen the series, and the vast majority said they had watched a "downloaded, burned or bootlegged copy". The remaining 2.6% reported watching it on television.[26]

5.14 The 2001 *Prejudicial Publicity* survey provides insight into jurors' reactions to prejudicial publicity, chiefly from traditional formats.[27] The study involved interviewing 175 jurors and the vast majority of trial judges and counsel in 41 trials held between 1997 and 2000 where significant publicity occurred before or during the trial. In almost all trials, the judge provided the jury with a direction at the beginning of the trial (i) to avoid contact with, or (ii) to ignore the content of, pre-trial and in-trial publicity. The study captured a considerable majority of metropolitan Sydney trials attracting moderate to high levels of specific publicity for the relevant three-year period.[28] In terms of pre-trial publicity, the survey results indicated that reports of alleged offences created the most potential for juror recall of media reports, with recall occurring in 78% of the studied trials in which the media published a relevant report.[29]

5.15 Jurors were most likely to recall pre-trial publicity relating to: defendants who were well-known in the community independently of the trial process; or to offences which occurred locally to the jurors; or, thirdly, to publicity that jurors encountered close to or after the beginning of the trial.[30] In just over 50% of the 41 trials, at least one juror in each trial recalled pre-trial publicity that was discussed in the jury room. Unsurprisingly for a cohort of trials in which significant

25. T Hunter, "Crikey Poll: Seven in Ten Victorians Have Seen Underbelly" (6 May 2008) Crikey «*http://www.crikey.com.au/Media-Arts-and-Sports/20080506-Crikey-poll-Seven-in-ten-Victorians-have-seen-iUnderbellyi.html*» at 26 November 2008.
26. Of the 30.2% who had not seen *Underbelly*, "50.8% weren't interested, 24.6% couldn't find a copy, 16.4% didn't know how to download it, and 8.2% didn't want to be held in contempt of court".
27. M Chesterman, J Chan and S Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (Law and Justice Foundation of NSW, 2001).
28. Estimated as two-thirds of this category of trials occurring between 1997 and 2000.
29. M Chesterman, J Chan and S Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (Law and Justice Foundation of NSW, 2001) xiv.
30. M Chesterman, J Chan and S Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (Law and Justice Foundation of NSW, 2001) xiv.

media publicity was a prerequisite for inclusion in the study, the *Prejudicial Publicity* survey found that the large majority of interviewed jurors reported that they were aware of specific media publicity of the case occurring *before* and/or *during* their trial.[31] In the 34 trials that received media coverage *during* the trial, at least one or more jurors reported that they "kept in touch" with the media coverage and, in 32 of these trials, jurors reported that at least some discussion about that media commentary took place in the jury room.[32] Interviews revealed four jurors (approximately 2%) who acted contrary to judicial instructions by actively seeking out media coverage.[33] One juror, for example, especially ordered daily delivery of a newspaper that carried lengthy reports of the trial.

5.16 After a study of the safety of verdicts, incorporating the views of judge and counsel and features of the juror responses, the researchers concluded that the study provided "a relatively successful record of resistance to publicity". The researchers placed particular reliance on the importance of jury discussion and jurors' close scrutiny of evidence brought on by the requirement that the verdict be unanimous. Although the *Prejudicial Publicity* survey included jurors' exposure to Internet material, the rate of household Internet access has quadrupled in the eight years since 1998.[34] In 1998, less than 20% of households could access the Internet from home, compared with over 60% by 2007.[35] Australian statistics indicate that 70-80% of adults (aged between 18-54 years) use the Internet. Predictably, there is a bias in Internet usage to those with higher incomes and to those who are young. There is a significant dip in usage for those over 55 years of age, though the Australian statistics indicate that, on average, 50% of

31. 82%.
32. M Chesterman, J Chan and S Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (Law and Justice Foundation of NSW, 2001) [207]-[209].
33. M Chesterman, J Chan and S Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (Law and Justice Foundation of NSW, 2001) [207].
34. See Australian Bureau of Statistics, "Internet Access at Home" in *Australian Social Trends*, 4102.0 (2008) 1.
35. Figures from Australian Bureau of Statistics, "Internet Access at Home" in *Australian Social Trends*, 4102.0 (2008). The Bureau estimates that for the June quarter of 1997 there were 6.38 million home computers with just under 4% having access to the internet: see Australian Bureau of Statistics, *Australian Demographic Statistics*, 3101.0 (June Quarter, 1997) 18.

those in the 55-64 year age group use the Internet. The average usage rate drops to less than 20% for those over 65 years of age.[36]

5.17 Prior to the Internet, potentially prejudicial publicity and commentary was relatively controllable. Publications from outside the State rarely had mass penetration and publishers were relatively accountable to the law. However, as the *Underbelly* situation revealed, the increase of web-based information, entertainment and commentary, and household access to it, creates an exponential growth in problems relating to the management of criminal jury trials where there is only imperfect control of the media.

5.18 Self-evidently, as time passes, the penetration of Internet usage will increase in the population both by virtue of expanding innovation in technology, falling costs to consumers, and the continuing growth of information on the Internet, all intersecting with today's youth becoming tomorrow's adults.[37] Consequently, the next decade is likely to see a trend towards saturation of usage, and indeed reliance upon the Internet as the major general and specialist information resource for the vast majority of the juror population base.

5.19 In terms of judicial direction, the NSW judge respondents to the AIJA survey reported that their practice was universally to direct jurors regarding prejudicial publicity.[38] This strong commitment to including a judicial direction was found also in the *Prejudicial Publicity* survey trials, the New Zealand study and the UNSW Pilot Jury Study. In all 10 trials in the *UNSW Pilot Jury Study*, the trial judge specifically referred to the Internet.

5.20 The *Prejudicial Publicity* survey examined jurors' reactions depending on whether they received a direction (i) to avoid contact with, or (ii) to ignore the content of, pre-trial publicity and publicity during the trial (referred to as "in-trial publicity"). The researchers concluded that the instruction *to avoid* the coverage was only partially effective, but the instruction *to ignore* the content:

> would appear … to have been valuable – perhaps more so than has been professionally realised – in so far as it encouraged

36. These figures relate to data taken between 2004-05 and 2006-07, see Australian Bureau of Statistics, *Household Use of Information Technology, 2006-2007*, 8146.0 (2007).

37. Increase in access is likely given the current Federal government policy to develop open access high-speed broadband network to reach 98% of Australian homes and businesses.

38. J Ogloff, J Clough, J Goodman-Delahunty and W Young, *The Jury Project: Stage 1 – A Survey of Australian and New Zealand Judges* (Australian Institute of Judicial Administration, 2006) 46, Appendix B, Table 1.

> jurors to trust their own first-hand, individual recollections of the evidence and argument. It may have inspired jurors to be confident in their abilities in this regard and thereby encourage and confirm the reaction to media reports of the trial which we found to be quite common – namely, that they are inevitably incomplete and are often inaccurate, if not demonstrably biased.[39]

From this observation and the findings of the study, the researchers therefore suggested:

> that judicial instructions to juries regarding publicity should encourage [jurors] ... strongly to trust their own capacity to recall and understand the evidence and the issues to be resolved, rather than any version of these conveyed expressly or impliedly by media publicity, specific or generic.[40]

5.21 By way of contrast, the *Bench Book* contains the following suggested direction:

> If you have read or heard or have otherwise become aware of any publicity about the events with which this trial is concerned, or about the accused, it is of fundamental importance that you put any such publicity right out of your minds. Remember that you have each sworn an oath, or made an affirmation, to decide this case solely upon the evidence presented here in this courtroom and upon the basis of the legal directions I give to you. You would be disobeying that oath or affirmation if you were to take into account, or allowed yourself to be influenced by, information that has come to you from some other source.[41]

ISSUE 5.1

(1) Should directions better address the potential problem of jurors being influenced by prejudicial publicity by encouraging them to exercise independent judgment with regards to the evidence before them?
(2) Should the judicial direction omit reference to jurors avoiding pre-trial and in-trial publicity?

39. M Chesterman, J Chan and S Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (Law and Justice Foundation of NSW, 2001) [369].
40. M Chesterman, J Chan and S Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (Law and Justice Foundation of NSW, 2001) xxii.
41. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (October 2008) [1-520].

EXTRA-CURIAL INVESTIGATIONS

5.22 The problem of jurors engaging in extra-curial investigations extends beyond Australia, with cases arising across the common law world. The English, New Zealand and Australian authorities discussed below represent a selection of recent cases. They are not exhaustive, but they illustrate the various ways in which jurors can embark upon inappropriate extra-curial research.

5.23 Jury research studies reveal that the problem is not one limited to isolated acts or rogue jurors. The UNSW *Pilot Jury Study*[42] received detailed comments from a small sample of 39 jurors from 10 Sydney trials. Jurors responded to a scenario concerning a hypothetical juror. Five jurors across three trials[43] agreed – one strongly – that, where a hypothetical juror felt frustrated with the adequacy of the evidence in the trial, it would be very acceptable for the juror to take action outside the trial process to find out more about the accused, witnesses or the circumstances of the crime. Another juror in a fourth trial reported an actual instance of a juror using inadmissible sentencing material to advocate an acquittal. Twenty-five of the 39 juror respondents were interested in obtaining further information about the defendant.[44] In the *Prejudicial Publicity* survey,[45] the researchers uncovered five cases in which, unknown to counsel or the judge, one or more jurors became aware, it seems by active investigation, that the accused had prior convictions or criminal charges. This pattern was present also in the 1999 New Zealand Law Commission jury study where "in a couple of cases, [jurors] ... reported to the jury adverse information about the character of the accused which they had picked

42. J Hunter and D Boniface, with J Chan, M Chesterman and D Thomson, funded by the Law and Justice Foundation of NSW, awaiting publication, but see J Hunter and D Boniface, "Secret Jury Business: What Jurors Search For and What They Don't Get" (Conference Paper, British Society of Criminology, Huddersfield, England, July 2008).
43. Because juror "sleuthing" is a topic that does not permit neutrality, it is strongly arguable that the sixth juror in a fourth trial who responded neither agreeing or disagreeing with the hypothetical juror sleuthing scenario should be included as expressing an incorrect view.
44. Though not necessarily with a desire or willingness to engage in extra-curial investigation.
45. M Chesterman, J Chan and S Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (Law and Justice Foundation of NSW, 2001) [336].

up from local knowledge or media publicity" as well as five cases of juror extra-curial investigations.[46]

5.24 These studies indicate two identifiable features found in both case law[47] and in research findings. First, there is a tendency for jurors to engage in the equivalent of a background check on the accused. Secondly, there is a trend showing that judicial directions consistently fail to impact upon certain jurors.[48] The New Zealand Law Commission's jury study observed:

> By and large, juries simply did not seem to appreciate the importance, or did not understand the logic, of restricting themselves to the information presented by the parties and the judge.[49]

5.25 Likewise, the UNSW Pilot Jury Study found that the juror respondents who considered juror investigations very acceptable had also received judicial direction against juror investigations. While concern can be expressed at the seemingly repeated practice of jurors consciously failing to heed directions to refrain from investigations or research, this is not the only problem. Two cases, one from New Zealand, the other English, show that administrative slips can mix the message. In *R v Tuporo*,[50] court authorities permitted a juror to retain and use a laptop computer in the jury room, but removed jurors' mobile phones. In the English case of *R v Wilson*, juror curiosity was attracted to the multiple entries of the defendant's name on the court list in the jury assembly room.[51]

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46. W Young, N Cameron, Y Tinsley, *Juries in Criminal Trials: Part Two*: *A Summary of Research Findings*, New Zealand Law Commission Preliminary Paper 37 (1999) vol 2, [7.42].
47. For example, *R v Folbigg* [2007] NSWCCA 371 and *R v K* (2003) 59 NSWLR 431.
48. For example, *R v Marshall* [2007] EWCA Crim 35 and *Folbigg v R* [2007] NSWCA 371.
49. W Young, N Cameron, Y Tinsley, *Juries in Criminal Trials: Part Two*: *A Summary of Research Findings*, New Zealand Law Commission Preliminary Paper 37 (1999) vol 2, [7.45]; J Goodman-Delahunty, N Brewer, J Clough, J Horan, J R P Ogloff, D Tait, and J Pratley, *Practices, Policies and Procedures that Influence Juror Satisfaction in Australia*, Research and Public Policy Series No 87 (Australian Institute of Criminology, 2008) 139 observed that 17% of the 134 juror respondents were confused about what they could discuss with non-jurors The same percentage were confused about what they could discuss with each other.
50. *R v Tuporo* [2008] NZCA 12.
51. *R v Wilson* [2008] EWCA Crim 134.

The motivation to sleuth

5.26 Jurors' abilities to acquire information privately at little cost is an important factor influencing their desires to become private investigators. As indicated above, most Australians can now investigate and research on the Internet by broadband connection from home. The Australian Bureau of Statistics findings indicate that, in a single jury, representing an albeit imperfect sample, there will be between seven and eight jurors with Internet access from home. They are able to search the virtual world for information in complete privacy, employing habits that are likely to be second nature for the majority of them.[52] The English case of *R v Karakaya*,[53] like *R v K*[54] in NSW, stands as authority that judges ought to direct juries against making extra-curial investigations. Both cases involved jurors gaining access to inadmissible material on the Internet. In *Karakaya*, a sexual assault case, the Court of Appeal described material found in the jury room as "of a campaigning nature". It presented in strident terms the view that "people were too frequently acquitted wrongly of such offences". In allowing the appeal, the Court of Appeal observed that "the material might have served to undermine the jury's acceptance of the judge's summing-up and directions of law".[55] In *R v K*, the material was similarly acquired from an unreliable Internet site.[56]

5.27 A recurring feature is that jurors do not believe they have enough information. Allied to this is their motivation to research beyond the evidence because they are anxious about making sure their verdict is "right", a feature we will return to shortly. In *R v Skaf*, the foreman told the court, "I only went to the park to clarify something for my own mind. I felt I had a duty to the court to be right".[57] In England in 2008, there have been two widely-reported instances of trials collapsing because of juror investigations.[58] In one, a manslaughter prosecution, the judge was alerted to the juror

52. See Australian Bureau of Statistics, "Internet Access at Home" in *Australian Social Trends*, 4102.0 (2008).
53. *R v Karakaya* [2005] 2 Cr App R 5.
54. *R v K* (2003) 59 NSWLR 431; [2003] NSWCCA 406.
55. *R v Karakaya* [2005] 2 Cr App R 5, [11] (Judge LJ).
56. That is, not publicly available law databases such as Austlii «*http://www.austlii.edu.au*» or sites such as «*http://www.crimenet.com.au*». See also *R v Cogley* [2000] VSCA 231.
57. *R v Skaf* (2004) 60 NSWLR 86; [2004] NSWCCA 37, [204].
58. R Verkaik, "Collapse of Two Trials Blamed on Jurors' Own Online Research" (20 August 2008) *The Independent* «*http://www.independent.co.uk/news/uk/home-news/jurors-internet-investigations-blamed-for-collapse-of-trials-902892.html*» at 27 November 2008.

misbehaviour when one of the jurors sent the judge a Google Earth representation of the alleged crime scene with a list of 37 questions about the case. This example, like the case of the foreman in *R v Skaf* and anecdotal views and jury research findings, strongly supports the view that the jurors who consider private investigation acceptable do not believe it to be wrong.

5.28 On many occasions, it seems jurors seek to check evidence or clarify points of law.[59] In New Zealand, recent cases address Internet searches and the more traditional approach of jurors asking others. In *R v Absolum*,[60] a juror was reported to have spoken to two people unconnected with the case regarding aspects of the evidence before the court. The New Zealand Court of Appeal, in *R v Harris*,[61] addressed a similar situation to that in *Karakaya*. Court officers found pages printed from a US Internet site, *www.answers.com*, in the jury room. The information described "beyond reasonable doubt" and "burden of proof" in a way that did not reflect New Zealand law.

5.29 This raises the question as to why judicial communications, including the specific judicial direction, are failing in key respects. What might motivate the jurors to believe that they need more information than that presented at trial, and that it is very acceptable to research or investigate the trial, despite direction to the contrary? As indicated above, one factor is undoubtedly the fact that an effective direction must counter more than juror access to a library book, a newspaper or a movie.

5.30 The messages sent by popular culture are no doubt a prominent motivator. Law and legal drama as entertainment has been part of Anglophone culture at least since Gilbert and Sullivan's productions such as *Trial by Jury*. Film depictions of crime investigation dramas date back to *Sherlock Holmes* literature, and most pertinently *Twelve Angry Men*. They first brought the genre of entertainment based on fictional crime and fictional trials into the lounge rooms of prospective jurors. The deluge of criminal investigation TV programs has enhanced concern. *Rumpole of the Bailey, Cracker, The Bill, Foyle's War, Agatha Christie's Poirot, Dalziel & Pascoe, Columbo, The Practice, Law & Order, Cold Case* and *Blind Justice, Blue Murder,*

59. In *Burrell v R* [2007] NSWCCA 65 (location of Guyra in NSW); in *Folbigg v R* [2007] NSWCCA 371 (retention of body heat in a deceased baby); in *R v Templeton* [2006] NZCA 158 (a juror was found reading photocopied pages from a law text); in *R v Forbes* (2005) 160 A Crim R 1; [2005] NSWCCA 377 (a murder trial involving ballistic evidence, a juror was found with a book, *Guns and Gunsmiths* and a brochure about ammunition).
60. *R v Absolum* [2003] NZCA 197.
61. *R v Harris* [2006] NZCA 273.

Crime Investigation Australia, *Underbelly*, and even a whole cable TV channel through Foxtel's *Crime & Investigation Network*, speak to today's jurors. The impact of these forms of entertainment was underscored in the 2004 Home Office report.[62] Forty nine percent of the juror respondents in this study reported TV drama as influential in shaping their views of the court system. Some made special reference to shows like *Kavanagh QC* and *The Bill*. Fifty five percent cited TV news in the same context, with 14% citing film.

5.31 A good percentage of fiction presents role models from every walk of life who by-pass conventional policing or justice and uncover key evidence missed by the professionals. These amateur investigators are victims, relatives, Henry Fonda, Hercule Poirot or Miss Marples. Popular culture may educate jurors to have false expectations that trials involve clear uncontested "facts". Finally, drama rarely puts the prosecution to proof. It searches out the truth.[63]

Current judicial practice

5.32 In the AIJA survey of judicial and court practice, only 43% of Australian judge respondents self-reported that they directed jurors not to conduct their own investigations or visit the crime scene.[64] The AIJA researchers suggested that a reason for "these relatively low [national] figures is that judges may be concerned that by telling jurors not to access certain material, at least one of them may be encouraged to do so".[65] The proliferation of evidence that jurors are tempted to engage in Internet searches suggests that silence on the point is inappropriate.[66] In NSW, 100% of the 23 participating judges indicated that they direct jurors not to conduct private investigations. This high rate is no doubt in response to the Court of Criminal Appeal's judgment in *R v K*.[67]

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62. R Matthews, L Hancock and D Briggs, *Jurors' Perceptions, Understanding, Confidence and Satisfaction in the Jury System: A Study in Six Courts* (United Kingdom, Home Office, 2005).
63. See also N J Schweitzer and M J Saks, "The CSI Effect: Popular Fiction About Forensic Science Affects the Public's Expectations About Real Forensic Science" (2007) 47 *Jurimetrics* 357; S Cole and R Dioso-Villa, "CSI and Its Effects: Media, Juries, and the Burden of Proof" (2007) 41 *New England Law Review* 435.
64. Compare 57% of New Zealand judges.
65. J Ogloff, J Clough, J Goodman-Delahunty and W Young, *The Jury Project: Stage 1 – A Survey of Australian and New Zealand Judges* (Australian Institute of Judicial Administration, 2006) 19.
66. V Bell, "How to Preserve the Integrity of Jury Trials in a Mass Media Age" (Supreme and Federal Courts Judges' Conference, January 2005).
67. *R v K* (2003) 59 NSWLR 431; [2003] NSWCCA 406.

5.33 However, a key issue is the content of any direction. It may be that judicial directions focus more heavily on command at the expense of reasoned explanation. The AIJA study found that, while the NSW judges reported universally that they give juries a direction that they not research or investigate, only 78% gave the jury reasons. The UNSW Pilot Jury Study found that judicial directions in its 10 trials were highly variable in the explanation of why juror investigations were unacceptable, to the extent that in two trials virtually no reasons were given.

5.34 Some jurisdictions, including NSW, have made juror research and investigations a serious criminal offence.[68] The criminalisation of this juror misconduct applied for nine of the 10 trials in the UNSW Pilot Jury Study, but it did not alter the attitudes of the jurors who agreed that extra-curial investigations could be very acceptable, nor did it stop the juror who was reported by a respondent to have brought inadmissible material into the jury room.[69] It is notable that only in three of the 10 trials in the study did the trial judge tell the jury that it was a crime to engage in private investigations and research. None mentioned that it was a serious crime.[70]

5.35 The Judicial Commission has responded to the findings of the UNSW Pilot Jury Study with a number of enhancements to its guideline direction. It has included clear reference to the "serious offence" where a juror makes an inquiry, mentioned the danger of error, illustrated it by examples, and set out a comprehensive statement countering jurors' misunderstanding of their role and the role of the trial:

> The obligation is on the Crown to put evidence before the jury in seeking to prove beyond reasonable doubt the accused's guilt. The accused has no obligation to produce any evidence or to prove anything. What all of this means is that it is not your role

68. *Jury Act 1977* (NSW) s 68C: "(1) A juror for the trial of any criminal proceedings must not make an inquiry for the purpose of obtaining information about the accused, or any matters relevant to the trial, except in the proper exercise of his or her functions as a juror" Maximum penalty: 50 penalty units or imprisonment for 2 years, or both. The section commenced in December 2004.
69. *Burrell v R* [2007] NSWCCA 65 (location of Guyra in New South Wales); *Folbigg v R* [2007] NSWCCA 371 (retention of body heat in a deceased baby, information from the Internet).
70. The *Bench Book*, until August 2008, included the offence within its guideline direction but only by extracting the relevant *Jury Act* section. While this might prompt a judge to consider including reference to the criminality of the conduct in his or her instructions to the jury, it would not aid a judge with a useful form of words.

> to try and determine where the truth lies. Jurors have indicated in studies and surveys that have been done in the past that they sometimes feel frustrated by a lack of evidence about some aspect of a case. In some cases it has led jurors to make enquiries for themselves to try and fill in the gaps that they perceive in the evidence. From what I am about to say to you, I trust you will understand that this is absolutely impermissible and that it is unfair to both the Crown and the defence. I want you to clearly understand that making enquiries about anything to do with the case is not your function. Your function is, as I have said, to decide on the evidence that has been placed before you, whether or not the Crown has proved the guilt of the accused beyond reasonable doubt.
>
> … It is of fundamental importance that your decision in this trial is based only upon what you hear and see in this courtroom … It is a serious criminal offence for a member of the jury to make any enquiry for the purpose of obtaining information about the accused, or any other matter relevant to the trial …[71]

5.36 The Judicial Commission recommends that directions on fundamental jury obligations, such as resisting extra-curial influences, should incorporate clear rationales and explanations of why these rules exist and why compliance is important within the broad framework of the criminal trial.

ISSUE 5.2

How much detail, context and explanation should directions include regarding the dangers of extra-curial influences?

71. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (August 2008) [1-520].

6. The components of the summing-up

- The Cussens formula
- Elements of the offence charged and defences
- Summary of the evidence
- Summary of the prosecution and defence cases
- Judicial opinion on the merits of the case

6.1 The trial judge's summing-up is delivered to the jury after the addresses of counsel and before the jury retires to consider its verdict. Its primary aim is to equip the jury for its task in reaching a verdict. Jurors should, therefore, be able to understand it.[1] This point has been emphasised in numerous judgments. For example, Chief Justice Spigelman has observed:

> A summing-up to a jury is an exercise in communication between judge and jury... It is, as has frequently been emphasised, desirable that a judge employs easily understood, unambiguous and non-technical language.[2]

6.2 The summing-up involves a combination of directions and narrative. The order in which various parts of the summing-up are interlinked and presented to the jury will depend on the requirements of the individual case being tried. The central components of the summing-up generally include directions on:

- the role of the jury;[3]
- the onus and standard of proof;[4]
- the legal ingredients of each count;
- any defences raised by the accused; and
- any general matters of law which require direction (cautions, comments and warnings).[5]

1. *Jenkins v The Queen* (2004) 79 ALJR 252, 257, citing *Alford v Magee* (1952) 85 CLR 437, [28]. See also A M Gleeson, "The State of the Judicature" (35th Australian Legal Convention, Sydney, 25 March 2007) 10. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria*, Final Report (1997) vol 3, [2.200]; Law Reform Commission of Canada, *The Jury*, Report 16 (1982) 84; *R v Adomako* [1995] 1 AC 171, 189 (Lord Mackay); *R v Landy* (1981) 72 Cr App R 237; *R v McGreevy* (1973) 57 Cr App R 424, 430, quoting Lord Lowry of NI; "Principles of Summing-up" (1999) 63 *Journal of Criminal Law* 422, 424; *Zoneff v The Queen* (2000) 200 CLR 234, [55], [65].
2. *R v Forbes* (2005) 160 A Crim R 1; [2005] NSWCCA 377, [79]. See also *Re Attorney-General's Reference (No 3 of 1994)* [1998] AC 245, 272; *R v Adomako* [1995] 1 AC 171, 189.
3. See para 4.14-4.16.
4. See para 4.21-4.37.
5. See ch 7 and ch 8.

6.3 The summing-up also generally includes:

- an outline of the nature of the prosecution's case;
- reference to the evidence as it relates to the legal issues and the defences raised; and
- a summary of the arguments of counsel.[6]

It may also include the judge's opinion on the merits of the case.

6.4 This chapter considers some of the ways in which judges address many of these components.

THE CUSSENS FORMULA

6.5 The guiding principle for approaching the task of summing-up in Australia is said to derive from statements of the Victorian judge, Sir Leo Cussens:

> The late Sir Leo Cussens insisted always most strongly that it was of little use to explain the law to the jury in general terms and then leave it to them to apply the law to the case before them. He held that the law should be given to the jury not merely with reference to the facts of the particular case but with an explanation of how it applied to the facts of the particular case. He held that the only law which it was necessary for them to know was so much as must guide them to a decision on the real issue or issues in the case, and that the judge was charged with, and bound to accept, the responsibility (1) of deciding what are the real issues in the particular case, and (2) of telling the jury, in the light of the law, what those issues are.[7]

6.6 The High Court and the NSW Court of Criminal Appeal have supported this approach and have established a model which requires the trial judge to set out so much of the law as is relevant to the jury's decision; explain how the jury may apply this law to the evidence; and summarise the relevant evidence and the relevant arguments put by counsel as they relate to each of these issues.[8]

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6. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (October 2008) [7-000].
7. *Alford v Magee* (1952) 85 CLR 437, 466 (Dixon, Williams, Webb, Fullagar and Kitto JJ).
8. *R v Zorad* (1990) 19 NSWLR 91, 105. See also *Alford v Magee* (1952) 85 CLR 437, 466; and *Holford v Melbourne Tramway and Omnibus Co Ltd* [1909] VLR 497, 522-523 (Cussens J).

6.7 The authorities also generally state that a summing-up should provide only so much detail as is necessary and that this will depend on the circumstances of the particular case.[9]

6.8 The general view is that summings-up have failed to achieve the aim of being succinct statements of the law and contain only so much other material as is necessary to explain to the jury its task.[10] The general view also appears to be that the problem has become greater in more recent times. For example, in respect of the summary of the law, one judge of the NSW Court of Criminal Appeal observed in 1990:

> It seems to me that it would be regrettable if trial judges have come to feel themselves under pressure to deliver to juries complex lectures on the law. It is my recollection that it used to be the approach of trial judges in very many cases to make no attempt to give the jury lengthy explanations of the law but simply to state for the jury in simple terms the issues which by the application of the law to the evidence given were thrown up for their decision and the consequence, in terms of verdict, of the way in which those issues might be decided.[11]

ELEMENTS OF THE OFFENCE CHARGED AND DEFENCES

6.9 The trial judge must sum up the law as it applies to the case before the court. This includes a summary of the elements of the offence charged and the elements of any defences available. The best practice is generally agreed to be that judges outline no more of the law than is necessary for the jury to come to an understanding of what is required of it.[12]

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9. *Alford v Magee* (1952) 85 CLR 437, 466; *Holford v Melbourne Tramway and Omnibus Co Ltd* [1909] VLR 497, 522-523 (Cussens J); *Mohamed v R* [2008] NSWCCA 45, [26]-[35].
10. See, eg, *R v Lawrence* [1982] AC 510, 519 (Lord Hailsham LC); *R v Zorad* (1990) 19 NSWLR 91, 105; A M Gleeson, "The State of the Judicature" (35th Australian Legal Convention, Sydney, 25 March 2007) 9; F H Vincent, "The High Court v The Trial Judge" in *28th Australian Legal Convention* (1993) vol 2, 265; Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria*, Final Report (1997) vol 3, [2.202]-[2.205].
11. *R v Williams* (1990) 50 A Crim R 213, 226-227 (Badgery-Parker J). See also *R v Flesch* (1987) 7 NSWLR 554, 558 (Street CJ).
12. *Directors of the Prudential Assurance Company v Edmonds* (1877) 2 App Cas 487, 507. See also *Swadling v Cooper* [1931] AC 1, 10; *R v Lawrence* [1982] AC 510, 519 (Lord Hailsham LC); *Mowlds v Fergusson* (1939) 40 SR (NSW) 311, 323. The question of the comprehensibility of directions relating to particular offences and defences and the elements thereof is discussed in ch 9.

6.10 The High Court has supported this approach as recently as 2002 when it affirmed that "it is not the function of a trial judge to expound to the jury principles of law going beyond those which the jurors need to understand to resolve the issues that arise for decision in the case".[13] In such contexts, model directions can prove helpful in setting out directions on the relevant law for the assistance of the jury.[14] However, there will be cases where model directions may not assist juries in understanding complex points of substantive law.[15]

6.11 Even if the judge fails to direct the jury expressly and comprehensively about all the elements of the offence charged, it may not involve a miscarriage of justice. This will depend on the circumstances of the case and the conduct of the trial.[16] So, in one case, the High Court observed that, "while greater elaboration was desirable", the directions were, "in the context of the particular trial, adequate to discharge the basic responsibility of identifying and communicating to the jury what, 'in the light of the law', 'the real issue' was". In support of this position, the High Court pointed to the fact that defence counsel "did not seek any further direction in relation to attempt either at the conclusion of the trial judge's summing-up or when the jury subsequently returned with a question on that subject" and also to the fact that the specific instances of alleged inadequacy were "either unpersuasive or insignificant".[17] However, while there may be no miscarriage of justice in such cases, an apparent failure to comply with this requirement will make it highly likely that an unsuccessful defendant will lodge an appeal.

6.12 Lord Justice Auld has argued for a stricter enforcement of the traditional distinction that the judge should be concerned with the law and the jury should be concerned with the facts. Adopting the view that the function of the judge should be "to protect the jury from the law rather than to direct them on it",[18] he suggested that a "fundamental, and practical review of the structure and necessary content of a summing-up" was required "with a view to shedding rather than incorporating the law and to framing simple factual

13. *R v Chai* (2002) 76 ALJR 628, [18]. See also *Alford v Magee* (1952) 85 CLR 437, 466; *Tully v The Queen* (2006) 230 CLR 234; [2006] HCA 56, [75]; *R v Mueller* (2005) 62 NSWLR 476, [4], [42]; *Matusevich v The Queen* (1977) 137 CLR 633, 638 (Gibbs J).
14. See ch 3.
15. Examples of these are discussed in ch 9.
16. *Holland v The Queen* (1993) 67 ALJR 946, 950-952; *R v Cao* (2006) 65 NSWLR 552; [2006] NSWCCA 89, [56].
17. *Holland v The Queen* (1993) 67 ALJR 946, 952.
18. E Griew, "Summing Up the Law" [1989] *Criminal Law Review* 768, 779.

questions that take [the law] into account".[19] One way of implementing this might be through "decision trees" and other deliberation aids.[20]

6.13 A further issue involves consideration of the point at which the judge can best provide the summary of the law to the jury – at the beginning of the trial, or before the addresses, or during the summing-up?[21]

ISSUE 6.1

What can be done to improve juror comprehension of the judge's summary of the relevant law in the summing-up?

SUMMARY OF THE EVIDENCE

6.14 It has generally been accepted that the best practice is for a judge to summarise the evidence in a way that relates the summary to the issues which the jury must determine,[22] and to avoid the tedious and unhelpful practice of reading slabs of transcript of the evidence of each witness in turn.

6.15 The Court of Criminal Appeal has commented that a judge does not comply with these requirements if he or she simply reads the relevant legal provisions to the jury and then:

> [reads] out the evidence which has been given chronologically, starting with the first witness and going through the evidence in chief, the cross-examination and then re-examination of each witness before turning to the next witness and so on. The idea of a summing-up is to present for the jury the issues of fact which they have to determine.[23]

6.16 The usefulness of relating the evidence to the issues before the jury is highlighted in the case of joint trials where evidence may be admissible against one accused, but not the other.[24] The NSW Court of Criminal Appeal has stated that, where more than one accused is tried in relation to the same offence, the trial judge should separate the

19. R E Auld, *Review of the Criminal Courts of England and Wales*, Report (2001) 535.
20. See para 10.36-10.41.
21. See para 6.55-6.59; para 9.90-9.103.
22. *Alford v Magee* (1952) 85 CLR 437, 466. See also A M Gleeson, "The Role of a Judge in a Criminal Trial" (Lawasia Conference, Hong Kong, 6 June 2007) 11; P Devlin, *Trial by Jury* (Stevens and Sons, 1956) 117-118.
23. *R v Zorad*, (1990) 19 NSWLR 91, 105.
24. See para 8.48-8.53.

evidence relevant to each accused and present the case made against each separately.[25] The Court observed:

> The jury should be specifically told of the evidence which they may consider against each individual accused, together with appropriate directions as to the legal principles involved. In this connection it is insufficient to rest such a direction upon the formula that each case must be considered separately, without further explanation.[26]

6.17 Numerous commentaries and judgments have counselled against judges giving lengthy chronological recitations of evidence, usually derived from their notes taken during the trial, as there is no requirement at law for a trial judge to provide a stand-alone summary of the evidence.[27] However, by the 1980s, it was the general practice in NSW for judges to provide a chronological summary of the facts. Such summaries were provided no matter how short the trial or simple the case.[28] This has contributed to trials increasing in duration.[29]

Limiting the summing-up of the evidence

6.18 One response to the problem is to impose limits on the extent to which the evidence is referred to in a summing-up. In formulating such an option, it should be considered that, by the time of the summing-up, the jury has heard the evidence, listened to the prosecution and defence addresses[30] and may also have access to the transcript of evidence.[31]

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25. *R v Towle* (1955) 72 WN (NSW) 338, 340.
26. *R v Towle* (1955) 72 WN (NSW) 338, 340.
27. See, eg, J F Stephen, *A History of the Criminal Law of England* (Macmillan and Co, 1883) vol 1, 455; *R v Lawrence* [1982] AC 510, 519 (Lord Hailsham LC); *R v Zorad* (1990) 19 NSWLR 91, 105.
28. NSW, Attorney General's Department, *Discussion Paper on Reforms to the Criminal Justice System* (1989) 62.
29. See also A M Gleeson, "The Role of a Judge in a Criminal Trial" (Lawasia Conference, Hong Kong, 6 June 2007) 12.
30. See the comments of Spigelman CJ in *R v Hannes* (2000) 158 FLR 359; [2000] NSWCCA 503, [106]: "It has long been established that it is not appropriate to subject a summing-up to an excessively fine analysis. In particular, it is not appropriate to do so without reference to the context of the trial, including the detailed submissions that have been made by the Crown and the representative of the accused immediately before the summing-up."
31. When they have requested it and the judge "considers that it is appropriate and practicable" to make it available: *Jury Act 1977* (NSW) s 55C.

6.19 Lord Justice Auld, in his 2001 review of the Courts of England and Wales, supported a limiting of the summing-up, and considered that the judge should not have to remind the jurors of the evidence in any great detail "save in particularly complex or long cases, or where the evidence has not been put before them in a manageable way".[32]

6.20 However, earlier in 1993, the Royal Commission on Criminal Justice in England and Wales had concluded that it would not be sensible to impose limits on a judge's summing-up on the facts as "the circumstances will vary from case to case".[33]

NSW legislation

6.21 A review of the NSW criminal justice system, in 1989, considered that the invariable practice of summarising the evidence led to some short trials taking longer than necessary. Despite there never having been a requirement that judges provide a chronological summary of the evidence,[34] the review suggested that judges should have the express discretion to dispense with an analysis of evidence in cases where the "evidence called in a trial has not been extensive".[35]

6.22 Following a positive response to the proposal, an amendment was introduced, in 1990, setting out the trial judge's discretion not to "summarise" the evidence "if of the opinion that, in all the circumstances of the trial, a summary is not necessary".[36] The second reading speech noted that the new provision was not intended to affect the requirement that the judge relate the evidence to the ingredients of the particular offence.[37] A trial judge remains obliged to refer in the summing-up to the evidence or the arguments by counsel, if the reference is necessary to ensure that the jury has an understanding of the relevant facts to be able to determine the matter.[38]

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32. R E Auld, *Review of the Criminal Courts of England and Wales*, Report (2001) 533.
33. England and Wales, *The Royal Commission on Criminal Justice*, Cm 2263 (1993) 124.
34. See *R v Smart* [1963] NSWR 706, 713; *R v Piazza* (1997) 94 A Crim R 459, 460 (Hunt CJ at CL).
35. NSW, Attorney General's Department, *Discussion Paper on Reforms to the Criminal Justice System* (1989) 63.
36. *Criminal Procedure Act 1986* (NSW) s 161, originally inserted as *Crimes Act 1900* (NSW) s 405AA by *Criminal Procedure Legislation (Amendment) Act 1990* (NSW) Sch 2.
37. NSW, *Parliamentary Debates (Hansard)*, Legislative Assembly, 24 October 1990, 9160, referring to *R v Zorad* (1990) 19 NSWLR 91, 105. See also *R v Piazza* (1997) 94 A Crim R 459, 460.
38. *Mohamed v R* [2008] NSWCCA 45, [28].

6.23 The amendment appears to have had some effect, at least with respect to shorter trials. In 1999, the Court of Criminal Appeal observed in relation to one case, where the evidence was concluded within two days, that in light of the new provision it was "entirely appropriate" for the judge to dispense with summarising the evidence.[39] In another 1999 trial, which lasted only three days and in which there were only six witnesses, the trial judge summed up without reference to the evidence. The Court of Criminal Appeal observed that this course was properly open to the judge under the new provision and noted:

> The need for, and the extent of, any exploration of the evidence and of the issues, in a summing-up, is to be assessed in the context of the trial, its length, its complexity and in light of the way that it has been run. Where the summing-up in a short trial has followed hard on the heels of a defence address, particularly where the appellant has not offered any evidence, very little is likely to be achieved by a reiteration of the evidence or of the points made by counsel in the closing addresses. To so require would be to credit the jury with little in the way of intelligence or common sense. An exercise of judgment is always required, on the part of the trial judge, to frame the summing-up in a way that is helpful to the jury.[40]

6.24 Notwithstanding these decisions, it is not uncommon for judges to continue to provide exhaustive analyses of the evidence, even in short trials, or for counsel to complain that the summing-up was unbalanced or deficient where this did not occur.[41]

ISSUE 6.2

What limits, if any, should be placed on the judge's summary of the evidence in the summing-up?

Written summaries of evidence

6.25 A question arises as to the extent to which the jurors should be provided with written summaries of the evidence to assist them in their deliberations. This needs to be considered in the context of the existing provisions allowing other types of written material to be given to the jury, including summaries of the law.

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39. *R v Williams* (1999) 104 A Crim R 260; [1999] NSWCCA 9, [37].
40. *R v Davis* [1999] NSWCCA 15, [24].
41. See, eg, *Mohamed v R* [2008] NSWCCA 45, [26]-[35]; *Thorne v R* [2007] NSWCCA 10, [49]-[59]; *R v MacLeod* (2001) 52 NSWLR 389; [2001] NSWCCA 357, [124]-[129]; *R v Hannes* (2000) 158 FLR 359; [2000] NSWCCA 503, [104]-[117].

6.26 The Court of Criminal Appeal, in the case of *R v Petroff*, held that a trial judge may provide the jury with a document recording the directions of law applicable to its task, provided that counsel were first given the opportunity to make submissions as to its contents and that it was made clear that the jury was not to substitute the written directions for the oral ones.[42] In practice, many judges hand such a document to the jury and then go through the directions with the jurors who will have the opportunity of reading the document at the same time, interpolating explanatory material where necessary. This position is now supported by the *Jury Act 1977* (NSW) which allows a trial judge to give written directions of law to a jury if he or she "considers that it is appropriate to do so".[43]

6.27 In some substantial cases — particularly circumstantial evidence cases — the jury would be assisted by having a document outlining each of the basic facts on which the Crown relies, provided that the document also incorporates the response of the accused (if any) to each such fact. While the courts have not completely closed off the possibility of such assistance,[44] in practice the Court of Criminal Appeal's decision in *Petroff* has been interpreted as prohibiting it. In many cases, this denies the jury a form of assistance that could be beneficial, particularly if the facts were marshalled in an orderly way in relation to the issues.[45]

6.28 In the trial of *R v Milat*, a wholly circumstantial case in which the evidence lasted four months, the Crown relied on a large number of basic factual issues, and the evidence said to establish or refute each of those facts was scattered throughout the evidence. The judge prepared a document for the purposes of the summing-up which set out the basic facts and the evidence said to establish each of them, together with the response of the accused to each item. Once the terms of the document were agreed, counsel for the accused properly

42. *R v Petroff* (1980) 2 A Crim R 101, 113-116.

43. *Jury Act 1977* (NSW) s 55B.

44. In *Tripodina v R* (1988) 35 A Crim R 183, 198 it was observed that "it is only in an exceptional case that such a document should be given to the jury dealing with matters of fact, and dealing only with the Crown case". See also *R v Healey* [1965] 1 All ER 365, 371. In *R v Vincent* (NSW CCA, No 353/1986, 19 November 1987, unreported), 11, Campbell J reserved for consideration the question whether "it is ever appropriate for the jury to be given as an aid to recollection a written summary prepared by the trial judge of the contentions of the Crown on any particular point".

45. See the comments of Street CJ in *R v Vincent* (NSW CCA, No 353/1986, 19 November 1987, unreported), 9, where he says that "in a complex case one can understand the degree of assistance that a jury may have from such a document".

objected to the document being given to the jury for its assistance, on the basis of the decision in *Petroff*. The summing-up lasted four days, in the course of which the document was read to the jury as the judge's own compilation of the factual issues that arose, both at the commencement of the section dealing with the factual issues and again at the conclusion of that section.

6.29 It has been suggested that *Petroff* imposes an unnecessary restriction on the assistance a trial judge can give to a jury, particularly in long trials or those with complex facts and multiple issues. Some of the trials of offences under the anti-terrorism legislation are likely to take even longer and have already been identified as posing problems for jury trials.[46]

6.30 There is currently no express provision, such as the provision that deals with summaries of the law, that allows a judge to supply a jury with a written summary of the evidence.[47] One reason for the absence of such a provision may be the problems that could arise from the inclusion in a written summary of "any elements of doubtful validity".[48] The Court of Criminal Appeal of England and Wales has also commented on the "immense care" that needs to be taken to ensure that any such summaries are "free from any miscopying, inaccuracy or false propositions".[49]

ISSUE 6.3

Under what circumstances should written materials be made available to juries that deal with the factual issues in a summing-up?

SUMMARY OF THE PROSECUTION AND DEFENCE CASES

6.31 Generally, it is accepted that judges should provide a brief outline of the arguments put by counsel in relation to the different issues in the case,[50] even though there is, strictly speaking, no "rule of law or of practice" which obliges them to do so.[51] It should also be noted that the judge does not need to provide the summary of the

46. M Clayfield, "Modern Trials Too Difficult for Juries" *The Australian* (10 October 2008), 6.
47. Even though a trial judge may allow the jury to receive transcripts of all or part of the evidence in certain circumstances: *Jury Act 1977* (NSW) s 55C.
48. *R v Vincent* (NSW CCA, No 353/1986, 19 November 1987, unreported), 9 (Street CJ); *Tripodina v R* (1988) 35 A Crim R 183, 197.
49. *R v Healey* [1965] 1 All ER 365, 371.
50. *R v Zorad* (1990) 19 NSWLR 91, 105; *R v Lawrence* [1982] AC 510, 519 (Lord Hailsham LC).
51. *R v Smart* [1963] NSWR 706, 713.

prosecution and defence cases in isolation from the summaries of each of the relevant legal elements and the related evidence.

6.32 The High Court has observed that the "requirement of fairness means that ordinarily the respective cases for the prosecution and the accused must be accurately and fairly put to the jury".[52] However, it has also stated that this requirement "does not oblige the judge to put to the jury every argument put forward by counsel for the accused".[53] What a judge must do in presenting the arguments of counsel will vary according to the circumstances of the case and the conduct of the trial.[54] According to the High Court, the inclusion of a particular argument depends upon whether it is "necessary to ensure that the jurors have sufficient knowledge and understanding of the evidence to discharge their duty to determine the case according to the evidence".[55]

6.33 The NSW Court of Criminal Appeal has further observed that the judge in summing-up is not relieved from the duty to assist the jury in understanding "what the critical issues of fact are upon application of the law to the particular case" by reason of counsel having already put their arguments in relation to it.[56]

Outlining the defence case

6.34 The trial judge, in summing up, must adequately present the defence case. Failure to do so, with respect to an important aspect of the defence case, will provide grounds for a successful appeal.[57] The trial judge in summing up must present the defence case sufficiently for the jury to understand what it is.[58] The judge's summing-up must also "hold an even balance" between the cases of the prosecution and the defence and present the defence case fairly.[59]

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52. *Domican v The Queen* (1992) 173 CLR 555, 561. See also *R v Checconi* (1988) 34 A Crim R 160, 173.
53. *Domican v The Queen* (1992) 173 CLR 555, 561. See also *King v R* [2008] NSWCCA 101, [80]-[86].
54. *R v Smart* [1963] NSWR 706, 713. See also *R v Checconi* (1988) 34 A Crim R 160, 173; *R v Courtney-Smith (No 2)* (1990) 48 A Crim R 49, 56; *R v Lowery (No 3)* [1972] VR 939, 948; *R v Melville* (1956) 73 WN (NSW) 579, 581.
55. *Domican v The Queen* (1992) 173 CLR 555, 561.
56. *R v Condon* (1995) 83 A Crim R 335, 347.
57. *R v Veverka* [1978] 1 NSWLR 478, 480.
58. *Dominguez v The Queen* (1985) 63 ALR 181, 187; *Domican v The Queen* (1992) 173 CLR 555, 561; *R v Veverka* [1978] 1 NSWLR 478, 482.
59. *Cleland v The Queen* (1982) 151 CLR 1, 10.

6.35 A simple defence case may require only a concise explanation.[60] In some cases, it may be appropriate to summarise the defence case as a "single and self-contained portion of the summing-up"; in other cases, it may be appropriate to deal with the defence points as they arise in relation to the prosecution's case.[61]

6.36 It has been suggested that the judge's duty to assist the jury in understanding the critical issues in the case (discussed above) should not be elevated to a "requirement that, in every case, regardless of its length or complexity, the trial judge must identify and repeat the points made by defence counsel".[62] In some cases, it may even be appropriate for the judge to refer the jury to the submissions that defence counsel have already made on the relevant points.[63]

6.37 The NSW Court of Criminal Appeal has also observed that a balanced summing-up cannot be achieved by attempting to strengthen a weak defence case at the expense of a strong prosecution case:

> If one case is strong and the other weak, then a balanced account inevitably will reflect the strength of one and the weakness of the other.[64]

Matters of law or arguments not put by the parties

6.38 A question also arises in the context of the summing-up as to whether the trial judge is under an obligation to include matters that the parties have not raised, such as alternative or lesser charges, or arguments in support of acquittal, or in support of defences. This raises the issue of the extent to which the judge is bound to include such matters in order to achieve a fair trial, and whether the inclusion of too much additional information will merely make the jury's task of coming to a verdict more difficult.

60. *Dominguez v The Queen* (1985) 63 ALR 181, 187.
61. *Dominguez v The Queen* (1985) 63 ALR 181, 187. See also *R v Veverka* [1978] 1 NSWLR 478, 481.
62. *R v Davis* [1999] NSWCCA 15, [24]. See also *Domican v The Queen* (1992) 173 CLR 555, 561.
63. *Cleland v The Queen* (1982) 151 CLR 1, 10; *R v Matthews* [1972] VR 3, 15.
64. *R v Ali Ali* (1981) 6 A Crim R 161, 164.

The defence case

> It is trite to observe that a judge is required to direct the jury on the issues as they have emerged in the trial.[65]

6.39 But what of issues that have not been raised during the trial, or possible lines of defence that have been expressly abandoned by the accused's counsel?

6.40 Putting to the jury defences or alternative offences that appear reasonably open upon the evidence, but have not been raised by defence counsel, is said to be "no more and no less than a recognition of the obligation of the trial judge to ensure that the accused person has a fair trial according to law".[66] Chief Justice Barwick observed:

> Whatever course counsel may see fit to take, no doubt bona fide but for tactical reasons in what he considers the best interest of his client, the trial judge must be astute to secure for the accused a fair trial according to law.[67]

This is particularly relevant where the defendant is denying that he or she did the act on which the offence is based, but also wishes to rely on evidence in the case which would permit an alternative defence and which would be difficult to raise in the final address without cutting down the primary line of defence. So, for example, where an accused has available alternative and necessarily conflicting defences, such as an alibi and self-defence, counsel may address only on the alibi case, but it will still be necessary for the judge to instruct the jury on self-defence.

6.41 Even where a defence that is reasonably open on the evidence is explicitly rejected by the defence counsel, as diminished responsibility was in *R v Cheatham*, the trial judge must leave the defence to the jury, in the interests of avoiding a miscarriage of justice.[68]

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65. *Douglas v R* [2005] NSWCCA 419, [84] (Simpson J) citing *Alford v Magee* (1952) 85 CLR 437, 466.
66. *R v Solomon* [1980] 1 NSWLR 321, 327.
67. *Pemble v The Queen* (1971) 124 CLR 107, 117. See also *R v Veverka* [1978] 1 NSWLR 478, 481. The issue has been considered more recently in *Gillard v The Queen* (2003) 219 CLR 1; *Gilbert v The Queen* (2000) 201 CLR 414; and *Fingleton v The Queen* (2005) 227 CLR 166, [81]-[84]. See also the recent decision of the House of Lords in *R v Coutts* (2006) 1 WLR 2154; but compare the approach taken in Scotland since *Johnston v HM Advocate* [1998] SLT 788 where the court considered that the "trial judge can be expected to deal with live issues, not with possible circumstances which are never raised in the trial", at 794. See also *R v Saad* (2005) 156 A Crim R 533, [88]-[110].
68. *R v Cheatham* [2000] NSWCCA 282, [63] (Spigelman CJ).

6.42 The best practice is for the trial judge to discuss with counsel, in the absence of the jury, what issues or "defences" should be put to the jury.[69] However, one consequence of the judge directing the jury on alternative "defences" which neither the prosecution or defence have dealt with in their addresses is that the judge has to take the running without the benefit of reminding the jury of the respective cases of the prosecution or defence on those matters.

6.43 The Court of Criminal Appeal has emphasised that the matters put to the jury must be open upon the evidence and that "it is not the judge's function to put to the jury unreal or fantastic possibilities":

> The criminal law should not be complicated by refined dissections of issues that must ultimately be presented to twelve laymen for their decision.[70]

It is also not the duty of the trial judge to put "alternative inferences of fact" which have been relied upon by neither the defence nor the prosecution and which do not raise an alternative defence.[71]

6.44 Where a defence is raised on the evidence, the trial judge should proceed on a view of the evidence most favourable to the accused. No matter how "weak and tenuous" it may seem to the trial judge, where an alternative defence is reasonably open on the evidence, the trial judge in a criminal trial is required to direct the jury on the alternative defence, even in situations where defence counsel has expressly abandoned it.[72]

6.45 If there is any doubt about the availability of a defence, the leading view is that the trial judge should allow the defence to go to the jury, and ask whether "there may be constructed a realistic hypothesis concerning the facts provided in evidence and available inferences which would give rise to the possibility for the defence being one for consideration".[73]

The prosecution case

6.46 Slightly different issues arise in the context of matters not raised by the prosecution as opposed to those matters that have not been relied upon by the defence.

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69. See, eg, *R v Kanaan* (2005) 64 NSWLR 527; [2005] NSWCCA 385, [88]-[89].
70. *R v Holden* [1974] 2 NSWLR 548, 551. See also *R v Clarke* (1995) 78 A Crim R 266, 230-231 and *Douglas v R* [2005] NSWCCA 419 (Simpson J).
71. *R v Brown* (1987) 32 A Crim R 162, 175.
72. *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645, 665 (Wilson, Dawson and Toohey JJ).
73. *R v Peisley* (1990) 54 A Crim R 42, 51 (Wood J). See also *R v PRFN* [2000] NSWCCA 230, [22] (James J).

6.47 While a trial judge's task of directing the jury as to the relevant law cannot be limited by what the prosecution raises,[74] it has been suggested that the better course in such circumstances is for the judge to raise the matters with counsel prior to final addresses, so that counsel from both sides may have the opportunity of addressing the jury on them.[75] This ensures that all the issues will be dealt with in the summing-up however counsel may wish to address the jury.

6.48 It has also been suggested that the trial judge should "normally refrain from advancing an argument in support of the Crown case that was not put by the Crown".[76] The reasons given for this are that such an action is "inconsistent with judicial impartiality" and it denies the parties the opportunity to address the argument.[77]

6.49 Even where the trial judge takes the view that, on the evidence, it was reasonably open to the jury to make an alternative finding, he or she may advance matters not opened or argued by the prosecution only where to introduce them would not amount to unfairness to the accused. Such unfairness may arise because the defence was not given the opportunity to test the evidence in relation to the matters during the course of the trial or to deal with the matters in its final submissions. Whether or not the raising of such matters amounts to unfairness to the accused will depend on the facts in each case.[78]

6.50 Likewise, it may amount to injustice to the accused if the trial judge raises an alternative verdict (where available[79]) at the conclusion of the prosecution's case,[80] or in the summing-up.[81] Where the raising of an alternative verdict is permitted, the judge ought to

74. *R v Kanaan* (2005) 64 NSWLR 527; [2005] NSWCCA 385, [46], [59], [61], [71]-[76].
75. *R v Solomon* [1980] 1 NSWLR 321, 336. See also *R v Tangye* (1997) 92 A Crim R 545, 556-559.
76. *R v Meher* [2004] NSWCCA 355, [87].
77. *R v Meher* [2004] NSWCCA 355, [88]. See also *King v The Queen* (1986) 161 CLR 423, 432.
78. See *R v Solomon* [1980] 1 NSWLR 321. See also *R v Wong* (1988) 37 A Crim R 385, 392, 393 re the necessity of the defendant knowing precisely the grounds upon which he or she is standing trial.
79. Where permitted by common law or statute, eg, *Criminal Procedure Act 1986* (NSW) s 162, *Drug Misuse and Trafficking Act 1985* (NSW) s 24(3), and *Crimes Act 1900* (NSW) s 34.
80. *R v Cameron* [1983] 2 NSWLR 66, 71.
81. *R v Pureau* (1990) 19 NSWLR 372, 376, 380.

direct the jury adequately as to the basis for such an alternative verdict.[82]

6.51 A particular instance where the authorities suggest that the trial judge should give directions, even though the defence expressly objects to that occurring, is in the case of an accused charged with murder where the various circumstances and partial defences could give rise to a manslaughter verdict.[83] It may be that some trial judges will be anxious to include such directions, on the most tenuous of bases, in order to appeal-proof the summing-up.[84] The question that arises is whether it should still be necessary in an adversarial justice system for trial judges to give these directions, particularly in cases where the defence prefers to go to the jury on the substantive count alone.

6.52 The second issue concerns whether it is either appropriate or necessary for judges, in an adversarial system of justice, to outline arguments or to direct the jury on the possible availability of defences or verdicts for lesser offences where they have not been raised by counsel. Such a consideration is significant, since it adds to the complexity of the trial in circumstances where counsel in the closing addresses have given no assistance to the jury on the alternatives. Perhaps greater attention in this respect should be given to the adversarial context in which criminal trials are conducted,[85] leaving it to the parties to settle the issues for determination.

6.53 However, in considering such questions, attention should be given to the High Court's position that the trial judge's duty to give appropriate directions on alternative verdicts "cannot be controlled by the tactics or manoeuvring" of the accused or his or representatives, at least where there is a possibility on the evidence of a finding of manslaughter .[86]

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82. *R v Pureau* (1990) 19 NSWLR 372, 374, 379; *R v Crisologo* (1997) 99 A Crim R 178, 187; *R v LJG* (2004) 148 A Crim R 558, [95].

83. In *R v Kanaan* (2005) 64 NSWLR 527; [2005] NSWCCA 385, [75] the NSW Court of Criminal Appeal summarised the requirements of the law in this regard.

84. Observations about the "appeal-proofing" of jury directions have also been made in relation to sexual assault trials: J Courtin, "Judging the Judges: How the Victorian Court of Appeal is Dealing with Appeals Against Conviction in Child Sexual Assault Matters" (2006) 18 *Current Issues in Criminal Justice* 266, 278.

85. The relevance of which, for example, in relation to warnings concerning identification evidence and lies was noted in *Dhanhoa v The Queen* (2003) 217 CLR 1, [20]-[22], [53].

86. *Varley v The Queen* (1976) 51 ALJR 243, 245 (Barwick CJ). See, generally, *R v Kanaan* (2005) 64 NSWLR 527; [2005] NSWCCA 385, [75]. However, the

ISSUE 6.4

(1) To what extent should a trial judge be able to put matters of law or arguments relevant to the defence that have not been raised or relied on by counsel for the defence?
(2) In what circumstances, if any, should a judge be able to put alternative charges even if the prosecution has not raised them?

Limiting the summing-up of the defence and prosecution cases

6.54 The question arises whether it is appropriate or necessary for the trial judge to repeat or summarise the arguments of trial counsel in circumstances where the jury has just had the benefit of their detailed and considered addresses. For example, in England and Wales, Lord Justice Auld proposed that, while a judge should always be required to give the jury an "adequate account" of the defence, the account should be "in more summary form than is now common".[87]

ISSUE 6.5

(1) In what circumstances, if any, should judges repeat or summarise the arguments of trial counsel?
(2) Should the judge's summary of the arguments of trial counsel be limited in any way?

Timing of the summing-up

6.55 Another possible approach to the question of the judge's summing-up of the arguments of counsel might be to change the timing of its delivery so that it occurs before counsel's addresses. This would have the beneficial effect of shortening the judge's summing-up because he or she would not need to repeat the arguments of counsel in however summary a form. It would also reduce opportunities for the judge to provide comments on the merits of the case.[88] Other beneficial outcomes would include the fact that the summing-up would provide a structure for the addresses of counsel and encourage them to stay on point.

6.56 A proposal of this sort goes beyond the support expressed by some commentators for the trial judge conferring with counsel before the closing addresses and the summing-up so that legal issues can be clarified and the final addresses proceed on the basis of some common

situation in relation to non-murder cases has been left open: *R v Kanaan* (2005) 64 NSWLR 527; [2005] NSWCCA 385, [85]-[89].

87. R E Auld, *Review of the Criminal Courts of England and Wales*, Report (2001) 537.

88. See para 6.61-6.69.

understanding. For example, Lord Justice Auld's proposals in England and Wales assumed the traditional order of speeches would be preserved. However, in proposing that counsel and the trial judge should confer before the final speeches and summing-up, he observed that "it is vital that [counsel] should be able to fashion their speeches knowing how [the judge] is going to put the matter to the jury".[89] Chief Justice Gleeson has similarly observed:

> It is important, for the orderly conduct of the trial, for counsel, before they address, to have a clear and common understanding of the way in which the case will ultimately be left to the jury. That, of course, may be influenced by the line of argument adopted in address, but it will also be influenced by the trial judge's view of the law to be applied.[90]

6.57 Such a practice has grown up in Queensland, where some judges now supply counsel with draft copies of the summing-up before the closing addresses. Counsel are then given an opportunity to make submissions on the draft before the judge provides a further draft, if required, which counsel can then take into account when delivering their closing addresses. The judge then delivers the summing-up to the jury with any amendments necessitated by counsel's addresses.

6.58 Concerns about the need for counsel to be aware of what the judge will raise in the summing-up can be met not only by requiring the judge to confer with the parties before the final addresses, but also by a model that allows the judge to deliver the summing-up before the final addresses of counsel.

6.59 Such a change would have a number of effects, including the fact that shorter and less repetitious summings-up will reduce the cognitive load on jurors. It may, by allowing the judge to set the framework for the closing speeches, invite jurors to give greater scrutiny of the arguments of counsel. It may also reduce the possibility that jurors see the judge as an arbitrator of the arguments of counsel and try to discern the judge's view of what the outcome of the trial should be.

6.60 Such a change would obviously require adjustments. For example, the judge would need to consult with counsel in advance about the content of the summing-up, and the judge would also

89. R E Auld, *Review of the Criminal Courts of England and Wales,* Report (2001) 529.

90. A M Gleeson, "The Role of a Judge in a Criminal Trial" (Lawasia Conference, Hong Kong, 6 June 2007) 9-10.

require the opportunity, if necessary, to correct any errors made by counsel during their addresses.

ISSUE 6.6

(1) Should the judge's summing-up be delivered before the addresses of counsel?
(2) If so, under what conditions?

JUDICIAL OPINION ON THE MERITS OF THE CASE

6.61 Some judges, when outlining the arguments put by counsel, add to that outline additional factual material which may be relevant to the particular issue. This additional material is often referred to as the judges' own "comment" on the evidence. There is a reasonable discretion available to the trial judge to express his or her views on the evidence. For example, in a recent High Court case, it was said that the trial judge may comment when appropriate on inconsistencies in, or omissions from a statement, or statements that an accused person has made out of court, or upon the differences (whether by way of additions, inconsistencies or omissions) between evidence that an accused person has given in court and statements that he or she has made out of court.[91]

6.62 Commentators have acknowledged that there is sometimes a fine line between setting out the evidence as it applies to the issues in the case and expressing an opinion on the facts of the case. For example, Sir James Stephen, writing in 1883, said:

> nor do I see how it is possible for [a judge to conceal his opinion from the jury] if he arranges the evidence in the order in which it strikes his mind. The mere effort to see what is essential to a story, in what order the important events happened, and in what

91. *RPS v The Queen* (2000) 199 CLR 620; [2000] HCA 3, [115] (Callinan J) but compare the joint judgment, at [42]. Sometimes, such statements can be quite strongly worded. See, for example, *McKinney v The Queen* (1991) 171 CLR 468, in which the High Court (at 476) directed that, in the absence of audiovisual recording of police interviews, the jury should be informed that it is comparatively more difficult for an accused person held in police custody without access to legal advice or other means of corroboration to have evidence available to challenge police evidence of confessional statements than it is for such police evidence to be fabricated, and that they should give careful consideration to the dangers involved in convicting an accused person in circumstances where the only (or substantially the only) basis for finding guilt beyond reasonable doubt is a confessional statement allegedly made in police custody, the making of which is not reliably corroborated (This was before the law was changed to require all such interviews to be recorded: *Criminal Procedure Act 1986* (NSW) s 281.)

> relation they stand to each other must of necessity point to a conclusion. The act of stating for the jury the questions which they have to answer and of stating the evidence bearing on those questions and showing in what respects it is important generally goes a considerable way towards suggesting an answer to them, and if a judge does not do as much at least as this he does almost nothing.[92]

W R Cornish, in his 1968 work on the jury, also observed that "the simple ordering of events in reviewing the evidence affords ample opportunity for the judge to show how strong or weak he considers the case presented by each side to be".[93]

6.63 Judicial comment on the evidence is generally a matter well within the judge's discretion, provided that it does not make the summing-up unbalanced. It has, therefore, generally been accepted that judges may express their own views on the evidence in a case,[94] and may even do so strongly,[95] subject to the condition that they make it clear that the evidence is a matter for the jury and that the jury should not be influenced by the expression of judicial opinion.[96] However, there are limits to judicial comment on the evidence, so that a trial judge cannot be too unbalanced in providing adverse comments, even where he or she directs the jury that they may ignore those comments.[97] The risk with any form of judicial "comment" is that the jury will see it as a binding direction of law,[98] or even mistakenly as a direction to convict.[99] Alternatively, if taken too far, or made too obvious, such comment may even be counterproductive, as Serjeant Sullivan suggested in the 1930s, when he said foremen of juries at the

92. J F Stephen, *A History of the Criminal Law of England* (Macmillan and Co, 1883) vol 1, 455.
93. W R Cornish, *The Jury* (Pelican, 1970), 123. See also P Devlin, *Trial by Jury* (Stevens and Sons, 1956) 117.
94. *R v Zorad* (1990) 19 NSWLR 91, 106-107.
95. *Taleb v The Queen* [2006] NSWCCA 119, [73]; *RPS v The Queen* (2000) 199 CLR 620; [2000] HCA 3, [42].
96. *Green v The Queen* (1971) 126 CLR 28, 34. See also N Madge, "Summing Up – A Judge's Perspective" [2006] *Criminal Law Review* 817, 824-826.
97. *R v Nation* (1994) 78 A Crim R 125; *Taleb v The Queen* [2006] NSWCCA 119.
98. For an example where error arose in this respect, see *R v Rajakaruna (No 2)* (2006) 15 VR 592.
99. Whether the decision in *Yager v The Queen* (1977) 139 CLR 28, which accepted the regularity of a directed verdict to convict, would withstand scrutiny today is questionable: see P Gillies and A Dahdal, "Directions to Convict" (2007) 31(5) *Criminal Law Journal* 295.

Old Bailey should be asked whether "they found for his Lordship or against him?"[100]

6.64 The illogicality and absurdity of the practice of judges directing the jury to ignore judicial comments on the evidence has been pointed out on numerous occasions.[101] In a recent NSW case,[102] Justice Handley, while preserving the existing rule, contended that, "as a matter of rationality", it was difficult to dispute the point of view once expressed by the British Columbia Court of Appeal that:

> It seems an absurdity for a judge after telling the jury the facts are for them and not for him, then to volunteer his opinions of facts followed then or later by another caution to the jury that his own opinion cannot govern them and ought not to influence them. If his opinion ought not to govern or influence the jury then why give his opinion to the jury.[103]

6.65 This is one of the points at which US practice departs sharply from that in Australia and England and Wales. The general practice in the US has been to limit or prohibit judges from expressing views on the evidence.[104] However, opinion in the US has not been uniformly in favour of such restrictions and there have been calls from time to time for a restoration of what is sometimes referred to there as the "English" system.[105]

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100. A M Sullivan, *The Last Serjeant: The Memoirs of Serjeant A M Sullivan, QC* (1952) 288.

101. See, eg, G Taylor, "Judicial Reflections on the Defence Case in the Summing up" (2005) 26 *Australian Bar Review* 70, 74; R J Farley, "Instructions to Juries – Their Role in the Judicial Process" (1932) 42 *Yale Law Journal* 194, 212.

102. *R v Heron* [2000] NSWCCA 312, [79]-[80].

103. *R v Pavlukoff* (1953) 106 CCC 249, 266 (British Columbia Court of Appeal).

104. See G Taylor, "Judicial Reflections on the Defence Case in the Summing Up" (2005) 26 *Australian Bar Review* 70, 74-76; N Madge, "Summing Up – A Judge's Perspective" [2006] *Criminal Law Review* 817, 823-824; D Wolchover, "Should Judges Sum Up on the Facts?" [1989] *Criminal Law Review* 781, 784-786. England and Wales, *The Royal Commission on Criminal Justice*, Cm 2263 (1993) 123. For the US historical background in this area, see: K A Krasity, "The Role of the Judge in Jury Trials: The Elimination of Judicial Evaluation of Fact in American State Courts from 1795 to 1913" (1985) 62 *University of Detroit Law Review* 595.

105. W R Cornish, *The Jury* (Pelican, 1970), 125-126. See also G Taylor, "Judicial Reflections on the Defence Case in the Summing Up" (2005) 26 *Australian Bar Review* 70, 74; D Wolchover, "Should Judges Sum Up on the Facts?" [1989] *Criminal Law Review* 781, 786; E R Sullivan and A R Amar, "Jury Reform in America – A Return to the Old Country" (1995) 33 *American Criminal Law Review* 1141, 1142-1144, 1157, 1160; W W Steele and

6.66 In recent times, there has been some indication that the High Court is taking a more cautious approach to the traditional position on judicial commentary. In one case, four judges observed:

> although a trial judge *may* comment on the facts, the judge is not bound to do so except to the extent that the judge's other functions require it. Often, perhaps much more often than not, the safer course for a trial judge will be to make no comment on the facts beyond reminding the jury, in the course of identifying the issues before them, of the arguments of counsel.[106]

Again, in another case, the same four stated:

> Unnecessary or extensive comments on the facts carry well-recognised risks of misstatements or other errors and of blurring the respective functions of the judge and the jury.[107]

6.67 The Court of Criminal Appeal has also recently suggested that the width of a trial judge's discretion to comment upon the evidence was narrower than had been permitted in the past, and that greater restraint was now to be expected. In particular, the judge should not advance arguments in favour of the prosecution case which the prosecutor had not put forward in the final address.[108]

6.68 The practice of judges giving directions or making comments on the significance that the jury should, or should not, attach to the evidence has received some criticism.[109] Commentators have called for a review of the practice of judges commenting on the evidence. One such commentator has questioned the reasons for allowing such a practice and has called for "a principled account of when such

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E R Thornburg, "Jury Instructions: A Persistent Failure to Communicate" (1991) 74 *Judicature* 249, 252 which states that the ban on commentary on evidence "make the instructions extremely awkward and difficult for jurors to comprehend".

106. *RPS v The Queen* (2000) 199 CLR 620; [2000] HCA 3, [42] (Gaudron ACJ, Gummow, Kirby and Hayne JJ). See also *Domican v The Queen* (1992) 173 CLR 555, 560.

107. *Azzopardi v The Queen* (2001) 205 CLR 50; [2001] HCA 25, 70.

108. *Taleb v The Queen* [2006] NSWCCA 119, [78]-[84]; and see also *Azzopardi v The Queen* (2001) 205 CLR 50; [2001] HCA 25, [52].

109. N A Phillips, "Trusting the Jury" (The Criminal Bar Association Kalisher Lecture, London, 23 October 2007), 14; N A Phillips, "Constitutional Reform: One Year On" (Judicial Studies Board, Annual Lecture, Inner Temple, 22 March 2007), 13; G Taylor, "Judicial Reflections on the Defence Case in the Summing Up" (2005) 26 *Australian Bar Review* 70, 83-87; and D Wolchover, "Should Judges Sum Up on the Facts?" [1989] *Criminal Law Review* 781, 787-788.

comments should be made".[110] Another commentator has suggested that the only way to avoid bias in the summing-up of evidence may be to prevent judges from summing up on the evidence at all.[111] Some have suggested that the most convincing reason for allowing judicial comment on the evidence is that the trial judge has expertise in some matters and can assist the jury to appreciate a point which may not be obvious to them because of their lack of experience in criminal trials.[112]

6.69 Has the time come when modern jurors can be trusted to deal with the evidence upon the basis of their own experience and common sense, and with the assistance of the arguments of counsel, without the need for any additional input from the judge?

ISSUE 6.7

In what circumstances, if any, should a judge comment on the merits of the case in the summing-up to the jury?

110. G Taylor, "Judicial Reflections on the Defence Case in the Summing Up" (2005) 26 *Australian Bar Review* 70, 83.

111. D Wolchover, "Should Judges Sum Up on the Facts?" [1989] *Criminal Law Review* 781, 787; England and Wales, *The Royal Commission on Criminal Justice*, Cm 2263 (1993) 123.

112. G Taylor, "Judicial Reflections on the Defence Case in the Summing Up" (2005) 26 *Australian Bar Review* 70, 84-87; D Wolchover, "Should Judges Sum up on the Facts?" [1989] *Criminal Law Review* 781, 788.

7. Directions about unreliable evidence

- Introduction
- Prison informers
- Accomplices
- Confessions and admissions
- Identification evidence
- Uncorroborated evidence
- Delay and forensic disadvantage
- Delay and credibility

INTRODUCTION

7.1 This chapter considers the directions that judges must or must not give about "unreliable" evidence in two broad categories: first, directions in relation to those types of unreliable evidence that are now principally dealt with by the provisions of the *Evidence Act 1995* (NSW) such as evidence of prison informers and accomplices, confessions and admissions and identification evidence; secondly, those that principally relate to sexual assault offences, such as uncorroborated evidence of complainants and evidence in cases where there has been a delay in bringing a complaint.

Statutory regulation of warnings

7.2 Prior to the *Evidence Act 1995* (NSW), case law established the need for judicial warnings or comment in a number of areas – chiefly where evidence given in certain circumstances was seen as unreliable unless corroborated. The judicial warnings in these areas were traditionally accompanied by the instruction that it was "dangerous to convict" on such evidence unless the jury, having scrutinised it with great care, was satisfied of its truth. The use of such a formulation was open to criticism because some jurors may have taken it as an implied invitation to acquit.

7.3 In 1985, the Australian Law Reform Commission observed that the law with regard to warnings was "too rigid and technical", and did not serve its purpose of minimising the risk of wrongful convictions. The ALRC, therefore, proposed the existing requirements with respect to corroboration evidence be abolished and only retained in certain circumstances.[1] The *Evidence Act* accordingly has rendered the requirement of corroboration unnecessary except in relation to perjury and related offences.[2]

7.4 The *Evidence Act 1995* (NSW) now deals with such issues by requiring a warning for evidence "of a kind that may be unreliable" in jury trials where a party requests it, unless the judge considers there are "good reasons" for not doing so.[3] The Act provides a list of the types of evidence that may be considered unreliable:

> (a) evidence in relation to which Part 3.2 (hearsay evidence) or 3.4 (admissions) applies,

1. Australian Law Reform Commission, *Evidence*, Report 26 (1985) vol 1, [1015], [1016].
2. *Evidence Act 1995* (NSW) s 164(1) and (2).
3. *Evidence Act 1995* (NSW) s 165(2) and (3).

(b) identification evidence,

(c) evidence the reliability of which may be affected by age, ill health (whether physical or mental), injury or the like,

(d) evidence given in a criminal proceeding by a witness, being a witness who might reasonably be supposed to have been criminally concerned in the events giving rise to the proceeding,

(e) evidence given in a criminal proceeding by a witness who is a prison informer,

(f) oral evidence of official questioning of a defendant that is questioning recorded in writing that has not been signed, or otherwise acknowledged in writing, by the defendant...

The list is not exhaustive and the section expressly states that it "does not affect any other power of the judge to give a warning to, or to inform, the jury".[4]

7.5 Under this provision, the focus is now on the reliability of the evidence in question and the factors that make it unreliable. The *Evidence Act* requires that the judge, in delivering the warning requested by a party to the trial:

(a) warn the jury that the evidence may be unreliable, and

(b) inform the jury of matters that may cause it to be unreliable, and

(c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.[5]

7.6 The recent High Court case of *Mahmood*[6] illustrates the point that warnings may still be required in the circumstances of a particular case. In that case, the prosecutor remarked on the "cold-blooded and clinical" demeanour of the accused in a portion of a taped record of a visit to the crime scene a week after the alleged events, when the portion of the taped record had been admitted for another purpose, namely, to explain the presence of blood on the accused's clothing. It was common ground on the appeal that the remainder of the footage that was not admitted did not support the prosecutor's observation. The trial judge merely raised concerns about the prosecutor introducing the question of demeanour in the circumstances, and had instructed the jury that they might give the evidence of demeanour on the tape less weight than other evidence of

4. *Evidence Act 1995* (NSW) s 165(5).

5. *Evidence Act 1995* (NSW) s 165(2).

6. *Mahmood v Western Australia* (2008) 82 ALJR 372; [2008] HCA 1.

the accused's emotional state that was closer to the time of the alleged offence. The High Court held that a direction was required that would overcome the "prejudicial effect" of the prosecutor's remarks in the closing address and concluded that:

> It was necessary for the jury to be directed, in unequivocal terms, that they knew so little of the context in which the segment of the video recording appeared that they could not safely draw the inference that the prosecutor had invited them to draw, that is to say, that they should ignore the prosecutor's invitation and remarks.[7]

7.7 The *Evidence Act* also states that the judge need not use any particular form of words in delivering the warning.[8] It is therefore no longer necessary to say that it is "dangerous to convict" on uncorroborated evidence nor to give a direction about the absence of corroboration.[9] The Court of Criminal Appeal has actively discouraged the use of the formula:

> The formulation 'dangerous to convict' is a powerful direction, capable of being understood, and in my opinion, is frequently understood, by a jury as, in effect, a direction by the judge to acquit the accused. It is a formulation that is best avoided, save in exceptional circumstances.[10]

7.8 However, the Court of Criminal Appeal has also observed that there may be circumstances where the judge can give a warning that it would be dangerous to convict on the uncorroborated evidence of an accomplice "if satisfied that it is necessary in the interests of justice to do so in the particular case", but "the judge is *never* under a duty to do so".[11] The High Court has made it clear that the common law will continue to require a warning where there would otherwise be a perceptible risk of a miscarriage of justice.[12]

7.9 In some cases, even where warnings are expressly prohibited,[13] the line to be drawn between comments and warnings can be fine, and highlights the problems involved in altering trial practice by legislation where the judge retains the discretion to ensure a fair trail.

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7. *Mahmood v Western Australia* (2008) 82 ALJR 372; [2008] HCA 1, [18].
8. *Evidence Act 1995* (NSW) s 165(4).
9. *Evidence Act 1995* (NSW) s 164(3). See *Conway v The Queen* (2002) 209 CLR 203, [53]; *Kanaan v R* [2006] NSWCCA 109, [214]–[217].
10. *Robinson v R* (2006) 162 A Crim R 88; [2006] NSWCCA 192, [19] (Spigelman CJ).
11. *Kanaan v R* [2006] NSWCCA 109, [217].
12. *Tully v The Queen* (2006) 230 CLR 234, [51], [89]-[92], [158]-[161].
13. See, eg, para 7.37.

7.10 For example, the High Court has noted the possibility in cases regarding the uncorroborated evidence of sexual assault complainants that, even where a warning has been prohibited by statute, the complainant's evidence may still be "subject to comment on credibility in the same way as the evidence of alleged victims in other criminal cases, but to comment only".[14] The judges did, however, qualify this position by stating:

> The judge's discretion to comment should not be exercised so as to convey to the jury, whether by phrase, gesture or intonation, a caution about the general reliability of the evidence of alleged victims of sexual offences which is tantamount to the [dangerous to convict] warning.[15]

What was still permitted was a comment in relation to the evidence of the particular complainant in the case being tried. This has been a cause of continuing debate and amendment to the law.[16]

7.11 There may, therefore, remain occasions, particularly in sexual assault cases, where directions will need to be given in similar terms to those which in the past have been productive of an inordinate number of appeals.[17]

PRISON INFORMERS

7.12 The *Evidence Act 1995* (NSW) identifies evidence of prison informers as being a type of evidence that may be unreliable.[18] A prisoner's evidence of an accused's oral confession made while they were incarcerated together has long been recognised as unreliable. Reasons given for its unreliability include:[19]

- such evidence is easily concocted;
- the accused will generally be denied an opportunity to corroborate his or her denial of the confession;

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14. *Longman v The Queen* (1989) 168 CLR 79, 87. See also *R v GPP* (2001) 129 A Crim R 1; [2001] NSWCCA 493, [23]-[34].
15. *Longman v The Queen* (1989) 168 CLR 79, 87-88.
16. See para 7.38-7.39.
17. For a recent analysis of the circumstances which will require a warning in relation to the evidence in this type of case, see *Wade v R* (2006) 164 A Crim R 583; [2006] NSWCCA 295; and *KJR v R* (2007) 173 A Crim R 226; [2007] NSWCCA 165, [9]-[10] (dangerous to convict because of delay).
18. *Evidence Act 1995* (NSW) s 165(1)(e).
19. *Pollitt v The Queen* (1992) 174 CLR 558, 586 (Deane J), 614 (McHugh J). See also *R v Clough* (1992) 28 NSWLR 396, 405.

- prison informers are generally of bad character and their evidence is, therefore, unreliable;
- prison informers may fabricate evidence in anticipation of benefits including favourable treatment within the prison environment;
- prison informers will be affected by the values and culture of prison society.

7.13 Despite there being no rule of law that a judge must always give a warning in relation to the evidence of a prison informer, there are only exceptional cases where it would not be required.[20]

7.14 The exact form of the warning will depend on the circumstances of the case. The High Court has noted that the fact that an accused is in custody usually means that there will be sufficient evidence to justify his or her detention on remand which can corroborate the informer's evidence. Prison informers are generally taken to be aware of this state of affairs. It is therefore accepted that it is insufficient for a judge merely to warn the jury not to rely on the evidence of a prison informer unless other evidence corroborates it. The warning should draw attention to such matters as the circumstances that make the informer's evidence unreliable and the need for evidence to corroborate the making of the confession itself.[21]

7.15 Following the High Court's decision in *R v Pollitt*, Justice Hunt set out some of the matters that should be included in a warning on the evidence of a prison informer:[22]

> (a) that the experience of the courts over the years has demonstrated that the evidence of such witnesses is potentially unreliable, together with the explanation as to why that is so;
>
> (b) that it is for that reason necessary to scrutinise the evidence of the particular witness in question with great care;
>
> (c) that, in the absence of substantial confirmation provided by independent evidence that the confession was in fact made,

20. *Pollitt v The Queen* (1992) 174 CLR 558, 599 (Dawson and Gaudron JJ), 605 (Toohey J).
21. *Pollitt v The Queen* (1992) 174 CLR 558, 588 (Deane J), 601 (Dawson and Gaudron JJ), 606 (Toohey J), 616-617 (McHugh J). See also *R v Clough* (1992) 28 NSWLR 396, 405-406.
22. *R v Clough* (1992) 28 NSWLR 396, 406.

it is dangerous[23] to convict upon the evidence of that witness;

(d) that such independent evidence is unlikely to be provided by a fellow prisoner, because he is likely to be motivated to concoct his evidence for the same reasons; and

(e) that, having regard to the potential unreliability of the evidence, there is a risk of a miscarriage of justice if too much importance is attached to it.

7.16 Arguably, a judge should give directions about the use of evidence from a prison informer because the issues relating to the reliability of such evidence are generally not taken to be within the experience of ordinary jurors. Some form of explanation is required so that jurors can assess the evidence properly.

ISSUE 7.1

(1) Are warnings about the use of a prison informer's evidence necessary?
(2) If so, in what circumstances should a judge deliver them?

ACCOMPLICES

7.17 At common law, a judge in a criminal trial was required to warn the jury that it was dangerous to convict on the uncorroborated evidence of an accomplice to the alleged criminal conduct.[24] In giving such a warning, the judge was required to explain what was meant by corroboration and direct the jury's attention to evidence that may corroborate what the accomplice has said.[25] Defence counsel, therefore, did not always entirely welcome accomplice warnings, since the recitation of evidence that could have corroborated what the accomplice said could strengthen the prosecution's case.[26]

23. The reference to "dangerous" to convict would no longer be appropriate since the passing of the *Evidence Act 1995* (NSW) s 165. See *R v Robinson* (2006) 162 A Crim R 88; [2006] NSWCCA 192, [19]

24. *Davies v Director of Public Prosecutions* [1954] AC 378, 399; *Jenkins v The Queen* (2004) 79 ALJR 252, 257. A model direction following the old form of warning is provided in the *Bench Book* to cover the exceptional cases where the judge considers that a warning that it is dangerous to convict on uncorroborated evidence is still required: Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (October 2008) [4-365]. See also *R v Chen* (2002) 130 A Crim R 300; [2002] NSWCCA 174, [58].

25. *Jenkins v The Queen* (2004) 79 ALJR 252, [27].

26. *Jenkins v The Queen* (2004) 79 ALJR 252, [29]. See also *Conway v The Queen* (2002) 209 CLR 203, [56].

7.18 The *Evidence Act* now provides that a judge may give a warning about evidence that may be unreliable where it has been given by a person "who might reasonably be supposed to have been criminally concerned in the events giving rise to the proceeding".[27]

7.19 The chief reason for the warning is said to be "the natural tendency of an accomplice to minimise the accomplice's role in a criminal episode, and to exaggerate the role of others, including the accused".[28] This tendency may even go so far as the witness implicating a person who is entirely innocent of the offence charged.[29] There is an even greater danger where, as a result of assistance provided to law enforcement authorities, the accomplice has received an immunity from prosecution or a reduced sentence,[30] with the consequent risk of the benefit being lost if he or she fails to give evidence. It has been suggested that juries would not, generally, be aware of such circumstances. There is a well-established requirement that the judge direct the jury on the significance of a grant of immunity to a witness in order to assist the jury in evaluating the reliability of that witness's evidence.[31] This is consistent with the requirement in the *Evidence Act* that the judge inform the jury of matters that may cause the evidence of a witness to be unreliable.[32]

ISSUE 7.2

(1) Is it necessary for judges to give a warning about the use of evidence of people reasonably supposed to have been criminally concerned in the events giving rise to the proceedings against the accused?
(2) If so, in what circumstances should it be given, and how should such a warning be phrased?

27. *Evidence Act 1995* (NSW) s 165(1)(d). The Court of Criminal Appeal suggested that, in giving a warning about "accomplice" evidence, a judge should avoid using the term "accomplice". This is because the use of the term may give the impression that the judge believes that the witness is an accomplice to the accused and, therefore, that the accused is guilty of the offence charged: *R v Stewart* (2001) 52 NSWLR 301, [21] (Spigelman CJ), [126] (Howie J); *R v Cornelissen* [2004] NSWCCA 449, [117]. This position is reflected in Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (October 2008) [4-355]. See also *Kanaan v R* [2006] NSWCCA 109, [217].
28. *Jenkins v The Queen* (2004) 79 ALJR 252, [30].
29. *R v Stewart* (2001) 52 NSWLR 301, [127].
30. *R v Stewart* (2001) 52 NSWLR 301, [149], [151]-[154].
31. *R v Chai* (1992) 27 NSWLR 153, 176-177; *R v Checconi* (1988) 34 A Crim R 160, 170-172.
32. *Evidence Act 1995* (NSW) s 165(2)(b).

CONFESSIONS AND ADMISSIONS

7.20 An admission is a statement that an accused has made prior to the current proceedings and that is against his or her interest.[33] The reception of admissions into evidence has been the subject of some controversy, and their treatment will depend on the circumstances of the case.[34]

7.21 A confession is an admission by the accused of guilt of the offence charged. A confession, which may be may be made to any person at any time, is generally admissible as evidence, but the question of weight is one for the jury.[35] Generally the courts have considered that evidence of a confession does not require a specific warning.

7.22 "Admission" is broadly defined under the *Evidence Act 1995* (NSW).[36] However, the need for a warning, even under the statutory provisions, will depend on the circumstances of the case,[37] including whether the accused disputes the admission,[38] whether there are good reasons for not providing a warning,[39] or whether, regardless of the category of witness, the evidence is of a "kind that may be unreliable".[40]

7.23 Much of the discussion of confessions is set in the context of the former practice of some investigating police to fabricate confessions. The obligatory use of recording equipment has overcome some of this problem so that a judge no longer needs to advise a jury to be cautious before convicting on disputed police evidence of an oral confession without corroborating independent evidence.[41]

7.24 However, there are also other circumstances where the defence may raise the unreliability of a confession. They include false confessions voluntarily made, for example, to protect the actual perpetrator of the crime, to achieve notoriety, or to assuage feelings of guilt relating to the victim and the events giving rise to the offence; false confessions made to achieve short-term relief regardless of the

33. See *Evidence Act 1995* (NSW) Dictionary Part 1.
34. *Mule v The Queen* (2005) 79 ALJR 1573; [2005] HCA 49, [21], [23].
35. *Ross v The King* (1922) 30 CLR 246, 254-255; *Burns v The Queen* (1975) 132 CLR 258, 261.
36. *Evidence Act 1995* (NSW) s 165(1)(a).
37. *R v Fowler* (2003) 151 A Crim R 166, [178]-[188].
38. *R v Reardon* (2002) 186 FLR 1; [2002] NSWCCA 203, [136].
39. *Evidence Act 1995* (NSW) s 165(3).
40. *R v Clark* (2001) 123 A Crim R 506, [70]-[73].
41. See *Carr v The Queen* (1988) 165 CLR 314, 324 (Brennan J).

long-term consequences, for example, to obtain release from immediate confinement, to escape a stressful situation or because of an inducement held out by the investigating authorities; and false confessions made because the accused has become wrongly convinced of his or her own guilt for a number of possible reasons including mental illness, and the presentation of false evidence by the investigating authorities.[42]

ISSUE 7.3

In what circumstances, if any, should a warning be given about the use of evidence of confessions and admissions?

IDENTIFICATION EVIDENCE

7.25 There are different types of identification evidence, including visual evidence identifying a person by way of photographs, identification parade or other means, identification of the voice of a person and identification of objects associated with a person such as motor vehicles, articles of clothing or weapons. The most common form of identification evidence is that which deals with the visual identification of a person, usually the accused.

7.26 The need for great care in approaching such evidence is reinforced by examples of wrongful convictions based on identification evidence arising from the inaccurate testimony of apparently honest witnesses.[43]

7.27 The *Evidence Act 1995* (NSW) requires the judge, when he or she has admitted identification evidence relating to the resemblance of the defendant, to inform the jury:

(a) that there is a special need for caution before accepting identification evidence, and

(b) of the reasons for that need for caution, both generally and in the circumstances of the case.[44]

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42. See S M Kassin, et al, *Police-induced Confessions: Risk Factors and Recommendations*, American Psychology-Law Society, Proposed White Paper (2008) 34-36.

43. See *R v Finn* (1988) 34 A Crim R 425, 430 and the list of examples provided by Kirby P in *Varley v Attorney General (NSW)* (1987) 8 NSWLR 30, 40. See also P Devlin, *Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases* (1976) ch 2; L Re, "Eyewitness Identification: Why So Many Mistakes?" (1984) 58 *Australian Law Journal* 509.

44. *Evidence Act 1995* (NSW) s 116(1). See also *Evidence Act 1995* (NSW) s 165(1)(b) and (2).

The Act also states that "it is not necessary that a particular form of words be used in so informing the jury".[45] The High Court has held that the warning does not have to be given if the identification evidence is not disputed.[46]

7.28 This provision is limited to evidence relating to the resemblance of a defendant[47] and does not extend to evidence relating to inanimate objects or to "negative" (or "exculpatory") identification evidence.[48] These are covered by the more general provisions relating to evidence that may be unreliable contained in s 165(1) of the *Evidence Act 1995* (NSW).[49]

7.29 The NSW Court of Criminal Appeal has extended the need for a warning to cases involving the identification of inanimate objects in appropriate cases, for example, a motor vehicle, clothing or a weapon. Such a warning would be necessary where the identification of the object is the "critical issue" determining the guilt of the accused.[50]

7.30 The question has arisen as to what warning, if any, should be given in relation to identification from video or photographic evidence where the jury is called upon to make its own assessment of the reliability of the evidence, for example, where the quality of the image is poor or otherwise questionable.[51] In such cases the difficulties involved in using this sort of footage are, on one view, "obvious to any layman" and can be said to arise for people in the ordinary course of life. They do not, therefore, require a specific comment or warning of the sort required where an eyewitness gives identification evidence.[52] The English Court of Appeal has observed that:

> for example, the jury does not need to be told that the photograph is of good quality or poor; nor whether the person alleged to have been the defendant is shown in close-up or was distant from the camera, or was alone or part of a crowd. Some things are obvious from the photograph itself ...[53]

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45. *Evidence Act 1995* (NSW) s 116(2).
46. *Dhanhoa v The Queen* (2003) 217 CLR 1, [17]-[22], [53], [90]-[94].
47. *Evidence Act 1995* (NSW) Dictionary "identification evidence".
48. See *Kanaan v R* [2006] NSWCCA 109, [115]-[126].
49. See para 7.4.
50. *R v Clout* (1995) 41 NSWLR 312, 320-321; clothing: *R v Lowe* (1997) 98 A Crim R 300, 314-318.
51. R Costigan, "Identification from CCTV: The Risk of Injustice" [2007] *Criminal Law Review* 591, 596.
52. *R v Downey* [1995] 1 Cr App R 547, 556; *R v Blenkinsop* [1995] 1 Cr App R 7, 11-12.
53. *R v Blenkinsop* [1995] 1 Cr App R 7, 11.

ISSUE 7.4

(1) In what circumstances should warnings be given about the use of identification evidence?
(2) Should warnings about the use of identification evidence extend to relevant observations about matters that would be considered obvious to any jury?

UNCORROBORATED EVIDENCE

7.31 There used to be a long-standing common law rule requiring trial judges in all sexual assault cases to warn the jury that it was dangerous to convict the accused upon the uncorroborated testimony of the complainant.[54] In 1981, legislation was passed abolishing the requirement to give a warning that it is unsafe to convict a person on the uncorroborated evidence of the complainant in trials for sexual offences.[55]

7.32 In *R v Murray*,[56] the NSW Court of Criminal Appeal held that this legislation does not prevent trial judges from directing the jury on the necessity to be satisfied beyond reasonable doubt of the truthfulness of the witness who stands alone as proof of the Crown case. The Court held that, in serious offences, it is always open to the judge to direct that, where there is only one witness asserting the commission of the crime, "the evidence of that witness must be scrutinised with great care before a conclusion is arrived at that a verdict of guilty should be brought in".[57]

7.33 The abolition of the requirement for the giving of a warning about uncorroborated evidence is no longer confined to sexual offences. It has been extended to all offences by s 164(3) of the *Evidence Act 1995* (NSW) which provides:

> Despite any rule, whether of law or practice, to the contrary, but subject to the other provisions of this Act, if there is a jury, it is not necessary that the judge:

54. See *R v Kelleher* [1974] 1 NSWLR 517 (affirmed in *Kelleher v The Queen* (1974) 131 CLR 534).
55. The *Crimes (Sexual Assault) Amendment Act 1981* (NSW) inserted s 405C into the *Crimes Act 1900* (NSW) which provided that on the trial of a person for a prescribed sexual offence, the Judge is not required by any rule of law or practice to give…a warning to the jury to the effect that it is unsafe to convict the person on the uncorroborated evidence of the person upon whom the offence is alleged to have been committed.
56. *R v Murray* (1987) 11 NSWLR 12.
57. *R v Murray* (1987) 11 NSWLR 12, 19 (Lee J).

(a) warn the jury that it is dangerous to act on uncorroborated evidence or give a warning to the same or similar effect, or

(b) give a direction relating to the absence of corroboration.

7.34 The new provisions have not discouraged trial judges from giving the *Murray* direction. A study found that in 80% of the sexual assault trials examined in NSW in 1994-1995 the judge gave some form of corroboration warning, including the old-style warning that it is unsafe or dangerous to convict on the uncorroborated evidence of the witness. The study found that the new-style warning — the *Murray* direction — was given in 59% of sexual assault trials.[58]

Criticisms

7.35 The *Murray* direction has been criticised as superfluous since the judge has already directed the jury not to convict unless they are satisfied of the guilt of the accused beyond reasonable doubt. One commentator questioned whether jurors are "in need of a warning of the patently obvious, particularly in view of the avalanche of directions now often required in a sexual assault trial".[59] The commentator described corroboration warnings like the *Murray* direction as "either superfluous where the complainant's unreliability was obvious and useless where the complainant was a skilled and convincing liar".[60]

7.36 There is also a concern that the *Murray* direction, by emphasising the absence of corroboration evidence and the need to "scrutinise" the evidence of the complainant "with great care", may be misinterpreted by juries as a suggestion to acquit.[61]

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58. NSW Department of Women, *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault* (1996) 188-190. The study covered all sound-recorded sexual assault hearings in the District Court of NSW over one year between 1 May 1994 and 30 April 1995.
59. D Boniface, "The Common Sense of Jurors vs the Wisdom of the Judicial Directions and Warnings in Sexual Assault Trials" (2005) 28 *University of New South Wales Law Journal* 261, 267.
60. D Boniface, "The Common Sense of Jurors vs the Wisdom of the Judicial Directions and Warnings in Sexual Assault Trials" (2005) 28 *University of New South Wales Law Journal* 261, 265.
61. NSW Legislative Council Standing Committee on Law and Justice, *Report on Child Sexual Assault Prosecutions* (2002), [4.192].

Legislative reform

7.37 In 2006, the NSW Parliament passed legislation inserting s 294AA into the *Criminal Procedure Act 1986* (NSW). The new section provides, in relation to certain prescribed sexual offence[62] proceedings:

> (1) A judge ... must not warn a jury, or make any suggestion to a jury, that complainants as a class are unreliable witnesses.
>
> (2) Without limiting subsection (1), that subsection prohibits a warning to a jury of the danger of convicting on the uncorroborated evidence of any complainant.[63]

7.38 The Second Reading Speech that introduced the amendment adopted the reasoning of the Criminal Justice Sexual Offence Taskforce that the *Murray* direction "was unnecessary, as the directions on reasonable doubt were sufficient to protect the accused".[64] This implied that the purpose of the amendment is to prevent judges from giving the *Murray* direction. This position is also consistent with the recommendations of a parliamentary committee that the *Criminal Procedure Act 1986* (NSW) be amended to provide that the *Murray* warning no longer be given in child sexual assault proceedings.[65]

7.39 There are, however, doubts whether the text of the amendment would achieve any such intention.[66] The *Murray* direction deals with the need for the jury to scrutinise with great care the evidence of the complainant, where he or she is the sole witness asserting the commission of the crime. Section 294AA(1), on the other hand, does not, by its terms, deal with evidence in the context contemplated in *Murray*, but is rather directed at warnings that refer to complainants of sexual offences as an unreliable class of witnesses. Further, the *Murray* direction does not warn juries about "the danger of convicting on the uncorroborated evidence of any complainant", which is what

62. "Prescribed sexual offence" is defined in *Criminal Procedure Act 1986* (NSW) s 3.

63. This became effective on 1 January 2007.

64. See NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 18 October 2006, the Hon G McBride, Minister for Gaming and Racing on behalf of the Hon Bob Debus, Second Reading Speech, 2958.

65. NSW Legislative Council Standing Committee on Law and Justice, *Report on Child Sexual Assault Prosecutions* (2002) Recommendations 24 and 25.

66. H Donnelly, "Delay and the Credibility of Complainants in Sexual Assault Proceedings" (2007) 19 *Judicial Officers' Bulletin* 17, 21.

s 294AA(2) appears to be proscribing. Hence, it is unlikely that s 294AA will prevent trial judges from giving the *Murray* direction.

ISSUE 7.5

(1) Should the Murray direction be abolished or should it be confined to cases where there is specific evidence indicating that the complainant's uncorroborated evidence may be unreliable?
(2) In either case, how should legislation be drafted to achieve this?

DELAY AND FORENSIC DISADVANTAGE

Sexual assault cases

7.40 In *Longman v The Queen*,[67] a case where the complainant alleged that her step-father sexually assaulted her when she was a child, the High Court held:

> The jury should have been told that, as the evidence of the complainant could not be adequately tested after the passage of more than twenty years, it would be dangerous to convict on that evidence alone unless the jury, scrutinising the evidence with great care, considering the circumstances relevant to its evaluation and paying heed to the warning, were satisfied of its truth and accuracy.[68]

7.41 Counsel for the defendant had asked the trial judge to give the jury a warning about acting on the uncorroborated evidence of the complainant. The judge refused to give such warning, relying on s 36BE of the *Evidence Act 1906* (WA), which abolished the corroboration warning requirements in relation to sexual assault offences, and prohibited judges from giving such warnings unless justified in the circumstances.

7.42 The High Court held that the section in question dispensed only with the requirement to warn the jury of a general danger of acting on the uncorroborated evidence of complainants in sexual offences as a class. It did not, however, affect the requirement for a judge to give a warning whenever necessary to avoid a perceptible risk of miscarriage of justice arising from the circumstances of the case.

7.43 The majority judgment of Justices Brennan, Dawson and Toohey stated that a warning in terms quoted above was required in this particular case because of the defendant's loss of the means of testing

67. *Longman v The Queen* (1989) 168 CLR 79.
68. *Longman v The Queen* (1989) 168 CLR 79, 91 (Brennan, Dawson and Toohey JJ).

the complainant's allegations. They reasoned that, had the allegations been made soon after the alleged events, it would have been possible to explore in detail the circumstances surrounding those events and to present evidence throwing doubt on the complainant's story or confirming the defendant's denial.[69]

7.44 Justices Deane and McHugh identified other reasons why the warning was needed in this case, including "the possibility of child fantasy about sexual matters",[70] and the fallibility of human recollection, especially of events which occurred in childhood.[71]

7.45 Subsequently, the High Court in *Crampton v The Queen*[72] emphasised the need for the direction that arose from *Longman* to be given unequivocally as a warning. The case involved a 19-year delay in the complaint. In her summing-up, the trial judge gave directions to the effect that a late complaint involved potential disadvantages to the accused. This was followed by an observation that the accused's defence consisted of denial. In her redirections made on request by the defence counsel, the judge said that the very long delay in the complaint was a matter the jury should consider with all the other circumstances of the case.

7.46 The High Court held that the trial judge's reference to the accused's denial of the complainant's allegations diminished her directions on delay, which the High Court characterised as a mere caution and not a warning. The Court said that the judge should have given an "unmistakable and firm" warning, and in terms similar to those suggested in Longman, that, because of the passage of so many years, it would be dangerous to convict on the complainant's evidence alone without the closest scrutiny of the complainant's evidence, subject to appropriate adaptations to the circumstances of the case.[73]

7.47 In *Doggett v The Queen*,[74] the High Court extended the application of the *Longman* warning to cases where the prosecution

69. *Longman v The Queen* (1989) 168 CLR 79, 90-91 (Brennan, Dawson and Toohey JJ).
70. *Longman v The Queen* (1989) 168 CLR 79, 102 (Deane J).
71. *Longman v The Queen* (1989) 168 CLR 79, 107-108 (McHugh J).
72. *Crampton v The Queen* (2000) 206 CLR 161; [2000] HCA 60.
73. *Crampton v The Queen* (2000) 206 CLR 161; [2000] HCA 60, [44]-[45] (Gaudron, Gummow, Callinan JJ).
74. *Doggett v The Queen* (2001) 208 CLR 343; [2001] HCA 46.

has presented evidence that corroborates the complainant's testimony.[75]

Criticisms

7.48 The *Longman* warning has been the subject of a number of criticisms, including the following.

7.49 First, the warning is said to have given rise to an irrebuttable presumption that delay in the complaint prevents the accused from adequately testing the complainant's evidence. The warning has an underlying assumption that the accused might have called relevant evidence had there been a contemporaneity between the alleged offence and the complaint or charge.[76]

7.50 It is argued that this assumption loses its force if the accused was not prejudiced in circumstances where he or she is able to call evidence in rebuttal, or where the absence of contemporaneity did not in any way deprive him or her of such an opportunity. The latter circumstance might arise, for example, where the complaint related to a time and place where the accused was in fact living alone with the complainant, and in circumstances where, no matter what inquiries were made, the case became one of word against word, such that rebuttal evidence could never have been obtained.[77]

7.51 Secondly, it is contended that the *Longman* warning has effectively reinstated the false stereotypes about the unreliability of complainants in sexual offences cases.[78]

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75. The corroborative evidence in that case consisted of a taped telephone conversation, organised with the assistance of the police, in which the accused made admissions of a general nature. Further, the complainant's mother and brother gave evidence which supported aspects of the complainant's evidence, such as the fact that she had complained to her mother about the sexual assaults. The High Court held that the corroborative evidence which was led at that particular trial had not itself been sufficient to displace the obligation on the trial judge to give a *Longman* warning: at [45]-[54] (Gaudron and Callinan JJ). Kirby J described the corroborative evidence in that case as patchy, unspecific, or completely silent on some of the incidents referred to in the charges: at [135].
76. *R v BWT* (2002) 54 NSWLR 241; [2002] NSWCCA 60, [15]-[20] (Wood CJ at CL); J Wood, "Complaint and Medical Examination Evidence in Sexual Assault Trials" (2002) 15 *Judicial Officers' Bulletin* 63.
77. *R v BWT* (2002) 54 NSWLR 241; [2002] NSWCCA 60, [15]-[20] (Wood CJ at CL).
78. Tasmania Law Reform Institute, *Warnings in Sexual Offences Cases Relating to Delay in Complaint*, Final Report (2006) [2.2.18]; NSWLRC, *Uniform Evidence*, Report 112 (2005) [18.95].

7.52 Thirdly, the use of the phrase "unsafe/dangerous to convict" has been criticised as an encroachment on the jury's fact-finding role. It is claimed that there is a risk that the jury will interpret the phrase as a suggestion or encouragement by the judge to acquit the accused.[79]

7.53 While there are passages in some cases to the effect that the *Longman* warning does not require the use of particular words,[80] and that a direction which does not contain the words "dangerous" or "unsafe" to convict is not necessarily inadequate,[81] the weight of authority appears to be that the use of the words "dangerous/unsafe to convict" will be essential in most cases of delay.[82]

7.54 Finally, there is a lack of clarity as to what length of delay in making a complaint will be considered "substantial" so as to necessitate the delivery of the warning. The *Longman* case itself involved a time lapse of more than 20 years between the alleged offences and complaint.

7.55 There have been cases where courts have held that the giving of the *Longman* warning to the jury was unnecessary, since the delay in complaint was not so substantial as to give rise to forensic disadvantage to the accused.[83] However, there are also cases where the giving of the warning was held to be appropriate in circumstances involving much shorter delays than was present in the *Longman* case: three years in one case,[84] and only a few months in another case.[85]

7.56 One judge made the observation that, while it is clear that a delay in the order of 20 years would require a *Longman* warning, it remains unclear from the relevant High Court cases what time lapse, if any, would be regarded as *not* calling for a *Longman* direction. He concluded that "the only prudent approach of a trial judge is one that

79. *R v BWT* (2002) 54 NSWLR 241**;** [2002] NSWCCA 60, [34] (Wood CJ at CL). See also NSW Criminal Justice Sexual Offence Taskforce, *Responding to Sexual Assault: The Way Forward* (2006) 95; NSWLRC, *Uniform Evidence,* Report 112 (2005) [18.93].
80. *Sheehan v R* (2006) 163 A Crim R 397; [2006] NSWCCA 233, [107] (Kirby J).
81. *R v Johnston* (1998) 45 NSWLR 362, 369-370 (Spigelman CJ).
82. See *R v GJH* (2000) 122 A Crim R 361; [2001] NSWCCA 128; *R v SJB* (2002) 129 A Crim R 54; [2002] NSWCCA 163.
83. See, for example: *Tully v The Queen* (2006) 230 CLR 234; [2006] HCA 56 (two-year delay): *R v Perez* [2008] NSWCCA 46 (four-year delay).
84. *Robinson v The Queen* (1999) 197 CLR 162; [1999] HCA 42.
85. *DRE v R* (2006) 164 A Crim R 400; [2006] NSWCCA 280. Spigelman CJ remarked that this was "at best a borderline case for a *Longman* warning": at [4].

regards any delay between offence and complaint as sufficient to raise for consideration the need for a *Longman* direction".[86]

Legislative reform

7.57 A number of law reform agencies have recommended the reform of the *Longman* warning.[87] The latest such call came from the the Criminal Justice Sexual Offence Taskforce, which was established by the NSW Attorney General to examine issues surrounding sexual assault.[88]

7.58 The Taskforce recommended that the *Longman* warning be given only upon the request of a party and where the court is satisfied that there is evidence that the accused had suffered a specific forensic disadvantage due to the delay. Further, it recommended that there should be no requirement that a particular form of words be used, and that the words "dangerous and unsafe to convict" need not be used to give effect to the warning, or, as a secondary recommendation, that the words "dangerous and unsafe to convict" should not be used.[89]

7.59 In 2006, the NSW Parliament implemented the recommendations of the Taskforce by amending s 294 of the *Criminal Procedure Act 1986* (NSW). Subsection (1) outlines the application of the section, thus:

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86. *R v BWT* (2002) 54 NSWLR 241; [2002] NSWCCA 60. [95] (Sully J). Wood CJ at CL appears to have limited his agreement with Sully J's judgment to where there is "significant" delay between the alleged offence and complaint: at [4].
87. See NSW Legislative Council Standing Committee on Law and Justice, *Report on Child Sexual Assault Prosecutions* (2002) Recommendation 23; NSW Interagency Adult Sexual Assault Committee, *A Fair Chance: Proposals for Sexual Assault Law Reform in NSW* (2004) 16; NSWLRC, *Uniform Evidence*, Report 112 (2005) Recommendation 8–3; Tasmania Law Reform Institute, *Warnings in Sexual Offences Cases Relating to Delay in Complaint*, Final Report (2006) Recommendation 2; Victorian Law Reform Commission, *Sexual Offences: Law and Procedure*, Final Report (2004) Recommendation 170.
88. The Taskforce included judges, representatives from government agencies (such as the Office for Women, the Attorney General's Department, Department of Community Services, NSW Health and Legal Aid) non-government agencies (such as NSW Rape Crisis Centre and Women's Legal Service NSW), NSW Police, government lawyers (including the Crown Advocate, Public Defenders Office, the Director of Public Prosecutions), academics, the NSW Law Society and the NSW Bar Association.
89. NSW Criminal Justice Sexual Offence Taskforce, *Responding to Sexual Assault: The Way Forward* (2006) 96.

> (1) This section applies if, on the trial of a person for a prescribed sexual offence, evidence is given or a question is asked of a witness that tends to suggest:
>
> (a) an absence of complaint in respect of the commission of the alleged offence by the person on whom the offence is alleged to have been committed, or
>
> (b) delay by that person in making any such complaint.

7.60 The amendments adopted to address issues relating to the *Longman* warning state:

> (3) However, if:
>
> (a) the delay in making a complaint by the person on whom the offence is alleged to have been committed is significant, and
>
> (b) the Judge is satisfied that the person on trial for the offence has suffered a significant forensic disadvantage caused by that delay, and
>
> the Judge may inform the jury (but only if a party to the proceedings so requests) of the nature of the disadvantage and of the need for caution in determining whether to accept, or give any weight to, the evidence or question referred to in subsection (1).
>
> (4) For the purposes of subsection (3)(b), the factors that may be regarded as establishing a significant forensic disadvantage include, but are not limited to, the following:
>
> (a) the fact that any potential witnesses have died or are not able to be located,
>
> (b) the fact that any potential evidence has been lost or is otherwise unavailable.
>
> (5) The mere passage of time is not in itself to be regarded as establishing a significant forensic disadvantage.[90]

7.61 One issue that arises from the amendments relates to the content of the direction that judges would be allowed to give. In particular, it remains unclear whether trial judges are prevented from using the words "dangerous/unsafe to convict" in the directions that can be made pursuant to the amendments.

7.62 The drafting of s 294(3) has also been criticised for being confusing about what trial judges may now tell the jury. While

90. These provisions came into effect on 1 January 2007. The word "and" at the end of s (3)(b) appears to be a drafting error.

allowing the judge to inform the jury of the nature of the significant forensic disadvantage is desirable, the subsection by its terms:

> does not appear to authorise informing the jury of a need for caution in determining whether to accept or give weight to the complainant's evidence but rather to "the evidence or question referred to in subsection (1)". The matters captured by that description are "absence of, or delay in making complaint". Such a limitation on the judge's capacity to "inform the jury" does not sit well with the circumstances in which that power may be exercised as set out in s 294(3)(a) and (b), or the caveat expressed in s 294(2)(c). Moreover, the defence can hardly be advantaged by a direction informing the jury of a need for caution in determining whether to accept the raising of an issue that there was, or evidence of, a delay or absence in making complaint.[91]

ISSUE 7.6

(1) Is it desirable to amend s 294(3) of the *Criminal Procedure Act 1986* (NSW) to clarify:
   - whether or not judges may continue to use the words "dangerous/unsafe to convict"; and
   - that its reference to the need for caution by the jury relates to the complainant's evidence and not to "the evidence or question referred to in subsection (1)"?

(2) Are there other ways by which the statutory provisions relating to the *Longman* warning may be improved?

Other cases

7.63 The question of delay and its impact on the conduct of the defence occurs most frequently in the context of the trial of sexual offences. However, as Chief Justice Spigelman has observed, sexual offence cases are only one example of situations where delay can affect the conduct of the defence.[92] Delay in bringing a matter to trial may arise not only because of a complainant's delay in making a complaint, but also because of a key witness's delay in coming forward or even a more general delay in bringing the matter to trial caused by the volume of pending cases. For example, the Tasmanian Court of Criminal Appeal has held that a warning about delay is necessary where there has been a lengthy delay before a trial for armed robbery.[93] Judicial directions relating to delay in such cases are not

91. J Nicholson, "Four Key Sexual Assault Directions", *Sexual Assault Handbook* (NSW Judicial Commission, 2008) [55].
92. *R v Johnston* (1998) 45 NSWLR 362, 370.
93. *R v Carr* (2000) 117 A Crim R 272; [2000] TASSC 183, [27]-[35].

subject to the statutory requirements imposed in the case of delayed complaint in sexual offence matters.[94]

ISSUE 7.7

In what circumstances, if any, is a warning relating to delay ever necessary in non-sexual assault trials?

DELAY AND CREDIBILITY

7.64 Courts can direct juries that delay or absence of complaint may be used as a factor in assessing the complainant's credibility. Such a direction is based on *Kilby v The Queen*,[95] where the High Court ruled that, while a failure to make a complaint at the earliest opportunity is not evidence of the complainant's consent to the alleged sexual assault, it is nevertheless relevant to the complainant's credibility and a fact to be considered by the jury in assessing the consistency of the complainant's evidence.

7.65 Subsequent to the *Kilby* decision, various Australian jurisdictions enacted legislation requiring the judge to warn the jury that a delay in making a complaint of sexual assault does not necessarily mean that the allegation is false.[96] In NSW, if evidence is given or a question is asked of a witness about an absence of or delay in the complaint in sexual offence proceedings, the judge:

> (a) must warn the jury that absence of complaint or delay in complaining does not necessarily indicate that the allegation that the offence was committed is false, and
>
> (b) must inform the jury that there may be good reasons why a victim of a sexual assault may hesitate in making, or may refrain from making, a complaint about the assault…[97]

In *Crofts v The Queen*,[98] the High Court held that the Victorian equivalent provision[99] is not intended to overturn the *Kilby* doctrine and therefore does not preclude a judge from commenting that delay

94. *Criminal Procedure Act 1986* (NSW) s 294.

95. *Kilby v The Queen* (1973) 129 CLR 460.

96. *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4(5)(b); *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4A(4); *Evidence Act 1929* (SA) s 34I(6a); *Criminal Code 1924* (Tas) s 371A; *Criminal Procedure Act 1986* (NSW) s 294; *Crimes Act 1958* (Vic) s 61(1)(b); *Evidence Act 1906* (WA) s 36BD.

97. *Criminal Procedure Act 1986* (NSW) s 294(2). This provision was adopted in 1981 when it was inserted as *Crimes Act 1900* (NSW) s 405B.

98. *Crofts v The Queen* (1996) 186 CLR 427.

99. *Crimes Act 1958* (Vic) s 61.

in complaint of sexual assault may affect the credibility of the complainant.[100]

7.66 In the result, where a trial judge gives the jury the statutory direction that a delay in complaint does not necessarily indicate that the allegation is false and that there may be good reasons why a victim of sexual assault hesitates to complain, the judge should also consider giving the direction that delay in complaint may be taken into account in evaluating the evidence of the complainant, and in determining whether or not to believe the complainant.

7.67 The Court qualified its ruling in two ways. First, the *Kilby* direction is not required where the peculiar facts of the case do not require such a warning to restore a balance of fairness. Secondly, the warning must not be expressed in terms that suggest a stereotyped view that sexual assault complainants are unreliable or that delay in making a complaint is invariably a sign that the complainant's evidence is false.[101]

Criticisms

7.68 The first criticism of the decision in *Crofts* is that the delivery to the jury of two seemingly contradictory directions may render both of them redundant and carries a real risk of confusing the jury.[102]

7.69 The *Crofts* decision has also been criticised on the basis that it preserves the assumption that delay in a complaint for sexual assault affects the credibility of the complainant because of the traditional notion, which is acknowledged at common law, that a genuine sexual assault victim will make a "hue and cry" immediately after the assault.[103]

7.70 This assumption is not in accord with the current body of research showing that it is common for sexual assault victims not to complain immediately. For example, the Victorian Law Reform Commission ("VLRC") conducted an empirical study covering sexual assault cases in Victoria between 1994 and 2002 which found that, although over half the reports of rape were made within a week, a significant number — 11.5% — were made five years after the alleged

100. The High Court followed the decision of the NSW Court of Criminal Appeal in *R v McDonald* (1985) 3 NSWLR 276, 278 (Hunt J).

101. See *Crofts v The Queen* (1996) 186 CLR 427, 451-452 (Toohey, Gaudron, Gummow and Kirby JJ).

102. Victorian Law Reform Commission, *Sexual Offences: Law and Procedure*, Final Report (2004) [7.89]-[7.90].

103. See *Kilby v The Queen* (1973) 129 CLR 460.

event. Delays in reporting occurred more frequently and for a longer period in cases of incest and sexual penetration of a child under 16 years; only 16% of such offences were reported within a week, 41% were reported at least two years after the offence, and over 30% were reported more than five years later.[104]

7.71 The results of the VLRC study are in line with international studies on child sexual assault victims. A study which reviewed data from several international studies found, among other things, that about 60% to 70% of people who were sexually abused when they were young had not told anyone about the abuse when they were children.[105] This implies that a large majority of those who participated in these studies did not disclose the fact that they were sexually abused as children until they reached adulthood.

7.72 The reasons for delay in reporting sexual assaults include fear of reprisal from or even the desire to protect the assailant, who the victim usually knows and trusts. Other reasons include the perception that the police would not do anything; fears of not being believed by the police or other sections of the justice system; and apprehensions about the legal process.[106]

7.73 Some judges, perhaps due to better awareness of the nature and effects of sexual assaults, have questioned the validity of the underlying assumption in *Crofts*. One judge, for example, made the following remarks:

> I do not understand how any inference can legitimately be drawn about the veracity of a young child simply from the fact that the child does not complain about sexual misconduct at the first reasonable opportunity especially where that conduct is perpetrated by a close family member. Certainly courts should not be encouraging such a line of reasoning on the basis of some supposed collective experience or understanding of the behaviour of children in such a situation. Further, I believe that there is very good reason to doubt that the *Kilby* direction accords with a

104. Victorian Law Reform Commission, *Sexual Offences: Law and Procedure*, Final Report (2004) [2.37]-[2.2.46].

105. K London, et al, "Disclosure Of Child Sexual Abuse: What Does the Research Tell Us About the Ways that Children Tell?" (2005) 11 *Psychology, Public Policy, and Law* 194.

106. See D Lievore, *Non-Reporting and Hidden Recording of Sexual Assault in Australia* (2002). While this paper examines the extent of and reasons for non-reporting of sexual assaults, it is likely that the same factors are at play in cases involving delay in making the complaint.

> more modern, if not more enlightened, understanding of the impact of sexual assaults upon adult victims.[107]

7.74 A final concern relating to the *Crofts* direction is that it is currently being given as a matter of course regardless of the presence of good reasons for the delay in complaint, and even where there was in fact no delay in complaint.[108] It has been suggested that judges give the direction only in "those cases where there is at least a prima facie basis for suggesting that the delay was a sign of a want of credibility, for example where there is an absence of any evidence suggesting a reason for it".[109]

Legislative reform

7.75 Based on the recommendation of the NSW Criminal Justice Sexual Offence Taskforce,[110] the NSW Parliament passed legislation adding a new provision to s 294(2) of the *Criminal Procedure Act 1986* (NSW) which states that a judge:

> must not warn the jury that delay in complaining is relevant to the victim's credibility unless there is sufficient evidence to justify such a warning.[111]

This new provision arguably does no more than reiterate existing law. In *Crofts*, the High Court made it quite clear that judges need not give a *Kilby* warning as a balancing direction to the statutory directions on delay "where the peculiar facts of the case and the conduct of the trial do not suggest the need for a warning to restore a balance of fairness".[112] Hence, the decision was premised upon the assumption that the balancing direction was required by the particular

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107. *R v LTP* [2004] NSWCCA 109, [123] (Howie J). See also *Suresh v The Queen* (1998) 153 ALR 145, 147 where Gaudron and Gummow JJ stated that the assumption that a victim of a sexual assault will complain at the earliest opportunity is of "doubtful validity", particulary in child sexual assault cases.
108. In a VLRC study of 11 cases where the trial judge gave the *Crofts* warning, only two cases involved a delay in complaint: Victorian Law Reform Commission, *Sexual Offences: Law and Procedure*, Final Report (2004) [7.88].
109. J Wood, "Child Witnesses: The New South Wales Experience" (Australian Institute of Judicial Administration: Child Witnesses – Best Practice for Courts, Parramatta, 30 July 2004).
110. NSW Criminal Justice Sexual Offence Taskforce, *Responding to Sexual Assault: The Way Forward* (2006) 101-102.
111. *Criminal Procedure Act 1986* (NSW) s 294(2)(c).
112. *Crofts v The Queen* (1996) 186 CLR 427, 451 (Toohey, Gaudron, Gummow and Kirby JJ).

circumstances of the case and not by considerations at large. It may, therefore, be claimed that the new statutory provision is simply a reiteration of the High Court's ruling in *Crofts*.

7.76 On the other hand, it may be argued that, by reinforcing the need for "sufficient evidence" before a *Crofts* direction is to be given, the new statutory provision seeks to prevent judges from indiscriminately giving the *Crofts* direction for the main purpose of "appeal-proofing" the case, particularly in cases where there was in fact no delay in the complaint, or where there are indisputably good reasons for a delay. It remains to be seen how courts will construe the provision, in particular the meaning of "sufficient evidence", so as to justify the giving of a *Crofts* direction.[113]

ISSUE 7.8

Is s 294(2) of the *Criminal Procedure Act 1986* (NSW) sufficient to address the issue of what (if any) warning the judge should give the jury on the impact of delay on the complainant's credibility?

113. See H Donnelly, "Delay and the Credibility of Complainants in Sexual Assault Proceedings" (2007) 19 *Judicial Officers' Bulletin* 17 for a view on how the phrase "sufficient evidence" in *Criminal Procedure Act 1986* (NSW) s 294(2)(c) might be construed.

8. Other directions about evidence

- Tendency and coincidence evidence
- Evidence of post-offence conduct: lies and flight
- Evidence of character
- Multiple offences
- Conspiracy counts
- Circumstantial evidence
- DNA evidence
- Demeanour evidence
- When Indigenous people give evidence

8.1 Like the previous chapter, this chapter describes directions that deal in various ways with the question of reliability of evidence. However, in addition to this, these directions fall within two broad categories of directions:

- Those that deal with the problems that arise where directions must be given in cases where evidence can be used for more than one purpose (but is not admitted for one or more of those purposes). These include directions dealing with tendency and coincidence evidence, evidence of post-offence conduct, evidence of character, multiple offences, and conspiracy counts.
- Those that deal with the problems that can arise as the result of common misconceptions about the interpretation of some evidence. These include circumstantial evidence, demeanour evidence, evidence given by Indigenous witnesses and evidence involving DNA profiling.

TENDENCY AND COINCIDENCE EVIDENCE

The Evidence Act

8.2 Tendency and coincidence evidence is admitted in accordance with Part 3.6 (s 94-s 101) of the *Evidence Act 1995* (NSW).[1] These statutory provisions replace the common law relating to the admissibility of what the common law terms propensity and similar fact evidence, and are intended to cover the field. It was previously held to be permissible to turn to the common law for guidance in applying Part 3.6.[2] However, it has now been held that the tendency and coincidence provisions of the *Evidence Act* apply to the exclusion of the common law principles previously applicable.[3]

8.3 Pursuant to s 97 of the *Evidence Act* (the tendency rule), evidence must not be admitted to prove that a person has, or had, a tendency to act in a particular way, or to have a particular state of mind, *unless* it has "significant probative value". "Probative value" is the extent to which the evidence could rationally affect the assessment

1. *Evidence Act 1995* (NSW) s 97, s 98, s 101. Such evidence is admitted as propensity and similar fact evidence in non-Evidence Act States: *Pfennig v The Queen* (1995) 182 CLR 461 and *Phillips v The Queen* (2006) 225 CLR 303.
2 See *Zaknic Pty Ltd v Svelte Corp Pty Ltd* (1995) 61 FCR 171.
3 *R v Ellis* (2003) 58 NSWLR 700; [2003] NSWCCA 319, [74]-[84], [90]-[95]. The High Court has expressly agreed with that construction: *Ellis v The Queen* [2004] HCATrans 488.

of the probability of the existence of a fact in issue.[4] The expression "significant probative value" means that its degree of relevance to the events giving rise to the offence charged is clearly and strongly probative of the relevant fact in issue.[5] The evidence must be able to "rationally affect the assessment of the probability of the relevant fact in issue to a significant extent; that is, more is required than mere statutory relevance".[6] What is required is something more than mere relevance, but less than a substantial degree of relevance.[7]

8.4 Pursuant to s 98 (the coincidence rule), evidence that two or more related events occurred is not admissible to prove that, because of the improbability of the events occurring coincidentally, a person did a particular act or had a particular state of mind *unless* it has "significant probative value". The two or more events must be substantially and relevantly similar, and the circumstances in which they are alleged to have occurred must be substantially similar.

8.5 The *Evidence Act* provides that evidence that is inadmissible as tendency or coincidence evidence, if admitted for other purposes, may still not be used to establish tendency or coincidence.[8] In this way, this provision differs from those relating to hearsay which, if admitted for other purposes, is evidence of the truth of what is stated.[9] However, pursuant to s 101, tendency or coincidence evidence may be used if its probative value "substantially outweighs any prejudicial effect it may have on the defendant".[10]

8.6 The *Bench Book* suggests a direction where the prosecution adduces evidence, noting, however, that it would require substantial modification if the evidence has been adduced by the accused:[11]

> [*The accused*] is charged only with the offence(s) stated in the indictment. You have before you evidence that the Crown relies upon as establishing that [*he/she*] committed [*that/those*] offence(s). However, you also have before you evidence that the accused … [*specify*].

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4 *Evidence Act 1995* (NSW) Dictionary.

5 *Zaknic Pty Ltd v Svelte Corp Pty Ltd* (1995) 61 FCR 171, 175-176 (Lehane J); *Jacara Pty Ltd v Perpetual Trustees WA Ltd* (2000) 180 ALR 569, [72]-[73].

6 *ASIC v Vines* [2003] NSWSC 1237, [31] (Austin J).

7 *Jacara Pty Ltd v Perpetual Trustees WA Ltd* (2000) 180 ALR 569, [72]-[73].

8. *Evidence Act 1995* (NSW) s 95. See *R v AH* (1997) 98 A Crim R 71, 78.

9. *Evidence Act 1995* (NSW) s 60; *R v Adam* (1999) 106 A Crim R 510; [1999] NSWCCA 189, [20]-[30].

10. *Evidence Act 1995* (NSW) s 101(2).

11. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (October 2008) [4-210].

> That evidence is before you because the Crown says there is a pattern of behaviour that reveals that the accused has a tendency to act in a particular way (or to have a particular state of mind) namely… [*specify*]. You may consider this evidence, but only for the limited purposes of … [*specify*]. So, if you are satisfied that the accused did (act in this way/have this state of mind) then you may use that fact in considering whether the accused committed the offence(s) charged. The evidence must not be used in any other way. It would be completely wrong to reason that, because [*the accused*] has committed one crime or has been guilty of one piece of misconduct, [*he/she*] is therefore generally a person of bad character and for that reason must have committed the offence(s). That is not the purpose of the evidence at all.

The *Bench Book* further suggests that, if the judge considers it appropriate, the jury should be instructed that:

> The evidence of the accused (acting in this way/having this state of mind) can only be used in the way the Crown asks you to if you are firstly satisfied of that evidence beyond reasonable doubt.[12]

The *Bench Book* direction does not specifically instruct that the evidence could show a tendency "to act in a particular way" rather than demonstrate a tendency to commit a particular crime.[13]

8.7 Specifically in relation to coincidence evidence, the *Bench Book* draws on Justice Mitchell's summing-up at first instance in *Sutton v The Queen*.[14]:

> Sometimes there may be such a striking similarity between two different acts that a jury may be satisfied beyond reasonable doubt that the person who committed one set of acts must have committed the other. That is to say, that the accused person has put a certain stamp upon the crime which makes it easily recognisable that [*he/she*] must have committed both sets of crimes. This could not be so if both sets are such that they may be explained by coincidence. There must be such a close similarity, such a clear underlying unity between both sets of acts, as to make coincidence a very unlikely explanation for what happened.
>
> And that is what the Crown says here. The Crown says here that it is so unlikely that you can disregard it that two or more people

12. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (October 2008) [4-210].
13. See *R v Li* [2003] NSWCCA 407, [11].
14. *Sutton v The Queen* (1984) 152 CLR 528, on appeal from the Supreme Court of SA.

> committed these crimes. If you decide that the Crown is right (but you must bear in mind that it is not sufficient if the evidence simply raises or deepens the suspicion that [*the accused*] is guilty of all offences) — it must make any other conclusion than "guilty" an affront to your common sense.
>
> In this case, the Crown says that, provided you are satisfied beyond reasonable doubt that [*the accused*] committed the crimes alleged in respect of one complainant, then the circumstances in which the other crimes were alleged to have been committed were so similar as to lead inevitably to the conclusion that [*he/she*] must have committed the other offences.[15]

8.8 Odgers has suggested that the assessment of the strength of the inference arising out of tendency evidence will normally be governed by such factors as:[16]

- the number of occasions of particular conduct relied on;
- the time between such occasions;[17]
- the degree of similarity between the conduct on the various occasions;[18]
- the degree of similarity of the circumstances in which the conduct took place;[19]
- whether the tendency evidence is disputed;[20] and
- whether the evidence is adduced to explain or contradict tendency evidence adduced by another party. (The probative value of such evidence may thereby be greater than when it is considered in isolation.)

8.9 In light of the above, the question arises whether the *Bench Book* goes far enough in directing the jury as to the use and probative value of tendency and coincidence evidence.

ISSUE 8.1

Is the direction to the jury suggested by the *Bench Book* in relation to tendency and coincidence evidence adequate?

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15. *Sutton v The Queen* (1984) 152 CLR 528, 544.
16. S Odgers, *Uniform Evidence Law* (7th ed, Thomson Law Book Co, 2006) [1.3.6680].
17. *R v Watkin* (2005) 153 A Crim R 434; 153 A Crim R 434.
18. *R v Fletcher* (2005) 156 A Crim R 308; [2005] NSWCCA 338.
19. *R v Milton* [2004] NSWCCA 195, [31]; *R v Fletcher* (2005) 156 A Crim R 308, [57], [67]-[68].
20. *Ibrahim v Pham* [2004] NSWSC 650, [31] (Levine J).

Evidence of other sexual conduct

8.10 In sexual assault trials, the prosecution leads evidence of the specific details of the accused's conduct that is the subject of the charge on an indictment. However, the prosecution may also lead, or seek to introduce, evidence of other (uncharged) sexual acts. These are usually acts involving the accused and the complainant on occasions other than when the charged act took place, but may be similar (uncharged) sexual acts involving another person.[21]

8.11 Such evidence falls within the category of coincidence evidence.[22] It is also described as "evidence of uncharged acts", although Chief Justice Gleeson has questioned whether this latter phrase "would always, or even usually, be a helpful phrase in a trial judge's directions to a jury".[23] It can suggest that the acts could have been the subject of charges, inviting speculation on why charges were not laid, whereas this is not necessarily so.[24] In light of that, the phrase "other sexual conduct" is employed in the following discussion.

8.12 In general terms, other "acts of the same kind as the charged acts are themselves a particular example of evidence that reveals criminal or discreditable conduct of an accused other than the conduct with which he or she is charged".[25] Some of the uses to which evidence of other sexual conduct can be put include:

- to establish the sexual interest[26] or attraction of the accused for the complainant;[27] or
- to explain the nature of the relationship between the accused and the complainant, and place the alleged offences into

21. Although *Pfennig v The Queen* (1995) 182 CLR 461 involved a charge of murder, rather than sexual assault, it did consider the admissibility of similar fact evidence not concerning the victim. The accused was charged with the murder of an abducted boy whose body was never found. The prosecution sought to have admitted evidence of the abduction and rape by the accused of another young boy 12 months after the alleged abduction.
22. *HML v The Queen* (2008) 245 ALR 204; [2008] HCA 16.
23. *HML v The Queen* (2008) 245 ALR 204; [2008] HCA 16, [1] (Gleeson CJ). The terminology of the *Evidence Act* has been substituted for the common law terminology. See also Hayne J at [129] and Kiefel J at [492].
24. *HML v The Queen* (2008) 245 ALR 204; [2008] HCA 16, [129] (Hayne J), [251] (Heydon J).
25. *HML v The Queen* (2008) 245 ALR 204; [2008] HCA 16, [1] (Gleeson CJ).
26. This was the term preferred in *HML v The Queen* (2008) 245 ALR 204; [2008] HCA 16.
27. *R v Leonard* (2006) 67 NSWLR 545; [2006] NSWCCA 267, [49]-[58] (Hodgson JA), referred to with approval in *HML v The Queen* (2008) 245 ALR 204; [2008] HCA 16, [273] (Heydon J).

> context.[28] This is more properly described as "context evidence" rather than "relationship evidence".[29] It is not admitted for a tendency purpose.

Evidence of other sexual conduct may also be admitted in relation to subsidiary issues that may arise in the trial, such as to counter evidence of good character led by the defence.[30]

8.13 If evidence of other sexual conduct is admitted into the trial, the trial judge must explain to the jury, first, the limited purpose for which the evidence is led; and secondly, the permissible and impermissible uses of such evidence. This must be done both at the time at which the evidence is given and in the summing-up.[31]

8.14 If evidence of other sexual conduct is admitted solely as context evidence, the jury:

> should be told in clear terms that the evidence has been admitted to provide background to the alleged relationship between the complainant and the accused so that the evidence of the complainant and his/her response to the alleged acts of the accused, can be understood and his/her evidence evaluated with a complete understanding of that alleged relationship. The jury must be told that they cannot use the evidence as tendency evidence.[32]

8.15 If evidence of other sexual conduct is admitted to show that the accused had a sexual interest in, or attraction to, the complainant, the judge must direct the jury about the purpose of such evidence. The jury should be directed that it should not use the evidence to reason that the accused is the sort of person who, because of a *general* tendency to commit sexual assault, would be more likely to commit the offence charged. It is the *specific* sexual attraction he or she has for the particular complainant that is relevant to proof that he or she committed the offence charged.[33]

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28. *R v Ball* [1911] AC 47 (HL); *R v Beserick* (1993) 30 NSWLR 510, 515 (Hunt CJ at CL).
29. *R v Qualtieri* [2006] NSWCCA 95, [80]-[81] (McClellan CJ at CL) and [112]-[113] (Howie J).
30. *BRS v The Queen* (1997) 191 CLR 275.
31. *R v Beserick* (1993) 30 NSWLR 510, 516 (Hunt CJ at CL); *R v Qualtieri* [2006] NSWCCA 95, [80] (McClellan CJ at CL).
32. *R v Qualtieri* [2006] NSWCCA 95, [80] (McClellan CJ at CL). See also *R v Hagerty* [2004] NSWCCA 89, [23] and *Rodden v R* [2008] NSWCCA 53, [123]-[125].
33. *Harriman v The Queen* (1989) 167 CLR 590, 630 (McHugh J) following *R v Bond* [1906] 2 KB 389, 401, approved in *Wilson v The Queen* (1970) 123

8.16 In the case of both context and tendency evidence, the jurors should be given a number of warnings. First, they should be warned that they cannot "substitute evidence of such other sexual activity for the specific activity which is the subject of the offence charged".[34]

8.17 Secondly, because of the prejudicial nature of the evidence, the jury should be given a clear warning of "the dangers of pure propensity reasoning, that is, reasoning from a conclusion that the accused is a bad type of person to the conclusion that he or she is guilty of the particular offences charged",[35] or, more specifically, reasoning that, because the accused may have done something wrong with the complainant on some other occasion, "he must also have done so on the occasion which is the subject of the offence charged".[36]

8.18 Thirdly, the jury must be told to give careful consideration to the time frame within which the other sexual conduct is alleged to have occurred. The more remote the other sexual activity is, the less will be its weight.[37]

ISSUE 8.2

(1) Should the *Bench Book* specifically address evidence of other sexual conduct in relation to tendency evidence?
(2) If so, what form should warnings and suggested directions in relation to such evidence take?

EVIDENCE OF POST-OFFENCE CONDUCT: LIES AND FLIGHT

8.19 Certain types of post-offence conduct can be admitted in evidence as indicating "consciousness of guilt".[38] These may include flight from the scene of the crime or flight from the jurisdiction, as well as attempts at concealment on the part of the accused. Concealment can include: lies; the assumption of a false name; attempts to dispose of allegedly incriminating evidence; and changing appearance to avoid detection.

CLR 334, 338 (Barwick CJ), 344 (Menzies J); *HML v The Queen* (2008) 245 ALR 204; [2008] HCA 16, [345]–[346] (Heydon J), following *R v BJC* (2005) 13 VR 407; [2005] VSCA 154, [37] (Byrne AJA). Crennan J also referred to a *specific* propensity: [436].

34. *R v Beserick* (1993) 30 NSWLR 510, 516 (Hunt CJ at CL).
35. *HML v The Queen* (2008) 245 ALR 204; [2008] HCA 16, [62] (Kirby J), [201] (Hayne J). See also *KRM v The Queen* (2001) 206 CLR 221; [2001] HCA 11, [31] (McHugh J), [133] (Hayne J).
36. *R v Beserick* (1993) 30 NSWLR 510, 516 (Hunt CJ at CL).
37. *R v Beserick* (1993) 30 NSWLR 510, 521-522 (Hunt CJ at CL).
38. *Edwards v The Queen* (1993) 178 CLR 193, 209.

Lies

8.20 A considerable volume of case law in Australia has been concerned with the question of lies where they have been relied on as evidence of consciousness of guilt.[39] The leading case of *Edwards v The Queen* held that a jury should be instructed that there may be reasons why an accused lied apart from a "realisation of guilt", and should be informed of those reasons.[40] This warning is considered necessary because of the general belief that juries will simply conclude that, because the accused has lied, he or she must be guilty of the offence charged.[41]

8.21 The *Bench Book* currently suggests the following formulation, in accordance with the principles laid down in *Edwards*,[42] where the Crown submits that the accused has lied. It starts with the instruction that the jury must first be satisfied that the asserted lie was a deliberate lie if it is to be taken as evidence of guilt. If so satisfied, then the jury must also be satisfied of three things, namely, that the lie:

> 1. relates to an issue that is material (or relevant) to the offence charged; and
> 2. reveals a knowledge of the offence or some aspect of it; and
> 3. was told because [the accused] knew that the truth of the matter about which [he/she] lied would implicate [him/her] in the offence charged, or to put it another way, because of a realisation of guilt and a fear of the truth. I emphasise that you must be satisfied that what was in [his/her] mind was guilt of the offence charged and not some other crime.

The direction continues as follows:

> You must remember, however, that people do not always act rationally, and that conduct of this sort may sometimes be explained in other ways. There may be reasons for telling a lie apart from the realisation of guilt. For example, a lie may be told out of panic; to escape an unjust accusation; to protect some other person; or to avoid a consequence unrelated to the offence …

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39. See, for example, *Edwards v The Queen* (1993) 178 CLR 193; *Zoneff v The Queen* (2000) 200 CLR 234; and *Dhanhoa v The Queen* (2003) 217 CLR 1.
40. *Edwards v The Queen* (1993) 178 CLR 193, 211-213.
41. *Zoneff v The Queen* (2000) 200 CLR 234; [2000] HCA 28, [57]-[58]; *Broadhurst v The Queen* [1964] AC 441, 457; *R v White* [1998] 2 SCR 72, [22].
42. See also *R v Lucas* [1981] 1 QB 720; and *R v Heyde* (1990) 20 NSWLR 234.

> If you think that there is a reasonable possibility that the lie was told for such a reason, then you cannot use it for this purpose.
>
> If you are satisfied, however, of the three matters to which I have referred, then you are entitled to use that finding in aid of the other evidence in the Crown case as pointing to the guilt of [the accused]. Standing by itself, it could not prove guilt.[43]

8.22 The direction adopts the *Edwards* phrase "realisation of guilt", rather than the phrase "consciousness of guilt" and, in addition, focuses in the first instance on knowledge that the truth would implicate the accused in the offence. This appears to avoid the difficulty with the meaning of "consciousness of guilt" pointed out by the High Court in *Zoneff v The Queen*,[44] and which has been a matter of some controversy.[45] The High Court drew attention to the "risk that its use by the trial judge may itself suggest guilt". Justice Kirby observed that:

> Experienced trial judges have noted the difficulty presented by the *Edwards* principles,[46] the practical difficulties which they present at trial and the "fertile ground for appeal" which they provide.[47]

8.23 The Supreme Court of Canada, in *R v White*, suggested that the label "consciousness of guilt", which it found "somewhat misleading", should be replaced with a more "general description" using "more neutral language" such as "evidence of post-offence conduct".[48] Justice Kirby, in *Zoneff*, agreed with this view and pointed to two considerations that support this change.[49] First, it adopts an objective classification, concentrating on the significance of post-offence conduct (in this case, lies) and measuring evidence of such conduct against

43. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (October 2008) [2-960].
44. *Zoneff v The Queen* (2000) 200 CLR 234, [15] (Gleeson CJ, Gaudron, Gummow and Callinan JJ).
45. The Victorian Court of Appeal, in a series of cases, has sought to grapple with the problems: *R v Morgan* (Victoria, Court of Appeal, 13 August 1996, unreported); *R v Renzella* [1997] 2 VR 88; *R v Laz* [1998] 1 VR 453; *R v Erdei* [1998] 2 VR 606; *R v Cervelli* [1998] 3 VR 776 and *R v Konstandopoulos* [1998] 4 VR 381.
46. J Wood, "Criminal Law Update: Court of Criminal Appeal" (1999) 4 *The Judicial Review* 217, 238.
47. *Zoneff v The Queen* (2000) 200 CLR 234, [70] (Kirby J). See F H Vincent, "The High Court v The Trial Judge" in *28th Australian Legal Convention* (1993) vol 2, 263.
48. *R v White* (1998) 125 CCC (3d) 385, 398.
49. *Zoneff v The Queen* (2000) 200 CLR 234, [63] (Kirby J).

other evidence of the accused's involvement in the crime. Secondly, it avoids the risk that "consciousness of guilt" (or, "realisation of guilt") suggests "a conclusion about the conduct in question which tends to undermine the presumption of innocence", and could prejudice the accused in the eyes of the jury.[50] This circularity of reasoning is obstructive. His Honour concluded that the label should be avoided in any instruction about the use that may be made of evidence of lies.[51]

8.24 The *Bench Book* direction also reflects the Privy Council decision in *Broadhurst v The Queen*, where it was held that a trial judge has a duty to make clear to the jury that, if an accused is lying, this does not necessarily mean that he or she is guilty.[52] Whether the accused gives untruthful evidence or no evidence, "the burden remains on the prosecution to prove the guilt of the accused". But, if inferences can be drawn from proved facts "about the accused's conduct or state of mind, his untruthfulness is a factor which the jury can properly take into account as strengthening the inference of guilt". What strength it adds depends on all the circumstances, "especially on whether there are reasons other than guilt that might account for untruthfulness".[53] In *Zoneff*, Justice Kirby pointed to this formulation as exhibiting "circular reasoning", of which others have been critical.[54] That is, the jury is invited to consider whether a lie was told because of guilt and then to decide whether the Crown case has become strong enough to prove such guilt.

8.25 Nonetheless, Justice Kirby was of the view that "its essential point displays a great deal of common sense":[55]

> The jurors are discharging functions that are onerous, formal and commonly unfamiliar to them. It would be relatively easy for them to fall into the error of attaching excessive or irrelevant significance to a conclusion that the accused (or an important witness in the accused's case) has told a lie. A warning of the *Broadhurst* kind, given with judicial authority, might be a healthy corrective to this kind of reasoning. Its general character and practical wisdom are precisely the kind of assistance which a judge might be expected to give to the jury where the suggestion of lying has been made by questioning or by submissions.

50. *Zoneff v The Queen* (2000) 200 CLR 234, [63] (Kirby J).
51. *Zoneff v The Queen* (2000) 200 CLR 234, [63] (Kirby J).
52. *Broadhurst v The Queen* [1964] AC 441, 457 (Lord Devlin).
53. *Broadhurst v The Queen* [1964] AC 441, 457 (Lord Devlin).
54. *Zoneff v The Queen* (2000) 200 CLR 234, [58] (Kirby J).
55. *Zoneff v The Queen* (2000) 200 CLR 234, [58] (Kirby J).

8.26 Chief Justice Gleeson and Justices Gaudron, Gummow and Callinan held, in *Zoneff*, that "rigid prescriptive rules as to when and in what precise terms an *Edwards*-type direction should be given cannot be comprehensively stated".[56] Generally, the direction should only be given if the prosecution has relied on lies as evidence of guilt. However, even if the prosecution has not suggested that a lie has been told out of consciousness of guilt, "[t]here may be cases in which the risk of misunderstanding on the part of a jury as to the use to which they may put lies" might call for a direction to be given by the trial judge.[57]

8.27 One option for reform of the lies direction is to shorten it substantially and reduce it to a bare reminder to the jurors to take into account, as they see fit, any evidence showing that the accused has lied, bearing in mind that there may be reasons other than an acceptance of guilt for having done so, or that it may not indicate a lack of credibility. Similar formulations are regarded as acceptable in other jurisdictions. The Supreme Court of Canada has observed:

> the best way for a trial judge to address [the danger that juries might jump too quickly from evidence of post-offence conduct to an inference of guilt] is simply to make sure that the jury are aware of any other explanations for the accused's actions, and that they know they should reserve their final judgment about the meaning of the accused's conduct until all the evidence has been considered in the normal course of their deliberations. Beyond such a cautionary instruction, the members of the jury should be left to draw whatever inferences they choose from the evidence at the end of the day.[58]

8.28 In California, the following is offered as a model direction:

> If [the] defendant [<insert name of defendant when multiple defendants on trial>] made a false or misleading statement relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show (he/she) was aware of (his/her) guilt of the crime and you may consider it in determining (his/her) guilt. [You may not consider the statement in deciding any other defendant's guilt.]
>
> If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence

56. *Zoneff v The Queen* (2000) 200 CLR 234, [15] (Gleeson CJ, Gaudron, Gummow and Callinan JJ).
57. *Zoneff v The Queen* (2000) 200 CLR 234, [16] (Gleeson CJ, Gaudron, Gummow and Callinan JJ).
58. *R v White* [1998] 2 SCR 72, [57].

that the defendant made such a statement cannot prove guilt by itself.[59]

ISSUE 8.3

(1) Should the lies direction be reformulated in the way suggested by the Supreme Court of Canada or following the Californian model?
(2) Alternatively, should the third point in the *Bench Book's* current suggested direction to the jury be reformulated?
(3) Should the reference to "realisation of guilt" be omitted and the instruction redrafted in more general terms?
(4) Is the current direction effective and adequate?

8.29 Evidence of lies may also be admitted as bearing on the credibility of the accused. "Credibility lies" are those that, when told on one matter, even peripheral to the offence, may lead the jury to view other testimony given by the accused with scepticism.[60]

8.30 Sometimes, the evidence will be relied on for each purpose. The different uses to which the evidence may be put will require the trial judge to determine the purposes for which the prosecution has led it,[61] and this will sometimes call for the trial judge to draw somewhat sophisticated distinctions in instructing the jury. However, as Justice Kirby pointed out in *Zoneff*, there is an inevitable difficulty for jurors in understanding and applying subtle distinctions between the use of evidence for one purpose and not another, and a risk that a warning not to use it for a particular purpose may be counterproductive in exciting the very reasoning which is forbidden, but which might otherwise not have occurred to them.[62]

8.31 The current *Bench Book* direction does not address the distinction between lies going to credibility and those indicating guilt. Nor is there any other direction in the *Bench Book* on evidence of lies led by the prosecution to impugn the accused's credibility.

ISSUE 8.4

Should the *Bench Book* contain a direction relating to evidence of lies led by the prosecution for the purpose of attacking the accused's credibility?

59. Judicial Council of California, *Criminal Jury Instructions* (2008) 132. See also *People v Edwards*, 8 Cal App 4th 1092, 1103-1104 (1992).
60. *Zoneff v The Queen* (2000) 200 CLR 234, [59] (Kirby J).
61. *R v Fowler* [2000] NSWCCA 142, [97]. It is good practice to ascertain, before the summing-up, whether the prosecution is relying on lies as evidence of guilt: *R v Ray* (2003) 57 NSWLR 616; [2003] NSWCCA 227, [98]-[100].
62. *Zoneff v The Queen* (2000) 200 CLR 234, [67] (Kirby J).

Flight

8.32 Evidence of flight by the accused may be used for similar purposes and is subject to the same requirements (with appropriate adaptation) with regards to judicial warnings.[63] So, for example, a trial judge should, where appropriate, advise the jury that a person may evade arrest for reasons other than consciousness of guilt, such as fear of being unjustly accused, not wishing to be involved as a witness in the matter, or fear of being apprehended for an offence other than the offence being tried.[64]

8.33 The *Bench Book* does not suggest a direction specifically in relation to flight as evidence of guilt, but the subject is dealt with, together with evidence of lies, under the heading "Consciousness of Guilt". Presumably, then, it is envisaged that the lies direction would guide the formulation of a flight direction. In that case, the same issues arise as were discussed above in relation to lies. Justice Simpson in *R v Cook* noted that "the principles developed in relation to evidence of lies are readily adaptable to the circumstance where the Crown tenders evidence of flight said to be indicative of a consciousness of guilt".[65] Her Honour stated in that case that:

> where evidence of flight is relied upon as evidence of a consciousness of guilt, the principles of law applicable to directions which must be given to the jury are, in my view, identical to those which govern the directions to be given to a jury where lies are relied upon as such evidence. [66]

8.34 The US *Pattern Criminal Jury Instructions for the District Courts of the First Circuit* suggests the following direction:

> The burden is upon the government to prove intentional flight. Intentional flight after a defendant is accused of a crime is not alone sufficient to conclude that he/she is guilty. Flight does not create a presumption of guilt. At most, it may provide the basis for an inference of consciousness of guilt. But flight may not always reflect feelings of guilt. Moreover, feelings of guilt, which are present in many innocent people, do not necessarily reflect actual guilt. In your consideration of the evidence of flight, you should consider that there may be reasons for [defendant]'s actions that are fully consistent with innocence.

63. *R v Cook* [2004] NSWCCA 52, [50].
64. *R v Cook* [2004] NSWCCA 52, [50]. See also *R v White* [1998] 2 SCR 72, 80.
65. *R v Cook* [2004] NSWCCA 52, [25] (Simpson J).
66. *R v Cook* [2004] NSWCCA 52, [50] (Simpson J).

> It is up to you as members of the jury to determine whether or not evidence of intentional flight shows a consciousness of guilt and the weight or significance to be attached to any such evidence.[67]

It may be thought that such a direction gives little assistance to the jury.

ISSUE 8.5

(1) Is it necessary or desirable to formulate a direction specifically in relation to evidence of flight?
(2) If so, should it be formulated along the lines of the US *Pattern Criminal Jury Instructions for the District Courts of the First Circuit* direction?

EVIDENCE OF CHARACTER

8.35 Evidence of character may be used chiefly for two purposes: to establish propensity of the accused to commit or not to commit the crime charged; and to establish the accused's credibility as a witness.[68] There are many problems with using such evidence, especially because of the assumptions underlying it.

8.36 The courts approach evidence of good character and evidence of bad character differently. Good character is readily admitted to evidence while the admission of evidence of bad character is strictly controlled. Evidence of bad character is generally excluded because it is unfairly prejudicial to the accused.

Good character

8.37 Evidence of "good character" refers to evidence which an accused may introduce in order to disprove guilt because it makes it unlikely that he or she committed the crime charged.[69]

8.38 The *Evidence Act* allows evidence to establish good character[70] as an exception to the general restriction on evidence that goes only to

67. *Pattern Criminal Jury Instructions for the District Courts of the First Circuit* (1997), 33.
68. *Melbourne v The Queen* (1999) 198 CLR 1; [1999] HCA 32, [30] (McHugh J), [72]-[76] (Gummow J), [120] (Kirby J), [152] (Hayne J), [200] (Callinan J); *Eastman v The Queen* (1997) 76 FCR 9, 53.
69. *Atwood v The Queen* (1960) 102 CLR 353, 359; *Eastman v The Queen* (1997) 76 FCR 9, 53.
70. *Evidence Act 1995* (NSW) s 110(1).

credibility.[71] Evidence of good character, notwithstanding its low probative value, has been allowed in to assist an accused who may have nothing else with which to counter a particular charge.[72]

8.39 While it has been accepted that there may be no need to give directions in relation to evidence of good character, the Court of Criminal Appeal has held that such directions are desirable.[73] No particular form is required for the directions. However, a trial judge should instruct the jury to bear in mind the evidence of good character as influencing the question of guilt and also, if the judge considers it appropriate, as having a bearing on credibility.[74] In some cases, it may be appropriate for the judge to point out that people do offend for the first time and that evidence of good character cannot provide a defence against convincing evidence of the offences charged.[75]

8.40 If the prosecution challenges evidence of the accused's good character, the judge should also instruct the jurors that, if they consider that the accused is not a person of good character, they should not take the evidence led by the prosecution as tending towards the guilt of the accused and thus use it to strengthen the prosecution's case.[76]

8.41 In giving directions as to the use of evidence of good character, the judge is not warning the jury to avoid a prohibited chain of reasoning as he or she would do in relation to some of the other directions discussed in this chapter.[77] Indeed, it has been observed that failing to give a direction with respect to good character is not the same as failing to give a direction about, for example, accomplice evidence where a jury "without proper guidance might well misuse the evidence to the detriment of the accused".[78] For example, in one case, the High Court observed:

> There is no reason to believe that the jury would not have understood that a man of good character would be unlikely to commit a crime of savage violence ... In other words, there is no

71. *Evidence Act 1995* (NSW) s 102.
72. Australian Law Reform Commission, *Evidence*, Report 26 (1985) vol 1, [802].
73. *R v RJC* (NSW CCA, No 60671/97, 1 October 1998, unreported), 26-27.
74. *R v Murphy* (1985) 4 NSWLR 42, 54.
75. *R v RJC* (NSW CCA, No 60671/97, 1 October 1998, unreported), 27; *R v Trimboli* (1979) 21 SASR 577, 578.
76. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (October 2008) [2-390]. See also *Donnini v The Queen* (1972) 128 CLR 114, 123-127; *R v Stalder* [1981] 2 NSWLR 9, 23.
77. See *Melbourne v The Queen* (1999) 198 CLR 1; [1999] HCA 32, [145].
78. *R v Schmahl* [1965] VR 745, 750.

> reason to conclude that the jury would have failed to give the evidence as to good character such weight as it deserved.[79]

8.42 It has been suggested that reference to character evidence may in fact divert juries from considering their substantial task, that is "properly evaluating the strength or weakness of evidence that more directly bears on whether or not the accused committed the crime in question".[80]

ISSUE 8.6

In what circumstances, if any, is it necessary to give directions on the use of evidence of good character?

Bad character

8.43 There are strict controls on the admission of evidence of bad character. The *Evidence Act* allows evidence that a person is not of good character, either generally or in a particular respect, in response to evidence of good character that has already been admitted.[81]

8.44 The common law approach to the use of evidence of bad character when it was led to rebut evidence of good character was that the jury could not use the evidence of bad character also to establish that the accused was the type of person who would commit the offence charged and therefore conclude that the accused was guilty.[82] This approach is now embodied in the *Evidence Act*, which provides that evidence that is inadmissible as tendency or coincidence evidence, if admitted for other purposes, may still not be used to establish tendency or coincidence.[83] Evidence that rebuts good character may also be used to corroborate the victim's evidence, but still may not be used to establish propensity to, and therefore guilt of, the activity charged. The High Court has held that, in such circumstances, where there is a risk of injustice, the trial judge must instruct the jury in clear terms about the uses to which it may properly put the evidence

79. *Simic v The Queen* (1980) 144 CLR 319, 333-334.
80. *Melbourne v The Queen* (1999) 198 CLR 1, [44] (McHugh J). See also Hayne J, [150].
81. *Evidence Act 1995* (NSW) s 110(2) and (3).
82. *R v Stalder* [1981] 2 NSWLR 9, 22-23. See also *Donnini v The Queen* (1972) 128 CLR 114, 123.
83. *Evidence Act 1995* (NSW) s 95. See *R v AH* (1997) 98 A Crim R 71, 78.

in question and also warn it against using it for an impermissible purpose.[84]

8.45 It seems to be accepted that a judicial warning in such circumstances will remove the risk that the jury will use the evidence improperly.[85] Others have suggested however that, by drawing attention to an impermissible line of reasoning, the trial judge may be encouraging the very line of reasoning that he or she is attempting to prevent.[86]

8.46 Sometimes, evidence of bad character will also be admitted for other permissible reasons. For example, by way of mention of a prior conviction or a previous episode of incarceration that provides an alibi. In such cases, the judge should warn the jury that it cannot conclude that the accused is guilty of the crime charged simply because he or she is of bad character and people of bad character are more likely to commit crimes. A warning along these lines has been included in the *Bench Book*[87] and the Court of Criminal Appeal has approved similar warnings on a number of occasions.[88]

8.47 The Court of Criminal Appeal, in one case, rejected a submission that the direction "gave rise to a risk of a miscarriage of Justice in that it was suggestive of a line of reasoning which might not otherwise have occurred to the jury, and risked planting in their minds an impression that the appellant was in fact a person of bad character".[89] In another case, the Court of Criminal Appeal observed that, in the particular circumstances, "what was required was a warning to the jury to concentrate on the issue before them and not to be distracted by evidence of the accused's character".[90]

ISSUE 8.7

(1) Are directions on the use of evidence of bad character necessary?
(2) If so, in what circumstances should judges given them?

84. *BRS v The Queen* (1997) 191 CLR 275. See also *R v Gilbert* (NSW CCA, No 60601/96, 10 December 1998, unreported), 14; *R v ATM* [2000] NSWCCA 475, [76]-[77].
85. See, eg, *BRS v The Queen* (1997) 191 CLR 275, 310 (McHugh J); see also the remarks of Kirby J at 331-332.
86. As suggested by counsel on appeal in *Zammit v R* (1999) 107 A Crim R 489, [143].
87. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (October 2008) [2-430].
88. See *Zammit v R* (1999) 107 A Crim R 489; [1999] NSWCCA 65, [142]-[144]; *Smale v R* [2007] NSWCCA 328, [49]-[53].
89. *Zammit v R* (1999) 107 A Crim R 489; [1999] NSWCCA 65, [143].
90. *Smale v R* [2007] NSWCCA 328, [51].

MULTIPLE OFFENCES

8.48 In general, in cases where multiple offences are tried together, the trial judge should instruct the jury that each offence should be considered separately by reference to the evidence which is available in relation to it, and according to the burden and standard of proof that rests upon the prosecution in relation to each count.[91] Appellate courts generally assume that the jurors have followed these instructions, even in cases where they have delivered apparently inconsistent sets of verdicts,[92] although their ability to separate out the evidence for each count, and to avoid the temptation of considering the matter globally, may be questionable.

8.49 A particular problem is likely to arise where multiple counts of sexual assault are alleged, relying on the sole evidence of the complainant, and the jury delivers apparently inconsistent verdicts. The High Court has held that, in cases where there was nothing in the evidence to justify different findings, except the jury's finding as to the reliability of the complainant's evidence, the accused's acquittal with respect to one charge must lead to an acquittal on all charges.[93]

8.50 In cases where such an outcome is likely, it may be appropriate for the trial judge to instruct the jurors that, "if they hold a reasonable doubt concerning the reliability of a complainant's evidence on one or more counts, whether by reference to the complainant's demeanour or for any other reason, they must take that into account in assessing the reliability of his or her evidence in relation to other counts".[94] A direction raising the converse proposition, to the effect that, if they are satisfied of the reliability and credibility of the complainant on one or more counts, then they may take that into account in assessing the reliability of his or her evidence in relation to the other counts, would however probably run into difficulties.

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91. See, eg, *R v Robinson* (2000) 111 A Crim R 388; [2000] NSWCCA 59, [9]. See also *R v ARD* [2000] NSWCCA 443, [16]-[22]; *R v Markuleski* (2001) 52 NSWLR 82, [31]-[34].
92. *MacKenzie v The Queen* (1996) 190 CLR 348, 367. See also *R v Andrews Weatherfoil Ltd* (1971) 56 Cr App R 31, 40; *R v Robinson* (2000) 111 A Crim R 388; [2000] NSWCCA 59, [4].
93. *Jones v The Queen* (1997) 191 CLR 439, 453. See also *R v Markuleski* (2001) 52 NSWLR 82; [2001] NSWCCA 290; and *KRM v The Queen* (2001) 206 CLR 221; [2001] HCA 11, [36], [98].
94. *R v Robinson* (2000) 111 A Crim R 388; [2000] NSWCCA 59, [9], approved in *R v ARD* [2000] NSWCCA 443, [12]-[13]. See also *R v Markuleski* (2001) 52 NSWLR 82; [2001] NSWCCA 290, [186]-[191].

8.51 The Court of Criminal Appeal has rejected a proposal that trial judges should warn the jurors specifically in such cases that, "if they return different verdicts where there are no distinguishing features in the evidence, such verdicts are liable to be regarded as a compromise and the guilty verdicts set aside",[95] on the basis that the jury should not be instructed on the likely consequences of its verdicts.[96]

8.52 Directions relating to multiple offences of the type outlined here may be confusing for juries, especially in relation to the way in which a doubt or satisfaction concerning the reliability of a complainant's evidence for one count may be used for other counts, and also in relation to the way in which they may approach the assessment of similar issues arising outside the justice system.

8.53 In cases where multiple (similar) counts are joined in one indictment, one possible approach is for the counts to be severed if there is a danger of impermissible prejudice to an accused.[97] However, this may require multiple trials, with additional delays, stress to those involved, and unnecessary costs.

ISSUE 8.8

What directions should a trial judge give in relation to multiple offences that have been tried together?

CONSPIRACY COUNTS

8.54 A conspiracy arises where at least two people agree to engage in an unlawful act. The existence of a conspiracy is seldom proved by direct evidence of the making of an agreement, but must usually be proved by circumstantial evidence.[98]

8.55 There are two types of evidence required to establish conspiracy on the part of an accused:

- First, that which assists in establishing that there was a conspiracy of the type alleged, which will involve evidence directed to the conduct of the other alleged co-conspirators.

95. *R v RAT* (2000) 111 A Crim R 360; [2000] NSWCCA 77, 371 (Dunford J).
96. *R v ARD* [2000] NSWCCA 443, [3], [128]-[130]. See also *R v Markuleski* (2001) 52 NSWLR 82; [2001] NSWCCA 290, [54]-[55], [179]-[180], [232]-[233].
97. *De Jesus v The Queen* (1986) 61 ALJR 1, 3, 10; *Hoch v The Queen* (1988) 165 CLR 292, 298. See also *Director of Public Prosecutions v Boardman* [1975] AC 421, 442, 447, 459.
98. *Ahern v The Queen* (1988) 165 CLR 87, 93.

- Secondly, that which is evidence of the accused's participation in that conspiracy.[99]

8.56 Normally, the acts or statements of others that are made in the absence of the accused can be used to prove the necessary combination, but cannot be used to prove the participation of the accused. However, acts or statements of one or more alleged co-conspirators in furtherance of a common purpose (not made in the presence of the accused) may be admissible against the accused, but only once his or her participation in the conspiracy is established. The High Court has held that what is required is reasonable evidence of the accused's participation that is independent of the acts or statements of an alleged co-accused.[100] The trial judge determines this question.[101] It is then the task of the jury to determine whether the elements of the conspiracy have been proved beyond reasonable doubt.

Unreliability of the evidence of co-conspirators

8.57 The Court of Criminal Appeal has held that it is desirable to advise the jury that, while the law permits the jury to consider evidence about the acts and statements of alleged co-conspirators, the hearsay nature of such evidence means that it should be scrutinised with great care and that the jury should not be too ready to convict on the evidence of other alleged co-conspirators.[102]

Use of evidence for different purposes

8.58 Where the evidence has been received on different bases - for example, where there is evidence of the existence of the conspiracy that does not implicate the accused - the judge should delineate for the jurors the evidence which they can use when considering whether the conspiracy existed, and that which they can use when determining whether the accused was involved.[103] There is inevitably a danger that evidence admitted for the first purpose might contribute to the accused being attributed with far more knowledge or involvement than he or she in fact had. This can be compounded by the fact that, in

99. See *Tripodi v The Queen* (1961) 104 CLR 1, 7.

100. *Ahern v The Queen* (1988) 165 CLR 87, 100.

101. *R v Masters* (1992) 26 NSWLR 450, 460-466; *R v Chai* (1992) 27 NSWLR 153, 185-187.

102. *R v Chai* (1992) 27 NSWLR 153, 190-191.

103. *R v Chai* (1992) 27 NSLWR 153, 192-193.

a trial of multiple defendants, the judge must identify the evidence with respect to each of the defendants separately.[104]

8.59 The multiple and complex directions required in relation to conspiracy counts can require significant mental gymnastics as a result of the several elements involved.

8.60 The real problem with conspiracy is the admissibility of evidence and what the prosecution has to show in order to make the statements attributable to one conspirator admissible against another conspirator. It is essential that the jury be given as much assistance as possible in understanding the grounds on which the evidence has been admitted. A necessary consequence of this assistance is the lengthening of the summing-up.

8.61 Some of the current problems could be alleviated if prosecutors did not use conspiracy in cases where there is a concluded crime by a principal offender and an accessory.[105]

ISSUE 8.9

What can be done to make the directions on the use of evidence relating to a conspiracy easier to follow?

CIRCUMSTANTIAL EVIDENCE

8.62 Circumstantial evidence is evidence of facts from which the jury is asked to infer the existence of other facts. In some cases, the ultimate fact may simply be the guilt of the accused.

8.63 The trial judge must instruct the jury that the charge has been established only where the guilt of the accused is the only rational or reasonable view of the evidence accepted by it; if there is any rational or reasonable explanation consistent with the innocence of the accused for the existence of that evidence, taken together, the accused must be acquitted.[106]

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104. *Cosgrove v R* (1988) 34 A Crim R 299, 303-304.

105. D Hunt, "The Role of the Independent Prosecution Office in Ensuring Probity and Fairness in the Criminal Justice System from the Courts' Perspective" (NSW DPP, Future Directions Conference, 1997), 7; *R v Stokes* (1990) 51 A Crim R 25, 35-37; *R v Clough* (1992) 28 NSWLR 396, 400.

106. *R v Hodge* (1838) 2 Lewin 227, 228; 168 ER 1136, 1137; *Peacock v The King* (1911) 13 CLR 619, 630, 634, 638, 651-652, 661-662, 668; *Martin v Osborne* (1936) 55 CLR 367, 375; *Plomp v The Queen* (1963) 110 CLR 234, 243, 246; *Pfennig v The Queen* (1995) 182 CLR 461, 482-483. In *Plomp v The Queen*, Dixon CJ (with whom Kitto, Taylor and Windeyer JJ agreed) explained the formula as meaning that, according to the common sense of human affairs,

8.64 It has been observed that this direction is "no more than an amplification of the rule that the prosecution must prove its case beyond reasonable doubt".[107] There is no rule requiring that such a warning be given in every case. In fact, in cases where the amount of circumstantial evidence involved is "slight", the direction may be more confusing than helpful.[108]

8.65 Circumstantial evidence may be one of two types: "strands in a cable" or "links in the chain". Like a cable made up of strands, the strength of a circumstantial case depends upon the strength and/or the number of the circumstances taken together. Each strand may not, by itself, be necessary to the conclusion of guilt, so that its removal may still leave the case capable of supporting a conclusion of guilt beyond reasonable doubt. It is accepted that it is not necessary for the jury to be satisfied beyond reasonable doubt of every circumstantial fact in order to reach a conclusion of guilt beyond reasonable doubt,[109] and trial judges should instruct juries accordingly.

8.66 Conversely, there is a category of facts that can be identified as indispensable to the conclusion of guilt. These indispensable facts, or factual conclusions, are more usually found in a "links in the chain" circumstantial case so that, if they are broken, the conclusion of guilt cannot be reached. The "links in the chain" stand in contrast to pieces of evidence or conclusions that can be described as "strands in the cable". Justice Dawson has suggested that, if a conclusion of fact is identified as "indispensable", that is, a link in the chain, it may be appropriate to tell the jury that "that fact must be found beyond reasonable doubt before the ultimate inference can be drawn":

> But where ... the evidence consists of strands in a cable rather than links in a chain, it will not be appropriate to give such a warning. It should not be given in any event where it would be unnecessary or confusing to do so.[110]

8.67 The current direction in the *Bench Book* attempts to achieve the above in the following way. It suggests that the trial judge instruct the jury that, where the Crown relies on evidence of a basic fact or facts from which the jury is asked to infer or conclude that a further fact or facts existed, namely the accused's guilt (circumstantial evidence):

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the degree of probability that the occurrence of the fact to be proved is so high that the contrary cannot reasonably be supposed.

107. *Shepherd v The Queen* (1990) 170 CLR 573, 578; *Martin v Osborne* (1936) 55 CLR 369, 375 (Dixon J).
108. *Shepherd v The Queen* (1990) 170 CLR 573, 578.
109. *Shepherd v The Queen* (1990) 170 CLR 573, 579-585.
110. *Shepherd v The Queen* (1990) 170 CLR 573, 579.

> Because the onus of proof is on the Crown to prove its case beyond reasonable doubt as to every essential element or ingredient of the charge, any such inference or conclusion from basic facts relied upon by the Crown must, of course, be a conclusion reached by you beyond reasonable doubt … .
>
> A case based on circumstantial evidence may be just as convincing and reliable as a case based on direct evidence, depending on the nature of the circumstances relied upon when considered as a whole (not individually or in isolation) and the degree of clarity and certainty to which that evidence may lead inevitably to the conclusion that the Crown has established its case … .[111]

8.68 The suggested direction continues with instructions to the jury that it must consider whether the evidence is reliable before drawing any conclusions from facts which they regard as established by it, and if it is not considered to be of sufficient reliability, then the jury must acquit.

8.69 The direction concludes:

> If you draw an inference adverse to [*the accused*] and in favour of the Crown, it must be the only inference which, in your view, can be drawn beyond reasonable doubt. This, of course, follows from the directions that I have given you that the onus of proof is on the Crown and it must establish all the essential elements of the [*charge/charges*] beyond reasonable doubt before it can succeed.
>
> If, at the end of your deliberations, there is more than one conclusion than that favourable to the Crown available to be drawn, then obviously the Crown has not proved its case beyond reasonable doubt and your duty would be to acquit [*the accused*] [*or go on to consider the other evidence relied on by the Crown*] … [*specify*].

ISSUE 8.10

(1) Does the *Bench Book's* current suggested direction as to how to treat circumstantial evidence adequately explain those facts that need to be proved beyond reasonable doubt and those that, taken individually, do not need to be proved beyond reasonable doubt?
(2) If not, how could the wording of the direction be improved to clarify the distinction between facts that are like "links in a chain" and facts that are like "strands in a cable"?

111. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (October 2008) [2-510].

DNA EVIDENCE

8.70 A jury sometimes must deal with statistical evidence about DNA profiling in relation to samples collected in connection with an alleged crime. The need for a judicial direction has arisen in some such cases. This is especially so where large-number probabilities are involved. The use of such evidence can lead some people to reach a conclusion by way of what is now commonly referred to as the "prosecutor's fallacy", that is:

1. Only one person in a million will have a DNA profile which matches the relevant sample.
2. The accused has a DNA profile which matches the relevant sample.
3. Therefore there is a million to one probability that the defendant left the sample and is guilty of the crime.[112]

This line of reasoning does no more than establish the probability that the accused shares a DNA profile with a certain number of other people, depending on the size of the area from which the DNA statistics are obtained. It ignores the number of people who may also fit the accused's DNA profile. The significance of DNA evidence will always depend on what other evidence is available.[113] So, for example, a water-tight alibi that the accused was somewhere else at the time will tend to exonerate him or her despite the matching DNA profile. On the other hand, the presence of other corroborating evidence that associates the accused with the crime would be supported by the matching DNA profile.[114]

8.71 The current approach in NSW is to allow statistical evidence relating to DNA to be presented to the jury (subject to admissibility) "accompanied by appropriate directions emphasising the need to avoid the prosecutor's fallacy".[115] However, judges do not necessarily need to give such a warning in all cases where DNA evidence is led. The Court of Criminal Appeal has observed that "trial judges are already required to give numerous directions and it is by no means clear that

112. See *R v GK* (2001) 53 NSWLR 317; [2001] NSWCCA 413, [48]; *R v Doheny* [1997] 1 Cr App R 369, 372-373. See also D J Balding and P Donnelly, "The Prosecutor's Fallacy and DNA Evidence" [1994] *Criminal Law Review* 711.

113. *Keir v R* [2007] NSWCCA 149, [133]-[138].

114. See *R v Doheny* [1997] 1 Cr App R 369, 373.

115. *R v GK* (2001) 53 NSWLR 317; [2001] NSWCCA 413, [59] (also reported as *R v JCG*).

in all circumstances a direction concerning the Prosecutor's Fallacy would assist the jury",[116] concluding that:

> The question is whether or not in the circumstances of a particular case juries should be assisted by a warning not to engage in an impermissible form of reasoning.[117]

8.72 Equally, a warning may also be needed to counter what may be referred to as the "defence fallacy". The defence fallacy says that because there is a chance that the DNA profile is shared by a certain number of people in a given population, the DNA sample could be from any one of those people and because they have not been eliminated from consideration, one of them could be the real offender. Such conclusions ignore the other forms of evidence, both circumstantial and direct, that might point towards the accused being the offender, for example, opportunity, motive, proximity to the crime scene and physical characteristics.[118] However, the question of the defence fallacy is unlikely to arise in the appeal courts because its application is favourable to the accused.

ISSUE 8.11

(1) In what circumstances, if any, should judges give warnings with respect to the use of DNA profiling?
(2) What should a warning about the use of DNA profiling include?

DEMEANOUR EVIDENCE

8.73 Instruction on the use of demeanour may take a number of forms. It has been conventional practice for judges to inform jurors that it is appropriate for them to observe and to take into account the demeanour of witnesses as part of the fact-finding process in determining the credibility of witnesses. Appellate courts have recently confirmed jurors' use of demeanour for this purpose.[119] A judge is not required to give such directions at the commencement of the trial, but the practice of giving some directions about matters such as this (as opposed to directions of law) is widespread.

116. *R v Galli* (2001) 127 A Crim R 493, [89].
117. *R v Galli* (2001) 127 A Crim R 493, [90].
118. A Haesler, "DNA for Defence Lawyers" (NSW Public Defender's Office Conference, May 2005). See also J S Croucher, "Assessing the Statistical Reliability of Witness Evidence" [2003] *Australian Bar Review* 173. Haesler notes that the reasoning is not fallacious if "there is simply no other evidence than the DNA 'match'".
119. *CSR Ltd v Maddalena* (2006) 80 ALJR 458; *Kamm v The Queen* [2007] NSWCCA 201, [50]; and *Morey v Western Australia* [2007] WASCA 103, [17], [21].

8.74 Commentators and courts have nevertheless cast doubt on the value of the demeanour of witnesses as a means of evaluating their evidence.[120] Courts have even suggested that, in some cases, juries should be warned that "comparison of demeanour is not necessarily a sound guide to comparative veracity".[121] Cultural differences may result in erroneous assessments of demeanour when witnesses from particular community groups give evidence.[122] A question does arise as to whether it is necessary to alert juries in a general way to the fact that assumptions about the demeanour of some witnesses may not be valid in light of cultural and linguistic differences, or whether counsel or the judge should be required to identify specific situations where cultural or linguistic differences may lead some jurors to misinterpret the evidence they are receiving. The *Equality Before the Law Bench Book* states:

> If appropriate, you may also need to alert the jury to the fact that any assessment they make based on the demeanour of a person from an ethnic or migrant background must, if it is to be fair, take into account any relevant cultural differences in relation to demeanour.[123]

8.75 The *Bench Book* also suggests that any comments may need to be made "early in the proceedings" rather than waiting until the summing-up, otherwise the jury's "initial assessment of a particular person may be unfairly influenced by false assumptions" and these may not be easily changed by anything said in the summing-up.[124]

8.76 Members of the High Court have recognised the existence of a significant body of scientific research that casts doubt on the ability of judges or anyone else to tell truth from falsehood on the basis of appearances alone.[125] The general conclusion of these studies is that

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120. M Stone, "Instant Lie Detection? Demeanour and Credibility in Criminal Trials" [1991] *Criminal Law Review* 821; R Giles, "The Assessment of Reliability and Credibility" (1996) 2 *Judicial Review* 281; *Fox v Percy* (2003) 214 CLR 118, [30]-[31]; *Trawl Industries v Effem Foods Pty Ltd* (1992) 27 NSWLR 326, 348; *Chambers v Jobling* (1986) 7 NSWLR 7, 9; *Galea v Galea* (1990) 19 NSWLR 263, 266-267; P Devlin, *The Judge* (Oxford University Press, 1979) 63.
121. *Carr v The Queen* (1988) 165 CLR 314, 330.
122. See, eg, para 8.80-8.81 in relation to Indigenous witnesses.
123. Judicial Commission of NSW, *Equality Before the Law Bench Book* (2006) 3311.
124. Judicial Commission of NSW, *Equality Before the Law Bench Book* (2006) 3311.
125. *Fox v Percy* (2003) 214 CLR 118; [2003] HCA 6, [31]. Some of these studies are detailed in L Re, "Oral v Written Evidence: The Myth of the "Impressive Witness" (1983) 57 *Australian Law Journal* 679, 680-682; and L Re and

the prospect of determining whether a witness is telling the truth from mere visual appearance, dependent on facial expressions, bodily movements, manner of speech and so on, is no better than chance. It is also possible, even if demeanour can act as a rough guide, that untruthful witnesses, especially those who are practised liars, may appear credible, and that truthful witnesses may appear untruthful.[126] This is especially so if untruthful witnesses are able to use trial proceedings to their advantage or if truthful witnesses are unsettled by an unfamiliar court environment.[127]

8.77 Real questions accordingly arise of whether it is appropriate to continue to give jurors a demeanour direction, whether it is possibly misleading to do so, and whether, in certain circumstances, judges should additionally provide instructions to help jurors overcome erroneous assumptions based on cultural and linguistic differences.

ISSUE 8.12

What instructions, if any, should judges give juries about the use of demeanour evidence?

WHEN INDIGENOUS PEOPLE GIVE EVIDENCE

8.78 A question arises of the necessity for instructions or directions to the jury in relation to Indigenous people, either as witnesses and/or as defendants in the proceedings.

Cultural and linguistic factors that may impact on the jury's assessment of the evidence

8.79 One issue is whether, and to what extent, the trial judge should instruct the jury on its approach to assessing the evidence of Indigenous witnesses.

T H Smith, *Manner of Giving Evidence*, Australian Law Reform Commission Evidence Reference Research Paper 8 (1982) 61-64.

126. For example, the High Court has observed that "police witnesses are often practised witnesses and it is not an easy matter to determine whether a practised witness is telling the truth": *McKinney v The Queen* (1991) 171 CLR 468, 476. See also M Stone, "Instant Lie Detection? Demeanour and Credibility in Criminal Trials" [1991] *Criminal Law Review* 821; L Re and T H Smith, *Manner of Giving Evidence*, Australian Law Reform Commission Evidence Reference Research Paper 8 (1982) 63-64; J Ellard, "A Note on Lying and its Detection" (1996) 2 *Judicial Review* 303, 309-314.

127. See M G Frank, "Assessing Deception: Implications for the Courtroom" (1996) 2 *Judicial Review* 315, 322-323.

8.80 A number of directions have come into use across Australia based on the suggestions of Justice Mildren of the NT Supreme Court. A version of these directions (sometimes referred to as "Mildren directions") has been adapted for use in Queensland by Dr Diana Eades,[128] and many of the points raised are also listed in the NSW Judicial Commission's *Equality Before the Law Bench Book*.[129] These instructions draw the jurors' attention to ways in which cultural differences, and differences in verbal and non-verbal communication, may impact upon their interpretation of the evidence of Indigenous witnesses, including:[130]

- Indigenous people sometimes speak English in a way that is different to standard English with regards to the meaning of words and phrases, grammatical construction and accents (sometimes referred to as "Aboriginal English");
- a tendency among some Indigenous people to agree with propositions put to them even when they do not actually agree (referred to as "gratuitous concurrence");
- a different understanding of concepts such as time and number;
- the avoidance of direct eye contact when in conversation with others;
- the use of periods of silence as a form of communication; and
- the use of gestures that are slight and quick movements of the eyes, head or lips to indicate location or direction.

Instructions are also suggested that draw attention to the fact that many Indigenous people have hearing difficulties and may therefore have problems understanding questions.

8.81 The *Equality Before the Law Bench Book* suggests that such factors, insofar as they relate to the demeanour of an Indigenous witness, means that judges:

> may need to alert the jury to the fact that any assessment they make based on an Indigenous person's demeanour must, if it is to

128. Queensland, Criminal Justice Commission, *Aboriginal Witnesses in Queensland's Criminal Courts*, Report (1996), Appendix 4, A-9 – A-14. See also Supreme Court of Queensland, *Equal Treatment Benchbook* (2005) 132-134.

129. Judicial Commission of NSW, *Equality Before the Law Bench Book* (2006) [2.3.3.3] and [2.3.3.4].

130. D Mildren, "Redressing the Imbalance Against Aboriginals in the Criminal Justice System" (1997) 21 *Criminal Law Journal* 7, 21-22; *Stack v Western Australia* (2004) 29 WAR 526; [2004] WASCA 300, [58].

> be fair, take into account any relevant cultural differences in relation to demeanour.[131]

A similar comment is suggested in cases where it may be appropriate to alert the jury to an Indigenous person's "communication style" so that any assessment the jury makes must also, "if it is to be fair, take into account any relevant cultural differences".[132]

8.82 A number of issues arise in relation to the use of such directions, particularly at the beginning of a trial, before any of the Indigenous witnesses have actually given evidence.

Applicability of the comments to all cases?

8.83 The first issue is that the warnings are framed to cover usual or general circumstances and may not apply to particular Indigenous witnesses. It has been suggested that there is a danger that a jury may wrongly conclude that a judge's comments refer to a particular witness when, in fact, they do not.[133] This is related to the point that there is a large and diverse community that may be identified as Indigenous and that, inevitably, characteristics that may pertain to Indigenous people who live a more "traditional" life may not so readily pertain to some "urban" Indigenous people who may have had greater participation in general society and therefore not exhibit to such an extent the characteristics suggested in the Mildren warnings.[134] The Queensland Criminal Justice Commission has suggested that there will be cases where a general inclusion of such instructions may "needlessly prolong proceedings, possibly confuse the jury and might be demeaning to some witnesses".[135] It has also suggested that some of these problems can be alleviated by judges preparing for trials involving Indigenous witnesses, for example, by identifying any

131. Judicial Commission of NSW, *Equality Before the Law Bench Book* (2006) [2.3.3.3].

132. Judicial Commission of NSW, *Equality Before the Law Bench Book* (2006) [2.3.3.4].

133. *Stack v Western Australia* (2004) 29 WAR 526; [2004] WASCA 300, [11], [19].

134. See, eg, Queensland, Criminal Justice Commission, *Aboriginal Witnesses in Queensland's Criminal Courts*, Report (1996), 43; *R v Condren* (1987) 28 A Crim R 261, 297. It has been suggested that this position is at odds with other literature in the field: S Fryer-Smith, "Case and Comment: Stack v Western Australia" (2006) 30 *Criminal Law Journal* 246, 251. See also NSWLRC, *Sentencing: Aboriginal Offenders*, Report 96 (2000), [3.4]-[3.9] for comments in relation to "urbanisation" and customary law.

135. Queensland, Criminal Justice Commission, *Aboriginal Witnesses in Queensland's Criminal Courts*, Report (1996) 43.

cultural or language issues from committal hearing depositions, and tailoring their instructions appropriately.[136]

8.84 In WA, a Mildren direction in relation to gratuitous concurrence was allowed on appeal in part because the trial judge made it clear to jury that the issue was for them to decide and that the observations did not apply to any particular Indigenous witness who was likely to give evidence.[137]

Timing of the comments

8.85 The *Equality Before the Law Bench Book* advises judges that, when there is a need to alert the jury to cultural and linguistic differences that may bear upon the giving of evidence, such comments:

> may need to be noted *early* in the proceedings rather than waiting until you give your final directions to them – otherwise, their initial assessment of a particular person may be unfairly influenced by false assumptions, and may not be able to be easily challenged by anything you say in your final directions to them.[138]

8.86 The Queensland *Equal Treatment Benchbook* has also suggested that it is important that such matters be raised early in the proceedings and that, "ideally", counsel would "foreshadow the likelihood of communication difficulties with the judge before the proceedings commence".[139]

8.87 Providing a generic set of instructions at the commencement of the trial when it is known that Indigenous people will be giving evidence raises the problem of giving instructions that may prove unnecessary in the particular case. Arguably, it may be more appropriate to raise only relevant issues when they occur during the course of the evidence and/or in the judge's summing-up.

ISSUE 8.13

In what circumstances, if any, should a judge give instructions to the jury about cultural or linguistic factors influencing the way some Indigenous people give evidence?

136. Queensland, Criminal Justice Commission, *Aboriginal Witnesses in Queensland's Criminal Courts*, Report (1996) 44.

137. *Stack v Western Australia* (2004) 29 WAR 526; [2004] WASCA 300, [50]-[52], [136].

138. Judicial Commission of NSW, *Equality Before the Law Bench Book* (2006) [2.3.3.3].

139. Supreme Court of Queensland, *Equal Treatment Benchbook* (2005) 126.

Allowing expert evidence to be led

8.88 If matters are not to be left to judicial notice and comment, an alternative approach may be to allow expert evidence to be led as to aspects of a particular witness's evidence.[140] However, allowing expert evidence may not be so easy to achieve. Some Australian courts have appeared to be reluctant to admit expert evidence on the behaviour and responses of Indigenous witnesses.

8.89 Before the passing of the *Evidence Act*, although subject to some uncertainty, the common law was generally that an opinion was inadmissible as evidence if it was about an ultimate issue.[141] This presented particular problems in relation to expert evidence on the behaviour and responses of Indigenous people. For example, in the Queensland Supreme Court, it was observed that an attempt to call expert witnesses to express an opinion on whether an accused made, for example, an inculpatory admission:

> is to attempt to call persons to swear to the very issues to be determined by the jury. This is plainly impermissible.[142]

8.90 There was also a tendency in the courts to determine that evidence of language and cultural matters are inadmissible because the matters are not so unusual that they either fall outside the normal patterns of human behaviour or are not matters of common knowledge within the general community.[143] For example, it has been suggested that:

> It will always be necessary to decide whether or not the alleged peculiarities are sufficiently different from the norm (whatever that may be) to justify expert evidence being led, keeping in mind that observations in the cases that so-called expert evidence may often confuse and mislead a jury, particularly when it relates to those areas which are properly within the province of the jury.[144]

The approach of excluding expert evidence because it dealt with matters of common knowledge was described by the Australian Law Reform Commission as "entirely fallacious and ought not to be part of

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140. See, eg, S Bronitt and K Amirthalingam, "Cultural Blindness: Criminal Law in Multicultural Australia" (1996) 21 *Alternative Law Journal* 58, 60.
141. See Australian Law Reform Commission, *Evidence*, Report 26 (1985) vol 1, [160].
142. *R v Condren* (1987) 28 A Crim R 261, 296-297.
143. See, eg, Queensland, Criminal Justice Commission, *Aboriginal Witnesses in Queensland's Criminal Courts*, Report (1996) 41; *R v Condren* (1987) 28 A Crim R 261, 267-268.
144. *R v Watson* [1987] 1 QdR 440, 466.

evidence law".[145] Section 80 of the *Evidence Act* now provides that "evidence of an opinion is not inadmissible only because it is about ... a fact in issue or an ultimate issue".[146]

8.91 In the same Queensland case it was also considered that evidence of "alleged general characteristics of speech" of Indigenous people could not be used in proof of the way in which a particular witness would respond to particular questions.[147]

8.92 Similar problems have arisen in relation to the admission of opinion evidence based on specialised knowledge in relation to the evidence of children in sexual assault matters.[148] Section 79 of the *Evidence Act* has recently been amended to provide that "specialised knowledge" includes "a reference to specialised knowledge of child development and child behaviour (including specialised knowledge of the impact of sexual abuse on children and their development and behaviour during and following the abuse)". The 2005 *Uniform Evidence* Report supported the inclusion of such an express provision on the basis that "expert opinion evidence on child development and behaviour (including the effects of sexual abuse on the development and behaviour of children) can in certain cases be important evidence in assisting the tribunal of fact to assess other evidence or to prevent inappropriate reasoning processes based on misconceived notions about children and their behaviour".[149] The amendments have not yet commenced.[150]

8.93 The Report also raised the question whether there was "also a need to clarify the admissibility of expert opinion as 'counter-intuitive' evidence in other instances", that is "evidence that is capable of dispelling myths or rectifying erroneous assumptions that may be held by the jury on a particular issue".[151] The Report ultimately rejected any such further amendments to s 79 but noted that:

> The reason for recommending a clarification of the expert opinion exception to the opinion rule for children is that, despite the fact that expert opinion evidence about the development and behaviour of children falls within s 79, courts have shown a reluctance to apply the section to such evidence. That appears to

145. Australian Law Reform Commission, *Evidence*, Report 26 (1985) vol 1, [743].

146. *Evidence Act 1995* (NSW) s 80(a).

147. *R v Condren* (1987) 28 A Crim R 261, 267, 297. See also *Stack v Western Australia* (2004) 29 WAR 526; [2004] WASCA 300, [18].

148. See NSWLRC, *Uniform Evidence*, Report 112 (2005) [9.144].

149. NSWLRC, *Uniform Evidence*, Report 112 (2005) [9.155].

150. *Evidence Amendment Act 2007* (NSW) Sch 1 [34].

151. NSWLRC, *Uniform Evidence*, Report 112 (2005) [9.159].

> be due to a pervasive view that 'child development and behaviour' is within the common knowledge of the tribunal of fact. By contrast, there is greater acceptance of the fact that behaviour of victims of crime and those with cognitive impairment is not within common knowledge.[152]

The question arises whether such an argument could be extended to allow the admission in appropriate cases of expert opinion on the evidence of Indigenous witnesses.

ISSUE 8.14

If judges may not comment on aspects of social or linguistic differences impacting upon an Indigenous person's evidence, should it be possible to allow expert evidence to be led as to aspects of a particular witness's evidence?

Avoiding prejudice in assessing the evidence of Indigenous people

8.94 The *Equality Before the Law Bench Book* suggests that a judge may need to provide jurors with specific guidance that "they must try to avoid making stereotyped or false assumptions". The *Bench Book* also suggests that judges should explain this by providing examples of stereotyping and by pointing out that "they must treat the particular Aboriginal person as an individual based on what they have heard or seen in court in relation to a specific person, rather than what they know or think they know about all or most Aboriginal people".

8.95 It is not clear how this warning would interact with any comments the judge may make about linguistic and cultural differences that the jury might need to bear in mind in relation to some Indigenous witnesses, or with any expert evidence adduced in relation to the same.

ISSUE 8.15

In what circumstances, if any, should judges give warnings about avoiding prejudice in assessing the evidence of Indigenous people?

152. NSWLRC, *Uniform Evidence*, Report 112 (2005) [9.170].

9. Elements of the offence and defences

- How can directions on substantive law be made more comprehensible?
- Recklessness
- Defences
- Other areas of substantive law
- Complex or obscure terminology
- Preliminary directions on the issues to be determined

9.1 In addition to the key components of a judge's summing-up and the various judicial directions and comments outlined in previous chapters, the judge must instruct the jury on the elements of the offence and any defences that apply in a particular trial.

9.2 There is no doubt that some of these directions, as required by the appellate courts, contained in the *Bench Book* or set out in statute, will involve many fine legal points that are confusing to jurors and often give rise to appeal points. Relevant questions are, therefore:

- do the current directions on elements of the offence and any defences provide sufficiently clear guidance to a jury;
- does the complexity of some directions give rise to unnecessary appeal points;
- in so far as they generate appeal points, are the fine distinctions that appellate courts often draw actually capable of being applied by jurors, or are they even relevant to their decision; and
- assuming that issues concerning elements of the offence and any defences must be raised, is there any way of explaining them so that jurors can readily understand and apply them?

9.3 In essence, this chapter explores two fundamental issues: first, whether the law is so complex that it is incapable of explanation, and secondly, in so far as the law is capable of explanation, whether any directions currently in use should be reformulated.

HOW CAN DIRECTIONS ON SUBSTANTIVE LAW BE MADE MORE COMPREHENSIBLE?

9.4 There are a number of ways of implementing improvements to the comprehensibility and accuracy of instructions on the substantive law, including by

- appellate decisions;
- amending the instructions in the *Bench Book*;
- amending the relevant statutory provisions; and
- altering trial procedure.

Some of these methods are discussed where relevant in the remainder of this chapter.

9.5 There are some notoriously complex areas of the criminal law which would benefit from legislative clarification or resolution by appellate courts. A recent example of legislative reform of an extremely complex area of law can be found in the UK with the enactment of the *Fraud Act 2006* (UK). This legislative reform

followed a review by the Law Commission and a subsequent proposal by the Home Office to repeal the eight statutory deception offences in the *Theft Act 1968* (UK) and the common law offence of conspiracy to defraud, and replace them with a general offence of fraud.[1] It was considered that the highly specific nature of the old offences and the failure to define "fraud" made fraud cases "extremely difficult" for juries.[2] The provisions were intended to benefit juries by making the law of fraud easier to understand.[3]

RECKLESSNESS

9.6 To act with recklessness at criminal law is to act with a foresight that one's actions may cause harm.[4]

9.7 The concept of recklessness now has a wider role to play in NSW since amendments to the *Crimes Act 1900* (NSW) removed the term "maliciously" from the formulation of certain offences and, in some cases, substituted the terms "recklessly" or "intentionally" or "with intent" for the term "malice".[5] The concept of recklessness also has a significant role in the Commonwealth Criminal Code, but that Code expressly includes an objective element as to whether the substantial risk taken was unjustifiable.[6]

9.8 Recklessness presents a number of problems. One is that, depending on the context, it can encompass several different mental states.[7]

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1. UK, Home Office, *Fraud Law Reform: Consultation on Proposals for Legislation* (2004).
2. England and Wales, Law Commission, *Fraud*, Report 276 (2002) [5.4]-[5.5].
3. UK, Home Office, *Fraud Law Reform: Consultation on Proposals for Legislation* (2004) [5].
4. *R v Coleman* (1990) 19 NSWLR 467, 471-472; *R v Stokes* (1990) 51 A Crim R 25, 40; *Pengilley v R* [2006] NSWCCA 163, [35]-[45], [53]; *Hogan v R* [2008] NSWCCA 150, [56]-[62].
5. *Crimes Amendment Act 2007* (NSW) Sch 1. The concept of "malice" had previously been seen as problematic, its application having been described as calling for "a meticulous analysis and fine and impractical distinctions to be made by the jury (for which task such a body is quite ill-suited)": *R v Coleman* (1990) 19 NSWLR 467, 472.
6. *Criminal Code* (Cth) s 5.4, s 5.6(2).
7. See *Pengilley v R* [2006] NSWCCA 163, [34]-[37]; *Banditt v The Queen* (2005) 224 CLR 262; [2005] HCA 80, [1]-[8]; *R v BBD* [2007] 1 Qd R 478, [48]-[49]; *R v Kitchener* (1993) 29 NSWLR 696 and A Webster "Recklessness: Awareness, Indifference or Belief" (2007) 31 *Criminal Law Journal* 272. *Crimes Act 1900* (NSW) s 4A provides that "if an element of an offence is

9.9 The High Court has observed that although "reckless" may be seen as an "ordinary term and one the meaning of which is not necessarily controlled by particular legal doctrines", in ordinary use it may "indicate conduct which is negligent or careless, as well as that which is rash or incautious". The difference in these possible meanings makes it "inappropriate" for a trial judge to do more than "invite the application of an ordinary understanding" of the word,[8] even though its use in ordinary speech, and when made a specific element of an offence pursuant to statute, may differ. This presents a possible difficulty for jurors.

9.10 Another problem arises in relation to the subjective test for recklessness. In general, there are two limbs to recklessness in the criminal law: a subjective limb and an objective limb. The subjective limb is that the accused must be aware that his or her conduct may give rise to harm and the objective limb is that it must be unreasonable or unjustifiable for the accused to take the risk that harm will result.[9] A variation has been introduced in those sexual assault cases where proof depends upon the absence of consent. In such cases, an accused, instead of foreseeing the possibility of absence of consent and going ahead anyway, may be guilty simply by failing to consider the issue of consent at all and going ahead regardless.[10]

9.11 One commentator has suggested that there are theoretical and practical difficulties in defining "the subjective state of mind that adequately described recklessness" and has noted:

> It must be questioned whether juries are able to fully appreciate the distinction between subjective and objective fault and the requisite state of mind to establish recklessness.[11]

9.12 The meaning of recklessness is dependent on relating it to the offence you are talking about (both in its "subjective" and "objective" features). If this is indeed the case, is the general model direction suggested by the High Court adequate? The present direction is contained in the *Bench Book*, as follows:

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recklessness, that element may also be established by proof of intention or knowledge".

8. *Banditt v The Queen* (2005) 224 CLR 262; [2005] HCA 80, [36]. As the text indicates, there are different considerations to be applied in some sexual assault cases.
9. See *Banditt v The Queen* (2005) 224 CLR 262; [2005] HCA 80, [36].
10. *R v Kitchener* (1993) 29 NSWLR 696.
11. A Webster "Recklessness: Awareness, Indifference or Belief" (2007) 31 *Criminal Law Journal* 272, 285-286.

> The element of recklessness is made out if you are satisfied beyond reasonable doubt that the injury [or damage] was caused recklessly by the accused. An injury [or damage] is caused recklessly if the accused realised that some physical harm [or damage] may possibly be inflicted upon the victim [or caused to the property] by [his/her] actions yet [he/she] went ahead and acted as [he/she] did. It is not necessary that the accused realise the degree of harm [or damage] that was in fact caused provided that [he/she] realised that some harm [or damage] of that type would possibly occur. The accused cannot be found to have acted recklessly unless the Crown proves that the accused actually thought about the consequences of [his/her] act and at least realised the possibility of some harm [or damage] of that type occurring.[12]

ISSUE 9.1

(1) Is recklessness, as currently formulated, adequately explained to juries? If not, what should be done to remedy the problem?
(2) Are there problems with recklessness in relation to specific offences? If so, how can these problems be resolved?

DEFENCES

9.13 In most cases that are tried, the jury will have to determine whether a defence to a charge is made out. A defence is commonly understood to be the accused's answer to a charge, or his or her excuse or justification for the offence with which he or she is charged. Examples include claims such as "it wasn't me", "it didn't happen", "I had to, or he would have killed me", "I was provoked" or "God told me to do it". Only a few of these claims are legally classified as "defences". While there remains some uncertainty as to what a defence at law really is, one view is that a defence is part of the definition of an offence, functioning "as a further set of rules governing the attribution of criminal responsibility".[13] The prosecution has to prove both the defining elements of the offence, and, where a defence is raised in the evidence, the absence of that defence.[14]

12. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (October 2008) [4-085].
13. D Brown, D Farrier, S Egger, L McNamara and A Steel, *Criminal Laws: Materials and Commentary on Criminal Law and Processes in NSW* (4th edition, 2006) 530.
14. With the exception of the defence of substantial impairment by abnormality of mind, insanity and some other statutory defences. See further para 9.52-9.53 below.

9.14 Although they may be raised in comparatively few cases,[15] a number of defences available in criminal trials present serious challenges to trial judges in directing the jury. Many of these defences are particularly complex, turning on subtle distinctions that can be extremely difficult for jurors to comprehend, much less apply. Some defences are based on common law, while others have been codified in legislation. Some defences apply generally, while others apply only to specific offences. Some defences, like self-defence, are completely exculpatory;[16] others, such as provocation and substantial impairment, are a partial defence that, if established, will reduce a charge of murder to manslaughter.

9.15 In the context of jury directions on "defences", there are two areas in particular which cause difficulty for trial judges. The first is ensuring that the jury is clear on the onus of proof and that any directions as to the elements of the "defence" are provided in such a way as to avoid any inference of a reversal of that onus. The second area that causes difficulty is instructing juries on the reasonable person test with its complex objective and subjective elements. Before looking at these two issues, we examine briefly the law pertaining to some of the major criminal "defences" and describe some of the complex legal concepts that arise.

Self-defence

9.16 The law has long recognised that a person does not commit an offence if he or she does an act constituting the offence in legitimate self-defence. Common law principles of self-defence applied in NSW[17] until the new Part 11 was introduced into the *Crimes Act 1900* (NSW) in 2002 to simplify and codify the law of self-defence.[18]

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15. A Judicial Commission of NSW study on the use of partial defences to murder in homicide cases between January 1990 and September 2004 found that 26% of defendants charged with murder had raised one or more of the partial defences. Diminished responsibility, as it was then known, was raised in less than 15% of cases while provocation was raised in only 13%: Judicial Commission of NSW, *Partial Defences to Murder in NSW 1990-2004*, Research Monograph 28 (2004) ("Judicial Commission Report").
16. But compare excessive self-defence which was reintroduced in the *Crimes Act 1900* (NSW) s 421 by the *Crimes Amendment (Self-Defence) Act 2001* (NSW). See also *R v Katarzynski* [2002] NSWSC 613, [13]. See also para 9.19 below.
17. The test for self-defence at common law was reformulated by the High Court in *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645, 661 (Wilson, Dawson and Toohey JJ).
18. New South Wales, *Parliamentary Debates (Hansard)*, Legislative Assembly, 28 November 2001, 19093.

9.17 Explaining the law of self-defence to jurors was virtually an impossible task in the days of *Viro v The Queen*,[19] and has arguably been made only slightly easier since the High Court reformulated the test in *Zecevic*,[20] or, in NSW, since the enactment of the *Crimes Amendment (Self-Defence) Act 2001* (NSW).[21]

9.18 The new test, as set out in s 418 of the *Crimes Act 1900* (NSW),[22] states that a person is not criminally responsible for an offence "if and only if":

- the person believes the conduct was "necessary" to defend himself or herself, others, property, or to prevent criminal trespass;[23] and
- "the conduct is a reasonable response in the circumstances as he or she perceives them to be."[24]

9.19 The Act provides further that the prosecution bears the onus of proving, beyond a reasonable doubt, that the accused did not act in self-defence;[25] that self-defence is not available where a person kills

19. *Viro v The Queen* (1978) 141 CLR 88.
20. *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645.
21. J Wood, "The Trial Under Siege: Towards Making Criminal Trials Simpler" (District and County Court Judges Conference, Fremantle, WA, 27 June - 1 July 2007).
22. The self-defence provisions (s 418-423) of the *Crimes Act 1900* (NSW) were inserted by the *Crimes Amendments (Self-Defence) Act 2001* (NSW). Unlike the provisions in relation to intoxication under Part 11A, the legislation does not oust the common law on self-defence. Indeed, in light of the fact that the provisions are grounded in common law principles, it is likely that the common law will remain relevant in resolving issues of interpretation: M Gani, "Codifying the Criminal Law: Implications for Interpretation" (2005) *29 Criminal Law Journal* 264, 277.
23. Under the *Crimes Act 1900* (NSW) s 418, a person carries out an act in self-defence if he or she believes the act is necessary in order to (a) defend himself or herself or another person; (b) prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person; (c) protect property from unlawful taking, destruction, damage or interference; or (d) prevent criminal trespass, or to remove a person committing criminal trespass.
24. *Crimes Act 1900* (NSW) s 418(2).
25. *Crimes Act 1900* (NSW) s 419.

another only to protect property or trespass to property;[26] and it reintroduces the law of excessive self-defence.[27]

9.20 Under s 418, the test of self-defence is based on what the accused *actually* believed at the time of the offence, not on reasonable beliefs or perceptions. Parliament's intention in formulating this new test was made clear by the Attorney General in his Second Reading Speech. Referring to the fact that the Bill was drawn substantially from the Model Criminal Code, the Attorney stated:

> that model removes the objective element of the test as to what the defendant perceived the danger to be. That represents the common law before the case of *Zecevic v DPP (Vic)* (1987) 162 CLR 645. It means that a person who really thought he was in danger, even if he was mistaken about that perception, may be able to rely on self-defence for his actions.
>
> The person's actions on the basis of his belief still has to be reasonable, but the belief itself is totally based on the circumstances as the person perceived them to be.[28]

By placing a stronger emphasis on the actual beliefs and perceptions of the accused, the statutory test allows a more subjective assessment of self-defence, which some commentators argue is a contentious liberalisation of the law of self-defence.[29]

9.21 When assessing the genuineness of the accused's belief, the jury must consider not only what the accused says was his or her perception of the seriousness of the attack and its immanency, but also all other relevant circumstances. These may include such things as evidence of explicit acts and threats by the aggressor, the personal characteristics of the aggressor such as age, size and strength, and any relevant knowledge the accused had about the aggressor from previous experience or incidents. A battered woman, for instance, may have a real sense of an impending attack from the aggressor if there have been prior incidents of violence in the relationship.

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26. *Crimes Act 1900* (NSW) s 420. Thus repealing the *Home Invasion (Occupants Protection) Act 1998* (NSW).
27. *Crimes Act 1900* (NSW) s 421 operates to reduce a charge of murder to manslaughter where a person honestly believes he or she is acting in self-defence, but uses more force than is reasonable in the circumstances.
28. New South Wales, *Parliamentary Debates (Hansard)*, Legislative Assembly, 28 November 2001, 19093.
29. See S Torpey, "The New Test of Self-defence" (2002) 9 *Criminal Law News* 41, 43.

9.22 The jury must also consider any extraordinary attribute of the accused which bears on his or her perceptions of the circumstances and which had a bearing on any belief he or she may have formed, including for example, if the accused was intoxicated and his or her mental state at the time of the conduct. The purpose of the inquiry is to determine whether the accused *actually* believed the conduct was necessary rather than whether any such belief was based on reasonable grounds.[30]

9.23 Furthermore, these inquiries are to be conducted from the accused's point of view at the time, not with the benefit of hindsight. As the majority judges said in *Zecevic*, the circumstances at the time of the offence may have afforded little, if any opportunity for calm deliberation and detached reflection on the accused's part.[31]

9.24 Section 418 (2) of the *Crimes Act* involves an objective assessment of the reasonableness of the accused's response, but given the circumstances "as he or she perceives them".[32] The objective assessment of the proportionality of the accused's response is thus tempered by the subjective qualification "as he or she perceives" the circumstances. When making this assessment, the jury must take into account those personal characteristics of the accused which may affect his or her perceptions of the circumstances at the time, such as age, intelligence, mental state and physical incapacity. The accused's intoxicated state is also relevant when assessing the accused's perception of the circumstances, but it is not relevant to the issue of whether the accused's response was reasonable.[33] Here, the jury must be directed to consider what "would have been a reasonable response by a sober person in the circumstances as [*the accused*] drunkenly perceived them".[34]

9.25 The *Bench Book* provides detailed model directions on self-defence:

> Although "self-defence" is referred to as a defence, it is for the Crown to eliminate it as an issue by proving beyond reasonable doubt that [*the accused's*] ... [*specify act, for example, stabbing*] was not done by [*the accused*] in self-defence. It may do this by proving beyond reasonable doubt one or the other of two things, namely —

30. Compare *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645.
31. *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645, 662-663.
32. *Crimes Act 1900* (NSW) s 418(2).
33. *R v Katarzynski* [2002] NSWSC 613.
34. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (October 2008) [6-490].

1. That [*the accused*] did not believe at the time of the [*specify act, for example, stabbing*] that it was necessary to do what [*he/she*] did in order to defend [*himself/herself*]; or
2. If it is reasonably possible that [*he/she*] did have such a belief, that nevertheless the [*specify conduct, eg stabbing*] of [*the accused*] was not a reasonable response in the circumstances as [*he/she*] perceived them.

If the Crown fails to prove either one or the other of these matters then the appropriate verdict is one of "not guilty".[35]

ISSUE 9.2

Are the *Bench Book* directions on self-defence adequate and/or appropriate?

Provocation

9.26 A "defence" of provocation will, if successful, entitle the defendant to be convicted of manslaughter for an offence that would otherwise constitute murder.[36] This is because public policy dictates that someone who is provoked to kill in "the heat of passion" is less blameworthy than the person who meticulously plans the murder. A conviction for murder would generally attract a greater penalty than a conviction for manslaughter. However, the range of sentencing options for manslaughter is now so wide that they can and do sometimes overlap with murder.[37] In NSW, the penalty for manslaughter is imprisonment of up to 25 years.

9.27 Provocation is therefore only an issue for the jury's determination after the jury has determined beyond a reasonable doubt that the accused is guilty of murder. It is not a relevant consideration at all if the jury is satisfied beyond a reasonable doubt that the accused did not intend to kill or cause grievous bodily harm to the victim.

9.28 The trial judge is required to leave the defence of provocation to the jury where sufficient evidence has been raised, generally by the

35. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (October 2008) [6-460].
36. *Stingel v The Queen* (1990) 171 CLR 312. See also *Crimes Act 1900* (NSW) s 23(1).
37. *R v Isaacs* (1997) 41 NSWLR 374, 381 (Gleeson CJ).

accused.[38] In making this determination, the trial judge must consider the version of events most favourable to the accused.[39]

9.29 Section 23 of the *Crimes Act 1900* (NSW) provides that an act is done or omitted under provocation where:

(1) the defendant had a loss of self-control, that was induced by the conduct of the deceased (including insulting words or gestures) towards or affecting the accused; and

(2) the conduct of the deceased was such as could have induced an ordinary person in the position of the defendant to have so far lost self-control as to form an intention to kill, or inflict grievous bodily harm upon the deceased.[40]

9.30 The provocative conduct of the deceased must have caused the defendant to lose self-control. Section 23(2)(a) provides that the provocation may include (although is not exclusive to) grossly insulting words or gestures towards or affecting the defendant. However, words are not strictly limited to insults; words spoken, which are violent, or extortionary may also qualify as provocative conduct.[41] Conversely, mere words of abuse would not normally qualify as provocative conduct.

9.31 Additionally, provocation requires that the loss of self-control be sudden and temporary, stemming from emotions such as fear, panic, anger or resentment.[42]

9.32 Although it is essential that the defendant lost self-control (induced by the deceased's provocative conduct) at the time of the killing, the act causing death need not immediately follow upon that provocative conduct.[43] It is possible for the provocative conduct to cumulate over a period of time, after which a triggering event causes the defendant to lose self-control.[44] This leaves the door to provocation open to battered women who kill their abusive husbands.

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38. The issue of provocation is sometimes raised on the Crown case, see, eg, *Heffernan v R* [2006] NSWCCA 293.
39. *Stingel v The Queen* (1990) 171 CLR 312.
40. *Crimes Act 1900* (NSW) s 23(2)(a)-(b).
41. *R v Lees* [1999] NSWCCA 301, [53] (Wood CJ at CL).
42. *Van Den Hoek v The Queen* (1986) 161 CLR 158, 166 (Mason J).
43. *R v Chhay* (1994) 72 A Crim R 1, 13 (Gleeson CJ).
44. *R v Chhay* (1994) 72 A Crim R 1, 10 (Gleeson CJ). See also *Osland v The Queen* (1998) 197 CLR 316; [1998] HCA 75.

9.33 Provocation must have been received within the sight or hearing of the defendant.[45] So, words or conduct not otherwise spoken to, or done, in the presence of the defendant cannot amount to provocation.

9.34 Although the new formulation of s 23(2)(a) does not make express mention of it (unlike the previous provision), it is likely that provocation cannot be sustained where it was self-induced.[46]

The test of provocation

9.35 Two questions are left to the jury on provocation: the first is whether the accused was actually provoked to do the killing and the second is whether a reasonable person in the position of the accused could have responded to the provocation in the same way as the accused.

9.36 The first is a subjective question, namely whether, on the facts, the accused genuinely had a loss of self-control caused by the deceased's alleged provocative conduct. Essentially, the jury must assess how grave were the allegedly provocative words or conduct, from the accused's perspective. Therefore, everything about the accused is likely to be relevant in answering this question, including his or her age, sex, maturity, physical features, ethnic background, personal attributes, personal relationships including his or her relationship with the victim, his or her past history (such as whether the accused had been a victim of a previous sexual assault) and even mental instability or weakness.[47]

9.37 The jury must put the provocative conduct into context, before moving on to answer the second question, namely, whether an ordinary person in the same position as the accused *could* have responded to the provocative conduct (as assessed in the first part) in the same way as the accused. The terminology used in the Act speaks in terms of possibilities, not probabilities or likelihood.[48] The question is not whether it was likely or probable that an ordinary person would react in the same way as the accused, but whether it was possible that an ordinary person would have so acted. The word "could" is not interchangeable with "would" or "might". To do so is likely to result in

45. *R v Davis* (1998) 100 A Crim R 573, 576 (Dunford J).

46. D Brown, D Farrier, S Egger, L McNamara and A Steel, *Criminal Laws: Materials and Commentary on Criminal Law and Processes in New South Wales* (4th edition, 2006) 598.

47. *Stingel v The Queen* (1990) 171 CLR 312, 326-327.

48. See, eg, *Heron v The Queen* (2003) 197 ALR 81; [2003] HCA 17, [33] (Kirby J).

a successful appeal on the ground that the jury was misdirected on the law.[49]

9.38 The underlying rationale for appealing to the ordinary person is to ensure there is no fluctuating standard of self-control against which defendants are measured.[50] In *Stingel v The Queen*,[51] the High Court defined the ordinary person as one with the minimum powers of self-control within the limits of what is ordinary for a person of the same age and maturity as the defendant.

9.39 Ethnicity,[52] gender,[53] intoxication[54] and sensitivity to sexual interference[55] are not relevant when considering whether an ordinary person could have done as the accused did, when affronted by the provocative words or conduct. This second objective element exists so that an accused who is easily prone to anger does not benefit from having "a ridiculously short fuse".[56]

9.40 Peculiarly, the NT Court of Criminal Appeal is prepared to inject Aboriginality and other characteristics of an Indigenous defendant into the objective test. In the case of *Mungatopi v R*,[57] where the defendant was Indigenous, the ordinary person was redefined as "an ordinary Aboriginal person living today in the environment and culture of a fairly remote Aboriginal settlement".

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49. See, eg, *R v Anderson* [2002] NSWCCA 194, [33]-[45] (McClellan J). In *Heron v The Queen*, the High Court found that the trial judge had erred in misstating the objective part of the test of provocation by referring to what an ordinary person "must" or "would" have done, rather than what an ordinary person "could" have done. But special leave to appeal was refused on the ground that there had been no miscarriage of justice: *Heron v The Queen* (2003) 197 ALR 81; [2003] HCA 17.
50. *R v Hill* [1986] 1 SCR 313, [66] (Wilson J).
51. *Stingel v The Queen* (1990) 171 CLR 312, 327.
52. See *R v Masciantonio* (1995) 183 CLR 58 where McHugh J, dissenting, argued that ethnicity should be incorporated since the notion of an ordinary person is a pure fiction in a multicultural society. See also, S Bronitt and K Amirthalingam, "Cultural Blindness: Criminal Law in Multicultural Australia" (1996) 21 *Alternative Law Journal* 58; and S Yeo, "Sex, Ethnicity, Power of Self-control and Provocation Revisited" (1996) 18 *Sydney Law Review* 304.
53. See *Stingel v The Queen* (1990) 171 CLR 312.
54. See *R v Croft* [1981] 1 NSWLR 126.
55. See *R v Green* (1997) 191 CLR 334.
56. A Reed, "Provocation: A Matter for Jury Determination" (2001) 112 *The Criminal Lawyer* 1.
57. *Mungatopi v R* (1991) 2 NTLR 1, 6 (Martin, Angel and Mildren JJ).

9.41 One appeal judge has commented that:

> Trial judges are required to direct the jury to distinguish between those characteristics that affect the gravity of the provocation offered, and those that affect the power of self-control.[58]

However, this distinction is not always clear.[59] In England, the House of Lords in *R v Smith (Morgan)*[60] said the distinction between the objective and the subjective tests is very difficult for a jury, and doubted whether the distinction was really workable.[61]

9.42 In *Heron*, Justice Kirby also observed the difficulties in explaining the law of provocation to juries:

> The law of provocation has been considered by this Court on a number of occasions in recent years. One of the reasons for the cases has been the obscurity, and internal ambivalence, of statutory expressions of the competing considerations of an objective and subjective kind involved in the law of provocation. The language of s 23 of the Crimes Act 1900 (NSW), in issue in this case, is a good illustration. The section, as it has been amended and as it stood at the relevant time, presents difficulties for a judge in explaining its requirements to a jury, in simple terms so that they may be applied to the facts of the particular case.[62]

9.43 The *Bench Book* suggests the following on the ordinary person test:

> An "ordinary person" is simply one who has the minimum powers of self control expected of an ordinary citizen who is sober and of the same age and consequent level of maturity as the accused.
>
> When one speaks of the effect of provocation on an ordinary person in the position of the accused, that phrase means an

58. M Weinberg, "Moral Blameworthiness: The 'Objective Test' Dilemma" (2003) 24 *Australian Bar Review* 173, 184.
59. *R v Rongonui* [2000] 2 NZLR 385, [108]-[111] (Elias CJ). See also Queensland Law Reform Commission, *A Review of the Defence of Provocation*, Working Paper 63 (2008) [3.44]-[3.48].
60. *R v Smith* [2001] 1 AC 146, 156 (Lord Slyn).
61. A previous NSW Law Reform Commission Report recommended the abolition of the objective test and its replacement with a purely subjective test compatible with community standards: NSW Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide*, Report 83 (1997), 49-53.
62. *Heron v The Queen* (2003) 197 ALR 81; [2003] HCA 17, [24] (Kirby J).

> ordinary person who has been provoked to the same degree of severity and for the same reason as the accused.
>
> In the present case, this translates to a person with the minimum powers of self control of an ordinary person, as described earlier, who is subjected … [for example, to a sexual advance by the victim which is aggravated because of the accused's special sensitivity to a history of violence and sexual assault within the family]. [None of the attributes or characteristics of a particular accused will be necessarily irrelevant to an assessment of the content and extent of the provocation involved in the relevant conduct].
>
> This question requires you to take full account of the sting of the provocation actually experienced by the accused, but eliminates from your consideration an extraordinary response (if such there be) by the accused to the provocation actually experienced.
>
> You should understand that when you are dealing with this question you are considering the possible reaction of an ordinary person in the position of the accused, not [his/her] inevitable or even probable reaction, but [his/her] possible reaction.[63]

ISSUE 9.3

(1) Are the *Bench Book* directions on provocation adequate?
(2) Is there a better way of explaining the test of provocation to the jury?

Duress

9.44 The defence of duress is available where a person did an act that was otherwise criminal by reason only of his mind being then overborne by threats of death or serious bodily violence, either to himself or another, provided that an average person, of ordinary firmness of mind, of the same age and sex and in similar circumstances, would have done so.[64]

9.45 The accused's belief in the threat of death or serious bodily injury must be based on reasonable grounds.[65] The threats must be "so

63. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (October 2008) [6-410].
64. *R v Hurley* [1967] VR 526, 543 (Smith J). See also *R v Abusafiah* (1991) 24 NSWLR 531, 535 (Hunt J). The defence is not available on a charge of murder where the accused does the actual killing: see *Lynch v Director of Public Prosecutions for Northern Ireland* [1975] 1 All ER 913 and *Abbott v The Queen* [1976] 3 All ER 140.
65. *R v Hurley* [1967] VR 526.

great as to overbear the ordinary power to human resistance".[66] The threats need not be imminent and immediate; it is sufficient that the threats be continuing, imminent and impending.[67]

9.46 The defence is lost where the accused fails "to avail himself of some opportunity which was reasonably open to him to render the threat ineffective".[68] Whether an opportunity to escape the threat existed and was reasonably open to the accused is a question of fact for the jury to decide,[69] having regard to the accused's age and circumstances, and to any risks to the accused which may be involved.[70]

9.47 Where the accused adduces evidence from which can be inferred a reasonable possibility that the accused acted under duress, the defence should be left to the jury.[71] In *R v Abusafiah,* Justice Hunt said that the jury should first be directed as to the elements of the offence charged (including the voluntary nature of the acts of the accused). Then it should be directed in relation to the specific acts of the accused alleged to have committed the offence, and finally, the jury should be directed on the issue of duress,[72] in respect of which His Honour suggested the following specific directions:

> (1) The Crown … must establish that the acts of the accused constituting the offence were done by him voluntarily. That those acts were in fact done would in most cases lead to the conclusion that they were done voluntarily. In the present case, however, it has been argued that you should not come to that conclusion because, it is said, the accused acted under duress or coercion.
>
> (2) The accused does not have to establish that he did act under duress. The Crown must establish that the acts of the accused were done voluntarily and, in order to do so, it must eliminate any reasonable possibility that he acted under duress.

66. *R v Lawrence* [1980] 1 NSWLR 122.
67. *R v Hurley* [1967] VR 526 (Smith J); see also *R v Hudson* [1971] 2 QB 202; followed in *R v Williamson* [1972] 2 NSWLR 281, 290.
68. *R v Hudson* [1971] 2 QB 202, 207; and *R v Williamson* [1972] 2 NSWLR 281.
69. *R v Lawrence* [1980] 1 NSWLR 122, 134.
70. *R v Hudson* [1971] 2 QB 202, 207.
71. *R v Abusafiah* (1991) 24 NSWLR 531, 535 (Hunt J). See also *R v Nguyen* [2008] NSWCCA 22 where the NSW Court of Criminal Appeal allowed the appeal on the ground that the trial judge erred in not leaving duress to the jury, and ordered a retrial.
72. *R v Abusafiah* (1991) 24 NSWLR 531, 535 (Hunt J).

9.48 It has been argued that duress is distinct from the concept of voluntariness, the latter being an essential and fundamental element of all offences[73] and that these directions misconceive the defence of duress as going to voluntariness.[74] A person who does not perform an act of his or her own free will, or by their own choosing, by reason of insanity for instance, lacks the actus reus for the offence and is therefore not criminally responsible for that act. A person who does a criminal act under duress, on the other hand, performs the physical elements of the crime freely, such as cultivating cannabis, but escapes criminal responsibility because he was coerced to do the act. In this case, duress operates as an excuse to criminal responsibility.

9.49 Although Justice Hunt makes a clear distinction between the two in his opening remarks, by specifically describing voluntariness as an element of the offence, and leaving duress to be decided last as a defence, his specific directions on duress link the effect of the defence with the voluntariness component of the *actus reus*. He thereby states that duress renders an accused's conduct involuntary.

9.50 Arguably, the *Bench Book* also perpetuates the misconception:

> A person acts under duress, and therefore involuntarily, if that person's actions were performed because of threats (express or implied) of death or really serious injury to [*himself/herself/dependants*] being threats of such a nature that a person of ordinary firmness and strength of will, that is, a person of the same maturity and sex as [*the accused*], and in [*the accused's*] position, would have yielded to them.
>
> The first, and most important consideration, for you is that [*the accused*] does not have to establish that [*his/her*] actions were done under duress. The Crown must establish that the acts of [*the accused*] were done voluntarily, and in order to prove that [*the accused*] did act voluntarily, the Crown must eliminate any reasonable possibility that [*the accused*] acted under duress.[75]

ISSUE 9.4

Are the directions on duress in the *Bench Book* appropriate?

73. S Yeo, "Voluntariness, Free Will and Duress" (1996) 70 *Australian Law Journal* 304.
74. S Yeo, "Voluntariness, Free Will and Duress" (1996) 70 *Australian Law Journal* 304.
75. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (October 2008) [6-160].

Substantial impairment by abnormality of mind

9.51 The defence of diminished responsibility is a partial defence to murder. It was first recognised by Scottish law as a means of mitigating the punishment of the "partially insane" from murder to culpable homicide (manslaughter).[76] The defence of diminished responsibility was subsequently codified in s 23A of the *Crimes Act 1900* (NSW) but in 1997, it was repealed and reformulated into the defence of substantial impairment by abnormality of mind.[77] The new s 23A(1) provides that in cases where the defendant is accused of murder, he or she can be alternatively convicted of manslaughter if three criteria are satisfied:

- at the time the alleged murder was commissioned, the defendant's capacity to understand events, or to judge whether his or her actions were right or wrong, or to control himself or herself, was substantially impaired by an abnormality of mind;
- the abnormality of mind arose from an underlying condition; and
- the impairment was so substantial as to warrant liability for murder being reduced to manslaughter.[78]

9.52 Unlike other defences, the onus of proof in the case of substantial impairment by abnormality of mind is borne by the defendant, on the balance of probabilities.[79]

9.53 As it is unique to murder, it follows that juries should be directed to consider the defence of substantial impairment only after they are satisfied, beyond a reasonable doubt, that the accused did the act which caused the death of the deceased with the relevant intention that would otherwise make the accused guilty of murder.

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76. P Arnella, "The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage" (1977) 77 *Columbia Law Review* 827, 830.
77. See *Crimes Amendment (Diminished Responsibility) Act 1997* (NSW). The amending legislation followed the recommendations in NSW Law Reform Commission, *Partial Defences to Murder: Diminished Responsibility*, Report 82 (1997). The Report itself was a response to Gleeson CJ, who expressed the view in *R v Chayna* (1993) 66 A Crim R 178, 191 that the defence of diminished responsibility was "ripe for reconsideration".
78. *Crimes Act 1900* (NSW) s 23A(1). See also *R v Trotter* (1993) 35 NSWLR 428, 431 (Hunt CJ at CL).
79. *Crimes Act 1900* (NSW) s 23A(4). See also *R v Trotter* (1993) 35 NSWLR 428, 430 (Hunt CJ at CL).

9.54 The first test requires the jury to ask whether the defendant suffered from an abnormality of mind. This is a:

> state of mind so different from that of ordinary human beings that the reasonable person would term it abnormal. It appears ... to be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgment as to whether an act is right or wrong, but also the ability to exercise will-power to control physical acts in accordance with that rational judgment.[80]

The abnormality must have arisen from an underlying condition, defined as a pre-existing mental or physiological condition, other than a condition of a transitory kind.[81] The abnormality must be of a "more permanent nature than a simply temporary state of heightened emotions".[82]

9.55 If the jury is convinced that there was an impairment by abnormality of mind arising from an underlying condition, then the defendant must further show that the impairment was so *substantial* as to warrant mitigation of criminal liability from murder to manslaughter. To be substantial, the impairment may be less than total, but it must be more than trivial or minimal.[83] Some impairment is not sufficient; if the abnormality of mind did not make any great difference, then it can hardly be said that the impairment was substantial.[84]

Understanding the difference between mental illness and substantial impairment

9.56 On the face of it, the defences of mental illness and substantial impairment appear similar. Previously known as the defence of insanity, the defence of mental illness, if established, entitles the accused to be found "not guilty by reason of mental illness". The legal and practical consequence of this verdict is that the accused may be detained for an indefinite period in a mental health facility or a prison.[85] Substantial impairment, on the other hand, will reduce a charge of murder to manslaughter.[86]

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80. *R v Byrne* [1960] 2 QB 396, 403 (Lord Parker CJ) approved in *R v Tumanako* (1992) 64 A Crim R 149, 159 (Badgery-Parker J).
81. *Crimes Act 1900* (NSW) s 23A(8).
82. NSW Law Reform Commission, *Partial Defences to Murder: Diminished Responsibility*, Report 82 (1997) 55.
83. *R v Trotter* (1993) 35 NSWLR 428, 431 (Hunt CJ at CL).
84. *R v Trotter* (1993) 35 NSWLR 428, 431 (Hunt CJ at CL).
85. *Mental Health (Criminal Procedure) Act 1990* (NSW) s 39.
86 This had a clearly significant outcome when murder carried a mandatory life sentence. Since this is no longer the case in NSW, there are renewed calls for

9.57 Mental illness is distinguished from the defence of diminished responsibility in its application of the M'Naghten test,[87] which requires a defect of reason from a disease of the mind, as distinct from a substantial impairment by abnormality of mind. It is a subtle distinction which can easily escape even those with expertise in the area.

9.58 The confusion that this can cause for jurors was most evident in the case of *Cheatham,* where, during its deliberations, the jury posed the following questions to the trial judge:

> On the fifth day of the trial the jury asked for a definition of "wrong" and some guidance on interpretation and suggested some phrases, "moral wrong", "legal wrong", "delusionary wrong", "altruistic wrong", et cetera.[88]
>
> Could we please have directions by the judge regarding what constitutes mental illness and diminished responsibility?[89]
>
> Did the judge instruct that we have to accept that the accused had an abnormality of the mind or can we reject this abnormality of mind?[90]
>
> Jury status. Not getting anywhere at the moment, agitation prevailing, can we go home?[91]

9.59 Chief Justice Spigelman, on appeal, said it was apparent from the jurors' notes to the judge that they were having difficulty with the two defences and the concepts underlying them,[92] despite the judge's proper directions and answers to the questions posed.[93] These answers "should not be unduly technical or complicated...but [should be expressed] simply and clearly".[94]

9.60 The struggle to ensure the jury understands the differences between the two defences is arguably aggravated by the court's

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the abolition of the defence of substantial impairment for murder. In Victoria, SA, Tasmania and WA the issue of substantial impairment is considered at the sentencing stage as a mitigating factor, rather than as a factor which goes to criminal responsibility.

87. *M'Naghten's Case* (1843) 10 Cl & Fin 200, 210; 8 ER 718, 722, (Tindal LCJ).
88. *R v Cheatham* [2002] NSWCCA 360, [59].
89. *R v Cheatham* [2002] NSWCCA 360, [64].
90. *R v Cheatham* [2002] NSWCCA 360, [66].
91. *R v Cheatham* [2002] NSWCCA 360, [69].
92. *R v Cheatham* [2002] NSWCCA 360, [69] (Spigelman CJ).
93. *R v Cheatham* [2002] NSWCCA 360, [67].
94. *R v BWT* (2002) 54 NSWLR 241; [2002] NSWCCA 60, [96] (Sully J).

obligation to direct the jury on diminished responsibility even where defence counsel does not purport to raise it, and indeed, expressly rejects it.[95] A likely consequence of this persistent confusion may be a greater preference among defence lawyers to go to trial without a jury.[96]

Directing the jury in relation to medical evidence

9.61 Medical evidence is pivotal in cases where the defences of mental illness and substantial impairment by abnormality of mind are raised. For this reason, the judge should direct the jury that it must not reject unanimous medical evidence unless there is other evidence which displaces or throws doubt on that medical evidence.[97] This is reflected in the *Bench Book* which provides:

> In determining whether [the accused] has established that it is more likely than not that these matters were so, you will pay close attention to the evidence of the psychiatrists (or other expert witnesses), particularly on the questions which are summarised in the first paragraph of the written directions … These are areas in which psychiatrists [etc, specify] have particular expertise and experience.
>
> You are not bound, however, to accept their evidence. You are entitled to act on other evidence in the case if you think that there is other evidence which conflicts with or undermines the basis upon which the psychiatrists expressed their opinions.
>
> On the other hand, you would obviously pay careful and close attention to what the opinion evidence is as to these matters because of the experience and expertise which these witnesses have in this field.
>
> You would only decline to act on the evidence of the psychiatrists [and psychologists] if you think that there is other evidence which outweighs the psychiatric evidence, or if you think that the facts differ from those on which the psychiatrists proceeded, or if you think that the reasons expressed by the psychiatrists for their opinions (even having regard to their expertise) do not support their conclusion … [a different direction would need to be given if, as often happens, the psychiatric or psychological evidence reaches different conclusions].[98]

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95. *R v Cheatham* [2002] NSWCCA 360. See also para 6.51-6.53.
96. *R v Chayna* (1993) 66 A Crim R 178, 191 (Gleeson CJ); see *Criminal Procedure Act 1986* (NSW) s 132.
97. *Taylor v R* (1978) 22 ALR 599 (FCA), 618 (Connor and Franki JJ).
98. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (October 2008) [6-580].

9.62 However, in relation to the defence of substantial impairment, medical evidence which is raised at the trial can only be accepted in so far it is used to show that the abnormality of mind falls within the provisions of s 23A, that is, that the defendant's capacity to exercise will power (to control his or her physical actions) was impaired, and that the defendant's perceptions, judgment and self-control was slight, moderate, extensive or somewhere in between.[99] Medical evidence cannot be adduced to establish that the impairment was so substantial as to warrant liability for murder being reduced to manslaughter. This is a question of fact to be determined by the jury, and not by experts.[100]

9.63 Instructing the jury as to medical evidence is a daunting task. For example, in *R v Chayna*,[101] seven psychiatrists offered varying opinions as to the defendant's mental condition at the time she killed her two daughters and sister-in-law: ranging from schizophrenia, to severe depression, to an acute dissociative state, with one expert witness doubting the presence of any mental impairment at all. The trial judge directed the jury that the evidence of this last witness supported a conviction of murder. The jury found the defendant guilty of murder, and the matter went to the Court of Criminal Appeal. It was there that Chief Justice Gleeson noted that the variety of psychiatric opinion available to the jury strongly suggests that the operation of diminished responsibility is dependent on concepts which medical experts themselves find at least ambiguous and, perhaps, unscientific, with the place of the defence in the criminal law being a subject "ripe for reconsideration".[102]

ISSUE 9.5

How can juror confusion about the concepts underlying the defence of substantial impairment be minimised?

Onus of proof

9.64 One of the central issues relating to "defences" in criminal trials is that they are not for the accused to prove, but rather for the Crown to disprove.[103] In relation to self-defence, for example, it is not for the

99. *R v Trotter* (1993) 35 NSWLR 428, 431 (Hunt CJ at CL).

100 This reflects the position at common law; see, eg, *R v Byrne* [1960] 2 QB 396, 403 (Parker CJ).

101. *R v Chayna* (1993) 66 A Crim R 178, 180-182.

102. *R v Chayna* (1993) 66 A Crim R 178, 189.

103. However, there are some matters where the onus of proof will remain with the accused. They include, for example the defence of substantial impairment by abnormality of mind (*Crimes Act 1900* (NSW) s 23A(4)) the

accused to prove that he or she acted in self-defence. Rather, once it is raised by the accused, the onus shifts to the prosecution to prove beyond a reasonable doubt that the accused *did not* act in self-defence.[104]

9.65 Similarly, in the case of provocation, once the defendant produces evidence of provocation, it is not for the defendant to prove that the act or omission causing death was committed out of provocation. Rather, the burden of proof on the criminal standard falls on the prosecution.[105]

9.66 In order to avoid any misdirection as to onus of proof, the Court of Criminal Appeal has held that, in all cases in which a "defence" is raised, the direction to the jury should be whether the prosecution has eliminated any reasonable possibility that the accused acted under duress or in self-defence or under provocation, as the case may be.[106] The question should be phrased in this way to avoid confusion as to the onus of proof that rests on the prosecution.[107]

9.67 In *R v Dziduch*, Justice Hunt observed:

> It is very unwise even to refer to the issue of self-defence as a "defence", unless it is only to point out that it is not really a defence at all.[108]

While the comment was directed specifically at the issue of self-defence, the same arguably applies to other "defences". To describe them as defences implies erroneously that they are issues for the accused to establish, rather than the Crown.[109]

9.68 It is also important, when directing a jury as to onus of proof, that the "defences" not be treated as entirely separate matters that

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onus of establishing which rests upon the defence, although only on the balance of probabilities: *R v Ayoub* [1984] 2 NSWLR 511; the common law defence of insanity: *R v Porter* (1933) 55 CLR 182; and deemed possession in relation to drug trafficking: *Drug Misuse and Trafficking Act 1985* (NSW) s 29(a). This paper is not concerned with the evidential burden which can rest upon the accused to raise a matter for which the legal onus of proof will then return to the prosecution. The jury does not need to concern itself with the evidential burden.

104. *Crimes Act 1900* (NSW) s 419. See also *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645, 656 (Wilson, Dawson and Toohey JJ).
105. See *Crimes Act 1900* (NSW) s 23(4).
106. *R v Abusafiah* (1991) 24 NSWLR 531**,** 538, 541-542.
107. *R v Dziduch* (1990) 47 A Crim R 378, 381-382.
108. *R v Dziduch* (1990) 47 A Crim R 378, 380.
109. *R v Alpuget* (NSW CCA, 27 July 1989, unreported) 5-7 (Hunt J).

the Crown has to establish. They should be listed by the judge along with all the other issues (such as the elements of the offence) that the Crown must establish.[110]

9.69 Trial judges need to be particularly careful when formulating the elements of the defence, that they do so without reversing the onus of proof.

9.70 In *R v Alpuget*,[111] Justice Hunt also suggested that it was advisable to tell the jury that it is often difficult to explain that the Crown, not the accused, bears the onus of proof. By doing so, the jury should be fairly put on notice that any subsequent directions which may not express the onus completely correctly are not intended to override the general direction on onus of proof.

The reasonable person test

9.71 In a number of defences in criminal trials, the jury is required to assess the particular facts of the case against the reaction of the "reasonable" or "ordinary person in the position of the accused". The issue is best illustrated in the directions relating to the "defences" of provocation, duress and self-defence.[112] In such cases, the issue is whether the prosecution has "eliminated any reasonable possibility that the accused acted under duress or in self-defence or under provocation, as the case may be".[113]

9.72 So, in the case of duress, the Court of Criminal Appeal has suggested that the relevant direction should be that the prosecution must establish that "there is no reasonable possibility that… a person of ordinary firmness of mind and will, and of the same sex and maturity as the accused, would have yielded to [the] threat in the way in which the accused did".[114]

9.73 In relation to provocation, the test is whether an ordinary person could have done what the accused did, faced with the same degree of provocation. Although relevant to determining the gravity of the provocation, the personal characteristics of the accused (including sex and ethnicity) are irrelevant to the standard of self-control

110. *R v Alpuget* (NSW CCA, 27 July 1989, unreported) 5-7 (Hunt J).

111. *R v Alpuget* (NSW CCA, 27 July 1989, unreported) 5-7 (Hunt J).

112. On self-defence, see *Crimes Act 1900* (NSW) s 418.

113. *R v Abusafiah* (1991) 24 NSWLR 531, 541. See also Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (October 2008) [6-160].

114. *R v Abusafiah* (1991) 24 NSWLR 531, 545 (where model directions were suggested).

imposed by the law; a standard which is determined by the hypothetical ordinary person.

9.74 Where provocation and duress are in issue, the jurors need to be reminded that they are not to answer the relevant question concerning the response of the reasonable or ordinary person by inquiring what their own reaction would or may have been. Rather, they are to select such person as a hypothetical member of the community with the necessary attributes required by law for that person. Quite how jurors select such a person, and what attributes they are expected to assign to him or her, remains unexplained, and very much a matter for conjecture. Indeed, the test of the hypothetical ordinary person is difficult to understand and difficult for juries to apply. Some academic writers also argue the test has led to inconsistent decisions by juries.[115]

ISSUE 9.6

How should the concept of a reasonable or ordinary person in the position of the accused be left to the jury in relation to the relevant defences?

Directions on intoxication

9.75 The new Part 11A of the *Crimes Act 1900* (NSW) overrides the common law on intoxication.[116] Under the Act, intoxication is not a defence but a factor going to criminal responsibility that may negate the elements of an offence.

9.76 Evidence of intoxication is a matter relevant to an offence of specific intent, that is, an offence of which an intention to cause a specific result is an element.[117] Evidence that a person was intoxicated (whether self-induced or otherwise) at the time of the relevant conduct may be taken into account in determining whether the person had the intention to cause the specific result necessary for the offence of specific intent.[118] However, it cannot be considered if the person had resolved to do the relevant act before becoming intoxicated or if he or she became intoxicated in order to gather strength to do the relevant act.[119]

115. Queensland Law Reform Commission, *A Review of the Defence of Provocation*, Working Paper 63 (2008), [12.39].

116. *Crimes Act 1900* (NSW) s 428H.

117. *Crimes Act 1900* (NSW) s 428B.

118. *Crimes Act 1900* (NSW) s 428C(1).

119. *Crimes Act 1900* (NSW) s 428C(2).

In relation to self-defence

9.77 Where intoxication is raised in connection with self-defence, the Supreme Court has held that the fact that the accused was intoxicated is relevant only to the first question to be determined by the jury when considering self defence, namely, whether the accused reasonably believed it was necessary to do what he or she did in self defence. Intoxication is not relevant to the second question of whether it was reasonable for the accused to have responded to the situation in the way he or she did.[120]

9.78 Where it is necessary to compare the state of mind of the accused with that of a reasonable person, in order to determine whether the accused is guilty of an offence, the comparison must be between the state of mind of the accused and that of a reasonable person who is not intoxicated.[121]

9.79 The *Bench Book* provides the following suggested written direction on intoxication in relation to self-defence:

> [The accused's] intoxicated state —
>
> 1. must be taken into account in determining whether [the accused] believed that [his/her] conduct was necessary to defend [himself/herself];
> 2. must be taken into account in determining the circumstances as [the accused] perceived them to be;
> 3. must not be taken into account in determining whether [his/her] response to those circumstances was reasonable.[122]

9.80 The *Bench Book* makes further suggestions for oral directions, as follows:

> You should fully understand that the law provides (in substance) that a person who genuinely thought that [*he/she*] was in danger, even if [*he/she*] were wrong about that perception because … [*specify, for example, [his/her] perception was affected by alcohol*], may still be regarded as having acted in lawful self-defence provided that the person's response was reasonable, based on the circumstances as [*he/she*] perceived them to be.
>
> You need to look at the case through the eyes of [*the accused*] in its context, [*taking into account [his/her] intoxicated state*] and

120. *R v Katarzynski* [2002] NSWSC 613 applied in *Presidential Security Services of Australia Pty Ltd v Brilley* [2008] NSWCA 204, [121-122], [137].

121. *Crimes Act 1900* (NSW) s 428F.

122. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (October 2008) [6-480].

> by reference to the actual situation in which [*he/she*] found [*himself/herself*], and as [*he/she*] perceived it to be.
>
> So you determine what [*the accused*] [*in [his/her] intoxicated state*] actually perceived was the danger [*he/she*] faced, and then determine whether what [*he/she*] did in response to that danger was reasonable. In determining whether what [*he/she*] did was reasonable, you stand back and consider the response from an objective viewpoint, disregarding, for example, that [*he/she*] may have overreacted because of the effects of alcohol upon [*him/her*].
>
> You are considering what would have been a reasonable response by a sober person in the circumstances as [*the accused*] drunkenly perceived them.[123]

In relation to substantial impairment

9.81 The effects of self-induced intoxication are to be disregarded in assessing whether or not the defence of substantial impairment is applicable.[124] However, a defendant who was intoxicated at the time of the killing may be able to rely on the defence if prolonged use of alcohol or drugs has led to brain damage or disease that substantially impaired the defendant's ability to control his or her actions. In cases such as these, the defendant must prove that it is the brain damage (being the underlying condition) that caused the abnormality of mind resulting in the substantial impairment of mental capacity, and not the short-term effects of the intoxication.[125]

In relation to consent

9.82 Other than in relation to the accused's intention in sexual offence cases, intoxication is also relevant to the issue of consent. Where evidence is raised on the issue of consent, the Crown bears the onus of proving, beyond a reasonable doubt, that the alleged victim did *not* consent. Consistent with common law principles of consent,[126] the *Crimes Act 1900* (NSW) provides that a person consents to sexual intercourse if the person freely and voluntarily agrees to the sexual intercourse.[127] A person does not consent if he or she lacks the capacity to consent (for example, because of age or cognitive incapacity) or if the person has no opportunity to consent because he or she is

123. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (October 2008) [6-490].

124. *Crimes Act 1900* (NSW) s 23A(3). See also *R v Di Duca* (1959) 43 Cr App R 167; *R v Fenton* (1975) 61 Cr App R 261; *R v Jones* (1986) 22 A Crim R 42; *R v De Souza* (1997) 41 NSWLR 656.

125. *R v Jones* (1986) 22 A Crim R 42; *R v Ryan* (1995) 90 A Crim R 191.

126. *DPP (No 1 of 1993)* (1993) 66 a Crim R 259, 265 (King CJ).

127. *Crimes Act 1900* (NSW) s 61HA(2).

unconscious or asleep.[128] Section 61HA of the *Crimes Act* expressly provides that one of the grounds on which consent may be negated is evidence that the alleged victim was substantially intoxicated at the time of sexual intercourse.

OTHER AREAS OF SUBSTANTIVE LAW

9.83 There are other contexts where multiple and complex directions are required as a result of the several elements involved in certain offences. One example is the law relating to the supply of prohibited drugs[129] and deemed supply,[130] in respect of which different directions are suggested.[131]

9.84 Also challenging are the directions required for many offences arising under the Commonwealth Criminal Code, with its somewhat complex distinction between physical elements and mental elements, its classification of the circumstances in which there is no criminal responsibility, and its sometimes cumbersome framing of offences, for example, in the area of terrorism.

ISSUE 9.7

What other areas of criminal law require revision in order to be more easily explained to juries?

COMPLEX OR OBSCURE TERMINOLOGY

9.85 There are many other existing criminal provisions which use complex or obscure language that may cause difficulties for juries. This can cause problems in two circumstances:

- first, for obvious reasons, when the judge provides no explanation of the word or phrase; and
- secondly, when the judge provides an explanation of the word or phrase.

In the second circumstance, an explanation can add an additional layer to a direction, and, rather than increasing clarity, may in fact increase the opportunity for misunderstanding.

128. *Crimes Act 1900* (NSW) s 61HA(4).

129. *Drug Misuse and Trafficking Act 1985* (NSW) s 25 sets out the offences of supply and knowingly taking part in the supply of prohibited drugs.

130. *Drug Misuse and Trafficking Act 1985* (NSW) s 29.

131. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (October 2008) [5-1810], [5-1820].

9.86 For example, the concept of being "knowingly concerned in" certain prohibited activities, without further explanation or guidance being given, may be problematic. The phrase is commonly used in cases of drug importation and possession. It occurs in the *Customs Act 1901* (Cth)[132] and courts frequently use it when referring to charges of knowing involvement or participation under the *Drug (Misuse and Trafficking) Act 1985* (NSW). It has been suggested that the use of the phrase "concerned in" might be mistaken by jurors for "concerned about" unless adequately explained;[133] and, additionally, that there is an area of imprecision concerning what an accused needs to do before he or she is "concerned in the offence".

9.87 The use of expressions such as "suffers", which are not in common parlance, in the context of certain conduct associated with the possession, manufacture or handling of drugs,[134] is also problematic, as can be seen in one case where it was held that the jury should have been instructed that it was not only necessary for the prosecution to show that the accused knowingly allowed the third party to carry out the relevant act, but additionally that he had the right or capacity to prevent it.[135]

9.88 Some of the problems for trial judges in giving meaningful directions in these areas could be overcome by encouraging the legislature, when framing new offences or amending existing offences, to avoid using terms which are not in everyday use, or which call for extensive supplementary explanation as to their meaning or reach.

9.89 Similarly, there is a case for the legislature avoiding the framing of offences or defences employing expressions of indeterminate reference such as "reasonable cause" or "lack of reasonableness", leaving it to the courts to provide the context[136] or for jurors to guess at what cause might be "reasonable" in the circumstances of the case with which they are concerned. An additional problem can arise where the manner in which the provision is framed and the jury directed might be understood as suggesting to the jury some reversal of the onus of proof.

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132. *Customs Act 1901* (Cth) s 243A(3)(f).

133. *R v Leff* (1996) 86 A Crim R 212, 225. See also cases where the Court of Criminal Appeal has considered that the phrase has been adequately explained: *R v Courtney-Smith (No 2)* (1990) 48 A Crim R 49, 65; *R v Sukkar* [2005] NSWCCA 54, [75]-[81].

134. For example, *Drug Misuse and Trafficking Act 1985* (NSW) s 6(c), s 18A(1)(b).

135. *R v Sheen* (2007) 170 A Crim R 533; [2007] NSWCCA 45.

136. See *Taikato v The Queen* (1996) 186 CLR 454; and *Fingleton v The Queen* (2005) 227 CLR 166; [2005] HCA 34, [108]-[109].

ISSUE 9.8

(1) Should the use of any of the following terms in directions be reviewed in order to help jurors to understand the law that they must apply:
   (a) knowing concern; and
   (b) suffer.

(2) Are there any other terms that should be reviewed in order to help jurors to understand the law that they must apply?

PRELIMINARY DIRECTIONS ON THE ISSUES TO BE DETERMINED

9.90 The judge's opening remarks are brief and intended mainly to give the jury a general introduction to the trial process. They usually do not cover substantive law.

9.91 However, a recent survey by the Australian Institute of Judicial Administration (AIJA) found that about 26% of judges in NSW discuss the elements of the relevant substantive law in their opening remarks. The results of this study, which surveyed judges from Australia and New Zealand, should be treated with caution when making general conclusions about judicial practice in this State, since only 23 NSW judges participated in the survey.[137]

9.92 The summing-up given at the end of the trial is the main means of explaining to the juror the legal principles they need to apply to bring in a verdict. It is assumed that giving the directions at the end of the trial is the best way of ensuring that these directions remain fresh in the minds of the jurors during their deliberations. There are, however, arguments for giving jurors the key legal directions during the opening remarks, particularly on substantive law.

Arguments for

9.93 The first argument in support of giving directions on substantive law to the jury both before and after the presentation of evidence is that it may improve jurors' recall and comprehension. Some studies have found that multiple exposure to the law enables

137. J Ogloff, J Clough, J Goodman-Delahunty and W Young, *The Jury Project: Stage 1 – A Survey of Australian and New Zealand Judges* (Australian Institute of Judicial Administration, 2006) 47. The survey obtained responses from 136 judges from Australia and 49 from New Zealand. Of the 23 NSW judges who participated in the survey, six (or 26 %) said they outlined the elements of the relevant substantive law in the opening remarks.

jurors to understand the legal directions and to apply them better to the evidence.[138]

9.94 Secondly, giving jurors the key legal directions during the opening remarks would give them a legal framework and a context for the evidence at the start of the trial. This has been shown to enable jurors to evaluate the evidence more effectively as it is being presented.[139] In other words, it may assist jurors to fit the various pieces of evidence being presented into a coherent story that makes sense to them.[140] It may also prevent jurors from relying solely on pre-existing and inaccurate beliefs about the law or on personal biases that might be triggered by the nature of the case or the characteristics of the defendant.

9.95 Finally, the enhancement in their ability to evaluate the evidence as a result of the preliminary directions on substantive law increases jurors' satisfaction in the trial process.[141]

9.96 Justice McClellan has recently spoken about the benefits of identifying the issues early in the trial:

> one source of significant time wasting in some trials is a failure to isolate the issues requiring determination before the trial commences. They are sometimes not identified until final address. This has two consequences. The jurors lose track of the evidence, having no means of appreciating its significance and the issues to which it relates. The trial itself is inefficient. Without knowing the issues the trial judge can exert little

138. D Cruse and B Browne, "Reasoning in a Jury Trial: The Influence of Instructions" (1986) 114 *The Journal of General Psychology* 129; L Heuer and S D Penrod, "Instructing Jurors: A Field Experiment with Written and Preliminary Instructions" (1989) 13 *Law and Human Behavior* 409. However, some studies have found that giving preliminary legal directions does not result in improvement in jurors' recall of the directions: L F Lee, I Horowitz and M Bourgeois, "Juror Competence in Civil Trials: Effects of Preinstruction and Evidence Technicality" (1993) 78 *Journal of Applied Psychology* 14; L Heuer and S D Penrod, "Instructing Jurors: A Field Experiment with Written and Preliminary Instructions" (1989) 13 *Law and Human Behavior* 409, 424-425.

139. V Smith, "Impact of Pretrial Instruction on Jurors' Information Processing and Decision Making" (1991) 76 *Journal of Applied Psychology* 220.

140. Y Tinsley, "Juror Decision-Making: A Look Inside the Jury Room" (2001) 4 *British Society of Criminology* «*http://www.britsoccrim.org/v4.htm*».

141. J Lieberman and B Sales, "What Social Science Teaches Us About the Jury Instruction Process" (1997) 3 *Psychology, Public Policy, and Law* 589, 629; L Heuer and S D Penrod, "Intructing Jurors: A Field Experiment with Written and Preliminary Instructions" (1989) 13 *Law and Human Behavior* 409, 413-414.

> influence over the advocates to confine the evidence and discipline the questioning of witnesses.[142]

Arguments against

9.97 There are, however, several arguments against giving jury directions on substantive law prior to the presentation of evidence. First, some judges fear that this might overload jurors with too much information at the beginning of the trial.[143]

9.98 Secondly, giving the jury a legal framework at the start of the trial may encourage individual jurors to view the trial from a single perspective. It is argued that there is a danger that jurors may reach a verdict before the jury deliberations (or even before all the evidence has been presented) without regard to the variety of views that the other jurors bring to the jury room.[144]

9.99 Finally, it is impractical to give directions at the beginning of the trial because the trial judge, in many cases, may not know which issues will arise, and thus what directions to give. The nature of the prosecution case and the defence or defences that the defence team is intending to use will usually be unclear to the judge at the start of the trial. This raises the importance of the next issue, which might be regarded as a key step in modernising jury trials.

Need for pre-trial disclosure obligations

9.100 Preliminary directions on the substantive law would require counsel for both sides to disclose the issues at the commencement of the trial. At the minimum, this would require the prosecution to identify the elements of each offence for which the accused is charged, and require the defence to identify any of the elements which it disputes and to disclose any positive defence to be relied on by the accused. Such disclosures would be particularly useful in complex trials.

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142. P McClellan, "The Australian Justice System in 2020" (National Judicial College of Australia, 25 October 2008), 11.
143. E Najdovski-Terziovski, J Clough and J R P Ogloff, "In Your Own Words: A Survey of Judicial Attitudes to Jury Communication" (2008) 18 *Journal of Judicial Administration* 65, 72.
144. L Heuer and S D Penrod, "Instructing Jurors: A Field Experiment with Written and Preliminary Instructions" (1989) 13 *Law and Human Behavior* 409, 414 citing R Hastie, *Final Report to the National Institute for Law Enforcement and Criminal Justice* (1983, unpublished).

9.101 The Office of the Director of Public Prosecutions endorses disclosure obligations, stating in its preliminary submission that:

> if the defence had disclosure obligations, took part in pre-trial negotiations to identify the issues and was required to settle with the prosecution a list of required witnesses, it is probable that the directions and warnings required in any trial could be assessed and determined at a much earlier point in the proceedings. This would eliminate many unnecessary directions and warnings and cut trial length and possible appeal points.[145]

Further difficulty with defences

9.102 However, even with such disclosure, preliminary instructions on the defence or defences may still be problematic because the issues relevant to the defence may not be crystallised or fully evident until after all the evidence has been presented. At times, an unanticipated defence may arise from the evidence. Alternatively, the defendant's instructions to his or her legal team might change when the prosecution's evidence is presented in full. The defendant may change his or her mind about testimony upon which the defence hinges.[146] This problem, if it arises, could be addressed by giving the jury revised directions on the defence or defences in the course of the trial and in the summing-up.

9.103 Pre-trial disclosure was recommended by this Commission in Report 95, *The Right to Silence*, including limited disclosure by the defence in certain cases.[147] The recommendation was only partially accepted, and pre-trial disclosure of the issues to be raised by both parties is permitted only in "complex criminal trials".[148]

ISSUE 9.9

(1) Should judges give preliminary directions on elements of the offence in their opening remarks?
(2) If so, should they also cover available defences?
(3) To what extent should the issues be defined in the preliminary directions?

145. Office of the Director of Public Prosecutions of NSW, *Preliminary Submission*, 3.
146. See D Watt, *Helping Jurors Understand* (Carswell, Toronto, 2007) 111.
147. NSW Law Reform Commission, *Right to Silence*, Report 95 (2000) [3.127]-[3.153].
148. *Criminal Procedure Act 1986* (NSW) s 136. See *R v Kamba* [2008] NSWSC 950.

10. Enhancing juror comprehension

- Introduction
- Note-taking by jurors
- Final directions on the law in writing
- Audio-visual presentation of jury directions
- Deliberation aids
- Questions from jurors during deliberations

INTRODUCTION

10.1 Arguably the most important means of improving comprehension of jury directions is by using language that jurors understand instead of the highly-technical and legalistic language that is often used by judges. As a means of encouraging judges to give directions that are understandable to jurors, the Commission in Chapter 3 raised the issue of whether there is a need to review the *Bench Book's* directions to make them more understandable to jurors. This Chapter canvasses other ways of assisting jurors to better comprehend the judge's directions.

10.2 In particular, this Chapter examines:

- note-taking by jurors;
- the provision of written directions to jurors;
- the use of audio-visual aids in the presentation of the summing-up;
- the provision of jury deliberation aids, such as step directions, issues tables and decision trees; and
- the ability of jurors to ask the judge questions about the directions during deliberations.

10.3 There are other means of assisting jurors perform their role, such as:

- giving them an opportunity to ask questions to witnesses through the judge;
- providing them with a transcript of the evidence;
- permitting the inspection of the exhibits during jury deliberations; and
- allowing the jury to use during their deliberations any chronologies, charts and schedules that have been received into evidence.

This Chapter will not canvass these other matters since they relate mainly to assisting jurors recall, clarify or understand the evidence; they are not primarily aimed at helping jurors with understanding the judge's directions. The terms of reference confine this inquiry to directions and warnings that a judge gives to a jury in a criminal trial.

NOTE-TAKING BY JURORS

The law and practice in NSW

10.4 In NSW, jurors are allowed to take notes during the trial. In *R v Sandford*, the NSW Court of Criminal Appeal held that a trial judge has a discretion to give writing materials to jurors to enable them to take notes. The Court added that it is difficult to imagine any legitimate basis for denying a request for such materials and, in fact, "it is now common practice for writing materials to be offered to jurors without waiting for a request".[1]

10.5 In a recent publication of the Attorney General's Department, *Guide for Jurors*, which is given to jurors prior to the commencement of the trial, jurors are informed:

> You will be provided with a notebook which you can use to take notes about the evidence that is given. The notebook will be left behind each afternoon when you leave court and will be handed in and destroyed when the proceedings are over.[2]

Further, it would appear from anecdotal evidence that it is now common practice for trial judges, in their opening remarks, to tell jurors that they may take notes. This is confirmed by the AIJA survey which found that 91% of the NSW judges told the jury in their opening remarks that they could take notes, and 70% gave additional directions on note-taking.[3]

Benefits

10.6 The obvious benefit of note-taking by jurors is that, when done properly, it can be a valuable aid for refreshing memory. While this benefit relates mainly to the evidence, it may also apply to the directions. That is, jurors may take notes of not just the evidence, but also the directions given by the judge to help their recall when they are in the jury room. Further, it may be argued that note-taking assists in sustaining jurors' concentration by preventing their

1. *R v Sandford* (1994) 33 NSWLR 172, 181-182 (Hunt CJ at CL).
2. NSW, Attorney General's Department, *A Guide for Jurors: Welcome to Jury Service* (February 2007) 7.
3. J Ogloff, J Clough, J Goodman-Delahunty and W Young, *The Jury Project: Stage 1 – A Survey of Australian and New Zealand Judges* (Australian Institute of Judicial Administration, 2006) 46.

attention from wandering away from the proceedings.[4] This argument may have particular application at the summing-up, which usually lasts several hours.[5]

10.7 The benefits of note-taking have support from empirical studies[6] and have also been recognised by courts. In *R v Sandford*, Justice Smart observed:

> Making a note increases the concentration and embeds the evidence into the mind. Jurors often make some notes of the evidence and the addresses and very full notes of the critical directions in a summing-up. Juries should be encouraged to make notes of the evidence, the final addresses and the summing-up.[7]

Some concerns

10.8 There are, however, concerns about note-taking, including that jurors taking notes may not be able to keep pace with the trial. Trial judges sometimes address this issue by giving a warning to jurors that they should not let their note-taking distract them from following the trial. Other judges inform them that, while they are entitled to take notes and might find it beneficial to record what appear to them as salient points, they will be entitled at the end of the trial to request a copy of the transcript of the evidence.

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4. L Sand and S Reiss, "A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit" (1985) 60 *New York University Law Review* 423, 447 citing *US v MacLean* 578 F2d 64 (3rd Circuit, 1978), 64.
5. The average duration of the charge in NSW is 362 minutes for 20-day trials, 217 minutes for 10-day trials and 141 minutes for five-day trials: J Ogloff, J Clough, J Goodman-Delahunty and W Young, *The Jury Project: Stage 1 – A Survey of Australian and New Zealand Judges* (Australian Institute of Judicial Administration, 2006) 48.
6. See, for example, W Young, N Cameron, Y Tinsley, *Juries in Criminal Trials Part 2: A Summary of the Research Findings*, New Zealand Law Commission, Preliminary Paper 37 (1999) [3.6] (in 41 trials covered by this study, at least 50% of jurors who responded to the survey said they took notes, and of those, 83% used them during deliberations, and 94% of these found them useful as a memory aid); V E Flango, "Would Jurors Do a Better Job If They Could Take Notes?" (1980) 63 *Judicature* 436 (jurors in four trials in Illinois who took notes rated the quality of the deliberations higher than those who did not take notes, and commented that the notes refreshed their memories and helped convince other jurors of the facts). See, however, L Heuer and S D Penrod, "Juror Notetaking and Question Asking During Trials" (1994) 18 *Law and Human Behavior* 121 (in a survey of 103 trials across 33 States in America, juror notes did not clearly serve as a memory aid).
7. *R v Sandford* (1994) 33 NSWLR 172, 185.

10.9 Other potential problems include:

- jurors might give undue weight to their notes, which may be inaccurate and will certainly be an incomplete record of the trial;
- a juror who has taken notes might exert more influence during deliberations than those who have not; and
- jurors may be distracted from observing the demeanour of witnesses.[8]

10.10 While an American study found that concerns about note-taking by jurors are unfounded,[9] two studies have indicated that jurors do encounter problems in relation to note-taking. The New Zealand Law Commission's jury study conducted in 1999 found:[10]

- The directions jurors were given on whether they should take notes, and the extent to which they should do so, were variable and generally inadequate. Jurors frequently criticised the lack of guidance about the sort of information which they should note down.
- Partly due to inadequate guidance on note-taking, the amount of notes taken by jurors varied enormously.
- Many jurors interpreted the caution from the judge that they should be careful to listen to and observe witnesses as meaning that they should avoid taking notes as far as possible.
- Jurors with few or no notes tended to defer to those who had taken extensive notes when there was a need to clarify, or there were disagreements about, the evidence. Their reliance on the notes of others reduced their ability to participate meaningfully in the discussions, and allowed other jurors to dominate the deliberations.

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8. This can be met by "a brief warning...of the importance of watching the demeanour of the witnesses as they give their evidence": In *R v Sandford* (1994) 33 NSWLR 172, 182 (Hunt CJ at CL).
9. L Heuer and S D Penrod, "Juror Notetaking and Question Asking During Trials" (1994) 18 *Law and Human Behavior* 121 (note-taking jurors do not distract other jurors, note-takers do not have undue influence over non-note-takers, note-takers can keep pace with the trial, note-takers do not overemphasise the evidence they have noted at the expense of evidence they did not record, etc).
10. W Young, N Cameron, Y Tinsley, *Juries in Criminal Trials Part 2: A Summary of the Research Findings*, New Zealand Law Commission, Preliminary Paper 37 (1999) [3.6].

10.11 A jury survey conducted in NSW also found that some jurors encountered problems related to note-taking, including:[11]

- Some jurors misinterpreted the advice (given in relation to note-taking) that jurors should ensure that they observe the demeanour of witnesses as discouraging them from taking any notes whatsoever during the trial.
- Some jurors reported that inconsistencies between jurors' notes became a source of disagreement during deliberations.
- One juror thought that where a discrepancy arose between her notes and the transcript of evidence, the notes took precedence.
- When jurors are informed that they may request all or part of the transcript of the evidence, the judge does not make it clear that such a request may be denied. One juror assumed that the transcript would definitely be given and, as a consequence, did not take extensive notes. It would now appear that any such request would have to be granted.

The authors of this study concluded that these findings "suggest that jurors may lack a clear understanding of the purpose of notes and are not sure how any notes that they have taken relate to the transcript".[12]

ISSUE 10.1

Is there is a need for judges to give jurors more extensive directions on note-taking? If so, what should these be?

FINAL DIRECTIONS ON THE LAW IN WRITING

10.12 The judge's summing-up, which contains the directions on the law that the jury must apply to the issues of the case, is traditionally delivered orally following the addresses of the prosecution and defence counsel. However, there is a growing practice for judges to give jurors a written copy or summary of the legal directions in the summing-up.

11. M Chesterman, J Chan and S Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (Law and Justice Foundation of NSW, 2001) [462]-[468].
12. M Chesterman, J Chan and S Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (Law and Justice Foundation of NSW, 2001) [471].

Benefits from written directions

10.13 There are a number of benefits from this practice. Studies have shown that giving jurors a copy of the directions improves their comprehension.[13] This may be because, when jurors refer to the written directions, they are referring to the law as directly told to them by the judge, and this repeated exposure may lead to greater familiarity with and understanding of the directions they need to apply.[14]

10.14 Further, written directions may reduce deliberation time, as juries spend less time trying to recall the directions. They may assist in resolving disputes among jurors about what directions the judge gave.[15]

10.15 Next, the written directions can be a useful way of identifying the final issues in the trial to which the directions can be related.

10.16 Finally, the improved comprehension of the directions and evidence that results from the presence of written directions may increase the jurors' confidence in their verdict.[16]

Current law and practice in NSW

10.17 In NSW, judges have discretion to give the legal directions in writing. Section 55B of the *Jury Act 1977* (NSW) provides:

> Any direction of law to a jury by a judge or coroner may be given in writing if the judge or coroner considers that it is appropriate to do so.

Prior to the adoption of s 55B in 1987, the common law allowed judges to use a written document in expounding their summing-up of the law

13. G P Kramer and D M Koenig, "Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project" (1989) 23 *University of Michigan Journal of Law Reform* 401; I G Prager, G Deckelbaum and B L Cutler, "Improving Juror Understanding for Intervening Causation Instructions" (1989) 3 *Forensic Reports* 187.
14. L Heuer and S D Penrod, "Instructing Jurors: A Field Experiment with Written and Preliminary Instructions" (1989) 13 *Law and Human Behavior* 409, 410.
15. L Heuer and S D Penrod, "Instructing Jurors: A Field Experiment with Written and Preliminary Instructions" (1989) 13 *Law and Human Behavior* 409, 411.
16. L Heuer and S D Penrod, "Instructing Jurors: A Field Experiment with Written and Preliminary Instructions" (1989) 13 *Law and Human Behavior* 409, 411.

to a jury. However, such a written document was considered only as an *aide memoire* to the oral directions.[17]

10.18 Section 55B makes it clear that the written directions are themselves the directions which the jury must take into account in deciding the case. Nevertheless, it is customary for the judge to read the written directions to the jury while they have the document in front of them. He or she usually takes the jury through each of the sub-paragraphs of the document and elaborates on them.

10.19 In *R v Forbes*,[18] the NSW Court of Criminal Appeal cited s 55B as the basis for the trial judge's delivery of the summing-up both orally and in writing. The Court observed that this practice is "widely followed and is to be encouraged".[19]

10.20 The appellant in that case (who was appealing a conviction for manslaughter) argued that a summing-up that is comprehensible only with the aid of a written document is not an effective communication tool. Further, the appellant contended that the judge's written directions inappropriately assumed that each member of the jury had an ability to read and comprehend a document, at the same time as listening to verbal directions.

10.21 In rejecting these submissions, Chief Justice Spigelman said that the appellant might very well have had more cause for complaint if the trial judge had given an entirely oral presentation of the directions because that would "probably have bewildered the jury". Further, the Chief Justice said that it was appropriate to assume that all jurors can read and follow proceedings by reference to the written directions in the absence of any suggestion that any juror had a difficulty.[20]

The incidence of written directions

10.22 Seventy per cent of the NSW judges who participated in the AIJA survey said that they give jurors some form of written assistance in relation to the legal directions contained in the summing-up.[21]

17. *R v Petroff* (1980) 2 A Crim R 101, 116 (Nagle CJ at CL citing with approval the trial judge's direction).
18. *R v Forbes* (2005) 160 A Crim R 1; [2005] NSWCCA 377.
19. *R v Forbes* (2005) 160 A Crim R 1; [2005] NSWCCA 377, [83] (Spigelman CJ).
20. *R v Forbes* (2005) 160 A Crim R 1; [2005] NSWCCA 377, [91]-[92].
21. J Ogloff, J Clough, J Goodman-Delahunty and W Young, *The Jury Project: Stage 1 – A Survey of Australian and New Zealand Judges* (Australian Institute of Judicial Administration, 2006) 30.

These figures are encouraging, and demonstrate that a large majority of judges in NSW realise the benefits of giving the legal directions to the jury in writing. However, the Commission considers that the percentage of judges who do not give written legal directions – 30% – is still quite substantial.

10.23 Based on informal information from judges, it appears that, while many Supreme Court judges routinely supplement their oral summing-up with written directions, this practice is not as widespread in the District Court. One possible reason for this is the fact that some of the criminal cases heard by the District Court are less complex than those tried at the Supreme Court. It is possible that some judges take the view that, in simple and uncomplicated cases, written directions are superfluous. However, it is arguable that, regardless of the complexity of the trial, jurors are likely to find that written directions are helpful, and may in fact assist them in understanding the legal concepts they need to apply in their decision-making process.[22]

ISSUE 10.2

Should the law be changed so that a judge must give directions of law in criminal proceedings in writing, unless the judge has good reasons for not doing so?

Inconsistency between oral and written directions

10.24 Where a judge gives written legal directions that contain legal errors, but his or her oral directions are legally accurate, or vice versa, the issue that arises is whether the set of directions that are legally accurate overcome any legal error in the other set of directions.

10.25 In *Derbas v R*,[23] the appellant argued that the trial judge's written directions failed to direct the jury sufficiently regarding accessorial liability, thus occasioning a miscarriage of justice. The judge gave oral directions on accessorial liability on two occasions in the summing-up, and the appellant accepted that the first of these oral directions was correct. The appellant posed the question of whether the correct oral direction was sufficient to fill the gap in the written direction and the later oral direction. The court held that it

22. There may, of course, be some practical difficulties where the evidence takes a short time and the whole trial is concluded during the one day.

23. *Derbas v R* [2007] NSWCCA 118. No reference was made in that case to *Jury Act 1977* (NSW) s 55B; see para [10.17]-[10.21].

was unnecessary to decide this issue because the appellant failed to establish errors in any of the directions.

ISSUE 10.3

Should legislation provide that, in case the written directions are legally deficient in some respect, the oral directions, if legally accurate, overcome the deficiency, and vice versa?

AUDIO-VISUAL PRESENTATION OF JURY DIRECTIONS

10.26 Audio-visual technologies are widely used in instructional or information-sharing settings, such as classrooms, seminars and conferences. They include whiteboards, slide shows, overhead projectors, and computer-based projections such as PowerPoint. These techniques can be a means of supplementing the traditional oral presentation of jury directions in order to improve juror comprehension.

WA experience

10.27 In WA, a District Court judge has been using PowerPoint in directing juries.[24] She emphasises that the use of PowerPoint does not involve any major changes to the oral presentation of the summing-up. The main difference lies in the slide presentation of key points; for example, a shorter version of the direction on burden of proof, or definitions of elements of the offence, such as "consent" or "sexual penetration".

10.28 She believes this method of presentation helps focus jurors' attention on the main points of the summing-up and improves their comprehension of the legal directions. She reports that both prosecutors and defence counsel have been supportive of this technique. Further, the Court of Appeal of WA has noted the use of PowerPoint in the summing-up and has not objected to this practice.[25]

Support from empirical studies

10.29 There is empirical evidence supporting the use of audio-visual presentation of jury directions. In the field of learning, researchers have found that instructional materials that use two modes of

24. M Yeats, "Using PowerPoint in Charging Juries" (Australian Institute of Judicial Administration Conference, Melbourne, 8-10 October 2000).
25. See *Dawson v The Queen* [2001] WASCA 2; *Nguyen v R* [2005] WASCA 22.

presentation (for example, oral presentation and visual diagrams) can result in better learning results.[26]

10.30 An Australian study found that the oral presentation of the direction on self-defence when combined with visual presentation (through computer animation and a flow-chart) of the key elements of the direction produced substantial improvement in comprehension.[27]

Jurors' support for visual aids

10.31 Jurors in various surveys have commented on the need for greater use of visual aids during the trial. In a survey of jurors who sat on civil trials in Victoria during 2001, one of the most common complaints was the lack of visual aids.[28] In the New Zealand jury study, many jurors wanted more use of whiteboards, overhead projectors and other visual aids in the presentation of evidence.[29] Although the desire for visual aids expressed in these studies pertained to the presentation of evidence, it may be assumed that jurors would also find their use in the summing-up helpful.

10.32 The results of these jury surveys are consistent with extra-judicial comments by some judges that the communication between the trial judge and the jury may be hampered by the different ways in which jurors from younger generations process information.[30] Their basic point is that a lengthy oral presentation may not be the best way to engage the attention of the younger pool of jurors. The new multi-media technologies, including the Internet, have accustomed younger jurors to assimilating information in different ways.

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26. S Tindall-Ford, P Chandler and J Sweller, "When Two Sensory Modes are Better Than One" (1997) 3 *Journal of Experimental Psychology: Applied* 257.
27. N Brewer, S Harvey and C Semmler, "Improving Comprehension of Jury Instructions with Audio-Visual Presentation" (2004) 18 *Applied Cognitive Psychology* 765.
28. J Horan, "Communicating with Jurors in the Twenty-First Century" (2007) 29 *Australian Bar Review* 75.
29. W Young, N Cameron, Y Tinsley, *Juries in Criminal Trials Part 2: A Summary of the Research Findings*, New Zealand Law Commission, Preliminary Paper 37 (1999) [3.7]-[3.9].
30. G Eames, "Towards a Better Direction – Better Communication with Jurors" (2003) 24 *Australian Bar Review* 35, 46; M Kirby, "Speaking to the Modern Jury – New Challenges for Judges and Advocates" (Worldwide Advocacy Conference, 29 June-2 July 1998).

Use of modern technologies in courts

10.33 There is already an increasing use of modern technologies in courts for various purposes. For example, some witnesses are appearing via video link-up, and computer monitors are being used to display evidence to juries. Hence, as a matter of practicality, most courts could very easily adopt the technology needed to allow trial judges to make audio-visual presentations of jury directions.

10.34 However, to encourage the use of audio-visual presentation of jury directions, courts will need to adopt training programs for judges on how to use them. Such a program might also include the development of specimen or standard visual aids on directions that are universally given (such as, the presumption of innocence, and the onus and standard of proof) and the elements of various offences. These standard visual aids may be modified to suit the particular set of circumstances of each case.

Superfluous due to availability of written directions?

10.35 It might, however, be argued that the use of visual aids would be superfluous because of the growing practice of providing jurors with a written document containing the legal directions from the summing-up.

ISSUE 10.4

Should trial judges be allowed to use visual aids to present jury directions and should such use be encouraged?

DELIBERATION AIDS

10.36 In addition to written directions, there are a number of deliberation aids that may assist jurors during their deliberations. The deliberation aids that are now being used in other jurisdictions include:

- step directions;
- issues tables; and
- decision trees.

Step directions (sequential questions)

10.37 Some parts of the summing-up, particularly the elements of the offence and any defence used by the accused, may be reduced to a series of questions with an algorithmic structure, that is, the order of questions is presented in such a way that each question determines what the next step will be. An example might be in the following form:

[**Note to jurors: This document does not contain all the relevant legal principles you need to make a decision on the case and consequently, you have to use it in conjunction with the directions given to you by the Judge during his or her summing up, as well as the written directions provided to you.**]

Step 1: Was the death of (name of the deceased) caused by the deliberate act of (name of accused)?
Has the prosecution proved beyond reasonable doubt that the death of (name of deceased) was caused by the deliberate act of (name of the accused)?

More specifically, was the act of (name of the accused) merely an unintentional pulling of the trigger (like a reflex action), or was it a composite act involving a number of steps deliberately taken by (name of the accused) which ended in either (a) the sudden and unexpected discharge, or (b) the deliberate firing of the gun?

If you answered no, you must acquit (name of the accused).

If you answered yes, move to the next step.

Step 2: Did the accused have the intent required for murder?
Has the prosecution proved beyond reasonable doubt that, at the time (name of the accused) did the act which caused the death of (name of deceased), any of the following were present:

- (name of the accused) intended to kill (name of deceased); or
- (name of the accused) intended to inflict grievous bodily harm (that is, really serious physical injury) upon (name of deceased); or
- the act of (name of the accused) was done with reckless indifference to human life (that is, (name of the accused) foresaw or realised that his act would probably cause the death of the (name of deceased) but he continued with that act regardless of the risk of death)?

If you answered no, you must acquit (name of the accused) .

If you answered yes, move to the next step.

[Succeeding steps to be added in relation to the defence or defences presented by the accused, and manslaughter where it might be available.]

10.38 Step directions are now used quite commonly in some overseas jurisdictions, such as Canada (where their model directions are in the

form of step directions[31]) and New Zealand (where step directions are known as "sequential questions"). An example of sequential questions from the New Zealand Bench Book, which are more elaborate than the ones given above, are reproduced as Appendix B to this Consultation Paper.[32]

Issues table

10.39 An issues table is similar to step directions because it also summarises the issues that the jurors need to resolve, but presents them in a tabular form. An example of an issues table from the New Zealand Bench Book is reproduced as Appendix C to this Consultation Paper.[33]

Decision tree (flow-chart)

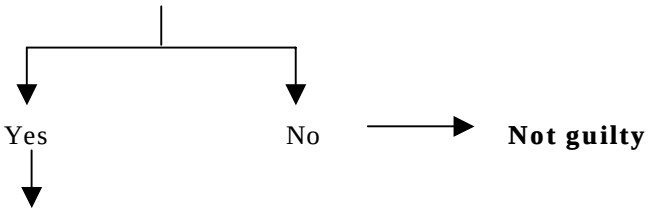
10.40 Another possible jury deliberation aid is the decision tree or flow-chart. Support for this technique is based on the theory that summarising the relationships between the key concepts discussed in the jury directions and illustrating those relationships through graphs or pictures (rather than purely in words) assists learning and recall. A study conducted in Australia showed that a flow-chart depicting the criteria for applying the law of self-defence aided mock jurors' comprehension of the directions.[34]

10.41 The following is an example of a decision tree for a charge of aggravated dangerous driving causing death under s 52A of the *Crimes Act 1900* (NSW). The example applies to a situation where the circumstance of aggravation alleged by the prosecution consists of the accused driving the vehicle to escape pursuit by a police officer.[35]

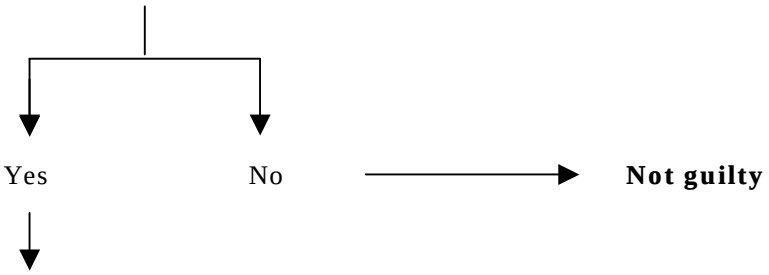
31. Canadian Judicial Council, *Model Jury Instructions in Criminal Matters* (2004) 3-50.
32. New Zealand, Institute of Judicial Studies, *Criminal Jury Trials Bench Book* (2006) Appendix 6.
33. New Zealand, Institute of Judicial Studies, *Criminal Jury Trials Bench Book* (2006) Appendix 7.
34. C Semmler and N Brewer, "Using a Flow-chart to Improve Comprehension of Jury Instructions" (2002) 9 *Psychiatry, Psychology and Law* 262.
35. *Crimes Act 1900* (NSW) s 52A(7)(c).

Aggravated Dangerous Driving Causing Death

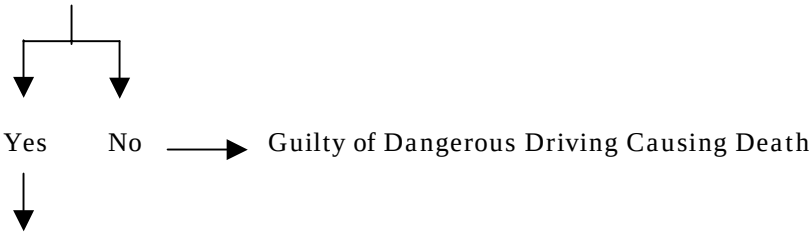
Has the Crown proved beyond reasonable doubt that the vehicle driven by (name of the accused) was involved in an impact occasioning the death of (name of the deceased)?



Has the Crown proved beyond reasonable doubt that (name of the accused), at the time of the impact, was driving the vehicle in a manner dangerous to another person?



Has the Crown proved beyond reasonable doubt that (name of the accused) was driving the vehicle concerned to escape pursuit by a police officer?



Guilty of Aggravated Dangerous Driving Causing Death

Conclusion

10.42 Step directions, issues tables and decision trees could be useful tools in assisting jurors during the deliberation process. Their usefulness lies in simplifying the issues jurors need to resolve, and in providing an easy-to-use roadmap that takes jurors through the crucial steps required to reach a decision. It must be emphasised that these tools are not stand-alone items, and juries should be told to use them together with the directions given by the judge in the summing-up (which contains in full the relevant legal principles and how these relate to the real issues in the case) and any written directions provided. It is also important for the judge to consult both prosecution

and defence counsel in crafting any deliberation aid to be given to the jury.

10.43 One way of facilitating the task of judges providing this form of assistance would be to include model step directions, issues tables and decision trees in the *Bench Book*. These models would provide judges with templates that could be modified to suit the particular circumstances of each case. The *Bench Book* could contain as many models as possible, particularly for offences that come before the courts most frequently.

ISSUE 10.5

(1) Should judges be encouraged to use model step directions, issues tables or decision trees? If so, how could judges be assisted in using such deliberation aids?
(2) Is it desirable to legislate to confirm the power of judges to use these deliberation aids when they consider it appropriate to do so?

QUESTIONS FROM JURORS DURING DELIBERATIONS

10.44 In many jurisdictions, including NSW, the jury is allowed to ask questions during deliberations. Such questions could be about the law or the evidence. There are studies which have shown that many juries do ask clarifying questions of the judge during deliberations, and that most questions relate to the legal principles that jurors need to apply.[36] Examples of questions posed to trial judges for clarification include: the meaning of "beyond reasonable doubt", consciousness of guilt, and recklessness as distinguished from intentional.[37]

10.45 The ability of juries to ask questions is an important mechanism for assisting jurors to understand the directions. It may also decrease deliberation time and increase jurors' sense of satisfaction with jury service.[38] Questions from jurors indicate difficulties in their

36. W Young, N Cameron, Y Tinsley, *Juries in Criminal Trials Part 2: A Summary of the Research Findings*, New Zealand Law Commission, Preliminary Paper 37 (1999) [4.20]; L Severance and E Loftus, "Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions" (1982) 17 *Law and Society Review* 153; A Reifman, S M Gusick and P C Ellsworth, "Real Jurors' Understanding of the Law in Real Cases" (1992) 16 *Law and Human Behavior* 539.
37. E Najdovski-Terziovski, J Clough and J Ogloff, "In Your Own Words: A Survey of Judicial Attitudes to Jury Communication" (2008) 18 *Journal of Judicial Administration* 65.
38. New Zealand, Law Commission, *Juries in Criminal Trials*, Report 69 (2001) [369]; M Dann, "'Learning Lessons' and 'Speaking Rights': Creating Educated and Democratic Juries" (1993) 68 *Indiana Law Journal* 1229.

deliberations, and the answers to these questions exert an influence in the decision-making process, an influence that some commentators believe may be just as important as the actual directions.[39]

10.46 Empirical evidence confirms the importance of allowing juries to ask questions. An American study on jurors who sat in trials found that jurors who requested and received help from the judge understood the law better than jurors who did not ask questions.[40]

Encouraging jurors to ask questions

10.47 Jurors should be informed of their ability to ask questions if they are having difficulties with the directions during their deliberations.

10.48 In NSW, the *Guide for Jurors* informs jurors of their ability to ask questions. In particular, the *Guide for Jurors* states that a "jury must get assistance from the judge if any juror does not understand something in the judge's instructions, such as a legal principle or a definition".[41] It informs jurors that they can ask questions by written request to the judge through a Sheriff's officer.

10.49 The information in the *Guide for Jurors* is a positive step in informing jurors that they can ask questions about the directions during the deliberations. However, it may not be enough. Jurors may not always read all the information in the *Guide for Jurors*. The New Zealand jury study, for example, found that a significant number of jurors had not read the New Zealand equivalent of the *Guide for Jurors*. [42] Given that the *Guide* was only made available in the jury assembly area and jurors were not provided with personal copies, even those jurors who read the *Guide* may not have been able to recall all the information it contained by the end of the trial.[43] Further, even if they were aware that they could ask questions, jurors may be hesitant to do so because they might be too intimidated by the judge or believe

39. D Watt, *Helping Jurors Understand* (Carswell, Toronto, 2007) 257-258.
40. A Reifman, S M Gusick and P C Ellsworth, "Real Jurors' Understanding of the Law in Real Cases" (1992) 16 *Law and Human Behavior* 539, 549.
41. NSW, Attorney General's Department, *A Guide for Jurors: Welcome to Jury Service* (February 2007) 9.
42. See W Young, N Cameron, Y Tinsley, *Juries in Criminal Trials Part 2: A Summary of the Research Findings*, New Zealand Law Commission, Preliminary Paper 37 (1999) [2.13]-[2.14].
43. W Young, N Cameron, Y Tinsley, *Juries in Criminal Trials Part 2: A Summary of the Research Findings*, New Zealand Law Commission, Preliminary Paper 37 (1999) [2.12].

that asking questions would be a burden on the judge,[44] or be embarrassed at the prospect of appearing foolish.

10.50 It would therefore seem important for the judge, at the end of the trial, to encourage jurors to ask questions if they have any difficulties with the directions. This would remind jurors that they could ask for assistance during their deliberations and allay possible fears that the judge may not be responsive or may even be hostile to their questions.

ISSUE 10.6

Should trial judges, as part of the summing-up, be required to inform the jurors that they may ask the judge during their deliberations any questions about the directions?

Questions prior to deliberations

ISSUE 10.7

(1) Should jurors be given the opportunity prior to their deliberations to ask questions about the directions given in both the summing-up and in the course of the trial?
(2) What process should be followed if jurors are given this opportunity?

Answering jurors' questions

10.51 The failure of judges to respond fully to questions from deliberating juries is a major stumbling block to better comprehension of jury directions. Studies from overseas show that, in response to questions from the jury about directions, it is very common for the judge to tell the jurors to rely on their best recollection of the directions or, where a written copy of the directions was given, to refer to the written copy, which may simply amount to a verbatim re-reading of the directions which the jury had requested to be clarified.[45] This raises the question of whether there is sufficient judicial

44. A Reifman, S M Gusick and P C Ellsworth, "Real Jurors' Understanding of the Law in Real Cases" (1992) 16 *Law and Human Behavior* 539, 551; W Young, N Cameron, Y Tinsley, *Juries in Criminal Trials Part 2: A Summary of the Research Findings*, New Zealand Law Commission, Preliminary Paper 37 (1999) [4.20], [7.62].

45. See I G Prager, G Deckelbaum and B Cutler, "Improving Juror Understanding for Intervening Causation Instructions" (1989) 3 *Forensic Reports* 187, 188; A Reifman, S M Gusick and P C Ellsworth, "Real Jurors' Understanding of the Law in Real Cases" (1992) 16 *Law and Human Behavior* 539, 541; L Severance and E Loftus, "Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions" (1982) 17 *Law and Society Review* 153, 172.

responsiveness to juries' problems with the directions during deliberations and of the extent to which the judge should discuss with counsel the appropriate answer to the jury's question.

ISSUE 10.8

(1) Should judges give greater attention to answering questions from the jury about directions?
(2) What more should be done in this regard?

Appendices

- Appendix A: Preliminary submissions
- Appendix B: Example sequential questions from New Zealand
- Appendix C: Example issues table from New Zealand

APPENDIX A: PRELIMINARY SUBMISSIONS

Commissioner of Police (NSW), 7 May 2007

Crown Solicitor's Office (NSW), 29 June 2007

Director of Public Prosecutions (NSW), 27 April 2007

Eric Hatfield, 14 May 2007

Hon Justice Robert Hulme, 26 March 2007

Kristy Martire and Richard Kemp, School of Psychology, University of New South Wales, June 2007

Legal Aid Commission of NSW, 2 May 2007

APPENDIX B: EXAMPLE SEQUENTIAL QUESTIONS FROM NEW ZEALAND

Note: On all issues, the burden of proof beyond reasonable doubt lies on the Crown.

Step 1 (Homicide): Did Paul's blow cause the death?

- Are you sure that Paul's blow with a tomahawk caused the deceased's death? If so, move to the next question.

Step 2 (Culpable Homicide): Was Paul's blow unlawful?

- Are you sure that Paul's fatal blow was the intentional and harmful application of force to the person of another, and that unless it amounted in law to "defence of another", it would constitute an assault and therefore be unlawful.
- The blow would be justified, and therefore not unlawful, if:
  a) it were delivered in the defence of Allan; and
  b) it involved no more force than, in the circumstances as Paul subjectively believed them to be, it was objectively reasonable to use.
- If the Crown has failed to exclude defence of another, the Crown has failed to establish culpable homicide. Enter NOT GUILTY verdicts for all accused on all counts and proceed no further.
- If the Crown has excluded defence of another (that is, it has proved beyond reasonable doubt that Paul was not acting in defence of another in the legal sense), Paul has committed a culpable homicide and is guilty of at least manslaughter. In those circumstances proceed to the next question.

Step 3: Did Paul have murderous intent?

- For present purposes, there was murderous intent if, at the moment he struck the deceased, Paul:
  a) meant to cause the deceased's death; or
  b) meant to cause the deceased bodily injury that he knew was likely to cause death, being reckless as to whether death ensued or not.
- If the Crown has not established that Paul had murderous intent in one of those senses, you will find Paul NOT GUILTY

OF MURDER but GUILTY OF MANSLAUGHTER and proceed to the sections dealing with Allan and Darren.

- If the Crown has established that Paul did have murderous intent in one of those senses, proceed to the next question.

Step 4: Might Paul have been acting under provocation?

- For present purposes, Paul was acting under provocation if:
  a) in the circumstances of the case it was sufficient to deprive a person having the power of self-control of an ordinary person but otherwise having the characteristics of Paul, of the power of self-control; and
  b) it did in fact deprive Paul of the power of self-control and thereby induced him to strike the fatal blow.
- If the Crown has excluded provocation (that is, proved beyond reasonable doubt that Paul was not acting under provocation) and proved that Paul had murderous intent, find Paul GUILTY OF MURDER and proceed to the sections dealing with Allan and Darren.

If the Crown has failed to exclude provocation (that is, it has not been shown beyond reasonable doubt that Paul was not acting under provocation), find Paul NOT GUILTY OF MURDER but GUILTY OF MANSLAUGHTER and proceed to the sections dealing with Allan and Darren.

Source: New Zealand, Institute of Judicial Studies, *Criminal Jury Trials Bench Book* (2006) Appendix 6.

APPENDIX C: EXAMPLE ISSUES TABLE FROM NEW ZEALAND

Count	Issues	Comments
Count 1 – Murder	1. Did the accused assault the deceased so as to inflict head injuries capable of resulting in the subdural haemorrhage from which the deceased died?	1. The first issue is a straightforward question of fact. The Crown case is largely circumstantial.
	2. Were the head injuries that were inflicted by the accused a substantial and operating cause of the deceased's death?	2. Assuming that issue 1 has been resolved in favour of the Crown, the fundamental issue then becomes whether the Crown has proved beyond reasonable doubt that any incident on the trampoline, or other possible accident or assault involving the deceased, was not of such significance as to prevent the accused's assault being a substantial and operating cause of death.
	3. At the time these injuries were inflicted, did the accused know that death was the likely consequence of the bodily injuries that he intended to inflict, and was he reckless as to whether death resulted?	3. The Crown case on this issue is a matter of inference arising principally out of the severity of the injuries that were inflicted on the deceased, and the time it would have taken to inflict them.
Count 2 – Manslaughter by an unlawful act, namely assault.	1. Did the accused assault the deceased so as to inflict head injuries capable of resulting in the subdural haemorrhage from which the deceased died?	1. The first issue is a straightforward question of fact. The Crown case is largely circumstantial.
	2. Were the head injuries inflicted by the accused a substantial and operating cause of the deceased's death?	2. Assuming that issue 1 has been resolved in favour of the Crown, the fundamental issue is whether the Crown has proved beyond reasonable doubt that any incident on the trampoline, or other possible accident or assault involving the deceased, was not of such significance as to prevent the accused's assault being a substantial and operating cause of death.

Source: New Zealand, Institute of Judicial Studies, *Criminal Jury Trials Bench Book* (2006) Appendix 7.

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Bibliography

ARNELLA, P, "The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage" (1977) 77 *Columbia Law Review* 827

AULD, R E, *Review of the Criminal Courts of England and Wales*, Report (2001)

AUSTRALIAN LAW REFORM COMMISSION and HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997)

AUSTRALIAN LAW REFORM COMMISSION, *Evidence*, Report 26 (1985)

BALDING, D J, and DONNELLY, P, "The Prosecutor's Fallacy and DNA Evidence" [1994] *Criminal Law Review* 711

BELL, V, "How to Preserve the Integrity of Jury Trials in a Mass Media Age" (Supreme and Federal Courts Judges' Conference, January 2005)

BONIFACE, D, "The Common Sense of Jurors vs the Wisdom of the Judicial Directions and Warnings in Sexual Assault Trials" (2005) 28 *University of New South Wales Law Journal* 261

BORNSTEIN, B H, "The Ecological Validity of Jury Simulations: Is the Jury Still Out?" (1999) 23 *Law and Human Behavior* 75

BREWER, N, HARVEY, S, and SEMMLER, C, "Improving Comprehension of Jury Instructions with Audio-Visual Presentation" (2004) 18 *Applied Cognitive Psychology* 765

BRONITT, S, and AMIRTHALINGAM, K, "Cultural Blindness: Criminal Law in Multicultural Australia" (1996) 21 *Alternative Law Journal* 58

BROWN, D, FARRIER, D, EGGER, S, MCNAMARA, L, and STEEL, A, *Criminal Laws: Materials and Commentary on Criminal Law and Processes in New South Wales* (4th edition, 2006)

CANADIAN JUDICIAL COUNCIL, *Model Jury Instructions in Criminal Matters* (2004)

CHARROW, R, and CHARROW, V, "Making Legal Language Understandable: A Psycholinguistic Study of Jury Directions" (1979) 79 *Columbia Law Review* 1306

CHESTERMAN, M, CHAN, J, and HAMPTON, S, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (Law and Justice Foundation of NSW, 2001)

COLE, S, and DIOSO-VILLA, R, "CSI and Its Effects: Media, Juries, and the Burden of Proof" (2007) 41 *New England Law Review* 435

CORNISH, W R, *The Jury* (Allen Lane, The Penguin Press, 1968)

COSTIGAN, R, "Identification from CCTV: The Risk of Injustice" [2007] *Criminal Law Review* 591

COURTIN, J, "Judging the Judges: How the Victorian Court of Appeal is Dealing with Appeals Against Conviction in Child Sexual Assault Matters" (2006) 18 *Current Issues in Criminal Justice* 266

CROUCHER, J S, "Assessing the Statistical Reliability of Witness Evidence" [2003] *Australian Bar Review* 173

CRUSE, D, and BROWNE, B, "Reasoning in a Jury Trial: The Influence of Instructions" (1986) 114 *The Journal of General Psychology* 129

DABARS, E, and HINTON, M, "Comment by an Accused on the Co-accused's Silence in a Joint Trial: R v Tran and To" (2007) 31 *Criminal Law Journal* 307

DANN, M, "'Learning Lessons' and 'Speaking Rights': Creating Educated and Democratic Juries" (1993) 68 *Indiana Law Journal* 1229

DAVIS, G, and LLOYD-BOSTOCK, S (ed), *Psychology, Law, and the Criminal Justice: International Developments in Research and Practice* (1992)

DEVLIN, P, *Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases* (1976)

DEVLIN, P, *The Judge* (Oxford University Press, 1979)

DEVLIN, P, *Trial by Jury* (Stevens and Sons, 1956)

DIAMOND, S S, "Beyond Fantasy and Nightmare: A Portrait of the Jury" (2006) 54 *Buffalo Law Review* 717

DONNELLY, H, "Delay and the Credibility of Complainants in Sexual Assault Proceedings" (2007) 19 *Judicial Officers' Bulletin* 17

EAMES, G, "Towards a Better Direction – Better Communication with Jurors" (2003) 24 *Australian Bar Review* 35

ELLARD, J, "A Note on Lying and its Detection" (1996) 2 *Judicial Review* 303

ELWORK, A, SALES, B, and ALFINI, J, *Making Jury Instructions Understandable* (1982)

ENGLAND AND WALES, Criminal Law Revision Committee, *Evidence (General),* Report 11 (Cmnd 4991,1972)

ENGLAND AND WALES, Judicial Studies Board, *Crown Court Bench Book: Specimen Directions* (June 2007)

ENGLAND AND WALES, Law Commission, *Fraud*, Report 276 (2002)

ENGLAND AND WALES, *The Royal Commission on Criminal Justice*, Cm 2263 (1993)

FARLEY, R J, "Instructions to Juries – Their Role in the Judicial Process" (1932) 42 *Yale Law Journal* 194

FLANGO, V E, "Would Jurors Do a Better Job If They Could Take Notes?" (1980) 63 *Judicature* 436

FLATMAN, G, and BAGARIC, M, "Juries Peers or Puppets – The Need to Curtail Jury Instructions" (1998) 22 *Criminal Law Journal* 207

FRANK, M G, "Assessing Deception: Implications for the Courtroom" (1996) 2 *Judicial Review* 315

FRYER-SMITH, S, "Case and Comment: Stack v Western Australia" (2006) 30 *Criminal Law Journal* 246

GANI, M, "Codifying the Criminal Law: Implications for Interpretation" (2005) *29 Criminal Law Journal* 264

GILES, R, "The Assessment of Reliability and Credibility" (1996) 2 *Judicial Review* 281

GILLIES, P, and DAHDAL, A, "Directions to Convict" (2007) 31(5) *Criminal Law Journal* 295

GLEESON, A M, "The Role of a Judge in a Criminal Trial" (Lawasia Conference, Hong Kong, 6 June 2007)

GLEESON, A M, "The State of the Judicature" (35th Australian Legal Convention, Sydney, 25 March 2007)

GOODMAN-DELAHUNTY, J, BREWER, N, CLOUGH, J, HORAN, J, OGLOFF, J R P, TAIT, D, and PRATLEY, J, *Practices, Policies and Procedures that Influence Juror Satisfaction in Australia*, Research and Public Policy Series No 87 (Australian Institute of Criminology, 2008)

GRIEW, E, "Summing Up the Law" [1989] *Criminal Law Review* 768

HAESLER, A, "DNA for Defence Lawyers" (NSW Public Defender's Office Conference, May 2005)

HASTIE, R, *Final Report to the National Institute for Law Enforcement and Criminal Justice* (1983, unpublished)

HASTIE, R, PENROD, S, and PENNINGTON, N, *Inside the Jury* (Harvard University Press, 1983)

HEFFER, C N, "The Language of Conviction and the Convictions of Certainty: Is "Sure" an Impossible Standard of Proof?" (2007) 5(1) *International Commentary on Evidence* (Article 5)

HEFFER, C, "Beyond 'Reasonable Doubt': The Criminal Standard of Proof Instruction as Communicative Act" (2006) 13(2) *International Journal of Speech, Language and the Law* 159

HEUER, L, and PENROD, S D, "Instructing Jurors: A Field Experiment with Written and Preliminary Instructions" (1989) 13 *Law and Human Behavior* 409

HEUER, L, and PENROD, S D, "Juror Notetaking and Question Asking During Trials" (1994) 18 *Law and Human Behavior* 121

HORAN, J, "Communicating with Jurors in the Twenty-First Century" (2007) 29 *Australian Bar Review* 75

HORAN, J, *The Civil Jury System* (PhD Thesis, University of Melbourne, 2004)

HUNT, D, "The Role of the Independent Prosecution Office in Ensuring Probity and Fairness in the Criminal Justice System from the Courts' Perspective" (NSW DPP, Future Directions Conference, 1997)

HUNTER, J, and BONIFACE, D, "Secret Jury Business: What Jurors Search For and What They Don't Get" (Conference Paper, British Society of Criminology, Huddersfield, England, July 2008)

JACKSON, J, "Juror Decision-making and the Trial Process" in G Davis and S Lloyd-Bostock (ed), *Psychology, Law, and the Criminal Justice: International Developments in Research and Practice* (1992)

JUDICIAL COMMISSION OF NEW SOUTH WALES, *Criminal Trial Courts Bench Book* (October 2008)

JUDICIAL COMMISSION OF NEW SOUTH WALES, *Equality Before the Law Bench Book* (2006)

JUDICIAL COMMISSION OF NEW SOUTH WALES, *Partial Defences to Murder in New South Wales 1990-2004*, Research Monograph 28 (2004)

KASSIN, S M, et al, *Police-induced Confessions: Risk Factors and Recommendations*, American Psychology-Law Society, Proposed White Paper (2008)

KIRBY, M, "Speaking to the Modern Jury – New Challenges for Judges and Advocates" (Worldwide Advocacy Conference, 29 June-2 July 1998)

KIRBY, M, "Why Has the High Court Become More Involved in Criminal Appeals?" (2002) 23 *Australian Bar Review* 4

KRAMER, G P, and KOENIG, D M, "Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Mighigan Juror Comprehension Project" (1989) 23 *University of Michigan Journal of Law Reform* 401

KRASITY, K A, "The Role of the Judge in Jury Trials: The Elimination of Judicial Evaluation of Fact in American State Courts from 1795 to 1913" (1985) 62 *University of Detroit Law Review* 595

LAW REFORM COMMISSION OF CANADA, *The Jury*, Report 16 (1982)

LEE, L F, HOROWITZ, I, and BOURGEOIS, M, "Juror Competence in Civil Trials: Effects of Preinstruction and Evidence Technicality" (1993) 78 *Journal of Applied Psychology* 14

LIEBERMAN, J, and SALES, B, "What Social Science Teaches Us About the Jury Instruction Process" (1997) 3 *Psychology, Public Policy, and Law* 589

LIEVORE, D, *Non-Reporting and Hidden Recording of Sexual Assault in Australia* (2002)

LLOYD-BOSTOCK, S, and THOMAS, C, "Decline of the 'Little Parliament': Juries and Jury Reform in England and Wales" (1999) 62 *Law and Contemporary Problems* 7

LONDON, K, et al, "Disclosure of Child Sexual Abuse: What Does the Research Tell Us About the Ways that Children Tell?" (2005) 11 *Psychology, Public Policy, and Law* 194

MADGE, N, "Summing Up – a Judge's Perspective" [2006] *Criminal Law Review* 817

McCLELLAN, P, "The Australian Justice System in 2020" (National Judicial College of Australia, 25 October 2008)

MILDREN, D, "Redressing the Imbalance against Aboriginals in the Criminal Justice System" (1997) 21 *Criminal Law Journal* 7

MITCHELL, G, "Asking the Right Questions about Judge and Jury Competence" (2005) 32 *Florida State University Law Review* 519

MONTGOMERY, J W, "The Criminal Standard of Proof" (1998) 148 *New Law Journal* 582

NAJDOVSKI-TERZIOVSKI, E, CLOUGH, J, and OGLOFF, J, "In Your Own Words: A Survey of Judicial Attitudes to Jury Communication" (2008) 18 *Journal of Judicial Administration* 65

NEW SOUTH WALES LAW REFORM COMMISSION, *Criminal Procedure: The Jury in a Criminal Trial: Empirical Studies*, Research Report 1 (1986)

NEW SOUTH WALES LAW REFORM COMMISSION, *Partial Defences to Murder: Diminished Responsibility*, Report 82 (1997)

NEW SOUTH WALES LAW REFORM COMMISSION, *Partial Defences to Murder: Provocation and Infanticide*, Report 83 (1997)

NEW SOUTH WALES LAW REFORM COMMISSION, *Right to Silence*, Report 95 (2000)

NEW SOUTH WALES LAW REFORM COMMISSION, *Sentencing: Aboriginal Offenders*, Report 96 (2000)

NEW SOUTH WALES LAW REFORM COMMISSION, *Uniform Evidence*, Report 112 (2005)

NEW SOUTH WALES LEGISLATIVE COUNCIL STANDING COMMITTEE ON LAW AND JUSTICE, *Report on Child Sexual Assault Prosecutions* (2002)

NEW SOUTH WALES, Attorney General's Department, *Discussion Paper on Reforms to the Criminal Justice System* (1989)

NEW SOUTH WALES, Attorney General's Department, *A Guide for Jurors: Welcome to Jury Service* (February 2007)

NEW SOUTH WALES, Criminal Justice Sexual Offence Taskforce, *Responding to Sexual Assault: The Way Forward* (2006)

NEW SOUTH WALES, Department of Women, *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault* (1996)

NEW SOUTH WALES, Interagency Adult Sexual Assault Committee, *A Fair Chance: Proposals for Sexual Assault Law Reform in NSW* (2004)

NEW ZEALAND, Institute of Judicial Studies, *Criminal Jury Trials Bench Book* (2006)

NEW ZEALAND, Law Commission, *Juries in Criminal Trials*, Report 69 (2001)

NICHOLSON, J, "Four Key Sexual Assault Directions", *Sexual Assault Handbook* (NSW Judicial Commission, 2008)

NIELAND, R G, "Assessing the Impact of Pattern Jury Instructions" (1978) 62 *Judicature* 185

ODGERS, S, *Uniform Evidence Law* (Thomson Law Book Co, 7th ed, 2006)

OGLOFF, J, CLOUGH, J, GOODMAN-DELAHUNTY, J, and YOUNG, W, *The Jury Project: Stage 1 – A Survey of Australian and New Zealand Judges* (Australian Institute of Judicial Administration, 2006)

PARLIAMENT OF VICTORIA, Law Reform Committee, *Jury Service in Victoria*, Final Report (1997)

PHILLIPS, A, *Lawyers' Language: How and Why Legal Language is Different* (Routledge, 2002)

PHILLIPS, N A, "Constitutional Reform: One Year On" (Judicial Studies Board, Annual Lecture, Inner Temple, 22 March 2007)

POTAS, I, "Instructing the Jury" in D Challinger (ed), *The Jury: Proceedings of Seminar on the Jury*, AIC Seminar, Proceedings No 11 (1986)

POTAS, I, and RICKWOOD, D, *Do Juries Understand?* (Australian Institute of Criminology, 1984)

PRAGER, I G, DECKELBAUM, G, and CUTLER, B, "Improving Juror Understanding for Intervening Causation Instructions" (1989) 3 *Forensic Reports* 187

"Principles of Summing-Up" (1999) 63 *Journal of Criminal Law* 422

QUEENSLAND LAW REFORM COMMISSION, *A Review of the Defence of Provocation*, Working Paper 63 (2008)

QUEENSLAND, CRIMINAL JUSTICE COMMISSION, *Aboriginal Witnesses in Queensland's Criminal Courts*, Report (1996)

RE, L, "Eyewitness Identification: Why So Many Mistakes?" (1984) 58 *Australian Law Journal* 509

RE, L, "Oral v Written Evidence: The Myth of the "Impressive Witness" (1983) 57 *Australian Law Journal* 679

RE, L, and SMITH, T H, *Manner of Giving Evidence*, Australian Law Reform Commission Evidence Reference Research Paper 8 (1982)

REED, A, "Provocation: A Matter for Jury Determination" (2001) 112 *The Criminal Lawyer* 1

REIFMAN, A, GUSICK, S M, and ELLSWORTH, P C, "Real Jurors' Understanding of the Law in Real Cases" (1992) 16 *Law and Human Behavior* 539

RICHARDSON, P J (ed), *Archbold Criminal Pleading, Evidence and Practice* (Sweet and Maxwell, 2002)

ROBERTSON, J M, "The Jury Writes Back: Aspects of Jury Management" (Biennial Judges' Conference, Gold Coast, Queensland, 22-26 June 2003)

ROYAL COMMISSION INTO THE NEW SOUTH WALES POLICE SERVICE, *Final Report* (1997)

SAKS, M J, "What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?" (1997) 6 *Southern California Interdisciplinary Law Journal* 1

SAND, L, and REISS, S, "A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit" (1985) 60 *New York University Law Review* 423

SAXTON, B, "How Well Do Jurors Understand Jury Instructions? A Field Test Using Real Juries and Real Trials in Wyoming" (1998) 33 *Land and Water Review* 59

SCHWARZER, W W, "Communicating with Juries: Problems and Remedies" (1981) 69 *California Law Review* 731

SCHWEITZER, N J, and SAKS, M J, "The CSI Effect: Popular Fiction About Forensic Science Affects the Public's Expectations About Real Forensic Science" (2007) 47 *Jurimetrics* 357

SEMMLER, C, and BREWER, N, "Using a Flow-chart to Improve Comprehension of Jury Instructions" (2002) 9 *Psychiatry, Psychology and Law* 262

SEVERANCE, L, and LOFTUS, E, "Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions" (1982) 17 *Law and Society Review* 153

SILVESTER, J, and RULE, A, *Leadbelly: Inside Australia's Underworld Wars* (Floradale Productions/Sly Ink,2004)

SMITH, V, "Impact of Pretrial Instruction on Jurors' Information Processing and Decision Making" (1991) 76 *Journal of Applied Psychology* 220

SPIGELMAN, J J, "The Internet and the Right to a Fair Trial" (6th World Wide Common Law Judiciary Conference, Washington DC, June 2005)

STEELE, W W, and THORNBURG, E R, "Jury Instructions: A Persistent Failure to Communicate" (1991) 74 *Judicature* 249

STEELE, W W, and THORNBURG, E R, "Jury Instructions: A Persistent Failure to Communicate" (1989) 67 *North Carolina Law Review* 77

STEPHEN, J F, *A History of the Criminal Law of England* (Macmillan and Co, 1883)

STONE, M, "Instant Lie Detection? Demeanour and Credibility in Criminal Trials" [1991] *Criminal Law Review* 821

STRAWN, D U, and BUCHANAN, R W, "Jury Confusion: a Threat to Justice" (1976) 59 *Judicature* 478

SULLIVAN, A M, *The Last Serjeant: The Memoirs of Serjeant A M Sullivan, QC* (1952)

SULLIVAN, E R, and AMAR, A R, "Jury Reform in America – A Return to the Old Country" (1995) 33 *American Criminal Law Review* 1141

SUPREME COURT OF QUEENSLAND, *Equal Treatment Benchbook* (2005)

TASMANIA LAW REFORM INSTITUTE, *Warnings in Sexual Offences Cases Relating to Delay in Complaint*, Final Report (2006)

TAYLOR, G, "Judicial Reflections on the Defence Case in the Summing Up" (2005) 26 *Australian Bar Review* 70

TINDALL-FORD, S, CHANDLER, P, and SWELLER, J, "When Two Sensory Modes are Better Than One" (1997) 3 *Journal of Experimental Psychology: Applied* 257

TINSLEY, Y, "Juror Decision-Making: A Look Inside the Jury Room" (2001) 4 *British Society of Criminology*

TORPEY, S, "The New Test of Self-defence" (2002) 9 *Criminal Law News* 41

TRIMBOLI, L, *Juror Understanding of Judicial Instructions in Criminal Trials*, Crime and Justice Bulletin No 119 (NSW Bureau of Crime Statistics and Research, 2008)

UNITED KINGDOM, Home Office, *Fraud Law Reform: Consultation on Proposals for Legislation* (2004)

VICTORIAN LAW REFORM COMMISSION, *Sexual Offences*, Interim Report (2003)

VICTORIAN LAW REFORM COMMISSION, *Sexual Offences: Law and Procedure*, Final Report (2004)

VINCENT, F H, "The High Court v the Trial Judge" in *28th Australian Legal Convention* (1993)

VODANOVICH, I, *The Criminal Jury in Western Australia* (PhD Thesis, University of Western Australia, 1989)

WATT, D, *Helping Jurors Understand* (Carswell, Toronto, 2007)

WEBSTER, A, "Recklessness: Awareness, Indifference or Belief" (2007) 31 *Criminal Law Journal* 272

WEINBERG, M, "Moral Blameworthiness: The 'Objective Test' Dilemma" (2003) 24 *Australian Bar Review* 173

WIGMORE, J H, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (Little, Brown and Company, 1940)

WILLEN, R S, "Rationalization of Anglo-Legal Culture: The Testimonial Oath" (1983) 34 *British Journal of Sociology* 109

WOLCHOVER, D, "Should Judges Sum Up on the Facts?" [1989] *Criminal Law Review* 781

WOOD, J, "Child Witnesses: The New South Wales Experience" (Australasian Institute of Judicial Administration: Child Witnesses – Best Practice for Courts, Parramatta, 30 July 2004)

WOOD, J, "Complaint and Medical Examination Evidence in Sexual Assault Trials" (2002) 15 *Judicial Officers' Bulletin* 63

WOOD, J, "Criminal Law Update: Court of Criminal Appeal" (1999) 4 *The Judicial Review* 217

WOOD, J, "Jury Directions" (2007) 16 *Journal of Judicial Administration* 151

WOOD, J, "The Trial Under Siege: Towards Making Criminal Trials Simpler" (District and County Court Judges' Conference, Fremantle, WA, 27 June - 1 July 2007)

YEATS, M, "Using PowerPoint in Charging Juries" (Australian Institute of Judicial Administration Conference, Melbourne, 8-10 October 2000)

YEO, S, "Sex, Ethnicity, Power of Self-control and Provocation Revisited" (1996) 18 *Sydney Law Review* 304

YEO, S, "Voluntariness, Free Will and Duress" (1996) 70 *Australian Law Journal* 304

YOUNG, W, CAMERON, N, and TINSLEY, Y, *Juries in Criminal Trials: Part Two*: *A Summary of Research Findings*, New Zealand Law Commission Preliminary Paper 37 (1999) vol 2

ZANDER, M, "The Criminal Standard of Proof – How Sure is Sure?" (2000) 150 *New Law Journal* 1517

ZANDER, M, and HENDERSON, P, *Crown Court Study* (1993)