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New South Wales
Law Reform Commission

Report
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Jury directions

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Law Reform Commission
Attorney General & Justice

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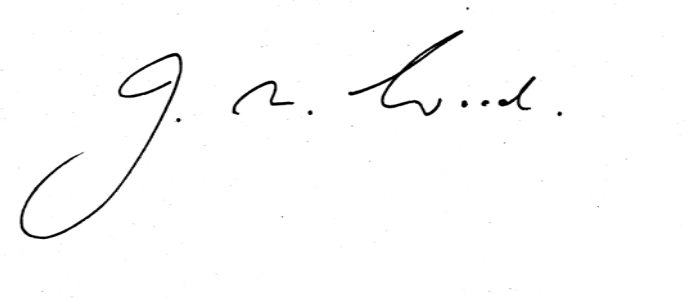
Dear Attorney

Jury Directions

We make this report pursuant to the reference to this Commission received 16 February 2007.



The Hon James Wood AO QC
Chairperson
November 2012

Table of contents

Tables and figures

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The Commission is grateful for the assistance of our expert advisors.
The recommendations of this report are the Commission's, and do not necessarily reflect the views of the Expert Advisors.

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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.

[*Reference received 16 February 2007*]

Executive Summary

0.1 Trial by judge and jury is a central feature of our criminal justice system. Although jury trials make up a relatively small proportion of the total number of criminal trials in NSW, they generally involve the determination of serious criminal charges that carry a potential sentence of imprisonment.

0.2 This report is about the directions that judges give to juries in the course of a criminal trial, and particularly at the summing up. These directions are designed to help jurors understand as much of the law and the issues that arise in the case as they need to make proper use of the evidence and to reach a verdict.

0.3 There is growing awareness that jury directions are not always working well in guiding jurors in their task. There are concerns that jury directions are becoming too complex and uncertain to meet their intended purposes, and that they rely on outmoded communication methods that may confuse rather than assist the jury

0.4 The system of jury directions may also exacerbate inefficiencies in the trial process. There are concerns that lengthy and complex directions unnecessarily prolong already lengthy trials.

0.5 Juries also face many challenges that arise from the impact on the criminal trial process of recent technological and scientific innovations, including:

- the increasing volume of evidence (for example, audio and video evidence from surveillance devices);
- the increasing complexity of the evidence (for example, expert evidence in relation to DNA profiling and statistical analysis);
- jurors' changing expectations as to the type of evidence that is presented and the ways in which it is presented.

A framework for reform

0.6 We have considered a range of options for devising a general approach to reform. Options that we have considered and rejected are:

- replacing the existing framework, which rests partly on the common law and partly on statute, with a statutory scheme or code; and
- retaining the existing framework and supplementing it through the introduction of model jury directions (that have been developed and approved for use otherwise than through legislation) which judges are expected to use.

0.7 Our preferred approach is to retain the existing framework, and strengthen it through:

- refinement and encouragement of greater use of the suggested directions contained in the Judicial Commission of NSW's Criminal Trial Courts Bench Book ("Bench Book"); and

- the adoption of trial management strategies to facilitate the jury's task, by
  - encouraging greater pre-trial management;
  - enhancing the participation of jurors in the trial process in particular by informing them, so far as is possible, of the issues and the law that they will be expected to apply to the case;
  - increasing the use of aids aimed at enhancing jurors' understanding of the evidence and their ability to apply the directions that they are given; and
  - removing any existing impediments to the provision of various forms of assistance;
- providing greater direction in relation to the process by which juries reason their decision through the use of special verdicts or question trails.

0.8 This approach accepts the desirability of the Bench Book including suggested directions that can be tailored to the individual case and that can evolve in response to appellate decisions.

0.9 The main concerns to be addressed are to ensure that:

- jury directions and the trial process provide appropriate help (in the context of a fair trial) to jurors to follow the evidence, to understand the issues, and to apply the directions to the evidence and issues; and
- jury directions and the trial process do not add unnecessarily to the complexity and length of the trial.

Formulating jury directions

0.10 It is important to ensure that jury directions are comprehensible to a cross-section of the community, while accurately stating the relevant law. We consider that the Judicial Commission of NSW Criminal Trial Courts Bench Book Committee should continue to undertake a comprehensive review of the suggested directions contained in the Bench Book and, as part of this review, undertake empirical testing in relation to any proposed directions. (Recommendations 3.1 and 3.5)

0.11 We recommend that the Bench Book should provide guidance to judges in delivering directions by setting out:

- an outline of the general principles that would assist in identifying when a jury direction is required and the content of that direction; (Recommendation 3.3)
- a basic guide on the composition and delivery of directions, and on the construction and delivery of a summing up, including the use of plain English principles; (Recommendation 3.4(a)-(c))
- guidance on giving practical advice to jurors as to how they might go about their deliberations and on responding to jury questions; (Recommendation 3.4(d)-(e)
- a checklist against which a proposed summing up could be compared for completeness.

0.12 The Bench Book should also include suggested directions in relation to offences arising under laws of the Commonwealth. (Recommendation 3.2)

Directing the jury on the criminal standard of proof

0.13 The standard of proof that must be reached before a person can be convicted of a criminal offence is proof "beyond reasonable doubt". It is crucial that this direction is readily comprehensible and consistently applied.

0.14 However, empirical studies and anecdotal evidence from case law and other judicial commentary suggest that jurors may not so readily understand the meaning of "beyond reasonable doubt". This position is exacerbated by the general prohibition, in Australia, against any explanation of the expression.

0.15 Other jurisdictions permit an explanation of "beyond reasonable doubt" and, in some cases, allow an alternative formulation of the direction. We conclude that there is a strong case for providing additional guidance to juries on the standard of proof and see merit in considering alternative formulations that may enhance jurors' understanding of such a fundamental aspect of the criminal process.

0.16 However, it is not feasible to recommend the introduction of a legislative formulation that would apply in NSW alone. We therefore recommend that the NSW Government should ask the Standing Council on Law and Justice to consider developing uniform legislation on directing juries about the criminal standard of proof in criminal trials in all Australian jurisdictions. (Recommendation 4.1)

0.17 We also consider that a range of formulations should be considered, and subjected to empirical testing to ensure that the chosen formulation is more easily understood, consistently applied and does not result in a change in the standard required. (Recommendation 4.2)

Assisting jurors in areas requiring special knowledge

0.18 We propose ways of assisting juries where the assessment of particular types of evidence requires some form of special knowledge. These forms of assistance include the use of expert evidence and, the use of specific directions and the introduction of procedural reforms.

DNA evidence

0.19 DNA evidence presents problems in trials because of the impact it can have on juries, in particular because of its complexity and also because the expectations of many jurors who have been influenced by popular media depictions.

0.20 We propose three approaches to assist juries in dealing with DNA evidence:

- The development of a suggested direction in relation to DNA evidence, that can be adapted to each individual case and which notes the limitations of DNA evidence, identifies issues that may arise in the trial concerning, for example,

crime scene or laboratory contamination or innocent explanation, explains the implications of the statistical match probability, and emphasises that DNA evidence must be considered in the context of all of the other evidence in the case. (Recommendation 5.1)

- The introduction of a practice note in relation to the pre-trial disclosure of DNA evidence in order to identify with precision the DNA issues that need to be left to the jury and to facilitate the presentation of the evidence, and ultimately the framing of a jury direction. (Recommendation 5.2)

- The preparation of a standard audio-visual presentation that can be tendered in evidence to provide jurors with a basic understanding of DNA evidence so as to place them in a position to assess that evidence and any issue relating to it. (Recommendation 5.3)

Expert evidence and procedural reform

0.21 The current practice of leading the evidence for the prosecution and the defence in separate blocks may not be the best way to present conflicting expert evidence to the jury. In order to allow the jury more effectively to assess expert evidence and any issues that arise, we propose consideration be given to:

- permitting, in appropriate cases, expert evidence called by the prosecution and defence to be given in a block;

- permitting the trial judge to give directions as to the order in which such witnesses should be cross-examined; and

- ensuring that expert witnesses are subject to the Expert Witness Code of Conduct. (Recommendation 5.4)

Child sexual abuse – expert evidence and directions

0.22 Jurors may bring misconceptions to a trial in relation to the capacity of children to give reliable evidence, and in relation to the way in which children might behave in response to sexual abuse. These misconceptions should be addressed by the NSW Government asking the Standing Council on Law and Justice to consider:

- commissioning further research on the issue;

- amending the uniform *Evidence Acts* to facilitate the reception of expert evidence concerning the misconceptions; and

- clarifying the extent to which a judicial direction could be given in relation to the misconceptions. (Recommendation 5.5(1))

0.23 We also recommend that the Bench Book include a suggested direction concerning those aspects of childhood development and response to sexual abuse that may be relevant for an understanding and assessment of the reliability of the evidence of child sexual abuse victims. (Recommendation 5.5(2))

Identification from still and video footage

0.24 Recognition or identification of suspects through the use of CCTV and similar technology, is likely to be relied on increasingly in the future. We, therefore, recommend that the Bench Book include a commentary on the considerations that arise in this context and a suggested direction to acquaint the jury with the possible difficulties that can arise in relation to the identification or recognition of people from still and video images. (Recommendation 5.6)

Indigenous witnesses

0.25 We have considered the directions currently given in a number of Australian jurisdictions in relation to various cultural and linguistic factors that can be relevant to an assessment of the evidence of Indigenous witnesses. In our view, the question of the content of directions that may be required in the NSW context should be the subject of further consideration by the Judicial Commission, involving consultation with NSW Indigenous and other communities and experts in the fields of culture and linguistics of relevance to those individual communities. (Paragraphs 5.123-5.133)

0.26 We have also considered an alternative approach of making express provision to allow expert evidence to be led in relation to linguistic or cultural differences either generally or in relation to a particular witness's evidence. However, we consider that it would be appropriate for this to be the subject of a more specific consultation process and inquiry than we have been able to undertake. (Paragraphs 5.134-5.137)

Assistance to the jury

0.27 We have considered a number of measures that could assist jurors in engaging more effectively in the trial process and in understanding and applying the directions they are given. Consistent with our general approach, our recommendations aim to encourage, rather than compel, the adoption of best practice for effective communication.

Juror orientation

0.28 We recognise the importance of good orientation practices for jurors, as a means of enhancing their understanding of the role that they are expected to perform. We support the continuing refinement of the information that is provided to jurors during the orientation process, and consider that the jury handbook, or similar written advice prepared by the Judicial Commission should be routinely provided to jurors, and be available for reference during the trial. (Recommendation 6.1)

Majority verdicts

0.29 In order to avoid the risk of the jury being confused by any references during the course of a trial to the potential availability of a majority verdict, we recommend that the Bench Book should include, in the preliminary directions for trials involving

offences against NSW law, a statement to the effect that the jury will be asked to return a unanimous verdict; and a majority verdict may be permitted in certain circumstances that will be explained if the occasion arises. (Recommendation 6.2)

Access to a transcript of the proceedings

0.30 Having access to the trial transcript can, in appropriate cases, help jurors accurately recall the evidence, counsels' addresses, and the judge's directions. We recommend that s 55C of the Jury Act 1977 (NSW) - which currently provides that a copy of all or part of the transcript of evidence at a trial may be supplied to the jury upon the jury's request, if the judge considers it is appropriate and practicable to do so – should be amended to make it clear that copies can also be provided of the transcript of the addresses and summing up, and to delete any pre-condition that is dependent upon the request of the jury. (Recommendation 6.3)

0.31 In order to facilitate access to the transcript consideration should be given, at least in long and complex trials, to providing jurors with the means of accessing transcripts electronically, and in a searchable form. (Recommendation 6.4)

Access to pre-trial audio and video recordings and transcripts

0.32 The Bench Book should provide:

- guidance concerning the considerations that apply in relation to the pre-recorded evidence of witnesses, and to the other audio and video recordings and relevant transcripts that may properly be admitted as exhibits; and
- suggested directions as to the ways in which the jury should approach each type of recording. (Recommendation 6.5)

Questions from the jury

0.33 The jury's ability to ask the trial judge questions is an important way to help jurors understand the directions and the issues at trial.

0.34 In order to overcome the reluctance of some jurors to ask questions, the Bench Book should include:

- more positive statements in suggested directions to encourage jurors to ask questions to clarify the evidence, the law, or the issues in the trial; and
- guidance to courts as to the way in which questions can be encouraged and managed. (Recommendation 6.6(a) and (b))

0.35 The Jury Guide issued by the Office of the Sheriff, should also be amended to make it clear that jurors can ask questions during the trial in relation to the evidence, and not only after they have retired to consider the verdict. (Recommendation 6.6(b))

Judge's preliminary address to the jury

0.36 We recommend that s 161 of the Criminal Procedure Act 1986 (NSW) should be amended to permit the judge to deliver a preliminary address to the jury before the closing addresses of counsel. (Recommendation 6.7) We envisage that this would not constitute a full address but might involve a summary of the elements of the offence(s) charged, of any defences and of any relevant legal issues. It would be given only in appropriate cases, after consultation with counsel, for example, where the judge has considered it desirable to provide, in advance of the addresses of counsel, written directions to the jury.

Provision of written summaries of evidence and addresses

0.37 The Jury Act 1977 (NSW) currently permits the delivery of written directions of law but does not address the issue of whether the jury can be provided with a written summary of the evidence or addresses of counsel. We consider that the ability of the judge, in appropriate cases, to provide such components of the summing up to the jury in writing, should be clarified. (Recommendation 6.9)

Integrated summing up and question trails

0.38 A "question trail" is a visual representation of an integrated summing up which restructures the summing up into a series of steps that logically follow on from each other. Each step presents a question of fact, tailored to the legal concepts involved. Instead of an explicit explanation of the law, the legal issues are incorporated into the questions of fact that arise in the trial. They are usually presented as a diagram or flow chart to present the sequential list of questions.

0.39 Courts in Australia and overseas have increasingly supported their use. Research suggests that jurors find it easier to understand concrete, factual scenarios, which break down the complexity of the issues they must consider into smaller, more manageable segments, rather than more abstract discussions of legal concepts.

0.40 We support the use of integrated directions and written question trails, provided they are used where appropriate, after consultation with counsel and with an explanation to the jury as to their use. We recommend that the Criminal Procedure Act 1986 (NSW) be amended to authorise their use. (Recommendation 6.10)

The summing up – use of visual aids

0.41 Empirical evidence suggests that the use of visual aids in the presentation of information in the courtroom can improve jurors' comprehension levels.

0.42 We consider that the use of such aids, for example presentation software, can potentially supplement the oral summing up both in relation to the directions and the summary of the issues and evidence. We recommend the amendment of the Jury Act 1977 (NSW) to confirm the permissible use of such aids in the summing up where they would be of assistance and the inclusion of good practice guidance in the Bench Book. (Recommendation 6.11)

Setting the scene for the jury – early issue identification

0.43 We have considered ways in which the issues in a criminal trial can be identified for the jury from the outset, through the use of pre-trial case management, opening addresses and preliminary directions from the judge.

Pre-trial disclosure and trial management

0.44 We support the use of pre-trial disclosure and trial management as a means of establishing the real issues in the trial from the outset. Such approaches can result in shorter and more streamlined trials, and reduce the burden on juries. They can also help in establishing a clear framework for counsel's opening addresses and provide a basis from which the judge can give meaningful introductory directions. This will better enable the jury to follow the evidence and place it and the directions in their proper context.

0.45 We recommend that the Trial Efficiency Working Group be reconvened to consider possible reforms to existing trial management procedures, particularly the ways in which they might be used on a more consistent and frequent basis. The Trial Efficiency Working Group should look at the legislation from the jury perspective, and consider whether further improvement could be made to facilitate jury decision-making, without affecting the fairness of the trial. (Recommendation 7.1)

A roadmap for the jury

0.46 The opening addresses of counsel, and the preliminary remarks of the trial judge which precede those addresses, each have a role to perform in informing the jury of the nature of the charge(s) and of the issues likely to arise.

0.47 We see merit in the jury being provided with written guidance, from the outset, in relation to the way that the proceedings are expected to unfold. This could include the provision of a roadmap or chronology or summary of some or all of the facts, a copy of the indictment, a statement of the elements of the offence(s) charged, a summary of the issues, and preliminary directions of law in relation to those elements and issues.

0.48 Accordingly we recommend that the Trial Efficiency Working group look at possible amendments to the Criminal Procedure Act 1986 (NSW) with a view to conferring a discretionary power in the court to require the prosecution to prepare (with defence agreement) the relevant documentation and to present outlines of issues and summaries of the elements of the offence and any relevant defences, together with any necessary preliminary directions. The provision of any of these documents should remain a matter for the discretion of the judge, following consultation with counsel, depending on the complexity and circumstances of the individual case. (Recommendation 7.2)

Recommendations

	Chapter 3: Formulating jury directions	page
3.1	The Judicial Commission of NSW Criminal Trial Courts Bench Book Committee should continue to undertake a comprehensive review of the suggested directions contained in the *Criminal Trial Courts Bench Book*. This review should ensure that the directions are comprehensible to a cross-section of the community, while accurately stating the relevant law.	44
3.2	The *Criminal Trial Courts Bench Book* should include suggested directions in relation to offences arising under laws of the Commonwealth.	45
3.3	The *Criminal Trial Courts Bench Book* should include an outline of the general principles that would assist judges to identify when a jury direction is required and the content of that direction. The outline should state that: (a) jury directions should aim to inform jurors about as much of the law as they need to know to decide the issues of fact and reach a verdict; (b) the judge should direct the jury whenever necessary to protect the fairness of the trial and to promote the public interest in seeing that justice is done; (c) jury directions must be legally accurate and fairly state the case for the accused and prosecution; (d) jury directions should be tailored to the particular circumstances of the case; (e) the judge's role is to hold the balance between the contending parties and not to enter the fray, for example, by advancing an argument in support of the prosecution case that was not put by the prosecution; and (f) jury directions should be as clear, simple, brief and comprehensible as possible without compromising their legal accuracy.	46
3.4	The *Criminal Trial Courts Bench Book* should set out a basic guide and checklist for jury directions, including: (a) general guidance on how directions should be composed and delivered; (b) general guidance on how a summing up should be constructed and delivered; (c) general guidance on the use of plain English principles, in particular on forms of legalese and sentence construction that can affect the comprehensibility of directions; (d) a template for use by the judge in giving practical advice to jurors as to how they might go about their deliberations; (e) advice on how to respond to jury questions about directions; and (f) a checklist against which a proposed summing up could be compared for completeness.	48
3.5	The Judicial Commission of NSW Criminal Trial Courts Bench Book Committee should undertake empirical testing and consultation with experts in plain English communication, in order to assess the comprehensibility of any proposed directions.	51

5.5 (1) The NSW Government should ask the Standing Council on Law and Justice to consider the issue of the evidence of child sexual assault victims and their response to sexual abuse in the light of this report and the report of the NSW and Australian Law Reform Commissions on Family Violence, with a view to: 104

(a) commissioning further research on the issue of juror and public misconceptions concerning the reliability of the evidence of children and their response to sexual abuse; and

(b) amending the uniform *Evidence Acts* to facilitate the reception of expert evidence concerning the reliability of the evidence of children and their response to sexual abuse, and/or clarifying the extent to which a judicial direction could be given in this respect.

(2) The *Criminal Trial Courts Bench Book* should include a suggested direction concerning those aspects of childhood development and response to sexual abuse that may be relevant for an assessment of the reliability of the evidence of child sexual abuse victims.

5.6 The *Criminal Trial Courts Bench Book* should: 107

(a) set out the considerations that arise when an identification of an accused is sought to be made from images captured in relation to a crime scene or connected events;

(b) confirm that the issue for the jury is whether they are satisfied that the accused is the person shown in the images and not, where a witness gives evidence of an identification made from those images, whether that identification was correctly made; and

(c) include a suggested direction that would:

(i) draw attention to the considerations that the jury needs to have in mind when asked to determine whether a person shown in the image is the accused; and

(ii) deal both with the cases where evidence from a witness is called in support of the images, and the cases where the exercise is confined to a jury comparison alone.

Chapter 6: Assistance to the jury page

6.1 As a matter of course on empanelment, jurors should be provided with written information to assist their orientation either in the form of the Juror Handbook or an Advice to Jurors on Empanelment prepared by the Judicial Commission of NSW and this information should remain with them throughout the trial. 117

6.2 The *Criminal Trial Courts Bench Book* should include, in the preliminary directions to the jury in trials involving offences against NSW law, a statement to the effect that: 119

(a) the jury will be asked to return a unanimous verdict; and

(b) a majority verdict may be permitted in certain circumstances that will be explained if the occasion arises.

6.3 Section 55C of the *Jury Act 1977* (NSW) should be amended to empower the trial judge to provide the jury with a copy of the transcript of proceedings, including the transcript of the evidence, counsel's opening and closing addresses, and the summing up, either on the request of the jury or on the judge's own motion, where it is considered that this would be of material assistance to the jury and would not interfere with the fairness of the trial. 122

6.4 Jurors should be provided with the means of accessing transcripts electronically and in a searchable form. 123

6.5 The *Criminal Trial Courts Bench Book* should provide: 127

(a) guidance concerning the different considerations that apply in relation to the pre-recorded evidence of witnesses, and to the other audio and video recordings and relevant transcripts that may properly be admitted as exhibits; and

(b) suggested directions as to the ways in which the jury should approach each type of recording.

6.6 (1) The suggested opening remarks, and the suggested directions for the summing up, in the *Criminal Trial Courts Bench Book* should include a more positive statement to encourage jurors to ask questions where they consider they need clarification about the evidence, the law, or the issues in the trial. 131

(2) The *Criminal Trial Courts Bench Book* should include a basic guide as to the way in which questions can be encouraged and managed.

required by an order made under s 141(1) of the *Criminal Procedure Act 1986* (NSW).

(b) to give to the jury, at any time including at the commencement of the trial (either before or after the opening addresses):

  (i) a copy of the outline of issues, if one has been required; or

  (ii) a summary of the elements of the offence(s) charged and any relevant defences,

  together with preliminary directions of law in relation to the elements of the offence(s) and defence(s) so identified;

(c) to require the prosecution and the defence to identify, in the course of a pre-trial conference, any warnings or limitations on use that they consider the judge should give the jury in relation to the evidence that is likely to be admitted;

(d) to require the prosecution and the defence to provide to the court before the closing addresses, a summary of the directions of law that each consider should be given to the jury in relation to the elements of the offence(s) charged and of any defence(s) raised.

1. Introduction

Background

1.1 This report 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] We provide this Report in response to terms of reference that requested the Law Reform Commission:

> 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);

1. See, eg, A M Gleeson, "The State of the Judicature" (35th Australian Legal Convention, Sydney, 25 March 2007); N A Phillips, "Constitutional reform: one year on" (Judicial Studies Board Annual Lecture, London, 22 March 2007); N A Phillips, "Trusting the Jury" (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).

- 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.

1.2 For ease of reference, and in accordance with the terms of reference, we have employed in the general text of this Report the expression "directions", in place of the more general expression "instructions" that is commonly used in the literature and in the case law when describing the necessary content of a summing up.

1.3 Accordingly, "directions" should be taken to include the statements of law from the judge that the jury is required to follow, the identification of the issues in the case, the warnings and comments and the summary of the evidence and of the competing cases that the judge also provides, as well as matters that are more of a housekeeping or procedural nature.

1.4 Following the receipt of our terms of reference, we published Consultation Paper 4[2] (CP 4), in December 2008, and received 10 submissions from criminal justice system stakeholders and academics.[3] A number of expert advisors, including judges and academics,[4] assisted with our deliberations. We are grateful for their time and expertise, which have been very valuable to the production of this Report.

1.5 Since the receipt of our terms of reference, the Victorian and Queensland Law Reform Commissions have undertaken similar projects.[5] These inquiries were prompted, in part, by the Standing Committee of Attorneys General's 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".[6] In this report we draw on the valuable work of the Victorian and Queensland Law Reform Commissions as contained in their reports that were both released in 2009.

1.6 We also note the recommendations contained in an August 2012 report to the Victorian Jury Directions Advisory Group prepared by Justice Weinberg and staff from the Judicial College of Victoria and the Department of Justice ("the Weinberg Report"),[7] in relation to four areas of law that give rise to jury directions, that were selected for analysis by reason of their perceived complexity and potential unintelligibility. The four areas are:

- complicity;
- inferences and circumstantial evidence;

2. NSW Law Reform Commission, *Jury Directions,* Consultation Paper 4 (2008).
3. See Appendix B.
4. See page viii.
5. Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009); Queensland Law Reform Commission, *A Review of Jury Directions*, Report 66 (2009).
6. Standing Committee of Attorneys General, *Annual Report 2006-2007.*
7. M Weinberg, *Simplification of Jury Directions Project*, Report to the Jury Directions Advisory Group (2012).

- evidence of other misconduct – tendency and coincidence; and
- jury warnings in relation to unreliable evidence.

1.7 The scope of our review has narrowed significantly since the release of CP 4. CP 4 considered in detail the substance of, and the potential difficulties associated with, a range of jury directions. The Judicial Commission of NSW Criminal Trial Courts Bench Book Committee ("Bench Book Committee") has considered all of the issues raised in CP 4 and has, where considered appropriate, made changes to some of the suggested directions in the Bench Book. This Report does not attempt to redraft those directions that were examined in CP 4.

Trial by jury

1.8 Trial by judge and jury is a central feature of our criminal justice system and an important legacy of our English common law heritage.[8] It is a system that has undergone substantial evolution over the centuries, although its central justification has remained unchanged.

1.9 In relation to the constitutional guarantee of trial by jury for trials on indictment for any offence against Commonwealth law in s 80 of the *Constitution* (Cth),[9] Justice Deane has observed:

> The rationale and the essential function of that guarantee are the protection of the citizen against those who customarily exercise the authority of government, ...
>
> The institution of trial by jury also serves the function of protecting both the administration of justice and the accused from the rash judgment and prejudices of the community itself. The nature of the jury as a body of ordinary citizens called from the community to try the particular case offers some assurance that the community as a whole will be more likely to accept a jury's verdict than it would be to accept the judgment of a judge or magistrate who might be, or be portrayed as being, over-responsive to authority or remote from the affairs and concerns of ordinary people. The random selection of a jury panel, the empanelment of a jury to try the particular case, the public anonymity of individual jurors, the ordinary confidentiality of the jury's deliberative processes, the jury's isolation (at least at the time of decision) from external influences and the insistence upon its function of determining the particular charge according to the evidence combine, for so long as they can be preserved or observed, to offer some assurance that the accused will not be judged by reference to sensational or self-righteous pre-trial publicity or the passions of the mob.[10]

1.10 Five advantages have been suggested to arise from trial by jury, namely that:[11]

8. See M Chesterman, "Criminal trial juries in Australia: from penal colonies to a federal democracy" (1999) 62 *Law and Contemporary Problems* 69, 75; M Kirby, "Delivering justice in a democracy III – the jury of the future" (1998) 17 *Australian Bar Review* 113.
9. The High Court has interpreted the protection in *Constitution* (Cth) s 80 very narrowly: see *Kingswell v The Queen* (1985) 159 CLR 264, 298-302 (Deane J); *Li Chia Hsing v Rankin* (1978) 141 CLR 182; *Cheatle v The Queen* (1993) 177 CLR 541.
10. *Kingswell v The Queen* (1985) 159 CLR 264, 300, 301-302 (Deane J).
11. See *AK v Western Australia* [2008] HCA 8, 232 CLR 438 [93]-[97] (Heydon J), summarising P Devlin, *Trial by Jury* (3rd ed, 1966) 164. See also *R v Belghar* [2012] NSWCCA 86 [24].

- Juries are superior to judges in assessing defence points.
- Juries are superior to judges in assessing credibility.
- Trial by jury enables justice to go beyond the furthest point to which the law can be stretched without injuring the fabric of the law.
- Trial by jury helps to ensure the independence and quality of the judges.
- Trial by jury gives protection against laws that the ordinary man may regard as harsh and oppressive and where appropriate allows the return of a just although "perverse" verdict.[12]

1.11 Despite the pivotal role it has long played in the administration of justice, trial by jury has its critics. These critics raise concerns about its efficiency and fairness as a method of deciding a person's criminal liability, as well as the rationality of expecting twelve people, drawn at random from the community, who are not knowledgeable in the criminal law or in criminal practice and procedure, to negotiate their way around the complexities of the trial.[13] While such concerns may not generally be considered enough to overshadow the enduring worth of the jury system, they have given rise from time to time to various reforms. The most recent such reforms in NSW have included the introduction of majority verdicts for all but Commonwealth offences by the *Jury Amendment (Verdicts) Act 2006* (NSW)[14] and uncommenced amendments that would have the effect of widening the pool of potential jurors.[15] More radical suggestions have ranged from abolition of trial by jury generally to the empanelment of assessors to sit with the judge, to the use of special juries in relation to complex corporate crime trials[16] or, as was recently suggested in New Zealand, to a hybrid form of a trial involving two jurors sitting with a judge to decide the case, at least for sexual offence proceedings.[17]

1.12 Jury trials represent a very small proportion of the means of disposing of criminal proceedings in NSW. The vast majority (approximately 97%) of adult criminal matters are dealt with in the Local Court. In 2011, 113,308 people were charged and finalised in the Local Court (with approximately 14.5% of these proceeding to a defended hearing), compared with 3,492 people in the District and Supreme Courts

12. A right enshrined in *Bushell's Case* (1670) Vaugh 135; 124 ER 1006, that also recognised the independence of the jury in performing its role in a criminal trial.
13. See, eg, P McClellan, "The Future Role of the Judge – Umpire, Manager, Mediator or Service Provider" in M Legg (ed), *The Future of Dispute Resolution* (LexisNexis Butterworths, 2012); NSW Law Reform Commission, *Criminal Procedure: The Jury in a Criminal Trial*, Discussion Paper 12 (1985) [2.6]-[2.16].
14. *Jury Act 1977* (NSW) s 55F.
15. *Jury Act 1977* (NSW) pt 2 as amended by *Jury Amendment Act 2010* (NSW); but see the amendments to the *Jury Amendment Act 2010* (NSW) proposed by the *Courts and Other Legislation Further Amendment Bill 2012* (NSW) sch 1.14.
16. P McClellan, "The Future Role of the Judge – Umpire, Manager, Mediator or Service Provider" in M Legg (ed), *The Future of Dispute Resolution* (LexisNexis Butterworths, 2012); V French, "Juries – a central pillar or an obstacle to a fair and timely criminal justice system?" (2007) *Reform* (90) 40.
17. New Zealand, Law Commission, *Alternative Pre-Trial and Trial Processes: Possible Reforms,* Issues Paper 30 (2012) 22-23.

(with approximately 17% of these proceeding to a defended hearing).[18] Of the 599 people who proceeded to a defended hearing in the District and Supreme Courts, 500 (83%) of them were subject to a jury trial.[19]

1.13 While more serious offences are generally dealt with on indictment in the Supreme and District Courts and are tried by a jury,[20] there are two exceptions to this general rule. First, for proceedings in the Supreme and District Courts, in relation to State offences, the Court can make an order in certain circumstances for proceedings to be heard by a judge alone.[21] Secondly, certain indictable State offences can be heard summarily in the Local Court, before a magistrate.[22]

1.14 Trial by judge alone is also permitted in most other Australian jurisdictions, in the case of trials on indictment of offences arising under State laws,[23] although not in the case of trial on indictment of offences arising under Commonwealth laws.[24]

1.15 In some cases where the prosecution does not agree with the defence's application, the community interest in trial by jury may override the accused's preference for a judge alone trial.[25] The decision of the court whether or not to order a judge alone trial will depend on a determination of where, in all of the circumstances of the case, the interests of justice lie.[26]

1.16 Many of the challenges that juries now face arise from the impact on the criminal trial process of technological and scientific innovations over the last two decades. The jury feels the effects of these technological advances in various ways. For example, increased reliance on technology in police investigation has affected the types of evidence presented. In the past, juries generally made decisions on the basis of evidence presented to them in oral form by witnesses sitting in a witness box. Jurors are asked more and more frequently to take in large volumes of audio and video evidence obtained by a range of intercept and recording devices, as well as by CCTV and security cameras. The rise of DNA profiling and other forensic techniques has also significantly enhanced the capacity of police to investigate crime. The growing reliance on DNA evidence in criminal trials in particular requires jurors to digest, understand and assess complex expert evidence relating to DNA profiling and statistical analysis. Jurors are likely to require help from judges through directions or otherwise to sort through technical material[27] and to evaluate

18. NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Court Statistics 2011* (2012) 26, 87. Excluded from these figures are the 8,633 people dealt with in the Children's Court, approximately 23% of whom proceeded to a defended hearing: 66.
19. NSW Bureau of Crime Statistics and Research, *NSW Higher Criminal Courts January 1993-December 2007, January 2009-December 2011: Number of judge alone and jury trials for persons in finalised appearances that proceeded to trial by year, method of finalisation and jurisdiction* (Reference: Hc12/10726 dg).
20. *Criminal Procedure Act 1986* (NSW) s 5, 46, 131.
21. *Criminal Procedure Act 1986* (NSW) s 132, 132A.
22. *Criminal Procedure Act 1986* (NSW) s 258-260, sch 1.
23. *Criminal Code* (Qld) s 615; *Juries Act 1927* (SA) s 7; *Criminal Procedure Act* (2004) (WA) s 118; *Supreme Court Act 1933* (ACT) s 68B.
24. By reason of *Constitution* (Cth) s 80: *Brown v The Queen* (1986) 160 CLR 171.
25. *Criminal Procedure Act 1986* (NSW) s 132(4) and (5).
26. *R v Belghar* [2012] NSWCCA 86.
27. J Goodman-Delahunty and L Hewson, *Improving Jury Understanding and Use of Expert DNA Evidence,* Technical and Background Paper 37 (Australian Institute of Criminology, 2010) 5-6.

conflicting expert evidence in order to reach a conclusion on the real issues that it is their responsibility to decide.

1.17 The technological advances of the last few decades have affected more than just the types of evidence relied on at trial. The prominence of the internet and multi-media in our daily lives, and the sensationalised representation of forensic science in popular television shows such as the CSI series,[28] has a potentially significant influence on juror behaviour and expectations. Access to seemingly limitless sources of information (and misinformation) on the internet poses a greater danger now than previously that jurors will be wrongly influenced by material relating to their case. The rise of online social networking sites also presents increased opportunities for inappropriate communications between jurors and others who may have some interest in the trial.[29] It is integral to a fair trial to have in place a system of jury directions that educates jurors about the fundamental assumptions of a trial process, the jurors' role within it and the pre-requisites of a fair trial. Such directions should underscore the inappropriateness of dealing with people and gaining access to information external to the trial, or of contact with any victims or witnesses, or with anyone else who may wish to express a view about the case.[30]

1.18 It is noted that the Standing Council on Law and Justice has formed a working group to examine and report on a national response to the problems that the use of social media can cause for a fair trial. The Standing Council has requested recommendations to be made on:

- model guidelines and warnings regarding prejudicial material for social media organisations;
- protocols between social media organisations, law enforcement agencies and courts for the removal of prejudicial material from content posted on social media; including opportunities to improve existing protocols;
- procedures for law enforcement agencies and courts to use social media to give warnings to or serve notices on social media users regarding prejudicial material;
- model jury directions that may be used when material that might be prejudicial has been in the public domain;
- legislative provisions relating to the conduct of juries, jury directions and offences, including prohibitions against jurors seeking information from extrinsic sources; and

28. Commentators have coined the phrase, "the CSI effect", to describe the effects on jurors of the media's depiction of forensic science: see para [5.16]-[5.18]; and J Goodman-Delahunty and D Tait, "DNA and the changing face of justice" (2006) 38 *Australian Journal of Forensic Sciences* 97.
29. D P Goldstein, "The appearance of impropriety and jurors on social networking sites: rebooting the way courts deal with juror misconduct" (2011) 24 *Georgetown Journal of Legal Ethics* 589, 590-591; T J Fallon, "Mistrial in 140 characters of less? How the internet and social networking are undermining the American jury system and what can be done about it" (2009) 38 *Hofstra Law Review* 935, 936.
30. See J Spigelman, "The Internet and the Right to a Fair Trial" (6th World Wide Common Law Judiciary Conference, Washington DC, June 2005) 3-4, 9-10; V Bell, "How to preserve the integrity of jury trials in a mass media age" (2006) 7 *Judicial Review* 311, 313.

- possible further empirical research about the effect on jurors of information from sources extrinsic to a trial.[31]

1.19 Apart from these more obvious risks to the integrity of the jury system, there is growing awareness of the ways in which technological developments are shaping the expectations of jurors for interacting, communicating and for processing information. In part these are generational changes. It has been suggested that generation X is more likely to be impatient with receiving information passively in oral form over long period, and more demanding of control.[32] Generation Y and later are much more likely to be taught at school to gather information in a self-directed way often using the Internet.[33] It is much more common for information to be presented in multiple forms – in writing, orally, and by way of diagrams and visual aids. The rise of the use of presentation software (for example, PowerPoint and Keynote) has meant that oral presentations are now routinely accompanied by written notes or visual aids. The Internet has, without doubt, changed the way people access information and expect information to be presented. If jurors were ever patient with long oral presentations of information without the assistance of visual and other aids, it is clear this is no longer the case.[34]

1.20 The impact of technology on the courtroom is felt at the same time as jurors must grapple with the ever-increasing complexities of the criminal law itself, including a rise in the prosecution of complex and sometimes previously unknown crimes, such as corporate, finance or tax related fraud, money laundering and terrorism. Indeed, there is evidence that criminal trials generally in NSW are becoming longer and giving a clear impression of increased complexity, placing greater demands on juries than ever before.[35] These pressures arise against a background of heightened consciousness of the expense and emotional trauma to all participants in a jury trial, and of the need for initiatives to make the process more efficient,[36] and to limit the incidence of miscarriage of justice resulting in the need for re-trials.

1.21 One aspect of the jury trial that is now attracting increasingly widespread calls for reform is the area of the directions that judges are required to give to juries in the course of the trial, and particularly at the stage of the summing up. These directions are designed to help jurors understand as much of the law and the issues that arise in the case as is needed in order to make proper use of the evidence and to reach a verdict. An effective system of readily comprehensible jury directions is crucial to ensuring that jurors are equipped to carry out their responsibilities in a way that upholds the fairness of the trial process.

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31. Australia, Standing Council on Law and Justice, *Communiqué* (5 October 2012) 3-4.
32. M Kirby, "Delivering justice in a democracy III – the jury of the future" (1998) 17 *Australian Bar Review* 113, 125.
33. I Judge, "Jury Trials" (Judicial Studies Board Lecture, Belfast, 16 November 2010) 3.
34. N Feigenson and C Spiesel, "The Juror and Courtroom of the Future" in J Epstein and C Henderson (ed), *The Future of Evidence: How Science and Technology will change the Practice of Law* (2011) 113, 129; N Feigenson, "Visual Evidence" (2010) 17 *Psychonomic Bulletin and Review* 149.
35. See para [1.51]-[1.56].
36. See, eg, NSW, Attorney General's Department, Criminal Law Review Division, *Report of the Trial Efficiency Working Group* (2009). Similar pressures are felt overseas: see, eg, R E Auld, *Review of the Criminal Courts of England and Wales*, Report (2001); and the Explanatory Note to *Criminal Procedure (Reform and Modernisation) Bill 2010* (NZ).

1.22 There is a long-standing awareness, both in Australia and overseas, that jury directions are not always working well in guiding jurors around the complexities of the criminal trial.[37] It is arguably more important than ever to have a system of jury directions that can help jurors meet the challenges of the increasingly complex criminal trial that is now encountered. Judges themselves acknowledge increasing concern about the shortcomings of the present system in helping today's jurors.[38]

1.23 This Report focuses on this aspect of trial by jury, although we also consider possible procedural reforms that could assist juries in carrying out their critical function of determining whether an accused person has been proved guilty of the crime charged. Together the objective is to ensure that the accused receives a fair trial according to the law, in which the jury is appropriately engaged.

The evolution and purpose of jury directions

1.24 The jury system first emerged in rudimentary form in 13th century England replacing the earlier forms of trial by ordeal or by battle.[39] Jurors were initially drawn from the neighbourhood in which the alleged crime occurred, specifically because of the local knowledge they brought to their task, including their knowledge of the character of the people involved. These jurors acted as judges and witnesses, who actively gathered information before the trial.

1.25 The self-informing nature of the jury gradually changed as the criminal process came to rely more on the oral evidence of witnesses including that called by the prosecution, and later, in the case of felonies, by the defence.[40] But even with this development, jurors continued to play an active role at trial, by joining with the judge

37. See para [1.83]-[1.86]; See also D Simon, "More problems with criminal trials: the limited effectiveness of legal mechanisms" (2012) 75 *Law and Contemporary Problems* 167, 174; P C Ellsworth and A Reifman, "Juror comprehension and public policy: perceived problems and proposed solutions" (2000) 6 *Psychology, Public Policy, and Law* 788, 788, 809; A Elwork, B D Sales, and J J Alfini "Juridic decisions: in ignorance of the law or in light of it?" (1977) 1 *Law and Human Behavior* 163, 164; J Lieberman and B Sales, "What social science teaches us about the jury instruction process" (1997) 3 *Psychology, Public Policy, and Law* 589, 589, 637; P W English and B D Sales, "A ceiling or consistency effect for the comprehension of jury instructions" (1997) 3 *Psychology, Public Policy, and Law* 381, 383; 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, 540.

38. See, eg, A M Gleeson, "The state of the judicature" (2007) 14 *Australian Journal of Administrative Law* 118, 121; G Eames, "Tackling the complexity of criminal trial directions: what role for appellate courts?" (2007) 29 *Australian Bar Review* 161; V Bell, "How to preserve the integrity of jury trials in a mass media age" (2006) 7 *Judicial Review* 311; J Wood, "Jury directions" (2007) 16 *Journal of Judicial Administration* 151; P McClellan, "Looking inside the jury room" (2011) 10 *Judicial Review* 315.

39. For more detailed accounts of the evolution of the jury trial, see: P Devlin, *Trial by Jury* (3rd ed, 1966) ch 1; J F Stephen, *A History of the Criminal Law of England* (1883) vol 1, ch 8; G Williams, *The Proof of Guilt: A Study of the English Criminal Trial* (3rd ed, 1963); P Lowe, "Challenges for the jury system and a fair trial in the twenty-first century" [2011] *Journal of Commonwealth Criminal Law* 175; W Schwarzer, "Communicating with juries: problems and remedies" (1981) 69 *California Law Review* 731; S Anand, "The origins, early history and evolution of the English criminal trial jury" (2005) 43 *Alberta Law Review* 407; M Hall, "Judicial comment and the jury's role in the criminal trial" (2007) 11 *Canadian Criminal Law Review* 247; J Langbein, "The criminal trial before the lawyers" (1978) 45 *University of Chicago Law Review* 263. See also *Kingswell v The Queen* (1985) 159 CLR 264, 299-304 (Deane J).

40. G Williams, *The Proof of Guilt: A Study of the English Criminal Trial* (3rd ed, 1963) 4-10.

to question witnesses directly. The judge enjoyed a supervisory role, leading what was a largely unstructured discussion with jurors, witnesses, the accused and the alleged victim. Judges had an unrestricted power to comment to the jury on the evidence and the merits of the case as they worked together to elicit evidence.[41]

1.26 By the late 18th century, the adversarial trial had emerged. Presentation of the cases for the prosecution and the defence became the responsibility of counsel through their examination and cross-examination of witnesses. A system of evidentiary laws developed to accommodate and regulate this process, and the power of the judge and the jury to gather evidence themselves was severely restricted.[42] There developed the notion that the jury was independent of the judge and that its verdict and its deliberations leading to the verdict were inscrutable.[43] In light of the jury's new role as sole decision-maker, jury directions were devised to redress, as well as prevent, jury error in carrying out that role.[44]

1.27 Jury directions therefore developed at a stage in the evolution of the jury trial when jurors began to take on a much more passive role in the course of a criminal trial, while at the same time assuming sole responsibility for deciding the defendant's guilt.[45] Jury directions were introduced to help the jury fulfil this responsibility in proceedings which were now largely within the control of lawyers and subject to a complex system of evidentiary laws. As is the nature of the common law, judges developed the law of jury directions on a case-by-case basis, in response to particular areas in which it was intuitively feared that jurors might have difficulties or fall into error in performing their function if left uninstructed.[46]

1.28 The system of jury directions continues to operate according to a basic premise that jurors will have difficulty in fulfilling their responsibilities without appropriate guidance from the judge. Jury directions aim to help jurors carry out their role of deciding issues of fact in the light of the applicable principles of law. They are

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41. M Hall, "Judicial comment and the jury's role in the criminal trial" (2007) 11 *Canadian Criminal Law Review* 247, 257-258; J Langbein, "The criminal trial before the lawyers" (1978) 45 *University of Chicago Law Review* 263, 285; S Anand, "The origins, early history and evolution of the English criminal trial jury" (2005) 43 *Alberta Law Review* 407, 428-429.

42. P Devlin, *Trial by Jury* (3rd ed, 1966) 11-12; J F Stephen, *A History of the Criminal Law of England* (1883) vol 1, 260-261; M Hall, "Judicial comment and the jury's role in the criminal trial" (2007) 11 *Canadian Criminal Law Review* 247, 258.

43. P Devlin, *Trial by Jury* (3rd ed, 1966) 46-48; J Langbein, "The criminal trial before the lawyers" (1978) 45 *University of Chicago Law Review* 263, 285; S Anand, "The origins, early history and evolution of the English criminal trial jury" (2005) 43 *Alberta Law Review* 407, 430; W Schwarzer, "Communicating with juries: problems and remedies" (1981) 69 *California Law Review* 731, 732-734. See *Jury Act 1977* (NSW) s 68A(1) and 68B(1) for current restrictions on the disclosure of the details of a jury's deliberations. For a discussion of the circumstances in which a court can go behind the secrecy of jury deliberations see *R v Skaf* [2004] NSWCCA 37; 60 NSWLR 86.

44. S Anand, "The origins, early history and evolution of the English criminal trial jury" (2005) 43 *Alberta Law Review* 407, 428; M Hall, "Judicial comment and the jury's role in the criminal trial" (2007) 11 *Canadian Criminal Law Review* 247, 258-259.

45. In the past, jurors were subject to various pressures to bring in a verdict and were, until *Bushell's Case* (1670) Vaugh 135; 124 ER 1006, amenable to attaint for bringing in a perverse verdict. In some cases, juries refused to follow judicial instructions and apply laws that they considered to be unjust: P Devlin, *Trial by Jury* (3rd ed, 1966) 68-70; W Schwarzer, "Communicating with juries: problems and remedies" (1981) 69 *California Law Review* 731, 732-734.

46. W Schwarzer, "Communicating with juries: problems and remedies" (1981) 69 *California Law Review* 731, 733; J Langbein, "The criminal trial before the lawyers" (1978) 45 *University of Chicago Law Review* 263, 301.

intended to focus jurors' minds on the real issues of the case.[47] They seek to prevent jurors from basing a decision on facts that have not been admitted into evidence, or from considering evidence for a purpose other than the purpose for which it was admitted. In doing so, jury directions serve the larger purpose of ensuring a fair trial or, to put it differently, of avoiding any "perceptible risk of miscarriage of justice".[48]

The current law and practice on jury directions

1.29 The main body of law governing jury directions remains the common law, as developed in the significant volume of appellate decisions that have been delivered in recent years. Legislation modifies some aspects but only to a limited extent. In general terms the directions that need to be given comprise directions of law which the jury is expected to apply, directions concerning the use of evidence, comments or observations by the judge about the facts of the case with which the jury is free to agree or disagree, and administrative or housekeeping aspects concerned with the running of the trial.

1.30 The common law does not prescribe exhaustively the situations where a judge must give a direction. Instead, the guiding principle is always whether a direction is needed in the particular circumstances of the case to allow the jury to perform its function as the judge of fact and so ensure a fair trial.[49] Failure to give a direction of this kind can lead to a miscarriage of justice and to the quashing of a conviction.[50]

1.31 While not exhaustive, the common law has established a number of directions that must generally be given in every trial as well as a number of situations that, if they arise at trial, will generally require a direction.

Directions relating to the decision-making process

1.32 Directions that fall within this category include those that instruct the jury on:

- the jury's exclusive role and right to determine the guilt of the accused, and in that respect, to decide the facts on the evidence, as distinct from the judge's role to decide any issue of law that might be relevant to the trial;
- the jury's duty to apply the law as explained by the judge;
- the jury's duty to act impartially without any form of prejudice, and keep an open mind until all the evidence has been presented;

47. *Tully v The Queen* [2006] HCA 56; 230 CLR 234 [49], [76]-[78]; *Doggett v The Queen* [2001] HCA 46; 208 CLR 343 [1].
48. *RPS v The Queen* [2000] HCA 3; 199 CLR 620 [41]; *Bromley v The Queen* (1986) 161 CLR 315, 324-325; *Carr v The Queen* (1988) 165 CLR 314, 330; *Longman v The Queen* (1989) 168 CLR 79, 86. See J Spigelman, "The truth can cost too much: the principle of a fair trial" (2004) 78 *Australian Law Journal* 29, 41.
49. *Alford v Magee* (1952) 85 CLR 437, 466; *RPS v The Queen* [2000] HCA 3; 199 CLR 620 [41]-[42].
50. *Azzopardi v The Queen* [2001] HCA 25; 205 CLR 50 [50]; *Mahmood v Western Australia* [2008] HCA 1; 232 CLR 397 [17].

- the jury's duty to reach a decision based only on the evidence presented in court and to resist "sleuthing" or any form of independent legal research;
- the jury's duty in dealing with any alternative verdicts that may be available; and
- the jury's duty to persevere in reaching a unanimous decision ("the Black direction"); or where appropriate, its right to return a majority verdict.[51]

Directions relating to the principles of criminal liability

1.33 Directions that fall within this category include those that instruct the jury on:

- the presumption of innocence that applies to the accused;
- the elements of the offence that must be proven;
- the burden and standard of proof to be applied;
- issues that, where relevant to the individual case, might negate the criminal liability of the accused, either wholly or partially, such as mental illness, self-defence, duress, intoxication, provocation, substantial impairment by reason of abnormality of mind;
- issues arising where the offence alleged involved more than one person requiring, for example, an assessment of responsibility according to the principles of complicity, or of whether the accused was acting in company; and
- defences or alternative offences which appear to be available on the evidence even though the accused has not raised them ("the *Pemble* direction"[52]).

Directions relating to the evidence

1.34 Directions that fall within this category include those that:

- warn the jury against relying on potentially unreliable evidence, for example, evidence of a person concerned in the offence (accomplice) or of a prison informer, eyewitness identification evidence or, where delay in making a complaint, has led to the accused suffering a significant forensic disadvantage;
- instruct the jury on the interpretation of evidence, including in relation to the inferences that may be drawn from tendency or coincidence evidence, circumstantial evidence, or DNA evidence;
- warn the jury about how it may or may not use evidence, including its use for limited purposes; and
- warn against drawing adverse inferences about the way in which certain evidence is presented, for example, where special measures have been taken allowing child witnesses or sexual offence complainants to give evidence via CCTV or in the form of a pre-recorded interview.

51. *Jury Act 1977* (NSW) s 55F.
52. *Pemble v The Queen* (1971) 124 CLR 107.

Directions relating to the accused's silence, conduct or character

1.35 Directions that fall within this category include those that instruct the jury about:

- the exercise by the accused either before or during the trial of the right to silence;
- the use that can be made of evidence of post-offence conduct where the accused told a lie to investigating police or had taken flight;
- alibi evidence including the use that can be made of a false alibi;
- the use that can be made of evidence of the accused's good or bad character; and
- the use that the jury can make of relationship or background evidence.

Legislation that modifies the common law on jury directions

1.36 While the law on jury directions derives primarily from the common law, a number of statutory provisions have been introduced over time to modify the common law. These affect specific areas of the law and are found in a number of statutes.[53]

Comments to the jury

1.37 Besides giving directions where these are required by law, the judge may also make comments to the jury. Comments fall into two categories. First, the judge may, and sometimes should, draw to the jury's attention, or remind it of, some matter within common experience of which jurors might ordinarily be expected to know, but which they may have forgotten or overlooked.[54] Secondly, the judge may express a view about the facts of the case. For instance, the judge may state an opinion about the importance that the jury may choose to attach to a particular piece of evidence. A judge is entitled to make comments about this kind of evidence even though it may be favourable to one side so long as they are fair and balanced.[55]

1.38 The jury is not obliged to agree with the views expressed in a comment (in contrast to its obligation to comply with a judge's direction of law). A judge must tell the jury that it does not have to agree with any such comment but may accept or reject it as it thinks fit. A judge will normally tell the jury that it is to disregard the comment if it is contrary to its own assessment of the relevant facts. Failure to do so may constitute an appealable error of law. An appeal on this ground will succeed if, on a fair reading of the whole of the summing up, the comment created a material prejudice

53. For example, *Criminal Procedure Act 1986* (NSW) s 161, s 294, s 294AA; *Evidence Act 1995* (NSW) s 20, s 116, s 164(3), s 165, s 165A, s 165B; *Jury Act 1977* (NSW) s 55B and *Mental Health (Forensic Provisions) Act 1990* (NSW) s 37.

54. *Crampton v The Queen* [2000] HCA 60; 206 CLR 161 [125]-[126]; *R v Stewart* [2001] NSWCCA 260; 52 NSWLR 301 [82]-[83].

55. *Mule v The Queen* [2005] HCA 49; 79 ALJR 1573 [6]; *RPS v The Queen* [2000] HCA 3; 199 CLR 620 [41]; *R v Inamata* [2003] NSWCCA 19; 137 A Crim R 510 [28]-[30].

to the accused or the jury would have failed to appreciate that it did not have to follow the judge's comment.[56]

1.39 There is a risk that judicial comment, if overdone, will be seen to intrude onto the jury's domain and diminish the appearance of an impartial system of justice. The High Court has noted that a judge is not bound to comment on the facts of a case and has observed that it will often be safer for a judge not to comment beyond reminding the jury of the arguments of prosecution and defence counsel.[57]

Directions on the administrative aspects of the trial

1.40 Most judges in NSW address jurors at the commencement of the trial about the administrative aspects of the trial process.[58] These may include issues relating to the expected length of the trial, an overview of the general nature of the trial process, the need to appoint a foreperson, and the opportunity to take notes and ask questions. In NSW, these comments are in addition to the formal induction process that jurors undergo before they are empanelled.

The summing up

1.41 In the summing up, the judge is expected to instruct the jury about as much of the law as it needs to know in order to make a decision in relation to the real issues in the case. It is necessary that the summing up provide a sufficient and balanced summary of the evidence as it relates to the cases presented by the prosecution and the defence.[59]

1.42 Traditionally the summing up has been delivered orally, although it is now commonly supplemented by written directions. In shorter trials the summing up will often be given *ex tempore* at the close of addresses, with little opportunity for the kind of careful drafting that would be employed in a judgment given in a judge alone trial. In every case, however, prudence dictates that the judge discuss with counsel any aspects of the summing up that may give rise to subsequent argument, and possibly to the need for a redirection that may only serve to cloud the comprehensibility of the summing up.

The Criminal Trial Courts Bench Book

1.43 The Judicial Commission of NSW publishes the Criminal Trial Courts Bench Book ("Bench Book"), which aims to provide guidance to judges in applying the current law when delivering a summing up. It contains suggested directions for use in

56. *Green v The Queen* (1971) 126 CLR 28, 34; *R v Zorad* (1990) 19 NSWLR 91, 106-107; *Nation v R* (1994) 78 A Crim R 125 (VCA).

57. *RPS v The Queen* [2000] HCA 3; 199 CLR 620 [42].

58. 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) 12-14.

59. *RPS v The Queen* [2000] HCA 3; 199 CLR 620 [41]; *R v Meher* [2004] NSWCCA 355 [82]; and *Abdel-Hady v R* [2011] NSWCCA 196 [136]. It is the judge's responsibility to decide what are the real issues in the case: *Hargraves v The Queen* [2011] HCA 44; 85 ALJR 1254 [42].

particular circumstances. These suggested directions are intended as guidelines only and are not prescriptive.[60]

1.44 The Bench Book does not purport to be an authoritative statement of the law. Failure to follow a suggested direction in accordance with the Bench Book does not in itself amount to an appealable error of law.[61] Apart from its role in assisting the delivery of a summing up to the jury, the Bench Book operates as a valuable resource for judges in judge alone trials, since they are expected, in the judgment, to identify the principles of law that were applied to the facts as found, including a reference to any relevant warnings.[62]

Concerns about inefficiencies in jury trials

1.45 One of the concerns about the system of jury directions is that it may exacerbate inefficiencies in the trial process. Fears have been expressed that lengthy and complex directions unnecessarily prolong already lengthy trials.[63] There is also concern that erroneous directions give rise to a number of successful appeals, resulting in the need for retrials and the recommencement of the trial process.[64]

The number of criminal trials

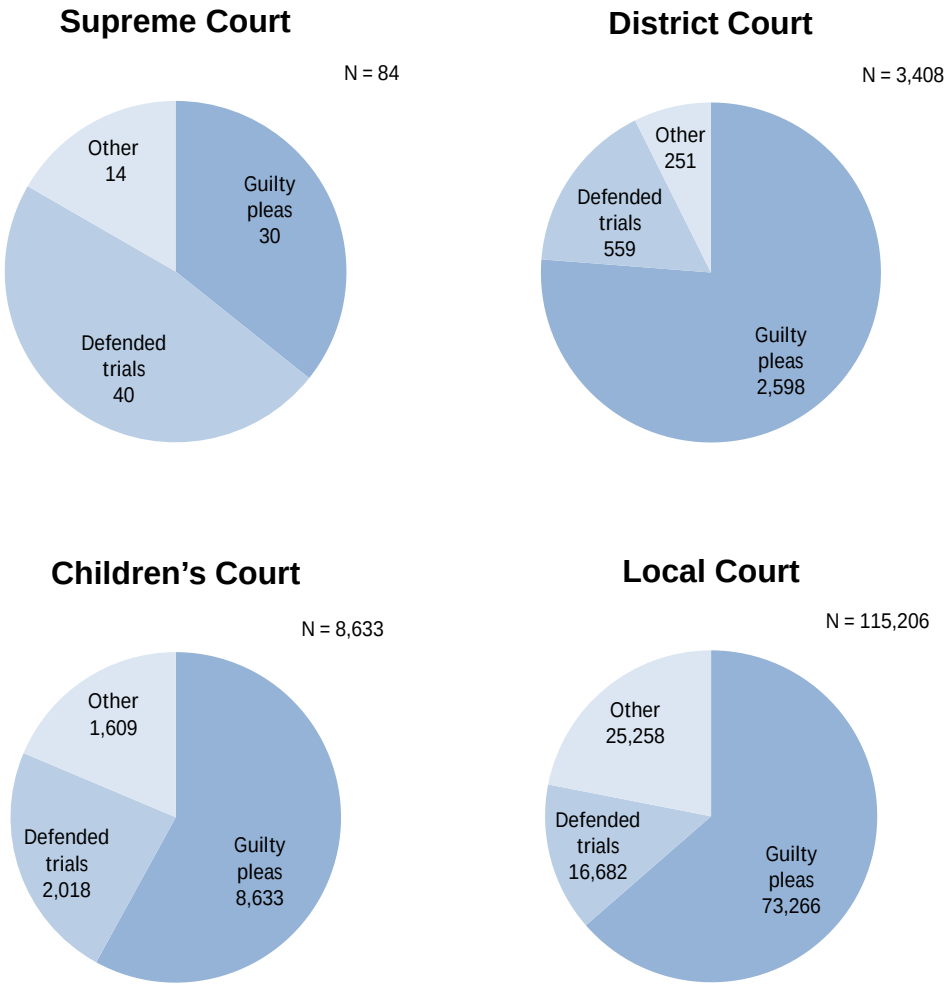
1.46 To put the extent of any problem into perspective, it is necessary to note that jury trials make up a very small percentage of the total number of first instance criminal proceedings in NSW.[65] Most criminal cases are determined in the Local Court, by magistrates, not juries. In part, this is because of the significant number of indictable offences that are now triable by consent in the Local Court.[66]

1.47 In addition, most people are dealt with following a guilty plea rather than a jury trial. The table below shows the numbers of finalisations by jurisdiction. In 2011, in the District Court, the State's main jury trial court, 559 people were dealt with by defended trial, amounting to 15% of the matters finalised in that court (though not all of these were tried by Jury (see below)).

1.48 Indeed, the 639 defended trials in the Supreme and District Courts represent a very small percentage (less than 0.5%) of the 127,331 criminal cases finalised in NSW courts in 2011.

60. *Ith v R* [2012] NSWCCA 70 [48].
61. *R v Forbes* [2005] NSWCCA 377; 160 A Crim R 1 [72]-[73]. See also NSW Law Reform Commission, *Jury Directions,* Consultation Paper 4 (2008) [3.2]-[3.4].
62. *Fleming v The Queen* [1998] HCA 68 [37]; 197 CLR 250; *Criminal Procedure Act 1986* (NSW) s 133(2)-(3).
63. M Kirby, "Why has the High Court become more involved in criminal appeals?" (2002) 23 *Australian Bar Review* 16.
64. G Eames, "Tackling the complexity of criminal trial directions: what role for appellate courts?" (2007) 29 *Australian Bar Review* 162.
65. See para [1.12].
66. NSW Sentencing Council, *An examination of the Sentencing Powers of the Local Court in NSW* (2010) [3.3]-[3.6] recorded the increase in personal violence indictable offences that have been heard in the Local Court between 1993 and 2007.

Figure 1.1: Finalisations and defended trials in 2011 by jurisdiction



Source: NSW BOCSAR Criminal Court Statistics 2011.[67]

1.49 Of the defended cases that proceeded to trial in the District and Supreme Courts, not all were jury trials. In the Supreme Court 31% of trials were by judge alone, and in the District Court 13% were by judge alone. Although the statistics indicate that the percentage of judge-alone trials is relatively small, the proportion of judge alone trials has recently increased as set out in Table 1.1.[68] The frequency of judge-alone trials may increase further as a result of the recent amendments to the *Criminal Procedure Act 1986* (NSW) determining the circumstances where a trial is heard by judge alone, which commenced on 14 January 2011.[69]

67. "Finalisations" means the number of people whose case was finalised in 2011. This is not the same as the number of trials, since they could involve multiple accused, or involve multiple charges for one accused that were tried separately. "Other" includes: convicted ex parte; all charges dismissed without hearing; and all charges otherwise disposed of.
68. See also NSW Legislative Council, Standing Committee on Law and Justice, *Inquiry into Judge Alone Trials under s 132 of the Criminal Procedure Act 1986,* Report 44 (2010) [2.9]-[2.11], Table 1.
69. *Criminal Procedure Act 1986* (NSW) s 132 and s 132A, as amended by *Courts and Crimes Legislation Further Amendment Act 2010* (NSW) sch 12.2[2].

Table 1.1: Percentage of trials by judge alone

Year	Supreme Court %	District Court %
2000	17	4
2001	8	5
2002	16	5
2003	5	4
2004	7	5
2005	9	4
2006	17	5
2007	3	7
2008	No data	
2009	24	7
2010	15	9
2011	31	13

Source: NSW Bureau of Crime Statistics & Research, Hc12/10726 dg

1.50 Although jury trials make up a relatively small proportion of the total number of first instance criminal proceedings in NSW,[70] they generally involve the determination of serious criminal charges that carry a potential sentence of imprisonment. The importance of ensuring that the jury trial process works effectively and efficiently is obvious.

The length of criminal trials

1.51 Judges and criminal lawyers suggest that criminal trials in NSW are becoming longer.[71] The available statistical information supports this assertion.

1.52 The statistical information about mean trial duration in the District Court suggests that there has been a steady rise in the length of criminal trials in that Court over the last 15 years. In 1995, the mean trial length in the District Court was 5.47 days. In

70. See para [1.12].

71. See, eg, NSW, Attorney General's Department, Criminal Law Review Division, *Report of the Trial Efficiency Working Group* (2009) 9; M Warren, "Making it easier for juries to be the deciders of fact" (Australasian Institute of Judicial Administration, Criminal Justice in Australia and New Zealand conference, 8 September 2011) 1; G Eames, "Tackling the complexity of criminal trial directions: what role for appellate courts?" (2007) 29 *Australian Bar Review* 161, 164; A M Gleeson, "The state of the judicature" (2007) 14 *Australian Journal of Administrative Law* 118, 121; NSW Bar Association, *Submission JU1,* 1.

2011, the mean trial length was 8.79 days.[72] This represents a 60% increase over that period.

Table 1.2: District Court of NSW - Mean trial duration (days)

Year	Mean trial duration (days)
1995	5.47
1996	4.58
1997	4.93
1998	5.34
1999	5.32
2000	5.69
2001	5.58
2002	6.00
2003	6.45
2004	6.52
2005	7.38
2006	7.46
2007	7.87
2008	7.75
2009	7.84
2010	8.64
2011	8.79

Source: District Court of NSW.

1.53 The Supreme Court has provided the Commission with a statistical comparison of average jury trial lengths for cases in the Supreme Court between two four-year periods in the 1990s and the 2000s.[73] The cases included within the study were those involving charges of murder, attempted murder, manslaughter and driving causing death.[74] The results of this analysis are set out below. The figures indicate a steady and significant increase in trial length for these types of cases over a span of two decades.

72. District Court of NSW, *Annual Review 2007*, 24; *Annual Review 2009*, 21; W Hi, District Court of NSW, *Email to NSW Law Reform Commission,* 14 November 2011. These statistics take account only of cases ending in a verdict and include both jury and judge alone trials.

73. NSW Supreme Court staff undertook this analysis, based on information provided by NSW Bureau of Crime Statistics and Research: see J Highet, *Email to NSW Law Reform Commission,* 27 January 2012.

74. There was one case involving driving causing death.

Table 1.3: Supreme Court trial length

Year	Number of trials	Mean trial length (calendar days)	Median trial length (calendar days)
1990	66	12	10
1991	62	13	9
1992	62	13	10
1993	35	19	15
2007	29	25	17
2008	48	22	17
2009	29	27	30
2010	23	26	25

Source: Supreme Court of NSW.

1.54 It is clear from the statistical evidence that juries are now required to sit for longer periods of time. Arising from this, it is likely that the amount of information presented to juries is increasing and that they are expected to recall evidence presented to them over a longer timeframe than was previously the case.

1.55 These figures do not explain the reasons for increases in trial lengths, nor do they reveal the extent (if any) to which these increases are attributable to the delivery of longer or more complex jury directions. However, there is some empirical evidence arising from an Australian Institute of Judicial Administration (AIJA) survey of Australian and New Zealand judges ("the AIJA survey") that indicates that judges in NSW, Victoria and Tasmania consistently spend much more time in summing up to the jury than do their counterparts in the remaining Australian States and in New Zealand.[75]

1.56 Although it is not possible to determine whether the trend in NSW towards longer criminal trials can be attributed in part or otherwise to an increase in the length of jury directions, it remains relevant to consider whether the practice of providing jury directions can be streamlined or made more efficient to ensure that they do not unnecessarily add to the length of trials or to the burdens placed on jurors.

Appeal rates

1.57 A recent report published by the Judicial Commission of NSW has cast some light on the role of misdirections in successful conviction appeals, by providing a

75. J Ogloff, J Clough and J Goodman-Delahunty, "Enhancing communication with Australian and New Zealand juries: a survey of judges" (2007) 16 *Journal of Judicial Administration* 235, 247-248. See NSW Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [1.18]-[1.19].

statistical analysis of conviction appeals for indictable offences in NSW between 2001 and 2007.[76] In that seven-year period, trials on indictment were conducted in relation to 4,509 individuals, 51.2% of whom were convicted. Of the 2310 convictions, 37.9% led to appeals against conviction. Of the total number of 937 appeals, 333 (35.5%) were successful.[77] The success rate of conviction appeals declined during the study period.[78]

Table 1.4: Data on first instance trials, convictions, proven offences and conviction appeals 2001–2007

Year	2001	2002	2003	2004	2005	2006	2007	2001–2007
First instance								
Trials								
Acquitted	398	291	273	276	262	227	231	1958
Convicted	374	358	354	312	314	312	286	2310
Other	31	31	31	36	45	35	32	241
Total trials	803	680	658	624	621	574	549	4509
Guilty plea	2353	2495	2505	2466	2461	2497	2408	17185
Total proven	2727	2853	2859	2778	2775	2809	2694	19495
Conviction rate following a trial	46.6%	52.6%	53.8%	50.0%	50.6%	54.4%	52.1%	51.2%
Appeals								
Conviction appeals	165	190	123	135	96	125	103	937
Successful conviction appeals	80	77	46	48	22	35	25	333
Success rate of conviction appeals	48.5%	40.5%	37.4%	35.6%	22.9%	28.0%	24.3%	35.5%
Conviction appeals as a proportion of first instance:								
Proven cases	5.9%	6.6%	4.2%	4.8%	3.3%	4.4%	3.8%	4.7%
Trial cases	19.1%	26.0%	17.6%	20.2%	13.4%	20.7%	18.6%	19.4%
Trial cases resulting in a conviction	40.9%	49.4%	32.8%	40.4%	26.4%	38.1%	35.7%	37.9%

76. H Donnelly, R Johns and P Poletti, *Conviction Appeals in New South Wales*, Monograph 35 (Judicial Commission of NSW, 2011).

77. H Donnelly, R Johns and P Poletti, *Conviction Appeals in New South Wales*, Monograph 35 (Judicial Commission of NSW, 2011) Table 2.4. The 937 appeals included 16 inquiry cases and 45 withdrawal of guilty plea cases: see note (e) to Table 2.4 of the study. The 33 successful appeals include12 inquiry cases and 11 withdrawal of guilty plea cases: see note (g) to Table 2.4 of the study.

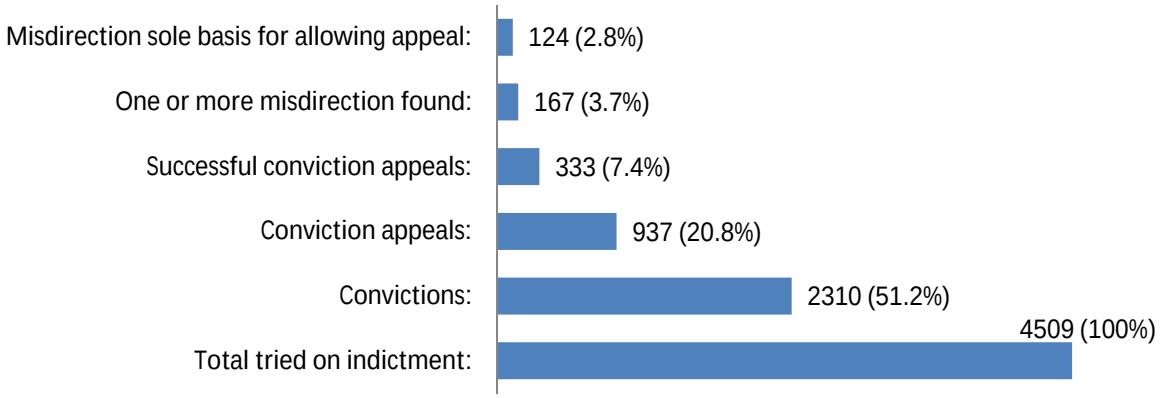
78. H Donnelly, R Johns and P Poletti, *Conviction Appeals in New South Wales*, Monograph 35 (Judicial Commission of NSW, 2011) [2.4.2].

Year	2001	2002	2003	2004	2005	2006	2007	2001–2007
Successful conviction appeals as a proportion of first instance:								
Proven cases	2.8%	2.6%	1.5%	1.7%	0.7%	1.2%	0.9%	1.6%
Trial cases	9.1%	10.9%	6.5%	7.2%	2.6%	5.9%	4.6%	6.9%
Trial cases which resulted in a conviction	19.5%	20.7%	12.1%	14.4%	5.1%	10.9%	8.7%	13.4%

Source: H Donnelly, R Johns and P Poletti, Conviction Appeals in New South Wales*, Monograph 35 (Judicial Commission of NSW, 2011) 16.*

1.58 Analysis suggests that a significant proportion of successful appeals against conviction in NSW are based, at least in part, on errors by the judge in directing the jury. In 167 of 315 successful conviction appeals,[79] the appeal court found that the trial judge had given one or more misdirections or had failed to give a necessary direction (that is, 53% of successful appeal cases). In 124 of these 167 misdirection cases (that is, 39% of successful appeal cases), one or more misdirections were the only basis for allowing the appeal.[80]

Figure 1.2: Trials on indictment, appeals and misdirections, 2001-2007



Source: H Donnelly, R Johns and P Poletti, Conviction Appeals in New South Wales*, Monograph 35 (Judicial Commission of NSW, 2011).*

1.59 For 59.4% of the misdirections, neither counsel for the prosecution nor the defence raised any objection at trial.[81]

79. The total number of successful conviction appeals was reduced from 333 to 327 because of lack of published statements of reasons in 6 appeals. The study analysed 327 appeals, 12 of which were enquiries into conviction (which were analysed separately). The misdirection findings were, therefore, based on 315 appeals: see H Donnelly, R Johns and P Poletti, *Conviction Appeals in New South Wales*, Monograph 35 (Judicial Commission of NSW, 2011) 46, 181.
80. H Donnelly, R Johns and P Poletti, *Conviction Appeals in New South Wales*, Monograph 35 (Judicial Commission of NSW, 2011) 93-94.
81. For 11.4% of misdirections, it was impossible to tell whether objection had been made at trial: H Donnelly, R Johns and P Poletti, *Conviction Appeals in New South Wales*, Monograph 35 (Judicial Commission of NSW, 2011) 98, 137.

1.60 These figures may underestimate the actual incidence of misdirection, because they do not take into account the instances where an accused person is acquitted, or is convicted and, for whatever reason, decides not to appeal the conviction, or the conviction appeal was dismissed notwithstanding the presence of one or more misdirections at trial.

1.61 The most common types of misdirection identified in the Judicial Commission's study involved:

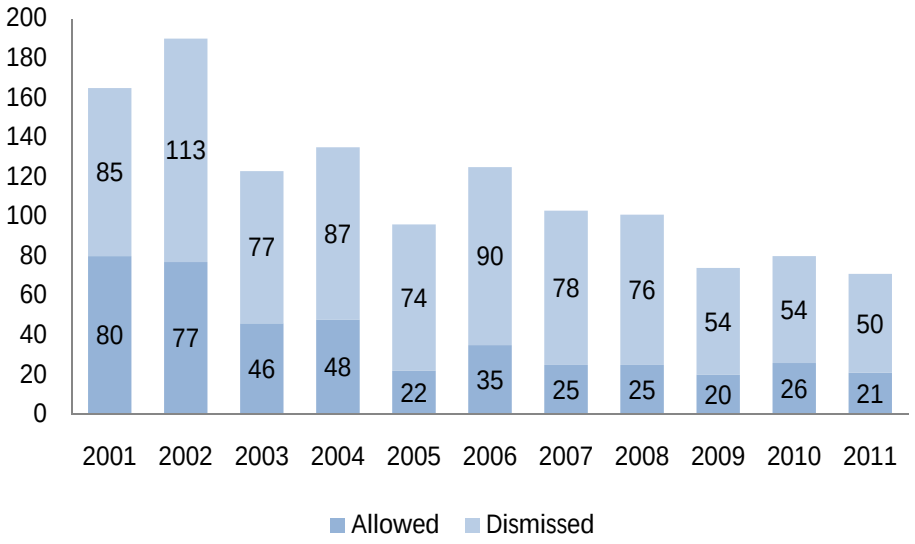
- instructions about the elements of an offence (33 misdirections);
- the *Longman* direction (27 misdirections);
- failure to warn or give an adequate warning about the potential unreliability of evidence pursuant to s 165 of the *Evidence Act* (23 misdirections);
- directions about silence of the accused or other witnesses (20 misdirections); and
- directions relating to complicity (14 misdirections).[82]

1.62 In the majority of successful conviction appeal cases, the appellate court ordered a retrial, and in most of the cases where a retrial was ordered, the Director of Public Prosecutions decided to proceed with at least some of the charges.[83] There were 95 retrials that resulted from successful appeals based only on misdirection. In 60% of these retrials, the appellant was reconvicted. In only 9.5% of these retrials was the appellant not convicted. The prosecution did not proceed on the indictment with regard to the other 30%.[84]

1.63 Figures supplied by the Judicial Commission of NSW show that, since 2007, the number of successful appeals has remained low relative to the earlier period 2001-2007.[85] We do not have access to figures relating to misdirections in successful appeals for the period since 2007. However, if the proportion of successful appeals involving a misdirection is maintained at the 2001-2007 levels of around 50%, this would represent a decreasing number of successful appeals involving misdirections when compared with the period 2001-2007.

82. H Donnelly, R Johns and P Poletti, *Conviction Appeals in New South Wales*, Monograph 35 (Judicial Commission of NSW, 2011) 98.
83. Of the total 333 successful conviction appeal cases, there were 206 cases where the appeal court ordered a new trial. Of these 206 cases, the DPP proceeded with some or all of the charges in 144 cases: H Donnelly, R Johns and P Poletti, *Conviction Appeals in New South Wales*, Monograph 35 (Judicial Commission of NSW, 2011) 172, 191-192.
84. H Donnelly, R Johns and P Poletti, *Conviction Appeals in New South Wales*, Monograph 35 (Judicial Commission of NSW, 2011) 194-195.
85. H Donnelly, Judicial Commission of NSW, *Letter to the Executive Director, NSW Law Reform Commission* (27 September 2012).

Figure 1.3: Conviction appeals – frequency and outcomes: 2001-2011



Source: Judicial Commission of NSW.

1.64 Similar research undertaken in Victoria for the same period of time indicates that error in the judge's directions was a ground of appeal in 52% of appeals against conviction decided in the Victorian Court of Appeal. This study was unable to consider the number of appeal cases in which misdirection caused the appeal to succeed, so a direct comparison with NSW conviction appeal rates is not possible.[86]

1.65 A more limited statistical analysis of conviction appeal rates was undertaken in Queensland for the period 1999/2000 to 2007/2008. These figures indicate that, on average each year within this period, 31% of appeals against conviction raised misdirection as a ground of appeal; 26.6% of these appeals involving an alleged misdirection were successful.[87]

1.66 It is acknowledged that the existence of a history demonstrating the need for appellate intervention, following a misdirection or failure to give a necessary direction, does not of itself provide a reason for abolishing jury trials, or for substantially reforming the current system of jury directions. Inevitably error will occur whether a trial is a jury trial or a trial by judge alone, and the search for an acceptable rate of error is likely to be illusory. Of more importance is the question of complexity and comprehensibility of jury directions which we address in the following section.

86. Victorian Law Reform Commission, *Jury Directions,* Final Report 17 (2009) Appendix B. Note also the Judicial Commission's concerns about comparisons between the two studies: H Donnelly, R Johns and P Poletti, *Conviction Appeals in New South Wales*, Monograph 35 (Judicial Commission of NSW, 2011) [2.4.6].

87. Queensland Law Reform Commission, *A Review of Jury Directions,* Report 66 (2009) 111-112.

Complexity and comprehensibility of jury directions

1.67 There are fears that jury directions are becoming too complex and uncertain to meet their intended purposes, that they rely on outmoded methods of communication that may confuse rather than assist the jury[88] and that they risk being more directed to satisfying the Court of Appeal than to informing the jury.[89] Judges speak of seeing jurors with glazed eyes or blank faces when they give a series of directions and comments on aspects of the evidence, to the point where they have concerns as to whether the jurors are able to follow and comply with what has been said.[90] The increasing complexity of the criminal law in relation to jury directions and the impediment this poses to the efficient conduct of trials has been noted.[91] The views of Lord Justice Auld on the state of jury directions in England apply equally to the situation in Australia, in so far as these communications to the jury have often become:

> highly technical and detailed propositions of law … Many are prolix and complicated, often subject to qualifications and in some instances barely comprehensible to criminal practitioners, never mind those who have never heard them before.[92]

1.68 Overly complex jury directions can cause confusion rather than elucidation among jurors,[93] particularly where they relate to the way in which certain bodies of evidence are to be weighed or considered. Alternatively, there is a risk that juries will read more into some directions, particularly warnings, than is intended or appropriate. An obvious example has been the giving of a warning in terms of it being "dangerous" or "unsafe" to convict on the basis of certain kinds of evidence, a direction that had been encouraged by the High Court but that is now discouraged in NSW as it may be understood by the jury as a hint from the judge that they should acquit the accused.[94] Similarly of concern is a direction that the jury "scrutinise the evidence" of a particular witness "with great care" because it is expected that the jury give a

88. See, eg, A M Gleeson, "The state of the judicature" (2007) 14 *Australian Journal of Administrative Law* 118, 121; G Eames, "Tackling the complexity of criminal trial directions: what role for appellate courts?" (2007) 29 *Australian Bar Review* 161; V Bell, "How to preserve the integrity of jury trials in a mass media age" (2006) 7 *Judicial Review* 311; J Wood, "Jury directions" (2007) 16 *Journal of Judicial Administration* 151; P McClellan, "Looking inside the jury room" (2011) 10 *Judicial Review* 315.

89. Queensland Law Reform Commission, *A Review of Jury Directions,* Report 66 (2009) [4.45]-[4.46]; M Weinberg, *Simplification of Jury Directions Project*, Report to the Jury Directions Advisory Group (2012) [1.28]-[1.30].

90. See NSW Law Reform Commission, *Jury Directions,* Consultation Paper 4 (2008) [1.23]; 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; *R v Yasso (No 2)* [2004] VSCA 127; 10 VR 466 [56]-[57].

91. G Eames, "Tackling the complexity of criminal trial directions: what role for appellate courts?" (2007) 29 *Australian Bar Review* 161, 163; see P McClellan, "Looking inside the jury room" (2011) 10 *Judicial Review* 315, 327; T Bathurst, "Community participation in criminal justice" (Opening of law term dinner 2012, Law Society of NSW, 30 January 2012) 16.

92. R E Auld, *Review of the Criminal Courts of England and Wales*, Report (2001) [45], cited in G Eames, "Tackling the complexity of criminal trial directions: what role for appellate courts?" (2007) 29 *Australian Bar Review* 161, 164.

93. Queensland Law Reform Commission, *A Review of Jury Directions,* Report 66 (2009) [4.44].

94. *R v Robinson* [2006] NSWCCA 192; 162 A Crim R 88 [16]-[19].

careful consideration to the whole of the evidence and this kind of direction can be misleading. Otherwise it is unlikely to contribute anything of value.

1.69 Of particular concern is the prolixity and technical complexity of directions that are now given either because of the judge's concern to avoid the risk of the verdict being overturned by appellate courts resulting in retrials, or because of the jurisprudence developed by appellate courts that require increasingly more complex and additional directions to be given. As a result, it has been suggested that it is common for jury directions to prioritise legal accuracy over juror comprehension.[95]

1.70 The need to ensure legal accuracy of directions in relation to elements of an offence or defences often means that judges will reflect the language of the relevant statutory provision or relevant case law. The resulting directions may therefore contain complex legal rules and explain concepts in legal language that is foreign to jurors. In CP 4, we considered that some of the problems 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.[96] The Victorian Law Reform Commission has also drawn attention to the fact that the language in which elements of an offence, or defences, are framed can impact on the complexity of the direction that will need to be given.[97]

1.71 A body of empirical research has developed over the last few decades, in Australia and overseas, that aims to observe the level of jurors' comprehension of jury directions and of their ability to apply these directions as part of their decision making process.[98]

1.72 There are impediments to obtaining reliable and uncontroversial data for this type of research because of the legal restrictions on communicating with jurors. In NSW, as elsewhere, legislation prohibits anyone from soliciting information from a juror or a former juror about the deliberations of a jury.[99] Exemption from the prohibition can, however, be granted to researchers undertaking research projects into matters relating to juries or jury service.[100]

1.73 Despite this exemption, the legal restrictions make it impossible to know with any certainty the number of verdicts that are based on misunderstandings or misapplications of the law or of evidence, or to gauge the success or otherwise of jury directions in preventing juror error.

95. D Watt, *Helping Jurors Understand* (Thomson Carswell, 2007) 25.
96. NSW Law Reform Commission, *Jury Directions,* Consultation Paper 4 (2008) [9.88].
97. Victorian Law Reform Commission, *Jury Directions,* Final Report 17 (2009) [4.53].
98. See para [1.83]-[1.86]. See also D Devine, *Jury Decision Making: The State of the Science* (New York University Press, 2012) 55.
99. *Jury Act 1977* (NSW) s 68A.
100. *Jury Act 1977* (NSW) s 68A(3).

1.74 Where jurors are interviewed at the conclusion of an actual trial, it is not necessarily the case that their answers accurately reflect the extent to which they understood or correctly applied the directions.[101]

1.75 In order to overcome this problem and the constraints on questioning real jurors, some researchers choose to study simulated jury trials and to draw causal inferences from the opportunity that this provides to scrutinise their deliberations.[102] Some question the validity of findings from simulated trial experiments on the basis that it is impossible to reproduce exactly the environment or duration of a real trial. Others defend reliance on jury simulations and maintain that their findings do not generally differ significantly from studies involving real juries.[103] The many types of jury simulation studies employed mean that each study will have a different level of validity when compared with others in terms of its ability to predict what will occur in a real trial.[104]

1.76 Ultimately, it may be that no single method of assessing juror comprehension is ideal. However, when the research is viewed collectively, that is, as a combination of various methodologies involving real and mock jurors, the studies may be helpful in forming some general conclusions about the likely utility of jury directions, and the level of juror comprehension of these directions.[105]

1.77 What cannot be overlooked in this respect is that the close attention, which appellate Courts give to the transcript of a summing up, involves a very different approach from that of jurors listening to oral directions, given in the context of a trial that has lasted for some time, and in which they have had the benefit of addresses, and an opportunity of forming some impression of the witnesses whom they have seen and heard.

1.78 The sense of dissatisfaction with the current system of jury directions in NSW and elsewhere is reflected in a growing body of literature that is critical of its unwieldiness and complexity. These criticisms are repeated in views expressed by legal practitioners and judges in submissions,[106] conference papers and surveys. Concerns about the efficacy of the current system have fuelled reviews and reforms

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101. See para [1.85]-[1.86].

102. 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) [8.1]-[8.8]; M J Saks, "What do jury experiments tell us about how juries (should) make decisions?" (1997) 6 *Southern California Interdisciplinary Law Journal* 1; R Hastie, S Penrod and N Pennington, *Inside the Jury* (Harvard University Press, 1983) 37. See NSW Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [2.2].

103. B H Bornstein, "The ecological validity of jury simulations: is the jury still out?" (1999) 23 *Law and Human Behavior* 75.

104. S S Diamond, "Illuminations and shadows from jury simulations" (1997) 21 *Law and Human Behavior* 561, 562; N Vidmar, "Experimental simulations and tort reform: avoidance, error and overreaching in Sunstein et al's punitive damages" (2004) 53 *Emory Law Journal* 1359, 1360.

105. See G Eames, "Towards a better direction – better communication with jurors" (2003) 24 *Australian Bar Review* 35, 39; J Ogloff and V G Rose, "The comprehension of judicial instructions" in N Brewer and K Williams (ed), *Psychology and the Law: An Empirical Perspective* (Guilford Press, 2005) 423; D Devine, *Jury Decision Making; The State of the Science* (New York University Press, 2012) 12-14; S S Diamond, "Illuminations and shadows from jury simulations" (1997) 21 *Law and Human Behavior* 561, 563.

106. See Director of Public Prosecutions for WA, *Submission JU2*, 1; Legal Aid NSW, *Submission JU4*, 1; NSW, Office of the Director of Public Prosecutions, *Submission JU9*, 1.

elsewhere in Australia and overseas,[107] and have raised the question whether the current requirements have departed too far from the much cited views of Sir Leo Cussen as to what is required of a judge in delivering an effective summing up:[108]

> 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.[109]

Observations on the general utility of jury directions

1.79 As a threshold issue, empirical research on jury behaviour offers observations about the general utility of judicial directions, that is, whether and the extent to which they make a difference in influencing jury behaviour, particularly jury decision-making. The studies have taken a number of forms: most have examined how well juries understand directions; others have explored whether modifications, such as plain language or the use of decision aids have improved comprehension; and others have examined the impact of directions on jurors and jury behaviour.[110] While the research can provide no definitive answer to these questions, it strongly suggests, as might be hoped, that judicial directions are capable of influencing, and do influence, jury behaviour. Studies involving mock juries have found that the presence or absence of directions can affect conviction rates. Similarly, variations in the wording of specific directions have been shown to influence verdicts in mock trials, for example those given in relation to the concept of proof beyond reasonable doubt.[111]

1.80 In studies involving real juries, jurors report finding judicial directions generally helpful. For example, in a study of 48 jury trials in New Zealand in 1998, the majority of jurors reported that they spent time in deliberations reviewing directions and generally demonstrating a high level of conscientiousness in following them.[112] Similarly, in a study of 41 jury trials in NSW between 1997 and 2000, it was concluded, based on jurors' responses in interviews, that most tried to follow judicial directions diligently, although there was a small minority of jurors in a couple of

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107. Queensland Law Reform Commission, *A Review of Jury Directions,* Report 66 (2009); Victorian Law Reform Commission, *Jury Directions,* Final Report 17 (2009); R E Auld, *Review of the Criminal Courts of England and Wales*, Report (2001); New Zealand, Law Commission, *Juries in Criminal Trials,* Report 69 (2001).
108. Cited by the High Court in *Tully v The Queen* [2006] HCA 56 [44]; see NSW Law Reform Commission, *Jury Directions,* Consultation Paper 4 (2008) [6.5].
109. *Alford v Magee* (1952) 85 CLR 437, 466.
110. D Devine, *Jury Decision Making: The State of the Science* (New York University Press, 2012) 55.
111. J Ogloff and V G Rose, "The comprehension of judicial instructions" in N Brewer and K Williams (ed), *Psychology and the Law: An Empirical Perspective* (Guilford Press, 2005) 407.
112. W Young, N Cameron and Y Tinsley, *Juries in Criminal Trials Part Two: A Summary of the Research Findings*, Preliminary Paper 37 (New Zealand, Law Commission, 1999) vol 2 [2.23], [7.3], [7.11].

cases who may have deliberately ignored judicial directions on the basis that the law as instructed in these instances did not accord with their notions of justice.[113] Jurors interviewed for a study commissioned by the Queensland Law Reform Commission (QLRC) in 2009 also reported the same positive view about the general utility of judicial directions, particularly the summing up.[114] A study of 10 criminal trials in Sydney between 2004 and 2006 reveals the same readiness by jurors to listen to the judge's directions and to rely on his or her guidance. This study suggests that jurors generally hold the judge in high regard and look up to him or her as an authority figure. That view accords with findings of an Australian study of juror satisfaction in 2007, which concluded, among other things, that jurors place considerable reliance on the interpretation of evidence provided by the judge.[115] Similarly, in a separate study of jurors serving in trials in NSW in 2007 and 2008, more than 30% of jurors reported that the judge's summing up "helped a lot", and 37% found that it "helped quite a bit".[116]

1.81 It may be accepted that jurors display a typically positive attitude towards directions and a readiness to comply with them. However the extent of the guidance provided by some specific directions may be less strongly asserted. For example, research into jurors' understanding of DNA evidence found that judicial directions advising caution in evaluating such evidence had a negligible effect on mock jurors' perception of its relevance to a conclusion as to the culpability of the accused.[117] Similarly, directions instructing jurors to avoid contact with media coverage of proceedings,[118] have been found to have only a limited utility in influencing jurors' behaviour. Also suggested to be of limited utility are directions requiring jurors to limit the use of evidence to a particular purpose, for example, evidence of a defendant's criminal record[119] if received in a case where character is raised, and evidence of a lie that is relied on as only going to credit.[120] It has been argued, based on this research, that directions that require jurors to ignore information that appears relevant to them, in determining what happened, tend to be less effective than other types of directions,[121] although there is some evidence that limiting

113. 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) [438]-[443], [455]-[458].

114. Queensland Law Reform Commission, *A Review of Jury Directions,* Report 66 (2009) vol 2, appendix E.

115. J Goodman-Delahunty and others, *Practices, Policies and Procedures that Influence Juror Satisfaction in Australia*: *Report to the Criminology Research Council,* Research and Public Policy Series No 87 (Australian Institute of Criminology, 2008) 142-143.

116. 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, table 8.

117. S Dartnall and J Goodman-Delahunty, "Enhancing juror understanding of probabilistic DNA evidence" (2006) 38 *Australian Journal of Forensic Sciences* 85; J Goodman-Delahunty and L Hewson, *Improving Jury Understanding and Use of Expert DNA Evidence*, Technical and Background Paper 37 (Australian Institute of Criminology, 2010) viii.

118. 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) [368]-[369].

119. N Brewer and K Williams, *Psychology and the Law: An Empirical Perspective* (Guildford Press, 2005) 420.

120. *Edwards v The Queen* (1993) 178 CLR 193; *Zoneff v The Queen* [2000] HCA 28; 200 CLR 234.

121. D Devine and others, "Jury decision making: 45 years of empirical research on deliberating groups" (2001) 7 *Psychology, Public Policy, and Law* 622, 666; D Devine, *Jury Decision Making: The State of the Science* (New York University Press, 2012) 67.

directions have more impact if given at the end of the trial as opposed to pre-trial or at the time the evidence is given.[122] It has also been suggested that, contrary to its intended purpose, this kind of direction can backfire and, by drawing attention to the evidence, give it undue importance.[123]

1.82 While the research referred to above indicates that directions can and do influence juror decision-making, it also reveals that jurors over a number of common law countries have real difficulties in understanding the directions that they are given.

Assessing jurors' comprehension

1.83 The empirical evidence that suggests that jurors are generally conscientious in their efforts to follow the trial judge's directions, and that they find these directions helpful, supports the argument that jury directions serve a valid purpose. However, the evidence is less positive about the level of comprehension that jurors display about the directions they are given. Studies involving both mock and real jurors, in Australia as well as in New Zealand, the United Kingdom, Canada, and the United States, consistently conclude that jurors lack a strong understanding of judicial directions, even though they may believe otherwise, and that this affects their ability to apply the directions to the facts.[124]

1.84 A study commissioned by the New Zealand Law Commission found that, of the 48 trials included within the study, only 13 did not reveal a fairly fundamental misunderstanding of the law at the deliberation stage by at least some of the jurors.[125] Similarly, the QLRC, in its study of jury trials occurring in mid-2009, found that jurors' understanding of directions was not particularly high.[126] These findings are consistent with findings from a recent study of mock jurors in the United Kingdom. Although more than half of the mock jurors in the study reported that the judge's directions were easy to understand, only 31% demonstrated that they actually understood the directions fully.[127] An older study of juries in NSW indicates that factors such as the length of the trial can have a negative effect on the level of juror comprehension, and conversely, reliance on methods such as note-taking and recourse to transcripts can help jurors recall evidence and concentrate.[128]

1.85 Judges themselves seem to have misgivings about the comprehensibility of the directions they give. According to a survey of Australian and New Zealand judges in

122. N Steblay and others, "The impact on juror verdicts of judicial instruction to disregard inadmissible evidence: a meta-analysis" (2006) 30(4) *Law and Human Behavior* 469, 486-487.
123. M Weinberg, *Simplification of Jury Directions Project*, Report to the Jury Directions Advisory Group (2012) [1.40]-[1.43], [4.90], [4.96].
124. For a general review of the literature, see, eg, M Comiskey, "Initiating dialogue about jury comprehension of legal concepts: can the 'stagnant pool' be revitalised?" (2010) 35 *Queen's Law Journal* 625; J Ogloff and V G Rose, "The comprehension of judicial instructions" in N Brewer and K Williams (ed), *Psychology and the Law: An Empirical Perspective* (Guilford Press, 2005) ch 12.
125. W Young, N Cameron and Y Tinsley, *Juries in Criminal Trials Part Two: A Summary of the Research Findings*, Preliminary Paper 37 (New Zealand, Law Commission, 1999) vol 2 [7.3].
126. Queensland Law Reform Commission, *A Review of Jury Directions*, Report 66 (2009) ch 2.
127. C Thomas, *Are Juries Fair?* Research Series 1/10 (UK, Ministry of Justice, 2010) vi-vii, 48.
128. M Findlay, *Jury Management in New South Wales* (Australian Institute of Judicial Administration, 1994) 85-86.

2006, 57% of judges believed that jurors experienced at least some level of difficulty in understanding directions provided at the end of a trial.[129] By contrast, jurors do not necessarily demonstrate insight into problems of comprehension. Studies relying on jurors' self-assessment of their comprehension levels indicate that most jurors report that they understood either everything or nearly everything that the judge told them.[130] Arguably, such findings go only so far as to show that jurors *believe* they understand more than they may in fact understand. If that is true, then it cannot be assumed that any misunderstandings will be remedied through giving jurors the opportunity to ask the trial judge questions or to seek clarification, as they may not realise that they do not understand the issues in question. Obviously the preferable course is to ensure that the directions are understandable from the outset.

1.86 As well as indicating general difficulties in juror comprehension, empirical studies suggest that there are certain directions that jurors have particular problems understanding. For instance, low levels of comprehension have been revealed in relation to directions on circumstantial evidence, as well as those relating to the burden and standard of proof, eyewitness identification evidence and evidence of bad character.[131] One study has found a fundamental misunderstanding among jurors of their role in assessing the evidence presented to them rather than as independent fact-finders charged with discovering the objective truth of the case.[132]

Our approach to this report

1.87 Consistently with the initiatives taken elsewhere, and in the light of the matters outlined above, we are of the view that the current system of jury directions in NSW requires some measure of reform, that can take account of the empirical work of juror comprehension levels and communication practices and of factors, including trial management, that tend to enhance comprehension. Any such approach to reform will admittedly need to face from the outset the potential tension between simplicity and comprehensibility, on the one hand, and legal accuracy, on the other, in a way that addresses the needs of juries. In this respect recent technological advances need to be utilised to best advantage, and past practices based upon a purely oral approach reconsidered.

1.88 In making recommendations for reform to the law and practice of jury directions in NSW, the remaining chapters of this Report adopt the following structure:

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129. 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.

130. L Trimboli, *Juror Understanding of Judicial Instructions in Criminal Trials,* Crime and Justice Bulletin No 119 (NSW Bureau of Crime Statistics and Research, 2008).

131. J Ogloff and V G Rose, "The comprehension of judicial instructions" in N Brewer and K Williams (ed), *Psychology and the Law: An Empirical Perspective* (Guilford Press, 2005) 413; I Horowitz and L Kirkpatrick, "A concept in search of a definition: the effects of reasonable doubt instructions on certainty of guilt standards and jury verdicts" (1996) 20 *Law and Human Behavior* 655; L Ellison and V Munro, "Getting to (not) guilty: examining jurors' deliberative processes in, and beyond, the context of a mock rape trial" (2010) 30 *Legal Studies* 74.

132. J Hunter, D Boniface and D Thomson, *What Jurors Search for and What They Don't Get*, UNSW Pilot Study – Juror Comprehension and Obedience to Judicial Directions Against Juror Investigation (2010) 14.

- **Chapter 2** considers a range of options for devising a general approach to reform, including the possibility of codification. It puts forward the Commission's preferred approach to reform that rejects codification; accepts the desirability of the Bench Book Committee formulating suggested directions that can be tailored to the individual case and that can evolve in response to appellate decisions; and encourages the adoption of other strategies that are designed to enhance the jury's involvement in the trial process as well as its comprehension and application of the directions that it receives.

- **Chapter 3** considers the desirability of a comprehensive review of the substance of the suggested directions contained in the Bench Book and the general principles that should govern the provision of jury directions.

- **Chapter 4** gives specific consideration to the issues that arise in relation to the direction that is at the heart of every criminal trial - the standard of proof that rests upon the prosecution, namely proof beyond reasonable doubt.

- **Chapter 5** considers issues that arise in relation to areas whre some form of special knowledge is required to assist juries with the assessment of particular types of evidence, including DNA evidence and other expert evidence, the evidence of children who are victims of sexual abuse, identification from still and video footage and evidence of indigenous people.

- **Chapter 6** considers a number of general measures that could be introduced to assist jurors in understanding and applying the directions they are given. These include, for example, the provision of directions and summaries of evidence in writing; enhanced access to the record of the proceedings; the use of audiovisual and other aids; and the provision of decision trails or trees.

- **Chapter 7** considers some incidental reforms that might be made to pre-trial management and prosecution and defence disclosure. These include the provision of a road map that could enhance jurors' participation in the trial as well as their understanding of the issues which they must decide in coming to a verdict, as well as the provision of directions during the course of the evidence.

2. A framework for reform

2.1 Having concluded that some reform is required to ensure that juries are sufficiently armed with the assistance that they need to carry out their task, the question arises as to the approach to reform that should be adopted.

Finding an approach to reform

2.2 We have identified three possible approaches to reform:

- Replace the existing framework, which rests partly on the common law and partly on statute, with a statutory scheme or code contained, for example, in a Jury Directions Act, or in the *Criminal Procedure Act 1986* (NSW).
- Retain the existing framework but amend or supplement it through the introduction of model jury directions which judges are expected to use.
- Retain the existing framework, and strengthen it through:
  - refinement of the suggested directions contained in the Criminal Trial Courts Bench Book ("Bench Book"); and
  - the adoption of trial management strategies that might facilitate the jury's task.

Option 1: Codification

2.3 As we mentioned in Chapter 1,[1] the Queensland and Victorian Law Reform Commissions, have recently undertaken reviews of the law and practice of jury directions. Given the complex, patchwork nature of the current system, both commissions considered whether it was desirable to overhaul the existing framework that rests on common law and statute law and replace it with a single statutory scheme or code.

1. See para [1.5].

The Victorian Law Reform Commission report

2.4 The Victorian Law Reform Commission (VLRC) opted for codification. It recommended that the law concerning jury directions in criminal trials should be located in a single statute, through legislation introduced over time, that would replace the common law and contain revised versions of all statutory provisions concerning directions, including those contained in the *Evidence Act 2008* (Vic).[2] The scheme proposed did not contemplate an immediate and exhaustive codification, since it contemplated the development by the courts of a body of law in relation to any particular direction that was not expressly dealt with by the code, so long as it was consistent with the general principles set out in the statutory scheme.[3]

2.5 The salient features of the statutory scheme recommended by the VLRC are that:

- The legislation should contain a list of general principles to guide the content of all jury directions. These principles should require directions to be clear, simple, brief, comprehensible and tailored to the circumstances of the particular case.[4]
- Judges should not be required to follow the precise wording of the legislation but should tailor their directions to the circumstances of the case in compliance with the general principles listed in the legislation.[5]
- The legislation should distinguish between directions that must be given and directions that may be given at the judge's discretion,[6] but should create an obligation to give a discretionary direction that has been requested by defence counsel, unless there is good reason not to do so.[7]
- The legislation should declare the judge's obligation to give a direction whenever one is needed to ensure a fair trial,[8] and it should include a non-exhaustive list of matters to be considered when determining whether a particular direction is necessary to ensure a fair trial, and whether there is good reason to refuse a request of counsel for a particular direction.[9]
- The legislation should ultimately govern the content of all directions of a procedural and evidentiary nature.[10]

2.6 The VLRC recommended that the legislative statement of the judge's obligation in directing the jury should contain the following principles:

> a) The trial judge must direct the jury about the elements of any offences charged by the prosecution that are in dispute and may do so by identifying the findings of fact they must make with respect to each disputed element.

2. Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) rec 1-3, [4.22]-[4.26].
3. Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) rec 14.
4. Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) rec 5.
5. Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [4.43].
6. Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) rec 6.
7. Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) rec 7.
8. Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) rec 8.
9. Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) rec 10.
10. Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) rec 12-13.

b) The trial judge must direct the jury about the elements of any defences raised by the accused person which must be negatived by the prosecution or affirmatively proved by the accused person and may do so by identifying the findings of fact they must make with respect to each disputed element.

c) The trial judge must direct the jury about all of the verdicts open to them on the evidence, unless there is good reason not to do so.

d) The trial judge must refer the jury to the evidence which is relevant to the findings of fact they must make with respect to the contested elements of each offence.

e) In referring the jury to relevant evidence the trial judge is not required to provide the jury with an oral restatement of all or any of that evidence, unless the judge determines, in the exercise of the judge's discretion, that it is necessary to do so in order to ensure a fair trial.

f) In determining whether it is necessary to provide the jury with an oral summary of evidence, the trial judge may have regard to the following matters:

- the length of the trial;
- whether the jury will be provided with a written or electronic transcript or summary of the evidence;
- the complexity of the evidence;
- any special needs or disadvantages of the jury in understanding or recalling the evidence;
- the submissions and addresses of counsel;
- such other matters as the judge deems appropriate in the circumstances of the case.

g) The trial judge must direct the jury that they must find the accused not guilty if they cannot make any of the findings of fact referred to in paragraph (a) beyond reasonable doubt.

h) The trial judge is under no obligation to direct the jury about the elements of the offence (or any defence) other than to comply with these requirements.

i) The trial judge must provide the jury with a summary of the way in which the prosecutor and the accused have put their respective cases.[11]

2.7 Other proposals related to the directions that were required concerning post-offence conduct;[12] identification and recognition evidence;[13] delay in complaint in cases of sexual assault and credibility;[14] and propensity.[15] Further proposals of a procedural nature related to the permissibility of the jury being given an edited version of the

11. Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) rec 23.
12. Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) rec 24-27.
13. Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) rec 28-33.
14. Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) rec 37-38.
15. Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) rec 39.

transcript to be used in conjunction with the summing up, and an "Outline of Charges" which identifies the elements of the offences charged and notes those that are in issue,[16] as well as a Jury Guide that would contain a list of questions of fact to guide them to a verdict.[17]

2.8 Critical to an evaluation of the VLRC's recommendations is the question whether its approach would satisfy the requirements of the fair trial principle. That principle includes the need to ensure that the jury, as sole trier of fact, is properly instructed on the issues at stake in the individual case,[18] and that jury directions are tailored to the real issues of each case.[19]

2.9 The VLRC took the view that even though its proposed statutory scheme would abrogate existing common law rules, it would not infringe the principle of a fair trial (with particular reference to Victoria's *Charter of Human Rights and Responsibilities Act 2006*).[20] On advice from the Victorian Government Solicitor's Office, it noted that care needed to be taken with respect to avoiding absolute or blanket rules when developing the proposed legislation; and that judges should be left with sufficient flexibility to depart from, or modify, prescribed directions when that was necessary to ensure a fair hearing.[21]

2.10 What was necessary was for the directions to be "custom built" for the case at hand to assist the jury to understand their task.[22] Accordingly the VLRC observed that it had recommended legislation that would contain the essential elements to be included in each direction, rather than prescribing the exact wording to be used. It emphasised, in its general principles, the importance of tailoring directions to the individual case.[23]

2.11 The President of the Victorian Court of Appeal has given support for legislative intervention of this kind in order to simplify the law.[24] In addition the Jury Directions Advisory Group and the Sexual Offences Advisory Group have now undertaken work to progress the recommendations of the report in Victoria. The Sexual Offences Advisory Group has the task of considering reform of the law relating to sexual offences.[25]

The Queensland Law Reform Commission report

2.12 By contrast to the VLRC report, the Queensland Law Reform Commission (QLRC) decided against recommending the introduction of a single, comprehensive

16. Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) rec 41-42.
17. Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) rec 43-44.
18. *RPS v The Queen* [2000] HCA 3; 199 CLR 620 [41]-[42].
19. *Pollock v The Queen* [2010] HCA 35; 242 CLR 233 [67].
20. Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [4.85]-[4.88].
21. Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [4.90].
22. Victorian Law Reform Commission, *Jury Directions,* Final Report 17 (2009) [4.90].
23. Victorian Law Reform Commission, *Jury Directions,* Final Report 17 (2009) [4.91].
24. *Wilson v The Queen* [2011] VSCA 328 [2], [5] (Maxwell P).
25. A matter that was the subject of Victorian Law Reform Commission, *Jury Directions,* Final Report 17 (2009) rec 17 and 18.

statutory scheme covering the content of jury directions and warnings.[26] It gave a number of reasons for its decision:

- It did not consider that Parliament was best placed to provide guidance to judges, advocates and jurors by way of a code designed to overcome the complexities in handling directions and complex warnings about problematic evidence.
- It was concerned that significant statutory intervention in this area might lead to unwanted inflexibility.
- It doubted whether a code or other statute dealing with jury directions and warnings could solve the problems associated with complex provisions in the substantive criminal law. Instead, it preferred other measures that did not require a code but that aimed to assist jurors to understand the information that they are given in directions, such as written aids and integrated directions.
- It was not convinced that the position in Queensland was so bad that it warranted a complete overhaul of the current law by way of codification. Instead, it took the view that specific legislative amendments and special measures aimed at improving particular aspects of the criminal trial procedure were to be preferred.[27]

Option 2: Model jury directions

2.13 The second option encompasses the introduction and use of model jury directions, (also known as standard pattern or specimen directions), of an authorised or mandatory kind, that have been developed and approved for use otherwise than through legislation. Typically they take the form of generalised directions that are intended to be used by judges whenever the situations to which they relate arise in a trial. Model directions of this kind tend to be drafted, approved, and updated by a committee of a superior court, or by a judicial council or similar body and can take the form either of mandatory or authorised, or semi-official directions. In some instances, they have been finalised as rules of the Court. They can be quite lengthy depending on the breadth of the factual scenarios that are addressed and on the defences or lesser alternative offences that might be available.

2.14 Model directions of this kind emerged in the United States in the late 1930s, in response to concerns about the excessive length, complexity and inconsistencies of directions formulated by individual judges. A committee of judges of the Los Angeles Superior Court developed a set of model directions that followed appellate court decisions. Most American jurisdictions now use some form of model directions.[28] One example can be seen in the model directions that have been

26. Queensland Law Reform Commission, *A Review of Jury Directions,* Report 66 (2009) rec 7-1.
27. Queensland Law Reform Commission, *A Review of Jury Directions,* Report 66 (2009) [7.91]-[7.98].
28. W Schwarzer, "Communicating with juries: problems and remedies" (1981) 69 *California Law Review* 731, 736-737; D Watt, *Helping Jurors Understand* (Thomson Carswell, 2007) 80; M Comiskey, "Initiating dialogue about jury comprehension of legal concepts: can the 'stagnant pool' be revitalized?" (2010) 35 *Queen's Law Journal* 625, 631-632.

developed for Federal Courts, including the extensively annotated *Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit*.[29]

2.15 Many of the States have also developed and adopted their own model directions that for practical purposes constitute the entirety, or at least the majority, of the summing up in those jurisdictions where judges make no reference to the evidence. One such example can be seen in the Rules of Court of the Californian Courts which provide official endorsement of the model directions that have been approved by the Judicial Council. The Rules strongly encourage the use of these directions, which are brought together in a series that is published with the authority of the Judicial Council of California.[30] They recommend that a judge use the applicable Judicial Council direction unless he or she finds that a different direction would more accurately state the law and be better understood by jurors. Typically in California the judge and the attorneys involved in a trial engage in a discussion, in the absence of the jury, that is designed to settle the specific directions drawn from the published series that are to be given to the jury. This approach places an emphasis on adhering to model directions, while still leaving some flexibility for deviation where necessary.[31]

2.16 An example of a system of model directions of a semi-official kind may be found in Illinois. The Illinois Supreme Court Committee on Jury Instructions in Criminal Cases has prepared, and now updates, a set of model directions for criminal trials. They must be used in trials wherever they are applicable, unless the court determines that the model direction does not accurately state the law.[32]

2.17 In theory at least, model directions offer a number of benefits:

- They could save time both for the trial judge and counsel in researching and preparing directions.
- They could provide a greater level of consistency and accuracy than directions prepared on a case-by-case basis, often in haste under the pressure of litigation.
- As a result of the second benefit, the rate of successful conviction appeals and subsequent retrials could be reduced.
- They could enhance juror comprehension by reducing the length, volume and complexity of directions because trial judges could rely on their legal accuracy

29. Judicial Committee on Model Jury Instructions for the Eighth Circuit, *Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit* (2012). Similar pattern criminal jury instructions have been prepared for the First Circuit and other circuits: "Model Federal Civil and Criminal Jury Instructions" *Federal Evidence Review* <federalevidence.com/evidence-resources/federal-jury-instructions>.
30. Judicial Council of California, *Criminal Jury Instructions* (2012).
31. *California Rules of Court*, Title 2 (Trial Court Rules), Chapter 4 Jury Instructions, Rule 2.1050(e).
32. *Illinois Supreme Court Rules*, Article IV, Rule 451(a). For a consideration of the benefits of the US system of pattern directions in Australia, see Victorian Parliament, Law Reform Committee, *Jury Service in Victoria*, Final Report (1997) vol 3 [2.199]-[2.209].

rather than erring on the side of excessively long and complex directions to avoid appealable error.[33]

2.18 These potential benefits, particularly a reduction in conviction appeals, sparked suggestions in Canada for the adoption of a system of mandatory model directions.[34] In 1997 the Canadian Judicial Council prepared a set of standard directions, although as noted in the preface, they do not carry the authority of the Council, its members, or any court. To the contrary it is observed that the "only authority these instructions enjoy is the measure of approval they receive through actual use in criminal trials".[35]

2.19 There are strong arguments against the introduction of model directions. For example, their potential for more consistent legal accuracy must be balanced against their inherent generality, which detracts from their value in guiding jurors to apply the law to the individual facts of the case before them.[36]

2.20 Doubt has also been cast on the potential for model directions to reduce appeal rates.[37] There is only limited and inconclusive statistical evidence in this respect. It has been pointed out that errors in instructing juries often arise not from the actual content of a direction but from the judge's decision to give an inappropriate direction or to refrain from giving an appropriate direction.[38] No set of model directions can provide complete certainty to a trial judge in making that threshold determination, just as no set of model directions whether mandatory or authorised can deal exhaustively with every issue that may arise at trial and that may ultimately be considered to require a jury direction.

2.21 Critics have similarly doubted the effectiveness of model directions to improve juror comprehension by reducing their length and complexity. The findings of a number of American studies into juror comprehension do not indicate any greater levels of comprehension among American jurors arising from the use of model directions.[39] While model directions may often be shorter than individually drafted directions, there is still the temptation for trial judges to supplement them with additional and possibly unnecessary directions at counsel's request, in order to avoid appealable

33. W Schwarzer, "Communicating with juries: problems and remedies" (1981) 69 *California Law Review* 731, 737; D Watt, *Helping Jurors Understand* (Thomson Carswell, 2007) 81-83.

34. I Mulgrew, "Fewer jurors among changes Plant mulling", *The Vancouver Sun*, 22 July 2004, B5; J Hauschildt, "Deadlocked: the case for mandatory pattern instructions in criminal jury trials" (2005) 50 *Criminal Law Quarterly* 453. Law Reform Commission of Canada, *The Jury in Criminal Trials*, Working Paper 27 (1980) 76, recommended non-mandatory directions.

35. Canadian Judicial Council, *Model Jury Instructions in Criminal Matters* (2004) 2.

36. D Watt, *Helping Jurors Understand* (Thomson Carswell, 2007) 81.

37. W Schwarzer, "Communicating with juries: problems and remedies" (1981) 69 *California Law Review* 731, 738; D Watt, *Helping Jurors Understand* (Thomson Carswell, 2007) 81-82; R Nieland, "Assessing the impact of pattern jury instructions" (1978) 62 *Judicature* 185.

38. D Watt, *Helping Jurors Understand* (Thomson Carswell, 2007) 81; W Schwarzer, "Communicating with juries: problems and remedies" (1981) 69 *California Law Review* 731, 738.

39. M Comiskey, "Initiating dialogue about jury comprehension of legal concepts: can the 'stagnant pool' be revitalized?" (2010) 35 *Queen's Law Journal* 625, 637-639.

error. And, as mentioned, their inherent generality may detract from their comprehensibility.[40]

Option 3: Strengthen the existing framework

2.22 Under the third option, the common law would continue to provide the basic framework for determining, on a case-by-case basis, whether a direction was needed and the requisite elements of that direction. Rather than responding to the shortcomings of the existing framework by codification, or by the introduction of mandatory model directions, the third option for reform aims to strengthen the existing framework by building on it in three ways, namely by:

- refining and encouraging greater reliance on the suggested optional directions that are contained in the Bench Book and that are developed by the Judicial Commission of NSW Criminal Trial Courts Bench Book Committee ("Bench Book Committee") in response to appellate decisions or legislative change;
- refining the existing system for criminal trial management to help jurors focus on and respond to the real issues for determination, by:
  - encouraging greater pre-trial management;
  - enhancing the participation of the jury in the trial process in particular by informing them, so far as is possible, of the issues and the law that they will be expected to apply to the case;
  - increasing the use of aids aimed at enhancing their understanding and application of the evidence and of the directions that they are given; and
  - removing any existing impediments to the provision of aids and other forms of assistance; and
- providing greater direction in relation to the process by which juries reason their decision through the use of special verdicts or question trails.

2.23 As the Bench Book makes clear, the use of the suggested directions is optional in that judges can frame their own directions, and will not fall into error of law for the simple reason that they have not used or have modified the suggested direction.[41]

2.24 Many other jurisdictions similarly favour the use of optional suggested directions, such as Queensland, New Zealand, Great Britain, Northern Ireland and Scotland.[42] In these jurisdictions, committees similar to the Judicial Commission of NSW,

40. It is noted that the experiences in American courts may provide little in the way of guidance for NSW jury trials, since it is not the practice in those courts for the summing up to deal with the facts of the case.
41. *Ith v R* [2012] NSWCCA 70 [48].
42. See Queensland, *Supreme and District Courts Benchbook*; Judicial College of Victoria, *Victorian Criminal Charge Book* (2010); England and Wales, Judicial Studies Board, Crown *Court Bench Book: Directing the Jury* (2010); New Zealand, Institute of Judicial Studies, *Criminal Jury Trials Bench Book*; Judicial Studies Board for Northern Ireland, *Crown Court Bench Book and Specimen Directions* (3rd ed, 2010); Scotland, Judicial Studies Committee, *Jury Manual*.

mostly comprising judicial officers, are charged with the responsibility of drafting and updating the directions.[43]

2.25 The principal advantage of the existing common law framework is its flexibility to meet the demands of the individual case and to respond to new, unforeseen issues that may arise in future cases. The use of a system of suggested directions that can be updated promptly, without the need for legislation, can assist judges to keep pace with appellate decisions and legislative changes in the criminal laws. In turn this provides a means of ensuring greater consistency and accuracy in the provision and content of directions without detracting from the flexibility that is needed for adjusting the directions to the individual case.

2.26 Of course, the utility of optional directions in this respect does depend on the extent to which they are used. In the Australian Institute of Judicial Administration (AIJA) survey of Australian and New Zealand judges, undertaken between August 2004 and January 2005, just over a quarter of the NSW judges who took part in the survey reported that they neither adopted the directions contained in the Bench Book, nor tailored these directions to the individual case.[44]

2.27 The researchers responsible for the AIJA survey also noted variability across Australian and New Zealand judges in their attitudes towards the usefulness of bench book directions. Some followed them closely while others found them to have significant deficiencies. They reported that reliance on bench book directions was more common among recently-appointed judges, with more senior judges preferring to rely on their own precedents.[45] The number of new judicial appointments since the AIJA survey in 2004-2005, and the greater prominence given to the Bench Book in recent years, as well as its accessibility to the legal profession, would almost certainly lead to a different result if the survey were repeated.

2.28 A number of reviews have recommended strengthening the existing common law framework by refinement of bench books and by procedural innovations that depart from the traditional concept of a wholly oral trial in which the jurors are largely passive participants.

2.29 The New Zealand Law Commission and the Canadian Law Reform Commission have both favoured the use of optional suggested directions[46] enhanced by greater reliance on written and visual aids.[47]

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43. For example, the Canadian Judicial Council, National Committee on Jury Instructions; the Judicial Studies Board of England and Wales; the Judicial Studies Board of Northern Ireland; New Zealand, Institute of Judicial Studies. The development of a set of model jury instructions for Northern Ireland was recommended in 2007: Ireland, Balance in the Criminal Law Review Group, *Final Report* (2007) 234-235, although implementation appears to be awaiting the establishment of a Judicial Council.

44. 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.

45. 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) 28-29.

46. New Zealand, Law Commission, *Juries in Criminal Trials,* Report 69 (2001) rec A44; Canada, Law Reform Commission, *The Jury,* Report 16 (1982) 84-85.

47. New Zealand, Law Commission, *Juries in Criminal Trials,* Report 69 (2001) 121, 136-137, rec A45, A50.

2.30 England and Wales follow a similar approach. The current edition of the *Crown Court Bench Book*[48] constitutes a significant advance from the specimen directions that the Judicial Studies Board published in the 1970s. It gives an overview of the circumstances that are likely to require particular directions and identifies the salient features that should be contained in those directions. This is supplemented by a large number of illustrations of the kind of directions that might be required depending on the facts of the case. As the forward makes clear, the objective has been to move away from the perceived rigidity of specimen directions towards a fresh emphasis on the responsibility of individual judges to draft directions that are appropriate to the individual case.

2.31 As noted earlier, the QLRC did not support the introduction of a statutory scheme for jury directions.[49] Rather, it saw the Queensland Benchbook as a key strength of the criminal justice system of that State and considered that it should continue to be refined and relied upon by judges and practitioners.[50] It considered that such an approach preserved the flexibility of directions.

2.32 The QLRC also made some recommendations directed at the revision of portions of the Benchbook, for example, in relation to questions from jurors,[51] directions about unreliable evidence,[52] the standard of proof,[53] and the Black direction,[54] and in relation to the approach that might be taken in drafting "model directions" generally.

2.33 Procedural and legislative changes were also proposed in relation to:

- pre-trial disclosure;[55]
- informing the jury of matters not in dispute and of the issues in the trial;[56]
- the use of integrated jury directions;[57]
- the provision of written and other assistance to the jury including copies of exhibits and transcripts of the evidence, addresses and directions; schedules, chronologies, charts, diagram, summaries and other explanatory materials; as well as decision trees, flow charts or check lists of questions for consideration by the jury to be accompanied as necessary by comment or instruction as to their use;[58]

48. England and Wales, Judicial Studies Board, *Crown Court Bench Book: Directing the Jury* (2010); as updated by England and Wales, Judicial College, *Crown Court Bench Book: Directing the Jury* (1st supplement, 2011) and the S Tonking and J Wait, *Crown Court Bench Book Companion* (2012).
49. See para [2.12].
50. Queensland Law Reform Commission, *A Review of Jury Directions,* Report 66 (2009) [7.138], rec 7-2.
51. Queensland Law Reform Commission, *A Review of Jury Directions,* Report 66 (2009) rec 10-2.
52. QLRC, *A Review of Jury Directions,* Report 66 (2009) rec 16-2, 16-3.
53. QLRC, *A Review of Jury Directions,* Report 66 (2009) rec 17-2.
54. QLRC, *A Review of Jury Directions,* Report 66 (2009) rec 17-5.
55. QLRC, *A Review of Jury Directions,* Report 66 (2009) rec 8-1–8-3.
56. QLRC, *A Review of Jury Directions,* Report 66 (2009) rec 8-3, 9-1–9-3.
57. QLRC, *A Review of Jury Directions,* Report 66 (2009) rec 9-4–9-6, 17-3.
58. QLRC, *A Review of Jury Directions,* Report 66 (2009) rec 10-1(1) and (2).

- the provision to the jury at the start of the trial of written material in relation to the burden and standard of proof, the role of judge and jury, the elements of the offence(s) charged and of any defence(s) identified by the defendant, and a statement of any admissions or agreed facts;[59]

- amendment of:

  - the *Evidence Act 1977* (Qld) in relation to propensity evidence (or review of the law in this respect), post incident conduct, and delay in prosecution;[60] and

  - the *Criminal Code* (Qld) in relation to unreliable evidence so as to preclude the use of expressions such as "scrutinise with great care", "dangerous to convict", or "unsafe to convict".[61]

The Commission's conclusion

2.34 We are not convinced that there is a good case for the adoption of a single, comprehensive statutory scheme in place of the existing framework for jury directions. In particular, we do not think that such an approach would, in practice, be any simpler in its application or result in worthwhile improvement in trial practice. On the contrary, there is the risk that this area of the law, which has developed over many years and is generally familiar to judges and counsel, could become unsettled, leading to increased complexity and uncertainty arising out of the necessity for courts to interpret and apply new legislation.

2.35 On a more fundamental level, there is an inherent potential for inflexibility in the introduction of a statutory scheme or codification that seeks to anticipate the issues on which a jury will need instruction. It is our view that the adoption of such a scheme could pose a risk to the fairness of the trial process if it detracts in any way from the ability of the trial judge to assess the needs of the particular case and to tailor the directions to the jury to accommodate those needs. A trial judge is in the best position to understand the dynamics of any particular trial and to devise directions that meet the demands of that trial.

2.36 Similarly, we do not see any real advantage in implementing a system of formally authorised or mandated model directions. In theory, such a system could increase consistency and accuracy, and consequently reduce the risk of appealable error. However, in reality, there remains a risk that judges would err when making the threshold determination of whether or not to provide a direction. Judges might also err on the side of caution by providing more directions than are necessary. Additionally, as with codification, a system of mandatory or authorised model directions has an inherent degree of inflexibility that could potentially compromise the fairness of the trial process.

2.37 Several submissions to CP 4 opposed codification and/or mandatory model directions, primarily on the basis that they would prove too inflexible.[62]

59. QLRC, *A Review of Jury Directions,* Report 66 (2009) rec 10-1(3).
60. QLRC, *A Review of Jury Directions,* Report 66 (2009) rec 13-1, 13-2, 14-1, 15-1.
61. QLRC, *A Review of Jury Directions,* Report 66 (2009) rec 16-1.

2.38 The main concerns to be addressed are to ensure that:

- jury directions and the trial process provide appropriate help to jurors to follow the evidence, to understand the issues, and to apply the directions to the evidence and issues; and
- jury directions and the trial process do not add unnecessarily to the complexity and length of the trial.

2.39 Our conclusion, which accords with the approach favoured by the QLRC, is that the best course is to retain the existing approach that encourages the use of suggested directions contained in the Bench Book, as developed by the Bench Book Committee. This approach will preserve for judges the discretion to tailor their directions to the real issues in the individual case[63] without the shackles of a codified or mandatory set of statutory directions. We also propose procedures to strengthen the existing system of suggested directions by refinement and, where appropriate, simplification. In particular greater attention should be given to ensuring that plain English principles are taken into account in framing suggested directions and to adopting strategies to test their comprehensibility.[64]

2.40 Additionally we are of the view that there should be an increased use of aids aimed at enhancing jurors' comprehension and resolution of the issues that arise in the individual case. Jurors should also be encouraged to participate more directly in the trial process, amongst other things, through their early exposure to the issues and applicable law, and the provision of written assistance as well as access to the transcript, chronologies and summaries.

2.41 This approach does not foreclose the possibility of the parliament, in appropriate cases, enacting legislation that requires the giving of specific directions or precludes their use, or defines the content of what may permissibly be said. Instances of this already exist, for example in the *Evidence Act 1995* (NSW).[65]

2.42 We deal with each aspect of this approach in the chapters that follow.

62. NSW Bar Association, *Submission JU1* [1.2]; Law Society of NSW, *Submission JU3* [1.2]; Legal Aid NSW, *Submission JU4*, 2; NSW, Office of the Director of Public Prosecutions, *Submission JU9* [3.2].
63. *Pollock v The Queen* [2010] HCA 35; 242 CLR 233 [67].
64. See para [3.17]-[3.29].
65. *Evidence Act 1995* (NSW) s 20, 116, 165, 165A, 165B; and see also *Criminal Procedure Act 1986* (NSW) s 161, 294, 294AA, 306X, 306ZI; and the recommendations that were made in NSW Law Reform Commission, *Family Violence – A National Legal Response*, Report 128 (2010) ch 28 in relation to the statutory requirements that were considered appropriate in sexual assault proceedings.

3. Formulating jury directions

3.1 In this chapter, we review the work that has been undertaken by the Judicial Commission of NSW Criminal Trial Courts Bench Book Committee ("Bench Book Committee"), and make some general recommendations in relation to the Committee's processes. We consider ways in which additional guidance might be given, particularly for newly appointed judges, in delivering a summing up.

Bench book directions in NSW

3.2 The Criminal Trial Courts Bench Book ("Bench Book") was launched by the Judicial Commission of NSW in 1990 and was initially only available to judges. It has been revised and updated since then under the direction of the Bench Book Committee. Committee members are selected from judicial officers of the Supreme and District Courts, who have extensive experience in criminal law and in the conduct of criminal trials. The Committee is convened by the Director, Research and Sentencing, of the Judicial Commission of NSW and it is chaired by a retired Supreme Court Judge. Four of the members of the current Committee are former or serving Supreme Court judges, and one is a District Court judge.[1]

3.3 In 2002, the Bench Book was extensively revised and made available to practitioners and to the general public.[2] The Bench Book Committee continues to update the Bench Book on a regular basis. For this purpose the research section of the Judicial Commission monitors any legislative changes that may have an impact on a suggested direction, and also keeps track of appellate judgments. The Convenor alerts the Committee to the possible need for revision of the Bench Book in light of developments of this kind, and in the case of important changes to the law, arranges for the issue of a special bulletin including a suggested revised direction.[3]

3.4 The Bench Book Committee also conducts regular, more general revisions of the suggested directions. The convenor, a consultant to the Judicial Commission (presently a retired Supreme Court trial judge), or a member of the Committee will draft a new or revised direction. The draft is then circulated to the other members

1. E Schmatt, *Letter to the Executive Director, NSW Law Reform Commission* (20 June 2012) 2.
2. Judicial Commission of NSW, *Criminal Trial Courts Bench Book*, Foreword.
3. E Schmatt, *Letter to the Executive Director, NSW Law Reform Commission* (20 June 2012) 2-3.

for their consideration. It is only when agreement is reached that the draft is approved for inclusion in the Bench Book. We have been informed that in revising and formulating directions, the Committee is conscious of the need to use plain English, and to frame directions in unambiguous and non-technical language that is easily understood and also legally accurate.[4]

3.5 The suggested directions in the Bench Book are supplemented by commentary on the principles of law that underlie them. These are similarly updated to keep pace with legislative change and appellate decisions. Additionally the Bench Book addresses a number of aspects of criminal trial procedure including, for example, the management of a trial involving a self-represented accused, receiving evidence from children or by alternative means, contempt in the face of the court, closing of the court and non-publication orders, jury empanelment and management, privilege against self incrimination, majority verdicts and limits on cross-examination.

3.6 During the period that has elapsed since the release of our consultation paper[5] (CP 4), substantial work has been undertaken in rewriting a number of directions that we identified as problematic, as well as the supporting commentary[6] and a number of special bulletins have been published. We understand that work is progressing in relation to a number of other directions, including those concerning complicity, expert evidence, circumstantial evidence, causation and voluntariness.

3.7 It is noted that the Bench Book does not, at this stage, provide suggested directions in relation to federal offences. Having regard to the complexities that arise under the *Criminal Code* (Cth) we consider that attention should be given, as a matter of priority, to the framing of suggested directions that would initially address the physical and fault elements of federal offences, as well as complicity and common purpose, and that would eventually address the more common offences that are tried by jury. In this regard we note that the Queensland *Supreme and District Courts Benchbook* contains suggested directions in relation to the general elements for offences arising under Commonwealth laws as well as directions for a large number of individual offences.[7]

Recommendation 3.1

The Judicial Commission of NSW Criminal Trial Courts Bench Book Committee should continue to undertake a comprehensive review of the suggested directions contained in the *Criminal Trial Courts Bench Book*. This review should ensure that the directions are comprehensible to a cross-section of the community, while accurately stating the relevant law.

4. E Schmatt, *Letter to the Executive Director, NSW Law Reform Commission* (20 June 2012) 4.
5. NSW Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008).
6. Some of the directions and commentary that have been rewritten include those in relation to accusatory statements in the presence of the accused, directed acquittals, disputed admissions to the police, alternative verdicts and counts, attempts, character, kidnapping, supply prohibited drugs, complaint evidence, consciousness of guilt, and sexual intercourse without consent.
7. Queensland, *Supreme and District Courts Benchbook* [89]-[156].

Recommendation 3.2

The *Criminal Trial Courts Bench Book* should include suggested directions in relation to offences arising under laws of the Commonwealth.

General principles concerning the necessity and content of directions

3.8 There are several well-established general principles at common law that determine the circumstances in which a jury direction is required, as well as its general content. These are that:

- jury directions should aim to inform jurors about as much of the law as they need to know in order to decide the issues of fact in the case and to reach a verdict;
- a judge should direct the jury whenever a direction is necessary to protect the fairness of the trial and promote the public interest in seeing that justice is done;
- jury directions must be legally accurate and state the case for the accused and prosecution in a fair and balanced way;
- jury directions should be tailored to the particular circumstances of the case;[8] and
- the judge's role is to hold the balance between the contending parties and not to enter the fray, for example by advancing an argument in support of the prosecution case that was not put by the prosecution.[9]

3.9 The High Court has explained the fair trial considerations involved in a summing up:

> 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.[10]

8. See, eg, *Alford v Magee* (1952) 85 CLR 437, 466; *Doggett v The Queen* [2001] HCA 46; 208 CLR 343 [2]; *RPS v The Queen* [2000] HCA 3; 199 CLR 620 [41]; *Domican v The Queen* (1992) 173 CLR 555, 561; *R v Chai* [2002] HCA 12; 76 ALJR 628 [18]; *HML v The Queen* [2008] HCA 16; 235 CLR 334 [119]-[122]. As to whether the notion of a fair trial encompasses fairness to trial participants other than the accused, see J Spigelman, "The truth can cost too much: the principle of a fair trial" (2004) 78 *Australian Law Journal* 29, 44.
9. *R v Robinson* [2006] NSWCCA 192; 162 A Crim R 88 [140], [143]-[146].
10. *RPS v The Queen* [2000] HCA 3; 199 CLR 620 [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] HCA 60; 206 CLR 161 [126]-[127] (Kirby J); *Longman v The Queen* (1989) 168 CLR 79, 108 (McHugh J).

Proposals in Queensland and Victoria

3.10 Both the Queensland and Victorian Law Reform Commissions acknowledged the continuing validity of these principles in governing the provision and content of a summing up. Both emphasised that reform to jury directions should be guided by the desire to improve on their clarity and brevity.[11] As noted earlier in this report,[12] the Victorian Law Reform Commission (VLRC) recommended that its statutory scheme for jury directions include a provision setting out a list of general principles to guide their content, as well as a provision that listed a number of matters to be considered when determining whether a direction was needed to ensure a fair trial.[13] The guiding principles that the VLRC recommended for inclusion in its statutory scheme were that all directions should be clear, simple, brief, comprehensible and tailored to the circumstances of the particular case.[14] Although the VLRC's guiding principles made no explicit reference to the requirement for legal accuracy, this would have been assumed. The Queensland Law Reform Commission (QLRC) expressly noted the need for accuracy.[15]

The Commission's view

3.11 We agree that the principles set out above[16] should continue to guide the Bench Book Committee's development of suggested directions, and equally should underpin the delivery of every summing up in a jury trial. They are of sufficient importance that we see merit in their inclusion in the Bench Book and in the basic guide and check list for the summing up discussed in the next section.

Recommendation 3.3

The *Criminal Trial Courts Bench Book* should include an outline of the general principles that would assist judges to identify when a jury direction is required and the content of that direction. The outline should state that:

(a) jury directions should aim to inform jurors about as much of the law as they need to know to decide the issues of fact and reach a verdict;

(b) the judge should direct the jury whenever necessary to protect the fairness of the trial and to promote the public interest in seeing that justice is done;

(c) jury directions must be legally accurate and fairly state the case for the accused and prosecution;

(d) jury directions should be tailored to the particular circumstances of the case;

11. Queensland Law Reform Commission, *A Review of Jury Directions*, Report 66 (2009) [7.140]-[7.172]; Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [4.27]-[4.28].
12. See para [2.5]-[2.6].
13. Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) rec 5-11.
14. Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) 70, rec 5.
15. Queensland Law Reform Commission, *A Review of Jury Directions*, Report 66 (2009) [7.1].
16. See para [3.8].

(e) the judge's role is to hold the balance between the contending parties and not to enter the fray, for example, by advancing an argument in support of the prosecution case that was not put by the prosecution; and

(f) jury directions should be as clear, simple, brief and comprehensible as possible without compromising their legal accuracy.

Basic guide and checklist for jury directions

3.12 The Bench Book currently provides an outline (aide memoire) of the matters to be dealt with in a summing up,[17] as well as suggested opening and final directions.[18] This is supplemented by a relatively brief commentary on some important aspects of a summing up.[19]

3.13 We see merit in the Bench Book Committee providing an expanded version of this material, along the lines of that contained in the *Crown Court Bench Book* for England and Wales,[20] that would encapsulate the essential purposes of directions, and the principles with which they should conform. This might desirably include, for example:

- Advice as to the ways in which the judge can most effectively communicate with the jury, including avoiding double negatives, legalese and unnecessary or convoluted explanations of the law, maintaining eye contact rather than reading from a script, and allowing breaks so as to maintain jury attention.
- Perhaps most importantly, advice as to the ways in which the summary of the evidence (particularly the expert evidence) in the summing up might best be organised and related to the cases for the prosecution and defence.[21]
- Advice that, when responding to a jury question about a direction, the judge should do more than simply repeat the original direction. Where necessary he or she should take the time to identify exactly what is troubling the jury. In particular the judge needs to treat the jury with respect in a way that establishes a rapport from the beginning of the trial and that acknowledges they are likely to have a range of educational qualifications and experiences.

3.14 It would also be useful to include, in relation to the summing up, some practical advice which the judge can give to the jury as to the way in which it might best organise and conduct its deliberations. There is precedent for advice of this kind contained in the *Guide to Jury Deliberations* provided to jurors by Justice Teague in Victoria[22] and in the *Guide to Jury Deliberations* provided to jurors in Queensland.[23]

17. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* [7-000].
18. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* [7-020]-[7-030].
19. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* [7-040].
20. England and Wales, Judicial Studies Board, *Crown Court Bench Book: Directing the Jury* (2010) ch 1, and England and Wales, Judicial College, *Crown Court Bench Book: Directing the Jury* (1st supplement, 2011) 4-6.
21. *R v Sampson* [2007] EWCA Crim 1238 [88].
22. Reproduced in G Eames, "Towards a Better Direction – Better Communication with Jurors" (2003) 24 *Australian Bar Review* 35, Appendix 3. See also S Tonking and J Wait, *Crown Court Bench Book Companion* (2012) 143; E Najdovski-Terziovski, J Clough and J Ogloff, "In your own

3.15 Additionally, and particularly for the assistance of newly appointed judges, it could be helpful to provide a concise and accessible checklist against which a proposed summing up could be compared for completeness.

3.16 We recommend further additions to the Bench Book, in the form of a basic guide and checklist, in Chapter 6.

Recommendation 3.4

The *Criminal Trial Courts Bench Book* should set out a basic guide and checklist for jury directions, including:

(a) general guidance on how directions should be composed and delivered;

(b) general guidance on how a summing up should be constructed and delivered;

(c) general guidance on the use of plain English principles, in particular on forms of legalese and sentence construction that can affect the comprehensibility of directions;

(d) a template for use by the judge in giving practical advice to jurors as to how they might go about their deliberations;

(e) advice on how to respond to jury questions about directions; and

(f) a checklist against which a proposed summing up could be compared for completeness.

Plain English and empirical testing of comprehensibility

3.17 The need for directions to be given in language that is plain and comprehensible, as well as correct, has been generally accepted. If the jury does not understand the directions, there is a risk that they will disregard them or, worse still, they will try to make independent inquiries in relation to the law. As the High Court said in *Ahern v The Queen*:

> Nothing is more likely to discredit and undermine the institution of trial by jury than a requirement that a trial judge explain to the jury matters of law in terms which are unlikely to be understood or retained by them.[24]

3.18 The emphasis in the VLRC's and QLRC's reports on the need for comprehensibility and clarity[25] reflect a general trend in common law jurisdictions to rework jury directions to ensure that they are readily comprehensible and for that reason

words: a survey of judicial attitudes to jury communication" (2008) 18 *Journal of Judicial Administration* 65, 81; American Judicature Society, *Behind Closed Doors: A Guide for Jury Deliberations* (1999).

23. Which can be found at <www.courts.qld.gov.au/__data/assets/pdf_file/0006/93813/sd-brochure-jurors-guide-deliberations.pdf>.

24. *Ahern v The Queen* (1988) 165 CLR 87, 103.

25. Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [4.27] – [4.28] rec 5; Queensland Law Reform Commission, *A Review of Jury Directions*, Report 66 (2009) [5.77] – [5.80].

expressed in plain English.[26] A recent study has noted that the simplification of the legal language in directions can result in improvements in comprehension of between 10% and 30%.[27] The need for plain and comprehensible directions is also recognised by the Canadian Judicial Council, which noted the need for maximum clarity in every direction that is given to a jury, and observed that "complexity in the law, however, cannot justify complexity in a judge's instructions to the jury".[28]

3.19 This trend is an obvious response to the growing concern, referred to in Chapter 1, that jury directions are potentially complex and confusing. At the same time there is a need to recognise that there are some aspects of the law that may be inherently complex and not easily accessible to those without formal legal training. The limits to the capacity of plain English to render these complex concepts readily comprehensible when instructing the jury does need to be taken into account.[29]

3.20 The Bench Book Committee has reviewed a number of directions for their comprehensibility and deleted, or explained, some of the terms traditionally employed. For example, in the context of circumstantial proof it has employed the more readily understandable term "conclusion" in place of "inference" and has abandoned the clumsy expression that was favoured by some judges in the past concerning "hypotheses consistent with the innocence" of the accused, or alternatively "hypotheses inconsistent with guilt".

3.21 A question, however, arises as to whether the Bench Book Committee would be further assisted in its work by engaging in consultation or collaboration with non-legal experts in order to test the comprehensibility of the Bench Book directions, particularly those of a more complex kind. This might involve consultation with experts in plain English drafting, and/or experts in psycholinguistics and psychology. It might also involve empirical testing of the comprehensibility of the directions to members of the community who are not legally trained. Some submissions agreed with this approach.[30]

3.22 An example of empirical testing in this area is a 1979 US study of people called for jury duty in Maryland which first tested the comprehensibility of several orally presented jury directions (drawn from the earlier Californian pattern directions) by requesting the subjects to paraphrase the directions. After linguistic analysis, the study tested the comprehensibility of the rewritten directions which were delivered orally to a new group of potential jurors. The study found:

> (1) that the standard jury instructions used in this study – when viewed as discourse – are not well understood by jurors;

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26. American Bar Association, *Principles for Juries and Jury Trials* (American Jury Project, 2005) Principle 14; G Mize and P Hannaford-Agor, "Jury trial innovations across America: how we are teaching and learning from each other" (2008) 1 *Journal of Court Innovation* 189, 222.
27. D Devine, *Jury Decision Making: The State of the Science* (New York University Press, 2012) 57.
28. Canadian Judicial Council, *Model Jury Instructions in Criminal Matters* (2004) 3.
29. D Watt, *Helping Jurors Understand* (Thomson Carswell, 2007) 69-71; R Assy, "Can the law speak directly to its subjects? The limitation of plain language" (2011) 38 *Journal of Law and Society* 376.
30. NSW Bar Association, *Submission JU1*, 2; NSW Law Society, *Submission JU3*, 2.

(2) that certain linguistic constructions are largely responsible for the incomprehensibility; and

(3) that if the problematic linguistic instructions are appropriately altered, comprehension will dramatically improve, notwithstanding the 'legal complexity' of any given instruction.[31]

3.23 We have been advised that the Judicial Commission is prepared to receive non-legal expert advice in relation to the formulation of suggested directions.[32] However it has not, in the past, followed the process that has been undertaken in some jurisdictions, of engaging experts in plain English drafting or in psycholinguistics, or of subjecting the suggested directions to empirical testing of their comprehensibility.

3.24 Perhaps the largest project that has engaged in work of this kind was undertaken in California. In 1997, the Chief Justice of California appointed a multi-member Task Force on Jury Instructions to write legally accurate jury directions in plain English. The civil subcommittee of the Task Force, operating under the auspices of the Judicial Council of California, completed a new set of 800 directions for civil cases in 2003, using drafting principles including rules of composition developed by linguists who had analysed the comprehensibility of existing instructions.[33] This was followed by the development of a new set of "Criminal Jury Instructions" that was adopted by the Judicial Council of California in 2005 (effective from 1 January 2006) applying a similar approach.[34]

3.25 The need for the use of plain English directions has been recognised by the New Zealand Institute of Judicial Studies which has employed editors with expertise in writing plain English in the preparation of the Criminal Jury Trials Bench Book.[35]

3.26 We recognise that the feasibility of any recommendation for the Bench Book Committee to engage in a process involving consultation with experts in linguistics or psychology, and to conduct empirical testing of suggested directions would depend on it having adequate resources to fund such work. Moreover care would be required to ensure that any reformulation proposed by non-legal consultants conforms with the relevant law.

3.27 However, we consider that there would be merit in the Judicial Commission undertaking a limited trial that could explore whether engaging in such a consultation process, or in empirical testing, might add value to the

31. R P Charrow and V R Charrow, "Making legal language understandable: a psycholinguistic study of jury instructions" (1979) 79 *Columbia Law Review* 1306, 1358. As to the desirability of empirical testing of assumptions concerning jury behaviour and comprehension. see also: B Foley and B Coonan, "The Future of Model Jury Instructions in Ireland" (Irish Criminal Bar Association Seminar, 26 February 2009) 11-12.
32. E Schmatt, *Letter to the Executive Director, NSW Law Reform Commission* (20 June 2012) 4.
33. Judicial Council of California, "New Plain-English Jury Instructions Adopted to Assist Jurors in California Courts", Media Release No 42 (16 July 2003).
34. Judicial Council of California, "New Criminal Jury Instructions Adopted Today to Improve State Jury System", Media Release No 46 (26 August 2005).
35. J McIntosh, New Zealand Institute of Judicial Studies, *Email to NSW Law Reform Commission*, 13 August 2012.

comprehensibility of the suggested directions, without compromising their legal accuracy.[36]

3.28 A summing up to a jury is an exercise of communication, the principal object of which is to explain to the jury the legal principles that they are to apply to the facts and circumstances of the particular case. It is therefore desirable that a judge employs "easily understood, unambiguous and non-technical language".[37]

3.29 In particular it would seem appropriate to identify the relevant research and to receive advice on those linguistic features that tend to improve the comprehensibility of oral communications. These include using the active rather than passive voice, affirmative rather than negative sentences, short sentences, avoiding legal jargon and constructions, uncommon words/expressions, nominalizations, homonyms and synonyms, multiple subordinate clauses and double or triple negatives.[38]

Recommendation 3.5

The Judicial Commission of NSW Criminal Trial Courts Bench Book Committee should undertake empirical testing and consultation with experts in plain English communication, in order to assess the comprehensibility of any proposed directions.

36. For example, employing a study of the kind that was used for the revised Californian directions on circumstantial proof: see P Tiersma and M Curtis, "Testing the comprehensibility of jury directions: California's old and new instructions on circumstantial evidence" (2008) 1 *Journal of Court Innovation* 231.

37. *R v Forbes* [2005] NSWCCA 337; 160 A Crim R 1 [79].

38. NSW Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [3.11]-[3.22]; and see Victorian Law Reform Commission, *Plain English and the Law*, Report 9 (1987).

4. Directing the jury on the criminal standard of proof

4.1 As an exception to our general approach, we make specific recommendations about the jury direction on the criminal standard of proof. We make this exception for the following reasons:

- It is questionable whether juries sufficiently understand the conventional direction.
- Judges are constrained save in limited circumstances, from providing any guidance to its content when jurors ask for further amplification or explanation.
- Courts in other common law jurisdictions have approved alternative forms of direction in relation to the criminal standard of proof.
- Any deficiencies in the conventional direction would require legislative intervention.
- The direction on the criminal standard of proof goes to the very heart of the trial process and it is crucial to the integrity of the jury system that this direction is readily comprehensible and consistently applied.

Current law in Australia

4.2 In Australia, as in other common law countries, historically the standard of proof that must be reached before a person can be convicted of a criminal offence is proof "beyond reasonable doubt". Despite differences in opinion as to how or when it came into being,[1] the phrase "beyond reasonable doubt" is of long-standing authority, and one that has been said to have "come echoing down the centuries in words of deceptive simplicity".[2] It has gained international acceptance as the appropriate standard of proof necessary to prove criminal wrongdoing, as evidenced by its adoption into the Rome Statute of the International Criminal Court.[3]

4.3 Australian trial judges routinely direct juries that the prosecution must prove its case against the accused beyond reasonable doubt. But they do not provide the jury with any further explanation or guidance about the meaning of "beyond reasonable doubt". This is because the High Court has consistently taken the stance that the phrase should not be the subject of further explanation or elaboration. Its view has been that further explanation is unnecessary and dangerous, because it is a phrase that is "in ordinary and common use" and is a "well understood expression";[4] and because it is for the jury to say whether or not a doubt is reasonable,[5] and to set for themselves the parameters of what is reasonable in the context of the case.[6] As the Court expressed it in the case of *Green v The Queen*:

> A reasonable doubt is a doubt which the particular jury entertain in the circumstances. Jurymen themselves set the standard of what is reasonable in the circumstances. It is that ability which is attributed to them which is one of the virtues of our mode of trial: to their task of deciding facts they bring to bear their experience and judgment. They are both unaccustomed and not required to submit their processes of mind to objective analysis [of the kind proposed in the summing up in that case].[7]

4.4 Subsequent cases have taken up the caution against directing jurors to submit their thought processes to objective analysis. The courts have positively disapproved the giving of a direction that would encourage jurors to scrutinise or analyse any doubt that they might have in order to determine whether it is a reasonable doubt.[8]

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1. See, eg, J Whitman, *The Origins of Reasonable Doubt* (Yale University Press, 2008); B J Shapiro, *Beyond Reasonable Doubt and Probable Cause* (University of California Press, 1991) 2-14.
2. *R v Lifchus* [1997] 3 SCR 320, [14].
3. See *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) art 66(3).
4. *Brown v The King* (1913) 17 CLR 570, 584 (Barton ACJ). See also *Dawson v The Queen* (1961) 106 CLR 1, 18 (Dixon CJ).
5. *Thomas v The Queen* (1960) 102 CLR 584, 595 (Kitto J).
6. *La Fontaine v The Queen* (1976) 136 CLR 62, 71-72 (Barwick CJ), and see 80-81 (Gibbs J).
7. *Green v The Queen* (1971) 126 CLR 28, 32-33.
8. *Graham v R* [2000] TASSC 153; 116 A Crim R 108 [63]; *R v Wilson* (1986) 42 SASR 203, 206-207; *R v Pahuja* (1987) 49 SASR 191, 194-195, where King CJ observed that "beyond reasonable doubt" is qualitative rather than quantitative in its meaning; *Krasniqi v The Queen* (1993) 61 SASR 366, 373; *R v Neilan* [1992] 1 VR 57, 71; *R v RWB* [2010] NSWCCA 147; 202 A Crim R 209 [57]. For a review and critique of these cases, see B R Martin, "Beyond reasonable doubt" (2010) 10 *Judicial Review* 83, 93-97.

4.5 While it is said that "beyond reasonable doubt" is a well understood, everyday phrase, the appellate courts have generally made it clear that a trial judge should not actually say so, when giving directions on it, as the phrase needs neither embellishment nor explanation.[9] Similarly, it has been held it would be wrong and a misdirection for a trial judge to explain "reasonable doubt" to the jury in terms of "a comfortable satisfaction" as to the guilt of the accused,[10] or to equate "reasonable doubt" with a "rational doubt", or a "doubt founded on reason",[11] or to indicate that it involves something less than "absolute certainty".[12]

4.6 Despite the general prohibition against any explanation of "beyond reasonable doubt", it has been accepted that there are some instances where it may be permissible for a trial judge to provide a limited explanation of the meaning of the phrase. For example, where the jury asks the judge for an explanation, it has been observed that it would not be wrong for the trial judge to direct the jury that the words "beyond reasonable doubt" are ordinary everyday words and should be understood as such,[13] or that they are words in "the ordinary English usage and mean exactly what they say".[14] It has been held that it would be permissible for the judge to elaborate in answer to a jury question that it was necessary for each individual juror to form his or her own views as to whether the prosecution case had been proved "beyond reasonable doubt".[15]

4.7 If the jury's question indicates that they may be proceeding on some false understanding of the meaning of "beyond reasonable doubt", then it has been held that a direction should be framed to correct that misunderstanding. This has occurred, for example, where the question raised the possibility that jurors were adopting a percentage or mathematical approach,[16] or that they were proceeding by reference to a balance of probabilities standard.[17]

4.8 Similarly, if counsel suggests to the jury that some fantastic or completely unreal possibilities, or some doubt of a "fanciful kind", ought to be regarded as a reasonable doubt, then it may be appropriate for a judge to direct the jury that this is not so,[18] although there is also authority to the contrary, as well as discouragement of such a direction in the absence of a specific concern.[19]

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9. *R v Reeves* (1992) 29 NSWLR 109, 117 (Hunt CJ at CL, Mahoney JA and Badgery Parker J agreeing).
10. *Thomas v The Queen* (1960) 102 CLR 584; *Green v The Queen* (1971) 126 CLR 28.
11. *Green v The Queen* (1971) 126 CLR 28; *La Fontaine v The Queen* (1976) 136 CLR 62; see also *R v Li* [2003] NSWCCA 386; 140 A Crim R 288; *R v Chami* [2004] NSWCCA 36 [226]-229].
12. *R v Solomon* (Unreported, NSW Court of Criminal Appeal, 15 November 1989) [3]-[5].
13. *R v Reeves* (1992) 29 NSWLR 109, 117.
14. *R v GWB* [2000] NSWCCA 410 [44].
15. *R v Southammavong* [2003] NSWCCA 312 [32]-[36].
16. *R v Cavkic* (2005) 12 VR 136.
17. *R v Collins* [1999] QCA 27.
18. *Green v The Queen* (1971) 126 CLR 28; *Keil v The Queen* (1979) 53 ALJR 525; *R v RWB* [2010] NSWCCA 147; 202 A Crim R 209 [49]-[50] and *R v Hettiarachchi* [2009] VSCA 270 [53]; see also *R v Majid* [2009] EWCA Crim 2563 where a direction of this kind was held to be permissible in the context of the "are you sure" direction in use in England and Wales.
19. *R v Wilson* (1986) 42 SASR 203, 207; *Walters v The Queen* [1969] 2 AC 26, 27; *R v Flesch* (1986) 7 NSWLR 554, 558; *R v Hettiarachchi* [2009] VSCA 270 [53].

4.9 The difficulty with the various formulations that have been approved, however, is that they tend to be circular and to add very little, if anything, by way of a response to a question that is obviously occasioning a serious concern for the jury.

The Bench Book direction in NSW

4.10 Consistently with the case law, the NSW *Criminal Trial Courts Bench Book* ("Bench Book") contains a suggested direction on reasonable doubt that does not define the term.[20] It stipulates that the prosecution must prove or establish the guilt of the accused beyond reasonable doubt, and supplements this direction in two ways:

- by stipulating that "beyond reasonable doubt" is a high standard of proof; and
- by observing that it requires jurors to ask themselves whether there is any reasonable possibility that the accused did not do what the prosecution alleged.

It is perhaps questionable whether the second part of this explanation sits comfortably with the decisions of the High Court noted above.[21]

The approach in other jurisdictions

4.11 The appellate courts in other common law countries, that once adhered to the conventional direction, now allow juries to be directed in greater detail on the meaning of "beyond reasonable doubt". The approach that is taken in explaining the phrase differs to some degree across jurisdictions but there are some core similarities. In each case, it involves a direction that would most likely be regarded in Australia as giving rise to a miscarriage of justice.

Canada

4.12 In the past, Canadian courts showed a greater inclination than their Australian counterparts towards the view that juries needed help in understanding the meaning of "beyond reasonable doubt".[22] Then, in 1997, in *R v Lifchus*, the Canadian Supreme Court expressly approved the practice of directing the jury on the meaning of the phrase. The Court stipulated that it would be an error amounting to misdirection for the trial judge not to provide the jury with an explanation, and set out the essential elements of such a direction. In finding that Canadian juries should be directed on the meaning of "reasonable doubt", Justice Cory (with whom the rest of the Court agreed) made the following points:[23]

- The criminal standard of proof is one of the principal safeguards to ensure that no innocent person is wrongly convicted, and it is therefore of fundamental importance that the jury understand the meaning of the term that is used to express that standard of proof.

20. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* [3-600].
21. Para [4.5].
22. See cases cited in *R v Lifchus* [1997] 3 SCR 320 [15]-[22]; and P Healy "Direction and guidance on reasonable doubt in the charge to the jury" (2001) 6 *Canadian Criminal Law Review* 161.
23. *R v Lifchus* [1997] 3 SCR 320 [15]-[22].

- While the phrase, "beyond reasonable doubt", consists of words commonly used in everyday language, those words have a very specific meaning in the legal context which may not correspond precisely with their ordinary meaning. It cannot be assumed that jurors will find the phrase readily comprehensible, as evidenced by the frequency with which they ask the trial judge for further explanation.

4.13 Justice Cory proceeded then to consider the essential elements of a jury direction on "reasonable doubt". He noted that it should be made clear to the jury that the standard of proof, beyond reasonable doubt, is inextricably linked to the presumption of innocence,[24] and that it "will suffice to direct 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". Justice Cory suggested that a jury should be directed that a reasonable doubt cannot be "based on sympathy or prejudice", or be "imaginary or frivolous", and that while the standard requires more than probability of guilt, the prosecution is not required to prove its case to an absolute certainty since such an unrealistically high standard could seldom be achieved.[25]

4.14 Justice Cory developed a possible direction, and summarised what should be included, and what should be avoided by way of an explanation.[26] The direction was to the following effect:

> Instructions pertaining to the requisite standard of proof in a criminal trial of proof beyond a reasonable doubt might be given along these lines:
>
> > The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the Crown has on the evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty.
> >
> > What does the expression "beyond a reasonable doubt" mean?
> >
> > The term "beyond a reasonable doubt" has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning.
> >
> > A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.
> >
> > Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.
> >
> > On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high.

24. *R v Lifchus* [1997] 3 SCR 320 [27].
25. *R v Lifchus* [1997] 3 SCR 320 [30]-[31].
26. *R v Lifchus* [1997] 3 SCR 320 [36]-[37].

> In short if, based upon the evidence before the court, *you are sure that the accused committed the offence* you should convict since this demonstrates that you are satisfied of his guilt beyond a reasonable doubt.[27]

4.15 Subsequent decisions of the appellate courts initially struggled to give effect to Justice Cory's suggested direction. They focused on whether the trial judge in the case under appeal had adequately complied with the *Lifchus* direction, leading to the question whether the guidance given in *Lifchus* required strict or substantial compliance. This preoccupation with the appropriate level of compliance was criticised for leading to a pattern of judicial decision-making which favoured form over substance.[28]

4.16 However, it appears now to be accepted that the test is one of substantial rather than strict compliance with the *Lifchus* direction.[29] The suggested wording in *Lifchus* is not to be seen as a "magic incantation" and trial judges are not obliged to restrict their directions on the standard of proof to that wording.[30] The focus for the appellate court in determining whether there has been a misdirection is whether there is a reasonable likelihood that the jurors were under a misapprehension about the meaning of reasonable doubt.[31]

4.17 Jurors can be correctly directed that they must be "sure" of the guilt of the accused in order to convict, but only if they have first been provided with a proper explanation of the meaning of "beyond reasonable doubt" in accordance with the *Lifchus* principles. The Canadian position in this respect contrasts with the practice in England and Wales, which is outlined below. Canadian jurors can also be directed that proof to an "absolute certainty" would be an impossibly high standard that is not required by law.[32]

4.18 The Canadian courts have disapproved the giving of an explanation of the phrase, "reasonable doubt", as one that is an "ordinary phrase of daily speech", or that the words used "have the same meaning as they have in their everyday or ordinary sense". To the contrary, it was held in *R v Lifchus* that it "has a specific meaning in the legal context", that required explanation.[33]

4.19 The Canadian Judicial Council has formulated a direction of the standard of proof that is based on the *Lifchus* ruling.[34] Central to the direction is the following:

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27. *R v Lifchus* [1997] 3 SCR 320 [39]. Emphasis added.
28. P Healy, "Direction and Guidance on Reasonable Doubt in the Charge to the Jury" (2001) 6 *Canadian Criminal Law Review* 161, 168.
29. *R v Russell* (2000) 38 CR (5th) 1; *R v Beauchamp* (2000) 38 CR (5th) 11 and *R v Avetysan* (2000) 38 CR (5th) 26.
30. *R v Layton* [2008] MBCA 118; 231 Man R (2d) 143 [24].
31. *R v Starr* [2001] MBCA 42, 2 SCR 144 [233]; *R v P(D)* [2002] ABCA 285, 317 AR 375 [7]; *R v Layton* [2008] MBCA 118; 231 Man R (2d) 143 [30].
32. *R v Layton* [2008] MBCA 118; 231 Man R (2d) 143 [27].
33. *R v Lifchus* [1997] 3 SCR 320 [22], [23] and [37]; *R v Avetysan* (2000) 38 CR (5th) 26.
34. Canadian Judicial Council, *Model Jury Instructions*, Preliminary Instructions (2012) [5.1]. Compare these with the model reasonable doubt direction in D Watt, *Ontario Specimen Jury Instructions (Criminal)* (Carswell, 2002) Preliminary 35, reproduced in D Watt, *Helping Jurors Understand* (Thomson Carswell, 2007) 126.

> A reasonable doubt is not an imaginary or frivolous doubt. It is not based on sympathy for or prejudice against anyone involved in the proceedings. Rather, it is based on reason and common sense. It is a doubt that arises logically from the evidence or from an absence of evidence.
>
> It is virtually impossible to prove anything to an absolute certainty, and the Crown is not required to do so. Such a standard would be impossibly high. However, the standard of proof beyond a reasonable doubt falls much closer to absolute certainty than to probable guilt. You must not find [Name of the Accused] guilty unless you are sure s/he is guilty. Even if you believe that [Name of the Accused] is probably or likely guilty, that is not sufficient. In those circumstances, you must give the benefit of the doubt to [Name of the Accused] and find him/her not guilty because the Crown has failed to satisfy you of his/her guilt beyond a reasonable doubt.

England and Wales

4.20 As long ago as the 1950s, English judges directed juries on the meaning of "beyond reasonable doubt" in terms of whether or not the jury was "sure" of the guilt of the accused.[35] This wording is now incorporated into the advice included in the *Crown Court Bench Book*, issued by the Judicial Studies Board, on directing the jury about the requisite standard of proof:

> The prosecution proves its case if the jury, having considered all the evidence relevant to the charge they are considering, are sure that the defendant is guilty. Further explanation is unwise.
>
> If the jury are not sure they must find the defendant not guilty.[36]

4.21 This formulation for directing the jury on the requisite standard of proof contains no reference to the phrase, "beyond reasonable doubt". An alternative formulation, favoured by some judges, is to use the term "sure" in combination with a reference to "beyond reasonable doubt", such as a direction that they must be satisfied beyond a reasonable doubt so that they feel sure of the guilt of the accused.[37] In some cases, judges have sought to make a distinction between feeling "sure" and feeling "certain", on the basis that certainty requires a higher standard of proof.[38] However it has also been held that this distinction should not be drawn because it is likely only to confuse.[39]

4.22 As an alternative to the "being sure" formulation of the criminal standard of proof, some judges in England and Wales and in Scotland have favoured a jury direction that is based on an analogy to an important, everyday decision. Employing this analogy, the notion of a "reasonable doubt" is explained to the jury as a doubt of the quality and kind which, when they are dealing with matters of importance in their own affairs, they allow to influence them one way or another.[40] Courts in other

35. *R v Kritz* [1950] 1 KB 82, 89-90; *R v Summers* (1952) 36 Cr App R 14, 15, and see *R v Bentley* (2001) 1 Cr App R 21.
36. England and Wales, Judicial Studies Board, *Crown Court Bench Book: Directing the Jury* (2010) 16.
37. *Ferguson v The Queen* [1979] 1 WLR 94, 99.
38. See, eg, the direction of the judge in *R v Smith* [2012] EWCA Crim 702 [8].
39. *R v Majid* [2009] EWCA Crim 2563.
40. *Walters v The Queen* [1969] 2 AC 26, 29.

jurisdictions have criticised the "important everyday decision" analogy as potentially reducing the standard of proof to an unacceptably low level.[41] However, the English appellate courts have held that the formulation may be acceptable if the trial judge takes the view, having observed the jurors in the instant case, that it is the most appropriate set of words to use to make those particular jurors understand that they must be *sure* of guilt in order to convict, and if there is a risk that, without the analogy, the jury may mistakenly consider that that their task is more esoteric than applying to the evidence the common sense with which they approach matters of importance to themselves in their ordinary lives.[42]

New Zealand

4.23 The Court of Appeal of New Zealand, in *R v Wanhalla,*[43] confirmed the correctness of the practice of judges directing juries that they must be "*sure*" of the guilt of the accused,[44] but took the view that an expanded explanation of the term should accompany that direction. The majority judgment in *Wanhalla* suggested a formulation for explaining the criminal standard of proof that is based partly on the wording of the Canadian Supreme Court in *Lifchus*. As in Canada, the New Zealand formulation adopts the approach of directing the jury first by express reference to the phrase, satisfaction "beyond reasonable doubt", followed by an explanation of the phrase in terms of whether the jury is "sure" that the accused is guilty, and elaborating on the standard of proof required as something more than "probably or likely guilty", but less than "absolute certainty of guilt". The Canadian formulation, as suggested in *Lifchus*, goes further than the wording suggested by the New Zealand Court of Appeal, in so far as the *Lifchus* formulation elaborates further on the meaning of a "reasonable doubt" as involving a doubt that is not imaginary or frivolous. The crux of the New Zealand formulation, as it appears in the judgment of Justice William Young, President of the Court of Appeal in *R v Wanhalla,* is as follows:

> The Crown must prove that the accused is guilty beyond reasonable doubt. Proof beyond reasonable doubt is a very high standard of proof which the Crown will have met only if, at the end of the case, you are sure that the accused is guilty.
>
> It is not enough for the Crown to persuade you that the accused is probably guilty or even that he or she is very likely guilty. On the other hand, it is virtually impossible to prove anything to an absolute certainty when dealing with the reconstruction of past events and the Crown does not have to do so.
>
> What then is reasonable doubt? A reasonable doubt is an honest and reasonable uncertainty left in your mind about the guilt of the accused after you have given careful and impartial consideration to all of the evidence.

41. See *R v Lifchus* [1997] 3 SCR 320 [23]-[24]; *Bisson v The Queen* [1998] 1 SCR 306 [6]-[8], and *R v Wanhalla* [2006] NZCA 229; [2007] 2 NZLR 573 [26]-[32], [131]-[134], [166]; *R v Adams* (unreported, NZ Court of Appeal, 5 September 2005) [59]-[64]; *R v Jopson* (unreported, NZ Court of Appeal, 25 November 2005) [28].
42. *Walters v The Queen* [1969] 2 AC 26, 30; *R v Ching* (1976) 63 Cr App R 7, 9-10; *R v Gray* (1974) 58 Cr App R 177, 183.
43. *R v Wanhalla* [2006] NZCA 229; [2007] 2 NZLR 573.
44. See also *R v Harmer* [2003] NZCA 126.

> In summary, if, after careful and impartial consideration of the evidence, you are sure that the accused is guilty you must find him or her guilty. On the other hand, if you are not sure that the accused is guilty, you must find him or her not guilty.[45]

4.24 The *Wanhalla* formulation has since been adopted as a specimen direction in the New Zealand Bench Book.[46]

4.25 Since *Wanhalla*, the New Zealand Court of Appeal has held that, while it is not mandatory for judges to follow the *Wanhalla* formulation, its use is to be encouraged in order to promote consistency.[47] If judges devise their own formulations to explain "reasonable doubt", there is a real risk that those formulations will be found to be defective on appeal. The *Wanhalla* formulation represents the Court of Appeal's best attempt at explaining a difficult term to juries, and its use is encouraged. However, failure to use the *Wanhalla* formulation does not of itself give rise to a miscarriage of justice.[48] The essential part of any direction on the standard of proof is that the jury is told that they must be *sure* of the guilt of the accused.[49]

The United States

4.26 Justice Ginsburg of the US Supreme Court has noted that:[50]

> 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.

4.27 The Bench Book prepared by the Federal Judicial Centre for US District Court judges provides a suggested set of preliminary jury directions that includes a direction that "the government must prove the defendant's guilt beyond reasonable doubt", and notes that "further directions will be given on this point later". The content of these further directions seems to have largely been left for development by individual circuits. An example of the direction developed for the Eleventh Circuit is as follows:

> **Definition of "Reasonable Doubt"**
> The Government's burden of proof is heavy, but it doesn't have to prove a Defendant's guilt beyond all *possible* doubt. The Government's proof only has to exclude any "reasonable doubt" concerning the Defendant's guilt.
>
> A "reasonable doubt" is a real doubt, based on your reason and common sense after you've carefully and impartially considered all the evidence in the case.

45. *R v Wanhalla* [2006] NZCA 229; [2007] 2 NZLR 573 [49].
46. See NZ, Institute of Judicial Studies, *Criminal Jury Trials Bench Book* (2006) [6.5].
47. *Peato v The Queen* [2009] NZCA 333 [2010] 1 NZLR 788 [55]; *Pritchard v The Queen* [2010] NZCA 403 [22].
48. *Peato v The Queen* [2009] NZCA 333 [2010] 1 NZLR 788 [52]; *Pritchard v The Queen* [2010] NZCA 403 [22].
49. *R v Brown* [2008] NZCA 156 [50].
50. *Victor v Nebraska* (1994) 511 US1, 26.

> "Proof beyond a reasonable doubt" is proof so convincing that you would be willing to rely and act on it without hesitation in the most important of your own affairs. It you are convinced that the Defendant has been proved guilty beyond a reasonable doubt, say so. It you are not convinced, say so.[51]

4.28 For other circuits the model direction is framed differently although commonly a "firmly convinced" formula has been adopted. For example, the Eighth and Ninth Circuits;[52] although the Eighth circuit instruction goes further by referring to "proof ... that a reasonable person, after careful consideration, would not hesitate to rely and act upon ... in life's most important decisions".[53] The Third Circuit employs a variation on this theme.[54]

4.29 Several variations exist in US State courts determined by case law or statute although an overriding consideration will always be that of due process.[55]

Do Australian juries understand the current direction on "beyond reasonable doubt"?

4.30 Some empirical studies and anecdotal evidence have suggested that the meaning of "beyond reasonable doubt" may not be as readily understood by jurors as has been assumed. As the Chief Justice of NSW has noted, "it is one of the most common sources of juror confusion and complaint".[56] It is not uncommon for juries to seek clarification of the phrase, and for judges and jurors to feel a sense of frustration when the only reply that can be given is that the expression cannot be defined, and that nothing more can be done than repeat the formula without further elaboration.[57] Examples from the case law illustrate this point.

Observations from the case law

4.31 In *R v Southammavong*, the trial judge gave the jury a standard direction in terms that "the words beyond reasonable doubt are ordinary everyday words and that is

51. US, Judicial Council of the Eleventh Circuit, *Eleventh Circuit Pattern Jury Instructions (Criminal Cases)* (2010) 20.
52. Judicial Committee on Model Jury Instructions for the Eighth Circuit, *Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit* (2012) § 3.11; Ninth Circuit Jury Instructions Committee, *Manual of Model Criminal Instructions* (2010) § 3.5.
53. Judicial Committee on Model Jury Instructions for the Eighth Circuit, *Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit* (2012) § 3.11.
54. Committee on Model Criminal Jury Instructions Third Circuit, *Criminal Jury Instructions* (2011) § 3.06.
55. For several of the formulations in use see J W Montgomery, "The Criminal Standard of Proof" (1998) 148 *New Law Journal* 582; for a specific direction that incorporates part of the Federal Judicial Center Model, see the direction approved for use in New Jersey cited in *R v Wanhalla* [2006] NZCA 229; [2007] 2 NZLR 573 [72].
56. T Bathurst, "Community participation in criminal justice" (Opening of Law Term Dinner 2012, Law Society of NSW, 30 January 2012) 17.
57. See B R Martin, "Beyond reasonable doubt" (2010) 10 *Judicial Review* 83, 84, 97, 112-113; and also Justice Vincent's observation in F H R Vincent, *Inquiry into the Circumstances that Led to the Conviction of Mr Farah Abdulkadir Jama*, Report (2010) 40 to the effect that he has always regarded the required response to a sensible jury question concerning the standard of proof as "ridiculous".

how you should understand them".[58] The jury later asked whether the judge could "provide some more clarification around what a reasonable doubt means, ie is it our own individual view, or is there a more independent definition". After discussion with counsel the trial judge simply repeated the original directions.[59]

4.32 On appeal, the Court found no error in the way in which the jury had been directed, or in which the question had been answered. In so far as that jury's question might have related to a wish by the jury to understand whether what was required was their collective or individual belief, the Court emphasised that the relevant test was a subjective one that applied to each juror.[60] In reference to the differing approaches taken in Canada, the United Kingdom and the United States towards directing juries on reasonable doubt, Chief Justice Spigelman noted:[61]

> That the courts of three other nations, while agreeing that some elaboration is permissible, do not agree on how or when or in what terms such elaboration ought occur, may indicate the wisdom of the Australian position. But that is a matter for the High Court.

4.33 There are many examples from the cases of juries requiring some greater explanation of the direction in circumstances where their question indicated that they may be adopting some idiosyncratic or erroneous approach.[62] In these cases, the courts can at least attempt to correct any obvious misunderstanding. More problematic is the case where the court feels constrained in providing assistance where the jury question seeks some elaboration or explanation of what is involved in the phrase as a whole, or in some element or elements of it.

4.34 An example is provided in the Victorian case of *R v Chatzidimitriou*, where the jury asked the trial judge to provide a definition of "doubt", "reasonable doubt" and "beyond reasonable doubt". The judge declined to do so beyond repeating the standard direction, in the course of which he observed that "the law has always taken the view that those are very plain English words and ought to be interpreted by the jury to mean exactly what they say, namely beyond reasonable doubt. It is impossible to put another definition on them".[63] Shortly after retiring, the jury sent out a requ*est for a dictionar*y, which was then provided. It was accepted by the parties that the jury had requested the dictionary in an attempt to obtain further content in relation to the various words. The Court of Appeal dismissed the challenge to the way in which this aspect of the direction had been managed. Justice Cummins accepted that the jury could define for itself the meaning of the expression "beyond reasonable doubt", and for that purpose to have access to a dictionary.[64] Justice Phillips thought that while it had been undesirable for the trial

58. *R v Southammavong* [2003] NSWCCA 312 [8].
59. *R v Southammavong* [2003] NSWCCA 312 [10]-[11].
60. *R v Southammavong* [2003] NSWCCA 312 [28].
61. *R v Southammavong* [2003] NSWCCA 312 [12].
62. For example *Norris v R* [2007] NSWCCA 235, 176 A Crim R 42 where the jury inquired whether it meant that they "needed" to be 100% sure either way; *R v Cavkic* [2005] VSCA 182; 12 VR 136; *R v McNamara* [1998] QCA 405; *R v Collins* [1999] QCA 27; *R v Southammavong* [2003] NSWCCA 312 [32]-[33].
63. *R v Chatzidimitriou* [2000] VSCA 91; 1 VR 493 [34].
64. *R v Chatzidimitriou* [2000] VSCA 91; 1 VR 493 [47]-[48].

judge to have acceded to the jury's request[65] nevertheless concluded that it did not give rise to error.[66]

Observations from empirical studies

4.35 There is empirical evidence that suggests that some jurors and some juries experience difficulty with the meaning of "reasonable doubt", and there is variation in what jurors think it means.

New South Wales

4.36 A NSW Bureau of Crime Statistics and Research study of responses from 1,225 of the 1,344 jurors who sat in 112 Supreme Court and District Court criminal trials in NSW between July 2007 and February 2008 showed (in rounded percentages) that 55% of the jurors who answered the relevant question believed that the phrase "beyond reasonable doubt" meant "sure" that the person is guilty, 23% believed it meant "almost sure" that the person is guilty, 12% believed it meant "very likely" that the person is guilty, and 10% believed it meant "pretty likely" that the person is guilty.[67] It should be noted that the survey had a limitation in requiring the participants to choose between four options, instead of allowing a more open ended answer.

4.37 Another study (which primarily dealt with the effect of prejudicial publicity on juries) found, in interviews with 175 of the jurors involved in 41 criminal trials conducted in NSW between 1997 and 2000, that "at least one or more" members of their jury disagreed about the meaning of "beyond reasonable doubt".[68]

New Zealand

4.38 A survey of 312 jurors that was conducted on behalf of the New Zealand Law Commission in 1998 noted:[69]

> [M]any jurors said that they, and the jury as a whole, were uncertain what "beyond reasonable doubt" meant. They generally thought in terms of percentages, and debated and disagreed with each other about the percentage certainty required for "beyond reasonable doubt", variously interpreting it as 100 per cent, 95 per cent, 75 per cent, and even 50 per cent. Occasionally this produced profound misunderstandings about the standard of proof.

4.39 The New Zealand Court of Appeal has expressed particular concern about the implications of these findings for jury deliberations.[70]

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65. *R v Chatzidimitriou* [2000] VSCA 91; 1 VR 493 [13].
66. *R v Chatzidimitriou* [2000] VSCA 91; 1 VR 493 [16]-[17].
67. 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.
68. 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].
69. W Young, N Cameron and Y Tinsley, *Juries in Criminal Trials Part Two: A Summary of the Research Findings*, Preliminary Paper 37 (New Zealand, Law Commission, 1999) vol 2 [7.16].
70. *R v Wanhalla* [2006] NZCA 229; [2007] 2 NZLR 573 [42].

Tasmania

4.40 In Tasmania, face-to-face interviews were held post-trial with 50 jurors in relation to trials held in the Tasmanian Supreme Court between September 2007 and October 2009 chiefly to determine their attitudes to sentencing outcomes. These jurors were also invited to share their views about their jury experience and to raise any concerns that may have arisen. A number of the responses to this invitation showed that some juries had problems with the concept of proof beyond reasonable doubt, as well as experiencing a degree of frustration in their attempts to apply it to the case in hand.[71]

Queensland

4.41 In Queensland, a questionnaire-based survey of jurors in respect of 14 trials conducted in the Supreme and District Courts over a 9 week period in August-October 2009 elicited 33 responses. A majority of the jurors (66%) reported that they understood the beyond reasonable doubt direction "very much". However, responses to a question about their understanding of the concept, showed that 12 of the jurors (36%) understood the concept as involving no doubt at all, 3 jurors (9%) explained it by reference to a reasonable person test, and another 3 jurors (9%) provided answers that could not be classified. Eleven jurors (33%) described their understanding in terms of a "minor" or "reasonable" doubt.[72] However, the Queensland Law Reform Commission (QLRC) has observed that in the case of some of this final group it was "not so easy" to determine the correctness or otherwise of each person's understanding.[73]

Other jurisdictions

4.42 Studies conducted in several other jurisdictions also suggest jurors may not sufficiently and consistently understand the phrase.[74] To a large extent, these studies have involved mock juries and, as a consequence, they may not adequately replicate the experience of jurors in an actual trial who have had the opportunity of hearing the evidence in full, and of listening to addresses concerning the strength of the prosecution and defence cases. These studies also involve a range of different methodologies, the validity of which we are unable to assess.

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71. J Davis, P Underwood, "The jury experience: insights from the Tasmanian jury study" (2011) 10 *Judicial Review* 333, 345-346.

72. B McKimmie, E Antrobus, "Jurors' Trial Experiences: the influence of directions and other aspects of trials" in Queensland Law Reform Commission, *A Review of Jury Directions*, Report 66 (2009) vol 2, Appendix E, 13-15.

73. Queensland Law Reform Commission, *A Review of Jury Directions*, Report 66 (2009) [17.14].

74. L Kerr and R Atkin, "Guilt beyond reasonable doubt: effects of concept definition and assigned decision rule on the judgments of mock jurors" (1976) 34 *Journal of Personality and Social Psychology* 282; I Horowitz and L Kirkpatrick, "A concept in search of a definition: the effects of reasonable doubt instructions on certainty of guilt standards and jury verdicts" (1996) 20 *Law and Human Behavior* 655; C Koch and D Dennis, "Effects of Reasonable Doubt Definition and Inclusion of a Lesser Charge on Jury Verdicts" (1999) 23 *Law and Human Behavior* 653; M Dhami, "On Measuring Quantitative Interpretations of Reasonable Doubt" (2008) 14 *Journal of Experimental Psychology: Applied* 353; and see also: R Simon and L Mahan, "Quantifying Burdens of Proof" (1970-1971) 5 *Law and Society Review* 319; J W Montgomery, "The Criminal Standard of Proof" (1998) 148 *New Law Journal* 582; London School of Economics Jury Project, "Juries and the Rules of Evidence" [1973] *Criminal Law Review* 208, 219; D Devine, *Jury Decision Making: The State of the Science* (New York University Press, 2012) 87.

4.43 No single conclusion can be drawn with any degree of certainty from these studies, although it is of interest that they have been consistent in their observation that definitional variations of reasonable doubt have affected individual and group verdicts and that the meaning of the concept, particularly when unexplained, has not necessarily been obvious to the study participants.

Judicial commentary

4.44 Some judges have also questioned whether the narrow Australian approach to the direction requiring satisfaction beyond reasonable doubt is now outdated. In *W v The Queen*, Justice Slicer observed:

> the appellate guidelines of the "least said the better" run counter to the sophistication of a modern and educated jury.[75]

4.45 To similar effect are the observations of Chief Justice Martin of the Northern Territory Supreme Court in 2010:

> It is suggested that the concept of "beyond reasonable doubt" is not today a concept regularly used by ordinary people. Nor is it popularly understood, particularly in the way jurors are supposed to understand it in a criminal trial.[76]

4.46 The response commonly given, when jurors do seek guidance on "beyond reasonable doubt", that the "words mean what they say and that they are common words", has provoked the following comment from Justice Eames, writing extra-judicially:

> whether or not the words are common ones, the phrase is not, I suggest if the jurors had understood the phrase then they would not have asked the question.[77]

4.47 In suggesting that a case for change had been made out, Chief Justice Martin has stated:

> It is a change that should be made not only with the well-documented difficulties in mind, but in the context of a recognition that, in the main, jurors are well educated and the patronizing attitudes of the past have no place in formulating explanations of legal and other issues or in delivery of those explanations.[78]

Explaining the required standard

4.48 A number of explanations of beyond reasonable doubt or substitute formulations can be found in the authorities, some of which have been rejected or seriously questioned, and others of which have received approval, or at least a degree of approval.

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75. *W v The Queen* [2006] TASSC 52; 16 Tas R 1 [15].
76. B R Martin, "Beyond Reasonable Doubt" (2010) 10 *Judicial Review* 83, 101.
77. G Eames, "Tackling the complexity of criminal trial directions: what role for appellate courts?" (2007) 29 *Australian Bar Review* 161, 179.
78. B R Martin, "Beyond Reasonable Doubt" (2010) 10 *Judicial Review* 83, 115.

4.49 The QLRC recommended that there should be no attempt to define 'beyond reasonable doubt' in statute or in model directions. However, in order to dispel misconceptions identified by empirical evidence "that jurors must be absolutely sure of guilt before convicting or that the prosecution need only prove that it is more likely than not that the defendant is guilty of the offences charged",[79] it did recommend adding a short statement to the model direction in the Queensland *Supreme and District Courts Benchbook*, based on a suggested formulation by the New Zealand Court of Appeal,[80] to the effect that:

> being satisfied beyond reasonable doubt does not require jurors to have no doubt whatsoever that the defendant is guilty of the offence charged, but that they must be convinced that the defendant is more than just probably or even very probably guilty.[81]

4.50 Chief Justice Martin has proposed a formulation of the direction to the following effect:

> The starting point is the presumption of innocence. Every person who pleads not guilty is presumed to be innocent of the crime(s) charged unless and until the Crown proves guilt to the satisfaction of the jury.
>
> You must treat the accused as innocent unless the Crown has proved his/her guilt. The presumption of innocence means that the accused does not have to establish his/her innocence or prove any explanation or defence. The Crown must do all the proving, including disproving any explanation or defence.
>
> Furthermore, nothing short of proof beyond reasonable doubt will do. The Crown must prove the guilt of the accused beyond reasonable doubt. Proof beyond reasonable doubt is a very high standard of proof which the Crown will have met only if you are sure that the accused is guilty.
>
> It is not enough for the Crown to persuade you that the accused is probably guilty or even that he/she is very likely guilty. On the other hand, when dealing with the reconstruction of past events, it is virtually impossible to prove anything with absolute certainty and the Crown does not have to do so. The Crown does not have to prove guilt beyond all doubt.
>
> What then is reasonable doubt? It is not appropriate to think of it in terms of percentages. A reasonable doubt is an honest and reasonable uncertainty left in your mind about the guilt of the accused. It is for you to decide what is reasonable.
>
> In summary, if, after careful and impartial consideration of the evidence, you are sure that the accused is guilty you must find him/her guilty. On the other hand, if you are not sure that the accused is guilty, you must find him/her not guilty."[82]

4.51 He further suggested:

> As to an explanation should a jury seek clarification, if the current direction remains unchanged, I favour permitting trial judges to provide an explanation which includes the following:

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79. Queensland Law Reform Commission, *A Review of Jury Directions*, Report 66 (2009) [17.46].
80. *R v Wanhalla* [2006] NZCA 229; [2007] 2 NZLR 573 [49].
81. Queensland Law Reform Commission, *A Review of Jury Directions*, Report 66 (2009) [17.49].
82. B R Martin, "Beyond Reasonable Doubt" (2010) 10 *Judicial Review* 83, 116.

- It is for the jury to say whether a doubt is reasonable;
- Absolute certainty is not required. The Crown does not have to prove guilt beyond all doubt;
- Possibilities which are in truth fantastic or completely unreal ought not to be regarded by the jury as affording a basis for reasonable doubt;
- A fanciful doubt is not a reasonable doubt.[83]

4.52 The arguments for and against providing a fuller explanation of the phrase were identified by Justice Hammond in *R v Wanhalla* as follows:

> The arguments for requiring a fuller explanation of the concept are that reasonable doubt in fact lacks a common usage and understanding; that "reasonable doubt" is capable of definition; that the formal requirements of "due process" actively require a reasonable doubt definition; and that social science studies and judicial experience indicates that jurors are sometimes confused by the present concept.
>
> The arguments against a fuller explanation are the flip-side of the same coin: that empirical evidence does not support the provision of a fuller definition of reasonable doubt; that leaving the term largely undefined avoids the pitfalls of attempted definition of a concept that inherently defies precise definition; that a jury verdict harnesses the collective wisdom of the particular community as embodied in the jury to determine for itself the appropriate meaning of the term, through its own deliberations.[84]

4.53 Of the four submissions to the Commission which addressed this issue, three favoured a direction that provided greater explanation of the phrase, "beyond reasonable doubt",[85] and one opposed such an approach.[86]

4.54 The following paragraphs set out some of the expressions that have been considered by way of an explanation or, or substitution for, a test of proof beyond reasonable doubt.

"A moral certainty"

4.55 This is a phrase that emerged early in the evolution of the concept,[87] but that has been rejected in some jurisdictions,[88] on the basis that it might induce jurors to pass a "moral" rather than "legal" judgment on an accused, or on the basis that "moral certainty" is not the same as "evidentiary certainty".

83. B R Martin, "Beyond Reasonable Doubt" (2010) 10 *Judicial Review* 83, 116.
84. *R v Wanhalla* [2006] NZCA 229; [2007] 2 NZLR 573 [156]-[157].
85. NSW Bar Association, *Submission JU1*, 2; Law Society of NSW, *Submission JU3*, 2; NSW, Office of the Director of Public Prosecutions, *Submission JU9* [4.7].
86. Commonwealth Director of Public Prosecutions, *Submission JU10*, 3.
87. *R v Wanhalla* [2006] NZCA 229; [2007] 2 NZLR 573 [143]-[144]; J Whitman, *The Origins of Reasonable Doubt* (Yale University Press, 2008) 204, 205.
88. See, eg, *R v Lifchus* [1997] 3 SCR 320 [25].

4.56 Although the US Supreme Court, in *Victor v Nebraska*, disapproved the use of a direction in these terms, it was held not to have contravened the due process rights of the accused.[89]

"The standard jurors apply to everyday, or alternatively important decisions in their lives"

4.57 The Privy Council has held this formula to be acceptable[90] and it is commonly used in Scotland.[91] It was also approved for some time in the United States[92] although disapproved in Canada,[93] and in New Zealand.[94]

4.58 A relevant criticism is that in practice important personal decisions are made on a balance of considerations, risks and expectations; or are influenced by elements of speculation, hope, prejudice or emotion; and as a consequence are made to a lesser standard than that required by the conventional direction.[95]

4.59 An alternative criticism is that explanation by analogy is not the same as equivalence.[96]

"A quantitative test depending on a percentage degree of satisfaction"

4.60 This is an approach that has been criticised, for example in the United States,[97] and elsewhere,[98] as being inconsistent with the qualitative nature of the expression "beyond reasonable doubt" and as one that is likely to lower the standard of proof required for a verdict of guilty. On the other hand, there is some empirical research which suggests that individuals understand and more consistently apply a definition of the criminal standard of proof that combines a qualitative with a quantitative direction.[99]

89. *Victor v Nebraska* (1994) 511 US 1, 14, 16.
90. *Walters v The Queen* [1969] 2 AC 26, 30 (Lord Gardiner).
91. F R Crowe and E Hawthorn, *Justice of the Peace Court Bench Book* (2007) [6.37].
92. *Holland v United States* (1954) 348 US 121; *United States v Morris* (1981) 647 F.2d 568.
93. *R v Lifchus* [1997] 3 SCR 320; *R v Bisson* [1998] 1 SCR 306 [23]-[24], [37] and *R v Avetysan* (2000) 38 CR (5th) 26.
94. *R v Adams* (Unreported, Court of Appeal of New Zealand, 5 September 2005); *R v Jopson* (Unreported, Court of Appeal of New Zealand, 25 November 2005) and *R v Wanhalla* [2006] NZCA 229; [2007] 2 NZLR 573.
95. J Brunetti, "The Flaw in New York's Reasonable Doubt Instruction" (June 2011) 83 *New York State Bar Journal* 25; *R v Kidd* [2002] QCA 433.
96. *R v Wanhalla* [2006] NZCA 229; [2007] 2 NZLR 573 [166].
97. *McCullough v Nevada* (1983) 657 P 2d 1157, 1159.
98. *R v Wanhalla* [2006] NZCA 229; [2007] 2 NZLR 573 [42]; *R v Cavkic* [2005] VSCA 182; (2005) 12 VR 136 [227]-[228].
99. See M Dhami, "On measuring quantitative interpretations of reasonable doubt" (2008) 14 *Journal of Experimental Psychology: Applied* 353.

"Abiding conviction as to guilt"

4.61 This is a test that was approved in the US Supreme Court[100] and that has been adopted in some US pattern directions.[101]

"Firmly convinced"

4.62 The US Federal Judicial Center has adopted this explanation as suitable for use in Federal Courts.[102]

4.63 It is also incorporated in the Bench Book produced by the Judicial Studies Board for Northern Ireland,[103] along with a direction to the jury that if they think that there is a "real possibility" that the accused is not guilty, then the accused must be given the benefit of the doubt as to whether he or she is guilty.

"Sure"

4.64 As noted above, a direction that uses the term "sure" either as an explanation of "beyond reasonable doubt" or in substitution for it has been used in New Zealand,[104] in England and Wales,[105] and in Canada.[106]

4.65 However, in Queensland it has been held that it is a misdirection to explain satisfaction beyond reasonable doubt as meaning "sure" or "really sure".[107] The QLRC found no compelling case for the adoption of this formulation, noting the risk that it could create further difficulties, for example in inviting some form of pseudo-mathematical inquiry such as "how sure is sure".[108]

The Commission's view

4.66 Proof beyond reasonable doubt does not require absolute certainty.[109] What is required to explain proof beyond reasonable doubt is a direction that ensures that juries apply the correct standard, in circumstances where they have to rely on evidence of past events that they did not personally witness.

4.67 Each juror must individually consider the evidence and submissions before they join in a group verdict. It is of concern that courts in Australia disapprove of the jury

100. *Victor v Nebraska* (1994) 511 US 1, 14-15.
101. J W Montgomery, "The Criminal Standard of Proof" (1998) 148 *New Law Journal* 582, 582.
102. Federal Judicial Center, *Pattern Criminal Jury Instructions* (1987) 28.
103. Judicial Studies Board for Northern Ireland, *Crown Court Bench Book and Specimen Directions* (3rd ed, 2010) 29.
104. *R v Harmer* [2003] NZCA 126; *R v Wanhalla* [2006] NZCA 229; [2007] 2 NZLR 573.
105. *R v Summers* (1952) 36 Cr App R 14, 15; *Ferguson v DPP* [1973] 1 WLR 276; and *R v Bentley* (2001) 1 Cr App R 21.
106. *R v Lifchus* [1997] 3 SCR 320 [39].
107. *R v Punj* [2002] QCA 333; 132 A Crim R 595.
108. Queensland Law Reform Commission, *A Review of Jury Directions*, Report 66 (2009) [17.40]-[17.41].
109. See *R v Bracewell* (1978) 68 Cr App R 44, 49.

being directed to scrutinise any doubt they may have or subject it to analysis to determine whether it is a "reasonable doubt".[110] In our view, it is necessary, if jurors, are to be satisfied beyond reasonable doubt, that they analyse any doubt arising from the evidence and the addresses of counsel, in order to determine whether it is a reasonable doubt that has not been removed by the prosecution.[111] To require jurors to do so does not involve any reversal of the onus of proof.

4.68 Judicial experience and empirical research do not, in our view, support the long-held assumption in Australia that the meaning of "satisfaction beyond reasonable doubt" is sufficiently evident to jurors as not to require any further explanation, or that jurors will be familiar with it as a phrase in common usage.[112] Further, it is unhelpful to respond, when jurors do seek guidance on "beyond reasonable doubt", that the "words mean what they say and that they are common words", or that a reasonable doubt is such a doubt that you, the jury, consider to be reasonable. Such explanations would more helpfully be accompanied by a direction that an "imaginary", or "fanciful", or "frivolous" doubt, or "one based on sympathy or prejudice alone" does not amount to a reasonable doubt.

4.69 On any view, the standard of proof is pivotal to the criminal justice system. It is unsatisfactory if there are significant concerns that jurors do not sufficiently and consistently understand the concept, or if judges are constrained in providing a meaningful explanation of the phrase.

4.70 In our view, the most desirable response to this issue would be for the High Court to review whether, in the light of the body of empirical research and developments in other common law countries, the time has arrived for departure from its long line of decisions in this context. This would achieve cross-jurisdictional consistency, which is a compelling need in this area. However, it might be difficult for the High Court to have the opportunity to reconsider its historical position, since it would depend on a judge directing the jury contrary to settled law, and on an intermediate appellate court upholding that course.

4.71 The alternative is to enact legislation permitting a direction to be given along the lines of that in use in England and Wales, Canada or New Zealand, or in terms similar to those formulated by Chief Justice Martin,[113] or some other suitable formulation. Legislation of this kind would involve a departure from long established authority in Australia. Nevertheless it would accord with the practice that is now universally followed in the comparable common law jurisdictions of England and Wales, Canada and New Zealand.

4.72 On one view, and depending on the form of the direction authorised, such a course may raise the bar for the prosecution (although that does not seem to have been

110. *Graham v The Queen* [2000] TASSC 153; 116 A Crim R 108 [63]; *R v Wilson* (1986) 42 SASR 203, 206-207; *R v Pahuja* (1987) 49 SASR 191, 194-195 where King CJ made the point that the expression beyond reasonable doubt is qualitative rather than quantitative in its meaning; *Krasniqi v The Queen* (1993) 61 SASR 366, 373; and see B R Martin, "Beyond Reasonable Doubt" (2010) 10 *Judicial Review* 83, 93-97 for a helpful review and critique of these cases.
111. B R Martin, "Beyond Reasonable Doubt" (2010) 10 *Judicial Review* 83, 97.
112. See para [4.3]-[4.4].
113. B R Martin, "Beyond Reasonable Doubt" (2010) 10 *Judicial Review* 83, 116, 117.

the case in those jurisdictions that have adopted the "are you sure" test). Care must be taken in this regard.

4.73 We conclude that there is a strong case for providing additional guidance to juries on the standard of proof. We consider that the current law severely limits the directions that can be given to juries and leaves them with insufficient assistance. Ultimately, any initiative in Australia to formulate a direction that defines or explains the criminal standard of proof in terms additional to or instead of "beyond reasonable doubt" requires legislative support in order to avoid a challenge in the High Court. The Commission sees merit in considering alternative formulations that may enhance jurors' understanding of such a fundamental aspect of the criminal process. However, we do not consider it feasible to recommend the introduction of a legislative formulation that would apply in NSW alone. The phrase, "beyond reasonable doubt", is so deeply ingrained in our collective common law tradition that it would be essential for reform to occur at a national level, with the aim of enacting uniform legislation on the point. For this reason, we recommend that this be a matter for consideration by the Standing Council on Law and Justice.

4.74 We are also of the view that a range of formulations should be considered, and subjected to empirical testing to ensure that the chosen formulation is more easily understood, consistently applied and does not result in a change in the standard required.

Recommendation 4.1

(1) The NSW Government should ask the Standing Council on Law and Justice to consider developing uniform legislation on directing juries about the criminal standard of proof in all Australian jurisdictions.

(2) The options that should be considered and tested include directions that:

  (a) the jury must be satisfied beyond reasonable doubt so that it is *sure* that the accused is guilty; or

  (b) without reference to the phrase "beyond reasonable doubt", the prosecution proves its case if the jury is *sure* that the accused is guilty; or

  (c) use one or more of the following explanations of the expression "beyond reasonable doubt":

    (i) proof beyond "reasonable doubt" involves a very high standard of proof that requires the jury to be sure that the accused is guilty;

    (ii) the standard of proof required is higher than a belief that the accused person is probably guilty or even that the accused person is very likely guilty, but does not require absolute certainty;

    (iii) "reasonable doubt" involves a reasonable uncertainty that remains about the accused's guilt, after careful and impartial consideration of all of the evidence;

    (iv) an imaginary, or fanciful or frivolous doubt, or one based on sympathy or prejudice alone does not amount to a reasonable doubt.

Recommendation 4.2

Any recommendation for reformulation of the direction on the criminal standard of proof should be subject to empirical testing, for the purpose of ascertaining whether the proposed formulation:

(a) is more easily understood than the current direction on reasonable doubt;

(b) is consistently applied by a large number of people; and

(c) results in individuals applying a standard of proof that is higher, lower or the same as that applied under the current direction on reasonable doubt.

5. Assisting jurors in areas requiring special knowledge

5.1 In this chapter, we consider some means of assisting juries where the assessment of particular types of evidence requires some form of special knowledge.

5.2 In Chapter 1, we referred to some of the challenges that face a jury sitting in a criminal trial. To a large extent, these challenges derive from the exponential increase in the use of scientific techniques to investigate and prosecute crime. This issue is exemplified in the area of DNA evidence. The advances in DNA profiling and in other ways of gathering and analysing crime scene samples or traces have changed both the way in which crime is investigated and the basic nature of the criminal trial. More than ever before, jurors are expected to make a decision to a large extent assisted by expert or opinion evidence in relation to complex, scientific material, in circumstances where their views may be largely informed, or at least influenced, by media depictions of the objectivity and infallibility of such material.

5.3 In the following paragraphs, we discuss concerns surrounding the use of DNA evidence in criminal trials and its explanation, in terms of juror comprehension. We explore the scope for jury directions to address at least some of these concerns, particularly where there is contested expert evidence. While our discussion is focused on DNA evidence as the most significant area, because of its rapid growth, our discussion has a wider application in generally helping jurors deal with the apparently increasing complexities of scientific and other expert evidence and the presence of differences in expert opinion. Having regard to the importance of ensuring that the issues that arise in these cases can be properly understood and

evaluated, we also consider some possible procedural reforms in relation to the way that the evidence is managed pre-trial and then presented at trial.

5.4 We also consider the use of expert evidence and directions as ways of assisting juries to understand issues relating to the evidence of child sexual abuse victims, including childhood development and the response of children to sexual abuse; to evaluate evidence in the form of still and video footage; and to assess the evidence of Indigenous witnesses that may be affected by cultural and linguistic factors.

DNA evidence

What is DNA profiling?

5.5 DNA is the biological material found in the nuclei of the cells of a person or living thing that contains genetic information about that person or thing. In human beings, the majority of the DNA strand is shared, but the small portion of it derived from the non-coding section of the DNA molecule that varies greatly between individuals has proved valuable in identifying or excluding possible suspects in criminal investigations.[1]

5.6 DNA profiling techniques were first used for criminal investigation in Australia in the mid-1980s.[2] Since then, DNA profiling has become a major investigative tool for law enforcement authorities. It relies on access to a DNA database system that contains a series of indexes of DNA profiles, including a crime scene index, a serious or convicted offenders index, a suspects index and so on.[3] DNA samples are left by perpetrators on or in victims, or at crime scenes, for example, by way of blood, semen, hair follicles, skin, and other bodily fluids and secretions. They can be collected and analysed, using one of a number of techniques that have been developed,[4] in order to obtain a DNA profile that is then placed on a crime scene index. The scientific advances in this field have been considerable both in terms of the nature and size of the samples that can be recovered and subjected to testing, and the techniques and protocols used for analysis and comparison. The recovery

1. J Goodman-Delahunty, P Saunders, M Dhami, Y Tinsley, *Strengthening Forensic Science in Korea* (Charles Sturt University, 2012) 62-63; R Scott, "DNA evidence in jury trials: the 'CSI effect'" (2010) 18 *Journal of Law and Medicine* 239, 254; Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia*, Report 96 (2003) ch 2.
2. M Kirby, "Forensic evidence: instrument of truth or potential for miscarriage?" (2009) 20 *Journal of Law, Information and Science* 1, 5-6; J Goodman-Delahunty and L Hewson, *Improving Jury Understanding the Use of Expert DNA Evidence*, Technical and Background Paper 37 (Australian Institute of Criminology, 2010) 1.
3. R Scott, "DNA evidence in jury trials: the 'CSI effect'" (2010) 18 *Journal of Law and Medicine* 239, 254; J Goodman-Delahunty and L Hewson, *Improving Jury Understanding the Use of Expert DNA Evidence*, Technical and Background Paper 37 (Australian Institute of Criminology, 2010) 1; J Goodman-Delahunty, P Saunders, M Dhami, Y Tinsley, *Strengthening Forensic Science in Korea* (Charles Sturt University, 2012) 63-64.
4. For example, analysts now use "short tandem repeat multiplexing" (STR), which creates DNA profiles by measuring the frequency with which the four DNA base pairs repeat their sequence within the section of DNA being examined. Different individuals have different numbers of repeated sections: see J Goodman-Delahunty, P Saunders, M Dhami, Y Tinsley, *Strengthening Forensic Science in Korea* (Charles Sturt University 2012) 75-76; R Scott, "DNA evidence in jury trials: the 'CSI effect'" (2010) 18 *Journal of Law and Medicine* 239, 254-255.

of mitochondrial DNA (inherited only from the mother) that can be used for a limited profile analysis and low template DNA analysis[5] provide examples of what is an evolving and progressively individualising process.

5.7 DNA testing does not measure and compare all the base pairs that hold together the DNA strands in chromosomes. Rather, it measures and compares the length of certain strings of base pairs (alleles) at known positions called "loci". Analysis currently focuses on 10 to 17 short tandem repeat DNA regions (including one gender marker) and applies the polymerase chain reaction method to samples of these loci to result in a DNA profile. The Profiler Plus method presently used represents a significant advance on the earlier outdated and time consuming technology. Automation has contributed dramatically to the speed of testing and exhibit turnaround, which has in turn encouraged greater use of and reliance on DNA testing of crime scene exhibits. This has been enhanced by the comprehensive regime for the collection of forensic samples, including buccal samples from suspects and people convicted of serious indictable offences, and for the matching of DNA samples, that is permitted pursuant to the *Crimes (Forensic Procedures) Act 2000* (NSW). Moreover the reliability of DNA evidence can potentially be enhanced by examining additional loci and samples,[6] a capacity that will become available in the near future when the Profiler Plus method is replaced by Powerplex 21. It will focus on 21 loci with the consequence that it will be more discriminatory and better able to deal with degraded samples.[7]

5.8 Where there is a match between two samples, it is not possible to say absolutely that they came from the same person, for one of the samples could have come from a different person who happens to have the same string length of base pairs at the loci that were tested.[8] However, a DNA profile allows a conclusion to be reached about the gender of the contributor to the crime scene sample, and the likelihood, rather than the certainty, that the DNA collected from the crime scene came from the suspect. That conclusion involves consideration of two factors: first, analysis of the biological sample; and second, application of mathematical probability to calculate the chance that someone in the population other than the suspect also matches the DNA profile in question.

5.9 Where DNA analysis determines a match, it determines the "random match probability", that is, the probability that someone else in the general target population selected also matches that DNA profile. The probability of finding a match with another randomly selected member of the population indicates the weight that could be given, as part of a circumstantial case, to the coincidence of a match in the DNA profiles, as incriminating the accused.[9] DNA evidence is capable

5. The Court of Appeal for England and Wales usefully discussed this in the course of the review of the science of DNA in *R v Reed* [2009] EWCA Crim 2698 [74]; aspects of that decision are explained in *R v Broughton* [2010] EWCA Crim 549 [31].
6. M Goode, "Some observations on evidence of DNA frequency" (2002) 23 *Adelaide Law Review* 45, 50.
7. Telephone advice given to LRC by Mr Robert Goetz, NSW Forensic and Analytical Science Service.
8. See Judicial College of Victoria, *Victorian Criminal Charge Book* (2010) [4.13.2.1].
9. A Ligertwood, "Can DNA evidence alone convict an accused?" (2011) 33 *Sydney Law Review* 487.

of asserting that the probability of finding a match with another randomly selected member of the population is extremely low. Such evidence, while not conclusive, very powerfully supports the proposition that it was indeed the suspect who deposited the DNA.

Some concerns about the reliability of DNA evidence

5.10 The legislation that exists in NSW concerning the collection and storage of DNA profiles, the *Crimes (Forensic Procedures) Act 2000* (NSW), allows investigators to cross-check and match profiles contained on an index of the DNA database system, both in relation to current investigations and previously unsolved crimes (in the latter case generating "cold hits").[10] DNA profiling can also be used as a means of exculpating people from suspicion of criminal activity, or of overturning wrongful convictions, as has been demonstrated by the various "innocence projects" that exist internationally, and as has been the experience with some Australian cases.[11] In NSW, a DNA Review Panel has been established to assist in that process, which can require retesting and cross-checking of samples in accordance with more advanced techniques.

5.11 Despite its undoubted value, there are also concerns about placing too much reliance on DNA evidence as proof of an accused person's guilt. In cases where a match is found between a crime scene DNA sample and DNA from an accused person, there may be another explanation for that match other than that the crime scene sample came from the accused. For example:[12]

- The defendant's sample may have been innocently left at the crime scene on some other occasion, or it may have been deliberately planted there by someone else, or it may have been subject to secondary transference.[13]
- The crime scene profile came from another person whose DNA profile matches that profile by chance. This possibility is presented to the jury as the random match probability. The jury's ability to reach a verdict taking account of the random match probability of DNA evidence depends on the jury's appreciation of the meaning of this phrase and its application to the particular case; or
- The crime scene profile came from an identical twin of the accused who will have a matching profile to that of his sibling.

5.12 Other concerns can arise in relation to the strength or reliability of the evidence, for example, because:

- The sample is so old or adulterated or degraded or contains a mixture of DNA from several people[14] or a partial profile to the point where there are sufficient

10. The NSW Government commissioned a review of this Act, chaired by the Hon G Barr QC, that has not yet been completed: K Keneally, *Media Release*, 6 April 2010.
11. See discussion of DNA profiling as an exculpatory tool in M Kirby, "Forensic evidence: instrument of truth or potential for miscarriage?" (2009) 20 *Journal of Law, Information and Science* 1, 10-14.
12. See R Scott, "DNA evidence in jury trials: the 'CSI effect'" (2010) 18 *Journal of Law and Medicine* 239, 254.
13. For an example of a case where transference arose as an issue see *Hillier v R* [2008] ACTCA 3; 163 ACTR 60.

complications in the typing as to affect the reliability of the interpretation and resulting statistical analysis.

- The results from the DNA analysis are unreliable because questionable techniques were applied in the collection or recording of the crime scene sample, or of the sample obtained from the accused; or because an error was made in the handling or continuity of the samples while in police custody or in the laboratory, resulting in contamination, or in a break in the chain of evidence; or because of laboratory error in testing the samples; or because of error in the identification of a match;[15] or in the calculation of a random match probability.

5.13 There have been examples of people who have been convicted of a crime based on the admission of incriminating DNA evidence, where it is later found that the integrity of that evidence was compromised in some way,[16] or where it is found that a sample had been obtained unlawfully from a suspect or even lifted and planted at a crime scene.

5.14 Of course concerns about the fallibility of scientific evidence extend beyond DNA evidence. Human error, and problems with the handling or interpretation of evidence, can arise in respect of samples other than DNA samples. Nor is any other scientific evidence able to prove with absolute certainty the identification of the perpetrator of a crime, despite what may be assumptions about the significance of evidence depending, for example, on fingerprint, palmprint or handwriting matches, or techniques involving microscopic ballistics comparison, examination of fibres and paint flecks, chemical analysis, gas chromatography, toxicology and the like or even pseudo scientific techniques such as facial reconstruction or body mapping[17] or photo interpretation.[18] In many instances, forms of analysis, such as blood splatter analysis, or cause, time and manner of death interpretation,[19] will depend on expert opinion evidence, which may differ and, as a result, will call for evaluation by jurors in the light of all of the other evidence in the case. Similarly to DNA evidence, much of scientific evaluation depends on statistical theory and probabilities of a match between crime scene samples and that provided by a suspect.

5.15 The question whether there are circumstances in which a jury could not evaluate those issues, and as a consequence necessitate a direction that it would be unsafe

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14. For a case where this arose as an issue see *R v Meyboom* [2011] ACTSC 13; 208 A Crim R 551.
15. In this regard problems can emerge in interpretation because of matters such as peak height imbalance, stutter, pull up, non-specific artefacts, and stochastic effects: M Goode "Some observations on evidence of DNA frequency" (2002) *Adelaide Law Review* 45, 69.
16. For example, *R v Jama* (unreported, Victoria, Court of Appeal, 7 December 2009) reported in F H R Vincent, *Inquiry into the Circumstances that Led to the Conviction of Mr Farah Abdulkadir Jama*, Report (2010) 45-47 and *R v Hillier* [2007] HCA 13; 228 CLR 618, and commentary in K Rayment, "Faith in DNA: the Vincent report" (2010) 20 *Journal of Law, Information and Science* 214; R Scott, "DNA evidence in jury trials: the 'CSI effect'" (2010) 18 *Journal of Law and Medicine* 239, 250-251; and, for cases where problems have emerged from the use of DNA evidence in Australia, see A Van Daal and A Haesler, "DNA evidence: current issues and challenges" (2011) 23(7) *Judicial Officers' Bulletin* 55.
17. See *R v Tang* [2006] NSWCCA 167; 65 NSWLR 681; *Morgan v R* [2011] NSWCCA 257; *R v Hookway* [1999] EWCA Crim 212; [1999] Crim LR 750.
18. G Porter "Zak Coronial Inquest and the interpretation of photographic evidence" (2012) 24 *Current Issues in Criminal Justice* 39.
19. *Gilham v R* [2012] NSWCCA 131; *Wood v R* [2012] NSWCCA 21. See also *Velevski v The Queen* [2002] HCA 4; 76 ALJR 402.

to convict the accused, was ventilated but not conclusively resolved in *Velevski v The Queen*.[20]

The "CSI effect"

5.16 With the growing reliance on DNA profiling, has come a change in the way criminal charges are prosecuted, as well as the public's expectations about the way in which they ought to be prosecuted. The "CSI effect" is a phrase first coined in the US, in reference to fictional crime investigation television shows, such as the CSI series.[21] The CSI effect describes the influence of these television shows on juror behaviour in so far as they have potentially changed jurors' expectations in deliberating on a verdict according to the presence or absence of scientific evidence. The presentation of such evidence, particularly DNA evidence, by the popular media may have contributed to an often uncritical acceptance by jurors of that evidence as providing objective, absolute answers to the question of the accused's guilt. The CSI effect has at least two aspects. The first is that jurors may be overwhelmed by the presentation of DNA evidence and will tend to convict if the prosecution leads such evidence, even if they do not understand it. The second is that jurors now expect DNA evidence to be led in criminal prosecutions and may refuse to convict where it is absent.[22]

5.17 A number of empirical studies have aimed to observe the responses of jurors and mock jurors to DNA evidence.[23] These studies suggest that jurors and mock jurors tend to have limited knowledge of DNA pre-trial and can have difficulty in understanding DNA profiling evidence and the statistical information on which such evidence relies, and that they can overestimate its weight. Results from a recent Australian study reveal that frequent viewers of CSI-type television shows expect more scientific evidence in criminal trials, and place more trust in that evidence than do infrequent viewers.[24] Some studies suggest that incriminating DNA evidence significantly increases conviction rates particularly among jurors with the least knowledge of DNA evidence.[25] Post-trial interviews with actual jurors in NSW have

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20. *Velevski v The Queen* [2002] HCA 4; 76 ALJR 402.

21. A Van Daal and A Haesler, "DNA evidence: current issues and challenges" (2011) 23(7) *Judicial Officers' Bulletin* 55; A Haesler, "Issues in gathering, interpreting and delivering DNA evidence", (Expert Evidence Conference, Canberra, February 2011) 8-10; J Goodman-Delahunty and L Hewson, *Improving Jury Understanding and Use of Expert DNA Evidence*, Technical and Background Paper 37 (Australian Institute of Criminology, 2010) 5-6.

22. A Haesler, "Issues in gathering, interpreting and delivering DNA evidence" (Expert Evidence Conference, Canberra, February 2011) 9; R Wheate, "The importance of DNA evidence to juries in criminal trials" (2010) 14 *International Journal of Evidence and Proof* 129, 130; N Schweitzer and M Saks, "The CSI effect: popular fiction about forensic science affects public expectations about real forensic science" (2007) 47 *Jurimetrics* 357, 358.

23. J Goodman-Delahunty and L Hewson, *Enhancing Fairness in DNA Jury Trials*, Trends and Issues in Crime and Criminal Justice No 392 (Australian Institute of Criminology, 2010) 4. A number of these studies are noted in *Aytugrul v The Queen* [2010] NSWCCA 272; 205 A Crim R 157 [89]-[95] and [101]-102] (McClellan CJ at CL).

24. J Goodman-Delahunty and L Hewson, *Improving Jury Understanding and Use of Expert DNA Evidence*, Technical and Background Paper 37 (Australian Institute of Criminology, 2010) 30-31.

25. J Goodman-Delahunty and L Hewson, *Enhancing Fairness in DNA Jury Trials*, Trends and Issues in Crime and Criminal Justice No 392 (Australian Institute of Criminology, 2010) 1; and, for a review of the significance of the way in which the manner of presentation of DNA evidence can influence the jury's response to it, see: J Goodman-Delahunty, T Gumbert and S Hale, "The biasing influence of linguistic variations in DNA profiling evidence" (unpublished paper, 2012) 3-

revealed that jurors who admitted having difficulty in understanding DNA expert evidence nevertheless proceeded to convict, with jurors tending to defer to experts because of their field of expertise.[26]

5.18 Some studies have attempted to identify the most effective measures for enhancing juror comprehension of DNA evidence and overcoming the "CSI effect". These studies have found that factors such as jurors' educational levels, the use of visual aids in the presentation of expert evidence, and a pre-trial informative tutorial on DNA profiling, are likely to enhance understanding of the evidence.[27]

The law relating to DNA evidence in criminal trials

5.19 In all Australian States and Territories, evidence of a DNA profile match between an accused person's sample and a crime scene sample is admissible as evidence going to a fact in issue in a case.[28] As with all expert opinion evidence, the admission of DNA evidence in a particular case may depend first on its relevance to a fact in issue, the qualifications of the expert who is called to testify, and its probative weight versus its prejudicial effect.[29] The reliability of the expert evidence, including, for example, the techniques used for analysis, and the competence of the expert witness, may be called into question in cross-examination, as can underlying matters such as exhibit manipulation and continuity, laboratory contamination, primary or secondary transfer, mixed contributors and so on. Although the possibility of error in the chain of evidence or in the laboratory is statistically incalculable,[30] it is possible for these and other issues to be explored on the *voir dire* and taken into account when consideration is given to the possible exclusion of the evidence, for example by reference to the general discretion to exclude evidence or the requirement to exclude prejudicial evidence under s 135 and s 137 of the *Evidence Act 1995* (NSW). Where the evidence is received, the question as to its weight becomes an issue for the jury to consider in the trial.

5.20 It is open to question whether, in NSW, a conviction is valid where it is based solely on DNA evidence. Several decisions of the NSW Court of Criminal Appeal in the 1990s indicated that a DNA profile match could not, in the absence of other evidence, prove beyond reasonable doubt that the accused was responsible for

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5, 11; M Dann, V P Hans, and D H Kaye, "Can jury trial innovations improve juror understanding of DNA evidence" (2007) 90 *Judicature* 152; V P Hans and others, "Science in the jury box: jurors' comprehension of mitochondrial DNA evidence" (2011) 35 *Law and Human Behavior* 60.

26. M Findlay, "Juror comprehension and the hard case: making forensic evidence simpler" (2008) 36 *International Journal of Law, Crime and Justice* 15, 23.

27. L Hewson and J Goodman-Delahunty, "Using multimedia to support jury understanding of DNA profiling evidence" (2008) 40 *Australian Journal of Forensic Sciences* 55. The issue of lawyers failing to understand the evidence is examined in K Cashman and T Hemming "Lawyers and DNA: issues in understanding and challenging the evidence" (2012) 24 *Current Issues in Criminal Justice* 69, 72-73.

28. A Haesler, "Issues in gathering, interpreting and delivering DNA evidence" (Expert Evidence Conference, Canberra, February 2011) 4.

29. *Evidence Act 1995* (NSW) s 79.

30. M Goode "Some observations on evidence of DNA frequency" (2002) 23 *Adelaide Law Review* 45, 56, 67-68; although a laboratory error rate is commonly taken into account in any statistical analysis.

leaving the crime scene stain.[31] Since that time, appellate courts in other Australian States have been prepared to uphold a conviction based solely on DNA evidence.[32] Although realistically there will normally be something else to implicate the accused, the High Court has left the question unresolved.[33]

5.21 In *R v Doheny*[34] the Court of Criminal Appeal in England noted that while the art of DNA analysis may progress to a point where it becomes possible to construct a DNA profile that is so rare that it will prove the guilt of a defendant without any further evidence, so far as it was aware that stage had not yet been reached.

5.22 In the recent case of *Aytugrul v The Queen*,[35] the High Court ruled on the acceptable ways for expert witnesses to express to the jury their conclusions about the probability of a DNA match with a random member of the population. As Justice McClellan had noted in the Court of Criminal Appeal,[36] expert witnesses may present their conclusions as:

(1) a ratio of the number of people in a given population who would be expected to have a particular DNA profile (for example, 1 in 1000);

(2) a ratio of the number of people in a given population who would not be expected to have a particular DNA profile (for example, 999 in 1000);

(3) a percentage of the number of people in a given population who would be expected to have a particular DNA profile (for example, 0.1%);

(4) a percentage of the number of people in a given population who would not be expected to have a particular DNA profile (for example, 99.9%);

(5) the number of people in a given population who would be expected to have a particular DNA profile (for example, 21,000 people out of a population of 21,000,000); and

(6) the number of people in a given population who would not be expected to have a particular DNA profile (for example, 20,979,000 out of a population of 21,000,000).[37]

5.23 In broad terms the possible formulations involve either "random occurrence or frequency or likelihood ratios", or "inclusion or exclusion percentages". Expressed either way they depend on random match probability, that is, the estimated

31. See *R v Green*, (Unreported, NSW Court of Criminal Appeal, 26 March 1993); *R v Pantoja* (1996) 88 A Crim R 554; *R v Milat* (1996) 87 A Crim R 446.
32. See, eg, *R v Rowe* [2004] SASC 427; *R v Gumm* [2007] SASC 311; 108 SASR 77; *R v Karger* [2002] SASC 294; 83 SASR 135; *R v Fletcher* [1998] 2 Qd R 437.
33. *Forbes v The Queen* [2010] HCA Trans 45. See discussion in A Haesler, "Issues in gathering, interpreting and delivering DNA evidence" (Expert Evidence Conference, Canberra, February 2011) 4-6. See also A Ligertwood, "Can DNA evidence alone convict an accused?" (2011) 33 *Sydney Law Review* 487.
34. *R v Doheny* (1997) 1 Cr App R 369, 373.
35. *Aytugrul v The Queen* [2012] HCA 15; 86 ALJR 474.
36. *Aytugrul v The Queen* [2010] NSWCCA 272; 205 A Crim R 157 [56]-[57].
37. *Aytugrul v The Queen* [2010] NSWCCA 272, 205 A Crim R 157 [86]. See also the Judicial College of Victoria, *Victorian Criminal Charge Book* (2010) [4.13.2.1].

frequency at which a particular profile might be expected to occur in a given population.

5.24 It was argued in *Aytugrul v The Queen* that presenting the DNA evidence and leaving it to the jury, in terms of an exclusion percentage (item (4), above), was unfairly prejudicial to the accused, and that the evidence should have been rejected pursuant to s 135 or s 137 of the *Evidence Act 1995* (NSW).[38]

5.25 In substance the asserted objections to presenting the evidence in terms of an exclusion percentage were that:

- It may have had an excessive subliminal effect.
- There was a risk of the jury rounding up an exclusion percentage of 99.9% of the population to 100%.
- There was a risk of the jury falling into the prosecutor's fallacy and looking at the evidence in terms of the odds that the sample belonged to the accused, an approach that depends on an erroneous assumption that the statistics of the match necessarily translate into the equivalent chance of the accused being guilty.[39]
- The jury could have been diverted from applying a deductive approach to the evidence in the trial to a mathematical approach.

5.26 The appeal was dismissed by a majority in the Court of Criminal Appeal[40] and by the High Court.[41]

5.27 Central to the majority judgments was the fact that the evidence before the jury had been expressed accurately both as an exclusion percentage, and as a frequency ratio, that there had been an explanation provided as to their interrelation, and that the two ways of expressing the results involved no more than different ways of expressing the one statistical statement.[42] In each case the Court noted the earlier decisions of the Court of Criminal Appeal in *R v GK*[43] and in *R v Galli*[44] in which consideration had been given to the way in which DNA evidence had been presented, and in particular whether it risked overstating its effect.

5.28 In its decision, the High Court declined to establish, as a general legal proposition, that evidence expressing the results of DNA analysis as an exclusion percentage

38. In the NSW Court of Criminal Appeal, McClellan CJ at CL, in dissent, would have allowed the appeal on this ground. See J Goodman-Delahunty, T Gumbert and S Hale, "The biasing influence of linguistic variations in DNA profiling evidence" (unpublished paper, 2012).
39. M Goode, "Some observations on evidence of DNA frequency" (2002) 23 *Adelaide Law Review* 45, 50. An example of the fallacy can be seen in *R v Keir* [2002] NSWCCA 30; 127 A Crim R 198.
40. *Aytugrul v The Queen* [2010] NSWCCA 272; 205 A Crim R 157 (Simpson and Fullerton JJ, McClelland CJ at CL dissenting).
41. *Aytugrul v The Queen* [2012] HCA 15; 86 ALJR 474.
42. *Aytugrul v The Queen* [2012] HCA 15; 86 ALJR 474 [28].
43. *R v GK* [2001] NSWCCA 413; 53 NSWLR 317.
44. *R v Galli* [2001] NSWCCA 504; 127 A Crim R 493.

would in every case be inadmissible because its probative value would always be outweighed by the danger of unfair prejudice.[45]

5.29 The Court questioned the reliance that had been placed in the dissenting judgment in the Court of Criminal Appeal on research articles and studies concerning juror comprehension or incomprehension of DNA evidence, and in particular on whether some form of expressing DNA statistics will have greater persuasive potential to those lacking scientific qualifications than others. It noted that before judicial notice could be taken of the research of this kind, the provisions of s 144 of the *Evidence Act 1995* (NSW) in relation to the acquisition and use of common knowledge would need to be met, and the opponent given an opportunity to meet the proposition being advanced.[46]

5.30 While declining to formulate a general rule of the kind proposed, the joint judgment in the High Court did accept that there may be cases where evidence of exclusion percentages may warrant a close consideration of the application of the general discretion to exclude evidence or the requirement to exclude prejudicial evidence under s 135 and s 137 of the *Evidence Act 1995* (NSW),[47] and that, had the exclusion percentage been examined in isolation, the appellant's arguments could have had some force.[48]

5.31 Although the case was determined on an admissibility of evidence basis, it does provide some general guidance for the future. It points to the need to ensure that the evidence provides jurors, who are unversed in scientific matters, with so much of the specialised knowledge as they require properly to understand the expert opinion(s) expressed, and what DNA evidence can and cannot demonstrate, and to ensure that this specialised knowledge is applied in relation to the facts of the case.[49]

5.32 In this regard the directions given by the trial judge are likely to be of considerable importance, for example, in explaining that the exclusion percentage was another way of putting the frequency ratio, and that the evidence should not be treated as definitely or necessarily establishing that the crime scene sample came from the appellant, as was the case in *Aytugrul*.

5.33 Consequent upon this decision it appears to have been accepted that, so long as the effect of the evidence is accurately expressed and explained, it can be presented in either formulation, Prudence, however, might dictate the use of both formulations accompanied by a clear direction as to what the evidence can and cannot prove.

5.34 To avoid the risk that the jury may be overwhelmed by exceptionally high probabilities or likelihood ratios, expert witnesses have been permitted in some cases to present the statistical evidence concerning the probability of a match in linguistic or qualitative terms rather than quantitatively, for example by describing

45. *Aytugrul v The Queen* [2012] HCA 15; 86 ALJR 474 [19]-[20].
46. *Aytugrul v The Queen* [2012] HCA 15; 86 ALJR 474 [20]-[22], [66], [73]-[74].
47. *Aytugrul v The Queen* [2012] HCA 15; 86 ALJR 474 [32].
48. *Aytugrul v The Queen* [2012] HCA 15; 86 ALJR 474 [30].
49. *Aytugrul v The Queen* [2012] HCA 15; 86 ALJR 474 [32].

the probability of a match with the accused as "strong", "very strong" or "extremely strong".[50] While the High Court acknowledged the existence of this approach, it did not express a view on whether this would or would not be a preferable way of presenting the evidence to a jury.

Recommendations for reform

5.35 In this section we deal with three approaches that might assist juries in dealing with DNA evidence:

- Encourage the Judicial Commission of NSW Criminal Trial Courts Bench Book Committee ("Bench Book Committee") to develop a suggested direction in relation to DNA evidence that could be modified to suit the individual case.
- Consider some procedural reforms that might give further clarity or direction in relation to the evidence and its use in the trial.
- Build on the recommendations previously discussed in this Report that are concerned with providing the jury with relevant aids or assistance to understand DNA analysis and opinion evidence concerning it.

Suggested directions

5.36 In its 2003 Report, the Australian Law Reform Commission made reference to the risk of the jury being "dazzled" by the statistics presented to them, and of failing to consider the DNA evidence in the context of all of the other evidence admitted in the trial.[51]

5.37 To meet this problem a number of possible options for reform were considered including the development of a suitable jury direction.

5.38 In its report, the ALRC advised:

> The Inquiry now considers that it would be more appropriate for a standard direction to be formulated by the judiciary. Therefore, in each jurisdiction a body representing the judiciary should develop a model direction. The model should provide guidance to trial judges in cases in which DNA evidence has been admitted, but should provide sufficient flexibility to be adapted to the circumstances of a particular case. The judicial body in each jurisdiction would differ. For example, in federal jurisdiction, the National Judicial College of Australia might develop the model direction; in New South Wales, the New South Wales Judicial Commission might do so.[52]

5.39 Some Australian States have developed suggested directions for inclusion in bench books. For example, the Victorian Bench Book contains the following suggested directions:

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50. *Forbes v R* [2009] ACTCA 10; 167 ACTR 1.
51. Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia*, Report 96 (2003) vol 2 [44.46].
52. Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia*, Report 96 (2003) vol 2 [44.66].

> **Even if** you accept (analyst's) evidence, that does **not** necessarily mean that (accused) must be guilty of the offence[s] charged. It is just one piece of circumstantial evidence, and must be considered in the light of the other evidence in the case. You will remember what I have told you about circumstantial evidence.
>
> It is important that you recognise the limitations of DNA evidence.
>
> You will recall that (analyst) gave evidence that s/he tested the accused's DNA sample and the [*describe forensic DNA sample*] at [*state number of loci*] loci, and that the accused's DNA sample corresponded to the [*describe crime scene DNA sample*] at each of those loci.
>
> People sometimes think that such evidence can prove who committed an offence. This is wrong. Evidence that (accused) could not be excluded as the person responsible for [*describe forensic DNA sample*] only proves that (accused) could have been the person who [*describe relevant issue, e.g. "left the hair found on the deceased's clothing"*]
>
> As (analyst) told you, s/he only tested the samples at [*state number of loci*] loci. (analyst) could not rule out the possibility that the two samples would diverge if tested at other loci.
>
> To address the possibility that someone else was responsible for the [*describe the forensic sample*], (analyst) **also** gave evidence about the probability of observing this DNA profile if the DNA came from a random member of the population who is not related to the accused. S/he said that the chance of this happening was [*describe relevant ratio, e.g. "five million to one"*].
>
> This does **not** mean that (accused) is [*state relevant part of ratio, e.g. "five million"*] times more likely to have committed the offence than a person chosen randomly. It simply means that roughly one person out of every [*state relevant part of ratio, e.g. "five million"*] has a DNA profile that matches the DNA in the [*describe the forensic sample*].
>
> This means that, in a country the size of Australia, which has over 22 million people, there are likely to be [*describe likely number of people in the population with a DNA match, e.g., "four or five"*] people who could have been responsible for [*describe the forensic sample*].
>
> You must consider all of the evidence in this case, and decide whether it is possible that someone other than the accused could have been responsible for [*describe the forensic sample*].[53]

5.40 The Queensland Benchbook provides:

> You have heard evidence about the deoxyribonucleic acid (DNA) molecule, a double-stranded linear molecule found in the nuclei of the cells of the body. It is wrapped up and folded and packed into the cell; but if it were unravelled it would look like the rungs of a ladder, with the steps being the bonds between complementary base pairs.
>
> The process of identification by DNA profiling is based on the testing of DNA molecules in bodily tissues and bodily fluids such as blood, saliva, and semen. From measurements taken at selected locations, a DNA profile for a sample of

53. Judicial College of Victoria, *Victorian Criminal Charge Book* (2010) [4.13.2.2]. The Charge Book's preferred the ratio to be expressed "as 1 in 5 million, that is 1 in 5 million persons chosen at random would be expected to have the same profile", in order to avoid the problems associated with the introduction of chances or odds.

> bodily tissue or fluid of unknown origin may be obtained and compared with the DNA profile obtained from a sample of bodily tissue or fluid of known origin. If the profiling tests are done correctly and if the profiles match, it may be concluded that the tissue or fluid of unknown origin *could come* from the same person as the person from whom the tissue or fluid of known origin came.
>
> The matching of the profiles does not establish that the tissue or fluid of unknown origin *is* from the person from whom the tissue or fluid of known origin came. There is the possibility that the tissue or fluid of unknown origin came from someone else.
>
> If the tissue or fluid of known origin came from a person with an identical twin, the tissues or fluid of unknown origin could have come from the twin; and it could have come from someone who is not the identical twin. The evidence is that the defendant does not have an identical twin. But the possibility remains that someone else could have a DNA profile which matches his.
>
> The chances of someone's having a matching profile are calculated from statistical studies. If we leave aside the special case of identical twins who have matching DNA profiles, the chances of someone having a matching profile will, if the statistics are reliable, be very small. In this case, the figure of one in [number] was calculated.
>
> The prosecution case rests on the results of analyses of [*tissue or fluid of unknown origin*] on the [object] found on [date] and a sample of the defendant's [*tissue or fluid*] supplied on [date]. Those analyses were made on [*date*] and, as you have heard, the DNA profiles obtained matched.
>
> The evidence of that matching is the foundation of the prosecution case, but that evidence will be worthless if the matching resulted from contamination of the [*tissue or fluid of unknown origin*] by the defendant's [*tissue or fluid*]. In that event the DNA profile of what appeared to be the [*tissue or fluid of unknown origin*] would have matched the DNA profile of the defendant's [*tissue or fluid*] sample because some of the defendant's [*tissue or fluid*] had been mixed with the [*tissue or fluid of unknown origin*] swamping it, and thus giving a false matching: the DNA profiles would have matched because they both were of DNA molecules in the defendant's [*tissue or fluid*].[54]

5.41 Similar recommendations for the development of specific directions concerning the use and limitations of DNA evidence can be seen in the literature[55] and in jury studies.[56] Guidance has also been given in court decisions. For example, in *R v Doheny*,[57] the English Court of Appeal suggested an direction that would encompass the following:

> In the summing-up careful directions are required in respect of any issues of expert evidence and guidance should be given to avoid confusion caused by areas of expert evidence where no real issue exists.
>
> The judge should explain to the jury the relevance of the random occurrence ratio in arriving at their verdict and draw attention to the extraneous evidence

54. Queensland, *Supreme and District Courts Benchbook*, 53.3-53.4.
55. M Goode "Some observations on evidence of DNA frequency" (2002) 23 *Adelaide Law Review* 45, 54-55, 74-75.
56. D A Nance and S B Morris, "An Empirical Assessment of Presentation Formats for Trace Evidence with a Relatively Large and Quantifiable Random Match Probability" (2002) 42 *Jurimetrics* 403, 444-445.
57. *R v Doheny* [1997] 1 Cr App R 369, 370.

> which provides the context which gives that ratio its significance, and to that which conflicts with the conclusion that the defendant was responsible for the crime stain.
>
> In relation to the random occurrence ratio, a direction along the following lines may be appropriate, tailored to the facts of the particular case: "Members of the jury, if you accept the scientific evidence called by the Crown this indicates that there are probably only four or five white males in the United Kingdom from whom that semen stain could have come. The defendant is one of them. If that is the position, the decision you have to reach, on all the evidence, is whether you are sure that it was the defendant who left that stain or whether it is possible that it was one of that other small group of men who share the same DNA characteristics."[58]

5.42 The *Crown Court Bench Book* for England and Wales contains a sample DNA direction that provides a concise and readily comprehensible explanation of DNA evidence and of the issues that are now likely to arise.[59]

5.43 In NSW, the Bench Book Committee has not yet formulated a suggested direction. Having regard to the fact that some of the uncertainties that existed prior to the decision of the High Court have now been resolved, it is our recommendation that the Committee develop a suggested direction that would note the limitations of DNA evidence, identify the issues that arise in the trial concerning, for example, crime scene or laboratory contamination or innocent explanation, explain the implications of the statistical match probability, and emphasise that the evidence must be considered in the context of all of the other evidence, that is, as part of a circumstantial case.[60]

5.44 It would be important for such a direction to accommodate the circumstances of the case, and to concentrate on those matters that may be in dispute, rather than venturing into a lengthy dissertation on the topic of DNA evidence as a whole. As a result of the significant use of DNA evidence and the increasing acceptance of its potential reliability, we recognise that it should not be necessary for any suggested general directions to involve more than a bare reminder to the jury of what is involved in the generation of DNA evidence, to explain the significance of any random match probability, and to warn that a match does not necessarily prove the guilt of the accused. Specific reference to the prosecutor's fallacy and the CSI effect might be appropriately included. Otherwise specific directions could be framed that would be appropriate for the kinds of issues that now tend to arise relating, for example, to possible problems associated with mixed or partial profiles, transference, innocent explanation, and interpretation of the findings in relation to random match probability.

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58. *R v Doheny* [1997] 1 Cr App R 369 [11]-[13].
59. England and Wales, Judicial Studies Board, *Crown Court Bench Book: Directing the Jury* (2010) [143]-[147], as supplemented by S Tonking and J Wait, *Crown Court Bench Book Companion* (2012) ch 7 [5].
60. For further suggestions on the way in which a direction might be usefully developed see *R v Karger* [2002] SASC 294; 83 SASR 135 [16], [17]; *R v Carroll* [2010] SASC 156 and A Haesler, "Issues in gathering, interpreting and delivering DNA evidence" (Expert Evidence Conference, Canberra, February 2011) 13-14.

Recommendation 5.1

The *Criminal Trial Courts Bench Book* should include a suggested jury direction relating to the use and significance of DNA evidence.

Pre-trial management

5.45 Although peripheral to the terms of reference, we consider it appropriate to make some brief observations as to the way that DNA evidence might be better managed pre-trial. One purpose in doing so is to provide a basis on which to address questions of admissibility, and of issue definition, and, as a consequence, of framing directions in a way that might be best adapted to the case.

5.46 This is an issue that the Court of Appeal for England and Wales addressed in *R v Doheny*[61] and that the Northern Territory Supreme Court addressed in *Latcha v The Queen.*[62]

5.47 The guidelines for circumstances where the prosecution proposes to lead DNA evidence that were suggested in these two decisions were primarily concerned with pre-trial disclosure of the population databases that had been used, and of the method employed in determining random match probabilities.[63] Although there may be less need for such disclosures today, save in the case of databases sought to be used in relation to population sub-groups, the suggested guidelines went further in providing support for the pre-trial determination of any issues concerning the admissibility and use of DNA evidence.[64]

5.48 In its 2003 report, the ALRC confirmed the need, when the prosecution relies on DNA evidence, for the defence pre-trial to have notice of and access to all genetic material collected from a crime scene, to have access to retesting and independent expert advice, and to be in a position to evaluate the probative value of the evidence and to cross examine the prosecution's expert witnesses effectively.[65] The literature additionally supports the desirability of developing procedural rules, particularly pre-trial procedural rules dealing with the disclosure and presentation of such evidence.[66]

5.49 Provisions do exist in NSW for prosecution and defence disclosure.[67] Directions can also be given for case management that include the ordering of pre-trial hearings, pre-trial conferences and further pre-trial disclosure.[68] There is also a Supreme

61. *R v Doheny* [1997] 1 Cr App R 369.
62. *Latcha v The Queen* (1998) 104 A Crim R 390.
63. *Latcha v The Queen* (1998) 104 A Crim R 390, 396-397; *R v Doheny* [1997] 1 Cr App R 369, 374-375.
64. *Latcha v The Queen* (1998) 104 A Crim R 390, 397 item (8); *R v Doheny* [1997] 1 Cr App R 369, 374.
65. Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia*, Report 96 (2003) vol 2 [44.86]-[44.88].
66. M Goode "Some observations on evidence of DNA frequency" (2002) 23 *Adelaide Law Review* 45, 75.
67. *Criminal Procedure Act 1986* (NSW) s 137, 138, 143.
68. *Criminal Procedure Act 1986* (NSW) s 134, 139-141.

Court Practice Note in relation to these matters.[69] These provisions could be engaged to achieve the kinds of recommendations made in *R v Doheny*[70] and *Latcha v The Queen*,[71] and also in *R v Reed* which supported the resolution of any disputes in relation to DNA evidence at a pre-trial hearing and emphasised the importance of pre-trial management.[72]

5.50 However, it is our understanding that although there is strict compliance with prosecution disclosure, there is limited resort to the other pre-trial management provisions, save in the more complex cases.[73] The extent to which they are used can depend on the practice or preference of individual judges as to whether they engage in pre-trial management.

5.51 In these circumstances we consider that it would be desirable for the courts to develop a specific practice note in relation to DNA evidence that would incorporate the essential features outlined in the *Doheny*, *Latcha* and *Reed* decisions. We defer to the authority of the courts to develop their own practice notes and will not attempt that exercise ourselves. However, we do recommend that any such practice note also make provision for a requirement that the defence notify the prosecution of any challenge it intends to make to the admission or weight of the DNA evidence, and that it serve upon the prosecution any experts' reports on which it intends to rely. Section 141 of the *Criminal Procedure Act 1986* (NSW), which allows the court, on its own initiative, to order pre-trial disclosure in particular cases, would seem to provide legislative support for the introduction of a practice note of this kind.

5.52 We would also think it important that, pursuant to any such practice note, any potential challenges to the admissibility of DNA evidence be resolved pre-trial. If the evidence is held to be admissible then the pre-trial hearing should also be an occasion when the DNA issues that need to be left to the jury can be identified with precision, so as to facilitate the presentation of the evidence, and ultimately the framing of a jury direction.

Recommendation 5.2

The courts should introduce a practice note in relation to the use of DNA evidence in criminal trials that would:

(a) mandate prosecution and defence disclosure of the intention to lead such evidence, to challenge its admissibility or to dispute its accuracy; and

(b) encourage pre-trial determination of the admissibility of such evidence and identification of any issues that might need to be left to a jury in relation to that evidence.

69. Supreme Court of NSW, *Practice Note* SC CL 2 (2010).

70. *R v Doheny* [1997] 1 Cr App R 369.

71. *Latcha v The Queen* (1998) 104 A Crim R 390.

72. *R v Reed* [2009] EWCA Crim 2698 [131]-[132].

73. See, eg, the observations in NSW, Attorney General's Department, Criminal Law Review Division, *Report of the Trial Efficiency Working Group* (2009) 75-77.

Leading DNA evidence

5.53 Assuming that DNA evidence is admitted, then it is important to appreciate that it may be virtually useless or incomprehensible to a jury unless interpreted and explained. It is similarly important to recognise that the task of the expert is not to express a personal opinion on the conclusion to be drawn from the evidence in terms of the guilt of the accused, but to provide an interpretation of the results of the tests in a way that non-scientific members of a jury can comprehend.[74] The evidentiary propositions formulated by the Court of Appeal for England and Wales in *R v Doheny* are to similar effect, although with some additional suggestions:

> 1. The scientist should adduce the evidence of the DNA comparisons between the crime stain and the defendant's sample together with his calculations of the random occurrence ratio…
>
> 5. In giving evidence the expert will explain to the jury the nature of the matching DNA characteristics between the DNA in the crime stain and the DNA in the defendant's blood sample.
>
> 6. The expert will, on the basis of empirical statistical data, give the jury the random occurrence ratio—the frequency with which the matching DNA characteristics are likely to be found in the population at large.
>
> 7. Provided that the expert has the necessary data, it may then be appropriate for him to indicate how many people with the matching characteristics are likely to be found in the United Kingdom or a more limited relevant sub-group, for instance, the caucasian, sexually active males in the Manchester area.
>
> 8. It is then for the jury to decide, having regard to all the relevant evidence, whether they are sure that it was the defendant who left the crime stain, or whether it is possible that it was left by someone else with the same matching DNA characteristics.
>
> 9. The expert should not be asked his opinion on the likelihood that it was the defendant who left the crime stain, nor when giving evidence should he use terminology which may lead the jury to believe that he is expressing such an opinion.
>
> 10. It is inappropriate for an expert to expound a statistical approach to evaluating the likelihood that the defendant left the crime stain, since unnecessary theory and complexity deflect the jury from their proper task.[75]

5.54 So much of the above is uncontroversial. Of more immediate relevance for this Report is the identification of measures that can be adopted for assisting the jury to understand DNA evidence. Again this has been the topic of studies which have indicated that the understanding of this kind of evidence is likely to be enhanced by the use of visual aids or by exposure to a cognitively-sequenced expert tutorial,

74. *Aytugrul v The Queen* [2010] NSWCCA 272; 205 A Crim R 157 [162]-[166] (Simpson J).

75. *R v Doheny* [1997] 1 Cr App R 369, 369-370; and see also guidelines (9) and (10) proposed in *Latcha v The Queen* (1998) 104 A Crim R 390, 397.

most particularly in the case of those who are less knowledgeable in relation to DNA.[76]

5.55 We understand that there is no consistent practice in NSW concerning the way in which DNA evidence is explained to jurors. In some cases, the explanation is confined to an oral explanation given by an expert called by the prosecution. In other cases it is supported by a power point presentation that was provided by analysts from the Division of Analytical Laboratories (now the Forensic and Analytic Science Service (FASS)).

5.56 We have also sighted a DVD prepared for research purposes[77] that provides a comprehensive and readily understandable explanation of DNA and its analysis.

5.57 We recognise that DNA evidence now has a ready acceptance in the criminal justice system, as a reliable part of a prosecution case, and that many of the earlier scientific and statistical issues have been resolved. The grounds of challenge in any given case are likely to be limited to matters concerning crime scene management, transference, contamination, laboratory error, innocent explanation, mixed profile interpretation, and the appropriateness of statistics founded on databases when issues of non-randomly reproducing sub-population groups are involved.

5.58 Notwithstanding, we remain of the view that a basic and clear explanation of what DNA is, and how it can be the subject of forensic use would assist jurors in dealing with these issues. This will ensure jurors are well-informed and minimise any temptation to seek information on their own about DNA. It is not necessarily the case that all lawyers or judicial officers are well versed in this field.[78] It is as important that those who are engaged in the criminal justice system have the knowledge and skills to understand and test DNA evidence, as it is for jurors to have sufficient information before them to assess the evidence.

5.59 Accordingly we consider it desirable that, following consultations between FASS, the Office of the Director of Public Prosecutions and the Public Defenders Office possibly facilitated by the Judicial Commission, a standard audio-visual presentation (either in the form of a DVD or power point presentation) be developed that can demonstrate in a brief and simple form what DNA comprises, what is involved in DNA collection, analysis and interpretation, and that might note the possibilities for error. Subject to the agreement of the parties in a trial, it could be tendered as part of the evidence of the expert who is called to give evidence of the DNA analysis in the instant case. It could then assist in the exposition of any issues concerning its reliability and weight.

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76. J Goodman-Delahunty and L Hewson, *Improving Jury Understanding and use of Expert DNA Evidence*, Technical and Background Paper 37 (Australian Institute of Criminology, 2010) 27-29; M Dann, V P Hans and D H Kaye, "Can jury trial innovations improve juror understanding of DNA evidence" (2007) 90 *Judicature* 152, 155; V P Hans, and others, "Science in the jury box: jurors' comprehension of mitochondrial DNA evidence" (2011) 35 *Law and Human Behavior* 60, 65-66. The use of jury tutorials in complex trials has produced positive results and attracted supporters, eg: V Black, "An Interview with Judge Pamela Rymer" (2000) 14 *National Judicial College Alumni Magazine* 10; G T Munsterman, P L Hannaford and G M Whitehead (ed), *Jury Trial Innovations* (2nd ed, National Center for State Courts, 2006) § 4.3, § 4.5, § 6.2.

77. L Hewson, *DNA and RMP explained* (DVD, 2008).

78. K Cashman and T Hemming "Lawyers and DNA: issues in understanding and challenging the evidence" (2012) 24 *Current Issues in Criminal Justice* 69, 71-73, 78-80.

5.60 Whether or not this suggestion is accepted, we would encourage the prosecution use of an appropriate visual aid as an introduction to the DNA evidence it calls in a trial. In this respect we recommend that a practice note be drafted to require the prosecution to serve on the defence pre-trial a copy of any such aid that it intends to use, and to require the defence to advise whether it consents or objects to its tender.

5.61 It is noted that in England and Wales laboratory staff and others engaged in the process of analysing DNA evidence are expressly permitted to give hearsay evidence in the form of statements.[79]

Recommendation 5.3

(1) The Forensic and Analytic Science Service, the Office of the Director of Public Prosecutions and the Public Defenders Office should prepare a standard audio-visual presentation that a party can tender in evidence to provide the jury with a basic understanding of DNA evidence so as to place it in a position to assess that evidence and any issue relating to it.

(2) A practice note should require the prosecution to notify the defence that it proposes to use such a presentation and should also require defence notification of any objection to its use in the particular case, with a view to determining the visual aid's admissibility before trial.

Expert evidence and procedural reform

5.62 The broader issues that relate to the admissibility and evaluation of opinion and expert evidence, including the question that arises as to the possibility of introducing a "reliability" requirement as a statutory condition of its admissibility,[80] are beyond our terms of reference. Several recent appeals from high profile trials have largely depended on the way that such evidence was given and managed. For the purpose of this report we confine our consideration to a possible procedural reform that would alter the long standing convention or principle of law that requires the prosecution evidence to be presented in its entirety in its case, and the defence evidence to be called in its case.

5.63 An exception exists in relation to alibi evidence and evidence of substantial impairment pursuant to s 150 and s 151 *Criminal Procedure Act 1986* (NSW). Considerable attention has been given in recent years to strategies for greater management and control of expert evidence, and for more innovative ways of dealing with conflicts between experts in civil trials, including single experts, court-appointed experts, concurrent evidence and so on, some of which we reviewed in our 2005 report on expert witnesses.[81] The regime that now applies in civil trials

79. *Criminal Justice Act 2003* (Eng) s 127.

80. As recommended in England and Wales, Law Commission, *Expert Evidence in Criminal Proceedings*, Report 325 (2011) [9.1], [9.11]-[9.14]; and see G Edmond, "Impartiality, Efficiency or Reliability? A Critical Response to Expert Evidence Law and Procedure in Australia" [2010] *Australian Journal of Forensic Sciences* 1.

81. NSW Law Reform Commission, *Expert Witnesses*, Report 109 (2005).

pursuant to the Uniform Civil Procedure Rules[82] and the associated practice notes[83] represent a substantial departure from past practice.

5.64 We accept that some of these strategies, particularly concurrent evidence, might be inappropriate for criminal trials, without the consent of the defence. This is so despite their regular and beneficial use in civil trials and despite the fact that there is some precedent for the use of concurrent evidence in judge alone trials, in special hearings, and during the testing of the admissibility of expert evidence on the *voir dire*. The inequality of resources and the limited capacity of the defence to access expert opinion, or to submit exhibits to independent testing, does call for caution. Moreover, it has been the experience in civil proceedings that judges have been closely involved in the concurrent evidence approach. This close involvement may need to be modified in a criminal trial, and care taken to avoid the reception into evidence of material of a hearsay nature. This approach and other innovations in relation to civil trials would seem worthy of further cautious exploration, including their use, with consent, in judge alone trials.

5.65 In those cases where the prosecution and the defence each intend to call expert/opinion evidence that is in conflict, we can see a benefit in allowing that evidence to be called in a block, that is, by the prosecution first followed by the defence, so long as the defence consents to that course. There may be situations where there are tactical considerations for the defence not to consent, and it may be that after hearing the evidence of the experts called by the prosecution, the defence would prefer to defer calling its own witnesses, or even to elect not to do so at all.

5.66 If a procedural reform was adopted that would allow the prosecution and defence expert/opinion evidence to be received in a block, then that could occur either after the prosecution has called all of its other factual evidence, or after all of the evidence has been called by each of the parties to the trial. The former would involve a less radical approach, although the latter would accord with the practice commonly followed in civil trials. In some cases the "science" might be best appreciated when all of the factual evidence has been tendered.

5.67 We believe that this approach could more effectively allow the jury to assess the evidence and any issues that arise, compared to the situation where some weeks or even months might pass between the time when the experts called by the prosecution give their evidence, and the defence experts are called. It would be appropriate, in our view, to confer on the trial judge the power to make an order as to when and in what manner the expert evidence was to be received. The precondition for the exercise of that power should be that it is in the interests of justice to make the particular order. We acknowledge that, if the more radical approach was permitted, then the legislation would need to permit an exception from the rule that prevents the prosecution from splitting its case.[84]

5.68 In making a recommendation for reform of this nature we are particularly mindful of the fact that experts giving evidence in a criminal trial in the Supreme Court are

82. *Uniform Civil Procedure Rules 2005* (NSW) Part 3 Div 2.

83. Supreme Court of NSW, *Practice Note*, SC 10, SC 11, SC Eq 5.

84. *R v Chin* (1985) 157 CLR 671.

subject to the Expert Witness Code of Conduct and as a consequence are subject to an overriding duty to assist the court impartially on any matter relevant to the expert witness's area of expertise.[85] Although it appears that experts giving evidence in the District Court do, in practice, acknowledge compliance with the Code, there does not appear to be express requirements to that effect in the District Court's Rules. The Code underlines the need for their evidence to be impartial and based on a proper foundation. In turn, that is only consistent with experts, whether called by the prosecution or defence, giving evidence in a way that is directed to providing the jury with an accurate and comprehensible account of the matter in issue. If some reform along the lines suggested was adopted then it might also be permissible for the evidence in chief of each witness to be called prior to the cross examination.

5.69 We accept this to be a somewhat significant departure from conventional practice. As it arises only peripherally under our terms of reference, and could have an application beyond DNA evidence, for which it might well be suited, our recommendation is limited to encouraging its further consideration by the courts and the profession.

Recommendation 5.4

(1) Consideration should be given to amending the *Criminal Procedure Act 1986* (NSW) and to introducing a practice note to permit expert evidence called by the prosecution and defence to be given in a block, and to permit the trial judge to give directions as to the order in which such witnesses should be cross-examined.

(2) Consideration should be given to amending the *District Court Rules 1973* (NSW) so as expressly to require experts called in criminal trials to be subject to the *Expert Witness Code of Conduct*.

Child sexual abuse – expert evidence and directions

5.70 This section of the Report addresses the perceptions or misconceptions that jurors may bring to a trial in relation to the capacity of children to give reliable evidence, and in relation to the way in which children might behave in response to sexual abuse.

Background – the common law and legislative amendments

5.71 The issues arising need to be understood in the context of the common law's response to certain incorrect assumptions in relation to sexual assault in general and the evidence of child victims of sexual abuse in particular, namely:

- the assumption as to the unreliability of the evidence of children as a class;
- the assumption that victims of sexual assault would normally make a prompt complaint; and

85. *Supreme Court Rules 1970* (NSW) pt 75 r 3J; *Uniform Civil Procedure Rules 2005* (NSW) sch 7 applies to criminal trials.

- the assumption that delay in prosecution would inevitably make it more difficult for the defence to test the prosecution case.

5.72 These assumptions, and the directions that the common law required in response to them, have not gone unchallenged[86] and have become the subject of legislative reform in most Australian jurisdictions.

Unreliability of the evidence of children as a class

5.73 The common law required judges to give warnings to juries about the dangers of convicting an accused person on the uncorroborated evidence of children,[87] sexual assault complainants and accomplices. The rationale for these warnings rested on the assumptions that such witnesses are prone to give false evidence and that the courts had a wider experience than the general public of the reasons why this might be the case.[88]

5.74 This matter has been addressed in the *Evidence Act 1995* (NSW) and the *Criminal Procedure Act 1986* (NSW) so that:

- the general corroboration requirement has been abolished;[89]
- a warning or suggestion must not be given that:
  - children as a class are unreliable witnesses; or
  - the evidence of children as a class is inherently less reliable or credible or requires more careful scrutiny than the evidence of adults; or
  - the evidence of a particular child is unreliable solely on account of the age of the child;[90]
- a general warning must not be given of the danger of convicting on the uncorroborated evidence of a witness who is a child;[91]

5.75 The *Evidence Act 1995* (NSW) does, however, permit the judge, at the request of a party, to

- inform the jury that the evidence of a particular child may be unreliable and the reasons why that might be the case; and
- give a warning as to the need for caution in determining whether to accept the evidence of a particular child or the weight to be given to it,

86. See, eg, *M v The Queen* (1994) 181 CLR 487, 514; *Suresh v The Queen* [1998] HCA 23; 72 ALJR 769 [5]; *R v Markuleski* [2001] NSWCCA 290; 52 NSWLR 82 [244]; and *R v LTP* [2004] NSWCCA 109 [128]; *R v BWT* [2002] NSWCCA 60; 54 NSWLR 241 [13]-[40].
87. *R v Hester* [1913] AC 96; and *Hargan v The King* (1919) 27 CLR 13.
88. *Bromley v The Queen* (1986) 161 CLR 315, 323-324; and *Crampton v The Queen* [2000] HCA 60; 206 CLR 161.
89. *Evidence Act 1995* (NSW) s 164.
90. *Evidence Act 1995* (NSW) s 165A(1)(a)-(c); *Criminal Procedure Act 1986* (NSW) s 294AA.
91. *Evidence Act 1995* (NSW) s 165A(1)(d).

if there are circumstances, other than the age of the particular child, that would warrant the giving of that information or warning.[92]

Prompt complaint by the victim

5.76 The common law also required judges to give a warning to juries in sexual assault trials that, in the evaluation of the evidence of a person who claimed to be the victim of a sexual assault, and in determining whether to believe that person, they could take into account the fact that he or she had not made a complaint at the first reasonable opportunity.[93] This rested on a general assumption that a prompt complaint is likely to be true, while a delayed complaint is more likely to be false. In turn, it provided the basis, at common law, for the admission of evidence of recent complaint, that is, where it was fresh in the memory of the complainant.[94]

5.77 This common law requirement has been addressed in the *Criminal Procedure Act 1986* (NSW) with the result, in general terms, that where, in sexual offence proceedings, evidence is given or a question is asked that tends to suggest that the complainant did not make a complaint or delayed in making a complaint, the judge must:

- warn the jury that this does not necessarily indicate that the allegation is false;[95]
- inform the jury that there may be good reasons for the absence of, or delay in, complaint;[96]
- not warn the jury that delay in complaining is relevant to the witness's credibility unless there is sufficient evidence to justify such a warning.[97]

Forensic disadvantage to the accused

5.78 There was also a requirement at common law for judges to give a warning to juries in sexual offence trials, concerning the difficulty for the accused in adequately testing the complainant's evidence, where there had been a delay in the prosecution of the case. In general terms it became necessary to direct the jury that it would be "dangerous" or "unsafe" to convict on the uncorroborated evidence of the complainant[98] (and subsequently even where there was corroborative evidence available)[99] unless, after scrutinizing the evidence with great care, it was satisfied of its truth and accuracy.

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92. *Evidence Act 1995* (NSW) s 165A(2).
93. *Kilby v The Queen* (1973) 129 CLR 460, 465.
94. *Graham v The Queen* [1998] HCA 61; 195 CLR 606 [12].
95. *Criminal Procedure Act 1986* (NSW) s 294(2)(a).
96. *Criminal Procedure Act 1986* (NSW) s 294(2)(b).
97. *Criminal Procedure Act 1986* (NSW) s 294(2)(c), a response to the decision in *Crofts v The Queen* (1986) 186 CLR 427, which had required a balancing direction to be given where the jury was give a direction or information in accordance with *Criminal Procedure Act 1986* (NSW) s 294(2)(a) and (b).
98. *Longman v The Queen* (1989) 168 CLR 79, 91; *Crampton v The Queen* [2000] HCA 60; 206 CLR 161.
99. So held by the majority in *Doggett v The Queen* [2001] HCA 46; 208 CLR 343 [46].

5.79 This matter has been addressed in the *Evidence Act 1995* (NSW) so that, where the court is satisfied that the defendant has suffered a significant forensic disadvantage because of the delay in the prosecution of proceedings (including delay between the time of the offence and its being reported), then it is required to inform the jury of the nature of the disadvantage and of the need to take it into account when considering the evidence, although without suggesting that it would be dangerous or unsafe to convict the defendant solely because of the delay or the forensic disadvantage suffered as a result of the delay.[100]

Addressing misconceptions in child sexual assault cases

5.80 Although the reforms outlined above addressed certain outdated perceptions in relation to the evidence of children, particularly in the context of sexual abuse trials, by prohibiting or by qualifying the warnings that can be given, they do not necessarily address misconceptions that jurors may bring to a trial in relation to the capacity of children to give reliable evidence, or in relation to the way in which children might behave in response to sexual abuse. Specifically, these reforms to judicial directions do not provide a basis for the supply of general information in relation to childhood development and the impact of sexual abuse on children.[101]

5.81 Research studies continue to find misconceptions or uncertainty among the test groups about how children respond to sexual abuse and whether children's evidence is reliable. For example, studies show high levels of uncertainty or misconception in relation to:

- a child's continued contact with the abuser, and ongoing affection for, or protection of, the abuser;
- a child's inconsistency or imprecision as to detail, and hesitancy in answering questions;
- the frequency with which medical examination can prove or disprove the occurrence of abuse;
- the extent to which children can, or cannot, be manipulated into inventing a false story;
- the significance of a complaint being retracted; and
- the fact that the way in which, and language in which, questions are asked of a child, can affect the answers that are given.[102]

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100. *Evidence Act 1995* (NSW) s 165B(2); the mere existence of delay does not establish significant forensic disadvantage: s 165B(6)(b).
101. For a review of such studies and for a contemporary Australian study, see: A Cossins, "Children, sexual abuse and suggestibility: what lay people think they know and what the literature tells us" (2008) 15 *Psychiatry, Psychology and Law* 153; A Cossins, J Goodman-Delahunty and K O'Brien, "Uncertainty and misconceptions about child sexual abuse: implications for the criminal justice system" (2009) 16 *Psychiatry, Psychology and Law* 435.
102. For a discussion of the myths and misconceptions that have been identified as common in the general community about sexual assault, see: A Cossins and J Goodnman-Delahunty, "Expert evidence or rape myths in child sexual assault trials: enhancing justice and jurors' 'common sense" (unpublished paper, University of New South Wales, 2012); A Cossins, J Goodman-

5.82 We next consider the possibility of overcoming these misconceptions by the use of either expert evidence or judicial directions.

Expert evidence

5.83 Evidence from a suitably qualified expert witness in relation to childhood development and behaviour in response to sexual abuse is, arguably, admissible under the general expert opinion rule in s 79(1) of the *Evidence Act 1995* (NSW), that provides:

> If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.

5.84 However, in our review of the uniform *Evidence Acts*, conducted jointly with the Australian and Victorian Law Reform Commissions, we found that submissions and consultations showed that "Australian courts continue to demonstrate reluctance to admit such evidence under s 79".[103] On this basis, we recommended, and the government implemented, an amendment to the *Evidence Act* to clarify the reach of s 79 and specifically to allow the admission of evidence based on

> 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).[104]

5.85 The joint Report followed upon similar recommendations that had been made by earlier inquiries.[105] Consequent upon these reports, the uniform *Evidence Acts* were amended so as to clarify, by way of exception to the opinion and credibility rules, the permissibility of receiving evidence of the kind mentioned.[106] Similar provision is made in Western Australia.[107] New Zealand introduced a similar provision in 1989,[108] but this has since been replaced by a general provision relating to expert evidence.[109]

Delahunty and K O'Brien, "Uncertainty and misconceptions about child sexual abuse: implications for the criminal justice system" (2009) 16 *Psychiatry, Psychology, and Law* 435.

103. NSW Law Reform Commission, *Uniform Evidence Law*, Report 112 (2005) [9.156].
104. *Evidence Act 1995* (NSW) s 79(2); NSW Law Reform Commission, *Uniform Evidence Law*, Report 112 (2005) Rec 9.1, [12.7].
105. Australian Law Reform Commission and Human Rights and Equal Opportunities Commission, *Seen and Heard: Priority for Children in the Legal Process,* Report 84 (1997) rec 101, [14.74]-[14.77]; NSW, *Royal Commission into the New South Wales Police Service*, Final Report (1997) vol 5: The Paedophile Inquiry, [15.131]; NSW Legislative Council, Standing Committee on Law and Justice, *Report on Child Sexual Assault Prosecutions*, Report 22 (2002) 123; and see also Victorian Law Reform Commission, *Sexual Offences Law and Procedure*, Final Report (2004) [7.188] and rec 173, and the subsequent joint Australian Law Reform Commission and NSWLRC report: NSW Law Reform Commission, *Family Violence: A National Legal Response*, Report 128 (2010) [27.140]-[27.169].
106. *Evidence Act 1995* (NSW) s 79(2) and s 108C inserted by *Evidence Amendment Act 2007* (NSW); although it is noted that admission of the evidence under s 108C is subject to a leave requirement, and to an additional requirement that the expert evidence could substantially affect the assessment of the credibility of the complainant.
107. *Evidence Act 1906* (WA) *s 36BE.*
108. *Evidence Act 1908* (NZ) s 23G, inserted by the *Evidence Amendment Act 1989* (NZ).
109. *Evidence Act 2006* (NZ) s 25.

5.86 However, so far as we are aware, the NSW provisions and the parallel provisions which are contained in the *Evidence Acts* of the Commonwealth, Victoria, Tasmania and the Australian Capital Territory, have not been employed in any sexual assault trial and have had no impact on trials in NSW. The reasons for the apparent reluctance of prosecutors to call evidence of the permitted kind has not been explained in any formal way. Conceivably they relate to:

- a shortage, at least in some jurisdictions, of suitably qualified experts who are prepared to give such evidence;
- a degree of uncertainty as to what evidence might usefully be given; and
- concerns whether its generality would add significantly to the knowledge of jurors or lead to confusion on their part.

Alternatively, or additionally, the reluctance may have been due to a concern that any attempt to call this evidence would prolong the length of the trial, because of:

- objections to its admission;
- the possibility of the defence calling contradictory expert evidence; or
- either side testing the evidence through lengthy cross-examination.

5.87 The *Evidence Act* amendments were principally directed at the reception of evidence in relation to children generally. An issue arises as to whether it is appropriate for the expert, who is called pursuant to the amended provision, to interview the child complainant and to express an opinion in relation to that child's response to the abuse and capacity to give reliable evidence in the light of the general experience and research knowledge. Concern also arises in this respect as to the acceptability of exposing the child to yet another interview and to the possibility that this might taint or influence the evidence that the child gives.

Judicial directions

5.88 An alternative approach to the calling of expert evidence would be a judicial direction or permitted judicial comment giving some general information about the development of children and the impact of sexual abuse on their capacity to give reliable evidence. The NSW *Criminal Trial Courts Bench Book* ("Bench Book") currently provides no relevant guidance.

5.89 A recent attempt to give such a direction in the County Court of Victoria[110] was held, on appeal, to have given rise to a miscarriage of justice. The Court of Appeal noted that, while expert evidence could have been received pursuant to the amended provisions of the *Evidence Act*, that had not occurred. It concluded, allowing the appeal:

> It was not within the limits of the judicial function of the judge to attempt to fill the gap. The comments of Her Honour were not properly within the scope of

110. *DPP v CMG* (unreported, County Court of Victoria, 11 February 2011).

> directions of law, and they were controversial. They took the judge into the arena. This is prohibited territory.[111]

Similar concerns have been identified by the NSW Court of Criminal Appeal,[112] and by the Northern Territory Court of Criminal Appeal.[113]

5.90 It would appear to follow, from these decisions, that the provision of any direction or comment of the kind envisaged would require legislative authority. It would need to take its place in the context of the other provisions mentioned earlier in this chapter.

5.91 A direction of law that would go part of the way in providing some generalised information in relation to the evidence of very young children, is permitted in New Zealand pursuant to the *Evidence Regulations 2007* (NZ) which provide:

> **49 Warning or informing jury about very young children's evidence**
> If, in a criminal proceeding tried with a jury in which a witness is a child under the age of 6 years, the Judge is of the opinion that the jury may be assisted by a direction about the evidence of very young children and how the jury should assess that evidence, the Judge may give the jury a direction to the following effect:
>
> (a) even very young children can accurately remember and report things that have happened to them in the past, but because of developmental differences, children may not report their memories in the same manner or to the same extent as an adult would:
>
> (b) this does not mean that a child witness is any more or less reliable than an adult witness:
>
> (c) one difference is that very young children typically say very little without some help to focus on the events in question:
>
> (d) another difference is that, depending on how they are questioned, very young children can be more open to suggestion than other children or adults:
>
> (e) the reliability of the evidence of very young children depends on the way they are questioned, and it is important, when deciding how much weight to give to their evidence, to distinguish between open questions aimed at obtaining answers from children in their own words from leading questions that may put words into their mouths.[114]

5.92 In England and Wales, the *Crown Court Bench Book* contains a number of illustrations of directions that might appropriately be given in the context of a child sexual abuse trial. They relate to:

- the different stages of intellectual and emotional development of children;
- the way in which children experience events and have an ability to register and recall them;

111. *CMG v R* [2011] VSCA 416 [18]-[19].
112. The publication of which is restricted pending a retrial: [2012] NSWCCA 89.
113. *NJB v R* [2010] NTCCA 5 [9]-[17].
114. *Evidence Regulations 2007* (NSW) reg 49 made pursuant to *Evidence Act 2006* (NZ) s 201(m).

- the reasons children might have for silence; and
- the manner in which grooming can occur and result in an acceptance by a child of the abuse and/or to a difficulty in recollecting when and how it commenced.[115]

5.93 Courts of that jurisdiction have held that some limited directions of the kind suggested, in the form of comment rather than directions of law, did not exceed the bounds of permissible comment.[116]

The Commission's view

5.94 There is limited evidence about whether expert evidence or judicial directions can improve jurors' knowledge, and even more limited evidence about which is more effective. Specifically for the present context, Australian studies in relation to the extent to which those who are jury eligible hold misconceptions about child sexual abuse, although limited in scope, provide some encouragement for the capacity of expert evidence or judicial directions to address those misconceptions.[117]

5.95 We are concerned that the objective of the *Evidence Act* reforms to allow expert evidence related to child development and behaviour, that were introduced in response to several reports of law reform agencies and public inquiries, have not been achieved.

5.96 Similarly, we are concerned that judges have struggled when attempting to provide directions, even in the form of comment, concerning the knowledge that has been accumulated about child development and the response of children to sexual abuse, and its relevance in relation to the assessment of their evidence. As noted earlier, the recent history is one in which directions of this kind have been found wanting on appeal, leading to the need for re-trials.[118]

5.97 There is a case for developing a standard approach to judicial directions or comment on this subject. It has long been accepted that there are areas where judges are free to comment on matters that may have been overlooked by jurors, or where they are required to give warnings in relation to matters in respect of which they have acquired special knowledge through trial experience, for example, in relation to the care required in assessing identification evidence.[119] However, the provision by a judge of any information in relation to childhood development and the response of children to sexual abuse, so far as that might be relevant to the reliability of their evidence, is subject to two important considerations. First, that

115. England and Wales, Judicial Studies Board, *Crown Court Bench Book: Directing the Jury* (2010) 363-370; and England and Wales, Judicial College, *Crown Court Bench Book: Directing the Jury* (1st supplement, 2011) 79-80.
116. See, eg, *Miller v R* [2010] EWCA Crim 1578, cited with approval in *GJB v R* [2011] EWCA Crim 867.
117. J Goodman-Delahunty, A Cossins and K O'Brien, "Enhancing the credibility of complainants in child sexual assault trials: the effect of expert evidence and judicial directions" [2010] *Behavioural Sciences and the Law* online; J Goodman-Delahunty, A Cossins and K O'Brien, "A comparison of expert evidence and judicial directions to counter misconceptions in child sexual abuse trials" (2011) 44(2) *Australian and New Zealand Journal of Criminology* 196.
118. See, eg, *NJB v R* [2010] NTCCA 5; *Naidu v R* [2011] VSCA 14; 31 VR 212; and publication restricted pending retrial [2012] NSWCCA 89.
119. *Domican v The Queen* (1992) 173 CLR 555.

information cannot be equated to evidence in the trial. Secondly, the distinction between a direction of law and a comment needs to be observed.[120]

5.98 The issues that arise as to whether juries should be given more information in this area, and how that should be given, are important and were the subject of the following recommendations in the joint Australian and NSW Law Reform Commissions' report on family violence:[121]

> **Recommendation 27–10** State and territory evidence legislation should provide that:
>
> (a) the opinion rule does not apply to evidence of an opinion of a person based on that person's specialised knowledge of child development and child behaviour; and
>
> (b) the credibility rule does not apply to such evidence concerning the credibility of children.
>
> **Recommendation 27–11** Federal, state and territory legislation should authorise the giving of jury directions about children's abilities as witnesses and responses to sexual abuse, including in a family violence context.
>
> **Recommendation 27–12** Judges should develop model jury directions, drawing on the expertise of relevant professional and research bodies, about children's abilities as witnesses and responses to sexual abuse, including in a family violence context.

5.99 The *Evidence Act 1995* (NSW), as one of the uniform *Evidence Acts*, already conforms with recommendation 27-11 (although, as noted above, it appears that the provision is underutilised). In our view, the other two recommendations are best dealt with on a national level, and in the light of empirical research. Research in Australia and overseas, as detailed above, shows that the public maintain misconceptions about children's evidence that can be helpfully and properly addressed by expert evidence or by judicial directions. However, there would be a benefit in further study of this question on a national basis.

5.100 In our view, the Standing Council on Law and Justice should address, at the national level, the question of whether the uniform *Evidence Acts* could be amended so as to facilitate the reception of expert evidence and/or the giving of suitable directions in this context. As part of this work, further empirical research into potential jurors' understanding should be conducted.

5.101 The Bench Book Committee should also consider the formulation of a suggested direction concerning those aspects of childhood development and response to sexual abuse that may be relevant for an understanding and assessment of the reliability of the evidence of those who have been subject to child sexual abuse. The direction should be based on current research and developed in consultation with relevant stakeholders including the Director of Public Prosecutions, and Senior Public Defender.

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120. *Mahmood v Western Australia* [2008] HCA 1; 232 CLR 397 [16]; *Crampton v The Queen* [2000] HCA 60; 206 CLR 161 [127].
121. NSW Law Reform Commission, *Family Violence: A National Legal Response*, Report 128 (2010).

Recommendation 5.5

(1) The NSW Government should ask the Standing Council on Law and Justice to consider the issue of the evidence of child sexual assault victims and their response to sexual abuse in the light of this report and the report of the NSW and Australian Law Reform Commissions on Family Violence, with a view to:

(a) commissioning further research on the issue of juror and public misconceptions concerning the reliability of the evidence of children and their response to sexual abuse; and

(b) amending the uniform *Evidence Acts* to facilitate the reception of expert evidence concerning the reliability of the evidence of children and their response to sexual abuse, and/or clarifying the extent to which a judicial direction could be given in this respect.

(2) The *Criminal Trial Courts Bench Book* should include a suggested direction concerning those aspects of childhood development and response to sexual abuse that may be relevant for an assessment of the reliability of the evidence of child sexual abuse victims.

Identification from still and video footage

5.102 The proliferation of visual surveillance through the use of CCTV and security cameras, static and mobile toll booth and highway cameras, and mobile phone cameras, as well as through the use of devices in accordance with a surveillance warrant, has added an important weapon to the armoury of law enforcement agencies in identifying suspects.

5.103 Subject to the discretionary considerations arising in relation to the general discretion to exclude evidence and the exclusion of prejudicial evidence under s 135 and s 137 of the *Evidence Act 1995* (NSW), such footage will normally be admissible in evidence,[122] and made available to the jury. It will then be in a position to make its own comparison between the accused before the court and the still or video images.[123]

5.104 More complex questions can arise when the prosecution seeks to call evidence from police officers who have come to know the accused as a result of prior dealings or who have undertaken repeated viewings and analysis of the still or video images; or from lay witnesses who are friends or relatives of the accused.

5.105 In circumstances where the extent of their familiarity or knowledge of the accused does not give them any advantage over the jury in identifying the accused as the person depicted in the images, then the evidence of such witnesses will be excluded.[124] However, the position will be otherwise if, because of their prior acquaintance with the accused or their knowledge of the accused's personal characteristics, they have an awareness of something that would not be apparent to

122. *R v Marsh* [2005] NSWCCA 331 [37].

123. *Bulejcik v The Queen* (1995) 185 CLR 375, 395; *R v Marsh* [2005] NSWCCA 331 [37]-[38].

124. *Smith v The Queen* [2001] HCA 50; 206 CLR 650 [11]-[12].

the jury, for example, his or her manner of walking, stature, stance, usual attire, or some change in appearance between the time the images were captured and the time of the trial.[125] It may be noted that a somewhat broader approach has been taken to the reception of evidence of this kind in New Zealand,[126] and in England and Wales.[127]

5.106 The issue whether evidence of this kind constitutes evidence of fact, or opinion evidence[128] that would be admissible as an exception to the opinion rule, subject to compliance with s 78 and 79 of the *Evidence Act 1995* (NSW), has not been fully resolved.[129]

5.107 The correct basis in law for the admissibility of this kind of evidence falls outside the scope of this Report, although the boundary between evidence of fact and opinion evidence can be elusive. Our concern is with the development of a suitable direction to the jury that might acquaint it with the possible difficulties that can arise in relation to the identification or recognition of people from still and video images.[130]

5.108 Obviously the reliability of identifying the accused as the person shown in the images will depend on their quality, including their sharpness and clarity. This will vary, for example, according to the distance and elevation from which the image was captured, whether the suspect is shown full face or in profile, the lighting conditions, the degree of activity and number of people involved, and the possibility that some attempt has been made at a disguise. In some cases the images will be grainy and of poor quality. Invariably they will be in monochrome and two dimensional, and the image may be distorted by movement or light.

5.109 Each of these factors will be relevant whether independent evidence is called from witnesses familiar with the accused, or whether the jury is required to make a comparison unaided by that evidence. While each exercise involves a process of identification, there is a difference between them. A witness will be making the identification by reference to their memory of the accused and, as such, the witness's evidence will be subject to the need for a warning under s 116 of the *Evidence Act 1995* (NSW). The jury will be making an immediate comparison in court between the accused and the images.

5.110 The difference between the two exercises was noted in *R v Kirby* thus:

> In the present case the jury were not being asked to make an identification reliant upon their own memories. They were doing no more than they inevitably would have done once the security photographs were tendered - ie, to examine them against the man in the dock, and against the various items of clothing and

125. *Smith v The Queen* [2001] HCA 50; 206 CLR 650 [14]-[15]; *R v Marsh* [2005] NSWCCA 331 [23]-[32]. See also *Nguyen v R* [2007] NSWCCA 363; 180 A Crim R 267 [57]-[59].
126. See, eg, *R v Howe* [1982] 1 NZLR 618, 627.
127. See, eg, *Attorney General's Reference (No 2 of 2002)* [2003] 1 Cr App R 321; and *R v Clare* [1995] 2 Cr App R 333.
128. *Smith v The Queen* [2001] HCA 50; 206 CLR 650 [57] and [58] (Kirby J).
129. See *R v Marsh* [2005] NSWCCA 331 [23]-[32]; and *Nguyen v R* [2007] NSWCCA 363; 180 A Crim R 267 [57]-[59].
130. For a discussion of the research in relation to the difficulties presented by photograph identification, see R Costigan, "Identification from CCTV: the risk of injustice" [2007] *Criminal Law Review* 591.

> otherwise that had been found at his home and tendered in evidence. The difference is that they were making a comparison of evidence, not an identification from their own memories. [131]

5.111 This does not, however, mean that a jury should not be given an appropriate direction in relation to the comparison exercise that they will inevitably need to undertake. In one sense, the need for a warning may be strengthened where evidence of an identification from images is given by a witness. Such evidence could potentially be persuasive in reinforcing their own comparison.

5.112 It is noted that, while the Bench Book deals in some detail with identification and recognition evidence, and provides a suggested direction in relation to eyewitness identification, it does not deal with in-court identification by a jury from still or video images captured by CCTV and similar technology.

5.113 Although this does not provide a reason for preventing the jury from making that kind of comparison, it should not be overlooked that, similarly to a dock identification (that will normally be disallowed), the presence of the accused in court is likely to have a persuasive effect, the existence of which might not necessarily be apparent to the jury. Additionally there is the fact that the accused and the person in the images will have been previously unknown to the individual jurors.

5.114 It is for these reasons that the Court of Appeal in England and Wales has identified the need for a warning where identification of the accused as the offender depends on the jury comparing that person with the suspect shown in security camera images. Although not going so far as to prescribe a guideline, it observed:

> Evidence of this kind is relatively novel. What is of the utmost importance with regard to it, it seems to us, is that the quality of the photographs, the extent of the exposure of the facial features of the person photographed, evidence, or the absence of it, of a change in a defendant's appearance and the opportunity a jury has to look at a defendant in the dock and over what period of time are factors, among other matters of relevance in this content in a particular case, which the jury must receive guidance upon from the judge when he directs them as to how they should approach the task of resolving this crucial issue.[132]

5.115 Attention has similarly been given to the need to ensure that nothing is said or done in relation to this form of photographic identification, where it is carried out by a witness who had prior knowledge of the accused's appearance or who had undertaken repeated viewings of the images, that might infect the process by prompting the recognition of a particular person.[133]

5.116 As a consequence of these decisions, the *Crown Court Bench Book* for England and Wales provides suggested directions in relation to:

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131. *R v Kirby* [2000] NSWCCA 330 [46].

132. *R v Dodson* (1984) 79 Cr App R 220, 229; and see *R v Faraz Ali* [2009] *Criminal Law Review* 40; [2008] EWCACrim 1522 [40]-[41], concerning the need for the jury to be given a warning about the dangers of mistaken identification, when making a comparison itself; but see also *R v Downey* [1995] 1 Cr App R 7, 11, which, to some extent, qualified the need for a *Dodson* type warning as a matter of course.

133. *R v Caldwell* (1994) 93 Cr App R 73, 78; and *R v Jaba* [2010] EWCA Crim 130.

- jury comparison of photographic images of a suspect with the accused;[134]
- recognition or identification of the suspect by a witness from such images;[135] and
- cases where the prosecution relies both on the evidence of a witness and the jury's own comparison of the images.[136]

The Commission's view

5.117 In our view it would be desirable for the Bench Book to include, in the commentary to the identification evidence section, a reference to the considerations that arise in this context. That commentary might properly include confirmation that the issue for the jury is whether they are satisfied that the person standing trial before them *is* the person shown in the images[137] and not, where a witness gives evidence of the identification, whether that identification was correctly made.

5.118 Further, we consider it desirable for the Bench Book to include a suggested direction that would draw the attention of the jury to the considerations that they need to have in mind when asked to draw a conclusion whether a suspect shown in still or video footage is the accused. This should deal both with the cases where evidence from a witness is called in support of the footage, and the cases where the exercise is confined to a jury comparison alone.

5.119 We regard recommendations to the above effect to be important because of the extent to which recognition or identification of suspects at the scene of a crime or in its near vicinity, through the use of CCTV and similar technology, is likely to be relied on in the future. We also have in mind the considerations which have justified the need for a warning in relation to recognition and identification evidence generally, that is where identification of the accused is in issue.[138] These have similar cogence in the present context.

Recommendation 5.6

The *Criminal Trial Courts Bench Book* should:

(a) set out the considerations that arise when an identification of an accused is sought to be made from images captured in relation to a crime scene or connected events;

(b) confirm that the issue for the jury is whether they are satisfied that the accused is the person shown in the images and not, where a witness gives evidence of an identification made from those images, whether that identification was correctly made; and

134. England and Wales, Judicial Studies Board, *Crown Court Bench Book: Directing the Jury* (2010) [115]-[116].

135. England and Wales, Judicial Studies Board, *Crown Court Bench Book: Directing the Jury* (2010) [119]-[121].

136. England and Wales, Judicial Studies Board, *Crown Court Bench Book: Directing the Jury* (2010) [117]-[118]. In this respect, see *R v Jabar* [2010] EWCA Crim 130.

137. *Smith v The Queen* [2001] HCA 50; 206 CLR 650 [8].

138. *Alexander v The Queen* (1981) 145 CLR 395; *Festa v The Queen* [2001] HCA 72; 208 CLR 593; and *Aslett v R* [2009] NSWCCA 188 [52]-[54].

(c) include a suggested direction that would:

(i) draw attention to the considerations that the jury needs to have in mind when asked to determine whether a person shown in the image is the accused; and

(ii) deal both with the cases where evidence from a witness is called in support of the images, and the cases where the exercise is confined to a jury comparison alone.

Indigenous witnesses

5.120 In CP 4 we raised the question of assessing the evidence of Indigenous witnesses in the light of various cultural and linguistic factors that can be of relevance to the manner in which they give evidence.[139] These factors may not be within the knowledge of members of the general community who would be eligible for jury duty and may, therefore, be overlooked.

5.121 The issues which arise in this respect are not necessarily confined to Indigenous witnesses. The evidence of members of other communities in NSW may be affected by similar factors as well as, in some cases, their different experiences of, and different levels of trust for, law enforcement and criminal justice agencies. Where English is not the first language of a witness for whom these factors may be relevant, the process of examination and cross examination can be made even more difficult. Any difficulties are not necessarily cured through the use of interpreters.

5.122 As is the case with some of the other issues discussed above, approaches to this issue could include using a judicial direction to draw attention to the relevant matters, or allowing expert evidence to be led to explain the cultural or linguistic factors that may impact upon the assessment of the evidence.

Jury direction

5.123 In NSW, the *Equality Before the Law Bench Book*, published by the Judicial Commission of NSW, suggests that judges inform jurors about:

- cultural factors that may impact on the way in which an Indigenous witness or defendant engages in verbal or non-verbal communication, so that jurors do not falsely perceive their "behaviour as dishonest or lacking in credibility";[140] and
- an Indigenous person's "communication style", which may be influenced by cultural or linguistic factors, so that any assessment the jury makes of that witness's evidence must, "if it is to be fair, take into account any relevant cultural differences".[141]

139. NSW Law Reform Commission, *Jury Directions,* Consultation Paper 4 (2008) [8.79]-[8.93].
140. Judicial Commission of NSW, *Equality Before the Law Bench Book* (2006) [2.3.3.3].
141. Judicial Commission of NSW, *Equality Before the Law Bench Book* (2006) [2.3.3.4].

5.124 It also provides guidance as to the use of terminology and descriptors that do not cause offense or sound discriminatory, and encourages judicial intervention to ensure that cross-examination remains appropriate.

5.125 A number of directions have come into use in some Australian jurisdictions based on those that were suggested by Justice Mildren of the Northern Territory Supreme Court ("Mildren directions").[142] Dr Diana Eades has adapted a version of these directions for use in Queensland,[143] and some of the points raised are noted in the NSW *Equality Before the Law Bench Book*.[144] Directions of this kind are designed to 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 the fact that:

- Indigenous people will sometimes speak English in a way that is different to standard English (sometimes referred to as "Aboriginal English") including the fact that the words used may differ in their meaning from standard English, as can grammatical construction, for example, in relation to the use of tense;
- some Indigenous people have a tendency to agree with propositions put to them even when they do not actually agree (referred to as "gratuitous concurrence");
- differences can exist in relation to the understanding and importance of concepts such as time, distance and number;
- a sense of politeness may lead to the avoidance of direct eye contact when in conversation with others, particularly when dealing with a person in authority;
- periods of silence can be used as a form of communication; and
- location or direction may be indicated by the use of gestures that are slight including quick movements of the eyes, head or lips rather than by words.[145]

Directions of this kind could also draw the attention of the jurors, in appropriate cases, to the fact that some Indigenous people have hearing difficulties or lower than average literacy or educational levels and may as a consequence have difficulty in understanding and following questions.[146]

5.126 The *Equality Before the Law Bench Book* points out that the judge should ensure that the jury does not allow any ignorance of cultural differences, or any stereotyped or false assumptions about Indigenous people to influence unfairly their judgement. It also identifies briefly some aspects on which specific guidance might need to be provided. Otherwise it advises judges that, when there is a need to alert the jury to

142. D Mildren, "Redressing the Imbalance Against Aboriginals in the Criminal Justice System" (1997) 21 *Criminal Law Journal* 7, 21-22. See also *Stack v Western Australia* [2004] WASCA 300; 29 WAR 526 [10]-[16], [58]-[59].

143. 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.

144. Judicial Commission of NSW, *Equality Before the Law Bench Book* (2006) [2.3.3.3], [2.3.3.4].

145. 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] WASCA 300; 29 WAR 526 [58].

146. See, eg, Supreme Court of Queensland, *Equal Treatment Benchbook* (2005) 91-93, 105, 117; Judicial Commission of NSW, *Equality Before the Law Bench Book* (2006) 2302-2303, 2307.

cultural and linguistic differences that may bear upon the giving of evidence, this needs to be done early so that the jury's initial assessment of the witness is not unfair.[147]

5.127 The Queensland *Equal Treatment Benchbook* has similarly suggested that it is important that such matters be raised early in the proceedings and points out that counsel, "ideally", should "foreshadow the likelihood of communication difficulties with the judge before the proceedings commence".[148]

5.128 However, providing a generic set of directions at the commencement of the trial, when it is known that Indigenous people will be giving evidence, may be inappropriate or unnecessary for the particular case.

5.129 The Mildren directions were developed in the Northern Territory in relation to Indigenous communities the characteristics and experiences of which differ in many respects from those in NSW. For example, around 79% of the Indigenous population of the Northern Territory live in remote or very remote areas. By comparison, in NSW only around 5% of the Indigenous population lives in remote or very remote areas.[149] Also, according to the 2006 Census only 60 Indigenous people in NSW reported that they do not speak English well, or at all, or did not state their English proficiency, compared with 7388 in the Northern Territory.[150] These statistics suggest that directions in accordance with the Mildren model may not be universally applicable in cases involving Indigenous people in NSW. However, we agree with the observation in Dr Diane Eade's submission that cultural or linguistic issues may be more widespread than a simple "urban" and "traditional" split would imply.[151] More research is required to ensure that such directions are applied appropriately in individual cases. Indeed, there is a danger that such directions, if applied in cases where the circumstances do not require them, may be regarded as paternalistic or racist or potentially inimical to a fair trial.

5.130 Where the directions are framed to cover usual or general circumstances, there is a danger that a jury may wrongly conclude that a judge's comments were intended to refer to a particular witness when, in fact, that was not their purpose.[152] In Western Australia, an appeal was allowed in part because the trial judge informed the jury about gratuitous concurrence generally and did not apply it to any particular Indigenous witness who was likely to give evidence.[153]

5.131 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

147. Judicial Commission of NSW, *Equality Before the Law Bench Book* (2006) [2.3.3.3].

148. Supreme Court of Queensland, *Equal Treatment Benchbook* (2005) 126.

149. Australian Bureau of Statistics, *Population Characteristics, Aboriginal and Torres Strait Islander Australians* 2006 (Catalogue No 4713.0, 2006) 18.

150. Australian Bureau of Statistics, *Population Characteristics, Aboriginal and Torres Strait Islander Australians* 2006 (Catalogue No 4713.0, 2006) 45.

151. D Eades, *Submission JU5*, 3.

152. *Stack v Western Australia* [2004] WASCA 300; 29 WAR 526 [11], [19].

153. *Stack v Western Australia* [2004] WASCA 300; 29 WAR 526 [50]-[52], [136].

witnesses".[154] 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 cultural or language issues from committal hearing depositions, and tailoring their instructions appropriately.[155]

5.132 It would appear to be more appropriate to confine the giving of a direction of this kind to those cases where it becomes apparent that there are specific linguistic or cultural issues of which the jury should be made aware, with respect to a specific individual witness or defendant. Such a direction should specify the person to whom it applies and the particular cultural and/or linguistic issues that are relevant for an assessment of his or her evidence. The judge could be assisted in deciding whether a specific direction is needed before evidence is given by having any relevant issues identified and brought to his or her attention by trial counsel. This might be conveniently assessed in the course of the pre-trial management that is examined elsewhere in this Report.[156] Desirably it would become the subject of a direction settled with trial counsel.

5.133 We have not engaged in the kind of consultations, or received sufficient submissions, that would enable us to form any concluded views as to the kinds of directions that could properly be given in this State. We are also reluctant to do so in the context of one community, since similar issues can arise in respect of the other community groups that exist in NSW. In our view, the question of the content of directions that may be required in the NSW context should be the subject of further consideration by the Judicial Commission, involving consultation with NSW Indigenous and other communities and experts in the fields of culture and linguistics of relevance to those individual communities.

Expert evidence

5.134 An alternative approach to dealing with linguistic or cultural differences through directions would be to allow expert evidence to be led either in relation to those aspects generally or in relation to a particular witness's evidence.[157] Some submissions supported the admission of expert evidence of the behaviour and speech of Indigenous witnesses.[158]

5.135 Under the *Evidence Act 1995* (NSW), expert evidence on the speech patterns or other linguistic or cultural factors of relevance for understanding the evidence of Indigenous witnesses could potentially be admitted as an exception to the opinion rule[159] or as an exception to the credibility rule.[160]

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154. Queensland, Criminal Justice Commission, *Aboriginal Witnesses in Queensland's Criminal Courts*, Report (1996) 43.
155. Queensland, Criminal Justice Commission, *Aboriginal Witnesses in Queensland's Criminal Courts*, Report (1996) 44.
156. See para [7.6]-[7.47].
157. See, eg, S Bronitt and K Amirthalingam, "Cultural blindness: criminal law in multicultural Australia" (1996) 21 *Alternative Law Journal* 58, 60.
158. Commonwealth Director of Public Prosecutions, *Submission JU10*, 9; Law Society of NSW, *Submission JU3*, 11; NSW Bar Association, *Submission JU1*, 10; NSW, Office of the Director of Public Prosecutions, *Submission JU9* [8.22].
159. *Evidence Act 1995* (NSW) s 79.

5.136 As discussed above, the joint report of the NSWLRC, ALRC and Victorian Law Reform Commission on uniform evidence law recommended legislative amendment in order to clarify the admissibility of evidence in relation to the development and behaviour of children, and in particular their response to sexual abuse, in aid of an assessment of their evidence. This was seen to be "justified on the basis of the demonstrated reluctance of some judicial officers to accept that this is a relevant field of expertise and a matter beyond the 'common knowledge' of the tribunal of fact".[161]

5.137 In the light of the reluctance of some courts in other Australian jurisdictions to admit expert evidence relating to Indigenous linguistic or cultural characteristics,[162] similar legislative provision could be made in order to clarify the admissibility of expert evidence in relation to those factors that might affect the assessment of the evidence of Indigenous witnesses or of witnesses from other community groups. However, similarly to our reservations about proposing the formulation of suggested generic directions, we consider that it would be appropriate for this to be the subject of a more specific consultation process and inquiry than we have been able to undertake.

160. *Evidence Act 1995* (NSW) s 108C.

161. NSW Law Reform Commission, *Uniform Evidence Law*, Report 112 (2005) [12.132].

162. See, eg, *R v Condren* (1987) 28 A Crim R 261; *Stack v Western Australia* [2004] WASCA 300; 29 WAR 526; *R v Watson* [1987] 1 Qd R 440.

6. Assistance to the jury

6.1 In this chapter we discuss several ways in which jurors may be assisted in engaging more effectively in the trial process, and in understanding and applying the directions that they receive.

6.2 Recent studies show that jurors' need for support and assistance commences with their initial engagement in the trial process.[1] Their subsequent understanding and

1. K Warner, J Davis and P Underwood, "The jury experience: insights from the Tasmanian jury study" (2011) 10 *Judicial Review* 333, 342-344; J Goodman-Delahunty and others, *Practices, Policies and Procedures that Influence Juror Satisfaction in Australia*: *Report to the Criminology*

ability to fulfil their responsibilities depends, to some degree, on familiarising them at this stage with an environment that is likely to be foreign to most of them. The settling in process that is required is very much a matter of common sense. However it is one in which court administrators, judges and counsel do need to place themselves in the position of jurors who are untrained in the law, in order to consider what is needed for their support, assistance and advice.[2]

6.3 The need for proper assistance does not cease at the empanelment stage. As we noted earlier there are widespread concerns as to jurors' capacity to understand and then apply the complex directions that are now required.[3] These difficulties may have more to do with the trial process than with any shortcomings of individual jurors, whose education levels today tend to be higher than in the past.

6.4 It is on this aspect that much of the recent research and literature has focused, when encouraging the use of communication methods other than that employed in the traditional form of summing up.[4]

6.5 The structure of the trial is still centred on the oral testimony of witnesses as the primary means of presenting evidence, followed by an oral summing up, a practice that evolved from a time when trials were much shorter and jurors were more likely to be illiterate or semi-literate.[5] However, jurors are now generally unused to digesting extensive information presented to them in oral form in their everyday lives. They may have difficulties in concentrating for long periods of time when listening to the oral testimony and the judge's summing up, or in recalling the detail of that evidence, or of the directions that they have been given, when the time arrives for them to commence their deliberations.[6]

Research Council, Research and Public Policy Series No 87 (Australian Institute of Criminology, 2008) 50-69.

2. K Warner, J Davis and P Underwood, "The jury experience: insights from the Tasmanian jury study" (2011) 10 *Judicial Review* 333, 359.
3. See para [1.11], [1.20], [1.67]-[1.86].
4. W Young, N Cameron and Y Tinsley, *Juries in Criminal Trials Part Two: A Summary of the Research Findings*, Preliminary Paper 37 (New Zealand, Law Commission, 1999) vol 2, ch 3; W Young, "Summing up to juries in criminal cases – what jury research says about current rules and practice" [2003] *Criminal Law Review* 665, 681-686; W Young, Y Tinsley and N Cameron, "The effectiveness and efficiency of jury decision-making" (2000) 24 *Criminal Law Journal* 89; J Clough, "The role of judges in assisting jury comprehension" (2004) 14 *Journal of Judicial Administration* 16, 17-18; N Brewer, S Harvey and C Semmler, "Improving comprehension of jury instructions with audio-visual presentation" (2004) 18 *Applied Cognitive Psychology* 765; P McClellan, "Looking inside the jury room" (2011) 10 *Judicial Review* 315, 330; P Rogers, "Supporting the right to a fair trial with reforms to jury directions and jury selection" (2012) 32 *Queensland Lawyer* 26, 34.
5. G Eames, "Tackling the complexity of criminal trial directions: what role for appellate courts?" (2007) 29 *Australian Bar Review* 161, 189; Victorian Parliament, Law Reform Committee, *Jury Service in Victoria*, Final Report (1997) [2.191].
6. J Clough, "The role of judges in assisting jury comprehension" (2004) 14 *Journal of Judicial Administration* 16, 17; W Young, Y Tinsley and N Cameron, "The effectiveness and efficiency of jury decision-making" (2000) 24 *Criminal Law Journal* 89, 93.

6.6 It has been suggested that another concern with oral testimony is that jurors may mistakenly believe that it is not "real" evidence, or is of less value or inherently less credible than, for example, scientific evidence.[7]

6.7 The conventional role of jurors as passive recipients of the information that is presented can leave them feeling marginalised.[8] It is out of step with current methods of effective communication, which emphasise interaction as the primary means of ensuring that people understand what is being communicated to them.[9]

6.8 Our recommendations in this chapter accordingly focus on the ways to engage jurors more effectively in the trial process from the outset, and on the means of conveying information, which they need to apply to their task, in a more meaningful way that is consistent with current methods of communication.

6.9 Consistent with our general approach, our recommendations aim to encourage, rather than compel, the adoption of good practice for effective communication. We recognise that it is not possible to set down absolute rules since the strategies employed for communication need to be tailored to the demands of the individual case. Most of the strategies that we discuss have already attracted support to greater or lesser degree, and as a consequence we have also given attention to the question whether there are any impediments to their use that should be removed.

Juror orientation

6.10 Two Australian studies have identified the importance of good orientation practices for jurors as a means of enhancing their understanding of the role that they are expected to perform, and consequently their satisfaction with the trial experience.[10]

6.11 In our *Jury Selection* report we gave consideration to the adequacy of the information that was, at that time, given to jurors prior to their attendance for jury service, as well as of the handbook that they received and of the video that was shown to them on the day of the trial.[11] Some of that material had been criticised, for being at times confusing, as well as lacking in practical information.[12] As a consequence, a recommendation was made for its improvement.[13]

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7. See K Warner, J Davis and P Underwood, "The jury experience: insights from the Tasmanian jury study" (2011) 10 *Judicial Review* 333, 347-348. For a discussion of juries' difficulties in dealing with DNA evidence in particular, see para [5.17].
8. W Young, Y Tinsley and N Cameron, "The effectiveness and efficiency of jury decision-making" (2000) 24 *Criminal Law Journal* 89, 94.
9. D Watt, *Helping Jurors Understand* (Thomson Carswell, 2007) 31.
10. J Goodman-Delahunty and others, *Practices, Policies and Procedures that Influence Juror Satisfaction in Australia*: *Report to the Criminology Research Council,* Research and Public Policy Series No 87 (Australian Institute of Criminology, 2008); K Warner, J Davis and P Underwood, "The jury experience: insights from the Tasmanian jury study" (2011) 10 *Judicial Review* 333.
11. NSW Law Reform Commission, *Jury Selection*, Report 117 (2007) [13.11]-[13.30].
12. J Goodman-Delahunty and others, *Practices, Policies and Procedures that Influence Juror Satisfaction in Australia*: *Report to the Criminology Research Council,* Research and Public Policy Series No 87 (Australian Institute of Criminology, 2008) [55]-[68].
13. NSW Law Reform Commission, *Jury Selection*, Report 117 (2007) rec 63.

6.12 Since that Report was delivered, three revised brochures and one handbook have been published and provided to jurors, including prospective jurors.[14] In addition, a new DVD has been prepared[15] that is shown to potential jurors on the day of their attendance pursuant to a jury summons.

6.13 The website of the Office of the Sheriff has also been updated to include more information. Other reforms are in progress, including standardisation of the induction procedures that court officers follow, and revision of the Notice of Inclusion and the Jury Summons, to simplify those documents and to make them easier to understand.[16]

6.14 Notwithstanding the substantial advances that have been made since our earlier report, we understand that provision of the Juror Handbook to jurors after empanelment does not always occur since some judges do not authorise its use in their courts. The reason for that reluctance is not clear to us as the handbook is, on our assessment, accurate and informative.

6.15 In our view, much can be achieved at the orientation stage in preparing jurors for the task ahead through the provision of information concerning the trial process and their responsibilities. The information provided by the Office of the Sheriff potentially plays an important role in this respect. So too does the provision of advice by the judge following empanelment, a subject that is covered by a suggested direction contained in the *Criminal Trial Courts Bench Book* ("Bench Book").[17]

6.16 We support the continuing refinement of the information that is provided to jurors during the orientation process, and are of the view that the jury handbook should be routinely provided to jurors and be available for reference during the trial.

6.17 An alternative approach that was identified in the consultation process would be the provision to the jury of a Standard Advice to Jurors on Empanelment, in written form, that could be usefully prepared by the Judicial Commission of NSW Criminal Trial Courts Bench Book Committee ("Bench Book Committee"). It might deal with such material as:

- the role of the judge and jury, and the nature of a criminal trial;
- the appointment of a foreperson to speak on the jury's behalf and the jury's ability to change that person at any time;
- the fact that any legal argument that arises will be heard in the jury's absence;
- advice in relation to the right of jurors to take notes, to ask questions at any time including during the evidence or summing up, and to request a copy of the transcript;

14. "*You may be selected for jury service*" supplied with the notice that eligible people receive when included on the jury roll; "*Jury service, a rewarding responsibility*" that accompanies service of a jury summons; and "*A guide to jurors, welcome to Jury Service*" that, subject to the trial judge's approval, is given to jurors after empanelment; and "*Juror support program*" that is provided to jurors at the conclusion of the trial.
15. *Welcome to Jury Service*, launched 14 May 2012.
16. NSW Sheriff's Office, *Email to NSW Law Reform Commission,* 20 August 2012.
17. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* [1-520].

- the prohibition against jurors making their own independent inquiries and against discussing the case with others;
- the need to ignore any prior media publicity and to bring any irregularities to the notice of the judge;
- the fact that the jury will be required to consider its verdict after hearing the evidence, the addresses of counsel and a summing up from the judge that will give directions on the law that are to be applied to the evidence; and
- advice as to the way in which the verdict will be taken (although without reference to whether it needs to be a unanimous or majority verdict).

6.18 Where the jury is provided with the Sheriff's juror handbook or a standard advice to jurors on empanelment, it would be appropriate for that document to be available to jurors throughout the trial and for the judge to take them through it in the opening directions.

6.19 We also consider that time spent by the trial judge, at the commencement of the trial, in settling in the jury and establishing a rapport with them is time well spent.[18] This process can be assisted by allowing a sufficient break between the empanelment and commencement of the trial proper to allow the jurors to meet one another and, if they wish, to appoint their foreperson. It is also a period during which they could be encouraged to familiarise themselves with the jury handbook, or alternatively the standard advice to jurors on empanelment, depending on which document they have.

Recommendation 6.1

As a matter of course on empanelment, jurors should be provided with written information to assist their orientation either in the form of the Juror Handbook or an Advice to Jurors on Empanelment prepared by the Judicial Commission of NSW and this information should remain with them throughout the trial.

Majority verdicts

6.20 In NSW, in proceedings relating to State offences, where a jury cannot reach a unanimous verdict, the jury may deliver a majority verdict.[19] Two preconditions must be met before the trial judge may accept a majority verdict.[20] 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.[21] Secondly, the judge must

18. See 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) 13; New Zealand, Law Commission, *Juries in Criminal Trials*, Report 69 (2001) 115-116.
19. Ordinarily only a majority of 11 to one is permitted, but if the size of the jury has been reduced to 11, then a 10 to one majority verdict is permitted.
20. *Jury Act 1977* (NSW) s 55F(2), s 55F(3)(a), s 55F(3)(b).
21. *Jury Act 1977* (NSW) s 55F(2)(a). 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; 73 NSWLR 390 [62]-[72]; *RJS v R* [2007] NSWCCA 241; 173 A Crim R 100.

be satisfied that the jury is unlikely to reach a unanimous verdict after examining one or more jurors on oath.[22] This second precondition would only be reached after the judge had delivered a perseverance or "Black" direction[23] encouraging the jury to continue the attempt to reach a unanimous verdict.

6.21 It has been the practice for judges to defer any mention of a majority verdict until it becomes apparent that the preconditions have been met. However, it has now been held that it is permissible, in the summing up, following the usual direction concerning the need for a unanimous verdict, for the judge to mention briefly that the law does permit the court in certain circumstances, that have not yet arrived, to accept a verdict that is not unanimous.[24]

6.22 The advantage of giving this advice includes the desirability of being frank with the jury in not pretending that the only verdict they can return is a unanimous verdict, although without descending, at that stage of the trial, into the detail of a Black direction, or of the requirements for a majority verdict. It has the obvious advantage of avoiding confusion for those jurors who are already aware, from media coverage of trials, that majority verdicts are sometimes returned.

6.23 The Bench Book now provides a suggested direction for inclusion in the summing up:

> Under our system of law, your verdict [on each count], whether it be "guilty" or "not guilty" must be unanimous. That is not to say that each of you must agree upon the same reasons for your verdict. You may individually rely upon different parts of the evidence or place a different emphasis upon parts of the evidence. However, by whatever route you each arrive at your decision, that final decision of either "guilty" or "not guilty" [in relation to each charge] must be the decision of all of you, unanimously, before it can become your verdict.
>
> As you may know, the law permits me, in certain circumstances, to accept a verdict which is not unanimous. Those circumstances may not arise at all, so that when you retire I must ask you to reach a verdict upon which each one of you is agreed. Should, however, the circumstances arise when it is possible for me to accept a verdict which is not unanimous, I will give you a further direction.[25]

6.24 It is noted that the current suggested initial directions to the jury on empanelling, contained in the Bench Book,[26] make no reference to any requirement for a unanimous verdict or to the availability of a majority verdict.

6.25 Consistently with the approach of mentioning the potential availability of a majority verdict in the suggested direction in the summing up, we consider that it would be desirable to deal with this issue from the outset, so as to avoid the risk of the jury being confused by any references that may be made during the course of the trial.

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22. *Jury Act 1977* (NSW) s 55F(2)(b).
23. *Black v The Queen* (1993) 179 CLR 44, 51.
24. *Ingham v R* [2011] NSWCCA 88 [84]. See also *R v Muto* [1996] 1 VR 336, 339.
25. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* [7-020].
26. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* [1-520].

Recommendation 6.2

The *Criminal Trial Courts Bench Book* should include, in the preliminary directions to the jury in trials involving offences against NSW law, a statement to the effect that:

(a) the jury will be asked to return a unanimous verdict; and

(b) a majority verdict may be permitted in certain circumstances that will be explained if the occasion arises.

Jury access to a transcript of the proceedings

Current law and practice

6.26 Section 55C of the *Jury Act 1977* (NSW) provides that:

> A copy of all or any part of the transcript of evidence at a trial or inquest may, at the request of the jury, be supplied to the members of the jury if the judge or coroner considers that it is appropriate and practicable to do so.

6.27 This provision was introduced in response to our 1986 Report[27] in which attention was drawn to the long standing practice in which juries were rarely, if ever, given a transcript of the evidence, but instead were expected to listen to the testimony of the relevant witnesses being read back to them by the judge.[28]

6.28 This provision is not the sole source of power in this respect. It has been accepted that the power of the judge to control the court processes includes a discretion to provide the jury with a copy of any part of the record of the proceedings, including not only a transcript of the evidence given by the witnesses but also a transcript of the addresses and of the summing up[29] irrespective of whether it has first been requested by the jury. A failure to do so when requested may, dependent on the circumstances of the case, give rise to an error of law and a miscarriage of justice.[30]

6.29 Judges in NSW now routinely provide copies of the transcript, at least when requested, but practice does differ as to the extent to which it is provided on the motion of the judge alone.

6.30 The existence of earlier resistance to the practice and of some inconsistency in its application has been noted in some studies and reports.[31]

27. NSW Law Reform Commission, *Criminal Procedure: The Jury in a Criminal Trial*, Report 48 (1986).
28. *R v Taousanis* [1999] NSWSC 107; 146 A Crim R 303 [8].
29. *R v Lowe* (1997) 98 A Crim R 300, 308-309 (NSWCCA); *R v Taousanis* [1999] NSWSC 107; 146 A Crim R 303 [9]-[14]; *R v Sukkar* [2005] NSWCCA 54 [84].
30. *R v Bartle* [2003] NSWCCA 329; 181 FLR 1.
31. NSW Attorney General's Department, Criminal Law Review Division, *Report of the Trial Efficiency Working Group* (2009) 69; 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) 13-14; J Goodman-Delahunty and others, *Practices, Policies and Procedures that Influence Juror Satisfaction in Australia*: *Report to the Criminology*

6.31 The Bench Book refers by way of commentary to the judge's discretionary power to supply the jury with a transcript of the proceedings, although without elaborating on the factors that should be considered in the exercise of the discretion that the judge possesses in this respect.[32] It notes the risks involved in the jury reading only part of the transcript and suggests that fairness may require that the jury be provided with parts of the transcript other than those requested to avoid the prejudice that might otherwise arise.[33] It does not, however, provide a suggested direction that could be given to the jury as to the way in which it should deal with the transcript.

6.32 It has been suggested that giving the jury a copy of the transcript risks them focussing on the written word, at the expense of their recollection of how the witness gave evidence.[34] Additionally it has been observed that notwithstanding careful checking by the judge and counsel it is not necessarily the case that the transcript will be entirely accurate.

6.33 Notwithstanding, it has been recognised that having access to the trial transcript can be an important means by which the jury can accurately recall the evidence, counsels' addresses, and the judge's directions.[35]

6.34 As has been observed:

> Having a judge (or Associate) read to the jury, after a request, hours of evidence from the transcript is hardly the best way of allowing the jury to evaluate that material. Such a lengthy recitation of evidence is often mind-numbing and hardly the best way of ensuring that the jury properly considers and evaluates the relevant evidence.[36]

6.35 In appropriate cases the provision of a transcript can accordingly assist in shortening the summing up, although it does not follow that the duty of the judge to deal with the evidence is exhausted by simply making the transcript available. It will remain necessary for the evidence to be referred to in a way that fairly identifies its relevance and importance as well as the use that can be made of it.[37]

6.36 In a study of the attitudes of NSW jurors about their comprehension levels, jurors reported the highest level of comprehension of the judge's summing up when they were given access to the transcript.[38] Similarly, research in Queensland indicates

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Research Council, Research and Public Policy Series No 87 (Australian Institute of Criminology, 2008) 140.

32. *R v Fowler* [2000] NSWCCA 142 [91].
33. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* [1-583]; and see *R v Lowe* (1997) 98 A Crim R 300, 308-309, 324.
34. *R v Tichowitsch* [2006] QCA 569; [2007] 2 Qd R 462 [11]-[12].
35. *R v Fowler* [2000] NSWCCA 142. See the views expressed by the NSW Attorney General's Department, Criminal Law Review Division, *Report of the Trial Efficiency Working Group* (2009) 68-69, that access to the transcript helps to ensure that the evidence is recounted accurately in the jury room.
36. *R v Tichowitsch* [2006] QCA 569; [2007] 2 Qd R 462 [13].
37. *R v Tichowitsch* [2006] QCA 569; [2007] 2 Qd R 462 [15].
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) 6.

that jurors expect to receive the transcript and anticipate that it will help them in their deliberations.[39]

6.37 The Bench Book Committee has drafted a suggested direction that would, amongst other things emphasise the need for the jury to:

- place the evidence or other material in the context of the whole of the evidence and arguments;
- ensure that it does not give the evidence recorded in the transcript more weight than it deserves because it has been presented in written form, effectively for a second time; and
- be aware that the transcript may not be 100% accurate and to raise a question about any inconsistencies that may come to its attention.[40]

The Commission's view

6.38 In our view allowing the jury access to the transcript of the evidence, addresses and summing up, either following request by counsel or on the initiative of the trial judge, should remain a matter of discretion to be exercised as part of the responsibility of the judge to deliver a trial that is fair to the accused and the community represented by the prosecution, and that provides a proper balance.[41]

6.39 It is recognised that there can be practical considerations involved in the routine supply of the transcript to the jury. The preparation and editing of a daily transcript and correcting it for errors, and exclusion of those portions that occurred in the absence of the jury, can be demanding on court resources and may not always be practicable. Clearly if a transcript is provided it must be accurate. However with the co-operation of counsel and with available technology, it should be possible to provide an accurate transcript for the jury in a timely way.

6.40 The New Zealand Law Commission, the Victorian Law Reform Commission (VLRC) and the Queensland Law Reform Commission (QLRC) have all favoured the routine provision of the transcript to the jury.[42]

6.41 We are not convinced that provision to the jury of a copy of the transcript of the proceedings should occur in every case, as a matter of course. Rather this should remain a matter of discretion, to be exercised in the context of the individual case by reference to the complexity and nature of the matters in issue, the length of the trial, any other measures that might more usefully assist the jury in recalling and considering the issues that they are to decide, and whether access has been requested by the jury. The practicability of its supply would also need to be taken into account. As such, we support the suggested direction to the jury on the use of

39. Queensland Law Reform Commission, *A Review of Jury Directions,* Report 66 (2009) [10.78]-[10.81].
40. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* [1-584] (proposed).
41. *R v NZ* [2005] NSWCCA 278; 63 NSWLRC 628 [4].
42. New Zealand, Law Commission, *Juries in Criminal Trials,* Report 69 (2001) 134; Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [5.18]; Queensland Law Reform Commission, *A Review of Jury Directions*, Report 66 (2009) vol 1 [10.109]-[10.114], [10.154].

any transcripts of evidence that are supplied to it that will be added to the Bench Book.

6.42 In the exercise of this discretion, a decision would need to be made whether to give the jury access to the daily transcript on a continuing basis, or to wait until the end of the trial before providing a copy. In long and complex cases there could be considerable merit in the provision of a daily transcript although that might depend on the capacity of the court to provide the jury with electronic means of accessing the transcript.

6.43 Although, as noted above, the court has the power to supply transcript of any part of the record of its own volition, we see merit in amending s 55C of the *Jury Act 1977* (NSW) to include the transcript of the addresses and summing up, and to delete any pre-condition that is dependent upon the request of the jury. While strictly unnecessary, such an amendment could provide additional judicial guidance.

6.44 In an earlier review of the jury system in NSW, it was suggested that greater use should be made of information technology to organise and manage the evidence for easier reference by the jury, including making use of computer systems for transcript retrieval and cross-referencing.[43] The New Zealand Law Commission subsequently considered a similar proposal to grant jurors access to computers to allow them to search the transcript. It ultimately rejected the proposal as a matter of principle. Its objections included the concern that jurors with stronger computer skills would tend to dominate deliberations, and that if court staff were allowed to help jurors use the computers they may accidentally influence deliberations, or be seen to have an influence.[44] However, having regard to the increased incidence in the use of information technology in recent years, and the likely capacity of jurors to gain access to material through this medium, this objection would now seem to have less force.

6.45 In our view consideration should be given to the development of a capacity, at least in long and complex trials, to provide transcript in a searchable form, which is on a computer or other device that allows for key word searches. In addition, the document should allow for navigation by inclusion of a table of contents or index that allows judges, the parties and jurors alike to locate the testimony of a particular witness easily. For instance, subject to resources, it may be helpful to provide individual tablet devices to assist jurors in annotating the transcript. Any such devices could also conceivably be used, in appropriate cases, to provide the jury with easy access to electronic versions of documentary evidence that has been admitted in the trial.

Recommendation 6.3

Section 55C of the *Jury Act 1977* (NSW) should be amended to empower the trial judge to provide the jury with a copy of the transcript of proceedings, including the transcript of the evidence, counsel's opening and closing addresses, and the summing up, either on the request of the

43. M Findlay, *Jury Management in New South Wales* (Australian Institute of Judicial Administration, 1994) 164.

44. New Zealand, Law Commission, *Juries in Criminal Trials*, Report 69 (2001) [133].

jury or on the judge's own motion, where it is considered that this would be of material assistance to the jury and would not interfere with the fairness of the trial.

Recommendation 6.4

Jurors should be provided with the means of accessing transcripts electronically and in a searchable form.

Jury access to pre-trial audio and video recordings and transcripts

6.46 In the course of a trial, audio and video recording and transcripts made before the trial can, subject to admissibility, be used as evidence. These records can relate to a number of circumstances and can include:

- audio or video recordings of events and conversations that form part of the course of conduct constituting the offence charged (taken, for example, from lawful telephone intercepts or CCTV surveillance);
- records of stages in the investigative process, such as identification parades, police interviews and crime scene re-enactments;
- pre-recorded interviews with vulnerable witnesses; and
- transcripts of evidence given in earlier proceedings in the case of a retrial in relation to a sexual offence.

Subject to certain exceptions, discussed in the following paragraphs, these records made before the trial will be treated as exhibits in court.

6.47 As a matter of course, juries are shown exhibits once they are received into evidence, and, subject to certain exceptions, will have access to them in the jury room after they have retired to consider the verdict. An exception exists in accordance with s 55A of the *Jury Act 1977* (NSW) which provides:

> A judge or coroner may refuse to allow an exhibit at the trial or inquest being left with the jurors after they have retired if satisfied that the exhibit or the safety of the jurors would be put at risk.

6.48 This provision was principally concerned with items such as weapons, drugs or fragile exhibits that may be damaged by unnecessary handling. In any such case the jury will still be able to see the exhibits again, upon request, in the courtroom in the presence of the accused, legal representatives and the judge.

6.49 Section 55A does not constitute an exclusive statement of the circumstances in which access to an exhibit in the jury room can be withheld, since the power of the court to control its process will permit it to place limitations on the manner in which access can be had, where that is necessary to secure a fair trial.

Audio and video recordings generally

6.50 The courts have long accepted out of court video and audio recordings as evidence of the conversations or other sounds or events recorded, once their provenance is satisfactorily established.[45] The use of sound and visual reproduction equipment to present the contents of the recordings of this kind to the jury constitute evidence of what was said.[46]

6.51 As a consequence, in the normal course, video and audio recordings of events or conversations occurring before the trial commences, for example relating to records of interview with the accused, identification parades, crime scene re-enactments, lawfully intercepted conversations, as well as CCTV recordings and surveillance photographs and videos, will be admitted as exhibits in the trial before being played to the jury[47] and will then become available for use in the jury room.[48]

Transcripts of audio and video recordings

6.52 Routinely a transcript of any conversation recorded by these means will also be provided for use by the jury, and the parties, in order to avoid the necessity of repetitive replaying of the recording and as an aide-memoire.[49]

6.53 The provision of a transcript can be of particular value where the recording is indistinct and does not yield its contents on a first playing. In such a situation transcripts can be received that have been prepared by a person who has listened to repeated playings of the recording, or who may have a particular familiarity with the speech of the person recorded, subject to proof of that having occurred and of the transcript being accurate.

6.54 Where a transcript is received into evidence and made available to the jury it has been held that a direction should be given that its purpose is to act as an aid to listening to the recording and not as independent evidence of the recorded conversation.[50] An instruction will normally be given to the jury that they cannot use the transcript as a substitute for the recording if they are not satisfied that it correctly sets out what they hear for themselves when it is played to them.[51]

6.55 In some cases the recording will be of a conversation in a foreign language, and for that reason unintelligible to the jury. The courts will allow the recording to be admitted as an exhibit, and for evidence to be given of it having been translated into English by a qualified translator who has listened to it, (acting as an *ad hoc* expert) and of having prepared a transcript of that translation. As a translation is not a

45. *Butera v Director of Public Prosecutions (Vic)* (1987) 164 CLR 180, 185.
46. *Butera v Director of Public Prosecutions (Vic)* (1987) 164 CLR 180, 185-186.
47. *R v NZ* [2005] NSWCCA 278; 63 NSWLR 628 [177]-[178].
48. *R v Davies* [2005] VSCA 90; 11 VR 314 [26].
49. *R v NZ* [2005] NSWCCA 278; 63 NSWLR 628 [178]-[179].
50. *Butera v Director of Public Prosecutions (Vic)* (1987) 164 CLR 187 although see *Evidence Act 1995* (NSW) s 48(1)(c) and *R v Giovannone* [2002] NSWCCA 323; 140 A Crim R 1 [61] the effect of which may be that, in the Uniform Evidence Act jurisdictions, the transcript becomes admissible as proof of the content of the recording.
51. *Butera v Director of Public Prosecutions (Vic)* (1987) 164 CLR 188; see *R v Dellapatrona* (1993) 31 NSWLR 123.

copying of the original recording (being in different languages), it is not strictly admissible as an aid to an understanding of the words spoken and recorded. However, as a matter of practice, subject to satisfactory proof of the translator's qualifications and accuracy of the translation, the original recording and the transcript will be admitted into evidence and made available to the jury for use in the jury room.[52]

6.56 Obviously, the availability of a transcript, in each of the circumstances outlined, can save considerable time in the conduct of the trial quite apart from overcoming any problem of unintelligibility. It can also provide an effective shortcut to facilitate access to the passages on which the parties place reliance.

Pre-recorded interviews with vulnerable people

6.57 Somewhat different questions arise in relation to pre-recorded interviews with vulnerable people whose evidence is relied on by the prosecution. Pursuant to the *Criminal Procedure Act 1986* (NSW), a vulnerable person can give evidence of a previous representation, in the form of a recording made of an interview with that person conducted by an investigating official.[53]

6.58 In the case of evidence given by a vulnerable person in the form of a recording, a warning is required to the effect that the jury must not draw any inference adverse to the accused or give the evidence any greater or lesser weight because of the way in which it is given.[54]

6.59 Additional provision is made in the Act, in the case of the retrial of sexual offence proceedings, to permit the prosecution to tender a record of the original evidence that was given by the complainant in those proceedings.[55] These will take the form of an audio visual recording if available, or if not available an audio recording, or if not available a transcript of the evidence.

6.60 This applies both in the case of a retrial following a successful appeal, and one that follows a trial that was discontinued either as the result of the jury being unable to agree on a verdict, or being discharged as a result of illness or other irregularity.

6.61 The Act also permits the court to order that a transcript be supplied to it, or to the jury, of the previous representation of a vulnerable person that is given in the form of a recording, if it appears to the court that a transcript would be likely to aid its comprehension of the evidence.[56]

6.62 Differences have emerged between Australian jurisdictions in relation to the permissibility of allowing pre-recorded video or audio statements of witnesses to be replayed in open court, in response to a jury request after retirement, and/or of

52. *Butera v Director of Public Prosecutions* (Vic) (1987) 164 CLR 180, 190-191.
53. *Criminal Procedure Act 1986* (NSW) s 306S(1)(a), 306U, 306V.
54. *Criminal Procedure Act 1986* (NSW) s 306X, and see *DGB v The Queen* [2002] NSWCCA 328; 133 A Crim R 227 as to the time when such a warning can be given. This warning is similar to that is required where evidence is given by CCTV or by a similar method: s 306ZI.
55. *Criminal Procedure Act 1986* (NSW) s 306B, 306I.
56. *Criminal Procedure Act 1986* (NSW) s 306Z.

allowing the jury unsupervised access to the recording or transcript, in the jury room, once they have retired. This has focused principally on the concern that either course could result in the recording being given undue weight, because of the form in which it is presented and/or because of its repetition,[57] and on whether that risk should be balanced by an additional warning to the jury to guard against that risk, accompanied by a reminder of any cross-examination and re-examination of the complainant at the trial or other relevant evidence.

6.63 The Court of Criminal Appeal examined the cross-jurisdictional differences in legislation and practice in considerable detail in *R v NZ.*[58]. The Court[59] noted the existence of a common law discretion to withhold an exhibit from the jury room where there is a risk that it will be given undue influence over direct oral evidence. It observed that once played, the recording becomes part of the court record, just as does the recording of the direct oral evidence of any other witness.[60] Further it held that the trial judge should have a discretion to determine what to do with the recording if the jury requests that it be replayed. The exercise of this discretion would depend on an assessment of the risk that unsupervised replays might give rise to an unfairness or imbalance that could not be overcome by a suitable warning or reference to the other evidence.[61]

6.64 Although it was not thought appropriate to lay down any rule of practice or procedure, to be followed in every case, where the evidence in chief of a witness was given by the playing of an audio or videotape, the majority summarised its views as to the preferred procedure as follows:

(a) The videotape evidence of a Crown witness should not become an exhibit and, therefore, should not be sent with the exhibits to the jury on retirement;

(b) Any transcript given to the jury under s 15A should be recovered from the jury after evidence of the witness has been completed;

(c) It is for the discretion of the trial judge how a jury request to be reminded of the evidence in chief of the witness should be addressed;

(d) It would be inappropriate for the judge to question the jury as to the purpose for which they wish to have the tape replayed;

(e) If the tape is to be replayed or the transcript of the tape provided to the jury, the judge should caution the jury about their approach to that evidence when the tape is being replayed to them or the transcript of the tape returned to them in terms to the effect that "because they are hearing the evidence in chief of the complainant repeated a second time and well after all the other evidence, they should guard against the risk of giving it disproportionate weight simply for that reason and should bear well in mind the other evidence in the case";

57. *Gately v The Queen* [2007] HCA 55; 232 CLR 208 [31]-[32], [95]-[96].

58. *R v NZ* [2005] NSWCCA 278; 63 NSWLR 628 [106]-[153]. This case was decided in relation to the provisions of the *Evidence (Children) Act 1997* (NSW) that are now incorporated in the *Criminal Procedure Act 1986* (NSW).

59. *R v NZ* [2005] NSWCCA 278; 63 NSWLR 628 [184]-[202] (Howie and Johnson JJ, with whom Wood CJ at CL, and Hunt AJA agreed).

60. *R v NZ* [2005] NSWCCA 278; 63 NSWLR 628 [194].

61. *R v NZ* [2005] NSWCCA 278; 63 NSWLR 628 [199]-[202].

(f) The judge should consider whether the jury should be reminded of any other evidence, for example the cross-examination of the witness at the time that the tape is replayed or sent to the jury room, if that step is considered to be appropriate.[62]

The Commission's view

6.65 While the Bench Book does refer to the decision in *R v NZ*,[63] having regard to the importance of avoiding error in this respect; to the likelihood of greater use being made of pre-recorded evidence in the future; and to the variety of other forms of pre-trial records of events and conversations that can be admitted in a trial, we consider that the Bench Book should provide:

- an appropriate commentary concerning the different considerations that apply in relation to the pre-recorded evidence of witnesses, and to the other recordings that may properly be admitted as exhibits; and
- suggested directions as to the ways in which the jury should approach each type of recording.

Recommendation 6.5

The *Criminal Trial Courts Bench Book* should provide:

(a) guidance concerning the different considerations that apply in relation to the pre-recorded evidence of witnesses, and to the other audio and video recordings and relevant transcripts that may properly be admitted as exhibits; and

(b) suggested directions as to the ways in which the jury should approach each type of recording.

Questions from the jury

6.66 The jury is allowed to ask the trial judge questions concerning the directions of law or the evidence. The ability to ask questions is an important way to help jurors understand the directions and the issues at trial.[64]

6.67 Empirical evidence supports the practice of encouraging jurors to ask questions as a way of increasing their comprehension[65] and involvement in the trial. Without positive encouragement, they may be reluctant to exercise this right out of concern that they might be seen to have insufficiently attended to the evidence or summing up, or that they are incapable of comprehending the issues.

62. *R v NZ* [2005] NSWCCA 278; 63 NSWLR 628 [210].
63. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* [1-378].
64. W Young, N Cameron and Y Tinsley, *Juries in Criminal Trials Part Two: A Summary of the Research Findings*, Preliminary Paper 37 (New Zealand, Law Commission, 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. See NSW Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [10.44]-[10.51].
65. 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.

Encouraging jurors to ask questions

6.68 Jurors may be informed of their ability to ask questions in two ways: by judicial directions informing them of their ability to ask questions; and by provision of a guidebook which refers to their ability to ask questions.

6.69 The Bench Book deals with the right of jurors to ask questions in the suggested opening remarks, and again in the suggestions as to what might be included in the summing up.

6.70 In relation to the opening remarks it offers the following suggested advice to the jury:

> **Queries about evidence or procedure**
> If you have any questions about the evidence or the procedure during the trial, or you have any concerns whatsoever about things that are happening with the trial, you should direct them to me, and only to me. The sheriff's officers and court officers are there to attend to your general needs, but are not there to answer questions about the trial itself. Should you have anything you wish to raise with me, or to ask me, please make a note and give it to the officer. The note will be given to me and, after I have discussed the matter with counsel, I shall deal with the matter. [66]

6.71 In relation to the summing up the suggested wording is:

> I take this opportunity of reminding you that, at this stage, at all times you are free to ask any questions about these legal directions that I am giving you if you have any difficulty with them. You can ask as often as you like and ask any questions that you wish in regard to both the legal directions and any questions of fact.[67]

6.72 The Jury Guide, which is made available to jurors, subject to the consent of the trial judge, advises:

> If at any time a member of the jury has a question or needs clarification about anything, the jury should ask the judge for assistance.
>
> Each member of the jury must understand the judge's instructions on the law in order to do the job properly. 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.
>
> For example, if there is any confusion about the law or some of the evidence the jury should ask:
>
> - for further clarification, explanation or definition of a word or legal principle; and/or
> - to be reminded of evidence by having the whole or part of the testimony of a witness provided.

66. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* [1-520].
67. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* [7-020].

This is done by sending a written request to the judge through the court officer.[68]

6.73 However, the *Jury Guide* may not be adequate by itself. A New Zealand jury study found that a significant number of jurors had not read the New Zealand equivalent of the *Jury Guide*.[69] Furthermore, by the end of the trial, jurors may not be able to recall all the information it contained.[70] Also jurors may be hesitant to ask questions because they might be too intimidated by the judge, believe that asking questions would be a burden on the judge,[71] or be embarrassed at the prospect of appearing foolish.

6.74 While the advice outlined above is adequate, it does not make it entirely clear that the jury can also ask questions during the examination or cross-examination of witnesses that might clarify their understanding of what is being said.

The Commission's view

6.75 In CP 4 we asked whether more could be done to encourage jurors to ask questions if they are having difficulty with any aspect of the trial or the summing up.[72] In this respect we had in mind the possibility that not all jurors will read the written orientation material that is provided or recall all of its detail.[73]

6.76 We also had in mind the fact that the current procedure for asking questions, which usually involves a written note delivered by the foreperson of the jury, and which may result in a need to reconvene the court (if the request is made after retirement) can be both time consuming and intimidating, and as a consequence is not necessarily a procedure that is conducive to jurors feeling relaxed and free to ask questions.[74]

6.77 As a general proposition we are of the view that jurors should not only be informed of the right to ask questions at any stage of the trial, but also given an assurance that they should not feel any constraints in doing so. In this respect, it has been suggested that it might be more efficient, as well as less intimidating, if a short period were set aside at the end of each day to allow the jury to ask the judge any

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68. NSW Sheriff, *A Guide for Jurors – Welcome to Jury Service* (Attorney General's Department of NSW, Court Services, 2007) [9].
69. See W Young, N Cameron and Y Tinsley, *Juries in Criminal Trials Part Two: A Summary of the Research Findings*, Preliminary Paper 37 (New Zealand, Law Commission, 1999) [2.13]-[2.14].
70. W Young, N Cameron and Y Tinsley, *Juries in Criminal Trials Part Two: A Summary of the Research Findings*, Preliminary Paper 37 (New Zealand, Law Commission, 1999) [2.12].
71. 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 and Y Tinsley, *Juries in Criminal Trials Part Two: A Summary of the Research Findings*, Preliminary Paper 37 (New Zealand, Law Commission, 1999) [4.20], [7.62].
72. NSW Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [10.44]-[10.51].
73. See W Young, N Cameron and Y Tinsley, *Juries in Criminal Trials Part Two: A Summary of the Research Findings*, Preliminary Paper 37 (New Zealand, Law Commission, 1999) vol 2 [2.12]; K Warner, J Davis and P Underwood, "The jury experience: insights from the Tasmanian jury study" (2011) 10 *Judicial Review* 333, 343.
74. See K Warner, J Davis and P Underwood, "The jury experience: insights from the Tasmanian jury study" (2011) 10 *Judicial Review* 333, 341-342; J Goodman-Delahunty and others, *Practices, Policies and Procedures that Influence Juror Satisfaction in Australia*: *Report to the Criminology Research Council,* Research and Public Policy Series No 87 (Australian Institute of Criminology, 2008) 98.

questions.[75] This could be extended to adopting a practice of inviting the jury to ask questions after the delivery of each direction on any significant issue of law.

Questioning of witnesses

6.78 A separate issue is whether jurors should be allowed to ask questions directly of the witnesses. It has been suggested that, by permitting the jury to question witnesses, jurors can become more active participants in the trial, which has a positive impact on their understanding of the decision that they must make.[76] It also has the advantage of alerting counsel and the trial judge to areas where the jury is confused or misunderstands the evidence or the issues, and allows them to correct these errors before the jury retires to consider its verdict. It may help jurors in staying alert during the proceedings and enhance their satisfaction with the trial process.

6.79 There is however a concern that, by allowing jurors to question witnesses, counsel will lose control over the presentation of their cases, or that the jury's questions will venture into inadmissible aspects of evidence or into irrelevant issues, causing annoyance or confusion if the questions are rejected. These concerns derive from the traditional concept of the adversarial trial as one in which the jury sits as passive and neutral deciders of the facts on the basis of the evidence presented by the parties. That approach is consistent with the prohibition that otherwise exists on jurors undertaking independent inquiries.

6.80 It is noted that in Arizona, USA, the criminal courts have a practice of allowing jurors to write out questions during witness testimony, which are then handed to the judge for vetting and then directed to the witness.[77] A similar practice occurs on an ad hoc basis, from time to time, in trials in NSW but normally on the initiative of the jury rather than as the result of a specific invitation from the judge.

6.81 Some submissions were in favour of informing jurors of their ability to ask questions prior to deliberations.[78]

6.82 The QLRC concluded that juries should continue to be informed about their right to ask questions concerning the evidence, the law and procedure, including their right to ask questions of witnesses through the trial judge. It considered that such an acknowledgement (with appropriate explanation) would give juries some reassurance that they can seek to clarify their uncertainties and reduce frustration that might lead to some jurors seeking information by independent investigation.[79]

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75. K Warner, J Davis and P Underwood, "The jury experience: insights from the Tasmanian jury study" (2011) 10 *Judicial Review* 333, 342.
76. D Watt, *Helping Jurors Understand* (Thomson Carswell, 2007) 52-55.
77. See *Arizona Rules of Criminal Procedure*, Rule 18.6(e). See M Yarnell, *The Arizona Jury: Past, Present and Future Reform: Executive Summary* (2005) 28.
78. Commonwealth Director of Public Prosecutions, *Submission JU10*, 11; Law Society of NSW, *Submission JU3*, 14; NSW Bar Association, *Submission JU1*, 12.
79. Queensland Law Reform Commission, *A Review of Jury Directions*, Report 66 (2009) vol 1 [10.185]-[10.192].

The Commission's view

6.83 Allowing jurors to ask questions of witnesses is potentially beneficial if confined to ensuring clarity of the evidence that is given and in removing ambiguity.

6.84 In our view, judges should take steps to facilitate and encourage jury participation in the evidence presentation stage of the trial. In doing so, judges should inform jurors that their ability to ask questions is explicitly connected to their role as triers of fact and should not be seen as an opportunity to conduct their own investigation or go beyond the evidence that has been presented in court.

6.85 However, we do not consider that jurors should be permitted to question witnesses directly. The current practice is sufficient whereby any question, which a juror wants to ask to clarify a witness's answer, is passed to the judge in writing, considered by counsel and the judge for relevance, and then placed into proper form.

Recommendation 6.6

(1) The suggested opening remarks, and the suggested directions for the summing up, in the *Criminal Trial Courts Bench Book* should include a more positive statement to encourage jurors to ask questions where they consider they need clarification about the evidence, the law, or the issues in the trial.

(2) The *Criminal Trial Courts Bench Book* should include a basic guide as to the way in which questions can be encouraged and managed.

(3) The Jury Guide issued by the Office of the Sheriff, should be amended to make it clear that jurors can ask questions during the trial in relation to the evidence and not only after they have retired to consider the verdict.

Directions in advance of the summing up

Directions of law during the evidence

6.86 It has been accepted that it is good practice for judges to give directions that amount to warnings about the use of those categories of evidence that require warnings or special consideration contemporaneously with the reception of that evidence. This applies to warnings concerning the evidence given by prison informants, people criminally concerned in the offence charged, and identification witnesses. It also applies to directions that place limitations on the use to which certain evidence can be put, for example, lies that may be relied on as proof of consciousness of guilt or only as going to credibility and to evidence given to the effect that the accused has exercised the right to silence.

6.87 This practice, it has been observed, is more likely to bring home to the jury the force of the direction in the precise context in which it is to apply; and additionally can

assist in preventing it being given undue weight.[80] It will not, however, remove the need for the relevant warning to be repeated in the summing up, although that will be dependent on the circumstances of the case and the need to ensure a fair trial.[81]

6.88 The Bench Book currently addresses, at several points in relation to specific topics, the desirability of giving directions of this kind contemporaneously with the evidence to which they relate.[82] We support the inclusion of general advice as to the desirability of giving warnings in relation to those categories of evidence that require warnings and limited use directions, at the same time as the evidence for which they are relevant as a discrete topic in the basic guide and checklist discussed in Chapter 3.[83] We understand that the Bench Book Committee is currently preparing a draft of such advice to be included in the Bench Book.

Judge's preliminary address to the jury

6.89 In CP 4 we gave consideration to the sequence in which the closing addresses and summing up have traditionally been delivered.[84] The possible advantages of allowing the summing up to precede the addresses were noted, including the fact that it could:

- assist in focusing the addresses; and
- shorten the summing up by removing the need for any summary to be given of the arguments of counsel.

6.90 Submissions generally did not support the judge delivering the summing up before the closing addresses.[85]

6.91 In proposing this option we had in mind the desirability, that has been noted, for example, by Lord Justice Auld, of counsel being able to fashion their speeches knowing how the judge is going to put the matter to the jury.[86]

6.92 After further consideration, subject to a limited exception, we are not minded to recommend any change in the traditional order in which the addresses and summing up are delivered. We do however consider it important that judges follow the practice of discussing with counsel, before the addresses, the directions that are

80. *DGB v R* [2002] NSWCCA 328; 133 A Crim R 227 [23]; *Relc v R* [2006] NSWCCA 383; 167 A Crim R 484 [44]; *Qualtieri v R* [2006] NSWCCA 95, 171 A Crim R 463 [80]; *Sanchez v The Queen* [2009] NSWCCA 171; 196 A Crim R 472 [58].
81. *DGB v R* [2002] NSWCCA 328; 133 A Crim R 227 [23].
82. For example, directions in relation to: the admissibility of evidence against different defendants in a joint trial: Judicial Commission of NSW, *Criminal Trial Courts Bench Book* [1-015]; the use of CCTV or alternative arrangements for the giving of evidence: [1-364]; accusatory statements in the presence of the accused: [2-000]; in-court identification: [3-010]; the right to silence: [4-130].
83. See para [3.12]-[3.16].
84. NSW Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [6.55]-[6.60].
85. Commonwealth Director of Public Prosecutions, *Submission JU10,* 5; Law Society of NSW, *Submission JU3,* 6; NSW, Office of the Director of Public Prosecutions, *Submission JU9,* 4; NSW Bar Association, *Submission JU1,* 5.
86. R E Auld, *Review of the Criminal Courts of England and Wales*, Report (2001) 529; and see also A M Gleeson, "The role of a judge in a criminal trial" (*LawAsia Conference*, Hong Kong, 6 June 2007) 9-10.

to be given. In appropriate cases, this could best be achieved by supplying counsel with a draft of the summing up; while in other cases, it may be sufficient simply to identify the generic directions that the judge expects to give.

6.93 Whichever path is followed, this has the advantage of identifying any possible deficiencies or errors in the summing up, thereby avoiding the need for a later, potentially confusing, redirection as well as limiting the possibility of a guilty verdict being quashed because of a misdirection.

6.94 Submissions generally supported the approach of the judge conferring with counsel before the closing addresses and summing up.[87] It has also been suggested that this approach could allow an agreed summary of the relevant law to be given to the jury before counsels' addresses.[88]

6.95 Without altering the traditional sequence in which the closing addresses and summing up are delivered, we are of the view that beneficial use could be made of a practice that has been followed in some trials,[89] of the judge delivering a preliminary address to the jury before the addresses of counsel.

6.96 This would not constitute a full address. Rather, it would constitute a summary of the elements of the offence(s) charged and of any defences raised, and of the issues (although without any reference to the evidence or anticipated arguments of counsel) that the jury needs to consider.

6.97 Where written directions or other summaries have been provided pre-trial, as noted in Chapter 7,[90] this could be the occasion for those documents to be reviewed and amended as necessary. In other cases, a summary of the kind outlined could assist in providing a focus for the addresses, and a reference point for the jury in assessing the competing arguments.

6.98 We do not suggest that any such practice should be mandated. Rather it should be a matter for discretion, depending on the circumstances of the individual case and an assessment of how, in accordance with good practice, the jury might be best assisted in its final deliberations. We understand that the Bench Book Committee is currently drafting an addition to the Bench Book which suggests that judges could, in appropriate circumstances, provide written directions to the jury on the elements of the offence and any relevant legal issues, and also provide some short oral directions in relation to this material without reference to the evidence. The proposed additions also suggest that the judge should discuss with counsel the issues that arise and the warnings and directions that should be used.

6.99 It would, in our view, be appropriate for s 161 of the *Criminal Procedure Act 1986* (NSW) to be amended expressly to permit the judge to give a preliminary address to

87. Law Society of NSW, *Submission JU3,* 6; NSW Bar Association, *Submission JU1,* 5; Commonwealth Director of Public Prosecutions, *Submission JU10* 4. See also NSW, Office of the Director of Public Prosecutions, *Submission JU9,* 4.

88. P McClellan, Chief Judge at Common Law, *Letter to Hon J Hatzistergos, Attorney General*, 18 December 2008*,* 2.

89. See, eg, *R v Said* [2009] VSCA 244.

90. See para [7.63]-[7.75].

the jury before the addresses of counsel. We support the proposals by the Bench Book Committee to outline good practice in relation to the way in which, through consultation with counsel and/or the delivery of a preliminary address, the addresses and summing up can be focused on the true issues, and the potential for error through misdirection minimised.

Recommendation 6.7

Section 161 of the *Criminal Procedure Act 1986* (NSW) should be amended to permit the judge to deliver a preliminary address to the jury before the closing addresses of counsel.

The summing up - summarising the evidence and addresses

Current law and practice

6.100 In accordance with the requirements for a fair trial, the trial judge will normally find it necessary in the summing up to refer to the evidence and the addresses. In particular, the judge will need to place the summary of the evidence in the context of the issues that arise on the defence case. As was observed in *El-Jalkh v R*:

> it is an essential function of a trial judge in summing-up to a jury that the trial judge, having identified the issue or issues in the trial, put the defence case on that issue or those issues and that the trial judge make such references to the evidence as may be required to enable the jury properly to understand the defence case and that it is not sufficient for the trial judge to say to the jury that they should give consideration to the arguments which have been put by counsel. [91]

6.101 The practice concerning the way in which the evidence is dealt with has changed over the years. In the 1980s, judges customarily provided lengthy and detailed summaries of evidence, even in short trials, often by summarising the evidence of each witness in turn, without any attempt to place that evidence in the context of the issues or of the evidence given by other witnesses. This approach has subsequently been regarded as time-consuming and unhelpful.[92]

6.102 Legislation has now modified the common law duty of the trial judge to summarise the evidence in the summing up. Section 161(1) of the *Criminal Procedure Act 1986* (NSW) provides that:

> At the end of a criminal trial before a jury, a Judge need not summarise the evidence given in the trial if of the opinion that, in all the circumstances of the trial, a summary is not necessary.[93]

91. *El-Jalkh v R* [2009] NSWCCA 139, [147] (James J with whom Spigelman CJ and Simpson J agreed).
92. NSW Attorney General's Department, *Discussion Paper on Reforms to the Criminal Justice System* (1989) 63; see *R v Zorad* (1990) 19 NSWLR 91, 105 cited in *R v Tillott* (1991) 53 A Crim R 46, 51.
93. The predecessor to this provision, *Crimes Act 1900* (NSW) s 405AA, was inserted by *Criminal Procedure Legislation (Amendment) Act 1990* (NSW) sch 2.

6.103 The application of this provision will depend on the circumstances of the individual trial and on the complexity of the factual issues that arise.[94] The Court of Criminal Appeal has recently noted the difficulties involved in finding the correct approach for a particular case:

> It is easy to state the basic requirements of a proper summing-up: it is less easy to apply them in particular cases. Especially in times where every word uttered in the course of a trial is recorded and transcribed, there is considerable pressure on a trial judge to err on the side of excessive caution in referring to the evidence and the issues, lest any misstatement or omission be seized upon by counsel for the purposes of an appeal. The safest course, it may be thought, is to deal with the evidence as it has unfolded, in a largely chronological fashion. Unfortunately, that course is likely to be of less help to the jury than the more demanding course of identifying issues in dispute and relating relevant evidence to each issue in turn. It is clear that it is the latter course which must generally be adopted.[95]

6.104 Empirical studies have shown support from both judges and jurors for the adoption of a more focused approach to the evidence. Respondents to an Australian Institute of Judicial Administration (AIJA) study identified factors that could potentially impede good communication in the summing up, including too much detail about the evidence, and the unnatural process of feeding information to the jury, with little real opportunity for jurors to ask questions.[96]

6.105 Although the estimates of the time spent in summing up and in dealing with the evidence reported in that study[97] may now be out of date, it is pertinent to note that a number of judges responding to the survey questioned the usefulness of lengthy summaries of the evidence and summaries of addresses, and expressed concern that these aspects of the summing up contributed to juror boredom and fatigue.

6.106 The study that was undertaken on behalf of the New Zealand Law Commission found that jurors rarely mentioned the judge's summary of the evidence, with some of those surveyed saying that it was unnecessary, or that it was boring and they did not listen to it. The researchers concluded from this that the judge's summary of evidence currently plays a less important part in jurors' understanding of the issues than is often imagined.[98] It was suggested that jurors would be better assisted if judges dealt with each issue according to a more systematic structure for assessing the evidence and applying the law.[99]

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94. *Wong v R* [2009] NSWCCA 101; *RR v R* [2011] NSWCCA 235; *R v Williams* [1999] NSWCCA 9, 104 A Crim R 260; *R v Davis* [1999] NSWCCA 15.
95. *Buckley v R* [2012] NSWCCA 85 [14].
96. 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) 35-36.
97. 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) 28.
98. W Young, N Cameron and Y Tinsley, *Juries in Criminal Trials Part Two: A Summary of the Research Findings*, Preliminary Paper 37 (New Zealand, Law Commission, 1999) vol 2 [7.26]-[7.29]; W Young, "Summing up to juries in criminal cases – what jury research says about current rules and practice" [2003] *Criminal Law Review* 665, 687-689.
99. W Young, "Summing up to juries in criminal cases – what jury research says about current rules and practice" [2003] *Criminal Law Review* 665, 688-689.

The Commission's view

6.107 We do not consider it appropriate to place any express legislative restriction on the extent to which, in the summing up, a judge can or should deal with the evidence. There was no support for this kind of restriction in the submissions, and any such limitation would unduly fetter the discretion of the judge to deal with the evidence in the way that is best suited to the individual case, in the interests of securing a fair trial. It might also risk opening up new avenues of appeal.

6.108 As noted above, it is most important to ensure that the summary of the evidence is placed in the context of the issues that arise on the defence case.

6.109 In a short single-issue trial it should be possible for the judge to rely on s 161 of the *Criminal Procedure Act 1986* (NSW) and to deliver a summing up that does not involve a detailed summary of the evidence, without departing from the requirement that the respective cases for the prosecution and defence be accurately and fairly put to the jury.[100] The jury should be credited with sufficient intelligence and common sense not to require an unnecessarily lengthy repetition of the evidence, particularly when they have only just been the subject of closing addresses of counsel.[101]

The summing up – use of written material

Provision of written directions

6.110 Judges in NSW have a common law power to give directions in writing to a jury, that is not dependent on the consent of counsel.[102] They also have a statutory power to do so pursuant to the *Jury Act 1977* (NSW) which provides:

> **55B Judge or coroner may give directions to jury in writing**
> 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.

6.111 The judge's power to give written directions under s 55B of the *Jury Act 1977* (NSW), as well as at common law, can be exercised at any stage during the trial.[103]

6.112 The Bench Book includes a discussion of the power to give written directions, both under s 55B and at common law.[104] It does not elaborate on the situations when it may or may not be suitable to give directions in writing, beyond noting that it is a matter for the exercise of the judge's discretion. It does refer to certain situations

100. *R v Meher* [2004] NSWCCA 355 [82]-[86]; *R v Veverka* [1978] 1 NSWLR 478, 482 and see *R v Malone* (Unreported, New South Wales Court of Criminal Appeal, 20 April 1994); *Wong v R* [2009] NSWCCA 101.
101. *R v Williams* [1999] NSWCCA 9, 104 A Crim R 260; *R v Davis* [1999] NSWCCA 15.
102. *Petroff v R* (1980) 2 A Crim R 101.
103. *R v Elomar (No 1)* [2008] NSWSC 1442; 233 FLR 222 [26]-[32], a case in which the jury were given, at the outset of the trial, a roadmap or chronology prepared by the prosecution of the facts sought to be proved, and written directions as to the elements of the offence charged that focused particularly on the definition of a "terrorist act" as appearing in the *Criminal Code* (Cth).
104. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* [1-582].

where written directions may be particularly useful, namely, where alternative verdicts are available, or where a defence arises which the accused must establish on the balance of probabilities, or where a defence is raised on the evidence that the prosecution must negative.

6.113 The practice of providing jurors with a written document setting out, at the least, the essential elements of the charge, has become widespread and has been encouraged by the Court of Criminal Appeal.[105] The AIJA survey that was conducted in 2004-2005 showed that 82.6% of judges responding to the survey reported that they provided the jury with written assistance about the summing up, with 69.9% noting this included the provision of written directions.[106] In a separate study, conducted in 2007, 56% of the NSW jurors included within the study reported that they had received written directions.[107]

6.114 There is some empirical evidence, arising from surveys of real as well as mock jurors, to support the supposition that written directions assist jurors.[108] Their effect on comprehension levels has been reported to be strongest when jurors are given both oral and written versions of a direction.[109] Jurors in the surveys generally demonstrated a desire for written directions and an expectation that they would be useful and, when provided with them, reported that they found them to be of assistance. There was evidence to suggest that the provision of written directions helped to reduce and resolve disagreements among jurors. The evidence was more equivocal about whether the provision of written directions did in fact have a positive impact on comprehension levels although it was found to have no detrimental effect on jurors' deliberations. For example, there was no indication that jurors spent too much time studying the written directions and less time studying the evidence. It has been suggested that these studies demonstrates that the mere provision of written directions will not be enough on its own to improve comprehension if they are not drafted in clear and concise terms and provided at the appropriate time.[110] For example, some jurors responding to a New Zealand survey complained that written and visual aids provided to them were not presented properly, were provided at the

105. *R v Forbes* [2005] NSWCCA 377; 160 A Crim R 1 [83] and [91]; and see *R v Taufahema* [2007] NSWCCA 33 [11].

106. 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) table 5, 30-31.

107. J Goodman-Delahunty and others, *Practices, Policies and Procedures that Influence Juror Satisfaction in Australia*: *Report to the Criminology Research Council,* Research and Public Policy Series No 87 (Australian Institute of Criminology, 2008) 140.

108. 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, 8, 10; J Ogloff and V G Rose, "The comprehension of judicial instructions" in N Brewer and K Williams (ed), *Psychology and the Law: An Empirical Perspective* (Guilford Press, 2005) 432-433; M Comiskey, "Initiating dialogue about jury comprehension of legal concepts: can the 'stagnant pool' be revitalised?" (2010) 35 *Queen's Law Journal* 625, 653-654; 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.

109. C Thomas, *Are Juries Fair?* Research Series 1/10 (UK Ministry of Justice, 2010) vi; M Comiskey, "Initiating dialogue about jury comprehension of legal concepts: can the 'stagnant pool' be revitalized?" (2010) 35 *Queen's Law Journal* 625, 654.

110. J Ogloff and V G Rose, "The comprehension of judicial instructions" in N Brewer and K Williams (ed), *Psychology and the Law: An Empirical Perspective* (Guilford Press, 2005) 433; D Watt, *Helping Jurors Understand* (Thomson Carswell, 2007) 89.

wrong time in the trial, and were not used enough for them to have the full benefit that they could offer. The researchers in this study concluded that these findings argued in favour of the more systematic use of written and visual aids.[111]

6.115 Some concerns have been expressed that:

- jurors will place too much reliance on written directions at the expense of the oral directions;[112]
- jurors could become distracted or bogged down in legal argument, or rely on one instruction to the exclusion of others;[113]
- save in long or complex trials, the provision of written directions will result in unnecessary complexity;[114] and
- it cannot be assumed that all jurors will be able to read and follow written directions.

It is worth noting, however, that the empirical evidence has not borne out these concerns[115] and that the Court of Criminal Appeal has dismissed the literacy concern.[116]

6.116 Reviews of jury directions in Queensland, Victoria, England and Wales, and New Zealand have all made recommendations for reform aimed at widening the use of written directions and of other written material in jury trials. The VLRC recommended that judges have the discretion to give juries a written "Jury Guide" as part of the summing up, which integrates directions on the law into questions concerning the facts of the particular case.[117] The VLRC also anticipated that judges could provide juries with written summaries of the evidence, and in some instances refer to these or to the transcript rather than provide an oral restatement of the evidence in the summing up.[118]

6.117 The QLRC recommended legislative amendment expressly to permit the judge to provide the jury with a range of written and visual material including written copies of the jury directions as well as summaries, chronologies, charts and diagrams.[119] The QLRC took the view that such material would help the jury to understand the

111. W Young, Y Tinsley and N Cameron, "The effectiveness and efficiency of jury decision-making" (2000) 24 *Criminal Law Journal* 89, 93.
112. 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) 32.
113. W Schwarzer, "Communicating with juries: problems and remedies" (1981) 69 *California Law Review* 731, 754-755.
114. *Nikolaidis v R* [2008] NSWCCA 323; 191 A Crim R 556 [124]-[125] (Simpson J).
115. See para [6.114], and see also M Comiskey, "Initiating dialogue about jury comprehension of legal concepts: can the "stagnant pool" be revitalized?" (2010) 35 *Queen's Law Journal* 625, 654-655.
116. *R v Forbes* [2005] NSWCCA 377; 160 A Crim R 1 [92].
117. Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) rec 43, 44 [6.46]-[6.60]. For our recommendations concerning integrated directions or question trails, see para [1.165]-[6.170].
118. Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) rec 23 [5.15]-[5.29].
119. Queensland Law Reform Commission, *A Review of Jury Directions*, Report 66 (2009) rec 9-6, 10-1.

issues or the evidence. It described these written documents as "aids", which presumably means that they were not intended to operate independently of oral directions.[120] It recommended that the *Criminal Code* (Qld) be amended to make specific provision. along the lines of a Victorian provision,[121] for the jury to be given written materials in the following terms:

> (1) For the purpose of helping the jury to understand the issues or the evidence, the trial judge may order, at any time during the trial that copies of any of the following are to be given to the jury in any form that the trial judge considers appropriate:
>
> (a) the indictment;
>
> (b) any document setting out the elements of each offence charged and any alternative offences;
>
> (c) any document admitted as evidence;
>
> (d) any statement of facts;
>
> (e) the opening statement and closing address by the prosecution, any opening statement and closing address by a defendant (or summaries of those statements and addresses) and the defendant's response to any notice to make pre-trial admissions issued by the prosecution;
>
> (f) any address of the judge to the jury;
>
> (g) any schedules, chronologies, charts, diagrams, summaries or other explanatory material;
>
> (h) transcripts of evidence or audio or audiovisual recordings of evidence;
>
> (i) transcripts of any audio or audiovisual recordings;
>
> (j) any of the judge's directions to the jury;
>
> (k) any document setting out decision trees, flowcharts or checklists of questions for consideration by the jury; and
>
> (l) any other document that the judge considers appropriate.
>
> (2) The trial judge may specify when and in what format any such material is to be given to the jury, and may make such comments or give such instructions to the jury on the use of any such material as the judge considers necessary in the interests of justice.[122]

6.118 In England and Wales, Lord Justice Auld recommended legislative amendment to require judges to use a case and issues summary in jury trials and to allow the use of other written or visual aids, that could be referred to in the oral summing up. In

120. Queensland Law Reform Commission, *A Review of Jury Directions*, Report 66 (2009) [10.138]-[10.140].

121. *Criminal Procedure Act 2009* (Vic) s 223.

122. Queensland Law Reform Commission, *A Review of Jury Directions*, Report 66 (2009) [10.154], rec 10-1.

New Zealand, the Law Commission recommended that consideration be given to the drafting of a practice note to direct that the judge provide the jury with written and visual aids as a matter of course.

The Commission's view

6.119 The great advantage of the written word over oral communication is the ease with which reference can be made to the written word without the need for the jury to rely solely on their memory. This is of particular value where the judge's directions, the issues to which they relate, and/or the evidence presented at trial, are long or complex.

6.120 While jurors are now permitted to make their own written notes during the trial,[123] there may be differences between individual jurors' notes or deficiencies in accuracy and detail, with jurors disagreeing about the evidence or about the terms of the directions.[124] By contrast, a judge's well-drafted written directions and written summaries of evidence or charts and chronologies of the kind considered later in this chapter, when combined with focused oral direction, can serve as easily accessible and reliable reference points to assist jurors in their decision-making, thereby enhancing jury confidence and the reliability of their verdict.[125]

6.121 In most cases the provision of written directions to the jury is likely to be helpful and in our view their use should generally be encouraged, unless the trial judge considers there is good reason to the contrary. As suggested in the Bench Book, it is good practice to consult the prosecution and defence on the form of those directions but their final form must remain a matter for the judge, depending on the complexity of the case and an assessment of how useful they are likely to be. Having regard to the extent to which written directions have been approved and are currently used, we do not see any need for a specific recommendation in this respect.

Relationship between written and oral directions

6.122 At common law the written directions were treated as an aide-memoire for the jury as to the directions that were given orally, and not in substitution for them.[126]

6.123 In contrast to the position at common law, written directions given under s 55B of the *Jury Act 1977* (NSW) can stand as directions in their own right.[127] However this

123. See *R v Sandford* (1994) 33 NSWLR 172, 181-182; NSW Law Reform Commission, *Jury Directions,* Consultation Paper 4 (2008) [10.4]-[10.5]. The AIJA survey reported 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: 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.
124. W Young, Y Tinsley and N Cameron, "The effectiveness and efficiency of jury decision-making" (2000) 24 *Criminal Law Journal* 89, 94.
125. *R v Thompson* [2008] VSCA 144; 21 VR 135 [102].
126. *Petroff v R* (1980) 2 A Crim R 101.
127. *R v Savvas* (1989) 45 A Crim R 38, 38.

does not mean that judges can dispense with the need for giving oral directions by the expedient of supplying a written one.[128]

6.124 It is recognised that, unless carefully drafted, the use of written directions has the potential to increase rather than reduce the incidence of appeals, because of the opportunity for error appearing in the written document, and the scope for inconsistencies to arise between written and oral directions.

6.125 In some instances it has been held that there should be no presumption that either the oral or written direction should prevail; rather it is their combined impact that must be assessed to determine whether there was a misdirection.[129] In other instances the oral directions have been held to prevail, so that any misdirection which they contain will not be corrected by a written direction.[130]

6.126 In *Justins v The Queen* the majority held that while the written direction that was given in that case omitted reference to a legal requirement for the charge of manslaughter, the oral direction that was given was sufficient to overcome that deficiency.[131] The dissenting judge however noted that written directions have a particular force and are likely to override the juror's recollection of the oral directions.[132]

The Commission's view

6.127 As noted earlier, problems can arise if the written directions are inconsistent with the terms of an oral direction.

6.128 We do not consider that legislative amendment can resolve this question. Although two submissions favoured the introduction of legislation that would make the written directions prevail over the oral directions,[133] we do not support such a course. Rather it is our view that the Bench Book should suggest that it is good practice for the judge to instruct the jury that if they perceive an inconsistency, they should ask a question to resolve it. Otherwise, and more fundamentally, the trial judge should take care to ensure that the oral and written directions are accurate and consistent, and should also encourage counsel to identify and bring to attention any differences or inconsistencies between them.

6.129 We also would not support the provision of written directions in the place of oral directions. Although valuable as an aide memoire, and as a reference point during the jury deliberations, there is a need to recognise the possibility of there being differences in individual jurors' cognitive skills when it comes to understanding a

128. *Petroff v R* (1980) 2 A Crim R 101, 117. See also *R v Dunn* [1996] SASC 58; 94 SASR 177 [36]; *R v Thomson* [2008] VSCA 144; 21 VR 135 [146]-[148] (Redlich JA).

129. *Hurst v Tasmania* [2011] TASCCA 12 [21].

130. *R v Burns* [2009] SASC 105; 103 SASR 514.

131. *Justins v R* [2010] NSWCCA 242; 204 A Crim R 315 [73], [343] (Spigelman CJ and Johnson J).

132. *Justins v The Queen* [2010] NSWCCA 242; 79 NSWLR 544 [243], [246] (Simpson J).

133. NSW Bar Association, *Submission JU1*, 11; Law Society of NSW, *Submission JU3*, 13. But see NSW, Office of the Director of Public Prosecutions, *Submission JU9*, 13.

written document. It cannot be assumed that all jurors will be able to understand written directions and summaries with the same level of ease.[134]

Recommendation 6.8

The *Criminal Trial Courts Bench Book* should:

(a) emphasise the need for judges:

(i) to ensure that oral and written directions are consistent; and

(ii) to invite counsel to identify any potential deficiency or inconsistency in the directions that are given; and

(b) include a suggested direction inviting jurors, if they perceive any inconsistency or have a difficulty in understanding the oral or written directions, to seek clarification.

Provision of written summaries of evidence and addresses

6.130 It is noted that s 55B of the *Jury Act 1977* (NSW) that permits the delivery of written directions of law does not address the issue of whether the jury can be provided with a written summary of the evidence or addresses of counsel. We would expect, in the normal course of events, that the summaries of evidence and the addresses of counsel would be integrated, together with the necessary directions of law, into the judge's summing up (as discussed later in this chapter[135]). So far as there is any doubt as to the ability of the judge, in appropriate cases, to provide such components of the summing up to the jury in writing, we consider that the ability to do so should be clarified.

Written summaries of evidence

6.131 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 prosecution 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,[136] in practice the Court of Criminal Appeal's decision in *Petroff v R*[137] has been interpreted as prohibiting it. In many cases, this would deny 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.[138]

134. *R v Thompson* [2008] VSCA 144; 21 VR 135, 166 (Redlich JA), 168 (Hansen AJA), contrast Neave JA, 154; *R v Dunn* [1996] SASC 58; 94 SASR 177 [38]-[43].

135. See para [6.140]-[6.170].

136. 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* (unreported, NSW CCA, 19 November 1987) 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".

137. *Petroff v R* (1980) 2 A Crim R 101.

138. See the comments of Street CJ in *R v Vincent* (unreported, NSW CCA, 19 November 1987) 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".

6.132 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".[139] 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".[140]

6.133 The Bench Book does, however, cite examples of cases where written summaries have been provided, usually with the consent of both counsel.[141]

6.134 Consistently with the common law power to provide written directions, any written summaries of evidence that are provided should be understood as an aide memoire rather than a replacement of the oral evidence.

6.135 We do not consider that judges should provide a written summary of the evidence in every case. Written summaries of the evidence may be appropriate in some lengthy or complex trials, such as those involving circumstantial evidence, but would normally be of limited use in short, single issue trials. In our view, judges should be able to provide written summaries of the evidence according to the circumstances of each case where they are considered useful as an *aide memoire*. Other factors on which the provision of such summaries would depend include the availability of resources to prepare them and the desirability of not delaying the trial. A summary may, for example, only need to focus on a key issue or reduce eyewitness accounts of a significant event to a table for easy reference.

6.136 On this basis, it would be desirable to regularise this process by amendment of s 55B of the *Jury Act 1977* (NSW) so as to authorise the provision to the jury of a written summary of the evidence. This would avoid any argument that the expression "direction of law" used in that section should be interpreted narrowly.

Written summaries of addresses of counsel

6.137 Generally, it is accepted that judges should include in the summing up a brief outline of the arguments put by counsel in relation to the different issues in the case,[142] even though there is, strictly speaking, no "rule of law or of practice" which obliges them to do so.[143] The judge does not need to provide the summary of the prosecution and defence cases in isolation from the summaries of each of the relevant legal elements and the related evidence. In many cases, integration of the arguments in the context of the individual issues can be more helpful.

6.138 The considerations outlined above in relation to summarising the evidence apply similarly to the question of the extent to which the judge needs to summarise the arguments of counsel or to have them reduced to a written summary. Having had the benefit of listening to the addresses immediately before the summing up, it is questionable whether any benefit is served by their oral repetition by the judge. The

139. *R v Vincent* (unreported, NSW CCA, 19 November 1987) 9 (Street CJ); *Tripodina v R* (1988) 35 A Crim R 183, 197.

140. *R v Healey* [1965] 1 All ER 365, 371.

141. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* [1-582].

142. *R v Zorad* (1990) 19 NSWLR 91, 105; *R v Lawrence* [1982] AC 510, 519 (Lord Hailsham LC).

143. *R v Smart* (1962) 80 WN (NSW) 1125, 1130.

jury can obviously be assisted by the arguments being marshalled, in a summary form, in relation to each issue, but there seems little point in a repetition of every point that was made in support of a particular proposition, or in opposition to it. In appropriate cases it could be helpful for a written summary of the arguments to be prepared with the assistance of counsel and supplied to the jury.

6.139 As we noted earlier, the judge should refrain from entering the fray by strengthening the case of either party through the addition of reasons that were not raised by counsel, and should only sparingly exercise the right to comment on the merits of the case or on the evidence. Apart from presenting an appearance of partiality that is inconsistent with the proper role of the judge, an intrusion of this kind, whether at the time of summing up or during the trial, can be counterproductive. The one exception to the raising of additional material to that dealt with by counsel concerns the application of the *Pemble* principle, that will require the judge to identify any alternative offences or defences that are fairly open on the evidence, even though they have not been mentioned by counsel.

Recommendation 6.9

Section 55B of the *Jury Act 1977* (NSW) should be amended to allow written summaries of the evidence and of the addresses of counsel to be given to the jury in cases where the judge considers that such written summaries would be likely to assist the jury in its deliberations.

Integrated summing up and question trails

Current law and practice

6.140 Traditionally, the summing up has presented the jury with a separate explanation of the law followed by a discussion of the evidence, the issues, and the arguments advanced by counsel and concluding with a direction to the jury to consider and bring back a general verdict of guilty or not guilty.

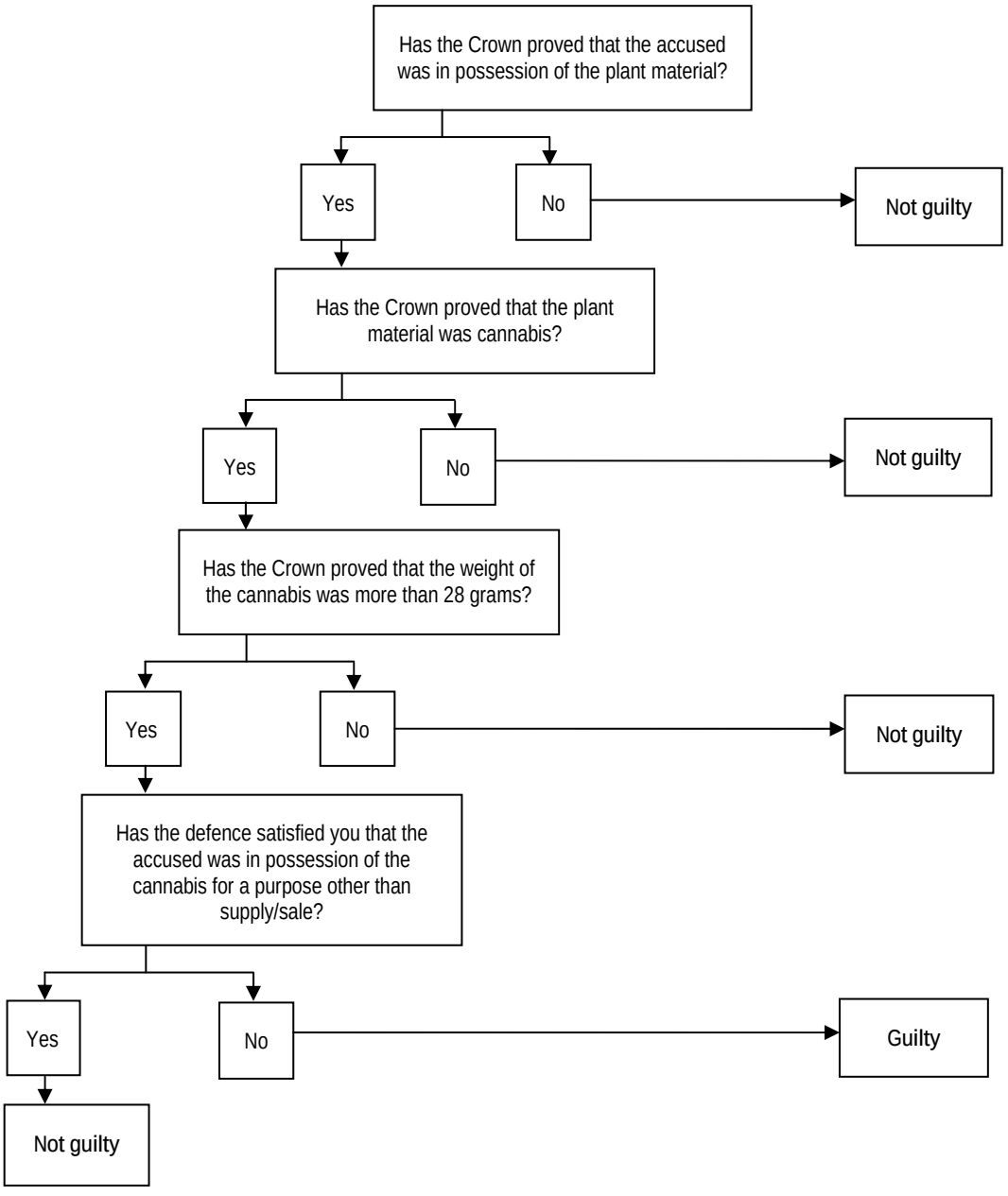
6.141 "Step directions", or "integrated summings-up", however, restructure the summing up into a series of steps that logically follow on from each other. Jurors are invited to make a decision about each particular issue in order to determine what the next step will be. Each step presents a question of fact, tailored according to the legal concepts involved. Instead of an explicit explanation of the law, the legal issues are embedded or incorporated into the questions of fact that arise in the trial.[144]

6.142 "Question trails" are visual representations of integrated summings up. They are usually presented as a diagram or flow chart to present the sequential list of questions that combine fact with legal concepts, that will lead to one of a number of outcomes. "Question trails" are also known as "decision trees", "jury guides",

144. For descriptions of step directions, see D Watt, *Helping Jurors Understand* (Thomson Carswell, 2007) 93; P Rogers, "Supporting the right to a fair trial with reforms to jury directions and jury selection" (2012) 32 *Queensland Lawyer* 26, 34; Queensland Law Reform Commission, *A Review of Jury Directions,* Report 66 (2009) vol 1 [9.88].

"structured question paths", "flow charts", "routes to verdict" and "jury checklists". One example of a question trail from the New Zealand courts is reproduced below.

Figure 6.1: Possession of cannabis for sale



Source: New Zealand, Institute of Judicial Studies, Criminal Jury Trials Bench Book (2006) Appendix 5.3.

6.143 Integrated summings-up, and more particularly question trails, have become increasingly used in Australia and overseas, as potentially involving a more effective means of communicating with jurors than the more traditional form of summing up.

6.144 Their use was acknowledged in the AIJA survey, which also drew attention to the difference between jurisdictions that existed at the time of the survey in 2004. The highest use of question trails at that time apparently occurred in Western Australia, while the lowest occurred in Victoria and NSW.[145]

6.145 Support for the use of question trails has been given by appellate courts in Australia and in England and Wales.[146] For example in 2010 the Victorian Court of Appeal referred to the New Zealand practice of using question trails and suggested a possible question trail that could have been used in the case under appeal.[147] In an earlier case the High Court praised, for its clarity, the summing up of a trial judge in which he presented the jury (orally) with a list of factual questions to guide them in reaching their verdict.[148] In a number of extra-curial comments, Australian judges have also expressed support and encouragement for their use.[149]

6.146 There is empirical evidence to support the use of integrated summings-up and question trails as aids to juror comprehension. Research suggests that jurors find it easier to understand concrete, factual scenarios, which break down the complexity of the issues they must consider into smaller, more manageable segments, rather than more abstract discussions of legal concepts.[150] The New Zealand Law Commission's study in 1998 reported that, in cases in which question trails were used, all the jurors found them to be extremely useful, and in cases in which question trails were not given, a couple of jurors said that they needed one.[151] An Australian study published in 2002 sought to ascertain whether the use of a flow chart enhanced mock jurors' comprehension of a judge's directions on the law of self-defence. The researchers found that the use of a flow chart, when used in conjunction with the judge's oral directions, assisted in the mock jurors' understanding of the issues but only when they were allowed to refer to the flow chart at the time they were being tested on their comprehension.[152]

145. 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, table 5.

146. *R v Green* [2005] EWCA Crim 2513.

147. *MG v The Queen* [2010] VSCA 97; 29 VR 305 [29].

148. *Stuart v The Queen* (1974) 134 CLR 426.

149. G Eames, "Towards a better direction – better communication with jurors" (2003) 24 *Australian Bar Review* 35, 50-52; M Murray, "Bad press: does the jury deserve it? Communicating with jurors" (36th Australian Legal Convention, Perth, 17-19 September 2009).

150. J Ogloff and V G Rose, "The comprehension of judicial instructions" in N Brewer and K D Williams (ed), *Psychology and the Law: An Empirical Perspective* (Guilford Press, 2005) 438-439.

151. W Young, N Cameron and Y Tinsley, *Juries in Criminal Trials Part Two: A Summary of the Research Findings*, Preliminary Paper 37 (New Zealand, Law Commission, 1999) vol 2, 62-63.

152. C Semmler and N Brewer, "Using a flow-chart to improve comprehension of jury instructions" (2002) 9 *Psychiatry, Psychology and Law* 262.

6.147 In CP 4 we discussed the use of step directions, issues tables, or decision trees and asked whether judges should be encouraged to use them.[153] Some submissions supported this approach.[154]

Consideration in other jurisdictions

6.148 It is noted that the VLRC recommended that judges be expressly permitted (presumably by legislation, although this is not explicitly stated) to provide juries with a document termed a "Jury Guide".[155] In substance it constitutes a written form of step directions, that contains a list of questions of fact that are designed to guide the jury towards a verdict. The VLRC's final report contains an example of a written direction in Jury Guide format.

6.149 The QLRC concluded that jurors were better able to understand factual questions presented to them, rather than issues presented in the context of long, abstract expositions of the law. For this reason, it recommended that the summing up be restructured as an integrated summing up, supplemented wherever appropriate by written guides to the law.[156] The QLRC considered that this type of change to the format of the summing up was not one that should be implemented by way of legislative reform, or by some other formal change to the rules of practice. Its recommendations were therefore intended as exhortative rather than formal changes to the law.[157]

6.150 In his review of the criminal courts in England and Wales, Lord Justice Auld proposed the introduction of a more concise form of summing up that would involve a set of integrated directions in conjunction with a series of factual questions, tailored to the law, which would logically lead either to a verdict of guilty or not guilty. He additionally proposed that the judge could, in appropriate cases, require the jury publicly to answer each question (following the model of special verdicts). In such cases, the verdict would flow logically from the answers to the judge's questions.[158]

6.151 In its review of juries in criminal trials in 2001, the New Zealand Law Commission noted that the use of a flow chart is very similar in effect to a special verdict, that is, the judge sets out the questions to be answered and the answers to those questions that would then lead to a verdict of guilty or not guilty. However, unlike special verdicts, it is for the jury, rather than the judge, to announce the verdict and it does not reveal its answers to the questions in the flow chart. The New Zealand Law Commission took the view that a flow chart, or a list of sequential questions, would not be necessary in every case, but observed that where there are complex

153. NSW Law Reform Commission, *Jury Directions,* Consultation Paper 4 (2008) [10.36]-[10.43].

154. NSW Bar Association, *Submission JU1* [12]; Law Society of NSW, *Submission JU3* [13]; NSW Director of Public Prosecutions, *Submission JU9* [10.3], Commonwealth Director of Public Prosecutions, *Submission JU10*; Director of Public Prosecutions for WA, *Submission JU2*, [2].

155. Victorian Law Reform Commission, *Jury Directions,* Final Report 17 (2009) rec 43-44, [6.46]-[6.66].

156. Queensland Law Reform Commission, *A Review of Jury Directions*, Report 66 (2009) rec 9-4, 9-5, 9-6, [9.130].

157. Queensland Law Reform Commission, *A Review of Jury Directions*, Report 66 (2009) [9.129].

158. R E Auld, *Review of the Criminal Courts of England and Wales*, Report (2001) [535]-[538].

issues, or multiple charges and defendants, they may be useful. It recommended that the use of flow charts and sequential questions be encouraged.[159] The use of question trails has become increasingly popular in New Zealand.[160] On a number of occasions, the New Zealand Court of Appeal has approved their use and has been critical where trial judges have not used question trails.[161]

6.152 The *Crown Court Bench Book* for England and Wales, prepared by the Judicial Studies Board in 2010, suggests that, where the case is complex, the judge should consider whether there is an advantage in providing the jury with a written route (or steps) to verdict, and provides a series of examples of such routes to verdict.[162]

6.153 The Queensland and Victorian Bench Books similarly provide examples of question trails in relation to certain offences.[163] In NSW, the *Bench Book* has not yet followed this approach.

Concerns

6.154 Some concerns have been raised in relation to the use of question trails. For example, difficulties with their use have been encountered in Canada for the reason that, on occasions, the question trail has been found on appeal to have contained a misdirection leading to a quashing of a conviction.[164] It was recognised, even though a question trail serves as an aide to an oral summing up, it will loom large in the jury's deliberations as a written document, such that the error will not necessarily be overcome by the fact that the jury were given correct oral directions.

6.155 This experience does not however mean that question trails are fundamentally flawed. The solution lies in ensuring that they are carefully and correctly drafted.

6.156 Another possible concern is that question trails could place too great a limitation on the jury's freedom to consider its verdict in whatever manner or sequence it may choose. The High Court has noted that jurors must be free to organise their individual processes of reasoning and group discussions in whatever manner appears convenient to them.[165]

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159. New Zealand, Law Commission, *Juries in Criminal Trials,* Report 69 (2001) [315]-[318].
160. The use of flowcharts or written sequential issues is expressly encouraged in the Ministry of Justice's Guide to Jury Trial Practice: see NZ Ministry of Justice, Criminal Practice Committee, *Guide to Jury Trial Practice* [64].
161. *R v Phan* [2008] NZCA 310 [34].
162. England and Wales, Judicial Studies Board, *Crown Court Bench Book: Directing the Jury* (2010) 300-301, 304-305, 313-314, 325, 328-329, 338-339, 348-349.
163. Queensland, *Supreme and District Courts Benchbook* No 146.2; Judicial College of Victoria, *Victorian Criminal Charge Book* (2010) [7.2.1.4], [7.2.1.5], [7.2.4.4], [7.2.5.3], [7.2.8.4]-[7.2.8.7], [7.2.9.3], [7.2.9.4], [7.3.1.1.4].
164. *R v Sheard* (2002) 163 Man R (2d) 84.
165. *Stanton v The Queen* (2003) 77 ALJR 1151, [34]-[39], [68]-[70]. See also *Blackwell v R* [2011] NSWCCA 93; 208 A Crim R 392 [91]-[94]; *Norris v The Queen* [2007] NSWCCA 235; 176 A Crim R 42 [56]. The Court of Appeal of British Columbia accepted a similar argument in *R v C* (FS) (1999) 211 WAC 145 when it found the way in which a trial judge had framed the question trail had unduly compartmentalised the various defences that had been raised and had diverted the jury from considering the issues in a comprehensive manner.

6.157 We have some difficulty in accepting that this constitutes a fatal objection to the use of question trails as an aide to jurors in reasoning to a verdict. Whether they are given a question trail or not, they must inevitably work their way through a series of steps, in determining whether the elements of the offence charged, or of some alternative common law or statutory offence, have been proved in the light of the evidentiary issues and defences that have been raised. So long as the question trail is understood as an aide that they can use if they find it useful and not as a rigid process that they must apply, then any such objection falls away.

6.158 It is important, in this respect, that the only answer which the jury is expected to return is the verdict of guilty or not guilty. Their answers, whether individual or collective, in reasoning to that verdict are not disclosed. Nor does the use of a question trail deny to them the right entrenched in the law to return a perverse or merciful verdict.[166]

6.159 More recently a note of caution was sounded in an article published by the Judicial Commission of NSW to the effect that jurors may feel compelled to reach a collective unanimity in answering each question in the trail, before moving on to the next question. As a result, it was suggested, they may not consider a later question which, if answered in favour of the defendant, would justify a verdict of not guilty. The result would be a hung jury and the need for a new trial that might be unnecessary. The example cited involved a question trail in a case involving a charge of sexual intercourse without consent, framed as follows:

> 1. Are you satisfied beyond reasonable doubt that the accused had sexual intercourse with Ms Y by penetrating her genitals with his finger?
>
>   If "yes" then go to question 2.
>
>   If "no" then the accused is not guilty of count 1 and count 2.
>
> 2. Are you satisfied beyond reasonable doubt that Ms Y did not consent to that sexual intercourse?
>
>   If "yes" then go to question 3.
>
>   If "no" then the accused is not guilty of count 1 and count 2.
>
> 3. Are you satisfied beyond reasonable doubt that the accused knew that Ms Y was not consenting to sexual intercourse?
>
>   If "yes" then go to question 4.
>
>   If "no" then the accused is not guilty of count 1 and count 2.
>
> 4. Are you satisfied beyond reasonable doubt that immediately before the sexual intercourse occurred, the accused intentionally applied force to Ms Y, without her consent, as a result of which Ms Y suffered actual bodily harm?
>
>   If "yes" then the accused is guilty on count 1.
>
>   If "no" then the accused is guilty of count 2.

166. See para [1.10].

6.160 It was suggested that the jury might, in the circumstances outlined, fail to reach agreement on question 2, resulting in a failure to reach an unanimous verdict and, as a consequence, in their discharge leading to the need for a retrial; whereas had they had gone on to question 3, and answered it in the negative, the accused would have been acquitted.[167]

6.161 A possible solution is for the judge to give a direction that makes it clear that the question trail is intended for use by each juror individually, as an aide in reaching the verdict that he or she considers justified on the evidence. A direction of this type is sometimes given in New Zealand when the judge introduces the question trail to the jury:

> On each sheet there are a number of questions. They refer to the matters the prosecution has to prove before you can find [the accused] guilty. You must each work your way through the questions. Think of it as a question trail personal to you. Of course, you should discuss each question and the evidence relating to it with your fellow jurors, but you must make up your own mind about each of the questions posed in this question trail.[168]

6.162 Another possible direction to address this problem is one that is also sometimes given in New Zealand at the end of the discussion of the questions in relation to a particular count, where the judge sets out the requirements for a verdict:

> If, on the other hand, all of you have concluded that [the accused] is not guilty, then that will be the verdict of the jury. It doesn't matter whether some of you concluded he was not guilty after question [2] and some after question [3]. So long as all of you have concluded at some point in the question trail that [the accused] is not guilty, that will be the verdict of not guilty. If some of you conclude he is guilty and the rest conclude he is not guilty, then you cannot return a verdict on the count.[169]

6.163 If the jury advises that it cannot reach agreement, for example, on the answer to question 2 in the example cited above, the judge could direct the jury that it can move on to the remaining questions, pointing out that in the event of every juror answering any of the questions in the negative, the verdict of the jury should be one of not guilty.

6.164 These approaches are consistent with the fact that in Australia, the courts have emphasised that individual jurors are free to reach a unanimous verdict by different methods and that they do not have to agree on each finding that leads to that unanimous verdict.[170]

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167. P Berman, "Question trails in jury instruction – a note of caution" (2012) 24 *Judicial Officers Bulletin* 27. See also R Chambers, "Question trails: a reply to his Honour Judge Berman SC's "Note of Caution"" (2012) 24 *Judicial Officers Bulletin* 57.
168. Information supplied by Justice R Chambers of the Supreme Court of New Zealand, 25 September 2012.
169. Information supplied by Justice R Chambers of the Supreme Court of New Zealand, 25 September 2012.
170. *Michael v Western Australia* [2008] WASCA 66; 183 A Crim R 348 [370]; *R v Southammavong* [2003] NSWCCA 312.

The Commission's view

6.165 In appropriate cases integrated summings up and question trails can be of considerable value in assisting the jury to understand the issues they need to decide and to apply the law to the facts of the case. We do not consider the concerns identified above should preclude their use.

6.166 In this respect we are, first, of the view that the *Criminal Procedure Act 1986* (NSW) should be amended to allow the use of question trails, so as to overcome any possible limitation on their use arising out of the decisions of the High Court and other courts noted above.[171]

6.167 Secondly, we consider that the problem identified in paragraphs 6.159-6.160 can be addressed by directions that make it clear that:

- the question trail is intended for use by each juror individually, as an aide in reaching the verdict that he or she considers justified on the evidence.
- the circumstances in which a verdict of acquittal can be entered includes those when the jury agree (unanimously, or after a Black direction agree by a majority) that an essential element of the offence charged has not been proved, even if they do not agree which element that is.

6.168 In summary, we support the use of integrated directions and written question trails, so long as certain safeguards are respected:

- Consideration needs to be given, in each case, to whether they are necessary and capable of providing assistance. In simple one or two issue trials they may not serve any useful purpose. In complex cases involving offences with multiple elements, or alternative offences, with a large number of issues or defendants, they may prove to be highly beneficial.
- The preparation of integrated directions or question trails should be undertaken in close consultation with trial counsel.
- The judge should read over the questions with the jury, in the context of the summing up, that is, when the elements of the offences charged and the factual issues and defences are explained.
- The judge should explain to the jurors that:
  - the question trail is a document that is intended to assist them individually in working through the issues to a verdict;
  - they will not be required to disclose their answers;
  - they are not bound to use it if they prefer to approach their deliberations in some other way; and
  - the document is not intended to be a replacement for, but rather is an addition to the directions that are given orally.

171. See para [1.156].

6.169 This direction should also make reference to the fact that the jurors may obviously discuss the answers to the questions among themselves but that the question trail is primarily directed for their individual guidance in coming to a verdict.

6.170 We do not, however support a return to the special verdict (or a verdict in the nature of a special verdict), save for that of not guilty by reason of mental illness. We consider it preferable for the jury to return a general verdict of guilty or not guilty, without any disclosure of the route by which they reached that verdict.

Recommendation 6.10

(1) The *Criminal Procedure Act 1986* (NSW) should be amended to authorise the use of question trails.

(2) The *Criminal Trial Courts Bench Book* should include a suggested direction about the use of question trails along with some possible examples. The model direction should:

  (a) emphasise that the question trail is a guide only and is a way of working through the jury's deliberations;

  (b) make it clear that jurors do not have to address the issues in the same sequence as that set out in the question trail;

  (c) explain to jurors that the question trail is intended for their individual use in coming to the jury's verdict; and

  (d) direct the jury that if, after considering all of the questions they are unanimous (or after a Black direction, agree by a majority) that one element of the offence charged has not been proved, they should return a verdict of not guilty, even if they do not agree on which particular element that is.

(3) The *Criminal Trial Courts Bench Book* should note that it is good practice for the judge to consult counsel on the terms of the question trail before presenting it to the jury.

The summing up – use of visual aids

Current law and practice

6.171 In CP 4 we discussed the increasing use of technology in the presentation of information in educational and information-sharing settings and conferences.[172] We raised the possibility of judges making greater use of such methods of presentation when communicating with the jury, both when giving directions, when presenting a flowchart or question trail, and when summarising the evidence.

6.172 A District Court judge in Western Australia uses presentation software to communicate key points including the directions that are given on the burden of proof and on the elements of the offence.[173] She has reported that the use of such

172. NSW Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [10.26]-[10.35].

173. M Yeats, "Using PowerPoint in charging juries" (Australian Institute of Judicial Administration, Conference, Melbourne, 8-10 October 2000).

presentations helps to focus jurors' attention on the main points of the summing up and improves their comprehension. The appeal courts, including the High Court, have also noted without adverse comment, the use of presentation software in the course of a summing up.[174]

6.173 There is empirical evidence to suggest that the use of this form of presentation in the courtroom can improve jurors' comprehension levels. An Australian study revealed that the oral presentation of the direction on self-defence, when combined with a computer animation and a flow chart of the key elements of the direction, produced substantial improvements in comprehension.[175] In other studies, jurors have commented that they would like to see greater use of visual aids during the trial[176] as have some judges, who consider that they are an effective way of engaging the attention of the current generation of jurors.[177]

6.174 At present, s 29(3) of the *Evidence Act 1995* (NSW) permits evidence to be given in the form of charts, summaries or other explanatory material, if it appears to the court that the material would be likely to aid its comprehension of other evidence that has been given or is to be given. This would allow the use of visual aids in the presentation of evidence. While there is no legislation that expressly permits the use of visual aids in the presentation of jury directions, presumably a trial judge would be empowered to do so as part of the general power to control court processes.[178]

6.175 In a recent survey of jurors across Australia, it was indicated that there may be some resistance among members of the judiciary to a more comprehensive use of visual aids, although it was recognised that these enhanced juror understanding. It was suggested that one possible reason for this resistance was fear that it increased the risk of inadvertent error through, for example, the presentation of power point slides.[179]

The Commission's view

6.176 We consider that the use of visual aids can potentially be a useful complement to the oral delivery of a summing up, both in relation to the directions and the summary

174. *Hargraves v The Queen* [2011] HCA 44; 85 ALJR 1254; *Dawson v R* [2001] WASCA 2; *Nguyen v R* [2005] WASCA 22.

175. N Brewer, S Harvey and C Semmler, "Improving comprehension of jury instructions with audio-visual presentation" (2004) 18 *Applied Cognitive Psychology* 765.

176. J Horan, "Communicating with jurors in the twenty-first century" (2007) 29 *Australian Bar Review* 75; W Young, N Cameron and Y Tinsley, *Juries in Criminal Trials Part Two: A Summary of the Research Findings*, Preliminary Paper 37 (New Zealand, Law Commission, 1999) vol 2 [3.7]-[3.9].

177. 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-2July 1998). See also 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) 5.

178. *R v Lowe* (1997) 98 A Crim R 300, 308-309 (NSWCCA); *R v Taousanis* [1999] NSWSC 107 146 A Crim R 303; *R v Sukkar* [2005] NSWCCA 54 [84]; *R v Bartle* [2003] NSWCCA 329; 181 FLR 1 [687].

179. J Goodman-Delahunty and others, *Practices, Policies and Procedures that Influence Juror Satisfaction in Australia*: *Report to the Criminology Research Council,* Research and Public Policy Series No 87 (Australian Institute of Criminology, 2008) 97.

of the issues and evidence, not in place of the oral summing up but as a supplement to it. In our view it would be useful to amend s 55B of the *Jury Act 1977* (NSW) so as to confirm the permissible use of visual aids; and additionally for the Bench Book to provide guidance as to good practice in this respect.

6.177 There are admittedly some resource implications involved in any move towards a more systematic use of visual aids in the courtroom. However, this should not preclude the use of such material in those cases where there is a perceived benefit, for example, in those cases where there are complex issues of fact and/or law.

Recommendation 6.11

Section 55B of the *Jury Act 1977* (NSW) should make it clear that a judge has the power to use visual aids as part of the judge's directions to the jury where the judge considers that this would be likely to assist the jury in its deliberations.

7. Setting the scene for the jury – early issue identification

7.1 In this chapter we consider the way in which the issues in a criminal trial can be identified for the jury from the outset, through the use of pre-trial case management, opening addresses and preliminary directions from the judge.

The value of early issue identification

7.2 Early issue identification can provide a structure that will assist the jury in following the evidence as it unfolds, and in placing it in the context of the competing cases of the prosecution and defence.

7.3 Observations about jury behaviour have noted that jurors evaluate and process evidence as they receive it. Research suggests that from the outset of the trial they will strive to construct a version of events to make sense of the evidence as it is presented, and that they will thereafter assimilate and interpret the evidence to fit within the narrative framework that they have constructed. They may change the narrative that they have constructed as new evidence is introduced, but these changes will be based on their understanding of the earlier evidence.[1]

7.4 Although the prosecution opening in which a case theory may be identified will give the jury some understanding of what the case is about and of the evidence that will be called, there is no imperative for the defence to open its case or to confirm what the issues are likely to be. This has attracted a degree of criticism from jurors who have complained that the lack of a defence opening at the commencement of the trial can mean that they do not understand what is in dispute.[2]

1. W Young, N Cameron and Y Tinsley, *Juries in Criminal Trials Part Two: A Summary of the Research Findings*, Preliminary Paper 37 (New Zealand, Law Commission, 1999) vol 2 [2.57], [3.13]; W Young, "Summing up to juries in criminal cases – what jury research says about current rules and practice" [2003] *Criminal Law Review* 665, 682-683.
2. Y Tinsley, "Juror decision-making: a look inside the jury room" in R Tarling (ed), *The British Criminology Conference: Selected Proceedings* (2001) vol 4 (online).

7.5 Conversely, if the jury is given a factual and legal framework from the very beginning, it will have a clear reference point from which it can assess the evidence. Without such a framework, there is the risk that the jury will focus on a matter that ultimately turns out not to be in dispute or that it will fail to realise the importance of what may be critical evidence.[3]

Pre-trial disclosure and case management

7.6 In this section we note the current law and practice in relation to the pre-trial disclosure of the prosecution and defence cases, and the extent to which pre-trial case management can assist in identifying the real issues in the trial and reducing its complexity.

7.7 Justice McClellan has spoken of the benefits of an early identification of the issues:

> 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 influence over the advocates to confine the evidence and discipline the questioning of witnesses.[4]

7.8 The Office of the Director of Public Prosecutions has endorsed early 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.[5]

7.9 The Queensland Law Reform Commission (QLRC) has also noted that effective pre-trial disclosure may reduce the number of interruptions during the course of a trial and, thus, reduce the negative impact on juror comprehension resulting from such interruptions.[6]

3. W Young, N Cameron and Y Tinsley, *Juries in Criminal Trials Part Two: A Summary of the Research Findings*, Preliminary Paper 37 (New Zealand, Law Commission, 1999) vol 2 [2.57], [3.13]; W Young, "Summing up to juries in criminal cases – what jury research says about current rules and practice" [2003] *Criminal Law Review* 665, 682-683.
4. P McClellan, "The Australian Justice System in 2020" (2009) 9 *Judicial Review* 179, 186.
5. NSW, Office of the Director of Public Prosecutions, *Preliminary Submission JU9,* 3.
6. Queensland Law Reform Commission, *A Review of Jury Directions: Issues Paper*, Working Paper 66 (2009) [8.11].

Current law and practice

New South Wales

7.10 The extent to which pre-trial disclosure by the prosecution has been required at common law, and for which provision is now made under legislation, needs to be understood in the context of the adversarial system that applies in NSW. It is a system under which the prosecution bears the burden of calling evidence that will establish a case against the accused, and in which the defence can test that case through cross examination and by calling evidence in rebuttal.

7.11 In recognition of the requirement to act fairly[7] that rests upon the prosecution, the common law is settled in requiring it to disclose to the defence the whole of the evidence that is available to it, where that evidence is relevant to an issue, or when it might raise a new issue that may not otherwise be apparent, or where it might hold out a real prospect of leading to other evidence of possible assistance to the defence.[8]

7.12 This obligation is reinforced by the need for the prosecution to call all of the available material witnesses in its case, unless:

- the defence consents to the witness not being called;
- the evidence has already been dealt with by an admission on behalf of the accused;
- the particular point has already been adequately established by another witness or witnesses; or
- the prosecution believes, on reasonable grounds, that the witness's testimony is plainly untruthful or plainly unreliable.[9]

7.13 On the other hand, a feature of the adversarial trial at common law has been the acceptance that the defence can keep its case close to its chest until it chooses otherwise, and that it is under no obligation to identify, let alone to narrow, the issues before the trial commences. Apart from the consequential limitation that this can have in arming the jury from the outset with a meaningful outline of the evidence and issues, it can impact on the ability of the trial judge to manage the trial efficiently.

7.14 Notwithstanding the advantages that have been identified for pre-trial management,[10] proposals for pre-trial defence disclosure have typically been met

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7. *R v Brown* [1998] AC 367, 374-375.
8. *R v Reardon (No 2)* [2004] NSWCCA 197; 60 NSWLR 454 [48]-[49] and [54]; *R v Spiteri* [2004] NSWCCA 321; 61 NSWLR 369 [17], [19]; *Mallard v The Queen* [2005] HCA 68; 224 CLR 125 [16]-[17]; and see NSW, Office of the Director of Public Prosecutions, *Prosecution Guidelines* (2007) ch 18.
9. *New South Wales Barristers' Rules* (2011) r 88. See also *Whitehorn v The Queen* (1983) 152 CLR 657, 674-675; *Apostilides v The Queen* (1984) 154 CLR 563; *R v Kneebone* [1999] NSWCCA 279; 47 NSWLR 450; *Libke v The Queen* [2007] HCA 30; 230 CLR 559 [71]-[72]; *R v Lipton* [2011] NSWCCA 247 [75]; and *Gilham v R* [2012] NSWCCA 131 [388]-[390], [404], [412].
10. NSW, Attorney General's Department, Criminal Law Review Division, *Report of the Trial Efficiency Working Group* (2009); NSW, Legislative Council, Standing Committee on Law and

with objections about the infringement of the defendant's right to silence and of the corresponding right against self-incrimination. Sometimes it has been suggested that this can open the way for a shift in the burden of proof, or, from a more practical perspective, that limited defence resources can make it difficult for the legal representatives of the accused to gain sufficient instructions that would permit timely compliance with disclosure requirements.

7.15 The desirability of introducing a regime of pre-trial disclosure was considered in our 2000 report on *The Right to Silence* in which recommendations were made for pre-trial disclosure both by the prosecution and defence.[11] This was followed by the enactment of the *Criminal Procedure Amendment (Pre-trial Disclosure) Act 2001* (NSW) applicable to complex trials.[12] It was amended in 2007 after a review that showed that very few pre-trial orders had been made, and it was later replaced by the case management scheme for which provision was made in the *Criminal Procedure Amendment (Case Management) Act 2009* (NSW). This legislation, which is now contained in the *Criminal Procedure Act 1986* (NSW)[13] commenced operation on 1 February 2010, and was based on the reforms proposed by the Trial Efficiency Working Group.[14] It applies to proceedings for indictable offences in the Supreme and District Courts.[15]

7.16 The recommendations of the Working Group and the consequent reforms were focused on trial efficiency, including the effective engagement of the jury. It observed, in this respect:

> a primary objective of both parties in a criminal trial should be the conduct of proceedings so as to best facilitate concentration, comprehension and decision-making on the part of the jury. The Group does not consider this to be a departure from its mandate to consider issues related to trial efficiency for two reasons. First, many of the issues which affect the jury experience are inextricably tied to those that contribute to lengthy trials. Secondly, there are situations where a trial results in a hung jury due to the jury's inability to comprehend complex evidence, or, as was widely reported in recent months, a trial being aborted due to jurors who were distracted while being subjected to voluminous and unfocused evidence.[16]

7.17 In accordance with the statutory scheme, at the first mention of the proceedings in the court before which the trial is proposed to be heard, directions are to be given with respect to the future conduct of the trial, including a direction as to the time by which the notice of the prosecution case and by which notice of the defence response are respectively to be given.[17]

Justice, *Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001*, Second Report (2004) [2.10]-[2.11]; P McClellan, "The Australian Justice System in 2020" (2009) 9 *Judicial Review* 179, 186.

11. NSW Law Reform Commission, *The Right to Silence,* Report 95 (2000) [3.127]-[3.153].
12. *Criminal Procedure Act 1986* (NSW) s 136; and see *R v Kamha* [2008] NSWSC 950.
13. *Criminal Procedure Act 1986* (NSW) chap 3 pt 3 div 3.
14. NSW, Department of Attorney General, Criminal Law Review Division, *Report of the Trial Efficiency Working Group* (2009).
15. *Criminal Procedure Act 1986* (NSW) s 45(1), s 135(1).
16. NSW, Department of Attorney General, Criminal Law Review Division, *Report of the Trial Efficiency Working Group* (2009) 67.
17. *Criminal Procedure Act 1986* (NSW) s 136-138.

7.18 The prosecution case notice provision calls for the prosecutor to give to the accused:

- a copy of the indictment;
- a statement of facts;
- a copy of the statement of each witness whose evidence the prosecution proposes to adduce;
- a copy of each document, evidence of the contents of which the prosecution proposes to adduce;
- a copy of a summary where it is proposed to adduce evidence in the form of a summary;
- copies of any exhibit or chart or explanatory material that is to be adduced; and
- a copy of each report by any expert witness who is to be called, where relevant to the case.[18]

7.19 The prosecution disclosure also extends to:

- the disclosure of material in the possession of the prosecution that was provided by the Police, or is otherwise in its possession, that may reasonably be regarded as relevant to the prosecution or defence case that has not been disclosed;
- the provision of a list of material that may reasonably be regarded as relevant to the prosecution or defence case of which the prosecution is aware but is not in its possession;
- the provision of a copy of any information in the prosecutor's possession that is relevant to the reliability or credibility of a prosecution witness.[19]

7.20 The notice of the defence response calls for:

- disclosure of the name of the legal practitioner who it is proposed will appear on behalf of the accused;
- notice of any consent that is to be given in relation to the tender of any prosecution witness statement or evidence summary; and
- a statement as to whether a notice of alibi or substantial mental impairment is to be given.[20]

7.21 The court can, in the exercise of its management powers, under this scheme, order and conduct a pre-trial hearing, at which it can make such orders, determinations or findings, or give such directions or rulings, as it thinks fit for the efficient

18. *Criminal Procedure Act 1986* (NSW) s 137(1)(a)-(h).
19. *Criminal Procedure Act 1986* (NSW) s 137(1)(i)-(k).
20. *Criminal Procedure Act 1986* (NSW) s 138.

management and conduct of the trial.[21] The powers exercisable in this respect permit the court:

- to order a pre-trial conference;[22]
- to order pre-trial disclosure by the prosecutor or defence;[23]
- to give advance rulings or make advance findings under s 192A of the *Evidence Act 1995* (NSW);[24] and
- to give a ruling on any question of law that might arise in the trial.[25]

7.22 The provisions relating to court-ordered pre-trial disclosure require the prosecuion to provide a notice that contains the matters to be included in its s 137 notice, a copy of any information, document or other thing in the prosecution's possession that could reasonably be regarded as adverse to the credit or credibility of the accused, and a list of the prosecution witnesses.[26]

7.23 The provisions relating to the order of pre-trial disclosure by the defence are potentially far-reaching. The notice which is required includes the matters specified in the s 138 notice,[27] but additionally call for the defence to:

- provide a statement as to whether the facts set out in the prosecution's statement of facts are agreed or in issue;
- give notice of an intention to dispute the admissibility of evidence disclosed by the prosecution and the basis of any objection;
- advise whether it disputes any expert evidence that the prosecution proposes to lead and to provide a copy of any report prepared by an expert witness whom it intends to call;
- advise whether it requires the prosecution to call any witnesses to corroborate its surveillance evidence;
- advise whether it disputes exhibit continuity or the accuracy of any transcript that the prosecution intends to tender, or the authenticity or accuracy of any proposed documentary evidence or other exhibit; and
- give notice of any significant issue that it intends to raise regarding the form of the indictment, severability of the charges, or separate trial.[28]

7.24 Where an order is made for a prosecution response, the notice required is to contain:

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21. *Criminal Procedure Act 1986* (NSW) s 139.
22. *Criminal Procedure Act 1986* (NSW) s 139(3)(b).
23. *Criminal Procedure Act 1986* (NSW) s 139(3)(c), s 141.
24. *Criminal Procedure Act 1986* (NSW) s 139(3)(e).
25. *Criminal Procedure Act 1986* (NSW) s 139(3)(g).
26. *Criminal Procedure Act 1986* (NSW) s 142.
27. *Criminal Procedure Act 1986* (NSW) s 143(a).
28. *Criminal Procedure Act 1986* (NSW) s 143(b)-(k).

- advice as to whether the prosecution intends to dispute any defence expert evidence and the basis for the dispute;
- notice of any issue that the prosecution intends to raise with respect to the continuity of custody of any exhibit that the defence intends to tender;
- notice as to whether the prosecution intends to dispute the accuracy or admissibility of any documentary evidence or other exhibit that the defence intends to tender; and
- notice as to whether the prosecution intends to dispute the admissibility of any other proposed evidence disclosed by the defence, and the basis for the dispute.[29]

7.25 Additionally, the prosecution is required to provide a copy of any material in the possession of the prosecution not previously disclosed that might reasonably be expected to assist the defence case.[30]

7.26 The court can waive any of the pre-trial disclosure requirements that apply under the trial management division of the Act,[31] but otherwise the disclosure requirements are ongoing. Additionally, the court is empowered, on or after commencement of the trial, to make such orders, determinations or findings, or give such directions or rulings, as it thinks appropriate for the efficient management and conduct of the trial.[32]

7.27 The extent to which the provisions for pre-trial disclosure and for pre-trial hearings and conferences are employed is very much a matter for the discretion of the trial judge. We understand that practice varies to a considerable degree in this respect, there being selective use of the provisions in the Supreme Court, but little, if any, use in the District Court.

Other jurisdictions

7.28 Provisions do exist for pre-trial disclosure and case management in England and Wales, and Victoria. The QLRC, in its review of jury directions, recommended the introduction of a detailed legislative scheme for compulsory pre-trial disclosure in any trial for an indictable offence.[33] This scheme would require defence disclosure in advance of the trial of the general nature of the defence and of the issues or facts asserted by the prosecution that are in dispute.[34] It also recommended that the legislation permit the conduct of the parties in relation to pre-trial disclosure and

29. *Criminal Procedure Act 1986* (NSW) s 144(a)-(d).
30. *Criminal Procedure Act 1986* (NSW) s 144(e) and (f).
31. *Criminal Procedure Act 1986* (NSW) s 148.
32. *Criminal Procedure Act 1986* (NSW) s 149E.
33. Queensland Law Reform Commission, *A Review of Jury Directions*, Report 66 (2009) vol 1, rec 8-1 to 8-5.
34. Queensland Law Reform Commission, *A Review of Jury Directions*, Report 66 (2009) vol 1, rec 8-1, [8.197].

otherwise, during the preparation for and the hearing of the trial, to be taken into account on appeal, including consideration of an application of the proviso.[35]

7.29 In 2006, the Supreme Court of Western Australia introduced a voluntary criminal case conferencing process for indictable matters that was aimed at the speedy resolution of the issues in criminal cases, and where appropriate to avoid the need for a trial altogether. This process is offered at the committal stage coinciding with the time when prosecution disclosure is required, but is also available at any stage of the pre-trial period. When the parties agree to a referral, a conference is held under the supervision of a facilitator who has previously held judicial office, pursuant to the protocol for voluntary criminal case conferencing developed by the Court. The facilitator does not speak for the court and nothing said at the conference is binding. However, the conference proceeds on the basis that it is a means by which the parties can reach an agreement to which they then adhere, in relation to identifying the real matters in issue, resolving any evidentiary issues and making admissions.

7.30 The conference can also include discussions in relation to the strength of the prosecution case, whether the current charge reflects the available evidence, and the options open to the accused, including that of pleading guilty (although without subjecting the accused to any direct or indirect pressure to do so).[36]

7.31 This procedure can be compared with the trial of criminal case conferencing scheme that previously was in place in NSW in relation to committal matters to be heard in the Local Court sitting at the Downing Centre and Central,[37] but has now been terminated.[38]

7.32 The NSW scheme was principally concerned with determining whether there was any offence(s) to which the accused was prepared to plead guilty, and on reaching agreement as to the facts in relation to any such offence(s). It differed markedly from the Western Australian scheme in that it was compulsory, narrower in scope, and constituted a conference between the Office of the Director of Public Prosecutions and defence lawyers that was not supervised by a mediator or judicial officer. Encouragement for its use was provided through the sentencing discount scheme for which provision was made in the Act.[39]

7.33 A scheme that would involve some features of these two schemes was also proposed by the Hon Martin Moynihan in a review that was carried out in 2008 in response to a request from the Queensland Government. In substance, the review proposed that:

- there should be an ongoing obligation on the lawyers for parties to engage in discussion with a view to resolving issues and achieving resolution;

35. See Queensland Law Reform Commission, *A Review of Jury Directions*, Report 66 (2009) vol 1 [8.206], rec 8-1(10) and rec 8-2(3); and vol 2 [11.143], rec 11-2(2).
36. See Supreme Court of Western Australia, *Protocol for Voluntary Criminal Case Conferencing* (29 August 2012) <www.supremecourt.wa.gov.au/P/protocol_for_voluntary_criminal_case_conferencing.aspx>.
37. *Criminal Case Conferencing Trial Act 2008* (NSW).
38. *Criminal Case Conferencing Trial Repeal Act 2012* (NSW).
39. *Criminal Case Conferencing Trial Act 2008* (NSW) s 16 and 17.

- case conferencing should be compulsory if the Office of the Director of Public Prosecutions was responsible for prosecuting the committal proceedings;
- the case conference should take place after resolution of the disclosure issues but before any committal hearing;
- legal representatives must have sufficient authority to negotiate and resolve matters and must act reasonably and genuinely in participating;
- at the case conference, lawyers for the parties should consider and discuss:
  - the appropriateness of the charges;
  - the likely penalty and benefits of an early plea;
  - any issues bearing on the progress of the case or the conduct of the trial; and
  - any offers bearing on a plea of guilty;
- the outcome of the conference should be recorded and sealed and kept in the court file and should only be opened in specified circumstances;
- the conference could take place either:
  - face to face;
  - by video or phone conference;
  - by email;
  - by text messaging; or
  - in writing,

  desirably, but not essentially in the presence of the accused; and
- proper evaluation processes should be built in from the outset.[40]

7.34 As envisaged, the conference would normally take place between the lawyers without a third party involvement, although it was noted that if the circumstances justified it, a magistrate should be able to convene and conduct a case conference.[41]

7.35 The Queensland Government's response to this proposal noted that Legal Aid Queensland and the Office of the Director of Public Prosecutions were supportive of the proposal and had "already demonstrated commitment to engage in discussions with a view to resolving issues and achieving early resolution". However, the Government considered that formal steps should be approached with caution "without evidence that such steps will change the behaviour of participants or streamline the system" and resolved to give further consideration to implementation

40. M Moynihan, *Review of the civil and criminal justice system in Queensland* (2008) 217-218.
41. M Moynihan, *Review of the civil and criminal justice system in Queensland* (2008) 202-203.

once the outcomes of the evaluation of the mandatory case conferencing trial in NSW had become known.[42]

7.36 The New Zealand Law Commission has noted the potential benefits of mutual pre-trial case disclosure in identifying the points of agreement and dispute between the parties,[43] in particular in streamlining the presentation of the evidence, in reducing trial time, and in overcoming the apparently illogical sequence in which evidence may otherwise need to be led.[44]

7.37 The Commission did not, however, support any mandatory regime for pre-trial disclosure or case management, on the basis that informal and voluntary disclosure was already permissible, and that mandatory disclosure posed a threat to the right to silence and to an application of the burden of proof that rests on the prosecution.[45]

7.38 Subsequent attempts in New Zealand to introduce case management and defence disclosure, including an obligatory defence opening,[46] have met with limited success.[47]

7.39 In NSW a potential sanction for non-compliance with the existing case management scheme exists in that the judge can refuse to admit evidence, including expert evidence, where a party has failed to comply with the requirements for pre-trial disclosure of that evidence.[48]

7.40 In the event of the accused being convicted, an incentive is provided for defence co-operation in facilitating the administration of justice by disclosure made before or during the trial or otherwise, by allowing the court to impose a lesser penalty than would otherwise have been set.[49]

7.41 A more drastic approach is taken in England and Wales where a defence failure to comply with the statutory disclosure obligations can result in the judge or prosecution being able to make a comment on that failure, that can include a comment to the effect that the jury could draw an inference adverse to the accused.[50]

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42. Queensland, *The Queensland Government's response to the review of the civil and criminal justice system in Queensland* (2009) 13.
43. New Zealand, Law Commission, *Juries in Criminal Trials*, Report 69 (2001) 123-128.
44. New Zealand, Law Commission, *Juries in Criminal Trials*, Report 69 (2001) 123-128; W Young, N Cameron and Y Tinsley, *Juries in Criminal Trials Part Two: A Summary of the Research Findings*, Preliminary Paper 37 (New Zealand, Law Commission, 1999) vol 2 [2.32]-[2.33], [2.58], [3.13]; Y Tinsley, "Juror decision-making: a look inside the jury room" in R Tarling (ed), *The British Criminology Conference: Selected Proceedings* (2001) vol 4 (online).
45. New Zealand, Law Commission, *Juries in Criminal Trials*, Report 69 (2001) [330], [335].
46. See *Criminal Procedure (Reform and Modernization) Bill 2010* (NZ).
47. The *Criminal Procedure Act 2011* (NZ) (relevant portions not yet commenced) provides for case management conferences but does not require defence disclosure of the matters in dispute nor does it mandate a defence opening, a right that remains optional.
48. *Criminal Procedure Act 1986* (NSW) s 146.
49. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22A.
50. *Criminal Procedure and Investigation Act 1996* (Eng) s 11.

The Commission's view

7.42 We support the use of pre-trial disclosure and trial management as a means of establishing the real issues in the trial from the outset, particularly if this is accompanied by removing the need for formal proof of matters that are not in issue and by resolving admissibility questions. Apart from assisting in focusing the trial at the outset, it can result in shorter and more streamlined trials, reduce the burden on juries, and avoid the need for the prosecution to call evidence in anticipation of a defence case that may not emerge.

7.43 Additionally, and relevantly for the purpose of this Report, it will have a value in establishing a clear framework for the opening addresses of counsel and a basis from which the judge can give meaningful introductory directions in relation to the elements of the offence(s) charged, the issues that arise and the relevant legal principles that the jury will need to apply. This will better enable the jury to follow the evidence and place it and the directions in their proper context.

7.44 Any scheme for pre-trial defence disclosure needs to have sufficient safeguards built in to ensure that it does not threaten the fairness of the resulting trial. The current NSW scheme addresses this issue in placing the focus on identifying those parts of the prosecution case that are in dispute, and on the prosecution evidence that will be the subject of an objection. It does not require the defence to disclose its case, except in relation to alibi and substantial mental impairment, and except so far as the defence intends to rely on expert evidence contradicting the prosecution expert evidence.

7.45 The practical efficacy of a scheme for pre-trial disclosure and trial management, depends, in part, on the allocation of sufficient resources at an early stage. The Trial Efficiency Working Group has observed that "no mechanism for facilitating pre-trial identification of the issues can be expected to succeed unless counsel for both sides are appointed sufficiently in advance".[51] Late briefing practices and insufficient opportunity for defence counsel to take instructions from the accused, will frustrate the operation of any such scheme. However, this should be capable of being addressed by proper planning on the part of the Office of the Director of Public Prosecutions, the legal aid agencies and the Office of the Public Defender, and by flexibility in the application of the powers that are exercisable under the scheme, to accord with circumstances of the individual case.

7.46 The trial management scheme set up by the 2009 amendments that arose out of the recommendations of the Trial Efficiency Working group is currently due for review to evaluate its effectiveness from a trial efficiency perspective in reducing delays,[52] and with the costs impacts of the procedures that were introduced. In our view it would be useful for that review to look additionally at the legislation from the jury perspective, and consider whether further improvement could be made to facilitate jury decision-making, without affecting the fairness of the trial. This could usefully involve a consideration of the Western Australian voluntary case conferencing scheme.

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51. NSW, Attorney General's Department, Criminal Law Review Division, *Report of the Trial Efficiency Working Group* (2009) 81.

52. *Criminal Procedure Act 1986* (NSW) s 314A.

7.47 By reason of the statutory requirement for the review we have not undertaken any investigation of this kind ourselves beyond noting the selective and sparing use to which the 2009 reforms have been put. Because of the importance of securing trial efficiency, we recommend that the Trial Efficiency Working Group be reconvened to consider further possible reforms to trial management procedures, particularly the ways in which those procedures might be used on a more consistent and frequent basis, and through which the jury can be armed with a clear picture of the issues in the trial, from the outset.

Recommendation 7.1

(1) The Trial Efficiency Working Group should be reconvened to consider further reform of trial management in criminal proceedings on indictment, including revisiting the use of case conferencing.

(2) The terms of reference of the Trial Efficiency Working Group should specifically require it to consider the ways in which improved criminal trial management could enhance jury decision-making.

A roadmap for the jury

7.48 In this section, we examine the other ways in which the jury can be best informed, from the outset, of the nature of the charge(s) preferred and of the issues likely to arise. The opening addresses of counsel, and the preliminary remarks of the trial judge which precede those addresses, each have a role to perform in this respect.

The prosecution opening

7.49 The prosecution opening will normally constitute an outline of the case and of the evidence it expects to call. It may refer to the issues that it expects to arise, particularly where they have been settled pre-trial, and it may touch briefly on the relevant law although not to the extent that will be required of the judge in the summing up. It obviously serves an important function in setting out the nature of the prosecution case in conceptual terms,[53] from which it may be unable to diverge without risking a miscarriage of justice.[54]

The defence opening

7.50 The defence is permitted to give an opening address immediately after the prosecution address. This right was confirmed by legislation[55] in response to a recommendation in our 1986 report on the jury in a criminal trial.[56] The intended

53. *R v Tangye* (1997) 92 A Crim R 545, 556.

54. *Anderson v R* (1991) 53 A Crim R 421; *Tran v The Queen* [2000] FCA 1888; 105 FCR 182 [133] and [148]; see also *Patel v The Queen* [2012] HCA 29; 290 ALR 189.

55. *Criminal Procedure Act 1986* (NSW) s 159.

56. NSW Law Reform Commission, *Criminal Procedure: The Jury in a Criminal Trial*, Report 48 (1986) rec 43.

purpose of extending this right to the defence was described in the second reading speech to the amending bill:[57]

> an opening address by the accused on trial issues will help to crystallise which issues are in dispute. It will enable the jury to be in a better position to appreciate the significance of the evidence as it is given throughout the trial, and particularly in the prosecution case. Furthermore it will allow the prosecution and the judge to focus upon those matters which are genuinely in dispute.[58]

7.51 The defence opening is limited to the matters disclosed in the prosecution's opening address, including a reference to the matters that are, and are not, in issue and to the matters that the accused intends to raise. It has been held that it should not be used as a vehicle for more general comments about, for example, the onus and standard of proof or the ways to assess the evidence.[59] It has also been emphasised that an opening address by defence, similarly to that of the prosecution, is not evidence in itself, but rather an indication of the evidence that counsel expects that the jury will hear.[60]

7.52 Where the defence intends to call evidence in the trial, then it has an additional right to give an opening in relation to its case before calling that evidence, whether or not it had addressed the jury at the commencement of the trial.[61]

7.53 The right of the defence to give either opening is entirely discretionary and, although commonly exercised today, there are practitioners who remain reluctant to commit themselves to a defence case from the outset, hoping that, as the evidence unfolds, as yet unperceived chinks may appear in the prosecution case.

The judge's opening remarks

7.54 The opening addresses of counsel traditionally follow the directions that the judge gives at the commencement of the trial that will generally have comprised:

- matters of housekeeping;
- some preliminary instructions in relation to the burden and standard of proof;
- an explanation of the respective roles of the judge and jury in the trial; and
- warnings to the jury not to undertake independent research or experiments or to discuss the case outside the jury room.

7.55 The extent to which judges go further, at this stage of the trial, by delivering some preliminary directions of law in relation to the offence(s) charged and preliminary remarks on the issues in the case, varies depending on personal preference, there being little consistency of practice in this respect. For example, in *R v Elomar*,[62] the

57. *Crimes Legislation Amendment (Procedure) Act 1997* (NSW).
58. NSW, *Parliamentary Debates*, Legislative Assembly, 14 May 1997, 8570.
59. *R v MM* [2004] NSWCCA 81; 145 A Crim R 148 [138]-[139].
60. *R v Hawi (No.10)* [2011] NSWSC 1656 [29].
61. *Criminal Procedure Act 1986* (NSW) s 159(3).
62. *R v Elomar* [No 1] [2008] NSWSC 1442; 233 FLR 222.

prosecution prepared a roadmap or chronology to aid the jury in understanding the unfolding of the evidence and the judge prepared written directions to assist the jury in placing the evidence into the context of the issues and the elements of the offence that the prosecution needed to prove. As Justice Whealy said in relation to the roadmap:

> In my opinion, in a trial of this factual complexity and length, a roadmap of the kind represented by MFI 4 is really essential. Without such assistance the jury would be likely to become completely lost. Without some guidepost or direction of this kind, the jury would be likely to simply flounder in a sea of uncertainty. They need a sense of direction, and this document is designed to achieve just that result. [63]

And in relation to the directions:

> In my view, it is appropriate to give directions of the kind identified in MFI 5 and 6 at the very outset of this trial. I accept that this is unusual. But this is an unusual trial. It is to be a very long and detailed factual trial. In my estimate, the jury needs some brief guidelines, accurate but brief, as to the legal issues likely to arise, and they need that assistance at the very commencement of the trial.[64]

7.56 Accordingly, we asked in CP 4 whether the judge should give some preliminary remarks on the law and issues in the case, and if so how far any such summary or reference to potential defences should go.[65]

7.57 The Victorian Law Reform Commission (VLRC) has recommended that the judge give early directions to the jury on the issues at stake in the trial, including their supply in written form. The VLRC proposed, in aid of this recommendation, the introduction of a legislative power, on the part of the judge, to require the prosecution, after consultation with the defence, to prepare an "outline of charges". This would identify the elements of the offence(s) charged and note those that were in dispute. It would be subject to amendment during the course of the trial.[66]

7.58 To similar effect was the recommendation of Lord Justice Auld in his review of the criminal courts of England and Wales that judges be required to give an opening address to the jury at the beginning of a trial, containing an objective outline of the case and the questions that the jury must decide. This address, it was suggested, should be supplemented by a written case and issues summary, prepared in draft form by prosecution and defence counsel before the start of the trial. As envisaged it would identify the nature of the charges, any evidence that was agreed and the matters of fact in issue, as part of a brief narrative, and include a list of the likely questions for the jury to decide. The need for the summary to be amended and for fresh copies to be provided to the jury as the issues narrow or widen, in the course of the trial, was recognised. In addition, it was observed, defence counsel should be

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63. *R v Elomar* [No 1] [2008] NSWSC 1442; 233 FLR 222 [3].
64. *R v Elomar* [No 1] [2008] NSWSC 1442; 233 FLR 222 [33].
65. NSW Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) Question 9.9. Two submissions did not support this approach: Law Society of NSW, *Submission JU3*, 13; Commonwealth Director of Public Prosecutions, *Submission JU10*, 10. One submission stated that judge should have a discretion to make preliminary directions of this nature: NSW, Office of the Director of Public Prosecutions, *Submission JU9* [9.4].
66. Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) 115-117, rec 41 and 42.

allowed (but not required) to make a short opening speech after the prosecution's opening address.[67]

7.59 The recommendations of the VLRC and of Lord Justice Auld were each made against the backdrop of existing legislation for pre-trial disclosure by the defence.[68]

7.60 In its review of jury directions, the QLRC cited similar reasons to those identified by the VLRC and Lord Justice Auld in recommending that:

- there be specific provision to require the judge to invite (but not require) the defence to provide an opening address;
- the jury should be informed as early as practicable of:
  - the issues that it will have to decide;
  - those matters that are admitted or otherwise not in dispute; and
  - the overall context in which the issues arise
- the *Criminal Code* be amended to allow the judge, at any time, to address the jury on the issues that arise or are expected to arise at trial;[69]
- the jury receive written material, unless the judge considered there were good reasons to the contrary, that would cover issues such as:
  - the burden and standard of proof;
  - the role of judge and jury;
  - the elements of each charge and each defence (to the extent identified by the defendant); and
  - any admissions or agreed facts.[70]

7.61 Studies have also revealed that jurors themselves have felt the need for early directions on the applicable law. For example, the New Zealand Law Commission's study found that some jurors "wanted rather more information on the case ... and in particular, would have liked some sort of legal framework which they could have used to organise the evidence as it emerged". It also found that jurors found even a

67. R E Auld, *Review of the Criminal Courts of England and Wales*, Report (2001) [22]-[23], [28].
68. In the case of England and Wales, see *Criminal Procedure and Investigations Act 1996* (Eng) s 1-21A. The legislation has undergone several major overhauls, see: NSW, Attorney General's Department, Criminal Law Review Division, *Report of the Trial Efficiency Working Group* (2009) 39-50; C Taylor, "The evolution of the defence statement" (2010) 74 *Journal of Criminal Law* 214; J Richardson, "A 'just' outcome: losing sight of the purpose of criminal procedure" [2011] *Journal of Commonwealth Criminal Law* 105. In the case of Victoria, see *Criminal Procedure Act 2009* (Vic) which repealed the *Crimes (Criminal Trials) Act 1999* (Vic). It requires the prosecution to serve a summary of its opening on the defence before trial, and requires the defence to file a response identifying the matters in issue. It permits (but does not require) the judge to give an opening address to the jury about the issues in the case.
69. Queensland Law Reform Commission, *A Review of Jury Directions*, Report 66 (2009) rec 9-1 to 9-3.
70. Queensland Law Reform Commission, *A Review of Jury Directions*, Report 66 (2009) rec 10-1(3).

"minimal description of the legal structure of the case" very helpful.[71] A study conducted recently in Western Australia reported that jurors "consistently volunteered that they would have liked clear guidance early in the trial, particularly as to the law".[72]

7.62 Results of studies have been mixed on the question of the effect of early directions on the applicable law. Some studies have found that multiple exposure to the law enables jurors to understand the legal directions and to apply them better to the evidence.[73] Other studies, however, have found that giving preliminary legal directions does not result in improvement in jurors' recall of the directions.[74]

The Commission's view

7.63 We see merit in the jury being provided with written guidance, from the outset of the trial, in relation to the way that the proceedings are expected to unfold.[75] This could include the provision of a roadmap or chronology or summary of some or all of the facts, a copy of the indictment, a statement of the elements of the offence(s) charged, a summary of the issues, and preliminary directions of law in relation to those elements and issues.

7.64 Although the summing up at the end of the trial is the main means of explaining to jurors the legal principles that they need to apply when bringing in a verdict, there are, in our view, good reasons for giving jurors the key legal directions, particularly on substantive law, during the judge's opening remarks.

7.65 Arguments that support the judge providing preliminary statements on the substantive law include that:

- they provide a legal framework and a context for the evidence so that the jury can better understand, sort, and evaluate the evidence;[76]
- they may improve jurors' recall and comprehension of the judge's later directions;

71. W Young, N Cameron and Y Tinsley, *Juries in Criminal Trials Part Two: A Summary of the Research Findings,* Preliminary Paper 37 (New Zealand, Law Commission, 1999) vol 2 [2.25].
72. J Fordham, "Bad press: does the jury deserve it?" (36th Australian Legal Convention, Perth, WA, 18 September 2009) 22.
73. D Cruse and B Browne, "Reasoning in a jury trial: the influence of instructions" (1986) 114 *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.
74. 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.
75. One submission supported such provision in some cases: NSW, Office of the Director of Public Prosecutions, *Submission JU9* [4.3].
76. V Smith, "Impact of Pretrial Instruction on Jurors' Information Processing and Decision Making" (1991) 76 *Journal of Applied Psychology* 220. See also NSW, Office of the Director of Public Prosecutions, *Submission JU9*, 2; NSW, Attorney General's Department, Criminal Law Review Division, *Report of the Trial Efficiency Working Group* (2009) 18; Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [6.42].

- they may correct pre-existing and inaccurate beliefs about the law held by the jurors or counteract personal biases that might be triggered by the nature of the case or the characteristics of the defendant; and
- they may enhance the jurors' ability to evaluate the evidence, and increase jurors' overall satisfaction with the trial process.[77]

7.66 There are, however, arguments against giving jury directions on substantive law prior to the presentation of evidence.

7.67 First, there is a fear that giving jury directions on substantive law prior to the presentation of evidence might overload jurors with too much information at the beginning of the trial.[78] It has also been suggested that "jurors may not understand the context of the directions without knowing anything about the evidence".[79]

7.68 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.[80]

7.69 We are not persuaded that these arguments outweigh the benefits of providing the jury with a suitable framework from the outset, particularly where they are reinforced by repetition of the directions at appropriate stages of the trial.[81]

7.70 We do, however, consider that the judge should deliver the preliminary directions on the relevant law, rather than rely on a document prepared by counsel, because:

- any directions of law should be given "with the imprimatur and authority of the judge"; and
- any document prepared primarily by the prosecution could give the prosecution an "unfair advantage and suggest an imbalance between the two parties in authority and standing".[82]

7.71 This does not mean that it is not desirable for the judge to consult with counsel in advance of delivering the preliminary directions.

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77. 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, "Instructing jurors: a field experiment with written and preliminary instructions" (1989) 13 *Law and Human Behavior* 409, 413-414.
78. 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, 72; NSW, Office of the Director of Public Prosecutions, *Submission JU9*, 3.
79. Commonwealth Director of Public Prosecutions, *Submission JU10*, 10.
80. 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).
81. M Comiskey, "Initiating dialogue about jury comprehension of legal concepts: can the 'stagnant pool' be revitalized?" (2010) 35 *Queen's Law Journal* 625, 652-653.
82. These reasons were identified in argument in *R v Sood (Ruling No 3)* [2006] NSWSC 762 [18], [28].

7.72 The provision of any of the documents noted above should remain a matter for the discretion of the judge, following consultation with counsel, depending on the complexity and circumstances of the individual case.

7.73 For example, in a complex case the jury is likely to be assisted by the provision, at the outset of the trial, of a roadmap or chronology of the facts that the prosecution expects to prove, along with a set of written directions on the elements of the offence(s) charged. This is precisely what occurred in *R v Elomar.*[83]

7.74 Obviously, such documents would need to be accurate and a direction given that the roadmap or chronology was not itself evidence. Attention would also need to be given to revisiting these documents and making any necessary amendments at the close of the evidence.

7.75 We are not in favour of the defence being compelled to provide an opening address of the kind recommended by the QLRC,[84] although consideration may need to be given to altering the traditional sequence of the opening addresses and preliminary directions. For example, in appropriate cases it might be sensible to confine the preliminary remarks of the judge to the housekeeping matters, and for the directions of law to follow the opening addresses of counsel. This could assist in providing a further focus for the jury in relation to the task ahead of them. We believe that it should be encouraged, particularly now that it has become largely accepted as good defence practice. Nor do we consider that the provision of a written roadmap or chronology or summary of the facts or issues, or of written directions of law should be mandated. However, we are of the view that their use should be expressly permitted by legislation.

Recommendation 7.2

The Trial Efficiency Working Group, in looking at possible amendments to the *Criminal Procedure Act 1986* (NSW), should consider giving a discretionary power to the court:

(a) to require the prosecution to prepare (and to seek defence agreement to) a draft outline of the issues in the trial that would set out any or all of the following:

(i) the elements of the offence or offences charged;

(ii) the elements that are and are not in dispute;

(iii) a summary of the prosecution case; and

(iv) a reference to the defences that the defence intends to raise,

based on the notice of the prosecution case and defence response required under s 137 and s 138 of the *Criminal Procedure Act 1986* (NSW), and on any notice of pre-trial disclosure required by an order made under s 141(1) of the *Criminal Procedure Act 1986* (NSW).

(b) to give to the jury, at any time including at the commencement of the trial (either before or after the opening addresses):

83. See para [7.55].

84. Queensland Law Reform Commission, *A Review of Jury Directions*, Report 66 (2009) [3.166]-[3.174].

(i) a copy of the outline of issues, if one has been required; or

(ii) a summary of the elements of the offence(s) charged and any relevant defences,

together with preliminary directions of law in relation to the elements of the offence(s) and defence(s) so identified;

(c) to require the prosecution and the defence to identify, in the course of a pre-trial conference, any warnings or limitations on use that they consider the judge should give the jury in relation to the evidence that is likely to be admitted;

(d) to require the prosecution and the defence to provide to the court before the closing addresses, a summary of the directions of law that each consider should be given to the jury in relation to the elements of the offence(s) charged and of any defence(s) raised.

Appendix A: Current reform proposals in other jurisdictions

A.1 In this appendix we note and briefly discuss some of the proposals for reform that have arisen out of the work of the Victorian Law Reform Commission (VLRC) and Queensland Law Reform Commission (QLRC), that have not otherwise been addressed in this report. They encompass the reforms proposed by the report to the Victorian Jury Directions Advisory Group prepared by Justice Weinberg and staff from the Judicial College of Victoria and the Department of Justice ("the Weinberg Report"),[1] in relation to complicity, circumstantial evidence and tendency, coincidence and context evidence, being areas in which the directions currently required were considered overly complex and potentially difficult to comprehend. Additionally, we note the reforms that the VLRC and QLRC have proposed in relation to the *Pemble* principle.

Complicity

A.2 One of the areas of law that has given rise to problems in the formulation of clear and comprehensible jury directions is that of complicity. In our 2010 report on complicity,[2] we noted the complexity of the current law and the difficulties in directing a jury on the relevant principles in a readily comprehensible way.[3] We concluded that codification was desirable, and proposed a legislative response that would deal with accessorial liability as well as with those forms of liability that have been dealt with pursuant to joint criminal enterprise, extended joint criminal enterprise, and felony murder.

A.3 The Weinberg Report considered that the substantive law relating to the principles of complicity was so complicated that reform could not be achieved by amending the suggested directions in the Victorian Charge Book alone, but that amendment of the substantive law is required. The Weinberg Report therefore recommended a statutory enactment in place of the common law principles of complicity to the effect that a person "involved in the commission of an offence" is taken to have committed that offence. The suggested provision would encompass the position of a person

1. M Weinberg, *Simplification of Jury Directions Project*, Report to the Jury Directions Advisory Group (2012).
2. NSW Law Reform Commission, *Complicity,* Report 129 (2010).
3. See our observations in NSW Law Reform Commission, *Complicity,* Report 129 (2010) [1.16]

who intentionally assists or encourages the commission of the offence or an offence of "the same general character", or who enters into an agreement, arrangement or understanding with another person to commit the offence or an offence of "the same general character".[4]

The Commission's view

A.4 The complicity reforms now proposed for consideration in Victoria, in the Weinberg Report, and in NSW, in our report, differ from one another, as well as from the schemes contained in the *Criminal Code* (Cth),[5] and the common law. The potential complexity of the common law has occasioned difficulty at trial level, and led to numerous appeals,[6] and we remain of the view that legislative reform is justified.

A.5 The key differences between our approach and that set out in the Weinberg Report are that:

- we propose a more detailed approach to the legislation that gives the courts more guidance on this difficult area and makes clear what is intended; and
- we would preserve the law of extended joint criminal enterprise, whereas the Weinberg Report's approach does not appear to preserve this law.

A.6 Beyond noting the desirability of harmonisation of the law in this area, we do not propose any additional recommendations or further comment.

Circumstantial evidence and inferences

A.7 In Chapter 4 we considered whether it was desirable to allow more content to be given to the expression "beyond reasonable doubt" that has traditionally been employed as the required degree of satisfaction for criminal proof, or whether some other phrase should be substituted for it.

A.8 In this section we examine briefly an issue that was raised in the Weinberg Report concerning the *Shepherd* direction[7] whereby, in cases relying on circumstantial evidence, the jury is instructed that it must be satisfied beyond reasonable doubt[8] of those "intermediate facts which constitute indispensable links in a chain of reasoning towards an inference of guilt".[9]

4. M Weinberg, *Simplification of Jury Directions Project*, Report to the Jury Directions Advisory Group (2012) 93-95.
5. *Criminal Code* (Cth) s 11.2 and 11.2A.
6. See, eg, *Clayton v The Queen* [2006] HCA 58; 81 ALJR 439; *May v R* [2012] NSWCCA 111; *R v Gnango* [2011] UKSC 59; [2012] 1 AC 827.
7. Arising out of the decisions in *Chamberlain v The Queen (No 2)* (1984) 153 CLR 521, 536; and *Shepherd v The Queen* (1990) 170 CLR 573, 579.
8. Although we continue to employ in the discussion that follows the expression "proved beyond reasonable doubt", that should be taken to include any reformulation or explanation of that formula.
9. *Shepherd v The Queen* (1990) 170 CLR 573, 579.

A.9 Questions have arisen in relation to the identification of those facts that will require a *Shepherd* direction. In general terms, the concern is with identifying those facts the existence of which is indispensible to proof of the prosecution case. In cases where the existence of some fact is, like a link in the chain, objectively indispensible in making good a chain of reasoning towards guilt, it is clear that a *Shepherd* direction will be required. It can be otherwise in cases where a individual fact may, like a strand in a cable, be unnecessary to the conclusion of guilt, so long as the other facts are capable of supporting such a conclusion.

A.10 Conflicting views have been expressed in the past as to whether the concept of an indispensible fact refers to a fact that the judge determines to be objectively indispensible, or one that the jury may consider indispensible depending on the view it takes of the facts.[10]

A.11 The Weinberg Report considered this issue in some depth and also drew attention to some matters such as confessions and lies in respect of which it has been held that directions as to proof beyond reasonable doubt are necessary.

A.12 After identifying the practices in other jurisdictions, and considering several options for reform, the Weinberg Report recommended the introduction of legislation to the following effect:

> **Part 00 – Matters to be Proved Beyond Reasonable Doubt**
>
> **A. Definitions**
>
> In this Part–
>
> **essential fact** means a fact without proof of which the prosecution case against the accused could not as a matter of law succeed;
>
> **trial judge** has the same meaning as in the *Criminal Procedure Act 2009*.
>
> **B. Matters on which a beyond reasonable doubt direction may be given**
>
> (1) Unless an enactment otherwise provides, the only matters that a trial judge may direct the jury must be proved beyond reasonable doubt are–
>
> (a) the elements of the offence charged or an alternative offence of which the accused may be found guilty;
>
> (b) the absence of any available defence; and
>
> (c) any essential fact.
>
> (2) The question of whether a fact is an essential fact is a question of law.
>
> **C. Jury direction about an essential fact**
>
> (1) This section applies if a trial judge determines that a fact is an essential fact.

10. *R v Merritt* [1999] NSWCCA 29 [70] in respect of which doubt was expressed in *R v Davidson* [2009] NSWCCA 150; 75 NSWLR 150.

(2) Notwithstanding that a trial judge determines that a fact is an essential fact, the trial judge only needs to direct the jury that the essential fact must be proved beyond reasonable doubt if –

(a) a party so requests; or

(b) it is necessary to do so to avoid a substantial miscarriage of justice.

(3) A trial judge need not direct the jury that an essential fact must be proved beyond reasonable doubt if there are good reasons for not doing so.

(4) In giving a direction under subsection (2), a trial judge must –

(a) identify the essential fact; and

(b) direct the jury that it must be satisfied of that fact beyond reasonable doubt before the accused may be found guilty of the offence charged or an alternative offence.

D. Abolition of common law rules

Any rule of law or practice that requires or permits a jury direction that any facts other that those referred to in section B must be proved beyond reasonable doubt is abolished.[11]

A.13 Additionally it recommended the use of the following jury direction:

Charge: Inferences and Circumstantial Evidence

Evidence can come in many forms. It can be evidence about what someone saw or heard. It can be an exhibit admitted into evidence. It can be someone's opinion.

Some evidence can prove a fact directly. For example, if a witness said that s/he saw or heard it raining outside, that would be direct evidence of the fact that it was raining.

Other evidence can prove a fact indirectly. For example, if a witness said that s/he saw someone enter the courthouse wearing a raincoat and carrying an umbrella, both dripping wet, that would be indirect or 'circumstantial' evidence of the fact that it was raining outside. You can conclude from the witness's evidence that it was raining, even though s/he didn't actually see or hear the rain.

As far as the law is concerned, it makes no difference whether evidence is direct or indirect. Although people often believe that indirect or circumstantial evidence is weaker than direct evidence, that is not true. It can be just as strong or even stronger. What matters is how strong or weak the particular evidence is, not whether it is direct or indirect.

However, you must take care when drawing conclusions from indirect evidence. You should consider all of the evidence in the case, and only draw reasonable conclusions based on the evidence that you accept. Do not guess. While we might be willing to act on the basis of guesses in our daily lives, it is not safe to do that in a criminal trial.

11. M Weinberg, *Simplification of Jury Directions Project*, Report to the Jury Directions Advisory Group (2012) [3.181].

[*In cases involving a significant amount of circumstantial evidence, add the following shaded section*.]

In determining whether a conclusion is reasonable, you should look at all of the evidence together. It may help you to consider the pieces of evidence to be like the pieces of a jigsaw puzzle. While one piece may not be very helpful by itself, when all the pieces are put together the picture may become clear.

However, when putting all the pieces together, you must take care not to jump to conclusions. It is sometimes easy for people to be too readily persuaded of a fact, on the basis of insufficient evidence or evidence that turns out to be truly coincidental. Once convinced of that fact, they may then seek support for it in the other evidence, perhaps distorting that evidence to fit their theory or disregarding 'inconvenient' facts. You must make sure that you do not do this. You must keep an open mind, and be prepared to change your views

You may only convict the accused if you are satisfied that his/her guilt is the only reasonable conclusion to be drawn from the whole of the evidence, both direct and indirect. If there is another reasonable view of the facts which is consistent with the accused's innocence, then the prosecution will not have proved his/her guilt beyond reasonable doubt, and you must acquit him/her.[12]

A.14 This suggested direction draws attention to the fact that some of the complexity in this area has arisen from a failure by judges to give proper attention to the fact that, in a circumstantial case, the jury must consider all of the circumstances established by the evidence and weigh them in deciding whether the prosecution case has been made good, and that it must not consider the evidence on a piecemeal basis. The High Court has made this clear.[13]

A.15 It was also the material consideration that led the NSW Court of Criminal Appeal to hold in *Burrell v R* that there had been no error in the omission of a *Shepherd* direction from the directions that were given. The court held, in fact, that the giving of a *Shepherd* direction may well have confused the jury.[14]

A.16 Although, as identified in the Weinberg Report, differences have emerged between case law in Victoria and NSW in this context, the current state of the law in NSW is that a *Shepherd* direction will rarely be required and is more likely to confuse than assist the jury. In *Davidson v R* the NSW Court of Criminal Appeal distinguished and cast doubt upon an earlier decision in *R v Merritt*[15] that suggested that a *Shepherd* direction could be appropriate in circumstances where the jury might regard a fact to be an indispensible intermediate fact, even though the judge had not thought that it was.[16]

A.17 The Court in *Davidson* adopted the approach that the judge is to determine the issue by an objective assessment as to whether a particular fact was indispensible rather than leaving it for the jury to decide. The most recent decisions of the Court of

12. M Weinberg, *Simplification of Jury Directions Project*, Report to the Jury Directions Advisory Group (2012) [3.262].
13. *Velevski v The Queen* [2002] HCA 4; 76 ALJR 402 [43]-[44]; *R v Hillier* [2007] HCA 13; 228 CLR 618 [46].
14. *Burrell v R* [2009] NSWCCA 163; 196 A Crim R 199 [136]. Special leave to appeal to the High Court was refused.
15. *R v Merritt* [1999] NSWCCA 29.
16. *Davidson v R* [2009] NSWCCA 150; 75 NSWLR 150.

Criminal Appeal have followed this approach and limited the use of the *Shepherd* direction to exceptional cases.[17]

A.18 The experience in NSW suggests that juries are directed that, where a confession or admission is being used as part of a circumstantial case, it does not have to be proved beyond reasonable doubt and are only directed that admissions or confessions have to be proved beyond reasonable doubt where the jury is asked to convict on that evidence alone (that is as a direct evidence case).

A.19 The recently-reissued Bench Book direction on circumstantial evidence in "strands in the cable" cases, accords with the approach taken in *Burrell* and *Davidson.* Moreover, it would appear to conform with the remaining recommendations made in the Weinberg Report concerning circumstantial proof. For example:

- the word "conclusion" is used in preference to "inference";
- inferential reasoning is explained;
- the jury is told to consider all of the evidence together and not on a piecemeal approach;
- the jury is advised that circumstantial evidence is not necessarily less probative than direct evidence; and
- the jury is told that "if there is any other reasonable conclusion open on those facts that is inconsistent with the conclusion the Crown asks you to find, then the Crown's circumstantial case has failed".[18]

The Commission's view

A.20 In those circumstances we do not consider that the legislative provision proposed by the Weinberg Report is warranted, at this stage in NSW, or that any change to the Bench Book direction is required. However, if it emerges that, notwithstanding the guidance given in *Davidson* and *Burrell*, difficulties do arise in relation to the identification of the circumstances in which a *Shepherd* direction is required, or in relation to the comprehensibility of the current direction, then the position can be reviewed and legislation along the lines of the Weinberg Report reconsidered.

Evidence of other misconduct

A.21 The VLRC and QLRC have each considered the need for a review of the law of propensity evidence and for legislative intervention, in response to concerns as to its complexity and current state of uncertainty.[19] The Weinberg Report has now

17. See, eg, *Dennis v R* [2012] NSWCCA 120 [31]-[37] *Rees v R* [2010] NSWCCA 84 [48]-[55]; 200 A Crim R 83 and in *Wood v R* [2012] NSWCCA 21 [555]-[570].
18. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* [2.520].
19. Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) ch 5 and Queensland Law Reform Commission, *A Review of Jury Directions,* Report 66 (2009) ch 13.

responded[20] by recommending a codification of the law,[21] and developing some possible directions.[22]

A.22 Although it is not necessarily helpful to compartmentalise evidence of conduct on the part of the accused on occasions other than those concerning the offences charged, in broad terms it can comprise:

- **tendency evidence**, that is, evidence of a tendency or propensity that a person has to act in a particular way, or to have a particular state of mind, that makes it more likely that he or she committed the offence(s) charged;
- **coincidence evidence**, that is, evidence of a series of events, the similarity of which is such that it is improbable that they occurred by coincidence, which in turn can make it more likely that the accused committed the offence charged, or that independent witnesses were telling the truth;
- **relationship or background evidence** that can explain the circumstances in which an offence occurred, for example in showing a history of animosity between the parties that might establish a motive or rebut a defence of accident;[23] or in throwing a light on the true nature of their dealings,[24] or on the accused's state of mind,[25] and
- **context evidence**, that is, evidence, particularly in sexual assault cases, of a course of conduct between the accused and a complainant that makes the incident charged more understandable, for example in explaining that it did not occur "out of the blue", or in explaining the behaviour of the complainant including any absence of resistance or of complaint, without the knowledge of which the evidence of the incident charged may seem to a jury to be implausible.[26]

A.23 Where the evidence is led as either tendency or coincidence evidence it will be subject to the threshold requirements for its admissibility under either the tendency rule or the coincidence rule, so that the prosecution must show that the evidence has a significant probative value,[27] and, in accordance with s 101(2) of the *Evidence Act 1995* (NSW), that its probative value substantially outweighs any prejudicial effect it may have on the defendant.[28]

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20. M Weinberg, *Simplification of Jury Directions Project*, Report to the Jury Directions Advisory Group (2012) ch 4.
21. M Weinberg, *Simplification of Jury Directions Project*, Report to the Jury Directions Advisory Group (2012) [4.213].
22. M Weinberg, *Simplification of Jury Directions Project*, Report to the Jury Directions Advisory Group (2012) [4.241].
23. *Wilson v The Queen* (1970) 123 CLR 334; *FDP v R* [2008] NSWCCA 317; 74 NSWLR 645 [36]-[37].
24. *Harriman v The Queen* (1989) 167 CLR 590.
25. *R v Serratore* [2001] NSWCCA 123.
26. *R v ATM* [2000] NSWCCA 475 [37]; *DJV v R* [2008] NSWCCA 272; 200 A Crim R 206 [28]; *RG v R* [2010] NSWCCA 173 [38]; *ES v R (No1)* [2010] NSWCCA 197 [41].
27. *Evidence Act 1995* (NSW) s 97, 98.
28. See *R v PWD* [2010] NSWCCA 209; 205 A Crim R 75 [66]-[73]; *R v Fletcher* [2005] NSWCCA 338; 156 A Crim R 308 [33]-[36], [45]-[48].

A.24 The *Evidence Act 1995* (NSW) does not make express provision in relation to the admissibility of relationship (background) evidence or of context evidence, although each is subject to the general test of relevance.[29] Each is also subject to

- the general discretion, under s 135, to exclude evidence that is unfairly prejudicial, misleading or confusing, or that might cause or result in undue waste of time;
- the general discretion, under s 136, to limit the use of unfairly prejudicial or misleading or confusing evidence; and
- the requirement, under s 137, to exclude evidence in criminal proceedings the probative value of which is outweighed by the danger of unfair prejudice to the defendant.

The requirement in s 137 poses a lesser barrier to admission of the evidence than that posed by s 101 in relation to tendency and coincidence evidence.

A.25 The courts have recognised, in sexual assault cases, that the persuasive effect of evidence of other acts gives rise to a risk of the misuse of that evidence.[30] In *ES v R (No1),* while the court noted the theoretical distinction between its use as motive evidence[31] and as tendency evidence, it held it was impractical to maintain that distinction.[32]

A.26 Tendency and coincidence evidence are different in point of principle,[33] however, there will often be an overlap in practice.

A.27 Relationship and context evidence can serve a similar purpose in establishing a meaningful setting for the offence that is charged, however there are also differences between them, as to their permitted use, that can lead to error if not recognised. Neither constitutes tendency evidence or permits tendency (propensity) reasoning. Nevertheless there is always a risk that a jury uninstructed in that respect might follow such a course. This needs to be addressed either at the admissibility stage, or by way of a direction to the jury not to use tendency reasoning.[34]

A.28 A direction not to engage in tendency reasoning is not universally required. For example, in *Toalepai v R,*[35] it was held that, if nothing was said in the trial to suggest that the evidence could or should be used for tendency purposes, then the failure to give a tendency warning need not result in a miscarriage of justice.[36]

29. *Evidence Act 1995* (NSW) s 55 and 56.
30. *FDP v R* [2008] NSWCCA 317; 74 NSWLR 645 [38].
31. Disclosing a sexual interest in the complainant, commonly referred to as "guilty passion" in earlier cases, eg, *R v Beserick* (1993) 30 NSWLR 510.
32. *ES v R (No1)* [2010] NSWCCA 197 [39].
33. *R v Nassif* [2004] NSWCCA 433; *O'Keefe v R* [2009] NSWCCA 121.
34. *R v ATM* [2000] NSWCCA 475 [75]-[78]; *Qualtieri v R* [2006] NSWCCA 95; 171 A Crim R 463 [80].
35. *Toalepai v R* [2009] NSWCCA 270.
36. *Toalepai v R* [2009] NSWCCA 270 [47]-[49]; *R v Jiang* [2010] NSWCCA 277 [41]-[53].

A.29 The absence of the warning may actually be of advantage to an accused in avoiding the "backfire effect" that can arise, if the jury engages in an impermissible line of reasoning because its attention has been drawn to it.

A.30 The fact that evidence of "other acts"[37] can potentially serve different purposes contributes to the complexity that arises in this area, both in relation to its admissibility, and in relation to the directions and warnings that are required.

A.31 That complexity has not been alleviated by the High Court's division of opinion in *HML v The Queen*,[38] that has not been resolved in subsequent decisions,[39] concerning:

- the basis or bases upon which evidence of context in sexual assault cases is admissible;
- the way in which it can be used; and
- the standard of proof required.[40]

A.32 Context evidence continues to be admissible in NSW subject to showing that the evidence is relevant, for example, in explaining the absence of a complaint.[41] However, as noted earlier, it may require a careful limited use direction to the jury that will exclude propensity reasoning.[42]

A.33 Similarly, pending further resolution, the Court of Criminal Appeal has proceeded upon the basis that, at least in relation to child sexual assault cases, tendency evidence needs to be established beyond reasonable doubt;[43] although context evidence does not need to be established to that standard.[44]

A.34 The formulation of the directions that are required can be quite complex because of the differences in the application of the evidence, depending on the basis on which it is admitted. The directions may also involve close distinctions that jurors, who will generally have no legal training, may not necessarily be able to apply easily. The potential complexity of the directions is, of course, increased where there are multiple counts or multiple complainants, or where there are multiple accused, or where the evidence is relied upon both as context and tendency evidence and coincidence evidence.

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37. Previously referred to as "uncharged acts" prior to the High Court's expression of concern about the use of the term in *HML v The Queen* [2008] HCA 16; 235 CLR 334 [129].
38. *HML v The Queen* [2008] HCA 16 235 CLR 334, on appeal from the Supreme Court of SA.
39. *BBH v The Queen* [2012] HCA 9; 86 ALJR 357, an appeal from the Supreme Court of Queensland that was similarly concerned with common law principles rather than with an application of the Uniform Evidence Acts.
40. Pending resolution of the issues that arise concerning the admissibility of such evidence, and whether it needs to be established beyond reasonable doubt, the position in NSW is governed by the decisions of the Court of Criminal Appeal in *DJV v The Queen* [2008] NSWCCA 272; 200 A Crim R 206; and *SKA v R* [2012] NSWCCA 205.
41. *DJV v R* [2008] NSWCCA 272; 200 A Crim R 206 [28]-[29].
42. *DJV v R* [2008] NSWCCA 272; 200 A Crim R 206 [14].
43. *DJV v R* [2008] NSWCCA 272; 200 A Crim R 206 [30]; *ES v R (No2)* [2010] NSWCCA 198 [72].
44. *DJV v R* [2008] NSWCCA 272; 200 A Crim R 206 [31].

A.35 The range of directions called for may involve:

- warnings not to engage in propensity reasoning;
- warnings not to substitute the other acts of misconduct for the acts said to constitute an offence; and
- directions to consider each count separately by reference only to the evidence that relates to it, subject to the qualification[45] that any doubt that exists in relation to a particular count in an indictment can be relevant for an assessment of the evidence of the complainant in relation to the other counts.

A.36 It may also be necessary to deal with the possibility of concoction or collaboration where there is more than one complainant; and with the standard of proof that will differ depending on whether the evidence is admitted as tendency or context evidence.

A.37 Reform through legislation has now been proposed in relation to the various types of evidence of other misconduct and directions in relation to them in Victoria[46] and in Queensland.[47] Amending legislation has been passed in South Australia.[48]

A.38 In addition, the Standing Council on Law and Justice has asked the Evidence Working Group to consider the issues that arise in relation to the tendency and coincidence provisions of the uniform *Evidence Acts*, which we assume will also include those issues that relate to context and relationship evidence.

A.39 In the meantime the Judicial Commission of NSW Criminal Trial Courts Bench Book Committee has been engaged in redrafting the suggested directions that need to be given in this context and the supporting commentary.

A.40 It is evident that the law in this context has developed in different directions across the Australian jurisdictions, particularly between those where admissibility turns upon common law principles rather than upon an application of the uniform *Evidence Acts*.[49] Different approaches also have been adopted in other common law jurisdictions.[50]

The Commission's view

A.41 Although we identified in CP 4[51] some of the issues that arise for jury directions in this context, we have not received sufficient submissions or engaged in the degree

45. *KRM v The Queen* [2001] HCA 11; 206 CLR 221.
46. M Weinberg, *Simplification of Jury Directions Project*, Report to the Jury Directions Advisory Group (2012) [4.206]-[4.212].
47. Queensland Law Reform Commission, *A Review of Jury Directions,* Report 66 (2009) rec 13.1 although that recommendation has not yet been carried into effect.
48. *Evidence Act 1929* (SA) s 34O-34T inserted by *Evidence (Discreditable Conduct) Amendment Act 2011* (SA) s 4, commenced 1 June 2012.
49. M Weinberg, *Simplification of Jury Directions Project*, Report to the Jury Directions Advisory Group (2012) [4.122]-[4.137].
50. M Weinberg, *Simplification of Jury Directions Project*, Report to the Jury Directions Advisory Group (2012) [4.138]-[4.191].
51. NSW Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [8.2]-[8.18].

of consultation that would permit the formulation, at this time, of any recommendation for reform.

A.42 Having regard to the current uncertainties and complexity of the law, and to the desirability of securing a harmonious approach, at least in relation to the uniform *Evidence Act* jurisdictions, we consider it more appropriate for the matter to be the subject of a separate review.

The Pemble principle

A.43 The common law requires directions to be given to the jury in relation to any defence or alternative verdict (whether arising at common law or pursuant to statute) that is reasonably open on the evidence, whether or not it was raised by counsel during the trial. The obligation of the judge in this respect was described by Chief Justice Barwick in *Pemble v The Queen* as follows:

> 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. This involves, in my opinion, an adequate direction both as to the law and the possible use of the relevant facts upon any matter upon which the jury could in the circumstances of the case upon the material before them find or base a verdict in whole or part.[52]

A.44 Depending on the state of the evidence, a failure to comply with the *Pemble* principle can constitute an error of law and potentially result in a miscarriage of justice.[53]

A.45 The express abandonment by counsel of a defence or of an alternative verdict that was open on the evidence does not alter this obligation.[54]

A.46 The decision in *Pemble* was delivered in the context of a murder trial, in which the defence counsel invited the jury to return a verdict of manslaughter, and did not address the possibility of an acquittal. Although it has been argued from time to time that the *Pemble* principle should be confined to cases of homicide, its reach has not been so confined.[55]

A.47 The principle has a practical significance for defence counsel who may prefer to pursue a case for an outright acquittal on the offence charged, rather than one that might result in a verdict of guilty for a lesser offence.

52. *Pemble v The Queen* (1971) 124 CLR 107, 117-118 (Barwick CJ); see also Menzies J at 133 and Owen J at 141.
53. *Gillard v The Queen* [2003] HCA 64; 219 CLR 1; *Carney v R* [2011] NSWCCA 223 [14].
54. *Pemble v The Queen* (1971) 124 CLR 107, 118; *Zecevik v Director of Public Prosecutions* (Vic) (1987) 162 CLR 645, 665. and see the High Court's subsequent decisions as to the application of the *Pemble* principle in *Gilbert v The Queen* [2000] HCA 15; 201 CLR 414; *Gillard v The Queen* [2003] HCA 64; 219 CLR 1; *Fingleton v The Queen* [2005] HCA 34; 227 CLR 166; *CTM v The Queen* [2008] HCA 25; 236 CLR 440. See also *Carney v R* [2011] NSWCCA 223 [64]-[65].
55. *Fingleton v The Queen* [2005] HCA 34; 227 CLR 166; *CTM v The Queen* [2008] HCA 25; 236 CLR 440; *R v King* [2004] NSWCCA 20; 59 NSWLR 515.

A.48 For example, in a case involving a count of robbery being armed with an offensive weapon,[56] where there is an issue as to whether the accused was armed with such a weapon, defence counsel (and for that matter the prosecution, although for different reasons) might see a tactical advantage in pursuing an all or nothing verdict, in preference to one of guilty for a lesser offence of robbery simpliciter,[57] and hence elect not to raise the alternative verdict as a possibility in their addresses.[58]

A.49 In other situations, defence counsel may face a practical difficulty in addressing the jury on an alternative basis that may seem to contradict the primary line of defence, and hence confuse a jury. For example, an accused who is charged with an offence of sexual assault of a complainant aged under 16 years, may prefer to run a single theory defence denying having engaged in sexual intercourse that may result in an acquittal, to a more complex one involving a backup defence that if he did have intercourse then he was acting under an honest and reasonable mistake as to the complainant's age.[59]

A.50 Similar considerations can apply in relation to murder trials. Although the defence case is confined to a denial of any involvement in the killing, it may become necessary, depending on the evidence, for the trial judge to direct the jury on the defences or circumstances in which the proper verdict would be one of acquittal, or not guilty of murder but guilty of manslaughter. This may extend to the giving of directions on intoxication, self defence and excessive self defence, provocation, substantial impairment, and manslaughter by an unlawful and dangerous act.[60]

A.51 In each of these situations, so long as the alternative line of defence or alternative verdict is sufficiently "enlivened",[61] or "viable",[62] or "reasonably available"[63] on the evidence, the trial judge will be obliged to give appropriate directions to the jury. This will be the case even though the first time that the jury will hear of the defence, or alternative verdict, will be in the summing up, and even though they will not have had the benefit of defence or prosecution addresses on the issue.

A.52 In such a case it will not be open to the defence, if the accused is convicted of a lesser offence, to argue, on appeal, that he or she was disadvantaged by the leaving of the alternative verdict.[64]

A.53 Nor will it be open to the prosecution to argue on appeal, that the fact that the jury were properly instructed on the elements of the more serious offence and convicted

56. *Crimes Act 1900* (NSW) s 97.
57. *Crimes Act 1900* (NSW) s 94.
58. *R v King* [2004] NSWCCA 20; 59 NSWLR 515.
59. *CTM v The Queen* [2008] HCA 25; 236 CLR 440
60. For a recent example, see *Carney v R* [2011] NSWCCA 223.
61. *CTM v The Queen* [2008] HCA 25; 236 CLR 440 [111].
62. *R v King* [2004] NSWCCA 20; 59 NSWLR 515 [110]; *R v Kanaan* [2005] NSWCCA 385; 64 NSWLR 527 [75].
63. *Chand v R* [2011] NSWCCA 53 [73].
64. *Sheen v R* [2011] NSWCCA 259; *Chand v R* [2011] NSWCCA 53.

of that offence, that there was, on that account, no risk of a miscarriage of justice arising from the failure to direct the jury on the alternative offence.[65]

A.54 Despite the adversarial nature of criminal proceedings, and the need to recognise the right of defence counsel to make informed tactical or forensic decisions (for example as to which issues to contest or which witnesses to call),[66] the obligation of the trial judge to ensure that the accused receives a fair trial remains paramount.[67]

A.55 The need to leave an alternative verdict will, however, depend upon whether the alternative is realistic in the context of the offence charged. It will not require an identification of every technically available alternative including those that are comparatively trifling, or remote from the real point of the case, since this could distract or confuse the jury or result in an outcome that would be contrary to the interests of justice.[68]

A.56 In its report on jury directions, the VLRC noted that different views had been expressed in relation to the extent to which informed tactical or forensic decisions of counsel should affect the application of the *Pemble* principle; and drew attention to the possibility that it does not sit well with the respective roles of the trial judge and of counsel in an adversarial system of criminal justice.[69]

A.57 It also identified as a potential problem that an application of the principle may require the judge to direct the jury on relevant matters without the benefit of arguments from counsel on the issue, with a consequent risk of overloading or confusing the jury, or of encouraging them to give undue weight to a defence because the judge raised it.[70]

A.58 The VLRC observed:

> A fair trial is one that is fair to both the defence and the prosecution. A rule which requires the trial judge to advance an argument, with the apparent weight of judicial office, that the defence has not raised and to which the prosecution has not had an opportunity to respond does not appear to be even handed.
>
> As Lasry J said in a speech last year:
>
> > A fair trial does not mean a verdict of not guilty. Fairness simply deals with the basic concepts of requiring the prosecution to prove its case beyond reasonable doubt and giving the accused a fair opportunity to test that case and be heard in his or her defence.[71]

65. *R v Kanaan* [2005] NSWCCA 385; 64 NSWLR 527 [75]; *Gillard v The Queen* [2003] HCA 64; 219 CLR 1; but see *King v The Queen* [2012] HCA 24; 86 ALJR 833 [56].
66. *TKWJ v The Queen* [2002] HCA 46; 212 CLR 124 [74]; *Nudd v The Queen* [2006] HCA 9; 80 ALJR 614 [9].
67. *R v King* [2004] NSWCCA 20; 59 NSWLR 515 [99], [110]; *CTM v The Queen* [2008] HCA 25; 236 CLR 440 [84], [192]; *TKWJ v The Queen* [2002] HCA 46; 212 CLR 124 [75]-[85]; *Nudd v The Queen* [2006] HCA 9; 80 ALJR 614 [9], [10].
68. *R v King* [2004] NSWCCA 20; 59 NSWLR 515 [12]; *Sheen v R* [2011] NSWCCA 259.
69. Victorian Law Reform Commission, *Jury Directions,* Final Report 17 (2009) [3.52]-[3.57] and [3.61].
70. Victorian Law Reform Commission, *Jury Directions,* Final Report 17 (2009) [3.58].
71. L Lasry, "Criminal defence lawyers: unwitting human rights defenders" (Chancellor's Human Rights Lecture, University of Melbourne, 25 November 2008).

> Defence counsel are able to put forward alternative arguments for an acquittal or conviction of a lesser offence. It requires a tactical decision which they are well placed to make. Defence counsel regularly make tactical decisions which may affect the outcome of a trial. Examples are the decision to lead good character evidence or to call the accused person to give evidence. In these circumstances the accused person must accept the consequences of a tactical decision made by competent counsel. The position should be the same when counsel chooses whether to address the jury about an alternative defence or conviction of a lesser offence.
>
> The issue of lesser included offences is complicated by the number of prescribed statutory alternatives. As Associate Professor John Willis pointed out, this adds to the difficulty in charging a jury and undermines the adversarial approach in which the contested issues are largely defined by the parties. ... Where lesser included offences are not prescribed by statute, the commission believes that prosecution and defence counsel should endeavour to identify those alternative offences they wish to have put to the jury as early as possible.[72]

A.59 As a consequence of these considerations it concluded that legislation was justified to remove any obligation of the judge, where the accused was represented, to direct the jury about defences or alternative verdicts that defence counsel had chosen not to place before the jury, although preserving that obligation in respect of defences or alternative verdicts that counsel had mistakenly and inadvertently failed to raise with the jury.[73]

A.60 The VLRC made the following recommendation:

> 34. The legislation should provide that a trial judge is not obliged to direct the jury about any 'defence' to a count on the indictment, or about any alternative verdict, which counsel for the accused did not place before the jury in final address unless the trial judge is satisfied that:
>
> (a) the defence or alternative verdict is reasonably open on the evidence; and
>
> (b) the failure of defence counsel to address the matter was due to error or oversight by counsel and was not adopted for tactical reasons in the interest of the accused; and
>
> (c) the trial judge is satisfied that it is necessary to direct the jury about the matter in order to ensure a fair trial.
>
> 35. When determining whether it is necessary to direct the jury about any 'defence' or alternative verdict in the circumstances referred to in recommendation 34, it shall be presumed, unless the judge is satisfied to the contrary, that a decision taken by counsel, for tactical reasons, not to advance a 'defence' or alternative verdict to the jury removes any obligation on the trial judge to direct the jury about that matter.[74]

A.61 The QLRC also gave consideration to a possible legislative refinement of the judge's general obligations in directing the jury that would also impact on the

72. Victorian Law Reform Commission, *Jury Directions,* Final Report 17 (2009) [5.71]-[5.74].
73. Victorian Law Reform Commission, *Jury Directions,* Final Report 17 (2009) [5.75].
74. Victorian Law Reform Commission, *Jury Directions,* Final Report 17 (2009) rec 34 and 35.

Pemble principle.[75] Rather than adopting the approach recommended by the VLRC, it considered that the issue should be addressed by legislative amendment as follows:

> **Parties' obligations to identify relevant jury directions**
>
> (11-1) The Criminal Code (Qld) should be amended to provide that both the prosecution and the defendant (if represented) must inform the judge before the start of the summing up which directions concerning specific defences and warnings concerning specific evidence they wish the judge to include in, or leave out of, the summing up.
>
> (11-2) In addition, the Criminal Code (Qld) should be amended to provide that:
>
> (1) the judge is not obliged to give any direction that is not requested unless, in the judge's view, it is nonetheless required in order to ensure a fair trial; and
>
> (2) in appeals asserting any misdirection or inadequate direction of the jury by the trial judge, the court must take into account which directions and warnings were and were not requested by the parties when determining an appeal, including any consideration of the application of the proviso in section 668E(1A) of the Criminal Code (Qld).[76]

A.62 The benefit of this amendment was seen to lie in focusing the attention of the parties on the directions that were required, before the summing up, and in requiring more active assistance on their part in having questions of this kind sorted out correctly at trial, rather than on appeal or at a re-trial.[77]

The Commission's view

A.63 In CP 4 we raised questions concerning the extent to which the trial judge should be able (or required) to leave to the jury matters of law or arguments relevant to a defence that have not been raised by counsel; and concerning the circumstances in which a judge should be able (or required) to leave alternative charges to the jury even if they have not been raised by the prosecution.[78] There was only a limited response to those questions and little support for any reform of the current law.[79]

A.64 Of importance in this respect is the existence of r 4 of the *Criminal Appeal Rules* and of the proviso to s 6(1) of the *Criminal Appeal Act 1912* (NSW).

75. Queensland Law Reform Commission, *A Review of Jury Directions,* Report 66 (2009) [11.53]-[11.95].
76. Queensland Law Reform Commission, *A Review of Jury Directions,* Report 66 (2009) [11.53]-[11.143].
77. Queensland Law Reform Commission, *A Review of Jury Directions,* Report 66 (2009) [11.87]-[11.90].
78. NSW Law Reform Commission, *Jury Directions,* Consultation Paper 4 (2008) [6.4].
79. Law Society of NSW, *Submission JU3*, 6; NSW Bar Association, *Submission JU1*, 5; NSW, Office of the Director of Public Prosecutions, *Submission J9*, 4; Commonwealth Director of Public Prosecutions, *Submission JU10*, 5.

A.65 Where an appellant seeks to rely, as a ground of appeal, on an omission of the trial judge to give a direction and objection was not taken at trial, r 4 requires, in substance, that the Court of Criminal Appeal grant leave.

A.66 It has been held that this rule is not a mere technicality that can be brushed aside. As has been observed one of its purposes is to ensure that the judge receives the assistance from counsel to which he or she is entitled in the task of giving appropriate directions to the jury.[80]

A.67 It is settled that in order to obtain leave under r 4 the appellant will need to demonstrate that any error in this respect led to a miscarriage of justice.[81] In the present context it will be sufficient for the appellant to show that the failure to give the necessary direction may have caused the appellant to lose a real chance (or a chance fairly open) of being acquitted of the offence charged, or of being acquitted of the charge and found guilty of an alternative offence.[82]

A.68 If leave is given then a further question will arise as to whether the case is appropriate for an application of the proviso, that would allow the appeal to be dismissed if the prosecution satisfies the Court that "no substantial miscarriage of justice has actually occurred".[83]

A.69 In considering the issues that arise in the present context the Court will give consideration to

- whether the appellant was represented;
- the extent to which the relevant defence or alternative verdict was ventilated at trial;
- any arguments pressed by counsel on that issue;
- the strength of the evidence that could support or enliven that defence or alternative verdict; and
- whether the leaving of the defence or alternative verdict would have distracted the jury or been contrary to the interests of justice.

A.70 In particular regard will be had to the circumstance that the *Pemble* obligation does not extend to a need to direct a jury in respect of matters that are "purely fanciful"[84]

80. *R v Abusafiah* (1991) 24 NSWLR 531, 536; *R v Clarke* (1995) 78 A Crim R 226, 236.
81. *R v Abusafiah* (1991) 24 NSWLR 531, 536; *R v Wilson* [2005] NSWCCA 20; 62 NSWLR 346 [20]; *R v Kanaan* [2005] NSWCCA 385; 64 NSWLR 527 [99]-[100]; *Sheen v R* [2011] NSWCCA 259 [94], [95]; Papakosmas v The Queen [1999] HCA 37; 196 CLR 297 [72]; *Carney v R* [2011] NSWCCA 223 [67].
82. *Carney v R* [2011] NSWCCA 223 [68].
83. As to the application of which test see *Weiss v The Queen* [2005] HCA 81; 224 CLR 300 [35]-[45]; *Gassy v The Queen* [2008] HCA 18; 236 CLR 293 [16]-[18], [33]-[34]; *AK v Western Australia* [2008] HCA 8; 232 CLR 438 [52], [59]; and, in the present context, see *Blackwell v R* [2011] NSWCCA 93; 208 A Crim R 392; and *Carney v R* [2011] NSWCCA 223 [102].
84. *Douglas v R* [2005] NSWCCA 419 [99]-[100]; and see *Sheen v R* [2011] NSWCCA 259 [88]-[89].

or to identify alternative verdicts involving a cascading series of offences some of which may be "comparatively trifling or remote".[85]

A.71 The focus of attention will necessarily be on the objective features of the trial process, and whether in all of the circumstances of the case, the failure to direct the jury on a defence or alternative verdict denied the accused a fair trial.[86] This will not necessarily preclude consideration of why an objection was not taken at the trial, for example, because of counsel's failure to follow instructions, or because of ignorance or inadvertence.[87]

A.72 In our view r 4 and the proviso preserve sufficient flexibility for the Court to allow a verdict to stand, despite the absence of a direction, where it is objectively satisfied, by reference to all of the circumstances of the case, that the trial was fair and did not result in a substantial miscarriage of justice.

A.73 The VLRC proposal would potentially require careful consideration to be given at the appellate level to whether counsel's failure to seek a direction in relation to a defence or alternative verdict (or abandonment thereof) was due to an oversight or error, or to a decision taken for tactical reasons in the interests of the accused. The practical difficulties that can arise in the investigation of an issue of this kind, and that can impact on professional privilege and turn on a fine balance of judgement, have been noted.[88]

A.74 More important, in our view, is whether objectively the trial was fair, and the verdict is just in all the circumstances of the case; a circumstance that should not depend on the performance or judgement of counsel. Accordingly, we do not recommend the introduction of a provision of the kind recommended by the VLRC.

A.75 The better solution in our view, which has support in the VLRC and QLRC Reports, is to place the emphasis on the identification, in the absence of the jury, of any possible alternative verdict early in the trial, and at the latest before the closing addresses. There is strong judicial support in NSW in this respect.[89]

A.76 Similar considerations apply to the need for an early identification of any defences that may be available.

A.77 Elsewhere in this Report we have drawn attention to the desirability of this approach being followed, amongst other things, as a mechanism for the identification of the true issues in the trial. Consideration can be given, in the context of discussions directed to this end, to what might be said in the summing up in relation to defences or alternative verdicts that counsel prefer not to raise in their addresses but accept could appropriately be the subject of directions.

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85. *Mifsud v R* [2009] NSWCCA 313 [44]-[50].
86. *Nudd v The Queen* [2006] HCA 9; 80 ALJR 614 [9]-[10].
87. *Nudd v The Queen* [2006] HCA 9; 80 ALJR 614 [15], [17].
88. *Nudd v The Queen* [2006] HCA 9; 80 ALJR 614 [10]-[12]; *R v Moussa* [2001] NSWCCA 427; 125 A Crim R 505 [56]-[63].
89. *R v Pureau* (1990) 19 NSWLR 372, 376; *R v King* [2004] NSWCCA 20; 59 NSWLR 515 [97]; *Sheen v R* [2011] NSWCCA 259 [82], [90].

A.78 Accordingly, we generally support the thrust of those portions of the recommendations of the VLRC and QLRC that address this procedural aspect. However, we do not consider it desirable for compliance in this respect to be elevated to a factor that would limit the *Pemble* obligation.

Appendix B: Submissions

JU1 New South Wales Bar Association

JU2 Director of Public Prosecutions for Western Australia, 23 March 2009

JU3 Law Society of New South Wales, 11 March 2009

JU4 Legal Aid NSW, 20 March 2009

JU5 Dr Diana Eades, 20 March 2009

JU6 Dr Chris Heffer, 18 March 2009

JU7 Disability Council of NSW, 12 March 2009

JU8 Dr Annie Cossins on behalf of National Child Sexual Assault Reform Committee, 12 March 2009

JU9 New South Wales Office of the Director of Public Prosecutions, 2 April 2009

JU10 Commonwealth Director of Public Prosecutions, 9 April 2009

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