Queensland
Law Reform Commission

A Review of Jury Directions

Report
Volume 1

Report No 66
December 2009

Queensland
Law Reform Commission

A Review of Jury Directions

Report

Volume 1

Report No 66
December 2009

The short citation for this Report is QLRC R 66.
Published by the Queensland Law Reform Commission, December 2009.

ISBN: 978-0-9805799-3-2

To: The Honourable Cameron Dick MP
Attorney-General and Minister for Industrial Relations

In accordance with section 15 of the *Law Reform Commission Act 1968* (Qld), the Commission is pleased to present its Report on its review of jury directions.

The Honourable Justice R G Atkinson
Chairperson

Mr J K Bond SC
Member

Mr I P Davis
Member

Mr B J Herd
Member

Ms R M Treston
Member

Assoc Prof B P White
Member

December 2009

Address:	7th Floor, 50 Ann Street, Brisbane, Qld 4000
Postal address:	PO Box 13312, George Street Post Shop, Qld 4003
Telephone:	(07) 3247 4544
Facsimile:	(07) 3247 9045
Email:	LawReform.Commission@justice.qld.gov.au
Website:	http://www.qlrc.qld.gov.au

Previous Queensland Law Reform Commission publications in this reference:

A Review of Jury Directions, Issues Paper, WP 66 (March 2009);

A Review of Jury Directions, Discussion Paper, WP 67 (September 2009).

Table of Contents

VOLUME 1

VOLUME 2

Summary of Recommendations

The following table sets out the Commission's Recommendations in summary form.

The first digit in each Recommendation number indicates the chapter in which that Recommendation is found.

No.	Recommendation	Para
No codification		
7-1	A single, comprehensive statutory scheme covering the content of jury directions and warnings or the circumstances in which they must or ought to be given should not be enacted in Queensland.	7.99
Queensland Supreme and District Court Benchbook		
7-2	The Queensland Supreme and District Court Benchbook should continue to be refined and relied upon by judges and practitioners in this State.	7.139
Pre-trial disclosure		
8-1	Chapter 62 of the Criminal Code (Qld) should be amended to include a pre-trial disclosure regime that has the following features: (1) The regime of pre-trial disclosure should apply to all parties in any trial for an indictable offence, and should provide for a time-table for the completion of pre-trial interlocutory steps, subject to any other order of the court. (2) In other criminal cases, the court should retain the power to hold pre-trial directions hearings on its own motion or the motion of any party. The court should have the power at any such pre-trial directions hearing to make directions in similar terms to the compulsory pre-trial disclosure regime for trial of indictable offences. (3) The prosecution should have the initial obligations to provide disclosure of the material that it is already required to disclose under sections 590AA to 590AX of the Criminal Code (Qld). Any other disclosure obligations, such as a statement of the facts, matters and circumstances relied on by the prosecution, ought to be given statutory effect in this regime.	8.206

No.		Recommendation	Para
8-1	(4)	The prosecution's obligations of disclosure of all information that is in any way material to the case should be on-going until the end of the trial.	8.206
	(5)	The prosecution should have the right to serve on each defendant a notice requiring the defendant to admit certain facts that the prosecution considers are not or cannot be properly in dispute, and requiring the defendant to waive the requirement that certain witnesses be called for the sole purpose of proving formal matters not in dispute.	
	(6)	The pre-trial disclosure regime should require defendants to disclose the general nature of their defence, which issues or facts asserted by the prosecution are in dispute, and which witnesses to be called by the prosecution for the sole purpose of proving formal matters can be dispensed with.	
	(7)	Defendants should not be required by the pre-trial disclosure regime under the Criminal Code (Qld) to state whether they intend to give evidence themselves or to lead evidence, or to identify any witnesses whom they intend to call, except to the extent that this is currently required by sections 590A, 590B and 590C of the Criminal Code (Qld), which should be retained.	
	(8)	Both parties should have an opportunity before the trial to apply to the court for orders in relation to any shortcomings in another party's disclosure.	
	(9)	No comment may be made by any party in the presence of the jury about any other party's failure to comply with its obligations of pre-trial disclosure without the leave of the trial judge.	
	(10)	No comment may be made by the trial judge or any party in the presence of the jury that suggests that the failure by any defendant to comply with his or her obligations of pre-trial disclosure can lead to any inference about the guilt of that defendant on any charge before the jury. Comment may be made on other matters, such as that party's credit.	
	(11)	The conduct of all parties in relation to pre-trial disclosure and otherwise during the preparation for and the hearing of the trial can be taken into account on appeal, including any consideration of the application of the proviso in section 668E(1A) of the Criminal Code (Qld).	
	(12)	In exceptional circumstances, the court should have the power to waive or modify any of the requirements of the pre-trial case management procedure to meet the needs and circumstances of any particular case.	

No.	Recommendation	Para
8-2	The consequences of non-compliance with the recommended pre-trial disclosure regime should include the following: (1) the denial of the right to lead evidence that is relevant to a matter that ought to have been disclosed pursuant to the provisions recommended in Recommendations 8-1(3), (4) or (6) above without the leave of the trial judge; (2) a requirement that the court take a defendant's compliance or non-compliance into account when determining the sentence if the defendant is convicted; and (3) a requirement that an appellate court take the parties' compliance or non-compliance into account when determining an appeal, including its consideration of the application of the proviso in section 668E(1A) of the Criminal Code (Qld).	8.206
8-3	The jury should wherever possible be informed of matters not in dispute in an agreed statement of facts or similarly neutral manner by the trial judge.	8.206
8-4	No special sanctions are necessary in relation to either the referral of any non-compliance by a legal practitioner to the relevant professional disciplinary bodies or the court's right to impose sanctions directly against any legal practitioner who advises or acquiesces in any non-compliance with the recommended regime of pre-trial disclosure. These issues should be handled under the courts' general powers in this regard.	8.206
8-5	There should be an urgent review of legal aid funding to remove any disincentive that might operate to discourage the early delivery of criminal defence briefs; for example, by adequately remunerating legal practitioners for interlocutory work, especially any additional pre-trial work required by the Commission's other recommendations or other proposed changes to the criminal justice system.	8.206
Informing a jury about the issues in the trial		
9-1	The Criminal Code (Qld) should be amended to require the trial judge to invite the defendant (if represented) to make an opening statement at the close of the opening address by the prosecution. The defendant should not be required to make any opening statement at that time.	9.78
9-2	The jury should be informed as early as is practicable of the issues that it will have to decide, the issues that have been admitted or are otherwise not in dispute, and the overall context in which these issues arise.	9.78

No.	Recommendation	Para
9-3	The Criminal Code (Qld) should be amended to provide that the judge may address the jury at any time on: (1) the issues that are expected to arise, or have arisen, in the trial; (2) the relevance to the conduct of the trial of any admissions made, directions given or matters determined prior to the commencement of the trial; (3) any other matter relevant to the jury in the performance of its functions and its understanding of the trial process, including giving a direction to the jury as to any issue of law, evidence or procedure.	9.78
Integrated jury directions		
9-4	A summing up to a jury should culminate in a series of factual questions put to the jury which it must determine in order to reach its verdict based on and in which are embedded the legal issues in the case (such as the elements of the offence and any specific defences).	9.130
9-5	Jury directions and warnings should be re-worked into an integrated summing up that avoids long statements of the law and relates the evidence (and the limits to which some of it may be used by the jury) directly to the questions of fact which the jury must determine in order to reach its verdict.	9.130
9-6	These integrated directions should be supplemented wherever appropriate by written guides to the law, directions and questions to be answered by the jury.	9.130
Written and other assistance for juries		
10-1	The Criminal Code (Qld) should be amended to provide that: (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 prose-	10.154

No.		Recommendation	Para
		cution, 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.	
10-1	(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.	10.154
10-1	(3)	At the start of the trial the jury should be provided with written material, unless the trial judge considers that there are good reasons why this should not happen, that covers matters such as: (a) the burden and standard of proof; (b) the role of the judge and jury; (c) the elements of each offence charged (and any alternative charge) and each defence (to the extent that defences have been identified by the defendant); and (d) admissions, agreed facts or other matters about which there is no dispute between the parties.	10.154

No.	Recommendation	Para
Questions from jurors		
10-2	The Queensland Supreme and District Court Benchbook should be amended by: (1) amending the model opening remarks by the judge in Chapter 5B to inform jurors of their right to ask questions of the judge through the bailiff or their speaker similar to the model directions in Chapters 15 and 24 of the Benchbook; and (2) removing the reservation about informing juries of their right to ask questions based on *Lo Presti* [1992] VR 696.	10.193
Choosing a jury speaker		
10-3	Rule 48(1) of the *Criminal Practice Rules 1999* (Qld) should be amended by: (1) deleting the words 'as early as is convenient' from the last paragraph of the wording set out in that Rule to be spoken by the proper officer; and (2) adding at the end of that paragraph the words, 'The speaker will deliver your verdict at the end of the trial.'	10.241
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.	11.143
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).	11.143

No.	Recommendation	Para
Propensity evidence		
13-1	The *Evidence Act 1977* (Qld) should be amended to: (1) remove the exclusionary rule in *Pfennig v The Queen* (2008) 235 CLR 334 that applies to propensity evidence and to provide that evidence should not be inadmissible simply because it is evidence that shows the defendant has engaged in other criminal acts or misconduct; (2) provide that, if evidence that shows that the defendant has engaged in other criminal acts or misconduct is admitted in a criminal proceeding tried with a jury, the judge is not obliged to give a specific direction as to what inference the jury may draw from that evidence; (3) provide that, notwithstanding paragraph (2), if the judge considers that the jury may engage in unfair prejudicial propensity reasoning in relation to the evidence, or if the defendant so requests and the judge considers it appropriate to do so, the judge must warn the jury that: (a) evidence that the defendant has engaged in other criminal or other misconduct is not conclusive of guilt. It is no more than one fact to be considered in combination with all the other facts; (b) it would be improper to decide that, simply because the defendant has engaged in other criminal or other misconduct before, he or she is probably guilty, without considering all the other evidence; and (c) the jury must not seek to punish the defendant for any other act — the defendant is only on trial, and liable to be punished, for the charges currently against him or her; and (4) provide that, if a warning is given under paragraph (3), it may be given in general terms.	13.80
13-2	If the recommendations in 13-1 above are not implemented, there should be a review of the law on propensity evidence in Queensland with a view to its reform.	13.80

No.	Recommendation	Para
Directions about post-incident conduct		
14-1	The *Evidence Act 1977* (Qld) should be amended provide that: (1) if evidence of a defendant's lie or other apparently incriminating post-incident conduct such as flight or concealment is offered in a criminal proceeding tried with a jury, the judge is not obliged to give a specific direction as to what inference the jury may draw from that evidence; (2) despite paragraph (1), if the judge considers that the jury may place undue weight on the evidence, or if the defendant so requests and the judge considers it appropriate to do so, the judge must warn the jury that: (a) the jury must be satisfied before using the evidence that the defendant did lie or engage in the other apparently incriminating conduct; (b) people lie or engage in other apparently incriminating conduct, such as flight or concealment, for various reasons; and (c) the jury should not conclude that the defendant is guilty just because he or she lied or engaged in the other apparently incriminating conduct; and (3) if a warning is given under paragraph (2): (a) it may be given in general terms and without reference to each particular item of post-incident conduct which may amount to an implied admission of guilt by the defendant; and (b) the judge should not use expressions such as 'consciousness of guilt' or 'post-offence conduct'.	14.56
Warnings following delay in prosecution (Longman)		
15-1	The *Evidence Act 1977* (Qld) should be amended by the insertion of new provisions that state that: (1) if the court, on application by a party, is satisfied that the defendant has suffered a significant forensic disadvantage because of the consequences of delay in prosecuting a charge (including any delay in reporting the alleged offence), the court must inform the jury of the nature of that disadvantage and the need to take that disadvantage into account when considering the evidence;	15.58

No.	Recommendation	Para
	(2) significant forensic disadvantage is not established by the mere fact of delay alone; (3) warnings given in accordance with these provisions should not use the expressions 'dangerous or unsafe to convict' or 'scrutinise with great care'; (4) the trial judge may refuse to give a warning or explanation if there are good reasons for doing so; and (5) warnings about the disadvantages suffered by reason of delay in prosecution (including any delay in reporting the alleged offence) may only be given in accordance with these new provisions.	
Directions about unreliable evidence		
16-1	Section 632 of the Criminal Code (Qld) should be amended to state that warnings to a jury about the unreliability of evidence must not use expressions such as 'scrutinise with great care', 'dangerous to convict' or 'unsafe to convict'.	16.54
16-2	Chapters 37 and 60 of the Supreme and District Court Benchbook should be amended to remove the expressions 'scrutinise with great care' and 'dangerous to convict'.	16.54
16-3	The model directions in the Supreme and District Court Benchbook in relation to prison informers, accomplices, indemnified witnesses and other witnesses whose evidence might be regarded as unreliable should be reviewed: (1) to determine whether they can be re-structured as integrated directions in accordance with Recommendations 9-4 to 9-6; and (2) to ensure that they do not arguably breach section 632 of the Criminal Code (Qld).	16.54
'Beyond reasonable doubt'		
17-1	There should be no attempt to define 'beyond reasonable doubt' in statute or in model directions such as those in the Queensland Supreme and District Court Benchbook.	17.49

No.	Recommendation	Para
17-2	The model direction in Chapter 57 of the Queensland Supreme and District Court Benchbook should be amended by: (1) adding a short statement 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; and (2) deleting 'as reasonable persons' from the last sentence, and re-wording it to the following effect: 'If, at the end of your deliberations, you have a reasonable doubt about the guilt of the defendant, then you cannot find the defendant guilty of that charge'.	17.49
Use of integrated directions for certain offences		
17-3	The directions to be given to juries in relation to sections 7, 8, 10A, 271, 272 and 304 of the Criminal Code (Qld) should be reviewed to examine the extent to which they can be re-structured as integrated directions in accordance with Recommendations 9-4 to 9-6.	17.88
The Black direction — non-unanimous verdicts		
17-4	The *Jury Act 1995* (Qld) should be amended to over-ride the requirement to give a Black direction in the terms currently mandated by the High Court in cases where a verdict of all but one of the jurors may be given, and to provide that in those cases the court should inform the jury at the start of deliberations: (1) that the jury is expected to reach a unanimous verdict and to make every reasonable effort to do so; (2) that, if a unanimous verdict cannot be reached after an appropriate period of deliberation, the judge may ask the jury to reach and deliver a verdict agreed to by all but one of the 12 (or 11) jurors; and (3) of the circumstances in which such a verdict may be delivered.	17.115
17-5	Chapter 52 of the Queensland Benchbook should be amended to reflect the terms of Recommendation 17-4.	17.115

Chapter 1

Introduction

INTRODUCTION

1.1 This Report, for presentation to the Attorney-General, is the final publication in the Queensland Law Reform Commission's enquiry into jury directions in criminal trials.

1.2 The Commission published its Issues Paper in this review — Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 — on 27 March 2009. This was followed by a Discussion Paper — Queensland Law Reform Commission, *A Review of Jury Directions*, Discussion Paper WP67 — which was published on 29 September 2009.

1.3 On 7 April 2008, the Attorney-General and Minister for Justice and Minister Assisting the Premier in Western Queensland referred to the Commission a review of the directions, warnings and summing up given by a judge to jurors in criminal trials in Queensland.

1.4 The original Terms of Reference later were amended by the Attorney-General and Minster for Industrial Relations by deleting from paragraph (a) on the first page of the Terms of Reference the requirement to obtain information about the nature of the split for hung juries, and the reasons for dissent in hung juries.[1] The amended Terms of Reference are set out in full in Appendix A to this Report.

1 Letter from the Attorney-General, the Hon Cameron Dick, to the Hon Justice Roslyn Atkinson, Chairperson of the Queensland Law Reform Commission, 5 May 2009.

BACKGROUND TO THIS REVIEW

1.5 In 2004, the Attorneys-General of Australia, New South Wales and Victoria referred to the law reform commissions in each of their jurisdictions a review of the Uniform Evidence Act.[2] In the federal jurisdiction and in New South Wales, this was a review of the operation of the Act in those jurisdictions in the ten years since its introduction. In Victoria, it was designed to facilitate the introduction of the Act into that State.[3] The Commissions reported jointly in December 2005.[4]

1.6 Chapter 18 of the Commissions' joint report deals with comments, warnings and directions to the jury. The Commissions recommended that:

> **Recommendation 18–1** The Standing Committee of Attorneys-General should initiate an inquiry into the operation of the jury system, including such matters as eligibility, empanelment, warnings and directions to juries.

1.7 This recommendation has been adopted to some extent by the Standing Committee of Attorneys-General ('SCAG'). There are currently or have recently been a number of law reform projects relating to juries in various Australian States.[5] In its Annual Report for 2006–07, SCAG noted, amongst other 'significant decisions':

> 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 — a reference was subsequently given to the NSW Law Reform Commission.[6]

SCOPE OF THIS REVIEW

Issues covered by this enquiry

1.8 The Terms of Reference for this enquiry directed the Commission to have particular regard to:

- whether any directions or warnings can be simplified or abolished;
- whether judges should be required to warn or direct juries in relation to matters that are not raised by counsel during the trial;
- the extent to which judges need to summarise the evidence for the jury;

---

2 The expression 'Uniform Evidence Act' refers to the *Evidence Act 1995* (Cth) and the *Evidence Act 1995* (NSW), which is in essentially identical terms. While the *Evidence Act 1995* (Cth) applies to all proceedings in a federal court and, to the extent of certain miscellaneous provisions such as those dealing with proof of Commonwealth documents, to proceedings in all Australian courts, State evidence laws apply in State courts exercising federal jurisdiction: *Evidence Act 1995* (Cth) ss 4(1), 5; *Judiciary Act 1903* (Cth) s 79.

3 The Uniform Evidence Law as enacted in the *Evidence Act 2008* (Vic) will commence operation on 1 January 2010.

4 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC Report No 102, NSWLRC Report No 112, VLRC Final Report (2005).

5 See the summary starting at [1.19] below.

6 Standing Committee of Attorneys-General, *Annual Report 2006–07*, <http://www.scag.gov.au/lawlink/scag/ll_scag.nsf/vwFiles/Annual_Report_06-07.doc/$file/Annual_Report_06-07.doc> at 1 September 2009.

- possible solutions to any problems relating to jury directions and warnings, including whether other assistance should be provided to jurors to supplement the oral summing up; and

- recent developments and research in other Australian and overseas jurisdictions.

1.9 In undertaking this enquiry, the Commission was to work, where possible and appropriate, with other law reform commissions, and to consult stakeholders.

1.10 Without limiting the scope of this enquiry, the Terms of Reference required the Commission to review jury directions in detail from two perspectives:

- the legal content of jury directions, and their length and complexity; and

- the language used in delivering directions to the jury.

1.11 However, it was also clear that the Terms of Reference required a broader consideration of the way in which criminal cases are presented to juries, and the methods that are, or might be, used to provide juries with the information, advice and guidance they need to arrive at their verdicts.

Issues excluded from this enquiry

1.12 Many aspects of the use and operation of juries in Queensland were not covered by this enquiry.

1.13 One notable area excluded from this enquiry was the range of issues concerning jury selection. Those issues are covered in the Commission's reference in that area pursuant to separate Terms of Reference issued by the Attorney-General on 7 April 2008.[7]

1.14 Other areas not covered by this reference, but which have been raised in the public media from time to time, include: the size of juries, the use of reserve jurors, the role of juries in sentencing,[8] access by jurors to the media (including the internet) during trials, and juror misconduct. Neither was the Commission asked to review the range of criminal (or civil) cases in which juries are used.

1.15 Finally, the central role of juries in the Queensland criminal justice system was not in question. That critical role was expressly acknowledged in the Terms of Reference.

7 See [1.35] below.

8 The New South Wales Law Reform Commission published a report on the role of juries in sentencing in August 2007. The principal recommendation in that report was that juries not be involved in the sentencing process to any greater extent than they are at present: New South Wales Law Reform Commission, *Role of juries in sentencing*, Report 118 (2007), Recommendation 1.

Research involving jurors

1.16 In undertaking this reference, the Commission was to have particular regard to various matters that would entail it conducting, or commissioning, research into jury decision-making:

- the views and opinions of jurors about the number and complexity of the directions, warnings and comments given to them by judges, and the timing, manner and approach adopted by judges in their summing up to juries;
- jurors' ability to comprehend and apply the judges' instructions; and
- jurors' information needs.

1.17 In June 2009, the Commission contracted with the School of Psychology at the University of Queensland to conduct empirical research into jurors' information needs and jurors' comprehension and application of jury directions. The University of Queensland provided its report to the Commission on 30 November 2009.

1.18 This research project is discussed in more detail in chapter 2 of this Report. The University of Queensland's report is reproduced in Appendix E.

OTHER LAW REFORM PROJECTS

Current law reform projects in Australia

1.19 The joint Law Reform Commissions' recommendation that there be a general enquiry into the operation of the jury system[9] has not yet been adopted in full by SCAG. However, a number of law reform projects on various aspects of the jury system are underway, or have recently been undertaken, in other States of Australia.

1.20 The Terms of Reference for this enquiry referred expressly to reviews currently or recently undertaken by the New South Wales Law Reform Commission ('NSWLRC') and the Victorian Law Reform Commission ('VLRC'). These reviews also cover directions, warnings and charges given to juries in criminal trials in those States. The Terms of Reference also referred to a project being undertaken by the Australian Institute of Judicial Administration. That project was incorporated into the VLRC's reference.

Victoria

1.21 The Terms of Reference in the VLRC's enquiry were in somewhat different terms from those in this Commission's enquiry:

> The Victorian Law Reform Commission is to review and to recommend any procedural, administrative and legislative changes that may simplify, shorten or otherwise improve the charges, directions and warnings given by judges to juries in criminal trials. In particular, the Commission should:

9 See [1.6] above.

(a) identify directions or warnings which may no longer be required or could be simplified;

(b) consider whether judges should be required to warn or direct the jury in relation to matters that are not raised by counsel in the trial;

(c) clarify the extent to which the judge need summarise the evidence for the jury.

In conducting the review the Victorian Law Reform Commission should have regard to:

- the themes and principles of the Attorney-General's Justice Statement (2004);
- the rights enshrined in Victoria's Charter of Human Rights and Responsibilities;
- the overall aims of the criminal justice system including:
  - the prompt and efficient resolution of criminal trials; and
  - procedural fairness for accused people.[10]

1.22 These Terms of Reference focussed on the content and legal effect of jury directions and did not seek to extend that enquiry into the psycho-linguistic aspects of jury decision-making processes.[11]

1.23 The VLRC published its Consultation Paper on jury directions in September 2008,[12] and sought submissions in response to it by 30 November 2008; this deadline was later extended to 30 January 2009. The VLRC also published a short background paper that summarised the key proposals that were advanced in its Consultation Paper.[13]

1.24 The VLRC reported to the Attorney-General of Victoria on 1 June 2009.[14] That Final Report was tabled on 29 July 2009 and contains 52 recommendations based on the primary recommendation that a new comprehensive statute be enacted to progressively cover this area of law. The VLRC's Final Report and its recommendations are discussed throughout this Report. To date there has been little comment on the

10 Victorian Law Reform Commission, 'Jury Directions — Terms of Reference', <http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/Home/Completed+Projects/Jury+Directions/LAWREFORM+-+Jury+Directions+-+Terms+of+Reference> at 21 December 2009.

11 But see Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [1.11] n 9; Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [1.27]–[1.28].

12 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) which is available on the VLRC's website: < http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/Home/Completed+Projects/Jury+Directions/LAWREFORM+-+Jury+Directions+-+Consultation+Paper> at 21 December 2009.

13 Victorian Law Reform Commission, *Jury Directions — a closer look*, Background Paper (2008), which is available on the VLRC's website: <http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/Home/Completed+Projects/Jury+Directions/LAWREFORM+-+Jury+Directions%3A+a+closer+look> at 21 December 2009.

14 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009). The VLRC had originally been required to report by 1 March 2009. The Final Report is also available from the VLRC's website: <http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/Home/Completed+Projects/Jury+Directions/LAWREFORM+-+Jury+Directions+-+Final+Report> at 21 December 2009.

VLRC's recommendations. However, one judicial commentator has described them as 'sensible and manageable.'[15]

New South Wales

1.25 The Terms of Reference issued to the NSWLRC on 16 February 2007 were in these terms:

> 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.[16]

1.26 The NSWLRC published its Consultation Paper in December 2008.[17] This Consultation Paper sought submissions by 13 March 2009. This was preceded by the separate publication of the results of related research conducted by the NSW Bureau of Crime Statistics and Research.[18] The NSWLRC is expected to report on its review in 2010. Its Consultation Paper and the report published by NSW Bureau of Crime Statistics and Research are discussed where relevant throughout this Report.

1.27 The Judicial Commission of NSW is currently undertaking a survey of conviction appeals for the period 2001–2007. Its report is also expected to be published in 2010.[19]

1.28 In March 2009, the Trial Efficiency Working Group of the Criminal Law Review Division of the Attorney General's Department of NSW published its report.[20] Many of its recommendations bear on the issues in the Commission's enquiry. In recognising

---

15 The Hon Justice Michael Murray, 'Bad Press: Does the Jury Deserve It? Communicating with Jurors' (Paper presented at the 36th Australian Legal Convention, Perth, 17–19 September 2009) 3.

16 New South Wales Law Reform Commission, 'Jury directions in criminal trials', <http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_cref116> at 3 November 2009.

17 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008).

18 NSW Bureau of Crime Statistics and Research (L Trimboli) 'Juror understanding of judicial instructions in criminal trials' *Crime and Justice Bulletin* No 199 (2008).

19 Interview with Hugh Donnelly, Judicial Commission of New South Wales (telephone interview, 30 November 2009). See Judicial Commission of New South Wales, *Annual Report 2007–08*, 26; <http://www.judcom.nsw.gov.au/about-the-commission/annual-reports/> at 30 November 2009. See also New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [1.36] n 60.

20 Trial Efficiency Working Group, Criminal Law Review Division, Attorney General's Department of NSW, *Report of the Trial Efficiency Working Group* (2009).

the importance of continuing research into, and reform of the law concerning, juries, the Working Group made these recommendations, among others:

> 1. Material provided to the jury and communications with the jury by the Sheriff's Office should be a standing item on the Jury Taskforce agenda. The Taskforce should annually audit and review material provided to jurors with a view to ensuring that the information is accessible, relevant and current.
>
> …
>
> 3. Conduct periodic surveys of juries (by the Bureau of Crime Statistics and Research at 2 yearly intervals) to ascertain their needs and identify shortcomings that impede their understanding of the trial process.[21]

Recent law reform projects

1.29 Other relevant reviews outside Queensland include the following:

- In October 2006, the Tasmania Law Reform Institute completed a project on warnings in sexual offences cases relating to delay in complaint with the publication of its final report.[22] In September 2009, the TLRI published an Issues Paper on the admissibility of tendency and coincidence evidence in sexual assault cases; although this Paper touches on some of the concerns that are central to the matters discussed in chapter 15 of this Report, the Paper's focus is on whether evidence should or may be admitted rather than on the impact the admission of any such evidence may have on jury directions.[23]

- In July 2005, the VLRC published its final report on the law and procedure relating to sexual offences, which deals in particular with judges' directions to juries.[24]

- The Law Commission of New Zealand has published a great deal of material on juries and the criminal justice system generally. It published its report on juries in criminal trials in February 2001,[25] and its report on criminal pre-trial processes in June 2005.[26] In August 1999 the Law Commission published its report on evidence and the evidence legislation of that country,[27] and a paper on the reliability of witness testimony.[28]

---

21 Ibid 12–3.

22 Tasmanian Law Reform Institute, *Warnings in sexual offences cases relating to delay in complaint*, Final Report No 8 (2006). The TLRI's report is discussed extensively in chapter 15 of this Report.

23 See Tasmania Law Reform Institute, Evidence Act 2001 *Sections 97, 98 & 100 and* Hoch's *case: Admissibility of 'Tendency' and 'Coincidence' Evidence in Sexual Assault Cases with Multiple Complainants*, Issues Paper No 15 (2009).

24 Victorian Law Reform Commission, *Sexual Offences: Law and Procedure*, Final Report (2004); see especially chapter 7.

25 Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001). This was preceded by two discussion papers: *Juries in Criminal Trials Part One*, Preliminary Paper 32 (1998) and *Juries in Criminal Trials Part Two* (Volumes 1 and 2), Preliminary Paper 37 (1999).

26 Law Commission of New Zealand, *Criminal Pre-Trial Processes: Justice Through Efficiency*, Report 89 (2005). This was preceded by a discussion paper: *Reforming Criminal Pre-Trial Processes*, Preliminary Paper 55 (2004).

27 Law Commission of New Zealand, *Evidence*, Report 55 (1999).

- In England and Wales, the Lord Chief Justice has established a review of potential areas for reform of the jury system, including a re-writing of the standard jury directions.[29] In 2001, Lord Justice Auld reported on his review of the criminal courts of England and Wales, which touched on aspects of criminal trial procedure and the presentation of information to the jury.[30]

- In 2002, the South African Law Commission[31] published a report on the law of sexual offences, portions of which were concerned with procedural and evidentiary aspects of trials for these offences, including cautionary rules.[32]

- In 1999, the Law Reform Commission of Western Australia published its report following a review of the civil and criminal justice systems of that State. Many of its recommendations relating to the criminal justice system were implemented, primarily by the *Criminal Procedure Act 2004* (WA) and the *Criminal Procedure and Appeals (Consequential and Other Provisions) Act 2004* (WA).[33]

- In the mid-1980s, the Law Reform Commission of Australia (as the Australian Law Reform Commission then was) did extensive research resulting in the publication of its interim[34] and final[35] reports on evidence that led to the enactment of the Uniform Evidence Act.[36]

- In March 1986, the NSWLRC published its report on the role of juries in criminal trials.[37]

- In 1983, the Scottish Law Commission published its report on evidence in sexual offence cases.[38]

---

28 Law Commission of New Zealand, *Evidence: Total Recall? The Reliability of Witness Testimony*, Miscellaneous Paper 13 (1999). See Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) xiii–xiv for a list of related publications by the Law Commission of New Zealand.

29 See The Hon J Wood AO QC, 'The trial under siege: towards making criminal trials simpler' (Paper presented at the District and County Court Judges Conference, Fremantle, 27 June–1 July 2007) 2. The Commission understands that the re-writing of the standard directions in England will be undertaken by the Criminal Committee of the Judicial Studies Board under the chairmanship of Sir Christopher Pitchford: Email from Professor Neil Rees (Chairperson of the Victorian Law Reform Commission) to Ian Davis (Full-time Member of the Queensland Law Reform Commission), 10 March 2009.

30 The Right Honourable Lord Justice Auld, *Review of the Criminal Courts of England and Wales*, Report (2001).

31 Now called the South African Law Reform Commission.

32 South African Law Commission, *Sexual Offences Report*, Project 107 (2002), especially ch 5. Although this deals with evidentiary matters in sexual offence cases, South African criminal law and procedure differs substantially from that in Australia and the South African Law Commission's work has not been considered in any detail in this Commission's Report.

33 Law Reform Commission of Western Australia, 'Review of the criminal and civil justice system in Western Australia' <http://www.lrc.justice.wa.gov.au/092o.html> at 12 November 2009.

34 Law Reform Commission of Australia, *Evidence*, Interim Report No 26 (1985).

35 Law Reform Commission of Australia, *Evidence*, Report No 38 (1987).

36 *Evidence Act 1985* (Cth).

37 New South Wales Law Reform Commission, *Criminal Procedure: The Jury in a Criminal Trial*, Report 48 (1986).

38 Scottish Law Commission, *Evidence — Report on Evidence in Cases of Rape and Other Sexual Offences*, Report No 78 (1983).

1.30 On a different, but clearly related topic, the Law Reform Commission of Victoria published a report on the use of plain English in legal contexts in 1987.[39] As will emerge, the use of language in jury directions features in this reference.[40]

1.31 The Commission has found the work of all the interstate law reform bodies, as well as that of the Law Commission of New Zealand, very useful in its own work in this reference. The Commission has consulted closely with the NSWLRC, the VLRC and the Law Commission of New Zealand, as well as all relevant sectors of the legal profession in Queensland and the community generally. As part of this consultation, on 5 and 6 February 2009 members of the Commission attended a symposium organised by the VLRC and attended by representatives of the NSWLRC, the Tasmania Law Reform Institute, the Law Commission of New Zealand and several prominent Australian academics in various fields of psychology that relate to jury decision-making processes.[41]

1.32 Particular attention is also given to the results of some recent Australian research on judicial practices and jury instructions. In 2006, the Australian Institute of Judicial Administration ('AIJA') published the results of a survey of 136 Australian and 49 New Zealand judges covering various aspects of judicial practice.[42] All Australian jurisdictions were represented except the two Territories.[43] The AIJA research included surveys of judicial practices in summing up to the jury. This research is discussed where relevant throughout this Report.

1.33 In September 2008, the Bureau of Crime Statistics and Research ('BOCSAR') published a survey of 1,225 jurors from trials across a number of District and Supreme Courts in New South Wales.[44] The research recorded jurors' self-reported understanding of jury instructions, the summing-up of evidence and other aspects of the trial process. It is also discussed where relevant in this Report.

1.34 Research published by the Australian Institute of Criminology ('AIC') in 2008 on juror satisfaction is also discussed at various points in this Report.[45] Part of that research involved a survey of 628 jurors who served in New South Wales, Victoria and South Australia. One of the topics it covered was jurors' understanding of the trial, including evidence and addresses from counsel and the judge.

---

39 Law Reform Commission of Victoria, *Plain English and the Law*, Report No 9 (1987).

40 See in particular chapters 4, 5, 7 and 9 of this Report.

41 This symposium was conducted subject to the Chatham House Rule, which entitles the participants to use the material discussed during the symposium but prevents any attribution to any specific participant, unless otherwise permitted by that participant.

42 Australian Institute of Judicial Administration (James RP Ogloff, Jonathan Clough, Jane Goodman-Delahunty & Warren Young), *The Jury Project: Stage 1 — A Survey of Australian and New Zealand Judges* (2006). This is the first stage of an ongoing program of research to evaluate the communication of judges and juries in the Australian and New Zealand jury system.

43 Ibid 11.

44 NSW Bureau of Crime Statistics and Research (L Trimboli) 'Juror understanding of judicial instructions in criminal trials' *Crime and Justice Bulletin*, No 199 (2008).

45 Australian Institute of Criminology, *Practices, policies and procedures that influence juror satisfaction in Australia*, Research and Public Policy Paper No 87 (2007).

Jury Selection Reference

1.35 On 7 April 2008, the Attorney-General of Queensland also issued Terms of Reference to this Commission in a separate reference concerning the selection of jurors in Queensland.[46]

1.36 The jury selection reference will be covered in a separate consultation paper and, in due course, by a separate report. The Commission is to report in that reference by 31 December 2010.

METHODOLOGY OF THIS REVIEW

Issues Paper

1.37 On 27 March 2009, the Commission released an Issues Paper in this review.[47] The main purposes of the Issues Paper were to outline the function of jury directions and the problems that are perceived to have arisen in relation to them — and to pose some preliminary questions to assist the Commission in its consultation process and in formulating possible proposals for reform.

Consultation and submissions

1.38 Copies of the Issues Paper were distributed to judges of the Supreme Court and District Court, key professional bodies such as the Queensland Law Society, the Bar Association of Queensland, the Law Council of Australia and Legal Aid Queensland, as well as other law reform bodies and interested organisations and individuals.

1.39 An advertisement was placed in the *Courier-Mail* on 4 April 2009 calling for submissions. Media releases were issued to the print and electronic media on 8 and 11 May 2009, and the Full-time Member of the Commission participated in an interview on 612 ABC Radio on 12 May 2009.

1.40 The Commission called for submissions in response to the Issues Paper by 31 May 2009.

1.41 The Commission received responses to the Issues Paper from 17 individuals and organisations, listed in Appendix B to this Report. They include:

- submissions from, or consultations with, two judges of the Supreme Court and two judges of the District Court;
- a joint submission from the Queensland Law Society and the Bar Association of Queensland, supported by a submission from the Law Council of Australia;[48]

46 The Terms of Reference for this enquiry are available from the Commission's website: <www.qlrc.qld.gov.au>.

47 Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009).

48 The Law Council of Australia provided a short submission endorsing the views expressed in the joint submission of the Queensland Law Society and the Bar Association of Queensland, and reiterating the views that it expressed in its own submission dated 30 January 2009 to the Victorian Law Reform Commission in response

- a consultation with the Office of the Director of Public Prosecutions;
- submissions from the South West Brisbane Community Legal Centre, the Brisbane Office of the Commonwealth Director of Public Prosecutions and Legal Aid Queensland; and
- submissions from, or telephone consultations with, six members of the public, a number of whom responded either to the advertisement placed by the Commission in the *Courier-Mail* on 4 April 2009 or the radio interview on ABC Radio of the Commission's Full-time Member on 12 May 2009. Four of these respondents were former jurors and one had recently been a defendant in a jury trial (and re-trial).

1.42 A number of these responses also dealt with issues that are covered by the Commission's current review of jury selection processes[49] and will be considered in the course of that review.[50]

Discussion Paper

1.43 The Commission released its Discussion Paper on 29 September 2009.[51] That paper had two principal purposes:

- to set out the nature and content of the submissions received by the Commission in response to the Issues Paper; and
- to outline the Commission's proposals and options for reform, with a view to generating further submissions before finalising its recommendations.

1.44 A number of the submissions received by this Commission in response to its Issues Paper were limited to the question of whether comprehensive statutory intervention (or codification) in relation to jury directions is necessary or desirable in Queensland. However, the desirability of, and opportunity for, reform of directions, warnings and the summing up is not limited to this question and requires consideration of some specific directions that are particularly problematic, as well as the timing and means of delivery of directions to the jury. The Discussion Paper canvassed these issues and set out the Commission's provisional views, on which it sought further submissions.

Further consultations and submissions

1.45 Copies of the Discussion Paper were, as before, distributed to the judges of the Supreme and District Courts of Queensland, key professional bodies such as the Queensland Law Society, the Bar Association of Queensland, the Law Council of Australia and Legal Aid Queensland, as well as other law reform bodies and interested organisations and individuals. Media releases were issued to the print and electronic media on 29 September 2009.

---

to that Commission's Consultation Paper published in September 2008.

49 See [1.35] above.

50 See Submissions 1, 2, 5 and 12.

51 Queensland Law Reform Commission, *A Review of Jury Directions*, Discussion Paper WP67 (2009).

1.46 The Commission called for submissions in response to the Discussion Paper by 31 October 2009.

1.47 The Commission received submissions from Legal Aid Queensland, the Brisbane Office of the Commonwealth Director of Public Prosecutions and the Bar Association of Queensland. The Queensland Law Society wrote a short submission endorsing and supporting the whole of the submission by the Bar Association of Queensland.[52] Although the Law Council of Australia did not make a submission in response to the Discussion Paper, it did provide the Commission with a copy of its submission made in January 2009 to the Senate Legal and Constitutional Affairs Committee on the Federal Court of Australia Amendment (Criminal Jurisdiction) Bill 2008,[53] which deals with questions of pre-trial disclosure such as those covered in chapter 8 of this Report.

1.48 In addition the Commission held consultation meetings with the joint Criminal Law Committee of the Queensland Law Society and the Bar Association of Queensland on 6 October 2009, with Legal Aid Queensland on 28 October 2009 and with the Office of the Director of Public Prosecutions on 5 November 2009. The Commission also had the benefit of the view of the Women's Legal Service on a range of issues relating to jury directions in sexual offence cases.[54]

1.49 The names of the respondents are listed in Appendix B to this Report.

Submissions made to the VLRC

1.50 In its Discussion Paper, the Commission also considered the submissions received by the Victorian Law Reform Commission ('VLRC') in response to its Consultation Paper on jury directions published in September 2008.[55] Eighteen submissions were posted on the VLRC's website.[56] Although the central thrust of the VLRC's proposals diverged from those of this Commission, it was clearly relevant to consider the VLRC's work.[57] Moreover, the joint submission in response to this Commission's Issues Paper from the Queensland Law Society and the Bar Association of Queensland[58] focussed on the VLRC's proposals in relation to a statute or code dealing with jury directions and warnings, and expressly adopted the submission to the VLRC made by Stephen Odgers SC.[59] The Law Council of Australia agreed with the joint submission,

52 Submission 13B. Throughout this Report, where the Commission refers to the submission from the Bar Association of Queensland (Submission 13A) it should be understood that the Queensland Law Society has formally adopted that submission.

53 Law Council of Australia, *Federal Court of Australia Amendment (Criminal Jurisdiction) Bill 2008*, Submission to the Senate Legal and Constitutional Affairs Committee, 16 January 2009.

54 Telephone interviews with Ann Gummow (Women's Legal Service), 2 December 2009.

55 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008).

56 See Victorian Law Reform Commission, Jury Directions — Submissions, <http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/Home/Completed+Projects/Jury+Directions/LAWREFORM+-+Jury+Directions+-+Submissions> at 1 September 2009. Submissions in response to the Consultation Paper on jury directions published by the New South Wales Law Reform Commission in December 2008 are not available on its website or otherwise published by it.

57 The Terms of Reference also expressly direct this Commission to 'have regard' to the work being done by the VLRC and the New South Wales Law Reform Commission: see Appendix A to this Report.

58 Submission 13.

59 Stephen Odgers SC, Submission to the Victorian Law Reform Commission, 12 November 2008.

and also referred to its own submission to the VLRC, which in turn acknowledged the submission to the VLRC made by the Criminal Bar Association of Victoria.[60]

1.51 The submissions received by the VLRC have therefore also been considered in this Report.

1.52 However, the submissions to the VLRC must be read with some care as the position in Queensland is different in material respects from that in Victoria, as is apparent from the VLRC's description of the law and practice in Victoria and from a review of the proposals in the VLRC's Consultation Paper and the recommendations in its Final Report.[61]

1.53 One significant difference is that trial judges in Queensland generally take much less time to sum up than do trial judges in Victoria in relation to trials of comparable length. The key aspect that appears to vary is the length of the judge's summary of the evidence, which is on average much longer in Victoria (and two other Australian States) than in Queensland.[62] Other statistics show that the rate of appeals lodged, and the rate of appeals upheld, on the basis of error in the judge's directions to the jury are also higher in Victoria than in Queensland.[63] It is open to speculate whether the two sets of observations are connected.

1.54 Another major difference is that Queensland has not adopted the Uniform Evidence Law, which has meant that unilateral reform of the *Evidence Act 1997* (Qld) has been possible, notably (with regard to the subject matter of this review) in relation to the admission of evidence from children and other vulnerable witnesses, based on this Commission's report on that subject.[64]

This Report

1.55 This Report reviews the background material contained in the Issues Paper and the Discussion Paper. However, some minor issues that were provisionally raised in these Papers but which did not lead to any submissions and which do not appear to be controversial or otherwise warrant further consideration have been omitted.[65]

1.56 Chapter 2 briefly outlines the results of the research project conducted by the University of Queensland as part of the Commission's inquiry.[66] Those results are also referred to throughout this Report.

---

60 Submission 14; Law Council of Australia, Submission to the Victorian Law Reform Commission, 30 January 2009; Criminal Bar Association of Victoria, Submission to the Victorian Law Reform Commission, 15 December 2008.

61 Legal Aid Queensland also cautioned against the adoption in Queensland of approaches adopted or recommended in other jurisdictions without care as 'there are significant differences both in practice and approach between Queensland and those other states': submission 16A, 2.

62 The statistics that demonstrate this are set out in [4.89]–[4.92] below.

63 See [6.56]–[6.59] below.

64 Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children, Parts 1 and 2*, Report No 55 (2000). See *Evidence Act 1977* (Qld) ss 21A–21AX, and in particular s 21AW, which deals specifically with the directions that must be given to a jury if evidence is taken under those provisions. This was discussed in the Issues Paper at [4.121]–[4.128].

65 These matters include good character evidence, evidence from children, and expert evidence.

66 See [1.16]–[1.18] above.

1.57 Chapters 3 to 6 of the Report describe the roles and functions of jury directions in criminal trials, and how they are applied by juries:

- Chapter 3 outlines the role of juries in criminal trials and the way in which criminal trials operate.

- Chapter 4 briefly describes the role, and different types, of directions and warnings given in criminal trials, and provides an overview of the difficulties identified with directions and warnings.

- Chapter 5 outlines the results of existing empirical research into the ways in which jurors respond to the directions, instructions and advice given to them by judges.

- Chapter 6 examines the rate of incidence of appeals in Queensland that involve allegations that a jury was improperly or inadequately directed by the trial judge, and compares those statistics with the results of a similar survey conducted by the VLRC.

1.58 Chapters 7 to 11 of the Report then set out the principal strategies of the Commission's recommended approach to reform of jury directions:

- Chapter 7 discusses four key bases of reform to jury directions in Queensland: that all reform in this area is predicated upon the need to ensure that the parties receive a fair trial; that codification of the law in this area is not appropriate in Queensland; that the drafting of jury directions in Queensland should continue to be based on the Queensland Benchbook; and that all reform in this area should aim to produce clearer, shorter and more comprehensible jury directions and warnings.

- Chapter 8 of the Report focuses on reforms directed to the pre-trial identification of issues — principally through a regime of pre-trial disclosure — that (among other matters) will also help to identify the questions that will need to be put to the jury.

- Chapter 9 makes various recommendations for improving the timing and means of delivery of directions and other information to juries during trials.

- Chapter 10 makes recommendations about the methods of giving information to juries by means of written materials and other similar aids.

- Chapter 11 recommends reforms in relation to the trial judge's, and the parties', obligations with respect to jury directions given in the summing up and at other times during a trial.

1.59 Chapters 12 to 17 of the Report make recommendations for reform in relation to a range of specific directions:

- Chapter 12 discusses directions about the limited use of evidence.

- Chapters 13 and 14 consider reform of directions in two specific areas of evidence admitted for limited purposes: propensity evidence and evidence about post-incident conduct.

- Chapter 15 discusses directions in sexual offence cases.

- Chapter 16 considers reform in two related areas: directions about unreliable evidence and directions about evidence from unreliable witnesses.

- Chapter 17 discusses a number of other directions such as those on the standard of proof and in relation to some particular defences.

1.60 Where relevant, each of chapters 7 to 17 of the Report discusses the various submissions received in response to the Commission's Issues Paper and Discussion Paper. In addition, the Commission has had regard to the VLRC's and NSWLRC's reviews on jury directions. Where relevant throughout the Report, the issues raised in the NSWLRC's Consultation Paper published in December 2008[67] are discussed, along with the proposals made in, and submissions given in response to, the VLRC's Consultation Paper[68] and the VLRC's recommendations in its Final Report published in July 2009.[69]

1.61 There are five Appendices to this Report:

- Appendix A sets out the Terms of Reference for this review;

- Appendix B lists the people and organisations who responded to the Issues Paper and the Discussion Paper;

- Appendix C contains a number of extracts from the Criminal Code (Qld) and other relevant statutes — the *Jury Act 1995* (Qld), the *Evidence Act 1977* (Qld) and the *Criminal Law (Sexual Offences) Act 1978* (Qld) — and the *Criminal Practice Rules 1999*;

- Appendix D contains some extracts from the Queensland Benchbook referred to in this Report; and

- Appendix E is a copy of the report from the University of Queensland setting out the results of its jury directions research project.

67 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008).

68 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008).

69 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009).

Chapter 2

Jury Directions Research Project

INTRODUCTION

Terms of Reference

2.1 The Terms of Reference in this review specifically directed the Commission to consider conducting, or commissioning, research into the ways in which jurors process evidence, judicial directions and warnings, and other information given to them in court during criminal trials:

> In undertaking this reference, the Commission is to have particular regard to:
>
> (a) subject to authorisation being given by the Supreme Court under section 70(9) of the *Jury Act 1995* (Qld), conducting research into jury decision-making in Queensland with a view to obtaining information about:
>
> - The views and opinions of jurors about the number and complexity of the directions, warnings and comments required to be given by a judge to a jury and the timing, manner and methodology adopted by judges in summing up to juries;
> - The ability of jurors to comprehend and apply the instructions given to them by a judge;
> - The information needs of jurors;

Confidentiality of jury information

2.2 Research of this nature is ordinarily severely restricted by the statutory confidentiality that surrounds jury deliberations under section 70 of the *Jury Act 1995* (Qld).

Section 70(2) imposes a strict prohibition on the publication to the public of 'jury information'.[1] 'Jury information' is defined in section 70(17) of the Act to mean:

> (a) information about statements made, opinions expressed, arguments advanced, or votes cast, in the course of a jury's deliberations; or
>
> (b) information identifying or likely to identify a person as, or as having been, a juror in a particular proceeding.

2.3 Similar prohibitions exist under the Act against a person seeking the disclosure of jury information from a member or former member of a jury (section 70(3)) and against a juror or former juror disclosing any jury information if that person has reason to believe that any of that information is likely to be, or will be, published to the public (section 70(4)). The same maximum penalty of two years' imprisonment applies for a breach of those provisions.

2.4 Accordingly, any research undertaken in the course of this enquiry would ordinarily have been severely constrained by the operation of section 70.

Orders of the Supreme Court

2.5 However, under section 70(9), the Attorney-General may apply to the Supreme Court of Queensland for authorisation to conduct research projects involving the questioning of members or former members of juries, and the publication of the results of that research. That authorisation may be given on any conditions that the Court considers to be appropriate: section 70(10).

2.6 As foreshadowed in the Terms of Reference, the Attorney-General filed an application for such an authorisation in the Supreme Court on 24 July 2008. That application was heard by the Chief Justice, the Honourable Paul de Jersey, on 15 September 2008. His Honour made the following Orders:

> 1. Pursuant to s 70(9) of the *Jury Act 1995* (Qld), the Queensland Law Reform Commission ('QLRC') is authorised to:
>
> (a) conduct a research project into jury decision-making in Queensland, which will involve the questioning of former members of juries; and
>
> (b) publish the results of the research project.
>
> 2. Pursuant to s 70(10) of the *Jury Act 1995* (Qld), that authorisation is on the condition that:
>
> (a) the former members of juries not be identified in any publication by the QLRC;
>
> (b) the former members of juries be permitted to decline to assist and to decline to answer one or more questions; and

1 Section 70(2) reads:

> A person must not publish to the public jury information.
>
> Maximum penalty — 2 years imprisonment.

(c) the QLRC shall ensure that any former member of juries whom it contacts for the purpose of the research project is advised of the contents of this order and, in particular, of the terms of the previous two conditions.

JURY DIRECTIONS RESEARCH PROJECT

Overview

2.7 As noted in chapter 1 of this Report, in June 2009 the Commission contracted with the School of Psychology at the University of Queensland to undertake a line of practical research into jurors' information needs and the comprehension and application by juries of jury directions and other information and material.[2] The project was led by Dr Blake McKimmie, a Senior Lecturer in the School of Psychology at the University of Queensland.

2.8 The project covered criminal trials in the Supreme Court and District Court of Queensland in Brisbane in mid-2009. Participation by former jurors who sat on those trials was entirely voluntary and involved a questionnaire which they were asked to complete after being discharged by the trial judge, followed by an interview conducted with them privately within the following fortnight. It was anticipated that the majority of the participating jurors would have sat on District Court trials, in keeping with the statistics that demonstrate that far more trials are heard in that court than in the Criminal Division of the Supreme Court.[3]

2.9 The research did not involve any participation by jurors while they were sitting on trials or at any time before they had been discharged by the trial judge. All participants will, therefore, have been former jurors at the time of their participation.

2.10 In general terms, apart from general demographic information, the questionnaire asked jurors about:

- the content and range of information that they received at various stages of the trial from the judge, the prosecutor and the defendant or defence counsel;
- written and other material received from the judge or either of the parties;
- the extent to which they found any of this information useful or hard to understand or apply;
- whether there was any information that they would have liked but did not receive, or any information that they would have preferred to have received at a different time during the trial; and

2 See [1.16]–[1.18] above.

3 See the statistics in chapter 6 of this Report, especially table 6.1. Those statistics show that in 2007–08 (and ignoring matters dealt with in the Magistrates Court), 81.6% of criminal matters were commenced in the District Court and the remaining 18.4% in the Supreme Court. These figures do not, however, indicate how many in each court were disposed of by jury trial or resulted in other outcomes.

- the extent to which they found any aspect of the trial procedure helpful or unhelpful in their job as jurors and in understanding the law.

2.11 The interview was intended to allow the former jurors to elaborate on any of the matters covered in the questionnaire about which they wished to add some further comments or to clarify their answers, and to ask them some further questions about the material they received during the trial that are more easily dealt with in discussion rather than in the somewhat constrained limits of a formal questionnaire.

2.12 At all times, the results of the questionnaires and the records of the interviews were prepared and stored to ensure the confidentiality of the jurors' identities and to avoid the identification of the trials on which they sat.

2.13 The University of Queensland was to provide its final Report on the results of this project to the Commission by 30 September 2009. This date was extended by agreement to 30 November 2009.

Report

2.14 The report from the University of Queensland[4] is set out in full as Appendix E to this Report. The following summary of the research is drawn from that report and the Commission's involvement in its preparation.

Survey and interviews of jurors

2.15 The research conducted by the University had two phases: a survey form that was distributed to jurors once they had been discharged by the trial judge either after delivering a verdict or if they were unable to reach a verdict; and a telephone interview conducted by University staff. All participation was voluntary and conducted after the trials had been completed. Apart from a very short indication given by the Bailiff during the juror orientation briefing that jurors might be asked to participate in a voluntary survey after the trial, no other information was given to jurors about the research by the court staff or judges.

2.16 The survey form was given to jurors when they returned to the juryroom after being discharged; completion of the form was completely voluntary. Jurors were asked to take the form away with them to complete at their leisure and to mail the forms to the University rather than being asked to remain at the court to do so. The participating jurors had been involved in 14 trials conducted in the Supreme Court (3 trials) and District Court (11 trials) in Brisbane over a nine-week period from early August to early October 2009. Of the 168 jurors involved, 33 (21.85%) completed the survey, and 16 of them were subsequently interviewed. A total of 58 charges were dealt with in those trials; the juries reached verdicts in relation to all but two of those charges.

2.17 The results of the research are discussed in the relevant places throughout this Report. The survey and interview covered the following matters, which are considered in more detail where relevant later in this Report:

4 School of Psychology, University of Queensland (Blake McKimmie, Emma Antrobus and Kathryn Havas), 'Jurors' Trial Experiences: The Influence of Directions and Other Aspects of Trials', Report (November 2009).

- demographic details of the jurors such as age, sex, education, employment, and racial and linguistic background;[5]
- the importance of a judge's directions in the context of the trial generally;[6]
- the jurors' responses to opening remarks by the judge, prosecution and defence; and to the addresses (closing statements) by the parties and to the judge's summing up;[7]
- the provision to the jurors of the transcript of the trial and recorded evidence;[8]
- the judge's directions in relation to 'beyond reasonable doubt'[9] and the burden of proof;[10] and the jurors' apparent and actual understanding of those directions;
- the timing of some directions;[11]
- aspects of the trials which assisted and hindered the jurors;[12] and
- other forms of assistance given to jurors during the trial.[13]

2.18 The University of Queensland gave this summary of the conclusions to be drawn from the survey and interviews:

> The part of the trial that jurors felt was most helpful to them was the Judge's summing up as it guided their deliberations and kept them focussed. Lists of charges or other written materials were said to also be very helpful, along with the Judge's explanation of the law. About half of the jurors said that there was an aspect of the trial that hindered their ability to perform their duty. The three leading hindrances were: the lawyers being confusing, broad legal issues, and the meaning of reasonable doubt. The majority of interviewees indicated that different understandings of beyond reasonable doubt led to difficulties in reaching agreement in the deliberation room. The importance of allowing enough for jurors to settle in was affirmed as several jurors found their duty overwhelming at first. Jurors identified a number of things that they would have found helpful to have—the top two were access to transcripts and a written summary of the relevant laws.[14]

5 See [3.86] below.

6 See [5.20], [5.26]–[5.27], [5.44]–[5.45], [5.58], [11.26] below.

7 See [5.23]–[5.27], [5.38]–[5.46], [9.9], [9.14]–[9.17], [9.21]–[9.23], [10.164], [10.217], [11.26] below.

8 See [10.78]–[10.81], [10.92]–[10.93] below.

9 See [5.39]–[5.40], [5.58], [17.10]–[17.15] below.

10 See [5.41], [5.58] below.

11 See [9.16] below.

12 See [5.26], [5.44]–[5.46], [5.58]–[5.60], [12.13]–[12.14] below.

13 See [5.60], [10.17]–[10.18], [10.36], [10.39] below.

14 School of Psychology, University of Queensland (Blake McKimmie, Emma Antrobus and Kathryn Havas), 'Jurors' Trial Experiences: The Influence of Directions and Other Aspects of Trials', Report (November 2009), 26

Experimental research — Simplifying directions

2.19 The University of Queensland also provided the Commission with a separate report that contains the results of additional research carried out in relation to the impact of simplification of directions on jurors' decision-making processes.[15] This was conducted separately from the survey and interviews described above and involved simulated trials conducted at the University. The jury directions covered by this research were those instructing jurors to disregard anything that they may have read or heard about the case outside the courtroom from the media, which is a direction routinely given in all trials, and especially those which have received any media attention.[16]

2.20 This research demonstrates that straight-forward directions tend to be more effective that more complex directions on the same topic in influencing jurors' decision-making.

> This pattern of results suggests that when presented with simple directions, participants were more alert to the potential that their perceptions might be biased and so they adopted a more conservative standard of proof, relied less on their personal beliefs, and stereotyped the defendant to a lesser degree. It does not appear that participants were specifically actively correcting for the biasing factor described in the directions, but rather adopting a more cautious and objective approach overall in evaluating the case.
>
> …
>
> The current study provided no support for the notion that jurors ignore directions in criminal trials. While there were no effects of media exposure upon verdicts, the results of the analyses of congruency of participants' verdicts and guilt likelihood ratings, as well as the degree to which they stereotyped the defendant and relied upon their own beliefs, indicated that participants were generally following directions when those directions were simple.[17]

2.21 However, jurors who are alert to possible biases in their own decision-making processes may over-compensate for that perceived bias. In the context of coming to a verdict in a criminal trial, this may mean that jurors unconsciously require a higher standard of proof before convicting. However, no 'rebound effect' was observed: the straight-forward directions on media reports did not appear to cause jurors to focus unduly on any such reporting in the effort to put it out of their minds.

> One important caveat is that once perceivers are aware of the potential for bias and they attempt to correct for it, they may adjust their perceptions too far. Research suggests that people do tend to attempt to correct for biases that they are aware of … Problematically, people also have difficulty estimating the magnitude of their biases and tend to systemically over-estimate the extent that their biases influence their perceptions … As such, the effect of directions may well be to make jurors particularly aware that they may be influenced by a biasing factor, and so jurors may overcompensate in arriving at a verdict. In doing so, they would become more lenient towards the defendant than they would have been if they had not been

15 School of Psychology, University of Queensland (Blake McKimmie and Kathryn Havas), 'An Experiment to Test the Effect of Simplifying Directions', Report (November 2009).

16 See [9.8] below; Queensland Courts, *Supreme and District Court Benchbook*, 'Trial Procedure' [5B.6]–[5B.7] <http://www.courts.qld.gov.au/2265.htm> at 10 November 2009.

17 School of Psychology, University of Queensland (Blake McKimmie and Kathryn Havas), 'An Experiment to Test the Effect of Simplifying Directions', Report (November 2009), 13.

> exposed to biasing information about him. There is no evidence for this in the current study, which may partly be due to the lack of a direct effect of media exposure in any of the conditions.
>
> …
>
> The current study provided no support for the hypothesis that the act of trying to suppress negative, trial-relevant media exposure would result in a rebound effect, with this act of suppression leading to exposure to relevant media in fact having more, rather than less, influence upon jurors' perceptions. One of the pre-requisites for this effect to occur is heavy cognitive load, resulting in the failure of the mental process which searches for thoughts to distract the person from the thought they are trying to suppress …
>
> …
>
> Despite the limitations of the current study, it revealed some results which indicated that giving jurors simplified directions to disregard negative media exposure may lead jurors to be able to do so more effectively than giving them either no directions, or the standard, complex directions that they are currently given in criminal trials. No results were found which indicated that jurors purposely ignore jury directions, or that directions lead to a rebound effect due to attempted suppression; but future research which specifically manipulates cognitive load would provide more convincing evidence that neither of these processes operate during juror decision-making.[18]

Acknowledgements

2.22 The Commission wishes to acknowledge the support received from the team at the University of Queensland — Dr Blake McKimmie, Ms Emma Antrobus and Ms Kathryn Havas — both in relation to this research project in particular and the Commission's project more generally.

2.23 The project could not have been completed without the enthusiastic support of the Judges and senior officials of the Supreme and District Courts of Queensland, in particular the Chief Justice of Queensland, the Hon Paul de Jersey, and the Chief Judge of the District Court, her Honour, PM Wolfe.

2.24 In addition, the project called on, and the Commission received, the helpful co-operation of several senior officers of the Courts, notably the Director of Courts, Ms Robyn Hill; the Sheriff of Queensland, Mr Neil Hansen; and the Chief Bailiffs during the currency of the project.

18 School of Psychology, University of Queensland (Blake McKimmie and Kathryn Havas), 'An Experiment to Test the Effect of Simplifying Directions', Report (November 2009), 13–15. See also [5.86]–[5.93], [12.23], [13.75], [14.49] below.

Chapter 3

The Role of Juries

THE CENTRAL ROLE OF THE JURY IN CRIMINAL TRIALS

3.1 A central pillar of criminal justice in Queensland is that defendants should be judged fairly and impartially by a jury of their peers who deliver their verdict in accordance with the law based on the evidence led at the trial.

3.2 The jury has been described as being at the heart of the Anglo-Australian system of criminal justice and 'fundamental to the freedom that is so essential to our way of life.'[1] Its effectiveness is measured, at least in part, by continued public confidence in it and its procedures and outcomes, which is in turn dependent on its accountability and public scrutiny.[2]

3.3 The use of juries in criminal trials is said to serve a number of important and related functions.[3] The use of juries comprised of ordinary, impartial citizens helps ensure a fair trial for the defendant. Jury trials also provide direct community involvement in the administration of justice. It is also said that juries act as a check against arbitrary or oppressive exercises of authority, lend legitimacy to the criminal justice sys-

1 Criminal Justice Commission of Queensland, *The Jury System in Criminal Trials in Queensland*, Issues Paper (1991), 4.

2 Ibid.

3 See *Brown v The Queen* (1986) 160 CLR 171, 197 (Brennan J), 201–202 (Deane J); *Kingswell v The Queen* (1985) 159 CLR 264, 299–302 (Deane J). Also see the High Court's remarks set out in [3.4]–[3.6] below, and generally, for example, D Watt, *Helping Jurors Understand* (2007) §1–6.

tem, make public acceptance of verdicts more likely, and contribute to the accessibility of proceedings to lay people.

3.4 The High Court of Australia has commented on the role of the jury on many occasions. Deane J said the following in *Brown v The Queen*:

> [R]egardless of the position or standing of the particular alleged offender, guilt or innocence of a serious offence should be determined by a panel of ordinary and anonymous citizens, assembled as representative of the general community, at whose hands neither the powerful nor the weak should expect or fear special or discriminatory treatment. That essential conception of trial by jury helps to ensure that, in the interests of the community generally, the administration of criminal justice is, and has the appearance of being, unbiased and detached. It fosters the ideal of equality in a democratic community …[4]

3.5 These statements were expressed more expansively in *Kingswell v The Queen* by Gibbs CJ and Wilson and Dawson JJ:

> Trial by jury also brings important practical benefits to the administration of criminal justice. A system of criminal law cannot be attuned to the needs of the people whom it exists to serve unless its administration, proceedings and judgments are comprehensible by both the accused and the general public and have the appearance, as well as the substance, of being impartial and just. In a legal system where the question of criminal guilt is determined by a jury of ordinary citizens, the participating lawyers are constrained to present the evidence and issues in a manner that can be understood by laymen. The result is that the accused and the public can follow and understand the proceedings. Equally important, the presence and function of a jury in a criminal trial and the well-known tendency of jurors to identify and side with a fellow-citizen who is, in their view, being denied a 'fair go' tend to ensure observance of the consideration and respect to which ordinary notions of fair play entitle an accused or a witness. Few lawyers with practical experience in criminal matters would deny the importance of the institution of the jury to the maintenance of the appearance, as well as the substance, of impartial justice in criminal cases (cf. Knittel and Seiler, 'The Merits of Trial by Jury', Cambridge Law Journal, vol. 30 (1972), 316 at pp.320–321).
>
> 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

4 *Brown v The Queen* (1986) 160 CLR 171; [1986] HCA 11 [2]. See also Brennan J in the same case at [7]:

> Trial by jury is not only the historical mode of trial for criminal cases prosecuted on indictment; it is the chief guardian of liberty under the law and the community's guarantee of sound administration of criminal justice. The verdict is the jury's alone, never the judge's. Authority to return a verdict and responsibility for the verdict returned belong to the impersonal representatives of the community. We have fashioned our laws governing criminal investigation, evidence and procedure in criminal cases and exercise of the sentencing power around the jury. It is the fundamental institution in our traditional system of administering criminal justice.

> by reference to sensational or self-righteous pre-trial publicity or the passions of the mob.[5]

3.6 Deane, Dawson, Toohey, Gaudron and McHugh JJ summarised the central importance of the jury system in these terms in *Doney v The Queen*:

> [T]he genius of the jury system is that it allows for the ordinary experiences of ordinary people to be brought to bear in the determination of factual matters. It is fundamental to that purpose that the jury be allowed to determine, by inference from its collective experience of ordinary affairs, whether and, in the case of conflict, what evidence is truthful.[6]

3.7 Some writers, however, are a little more reserved in their support of the jury as a bulwark against oppression:

> The assumption that political liberty at the present day depends upon the institution of the jury, though still repeated by English lawyers to foreign visitors, is in truth merely folklore — of a piece with the theory that English liberty depends on the separation of powers, or (as opinion at one time had it) upon the absence of an organized police force.[7]

3.8 Certain aspects of the operation of juries are hidden from public scrutiny, which lends the jury system a certain mystique and inscrutability that may create some difficulty when trying to review the system in detail. Some of the mystery comes from the obscurity of human decision-making processes generally and the complicated social and psychological factors that operate peculiarly within a jury, and some because a jury's deliberations are expressly kept secret by law.[8]

3.9 Two key elements in the uncertainty surrounding juries and their decision-making processes are the complete secrecy that conceals their deliberations and the fact that they do not publish reasons.[9] It would probably be impossible to devise a system in which juries could publish reasons, even if it were desirable for them to do so, but without reasons the transparency that is demanded in virtually every other aspect of our systems of justice and public administration will remain absent. In those circumstances, it has been said that it is not always possible for justice to be seen to be done.[10]

3.10 The jury's autonomy in this regard may be contrasted sharply with the obligations on judges hearing trials without juries to publish their reasons for coming to their verdicts:

> *The importance of judicial reasons for decision.* The duty of judges to give reasons for their decisions after trials and in important interlocutory proceedings is well-

5 *Kingswell v The Queen* (1985) 159 CLR 264; [1985] HCA 72 [51]–[52].

6 *Doney v The Queen* (1990) 171 CLR 207; [1990] HCA 51 [14].

7 Glanville Williams, quoted in D Watt, *Helping Jurors Understand* (2007) 9.

8 See *Jury Act 1995* (Qld) s 70. See [2.2]–[2.4] above in relation to s 70 in the context of jury research, and [3.52], [3.80]–[3.83] below.

9 The latter has been described as 'the major, glaring demerit': MJ McCusker, 'Bad Press: Does the Jury Deserve It?' (Paper presented at the 36th Australian Legal Convention, Perth, 17–19 September 2009) 8.

10 MJ McCusker, 'Bad Press: Does the Jury Deserve It?' (Paper presented at the 36th Australian Legal Convention, Perth, 17–19 September 2009) 9. See also *AK v Western Australia* [2008] HCA [89] referred to in this passage. The observations by Heydon J about the jury system at [90]–[104] warrant study at some length.

established. The objectives underlying that duty have been summarised as follows:[11]

> 'First, the existence of an obligation to give reasons promotes good decision making. As a general rule, people who know that their decisions are open to scrutiny, and who are obliged to explain them, are more likely to make reasonable decisions. Second, the general acceptability of judicial decisions is promoted by the obligation to explain them. Third, it is consistent with the idea of democratic institutional responsibility to the public that those who are entrusted with the power to make decisions, affecting the lives and property of their fellow citizens, should be required to give, in public, an account of the reasoning by which they came to those decisions.'[12] (note as in original)

3.11 The jury's immunity from scrutiny, as well as the status afforded to jury decisions in the criminal justice system, has also led to many assumptions about the way in which juries operate and, importantly for this review, the way in which juries respond to the instructions, directions, comments and warnings given to them by judges. Some of these assumptions do not withstand scrutiny and are challenged by some of the empirical evidence, particularly from psychological and psycho-linguistic sources.[13]

3.12 Warnings have been sounded for centuries that changes to the jury system should be undertaken cautiously:

> [I]nroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our Constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.[14]

3.13 Despite the strength of such rhetoric, significant changes have been made to the jury system over time. However, its central role in the criminal justice system in Queensland and throughout Australia is not challenged and is not in question in this enquiry.[15] Nonetheless, it is important to consider and, where necessary, challenge the rhetoric and the assumptions behind the jury system to see where improvements and adaptations to modern life can be made. Twenty-five years ago this Commission endorsed a warning that 'uncritical veneration' of juries must end.[16]

3.14 The operation of the jury system is, however, not without criticism. In particular, many commentators have questioned whether jurors are able to understand, remember and integrate the information and legal principles they are confronted with in reaching a verdict.[17] It is not surprising that verdicts in some cases become controversial and the subject of media attention and criticism. It is noteworthy, however, that these cases are exceptional and represent a small proportion of all jury trials in Queensland.

---

11 Gleeson, 'Judicial Accountability', (1995) 2 *The Judicial Review* 117 at 122.

12 *AK v Western Australia* [2008] HCA [89] (Heydon J)

13 See in particular chapters 4 and 5 of this Report.

14 Blackstone's *Commentaries* (1769), Book IV, 344 referred to in *Kingswell v The Queen* (1985) CLR 264, 269 (Brennan J).

15 See [1.15] above and the Terms of Reference in Appendix A.

16 J Baldwin and M McConville, 'Research and the Jury' *Justices of the Peace of March 10, 1979*, quoted in Queensland Law Reform Commission, *Working Paper on Legislation to Review the Role of Juries in Criminal Trials* WP 28 (1984), 4.

17 See, for example, D Watt, *Helping Jurors Understand* (2007) §8; MJ McCusker, 'Bad Press: Does the Jury Deserve It?' (Paper presented at the 36th Australian Legal Convention, Perth, 17–19 September 2009) 4, 7.

3.15 Little of this commentary is based on empirical research, which is understandable given the great difficulties associated with conducting proper research of juries and their decision-making processes. But that means that a great deal of this commentary is anecdotal or may be based only on casual observation. Even those commentators who see juries on a daily basis — judges and trial lawyers — may be prone to basing their comments on assumptions about the ability, or inability, of jurors to handle the evidence and the law, which may, or may not, be borne out by the results of psychological and psycho-linguistic research. Great store is placed on the jury's capacity to import community standards into the criminal justice system, but this faith is put into question by some recent jury research: for example, jurors' standards of a concept as fundamental to criminal justice as dishonesty vary widely.[18]

> To suggest that the system of trial by jury could bear critical scrutiny is seen by some as akin to questioning motherhood.
>
> Accusations of elitism are invited if the suggested alternative is trial by judge alone — an alternative that would exclude community involvement at a time when the justice system is often portrayed as being 'out of touch'.[19]

3.16 The results of such empirical research are discussed throughout this Report. Along with the Commission's consultations, the available research reflects a considerable body of opinion that juries generally perform their tasks conscientiously and with application, and usually deliver verdicts that accord with the expectations of informed observers' and the community. However, their ability to understand and apply the law and judicial directions is at times questionable. The greater the clarity of judges' directions to juries, the more likely that jurors will be able to understand and apply those directions.

Jurors' perceptions of the jury system

3.17 It has been noted that the participation by ordinary members of the community in juries is their last direct involvement in the democratic processes of a modern state — the others, such as participation in the legislative process, have been taken over by representative bodies or other indirect systems.[20]

3.18 One benefit of the involvement of members of the public in the criminal justice system as jurors is that they become involved as an integral part of the legal system, perhaps for the first time and not just as a consumer of legal services but as an integral part of its machinery. It is perhaps not surprising, then, to find that many jurors report that their appreciation of the system, and the work done by the courts and judges in particular, improves.

3.19 Research in Australia has demonstrated that people who have served on juries have significantly more confidence in juries and the criminal justice system than other members of the jury-eligible population. Even people who attended for jury service but

18 Mark Henderson, 'Jurors find it hard to tell right from wrong, says study', *Times Online*, 7 September 2009; MJ McCusker, 'Bad Press: Does the Jury Deserve It?' (Paper presented at the 36th Australian Legal Convention, Perth, 17–19 September 2009) 2, 4–5.

19 Valerie French, 'Juries — a central pillar or an obstacle to a fair and timely criminal justice system? A very personal view', (2007) 90 *Reform* 40, 40.

20 The Hon M Moynihan, 'Jury Trials in Queensland' (Paper presented at the Jury Research and Practice Conference, Brisbane, 14 November 2008).

were not empanelled showed high confidence levels, though not as high as those shown by jurors.[21]

> The results revealed a strong positive correlation between overall satisfaction with the experience of jury service and confidence in the jury system … the more jurors were satisfied with their experience, the more confidence they expressed. …
>
> Differences between jurors and members of the public regarding overall confidence in the criminal justice system were pronounced … Ratings by members of the jury pool of the justice system as efficient and fair … and of its treatment of victims as fair significantly exceeded those by citizens with no experience of jury duty … Furthermore, jurors on duty were significantly more likely than members of the public to believe that defendants were treated fairly and to express confidence in the capacity of judges to perform their duties … There was very little difference in the confidence in the ability of prosecutors and defence lawyers between jury pool members and citizens with no jury experience. Overall, jurors and jury-eligible citizens were moderately confident in the abilities of prosecution (50%) and defence lawyers (52%).
>
> Particularly interesting was the apparent effect of jury service on juror confidence in judges, defence lawyers and prosecutors. A comparison of empanelled and non-empanelled juror ratings revealed higher levels of confidence in judges and defence lawyers among jurors with more in-depth exposure to judges and defence barristers, while confidence in the prosecution was not affected by more extensive experience on a jury. This difference may be interpreted as a consequence of the learning that takes place with the exposure to judges and defence barristers through the experience of jury service, although other explanations cannot be ruled out. For instance, jurors who express anti-prosecution sentiments may be disproportionately excluded. Whatever the explanation, a similar pattern emerged regarding confidence in the fairness of treatment for victims and defendants; that is, empanelled jurors expressed greater confidence in their treatment than did non-empanelled jurors and members of the general public.
>
> The results of this study indicated that most citizens support the jury system, although citizens who attended jury duty were significantly more enthusiastic about the role of juries, and their capacity to keep judges and the justice system accountable …
>
> Interestingly, jurors (both empanelled and non-empanelled) were more likely to believe that juries were less representative of the community than were jury-eligible citizens who had never completed jury service (22% vs 14%). One possible explanation is that jury pool members developed greater insight into the options for exemption and excusal than citizens less well-informed about jury service.
>
> Furthermore, jurors were less likely than community members to believe that courts overestimate people's knowledge of the criminal justice process, suggesting increased faith in the capacity of ordinary citizens to make difficult decisions following their exposure to the jury process. Empanelled jurors were more likely than both non-empanelled jurors and community participants to agree that jury service is educational and interesting. These results are consistent with the view that jury service provides a form of training in citizenship.
>
> …

21 Australian Institute of Criminology, *Practices, policies and procedures that influence juror satisfaction in Australia* Research and Public Policy Paper No 87 (2007) 148. A total of 1,048 non-empanelled jurors (318 in New South Wales, 476 in Victoria and 254 in South Australia) and 628 empanelled jurors (156 in New South Wales, 317 in Victoria and 155 in South Australia) completed the written survey: xii.

> … Most people indicated a preference for a jury trial over a trial by judge alone, irrespective of whether they were in the role of the victim or the defendant … This preference was slightly stronger among jurors than members of the general community, indicating either the positive influence of the jury experience or the filtering out from jury duty of those who are less enthusiastic about the capacity of juries.[22]

3.20 Similar results have been obtained overseas. In a survey of 361 jurors in London and Norwich conducted in 2001–02, just under two-thirds of the jurors who responded had a more positive view of the jury trial system than before doing their jury service, and there was an 'unexpected' appreciation of the work of judges in managing, organising and summing up the cases.[23]

> The most positive aspects of engaging in jury service were found to be having a greater understanding of the criminal court trial (58%), a feeling of having performed an important civic duty (41%) while 22 per cent found it personally fulfilling.
>
> …
>
> The vast majority of respondents (over 95%) considered juries very important, essential, quite important or necessary in our system of justice.
>
> Participating in jury service appears to produce a remarkable level of social solidarity amongst jurors while enhancing their sense of citizenship.[24]

3.21 There is also some evidence that goes the other way, however. In conducting research into juries in Queensland in 2001–02, Richardson was able to interview some 19 jurors out of the 192 who otherwise participated in her research.[25] Although comments from this small pool of District Court jurors may not be instructive of opinions held by jurors generally, they give some indication of the issues that concerned individual jurors: some felt that witnesses and the evidence were manipulated by the barristers; boredom and interruptions in the evidence were concerns for a significant number of the jurors; and frustration at not being able to ask questions was also noted.

3.22 In commenting on her research, Richardson summarised her observations this way:

> Jurors consistently recognised significant flaws in the system, but were unable to 'think of a better one that would work more efficiently'. As a result of their experience, some have 'lost faith in the jury system' and reported they would not like to have a jury trial if there were charged with criminal offences.
>
> Nonetheless, although all jurors were able to identify flaws in the system, they reported that they considered jury duty to be a social responsibility and although

22 Ibid 148–152.

23 Home Office (UK), *Jurors' perceptions, understanding, confidence and satisfaction in the jury system: a study in six courts*, Home Office Online Report 05/04, 7–9. <http://www.homeoffice.gov.uk/rds/pdfs2/rdsolr0504.pdf> at 11 March 2009.

24 Ibid 9.

25 Christine Richardson, *Symbolism in the Courtroom: An Examination of the Influence of Non-Verbal Cues in a District Court Setting on Juror Ability to Focus on the Evidence*, (Doctoral thesis, Griffith University, 2006) 113–4, 264–5.

> none would volunteer to be on a jury again, predominantly if called upon to do so, they would honour their responsibility and participate in jury service again.[26]

3.23 However, jurors took their task seriously despite any shortcomings they might have felt about the system:

> Overall the task of being a juror and associated responsibilities were salient to all jurors who were interviewed. All jurors took their role very seriously and in most cases the task over-rode any other concerns. … all who commented on the task of being a juror were aware of the seriousness of their role which impacted on them significantly.[27]

3.24 That jurors take their task seriously is rarely questioned by legal observers though some anecdotes from former jurors question the attitudes of fellow jurors.[28] Nonetheless, jury service is a stressful experience for all jurors where the vagaries of human idiosyncrasy bear on the deliberations behind each verdict.[29]

> The substantial personal commitment of jurors must be valued and respected and never taken for granted, whether by the court or the parties' legal representatives.[30]

3.25 Interesting perspectives of jury service are now emerging in the United Kingdom, where lawyers (including judges) have been eligible for jury service since 2004. One recent note by a senior counsel was published in the *Times Online*; although a number of his criticisms were directed to the poor orientation procedures, he also had some comments about jury directions:

> The Lord Chief Justice, Lord Judge, recently made some remarks about how juries nowadays find it difficult to listen for long periods of time. But this may be partly because at no point in the Postman Pat-style explanations about 'how court works' that are given to jurors is it properly explained what they are actually expected to do. I doubt that many jurors without experience of court understand, before they sit on a jury, that they may well have to listen carefully to oral evidence for hours at a time, over a number of days — or weeks. And that then they are supposed to remember and analyse that evidence — without a transcript — after they retire to consider their verdict. After all, how can they know this? Nobody tells them beforehand. The same goes for directions on the law. The judge of course gives these directions during his summing-up. Perhaps in Rumpole's day the directions used to be simple — a bit of advice about the 'golden thread' perhaps, and the elements of theft. But in modern criminal cases the directions are often very complex. Yet the theory is that the jury are supposed to remember and understand these convoluted

---

26 Christine Richardson, 'Juries: What they think of us', *Queensland Bar News* (December 2003) 16; Christine Richardson, *Symbolism in the Courtroom: An Examination of the Influence of Non-Verbal Cues in a District Court Setting on Juror Ability to Focus on the Evidence*, (Doctoral thesis, Griffith University, 2006) 298–307.

27 Ibid 295.

28 See, eg, MJ McCusker, 'Bad Press: Does the Jury Deserve It?' (Paper presented at the 36th Australian Legal Convention, Perth, 17–19 September 2009) 1–2; Judith Fordham, 'Bad Press: Does the Jury Deserve It?' (Paper presented at the 36th Australian Legal Convention, Perth, 17–19 September 2009) 11; The Hon Justice Michael Murray, 'Bad Press: Does the Jury Deserve It? Communicating with Jurors' (Paper presented at the 36th Australian Legal Convention, Perth, 17–19 September 2009) 1.

29 See, eg, Victoria Coren, 'Twelve angry, calm, sympathetic, hostile, but above all human … men', *The Observer*, <www.guardian.co.uk/politics/niov/15/jury-trials-victoria-coren/print> at 16 November 2009.

30 *R v Spizzirri* [2000] QCA 469 [15] (de Jersey CJ); quoted by Legal Aid Queensland in its submission: Submission 16A, 3.

> directions, and then apply them to the facts. In most cases, this is probably a polite fiction.[31]

HISTORICAL BACKGROUND

3.26 In Anglo-Australian law, the jury can be traced back to the Magna Carta, subscribed by King John in 1215:

> No free man shall be seized, or imprisoned, or dispossessed or outlawed, or in any way destroyed; nor will we condemn him, nor will we commit him to prison, except by the legal judgement of his peers, or by the law of the land.[32]

3.27 Trial by jury was established in New South Wales by 1832 and in Queensland at the time of its separation from New South Wales in 1859.[33] It was first covered by statute in Queensland as early as 1867. That original Act was replaced in 1929 and again in 1995, and today a number of other statutes, both State and Commonwealth, also regulate the operation of the jury system in this State.[34]

CONTEMPORARY SOURCES OF THE LAW

3.28 In Queensland, the principal sources of the law governing the role and operation of the jury system are found in the Criminal Code (Qld), the *Jury Act 1995* (Qld), the Criminal Practice Rules 1999 made under the *Supreme Court Act 1991* (Qld), and in the common law.

JURORS' TASKS

3.29 Jurors are given three principal tasks:

- They must assess the evidence and come to any necessary resolution of disputed facts impartially and free from influences from outside the courtroom.
- They must follow the judge's instruction on the law.
- They must fairly apply the law to the evidence as instructed to reach their verdict.[35]

3.30 Jury directions have a role in each of these three tasks.

---

31 Robert Howe QC, 'Why too much experience can subvert jury trial', *Timesonline* <http://business.timesonline.co.uk/tol/business/law/article6941178.ece> at 3 December 2009.

32 It may be argued that the concept of judgment by one's peers of the defendant has changed in the intervening eight centuries, but that is not a matter for this enquiry and will be discussed by the Commission in its publications in 2010 on jury selection: see [1.13] above.

33 Criminal Justice Commission of Queensland, *The Jury System in Criminal Trials in Queensland*, Issues Paper (1991), 6.

34 For example, the *Evidence Act 1977* (Qld), the *Evidence Act 1995* (Cth), the Criminal Code (Qld) and the Criminal Practice Rules 1999 made under the *Supreme Court Act 1991* (Qld).

35 See James RP Ogloff & V Gordon Rose, 'The Comprehension of Judicial Instructions' in Neil Brewer & Kipling D Williams (eds) *Psychology and Law: an Empirical Perspective* (2005) 407.

HOW CRIMINAL TRIALS OPERATE

Basic concepts

3.31 In Queensland, generally speaking all indictable offences are to be tried by a judge and jury in the Supreme Court or the District Court,[36] although there is now scope in Queensland for some indictable offences to be heard by a judge sitting alone without a jury.[37] Indictable offences are the more serious crimes such as murder and manslaughter. People charged with indictable offences will face trial only if they are committed to stand trial by a magistrate in the Magistrates Court. Committal proceedings are a form of preliminary examination of the case by a magistrate. They are not a trial of the case and the defendant is not required to lead any evidence. However, if the magistrate is satisfied that the prosecution has sufficient evidence which, if led before a jury unexplained, could lead a jury which has been reasonably directed as to the relevant law to convict the defendant of the offence, then the defendant will be committed to stand trial for that offence. A defendant may, but is not required to, enter a plea of guilty or not guilty at this stage.[38]

3.32 The indictment itself is the document containing the written charge listing the offence or offences for which the defendant is to be put on trial.[39]

3.33 The right to a trial by jury in relation to indictable offences against federal laws is guaranteed by section 80 of the *Australian Constitution*:

> **Trial by jury**
>
> The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

3.34 For this reason, trials on indictment of any offence against a law of the Commonwealth are omitted from the range of trials that may be heard by a judge alone in Queensland and elsewhere in Australia.[40]

3.35 The judge decides questions of law only; these will include rulings on the admissibility of evidence and other procedural questions. Many of these issues will be argued by the lawyers for each party, and determined by the judge, in the absence of the jury so that the jury does not hear any evidence that the judge ultimately rules should not be admitted.

---

36 Criminal Code (Qld) ss 3(3), 300, 604; *Supreme Court Act 1995* (Qld) s 203; *District Court of Queensland Act 1967* (Qld) s 61.

37 The *Criminal Code and Jury and Another Act Amendment Act 2008* (Qld) introduced a new ch 62 div 9A (ss 614–615E) into the Criminal Code (Qld) allowing for trials of some indictable offences by a judge alone.

38 See the *Justices Act 1886* (Qld) for the procedural requirements of committal proceedings: Criminal Code (Qld) s 554. The Commission understands that the Queensland Government is preparing a bill to implement some of the recommendations from the Moynihan Report published in December 2008, which, if put into effect, will change some aspects of the committal process, including some disclosure obligations: see the Hon Martin Moynihan AO QC, *Review of the civil and criminal justice system in Queensland*, Report (2008).

39 Criminal Code (Qld) s 1 (Definition of ***indictment***): '***indictment*** means a written charge preferred against an accused person in order to the person's trial before some court other than justices exercising summary jurisdiction.' The forms of indictment are found in Schedules 2 to 4 of the *Criminal Practice Rules 1999*.

40 Criminal Code (Qld) s 615D, introduced by the *Criminal Code and Jury and Another Act Amendment Act 2008* (Qld).

3.36 It is for the jury to decide the facts from the evidence and to reach a verdict on whether the defendant is guilty of the offence or offences charged by applying the law to the facts.

3.37 In a criminal trial, the jury consists of 12 people[41] but the trial may continue without the full complement of jurors provided that there are at least ten jurors.[42] Up to three additional people may be selected as reserve jurors.[43]

Juror orientation

3.38 In Queensland, before being empanelled all potential jurors who have been summoned to attend for jury service attend an orientation session after arriving at court in which they are provided with some information about their role and their obligations, entitlements and other administrative matters.[44] These sessions are conducted by officers from the Sheriff's office. The jurors are given advice on how to conduct themselves in court and during a trial. This includes the requirements not to discuss the trial with people outside the juryroom and not to make private enquiries about the evidence or private visits of locations associated with the case. They are informed that evidence may be given in a variety of ways; for example, photographs may be viewed on large screens in the courtroom, and video evidence may be taken from witnesses in another location. They are also told that the court may be closed if, for example, evidence is to be given by a child.

3.39 After this introduction, potential jurors are shown a video that outlines the empanelling and trial process.[45] The video includes:

- an introduction by the Chief Justice explaining the importance of jury service and thanking the jurors for their contribution;
- an outline of the jury selection process;
- an overview of the court room identifying each of the people in the court room by reference to their location and court attire, explaining the last opportunity to seek an excusal from jury service from the judge, and showing how the accused is arraigned and a plea is taken;
- an outline of the empanelling process explaining what information about the jurors is made available to counsel, what happens when a juror is called, the taking of the oath or an affirmation, the prosecutor's right to challenge and the defendant's right to 'stand by' a juror, and asking if any jurors feel that they cannot be, and be seen to be, completely impartial;

41 *Jury Act 1995* (Qld) s 33.

42 *Jury Act 1995* (Qld) s 57(2).

43 *Jury Act 1995* (Qld) s 34.

44 Similar orientation sessions are conducted in all other Australian jurisdictions: see Elizabeth Najdovski-Terziovski, James RP Ogloff, Jonathan Clough and Rudy Monteleone, 'What are we doing here? An analysis of juror orientation programs' (2008) 92(2) *Judicature* 70

45 For example, Australian Institute of Judicial Administration Inc, *Working with Juries Seminar: Summary of Proceedings* (15 June 2007) Appendix, 21. Potential jurors are also given a booklet: Queensland Courts, *Juror's Handbook* (2008) <http://www.courts.qld.gov.au/103.htm> at 30 November 2009.

- an explanation of the jury's role and trial processes once the jury has been empanelled;[46] and

- an outline of jurors' responsibilities concerning jury deliberations.[47]

3.40 Potential jurors each also receive a booklet, the *Juror's Handbook*, which covers similar topics.[48]

3.41 In particular, jurors are given notebooks which they are told must stay at court during the trial and will be destroyed at the end of the trial. They are told to take their own notes as they will not be given a copy of the transcript, even if they ask.[49]

3.42 Empanelled jurors are also supplied with a booklet entitled *Guide to Jury Deliberations*[50] when they retire to consider their verdict. This outlines some suggested approaches that might be taken during a jury's deliberations, reviews some aspects of a jurors' duties, and emphasises the need for confidentiality in relation to the jury's discussions.[51]

3.43 Both booklets are available on the Queensland Courts' website.[52]

3.44 The status of comments in the *Guide to Jury Deliberations* was recently considered by the Queensland Court of Appeal in *R v Edwards*,[53] The appellant argued that there had been a miscarriage of justice because the contents of the Guide (which had been consulted by the jury during deliberations) contradicted directions given by the trial judge. In delivering the principal judgment of the Court, White J (with whom McMurdo P and Wilson J agreed) noted the following excerpts from the Guide:

> Subject to following the judge's directions about the law, you are free to deliberate in any way you wish. These are suggestions to help you proceed with the deliberations in a smooth and timely way.
>
> …

46 This part of the video explains that the bailiff is not permitted to discuss the case with the jury, that the jurors are usually free to go home at the end of each day of the trial, and that the jury will be asked to nominate a speaker. It also explains that the judge will hear argument on matters of law in the jury's absence, that jurors must not discuss the trial with any one and must never inspect any places referred to in the trial, and that jurors should keep an open mind throughout the trial. It explains that at the end of the evidence counsel will make their closing addresses and the judge will give the summing up.

47 This includes explanations that jurors should consider the evidence calmly and carefully, and should listen to one another and not be afraid to discuss the issues; that what happens in the jury room remains confidential and that it is an offence to publish jury deliberations, or disclose jury deliberations to anyone if it is likely to be published; and that jurors should read the *Juror's Handbook*.

48 Queensland Courts, *Juror's Handbook* (2008). See also <http://www.courts.qld.gov.au/103.htm> and <http://www.courts.qld.gov.au/Factsheets/SD-Publication-JurorsHandbook.pdf> at 30 November 2009.

49 This is not strictly true, but transcript, or portions of transcript, is rarely given to jurors in Queensland (although it is common in some other jurisdictions, such as New Zealand). See chapter 10 below.

50 Queensland Courts, *Guide to Jury Deliberations* (2008).

51 Both booklets are available on the Queensland Courts' website: <http://www.courts.qld.gov.au/103.htm> at 30 November 2009. Similar information is also available in the Queensland Courts' website at <http://www.courts.qld.gov.au/162.htm> at 30 November 2009.

52 For both booklets, go to <http://www.courts.qld.gov.au/103.htm> at 30 November 2009.

53 [2009] QCA 122.

> **What do we do now?**
>
> First, review the judge's directions on the law because the directions tell you what to do.
>
> **Is there a set way to examine and weigh the evidence and to apply the law?**
>
> The judge's directions will tell you if there are special rules or a set process you should follow. Always keep in mind the judge's directions about who bears the burden of proving various things in the case. Otherwise, you are free to conduct your deliberations in whatever way is helpful. Here are several suggestions:
>
> - Consider the judge's directions that define each charge … and list each separate element that makes up that charge …
> - For each of these elements, review the evidence, both the oral testimony and the exhibits, to see if it has been proven to the required standard.
> - Consider the judge's directions about the defences to each charge …
> - For each of the defences, review the evidence, both the oral testimony and the exhibits, to see if it has been excluded to the required standard (in a criminal trial)…
> - Discuss each charge … and each defence, one at a time.
> - Follow the judge's directions about the sequence in which you should consider alternative charges in a criminal trial.
> - Vote on each charge …[54]

3.45 After considering the trial judge's response to the jury's request for further directions on the elements of each offence charged, White J concluded (at [38]) that:

> It is clear that the approach suggested in the guide in no way undermined the trial judge's directions nor confused the jury. The guide makes clear in several places that it is subject to the directions of the trial judge.

Preliminary matters

3.46 Before the trial itself commences, the judge will deal with a number of formal matters:

- the formal presentation of the indictment by the prosecutor;
- the hearing of any applications by jurors to be excused from jury service; and
- any preliminary rulings on law, evidence or procedure that may assist in the running of the case and which should be dealt with in the absence of the jury.[55]

54 [2009] QCA 122 [35].

55 See RG Kenny, *An Introduction to Criminal Law in Queensland and Western Australia* (2004) [5.72].

3.47 A trial begins with arraignment of the defendant.[56] The judge's associate reads the indictment to the defendant and calls upon the defendant to enter a plea of guilty or not guilty. A plea of not guilty is in effect a demand that the matter be heard and determined by a jury.[57] Section 604 of the Criminal Code (Qld) provides:

> **604 Trial by jury**
>
> (1) Subject to chapter division 9A[58] and subsection (2), if the accused person pleads any plea or pleas other than the plea of guilty, a plea of autrefois acquit or autrefois convict or a plea to the jurisdiction of the court, the person is by such plea, without any further form, deemed to have demanded that the issues raised by such plea or pleas shall be tried by a jury, and is entitled to have them tried accordingly.
>
> (2) Issues raised by a plea of autrefois acquit or autrefois convict must be tried by the court. (note added)

Empanelment of jurors

3.48 The jurors are then empanelled from a pool of prospective jurors randomly selected from the Electoral Roll who have been summoned from the community for jury service.[59] Jury service is not voluntary. It is a duty for those persons who are qualified to serve and who are not otherwise excused from service.[60] The ways in which juries are selected in Queensland are not in issue in this enquiry; however, the Commission has received separate Terms of Reference from the Attorney-General to report on that topic.[61]

3.49 It is worth noting, however, that lawyers actually engaged in legal work, former and current judges and magistrates, former and current police officers and correctional officers, and anyone who has been convicted of an indictable offence or sentenced to imprisonment are not eligible for jury service.[62]

3.50 The *Juries Act 1995* (Qld) provides for the manner in which the prosecution and the defence may each challenge the empanelment of prospective jurors. Both sides may make up to eight peremptory challenges (that is, challenges for which no cause need be shown)[63] and an unlimited number challenges for cause. A challenge for cause is made on the basis that the person challenged is not qualified for jury service

---

56 Ibid.

57 Ibid [5.76].

58 Ch 62 div 9A provides for trial of indictable offences by a judge alone, and was introduced by the *Criminal Code and Jury and Another Act Amendment Act 2008* (Qld).

59 *Jury Act 1995* (Qld) Pt 5 Div 6.

60 *Jury Act 1995* (Qld) ss 5, 28.

61 See [1.13], [1.35] above.

62 *Jury Act 1995* (Qld) s 4(3). This is not the position in all jurisdictions: for example, lawyers have been eligible for jury service in England since the *Criminal Justice Act 2003* (UK) took effect in April 2004. These issues will be considered by the Commission in its reference on jury selection: see [1.13], [1.35] above. The advent of lawyers and members of the police force on juries has not been without its problems, and has been the subject of a number of appeals in the UK: see, for example, 'Police officers and lawyers as jurors—United Kingdom' (2008) 12 *The International Journal of Evidence and Proof* 160; 'Jurors in occupations connected with the administration of justice—United Kingdom' (2008) 12 *The International Journal of Evidence and Proof* 252.

63 *Jury Act 1995* (Qld) s 42(3). More peremptory challenges are available if reserve jurors are also to be selected: *Jury Act 1995* (Qld) s 42(4).

or is not impartial.[64] Any pre-trial challenge must be made after the person's name is called but before the court officer starts to recite the oath or affirmation to empanel that person as a juror.[65]

Jurors' oath

3.51 Empanelled jurors take an oath or make an affirmation to the following effect:

> You will conscientiously try the charges against the defendant (or defendants) [*or the issues on which your decision is required] and decide them according to the evidence. You will also not disclose anything about the jury's deliberations other than as allowed or required by law.[66]

3.52 This oath or affirmation emphasises two key aspects of the jurors' tasks:

- They must determine their verdict 'according to the evidence' and not, by implication, by reference to any other information that they may have or acquire in relation to the case, nor their own personal inclinations, for example, to extend mercy in an apparently deserving case.
- They must keep their deliberations confidential.[67]

Choosing a speaker

3.53 Each jury is required to choose one of themselves as their speaker.[68] The *Juror's Handbook* says that this happens in the first day, usually during the first break after empanelling. The speaker speaks for the jury in court. The speaker's role in the jury room is a matter for each jury, however. Typically, a speaker will oversee the jury's deliberations. A jury can replace the speaker with another juror.[69]

The trial begins

3.54 Once the jury has been empanelled, it is common in Queensland for the trial judge to start with a general introduction of the case to the jury, outlining the jury's role in proceedings and contrasting it with the judge's own role, identifying the key counsel, defendant, court officers and other people, and stating some of the most important aspects of the jurors' duties. For example, the judge reminds them that they are to decide the case on the basis of the evidence given in court alone, and not on any outside influences, and that they are not to make their own enquiries about the case or the

64 *Jury Act 1995* (Qld) s 43(2).

65 *Jury Act 1995* (Qld) s 44(1), (2). Challenges for cause may also be made during the course of a trial under s 47 of that Act.

66 *Oaths Act 1867* (Qld), s 22. The fact that jurors take an oath to deliver a true verdict reflects the etymology of *juror* as someone who swears an oath, and of *verdict* as the speaking of the truth.

67 See [2.2]–[2.4], [3.8] above and [3.80]–[3.83] below.

68 The speaker is also know as the 'foreman', 'foreperson' or 'jury representative' in other jurisdictions.

69 Queensland Courts, *Juror's Handbook* (2008) 14. See also [10.212]–[10.241] below.

defendant. The jurors are also told that they can take notes and seek assistance by asking questions through the bailiff.[70]

3.55 The judge must also ensure that the jury is informed in 'appropriate detail' of the charge or charges in the indictment: see section 51 of the *Juries Act 1995* (Qld):

> **51 Jury to be informed of charge in criminal trial**
>
> When the jury for a criminal trial has been sworn, the judge must ensure the jury is informed—
>
> (a) in appropriate detail, of the charge contained in the indictment; and
>
> (b) of the jury's duty on the trial.

3.56 The precise forms of words to be used in relation to the formalities required by section 51(a) and in other parts of a trial are set out in rules 44 to 51 of the *Criminal Practice Rules 1999* made under the *Supreme Court Act 1991* (Qld).[71]

3.57 The basic nature of the offences to be tried necessarily emerges from the reading of the indictment. Juries will also be given some introductory information at the start of the trial by the judge as to, for example, the elements of the offences, the burden and standard of proof or the structure of the decisions that the jury will ultimately have to make. Some outline of the evidence will also emerge from the prosecution's opening, but otherwise most of the instruction on the law and the decision-making process is given at the end of the trial.

Hearing of evidence

3.58 The prosecution then begins its case with an opening address in which its case is outlined.[72] The opening address may be accompanied by some form of written outline or other aide mémoire for the jury, though this is not usual.

3.59 The defendant may also make an opening statement at this stage, but this is a matter within the discretion of the court.[73] This might be more appropriate in cases where it is likely that the defendant will give evidence so that the jury's attention can be drawn in advance to issues that are likely to arise during the trial for the jury's determination.[74]

3.60 The prosecution witnesses are then called. Each gives his or her evidence-in-chief, is then cross-examined by the defendant or defence counsel, and may be re-examined by the prosecutor in relation to matters raised in the cross-examination.

---

70 A model form of this introduction and direction is found in Queensland Courts, *Supreme and District Court Benchbook*, 'Trial Procedure' [5B] <http://www.courts.qld.gov.au/2265.htm>, and is set out at [9.8] below.

71 These are set out in Appendix C to this Report.

72 Criminal Code (Qld) s 619(1).

73 *R v Nona* [1997] 2 Qd R 436 (Fryberg J). This is not expressly provided for in the Criminal Code (Qld). Provisions giving an accused person leave to make an opening address were inserted into the *Crimes Act 1961* (NZ) in 2000: see Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) [311].

74 The only requirements on defendants to give notice of any part of their defence in advance of the trial are those under Criminal Code (Qld) ss 590A, 590B and 590C to give notice of the particulars of alibi evidence, expert evidence and evidence of a representation under s 93B of the *Evidence Act 1977* (Qld) within 14 days after the defendant has been committed for trial.

3.61 At the close of the prosecution case, the defendant may submit to the court that there is no case to answer. Such an application is made and determined in the absence of the jury.[75] The judge must consider whether the defendant could be lawfully convicted on the basis of the evidence led by the prosecution and determine whether, as a matter of law, there is a prima facie case against the defendant. If the application is successful and the judge is satisfied that there is no case to answer, the judge will direct the jury as a matter of law to find the defendant not guilty of the offence charged.[76]

3.62 If the defendant does not make any such application at the close of the prosecution case, or if any such application fails, the defence may, but is never obliged, to lead its own evidence. Section 618 of the Criminal Code (Qld) reads:

> **618 Evidence in defence**
>
> At the close of the evidence for the prosecution the proper officer of the court shall ask the accused person whether the person intends to adduce evidence in the person's defence.

3.63 Before the defendant leads any evidence, the defence counsel (or the defendant, if unrepresented) may address the jury to outline the defence case.[77] The defendant himself or herself may then testify, and any other defence witnesses may be called. The defence witnesses will give their evidence-in-chief, will then be cross-examined by the prosecutor, and may then be re-examined by the defence on matters raised in the cross-examination.

3.64 Jurors are entitled to seek to put questions to a witness, but must only do so through the judge, who will determine whether the question should be asked.[78]

3.65 Although technological developments in recent years have changed the way in which some evidence is given in criminal trials, the majority of evidence in trials is given orally by witnesses in the witness box in the manner described above. This may be contrasted with, for example, commercial and other similar civil cases, where the evidence may be very largely, or even exclusively, documentary, and trial judges are provided with bundles of documents prepared in advance by the parties.

3.66 Increasingly, however, evidence in criminal trials is given by means other than oral testimony in court. For example, police interviews and police searches are routinely video-recorded, and the recordings are played back in court. In cases where documentary evidence is important (such as fraud cases), jurors may be provided with bundles of documents, and documents can be displayed on video monitors in the courtroom. In some courts, these monitors can be oriented or switched off so that, when necessary, documents are not displayed to any members the public who may be present in the courtroom. Testimony from children and other protected witnesses may be taken and recorded in advance of the trial and played back to the jury during the trial itself; some witnesses may give their evidence from behind screens so that their identity is hidden from the public.

---

75 RG Kenny, *An Introduction to Criminal Law in Queensland and Western Australia* (2004) [5.83].

76 See Queensland Courts, *Supreme and District Court Benchbook*, 'Directed Verdict' [14] <http://www.courts.qld.gov.au/2265.htm> at 30 November 2009.

77 Criminal Code (Qld) s 619(3).

78 See [10.159]–[10.193], Rec 10-2 below.

3.67 These methods of giving and presenting evidence are not strictly relevant to jury directions themselves, but they reflect a modern trend to consider and use non-traditional means of providing information to the jury.

Matters of law and procedure

3.68 During the trial, various questions of law and procedure may arise. These include the admissibility of evidence and the qualification of certain witnesses as experts. These are heard and determined by the judge in the absence of the jury in a proceeding within the case as a whole called a *voir dire*.[79]

Closing addresses and summing up

3.69 Once the defendant's evidence (if any) has been completed, the parties then address the jury, each summarising the evidence and calling on the jury to convict or acquit the defendant, as the case may be. If the defendant has called any evidence, the defendant's address is first and the prosecutor has a right of reply; otherwise the prosecutor's address is first, followed by the defence's address.[80]

3.70 It is then the judge's duty to sum up the evidence in the case and give the jury its directions on the law that it is to apply. Section 620 of the Criminal Code (Qld) reads:

> **620 Summing up**
>
> (1) After the evidence is concluded and the counsel or the accused person or persons, as the case may be, have addressed the jury, it is the duty of the court to instruct the jury as to the law applicable to the case, with such observations upon the evidence as the court thinks fit to make.
>
> (2) After the court has instructed the jury they are to consider their verdict.

3.71 The content of the summing up and the directions as to the law — and of similar directions, comments and warnings that may be given at the start of, and during, the trial — are outlined in chapters 4, 9 and 11 of this Report.

3.72 The jury then retires to consider its verdict.[81]

Verdict and sentencing

3.73 After giving its verdict, the jury is discharged. If the defendant is found guilty, he or she is convicted and will be sentenced by the judge. The jury has no role in the determination of the sentence. It is for the judge to decide the facts relevant to sentencing,[82] though the judge's view of the facts must be consistent with the jury's verdict.[83]

---

79 RG Kenny, *An Introduction to Criminal Law in Queensland and Western Australia* (2004) [5.85].

80 Criminal Code (Qld) s 619(2), (4), (5).

81 Criminal Code (Qld) s 620(2).

82 See *Evidence Act 1997* (Qld) s 132C.

83 See generally *Cheung v The Queen* (2001) 209 CLR 1 [4]–[5], [14], [16]–[17] (Gleeson CJ, Gummow and Hayne JJ). This lack of involvement in the sentencing process is not a matter for consideration in this enquiry: see [1.14] above and the Terms of Reference in Appendix A.

3.74 As a general rule, a jury should not be concerned with the consequences of its verdict, and the parties' addresses and the judge's summing up should not advert to these issues.[84]

3.75 A jury never gives reasons for its verdict; trial judges and magistrates do both in relation to the verdicts that they reach (where they are the triers of fact) and in sentencing. The jury's verdict is thus opaque, as opposed to the transparency of detailed reasons for judgment, and offers very little guidance to observers about the jury's decision-making processes.[85]

3.76 The jury's verdict must, generally speaking, be unanimous. This is certainly the position in the following cases:

- murder trials;
- trials for offences under section 54A(1) of the Criminal Code (Qld) relating to demands on government agencies with menaces where a mandatory sentence of life imprisonment may be imposed;
- trials for offences against a law of the Commonwealth; and
- where a jury has been reduced to ten people by the time that it gives its verdict.[86]

3.77 However, in other cases a jury may be asked to deliver a non-unanimous verdict if it is unable to reach a unanimous verdict.[87] If after the 'prescribed period' the jury has not reached a unanimous verdict and the judge is satisfied that the jury is unlikely to do so after further deliberation, the judge may ask the jury to reach a non-unanimous verdict.[88] If a verdict can be reached with only one dissenting juror, that then becomes the verdict of the jury.[89]

3.78 In these circumstances, this verdict is the verdict of all but one of the jurors (ie, 11 out of a jury of 12 or ten out of a jury of 11).[90]

3.79 The 'prescribed period' is a period of at least eight hours (with breaks excluded) plus any other period that the judge considers reasonable having regard to the complexity of the trial.[91]

---

84 *Lucas v the Queen* (1970) 120 CLR 171, 174–5; [1970] HCA 14 [7]–[9] (Barwick CJ, Owen and Walsh JJ). See [4.32] below.

85 In relation to the giving of reasons by judges, see The Honourable JJ Spigelman AC, 'Reasons for Judgment and the Rule of Law' (Paper delivered at the National Judicial College, Beijing, 10 November 2003; and at the Judges' Training Institute, Shanghai, 17 November 2003). See also [3.9]–[3.10] above.

86 *Jury Act 1995* (Qld) s 59.

87 This may also occur in trials for murder and under s 54A(1) of the Criminal Code (Qld) where the defendant is liable to be convicted of another offence: *Jury Act 1995* (Qld) ss 59(4), 59A(1). Non-unanimous verdicts were introduced in Queensland in 2008 by the *Criminal Code and Jury and Another Act Amendment Act 2008* (Qld).

88 *Jury Act 1995* (Qld) s 59A(2).

89 *Jury Act 1995* (Qld) s 59A(3).

90 *Jury Act 1995* (Qld) s 59A(6).

91 *Jury Act 1995* (Qld) s 59A(6). See also [17.89]–[17.115] below in relation to the Black direction.

Confidentiality of jury deliberations

3.80 The *Jury Act 1995* (Qld) provides as a general statement that the jury must not separate until it has reached a verdict or been discharged, except in accordance with the Act.[92] However, provided that there is no prejudice to the fairness of the trial, a judge may allow a jury to separate during meal or other adjournments.[93] A judge may also allow a jury to separate after it has retired to consider its verdict if that would not prejudice a fair trial.[94] It is now common in Queensland for juries to separate during the hearing of a trial and even during their deliberations.

3.81 This represents a significant departure from the earlier principle that a jury must be kept together at all times to ensure that it made its decisions and came to its verdict free from any outside influence, and from earlier authorities where even trivial conversations between jurors and other people (including, in particular, other participants in the trial) gave serious cause for concern even if a judge ultimately concluded that there had been no prejudice to the fairness of the trial.[95]

3.82 When a jury is kept together, no-one outside the jury is permitted to communicate with a juror without the judge's leave.[96]

3.83 Information identifying a person as a juror in a particular proceeding must not be published.[97] Information about jury deliberations is also to be kept confidential.[98]

WHO ARE THE JURORS?

3.84 Some demographic information about juries in Queensland was obtained by Richardson in 2001–02 as part of her doctorate work on the impact on jurors of non-verbal cues in courtrooms. Her study covered 192 District Court jurors, 140 in Brisbane and 52 in Cairns. The following statistics emerged from that study:[99]

- There was a slight preponderance of women participating in the study: they constituted 56% of the jurors surveyed. At the time, women made up just over 50% of the Queensland population, according to the Australian Bureau of Statistics.

- Participants were aged between 18 and 69, with an average age of a little over 46 years. Although this was well above the median age of the Queensland population at the time (about 35 years), Richardson noted

92 *Jury Act 1995* (Qld) s 53(1), (2).

93 *Jury Act 1995* (Qld) s 53(3)–(6).

94 *Jury Act 1995* (Qld) s 53(7).

95 See MJ Shanahan, PE Smith and S Ryan, *Carter's Criminal Law of Queensland* (16th ed, 2006) [71,445.10].

96 *Jury Act 1995* (Qld) s 54.

97 *Jury Act 1995* (Qld) s 70(2).

98 *Jury Act 1995* (Qld) s 70(2)–(4). Note, there are some exceptions to this: see *Jury Act 1995* (Qld) s 70(5)–(16). One of these exceptions relates to research in relation to juries which has been authorised by the Supreme Court; such authorisation has been granted to the Commission in relation to the present enquiry: see [2.5]–[2.6], [3.8], [3.52] above.

99 Christine Richardson, *Symbolism in the Courtroom: An Examination of the Influence of Non-Verbal Cues in a District Court Setting on Juror Ability to Focus on the Evidence*, (Doctoral thesis, Griffith University, 2006) 111–6.

that people under 18 cannot be called for jury service and, although she could not determine the mean age of Queenslanders over 18, it is clear that juries would on average be older than the population as a whole.

- The highest level of formal education achieved by the participating jurors is set out in the following table. Over 34% had gone to university and just under 30% had undertaken some form of tertiary education, about two-thirds in all (64.06%) receiving some form of post-secondary school training or education. This suggests that the jury selection process (including challenges) does not necessarily result in 'dumbed-down' juries, bearing in mind that the participants in this survey had actually heard a trial and were not merely drawn from the pool of people summoned to attend for jury service. In fact, a comparison with statistics for the Queensland population as a whole indicated that jurors were better educated than Queenslanders overall.

Post-graduate degree	11.46%
Undergraduate degree	22.91%
TAFE or equivalent	29.69%
Completed Grade 12	11.46%
Completed Grade 11	2.60%
Completed Grade 10	15.63%
Lower than Grade 10	6.25%

Table 3.1: Queensland jurors' education.

- Most jurors were employed, but over one-third reported that they were not in the workforce, as noted in the following table. This is significantly higher than the unemployment rate for Queensland at the time, but would also include retirees, students, carers and full-time homemakers, about which no statistics were noted. Richardson observed that, as difficulties with work caused by jury service is a basis for being excused under the *Jury Act 1995* (Qld), it might be expected that jurors would include a higher percentage of people not in full-time or permanent employment than the adult population as a whole:

Not in workforce	38.30%
Management and professional	36.70%
Trades and labourers	7.45%
Clerical and sales	17.55%

Table 3.2: Queensland jurors' employment status.

- This survey did not look at the ethnic origins of the jurors, nor their first language.

3.85 The participating jurors reported on their previous experience, if any, as jurors. Most had had no prior experience as a juror[100] and just over 20% had 'experienced jury duty'[101] once or twice before. Incredibly, it seemed that one (or a very small number) had had up to nine previous experiences of jury service.[102]

3.86 The results of the recent research carried out by the University of Queensland produced similar results.[103]

- Effectively equal numbers of women (17 or 51.5%) and men (16 or 48.5%) participated in the survey.
- The jurors ranged in age from 21 to 69, with an average age of about 43 years.
- Fourteen jurors (42%) had a bachelor's degree or post-graduate qualification; a further 12 (36%) had a diploma or certificate, one had completed an apprenticeship and the remaining 6 (18%) had completed (or partly completed) secondary school.
- Two-thirds (23 out of 33) of the jurors were employed, four (12%) were retired, three (9%) were employed in the home, two were full-time students and one gave no response.
- No juror described himself or herself as Indigenous.[104]
- All jurors used English as their first language.

3.87 The composition of juries was also one aspect of a survey conducted by Trimboli and published by the Bureau of Crime Statistics and Research ('BOCSAR') in September 2008.[105]

> A total of 1,225 jurors from 112 juries completed a short, structured questionnaire regarding their self-reported understanding of judicial instructions, judicial summing-up of trial evidence and other aspects of the trial process. These jurors heard District Court or Supreme Court trials held between mid-July 2007 and February 2008 in six courthouses in Sydney, Wollongong and Newcastle.[106]

---

100 The precise percentage was not recorded by Richardson: see Christine Richardson, *Symbolism in the Courtroom: An Examination of the Influence of Non-Verbal Cues in a District Court Setting on Juror Ability to Focus on the Evidence*, (Doctoral thesis, Griffith University, 2006) 116.

101 Ibid. It is unclear whether they had actually sat on juries before or simply been summoned.

102 Ibid. The high number of previous experiences of jury duty might be accounted for in part by the fact that a person might be required to attend for jury service more than once during any given jury service period without being empanelled.

103 School of Psychology, University of Queensland (Blake McKimmie, Emma Antrobus and Kathryn Havas), 'Jurors' Trial Experiences: The Influence of Directions and Other Aspects of Trials', Report (November 2009) 7–8.

104 The survey was conducted only in Brisbane.

105 NSW Bureau of Crime Statistics and Research (L Trimboli) 'Juror understanding of judicial instructions in criminal trials' *Crime and Justice Bulletin*, No 199 (2008).

106 Ibid 1.

3.88 Of the 1,225 jurors in the survey, about 1,200 answered several questions about themselves. The following figures emerged:[107]

- The sexes were almost equally represented: 50.8% of the jurors were men and 49.2% were women.

- The age spread was remarkably even:

Age (years)	
18–24	11.8%
25–34	20.8%
35–44	21.5%
45–54	21.4%
55–64	20.3%
65+	4.3%

Table 3.3: NSW jurors' ages.

- Jurors are much better educated than some stereotypes would suggest, with over 41% holding a bachelor's degree or higher. This result might belie some pre-conceptions that jurors overall are not equipped intellectually to handle complex evidence or propositions of law. The comment made in relation to the high education level of Queensland jurors applies more strongly here. The full breakdown of the highest level of education achieved was as follows:

Post-graduate degree	12.7%
Graduate diploma or certificate	8.4%
Bachelor degree	20.2%
Advanced diploma or certificate	12.9%
Certificate level	24.4%
Secondary education	20.9%
Pre-primary or primary education	0.3%
Other (eg, apprentice)	0.2%

Table 3.4: NSW jurors' education.

- The vast majority of jurors were employed, which again suggests that, generally speaking, jurors are not unsophisticated, and of course has implications when considering the impact that jury service has on jurors' lives. The full breakdown of employment status was as follows:

107 Ibid 3–4, 15.

Employed or self-employed	83.2%
Unemployed and seeking work	1.6%
Unemployed and not seeking work	2.1%
Retired	10.0%
Student or other	3.2%

Table 3.5: NSW jurors' employment status.

- English was the first language of 82.6% of the jurors. It is likely that many potential jurors whose command of English was poor were eliminated at some stage before empanelment.

- The BOCSAR survey did not report on jurors' prior experience with the criminal justice system, if any, as jurors or otherwise.

3.89 Recent research in Western Australia also revealed that jurors had a higher level of formal education than the general population, even taking into account an assumption that jurors who had received education to a lower level may have chosen not to participate in the survey.[108]

3.90 The BOCSAR research does not indicate whether there was any skewing of these results in longer trials, particularly in relation to employment status and education, as this has been found in research in the United Kingdom with manual workers and unskilled workers more likely to serve in trials lasting 11 days or longer, and professionals and skilled non-manual workers less likely to.[109]

3.91 That UK research also showed that a significant number of jurors had prior court experience: 13% as witnesses, 8% as defendants and 4% as victims. About one in five (19%) had previously served as a juror.[110]

3.92 However, significantly, over 40% claimed that they had a good knowledge of the court process before their jury service, apparently largely from the media.[111]

3.93 The composition of juries in Queensland and elsewhere in Australia will be considered by the Commission in greater detail in its consultation paper on jury selection, which is expected to be published in the first half of 2010.

108 Judith Fordham, 'Bad Press: Does the Jury Deserve It?' (Paper presented at the 36th Australian Legal Convention, Perth, 17–19 September 2009) 16.

109 Home Office (UK), *Jurors' perceptions, understanding, confidence and satisfaction in the jury system: a study in six courts*, Home Office Online Report 05/04, 6 <http://www.homeoffice.gov.uk/rds/pdfs2/rdsolr0504.pdf> at 30 November 2009.

110 Ibid 7.

111 Ibid.

Chapter 4

Jury Directions and their Problems

INTRODUCTION

4.1 To assist the jury in its role, and as part of their duty to ensure a fair trial, judges are required to give the jury a variety of directions and warnings about law and how to apply it to, or how to assess, the evidence, and a summing up of the case. They may also add some of their own comments about the evidence.

4.2 To that end, the object of directions and the summing up is to assist the jury to avoid 'erroneous or unfair reasoning'[1] and reach a proper verdict — a failure to give proper directions may amount to a miscarriage of justice.[2] The judge's role in giving directions to jurors 'is crucial to their understanding of the relevant principles of law and the manner in which they will impact in the particular case'.[3]

4.3 The summing up is thus one of the most significant of the judge's functions in a jury trial and perhaps 'the most important act of communication between judge and jury':

> It is at this point that the trial judge endeavours to communicate to the jury the principles of law which they must apply to the facts of the case. It is also the time at

1 Hon G Eames, 'Tackling the complexity of criminal trial directions: What role for appellate courts?' (2007) 29(2) *Australian Bar Review* 161, 165.

2 As to appeals on the basis of a miscarriage of justice because of a misdirection on the law or a misstatement of the evidence, see Criminal Code (Qld) ss 668D(1), 668E(1). Not every failure to fully direct the jury will amount to a miscarriage of justice: eg, *Holland v The Queen* (1993) 117 ALR 193, 200. See generally MJ Shanahan, PE Smith and S Ryan, *Carter's Criminal Law of Queensland* (16th ed, 2006) [s 668E.50.1].

3 *R v PZG* (2007) 171 A Crim R 62 [19]; MJ Shanahan, PE Smith & S Ryan, *Carter's Criminal Law of Queensland* (16th ed, 2006) [s 620.10].

> which the trial judge must attempt to straddle the needs of good communication and the scrutiny of the Court of Appeal.[4]

4.4 In meeting these twin aims, judges are faced with a difficult task. An increase in the number and complexity of the jury directions that are required to be given — to avoid appellable error — may frustrate the clarity and comprehensibility of the judge's instructions. If juries are unable to understand (and therefore to apply) jury directions, this may in turn undermine the effectiveness of those directions in ensuring a fair trial.

4.5 The problems associated with jury directions may be broadly divided into two areas. The first covers problems with the content of the directions which are given to the jury, and encompasses difficulties associated with the complexity of the law that has to be explained to the jury, and difficulties associated with the manner of expression employed in directions, particularly those mandated in more or less precise terms by appellate courts.

4.6 The second broad area covers problems associated with the way in which juries comprehend, handle and apply directions and other information and guidance given to them by judges and counsel. These problems invite a review of the psychology involved in jury comprehension and jury decision-making processes, and a consideration of the wider question of in-court communication between a jury and the other participants in the trial.

4.7 This chapter outlines the types of directions and warnings that must be given in criminal trial and provides an overview of the key difficulties associated with jury directions. Chapter 5 canvasses the findings of existing empirical research about the extent to which juries comprehend and apply judges' directions, warnings and summings up.

WHAT ARE JURY DIRECTIONS?

4.8 Judges are required to give a number of specific, and sometimes quite complex, jury directions in criminal trials. This reflects both common law and statutory developments in the criminal law.[5]

4.9 Appellate decisions of the High Court have mandated that particular directions be given (for example, in relation to various types of unreliable evidence[6]) as well as the required content of some of those directions (as with warnings about consciousness of guilt evidence[7]). While appellate courts do not usually translate these legal principles into standard directions,[8] judges in Queensland have the benefit of the model directions and accompanying notes contained in the Queensland Supreme and District

---

4 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, 78. See also, JB Bishop, *Criminal Procedure* (2nd ed, 1998) 517.

5 See generally Victorian Law Reform Commission, *Jury Directions*, Consultation Paper No 6 (2008) [2.6].

6 Eg *Bromley v The Queen* (1986) 161 CLR 315, 320; *McKinney v The Queen* (1991) 171 CLR 468; *Pollitt v The Queen* (1992) 174 CLR 558. See also chapter 16 in this Report.

7 *Edwards v The Queen* (1993) 178 CLR 193. See [14.2]–[14.6] below.

8 Although the Victorian Court of Appeal has noted that 'Decisions in [some] areas of the criminal law demonstrate the importance of adhering to the *ipsissima verba* of High Court formulations': *R v Gould* [2009] VSCA 130 [49] (Vincent, Nettle & Neave JJA) (note omitted).

Court Benchbook (the 'Queensland Benchbook') published by the Courts.[9] While the Queensland Benchbook is not intended to 'establish any inflexible or mandatory regime',[10] in some areas, judges are actively discouraged from straying from it.[11]

4.10 Statutory provisions — notably those in the *Evidence Act 1977* (Qld), the Criminal Code (Qld), and the *Evidence Act 1995* (Cth) — also impact on the range and type of specific directions that may be given. Some provisions mandate directions additional to those required at common law. Other provisions have over-ridden or modified particular common law requirements.

4.11 Some of the provisions in the *Evidence Act 1977* (Qld) deal with the admissibility of certain evidence, such as hearsay evidence, or the manner in which particular evidence, such as the evidence of an affected child or a special witness, is to be received. In consequence, the Act requires certain directions to be given to the jury so that the jury does not give undue weight to particular evidence or draw an unfair adverse inference against the defendant because of the way in which the evidence has been received. For example, sections 21A(8) and 21AW mandate particular instructions when evidence is received from a special witness or an affected child pursuant to the special measures provided for in the Act.[12]

4.12 Other jury directions required under the *Evidence Act 1977* (Qld) relate to evidence given by an operative whose identity has been protected,[13] the defendant's being barred from cross-examining a protected witness in person[14] and the admission of hearsay evidence.[15]

4.13 Section 632 of the Criminal Code (Qld) also deals with jury directions. It limits the directions that may be given in the case of uncorroborated testimony. It provides that the judge may comment on the evidence but must not suggest to the jury that the law regards any class of people as unreliable witnesses.[16]

4.14 Provisions in the *Evidence Act 1995* (Cth) may also be relevant.[17] That Act requires specific jury directions in relation to identification evidence,[18] unreliable

9 Queensland Courts, *Supreme and District Court Benchbook* <http://www.courts.qld.gov.au/2265.htm>. The Benchbook is discussed in more detail in chapter 7 of this Report.

10 Queensland Courts, *Supreme and District Court Benchbook*, 'Foreword' [2] <http://www.courts.qld.gov.au/2265.htm> at 30 November 2009.

11 See, for example, Queensland Courts, *Supreme and District Court Benchbook*, 'Reasonable Doubt' [57] <http://www.courts.qld.gov.au/2265.htm> at 30 November 2009, discussed at [17.7] and following below. See also *R v De Silva* (2007) 176 A Crim R 238 [21] (Jerrard JA) (directions on attempt); *R v Mason* [2006] QCA 125 [27] (McMurdo P) (limited-use directions in relation to evidence of the complaint); *R v Armstrong* [2006] QCA 158 [34] (McMurdo P) (directions on defence evidence); and *R v Stuart* [2005] QCA 138 [20] (directions on accident under s 23(1)(b) of the Criminal Code (Qld)).

12 *Evidence Act 1977* (Qld) ss 21A(8), 21AW are discussed at [4.121]–[4.128] of the Issues Paper.

13 *Evidence Act 1977* (Qld) s 21KA.

14 *Evidence Act 1977* (Qld) s 21R. A protected witness means a witness under 16 years; a witness who is a person with an impairment of the mind; or, for certain offences and in particular circumstances, an alleged victim of the offence: *Evidence Act 1977* (Qld) s 21M.

15 *Evidence Act 1977* (Qld) s 93C. The specified directions are required only if requested by a party and unless there are good reasons for not doing so.

16 Criminal Code (Qld) s 632 is discussed at [15.68] and following, and [16.7] and following below.

17 While the *Evidence Act 1995* (Cth) applies to all proceedings in a federal court and, to the extent of certain miscellaneous provisions such as those dealing with proof of Commonwealth documents, to proceedings in all Australian courts, State evidence laws apply in State courts exercising federal jurisdiction: *Evidence Act 1995* (Cth) ss 4(1), 5; *Judiciary Act 1903* (Cth) s 79.

18 *Evidence Act 1995* (Cth) ss 115(7), 116.

evidence, such as hearsay or accomplice evidence,[19] and any significant forensic disadvantage suffered by the defendant as a result of a delay in prosecution.[20] In addition, the Act removes the requirement to give uncorroborated evidence warnings[21] and limits the warnings that may be given in respect of children's evidence.[22]

4.15 Some of the directions that trial judges are required to give, and the form those directions must take, are more controversial than others: for example, the Longman direction relating to the complainant's delay in reporting an alleged offence.[23]

Directions

4.16 Jury directions are statements about the law made by the judge which the jury must follow. These are also referred to as jury instructions[24] and sometimes as jury charges.[25] Judges are required, as part of their duty to ensure a fair trial, to give directions to the jury on 'so much of the law as they need to know in order to dispose of the issues in the case'.[26]

4.17 Directions may relate to substantive, procedural or evidentiary points of law. The directions to be given in a particular trial will depend on what is required to ensure a fair trial in the circumstances of the case. Some directions, however, must be given in every criminal trial. These include directions about the elements of the offence (which are substantive directions) and the burden and standard of proof (which are procedural directions).[27]

4.18 As is reflected by the structure of the Queensland Benchbook, jury directions are usually given during three phases of the trial. At the start of the trial, judges will give some instructions in their opening remarks to the jury on general legal concepts and procedural matters.[28] The opening remarks set out in the Queensland Benchbook are discussed in chapter 9 of this Report.[29]

---

19 *Evidence Act 1995* (Cth) s 165.

20 *Evidence Act 1995* (Cth) s 165B.

21 *Evidence Act 1995* (Cth) s 164(3).

22 *Evidence Act 1995* (Cth) s 165A.

23 See Queensland Courts, *Supreme and District Court Benchbook* 'Delay between (Sexual) Incident and Complaint (Longman Direction)' [65] <http://www.courts.qld.gov.au/2265.htm> at 30 November 2009. This direction is based on the High Court's decision in *Longman v The Queen* (1989) 168 CLR 79. See [15.10] and following below.

24 Eg *RPS v The Queen* (2000) 199 CLR 620 [41], [43] (Gaudron ACJ, Gummow, Kirby and Hayne JJ).

25 Eg Judicial College of Victoria, 'Victorian Criminal Charge Book' <http://www.judicialcollege.vic.edu.au/publications/victorian-criminal-charge-book> at 30 November 2009.

26 *RPS v The Queen* (2000) 199 CLR 620 [41] (Gaudron ACJ, Gummow, Kirby and Hayne JJ). See also *Alford v Magee* (1952) 85 CLR 437, 466.

27 *RPS v The Queen* (2000) 199 CLR 620 [41] (Gaudron ACJ, Gummow, Kirby and Hayne JJ).

28 See Queensland Courts, *Supreme and District Court Benchbook*, 'Trial Procedure' [5B] <http://www.courts.qld.gov.au/2265.htm> at 30 November 2009 See also JRP 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, 239–43. The findings of this research with respect to judges' opening remarks are discussed at [9.10]–[9.17] below. In relation to Victoria, see also E Najdovski-Terziovski, J Clough and JRP Ogloff, 'In your own words: A survey of judicial attitudes to jury communication' (2008) 18 *Journal of Judicial Administration* 65, 71–2.

29 See [9.8]–[9.9] below.

4.19 Jury directions might also be given during the course of a trial, especially in lengthy or complex trials.[30] Typically, these are evidentiary directions and are given as the need arises, but the Queensland Benchbook also contains suggested directions on a range of other issues that may require directions during the course of a trial.[31] These include directions dealing with:

- the defendant's discharge of his or her counsel part-way through the trial;
- transcripts of tape recordings heard as evidence;
- the effect of the dismissal of some of the charges against the defendant, and of the disposition of charges against a co-defendant;
- translations of evidence given in a language other than English;
- warnings not to speculate about what may have happened at an earlier trial of the charges; and
- the ability of the jury to have questions asked of witnesses.[32]

4.20 The majority of jury directions, however, are given as part of the judge's summing up at the conclusion of the evidence and closing addresses by counsel. It is at this stage of the trial that the judge is required to instruct the jury on the law applicable to the case[33] and to 'assist the jury in connexion with the facts relevant to their consideration of [the alleged offence]'.[34] The summing up is discussed in more detail below.

Warnings

4.21 Directions on the evidence are also called warnings. Warnings direct the jury about 'how they should *not* reason or about particular care that must be shown before accepting certain kinds of evidence'.[35]

4.22 Judges must give a warning whenever it is necessary 'to avoid a perceptible risk of miscarriage of justice arising from the circumstances of the case'.[36] They should be couched in terms that tell the jury that it is bound to follow them.[37] Special warnings

30 These are sometimes referred to as 'instructions in running' or 'ongoing instructions'. See, for example, *R v Kirby* [2000] NSWCCA 330 [68] (Wood CJ); *R v PZG* (2007) 17 A Crim R 62 [22].

31 Queensland Courts, *Supreme and District Court Benchbook* [8]–[22] <http://www.courts.qld.gov.au/2265.htm> at 30 November 2009.

32 See [10.157]–[10.193] below.

33 Criminal Code (Qld) s 620(1). Sometimes directions may also need to be given to the jury after it has retired to consider its verdict. An example is the Black direction that is given if it appears the jury is encountering difficulty in reaching a verdict: *Black v The Queen* (1993) 179 CLR 44, 51 (Mason CJ, Brennan, Dawson and McHugh JJ). This is discussed at [17.89] and following below.

34 *Pemble v The Queen* (1971) 124 CLR 107, 120 (Barwick CJ).

35 *RPS v The Queen* (2000) 199 CLR 620 [41] (Gaudron ACJ, Gummow, Kirby and Hayne JJ).

36 *Longman v The Queen* (1989) 168 CLR 79, 86 (Brennan, Dawson, Toohey JJ); *Bromley v The Queen* (1986) 161 CLR 315, 325 (Brennan J).

37 *Azzopardi v The Queen* (2001) 205 CLR 50. Some concern has been expressed, however, that warnings of this sort may be misinterpreted by juries as coded instructions to acquit the defendant: see [15.14] below.

are also required in particular cases; for example, in relation to certain types of evidence in sexual offence cases.[38]

4.23 There is an important distinction between a warning, which is a direction that the jury is bound to follow, where the judge is *instructing* the jury how *not* to reason or placing limits on the use of certain evidence, and a comment on the evidence, which the jury is not bound to follow, where the judge is *suggesting* how the jury *might* reason.

Comments

4.24 While it is the jury's province to decide questions of fact, it is sometimes appropriate for the judge to make limited comments on factual issues.[39] For example, a suggestion that the jury may attach particular significance to a fact or that particular evidence may be considered of greater weight is a comment.[40]

4.25 A comment differs from an evidentiary direction or warning by suggesting how the jury may (rather than instructing it on how it may *not*) reason toward a conclusion of guilt.[41] Because it is not a direction, the jury is not bound to follow a judge's comment.[42]

4.26 In general, judges are free to make whatever comments they see fit provided that it is made clear to the jurors that all factual decisions are for them and that any comments on the evidence made by the judge are no more than some factors that they can take into account.[43] In this regard the High Court has commented:

> And, of course, it has long been held that a trial judge may comment (and comment strongly) on factual issues.[44] But although a trial judge *may* comment on the facts, the judge is not bound to do so except to the extent that the judge's other functions require it. Often, perhaps much more often than not, the safer course for a trial judge will be to make no comment on the facts beyond reminding the jury, in the course of identifying the issues before them, of the arguments of counsel.[45] (note and emphasis in original)

The summing up

4.27 In a criminal trial, the judge is required to direct the jury about the law applicable to the case after the evidence has been given and closing addresses by counsel have

---

38 See Queensland Courts, *Supreme and District Court Benchbook*, [62]–[66] <http://www.courts.qld.gov.au/2265.htm> at 30 November 2009. Warnings given in sexual offence cases are discussed in chapter 15 of this Report.

39 Criminal Code (Qld) s 620(1) provides that it is the duty of the court to instruct the jury as to the law applicable to the case 'with such observations upon the evidence as the court thinks fit to make'. See also *R v Zorad* (1990) 19 NSWLR 91, 106–7.

40 *Mahmood v Western Australia* (2008) 232 CLR 397 [16] (Gleeson CJ, Gummow, Kirby and Kiefel JJ).

41 *Azzopardi v The Queen* (2001) 205 CLR 50 [50] (Gaudron, Gummow, Kirby and Hayne JJ).

42 Ibid. The jury must be directed that any comments made by the judge are to be taken as suggestions only and are in no way binding on the jury: *Smith v R* [2008] WASCA 128 [155]–[156] (Buss JA), [273] (Miller JA).

43 See MJ Shanahan, PE Smith and S Ryan, *Carter's Criminal Law of Queensland* (16th ed, 2006) [s 620.45] and the cases cited there.

44 See, for example, *Tsigos v The Queen* (1965) 39 ALJR 76 (note).

45 *RPS v The Queen* (2000) 199 CLR 620, 637; [2000] HCA 3 [42] (Gaudron ACJ, Gummow, Kirby and Hayne JJ).

been made.[46] This is also called the judge's 'summing up' or 'charge' to the jury.[47] The judge must instruct the jury about the relevant law, including the elements of the offence and the burden and standard of proof, identify the issues to be decided and relate the law to them, and put the defence to the jury fairly.[48] A misdirection given in the judge's summing up is often grounds for appeal.[49]

4.28 The summing up will include directions and, where necessary, warnings. This will include general directions that are required in every criminal jury trial,[50] including procedural directions on the burden and standard of proof and the respective functions of the judge and jury. The Queensland Benchbook also provides suggested directions on what is and is not evidence, proof of primary facts and the drawing of inferences. The judge is also required to give directions on the elements of the offences charged and relevant matters of criminal responsibility, including applicable defences. The summing up may also include comments on the facts, though the judge must give a direction that the jury is the sole judge of the facts and may ignore any comment the judge makes on the facts.[51] Given the material that must be covered in a summing up, it may occupy a considerable time, depending on the circumstances of the particular case.[52]

4.29 The clear duty at common law for the trial judge to sum up the case and, in doing so, to relate the evidence in a trial to the legal and factual issues that the jury must resolve was stated by the High Court in *Alford v Magee*:

> And it may be recalled that the late Sir Leo Cussen 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. If the case were a criminal case, and the charge were of larceny, and the only real issue were as to the *asportavit*, probably no judge would dream of instructing the jury on the general law of larceny. He would simply tell them that if the accused did a particular act, he was guilty of larceny, and that, if he did not do that particular act, he was not guilty of larceny. … looking at the matter from a practical point of view, the real issues will generally narrow themselves down to an

46 Criminal Code (Qld) s 620(1). In the other Australian jurisdictions, eg, *Criminal Code* (NT) s 364; *Criminal Code* (Tas) s 371(j); *Criminal Procedure Act 2004* (WA) s 112. In New South Wales, the judge need not summarise the evidence if he or she is of the opinion that, in all the circumstances, it is not necessary: *Criminal Procedure Act 1986* (NSW) s 161(1).

47 This is the case in Victoria: eg, *R v Thompson* [2008] VSCA 144; *Victorian Criminal Charge Book*, 'Charge' [3.1.2] <http://www.justice.vic.gov.au/emanuals/CrimChargeBook/default.htm> at 16 December 2009.

48 *RPS v The Queen* (2000) 199 CLR 620 [41]–[42] (Gaudron ACJ, Gummow, Kirby and Hayne JJ); *Mogg* (2000) 112 A Crim R 417 [54] (McMurdo P).

49 Criminal Code (Qld) ss 668D(1), 668E(1). And see generally MJ Shanahan, PE Smith and S Ryan, *Carter's Criminal Law of Queensland* (16th ed, 2006) [s 668E.50].

50 See generally *RPS v The Queen* (2000) 199 CLR 620 [41] (Gaudron ACJ, Gummow, Kirby and Hayne JJ); Queensland Courts, *Supreme and District Court Benchbook*, 'General' [24] <http://www.courts.qld.gov.au/2265.htm> at 30 November 2009.

51 *Azzopardi v The Queen* (2001) 205 CLR 50 [50]; *Smith v The Queen* (2008) 37 WAR 297; [2008] WASCA 128 [155] (Buss JA).

52 Research in relation to the average length of summings up by Australian and New Zealand judges is discussed at [4.88]–[4.94] below.

> area readily dealt with in accordance with Sir Leo Cussen's great guiding rule.[53] (emphasis added)

4.30 In Queensland, the trial judge's duty to sum up to the jury is set out in section 620 of the Criminal Code (Qld):

> **620 Summing up**
>
> (1) After the evidence is concluded and the counsel or the accused person or persons, as the case may be, have addressed the jury, it is the duty of the court to instruct the jury as to the law applicable to the case, with such observations upon the evidence as the court thinks fit to make.
>
> (2) After the court has instructed the jury they are to consider their verdict.

4.31 The duty to sum up the law relevant to the case in hand is considered in greater detail in chapter 11 of this Report

4.32 The summing up should not discuss the consequences of the jury's verdict, whatever it may turn out to be, as the jury itself should not be concerned with these issues. The High Court has considered this point:

> Indeed, the jury are not concerned with the consequences which may follow upon their verdict whether it be a verdict of guilty of the offences charged or a special verdict of not guilty on the ground of insanity. In our opinion, the judge is not bound to tell them, and counsel ought not to be allowed in any case to tell them, of the possible results of their verdict. No doubt, in places where capital offences remain, juries know what is the maximum punishment for the offence. Even then, in our opinion, it is undesirable that counsel be allowed to attempt to divert the jury from their consideration of the issues for their decision by emphasis upon the consequences of their verdict should they convict.
>
> Not only do we think that a trial judge is not bound to inform the jury of the consequences of a verdict of not guilty on the ground of insanity, but in our opinion it is in general unnecessary and undesirable that he should do so. With great respect to so experienced a judge as the late Barry J., we are unable to accept as universally valid the reason he gives in *Reg. v. Weise* (1969) VR 953 for giving the jury information as to the consequences which may follow on a verdict of not guilty on the ground of insanity. Certainly Dixon J. (as he then was) did not so think when summing up in *R. v. Porter* [1933] HCA 1; (1933) 55 CLR 182, a case in which insanity was pleaded. There is, in our opinion, no need to complicate a trial and the resolution of the issues which arise in it by the introduction of what is truly, so far as the jury are concerned, an extraneous matter. It is, in our opinion, generally undesirable that reference should be made to the possible consequences which may ensue upon any verdict which the jury may properly return.
>
> Of course, there may be occasions when it is appropriate to apprise the jury of the consequences of the special verdict, i.e. not guilty on the ground of insanity. For example, if counsel should so far exceed his function as to speak to the jury of such consequences it may be not only desirable but necessary in the interests of justice for the judge to advert to the matter in his summing up. *Attorney-General (SA) v. Brown* (1960) AC 432 affords an illustration of such a case (see p. 454 of the report). There may be other circumstances in which a like intervention by the presiding judge is justified and at times called for. But the conclusion that he may, or

53 *Alford v Magee* (1952) 85 CLR 437, 466; [1952] HCA 3 [28] (Dixon, Williams, Webb, Fullagar and Kitto JJ).

should, refer in such cases to the consequences of the verdict can only arise in special circumstances.[54]

THE CRITICAL ROLE OF JURY DIRECTIONS

4.33 The accuracy and fairness of directions to juries, and the accurate and fair application of those directions during a jury's deliberations are central to the community's faith in the jury system. Weinberg J noted this in the recent decision of the Victorian Court of Appeal in *R v Dupas (No 3)*:[55]

> It is a fundamental tenet of our criminal justice system that jurors decide cases according to their oaths, ***and that they obey instructions that trial judges give them***. In *Gilbert v The Queen*,[56] McHugh J said:
>
> > The criminal trial on indictment proceeds on the assumption that jurors are true to their oath, that, in the quaint words of the ancient oath, they hearken to the evidence and that they obey the trial judge's directions. On that assumption, which I regard as fundamental to the criminal jury trial, the common law countries have staked a great deal. If it was rejected or disregarded, no one — accused, trial judge or member of the public — could have any confidence in any verdict of a criminal jury or in the criminal justice system whenever it involves a jury trial. If it was rejected or disregarded, the pursuit of justice through the jury system would be as much a charade as the show trial of any totalitarian state. Put bluntly, unless we act on the assumption that criminal juries act on the evidence and in accordance with the directions of the trial judge, there is no point in having criminal jury trials. It is of course true that, if a jury persists in returning a verdict that is contrary to law, the trial judge must accept it. But that only means in Lord Mansfield's words that, although '[i]t is the duty of the Judge ... to tell the jury how to do right ... they have it in their power to do wrong'.
>
> > In my respectful opinion, the fundamental assumption of the criminal jury trial requires us to proceed on the basis that the jury acted in this case on the evidence and in accordance with the trial judge's directions and that they would have done so even if manslaughter had been left as an issue, as it should have been left. In *Spratt*, Pidgeon J said, correctly in my opinion, 'that an appellate court must proceed on the basis that the jury have understood and applied the law in reaching a true verdict'.[57]
>
> …
>
> Of course, the point made by McHugh J had been made many times before.
>
> In *Yuill v R*,[58] Kirby ACJ observed:
>
> > Courts will assume that jurors, properly instructed, will accept and conform to the direction of the trial judge to decide the case solely on the evidence placed before them in the court ... There is an increasing body of judicial opinion, lately expressed, to the effect that whatever pre-trial publicity exists,

54 *Lucas v the Queen* (1970) 120 CLR 171, 174–5; [1970] HCA 14 [7]–[9] (Barwick CJ, Owen and Walsh JJ). See [3.74] above.

55 [2009] VSCA 202 [204], [215]–[216].

56 [2000] HCA 15; (2000) 201 CLR 414.

57 Ibid [31]–[32] (citations omitted).

58 (1993) 69 A Crim R 450, 453–4. This passage was cited with approval by Spigelman CJ in *R v Bell* [1998] NSWSC 570, 7–8 (Unreported, Spigelman CJ, Abadee and Ireland JJ, 8 October 1998).

> jurors when they take on the solemn responsibility of the performance of their duties in the court room, differentiate between gossip, rumour, news and opinion which they hear before the case and the evidence which they hear in the court in the trial for which they are empanelled.

To the same effect is *R v Milat*,[59] where Gleeson CJ (with whom Meagher JA and Newman J agreed) had this to say:

> … Ultimately, however, it is the capacity of jurors, properly instructed by trial judges, to decide cases by reference to legally admissible evidence and legally relevant arguments, and not otherwise, that is the foundation of the system. (notes in original; emphasis added)

4.34 Jury directions are one of the trial judge's key tools for ensuring that a criminal jury trial is as fair, procedurally, as the judge can make it within the constraints of the law. Considerable faith has thus been placed in jury directions, and juries' willingness and ability to follow them, in minimising and curing defects that might otherwise threaten the fairness of jury trials and the community's continued confidence in the criminal justice system.

4.35 Recent research in Western Australia confirms the belief of many lawyers that jurors regard judicial directions very seriously.[60] Research in many different jurisdictions also demonstrates, however, that juries do not always understand the directions given to them, whether because the law is too difficult, the manner of presentation is confusing, or the import of the direction is such that it has the opposite effect to that intended.[61] As a result, some of the faith placed on jury directions appears, in reality, to be misplaced.

4.36 Ironically, while the ability of juries to evaluate the evidence and decide cases fairly is regarded with such caution that juries are given elaborate instructions to offset the risk that they reason toward a verdict erroneously, they are at the same time assumed to have the sophisticated intellectual prowess that is necessary to enable them to understand and apply those same directions, however complex, lengthy and counter-intuitive they may be.

4.37 It follows that the resolution of problems associated with jury directions — both in terms of their content, presentation and legal accuracy, and in relation to the way that they are handled by juries — is critical in maintaining the confidence that the community places in the criminal justice system as a whole.

PROBLEMS WITH JURY DIRECTIONS

4.38 As the preceding discussion indicates, the trial judge is faced with a difficult task in summing up a case and in giving a jury proper and appropriate directions as part of that exercise, and throughout the case as circumstances and the law demand. One element of that difficulty is the tension between providing directions that are thorough and subtle enough to be an accurate statement of the law and of the risks associated with properly assessing the evidence, and which are at the same time comprehensible

59 [1998] NSWSC 795, 47 (Unreported, Gleeson CJ, Meagher JA, Newman J, 26 February 1998).

60 Judith Fordham, 'Bad Press: Does the Jury Deserve It?' (Paper presented at the 36th Australian Legal Convention, Perth, 17–19 September 2009) 11.

61 This research is canvassed at [5.38]–[5.64], [12.11]–[12.14], [14.5], [17.13]–[17.21] of this Report.

to the jurors, who are not lawyers and are facing these tasks for possibly the first and only times in their lives.

> The task of directing jurors in a manner which is 'clearly right' is, to say the least, a difficult one. The judge must explain often complex legal principles to jurors who have little, if any, knowledge of the law. However, if it is difficult for judges, we should also spare a thought for jurors, who must decide the accused's guilt on the basis of oral directions which may take two hours or two days.[62] (notes omitted)

4.39 Trial judges have several audiences. Most obviously, there is the jury of non-lawyers in the court in front of them who need guidance that they can apply in the immediate future. In addition, there are the defendants, victims and their families and supporters; and, of course, the general public. There is also a secondary audience of lawyers who will, at some leisure, pore over the judges' words in the light of the law and the outcome of the case. Some of those lawyers will do so for the express purpose of looking for error that might support an appeal. The primary audience, however, is the jury:

> The main object of a summing up is the proper instruction of the jury on the law which governs its deliberations. … A judge does not prepare his summing up to satisfy the demands of the Court of Criminal Appeal: he prepares it to instruct the jury comprehensibly on the relevant matters.[63]

4.40 Nonetheless, judges strive to ensure as best they can that the summing up and directions are also correct in law, and seek to reduce the risk of error, appeal and re-trial as a matter of professionalism and as a discharge of their obligations to the defendant, victim and the public.

4.41 A trial judge's difficulties are exacerbated by the increase in the number and complexity of the directions that appellate courts, legislation and other social developments now require of them. And, of course, directions are given ex tempore as needed during the trial and immediately following the end of counsel's addresses. Judges do not often have the luxury of being able to script their directions in advance and must exercise their judgment on the run as the case proceeds.

4.42 At the heart of any jury direction is a communication from the judge to the jury:

> A summing-up to a jury is an exercise in communication between judge and jury … It is, as has frequently been emphasised, desirable that a judge employs easily understood, unambiguous and non-technical language.[64]

4.43 The problems said to arise with jury directions occur when this communication is unsuccessful, in part or whole. That may be because the direction is deficient as a matter of law or because the language used does not meet the criteria set out in the preceding quotation. It has been said that the failure of judges to communicate effectively with juries may arise from a number of related problems within the criminal justice system, as are summarised below.[65]

---

62 J Clough, 'The role of judges in assisting jury comprehension' (2004) 14 *Journal of Judicial Administration* 16, 16.

63 *R v CBR* [1992] 1 Qd R 637, 638 (de Jersey J).

64 *R v Forbes* [2005] NSWCCA 377 [79] (Spigelman CJ).

65 See Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [2.8]–[2.12] for a discussion of some of these points.

An increase in the number and complexity of directions

4.44 The number and length of jury directions have increased in recent times to the point where it is now increasingly apparent that directions may no longer serve their principal function of stating clearly the law and rules of evidence that the jury must apply. The consequence of this is that juries (and judges) become over-burdened with directions that ultimately serve to confuse rather than clarify.

4.45 The proliferation of directions has been due in large measure to the increasing number of decisions of appellate courts in which those courts have required certain directions to be given, and more frequently in recent times more or less dictated the content of those directions in terms better suited for lawyers rather than jurors. In doing so, the appellate courts remove or restrict trial judges' discretion to give a direction, and to determine the terms in which directions are to be given.

4.46 Moreover, it is said that trial judges feel, or are, obliged to give directions in terms mandated by appellate courts more with a view to reducing the risk of appeal points based on procedural oversight than with a view of assisting the jury.[66] This issue was addressed by the Chief Justice of Queensland, the Honourable Paul de Jersey, who expressed the judge's role in these terms:

> The focus of an appeal court in determining the sufficiency of a summing up should rest more on the prospect of the jury's understanding the relevant concepts, than on the question whether the necessary matters have been included in their traditional formulations. A judge does not prepare his summing up to satisfy the demands of the Court of Criminal Appeal: he prepares it to instruct the jury comprehensibly on the relevant matters.[67]

4.47 However, there is a concern that trial judges may feel that, in order to avoid 'unnecessary' appeals and re-trials on procedural grounds, they must include in their summings up all directions that might possibly be considered relevant or required, however tangentially, and thus lengthen and over-complicate those directions, reducing their comprehensibility and the jury's ability to apply them. This is partly a consequence of the need to ensure, and be seen to ensure, a fair trial, for it is this over-riding principle that informs the decision of any trial judge and any appellate court when considering the necessity, adequacy or appropriateness of giving a jury direction.

4.48 The impact of appellate court decisions on jury directions was succinctly summarised by Hon J Eames in this way:

> Over the past 20 years[68] appellate courts have applied great intellectual skill to the articulation and refinement of the criminal law but, with some notable exceptions, have not attempted to translate their judgments into the language of practical, and brief, directions which trial judges can deliver to lay jurors. That role has fallen to the authors of court bench books or has been left to individual judges when fashioning a jury charge for an individual case. Being fearful of error, judges have tended to couch their charges in language very close to that of the appellate judgments. When in doubt as to the applicability of one or other of the judicial warnings to the

66 See ibid [2.20], [2.21].

67 *R v CBR* [1992] 1 Qd R 637, 638 (de Jersey J).

68 The authors of 'Report on Uniform Evidence Law' 2005, by Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission considered, at p 598 [18.26] that 'the expansion of the common law judicial warnings began with the decision of the High Court in *Bromley v R*': (1986) 161 CLR 315; 67 ALR 12.

> case at hand judges have usually included such directions. In the result, directions on a wide range of topics have become longer and more complex.[69] (note in original)

4.49 One problem unavoidably associated with the increase in number and complexity of jury directions is that this proliferation is accompanied by an inevitable risk of the increase in appeals that are raised, and upheld, on purely procedural grounds.[70] Complexity and prolixity invite error: it simply becomes easier for careful and thorough judges to make mistakes, which may encourage speculative appeals based on a detailed combing of the transcript of the trial for arguable points based on the asserted inadequacy of jury directions.[71] This complexity may ultimately defeat the principal purpose of jury directions, which is to inform the jury:

> From the perspectives of the trial judge and jury alike, the respective roles performed by them in a criminal trial becomes increasingly complex and onerous. The number of issues and volume of material with which they must deal on occasions can be seen to strain the process to its limits, and even cast doubt upon the confidence with which the outcome can be accepted.
>
> The provision of instructions is designed to ensure that the jury understand what it is that they have to decide, what material can or cannot be taken into account in arriving at their decision and the manner in which that material may be used. Often, as a trial judge, I experienced concern about the capacity of jury members to follow and comply with the plethora of sometimes complicated instructions that I was obliged to give them. I am confident that this view would be generally shared by most, if not all, of those currently performing that role. It is not simply a question of the protraction of an already complex and costly process that is involved, but much more importantly the reliability of the jury verdict and the respect with which it is regarded in the community.[72]

4.50 It thus becomes easier for jurors to become confused and to fall into error in their use of the evidence and their application of the law to the evidence as they find it.

Complexity of the law

4.51 If the law on a given issue is complex and cannot be stated simply or concisely, it will follow almost inevitably that directions to a jury on that issue will also be complex. A re-casting of the direction in a format that is more digestible to a jury may be either impossible or fail to state the law accurately.

4.52 It has been commented that the words of the relevant statute or the Criminal Code (Qld) should be used by the judge in the directions to the jury where it is practicable or the words are in 'simple language'.[73] Though this might be seen as clearly desirable, problems arise when the wording of the statute is not in simple language or where the concepts or legal tests that the statute states, even if simply expressed, require further explanation or elaboration before they can be applied by a jury.

---

69 Hon J Eames, 'Tackling the complexity of criminal trial directions: What role for appellate courts?' (2007) 29 *Australian Bar Review* 161, 165.

70 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [2.16].

71 This is said to have become a real problem in Victoria: ibid [2.16]–[2.17]. But see chapter 6 on appeals below.

72 *R v Yasso (No 2)* (2004) 10 VR 466, 482–3; [2004] VSCA 127 [56]–[57] (Vincent JA).

73 See MJ Shanahan, PE Smith and S Ryan, *Carter's Criminal Law of Queensland* (16th ed, 2006) [s 620.10] and the cases referred to there.

4.53 One example of the complexity of the substantive criminal law that results in complexity in jury directions can be seen in the partial defence of provocation to a charge of murder found in section 304 of the Criminal Code (Qld), which is discussed at [17.68]–[17.74] below. Other problems arise out of the confused state of the law relating to the admissibility and permitted use of propensity evidence: see chapter 13 below.

Inverse onus of proof

4.54 Directions about defences may be complicated by being couched in negative or double negative terms. This is a result of the prosecution's onus of proving all elements of any criminal offence charged and (with rare exceptions) of negativing any defence that may be raised in the case.[74]

4.55 This complexity can be seen by using the partial defence to murder of provocation, again, as an example. In a recent judgment, McMurdo P in the Queensland Court of Appeal set out the seven elements of the partial defence of provocation, only one of which need be negatived by the prosecution to defeat it:

> As Callinan J said about the somewhat analogous matter of directions to a jury on the defence of accident in *Stevens v The Queen*:[75] '… it is not necessary for an accused in order to be acquitted, to establish any facts, matters or inferences from them'. The jury did not have to conclusively find any facts or draw any inferences before considering provocation. In determining whether the prosecution had disproved provocation beyond reasonable doubt, the jury was required to consider the version or versions of the facts and inferences most favourable to the appellant that were reasonably open from the evidence. Then the jury was required to consider whether the prosecution had satisfied them beyond reasonable doubt that:
>
> 1. the potentially provocative conduct of the deceased did not occur; or
> 2. an ordinary person in the circumstances could not have lost control and acted like the appellant acted with intent to cause death or grievous bodily harm; or
> 3. the appellant did not lose self-control; or
> 4. the loss of self-control was not caused by the provocative conduct; or
> 5. the loss of self-control was not sudden (for example, the killing was premeditated); or
> 6. the appellant did not kill while his self-control was lost; or
> 7. when the appellant killed there had been time for his loss of self-control to abate.
>
> If the jury were satisfied of any of those seven things beyond reasonable doubt, then they had to find the appellant guilty of murder. Otherwise, they had to find the appellant not guilty of murder but guilty of manslaughter.[76] (note in original)

4.56 The requirement that the prosecution must disprove something that it did not raise and indeed may only have been raised incidentally on the evidence, may well accord easily with legal principle. However, it may not be so intuitively obvious, or may even be counter-intuitive, to a juror without any experience of the theory of the law. Moreover, in the first six of the elements stated by McMurdo P, the jury is asked to consider whether the prosecution has proved that something did ***not*** happen. Any

74 See, eg, *Woolmington v DPP* [1935] AC 462, 480–82 (Viscount Sankey LC).

75 (2005) 227 CLR 319 at 371.

76 *R v Pollock* [2008] QCA 205 [7].

direction to the jury on this defence will almost certainly need to re-state each of these elements using the words of the judgment (perhaps without the parenthetical remark in element 5). This might be one occasion where the jury would clearly benefit significantly from a written statement of these elements provided to it during final addresses or the judge's summing up.

4.57 Another more recent decision of the Queensland Court of Appeal highlights these difficulties. In *R v Edwards*[77] the Court of Appeal considered the following direction given by the trial judge to the jury on the prosecution's onus of negativing a defence of self-defence:

> [I]f you don't accept the complainant or if you have a doubt about that version, and the accused's version has not been proved by the Crown beyond reasonable doubt not to be the one not to have happened, then the accused is entitled to the benefit of the doubt in relation to self defence.[78]

4.58 In the Court of Appeal's judgment it was 'clear that the triple negative rendered that part of the direction virtually unintelligible and it is clearly incorrect', and the prosecution conceded on the appeal that in isolation this direction was confusing.[79] However, in the context of much longer directions on the burden of proof in relation to this defence, the Court concluded that the flaw was overcome by the judge's correct statement of the approach that the jury should take in its analysis of the defence later in the summing up, and in a re-direction that was 'sensible' and favourable to the defendant. The appeal was dismissed as it 'could not be said that the [defendant] has lost a real chance of an acquittal through judicial error.'[80]

Multiple and alternative charges

4.59 Many trials also involve alternative charges against a defendant. These alternatives may be specified in the indictments prepared by the prosecution or may be mandated by statute. For example, the charge of manslaughter is always available as a statutory alternative to a charge of murder under section 576(1) of the Criminal Code (Qld). Other alternatives arise under sections 575 and 579 of the Code:

> **575 Offences involving circumstances of aggravation**
>
> Except as hereinafter stated, upon an indictment charging a person with an offence committed with circumstances of aggravation, the person may be convicted of any offence which is established by the evidence, and which is constituted by any act or omission which is an element of the offence charged, with or without any of the circumstances of aggravation charged in the indictment.
>
> **579 Charge of specific injury—charge of injury with specific intent**
>
> (1) Upon an indictment charging a person with an offence of which the causing of some specific result is an element, the person may be convicted of any offence which is established by the evidence, and of which an intent to cause that result, or a result of a similar but less injurious nature, is an element.

77 [2009] QCA 122.

78 [2009] QCA 122 [3].

79 [2009] QCA 122 [40] (White J; McMurdo P and Wilson J concurring).

80 [2009] QCA 122 [44]–[45] (White J; McMurdo P and Wilson J concurring).

> (2) Upon an indictment charging a person with an offence of which an intent to cause some specific result is an element, the person may be convicted of any offence which is established by the evidence and of which the unlawful causing of that result is an element.

4.60 Each alternative charge requires its own set of directions. This multiplication of jury directions will be magnified in cases where there are multiple defendants as well, as separate directions and a separate summing up will be required in relation to each defendant in respect of each charge.

4.61 The multiplicity of directions cannot be reduced in cases involving alternative charges which are not found on the indictment or in the Criminal Code (Qld) as judges are required to give juries directions about all alternative charges that arise on the evidence, even if the defendant advised by experienced counsel has made a conscious decision not to raise some of them.[81] It has been said that this can distort the adversarial nature of a trial in which the parties determine the charges and defences to be relied on as it can thwart a deliberate tactical decision to withhold or forego a particular charge or defence.[82]

4.62 This proliferation of directions in cases of multiple offences is perhaps most dramatically seen in cases of multiple fraud and multiple sexual offences.[83] In these cases, the trial judge is simply required to address the jury methodically on each count, and on the evidence and law that relates to each.

4.63 This is not of itself a shortcoming of the law or procedure concerning jury directions. It is simply a natural consequence of the fact that complicated cases give rise to complicated evidence and complicated law, and that cases with multiple charges give rise to multiple directions, all of which must be dealt with systematically. However, such cases will increase the prospect that even diligent and methodical judges (and juries) will fall into error, and will amplify any other systemic problems associated with jury directions.

Multiple defendants

4.64 Trials that involve multiple defendants also necessarily involve more complex directions. Juries must be specifically and repeatedly warned against misusing evidence admitted against one defendant when assessing the guilt of a co-defendant.

4.65 Self-evidently, the increase in the number of defendants increases the number and range of directions that must be given. This results, firstly, from the simple fact that there will be more counts on more indictments being handled by the court, and the jury, in the same proceeding. Although in one sense, this is simply the collection in one trial of material, evidence and directions that would all have to be aired at some stage, the fact that they are all being handled by the same jury must add to the difficulty of the tasks that that jury faces.

---

81 *Pemble v the Queen* (1971) 124 CLR 107, 117–18 (Barwick CJ). See [11.53]–[11.95] below.

82 See Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [2.26]–[2.29], where the question of the apprehended distortion of the adversarial system is referred to on a different basis.

83 See, eg, *R v Kanaris* [2005] QCA 473, where the defendant was convicted on 18 counts of fraud. Each count required the judge to outline the evidence separately, though the directions on the law need not have been separated in the same way: see especially [11]–[20].

4.66 Empirical evidence, however, suggests that the mere increase in the number of defendants does not of itself impact greatly on jurors' ability to comprehend the evidence.[84]

4.67 The problems associated with multiple defendants are not straight-forward, however. Co-defendants will often have defences that are not mutually consistent and may well seek to incriminate each other in order to exculpate themselves. The directions that should be given (where necessary in the interests of justice or to avoid a perceptible risk of a miscarriage of justice[85]) based on the risks associated with relying on uncorroborated accomplice evidence are discussed in chapter 16 of this Report.[86]

4.68 To complicate matters further, a jury will often be faced with the difficult forensic task of being instructed to use one co-defendant's evidence for certain limited purposes in relation to that defendant's own case and for certain limited but different purposes in relation to a co-defendant's case.[87] Similar limited-use directions will be given in cases where evidence of uncharged discreditable conduct on the part of a defendant is admitted.[88]

4.69 The model direction in the Queensland Benchbook about evidence admitted against one defendant only, which is a form of limited-use direction, is quite short. The difficulties lie not in the wording of the direction but in the nature of the forensic task that it asks jurors to perform. It reads:[89]

> **Evidence admitted**[90] **against one defendant only**
>
> **More than one defendant is on trial. Each is entitled to have his case decided solely on the evidence admissible against him. Some of the evidence in this case cannot be considered against all.**
>
> **The (testimony) (exhibit about which) you (are about to hear) (just heard), (**describe testimony or exhibit**), can be considered only in the case against the defendant (**insert name**). You must not consider that evidence when you are deciding if the case has been proved against the other defendant(s).**[91] (notes and formatting as in original)

4.70 In the Victorian Court of Appeal case of *R v Torney*, O'Bryan J (with whom Starke and Crockett JJ substantially agreed) considered the risks of joint trials:

---

84 Mark Findlay, 'Juror Comprehension and Complexity: Strategies to Enhance Understanding' (2001) 41 *British Journal of Criminology* 56, 73.

85 See Criminal Code (Qld) s 632(3).

86 See [16.22]–[16.29] below.

87 See [12.13]–[12.14] below.

88 See [13.2], [13.29] below; see generally chapter 13 in relation to propensity warnings and similar fact evidence.

89 Queensland Courts, *Supreme and District Court Benchbook*, 'Evidence admitted against one defendant only' [16] <http://www.courts.qld.gov.au/2265.htm> at 30 November 2009.

90 This instruction may be adapted where the evidence is admissible only for a limited purpose.

91 This might not always be appropriate before the summing-up (for example, if there is a substantial chance that evidence yet to be adduced or later incidents in the trial may make the evidence admissible against another defendant).

> The safeguards against unfairness created by a joint trial are found, firstly, in the adequacy of the directions given by the trial judge to the jury and, secondly, in the jury comprehending and applying those directions.[92]

4.71 The first of these safeguards is a matter for the trial judge, and is therefore in the hands of the court at first instance and on appeal. The second safeguard is in the hands of the jury, and there is often no means of assessing whether or to what extent that safeguard is in fact upheld. In *R v Torney*, the jury had asked some questions which cast some doubt on their comprehension of the judge's directions, which O'Bryan J regarded as 'more than adequate' and 'precise and correct'.[93] Having expressed some reservations about the jury's comprehension of the directions of the limited use that it could make of the record of interview of one co-defendant, O'Bryan J was ultimately satisfied that any doubt or confusion in the minds of the jurors had been 'promptly removed' before they came to their verdict about two hours later.[94]

4.72 This case is one example of how a jury's questions of a judge during deliberations shed some light on its decision-making process that allowed the appellate court to reflect on whether or not it had in fact understood and correctly applied the judge's directions. Here, that court was satisfied that the jury had done so and dismissed the appeal against conviction.

Complexity of the evidence

4.73 It might seem fairly self-evident that cases that involve lengthy, complex and detailed technical evidence would cause juries a great deal of difficulty. Complicated financial fraud cases are often cited as the epitome of the type of case where this sort of difficulty would arise.[95] However, some empirical evidence challenges this assumption; at least there does not seem to be a clear or simple correlation between the complexity of the case and a jury's ability to comprehend the evidence.[96]

4.74 The length of the trial, however, seems to produce a clear decline in juror comprehension of the evidence and law.[97] Nonetheless, there seem to be several factors that can adversely impact an jurors' comprehension — the interpolation of *voir dires* and other interruptions in the trial, and manner of the presentation of the evidence,

---

92 *R v Torney* (1983) 8 A Crim R 437, 454, cited by the Victorian Court of Appeal in *The Queen v Lam* [2008] VCSA 109 [43].

93 *R v Torney* (1983) 8 A Crim R 437, 454, 455.

94 Ibid 455.

95 See Mark Findlay, 'Juror Comprehension and Complexity: Strategies to Enhance Understanding' (2001) 41 *British Journal of Criminology* 56, 64. See also, for example, The Right Honourable Lord Justice Auld, 'Chapter 5: Juries' in *Review of the Criminal Courts of England and Wales*, Report (2001) [173]–[206], where he recommended that in serious and complex fraud cases judges should be empowered to direct trial by themselves sitting with lay members or, where the defendant has opted for trial by judge alone, by themselves alone, if it is in the interests of justice to do so. In coming to this recommendation, Lord Justice Auld commented, at [183]:

> If I had to pick two of the most compelling factors in favour of reform, I would settle on the burdensome length and increasing speciality and complexity of these cases, with which jurors, largely or wholly strangers to the subject matter, are expected to cope. Both put justice at risk.

96 Ibid 56, 73. See also Judith Fordham, 'Illuminating or Blurring the Truth: Jurors, Juries, and Expert Evidence' in B Brooks-Gordon and M Freeman (eds), 9 *Law and Psychology* (2006) 338, 339–41.

97 Ibid 56, 76.

especially expert evidence, among others[98] — and it may not be appropriate (at least in the absence of further research) to draw broad conclusions between particular aspects of trials and juror comprehension.

4.75 Apart from any of these considerations, it should also be remembered that in recent surveys over 34% of jurors in Queensland and 41% of jurors in New South Wales had a bachelor's degree or higher.[99] One inference from this is that jurors generally are equipped intellectually to handle complex matters, provided that the law and the evidence is presented to them in a way that invites their understanding rather than works against it. This is not just a battle to keep the jurors from boredom, though one might think that a jury that is properly and engagingly informed would be less likely to become bored or to flag while the trial proceeds.

4.76 It is not merely complex evidence that may pose difficulties for jurors — the jurors' task in using evidence can sometimes be extremely complicated. A jury will often be faced with the difficult forensic task of being instructed to use evidence for certain limited purposes only. This is a consequence of the rules of admissibility whereby evidence may be admissible for some purposes, but inadmissible for others. This arises, for example, in relation to co-defendants and propensity evidence.[100]

4.77 Concerns have been raised that limited-use directions of this nature are in effect futile.[101] The intellectual forensic exercise required of jurors requires a mental agility and thoroughness of approach that few lawyers manage successfully. To expect it of jurors with all the other difficulties they face in mastering the law in any trial might seem over-optimistic, if not unrealistic.

The manner of presentation

4.78 It has been noted that the judge's directions should be, but are not always, clear and comprehensible.[102] They should also be concise and tailored to the particular case.[103]

> The function of a summing up is to furnish information which will help a particular jury to carry out its task in the concrete circumstances of the individual case before it and in the light of the trial judge's assessment of how well that jury is handling its task. It is undesirable for a summing up to assume the character of a collection of hallowed phrases mechanically assembled on a priori principles to be mouthed automatically in all circumstances, whether or not a particular jury actually understands them.[104]

98 See, for example, Chris Richardson, 'Juries: What they think of us' (2003) *Queensland Bar News* 16 (December 2003).

99 See [3.84], [3.86] above.

100 Limited use directions are discussed in chapter 12 below.

101 See, for example, Kirby J in *Zoneff v The Queen* (2000) 200 CLR 234 [66]–[67] quoted at [5.2] below.

102 Eg Hon J Wood, 'Jury Directions' (2007) 16 *Journal of Judicial Administration* 151; Hon G Eames, 'Towards a better direction — Better communication with jurors' (2003) 24 *Australian Bar Review* 35. See also, *R v Adomako* [1995] 1 AC 171, 189 (Lord Mackay of Clashfern LC); *R v Landy* [1981] 1 All ER 1172, 1183 (Lawton LJ); *Zoneff v The Queen* (2000) 200 CLR 234 [65], [68] (Kirby J); *Ahern v The Queen* (1988) 165 CLR 87, 103; *R v Flesch* (1986) 7 NSWLR 554.

103 Eg *Holland v The Queen* (1993) 117 ALR 193, 200–1, quoting *R v Lawrence* [1982] AC 510, 519.

104 *Darkan v The Queen* (2006) 227 CLR 373 [67] (Gleeson CJ, Gummow, Heydon and Crennan JJ).

4.79 The development of detailed model directions set out at length in compendiums such as the Queensland Benchbook (and its counterparts in other jurisdictions) may encourage trial judges to rely on the formulas set out in them, sometimes with the loss of a more tailored, less abstract direction that is directly connected to the facts of the particular case. The risks associated with this have been noted by the High Court:

> Further, and more fundamentally, any suggested forms of direction put forward as 'standard' or 'model' directions will very likely mislead if their content is not properly moulded to the particular issues that are presented by each particular case. Model directions are necessarily framed at a level of abstraction that divorces the model from the particular facts of, and issues in, any specific trial. That is why such directions must be moulded to take proper account of what has happened in the trial. That moulding will usually require either addition to or subtraction from the model, or both addition and subtraction.
>
> The fundamental propositions stated by the Court in *Alford v Magee*, which have since been referred to many times, must remain the guiding principles. First, the trial judge must decide what the real issues are in the particular case and tell the jury, in the light of the law, what those issues are. Second, the trial judge must explain to the jury so much of the law as they need to know to decide the case and how it applies to the facts of the particular case.
>
> Neither purpose is adequately served by the bare recitation of forms of model directions. Not only are the real issues not identified for the jury, no sufficient explanation is given to the jury of how the relevant law applies to the facts of the particular case.[105]

4.80 Moreover, the traditional presentation of a criminal trial is overwhelmingly oral. It is founded in traditions, procedures and laws that go back centuries, well before general literacy. Many commentators, not least among them the former Chief Justice of the High Court, the Honourable AM Gleeson, have noted that this is incompatible with the modern reality that a great deal of the information that we all process is in writing of one form or another, and increasingly in electronic or other modern formats.[106]

4.81 The research conducted by the Australian Institute of Judicial Administration and published in 2006[107] indicates that judges themselves are, as a group, alert to the methods that both detract from and enhance the effectiveness of their communications with jurors.[108] The factors which judges felt enhanced their communications with the jury included:

- Using plain English. 'Treat them as intelligent human beings but not necessarily well educated ones.'
- Speaking slowly, logically and sequentially;
- Being conversational and avoiding being pompous and talking down to the jury;
- Using examples where possible;

105 *HML v The Queen* (2008) 235 CLR 334, 386–7; [2008] HCA 16 [120]–[122] (Hayne J).

106 See, for example, Australian Institute of Judicial Administration (James RP Ogloff, Jonathan Clough, Jane Goodman-Delahunty & Warren Young), *The Jury Project: Stage 1 — A Survey of Australian and New Zealand Judges* (2006) 5.

107 Ibid.

108 Ibid 35–36.

- Providing regular breaks;
- Summary sheets and other written materials; and
- PowerPoint displays or other visual aids.

A number of judges mentioned the importance of developing a rapport with the jury. That is, working collaboratively with them from the beginning of the trial, making sure they understand what is happening and why, and ensuring that they felt comfortable about asking questions.[109]

4.82 Factors which militated against good communications included:

- Jury fatigue and boredom, exacerbated by factors such as the slow pace of some trials, the manner in which the judge delivers his or her charge, formulaic directions, too much detail about the evidence and summarising addresses and lack of visual stimulation;
- The unnatural process of feeding information to the jury, with little real opportunity for jurors to ask questions; and
- The structure and atmosphere of the courtroom, including poor acoustics.[110]

4.83 That research also identified four ways in which the oral conventions of trial procedure present problems for contemporary jurors:

(a) they have difficulty in concentrating on, absorbing, and recalling orally presented information, given few written or visual aids;

(b) the slow pace of witness examinations creates a cumbersome and inefficient presentation of evidence, affecting their capacity to make reliable credibility assessments of witnesses;

(c) evidence presented in a fragmented illogical (not temporal) sequence is more difficult to follow; and

(d) the presentation of technical or specialized evidence, eg, by expert witnesses, is hard to understand, often because it is ponderous and complicated.[111]

4.84 Some of these issues derive from the adversarial nature of the trial itself, and it is not the Commission's task as part of this enquiry to consider any reform to that fundamental aspect of our criminal justice system. However, it must be acknowledged that the adversarial system sets up a court environment and a truth-seeking protocol that can be slow, cumbersome, prone to interruption and is alien to most other aspects of life, and it is only natural that jurors might not feel comfortable with it.

4.85 Communications from the judge to the jury occur throughout a trial, not just in bursts at the start and at the end. Juries look for guidance from judges from the time

109 Ibid 35.

110 Ibid 35–6. See also Christine Richardson, *Symbolism in the Courtroom: An Examination of the Influence of Non-Verbal Cues in a District Court Setting on Juror Ability to Focus on the Evidence*, (Doctoral thesis, Griffith University, 2006) in relation to the last of these factors.

111 Australian Institute of Judicial Administration (James RP Ogloff, Jonathan Clough, Jane Goodman-Delahunty & Warren Young), *The Jury Project: Stage 1 — A Survey of Australian and New Zealand Judges* (2006) 5.

that they are empanelled until they are discharged. Formal jury directions are only part of these communications.[112]

Judges' views of complex directions

4.86 In 1985 as part of its review of criminal justice procedure, the NSW Law Reform Commission conducted a survey that involved 1,834 jurors and 42 judges, 30 from the District Court and 12 from the Supreme Court. The judges were asked to comment on the various directions that juries were given in trials for different offences.

- A strong majority (71%) said that some of the directions on the law were too difficult for jurors to understand.
- The most problematic directions were those on self-defence. Just over half of the judges (52%) reported that the area was 'conceptually difficult' while a quarter said that it was only made difficult by the required formulation of words.
- The second most problematic area was intoxication, with 38% of judges stating that it was difficult for jurors to understand, and nearly all of those judges felt that the reason for the difficulty was the required formulation of words.
- Other areas where about one-third of the judges felt that there was difficulty for jurors were mental illness, conspiracy, diminished responsibility and provocation. Again, the required formulations of words were felt by a significant number of those judges to be at fault.[113]

4.87 In the survey of Australian and New Zealand judges conducted by the Australian Institute of Judicial Administration published in 2006,[114] judges were asked to provide examples of legal issues which they felt were problematic, which were described by one judge as 'difficult enough for lawyers to comprehend—they must be well nigh impossible for a lay person to grasp.'[115] The following were common examples:

- Difficult evidentiary issues such as reverse onus provisions, circumstantial evidence, consciousness of guilt, uncharged acts/relationship evidence, evidence admissible for limited purposes/only in relation to particular defendants, *Longman* warning, propensity evidence, hearsay and the drawing of inferences.
- Difficult grounds of liability such as conspiracy, joint offenders and complicity;

112 Ibid. See also Christine Richardson, *Symbolism in the Courtroom: An Examination of the Influence of Non-Verbal Cues in a District Court Setting on Juror Ability to Focus on the Evidence*, (Doctoral thesis, Griffith University, 2006) for a discussion of how the court setting and the conduct of participants in a trial affect jurors.

113 New South Wales Law Reform Commission, *Criminal Procedure*: *The Jury in a Criminal Trial: Empirical Studies*, Research Report 1 (1986) [6.47], referred to in New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [2.15]–[2.19].

114 Australian Institute of Judicial Administration (James RP Ogloff, Jonathan Clough, Jane Goodman-Delahunty & Warren Young), *The Jury Project: Stage 1 — A Survey of Australian and New Zealand Judges* (2006); see [4.89] below.

115 Ibid 34.

- Complex offences including commercial and fraud cases, Commonwealth offences and drug offences; and

- Complex defences such as provocation and self-defence.

These complex issues are obviously compounded in some cases. Sexual offence cases involving delay were specifically mentioned. These may include relationship evidence, propensity evidence, a *Longman* warning and directions on consent all in the one charge to the jury. In addition, some judges noted that juries may be burdened by defences which the trial judge is obliged to mention even though not raised by counsel.[116]

The length of the summing up

4.88 Directions on the law are not meant to entail 'a disquisition on jurisprudence or philosophy or a universally applicable circular tour round the area of law affected by the case'.[117] An increase in the number and complexity of jury directions, however, is likely to impact on the length of judges' summings up, as will the extent to which the judge summarises the evidence in the case and counsels' arguments. The length and complexity of the summing up will vary in each case and will depend, in part, on the law on which the judge must instruct the jury.[118] Research shows that there is also considerable variation in the average length of a summing up between different jurisdictions.

4.89 In research conducted by the Australian Institute of Judicial Administration ('AIJA'), judges were asked to estimate the lengths of their summings up and directions (or charges) to juries at the end of addresses.[119] This is understandably a difficult task and many of the judges responding to the survey did not answer these questions or qualified their answers, noting the difficulty in providing accurate estimates. Some made the point that the length of the trial did not necessarily equate with its complexity, and that it is the complexity of the issues or the law that may extend directions, not just the duration of the evidence itself.

4.90 The results are summarised in Table 4.1, which highlights the variations among the Australian States, and between Australia and New Zealand. It sets out the judges' estimates in minutes of the time spent in directing on the law and in summarising the evidence and the parties' addresses.

4.91 The shortest charges were consistently those reported by New Zealand judges. In Australia, the shortest were those reported from South Australia and Western Australia, with Queensland relatively close to them as the third-shortest. The other three States (New South Wales, Victoria and Tasmania) were relatively close to each other but all significantly longer than the 'short' States. On average, summing up in the 'long' States took 60% to 75% longer than in the 'short' States.

116 Ibid 35.

117 *R v Lawrence* [1982] AC 510, 519 (Lord Hailsham).

118 In Queensland, the average summing up may last from about 1½ hours in shorter trials to 3½ to 4 hours in longer trials, with directions on the law accounting for approximately one-third of the total time: JRP 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, 247–8.

119 Australian Institute of Judicial Administration (James RP Ogloff, Jonathan Clough, Jane Goodman-Delahunty & Warren Young), *The Jury Project: Stage 1 — A Survey of Australian and New Zealand Judges* (2006) 26–28.

	NSW	Qld	SA	Tas	Vic	WA	NZ
Five-day trial							
Law	52	36	28	58	60	41	24
Evidence	58	41	35	73	63	36	21
Addresses	31	23	21	23	22	18	18
Total	**2h 21m**	**1h 40m**	**1h 24m**	**2h 34m**	**2h 25m**	**1h 35m**	**1h 03m**
Ten-day trial							
Law	64	46	35	73	83	43	24
Evidence	115	68	64	100	131	48	28
Addresses	38	33	28	47	41	25	24
Total	**3h 37m**	**2h 27m**	**2h 07m**	**3h 40m**	**4h 15m**	**1h 56m**	**1h 16m**
Twenty-day trial							
Law	74	65	47	77	104	45	33
Evidence	231	114	112	180	188	72	43
Addresses	57	53	35	60	47	38	32
Total	**6h 02m**	**3h 52m**	**3h 14m**	**5h 17m**	**5h 39m**	**2h 35m**	**1h 48m**

Table 4.1: Estimated duration of summing up.

4.92 These data themselves do not shed any light on the reasons for the consistent differences in the length of jury charges. However, the more common practice in New Zealand of providing the transcript of evidence (known as the judge's notes of evidence) to the jury could well be the cause of the noticeably shorter periods of time spent in summarising the evidence there than in any Australian State.[120] There is some support for this from the figures in Table 4.1. They demonstrate that the time spent on the summary of evidence was the area in which there was the greatest disparity between the 'long' and the 'short' States, and between the various Australian States and New Zealand. On average, the summary of evidence in the three 'long' States took 65 minutes in five-day trials, 115 minutes in ten-day trials and 200 minutes in twenty-day trials. The equivalent figures for the average of the 'short' States are 37 minutes, 60 minutes and 99 minutes respectively, and for New Zealand 21 minutes, 28 minutes and 43 minutes.

4.93 These variations were noted by the Court of Appeal of Western Australia in *Western Australia v Pollock*: [121]

> [3] As Miller JA points out, these principles have been enunciated by the High Court (see, for example, *Alford v Magee* [1952] HCA 3; (1952) 85 CLR 437; *RPS v R* [2000] HCA 3; (2000) 199 CLR 620 [41]–[42]). However, the cases surveyed by Miller JA suggest that there may be differences in emphasis and in practice amongst the different jurisdictions of Australia. Those cases, supported by anecdotal evidence, suggest that, for example, it may be more common in some jurisdictions for judges to address on the facts and the evidence. As this case illustrates, the practice of judges in this state varies, as it should, because the need for and utility of an address on the facts depends very much upon the circumstances of each individual case.

120 Jury Directions Symposium, Melbourne, 5–6 February 2009.

121 [2009] WASCA 96 [3] (Martin CJ). See also Miller JA in the same case at [114]–[134].

4.94 Concerns about the growing length of summings up were noted in the same case:

> [120] Preliminary consultations of the VLRC for the purpose of its Jury Directions Consultation Paper revealed that members of both the bench and the bar criticised the growing length of summings up in criminal cases (see para 5.48). In *Thompson*, Neave JA, at [102], doubted the capacity of jurors to absorb lengthy and complex oral charges containing detailed summaries of evidence. Her Honour had reservations about the conclusions reached by Redlich JA, saying:
>
> > ... It seems to me that the delivery of a short oral charge which directs the jury accurately on the law and provides a 'road map' of the relevant issues, combined with the provision of written material which summarises the evidence and relates it to those issues, might in some circumstances assist jury comprehension and lead to a fairer trial than a very lengthy oral charge.[122]

Jurors' understanding of the law

4.95 Of principal significance for this enquiry is the impact of long and complex jury directions and summings up on juries' comprehension of the law that they are expected to apply in reaching their verdicts.

4.96 The research by the AIJA also involved a survey of criminal trial judges in Australia and New Zealand on the communication of judges and juries.[123] More than half the judges surveyed reported that jurors had either some or a great deal of difficulty understanding judicial instructions on the law.[124] Many judges also reported that complex defences, such as provocation, may be especially difficult for jurors to grasp.[125]

4.97 Other Australian research — canvassed in the next chapter — has tended to confirm that jurors have difficulty understanding judicial instructions on the law.[126] Examination of this issue is ongoing.[127]

4.98 Judges have relatively limited means available to them during trials to note the way in which jurors are absorbing and considering the evidence and directions. They can, of course, observe the jurors' demeanour during the trial and can see when they

---

122 [2009] WASCA 96 [120] (Miller JA).

123 Australian Institute of Judicial Administration (James RP Ogloff, Jonathan Clough, Jane Goodman-Delahunty & Warren Young), *The Jury Project: Stage 1 — A Survey of Australian and New Zealand Judges* (2006). See [4.89] above.

124 Ibid 33–4. In Queensland, the judges surveyed were from the District and Supreme Courts.

125 Ibid 34–5.

126 See, for example, I Potas and D Rickwood, *Do Juries Understand?* (1984); M Findlay, *Jury Management in New South Wales* (1995). Similar results have been obtained in New Zealand: see Law Commission (New Zealand), *Juries in Criminal Trials Part Two*, Preliminary Paper No 37 (1999) Vol 2.

127 For example, the Australian Institute of Judicial Administration had been conducting a research program on jury charges: see James RP Ogloff, Jonathan Clough, Jane Goodman-Delahunty & Warren Young, *The Jury Project: Stage 1 — A Survey of Australian and New Zealand Judges* (2006) 1. The Law Reform Commissions of New South Wales and Victoria have also been asked to examine jury directions in criminal trials. The Victorian Law Reform Commission (which took over the work that had previously been conducted by the Australian Institute of Judicial Administration) published its Final Report on this subject in July 2009: Victorian Law Reform Commission, *Jury Directions*, Final Report (2009). The NSWLRC published its Consultation Paper in December 2008: New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008). A jury research project has also been undertaken as part of the Queensland Law Reform Commission's enquiry: see chapter 2 above.

appear to be attentive, alert, bored or distracted. The questions that juries ask can be a very good indicator as to the degree to which a jury has understood the evidence or the law as expounded to it by the judge. For example, a question seeking further clarification of a provision of a defence such as provocation, which is widely regarded as complicated, may indicate that the jury has correctly identified differences between the objective and subjective elements of that defence and is seeking further guidance on the distinction between them.[128]

4.99 A jury's verdict can also, to a limited extent, provide clues as to the way in which the jury has considered the law and its application to the evidence.

4.100 Research conducted overseas confirms the Australian findings that jurors do have difficulty understanding and using judicial instructions. This research suggests, for example, that jurors may, indeed, rely upon their own commonsense notions of criminal responsibility instead of applying judicial instructions on the law.[129] It is said, for example, that jurors tend to construct a story of the case using crime 'prototypes'. On the other hand, research also indicates that jurors' assessments of criminal responsibility are not limited to simplistic prototypes but are complex, sophisticated and contextual, involving both subjective and objective criteria.[130]

4.101 Juror comprehension may be improved, however, by changes in the way instructions are given; for example, by rewriting jury instructions to remove difficult linguistic constructions, and providing juries with flow charts or other visual aids.[131]

4.102 Even if steps are taken to improve communication with the jury, it may remain difficult for jurors to understand inherently complex legal principles.[132] Complex defences may be particularly difficult for jurors to understand. For example, the 'ordinary person' test for the partial defence of provocation has been criticised for being too hard for juries to understand and apply.[133]

---

128 See [17.68]–[17.64] below.

129 See generally, JRP Ogloff and VG Rose, 'The Comprehension of Judicial Instructions' in N Brewer and KD Williams, *Psychology and Law: An Empirical Perspective* (2005) 407, 426; and DJ Devine et al, 'Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups' (2001) 7(3) *Psychology, Public Policy, and Law* 622, 699. See also, for example, MP Spackman et al, 'An Analysis of the Effects of Subjective and Objective Instruction Forms on Mock-Juries' Murder/Manslaughter Distinctions' (2002) 26(6) *Law and Human Behaviour* 605; and VL Smith, 'Prototypes in the Courtroom: Lay Representations of Legal Concepts' (1991) 61(6) *Journal of Personality and Social Psychology* 857.

130 Eg NJ Finkel, 'Commonsense Justice, Culpability, and Punishment' (2000) 28 *Hofstra Law Review* 669; and NJ Finkel and JL Groscup, 'Crime Prototypes, Objective versus Subjective Culpability, and a Commonsense Balance' (1997) 21(2) *Law and Human Behaviour* 209. See also generally Judith Fordham, 'Illuminating or Blurring the Truth: Jurors, Juries, and Expert Evidence' in B Brooks-Gordon and M Freeman (eds), 9 *Law and Psychology* (2006) 338, 352–4, 358–9.

131 These techniques, the use of which is not restricted in law, are considered in chapter 10 of this Report. See generally, for example, JRP Ogloff and VG Rose, 'The Comprehension of Judicial Instructions' in N Brewer and KD Williams, *Psychology and Law: An Empirical Perspective* (2005) 407–444; and DJ Devine et al, 'Jury Decision-Making: 45 Years of Empirical Research on Deliberating Groups' (2001) 7(3) *Psychology, Public Policy, and Law* 622, 667–8. Kirby J referred to some of this research in *Zoneff v The Queen* (2000) 200 CLR 234 [66].

132 D Watt, *Helping Jurors Understand* (2007) 70, 177.

133 Eg *R v Makotia* (2001) 120 A Crim R 492 [18]–[19] (Smart J); *R v Rongonui* [2000] 2 NZLR 385 [177], [205] (Thomas J), [216] (Blanchard J), [236] (Tipping J); *R v Voulkelatos* [1990] VR 1, 12–13 (Murphy J); *Director of Public Prosecutions v Camplin* [1978] AC 705, 718 (Lord Diplock); and B McSherry, 'Afterword: Options for the Reform of Provocation, Automatism and Mental Impairment' (2005) 12(1) *Psychiatry, Psychology and Law* 44, 45.

Chapter 5

How Juries Apply Directions

INTRODUCTION

5.1 Directions written by lawyers for lawyers will quite possibly fail to give jurors what they need, but are more likely to leave the case appeal-proof. But directions that are not written or delivered with the primary audience — the jurors — in mind will leave the jury without guidance or instructions that it can use, or will cause it to focus on aspects of the case that should be downplayed or indeed disregarded.[1]

5.2 These concerns have come to the attention of the High Court. In *Zoneff v The Queen*, for example, Kirby J made these observations:

> Because of legal constraints and longstanding conventions of secrecy in juror deliberations, there has, until recently, been little empirical research about the operation of judicial instructions upon the decision-making of actual jurors. In the United States, such investigations of the realities of jury deliberations[2] indicate the close attention which jurors typically pay to what the judge says; their earnest endeavour to perform their functions as they take to be expected of them;[3] the relatively low rate of comprehension of concepts which lawyers assume to be central to the

1 Australian Institute of Judicial Administration (James RP Ogloff, Jonathan Clough, Jane Goodman-Delahunty & Warren Young), *The Jury Project: Stage 1 — A Survey of Australian and New Zealand Judges* (2006) 4.

2 Wrightsman, 'The Legal System's Assumptions Versus the Psychological Realities of Jury Functioning: How Changes in Judicial Instructions Might Improve Jury Decision-Making', (1987) 8 *Bridgeport Law Review* 315.

3 Steele and Thornburg, 'Jury Instructions: A Persistent Failure to Communicate', (1988) 67 *North Carolina Law Review* 77; Kramer and Koenig, 'Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project', (1990) 23 *Journal of Law Reform* 401 at 402 (hereafter 'Kramer and Koenig').

> performance of their duties;[4] and their lack of comprehension of subtle directions requiring conditional acceptance of evidence for one but not another purpose.[5]
>
> The law presumes that triers of fact are able to disregard the prejudicial aspects of testimony and adjust appropriately the weight to be attached to such evidence on the basis of its 'probative value'.[6] However, such empirical studies as have been performed on jurors' abilities to follow judicial instructions, and to divide and sanitise their minds concerning impermissible uses of evidence, have yielded results which are substantially consistent. They cast doubt on the assumption that jurors can act in this way.[7] Indeed, there is some empirical evidence which suggests that instruction about such matters will sometimes be counter-productive. The purpose may be to require a mental distinction to be drawn between the use of evidence for permissible, and the rejection of the same evidence for impermissible, purposes. Yet the result of the direction may be to underline in the jury's mind the significance of the issue, precisely because of the judge's attention to it.[8] Lengthy directions about lies run the risk of emphasising the lies and their importance.[9] (notes as in original)

5.3 And, as noted by McHugh J in *KRM v The Queen*:

> The more directions and warning juries are given the more likely it is that they will forget or misinterpret some directions or warnings.[10]

5.4 These remarks, and the research on which they are based, tend to suggest that jurors are diligent in their application to their tasks but that they sometimes do not comprehend the law and other directions as expounded to them, and fall back on their intuitive grasp of the law and justice, especially as warnings and directions proliferate. Worse, this research suggests that a judge's directions might on occasion be counter-productive and compound the injustice that they seek to avert. That jurors take their

---

4 Kramer and Koenig at 429.

5 Charrow and Charrow, 'Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions', (1979) 79 *Columbia Law Review* 1306; Severance, Greene and Loftus, 'Toward Criminal Jury Instructions That Jurors Can Understand', (1984) 75 *Journal of Criminal Law & Criminology* 198; Sue, Smith and Caldwell, 'Effects of Inadmissible Evidence on the Decisions of Simulated Jurors: A Moral Dilemma', (1973) 3 *Journal of Applied Social Psychology* 345; Broeder, 'The University of Chicago Jury Project', (1959) 38 *Nebraska Law Review* 744; Oros and Elman, 'Impact of Judge's Instructions Upon Jurors' Decisions: The 'Cautionary Charge' in Rape Trials', (1979) 10 *Representative Research in Social Psychology* 28 at 32; Tanford, 'The Law and Psychology of Jury Instructions', (1990) 69 *Nebraska Law Review* 71 at 86; Doob and Kirshenbaum, 'Some Empirical Evidence on the Effect of s 12 of the Canada Evidence Act Upon an Accused' (1972) 15 *Criminal Law Quarterly* 88; Wissler and Saks, 'On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide On Guilt', (1985) 9 *Law and Human Behavior* 37 at 41–44; Young, Tinsley and Cameron, 'The Effectiveness and Efficiency of Jury Decision-making', (2000) 24 *Criminal Law Journal* 89 at 97–98.

6 Schaefer and Hansen, 'Similar Fact Evidence and Limited Use Instructions: An Empirical Investigation', (1990) 14 *Criminal Law Journal* 157 at 159.

7 A good example may be the distinction drawn between inferential reasoning leading to the conclusion of consent as opposed to credibility in the use of evidence of 'recent complaint' in sexual offences. See eg *Crofts v The Queen* [1996] HCA 22; (1996) 186 CLR 427 at 448–451 which accepted *Kilby v The Queen* [1973] HCA 30; (1973) 129 CLR 460 at 472 as stating the applicable law.

8 Schaefer and Hansen, 'Similar Fact Evidence and Limited Use Instructions: An Empirical Investigation', (1990) 14 *Criminal Law Journal* 157 at 166.

9 (2000) 200 CLR 234 [66]–[67].

10 *KRM v The Queen* (2001) 206 CLR 221, [2001] HCA 11 [37].

task very seriously is also a perception widely held among lawyers[11] and supported by research.[12]

5.5 This chapter outlines the results of empirical research conducted in Australia and overseas on the ways jurors use and apply jury directions. It is not intended to be an exhaustive survey of jury research — particularly of the considerable amount of research that has been conducted in some overseas jurisdictions — but pays particular attention to Australian research and to the issues most pertinent to this enquiry.

5.6 The Commission's own jury research project, conducted for this enquiry by the University of Queensland pursuant to the Terms of Reference, is also discussed in chapter 2 of this Report.

JURY RESEARCH METHODS

Surveys and simulations

5.7 There have been many surveys and academic studies of jury behaviour in Australia, New Zealand and elsewhere overseas, especially in the United States, many of which have focussed on how jurors interpret judicial directions, warnings and summings up. The two main research strategies involve surveys and interviews with jurors (which, in reality means ex-jurors as this research cannot be done during a trial) and simulated trials[13] conducted under laboratory conditions. The relative merits of research based on surveys of actual jurors and research based on simulated trials with groups of research subjects arbitrarily grouped into 'juries' (often university students, especially psychology students) are a matter of some debate.

5.8 Surveys and studies of actual jurors in actual trials are generally very difficult to conduct, principally because what goes on in the jury room is, in Australia at least, strictly confidential and may not be published by any person upon pain of criminal sanctions.[14] Clearly, nothing should be done during the course of any trial that might be seen in any way to influence or affect the jury before it has been discharged.

5.9 Even when it has been possible to survey real jurors after they have been discharged, it has proved to be very difficult to formulate a survey strategy that can rigorously test jurors' understanding of the law upon which they have just deliberated and delivered a verdict. It is hard to test jurors' understanding of the law or facts of the case that they heard in any objective fashion, although in some respects jurors' subjective views about the case and trial procedure generally can be very instructive.

---

11 See, eg, The Hon Justice Michael Murray, 'Bad Press: Does the Jury Deserve It? Communicating with Jurors' (Paper presented at the 36th Australian Legal Convention, Perth, 17–19 September 2009) 1. See also Judith Fordham, 'Bad Press: Does the Jury Deserve It?' (Paper presented at the 36th Australian Legal Convention, Perth, 17–19 September 2009) 11.

12 See generally, for example, School of Psychology, University of Queensland (Blake McKimmie, Emma Antrobus and Kathryn Havas), 'Jurors' Trial Experiences: The Influence of Directions and Other Aspects of Trials', Report (November 2009).

13 Also called 'mock trials'.

14 See, for example, *Jury Act 1995* (Qld) s 70, discussed at [2.2]–[2.4] above. This does not apply in all jurisdictions (eg, the United States).

5.10 Moreover, the standardising of jurors' experience over a range of cases involving different offences, different time spans, different trial judges and a number of other variables can make the collection of a statistically useful size of subjects difficult. Research involving discharged jurors cannot examine how controlled differences in variables (such as different techniques in presenting directions on the law in otherwise identical circumstances) result in variations in outcome, whereas this can be achieved in the environment of a simulated trial.

5.11 The main alternative research strategy of jury trial simulations has often been criticised, or at least the results from them are said to be less reliable, because the circumstances of the simulation simply do not, and cannot, replicate all the dynamics of a real trial: no-one is actually on trial for a criminal offence and the participants are not put in the position of having to decide the legal fate of a fellow member of their community. It is said that no simulation, however carefully prepared, can reproduce the environment generated in a courtroom and juryroom during a trial, and that a simulation can never really replicate the complex dynamics of a real jury's deliberations.

5.12 The benefits of simulated trials stem from the fact that these are controlled experiments in which variables that cannot be regulated in field studies are susceptible to control so that their effects on the outcomes can be measured. For example, simulations allow the participating 'jurors' to be exposed to varying styles of directions in the context of the same case with the same factual background and the same presentations by counsel. Some 'juries' might receive a lengthy summary of the evidence, others a short summary or a copy of the transcript of evidence, others a written summary of the elements of the offence, and so on. The variation in their 'verdicts' can be measured and, where these variations are statistically significant, some conclusion might be drawn about the effectiveness of the different styles of jury directions, and suggestions for reform can be made. This controlled examination of different variables and different options cannot be done in field studies of actual jurors.

5.13 There are also some issues that militate against the unquestioning use in one jurisdiction of statistics obtained in another. The Commission's research has demonstrated that judicial practices in relation to directions and summings up vary considerably within Australia, and between Australia and, for example, New Zealand and the United States. As a result, one can only cautiously accept overseas (or even interstate) research results that are based on jurors' perceptions of, and reactions to, summings up and directions as their experiences will vary considerably. That is in principle true to some extent even amongst juries within any given jurisdiction as different trial judges within the same jurisdiction will have different skills and approaches, though these variations might be less in jurisdictions (such as New Zealand and some parts of the United States) where directions are generally shorter than in Australia or have been reduced or standardised by statute.

5.14 In addition, some United States research deals with juries in civil trials, which are much more common there than in Australia. Research has shown clear differences between juries in criminal and civil trials in the United States in relation to the issues covered by this Report.[15] The consideration of evidence drawn from research into civil juries overseas in relation to criminal jury trials in Queensland should be undertaken with some care.

15 See, for example, the research reported at James RP Ogloff & V Gordon Rose, 'The Comprehension of Judicial Instructions' in Neil Brewer & Kipling D Williams (eds) *Psychology and Law: an Empirical Perspective* (2005) 413, 414.

Observing juries

5.15 It is very difficult to establish what a jury makes of the directions, warnings and comments made by the judge. The verdict itself may provide some insight into the jury's thinking, but that guidance is very limited. The verdict may accord with the view of the case held by the judge and the other lawyers, and in this sense be regarded as 'satisfactory'. The verdict may also be seen as in agreement with community standards or meeting the expectations of the victims or other affected people. In that sense, there may be some informal consensus about whether the jury's verdict was 'correct'.

5.16 But generally speaking, there are few clues about how the jury's decision-making process unfolded: it is virtually impossible to assess how the jury's decision was reached, however outwardly acceptable it may be. No conclusions can be drawn about how rational or otherwise the decision-making process was, or how fairly and even-handedly the jurors dealt with each other in coming to a unanimous, or almost unanimous, decision.

5.17 It is similarly virtually impossible to determine whether a jury accurately understood, and accurately and fairly applied the directions and warnings given to it, whether it accurately and impartially reviewed the evidence, and whether it took into consideration the judge's comments without attaching undue weight to them.

5.18 Considerable research has been carried out into juries' decision-making processes, some of which was referred to in the quotation from Kirby J cited above.[16] Some of that research suggests that conventional directions to a jury do not necessarily achieve their purpose, being based on lawyers' assumptions about how jurors respond to them and otherwise go about their tasks.

5.19 The ultimate conclusion that may follow from any real suggestion that juries are not being properly assisted in their tasks is that their decisions may not be reliable, and confidence in the jury system as a whole could falter.

5.20 Research has demonstrated that jury directions are certainly capable of affecting a jury's decision and that they are an important, even the most important, factor in a jury reaching its conclusion.[17] Overseas research has also demonstrated that jurors pay a great deal of attention to the judges' directions and often re-read them where they have written versions.[18] It is perhaps self-evident that the longer a case, the longer and more complex the evidence and the legal issues — and the longer and more numerous the directions and warnings to the jury are, the greater the scope for them to be ignored, forgotten, misinterpreted or misapplied.[19] Accordingly, it is important to understand how jurors interpret and apply directions and which particular directions or methods of presenting directions are most effective.

16 See [5.2] above.

17 James RP Ogloff & V Gordon Rose, 'The Comprehension of Judicial Instructions' in Neil Brewer & Kipling D Williams (eds) *Psychology and Law: an Empirical Perspective* (2005) 408. The judge's summing up and directions were also the most frequently cited aspect of the trial that jurors surveyed by the University of Queensland felt helped them in their role: see School of Psychology, University of Queensland (Blake McKimmie, Emma Antrobus and Kathryn Havas), 'Jurors' Trial Experiences: The Influence of Directions and Other Aspects of Trials', Report (November 2009) 12, 21–2.

18 Ibid 412.

19 See, for example, ibid 408.

HOW JURIES INTERPRET AND UNDERSTAND DIRECTIONS

Jurors' views of summings up, directions and addresses

5.21 The research recently conducted by the University of Queensland examined the participating jurors' responses to the various instructions, directions and warnings from the judge, and to the addresses and other remarks made by the parties.[20]

5.22 The degree of help that jurors feel they receive from judges' directions on the law, summings up of the evidence,[21] and from the parties' addresses at the end of the evidence, was also one aspect of a survey conducted by Lily Trimboli and published by the NSW Bureau of Crime Statistics and Research ('BOCSAR') in September 2008.[22]

> The survey found that the vast majority of jurors … perceived that the judge's summing-up of the trial evidence was 'about the right length'; understood either 'everything' or 'nearly everything' that the judge said during his/her summing-up of the trial evidence; believed that 'in his/her summing-up of evidence, the judge generally used words [that were] easy to understand'; and 'understood completely' the judge's instructions on the law or 'understood most things the judge said'.[23]

Summings up of the evidence and addresses

University of Queensland report

5.23 Jurors were asked to identify the matters that were explained to them as part of the judge's summing up, and the closing addresses of the prosecution and defence. All of the jurors surveyed reported that the judge's summing up included a summary of the evidence, and 91% reported that a summary of the evidence was included in the closing address of the prosecution and of the defence.[24] The jurors also reported on the other matters that were covered in the summing up and closing addresses:

	Judge's Summing up	**Prosecutor's address**	**Defence's Address**
Outline of law relevant to case	100%	76%	76%
Outline of elements of offence(s)	100%	88%	76%
Outline of elements of defence(s)	94%	—	82%
Outline of questions to answer to arrive at a verdict	97%	79%	90%
Case summary	94%	97%	100%

20 School of Psychology, University of Queensland (Blake McKimmie, Emma Antrobus and Kathryn Havas), 'Jurors' Trial Experiences: The Influence of Directions and Other Aspects of Trials', Report (November 2009); see also [2.7]–[2.18] above and Appendix E to this Report.

21 This survey distinguished between the judges' summings up of the evidence and their instructions on the law, and different questions were directed to each issue.

22 NSW Bureau of Crime Statistics and Research (L Trimboli) 'Juror understanding of judicial instructions in criminal trials' *Crime and Justice Bulletin* No 199 (2008). See [3.87] above.

23 Ibid 1.

24 School of Psychology, University of Queensland (Blake McKimmie, Emma Antrobus and Kathryn Havas), 'Jurors' Trial Experiences: The Influence of Directions and Other Aspects of Trials', Report (November 2009) 11, Table 4.

Evidence summary	100%	91%	91%
The meaning of 'burden (or onus) of proof'	91%	—	—
The standard of proof	88%	—	—

Table 5.1: Percentage of jurors reporting elements of closing addresses and judge's summing up explained to them[25]

5.24 The jurors were also asked whether they were given any written summaries or aids as part of the summing up or closing addresses and, if they had, whether they found them helpful (on a 7-point scale; 1 a being not at all helpful, 7 being very helpful). Two jurors (of the 33 jurors in the sample) reported that the judge gave the jury extra materials relating to the evidence as part of the summing up, which they rated as being helpful (with scores of 6 or 7 out of 7). Seven jurors also received extra materials from the prosecution, most of which related to the evidence, and three jurors reported that extra materials on the evidence were given to them as part of the defence closing address. These materials were also generally rated as helpful (with scores in the range of 4 to 7 out of 7).[26]

5.25 The jurors were also asked about the length of the summing up and the parties' closing addresses. The surveyed jurors reported that the judge's summing up was significantly longer than they felt was needed. However, jurors who participated in the follow-up interviews commented that the summing up had been helpful to them and, while some found it 'slightly repetitive', others found the repetition was necessary to help them 'stay on track'.[27] Jurors generally considered the closing addresses of the prosecution and defence to be an appropriate length.[28]

5.26 As part of the survey, jurors were also asked to identify any aspects of the trial that they felt helped them in their role as juror. Those matters most frequently cited 'centred on the Judge's summing up' and, in particular, the directions and explanations given to jurors by the Judge.[29] The importance of the summing up, and closing addresses of the parties, was also evident in the follow-up interviews. One juror commented, for example, that:

> 'I think that the counsel's summing up was pretty important, because they, they're over that case really thoroughly, and they know to pinpoint the most critical pieces of evidence that will, you know, that will, that's on their side. So that probably is pretty helpful. I mean, as I said before, the summing up was very very good, and he also just, I liked the very, the very, pertinent pieces of evidence, and he summarises them. I mean, it doesn't mean that you discard all else, but it's just, they know their stuff and they help you to focus in on critical stuff.' — Juror 17[30]

5.27 Other comments from jurors about the helpfulness of the judge's summing up focused particularly on the judge's explanations of the law, related to the facts of the case, and indicate jurors' deference to the authority of the judge:

25 Ibid 11, Table 4.

26 Ibid 11.

27 Ibid 11.

28 Ibid 11.

29 Ibid 21.

30 Ibid 22.

> 'But definitely when the judge did her closing speech, quite a number of people thought, oh this is important, need to write this down. It was obviously helping them clarify or umm... yeah, clarify and keep focused.' — Juror 4
>
> ….
>
> 'Very clearly explaining the law, um the things that we could consider and not consider. The things that were admissible against certain people or not. Um, all that sorts of things, it's very helpful. Because you couldn't mull around all of those things. You knew that you could use this against someone, and you could use this, and this is acceptable, and this, and she explained in regards to the facts and the laws, you know, broke it all down for us, so it was sort of like fitting together the jigsaw pieces, in a way. And yeah, it's very helpful. Without the judge you'd be, you know, running around you know, for days I think, you know, trying to sort it all out. Yeah, very good to have them, the points of law and the facts you can consider or not.' — Juror 27[31]

BOCSAR report

5.28 The jurors were asked about the degree to which they felt that the judge's summing up of the evidence and the addresses by the prosecutor and defence counsel assisted them in reaching a verdict. In summary, the jurors responded that the judge's summing up was more useful than the addresses of either party, and slightly more jurors found the prosecutor's address to be more helpful than that of the defence. The jurors were asked a multiple-choice question with four choices: did the summing up or address help them 'a lot', 'quite a bit', 'a little bit' or 'not at all'. Their responses are summarised in Table 5.2.[32]

	Judge	Prosecutor	Defence
Did not help at all	5.5%	8.3%	10.8%
Helped a little bit	27.2%	36.2%	38.5%
Helped quite a bit	37.0%	38.0%	37.2%
Helped a lot	30.3%	17.6%	13.5%

Table 5.2: Jurors' reactions to summings-up and addresses.

5.29 These Australian studies demonstrate that the judge's role is central in instructing and guiding a jury, and that the role of counsel in this regard is, to a point, subsidiary. It is quite understandable that jurors see the judge as their main source of guidance during a trial and as they are about to retire to deliberate. It has been suggested to the Commission that jurors are keen to get from the judge's directions and other observations as much guidance, and as many clues as to the 'correct' verdict, as they can. This may also lead jurors to read too much into cautionary expressions.[33] Counsel for both parties, on the other hand, may be seen as partisan. In any event, the judge is clearly the person in the courtroom with the highest status, and due deference is paid

31 Ibid 12.

32 Ibid 7, Table 8.

33 Consultation, Dr B McKimmie, School of Psychology, University of Queensland, 9 December 2008.

to him or her by the jury.[34] Even so, jurors watch counsel closely throughout the trial and pay attention to their conduct and demeanour.[35]

5.30 Nonetheless, it is clear that not all jurors feel that their concerns or needs are being met by the addresses of either party or the judge's summing up of the evidence.

5.31 Whatever the shortcomings of self-assessed surveys such as this might be, questions of this sort are valuable in exposing the jurors' impressions of the trial process. In this instance, the jurors' reactions to the addresses by the parties and summing up by the judge clearly support the idea that it is to the judge that they look for most guidance and assistance. This in turn reinforces the concern that a judge's summing up — and, by extension, his or her directions and warnings — should be prepared, structured and worded so as to best assist jurors in ways that are accessible to them. It may also support the contention that statements by counsel on the law are no substitute for directions by the judge.

5.32 The results of this survey are consistent with a survey conducted by the NSW Law Reform Commission in 1985. Of 1,697 jurors who responded to the relevant question, 95% reported that the judge's summing up helped them to understand the case,[36] though the extent to which they were helped was not assessed. Those relatively few jurors who felt that the summing up was unhelpful had a number of reasons: it was unnecessary as they already understood the law; it was confusing, too long or boring; the judge was not a clear speaker; or it did not resolve the complexities of the case.[37]

5.33 Some similar responses came from jurors in a more recent survey conducted in New South Wales between 1997 and 2000.[38]

5.34 It is perhaps over-optimistic to expect all jurors to feel entirely satisfied with any judge's summing up and to feel entirely comfortable with the explanation of the law and issues that they must resolve. In any event, some of the jurors' uncertainties may be resolved during deliberations.[39]

5.35 The survey by the NSW Bureau of Crime Statistics and Research ('BOCSAR') asked jurors about several other aspects of their impressions of the judge's summing up of the evidence.[40] For example, when asked about the length of the summing up, a

34 This is supported by earlier research in New South Wales, Hong Kong and Russia: see Mark Findlay, 'Juror Comprehension and Complexity: Strategies to Enhance Understanding' (2001) 41 *British Journal of Criminology* 56, 68.

35 Chris Richardson, 'Juries: What they think of us' (2003) *Queensland Bar News* 16 (December 2003); Christine Richardson, *Symbolism in the Courtroom: An Examination of the Influence of Non-Verbal Cues in a District Court Setting on Juror Ability to Focus on the Evidence*, (Doctoral thesis, Griffith University, 2006).

36 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [2.20].

37 Ibid [2.21].

38 M Chesterman, J Chan & S Hampton (Law and Justice Foundation of NSW), *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (2001). See also New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [2.22].

39 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [2.4].

40 The authors of the survey and report did not have available to them details of the directions, their contents, the issues traversed, the complexity of the case or legal and procedural issued raised, the content of the parties' addresses, and so on: NSW Bureau of Crime Statistics and Research (L Trimboli) 'Juror understanding of judicial instructions in criminal trials' *Crime and Justice Bulletin* No 199 (2008), 3.

very strong majority (81.7%) said that it was 'about the right length'. It was 'too long' for 13.9%, 'far too long' for only 3%, but 'too short' for just 1.3%.[41]

5.36 Over half the jurors surveyed (57.5%) said that they understood 'everything' that the judge had said in the summing up of the evidence; over a quarter (27.9%) said that they understood 'nearly everything'; 14.4% said that they understood 'most things' and a very small number (0.3%) said that they understood 'very little' of what the judge said. Unsurprisingly, jurors who thought that they had understood everything or nearly everything the judge had said also reported that they found the words used by the judge 'easy to understand'.[42]

5.37 Jurors were also asked how often in the summing up of the evidence the judge told them things that they felt that they already knew. Almost half (47.3%) said that this happened 'sometimes'. However, a greater number — 48.5% in total — said that this happened 'often' (37.2%) or 'a lot' (11.3%). Only 4.2% of jurors surveyed felt that they were hearing it for the first time.[43] This outcome might be seen as indicating that the summing up is to a large extent repetitious of the evidence that has already been heard and referred to by counsel, bearing in mind that the parties' addresses are regarded as much less helpful in dealing with the evidence than the judge's summing up.[44]

Directions on the law

University of Queensland report

5.38 The survey asked jurors whether they found any of the instructions given to them by the judge in either the judge's opening remarks or in the summing up hard or difficult to apply. Only three jurors (of the 33 jurors in the sample) said the judge's opening remarks were difficult to apply: one found choosing the speaker difficult; one found it difficult to take accurate notes of the wording of the indictment as it was read out; and one said it was difficult to understand the concept 'beyond reasonable doubt'.[45] None of the jurors said they had difficulty applying the judge's directions in the summing up, although at least one juror commented in the follow-up interview that the jury had to seek further clarification from the judge:

> 'Yes, the judge did go through charge by charge, defendant by defendant, charge by charge, and listed out what evidence could be used against which person. Unfortunately, it was also pretty quickly said. So not all of us got it down on paper. Um... there was a lot of discussion in the jury room about that. And we did actually have to go back and ask on one of those points too. Like, which evidence could be — like a certain piece of evidence and could it be used against a certain person.' — Juror 25[46]

5.39 The jurors were also specifically asked about their understanding of the directions on the burden and standard of proof, and whether they found them helpful. Instruction on the burden and standard of proof was included in the judge's summing

41 Ibid 4–6.

42 Ibid 6–7.

43 Ibid 7.

44 See [5.31] above.

45 School of Psychology, University of Queensland (Blake McKimmie, Emma Antrobus and Kathryn Havas), 'Jurors' Trial Experiences: The Influence of Directions and Other Aspects of Trials', Report (November 2009) 8.

46 Ibid 12.

up in most cases.[47] The majority of jurors (57% for burden of proof and 66% for 'beyond reasonable doubt') reported that they understood the direction 'very much', rated the Judge's explanation as helpful (with scores of 6 or 7 out of 7), and did not find the Judge's explanation hard to understand or in need of clarification.[48]

5.40 However, when the jurors' objective understanding was tested, by having them explain in their own words what 'beyond reasonable doubt' and 'burden of proof' mean, many jurors were found to have misunderstood those concepts.[49] While 33% of jurors described beyond reasonable doubt in terms of having no doubt that is reasonable or there being no reasonable alternative explanation, 36% described it in terms of a requirement for total proof, 9% equated it with a 'reasonable person' test, one juror described it in terms of the balance of probabilities, and 18% gave various other types of descriptions or did not give a description at all.[50]

5.41 Jurors were somewhat better at understanding the burden of proof; 61% described it correctly. Most of those who attempted a description but got it wrong confused it with the notion that it was for the jury to assess the evidence, for example:[51]

> 'Not sure — My understanding [of] onus is responsibility and therefore, onus of proof is the juries (sic) responsibility on judging only on the proof (evidence) given.' — Juror 21[52]

5.42 Jurors were also asked whether the judge gave them any instructions that they may only use a particular piece of evidence for one purpose and not another (limited-use directions). Fourteen jurors (42%) indicated they had been given a limited-use direction. Of these, ten jurors gave a description of the direction which in all cases related to the differential use of evidence in trials involving multiple defendants.[53] For example:

> 'Accounts relayed by one defendant could only be used in reference to that defendant and not the other.' — Juror 23[54]

5.43 Using the jurors' descriptions as a guide, it would seem these particular instructions were relatively well understood.

5.44 The survey also asked jurors to identify any aspects of the trial they felt helped them in their job as jurors. Those things jurors most frequently identified were the judge's directions and clarification on points of law. One juror wrote, for example:

> 'The directions given put me at ease and allowed me to decide the verdict by law not by feeling only.' — Juror 1[55]

---

47 Ibid 11, Table 4.

48 Ibid 15, 16.

49 While the researchers found that '[t]he more jurors said they understood the direction [on burden of proof], the more accurate they were when describing what they thought the direction meant', they found no such relationship in relation to jurors' understanding of 'beyond reasonable doubt': Ibid 17.

50 Ibid 13–15.

51 Ibid 16.

52 Ibid 16.

53 Ibid 19.

54 Ibid 19.

55 Ibid 21.

5.45 In the follow-up interviews, jurors also 'maintained that the Judge's summing up (and, to a lesser extent, the addresses of the Prosecution and Defence) were important in guiding their deliberations and keeping them focused'.[56]

5.46 While the jurors considered the judge's directions one of the most helpful aspects of the trial, jurors also frequently suggested that they would have liked a written summary of the relevant laws or directions.[57]

BOCSAR report

5.47 The jurors in the BOCSAR study[58] were also asked to what extent they understood the judge's instructions on the law. Just under half (47.2%) said that they understood the judge 'completely' and an almost identical number (47.7%) said that they understood most things that the judge said, together accounting for 94.9% of responding jurors. Of the remainder, 4.9% said that they understood 'a little' of what the judge said and only 0.2% (ie, 2 out of 1,218 responding jurors) confessed to not understanding anything that the judge had said.[59]

5.48 What this survey suggests, however, is that many jurors already think that they know something of the law and, therefore, may be less open (subconsciously or otherwise) to instruction from a judge on a question that they think they already know the answer to.

Overseas research

5.49 In the United Kingdom the Home Office conducted a survey of 361 jurors who heard trials in five courts in Greater London and one in Norwich in 2001–2. That research also showed that a significant number had prior court experience: 13% as witnesses, 8% as defendants and 4% as victims. About one in five (19%) had previously served as a juror.[60] However, over 40% claimed that they had a good knowledge of the court process before their jury service, apparently largely from the media: over half the jurors interviewed said that the media had been influential in shaping their perceptions of the jury system.[61]

5.50 Exposure to the media is undeniably part of the life experience that jurors bring to court with them. The media's portrayal of courts, trials and the law — which is extensive and much of which is distorted — may influence jurors to an extent that they are less susceptible to a judge's directions than might otherwise be the case, or might have been the case in the past.

---

56 Ibid 21.

57 Ibid 24–6.

58 See [3.87], [5.22] above.

59 NSW Bureau of Crime Statistics and Research (L Trimboli) 'Juror understanding of judicial instructions in criminal trials' *Crime and Justice Bulletin* No 199 (2008), 8–9, Table 9.

60 Home Office (UK), *Jurors' perceptions, understanding, confidence and satisfaction in the jury system: a study in six courts* Home Office Online Report 05/04, <http://www.homeoffice.gov.uk/rds/pdfs2/rdsolr0504.pdf> at 30 November 2009, 7.

61 Ibid.

Judges' perceptions of jurors' comprehension

5.51 In the survey of Australian and New Zealand judges by the Australian Institute of Judicial Administration, judges were asked about their views of how well jurors comprehended the judges' directions and summings up.[62] Their views can be summarised as follows:

- Jurors had the least difficulty with summaries of the evidence and the judges' summaries of the parties' addresses.
- Jurors had moderate levels of difficulty understanding the evidence.
- Unsurprisingly, jurors had the greatest difficulty understanding the law about which directions were given. Only 1.5% of judges said that jurors had 'no problem' comprehending the law; over half reported that jurors had either 'some' (48.5%) or 'a great deal' (8.8%) of difficulty. The remaining 41.2% presumably had 'little difficulty'.
- Generally, judges were reluctant to generalise and said that perceived degrees of difficulty varied from jury to jury.

5.52 As has been noted, judges have quite limited means to assess a jury's comprehension[63] and their observations in this regard are necessarily quite impressionistic.[64]

Overseas research

5.53 Research in Chicago in the 1960s[65] revealed that judges agreed with juries' verdicts 75.4% of the time. In a further 16.9% of cases, the disagreement arose because the judge would have convicted but the jury acquitted. In cases of hung juries, the judges would more often have convicted than acquitted.

5.54 More recent research in Wyoming showed similar outcomes. Judges agreed with juries' verdicts in 76% of cases though almost all (97%) of the judges felt that the jurors had understood the key facts and all (100%) felt that they had understood the law.[66] This last result may suggest that judges are not especially good in assessing the level of a jury's comprehension of the law on which they are instructed, given the low rates of jury comprehension referred to above.

5.55 A survey conducted by the Law Commission of New Zealand reported in 2001[67] showed that judges interviewed after a jury had retired but before it had delivered its verdict agreed with the outcome only 50% of the time, which is statistically speaking no better than flipping a coin.

---

62 Australian Institute of Judicial Administration (James RP Ogloff, Jonathan Clough, Jane Goodman-Delahunty & Warren Young), *The Jury Project: Stage 1 — A Survey of Australian and New Zealand Judges* (2006) 33–35. See [4.89] above.

63 See [10.165]–[10.166] below.

64 Australian Institute of Judicial Administration (James RP Ogloff, Jonathan Clough, Jane Goodman-Delahunty & Warren Young), *The Jury Project: Stage 1 — A Survey of Australian and New Zealand Judges* (2006) 34.

65 Reported in James RP Ogloff & V Gordon Rose, 'The Comprehension of Judicial Instructions' in Neil Brewer & Kipling D Williams (eds) *Psychology and Law: an Empirical Perspective* (2005), 413–4.

66 Ibid 414.

67 See ibid.

5.56 Researchers in Michigan asked judges for their views as to the comprehensibility of some of the standard directions that they gave juries. The judges displayed a significant degree of doubt that those directions were understood: between 25% and 31% in relation to certain specific directions and 44% overall.[68] Nonetheless, the directions were still given; no doubt, in many instances the judges had little option.

DO JURORS UNDERSTAND THE LAW?

5.57 Research into the extent to which jurors understand the law that they are required to apply has suggested that their level of comprehension is not particularly high.

University of Queensland report

5.58 As discussed above, responding jurors found that the judge's summing up and directions on the law were among the most important factors in the trial that aided them in their task as jurors.[69] They did not report having any difficulties in understanding the judge's directions on the law in general, although some reported difficulties in understanding the meaning of 'beyond reasonable doubt' and the burden of proof and, indeed, many described those concepts in terms that indicated misunderstanding. Conversely, jurors' descriptions of the directions they heard to use particular evidence against one but not another defendant in trials with multiple defendants indicated general understanding of those instructions.

5.59 Jurors acknowledged that the legal issues were very broad in some cases and that this made their task difficult. They also identified difficulties with aspects of the law that seemed to contradict other aspects of the law.[70]

5.60 One of the most frequently cited improvements jurors thought could be made to help them understand the law, was a written summary of the laws or directions:

> Given the problems that were highlighted regarding difficulties with deliberations and conflicts regarding directions, most jurors who were interviewed felt that having something written down, either regarding the exact wording of the law (or, alternatively, the law in layman's terms), a summary of all the evidence, or the Judge's summation, to refer to during deliberations would have aided them.[71]

Overseas research

5.61 Research in New Zealand has produced findings concerning jurors' satisfaction with judge's instructions on the law. Of 312 jurors in 48 trials, 85% of responding jurors found the judge's summing up 'clear' and over 80% found the judge's instructions

68 Reported in ibid 415. The size of the sample of judges was not given.

69 School of Psychology, University of Queensland (Blake McKimmie, Emma Antrobus and Kathryn Havas), 'Jurors' Trial Experiences: The Influence of Directions and Other Aspects of Trials', Report (November 2009). See [5.26]–[5.27], [5.44]–[5.45] above.

70 Ibid 23.

71 Ibid 25.

'helpful'.[72] These results reflect the results of the research conducted by the NSW Bureau of Crime Statistics and Research.[73]

5.62 However, despite the New Zealand jurors' confidence in the directions given to them, 72% demonstrated a misunderstanding of the law about which they had been instructed, in particular in relation to the elements of the offence about which they need to be satisfied beyond reasonable doubt before convicting.[74] This outcome has been found in other similar research in the United States and Canada.[75]

5.63 Research in Michigan involving a survey of 224 people of whom 140 (62.5%) who had served on a jury and the remainder of whom had been called but had not served demonstrated that:

- the participants' ability to correctly answer questions about their procedural duties on a true/false basis was slightly worse than chance;
- their score on substantive legal issues arising in the cases that they had heard was only 41%;
- those who had received instructions about their procedural duties performed better than those who had not, but those who had received instructions about the substantive legal issues performed no better than those who had not;
- addresses by counsel did not improve the jurors' performance; and
- jurors who had asked for further clarification from the judge fared better than other jurors.[76]

5.64 However, some of this research leaves some key questions unanswered as it does not reveal how the jurors in fact came to their decisions and how they applied the directions that they were given. Reported difficulties by jurors in comprehending the substantive law may not be as disturbing as first appears. What must also be taken into account are the specific tasks that the jurors were asked to perform and the specific questions that they were required to answer. If these tasks and questions are framed so as to avoid requiring the jury to confront technical legal questions in a technical legal way — but are couched so as to emphasise the jury's fact-finding role — these difficulties may in practice be side-stepped to a large extent.[77]

72 See ibid 411.

73 NSW Bureau of Crime Statistics and Research (L Trimboli) 'Juror understanding of judicial instructions in criminal trials' *Crime and Justice Bulletin* No 199 (2008) 7. See [3.87] above.

74 See James RP Ogloff & V Gordon Rose, 'The Comprehension of Judicial Instructions' in Neil Brewer & Kipling D Williams (eds) *Psychology and Law: an Empirical Perspective* (2005) 411.

75 See ibid 412, 415–6.

76 Reported in ibid 411–2. See [5.56] above. It should be noted that this research involved jurors and potential jurors for both criminal and civil juries.

77 See [9.120]–[9.130] below.

HOW DIRECTIONS INFLUENCE DELIBERATIONS AND VERDICTS

5.65 A central question in this enquiry is whether jury directions, irrespective of how well they reflect the law, actually influence the way jurors make decisions, and in ways that the courts expect. It may prove to be a waste of time to be overly concerned with the niceties of expression or the manner in which directions are delivered if they are simply disregarded, unconsciously or otherwise, by the jurors to whom they are directed.

5.66 One issue of concern is the requirement that juries be directed from time to time to put some evidence out of their minds, or to use certain evidence for some purposes and not for others. For example, some evidence may be used only to determine a witness's credit and not any of the substantive factual issues in the case. In other cases, some evidence may be admitted against one defendant and not another. The jury will be directed in those cases to apply the evidence for certain specified permissible purposes but not for others. The concerns about limited-use directions are outlined in chapter 12 of this Report. In short, the risk is that these directions are too arcane, and the intellectual task that they ask of jurors is too subtle, with the outcome that the directions are not or cannot be applied effectively and evidence may well be used in ways that were expressly prohibited.

5.67 Some directions may have an effect which is the opposite of what was intended. Directions that focus on evidence that is to be disregarded or given little weight may simply cause jurors, perhaps subconsciously, to focus on it in reaching their decisions. Sometimes the import of a direction may be exaggerated by a jury.

APPROACHES TO REFORM

5.68 In 2005, Professor James Ogloff of Monash University and the Victorian Institute of Forensic Mental Health and Dr V Gordon Rose of the Department of Psychology at Simon Fraser University, British Columbia wrote:

> [W]e have attempted to provide an overview of the current empirical understanding of jurors' comprehension of judicial instructions. As pointed out, it is critical that jurors demonstrate some basic understanding and appreciation of the legal principles and elements with which the judge provides them in order to determine whether the evidence presented in the trial meets the legal requirements for a verdict. …
>
> Generally, surveys of jurors show that jurors who have served on a trial believe that the judge's instructions were helpful. Moreover, those studies that have asked the question suggest that jurors believe, and have some confidence in, the 'fact' that they understand the judge's instructions. By contrast, virtually all of the existing empirical research, primarily employing a mock-juror paradigm, shows that, at best, jurors or participants have a very limited understanding of the law. Field studies of actual jurors suggest that although instructions do help jurors, at least to some extent, jurors still demonstrate considerable difficulty understanding the jury charge.[78]

5.69 Other research has highlighted the differing levels of competence that juries exhibit in relation to different aspects of their tasks.

---

78 James RP Ogloff & V Gordon Rose, 'The Comprehension of Judicial Instructions' in Neil Brewer & Kipling D Williams (eds) *Psychology and Law: an Empirical Perspective* (2005) 438.

> Jurors do seem to have some problems evaluating the reliability of some types of evidence (eg, eyewitness evidence, confession evidence, expert evidence), and the procedural safeguards intended to assist their discernment of reliability appear to be relatively ineffective. Jurors are also influenced by extraevidentiary factors, for example, considering inadmissible evidence even after judicial admonishments to disregard it. Nonetheless, juror decision making in civil cases appears to be relatively competent, with jurors generally attending to legally relevant factors when deciding liability, compensatory damages, and punitive damages.[79]

5.70 If the reality is that many jurors do not seem to be able to comprehend certain legal concepts, at least to the satisfaction of lawyers, there may be little to be gained by agonising over the precise words (or even the continued use) of certain warnings and directions.

5.71 It is relevant to ask whether the community would accept that judges or other lawyers would do any better. They might have a better grasp of the law, but the essential element that any jury brings to a criminal trial is the inherent grasp of community values (whatever they may be) without the conditioning of legal training. This 'amateur' status is highly valued as a vital link between the criminal justice system and the community at large.

5.72 Perhaps, then, the difficulties that juries have in trying to comprehend some legal concepts ***to the standard that would satisfy lawyers*** is not the critical concern if the crucial consideration is whether juries' verdicts are nonetheless reliable and justify continued community acceptance.

5.73 If these two propositions are accepted — that juries are good at handling the facts but less adept at the law — then some avenues for reform may lie in playing to a jury's strengths, and (apart from anything else) adapting criminal trial and pre-trial procedures to allow juries to focus on the facts rather than the law. This could involve, for example, providing juries with factual questions, tailored to the case at hand, to be answered in a logical sequence. Those questions will have been prepared by the judge with counsel's assistance so as to embed the law that governs the offence within them. The jury is then not asked to consider the law directly but to come to the necessary factual conclusions, the results of which will determine the verdict. These propositions, and the research from which they are drawn, have informed the general approach that the Commission has taken in this Report.

5.74 The Commission has reached the view that constructive reform concerning jury directions should take into account at least the following principles which, although they may not sit comfortably with some conventional notions of the jury system, appear to acknowledge what research has shown about juries and their decision-making processes:

- Jurors work conscientiously to arrive at their verdicts.
- Jurors are good at coming to conclusions about facts and at assessing witnesses and the evidence.

79 Lora M Levett and others, 'The Psychology of Jury and Juror Decision Making' in Neil Brewer & Kipling D Williams (eds) *Psychology and Law: an Empirical Perspective* (2005) 396.

- Jurors are not lawyers and have difficulty understanding many of the legal concepts that they are directed about. Lengthy abstract directions on the law do little, if anything, to remedy this.

- A lengthy incantation of legal principles in the abstract, however important, will do little to help the jury apply the law to the facts.[80]

- Jurors are literate and often well-educated, often more than is customarily assumed. They can deal with written material effectively, and better than oral evidence and addresses only.

- The conventional, almost exclusively oral, tradition of criminal trials is no longer appropriate in a world with a very high degree of literacy in which almost everyone deals with written and visual materials at all levels of their education and in all aspects of their lives.

- It is unrealistic and counter-productive to assume that juries should not be given as much information as possible (within the limits of the rules of evidence) to assist them arriving at their verdict.

- The judge is the focus of the jurors' attention, and they seek and obtain more guidance from the judge than from either the prosecution or defence counsel. The focus of guiding the jury on the law then falls to the judge, as it should, and should not be left to counsel.

- Summings up should be as short as the law and a proper review of the case allow. In general, the evidence itself does not need to be repeated. A jury with access to a copy of the evidence (including the transcript) can be left to review the evidence that it wants to remind itself about.

Can jurors' comprehension be improved?

5.75 A key aspect of this enquiry is a consideration of various strategies that might be adopted to improve juror comprehension of judicial directions and warnings. Research shows that jury directions are influential in determining a jury's decisions.[81] If so, then efforts should be made to consider techniques to improve the rate of comprehension. These should cover both the content and the presentation of directions, and are considered in chapters 7 to 17 of this Report.

5.76 However, as the present state of research here and overseas indicates that juries may have considerable difficulties in comprehending the law, it may be better to shift the focus of jury directions away from the law and onto the facts, where juries appear to be more comfortable and more competent. This idea is reinforced if it is accepted that it is unreasonable to expect jurors to understand the law on the basis of the extremely limited exposure to it that they experience during the course of a trial. Lawyers themselves train for many years to achieve expertise in some of these notoriously difficult areas — it may be futile to expect that any form of direction on the law is

80 See *HML v R* [2008] HCA 16 [120]–[122] (Hayne J) quoted in [4.79] above.

81 James RP Ogloff & V Gordon Rose, 'The Comprehension of Judicial Instructions' in Neil Brewer & Kipling D Williams (eds) *Psychology and Law: an Empirical Perspective* (2005) 408, 412.

going to instil a deep and subtle comprehension in a dozen untrained (though not unintelligent) people facing these problems for the first time in their lives.

Use of plain English

5.77 If a law is complex, it is likely that any jury direction about it will also be complex. That may be hard to avoid. Nonetheless, if the needs of the primary audience, the jury, are to be properly taken into account, all directions should be couched as far as possible in language that is accessible to them.

5.78 Plain English is clear, uncomplicated expression. It is not simple English[82] and certainly not simplistic English. The use of plain English reflects an effort on the part of the speaker or writer to use language that is tailored to the task it needs to fulfil. Although a jury direction must state the law accurately, it should do so as succinctly as feasible. One basis for this is the underlying principle that a jury should be directed only about so much of the law as it needs to know to determine the case.[83]

5.79 The use of plain English involves structuring the expression of ideas in ways that invite and encourage, rather than thwart, understanding. It is perhaps self-evident that a well structured direction will be clearer to jurors and lawyers alike and is more likely to accurately and clearly state the law.

5.80 The way in which directions are expressed can be improved by the use of a few straight-forward drafting techniques. These include:

- using shorter, less convoluted sentences, though the emphasis should always be on clarity and not just on sentence length;
- using active rather than passive verbal structures;
- avoiding double and multiple negatives;[84] and
- avoiding jargon, legal shorthand, Latin and archaic terms where other expressions are available.

5.81 It may be difficult to state the law without recourse to legal terminology but thought must be given to how a jury will understand and apply expressions and concepts such as ‘reasonable person’, ‘ordinary person’, ‘beyond reasonable doubt’, ‘dangerous and unsafe to convict’, ‘scrutinise the evidence with great care’, ‘malice’, ‘inconsistent with guilt’, ‘rational inference or hypothesis consistent with innocence’, ‘proximate cause’, ‘scrutinise’, ‘demeanour’ or anything in Latin.[85] Many directions,

82 R Eagleson, *Writing in Plain English* (1990) 4. For the use of plain English in legislation, see Victorian Law Reform Commission, *Plain English and the Law*, Report No 9 (1987).

83 *RPS v The Queen* (2000) 199 CLR 620 [41] (Gaudron ACJ, Gummow, Kirby and Hayne JJ). See also *Alford v Magee* (1952) 85 CLR 437, 466.

84 This can be difficult where an accurate statement of the onus of proof — or the onus of disproof of the applicability of a defence — involves the stringing together of negative concepts: eg, where the jury must consider if the prosecution has failed to prove that a defence does not apply; see [4.54]–[4.58] above.

85 The Hon J Wood AO QC, ‘The trial under siege: towards making criminal trials simpler’ (Paper presented at the District and County Court Judges Conference, Fremantle, 27 June–1 July 2007) 4.

particularly those standardised in benchbooks, do attempt to define or re-state these terms, some of which are hard for lawyers to grasp or define.[86]

5.82 Problems may arise when some of these technical terms have a meaning in common usage — such as 'malice' — or are informally known to many members of the public (and, therefore, to many jurors) through the media — such as 'beyond reasonable doubt' and 'circumstantial evidence'. Jurors may bring with them into the courtroom some understanding of these terms drawn, for example, from the popular media.[87] These pre-conceptions may be quite inaccurate — such as a misconception that a defendant cannot be convicted on circumstantial evidence alone[88] — but entrenched and therefore difficult to displace by a judicial direction.

5.83 Other problems may arise when trial judges attempt to clarify or paraphrase some of these expressions and, in doing so, inadvertently fall into error. In *R v Punj*[89] for example, the trial judge fell into error in trying to paraphrase the expression 'beyond reasonable doubt'.[90]

5.84 One further cause for concern relating to the use of some standard legal expressions in jury directions is that, in their desire to extract guidance from those directions, juries may subconsciously infer instructions that over-state what has been intended by the words of the directions. For example, a direction that certain evidence should be 'scrutinised with great care' — not an expression that is in common usage — may be interpreted as a coded instruction to disregard that evidence; and a direction that it would be 'dangerous and unsafe to convict' based on certain evidence may be taken to be a coded instruction to acquit or to disregard that evidence entirely.[91]

5.85 In the survey of jurors' understanding of judicial instructions conducted by NSW Bureau of Crime Statistics and Research ('BOCSAR') in 2007–08,[92] a small number of jurors identified words that were used by the judges that the jurors had difficulty in understanding. Some jurors identified these troublesome terms simply as 'technical

---

86 The problems associated with attempting to define 'beyond reasonable doubt' are discussed above at [17.3]–[17.48] below. See also New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [1.32]–[1.34], [3.14]–[3.36].

87 See [5.32]–[5.48] above.

88 The model direction on circumstantial evidence in the Queensland Benchbook reads as follows:

> Circumstantial evidence is evidence of circumstances which can be relied upon not as proving a fact directly but instead as pointing to its existence. It differs from direct evidence, which tends to prove a fact directly: typically, when the witness testifies about something which that witness personally saw, or heard. Both direct and circumstantial evidence are to be considered.
>
> To bring in a verdict of guilty based entirely or substantially upon circumstantial evidence, it is necessary that guilt should not only be a rational inference but also that it should be the only rational inference that could be drawn from the circumstances.
>
> If there is any reasonable possibility consistent with innocence, it is your duty to find the defendant not guilty. This follows from the requirement that guilt must be established beyond reasonable doubt. (note and commentary omitted)

Queensland Courts, *Supreme and District Court Benchbook*, 'Circumstantial Evidence' [46] <http://www.courts.qld.gov.au/2265.htm> at 30 November 2009.

89 [2002] QCA 333. See also *R v Irlam, ex parte A-G* [2002] QCA 235, although the trial judge's gloss on the expression was held not to have invalidated the summing up when read as a whole: [53]–[58].

90 The problems associated with attempting to define 'beyond reasonable doubt' are discussed at [17.3]–[17.48] below.

91 Consultation, Dr B McKimmie, School of Psychology, University of Queensland, 9 December 2008.

92 NSW Bureau of Crime Statistics and Research (L Trimboli) 'Juror understanding of judicial instructions in criminal trials' *Crime and Justice Bulletin* No 199 (2008); see [3.87], [5.22] above.

words' or 'legal words'. Others gave specific examples: 'malicious', 'intent', 'beyond reasonable doubt', 'wrongful', 'indictable offence', 'circumstantial evidence', 'word against word', '"supply" of prohibited drug' and sentences with double negatives.[93] However, of the 1,194 jurors who responded to this question, the overwhelming majority (97.1%) said that the judge generally used words that the jurors found easy to understand.[94] Of course, as the authors of the BOCSAR report acknowledge,[95] the actual extent of the jurors' understanding cannot be objectively measured in a self-reporting study such as this one.

Simplifying directions

5.86 A recurrent feature of any discussion of jury directions is the need to strike a balance in the interests of the competing demands of fair trial obligations, jury comprehension and the avoidance of unnecessary appeals. That issue appears again in the context of any attempt to simplify or otherwise amend jury directions. Even if it is accepted that juries are generally intelligent but not expert lawyers[96] (and that those jurors who are not as skilled in dealing with the intellectual demands of jury service will be assisted by those who are),[97] it nonetheless follows that the general quality of jury directions will be improved — and the jurors' tasks made simpler with a greater likelihood of reliable verdicts — if directions are made more straight-forward and expressed clearly without being laden with legal concepts and legal jargon.

5.87 This Report covers a number of issues concerning the complexity of jury directions, either generally or in relation to specific offences or evidence.[98] However, some research suggests that there are also problems associated with the simplification of jury directions to the point that they might become ineffective or even counter-productive. The report from the University of Queensland on the results of its experimental research highlights this risk.[99]

5.88 While comprehending the judge's instructions will not necessarily guarantee that juries follow them, it is a necessary step in ensuring that they can. Complex and hard-to-understand directions may be improved by simplifying their language and content. Whether this improves juror understanding, and compliance with, directions, was examined in an experimental study conducted by the University of Queensland.[100] It is possible, for example, that even if jurors understand simplified directions better, they may choose to ignore them; however, anecdotal remarks from judges and lawyers, and jurors' responses to surveys are to the effect that jurors are conscientious in listening to, and trying to follow, the judge's instructions.

---

93 NSW Bureau of Crime Statistics and Research (L Trimboli) 'Juror understanding of judicial instructions in criminal trials' *Crime and Justice Bulletin* No 199 (2008), 7.

94 Ibid.

95 Ibid 3, 10–11.

96 See [3.84], [3.86] above.

97 Judith Fordham, 'Bad Press: Does the Jury Deserve It?' (Paper presented at the 36th Australian Legal Convention, Perth, 17–19 September 2009) 17.

98 See, for example, the discussion of the use of integrated directions in the summing up at [9.79]–[9.130] below and of directions on post-incident conduct in chapter 14 of this Report.

99 School of Psychology, University of Queensland (Blake McKimmie and Kathryn Havas), 'An Experiment to Test the Effect of Simplifying Directions', Report (November 2009). See [2.19]–[2.21] above.

100 Ibid.

5.89 The University of Queensland's study sought to examine these matters by comparing participants' responses to a standard (and longer) direction with responses to a simplified (and shorter) direction.[101] The directions in the study instructed jurors to disregard pre-trial publicity.

5.90 An initial pilot study found that the simplified direction was indeed easier to understand than the standard, complex direction.[102] In the main study, participants were exposed to media stories about the defendant's prior convictions.[103] During a simulated trial, they were given either the standard or simplified version of the direction to disregard information heard outside the courtroom, including media stories, or no direction at all. Those who received the simplified direction were considerably more conservative in their verdicts and reported relying on their own beliefs less than those who were given the standard direction or no direction at all.[104] They also reported stereotyping the defendant to a lesser extent than those who received no direction.[105]

> This pattern of results suggests that when presented with simple directions, participants were more alert to the potential that their perceptions might be biased and so they adopted a more conservative standard of proof, relied less on their personal beliefs, and stereotyped the defendant to a lesser degree. It does not appear that participants were specifically actively correcting for the biasing factor described in the directions, but rather adopting a more cautious and objective approach overall in evaluating the case.[106]

5.91 The researchers concluded, therefore, that:

> giving jurors simplified directions to disregard negative media exposure may lead jurors to be able to do so more effectively than giving them either no directions, or the standard, complex directions that they are currently given in criminal trials.[107]

5.92 While the results of the study provide good evidence for the benefits of simplifying judicial instructions, and provided no indication that jurors ignore directions, the researchers also noted the possible risk of back-fire when admonitory directions like this are simplified: if simplified directions are easier to understand and thus make jurors alert to the need to curb potential biasing factors, there is a risk they may over-correct, making jurors more conservative in their verdicts than they might otherwise be:

> One important caveat is that once perceivers are aware of the potential for bias and they attempt to correct for it, they may adjust their perceptions too far. Research suggests that people do tend to attempt to correct for biases that they are aware of (Bodenhausen, Mussweiler, Gabriel, & Moreno, 2001; Lambert, Khan, Lickel, & Fricke, 1997; Wilson & Brekke, 1994). Problematically, people also have difficulty estimating the magnitude of their biases and tend to systemically over-estimate the extent that their biases influence their perceptions (Wilson & Brekke, 1994). As such, the effect of directions may well be to make jurors particularly aware that they may be influenced by a biasing factor, and so jurors may overcompensate in arriving at a verdict. In doing so, they would become more lenient towards the defen-

101 Ibid 6–9.

102 Ibid 6.

103 Some participants were exposed instead to 'irrelevant' media stories: Ibid 7.

104 Ibid 11–12.

105 Ibid 12.

106 Ibid 13–14.

107 Ibid 15.

> dant than they would have been if they had not been exposed to biasing information about him.[108]

5.93 No such effect was found, however, in this study. Neither did the study find any evidence that jurors ignore judicial directions. The study does provide support, however, for the notion that jurors are often unable to understand judicial instructions and that simplification can improve jurors ability not only to understand but to follow those instructions.[109]

108 Ibid 14.

109 Ibid 12–13.

Chapter 6

Appeals Involving Jury Directions

INTRODUCTION

6.1 This chapter considers whether any systemic problems associated with jury directions have manifested themselves in practice at appellate level. The Commission has reviewed a statistical analysis of criminal trials and appeals in Victoria included in a Consultation Paper published in September 2008 by the Victorian Law Reform Commission,[1] and sets out some provisional conclusions drawn from the Commission's own statistical analysis of relevant criminal appeals in Queensland.

APPEALS AND RE-TRIALS

6.2 In any analysis of the issues surrounding jury directions, it is important to consider whether the difficulties discussed in this Report in fact result in any general or systemic problems in the administration of the criminal justice system in Queensland. A number of potentially inconsistent principles that need to be balanced in any healthy justice system are at play.

6.3 One important principle is the need for public confidence in the system as a whole and in the outcome of each case. It is also critical that the participants in every case have confidence in the process and outcome of that case. That is not to say that the outcome is welcomed by all participants; there will necessarily be some who will be disappointed in each case. However, this requirement of public confidence is met if the parties accept that, in the context of the criminal justice system, the trial was fair, as well as any appeal processes that might flow from it.

---

1 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008), Appendix A. Additional statistics in summary form appeared in Schedule B to the VLRC's Final Report: Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) Schedule B, 150–153.

6.4 It is also critical that there be available an open and effective system of appeal so that any suggestion that a trial might have miscarried can be reviewed by a higher tribunal, and either dismissed or accepted, with the result that a new trial is ordered or, as occurs more rarely, a new verdict imposed. If a re-trial is ordered, the second verdict may well, of course, be the same as the first, but public confidence in an open and fair criminal justice system demands that the verdict be reached at the conclusion of a fair trial and that it not be undermined by a significant flaw in the process even if the outcome is ultimately the same.

6.5 At the same time, the public interest demands an appeal system that runs effectively, that is not congested by patently unmeritorious appeals — and that the rate of successful appeals is not so high that it would suggest that there are systemic problems in relation to the trials that need correction. A fair and accessible appeal regime is essential not only to ensure justice in particular cases but to allow a judicial system, especially one based on the common law, to develop and renew itself.

Appeals by the prosecution

6.6 In the context of a criminal justice system, the overwhelming majority of appeals are those commenced by convicted defendants, either against the way in which the trial was conducted or against the sentence imposed by the court, or both. The prosecution is generally unable to appeal against an acquittal[2] but the Attorney-General may appeal against the leniency of the sentence imposed.[3] The appellate court may in its unfettered discretion replace the original sentence with such sentence as seems proper to it.[4] In Queensland, appeals by the prosecution against sentence account for only 6.8% of all criminal appeals on average.[5]

6.7 The Attorney-General is also entitled to appeal against a number of orders by a judge during the course of a trial. The Attorney-General may appeal against an order staying proceedings on an indictment.[6] The Attorney-General may also refer any point of law that arose in the trial of a charge upon indictment (or the summary trial of a charge of an indictable offence) where:

- following the ruling on the point of law, the defendant was acquitted of that charge; or
- was discharged in respect of that charge if the prosecution did not proceed further as a result of the ruling on the point of law; or
- where the defendant was convicted of another charge (with or without a circumstance of aggravation).[7]

2 The few bases on which the Attorney-General may appeal in a criminal matter are set out in s 669A of the Criminal Code (Qld); none allow an appeal by the Attorney-General against the verdict itself.

3 Criminal Code (Qld) s 669A(1).

4 Criminal Code (Qld) s 669A(1).

5 See the statistics in Table 6.1 later in this chapter, discussed at [6.32]–[6.41].

6 Criminal Code (Qld) s 669A(1A).

7 Criminal Code (Qld) s 669A(2), (2A).

6.8 The Attorney-General also has comparable rights of appeal from rulings in relation to pre-trial rulings on points of law.[8] However, the Criminal Code (Qld) provides for no re-trial in the event that any such appeal is upheld.

Appeals by defendant after conviction

6.9 In Queensland, a convicted defendant has a right to appeal to the Court of Appeal from either the District or Supreme Court on any point of law.[9] This would include any ground of appeal that the judge misdirected the jury, or erred in any other way in the application of the law to the case, such as the admission of evidence.

6.10 In other situations — that is, appeals involving any question of fact (including mixed questions of fact and law), appeals against the severity of the sentence and appeals on any other basis that appears to the Court to be sufficient — the leave of the Court is required.[10]

6.11 Subject to the provision discussed in [6.14] below, the Court of Appeal shall allow any appeal against conviction if:

- the jury's verdict is unreasonable or cannot be supported having regard to the evidence;
- there was a wrong decision on any point of law (such as a direction to the jury); or
- there was a miscarriage of justice on some other basis.[11]

6.12 In all other circumstances, an appeal against conviction must be dismissed.[12]

6.13 If the appeal is allowed, the Court must quash the conviction and direct a judgment and verdict of acquittal to be entered.[13] The Court has the power to order a fresh trial of the relevant charge or charges where a miscarriage of justice has occurred and where, in the circumstances, this can be remedied more adequately by such an order.[14] Ordinarily, a re-trial will be ordered (as is borne out by the statistics in Table 6.3 below). However, a re-trial is not to be ordered as a matter of course where an appeal is upheld: the interests of justice require a balancing of the public interest in securing a fair trial of the charges against any possible oppression of the defendant,[15] among other issues. It has been observed that a re-trial would generally be ordered where the case against the defendant is reasonably strong and there is evidence on which a properly instructed jury could convict, and where the miscarriage arose from a procedural error[16] (such as misdirection to the jury). On the other hand, the Privy Council has

8 Criminal Code (Qld) s 668A.

9 Criminal Code (Qld) s 668D(a).

10 Criminal Code (Qld) s 668D(b), (c).

11 Criminal Code (Qld) s 668E(1), but subject to s 668E(1A): see [6.14] below.

12 Criminal Code (Qld) s 668E(1).

13 Criminal Code (Qld) s 668E(2).

14 Criminal Code (Qld) s 669(1).

15 See, eg, *Rabey v The Queen* [1980] WAR 84, 95 (Wickham J).

16 *R v Leak* [1969] SASR 172, 176; *Rabey v The Queen* [1980] WAR 84, 96 (Wickham J).

stated that a re-trial ought not be ordered where the prosecution evidence was insufficient to justify a reasonable, properly instructed jury convicting the defendant: the prosecution ought not be given an opportunity to cure this defect at a second trial.[17]

6.14 However, even if satisfied that the points raised in the appeal should be decided in the appellant's favour, the Court may dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.[18] This proviso has been invoked by the Queensland Court of Appeal in some recent appeals where error was found but the appeal was nonetheless dismissed.[19] The Victorian Court of Appeal has noted that:

> as McHugh and Gummow JJ observed in *Dhanhoa*,[20] it is not enough for an appellant to succeed on an appeal against conviction to demonstrate that the trial judge has given a misdirection. To succeed in the appeal, the applicant must establish a reasonable possibility that the failure to direct correctly 'may have affected the verdict'.[21]

6.15 In appeals against sentence, if the Court considers that a sentence other than that originally passed by the trial judge is warranted, it shall quash the original sentence and pass the appropriate sentence in substitution for it, whether that be more or less severe.[22] However, if in the Court's opinion the sentence should be increased, it is the practice of the Queensland Court of Appeal to warn applicants who have appealed against sentence that their sentence may be increased before the appeal is determined.[23]

6.16 The key restriction on any appeal by the defendant is that the verdict itself cannot be analysed and combed for error in reasoning or law, as a judge's reasons for judgment can. The jury's decision is regarded as inviolable and cannot be challenged unless it is 'unreasonable, or cannot be supported having regard to the evidence.'[24]

6.17 It is important to bear in mind that a jury never gives any reasons for its verdict, and its thought processes are often opaque to observers, including defendants and their lawyers. In some cases conclusions may be drawn that the jury was or was not satisfied beyond reasonable doubt of certain key elements of the alleged offence and any defences asserted, but little else can be discerned. This can be contrasted with any decision by a judge or judges, whether in a civil case or a criminal trial, as it must be accompanied by a statement of reasons which can be analysed later at some leisure and scrutinised thoroughly for appeal points. In most criminal trials, however,

---

17 *Reid v The Queen* [1980] AC 343, 348.

18 Criminal Code (Qld) s 668E(1A). Similar provisions exist in other Australian jurisdictions: see, eg, *Criminal Appeal Act 1912* (NSW) s 6(1) and more generally New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [1.47].

19 See, for example, *R v Stuart* [2005] QCA 138; *R v Hart, ex parte Cth DPP* [2006] QCA 39; *R v Armstrong* [2006] QCA 158; *R v HAC* [2006] QCA 291; *R v Rowe* [2006] QCA 379.

20 *Dhanhoa v The Queen* (2003) 217 CLR 1, 18 [60].

21 *R v Gould* [2009] VSCA 130 [49] (Vincent, Nettle & Neave JJA).

22 Criminal Code (Qld) s 668E(3).

23 Thomson Reuters, *Queensland Sentencing Manual* (at 18 December 2009) [18.18].

24 Criminal Code (Qld) s 668E(1). See *R v Thaiday* [2009] QCA 27 for an example of a case where a jury's verdict of guilty was quashed on appeal and a verdict of not guilty entered. The jury had convicted the defendant notwithstanding the trial judge's 'clear and thorough directions' on the twenty-year delay in lodging a complaint and in relation to discrepancies in the complainant's evidence; however, the Court of Appeal could not exclude the 'significant possibility that an innocent person' had been convicted.

the jury simply delivers its verdict and is discharged. It is against the law for any details of the jury's deliberations to be published without the authorisation of Supreme Court.[25]

6.18 As it may be very difficult to challenge the verdict itself on appeal, convicted defendants will often focus their appeals on the trial process, and key parts of that process are the directions, summing up and other comments given by the trial judge to the jury. It would be expected, therefore, that appeals alleging some form of misdirection (apart from any other basis of appeal) might be relatively common among appeals against conviction.

6.19 It would be instructive to know how frequently appeals arise in the Queensland criminal justice system, how many of those relate to alleged misdirections, and to analyse the outcomes of those appeals. Such an exercise was done by the Victorian Law Reform Commission ('VLRC') and described in its 2008 Consultation Paper.[26] The Commission has also undertaken its own review of criminal appeals in Queensland, the results of which are set out in this chapter.

6.20 It should be borne in mind that appeals will only bring to light defects in jury directions that disadvantaged the convicted defendant, or are argued to have done so. Flaws in jury directions in any case where the defendant was acquitted and any directions that were unduly favourable to the defendant will not be the subject of an appeal and, therefore, the subject of judicial comment at appellate level.

STATISTICAL REVIEW OF APPEALS

Victorian statistics

Frequency of appeals

6.21 The detailed results of the VLRC's statistical analysis are set out in Appendix A to its 2008 Consultation Paper[27] and a summary version of selected statistics appears in Schedule B to its Final Report.[28] The salient figures are summarised in the following paragraphs.

6.22 From 2000 to 2007, a total of 538 appeals against conviction were filed in the Victorian Court of Criminal Appeal.

6.23 Of those 538 appeals, 207 were successful on some basis (which could include a ground other than misdirection), a rate of 38.5%. The annual rate varied in that period from 28.6% to 50.8%.[29] This is an increase from the average rate of 32.3% for the preceding period from 1995 to 1999 (110 successful appeals from 341 appeals filed) with annual rates varying between 23.1% and 39.7%.

25 See *Juries Act 1995* (Qld) s 70, and see [2.2]–[2.4] above.

26 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008), [1.3]–[1.8], Appendix A.

27 Ibid.

28 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009), Schedule B, 150–3.

29 The success rate of 7% for appeals filed in 2000 (3 successful appeals out of 43 filed) is inconsistent with the overall success rate.

6.24 Over the seven-year period from 2000–01 to 2006–07, the number of appeals on average represented 29% of convictions recorded, though in the last year for which figures were reported (2006–07) the figure dropped to 21%. Prior to that year, the number of appeals had been quite consistent and averaged 34%.

6.25 The success rate of appeals over that seven-year period was also quite consistent and averaged 41% of appeals heard, 13% of convictions recorded and 7% of contested trials.[30]

Frequency of appeals on the basis of misdirection

6.26 Of the 530 appeals filed from 2000 to 2007 where the VLRC was able to identify the grounds of appeal, two-thirds (358 or 67.5%) raised at least one allegation of misdirection in the grounds of appeal. The annual rate varied from 60.5% to 77.0%. Other grounds of appeal included issues such as the allegedly wrongful admission of evidence or other procedural matters.

Frequency of successful appeals

6.27 Of the 358 appeals against conviction which alleged misdirection, 142 were successful. This represents:

- 68.6% of the 207 successful appeals against conviction during the same period;
- 39.7% of the 358 appeals against conviction which alleged misdirection; and
- 26.4% of all appeals filed.

6.28 The VLRC was not able to comment on whether the allegations of misdirection were in fact successful in any of the 207 successful appeals or whether the appeal succeeded on any different basis. However, the Commission notes that the figures in Table 6.3 later in this chapter suggest that the rate of appeals in Queensland alleging misdirection which are allowed on some other basis is quite low by comparison.

Outcome of re-trials

6.29 Between 2000–01 and 2006–07, 137 re-trials were ordered by the Victorian Court of Criminal Appeal. This represents 68.2% of the 201 successful appeals against conviction. The orders made in the remaining 64 successful appeals presumably quashed the convictions but did not involve re-trials.[31]

6.30 Of those 137 re-trials, 10 (7.3%) were pending at the time that the VLRC's Final Report was completed. Of the remaining 127 re-trials:

- 82 (64.6% or almost two-thirds) resulted in conviction;

30 The Commission notes that there appears to an error in the table which appears on page 151 of the VLRC's Final Report relating to the description of the figures in the last line of that table.

31 This may be because the appellant remained convicted of other offences and there was not point in a fresh trial in relation to the offences in relation to which the appeal was successful; or because the penalty that would be likely in the event of conviction at the re-trial was so low (eg, shorter than any period of imprisonment already served) that there was no point in a fresh trial.

- three (2.36%) resulted in pleas of guilty;
- in 31 cases (24.4%), the prosecution did not pursue the re-trial, entering a plea of *nolle prosequi*,[32] as a result of which the convictions remained quashed; and
- 11 (8.7%) resulted in an acquittal.

VLRC's views

6.31 In the Preface to its Consultation Paper,[33] the VLRC described the issues associated with directions to juries as 'a very significant practical problem for the criminal justice system.' It continued:

> Recently, there has been a considerable increase in the number of cases where a conviction has been overturned because the trial judge failed to give the jury a direction required by law. Very few people are acquitted at subsequent re-trials.[34] (note added)

Queensland statistics

6.32 The Commission has not had the opportunity to conduct a complete statistical analysis of the depth of that carried out by the VLRC. However, it has been able to undertake some research based on the annual reports of the Supreme and District Courts of Queensland published between 2001–02 and 2007–08, the annual reports published by the Office of the Director of Public Prosecutions between 2003–04 and 2007–08, and a review of relevant published decisions of the Court of Appeal from 1999–2000 to 2007–08.

6.33 Table 6.1 sets out some overall statistics drawn from the annual reports published by the Supreme Court and the District Court of Queensland for the period from 2001–02 to 2007–08.[35] These reports include figures going back to 1999–2000. The figures in this table relate only to matters in the criminal jurisdiction of each Court.

District Court

6.34 The figures for the District Court are not as detailed as those available for the Supreme Court; for the Commission's purposes, the annual reports only give the overall numbers of criminal cases handled by the Court, although these are broken down by location. The figures relating to the disposal of cases do not indicate how many were disposed of by jury trial, by plea of guilty, plea of *nolle prosequi* or otherwise. These figures do not of themselves appear to reveal any pattern relevant to this enquiry.

---

32 Literally, *I do not wish to prosecute*. This is the plea entered by the prosecution when it wishes to abandon a prosecution: see Criminal Code (Qld) s 563. The reasons for such a plea after a successful appeal may include, apart from a re-assessment of the evidence, a conclusion that, even if the defendant were to be convicted at the re-trial, the likely sentence would be negligible in light of time already served or other penalties imposed which were not successfully appealed.

33 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) 3.

34 The rate of successful appeals in criminal cases in Victorian courts was the subject of public criticism published in the *Herald Sun* in Melbourne on 13 January 2009: see <www.news.com.au/heraldsun/story/0,21985,24904586-2862,00.html> at 13 January 2009.

35 The annual reports for 2007–08 were the most recent available to the Commission when preparing this Report.

Supreme Court (Trial Division)

6.35 Over the period under consideration the number of criminal cases lodged in the Supreme Court more than doubled, rising from 594 in 1999–2000 to 1,493 in 2007–08. No similar pattern can be discerned in the District Court; if anything, the number of cases filed in that Court appears to be declining. This naturally affected the ratio of criminal cases disposed of in the two courts: in 2002–03, the Supreme Court handled only 6.2% of all criminal cases finalised in Queensland, but by 2007–08 this had risen to 18.4%. The total number of criminal cases finalised in both Courts between 1999–2000 and 2006–07 varied from 7,444 to 8,374 with no appreciable pattern over time.

6.36 Recent Supreme Court annual reports do not reveal how criminal cases were finalised, but between 1 July 1999 and 30 June 2003,[36] only 189 of the 2,176 cases finalised (8.7%) were disposed of by trial.[37] If this ratio still holds true (and it was somewhat consistent from 1999–2000 to 2002–03, rising from 7.8% to 10.9%), about 118 cases would have been resolved by trial in the Supreme Court in 2006–07.

6.37 Figures provided by the Office of the Director of Public Prosecutions quoted by the Hon Martin Moynihan in his Report on his review of the civil and criminal justice system in Queensland show that the vast majority of criminal matters that are committed for trial are resolved by a plea. In the two-year period 2006–08, of the 10,504 matters committed for trial, 8,648 (82.3%) ended in a plea prior to trial.[38]

Court of Appeal — matters lodged

6.38 The total number of criminal appeals commenced in the Court of Appeal has dropped in recent years from a high of 475 in 2002–03 to only 338 in 2006–07, though it rose again to 440 in 2007–08.

6.39 Unsurprisingly, the major source of appeals has been the District Court throughout the period under consideration. However, notwithstanding the sharp increase in the number of criminal cases handled by the Supreme Court, the percentage of appeals originating from that court has barely increased. In 2001–02 the Supreme Court finalised 6.2% of all criminal matters[39] and was the source of 22.8% of all criminal appeals. In 2007–08, the Supreme Court was still the source of 20.9% of all criminal appeals (down from 24.0% in 2006–07) although it finalised 18.4% of all criminal cases that year.

6.40 The material currently available to the Commission does not allow it to calculate the number of trials from which appeals are lodged.

6.41 The annual reports do not give any breakdown of the grounds of the appeals lodged. Nor is there any indication in the annual reports as to how the criminal appeals were finalised in the Court of Appeal. However, the annual reports do provide a breakdown of the general nature of matters commenced in that court, distinguishing between

36 The Courts' annual reports all cover financial years running from 1 July to 30 June.

37 The Commission presumes that these were all jury trials although this is not made explicit in the relevant annual reports.

38 The Hon Martin Moynihan AO QC, *Review of the civil and criminal justice system in Queensland*, Report (2008) 32.

39 Although it should be noted that the Supreme Court only finalised 469 cases that year, which was exceptionally low by comparison with the years before and after.

appeals against sentence, appeals against conviction, appeals against both, applications for time extensions for lodging appeals, and appeals by the prosecution against sentence.

	1999–00	2000–01	2001–02	2002– 03	2003–04	2004–05	2005–06	2006–07	2007–08	Totals	Averages
District Court Criminal Jurisdiction											
Lodged	7663	7461	7427	7306	7092	6772	7205	6577	6606	64109	7123
Finalised	7384	7546	7599	6991	6866	6694	7224	6393	6836	63533	7059
Active	2236	2159	1910	1829	1945	2122	2127	2303	2123	18754	2084
Supreme Court Criminal List											
Lodged	594	578	445	478	727	800	999	1330	1493	7444	827
Finalised	603	601	503	469	639	750	863	1354	1538	7320	813
Active	186	158	100	181	265	305	444	474	436	2549	283
How disposed of:											
Trial	47	43	48	51						189	47
	7.8%	7.2%	9.5%	10.9%							8.7%
Plea	460	475	397	345						1677	419
Other (eg, nolle prosequi)	96	83	58	73						310	78
	603	601	503	469						2176	544
Ratios											
District Court	7384	7546	7599	6991	6866	6694	7224	6393	6836	63533	7059
Percentage	92.5%	92.6%	93.8%	93.7%	91.5%	89.9%	89.3%	82.5%	81.6%		89.7%
Supreme Court	603	601	503	469	639	750	863	1354	1538	7320	813
Percentage	7.5%	7.4%	6.2%	6.3%	8.5%	10.1%	10.7%	17.5%	18.4%		10.3%
Total	7987	8147	8102	7460	7505	7444	8087	7747	8374	70853	7873
Court of Appeal (criminal matters)											
from Supreme Court	89	100	94	108	76	90	91	81	92	821	91
	22.0%	24.9%	22.8%	22.7%	19.0%	20.7%	24.1%	24.0%	20.9%		22.3%
from District Court	314	296	319	364	323	344	287	257	348	2852	317
	77.7%	73.8%	77.2%	76.6%	80.5%	79.3%	75.9%	76.0%	79.1%		77.4%
Other	1	5		3	2					11	1
Total	404	401	413	475	401	434	378	338	440	3684	409
Lodged	404	401	413	475	401	434	378	338	440	3684	409
Finalised	356	321	338	360	330	357	296	352	399	3109	345
Active	115	140	149	145	114	99	112	111	172	1157	129
Nature of matters lodged:											
Sentence applications	192	162	191	225	184	197	184	145	211	1691	188
	47.5%	40.4%	46.2%	47.4%	45.9%	45.4%	48.7%	42.9%	48.0%		45.9%
Conviction appeals	73	78	58	85	64	58	50	55	58	579	64
Conviction & sentence appeals	47	62	61	59	63	58	56	53	65	524	58
Sub-total	120	140	119	144	127	116	106	108	123	1103	123
	29.7%	34.9%	28.8%	30.3%	31.7%	26.7%	28.0%	32.0%	28.0%		29.9%
Ratio	1.60	1.16	1.61	1.56	1.45	1.70	1.74	1.34	1.72	1.53	
Extensions (sentence applications)	11	24	27	26	24	18	24	18	39	211	23
Extensions (conviction applications)	15	14	18	12	8	20	13	12	17	129	14
Extensions (conviction & sentence)	7	13	9	6	13	18	13	11	14	104	12
Sentence appeals by prosecution	42	23	35	45	20	26	20	17	22	250	28
	10.4%	5.7%	8.5%	9.5%	5.0%	6.0%	5.3%	5.0%	5.0%		6.8%
Other	17	25	14	17	25	39	18	27	14	196	22
	404	401	413	475	401	434	378	338	440	3684	409

Table 6.1: Statistics of Criminal Cases in Queensland Courts, 1999–2008.

6.42 The following key points emerge from these figures (see Table 6.1):

- Appeals against sentence alone accounted for between 40.4% and 48.7% of all appeals lodged in criminal matters (at an average of 45.9%) with no obvious pattern of rise or fall over the period under consideration.

- Appeals against conviction (or both conviction and sentence) accounted for between 26.7% and 34.9% (at an average of 29.9%), again with no obvious pattern of rise or fall.

- Generally, the ratio of appeals against sentence compared to appeals against conviction (or conviction and sentence) stood at between 1.45 and 1.74 (at an average of 1.53), although the ratios in 2000–01 and 2006–07 were both significantly lower than this range.

- Applications for leave to appeal against sentence by the prosecution never represented more than 10.4% of all criminal appeals lodged, though the figure was usually much lower than this and averaged 6.8%.

Court of Appeal — outcomes

6.43 The statistics drawn from the Courts' annual reports deal with the numbers of appeals and applications lodged, and the overall numbers of appeals finalised, but offer no breakdown of the success rate of appeals handled by the Court of Appeal in any given year. However, some information in this regard can be drawn from the annual reports of the Office of Director of Public Prosecutions ('ODPP'). The Commission has considered the figures published in the ODPP's annual reports for 2003–04 to 2007–08, which contain statistics that go as far back as 1998–1999. These figures are set out in Table 6.2.

6.44 The figures published by the ODPP do not tally exactly with those published by the Courts where they cover the same areas (eg, numbers of appeals lodged and numbers of appeals finalised). This discrepancy is caused in large part (if not entirely) by the fact that the ODPP's figures do not include appeals by the Commonwealth Director of Public Prosecutions.

6.45 The value of the ODPP's figures lies in their analysis of the outcomes of appeals each year. They demonstrate that, on average:

- 88 appeals against conviction were resolved per year, which represented 35.8% of all appeals by defendants that were finalised;[40]

- 28.9% of appeals against conviction were allowed, though the ODPP's figures do not specify the basis on which any appeal succeeded;[41]

- successful appeals against conviction represented 10.3% of all appeals resolved per year;

- the percentage of successful appeals against conviction each year seems to be rising over the period studied, but the trend in this regard is not entirely clear;

- appeals by defendants against sentence fared rather better than appeals against conviction, with an average of 34.1% being allowed;[42]

40 This is coincidentally the same number as the number of appeals by defendants resolved in 2006–07.

41 The figures for 2006–07 and 2007–08 are also somewhat different from those for other years as they include appeals which were abandoned by defendants.

- appeals by the Attorney-General against sentence, though very few in number, had a much higher success rate, with an average of 58.6% being allowed.

	1999–00	2000–01	2001–02	2002–03	2003–04	2004–05	2005–06	2006–07	2007–08	Totals	Averages
AG's appeals against sentence											
Filed								16	21	37	19
Allowed	28	12	15	34	9	13	2	10	13	136	15
	57.1%	50.0%	55.6%	73.9%	37.5%	61.9%	28.6%	76.9%	61.9%		58.6%
Dismissed	21	12	12	12	15	8	5	3	8	96	11
Other			1			1				2	0
	49	**24**	**27**	**46**	**24**	**21**	**7**	**13**	**21**	**232**	**26**
Appeals by defendants											
Against sentence								166	177	343	172
								55.5%	51.5%		53.3%
Against conviction								91	50	141	71
Against conviction & sentence								26	77	103	52
								39.1%	36.9%		37.9%
Application for extension of time - sentence								10	30	40	20
Application for extension of time - conviction								6	10	16	8
								299	344	643	
Outcomes											
Appeal against conviction											
- allowed	12	22	27	23	23	22	24	31	45	229	25
	25.0%	32.4%	27.6%	21.1%	21.7%	27.5%	30.4%	36.9%	37.2%		28.9%
- dismissed	36	46	71	86	83	58	55	42	52	529	59
- abandoned								11	24	35	18
Total	**48**	**68**	**98**	**109**	**106**	**80**	**79**	**84**	**121**	**793**	**88**
Percentage of all appeals	24.6%	39.8%	37.1%	34.3%	37.2%	32.3%	34.5%	36.2%	44.5%		35.8%
Appeals allowed as percentage of all appeals	6.2%	12.9%	10.2%	7.2%	8.1%	8.9%	10.5%	13.4%	16.5%		10.3%
Appeal against sentence											
- allowed	61	40	48	65	56	61	43	49	61	484	54
	41.5%	38.8%	28.9%	31.1%	31.3%	36.3%	28.7%	33.1%	40.4%		34.1%
- dismissed	86	63	118	144	123	107	107	65	63	876	97
- abandoned								34	27	61	31
Total	**147**	**103**	**166**	**209**	**179**	**168**	**150**	**148**	**151**	**1421**	**158**
Total appeals	**195**	**171**	**264**	**318**	**285**	**248**	**229**	**232**	**272**	**2214**	**246**
Applications for extension of time											
- sentence - dismissed								2	9	11	6
- conviction - dismissed								2	10	12	6
- sentence - allowed								8	4	12	6
- conviction - allowed								1	7	8	4
Total	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**13**	**30**	**43**	**22**
Total of appeals finalised	**195**	**171**	**264**	**318**	**285**	**248**	**229**	**245**	**302**	**2257**	**251**
Decision reserved								40	86	126	14
Other			7	4			75	20	54	160	18
Total of all outcomes	**195**	**171**	**271**	**322**	**285**	**248**	**304**	**305**	**442**	**2543**	**283**
Judgments											
Appeals against sentence								114		114	
Appeals against conviction								73		73	
								187	0	187	

Table 6.2: Statistics from the Office of the Director of Public Prosecutions.

42 It should be borne in mind that any appeal judgment may deal with both appeals against conviction and appeals against sentence by both the defendant and the Attorney-General, which is not distinguished in these figures.

Appeals involving jury directions — numbers

6.46 In order to consider the rate of incidence of appeals in which directions to the jury were an issue, the Commission conducted an analysis of judgments published by the Court of Appeal from 1999–2000 to 2006–07, the results of which are set out in Table 6.3.

	1999–00	2000–01	2001–02	2002–03	2003–04	2004–05	2005–06	2006–07	Totals	Averages
Published judgments in SCQ Library	459	515	542	582	524	510	451	451	4034	448
Criminal judgments	253	272	308	326	284	312	263	237	2255	251
Percentage	55.1%	52.8%	56.8%	56.0%	54.2%	61.2%	58.3%	52.5%		55.9%
Judgments concerning alleged misdirections	**11**	**9**	**18**	**34**	**27**	**45**	**40**	**25**	**209**	**23**
Percentage of all judgments	2.4%	1.7%	3.3%	5.8%	5.2%	8.8%	8.9%	5.5%		5.2%
Percentage of criminal judgments	4.3%	3.3%	5.8%	10.4%	9.5%	14.4%	15.2%	10.5%		9.3%
Dismissed	**8** 80.0%	**8** 88.9%	**12** 70.6%	**26** 76.5%	**19** 70.4%	**34** 75.6%	**18** 45.0%	**17** 68.0%	**142**	**18** 68.6%
Appeals allowed										
Re-trial ordered	**1**	**0**	**3**	**3**	**5**	**8**	**17**	**7**	**44**	**6**
Acquittal entered	**0**	**0**	**1**	**1**	**3**	**1**	**1**	**1**	**8**	**1**
Different verdict entered	**0**	**0**	**0**	**2**	**0**	**0**	**1**	**0**	**3**	**0**
	10.0%	0.0%	23.5%	17.6%	29.6%	20.0%	47.5%	32.0%		26.6%
Appeal allowed on basis other than misdirection	1	1	1	2	0	2	3	0	10	1
Total	**10**	**9**	**17**	**34**	**27**	**45**	**40**	**25**	**207**	**26**
Cases involving sexual offences	5	2	7	11	5	9	17	12	68	9
Percentage of cases involving alleged misdirection	50.0%	22.2%	41.2%	32.4%	18.5%	20.0%	42.5%	48.0%		32.9%

Table 6.3: Court of Appeal Judgments published 1999–2007.

6.47 This analysis involved a manual count of all Court of Appeal judgments published online by the Supreme Court of Queensland Library. In each year the number of published judgments was slightly lower than the number of matters finalised (as disclosed in the annual reports) as some matters were resolved without going to judgment (for example, by withdrawal of the appeal). In addition, an examination of the numbering of the judgments indicates that each year a small number of judgments are not published.

6.48 The Commission was then provided by the Supreme Court with a list of cases drawn from the Queensland Legal Indices Online in which the keywords 'direction' or 'jury' appeared in the catchwords.[43]

43 A closer examination of this list revealed a small number of civil defamation cases in which jury directions were matters considered in the judgment, and a very small number of cases where the keyword 'direction' arose in a different context. These cases were removed from the Commission's analysis. Closer examination

6.49 A comparison of the number of published appeal judgments relating to jury directions with the total number of published appeal judgments overall and in criminal appeals shows that:

- Appeal judgments in criminal matters accounted for between 52.5% and 61.2% of all appeal judgments (at an average of 55.9%), with no discernable pattern of rise or fall over time.

- Appeal judgments that dealt with jury directions never accounted for more than 15.2% of all published criminal appeal judgments, and never more than 8.9% of all published appeal judgments (at an average of 9.3% and 5.2% respectively). There was a rise in these percentage figures from 2000–01 to 2002–03, but since then the figure has varied between 9.5% and 15.2% of criminal appeals with no appreciable pattern over time.

6.50 Finally, the Commission conducted a provisional review of each of the published appeal judgments in which jury directions were considered. That review indicates that on average 26.6% of these appeals are allowed at least to some extent on grounds involving misdirection to the jury. In other words, about two-thirds of these appeals are dismissed. In addition, a small number of appeals (about 3.8%) where the appellant had also unsuccessfully argued that there had been a misdirection were allowed on other grounds.

6.51 Overall, the percentage of successful appeals involving alleged misdirections has risen steadily over the period under consideration, although the figure for 2005–06 seems exceptionally high, even within the context of this trend. The statistics themselves can offer no explanation for that.

6.52 On average, sexual offence cases accounted for just under one-third (32.9%) of all appeals involving alleged misdirection, but the figure varied considerably from year to year. The Commission does not currently have available to it any information that indicates the prevalence of trials for sexual offences in the criminal justice system generally.

6.53 The Commission's provisional analysis of the nature of the jury directions that were challenged successfully and unsuccessfully on appeal does not reveal any particular direction or directions that stand out as being particularly susceptible to challenge. Directions concerning the defences of self-defence, identification evidence and the use of evidence of a defendant's lies as evidence of consciousness of guilt seem to recur somewhat more frequently than most others, but a pattern is hard to discern, and directions on these particular topics do not appear, on this preliminary analysis, to arise with any disturbing frequency.

Appeals involving jury directions — analysis

6.54 It is more instructive to consider the rate of appeals concerning alleged misdirections — both allowed and dismissed — in the context of appeals against conviction by considering figures in Tables 6.2 and 6.3 together. This allows a closer comparison with the VLRC's statistics.

---

also revealed some cases which introduced some slight anomalies into the statistics: for example; one published judgment dealt with two appellants who received different outcomes.

- From Table 6.2, it appears that the Queensland Court of Appeal finalised on average 88 appeals against conviction each year between 1999–2000 and 2007–08.

- On average, 25 of these appeals (28.9%) were allowed (see Table 6.2).

- Table 6.3 indicates that on average 26 published criminal appeal judgments concerned alleged misdirections (31.0% of 84 finalised on average each year).

- Table 6.3 also indicates that, of these 26 judgments, an average of 7 appeals against conviction were allowed on the basis of some error involving directions to the jury. These 7 successful appeals represent 26.6% of the 26 judgments concerning alleged misdirections and 8.3% of the 84 appeals against conviction finalised per year.

Re-trials

6.55 The Commission has not been able to compile any statistics about re-trials in Queensland.

Comparison between Victoria and Queensland

6.56 The two sets of statistics from Victoria and Queensland do not readily permit easy comparison. Nonetheless, it can be tentatively seen that the frequency with which jury directions feature in judgments in appeals against conviction in Queensland (31.0% on average)[44] appears to be much lower than the frequency with which they appear as grounds for appeal in Victoria (67.5%): compare Table 6.3 in this Report with the figures in paragraph [6.26] above and in Table 2 in the VLRC's Consultation Paper.[45]

6.57 Moreover, the success rate of appeals against conviction alleging misdirection appears to be much higher in Victoria (39.7% of judgments alleging misdirection and 26.4% of appeals against conviction filed)[46] than in Queensland (26.6% of judgments concerning alleged misdirection and 8.3% of appeals against conviction finalised per year).[47]

6.58 The Commission appreciates that it may be very difficult, if not impossible, to establish benchmarks against which some of these figures can be compared. For example, it may be difficult to determine whether it would ever be possible to establish an optimum level of criminal appeals, or an optimum level of successful appeals. It would be a major problem if it were felt that appeals were commenced too frequently, but by the same token there should not be any undue barrier to appeal, bearing in mind

44 See [6.54] above.

45 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) Appendix A, Table 2, 109. The Commission notes the difference between issues raised in judgments (which reflect the issues that were ultimately argued at the hearing of the appeal) and grounds of appeal, which may be significantly revised before the appeal is heard.

46 See [6.27] above.

47 See [6.54] above.

that people convicted of an offence may appeal as of right against their conviction or apply for leave to apply against sentence with minimal direct court fees involved.[48]

6.59 It may also be conceptually very difficult to establish an optimal number of appeals that should be upheld: too few may reflect unduly high barriers for success on appeal — in any event, success on appeal in the vast majority of criminal cases results in a re-trial and not a final acquittal. However, an unduly high rate of success on appeal could be a symptom of major systemic problems in the administration of criminal justice.

Other jurisdictions

6.60 In its 2008 Consultation Paper on jury directions, the NSW Law Reform Commission reported the results of a survey conducted by the NSW Judicial Commission of sexual offence cases between 2001 and June 2004.[49] The survey showed that during that period the NSW Court of Criminal Appeal allowed 70 out of 136 (51.5%) appeals from sexual offence trials; just over half (54%) of the successful appeals were upheld on the basis of misdirection.

6.61 It is pertinent to note that sexual offence trials are often more difficult to manage than trials for other offences, are highly charged emotionally and have historically been beset by a range of controversial, complicated and contradictory jury directions. All of these factors might lead to a higher rate of appeal, and a higher rate of successful appeal, in these cases compared with those for other offences.

Submissions

6.62 In its Issues Paper, the Commission sought submissions on the following questions:

> 5-1 Does the frequency of criminal appeals in Queensland where a misdirection by a judge is alleged create any practical problems or problems in principle?
>
> 5-2 What, if any, conclusions could be drawn from the statistics relating to appeals in criminal matters in Queensland?

6.63 No respondents to the Issues Paper commented on these questions. This material was not covered in the Discussion Paper.

The QLRC's views

6.64 The Commission is not aware of any information to suggest that the frequency of criminal appeals in Queensland in relation to alleged misdirections or other similar procedural errors, of itself creates, or is evidence of, significant problems for the criminal justice system. This may well be, at least in part, because it is difficult to establish what, if any, benchmarks in this regard might be and how they might be established.

---

48 Although such people would, of course, have to bear their own legal fees, subject to the availability and provision of legal aid.

49 NSW Criminal Justice Offence Taskforce, *Responding to Sexual Assault: The Way Forward* (2006), 89–90, referred to in New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [1.36] n 60.

6.65 The statistical information in this chapter is nonetheless repeated from the Issues Paper as some evidence of the rate of appeals concerning jury directions. It also serves to identify some differences in the rate of appeals in Victoria and in Queensland.[50]

50 See [6.56]–[6.59] above.

Chapter 7

A Strategy for Reforming Jury Directions

INTRODUCTION

7.1 This chapter focuses on four key elements of the Commission's overall reform strategy that underpin its more specific recommendations in later chapters of this Report:

- The fundamental objective of jury directions, and many other aspects of criminal trial procedure, is to ensure that the defendant receives a fair trial. The concept of a fair trial, and what it means in practice, need to be considered as critical elements of any review of jury directions.

- The possibility of a codification of the disparate law and practice in the area of jury directions has been a contentious topic in Australia, due largely to the recommendations of the Victorian Law Reform Commission

('VLRC') that a comprehensive jury directions statute be introduced in that State, in effect to codify the relevant common law and existing statutory provisions.[1] Although this Commission recommends certain specific statutory reforms in Queensland, it is satisfied that a codification of the nature proposed in Victoria is not warranted in this State.

- Some of the specific recommendations set out in later chapters of this Report are based on, and rely on the continued use of, the Queensland Benchbook. Its role is considered in general terms in this chapter, and particular portions of it are considered in greater detail later in this Report. One of the Commission's bases of reform in this area is to apply what already works well in Queensland, and to seek to improve on it and use it as the foundation for more directed reform in particular areas.

- Any reform to jury directions and warnings should aim to improve their clarity, brevity and accuracy.

7.2 The Terms of Reference specifically require the Commission to have regard to the work undertaken by the NSW and Victorian Law Reform Commissions on jury directions as part of this enquiry. In addition, a number of the submissions made to the Commission's Issues Paper specifically endorsed or adopted submissions made to the VLRC's Consultation Paper. As a consequence, the summary of submissions in this chapter (and in others that follow) includes discussion of submissions made to the VLRC where relevant. As noted in chapter 1 of this Report, the submissions to the VLRC must be read cautiously given that the position in Victoria differs substantially from that in Queensland in some respects.[2]

THE OBLIGATION TO ENSURE A FAIR TRIAL

7.3 One recurrent theme in any discussion of the criminal justice system is the need to ensure, so far as practicable, that the defendant receives a fair trial.[3] Statements of the obligation to provide a fair trial can be found in international conventions to which Australia is a party, throughout the common law and in relevant statutes. One example is the clear statement of the High Court in *RPS v R*:

> The fundamental task of a trial judge is, of course, to ensure a fair trial of the accused.[4]

7.4 It has also been argued that a constitutional basis for the right to a fair trial can be found in Chapter III of the Australian *Constitution*, at least in relation to trials for offences against the laws of the Commonwealth.[5]

7.5 Ensuring that the defendant receives a fair trial may be seen as the ultimate obligation of a trial judge in presiding over a trial, whether or not the judge is the trier of fact, and as the primary objective of all jury directions and warnings. The trial judge's

1 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009).

2 See [1.50]–[1.54] above.

3 See, for example, Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [4.54]–[4.107].

4 (2000) 199 CLR 620, 637; [2000] HCA 3 [41] (Gaudron ACJ, Gummow, Kirby and Hayne JJ).

5 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [4.74]–[4.77].

obligation in this regard can be seen in statute and in the common law as an over-riding duty that can negate the operation of a more specific duty and is ultimately the standard against which the exercise of procedural discretions may be measured. In addition, even when statutory rules that might otherwise have the effect of limiting or permitting more abridged directions, the judge's discretion to give a warning where the interests of justice require it is in some cases expressly preserved by statute: see, for example, section 632 of the Criminal Code (Qld).[6]

7.6 However, the status of any such over-riding duty is unclear. For example, it is not yet certain to what extent sections 24(1) and 32(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) might prevail over any attempt to codify the law of jury directions and warnings in Victoria.[7] If a duty to ensure a fair trial, whether under statute or at common law, will prevail over any other statement of a trial judge's obligations to instruct a jury, it may be futile to seek to reduce the law in this area to a single comprehensive statutory statement.

7.7 One statement of the characteristics of a criminal justice system that seeks to ensure a fair trial for defendants is found in Article 14 of the International Covenant on Civil and Political Rights, to which Australia is a party:[8]

> 1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
>
> 2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
>
> 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
>
> (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
>
> (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
>
> (c) to be tried without undue delay;

6 See [16.7] below.

7 See Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [4.54]–[4.78]. See also [7.21] below in relation to section 24(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). Section 32(1) of that Act reads:

> **32. Interpretation**
>
> (1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

8 See n 17 below.

(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) to have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

7.8 It has also been accepted that no single approach to ensuring a fair trial denies the fairness of different systems with the same overall objective.[9]

7.9 Not surprisingly, jury directions and other matters of procedural detail are not covered in an instrument of broad application such as this Covenant.

7.10 The characteristics of a fair trial include matters that go far beyond the scope of this review. Moreover, it is probably impossible to define what constitutes a fair trial, and probably futile to seek to do so, in any comprehensive fashion, even in the limited context of jury directions. The High Court has declined to do so, albeit in a different context:

Right to a fair trial

7. The right of an accused to receive a fair trial according to law is a fundamental element of our criminal justice system.[10] As Deane J correctly pointed out in *Jago v. District Court (NSW)*,[11] the accused's right to a fair trial is more

9 See *New Zealand v Moloney* [2006] FCAFC 143; Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [4.86], discussing criminal trial processes in New Zealand, where a Longman direction is not given.

10 *Jago v District Court (NSW)* [1989] HCA 46; (1989) 168 CLR 23, per Mason CJ at p 29; Deane J at p 56; Toohey J at p 72; Gaudron J at p 75).

11 Ibid at pp 56–57.

> accurately expressed in negative terms as a right not to be tried unfairly or as an immunity against conviction otherwise than after a fair trial, for no person can enforce a right to be tried by the State; however, it is convenient, and not unduly misleading, to refer to an accused's positive right to a fair trial. The right is manifested in rules of law and of practice designed to regulate the course of the trial.[12] However, the inherent jurisdiction of courts extends to a power to stay proceedings in order 'to prevent an abuse of process or the prosecution of a criminal proceeding ... which will result in a trial which is unfair'.[13]
>
> 8. There has been no judicial attempt to list exhaustively the attributes of a fair trial. That is because, in the ordinary course of the criminal appellate process, an appellate court is generally called upon to determine, as here, whether something that was done or said in the course of the trial, or less usually before trial,[14] resulted in the accused being deprived of a fair trial and led to a miscarriage of justice. However, various international instruments and express declarations of rights in other countries have attempted to define, albeit broadly, some of the attributes of a fair trial. Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms … enshrines such basic minimum rights of an accused as the right to have adequate time and facilities for the preparation of his or her defence[15] and the right to the free assistance of an interpreter when required.[16] Article 14 of the International Covenant on Civil and Political Rights ('the ICCPR'), to which instrument Australia is a party,[17] contains similar minimum rights, as does s.11 of the Canadian Charter of Rights and Freedoms.[18] Similar rights have been discerned in the 'due process' clauses of the Fifth and Fourteenth Amendments to the United States Constitution.[19] (notes as in original)

7.11 The reference by Mason CJ and McHugh J to the inherent power of the courts to prevent an unfair trial in paragraph [7] of *Dietrich v The Queen* cited above suggests that this is a paramount obligation that will prevail in the event of any conflict over other, more specific rules of procedure.

7.12 In the same case, Brennan J noted that fairness is measured against legal rules rather than broader, community standards of fairness, in which case it may be said that a fair trial is one that is procedurally fair:

> 15. The procedure of the criminal courts is designed to produce as fair a trial as practicable in the circumstances of each case. … But the rhetoric that a trial must be fair before a conviction can properly be recorded is true only to the extent that unfairness leads to a miscarriage of justice. The legal question then is not whether a trial has been unfair according to community values but whether it is unfair in the sense that it has not taken place according to law.[20]

---

12 *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54; *Reg. v. Sang* [1979] UKHL 3; (1980) AC 402, both referred to in *Jago* (1989) 168 CLR, at p 29.

13 *Barton v The Queen* [1980] HCA 48; (1980) 147 CLR 75, at pp 95–96; *Williams v. Spautz* [1992] HCA 34; (1992) 66 ALJR 585; 107 ALR 635.

14 *Reg. v Glennon* [1992] HCA 16; (1992) 173 CLR 592.

15 Art 6(3)(b).

16 Art 6(3)(e).

17 Australia signed the ICCPR on 18 December 1972 and ratified it on 13 August 1980.

18 Pt 1 of the *Constitution Act 1982*, enacted by the *Canada Act 1982* (UK).

19 *Dietrich v The Queen* (1992) 177 CLR 292, 299–300, [1992] HCA 57 [7]–[8] (Mason CJ, McHugh J).

20 *Dietrich v The Queen* (1992) 177 CLR 292, 325, [1992] HCA 57 [15] (Brennan J). A statement such as that by Brennan J that describes a fair trial as one that is as fair 'as practicable in the circumstances of each case' acknowledges that a fair trial is not necessarily a perfect trial: see [7.16] below.

7.13 The Honourable JJ Spigelman has noted the pervasiveness of the concept of a fair trial but also the impossibility of pinning down it definitively:

> It is not possible to attempt to list exhaustively the attributes of a fair trial. The issue has arisen in a seemingly infinite variety of actual situations in the course of determining whether something that was done or said either before or at the trial, deprived the trial of the quality of fairness to a degree where a miscarriage of justice had occurred. However, over the course of centuries certain identifiable issues have arisen on many occasions and led to similar judgments being made as to their effect on fairness of proceeding.
>
> There is probably no aspect of the preparation for a trial or of actual trial procedure which is not touched, and often determined, by fair trial considerations. As Lord Devlin once put it:
>
> > Nearly the whole of the English criminal law of procedure and evidence has been made by the exercise by the judges of their power to see that what was fair and just was done between prosecutors and accuseds.[21]
>
> The kinds of issues that have arisen are so multifarious that only a partial list can be proffered. Nevertheless, the list indicates the vigour of the principle in our common law tradition:
>
> - The issue often arises of whether a trial should proceed at a particular time or in that geographical location or before a particular judge. Adjournments and changes of venue occur frequently, for example, to allow the effects of adverse publicity to dissipate. There may be extreme cases in which even a permanent stay is appropriate.
>
> - The imposition of an onus of proof and the differentiation of the standard of proof between civil and criminal proceedings, reflects an understanding of what fairness requires in the particular circumstances, relevantly, if the special stigma of a criminal conviction is to be attached to a citizen.
>
> - The detail of the obligation to obey the rules of natural justice applies with particular force and encompasses all of the requirements of a fair hearing, including reasonable notice of the case a person has to meet and the provision of a reasonable opportunity of presenting his or her case.
>
> - All of the detailed rules and practices with respect to when notice or disclosure is required, when an adjournment is appropriate and the order of proceedings, particularly the right of cross-examination, have, as their source, centuries of consideration by generations of judges of the interaction, sometimes synergistic, sometimes in conflict, between the search for truth and the requirements of a fair hearing.
>
> - Identification of the principle that the unavailability of legal representation for an accused charged with a serious offence, should lead to a stay of the proceedings, is obviously based on this principle.
>
> - The requirements of clarity in a criminal indictment is reinforced in that context by the need to avoid duplicity or latent ambiguity and by judicial control of the size and content of an indictment. These rules are substantially based on fairness considerations.

21 *Connelly v DPP* [1964] AC 1254, 1347.

- The right of an accused to fair and timely disclosure of the Crown case and of the materials held by the Crown applies the principle.

- The prosecution obligation in a criminal trial to put its case fully and fairly and not to split its case, so that the accused knows in full the case against him or her before deciding to adduce evidence.

- The requirement that an interpreter be available for an accused so that the accused can follow the proceedings.

- The determination of circumstances in which fairness of a trial has been affected by incompetence of counsel does on occasions require appellate intervention.

- The obligations on a trial judge in the case of unrepresented litigant to ensure that the litigant receives such assistance as to enable a fair trial to occur.[22]

7.14 Stephen Odgers SC may have had observations such as these in mind when making the following comments in his submission in response to the VLRC's Consultation Paper:

> The Consultation Paper gives a great deal of importance to the concept of a 'fair trial'. For example, it is contended that some directions need only be given if necessary to ensure a fair trial. Appellate courts are to be directed to focus on the question of whether there was a fair trial. However, the content of this concept is hardly self-evident. The courts have given content to the concept over the years but have resisted any comprehensive definition. A variety of considerations inform the concept, including the adversarial paradigm, 'accusatorial' limitations on that paradigm, and a concern to minimize the risk of conviction of innocent persons. It is a useful concept in some contexts (for example, in deciding whether an error at trial was so fundamental that an appeal should be allowed even if there was no real danger that an innocent person was wrongly convicted).[23]

7.15 Odgers alludes to the allied, but no less important, requirement that a fair trial be seen to take place. On appeal, it might be necessary to quash a conviction and order a re-trial where there has been such a pronounced shortcoming in the procedure of the trial that its outcome must be set aside irrespective of the actual risk that a miscarriage of justice has occurred.

7.16 By the same token, some minor procedural errors will not result in any real apprehension of a miscarriage of justice or the denial to the defendant of any real prospect of acquittal. A fair trial does not have to be a perfect trial:

> A fair trial according to law does not mean a perfect trial, free from possible detriment or disadvantage of any kind or degree to the accused … It may result from the laws of evidence and be, for example, the danger that, despite an impeccable charge on the limited use to be made of certain evidence for the prosecution, the jury will make a further and impermissible use of it; the law treats the judge's

22 The Honourable JJ Spigelman, 'Our Common Law Heritage' (Paper delivered to the 2004 Joint Study Institute of Law Librarians, Sydney, 21 February 2004).

23 Stephen Odgers SC, Submission to the Victorian Law Reform Commission, 12 November 2008, 2–3

> warning as meeting the danger, but can one be certain that no juror has ever failed to heed the warning?[24]

7.17 In making that statement, Brooking J in the Appeal Division of the Supreme Court of Victoria relied on the following passage of Brennan J in *Jago v District Court (NSW)*:

> 27. By the flexible use of the power to control procedure and by the giving of forthright directions to a jury, a judge can eliminate or virtually eliminate unfairness. The judge's responsibilities are heavy but they are not discharged by abdication of the court's duty to try the case. If it be said that judicial measures cannot always secure perfect justice to an accused, we should ask whether the ideal of perfect justice has not sounded in rhetoric rather than in law and whether the legal right of an accused, truly stated, is a right to a trial as fair as the courts can make it. Were it otherwise, trials would be prevented and convictions would be set aside when circumstances outside judicial control impair absolute fairness.[25]

7.18 Later in the same case, Brennan J described the objective of 'perfect justice' as an 'unattainable end',[26] and Mason CJ noted that in 'the safeguarding of the interest of the accused … the touchstone in every case is fairness.'[27]

7.19 As minor procedural imperfections may not result in any real risk of a miscarriage of justice, criminal procedure statutes often contain provisos that allow an appellate court to dismiss an appeal against conviction even though satisfied that there was some, though minor, error in the conduct of the trial. In Queensland, such a proviso is found in section 668E(1A) of the Criminal Code (Qld):

> (1) The Court on any such appeal against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or can not be supported having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal.
>
> (1A) However, the Court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

7.20 Such provisos can 'prevent the administration of the criminal law from being "plunged into outworn technicality"'.[28]

7.21 In Victoria, the *Charter of Human Rights and Responsibilities Act 2006* (Vic) emphasises the public nature of a fair trial:

---

24 *Jarvie v Magistrates' Court of Victoria* [1995] 1 VR 84, 91–92 (Brooking J). Brooking J's remarks about the improper use by jurors of evidence admitted for limited purposes only echoes concerns discussed in chapter 12 of this Report.

25 *Jago v District Court (NSW)* (1989) 168 CLR 23, 49; [1989] HCA 46 [27] (Brennan J). Brooking J also cited Brennan J in *R v Glennon* (1992) 173 CLR 592, 614–7 and in *Dietrich v The Queen* (1992) 177 CLR 292, 325.

26 *Jago v District Court (NSW)* (1989) 168 CLR 23, 54; [1989] HCA 46 [34] (Brennan J).

27 Ibid [19] (Mason CJ). See also *Wagner* (1993) 66 A Crim R 583, 595 (Mulligan J, Court of Criminal Appeal, South Australia).

28 *Wilde v The Queen* (1987–1988) 164 CLR 365, 373 (Brennan, Dawson & Toohey JJ, quoting Barwick CJ in *Driscoll v The Queen* (1977) 137 CLR 517, 527).

> **24 Fair hearing**
>
> (1) A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

7.22 One fundamental aspect of a fair criminal trial is procedural flexibility to allow the trial to be conducted in a way that best preserves the interests of justice, tailored to meet the circumstances of each trial. This was a major concern of some respondents to both this Commission and the VLRC, and is a primary aspect of a number of this Commission's specific recommendations. Flexibility was also incorporated by the VLRC into the general principles that it recommended should guide the content of all jury directions.[29]

NSWLRC's Consultation Paper

7.23 In its Consultation Paper on jury directions, the NSWLRC also commented on the role of jury directions in securing a fair trial — or, at least, in avoiding an unfair trial:

> 1.11 Judicial instructions should achieve a number of outcomes. First, they should ensure (or at least not detract from) a fair trial for the accused. Secondly, they should be accurate and adequate with regards to the law, the alleged facts and the arguments of counsel. Thirdly, they should be understandable to the jurors and assist them in coming to a verdict.
>
> …
>
> 1.14 There is no easy answer when the outcomes in paragraph 1.11 come into conflict. For example, the need to ensure a fair trial will determine what judicial warnings are necessary. Yet a large number of such warnings may make it difficult for jurors to comprehend the directions of law. So too, the requirement of accuracy is thought by some to encourage judges to use the precise language in which a direction or warning has been formulated by an appellate court, in order to 'appeal proof' their instructions. Yet the utterance of such 'hallowed phrases' may be confusing to a jury because they are couched in the language that would be unfamiliar or that may conflict with everyday non-legal meanings. On the other hand, the need to communicate complex legal concepts simply to lay jurors may lead to a loss of accuracy in statements of law.[30] (notes omitted)

VLRC's recommendations

7.24 In its Final Report, the VLRC recommended a comprehensive statutory scheme intended in due course to oust the common law concerning jury directions.[31]

7.25 One issue that the introduction of such an Act in Victoria faces, that it would not face in most other Australian jurisdictions, is the impact of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). The Australian Capital Territory is the only other Australian jurisdiction with comparable legislation. The main purpose of the Charter is to 'protect and promote human rights by … ensuring that all statutory provisions

29 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009), Recommendation 11, [4.38].

30 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [1.11]–[1.14].

31 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [4.22]–[4.26]; see in particular Recommendations 1–4. See [7.69] below.

… are interpreted so far as possible in a way that is compatible with human rights; and … imposing an obligation on all public authorities to act in a way that is compatible with human rights.'[32] The Charter applies to courts and tribunals.[33]

7.26 The right to a fair trial is found in section 24(1) of the Charter, which is set out in [7.21] above. The possible difficulties that might be associated with the introduction of an Act such as that recommended by the VLRC arise out of section 32(1) of the Charter, which reads:

> So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

7.27 There is a concern that section 32(1) — or any principle that there is an overriding right to a fair trial that may, in appropriate circumstances, prevail over any other law in relation to trial procedure generally (and jury directions in particular) — might simply permit appellate courts to re-introduce a regime of detailed, lengthy and more or less mandatory directions irrespective of the purpose and provisions of this proposed Act.

7.28 The VLRC received advice from the Victorian Government Solicitors Office on this issue. It was to the effect that 'if the proposed legislation allows judges to fulfil their fair hearing obligation in a manner equal to or better than the common law rules that have developed, the legislation will be compatible with the fair hearing right in section 24 of the Charter'.[34] The VLRC concluded that its proposed legislation would meet this test.[35] In particular, in Recommendations 8 to 10, the VLRC recommended the inclusion in the statute of specific statements addressed to the trial judge's duty to give directions that are required to ensure a fair trial:

> 8. The legislation should declare that the trial judge has an obligation to give the jury any direction that is necessary to ensure a fair trial.
>
> 9. The fact that a direction is not sought, or is opposed, by counsel for the accused must be taken into account by the trial judge when determining whether any direction or warning is necessary to ensure a fair trial.
>
> 10. In determining whether any direction is necessary to ensure a fair trial and whether there is good reason to refuse a request by counsel for the accused for a particular direction the trial judge may consider any of the following matters:
>
> - the content of addresses by counsel and/or by the accused, if unrepresented
> - the capacity of counsel to deal with the matter adequately
> - the submissions of counsel or the accused, if unrepresented
> - any questions or requests made by the jurors

32 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 1(2)(b), (c).

33 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 6(2)(b).

34 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [4.78], [4.84].

35 Ibid [4.84].

- the extent to which the issue is a matter of common sense which the jury as a whole may be presumed to appreciate
- whether the topic will be sufficiently addressed by another direction
- the rights of both the prosecution and the accused person to a fair trial.[36]

7.29 The VLRC also sought to maintain flexibility in its regime by recommending that, while the essential elements of jury directions should be set out in the statute, the precise language or formulations in which they are to be given should not be legislated.[37]

Submissions

7.30 A number of submissions in response to both this Commission's Issues Paper and the VLRC's Consultation Paper emphasised the need for the substantive law and practice to remain flexible 'to meet the needs of each individual case, always maintaining an accused person's right to a fair trial according to law.'[38]

7.31 In the words of one respondent to the VLRC's Consultation Paper:

> The starting point must be … to ensure that [the defendant] gets a fair trial.[39]

7.32 The Criminal Bar Association of Victoria and one of its members, Benjamin Lindner, stressed that the desire for simplicity was subject to the higher duty of ensuring a fair trial:

> Generally, the shorter and more concise a direction of law, the better. It is accepted that such a direction is more likely to be easier to devise and more likely to be well understood by a jury. It is a worthwhile goal in all discussions about jury directions. But brevity should not usurp fairness to an accused; any difficulty in crafting a direction should not be solved by tipping the scales of justice, or simply relegating the task to a too hard basket.
>
> …
>
> Simplicity, conciseness, brevity and comprehensibility are all laudable goals in devising directions. But all these goals must be secondary to that of ensuring a fair trial. Once that principle is diluted or compromised, the risks of an unfair trial increase. … Any changes to directions aimed to simplify them are supported — but not at the expense of fairness.
>
> …

36 Ibid [4.36]–[4.38]. The VLRC recommended one significant qualification to what would otherwise be a range of decisions entirely within the judge's discretion: a request by the defendant for a discretionary direction would oblige the judge to give that direction in the absence of good reason not to. Recommendation 7 reads: 'The trial judge must give a discretionary direction that has been requested by counsel for the accused unless satisfied that there is good reason not to do so.'

37 Ibid [4.85]–[4.91].

38 The Hon Justice M McMurdo, Submission 8; See also South West Brisbane Community Legal Centre, Submission 11.

39 Associate Professor John Willis, Submission to the Victorian Law Reform Commission, 16 December 2008, 5.

> … the notion of 'fairness' that underpins so much of the directions required should not be diluted as the challenges of the law become more complex. On the contrary, it should be guarded even more vigilantly.[40]

The QLRC's views

7.33 The Commission does not accept that there is any dichotomy to be drawn between directions that are on the one hand simple, concise, brief and comprehensible and on the other ensure a fair trial, such as Lindner appears to draw. In order to be fair, a direction or warning must be understood by juries and capable of being sensibly and accurately applied by them. Directions that do not meet these criteria militate against the fairness of the trials in which they are delivered.

7.34 Nonetheless, the Commission concludes that there is no need, and it would be futile, to seek to distil a defendant's right to a fair trial, or a trial judge's obligation to ensure fair trial so far as procedurally possible, into any statutory or similar comprehensive and binding statement.

7.35 However, the principles that are encompassed by the notion of a fair trial should underpin any reform of the criminal justice system, including any reform to jury directions contemplated in this Report.

NO CODIFICATION

7.36 As is apparent from the discussion in several chapters of this Report, a number of difficulties with the current system of jury directions have been identified. The prospect of reform of jury directions by way of comprehensive statutory intervention, and whether this should involve codification of this area of the law, was a key aspect of the VLRC's Consultation Paper. One of the questions raised for consideration in this Commission's Issues Paper was the extent to which any of the difficulties with jury directions should be addressed by codification;[41] in its Discussion Paper, the Commission expressed the provisional view that codification is not warranted in Queensland.

7.37 This issue is dealt with separately and before a consideration of other matters in this Report because of the particular attention it received in a number of the submissions made in response to both this Commission's Issues Paper and the VLRC's Consultation Paper, almost to the exclusion of any consideration of the numerous particular problems discussed in the Issues Paper.

NSWLRC's Consultation Paper

7.38 While the NSWLRC suggested the possibility of reforms to jury directions that might be implemented legislatively — for example, that some directions might be

---

40 Benjamin Lindner (Criminal Bar Association), Submission to Victorian Law Reform Commission, 30 November 2008. See also Criminal Bar Association of Victoria, Submission to the Victorian Law Reform Commission, 15 December 2008, 19–21, 25–26.

41 In this chapter, the Commission uses the term 'codification' to cover comprehensive statutory intervention such as that recommended by the VLRC even if any such regime would not necessarily amount to codification strictly speaking.

abolished or that the contents of particular directions might be clarified[42] — it did not suggest codification or extensive statutory intervention in its Consultation Paper on jury directions. Indeed, the NSWLRC specifically raised the possibility of improving jury directions by non-legislative means, for example:

- relying on other components of a criminal trial, such as the admission of evidence, to reduce the need for jury directions;
- adopting practical ways of assisting jurors to understand jury directions better, such as the provision of written directions; and
- modifying existing directions through judicial education and modification of the NSW *Criminal Trial Court Bench Book*.[43]

VLRC's proposals and recommendations

7.39 The VLRC made what might have been seen as a very radical proposal to cut the Gordian Knot of jury directions in that State. It is perhaps not overstating the position that was expressed in its Consultation Paper[44] that the state of the common law and the scattering of statutory provisions concerning jury directions is now such that statutory intervention is the only practicable solution. The common law cannot be relied on to streamline itself, and not within any particular timeframe. The VLRC proposed that the answer may lie in a single piece of legislation which would have a threefold objective: to consolidate, simplify and organise the law.[45]

7.40 The VLRC's major proposals were as follows:

- Proposal 1: All of the circumstances in which the trial judge is required or required not to direct the jury should be set out in legislation.[46]
- Proposal 2: The content of some of the directions that the trial judge is required to give to the jury should be set out in legislation.[47] (The VLRC did not suggest that all of the directions that a trial judge would, or might, be required to give should be set out in a standardised form: this was suggested for a small number of directions only. The methods by which this might be achieved included model directions, outlines of directions, and simplified generic or 'all-purpose' directions.[48])

---

42 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [1.30], [1.51], [1.57]–[1.59].

43 Ibid [1.60]–[1.65].

44 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008). This Paper is available on the VLRC's website, as are copies of a number of submissions that have been lodged in response to it: <http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/Home/Completed+Projects/Jury+Directions/LAWREFORM+-+Jury+Directions+-+Consultation+Paper> at 7 December 2009. The VLRC also published a short discussion paper that summarised the key proposals advanced in its Consultation Paper: Victorian Law Reform Commission, *Jury Directions — a closer look*, Background Paper (2008), also available on its website: <http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/Home/Completed+Projects/Jury+Directions/LAWREFORM+-+Jury+Directions%3A+a+closer+look> at 7 December 2009

45 Jury Directions Symposium, Melbourne, 5–6 February 2009.

46 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [7.10].

47 Ibid [7.23].

48 Ibid [7.24]–[7.27].

- Proposal 3: The principles concerning the trial judge's obligation to direct the jury about the real issues in a case should be included in legislation.[49]

7.41 At the heart of the VLRC's suggested Act is an attempt to re-assert the trial judge's discretion as a key element in the necessity for, and the range and content of, jury directions in any particular case. It would not seek to give trial judges free rein, but it would seek to relieve them in appropriate cases of what is seen as a burden of excessive, unwieldy, unhelpful and counter-productive directions that fail to achieve what they are supposed to do, and do so at great length and, therefore, at great expense to the parties, the court and the community.

7.42 The VLRC proposed that this Act be a code rather than an ordinary piece of legislation, with the effect that the operation of the common law would be excluded, giving a 'fresh start' in the law of jury charges with the relevant law located in a single place.[50]

> The [VLRC] proposes that, apart from a small and identified class of mandatory directions, all directions ought to be discretionary. The class of mandatory directions would include standard procedural directions (e.g. burden of proof, standard of proof), as well as directions about the elements of the offences charged and any defences raised. The obligation to charge the jury in accordance with the principles in *Alford v Magee* (1952) 85 CLR 437 would remain. It is arguable that some evidentiary directions should also be mandatory, if the risks associated with that kind of evidence justify a warning in every case. Identification and propensity evidence are examples of categories of evidence that may warrant a mandatory direction under a new code.
>
> Currently, most evidentiary warnings are mandatory in practice, if not in law. In law, most evidentiary warnings are required only if the failure to give them creates a perceptible risk of a miscarriage. In practice, however, the consequences of failing to give a warning are so profound that judges will simply give them, regardless of whether they actually consider there is a 'perceptible' risk.[51] (notes omitted)

7.43 The wording of a small number of the more problematic directions would be set out in the new legislation; two such directions were identified in the VLRC's Consultation Paper: consciousness of guilt and propensity.[52] Otherwise the Act would limit itself to identifying a small number of mandatory directions, leaving the consideration, application and content of the remainder largely up to the trial judge, though with some guiding principles outlined in the legislation.

7.44 The ambit of the obligation to summarise the evidence — which in Victoria appears to result in summaries of much greater length than in Queensland and elsewhere — would be clarified, presumably with a view to streamlining this aspect of jury charges quite considerably.[53]

7.45 In a similar vein, the legislation would seek to re-state the rule in *Pemble's case* in line with what is said to be its original purpose so that the defendant would not

---

49 Ibid [7.45].

50 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) 93–4; Victorian Law Reform Commission, *Jury Directions — a closer look*, Background Paper (2008) 3.

51 Victorian Law Reform Commission, *Jury Directions — a closer look*, Background Paper (2008) 4.

52 Ibid 5–8; Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) 93–4.

53 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) 98–9.

receive the benefit of directions on defences that were not raised or addressed on by defence counsel.[54]

7.46 The VLRC also contemplated that the proposed Act would contain some procedural reforms: allowing the jury charge to be delayed or split; limiting appeals to points raised at the trial; identification of issues in advance of the trial; and on-going professional training for counsel and judges.[55]

Submissions

7.47 The VLRC's suggestion of codification generated very mixed and strongly worded responses to the VLRC.

7.48 Some submissions in response to the VLRC's Consultation Paper opposed the introduction of a statutory scheme along the lines of that proposed by the VLRC, particularly if the trial judge were to continue to retain a wide discretion in relation to jury directions. As the VLRC noted in its Final Report, the main objection to the proposed statute was the apprehension of a lack of flexibility.[56]

7.49 Judge MD Murphy of the County Court of Victoria expressed concern for the need to retain the flexibility of the common law:

> I am not a strong supporter of jury directions legislation. The danger with legislation is that it will create a whole new raft of appeals as it is interpreted. Further, the current system where there is effectively an iterative process between the trial courts and the Court of Appeal, leavened by learning from other jurisdictions, is such that there is a danger that should there be a comprehensive code of jury directions it will not be able to respond in a flexible manner as under the current system.
>
> …
>
> I regard the introduction of a code as possibly creating inflexibility. In my view, if such a code is implemented then there ought to be a mechanism for its continuous review and amendment. I fear that with the crowded legislative agenda there is a danger that a code will be unable to respond to any inadequacies identified. I would propose an alternative mechanism that allows for any codified directions to be amended. One such mechanism could be that the directions be akin to Rules of Court such that the judges would be in a position to modify the appropriate directions, subject to legislative disallowance.[57]

7.50 The submission by Stephen Odgers SC, which was endorsed by the Queensland Law Society and the Bar Association of Queensland in their joint submission to this Commission's Issues Paper,[58] opposed the VLRC's Proposals 1, 2 and 3:[59]

> Proposal 1. I oppose this proposal. Almost all warnings and directions currently required of trial judges have been developed by the courts. The involvement of the legislature has, in general, been reactive. The courts are confronted by the situations that have led to a recognition that some kind of warning or direction is

54 Ibid 104.

55 Ibid 101–5.

56 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [4.18].

57 Judge MD Murphy, Submission to the Victorian Law Reform Commission, 5 February 2009, 2–3.

58 See [7.76] below.

59 These Proposals are set out in [7.40] above.

required. New cases throw up new issues. The law in this area is in a constant state of change, not just because of legislative intervention but also because it is impossible to predict all the circumstances in which the need for a warning or direction emerges. Equally, over time, it becomes apparent that a warning or direction that has been regarded as necessary becomes less appropriate. The courts must be allowed to develop the law in this area subject, of course, to legislative action designed to modify that development.

…

Proposal 2. I do not support legislative attempts to simplify the content of directions required to be given by trial judges. I accept that the courts have not proved particularly successful in crafting comprehensible directions. Having said that, I am skeptical that legislative formulations will prove satisfactory, given the variety of situations in which directions will be required. It would be better if more resources were directed to the highest levels of the courts to improve the comprehensibility of directions. Bench book standard directions should be formulated with the assistance of experts in communication and mock jury research. More should be done in that context to assist trial judges to adapt standard directions to particular cases.

Proposal 3. I see no need to put the '*Alford v Magee*' principle in legislation. …

Question (7.52).[60] The [Uniform Evidence Law] provisions should be left alone. They are a reasonable approach to a difficult area. They are far preferable to the proposals advanced in this Paper. On the other hand, I do not oppose a provision that allows a judge not to summarise evidence.[61] (note added)

7.51 The Criminal Bar Association of Victoria also opposed statutory reform:

The Criminal Bar Association does not favour either of these proposals[62] on the basis that it is not possible to provide what has been conveniently described as a 'one-stop' shop for the giving of directions, and the content that they may contain. An important part of the need to give directions, and what is contained within those directions, is governed by the requirement for such degree of flexibility as is required by the individual circumstances of any one case. We submit that it is impossible to predict what directions may need to be given, and what should be contained within them, and thus to retain the required degree of flexibility. Further, as experiences with Parliament have shown in the past, once legislation or codification is in place, it takes much effort and expense to change what has been made into the force of law. By taking the steps proposed, the power of appellate courts to intervene and interpret is severely limited.

In arguing that the ability of the appellate courts to interpret should not be disturbed, we are mindful that the Consultation Paper is critical of the approach of various appellate courts in their interpretation of jury directions and warnings, and the impact of what has been described as the development of 'the appellate Bar'. If there is force in those views, then it seems to this Association that the answer may lie in appellate courts speaking with a cohesive singular voice; producing judgements that stand for clear singular principles; and acting with firmness. Leadership in this area must surely begin 'from the top'. At the same time, educational process-

60 The question at [7.52] of the VLRC's Consultation Paper reads:

> How should consistency between new directions and warnings legislation and the Uniform Evidence Act be maintained?

61 Stephen Odgers SC, Submission to the Victorian Law Reform Commission, 12 November 2008, 7–8.

62 Ie, the introduction of a statute or a code: see Proposals 1 and 2 set out in [7.40] above.

> es can and should be put in place to better inform the judiciary and legal practitioners about the need to strive for leadership, focus, and clarity.[63] (note added)

7.52 This position was supported by the Law Council of Australia in its submission to the VLRC:

> 13. To a very large extent, the warnings and directions currently required of trial judges have been developed by the courts in response to particular cases. As the Criminal Bar Association of Victoria stated in their submission, '... it is not possible to provide ... a "one-stop shop" for the giving of directions, and the content they may contain. An important part of the need to give directions, and what is contained within those directions, is governed by the requirement for such degree of flexibility as is required by the individual circumstances of any case.' The law in this area is in a constant state of change because it is impossible to predict all the circumstances in which the need for a warning or direction emerges. For this reason, the legislature should not attempt to codify the law in respect of jury warnings and directions or attempt to reduce the law to one piece of legislation.[64] (note omitted)

7.53 Similarly, Bernard Lindner, a member of the Criminal Bar Association of Victoria, submitted to the VLRC that:

> While there can always be improvements made to a system of criminal justice, in my submission it is important not to replace a system of well articulated principles with a new regime (such as Jury Directions Legislation) which will be liable to create a new and lively jurisprudence — ie. to merely change the nature of appeals, and not to reduce their numbers or success ratio.
>
> …
>
> In my submission, the answer to perceived overcomplexity in jury directions does not lie in the introduction of new legislation, be it an Act or a Code. Rather, an increase in the role of the Judicial College, a specialisation of judicial roles (ie: judges specialising in criminal trials), an increase in the resources of the Supreme and County Courts, and an increase in the funding of both prosecuting and defence would better address the problems isolated by this Consultation Paper.[65]

7.54 However, some submissions in response to the VLRC's Consultation Paper supported strong statutory intervention, even codification, in that State. For example, Patrick Tehan QC submitted that:

> I think the time has now come for some form of codification and simplification of directions in sexual offence trials. I think this will tend to lessen the burden on trial judges and will also assist in overcoming the complexity identified by the [VLRC] with having statutory and common law directions.[66]

7.55 This was echoed by another respondent to that Paper:

> All of the circumstances in which a trial judge is, or is not required to direct the jury should be set out in legislation. This legislation should ideally be in the form of a

63 Criminal Bar Association of Victoria, Submission to the Victorian Law Reform Commission, 15 December 2008, 10–11.

64 Law Council of Australia, Submission to the Victorian Law Reform Commission, 30 January 2009, 4–5.

65 Bernard Lindner (Criminal Bar Association), Submission to the Victorian Law Reform Commission, 30 November 2008.

66 Patrick Tehan QC, Submission to the Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) 26 November 2008 [3].

> code (encompassing a complete statement of the law) setting out specific guidance in the form of model directions (expressed in plain English) as to the content of the warnings. These model directions whenever possible should be accompanied by explanations which tell the jury why they are being instructed to reason, or not to reason in a particular way.
>
> …
>
> The adoption of a code would have the effect of displacing all other law and ousting the existing common law and any statutory rules that currently apply. This would provide greater clarity and cohesion and no longer require judges to reconcile statutory provisions with common law rules.
>
> Ideally, judicial discretion should come in the form of the timing of directions and less so in the content of the directions (which would be expressly covered, so far as it is practical to do so by the code). The Trial Judge should be given greater flexibility in determining at what stage of a trial the warnings and directions should be given.[67]

7.56 The Law Reform Committee of the County Court of Victoria supported statutory intervention in the form of codification:

> A code in the form proposed, and the tests for giving discretionary direction are supported. A code provides more prospect of a fresh start than grafting yet another set of legislative changes onto the existing common law framework. If the High Court and Court of Appeal continue to develop the common law in relation to jury directions in the manner they have in recent years, there is an appreciable risk a non code approach will fail to achieve the aims of simplifying directions, reducing the length of charges and giving more discretion to trial judges in determining what evidentiary directions are necessary in a particular case. However, such provisions need to be clear, less complex than at present, and provide sufficient flexibility to adapt to changing circumstances. A code also reduces the risk the judge or trial counsel will overlook a direction which ought be given in the interests of a fair trial. The fair trial test, and presumption in favour of giving any discretionary direction sought by the defence are supported. So is the replacement of prescribed forms of words with guiding principles.[68]

7.57 The Law Reform Committee noted that such radical change would come at a cost, but a cost that should be met:

> Change of this magnitude requires a lead time for education and training for judges and practitioners, and allowance for greater time to prepare charges. Trials are themselves likely initially to take longer, and delays for jurors to increase. List judges and registry staff will have an added workload as additional case management directed to supporting early issue identification will be required. There will also be a need to monitor and evaluate the proposed reforms.
>
> None of this is a reason for resisting reform. If such reform is to promote fair trials, which are heard in a timely fashion, there is a clear need to prepare for such change rather than react to it. That means amongst other things, appointment of additional judges, court and registry staff. It also means allowing further time (and therefore funding for) for preparation of trials by judges, and counsel.[69]

---

67 Maria Abertos, Submission to the Victorian Law Reform Commission, 29 November 2008 [8]–[9].

68 Law Reform Committee of the County Court of Victoria, Submission to the Victorian Law Reform Commission, 13 March 2009, 3–4.

69 Ibid 4.

7.58 The VLRC proposed that the introduction of a code would be accompanied by the establishment of a permanent supervisory body. This was also supported by the Law Reform Committee:

> **The [VLRC] proposes:**
> - The establishment of a body to review the operation of the code and the formulation of directions
>
> **...**
>
> **Response**
> A permanent body, comprising appellate and trial judges, practitioners, and academics to review the operation of the code is supported. Whilst the Court of Appeal fulfils a vital function in reviewing individual charges, it has limited opportunity power or capacity to inform itself about the overall operation of the code, or to recommend or bring about any further reform on anything but a case by case basis.[70]

7.59 However, the Victorian Office of Public Prosecutions ('OPP') did not regard any such oversight body as desirable or necessary: the Judicial College of Victoria is, in its view, 'ideally placed to oversee any implementation and development.'[71]

7.60 The OPP did, however, support legislative reform of the process, but not the substance, of jury directions:

> The OPP can see the benefits to legislating the *process* of jury direction to provide guidance to judges however it is important to appreciate the difference between the *process* and *substance* of jury directions. Legislation that sets out basic guidelines as to when a direction ought to be given largely declaratory of the common law may be of assistance. It would be inappropriate for the legislation to go into detail and prescribe the exact wording required as what should be said depends on the circumstances of the particular case.
>
> …
>
> The OPP does not favour the creation of a code. Detailed legislation setting out all situations when a judge must direct a jury and detailing what the judge must say would potentially inhibit a trial judge's ability to analyse the evidence and make a judgment as to what is appropriate in the circumstances of a particular case.
>
> … A code could not deal with 'unforeseen cases' therefore the only fallback is the common law.[72] (emphasis in original)

7.61 Nor, in the OPP's opinion, should any new legislation specify the factors to be considered by a trial judge when deciding whether to exercise a discretionary power to give a jury directions.[73]

7.62 The OPP argued that, if some statutory reform were introduced, most directions should be discretionary: 'most directions are only required when the circumstances and an analysis of the evidence in a particular case call for such a direction.'[74] However:

---

70 Ibid 7.

71 Office of Public Prosecutions, Submission to the Victorian Law Reform Commission, 12 February 2009, 7.

72 Ibid 3–4.

73 Ibid 6.

74 Ibid.

> The OPP would not be opposed to making some directions mandatory, but these should be limited to directions that are common to all trials and do not require an analysis of the evidence in the particular case. For instance the onus and standard of proof and the use of inferences, the presumption of innocence and the role of judge and jury.
>
> …
>
> A general checklist would be the most suitable model.[75]

7.63 In a similar tone to the last of these comments from the OPP, Judge MD Murphy of the County Court of Victoria made this submission to the VLRC:

> Clearly, there is a strong pressure on trial judges in order to avoid successful appeals to give directions that might otherwise not be appropriate. It may be that the need for a code may be obviated by … legislative support for making most directions discretionary.[76]

7.64 Associate Professor John Willis accepted that some statutory intervention was probably necessary, though stressed that this should not be prescriptive:

> 1. It is probably necessary to have some of these matters put into statute to overcome the effects of previous court decisions.
>
> 2. It is crucial to preserve judicial discretion in this area.
>
>   (a) The performance of legislators in this and related areas had been of late, at best, unhelpful (see s. 36B, s 37, s 37AAA, s 37AA & s 61 *Crimes Act* [*1958* (Vic)]).
>
>   (b) The innumerable circumstances that can arise in trial situations make prescription most undesirable.
>
> …
>
> Model directions should not be set out in legislation.
>
> This is a recipe for rigidity and inflexibility. There are already model directions which are used — on occasion not very well.
>
> The 'cut and paste' approach to jury directions is often not the best means of assisting a jury in a specific case.
>
> …
>
> To the extent that this will require legislation, it is likely to be a difficult, sensitive and possibly protracted exercise.[77]

7.65 In a somewhat more neutral tone, Victoria Legal Aid supported 'the consolidation of legislation to reform the currently fragmented system'. However, they did not support codification:

---

75 Ibid 6, 13.

76 Judge MD Murphy, Submission to the Victorian Law Reform Commission, 5 February 2009, 3.

77 Associate Professor John Willis, Submission to the Victorian Law Reform Commission, 16 December 2008, 14–15.

> If directions are legislated, it should not be a code which prescribes what directions can and cannot be given.[78]

7.66 The Criminal Bar Association of Victoria supported 'in broad terms' the proposal that some of the directions that a trial judge is required to give could be set out in legislation.

> The advantage of adopting this course would be that it retains the necessary degree of flexibility so that in accordance with paragraph 7.25,[79] the 'directions' should be drafted so that they are capable of being adapted to the needs to [*sic*] particular cases. In the interests of simplicity, the Criminal Bar Association would not object to legislation containing a shorter and simpler approved directions and schedule. Further, another advantage of some directions being so formulated, this allows for the flexibility of interpretations in the course of appellate intervention.
>
> An advantage of adopting Option A — Model Directions — is that according to paragraph 7.27[80] a direction which has been approved by the Judicial College of Victoria is to be accepted as a legally correct direction until such time as the Court of Appeal declared that that direction was incorrect. A significant advantage of an approved model direction formulated by the Judicial College of Victoria is that it would be likely formulated by a broad range of judicial officers and consultative persons with the last say, rather than giving that responsibility to politicians.[81] (notes added)

VLRC's recommendations

7.67 In its Final Report on jury directions, the VLRC recommended the enactment of a comprehensive statute covering jury directions and warnings, substantially in line with the proposals in its Consultation Paper. In its view, the law of jury directions has reached a state where only a legislative response can resolve the difficulties:[82]

> **Why is the law in this state?**
>
> 4.7 While there are many reasons why the law of jury directions has reached the stage where it is unnecessarily complex, three major reasons stand out:
>
> 1. The law of jury directions, like any body of common law rules, is the product of unsystematic judicial development. …
>
> 2. The common law has not yet developed any clear framework for the law of jury directions. …

78 Victoria Legal Aid, Submission to the Victorian Law Reform Commission, 9 December 2008.

79 Paragraph [7.25] of the VLRC's Consultation Paper reads:

> Model directions or suggested forms of words, on the relevant areas of law could be included in the legislation. Those directions should be drafted so that they are capable of being adapted to the needs of particular cases. The model directions already completed by the Judicial College of Victoria (JCV) in their online Criminal Charge book provide a very useful starting point.

80 Paragraph [7.27] of the VLRC's Consultation Paper reads:

> Alternatively, the legislation could provide that unless the Court of Appeal determines otherwise, a direction approved by the JCV is a legally correct direction and that substantial conformity with the terms of such a direction shall be regarded as meeting the legal requirements for a direction on that topic. If the Court of Appeal declared that a JCV direction was incorrect, the Court could be required to formulate the correct direction.

81 Criminal Bar Association of Victoria, Submission to the Victorian Law Reform Commission, 15 December 2008, 12–13.

82 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [4.7]–[4.9].

> 3. The body of common law concerning a fair trial is forever evolving and is incapable of precise description. In the absence of useful organising principles, trial judges must retain an encyclopaedic knowledge of the categories or circumstances in which the common law stipulates that a direction is required. …
>
> 4.8 In some areas the law of jury directions has become even more complex because parliament has legislated to overcome shortcomings in the common law. At times, the courts have responded to legislative intervention by devising new and slightly different common law rules. It is often difficult for judges to identify and apply the legal rules that emerge from a body of entwined legislation and case law.[83]
>
> 4.9 While clear common law principles may emerge over time to guide the trial courts in the application of the law, there are no indications that this is likely to happen in the foreseeable future. Intermediate appellate courts are unable[84] to reconsider the basic approach to particular problems and the High Court cannot develop common law rules until an appropriate case arises.[85] At times individual High Court justices have sought to refine particular common law rules, often adding further complexity in the process.[86] (notes in original)

7.68 The VLRC drew a parallel between the rationalisation of the law of evidence in the Uniform Evidence Law and its recommended jury directions statute.[87] The VLRC also noted that piecemeal statutory intervention may only complicate the law.[88] However, the advantages of comprehensive legislative intervention are greater, in the VLRC's view:[89]

> 4.13. … Legislation has the capacity to bring order, clarity and greater simplicity to this body of law. The Victorian Parliament sought the same ends when it passed the Uniform Evidence Act. …
>
> 4.14 Legislation also has the capacity to modernise this area of law by promoting contemporary ways of communicating with juries and by encouraging changes to practices that have been the source of complexity and delay.

---

83 An example has been the complex overlap of common law and statutory obligations in relation to directions in the area of sexual offences, discussed in chapter 3 [of the VLRC's Final Report].

84 In *R v Chang* (2003) 7 VR 236, 238, Ormiston JA noted that an 'intermediate Court of Appeal (and trial judges) can do little else than to attempt to apply Edwards, as it has subsequently been interpreted in cases such as *Zoneff v R*.'

85 Since the initial decision of *Edwards v The Queen* (1993) 178 CLR 193, the High Court has considered the question of consciousness of guilt directions on only seven occasions, mostly only in passing. By contrast, the Victorian Court of Appeal has dealt with the issue in 84 cases since Edwards. In late 2008, the High Court refused special leave in the case of *Dickinson v R* [2008] HCA 203, which raised the question of the interaction between lesser included offences and consciousness of guilt. While acknowledging the case raised 'some questions of principle suitable for consideration by this Court', the High Court stated that Dickinson was not an appropriate vehicle for consideration of those questions and warned of the dangers 'in overrefining the requirements for judicial directions on issues such as consciousness of guilt.'

86 See, eg, *Dhanhoa v R* (2003) 217 CLR 1 where the High Court, in the words of Ormiston JA in *Chang* (2003) 7 VR 236, 238, considered the law of consciousness of guilt 'briefly … but in ways which evidenced three somewhat different approaches to the issue but without giving any new assistance of trial judges and lawyers.' See also *HML v R* (2008) 235 CLR 334 in which all seven High Court justices delivered individual judgments concerning the way in which evidence of 'uncharged acts' may be used (although Gummow J's judgment was only a concurrence). As a result, *HML* lacks a clear *ratio decidendi* as demonstrated by the Victorian Court of Appeal's discussion in *R v Sadler* [2008] VSCA 198, [59]–[67].

87 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [4.11]–[4.13].

88 Ibid [4.8], [4.16].

89 Ibid [4.13]–[4.15].

4.15 Legislation is far more easily refined and improved than the common law because it is not necessary to wait for an appropriate case to make its way to the High Court before the law can be changed. Prior to her appointment to the High Court, Justice Virginia Bell commented on the need for change in the way juries are directed and the means by which change might be achieved:

> Many of us who are engaged in the business of directing juries may feel, as I do, that we have let the law get into a state where we give excessive warnings to juries, and excessive judicial advice about how they should approach the task in the light of the peculiar experience of the court about these matters. I would like to see some change in that, but if that change comes then it is change that must come from the High Court, or as the result of legislative change.[90] (note in original)

7.69 The VLRC's key recommendations were:

1. The law concerning jury directions in criminal trials should be located in a single statute.

2. The legislation should be introduced over time and replace the common law, and it should contain revised versions of all existing Victorian statutory provisions (including relevant Evidence Act 2008 (Vic) provisions) concerning directions.

3. Section 165(5) of the Evidence Act 2008 (Vic), which saves the operation of the common law, should be repealed.[91]

4. The legislation should permit development of a body of law by the courts in accordance with general principles set out in the statute when a particular direction that is necessary for a fair trial, or is otherwise appropriate, is not expressly dealt with by the legislation.

5. The legislation should contain general principles which guide the content of all directions. All directions should be:

   - clear
   - simple
   - brief
   - comprehensible
   - tailored to the circumstances of the particular case.

6. The legislation should clearly indicate those directions that are mandatory and those which are discretionary.

…

12. The legislation should ultimately govern the content of all directions of a procedural nature such as:

---

90 The Hon Justice Virginia Bell, 'Communication with juries' (Speech delivered at the National Judicial College of Australia Conference, Museum of Sydney, 10 November 2007) <http://njca.anu.edu.au/ Professional%20-Development/programs%20by%20year/2007/Communic%20and%20the%20courts%20NOV/papers/Virginia%20Bell%20transcript.pdf> at 29 April 2009.

91 This issue is discussed in more detail in chapter 16 of this Report.

- burden and standard of proof
- the role of the trial judge, the jury and of counsel
- the requirement that the verdict be based solely on the evidence
- the assessment of witnesses
- unanimous verdicts
- those directions which are mandatory when the circumstances require (eg alternative verdicts, separate consideration, and perseverance)
- Those directions which may be given when the circumstances require (eg majority verdicts)
- Those directions which are of an administrative nature (eg jury empanelment, selecting a foreperson, trial procedure)

13. The essential elements of directions concerning the use of evidence should be set out in the legislation over time. Once the essential elements of a particular direction are dealt with by the legislation, any common law rule concerning that direction should be abolished. The essential elements of the following directions should be included in the initial legislation:

    - propensity reasoning
    - identification evidence
    - use of post-offence conduct.

14. Until the legislation deals with a particular direction, or is declared complete, common law rules concerning that direction should continue to apply. If the legislation, once completed, does not refer to the essential elements of any direction the trial judge considers necessary to ensure a fair trial, the trial judge should have a discretionary power to determine the content of that direction guided by the general principles in the legislation.[92] (note added)

7.70 One interesting refinement in this recommendation over the VLRC's earlier proposals is the recommendation that the statute progressively supplant the common law to provide a transitional period, and perhaps quite a long one, while the more complex aspects of the legislation are prepared and enacted.

The Issues Paper

7.71 In chapter 8 of the Issues Paper, this Commission discussed the VLRC's proposals and asked whether it was necessary or desirable to consider codification in Queensland in the area of jury directions, whether in the form of the scheme suggested by the VLRC in its Consultation Paper or in some other form.[93] This Commission noted that the strength of views that the law of, and judicial practice in relation to, jury directions in Victoria is in serious disarray and needs radical reform does not appear to be

92 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009), 13–14, [4.22]–[4.48].

93 Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [8.37]–[8.53], and Issues for Consideration 8-6 to 8-9.

echoed in Queensland. Nonetheless, this Commission sought submissions on the following questions:

> 8-6 Is it necessary or desirable to find mechanisms to preserve or reinforce the trial judge's discretion in relation to jury directions?
>
> 8-7 If so, what form might those mechanisms take?
>
> 8-8 Would it be necessary or desirable to do so by way of statute?
>
> 8-9 Would the statutory changes proposed by the Victorian Law Reform Commission, or some similar scheme, be necessary or desirable in Queensland?[94]

Submissions

7.72 None of the submissions made in response to the Commission's Issues Paper expressed support for statutory intervention in Queensland of the kind proposed in the VLRC's Consultation Paper. All of the submissions on this question opposed codification.

7.73 The Queensland Law Society and the Bar Association of Queensland made a joint submission to the Commission's Issues Paper.[95] The thrust of their submission was to argue against the introduction of any statutory scheme in Queensland, irrespective of what might happen in Victoria:

> In particular we wish to respond to a proposal that directions given to juries in criminal trials should be reformulated and enshrined in legislation. Such a proposal has been put forward by the Victorian Law Reform Commission in the paper entitled 'Jury Directions — A Closer Look'.[96] In that paper the central reform proposal was that the law governing the directions and warnings that a trial judge has to give to a jury in a criminal trial should be codified in one piece of legislation. This is a radical proposal, and one which we consider to be dangerous and unnecessary.[97] (note added)

7.74 In any event, in their view, the common law's ability to develop in response to legal problems provided their preferred avenue of reform:

> It is accepted that it is an onerous task for a trial judge to discharge his or her duty in adequately summing up a criminal case to a jury. The types of directions and warnings that are given to juries in Queensland are discussed in Chapter 3 of the QLRC Working Paper No. 66. A large body of case law has been developed in Australia concerning a judge's summing up to a jury, in particular specific directions and warnings in specific cases. This will no doubt continue to be the case, as new types of offences are created by State and Commonwealth legislatures, and statutory changes are made to the rules of evidence and procedure. It is difficult to see how a piece of legislation or a code can keep up with these changes to the law. One of the great advantages of the common law system we inherited from England was that it was quickly able to respond to legal problems and to develop the law accordingly. That is not to deny of course that there have been numerous instances

94 Ibid 105, 170, 174.

95 This joint submission was endorsed by Legal Aid Queensland, who commented that 'codifying jury directions into one piece of legislation is neither necessary nor desirable': Submission 16, 1.

96 This background paper was published by the VLRC in December 2008 as a summary of its Consultation Paper: see Victorian Law Reform Commission, *Jury Directions — a closer look*, Background Paper (2009).

97 Queensland Law Society and Bar Association of Queensland, Submission 13, 1.

> where legislative intervention has been required to remedy injustices that could not be adequately dealt with by the courts.
>
> …
>
> It is the experience of the Bar Association and the Law Society that judges in Queensland diligently endeavour to discharge their functions in adequately summing up the case to a jury, by providing all appropriate directions. If there is a failure to give an appropriate direction, or there is a misdirection, there is adequate appellate review by the Court of Appeal, and in some cases, the High Court of Australia. In this regard we consider the current system works particularly well, and there is simply no need to change a system that is working well.
>
> However, this is not to say that the current way in which juries are instructed by trial judges cannot be improved. In particular, an examination of whether juries are receiving the best possible assistance from the trial judge concerning the law and how it applies to a particular set of facts should be undertaken. It is understood that some research has been done on this in other States, and utilisation could be made of s.70(9) *Jury Act 1995* (Q) for research on this issue.[98]

7.75 The Queensland Law Society and the Bar Association of Queensland enumerated six bases of their objection to the introduction of any statutory scheme:

> 1. The legislation of jury directions will do nothing to limit developments in the courts of other directions that should be given in particular cases. It is noted in the Victorian proposal that it is stated that 'Apart from a small identified class of mandatory directions, all directions ought to be discretionary.' Mandatory directions would include standard procedural directions concerning the burden and standard of proof, and directions about the elements of the offences charged and any defences raised. It is also suggested that some evidentiary directions should also be mandatory, 'if the risks associated with that kind of evidence justify a ruling in every case'. It is difficult to see what this approach would achieve. There are already in existence in Queensland a number of mandatory directions that have to be given to a jury, including those as to the onus and standard of proof, the elements of the offence etc. Whether any further directions should be given clearly depends on the facts in any given case, and it is simply impossible for legislation to cover all the variable factual circumstances that come before the courts.
>
> 2. A critical question arises as to who is going to draft the directions that will become legislation. Who will determine which directions become mandatory under the statute? There will no doubt be differences of opinion between the legal profession, the Commonwealth and State DPP offices and the courts about which directions should be included in the legislation. What ability is there for a jury direction to be added later, other than by legislative amendment? Will the legislation supplement the existing case law or be a complete codification? It is respectfully submitted that the legislative process is a cumbersome way of dealing with the subject matter that has long been adequately supervised by the court system.
>
> 3. There is no compelling reason why Queensland needs to alter its current system. Whatever the situation may be in Victoria, misdirections by judges in Queensland or the failure to give directions do not seem to be a particular

98 Queensland Law Society and Bar Association of Queensland, Submission 13, 1–3. Research has, of course, also been done in Queensland: see chapter 2 of this Report. See also Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [1.14]–[1.20]. Similarly, Legal Aid Queensland, which endorsed the joint submission of the Queensland Law Society and the Bar Association of Queensland, commented that: 'such reform is best left to the appellate courts to guide, in context': Submission 16, 3.

> problem. These cases do occur from time to time, however they are more than adequately managed by the appellate courts.
>
> 4. Queensland has had the benefit for some years of the Supreme Court and District Court Bench Book. … It was prepared by a bench book committee … That committee revised directions that had previously been compiled, and kept up to date with High Court and Court of Appeal decisions in criminal law matters. Accordingly, the committee was able when necessary to meet quickly and revise the existing directions if some error was found with those, or the law on which they were based was changed. The advantage of this system was that such a committee can meet very quickly. The process required to amend a piece of legislation is necessarily more time consuming and cumbersome. While strict adherence to the suggested directions in the Bench Book is not necessary, as the Court of Appeal has stated on a number of occasions, the Bench Book has been revealed to be a useful and beneficial development. It is the experience of both the Bar Association and the Law Society that the Bench Book has been a useful and worthwhile innovation. It is of course open for any member of the profession to make a suggested change to a direction, or to suggest a completely new direction, for consideration by the Bench Book committee.
>
> 5. Legislative enshrinement of mandatory directions may well lead to a large number of appeals about the terms in which a judge had addressed a jury, whether or not the judge was actually trying to follow, or to amend, the mandated directions. It is unlikely that directions less easy to amend, and prone to provoke appeals, would be any improvement on the present system.
>
> 6. Appeals regarding jury directions largely concern a misdirection, or a failure to give a particular direction. It is difficult to see how legislative enactment of directions is going to fix this. If the law currently requires a particular direction to be given in a particular case, and a judge fails to do so, then it is unlikely that legislation is going to make any difference.[99]

7.76 The Queensland Law Society and Bar Association of Queensland expressly adopted the comments made by Stephen Odgers SC of the New South Wales Bar in his submission to the VLRC, which, in their words, discussed 'with considerable persuasion the defects in the proposal to legislate jury directions.'[100]

7.77 Their joint submission also closely reflects the submission made by the Queensland Law Society in response to the VLRC's Consultation Paper,[101] in which it endorsed the submission made by the Law Council of Australia to the VLRC:[102]

> The Society wishes to strongly advocate against codification of the law of jury warnings and directions. Judicial warnings and directions are given in a bid to ensure an accused receives a fair trial. Miscarriages of justice will not be avoided by fixing the law in this regard.[103]

7.78 The position adopted in the joint submission was, in turn, endorsed by the Law Council of Australia in its submission in response to this Commission's Issues Paper:

---

99 Queensland Law Society and Bar Association of Queensland, Submission 13, 2–3.

100 Ibid. Odgers' submission is considered in detail at various places in this chapter and later in this Report.

101 Queensland Law Society, Submission to the Victorian Law Reform Commission, 30 January 2009.

102 Law Council of Australia, Submission to the Victorian Law Reform Commission, 30 January 2009.

103 Queensland Law Society, Submission to the Victorian Law Reform Commission, 30 January 2009. In this comment, 'fixing' presumably means 'putting into a static form' rather than 'reforming'.

> The Law Council agrees with the position adopted in the Joint Submission [of the Queensland Law Society and the Bar Association of Queensland] and is generally opposed to any proposal to codify jury directions into legislation.
>
> …
>
> Trial judges should be able to draw upon the warnings and directions that have been developed over time by the courts in response to particular cases. The consolidated content of these warnings and directions is in a constant state of flux because it is impossible to predict all the circumstances in which the need for a warning or direction emerges. For this reason, the Law Council submits that the legislature should not attempt to codify the law in respect of jury warnings and directions or attempt to reduce the law to one piece of legislation.
>
> The Law Council also shares the view expressed in the Joint Submission that consideration should be given to alternative mechanisms which may operate to improve consistency and clarity of jury directions and lead to an enhanced jury engagement. Such mechanisms include improved judicial education, improved training of prosecutors, higher levels of legal aid funding to ensure the quality of defence representation, and use of appropriate expertise to improve the effectiveness of jury directions.[104]

7.79 The position adopted in the joint submission was also endorsed by Legal Aid Queensland, who was specifically concerned about a rigidity in a codified scheme that would prevent adaptation of jury directions to fit the circumstances of individual cases:

> Formulaic directions could also create injustices, as we cannot see that it would be possible to cater, through legislation, for all of the factual situations and events that occur during trials. A 'one size fits all' approach might in fact lead to more appeals and expense, and ongoing need for amendment of the relevant directions, and problems relating to retrospectivity and other completed trials etc.[105]

7.80 A District Court judge responding to the Commission's Issues Paper was also opposed to the introduction of a mandatory regime for the reasons set out in [8.48] of the Issues Paper,[106] which reads:

> 8.48 There is a concern that section 32(1) [of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)] — or any principle that there is an overriding right to a fair trial that may, in appropriate circumstances, prevail over any other law in relation to trial procedure generally (and jury directions in particular) — might simply permit appellate courts to re-introduce a regime of detailed, lengthy and more or less mandatory directions irrespective of the purpose and provisions of this proposed Act.[107]

7.81 In other words, the existence of an over-arching right to a fair trial, for example, might simply mean that any attempt to oust the common law in this area and to replace it with a statutory scheme (whether or not a code) may simply leave it open to the courts to modify that scheme, and re-introduce the complexity that the scheme would seek to remove, by reference to that right, and so create exceptions, imply general or

---

104 Law Council of Australia, Submission 14, 1–2.

105 Submission 16, 3.

106 Submission 6.

107 Section 32(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) reads:

> So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

over-riding rules of application or find fault or omissions in particular directions in particular cases, much as happens at present.[108]

7.82 The Brisbane Office of the Commonwealth Director of Public Prosecutions submitted that:

> It is essential that trial judges have a wide discretion in relation to jury directions.
>
> …
>
> It would not be desirable to preserve or reinforce a trial judge's discretion by statute. The current law allows the judge a wide discretion in relation to the conduct of the trial eg *R v Tichowitsch* [2007] Qd R 262 at paragraph [2].[109]
>
> …
>
> The statutory changes proposed [by the VLRC] or some similar scheme would not be necessary or desirable in the light of the wide discretion of a trial judge to control the conduct of the trial which already exists.[110] (note added)

The Discussion Paper

7.83 In its Discussion Paper, the Commission canvassed the VLRC's proposals and final recommendations on codification and the submissions received in response to this Commission's Issues Paper.[111] The Commission noted that the scope of the VLRC's proposals for codification seemed to be taken by several respondents as more sweeping than they in fact were. It also expressed some reservation about accepting the enthusiasm espoused by some respondents for the common law given that many of the present difficulties with jury directions have arisen as a consequence of the common law, enunciated by the appellate courts, and its inability to respond quickly and systematically to address such difficulties.[112] Nonetheless, on balance, the Commission came to the provisional conclusion that:[113]

> 2-1 There is no demonstrated need in Queensland for a single, comprehensive statutory scheme covering the content of jury directions and warnings or the circumstances in which they must or ought to be given.

---

108 The concept of a 'fair trial' is discussed at [7.3]–[7.22] above.

109 That paragraph reads:

> One of the grounds of appeal was that the trial judge erred in providing the jury with a transcript of the evidence at trial. It was submitted that he had no power to do that. In my view that submission cannot be sustained. There is no legislative provision preventing a judge from giving the jury a transcript of evidence, ***and the trial judge is in control of procedure during the trial***. It must however be recognised that to date juries in Queensland have not usually been given copies of the transcript of evidence. (Williams JA) (emphasis added)

110 Brisbane Office of the Commonwealth Director of Public Prosecutions, Submission 9, 4, 6. See also the submissions made by the Brisbane Office of the Commonwealth Director of Public Prosecutions in relation to written directions and similar techniques discussed at [10.128] below.

111 Queensland Law Reform Commission, *A Review of Jury Directions*, Discussion Paper WP67 (2009) [2.22]–[2.61].

112 Ibid [2.62]–[2.70].

113 Ibid 39, Proposal 2-1.

Further submissions

7.84 The Commission's provisional conclusion that codification in this area of the law is not necessary in Queensland was applauded by Legal Aid Queensland.[114]

7.85 The Bar Association of Queensland maintained its earlier view that significant statutory intervention in this area of practice and law is not warranted.[115] Overall, the Bar Association of Queensland opposed most of the Proposals in the Discussion Paper.

> The general consensus of members of this Association, who practice regularly in the criminal jurisdiction, is that the system of conduct criminal trials (particularly with the more recent experience of the support of the Supreme and District Courts Bench Book), works essentially well and is not in need of fixing.[116]

7.86 Neither did the Bar Association place much store in the results of research by non-lawyers, at least to the extent that they did not coincide with the observations of practising lawyers:[117]

> However, it must be noted, in our view, that such commentary even from eminent commentators in their own disciplines, whilst not to be disregarded, is no substitute for the views of experienced and effective practitioners in the criminal justice system.
>
> Accordingly, this Association does not accept that the Commission should be 'satisfied that the problems surrounding the content and delivery of jury directions and warnings are significant enough to warrant active steps to reform them'.[118] Nor does this Association accept the implied criticism of such experienced practitioners as commentators in respect of these issues, as being blinded to 'the fact that jurors have considerable difficulty in handing directions on the law, and complex warnings about the artificial ways in which they may have to deal with certain problematic evidence', or that there is necessarily such a problem, or that all judges, advocates and jurors 'need assistance in this regard'.[119] (notes in original)

7.87 The Commission does not agree with this submission. However strong and compelling the views of experienced lawyers may be, whether soundly based on strong principle or considered evaluation of the observations of many years in practice, it is in the Commission's opinion essential that developments in all relevant areas of the human sciences be taken into account. The criminal justice system, and the jury system in particular, are human endeavours, and the experience and findings of learned professionals in fields of human science, especially psychology and psycho-linguistics, cannot be dismissed except to the detriment of the legal system as a whole.

7.88 The Commission's review of jury directions has taken into account the views of many distinguished lawyers, amongst them the Hon Geoffrey Eames QC, the Right Honourable Lord Justice Auld, the Hon James Wood AO QC, and the members of the

---

114 Submission 16A, 4.

115 Submission 13A, 1. The Queensland Law Society endorsed and supported the whole of the submissions by the Bar Association of Queensland: Submission 13B.

116 Ibid.

117 Ibid 2. The passages in the Discussion Paper referred to in the following excerpt can be found at [7.91] and [7.94] in this Report.

118 See Discussion Paper at [2.64].

119 See Discussion Paper at [2.66].

Trial Efficiency Working Group of the NSW Attorney General's Department.[120] In many of their publications, these eminent lawyers have referred to research conducted by non-lawyers as an essential element of their contributions to the debate surrounding jury directions and other aspects of the jury system. No review of the criminal justice system — which is so firmly rooted in the community by virtue of the involvement of juries — can do otherwise.

7.89 In this country, no practising lawyers are allowed to serve of juries.[121] It follows that, no matter how experienced a criminal trial lawyer may be, his or her actual knowledge of how jurors operate is, at best, second hand and impressionistic.

7.90 One only has to consider the remarks over many years of very distinguished and experienced lawyers about the implications of delayed complaint in sexual assault cases to recall how reliance on their views alone led to manifest injustice over many years. It was only when other people started to intervene that those same practitioners could be persuaded, reluctantly, to alter their views.[122]

The QLRC's views

7.91 On balance the Commission remains unconvinced that this is an area of law in which comprehensive and detailed legislation and regulations are likely to prove beneficial in the long run in Queensland. The Commission is satisfied that the problems surrounding the content and delivery of jury directions and warnings are significant enough to warrant active steps to reform them but that this should be done by a series of other approaches outlined later in this Report rather than by codification.

7.92 The Commission acknowledges that amongst the great values of the common law are its flexibility and its ability to correct itself, as noted by the Queensland Law Society and Bar Association of Queensland[123] and Judge Murphy,[124] for example, and many others. However, many of the present difficulties in relation to jury directions (as noted by many commentators and researchers)[125] are founded on the lack of clarity in

120 The Working Group comprised Justice Peter McClellan, Chief Judge at Common Law, Supreme Court of NSW (Chair), Justice Megan Latham (Supreme Court of NSW), Registrar Gabrielle Drennan, (Supreme Court of NSW), Judge Greg Hosking SC (District Court of NSW), Mr Caleb Franklin (Principal Solicitor, Aboriginal Legal Service) and Ms Nell Skinner (Managing Solicitor, Aboriginal Legal Service), Ms Penny Musgrave (Director, Criminal Law Review Division, NSW Attorney General's Department), Ms Nicole Lawless (Deputy Director, Criminal Law Review Division, NSW Attorney General's Department), Mr Craig Smith (Director, Judicial Support, Courts, NSW Attorney General's Department), Mr Stephen Odgers SC (Chair of the Criminal Law Committee, NSW Bar Association), Mr Neil Adams (In House Counsel, Commonwealth Discussion Paper), Mr Phillip Boulton SC (President of the Criminal Defence Lawyers Association), Mr Mark Tedeschi QC (Senior Crown Prosecutor, Office of the NSW Discussion Paper), Mr Stephen Kavanagh (Solicitor for Public Prosecutions, Office of the NSW Discussion Paper), Mr Ernest Schmatt PSM (Chief Executive, Judicial Commission of NSW), Mr Tim Game SC (Chair of the National Criminal Law Committee, Law Council of Australia), Ms Pauline Wright (Chair of the Criminal Law Committee, NSW Law Society), Mr Brian Sandland (Director, Criminal Law, Legal Aid Commission), and Mr Mark Ierace SC (Senior Public Defender, Office of the Public Defenders): Trial Efficiency Working Group, Criminal Law Review Division, Attorney General's Department of NSW, *Report of the Trial Efficiency Working Group* (2009) 11–12.

121 *Juries Act 1967* (ACT) s 11(1), sch 2, part 2.1; *Jury Act 1977* (NSW) s 6(b), sch 2; *Juries Act 1997* (NT) s 11(1), sch 7; *Jury Act 1995* (Qld) s 4(3)(f); *Juries Act 1927* (SA) s 13(c), sch 3; *Juries Act 2003* (Tas) s 6(3), sch 2; *Juries Act 2000* (Vic) s 5(3), sch 2; *Juries Act 1957* (WA) s 5(a)(i), sch 2, part 1.

122 See chapter 15 of this Report.

123 See [7.74] above.

124 See [7.49] above.

125 Odgers' submission in response to Proposal 2 of the VLRC, for example, appears to acknowledge the role of appellate courts in complicating jury directions: see [7.50] above.

the common law enunciated by appellate courts, and on the fortuity of 'corrections' to the common law, which rely on the right case coming before a court of sufficient seniority, which may often be determined by the parties and witnesses, and their will and ability to persist. It might well be seen that the current problems are created in part by the inability of the common law to respond quickly and systematically.[126] There are times when only comprehensive statutory change can untangle the common law and replace it with a coherent, modern legal strategy.

7.93 The Commission is satisfied that the final decision as to which directions should be given in any particular case, and the precise formulation of them, should (indeed, must) remain with the trial judge. That task will be made easier in many instances by discussion with the parties, and in other instances by reliance on more or less standardised wordings found in the Queensland Benchbook as updated from time to time. The Commission is also satisfied that the content, timing and need for particular jury directions and warnings will (indeed, must) change to meet changes in the law, changes in criminal trial procedure and developments in the understanding of how juries handle judicial statements and other information presented to them (including the evidence).[127]

7.94 However, an acceptance of this fundamental responsibility on the part of the trial judge should not blind commentators or lawmakers to the fact that jurors experience some difficulty in handling directions on the law, and complex warnings about the artificial ways in which they may have to deal with certain problematic evidence. Accepting that judges, advocates and jurors may all need assistance in this regard, the Commission does not feel that Parliament is best placed to provide that guidance in the form of a code.

7.95 The Commission is also concerned that significant statutory intervention in this area might lead to a rigidity that should be avoided, a view endorsed by the Bar Association of Queensland: 'flexibility is an important attribute in respect of the application of generally expressed principles which are to be applied to a variety of circumstances as they arise from case to case.'[128]

7.96 In its Discussion Paper, the Commission stated its provisional view that a code or other statute dealing with jury directions and warnings will not solve the problems associated with complex provisions in the substantive criminal law, such as the provisions in the Criminal Code (Qld) relating to the identification of parties to an offence, self-defence and provocation.[129] The Commission's view has not changed.

7.97 A code or other statute cannot deal with other key areas of reform such as the use of integrated directions, written aids and other matters of detailed procedural innovation. The Commission's recommendations set out in later chapters of this Report suggest some specific reforms, only some of which would result in statutory intervention, which seek to confront the problems, both legal and psychological, in the ways in which juries receive and process judicial directions and warnings.

---

126 See [7.50] above. See also the comments of the Criminal Bar Association of Victoria in [7.51] above; the comments of the Law Reform Committee of the County Court of Victoria in [7.56] above.

127 These issues are considered in greater detail in chapters 3 to 5 of this Report.

128 Submission 13A, 2.

129 Criminal Code (Qld) ss 7, 8, 271, 272 and 304, discussed in chapter 17 of this Report. See also Appendix C.

7.98 Moreover, the Commission is not convinced that the position in Queensland, whatever the position may be elsewhere, is so bad that the current law needs to be swept out and started afresh. The present circumstances in Queensland suggest to this Commission that a series of specific reforms is preferable, directed at amendments to the statutes and rules governing criminal trial procedure. In coming to that conclusion, the Commission is aware that attempts at reform through non-legislative means may be much harder to implement, whatever the view of Parliament, as they rely much more heavily on a co-operative approach on the part of the various institutions and bodies involved.

Recommendation

7.99 The Commission makes the following recommendation:

7-1 A single, comprehensive statutory scheme covering the content of jury directions and warnings or the circumstances in which they must or ought to be given should not be enacted in Queensland.

THE QUEENSLAND BENCHBOOK

7.100 The Queensland Supreme and District Court Benchbook (the 'Queensland Benchbook') is a compilation of model directions prepared and regularly updated[130] by a committee of Supreme and District Court Judges in Queensland and published by the Courts.[131] Its purpose and function is explained in the Foreword:

> The Benchbook is intended to provide guidance, not to establish any inflexible or mandatory regime. It should assist the Judge to devise at trial a summing up appropriate to the particular case, while reminding of the necessary framework and matters which must be covered. Referring to the Benchbook should not only lessen the prospect of error, but also streamline summings up, better informing juries and generally promoting the interests of justice.
>
> The Judges consider it appropriate that the Benchbook be open to all participants in the criminal justice process. Copies will therefore be provided to the Director of Public Prosecutions and the Public Defender, and to the Presidents of the Bar Association of Queensland and the Queensland Law Society for the information of their members. Unrepresented accused persons also will have access to a copy.[132]

7.101 Consistently with the Courts' intention that the Queensland Benchbook be widely available to all participants in the criminal justice process, it is published on the internet. It is therefore available to all potential jurors, although presumably currently

130 The Queensland Courts' website (see n 131) publishes update notes when the Benchbook is amended, the most recent of which is dated February 2009. The extracts from the Benchbook used in this Report take those update notes into account, where relevant.

131 Queensland Courts, *Supreme and District Court Benchbook* <http://www.courts.qld.gov.au/2265.htm>.

132 Ibid 'Foreword' [2] at 30 November 2009.

serving jurors will have been warned not to undertake their own private research and should not consult it online during the trial in which they are serving.[133]

7.102 The Queensland Benchbook assists judges to give accurate directions to the jury by providing suggested model directions and bench notes which allow judges to tailor their directions and summing up to the particular case.[134]

7.103 By covering the full range of specific directions that may be required, the Queensland Benchbook is necessarily lengthy; it sets out around 190 model or suggested directions. However, it is not intended to set out an 'inflexible or mandatory regime' but to provide guidance in fashioning a summing up that is streamlined and appropriate to the particular case and which reduces the prospect of error.[135] As Keane JA recently commented in *R v Hayes*:

> The Benchbook is not intended to be applied as if it were a statute; it is a guide which may be employed by judges to the extent that it is useful in the circumstances of a particular case. A departure from the Benchbook is not itself an error on the part of a trial judge. The sufficiency of a trial judge's directions depends on the circumstances of each case.[136]

7.104 Judges select those model directions that are relevant to the case before them, and adapt each model direction to suit the facts and circumstances of that case. The model directions typically indicate places where the trial judge can insert, for example, a summary of the relevant evidence or other details that will relate the outline of law contained in the model direction to the evidence before the jury. The Introduction to the Queensland Benchbook makes this clear:

> These notes are not intended as an elaborate specification to be adopted religiously on every occasion. A summing up, if it is to be helpful to the jury, should be tailored to fit the facts of the particular case, and not merely taken ready-made 'off the peg'.[137] (note omitted)

7.105 Similarly, Hayne J noted the difficulties and dangers of formulating and relying on model directions in *HML v The Queen*:

> Further, and more fundamentally, any suggested forms of direction put forward as 'standard' or 'model' directions will very likely mislead if their content is not properly moulded to the particular issues that are presented by each particular case. Model directions are necessarily framed at a level of abstraction that divorces the model from the particular facts of, and issues in, any specific trial. That is why such directions must be moulded to take proper account of what has happened in the trial.

---

133 The Queensland Benchbook contains a suggested warning to jurors not to make private investigations or act on material that is not in evidence in the trial: ibid at 30 November 2009. See also [3.52] above and [9.8] below.

134 In a recent survey of Australian and New Zealand criminal trial judges, just over half of the Queensland judges surveyed reported that they use the Benchbook to tailor directions to the individual case: 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, 249.

135 Queensland Courts, *Supreme and District Court Benchbook*, 'Foreword' [2] <http://www.courts.qld.gov.au/2265.htm> at 30 November 2009.

136 [2008] QCA 371 [62]. See also, for example, *R v Clarke* (2005) 159 A Crim R 281 [53] (McMurdo P).

137 Queensland Courts, *Supreme and District Court Benchbook*, 'Introduction' [4.1] <http://www.courts.qld.gov.au/2265.htm> at 30 November 2009. See also *R v Clarke* (2005) 159 A Crim R 281 [53] (McMurdo P): 'The Benchbook is intended to be adapted by judges as necessary to the circumstances of each unique criminal trial.'

> That moulding will usually require either addition to or subtraction from the model, or both addition and subtraction.[138]

7.106 Notwithstanding the statement in the foreword that the Queensland Benchbook does not create an 'inflexible or mandatory regime', in some areas, judges are actively discouraged from straying from it.[139] There have been a number of cases where a divergence from the Benchbook has resulted in a successful appeal by the defendant.[140]

7.107 As with any legal reference, the Queensland Benchbook is annotated to identify the source of the law that governs the content of the model directions, apart from other matters.

7.108 Equivalent model or template directions are found in benchbooks in other Australian jurisdictions, for example:

- the *Criminal Trial Court Bench Book* published by the Judicial Commission of NSW under the direction of the Criminal Trials Courts Bench Book Committee, which includes judges from both the District Court and Supreme Court of NSW; and

- the *Victorian Criminal Charge Book* published by the Judicial College of Victoria under the direction of an Editorial Committee consisting of judges of the Supreme and County Courts of Victoria.

7.109 The Victorian Criminal Charge Book has received strong judicial support in the Victorian Court of Appeal, which regretted that the trial judge in one recent case did not follow it. In delivering the first judgment, Ashley JA remarked:

> It is regrettable that, although this case was conducted over a short period and was in a short compass, the learned judge did not follow the charge book when directing the jury. Counsel for the applicant agreed, in answer to a question asked by the President, that had the charge book been followed, the problems of which he complained would not have arisen. This charge can be contrasted with the charge in *R v Hendy*.[141] There the judge followed the charge book carefully and the only question was whether, in effect, the charge book itself contained something that could have been improved upon in accordance with the authorities.[142]

7.110 Maxwell P took this observation further:

> Ashley JA has referred to *R v Hendy*. He and I were both members of the court in that matter and, like him, I was struck by the contrast between this case and that. In *R v Hendy*, I said:

---

138 (2008) 235 CLR 334 [120].

139 See, for example, Queensland Courts, *Supreme and District Court Benchbook*, 'Reasonable Doubt' [57] <http://www.courts.qld.gov.au/2265.htm> at 30 November 2009, discussed at [17.7] below. See also *R v De Silva* (2007) 176 A Crim R 238 [21] (Jerrard JA) (directions on attempt); *R v Mason* [2006] QCA 125 [27] (McMurdo P) (limited-use directions in relation to evidence of the complaint); *R v Armstrong* [2006] QCA 158 [34] (McMurdo P) (directions on defence evidence); and *R v Stuart* [2005] QCA 138 [20] (directions on accident under s 23(1)(b) of the Criminal Code (Qld)).

140 See, eg, *R v RH* [2005] 1 Qd R 180 [24] (Jerrard JA) (directions on preliminary complaint); *R v CU* [2004] QCA 363, 8 (de Jersey CJ) (directions on honest and reasonable mistake under s 24 of the Criminal Code (Qld)).

141 [2008] VSCA 231.

142 *R v Said* [2009] VSCA 244 [24] (Ashley JA).

> The language of the directions on self-defence indicates that the learned judge was, prudently, utilising the Charge Book prepared and published by the Judicial College of Victoria. The Charge Book is an invaluable resource for trial judges. The detailed guidance which it provides is a powerful safe-guard against error.[143]

> As Ashley JA has already noted, none of the complaints which we are upholding in respect of the charge in the present case would have been sustainable had the charge book charge been used. It is most unfortunate that this appeal was made necessary because of what were avoidable errors. Not only has the appeal involved time and cost for the court and the parties, but the conviction must be quashed and a retrial ordered.
>
> This case illustrates just how important a resource the charge book is for trial judges, and how important it is that it be used for its intended purpose, that is, to minimise the risk of appealable error. The charge book contains much more than the model charges. Each part of the charge book provides references to relevant decisions, and guidance as to when and how particular topics need to be addressed (depending always on the circumstances of the particular trial). The charge book is accessible on-line and there is every reason to think that judges can – and should – avail themselves of the assistance which it provides.
>
> The charge book is a living document. For example, following comments which the Court made in *Hendy*, the model charge on self-defence was modified to remove the passage which had given rise to debate in that case. It is also important to emphasise that it is not an academic document. The model charges are reviewed and edited by experienced trial judges and experienced appeal judges, who have worked very hard with the Judicial College of Victoria, over several years, to arrive at formulations which are both faithful to the requirements of the law and cognisant of the practicalities of running trials. I want to express this Court's appreciation of the work that has gone into the charge book, and to reiterate the hope that that work will continue to pay dividends.
>
> Every time appealable error is avoided, every time the community is saved the time and expense of an appeal and a retrial, the vital importance of the charge book is reinforced.[144] (notes in original)

7.111 Judges in South Australia and Western Australia also report that they have access to a benchbook, and judges in Tasmania report that some of them have access to, and use, benchbooks from Victoria and Western Australia.[145]

7.112 In New Zealand, model directions and practice notes are found in the *Criminal Jury Trials Benchbook*, produced by the Institute of Judicial Studies and edited by a committee of judges.[146] As a result of recommendations made by the Law Commission of New Zealand following research into jury decision-making, the Criminal Practice Committee, chaired by the Chief Justice and comprised of representatives of the

143 Ibid [18].

144 *R v Said* [2009] VSCA 244 [28]–[31] (Maxwell P). Coghlan AJA endorsed the President's remarks about the Charge Book: [32].

145 Australian Institute of Judicial Administration (James RP Ogloff, Jonathan Clough, Jane Goodman-Delahunty & Warren Young), *The Jury Project: Stage 1 — A Survey of Australian and New Zealand Judges* (2006) 28. See [4.89] above.

146 See Law Commission (New Zealand), *Juries in Criminal Trials Part Two*, Preliminary Paper No 37 Vol 1 (1999) [45]; Law Commission (New Zealand), *Juries in Criminal Trials*, Report No 69 (2001) xv; Institute of Judicial Studies, *Annual Report 1 July 2007–30 June 2008*, 11, 21; Jury Directions Symposium, Melbourne, 5–6 February 2009.

judiciary and the legal profession, published a *Guide to Jury Trial Practice*.[147] This provides a set of general guidelines on the criminal trial process for use by judges and counsel including guidance on the judge's summing up.

7.113 There seems to be some general acceptance that model directions are of value in standardising directions and in helping trial judges avoid error by omitting necessary directions and in the content of the directions given. However, trial judges might still be able to do something to improve their reception by the jury. One complaint that has been noted is the recitation by some judges of standard directions without either colour or intonation in their delivery, and with little or no attempt to connect the law to the facts of the case before the jury.[148]

7.114 Research by the Australian Institute of Judicial Administration ('AIJA') indicates that there is a wide variation in the practices of judges who have access to a benchbook.[149] Some followed benchbooks and used the model directions in them with little or no variation; some used them with adaptations geared to each case; some did not like them and preferred their own precedents. Some judges make their personal precedents available to their colleagues.

7.115 The AIJA research indicated that reliance on benchbooks tended to be higher amongst less experienced judges, suggesting that newer judges might be more concerned with following an accepted precedent to avoid appealable error.[150]

> Judges will sometimes follow outmoded bench books and styles because it is safe; ie appeal proof: 'at one time it was trial by jury — now it is more trial by directions … I wonder sometimes if we do not trust juries enough.' Some judges feel constrained by the bench book and are unable to communicate as they might otherwise. Some commented that the bench books may have a tendency to encourage directions on law which are superfluous to the case.[151]

7.116 The converse may also apply, especially in jurisdictions, such as Queensland, where the benchbook is under constant review: more experienced judges may well find that the Benchbook will keep them abreast of developments in the law and prevent them from falling into error by relying on 'tried and true' formulae in their directions that may reflect an earlier statement of the law.

NSWLRC's Consultation Paper

7.117 The use of model directions contained in the NSW *Criminal Trial Court Bench Book* ('NSW Bench Book') was discussed in detail in the NSWLRC's Consultation

147 Criminal Practice Committee, *Guide to Jury Trial Practice* (November 2003) 3–5 <http://justice.govt.nz/services/information-for-legal-professionals/practice-notes-and-guides/guide-to-jury-trial-practice> at 7 December 2009. Also see Law Commission (New Zealand), *Juries in Criminal Trials*, Report No 69 (2001) xv–xvi.

148 See *HML v R* (2008) ALJR 723, [2008] HCA 16 [120]–[122] (Hayne J); see [4.79] above.

149 Australian Institute of Judicial Administration (James RP Ogloff, Jonathan Clough, Jane Goodman-Delahunty & Warren Young), *The Jury Project: Stage 1 — A Survey of Australian and New Zealand Judges* (2006) 28–30.

150 Ibid 29.

151 Ibid 36.

Paper on jury directions.[152] The NSWLRC outlined a number of benefits from the use of such a tool:

> 3.5 Because the criminal law has become very complex, model directions can be of significant benefit to the trial judge and counsel. First, they are a valuable time-saving device because they reduce the time spent on researching the relevant law, and spare judges from drafting directions from scratch.
>
> 3.6 Secondly, the neutral language used in model directions may decrease the likelihood that the directions given to the jury are more favourable to one of the parties to the case than to another. However, this is not to say that bias may not creep back in, if judges use the model instructions only as a basis for their instructions, especially in cases where the judge may have taken into account the submissions of counsel on the content of a particular direction.
>
> 3.7 Thirdly, model directions have a theoretical advantage in terms of accuracy over directions written under the pressure of litigation. Because they are usually the product of extensive research and deliberation by committees, model directions are less likely to contain erroneous statements of law than directions that are written under time and other pressures associated with the trial.
>
> …
>
> 3.10 In addition to the benefits canvassed above, model directions have the potential to be advantageous in one important aspect of criminal trials: in assisting jurors to comprehend better the legal directions they need to apply to the case. Trial judges can find it difficult to formulate jury directions that are helpful to jurors because of their overwhelming need to give legally accurate directions and, in particular, to comply with judgments of appellate courts which state the relevant law in language that jurors would find difficult to understand. Model directions can be a means of addressing this problem if formulated in language that reflects the law as established by appellate courts but stated in a way that jurors can easily understand.[153] (notes omitted)

7.118 Accordingly, the NSWLRC suggested the possibility of revising the NSW Bench Book to make the model directions clearer for jurors.[154]

VLRC's proposals and recommendations

7.119 One of the options proposed by the VLRC in its Consultation Paper was the inclusion of model directions in its suggested legislative code:[155]

> Proposal 2
>
> The content of some of the directions that the trial judge is required to give to the jury should be set out in legislation.
>
> …

152 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper (2008) ch 3.

153 Ibid [3.5]–[3.10].

154 Ibid [3.14]–[3.35].

155 The introduction of a statutory scheme such as the one proposed by the VLRC is discussed at [7.36]–[7.98] above.

> Option A — Model directions
>
> 7.25 Model directions or suggested forms of words, on the relevant areas of law could be included in the legislation. Those directions should be drafted so that they are capable of being adapted to the needs of particular cases. The model directions already completed by the Judicial College of Victoria (JCV) in their online Criminal Charge book provide a very useful starting point.
>
> 7.26 In those instances where an existing JCV model direction is overly long and complex because of an existing common law rule, the legislation could contain a shorter and simpler approved direction in a schedule. …
>
> 7.27 Alternatively, the legislation could provide that unless the Court of Appeal determines otherwise, a direction approved by the JCV is a legally correct direction and that substantial conformity with the terms of such a direction shall be regarded as meeting the legal requirements for a direction on that topic. If the Court of Appeal declared that a JCV direction was incorrect, the Court could be required to formulate the correct direction.[156] (note omitted)

Submissions

7.120 Some of the submissions made to the VRLC's Consultation Paper generally supported the preparation and use of benchbooks:

> [Victoria Legal Aid] supports the production of a Benchbook [in Victoria] by the Judicial College that includes specific reference to jury directions.[157]

7.121 A judge of the County Court of Victoria also specifically supported the Queensland Benchbook.[158]

7.122 A few of the respondents to the VLRC's Consultation Paper specifically commented on the VLRC's model directions proposal. Stephen Odgers SC, who opposed the introduction of a code, expressed a preference for model directions set out in a Benchbook:

> Proposal 2. I do not support legislative attempts to simplify the content of directions required to be given by trial judges. I accept that the courts have not proved particularly successful in crafting comprehensible directions. Having said that, I am skeptical that legislative formulations will prove satisfactory, given the variety of situations in which directions will be required. It would be better if more resources were directed to the highest levels of the courts to improve the comprehensibility of directions. Bench book standard directions should be formulated with the assistance of experts in communication and mock jury research. More should be done in that context to assist trial judges to adapt standard directions to particular cases.[159]

---

156 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) Proposal 2, [7.25]–[7.27].

157 Victoria Legal Aid, Submission to the Victorian Law Reform Commission, 9 December 2008. See also the submission by Bernard Lindner, a member of the Criminal Bar Association, in response to the VLRC's Consultation Paper, in which he applauds the work of the Judicial College of Victoria in preparing model directions in its Criminal Charge Book.

158 Judge MD Murphy, Submission to the Victorian Law Reform Commission, 5 February 2009, 1. Judge Murphy is also a supporter of the model charges used in the USA, in particular those of the Seventh Circuit in Chicago, as they are 'a model of economy': ibid.

159 Stephen Odgers SC, Submission to the Victorian Law Reform Commission, 12 November 2008, 7.

7.123 This submission was specifically endorsed by the Queensland Law Society and the Bar Association of Queensland in their joint submission to this Commission's Issues Paper.[160]

7.124 Associate Professor John Willis, while supportive of limited statutory intervention, submitted to the VLRC that model directions should not be drafted in legislation:

> Model directions should not be set out in legislation.
>
> This is a recipe for rigidity and inflexibility. There are already model directions which are used — on occasion not very well.
>
> The 'cut and paste' approach to jury directions is often not the best means of assisting a jury in a specific case.[161]

7.125 The Criminal Bar Association of Victoria, however, supported the possibility of including some 'shorter and simpler approved directions', drafted by the Judicial College of Victoria, in a legislative schedule:

> An advantage of adopting Option A — Model Directions — is that according to paragraph 7.27[162] a direction which has been approved by the Judicial College of Victoria is to be accepted as a legally correct direction until such time as the Court of Appeal declared that that direction was incorrect. A significant advantage of an approved model direction formulated by the Judicial College of Victoria is that it would be likely formulated by a broad range of judicial officers and consultative persons with the last say, rather than giving that responsibility to politicians.[163] (note added)

VLRC's recommendations

7.126 In its Final Report, the VLRC recommended that the content of all procedural directions, and the essential elements of all directions on evidence, should be governed by its proposed jury directions statute. It did not, however, consider that the legislation should include model or 'pattern' directions and specifically endorsed the continued role of the *Victorian Criminal Charge Book*, which it described as 'a superb resource':[164]

> 5.34 Pattern directions are inflexible means of minimising error rather than assisting juries with the task of understanding the evidence and using it fairly. While the commission recognises the value which many judges gain from detailed model directions, it is neither workable nor desirable to include detailed model directions in legislation. There is a danger that model legislative directions would be quoted verbatim in order to reduce the risk of any appealable error.
>
> 5.35 If the proposed jury directions legislation contains the essential elements of particular directions, the JCV could continue to publish model directions for trial

160 Also see [7.129] below.

161 Associate Professor John Willis, Submission to the Victorian Law Reform Commission, 16 December 2008, 15.

162 See [7.119] above.

163 Criminal Bar Association of Victoria, Submission to the Victorian Law Reform Commission, 15 December 2008, 12–13.

164 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [2.42].

> judges to use as guides or precedents to be adapted to the circumstances of a particular case.[165]

7.127 The VLRC also noted that, while the minimum content of the warning to be given in relation to identification evidence, for example, should be set out in the legislation that it recommended:

> The Charge Book will continue to be an extremely useful resource for trial judges when identifying factors that might affect the reliability of identification evidence in a particular case.[166]

The Issues Paper

7.128 The content and purpose of the Queensland Benchbook was considered in detail in chapter 4 of this Commission's Issues Paper.[167] Although this Commission did not pose any specific questions in the Issues Paper about the Benchbook, some of the respondents commented on it.

Submissions

7.129 In opposing codification, the joint submission from the Queensland Law Society and the Bar Association of Queensland commented on the advantages of the Queensland Benchbook:

> Queensland has had the benefit for some years of the Supreme Court and District Court Bench Book. … It was prepared by a bench book committee that was chaired by Jerrard JA, Philippides J, Shanahan DCJ and Dick DCJ. That committee revised directions that had previously been compiled, and kept up to date with High Court and Court of Appeal decisions in criminal law matters. Accordingly, the committee was able when necessary to meet quickly and revise the existing directions if some error was found with those, or the law on which they were based was changed. The advantage of this system was that such a committee can meet very quickly. The process required to amend a piece of legislation is necessarily more time consuming and cumbersome. While strict adherence to the suggested directions in the Bench Book is not necessary, as the Court of Appeal has stated on a number of occasions, the Bench Book has been revealed to be a useful and beneficial development. It is the experience of both the Bar Association and the Law Society that the Bench Book has been a useful and worthwhile innovation. It is of course open for any member of the profession to make a suggested change to a direction, or to suggest a completely new direction, for consideration by the Bench Book committee.[168]

7.130 One judge felt that the directions in the Benchbook are not in plain English, but that trial judges 'have little choice if they do not wish to create appellable points'.[169]

---

165 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [5.34]–[5.35].

166 Ibid [3.105]. The VLRC also noted the continued importance of the Victorian Charge Book in the context of its recommendations about the use of an Outline of Charges and a Jury Guide (which are discussed at [10.54]—[10.59] below): Ibid [6.40], [6.58]. Identification evidence is discussed in more detail in chapter 16 below.

167 Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009), especially at [4.11]–[4.23], and throughout chapter 4 and later chapters of that Paper.

168 Queensland Law Society and Bar Association of Queensland, Submission 13, 19 June 2009, 2. This submission was specifically endorsed by Legal Aid Queensland: Submission 16, 3.

169 Submission 6.

7.131 The South West Brisbane Community Legal Centre suggested that, given the risk of trial judges' creating unnecessary appeal points by diverging from the Benchbook, 'desirable simplification may be best achieved by a more frequent review of the Benchbook itself.'[170]

7.132 The Commission is aware that the Benchbook is reviewed continually and formally updated from time to time to reflect changes in the law. The online version of the Benchbook includes lists of recent revisions.[171]

7.133 The Commission also notes that, of course, the authors of the Benchbook are themselves bound by the law that governs the content and use of directions no less than any other judge, though they do have the power in some cases to streamline the wording adopted as a 'standard' when the law and drafting techniques permit.

7.134 Another respondent suggested that the Queensland Benchbook should also contain model directions in relation to specific defences that arise under the Commonwealth Criminal Code:

> For example, model direction … 76 relates to mistake of fact. A separate model direction for mistake of fact under the Commonwealth Code could be added. There are many other examples of model directions that have analogues under the Commonwealth Code. In addition to defences, there are other provisions of the Commonwealth Code that could be the subject of model directions such as parties to offences ([model direction] 71 and Commonwealth Code s 11.2).[172]

The Discussion Paper

7.135 The Queensland Benchbook was discussed in chapter 2 of the Commission's Discussion Paper. The Commission's provisional view was that the Benchbook is a key strength of Queensland's criminal justice system and its continued refinement and use should be assumed and built upon.[173]

Further submissions

7.136 The Commission's provisional view in relation to the Benchbook was endorsed by Legal Aid Queensland.[174]

7.137 The Bar Association of Queensland commented that the Benchbook was part of the current system of criminal trial procedure, which overall 'works essentially well and is not in need of fixing.'[175] It does not have the 'same inherent inflexibility or mandatory character' as directions imposed or dictated by statute.[176]

---

170 Submission 11.

171 Queensland Courts, *Supreme and District Court Benchbook*, [1] and Update Notes <http://www.courts.qld.gov.au/2265.htm> at 30 November 2009.

172 Brisbane Office of the Commonwealth Director of Public Prosecutions, Submission 9. This submission goes on to comment in some detail about the model direction in Chapter 104 of the Benchbook in relation to defrauding the Commonwealth.

173 Queensland Law Reform Commission, *A Review of Jury Directions*, Discussion Paper WP67 (2009) [2.88].

174 Submission 16A, 5.

175 Submission 13A, 1. The Queensland Law Society endorsed and supported the whole of the submissions by the Bar Association of Queensland: Submission 13B.

176 Submission 13A, 2.

The QLRC's views

7.138 The Commission's view is unchanged. It sees the Queensland Benchbook as a key strength of the criminal justice system in this State which should be built upon. It is a principal element of the Commission's recommendations. Although later in this Report the Commission makes some recommendations directed at revision of some specific portions of the Benchbook and in relation to an overall approach that might be taken in drafting the Benchbook's model directions generally, the Commission's recommendations in many cases assume and accept that the Benchbook will continue to be refined and relied on by judges and practitioners.

Recommendation

7.139 The Commission makes the following recommendation:

7-2 The Queensland Supreme and District Court Benchbook should continue to be refined and relied upon by judges and practitioners in this State.

COMPLEXITY AND COMPREHENSIBILITY OF JURY DIRECTIONS

7.140 It has been pointed out that jury directions should be, but are not always, clear and comprehensible.[177] To properly assist the jury, they must be both correct and understandable:

> The task of directing jurors in a manner which is 'clearly right' is, to say the least, a difficult one. The judge must explain often complex legal principles to jurors who have little, if any, knowledge of the law. However, if it is difficult for judges, we should also spare a thought for jurors, who must decide the accused's guilt on the basis of oral directions which may take two hours or two days.[178] (notes omitted)

7.141 Indeed, the mere fact that a summing up is 'unduly lengthy and confusing' might be a basis for appeal:

> Having scrutinised the record, [counsel for one of the appellants] submitted that, omitting the discussions with counsel about the issues involved, summing up had occupied in all some nine hours spread over four days. In itself, the time taken in giving directions to the jury is rarely a sufficient basis for setting aside a conviction; but the summing up in the present case is fairly open to some criticism on the ground of its being confusing.[179]

177 See, eg, Hon J Wood, 'Jury Directions' (2007) 16 *Journal of Judicial Administration* 151; Hon G Eames, 'Towards a better direction — Better communication with jurors' (2003) 24 *Australian Bar Review*, 35. See also, *R v Adomako* [1995] 1 AC 171, 189 (Lord Mackay of Clashfern LC); *R v Landy* [1981] 1 All ER 1172, 1183 (Lawton LJ); *Zoneff v The Queen* (2000) 200 CLR 234 [65], [68] (Kirby J); *Ahern v The Queen* (1988) 165 CLR 87, 103; *R v Flesch* (1986) 7 NSWLR 554.

178 J Clough, 'The role of judges in assisting jury comprehension' (2004) 14 *Journal of Judicial Administration* 16, 16.

179 See, eg, *R v Martin, Klinge & Sambo* [2002] QCA 443 [10] (McPherson JA; Helman and Philippides JJ agreeing).

7.142 The Introduction to the Queensland Benchbook sets out the objectives of clear and comprehensible jury directions to be adapted from the models in the Benchbook to meet the demands of each trial:[180]

> **Introduction**
>
> The particular form and style of a summing-up, provided it contains what must on any view be certain essential elements, must depend not only upon the particular features of the particular case, but also on the judge's view as to the form and style which will be fair, reasonable and helpful.[181]
>
> These notes are not intended as an elaborate specification to be adopted religiously on every occasion. A summing-up, if to be helpful to the jury, should be tailored to fit the facts of the particular case, and not merely taken ready-made 'off the peg'.[182]
>
> The function of a summing-up is not to give the jury a general dissertation on some aspect of the criminal law, but to tell them what are the issues of fact on which they must make up their minds in order to determine whether the defendant is proven guilty of a particular offence.[183]
>
> A summing-up should be clear, concise and intelligible. If overloaded with detail, whether of fact or law, and following no obvious plan, it will not have the attributes it should display.[184]
>
> The object of the summing-up is to help the jury. A jury is not helped by a colourless reading out of evidence. The judge is more than a mere referee, who takes no part in the trial save to intervene when a rule of procedure or evidence is breached. The judge and the jury try a case together. It is the judge's duty to give the jury the benefit of the judge's knowledge of the law and to advise them in the light of the judge's experience as to the significance of the evidence.[185] (notes as in original)

7.143 As the Terms of Reference for this enquiry went beyond jury directions and asked the Commission to look at juries' information needs more broadly, the scope of this enquiry was broad enough to cover the ways in which all information given to a jury during a criminal trial — including both the evidence and information as to the law — is presented. The rules of evidence are clearly outside the scope of this enquiry, but the

---

180 Queensland Courts, *Supreme and District Court Benchbook*, 'Introduction' [4] <http://www.courts.qld.gov.au/2265.htm> at 30 November 2009.

181 *McGreevy* [1973] 1 WLR 276, 281.

182 *Nembhard* (1982) 74 Cr App R 144, 148. In *Holland* (1993) 117 ALR 193, 200 the High Court approved a statement in *Lawrence* [1982] AC 510, 519 that 'a direction to a jury should be custom built to make the jury understand their task in relation to a particular case'; cf. *Mogg* (2000) 112 A Crim R 417 [50]–[52], [70]–[74]; and *Hytch* (2000) 114 A Crim R 573 [10]: 'A trial judge ordinarily has an obligation to sum up the respective cases of both the prosecution and the defence [*RNS* [1999] NSWCCA 122] and to remind the jury in the course of identifying the issues before them of the arguments of counsel [*RPS* (2000) 199 CLR 620].'

183 *Mowatt* [1968] 1 QB 421, 426. In *Holland,* the High Court approved a statement from *Lawrence* that 'the purpose of a direction to a jury is not best achieved by a disquisition on jurisprudence or philosophy or a universally applicable circular tour round the area of law affected by the case.' See also *Adams*, *ex parte A-G* [1998] QCA 64; and *Mogg* [71]–[72]: 'A trial judge's duty…will rarely if ever be discharged by presenting in effect an abstract lecture upon legal principles followed by a summary of the evidence. It is of little use to explain the law to the jury in general terms and then leave it to them to apply to the case… the law should be given to the jury with an explanation of how it applied to the facts …'. Cf *Chai* (2002) 76 ALJR 628,632 [18].

184 *Landy, White and Kaye* [1981] 1 WLR 355, 367; and *Flesch* (1987) 7 NSWLR 554, particularly, 558, where Street CJ stated 'a summing up should be as succinct as possible in order not to confuse the jury'.

185 *Sparrow* [1973] 1 WLR 488, 495. In *Holland,* the High Court approved a statement from *Lawrence* that 'a direction is seldom improved and may be considerably damaged by copious recitations from the total content of a judge's note book'.

Commission has been directed to consider how information given to the jury can be presented in the most useful way ***from the jurors' point of view.***

7.144 The difficulties that jurors have in comprehending and processing directions from the judge were outlined in some detail in chapters 4 and 5 of this Report,[186] and some more specific issues are dealt with in later chapters. These difficulties fall into two broad areas: those associated with the complexity of the law and the manner of expression employed in directions; and those associated with the way in which juries comprehend, handle and apply directions. The empirical research surveyed in this Report suggests that, while jurors are diligent in their tasks, they do encounter problems in comprehending and applying the law and the various directions and warnings given to them. This question has also been explored in the jury research project conducted by the University of Queensland for the Commission as part of this enquiry.[187]

7.145 It has also been pointed out by the Trial Efficiency Working Group of the NSW Attorney General's Department that juries' poor comprehension of the issues at trial leads to inefficiencies in the conduct of criminal trials.[188]

> [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 [Trial Efficiency Working] 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.
>
> …
>
> A recent study conducted by the New Zealand Law Commission found that, in general, the problems which individual jurors found in comprehending and absorbing evidence during the trial were attributable to the way in which evidence was presented to them rather than any personal incapacity.[189] In particular, it was noted that few jurors had experience in assimilating a large quantity of factual information delivered orally, and that the emphasis on oral evidence was arguably at odds with modern forms of communication and learning.[190] Jurors also noted problems with recall, reporting that they confused witnesses and complainants' accounts, mistook names, dates or times, and sometimes had difficulty in recollecting what evidence related to which charge. These problems were more pronounced where the evidence was confused or contradictory, where the sequence of events was unclear, and when there were multiple complainants and charges.[191]
>
> On multiple charge trials, the New Zealand Law Commission noted that while to some degree the difficulties encountered in assessing evidence could be attributed to the personal limitations of individual jurors, the impact of the way in which the

186 See also Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009), in particular ch 6, 7 and 8.

187 This research project is discussed in chapter 2 of this Report.

188 Trial Efficiency Working Group, Criminal Law Review Division, Attorney General's Department of NSW, *Report of the Trial Efficiency Working Group* (2009) 58, 67–70.

189 NZ Law Commission, *Juries in Criminal Trials: Part Two, Volume 2*, (1999) Preliminary Paper 37, para 3.2.

190 Ibid para 3.3.

191 Ibid para 3.5.

> cases were conducted was at least as significant, with too many charges being brought, insufficient effort being made to distinguish the various charges to the jury, and the presentation of the evidence in a manner which did not link sufficiently with the charge to which it related.[192]
>
> …
>
> The trial experience and comprehension of the evidence by jurors would be further enhanced by confining the issues in dispute. There is a continuing need to identify legal issues, including challenges to the admissibility of evidence, in advance of the trial so that they can be resolved before a jury is empanelled. The jury may then hear the evidence without interruptions. It is also important that technical difficulties in the presentation of electronic evidence be managed so as to allow the efficient presentation of such material to the jury.
>
> [I]t is important that jurors are placed in the best position possible to assess the evidence they hear. …[193] (notes in original)

NSWLRC's Consultation Paper

7.146 The difficulties facing jurors in comprehending long and complex jury directions were also discussed at length by the NSWLRC in its Consultation Paper on jury directions.[194] It noted, in particular, that jurors' comprehension may be impeded by the 'highly-technical language of appellate court judgments' in which directions are often given, the complexity of the directions, particularly when they turn on fine distinctions and ask jurors to perform difficult mental feats, and the number and length of directions with which jurors are faced.[195]

7.147 In its survey of empirical research on juror comprehension of judicial instructions, the NSWLRC also concluded that the research indicates 'a need to make jury directions more comprehensible in order to assist juries'.[196]

> [T]he surveys that have gone beyond asking jurors general questions about whether they understood the judge's directions (and/or whether they believed the summing-up was useful) have found that jurors do not have the high level of comprehension they thought they had, or that they did, in reality, misunderstand or have problems with specific directions.[197] (notes omitted)

VLRC's review

7.148 In its Consultation Paper, the VLRC also identified the difficulties for juries in comprehending what have become more numerous and more complex jury directions:

> One of the consequences of the increased number and complexity of directions is that they have become more and more difficult for a jury to understand. Another is that the major focus for trial judges often has been the avoidance of appeals and retrials, rather than simple and clear directions to the jury about the law and the evi-

192 Ibid para 3.13.

193 Trial Efficiency Working Group, Criminal Law Review Division, Attorney General's Department of NSW, *Report of the Trial Efficiency Working Group* (2009) 67–9.

194 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [1.17]–[1.34], ch 2.

195 Ibid [1.22], [1.24], [1.26], [1.32].

196 Ibid [2.52].

197 Ibid [2.51].

> dence. In many cases, directions are probably given more for the benefit of appellate courts than to give the jury information they require to decide the case. Yet it is complexity, rather than simplicity, that tends to generate error. This is doubly unfortunate, because it results in the worst of both worlds: complex directions, more appeals and more retrials.[198]

7.149 The VLRC explained in its Final Report that the need for trial judges to meet the often uncertain requirements of the common law, as decided by appellate courts, has meant that summings up ('jury charges' in Victoria) have become longer and more complex with the result of impeding the effectiveness of judges' communication with juries.[199]

Submissions

7.150 Some of the submissions in response to the VLRC's Consultation Paper commented generally on the need for reform of jury directions.

7.151 The Law Reform Committee of the County Court of Victoria enunciated the following guiding principles for reform to jury directions:

> Any changes to jury directions must:
>
> - Respect the right to a fair trial. A fair trial is one which is conducted according to law. A trial must not only be fair to the accused but also to the prosecution.
> - Promote certainty about the content of a charge, and of particular directions.
> - Facilitate the conduct of the trial on the issues as identified by the parties at trial.
> - Encourage the raising of arguments about directions and their content at trial, so as to reduce the number of appeals allowed on points not taken at trial.
> - Ensure accused persons are able to avail themselves of all defences properly open on the facts or the law, if they choose to rely on them.
> - Result in simplified, comprehensible directions, and shorter charges.
> - Set realistic goals having regard to the volume of cases pending before the Court.[200]

7.152 The Victorian Office of Public Prosecutions commented that it is 'important that directions be simplified in order to minimise error and to increase the capacity of jurors to understand them.'[201]

7.153 Other submissions acknowledged the increasing complexity of jury directions; for example, Odgers submitted that:

---

198 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2009) [2.21].

199 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [2.35]–[2.41].

200 Law Reform Committee of the County Court of Victoria, Submission to the Victorian Law Reform Commission, 13 March 2009, 3.

201 Office of Public Prosecutions, Submission to the Victorian Law Reform Commission, 12 February 2009, 6. However, the OPP opposed the codification of the content (or substance) of any jury directions: see ibid 3; see also [7.60]–[7.62] above.

> The Consultation Paper recognizes that the tribunal of fact, the jury, is made up of ordinary people who may find judicial directions incomprehensible. That may be accepted. However, the solution is not to abandon the obligation on judges to give warnings and directions. It is to improve the quality of the communication. I support making directions as comprehensible as possible to jurors.[202]

7.154 In its submission to the VLRC, the Queensland Law Society opposed the simplification of directions and warnings without a more sophisticated approach to the problems associated with them:

> Further, the Society does not support the proposed simplification of the content of the warnings and directions required to be given by trial judges. While it is acknowledged that there is a large degree of concern as to the difficulty jurors experience in understanding judicial directions, simplification of those directions is not an appropriate solution.
>
> The legitimacy of a jury's decision rests upon its members being provided with, and taking into account the same legal principles that a judge alone would consider in making the decision. Merely simplifying the instructions provided to jurors will not solve the fundamental problem, that relevant legal principles are not currently being satisfactorily communicated to juries. The Society is of the opinion that, ultimately, improvements in the comprehensibility of warnings and directions can only be achieved through further research in to jurors interpretation of directions and how best to effectively provide such directions, not through simplification of the instructions given.[203]

7.155 Most respondents to the VLRC who considered these issues advocated greater flexibility and a more modern approach to the timing of jury directions and the means by which they are delivered. One respondent also commented that:

> There is scope for considerable improvement in this area without the need for legislation. There could be a greater focus on such matters as: the language used, timing of directions, the length of directions, breaks for jurors during directions etc.[204]

The Issues Paper

7.156 In its Issues Paper, the Commission summarised the difficulties with jury directions, in terms of their number, length and complexity and the impact of those factors on juror comprehension.[205]

Submissions

7.157 A number of submissions responding to the Commission's Issues Paper made some general comments on the reform of jury directions. Almost all of the respondents to the Issues Paper endorsed some changes to the content, style and manner of delivery of jury directions, though with different emphases.

---

202 Stephen Odgers SC, Submission to the Victorian Law Reform Commission, 12 November 2008.

203 Queensland Law Society, Submission to the Victorian Law Reform Commission, 30 January 2009. This submission was endorsed by Legal Aid Queensland: Submission 16, 1, 3, 5.

204 Associate Professor John Willis, Submission to the Victorian Law Reform Commission, 16 December 2008, 15. Some of these issues are considered later in chapters 9 and 10 of this Report.

205 Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009): see especially ch 6, [8.25]–[8.35].

7.158 The 'essential' need to preserve for trial judges a wide discretion in relation to jury directions was also noted.[206] For example, the Brisbane Office of the Commonwealth Director of Public Prosecutions submitted that the 'trial judge's discretion about the application of any technique [of presenting directions] should be preserved.'[207]

7.159 There was some significant support in submissions for the proposition that jury directions have become too complex.[208] The Queensland Law Society and the Bar Association of Queensland in their joint submission said that:

> It is accepted that some jury directions can be complex … One of the principal reasons for complex directions is the enactment of complex laws.[209]

7.160 However, in their view this was not an insuperable problem as 'it is our experience that juries by and large are adequately able to deal with complicated cases and to apply the relevant law to complicated facts.'[210]

7.161 Legal Aid Queensland endorsed the submission of the Queensland Law Society to the VLRC's Consultation Paper, cited at [7.154] above.

7.162 The Office of the Director of Public Prosecutions ('ODPP') expressed some concern that trial judges were either compelled by law or by their own concerns about an appellate court's view of their directions to give directions that kept alive 'fanciful' defences. This was an area, in the view of the ODPP, where an over-abundance of caution often proved counter-productive or 'harmful', with the possible outcome over time of too many false acquittals. Giving too many directions and warnings meant that they tend to lose their effectiveness: courts should be given back their gatekeeper role to keep the fanciful out of trials.[211] The one-sided nature of appeals (ie, that they are practically speaking only ever taken by convicted defendants) means that long, confusing or excessive directions and warnings in cases that resulted in acquittals never came up for review on appeal.[212]

7.163 The ODPP suggested that trial judges' problems are compounded by the poor definition of the circumstances which trigger the application of some warnings — the objective of a trial judge ought to be to 'clarify and cull' the issues to be left to the jury and therefore the directions that must also be given to them.[213]

7.164 Some former jurors who responded to the Issues Paper echoed concerns about the complexity of jury directions and their counter-productive effects:

---

206 Brisbane Office of the Commonwealth Director of Public Prosecutions, Submission 9, 4; Law Council of Australia, Submission 14.

207 Ibid 6. See also Queensland Law Society, Submission to Victorian Law Reform Commission, 30 January 2009. However, in its submission to the VLRC's Consultation Paper, Victoria Legal Aid expressed some concern that leaving matters to the trial judge's discretion could lead to inconsistencies among judges, 'with judges being required to make value judgments about the evidence': Victoria Legal Aid, Submission to the Victorian Law Reform Commission, 9 December 2008. A trial judge will, of course, have to make many such decisions during the course of any criminal trial.

208 Submissions 6, 7 and 8.

209 Queensland Law Society and Bar Association of Queensland, Submission 13, 1.

210 Ibid. Also see the Queensland Law Society's submission to the VLRC's Consultation Paper, cited at [7.154] above.

211 Submission 15.

212 Ibid.

213 Ibid.

> The first case in which I was selected was the rape or attempted rape trial. A three day trial involving detailed evidence from … conflicting [witnesses]. There were several occasions on which the Judge intervened to give the jury directions on issues that were presented during the evidence. Most of these directions were for the jury to ignore the evidence presented.
>
> … during in-house discussions it became very obvious that some panel members could find very little distinction between facts that were presented, opinions that were expressed and even indulged in arguments re the probable reasons why the Judge had arrived at his/her directives. These discussions occurred even though the Judge had ordered these matters to be ignored. My disappointment was that these discussions continued at length and there was no attempt by the foreman to direct panel members to cease discussing these matters. ***It appeared that the Judge in issuing the directive actually ensured that the matter was flagged for further discussion in the isolation of the jury room.*** These discussions can very quickly deteriorate into lay-man's opinions on why the original directions were issued, a potentially dangerous and influencing situation lacking proper control.[214] (emphasis in original)

7.165 The concern that a judge's direction to discount certain evidence would simply produce the opposite effect in the minds of the jurors was also expressed by a Supreme Court judge. That judge noted that warnings about accomplice evidence, for example, require trial judges to identify for the jury all the potentially corroborative evidence. By the time this is done, it was submitted, the warning itself has lost its force.[215]

7.166 Another former juror submitted that the directions contained 'a lot of judge's jargon' that was hard to understand, and were part of a 'lengthy speech' that was 'difficult to digest'. In another trial on which she sat, the judge 'mumbled' and 'rambled a lot' in 'muffled tones'. This judge failed to give a strong, clear message, which the respondent described as a 'question of presentation'.[216]

7.167 Allied to the difficulties faced by trial judges in the face of the growing complexity and proliferation of jury directions was what one Supreme Court judge described as the 'emasculation' of the proviso in section 668E(1A) of the Criminal Code (Qld), which meant that imperfection in the summing up was now more likely to result in a re-trial.[217] The wording of the sub-section was not the problem, in the eyes of this respondent, but that it is not given effect; if it were, 'many of these problems will disappear'. This judge submitted that, in combination, the result of High Court and intermediate appellate court decisions was that it was harder to give an error-free summing up, and appellate courts were less tolerant of imperfections. The push towards legally correct summings up has come at the expense of juror understanding.[218]

---

214 Submission 2.

215 Submission 7. Directions about limited-use evidence and unreliable evidence (including accomplice evidence) are discussed in chapters 12 and 16 respectively of this Report.

216 Submission 3.

217 Submission 7. Section 668E(1A) reads:

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

218 Submission 7. This point of view was echoed by the Office of the Director of Public Prosecutions: Submission 15.

7.168 This respondent also considered that a related issue is the non-financial cost of re-trials (such as the emotional strain on victims and witnesses), which is rarely discussed by appellate courts but is one of the main reasons that re-trials do not proceed.[219]

The Discussion Paper

7.169 The submissions to the Issues Paper were canvassed in chapter 3 of the Commission's Discussion Paper. The Commission noted that the principal objectives of clarity, brevity and accuracy that are to inform the delivery of jury directions and the summing up as a whole are of obvious importance. The Commission expressed the provisional view that the proposals for reform put forward in the rest of its Issues Paper would address those objectives and thus a number of the difficulties identified with jury directions.[220]

Further submissions

7.170 These issues were not specifically canvassed in any submission to the Commission in response to the Discussion Paper.

The QLRC's views

7.171 Although the various observations outlined above inform a number of the recommendations for reform made later in this Report, they do not of themselves lead the Commission to make any recommendation in relation to jury directions and warnings generally.[221]

7.172 The principal objectives of clarity, brevity and accuracy are noted by the Law Reform Committee of the County Court of Victoria,[222] in the Introduction to the Queensland Benchbook[223] and by many other commentators. They do not need to be reiterated in any formal recommendation by the Commission.

219 Submission 7. See Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [5.60]–[5.63].

220 Queensland Law Reform Commission, *A Review of Jury Directions*, Discussion Paper WP67 (2009) [3.29].

221 Some particular jury directions and warnings are considered in detail in chapters 12 to 17 of this Report and some re-drafting recommendations are made there in the light of particular issues that affect these directions and warnings.

222 See [7.151] above.

223 See [7.142] above.

Chapter 8

Reforming Jury Directions: Pre-trial Disclosure

INTRODUCTION

8.1 As part of this review, the Commission was charged with considering whether any procedural or administrative changes may improve the current system of jury directions. The Commission was asked to have particular regard, among other things, to:

> (e) possible solutions to identified problems relating to jury directions and warnings, including whether other assistance should be provided to jurors to supplement the oral summing up;[1]

8.2 With respect to the style and manner in which jury directions (and other information) are delivered during criminal trials, the Commission identified six broad issues for consideration in its Issues Paper:

> 9-1 What procedural or other reforms might be introduced to allow for a better exploration of the real issues in a criminal trial in advance of the trial or before the jury is empanelled or starts to hear the evidence?
>
> 9-2 What, if any, advantage is there to a jury in maintaining the current practice of summarising the evidence, and what, if any, advantage might be gained by reducing these summaries and replacing them, at least in part, by the provision of a transcript of the evidence, or other written aids, to juries?
>
> 9-3 What other techniques might be used to assist juries in their understanding of the evidence and the law, and in their deliberations?

1 See the Terms of Reference set out in Appendix A to this Report.

9-4 Should any such techniques be mandated in statute, regulations, court rules, practice notes or in other way? If so, how?

9-5 If any such formal rules are to be promulgated, should they include any express statement about the trial judge's discretion about the application of any of these techniques in any given criminal trial? If so, what should that statement say?

9-6 Should any such techniques be the subject of mandatory or optional professional development for criminal trial lawyers (counsel and solicitors), judges or other judicial officers?[2]

8.3 The Commission's approach to these questions is set out across this chapter and chapters 9 and 10 of this Report. These chapters bring together several related areas of concern about the style and manner of presentation of jury directions:

- The overall presentation of any criminal trial to a jury depends in part on a clear identification of the issues that the jury must decide, and then a clear statement of those issues to the jury in the summing up. The identification of issues in criminal trials can be the subject of pre-trial directions hearings. However, the Commission is concerned that pre-trial directions are under-used and a strengthening of pre-trial issue identification obligations of both the prosecution and the defendant is warranted in the context of this review so that the jury is presented with the evidence and the issues as clearly as possible. In this chapter, the Commission recommends an expanded regime of pre-trial disclosure by the prosecution and defence as a basis for improvements in the ways in which jurors are instructed and informed in criminal trials.

- A key problem with jury directions in their current form is their complexity as a result of the number of directions and warnings that must be given, the content of the legal concepts covered by them, and the ways in which those concepts are expressed. Chapter 9 recommends a re-working of the structure of a summing up to combine directions on the law that must be considered by a jury and the questions of fact that a jury must answer in coming to its verdict into what the Commission has described as 'integrated directions'.

- Recommendations relating to the timing of directions and other preliminary information that may be given to juries (including opening statements by the defence) are also covered in chapter 9.

- The place of professional training for judges and advocates is also considered towards the end of chapter 9.

- In chapter 10, the Commission discusses a number of methods by which juries might be more effectively engaged in the trial process in order to improve their decision-making capabilities, including access to transcripts and other written materials.

2 Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) 206.

8.4 Legislative and other reforms with respect to the substantive content of jury directions are considered in the later chapters of this Report.

DEFINING THE ISSUES FOR THE JURY

8.5 As will be seen from the following sections of this chapter, chapter 9 and chapter 10, a number of the Commission's recommendations are linked, and are predicated upon a series of related changes to criminal trial procedure and the way in which the judge's summing up is presented. The combined purpose and effect of this approach is to provide juries with a 'framework for deliberation'[3] and to make criminal trials more focussed from their point of view by:

- clarifying ***before the trial itself*** — so far as is practicable and consistent with a defendant's right to a fair trial — the issues that are likely to be left to the jury to resolve, which in turn may involve the pre-trial determination of issues such as the admissibility of evidence;

- re-structuring the summing up to present the questions that the jury must answer in order to reach its verdict in an integrated and comprehensible way that avoids the need for lengthy and abstract statements of the law by embedding the legal issues in questions of fact — which will be facilitated by the pre-trial identification of issues; and

- requiring of the parties, and of counsel in particular, a greater and earlier participation in the determination and resolution of issues, and of the directions that each wishes the judge to give the jury.

8.6 This first of these issues is discussed in this chapter, and the other two in the following chapters.

PRE-TRIAL RULINGS AND DISCLOSURE

8.7 A clear, pre-trial identification of the evidentiary and factual issues likely to arise in the trial could assist jurors to understand the general context of the evidence and navigate it better as the trial progresses, and could assist the judge in considering what directions and warnings may be necessary. It might also address the concern, noted by Lord Justice Auld, that jurors express dissatisfaction with 'artificial and repetitious trial procedures and the frequent interruption of them for discussions between the judge and advocates on matters of law'.[4] If questions of admissibility, for example, can be anticipated and dealt with in advance, interruptions to the flow of the trial may be reduced.

8.8 In the discussion that follows in this and the following chapters of this Report, it will become clear that a number of the suggested reforms to criminal trial procedure that have been considered in Australia and elsewhere, and indeed a number of the Commission's key recommendations, hinge to some extent on an early identification by

3 See New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [4.3]–[4.5].

4 The Right Honourable Lord Justice Auld, *Review of the Criminal Courts of England and Wales*, Report (2001) ch 5 [216].

the court and the parties of the real issues in dispute and other procedural issues (such as special witnesses or the nature of particular evidence) that will arise during the course of the trial.

8.9 The *Criminal Practice Rules 1999* (Qld), and section 590AA of the Criminal Code (Qld), provide an opportunity for the parties to seek, and the Court to give, directions about the conduct of a trial.[5] This presents an opportunity, if it is taken, for the Court and the parties to actively consider before a trial commences whether it might assist a jury to provide not only an opening of the prosecution's case once all preliminary formalities have been completed,[6] but also some preliminary statement from the judge of the law and the issues that the jury will have to resolve. This may well be desirable or useful in cases of particular complexity due to the number of defendants, number of charges or the nature of the legal and evidentiary issues. As a result, the likely nature of the issues in the trial may be well known to all parties well in advance.

8.10 However, criminal trials should not be likened to civil hearings. The mutual obligations of discovery and disclosure on all parties to civil proceedings do not presently find a parallel in criminal proceedings in Queensland.

8.11 Although the *Criminal Practice Rules 1999* (Qld) provide for pre-trial directions hearings, and while the Criminal Code (Qld) imposes disclosure obligations on the prosecution, defendants in criminal trials have the benefit of important principles restricting the extent to which aspects of their defence have to be disclosed. Those principles include the burden of proof of the charges (which always falls on the prosecution), the right to silence and the defendant's right not to be compelled to give self-incriminating evidence.[7] There is at present no real requirement for defendants to outline their defences or procedural, evidentiary or other issues that might arise during the trial in advance, with the exception of the special matters required under sections 590A, 590B and 590C of the Criminal Code (Qld). These sections require defendants in Queensland to give notice of particulars of three aspects of their defences in advance of the trial: alibi evidence, expert evidence, and evidence of a representation under section 93B of the *Evidence Act 1977* (Qld) (which relates to hearsay evidence of statements by people who are dead or mentally or physically incapable of giving the evidence).[8]

8.12 It would seem reasonably self-evident that any clarification of these points in advance of the trial will be of benefit to the judge and the parties, not least in being able to give some useful guidance to the jury about the general nature of the trial and the issues likely to arise for its consideration. In this respect, the Law Commission of New Zealand concluded:

> To the greatest extent possible, counsel should co-operate to identify issues in advance of the trial.[9]

5 See especially Chapter 9 of those Rules.

6 See [3.58] above.

7 See, eg, *Azzopardi v The Queen* (2001) 205 CLR 50, [34] (Gaudron, Gummow, Kirby and Hayne JJ); *RPS v The Queen* (2000) 199 CLR 620, [101] (Callinan J). Also see Kevin Dawkins, 'Defence Disclosure in Criminal Cases' [2001] *New Zealand Law Review* 35, 38; The Hon Martin Moynihan AO QC, *Review of the civil and criminal justice system in Queensland,* Report (2008) 27–8.

8 See also *Mental Health Act 2000* (Qld) s 265 in relation to the disclosure of psychiatric reports.

9 Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) 117.

8.13 Moreover, some empirical evidence has indicated that interruptions to the flow of a trial caused by *voir dires* tend to have a negative impact on juror comprehension.[10] This might well also apply to other interruptions to the orderly presentation of the evidence. If that is the case, the fewer such interruptions, which might be achieved by better ventilation and resolution of issues such as the admissibility of evidence in advance of the trial itself, could well assist juror comprehension.[11]

8.14 Defendants' general rights to a fair trial and their more specific rights to decline to testify free from adverse comment and the privilege from self-incrimination do not grant them an absolute privilege from active participation in the clear statement and resolution of the issues that a trial raises. The defendant's duties under sections 590A, 590B and 590C of the Criminal Code (Qld), and similar provisions in many comparable jurisdictions, illustrate that a defendant can be legitimately and fairly required to participate actively in the management of the trial. The adversarial nature of criminal trials should not be cited as a reason to ignore the benefits to all concerned of an efficient criminal justice system. As the Hon Martin Moynihan AO QC observed:

> The point is that the adversarial cast of mind 'A man will not know of what metal a bell is made if it has not been well beaten so the law shall be well known by good disputation'[12] shapes the attitude of the protagonists: prosecution against the defence, defence attitude towards police and police towards the defence. This culture can blind the protagonists to finding common ground to dispose of a case expeditiously with the minimum necessary commitment of resources without compromising the conduct of the defence.[13] (note in original)

8.15 Conflicting views have been expressed about the legitimacy of imposing any pre-trial obligations on defendants that may in any way be seen as restricting their privileges to withhold any details of their defences until after the conclusion of the prosecution case. Criticisms of these regimes have been based on assertions said to be founded on the presumption of innocence and the requirement that the prosecution prove its case beyond reasonable doubt.[14] Others suggest that this is mere cant without a concrete foundation on a real, rather than a feared, infringement of defendants' rights.[15]

8.16 The most frequently cited criticism of regimes which require defendants to participate in issue identification before trial is that they offend against the defendants' right to silence and their asserted right never to be compelled to participate in a process that may facilitate a conviction.[16] This was raised repeatedly in submissions to this Commission and the Victorian Law Reform Commission (discussed later in this chapter). However, the Commission notes that the rights recognised, for example, in Article 14 of

---

10 Mark Findlay, 'Juror Comprehension and Complexity: Strategies to Enhance Understanding' (2001) 41 *British Journal of Criminology* 56, 74; Chris Richardson, 'Juries: What they think of us' (2003) *Queensland Bar News* 16 (December 2003).

11 Mark Findlay, 'Juror Comprehension and Complexity: Strategies to Enhance Understanding' (2001) 41 *British Journal of Criminology* 56, 74.

12 Hankford J, Lord Chief Justice of England and Wales 1413–1424.

13 The Hon Martin Moynihan AO QC, *Review of the civil and criminal justice system in Queensland*, Report (2008) 31.

14 See Geoff Flatman QC and Mirko Bagaric, 'Accused Disclosure—Measured Response or Abrogation of the Presumption of Innocence?' (1999) 23 *Criminal Law Journal* 327, 327, writing in relation to the *Crimes (Criminal Trials) Act 1999* (Vic); Greg Martin, 'Defence disclosure: should it be accompanied by legal aid reform?' (2004) 31(10) *Brief* 14.

15 See Geoff Flatman QC and Mirko Bagaric, 'Accused Disclosure—Measured Response or Abrogation of the Presumption of Innocence?' (1999) 23 *Criminal Law Journal* 327, 327.

16 Ibid 329–330.

the International Covenant on Civil and Political Rights[17] include a right 'not to be compelled to testify against himself or to confess guilt.'[18] This does not of itself assert a right not to participate in the criminal trial process. For example, defendants are compelled to attend court for trial and ancillary court hearings by the requirements of bail or remand detention, and to plead in answer to the charges.

8.17 The Commission acknowledges, however, that but for the restricted requirements of pre-trial disclosure, the usual process (set out in section 619 of the Criminal Code (Qld))[19] is for the defence to be called on only after the close of the prosecution's case. A more subtle argument is that compulsory disclosure of any sort by a defendant, though perhaps not disturbing the onus or standard of proof, nonetheless makes it easier for the prosecution to discharge its obligations and obtain a conviction.[20]

8.18 A number of counter-arguments have been raised against this contention:

- The right not to be forced to incriminate oneself cannot be said to be absolute or unquestionable.[21]
- At some point, all defendants will be required to answer the charges and the evidence against them. Fair pre-trial disclosure only brings this forward to a time after the defendants have already been committed for trial (which means that a magistrate has already found that they have a case to answer) and to a time only relatively shortly before the trial, albeit a time before the evidence against the defendant has been heard at the trial itself.[22]
- Pre-trial disclosure of any sort does nothing to detract from the prosecution's burden of proof at trial and the presumption of innocence.[23]
- The jury will know nothing of the pre-trial disclosure material (or any breach by any party of its obligations) until that material is admitted into evidence or a breach becomes the subject of comment before the jury, if that is permitted by statute and by the court.
- Moreover, if the prosecution is bound by its own pre-trial disclosure, the risk of a defendant being ambushed by a hastily strapped-up prosecution case can be carefully guarded against by the court.[24]

8.19 The various advantages of the early identification of the real issues in dispute are said to include the following:

---

17 See [7.7] above.

18 Article 14(3)(g).

19 Criminal Code (Qld) s 619 is set out in Appendix C to this Report.

20 Kevin Dawkins, 'Defence Disclosure in Criminal Cases' [2001] *New Zealand Law Review* 35, 38–9.

21 Geoff Flatman QC and Mirko Bagaric, 'Accused Disclosure—Measured Response or Abrogation of the Presumption of Innocence?' (1999) 23 *Criminal Law Journal* 327, 300; Greg Martin, 'Defence disclosure: should it be accompanied by legal aid reform?' (2004) 31(10) *Brief* 14, 15.

22 Geoff Flatman QC and Mirko Bagaric, 'Accused Disclosure—Measured Response or Abrogation of the Presumption of Innocence?' (1999) 23 *Criminal Law Journal* 327, 330.

23 Ibid 330–1.

24 See ibid 331–2 in relation to the risk of hastily manufactured prosecution evidence.

- Trial judges would be in a better position to control the admission of evidence if they better understand the nature of the parties' cases and contentions.[25]

- Fewer witnesses would need to be called to give purely formal, non-contentious evidence.[26]

- The earlier that defendants are forced to come to grips with, and formally articulate, any aspect of their defences would reduce the number of defendants going to trial with untenable defences.[27]

8.20 To these can be added:

- the fact that early issue identification would make it easier for the trial judge to prepare a jury guide, or similar documents or oral directions, which in turn would make it easier for the jury to understand the issues in the trial; and

- a better balance in the presentation of the early stages of a trial, and the advantage for defendants, in that the jury will be considering the various defences from early in the trial whereas, under the present system, they hear only from the prosecution (apart from the cross-examination of prosecution witnesses) until the prosecution case has closed.

8.21 A number of commentators and respondents to the Commission's Discussion Paper have argued, however, that a formal, mandatory scheme of extended defence disclosure is unnecessary in Queensland since it generally already occurs in appropriate cases.[28] The asserted risk of defence by ambush, where a prosecutor is wrong-footed by a defence raised at the trial that was otherwise unpredictable, has not been supported by research.[29] There are many good reasons why any defendant with a good defence supported by evidence might seek to make the nature of that defence and evidence known to the police, prosecutor or before the committal magistrate to stop the prosecution long before trial. In any event, the prosecution's remedy of applying for an adjournment of the trial to seek evidence in rebuttal is highly unattractive.

8.22 Another area in which pre-trial disclosure regimes may be seen to offend long-standing principles is in relation to the penalties for non-compliance, or the incentives for compliance. As can be seen from the summary of relevant provisions from various jurisdictions,[30] sanctions and incentives vary from the exclusion of evidence and costs orders against defaulting parties or practitioners to the consideration of compliance or non-compliance on sentencing, and adverse comment to the jury including (in some cases) comment about inferences of a defendant's guilt.

25 Ibid 334.

26 Ibid.

27 Ibid.

28 See [8.168], [8.175] below.

29 Kevin Dawkins, 'Defence Disclosure in Criminal Cases' [2001] *New Zealand Law Review* 35, 39–40.

30 See [8.33]–[8.103] below. See also Kevin Dawkins, 'Defence Disclosure in Criminal Cases' [2001] *New Zealand Law Review* 35, 39.

8.23 One of the risks of institutionalising any scheme of case management such as that considered in this chapter is said to be that it could give rise to:

> waves of interlocutory applications to settle disputes about the sufficiency of disclosure, to extend the time limits for disclosure, to challenge prosecution non-disclosure of sensitive material, and to determine what consequences should follow from defence non-compliance with disclosure requirements.[31]

Pre-trial disclosure in Queensland

8.24 Section 590AA of the Criminal Code (Qld) and the *Criminal Practice Rules 1999* (Qld) already provide an opportunity for pre-trial directions hearings.[32] These provisions are, however, purely permissive and do not compel any pre-trial directions hearings to be held as a matter of course. Section 590AA reads:

> **590AA Pre-trial directions and rulings**
>
> (1) If the Crown has presented an indictment before a court against a person, a party may apply for a direction or ruling, or a judge of the court may on his or her initiative direct the parties to attend before the court for directions or rulings, as to the conduct of the trial or any pre-trial hearing.
>
> (2) Without limiting subsection (1) a direction or ruling may be given in relation to—
>
> (a) the quashing or staying of the indictment; or
>
> (b) the joinder of accused or joinder of charges; or
>
> (ba) the disclosure of a thing under chapter division 3;[33] or
>
> (c) the provision of a statement, report, proof of evidence or other information; or
>
> (d) noting of admissions and issues the parties agree are relevant to the trial or sentence; or
>
> (da) an application for trial by a judge sitting without a jury; or
>
> (e) deciding questions of law including the admissibility of evidence and any step that must be taken if any evidence is not to be admitted; or
>
> (f) ascertaining whether a defence of insanity or diminished responsibility or any other question of a psychiatric nature is to be raised; or
>
> (g) the psychiatric or other medical examination of the accused; or
>
> (h) the exchange of medical, psychiatric and other expert reports; or
>
> (i) the reference of the accused to the Mental Health Court; or

31 Kevin Dawkins, 'Defence Disclosure in Criminal Cases' [2001] *New Zealand Law Review* 35, 41.

32 Criminal Code (Qld) s 590AA; *Criminal Practice Rules 1999* (Qld) ch 9.

33 Criminal Code (Qld) ch 62 div 3 deals with disclosure by the prosecution.

(j) the date of trial and directing that a date for trial is not to be fixed until it is known whether the accused proposes to rely on a defence of insanity or diminished responsibility or any other question of a psychiatric nature; or

(k) the return of subpoenas; or

(l) the *Evidence Act 1977*, part 2, division 4A or 6;[34] or

(m) encouraging the parties to narrow the issues and any other administrative arrangement to assist the speedy disposition of the trial.

(3) A direction or ruling is binding unless the judge presiding at the trial or pre-trial hearing, for special reason, gives leave to reopen the direction or ruling.

(4) A direction or ruling must not be subject to interlocutory appeal but may be raised as a ground of appeal against conviction or sentence. (notes added)

8.25 The relevant provisions in the *Criminal Practice Rules 1999* (Qld), especially Rule 42, are quite brief and simply set out some procedural aspects of pre-trial directions hearings under section 590AA.[35]

8.26 There are also some specific areas in which pre-trial disclosure by the parties is made mandatory by the Criminal Code (Qld). A breach of these obligations may mean that the defaulting party cannot lead the evidence that should have been the subject of notification without the leave of the court. The need to ensure a fair trial may mean that a court will relatively often grant a defendant that leave.

---

34 *Evidence Act 1977* (Qld) pt 2 div 4A and 6 deal with evidence of affected children and cross-examination of protected witnesses, respectively.

35 The relevant rules are Rules 41 and 42, which read:

Chapter 9 Pre-trial directions and rulings

41 Application of ch 9

This chapter applies if the Crown presents an indictment before a court against a person and a party to the trial (the *party*) wants the court to give a direction or ruling about the conduct of the trial under the Code, section 590AA.

42 Application for direction or ruling

(1) The party must apply to the court for the direction or ruling.

(2) The application must state—

(a) the nature of the direction or ruling sought; and

(b) whether a witness or anyone else is required to attend the hearing of the application.

(3) The party must serve a copy of the application on each other party at least 2 clear days before the day on which the application is to be heard (the *hearing day*).

(4) However, if the parties agree, the application may be served later than 2 clear days before the hearing day.

(5) Subrule (4) does not apply if the direction or ruling sought is about 1 or more of the following—

(a) quashing or staying the indictment;

(b) joining accused persons or charges;

(c) deciding questions of law, including the admissibility of evidence and steps to be taken if evidence is inadmissible;

(d) the psychiatric or other medical examination of the accused person;

(e) referring the accused person to the Mental Health Tribunal.

8.27 The salient provisions relating to the prosecution's duties of pre-trial disclosure include these:[36]

- It is a 'fundamental obligation of the prosecution to ensure criminal proceedings are conducted fairly with the single aim of determining and establishing truth.' Consequently, the prosecution is under an on-going obligation to give a defendant full and early disclosure of all evidence on which it proposes to rely and of all things that it possesses that would tend to assist the defendant's case (unless such disclosure would be unlawful or contrary to the public interest).[37]

- The prosecution must give the following material to a defendant at least 14 days before a committal hearing within 28 days after the indictment has been presented:[38]

  - a copy of the bench charge sheet, complaint or indictment containing the charge against the defendant;

  - a copy of the defendant's criminal history;

  - a copy of any statement of the defendant;

  - a copy of any statement of any proposed witness for the prosecution or (if there is no statement) a written notice naming the witness;

  - a copy of any report of any test or forensic procedure relevant to the proceeding and a written notice describing any test or forensic procedure (including one that is not yet completed) on which the prosecution intends to rely at the proceeding; and

  - a written notice describing any original evidence or other thing on which the prosecution intends to rely at the proceeding.[39]

- If requested by the defendant, the prosecution must disclose:

  - anything that may be adverse to the reliability or credibility of any proposed witness for the prosecution or that may tend to raise an issue about the competence of such a witness; and

  - a copy of any witness statement or other thing that is relevant to the proceedings but which the prosecution does not intend to rely on at the trial.[40]

8.28 The Office of the Director of Public Prosecutions has published the Director's Guidelines which cover all aspects of the prosecution process from the prosecutors' perspective, including pre-trial disclosure. In this respect, the Guidelines are expansive:

---

36 There are other more specific obligations in relation to sensitive evidence, the viewing of evidence, evidence of an 'affected child', the copying of evidence and so on in Criminal Code (Qld) ss 590AD to 590AX.

37 Criminal Code (Qld) ss 590AB, 590AL.

38 Criminal Code (Qld) s 590AI(2).

39 Criminal Code (Qld) s 590AH.

40 Criminal Code (Qld) s 590AJ.

27. DISCLOSURE: Sections 590AB to 590AX of the Criminal Code

The Crown has a duty to make full and early disclosure of the prosecution case to the defence. The duty extends to all facts and circumstances and the identity of all witnesses reasonably regarded as relevant to any issue likely to arise, in either the case for the prosecution or the defence.

However, the address, telephone number and business address of a witness should be omitted from statements provided to the defence, except where those details are material to the facts of the case: *section 590AP*. In the case of an anonymity certificate, the identity of the protected witness shall not be disclosed without order of the court: sections 21F and 21I of the *Evidence Act 1977*.

(i) **Criminal Histories**

The criminal history of the accused must be disclosed:—

- Where a prosecutor knows that a Crown witness has a criminal history, it should be disclosed to the defence.

- Where the defence in a joint trial wishes to know the criminal history of a co-accused it should be provided.

(ii) **Immunity**

Any indemnity or use-derivative-use undertaking provided to a Crown witness in relation to the trial should be disclosed to the defence. However, the advice which accompanied the application for immunity is privileged and should not be disclosed.

The Attorney-General's protection from prosecution is limited to truthful evidence. This is clear on the face of the undertaking.

If the witness's credibility is attacked at trial, the undertaking should be tendered. But it cannot be tendered until and unless the witness's credibility is put in issue.

(iii) **Exculpatory Information**

If a prosecutor knows of a person who can give evidence that may be exculpatory, but forms the view on reasonable grounds that the person is not credible, the prosecutor is not obliged to call that witness (see Guideline 37).

The prosecutor must however disclose to the defence:—

(a) the person's statement, if there is one, or

(b) the nature of the information:—

- the identity of the person who possesses it; and

- when known, the whereabouts of the person.

These details should be disclosed in good time.

The Crown, if requested by the defence, should subpoena the person.

(iv) **Inconsistent Statement**

Where a prosecution witness has made a statement that may be inconsistent in a material way with the witness's previous evidence the prosecutor should inform the defence of that fact and make available the statement. This extends to any inconsistencies made in conference or in a victim impact statement.

(v) **Particulars**

Particulars of sexual offences or offences of violence about which an 'affected child witness' is to testify, must be disclosed if requested: section *590AJ(2)(a)*.

(vi) **Sensitive Evidence: *sections 590AF; 590AO; 590AX***

Sensitive evidence is that which contains an image of a person which is obscene or indecent or would otherwise violate the person's privacy. It will include video taped interviews with complainants of sexual offences containing accounts of sexual activity, pornography, child computer games, police photographs of naked complainants and autopsy photographs.

Sensitive evidence:—

- **Must not** be copied, other than for a legitimate purpose connected with a proceeding;
- **Must not** be given to the defence without a Court order;
- **Must be** made available for viewing by the defence upon a request if the evidence is relevant to either the prosecution or defence case;
- **May be** made available for analysis by an appropriately qualified expert (for the prosecution or defence). Such release must first be authorised by the Legal Practice Manager, upon such conditions as thought appropriate.

(vii) **Original Evidence*: section 590AS***

Original exhibits must be made available for viewing by the defence upon request. Conditions to safeguard the integrity of the exhibits must be settled by the Legal Practice Manager.

(viii) **Public Interest Exception: *section 590AQ***

The duty of disclosure is subject only to any overriding demands of justice and public interest such as:—

- the need to protect the integrity of the administration of justice and ongoing investigations;
- the need to prevent risk to life or personal safety; or
- public interest immunity, such as information likely to lead to the identity of an informer, or a matter affecting national security.

These circumstances will be rare and information should only be withheld with the approval of the Director. When this happens, the defence must be given written notice of the claim (see Notice of Public Interest Exemption).

(ix) **Committal Hearings**

All admissible evidence collected by the investigating police officers should be produced at committal proceedings, unless the evidence falls into one of the following categories:—

(a) it is unlikely to influence the result of the committal proceedings and it is contrary to the public interest to disclose it. (See paragraph 25 (viii) above);

(b) it is unlikely to influence the result of the committal proceedings and the person who can give the evidence is not reasonably available or his or her appearance would result in unusual expense or inconvenience or produce a risk of injury to his or her physical or mental health, provided a copy of any written statement containing the evidence in the possession of the prosecution is given to the defence;

(c) it would be unnecessary and repetitive in view of other evidence to be produced, provided a copy of any written statement containing the evidence in the possession of the prosecution is given to the defence;

(d) it is reasonably believed the production of the evidence would lead to a dishonest attempt to persuade the person who can give the evidence to change his or her story or not to attend the trial, or to an attempt to intimidate or injure any person;

(e) it is reasonably believed the evidence is untrue or so doubtful it ought to be tested upon cross-examination, provided the defence is given notice of the person who can give the evidence and such particulars of it as will allow the defence to make its own inquiries regarding the evidence and reach a decision as to whether it will produce the evidence.

- Any doubt by the prosecutor as to whether the balance is in favour of, or against, the production of the evidence should be resolved in favour of production.

- Copies of written statements to be given to the defence including copies to be used for the purposes of an application under *section 110A* of the *Justices Act 1886*, are to be given so as to provide the defence with a reasonable opportunity to consider and to respond to the matters contained in them: they should be given at least 7 clear days before the commencement of the committal proceedings.

- In all cases where admissible evidence collected by the investigating police officers has not been produced at the committal proceedings, a note of what has occurred and why it occurred should be made by the person who made the decision and attached to the prosecution brief.

(x) **Legal Professional Advice**

Legal professional privilege will be claimed in respect of ODPP internal advices and legal advice given to the Attorney-General.

(xi) **Witness Conferences**

The Director will not claim privilege in respect of any taped or written record of a conference with a witness provided there is a legitimate forensic purpose to the disclosure, for example:—

(a) an inconsistent statement on a material fact;

(b) an exculpatory statement; or

(c) further allegations.

The lawyer concerned must immediately file note the incident and arrange for a supplementary statement to be taken by investigators. The statement should be forwarded to the defence.

(xii) **Disclosure Form**

The Disclosure Form must be fully completed and provided to the legal representatives or the accused at his bail address or remand centre no later than:—

- 14 days before the committal hearing;
- again, within 28 days of the presentation of indictment, or prior to the trial evidence, whichever is sooner.

The police brief must include a copy of the Disclosure Form furnished to the accused. The ODPP must update the police disclosure but need not duplicate it: *section 590AN.*

Responsibility for disclosure within ODPP rests with the case lawyer or prosecutor if one has been allocated to the matter.

(xiii) **Ongoing Obligation of Disclosure**

When new and relevant evidence becomes available to the prosecution after the Disclosure Forms have been published, that new evidence should be disclosed as soon as practicable. The duty of disclosure of exculpatory information continues after conviction until the death of the convicted person: *section 590AL*.

Upon receipt of the file a written inquiry should be made of the arresting officer to ascertain whether that officer has knowledge of any information, not included in the brief of evidence, that would tend to help the case for the accused.

Post conviction disclosure relates to reliable evidence that may raise reasonable doubt about guilt: *section 590AD*.

(xiv) **Confidentiality**

- It is an offence to disclose confidential ODPP information other than in accordance with the duty of disclosure or as otherwise permitted by legislation: *section 24A of the Director of Public Prosecutions Act 1984.*

- Inappropriate disclosure of confidential information may affect the safety or privacy of individuals, compromise ongoing investigations or undermine confidence in the office. This means sensitive material must be carefully secured. It must not be left unattended in Court, in cars or in any place where it could be accessed by unauthorised people.

Amended the sixteenth day of May, 2005[41]

Review of the civil and criminal justice system in Queensland

8.29 In December 2008, the Hon Martin Moynihan AO QC, former Senior Judge Administrator of the Supreme Court of Queensland, reported to the Attorney-General on his review of the civil and criminal justice system in Queensland.[42] The Terms of Reference for the review required Mr Moynihan to report on:

> Whether there should be a formal system supported by legislation and/or practice direction to facilitate:
>
> - Early identifying and encouragement of pleas of guilty.
> - Identifying points to be determined by pre-trial rulings.
> - Narrowing issues to be determined by the jury.
> - Facilitating the conduct of the trial.[43]

8.30 His principal recommendation was that there be a 'comprehensive overhaul of all criminal justice procedure legislation and rules to consolidate, modernise and streamline criminal justice procedure in Queensland.[44] He also recommended changes to the committal process.[45]

8.31 Chapter 5 of his Report deals with pre-trial disclosure in criminal matters and considers Chapter 62 Division 3 (ie, sections 590AB to 590AX) of the Criminal Code (Qld) in some detail. These provisions deal with disclosure by the prosecution. The Report also deals, though without much discussion, with disclosure by the defendant.[46] Mr Moynihan's Report focuses on criminal proceedings up to the point of committal and disclosure by the prosecution up to the point of the committal hearing. However, some of the Report's recommendations do impact on the defendant's obligations by providing the prosecution with a procedure by which it can complain to the court of any non-compliance by a defendant.[47]

---

41 Office of the Director of Public Prosecutions, *Director's Guidelines*, 36–41; <http://www.justice.qld.gov.au/images/Courtsandtribunals/Directors_Guidelines.pdf> at 8 December 2009.

42 The Hon Martin Moynihan AO QC, *Review of the civil and criminal justice system in Queensland*, Report (2008).

43 Ibid Appendix 1.

44 Ibid Rec 1, 5, ch 4. Mr Moynihan discusses a pre-trial disclosure regime in chapter 5 of his Report but his recommendations in this regard are primarily directed to disclosure up to the time of a committal hearing.

45 Ibid ch 9.

46 See, for example, ibid 89.

47 See Ibid 99–103.

8.32 Mr Moynihan's review and recommendation have a far greater scope than the Commission's review of jury directions. However, the Commission considers that its recommendations are, so far as they cover issues dealt with by his Report, consistent with Mr Moynihan's recommendations. If his recommendations about a comprehensive overhaul of criminal justice procedure are implemented, the Commission's more specific recommendations about jury directions could be included in that reform process, and might be affected by the implementation of his suggested reforms of committal procedures. Amongst other matters, for example, it is clear that a defendant's ability (or indeed obligation) to make pre-trial disclosure would be affected by the extent of the prosecution's disclosure and, perhaps, the preliminary examination of witnesses at a committal hearing.[48]

Other jurisdictions

8.33 Pre-trial disclosure obligations by the prosecution are common, of long standing and, given that the burden of proof and open disclosure always falls on the prosecution in common law jurisdictions, not controversial. Pre-trial disclosure obligations falling on a defendant are of more recent origin and are more controversial. However, they are found in a number of other Australian jurisdictions and in some comparable jurisdictions overseas.[49] They can also be found in the United States notwithstanding the protection against self-incrimination in the Fifth Amendment to the United States *Constitution*.[50]

New South Wales

8.34 The Supreme and District Courts of New South Wales are empowered to give directions for pre-trial disclosure by both the prosecution and the defendant on a case-by-case basis under the *Criminal Procedure Act 1986* (NSW).[51] Such disclosure may be given only in relation to 'complex' trials at which the defendant will be represented.[52]

8.35 The court may waive any of the pre-trial disclosure requirements otherwise provided for by the Act[53] and there is no set timetable for the completion of any disclosure that may be ordered.[54] The disclosure requirements (if ordered) are on-going until the conclusion of the case.[55]

---

48 See also [8.189] below.

49 The Australian jurisdictions not discussed below generally have few, if any, pre-trial disclosure obligations on the part of the defendant other than the disclosure of reliance on an alibi: see Kevin Dawkins, 'Defence Disclosure in Criminal Cases' [2001] *New Zealand Law Review* 35, 55–6.

50 See Trial Efficiency Working Group, Criminal Law Review Division, Attorney General's Department of NSW, *Report of the Trial Efficiency Working Group* (2009) 50–1; Kevin Dawkins, 'Defence Disclosure in Criminal Cases' [2001] *New Zealand Law Review* 35, 39, 57–8. But note Geoff Flatman QC and Mirko Bagaric, 'Accused Disclosure—Measured Response or Abrogation of the Presumption of Innocence?' (1999) 23 *Criminal Law Journal* 327, 332, n 30.

51 *Criminal Procedure Act 1986* (NSW) s 134. The New South Wales Law Reform Commission had recommended in 1986 that a 'system of pre-trial hearings should be implemented for the purpose of resolving matters of law before trial and planning the efficient presentation of the case to the jury': New South Wales Law Reform Commission, *The Jury in a Criminal Trial*, Report No LRC 48 (1986) 162, Rec 80.

52 *Criminal Procedure Act 1986* (NSW) s 136. Whether a trial is complex depends on the likely length of the trial, the nature of the evidence to be adduced and the legal issues likely to arise at it: s 136(2).

53 *Criminal Procedure Act 1986* (NSW) s 142.

54 See *Criminal Procedure Act 1986* (NSW) s 137(2).

55 *Criminal Procedure Act 1986* (NSW) s 141.

8.36 Subject to those qualifications, pre-trial disclosure involves an exchange by the parties of three sets of material: the case for the prosecution, the defence response, and the prosecution response to the defence response.

8.37 The notice of the case for the prosecution is to contain the following:

> (a) a copy of the indictment,
>
> (b) an outline of the prosecution case,
>
> (c) copies of statements of witnesses proposed to be called at the trial by the prosecutor,
>
> (d) copies of any documents or other exhibits proposed to be tendered at the trial by the prosecutor,
>
> (e) if any expert witnesses are proposed to be called at the trial by the prosecutor, copies of any reports by them that are relevant to the case,
>
> (f) a copy of any information in the possession of the prosecutor that is relevant to the reliability or credibility of a prosecution witness,
>
> (g) a copy of any information, document or other thing provided by police officers to the prosecutor, or otherwise in the possession of the prosecutor, that may be relevant to the case of the prosecutor or the accused person, and that has not otherwise been disclosed to the accused person,
>
> (h) a copy of any information, document or other thing in the possession of the prosecutor that is adverse to the credit or credibility of the accused person.[56]

8.38 The notice of the defence response may be quite lengthy and goes well beyond what is required in other jurisdictions. It is to contain the following:

> 1. …
>
> (a) notice as to whether the accused person proposes to adduce evidence at the trial of any of the following contentions:
>
> (i) insanity,
>
> (ii) self-defence,
>
> (iii) provocation,
>
> (iv) accident,
>
> (v) duress,
>
> (vi) claim of right,
>
> (vii) automatism,
>
> (viii) intoxication,

56 *Criminal Procedure Act 1986* (NSW) s 138.

(b) if any expert witnesses are proposed to be called at the trial by the accused person, copies of any reports by them proposed to be relied on by the accused person,

(c) the names and addresses of any character witnesses who are proposed to be called at the trial by the accused person (but only if the prosecution has given an undertaking that any such witness will not be interviewed before the trial by police officers or the prosecutor in connection with the proceedings without the leave of the court),

(d) the accused person's response to the particulars raised in the notice of the case for the prosecution (as provided for by subsection (2)).

(2) …

(a) if the prosecutor disclosed an intention to adduce expert evidence at the trial, notice as to whether the accused person disputes any of the expert evidence and which evidence is disputed,

(b) if the prosecutor disclosed an intention to adduce evidence at the trial that has been obtained by means of surveillance, notice as to whether the accused person proposes to require the prosecutor to call any witnesses to corroborate that evidence and, if so, which witnesses will be required,

(c) notice as to whether the accused person proposes to raise any issue with respect to the continuity of custody of any proposed exhibit disclosed by the prosecutor,

(d) if the prosecutor disclosed an intention to tender at the trial any transcript, notice as to whether the accused person accepts the transcript as accurate and, if not, in what respect the transcript is disputed,

(e) notice as to whether the accused person proposes to dispute the accuracy or admissibility of any proposed documentary evidence or other exhibit disclosed by the prosecutor,

(f) notice as to whether the accused person proposes to dispute the admissibility of any other proposed evidence disclosed by the prosecutor and the basis for the objection,

(g) notice of any significant issue the accused person proposes to raise regarding the form of the indictment, severability of the charges or separate trials for the charges.[57]

8.39 The notice of the prosecution response to the defence response is to contain the following:

(a) if the accused person has disclosed an intention to adduce expert evidence at the trial, notice as to whether the prosecutor disputes any of the expert evidence and, if so, in what respect,

(b) if the accused person has disclosed an intention to tender any exhibit at the trial, notice as to whether the prosecutor proposes to raise any issue with respect to the continuity of custody of the exhibit,

57 *Criminal Procedure Act 1986* (NSW) s 139.

> (c) if the accused person has disclosed an intention to tender any documentary evidence or other exhibit at the trial, notice as to whether the prosecutor proposes to dispute the accuracy or admissibility of the documentary evidence or other exhibit,
>
> (d) notice as to whether the prosecutor proposes to dispute the admissibility of any other proposed evidence disclosed by the accused person, and the basis for the objection,
>
> (e) a copy of any information, document or other thing in the possession of the prosecutor, not already disclosed to the accused person, that might reasonably be expected to assist the case for the defence,
>
> (f) a copy of any information, document or other thing that has not already been disclosed to the accused person and that is required to be contained in the notice of the case for the prosecution.[58]

8.40 The purpose of these provisions is said in the legislation to be 'to reduce delays in complex criminal trials',[59] and they are clearly directed to a purpose which, though not entirely consistent with the thrust of the Commission's Terms of Reference, is not inconsistent either. However, it is clear that the legislation contemplates that this regime will not necessarily apply in cases that are not 'complex' and in any event may be modified by the court to meet the demands of each case.

8.41 The NSW scheme came into effect in 2001, and was reviewed in 2004 by the Legislative Council's Standing Committee on Law and Justice.[60] In those three years, pre-trial disclosure orders had been made in only six Supreme Court matters and in two in the District Court. One of the reasons for such scant implementation was said to be the 'gateway provision' that required the matter to be 'complex'.[61] Although it was virtually impossible to draw any conclusions from the data, the review determined that 'the policy objectives of the Act were valid and that the terms of the Act were appropriate for securing those objectives.'[62] The Director of Public Prosecutions submitted to the review that the consequent changes within the DPP's office were working well and that the arraignment guilty plea rate had risen from 16% to 36% across the State.[63] The *Criminal Procedure Act 1986* (NSW) was amended in 2007 on the basis of the Standing Committee's recommendations.

8.42 The Trial Efficiency Working Group of the Criminal Law Review Division of the Attorney General's Department of NSW has suggested that without further amendment the NSW provisions are likely to remain under-used.[64]

---

58 *Criminal Procedure Act 1986* (NSW) s 140.

59 *Criminal Procedure Act 1986* (NSW) s 134.

60 Trial Efficiency Working Group, Criminal Law Review Division, Attorney General's Department of NSW, *Report of the Trial Efficiency Working Group* (2009) 28–30.

61 See *Criminal Procedure Act 1986* (NSW) s 134; and n 52 above.

62 Trial Efficiency Working Group, Criminal Law Review Division, Attorney General's Department of NSW, *Report of the Trial Efficiency Working Group* (2009) 30.

63 Ibid.

64 Ibid 77. See also [8.129]–[8.143] below in relation to the *Criminal Procedure Amendment (Case Management) Act 2009* (NSW), which will implement the Working Group's recommendations.

South Australia

8.43 A regime of pre-trial disclosure operates in South Australia though it, too, is discretionary.[65]

8.44 The Director of Public Prosecutions may apply to the court for authorisation to serve on the defendant a notice to admit specified facts.[66] Although the privilege against self-incrimination is expressly preserved under the legislation, there is significant pressure on defendants to make all reasonable admissions or have any unreasonable refusal taken into consideration on sentencing. The key provisions of section 285BA of the *Criminal Law Consolidation Act 1935* (SA) in this regard are these:

> (3) The notice must contain a warning, in the prescribed form, to the effect that, if the defendant is convicted, the court is required to take an unreasonable failure to make an admission in response to the notice into account in fixing sentence.
>
> (4) This section does not abrogate the privilege against self-incrimination and a refusal to make an admission on the ground that the admission would tend to incriminate the defendant of an offence is not to be made the subject of comment to a jury.
>
> (5) An order under this section may only be made at a directions hearing at which the defendant is represented by a legal practitioner unless the court is satisfied that—
>
> (a) the defendant has voluntarily chosen to be unrepresented; or
>
> (b) the defendant is unrepresented for reasons attributable to the defendant's own fault.
>
> (6) If a defendant unreasonably fails to make an admission in response to a notice under this section, and the defendant is convicted, the court should take the failure into account in fixing sentence.
>
> (7) Without limiting subsection (6), a defendant unreasonably fails to make an admission if the defendant—
>
> (a) claims privilege against self-incrimination as a reason for not making the admission; and
>
> (b) thus puts the prosecution to proof of facts that are not seriously contested at the trial.

8.45 If the prosecution has discharged its obligations of disclosure, it may by notice authorised by the court require defendants to disclose the nature of certain specific forms of evidence or defences on which they intend to rely:

> (a) evidence tending to establish that the defendant was mentally incompetent to commit the alleged offence or is mentally unfit to stand trial;
>
> (b) evidence tending to establish that the defendant acted for a defensive purpose;

65 See ibid 35–6.

66 *Criminal Law Consolidation Act 1935* (SA) s 285BA.

> (c) evidence of provocation;
>
> (d) evidence of automatism;
>
> (e) evidence tending to establish that the circumstances of the alleged offence occurred by accident;
>
> (f) evidence of necessity or duress;
>
> (g) evidence tending to establish a claim of right;
>
> (h) evidence of intoxication.[67]

8.46 Non-compliance by a defendant with a requirement of such a notice does not render any evidence covered by it inadmissible but the prosecutor or the judge (or both) may comment on the non-compliance to the jury.[68] There is no restriction in the legislation of the nature of any such comment.

8.47 A defendant may be called on to consent to dispense with the calling of prosecution witnesses who would be called solely to establish the admissibility of certain forms of evidence:

> A court before which a defendant is to be tried on information may require the defence to notify the Director of Public Prosecutions in writing whether it consents to dispensing with the calling of prosecution witnesses proposed to be called to establish the admissibility of specified intended evidence of any of the following kinds:
>
> (a) documentary, audio, visual, or audiovisual evidence of surveillance or interview;
>
> (b) other documentary, audio, visual or audiovisual evidence;
>
> (c) exhibits.[69]

8.48 Again, there is real pressure on defendants to respond reasonably to this notice: if defendants fail to comply, their consent to the tender of the relevant evidence for purposes specified in the notice will be conclusively presumed.[70]

8.49 Defendants also have a mandatory obligation to inform the Director of Public Prosecutions of their intention to introduce certain expert evidence by the first directions hearing in relation to any trial or otherwise as soon as practicable after it becomes available.[71] As in Queensland, the fact that this requirement is triggered by the defendant's intention might be cynically relied on to delay giving any such notice until the prosecution case has been closed at the trial itself, when the defendant may assert that no intention was conclusively formed until the whole of the prosecution evidence was led.[72]

---

67 *Criminal Law Consolidation Act 1935* (SA) s 285BB.

68 *Criminal Law Consolidation Act 1935* (SA) s 285BB(3).

69 *Criminal Law Consolidation Act 1935* (SA) s 285BB(4).

70 *Criminal Law Consolidation Act 1935* (SA) s 285BB(5).

71 *Criminal Law Consolidation Act 1935* (SA) s 285BC.

72 See Submission 7 discussed at [8.147] below.

8.50 Defendants may also be required to submit to an examination by an independent psychiatric expert if the defendant proposes to introduce expert psychiatric evidence or other expert medical evidence relevant to the defendant's mental state or medical condition at the time of an alleged offence.[73] A failure to comply may result in the evidence not being admitted and on comment being made to the jury.[74]

8.51 A legal practitioner who has advised a defendant not to comply with section 285BC of the *Criminal Law Consolidation Act 1935* (SA), or who has expressly agreed to the defendant's non-compliance, may be reported to the appropriate professional disciplinary authority.[75]

Victoria

8.52 The new Victorian legislation is the most recent and appears to be the most sweeping of the various pre-trial procedural statutes in Australia. A regime of compulsory pre-trial disclosure and related steps was first enacted in Australia in Victoria in 1993,[76] and then again in the *Crimes (Criminal Trials) Act 1999* (Vic). That Act is to be repealed when the *Criminal Procedure Act 2009* (Vic) comes into effect.[77] However, the relevant provisions of the 1999 Act have been re-enacted and expanded in the new legislation.[78]

8.53 The provisions governing pre-trial procedures are covered at length in Part 5.5 (ie, sections 179 to 206) of the *Criminal Procedure Act 2009* (Vic).

8.54 The court may at any time (other than during a trial) conduct one or more directions hearings.[79] At any such hearing, the court may 'make or vary any direction or order, or require a party to do anything that the court considers necessary, for the fair and efficient conduct of the proceeding.'[80] This may include orders that:

- require defendants to advise whether they are legally represented and have funding for continued legal representation up to and including the trial;
- require the parties to notify the court of any pre-trial issues that they intend to raise or of issues of law or fact that they may apply to have determined before the trial;

---

73 *Criminal Law Consolidation Act 1935* (SA) s 285BC(4).

74 *Criminal Law Consolidation Act 1935* (SA) s 285BC(5).

75 *Criminal Law Consolidation Act 1935* (SA) s 285BC(8)–(9).

76 The failure of this Act in practice was noted in Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [6.8]; Ray Gibson, 'The *Crimes (Criminal Trials) Act 1999* — a radical change' *Law Institute Journal,* October 1999, 50, 51; Trial Efficiency Working Group, Criminal Law Review Division, Attorney General's Department of NSW, *Report of the Trial Efficiency Working Group* (2009) 23; Kevin Dawkins, 'Defence Disclosure in Criminal Cases' [2001] *New Zealand Law Review* 35, 48–9, where it is noted that 'the Act was met by "a general culture of combat rather than co-operation", and most trials proceeded as though it never existed.'

77 Chapter 1 (ss 1–4) commenced on 10 March 2009; s 384 will commence on 1 July 2010; the remaining provisions, but for s 437, will commence on 1 January 2010: Victorian Government, Special Gazette No 53 (10 March 2009) 1; Victorian Government, General Gazette No 50 (10 December 2009) 3215.

78 The Victorian legislation is discussed by the VLRC in its recent Final Report on jury directions: Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [6.6]–[6.22].

79 *Criminal Procedure Act 2009* (Vic) s 179.

80 *Criminal Procedure Act 2009* (Vic) s 181(1).

- require the parties to provide an estimate of the length of the trial;
- require the parties to disclose the estimated number and the availability of witnesses (other than the defendant) and any relevant requirements of witnesses and interpreters;
- order a party to make, file or serve any written or oral material required by the court for the purposes of the proceeding;
- order the prosecution to serve on the defendant a copy of any material on which it intends to rely at the trial; and
- determine any objection relating to the disclosure of information or material by the prosecution.[81]

8.55 Unless otherwise directed by the court, the Director of Public Prosecutions must serve on the defendant 28 days before the trial:[82]

- a summary of the prosecution opening, which must outline the manner in which the prosecution will put the case against the accused and the acts, facts, matters and circumstances being relied on to support a finding of guilt;[83] and
- a notice of pre-trial admissions, which must identify the statements of the witnesses whose evidence, in the opinion of the DPP, ought to be admitted as evidence without further proof, including evidence that is directed solely to formal matters (including continuity, a person's age or proving the accuracy of a plan, or that photographs were taken in a certain manner or at a certain time).[84]

8.56 The defendant's response must be served 14 days before the trial is listed to start.[85] It must contain:

- a response to the summary of the prosecution opening, which must identify the acts, facts, matters and circumstances with which issue is taken and the basis on which issue is taken;[86] and
- a response to the notice of pre-trial admissions, which must indicate what evidence set out in the notice of pre-trial admissions is agreed to be

81 *Criminal Procedure Act 2009* (Vic) s 181(2).

82 *Criminal Procedure Act 2009* (Vic) s 182(1).

83 *Criminal Procedure Act 2009* (Vic) s 182(2).

84 *Criminal Procedure Act 2009* (Vic) s 182(3).

85 *Criminal Procedure Act 2009* (Vic) s 183(1).

86 *Criminal Procedure Act 2009* (Vic) s 183(2). The requirement that a defendant file a point-by-point response to the prosecution's disclosure has been criticised as 'not only undercutting the principle that a defendant ought not to be compelled to assist his own prosecution but as ignoring the practical reality that in many cases defence lawyers will have not been fully instructed, if at all, at any early stage of the proceedings': Kevin Dawkins, 'Defence Disclosure in Criminal Cases' [2001] *New Zealand Law Review* 35, 50–1.

admitted as evidence without further proof and what evidence is in issue and, if issue is taken, the basis on which issue is taken.[87]

8.57 Nonetheless, defendants are not required to identify any witness (other than an expert) that they intend to call, nor to state whether they will give evidence.[88] However, defendants have certain specific obligations of disclosure:

- Defendants must notify the prosecution of an intention to call expert evidence at least 14 days before the trial and serve a copy of the expert witness's statement.[89]

- Defendants may not (without leave of the court) at trial lead any evidence either personally or from any other witness in support of an alibi unless their intention to do so has been notified to the prosecution.[90] The notice to the prosecution must contain particulars of the alibi and the names and addresses of any witnesses to the alibi.[91] The court must not refuse leave to lead this evidence, however, if the defendant was not informed of these requirements.[92] The prosecution may apply for an adjournment as a result of this notification, which must be granted unless this would 'prejudice the proper presentation' of the defendant's case.[93]

8.58 The prosecution's obligations of disclosure are on-going.[94] The prosecution must also notify the defendant of its intention to call witnesses to lead evidence not otherwise in the depositions served and to give the defendant copies of the proposed additional evidence.[95]

8.59 If either party intends to depart substantially at the trial from a matter set out in any of the documents served by that party, it must inform the court and the other party before the trial, though it need not inform that other party of the details of the proposed departure unless ordered by the court.[96]

8.60 In particular, at a pre-trial directions hearing the court may decide any issue of law, fact or procedure that arises or is anticipated to arise at the trial, including any issue of the admissibility of any evidence.[97] Any party seeking any such order must first notify the other party at least 14 days before the trial is listed to start in order to find out

87 *Criminal Procedure Act 2009* (Vic) s 183(3).

88 *Criminal Procedure Act 2009* (Vic) s 183(4).

89 *Criminal Procedure Act 2009* (Vic) s 189.

90 *Criminal Procedure Act 2009* (Vic) s 190.

91 *Criminal Procedure Act 2009* (Vic) s 190(4). It is a criminal offence for any police officer or person acting for the prosecution to communicate directly or indirectly with a witness named in this notice: *Criminal Procedure Act 2009* (Vic) s 191.

92 *Criminal Procedure Act 2009* (Vic) s 190(7).

93 *Criminal Procedure Act 2009* (Vic) s 190(8).

94 *Criminal Procedure Act 2009* (Vic) s 185.

95 *Criminal Procedure Act 2009* (Vic) s 188.

96 *Criminal Procedure Act 2009* (Vic) s 184.

97 *Criminal Procedure Act 2009* (Vic) s 199.

whether that issue will be disputed or the order opposed.[98] One such issue may be the defendant's application that certain prosecution evidence be excluded.[99]

8.61 The judge determining any such pre-trial issue need not be the trial judge,[100] but that judge's rulings will be binding on the trial judge unless the trial judge considers 'that it would not be in the interests of justice for the order or other decision to be binding.'[101]

8.62 The documents that the parties are required to file and serve before the trial in principle limit the issues and evidence that each may raise at the trial.

8.63 In their opening addresses, both parties are restricted to the matters set out in the documents that they served on the other party under the pre-trial disclosure regime.[102] The parties are free to depart from those documents only if the trial judge considers that there are 'exceptional circumstances'. A change of legal representative does not constitute exceptional circumstances.[103]

8.64 The parties may introduce evidence at the trial which was not disclosed in the pre-trial exchange of material with the leave of the trial judge.[104] If the defendant gives evidence which could not have been foreseen by the prosecution having regard to the defendant's pre-trial notices, the trial judge may allow the prosecutor to call evidence in reply.[105]

8.65 With severe limits, a breach by one party of its pre-trial disclosure and notification obligations, or a departure from that material by the introduction of different evidence at the trial, may be the subject of comment to the jury by the judge or another party.[106] Comment may only be made with the leave of the trial judge, and only if the comment is relevant and 'not likely to produce a miscarriage of justice'.[107] In any event, no comment by the judge or a party may suggest that any inference of guilt may be drawn from the other party's breach except 'in those circumstances in which an inference of guilt might be drawn from a lie' told by the defendant or from a failure by the defendant to call evidence from a particular witness.[108] No comment may suggest that a breach may be taken into account in considering the probative value of the prosecution evidence except where the defendant's failure to give or lead evidence might be taken into account for that purpose.[109]

8.66 However, it appears that the adverse comment provisions that currently exist in the *Crimes (Criminal Trials) Act 1999* (Vic) have not been routinely used for two reasons. The first is said to be the high rate of compliance; the second is that the judiciary

98 *Criminal Procedure Act 2009* (Vic) s 200(1).

99 *Criminal Procedure Act 2009* (Vic) s 202.

100 *Criminal Procedure Act 2009* (Vic) s 203.

101 *Criminal Procedure Act 2009* (Vic) s 204.

102 *Criminal Procedure Act 2002* (Vic) ss 224, 225. See [8.55]–[8.56] above.

103 *Criminal Procedure Act 2002* (Vic) ss 224, 225.

104 *Criminal Procedure Act 2009* (Vic) s 233(1).

105 *Criminal Procedure Act 2009* (Vic) s 233(2).

106 *Criminal Procedure Act 2009* (Vic) s 237(1).

107 *Criminal Procedure Act 2009* (Vic) s 237(2).

108 *Criminal Procedure Act 2009* (Vic) s 237(3)(a), (b)(i).

109 *Criminal Procedure Act 2009* (Vic) s 237(b)(ii).

considers the provisions to be 'problematic' as '[s]ubstantial difficulties arise in framing an adverse comment in a manner that does not distract the jury from a proper consideration of the evidence.'[110]

Western Australia

8.67 A defendant in Western Australia is subject to a series of on-going[111] pre-trial disclosure obligations, some of which can be waived or modified by the court.

8.68 Within a prescribed period before the trial, defendants must give written notice of their intention to give or lead alibi evidence, the details of the nature of that evidence and the name of each witness that the defendant intends to call with information sufficient to enable that person to be located.[112]

8.69 The obligation to disclose alibi evidence cannot be waived or modified by the court.[113]

8.70 Other similar obligations on the part of the defendant that may be waived or modified by the court[114] include disclosure of expert evidence, written notice of the factual elements of the offence that the defendant may contend cannot be proved, and written notice of any objection by the defendant to any document, or the evidence of any witness, that the prosecution intends to adduce at the trial.[115]

8.71 A failure by either party to comply with its disclosure obligations may result in adjournment of the trial, the discharge of the jury[116] and adverse comment to the jury by the judge, defendant or prosecutor.[117]

Federal Court of Australia

8.72 The *Federal Court of Australia Amendment (Criminal Jurisdiction) Act 2009* (Cth) provides for the exercise by the Federal Court of Australia of 'certain criminal jurisdiction'. The Commission notes that these provisions have only recently been enacted,[118] and that the Federal Court of Australia has not to date held any jury trials.

8.73 Sections 23CD(2) and 23CF of the *Federal Court of Australia Act 1976* (Cth) now provide for a regime of pre-trial disclosure by a defendant in criminal proceedings, in response to disclosure by the prosecution, in these terms:

---

110 Trial Efficiency Working Group, Criminal Law Review Division, Attorney General's Department of NSW, *Report of the Trial Efficiency Working Group* (2009) 34.

111 *Criminal Procedure Act 2004* (WA) s 96(4). See also Trial Efficiency Working Group, Criminal Law Review Division, Attorney General's Department of NSW, *Report of the Trial Efficiency Working Group* (2009) 37–9.

112 *Criminal Procedure Act 2004* (WA) s 96(3).

113 *Criminal Procedure Act 2004* (WA) s 96(2).

114 See *Criminal Procedure Act 2004* (WA) s 138.

115 *Criminal Procedure Act 2004* (WA) s 96(3)(b), (c) and (d).

116 *Criminal Procedure Act 2004* (WA) s 97(2), (3).

117 *Criminal Procedure Act 2004* (WA) s 97(4).

118 The *Federal Court of Australia Amendment (Criminal Jurisdiction) Act 2009* (Cth) was assented to on 16 November 2009; schedule 1 commenced on 4 December 2009: see *Federal Court of Australia Amendment (Criminal Jurisdiction) Act 2009* (Cth) s 2.

23CD Pre-trial and ongoing disclosure

…

(2) The accused must give the following to the prosecutor as soon as practicable after the accused's first pre-trial hearing before the Court in relation to the indictment:

(a) if at the trial the accused proposes to adduce supporting evidence of an alibi—notice of particulars, prepared in accordance with the Rules of Court, of that alibi;

(b) if at the trial the accused proposes to adduce supporting evidence that the accused was suffering from a mental impairment (within the meaning of section 7.3 of the *Criminal Code*)—notice of particulars, prepared in accordance with the Rules of Court, of that impairment.

Note: A party may also be required to disclose additional information as a result of other laws (for example, subsection 44ZZRO(2) of the *Trade Practices Act 1974*).

…

23CF Accused's response

(1) The notice of the accused's response to the notice of the prosecution's case must include the following:

(a) a statement setting out, for each fact set out in the notice of the prosecution's case:

(i) that the accused agrees that the fact is to be an agreed fact for the purposes of section 191 of the *Evidence Act 1995* at the trial; or

(ii) that the accused takes issue with the fact;

and, if the accused takes issue with the fact, the general basis for taking issue;

(b) a statement setting out, for each matter and circumstance set out in the notice of the prosecution's case:

(i) whether the accused takes issue with the matter or circumstance; and

(ii) if the accused does take issue—the general basis for taking issue;

(c) notice as to whether any statement by a person given under sub-paragraph 23CE(b)(i) can be tendered at the trial without the person being called as a witness at the trial;

(d) notice as to whether the accused requires the prosecutor to call witnesses to corroborate any specified surveillance evidence that was notified to the accused by the prosecutor under section 23CE;

(e) notice as to whether the accused requires the prosecutor to prove:

(i) the continuity of handling of any specified exhibits; or

(ii) the accuracy of any specified exhibits that are transcripts, summaries or charts;

that were notified to the accused by the prosecutor under section 23CE;

(f) in relation to each report given under paragraph 23CE(f), notice as to:

(i) whether the accused accepts or contests the opinions expressed in the report; and

(ii) whether the report can be tendered at trial without the expert being called as a witness at the trial;

(g) any consent that the accused gives under section 190 of the *Evidence Act 1995* in relation to:

(i) any evidence notified under section 23CE as evidence proposed to be adduced by the prosecutor; or

(ii) any other evidence relating to the trial;

(h) any consent that the accused gives under section 184 of the *Evidence Act 1995* in relation to the trial;

(k) a copy of any report, relevant to the trial, that has been prepared by an expert witness whom the accused proposes to call at the trial; and may include other matters.

(2) Paragraph (1)(a) and subparagraph (1)(b)(ii) do not require the accused to disclose details of the accused's proposed defence.[119]

8.74 Section 23CF(a) and (b)(ii) require a defendant to disclose 'the general basis for taking issue' with the facts, matters or circumstances set out in notices issued by the prosecution. This appears to be generally consistent with the requirement in some other jurisdictions for the general nature, but not the specific details, of the defence to be disclosed. The Commission notes that when those provisions were first proposed, however, they required the defendant to disclose 'the basis', rather than 'the general basis' for taking issue with the facts, matters and circumstances identified by the prosecution.[120] That proposed wording may have left the scope of the provision somewhat unclear, and it may have been significantly wider than the provision as enacted. It might have required defendants to disclose, for example, the identity of proposed witnesses (including themselves) and the substance of their intended evidence.[121]

119 *Federal Court of Australia Act 1976* (Cth) s 23CF, inserted by *Federal Court of Australia Amendment (Criminal Jurisdiction) Act 2009* (Cth) sch 1 pt 1.

120 See Federal Court of Australia Amendment (Criminal Jurisdiction) Bill 2008 (Cth) sch 1 pt 1, proposed s 23CF(a), (b)(ii).

121 That concern was also voiced by the Law Council of Australia: see [8.180] below.

New Zealand

8.75 In its 2001 report on juries in criminal trials, the Law Commission of New Zealand ('LCNZ') considered various options in relation to pre-trial disclosure and the presentation of evidence.[122] At the time that that report was prepared, New Zealand lacked a comprehensive statutory pre-trial disclosure regime.[123] The LCNZ had recommended some changes to practice in its report on criminal prosecution[124] relating to the disclosure by the defence of proposed expert evidence and notification of any alibi defence but expressly stated that this should not extend to other defences (ie, insanity, provocation, automatism, intoxication, self-defence, accident and compulsion).[125]

8.76 The New Zealand Government declined to introduce a 'full' defence disclosure regime:

> The benefits of a 'full' defence disclosure regime were considered not sufficiently convincing to warrant the costs that it would incur, both in terms of its establishment and its operation. The risk of prejudicing the principles of the presumption of innocence, the right to silence, the privilege against self-incrimination, and the burden of proof resting with the prosecution were highlighted as arguments against full disclosure by the defence, as was the traditionally adversarial nature of New Zealand's criminal justice system.[126]

8.77 The LCNZ was of the view that it was in the area of expert evidence that pre-trial disclosure would prove most advantageous, and saw no injustice to defendants in requiring pre-trial disclosure in this regard.[127] However:

> The Commission does not consider that formal notice requirements on the defence should be extended beyond alibi and expert evidence because, in practice, there are few cases in which the prosecution is not capable of anticipating the defence's position. To require defence disclosure of 'positive' defences other than alibi or expert evidence would be arbitrary, given the difficulty of distinguishing such defences from general defences. Moreover, such disclosure would create difficulties because, prior to the presentation of the prosecution case, the defence may not know whether a positive defence should be raised.[128]

8.78 After further consultation, the LCNZ concluded that there was no need for a formal or compulsory pre-trial disclosure regime. The option for the defence to admit any fact alleged by the prosecution under section 369[129] was considered to be 'an efficient and sensible means of lessening the evidence that must be presented at trial, and should be encouraged by active judicial inquiry at call-over.'[130] The LCNZ summarised the further submissions that it had received on this issue this way:

---

122 Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) ch 11.

123 Ibid [324].

124 Law Commission of New Zealand, *Criminal Prosecution*, Report 66 (2000) ch 8. See also Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) [324].

125 See Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) [324].

126 See ibid [325].

127 Ibid [326].

128 Ibid [327].

129 *Crimes Act 1961* (NZ) s 369 gives the defence the option of formally admitting any fact alleged, in which the prosecution was not required to prove that fact: Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) [323].

130 Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) 127.

> This question was included in our survey of trial practitioners … The majority indicated that they would not support any further change in this area, although a number also pointed out that the defence may choose to disclose information or make section 369 admissions of fact, and that this is a useful and responsible thing to do. The primary reason given for not supporting any further change was that it would fundamentally alter the burden of proof, which should rest entirely on the prosecution, and infringe the right to silence. Moreover, the Crown has more resources than the defence — one respondent made the point that the defence's advantage of the burden of proof balances the Crown's advantage in resourcing:
>
> > The defence is entitled to take issues as they appear at trial and to 'see how the prosecution goes' before deciding how to close. The adversarial system only works when it is balanced. The resources of the state must be balanced by the burden of proof and the defence should not be required to make it easier for the prosecution.
>
> There would also be serious practical difficulties, because it is often difficult or impossible for defence counsel to get firm instructions from the client prior to trial:
>
> > What concerns me about having a pre-trial disclosure regime is that as defence counsel you might end up by being committed to a particular line of defence and committed to conceding certain things well in advance of the trial. However much it might seem to be reasonable to have that good a grasp of the trial months in advance of the trial actually having been set down, the reality is quite different. I am sure most defence counsel start working furiously and feverishly once the trial has been set down and in the week or weeks preceding the trial, depending on how long the trial is. If a pre-trial disclosure regime has been required, then I can simply foresee the situation where as defence counsel you have conceded matters that you ultimately wished that you had not. I am not opposed to some regime where, closer to the trial date, such matters could be discussed. Although, I am still concerned that that requires revealing to the Crown details of the defence which I feel somewhat uncomfortable with.
>
> The New Zealand Law Society submitted that in most cases identification of issues is reasonably obvious to both parties and there is no pressing need for any formalisation of the process. There already exist adequate procedures for identification of issues for the jury, through the opening statements of the prosecution and defence.[131] (note omitted)

8.79 The LCNZ considered the question of pre-trial defence disclosure again in its 2005 report on criminal pre-trial processes.[132] Its conclusions and recommendations were these:

> REQUIREMENT ON DEFENDANTS TO STATE THE NATURE OF THEIR CASE
>
> Chapter 5 explains why there should be a requirement on defendants whose cases are proceeding to trial to state pre-trial the nature of their case. This means that, in addition to identifying what (if any) facts are agreed, and what (if any) evidence can be admitted by consent, they must say what issues are contested: for example, identity of the offender, an element of the offence, a positive defence, procedural error.
>
> Some defence disclosure is voluntarily occurring with increasing frequency in New Zealand. It is increasingly recognised as good practice because it facilitates the

131 Ibid [328]–[330].

132 Law Commission of New Zealand, *Criminal Pre Trial Processes: Justice Through Efficiency*, Report 89 (2005) especially ch 5.

smooth running of a case and the targeting of scarce resources. We are recommending a compulsory requirement.

The chapter discusses what the objections in principle are likely to be. Chiefly, these are the right to silence, the onus of proof, and New Zealand's adversarial (as opposed to inquisitorial) criminal justice system. In this context, we consider them unpersuasive.

The United Kingdom and Victoria have similar, but more extensive, defence disclosure requirements. In the United Kingdom it has so far not worked well: the defence bar is rigorously opposed, and the sanctions for non-compliance have not been well enforced because they are considered in most quarters to be unprincipled. We do not favour the overseas approaches.

Finally, there is a brief discussion of the distinction between disclosure of the nature of the case (which we are recommending for defence), and the evidence on which it will be based (the prosecution requirement). The Criminal Procedure Bill 2004 requires evidential defence disclosure for alibi and expert evidence, which we consider appropriate, but we do not recommend it more generally.

Recommendations

R26 Defendants who are proceeding to trial should be required by statute to disclose pre-trial the issues in dispute (for example, identity of the offender, an element of the offence, a positive defence, procedural error).

R27 Section 367(1A) *Crimes Act 1961* should be amended, to provide that defence opening statements are mandatory in jury trials.[133]

8.80 The *Criminal Disclosure Act 2008* (NZ) came into effect on 29 June 2009. As can be seen from its title, it is a single piece of legislation concerned with pre-trial disclosure in criminal trials with a stated purpose to 'promote fair, effective, and efficient disclosure of relevant information between the prosecution and the defence, and by non-parties, for the purposes of criminal proceedings.'[134] Section 3(2) of the Act contains a general overview of the disclosure regime in diagrammatic form, reproduced in Figures 8.1 and 8.2.

8.81 The defendant's principal obligations of disclosure are found in sections 22 and 23 of the Act. Under section 20, the defendant must be given written notice of these requirements by the court.

8.82 Section 22 requires defendants to give written notice of the particulars of any alibi on which they intend to rely. This notice must include the names and addresses of any witnesses to be called by the defendant for this purpose. Section 23 requires defendants to disclose to the prosecutor any brief of evidence or report to be given by any expert witness, or a summary of that brief or the conclusions of any such report.

133 Ibid *xvi–xvii*.

134 *Criminal Disclosure Act 2008* (NZ) s 3(1).

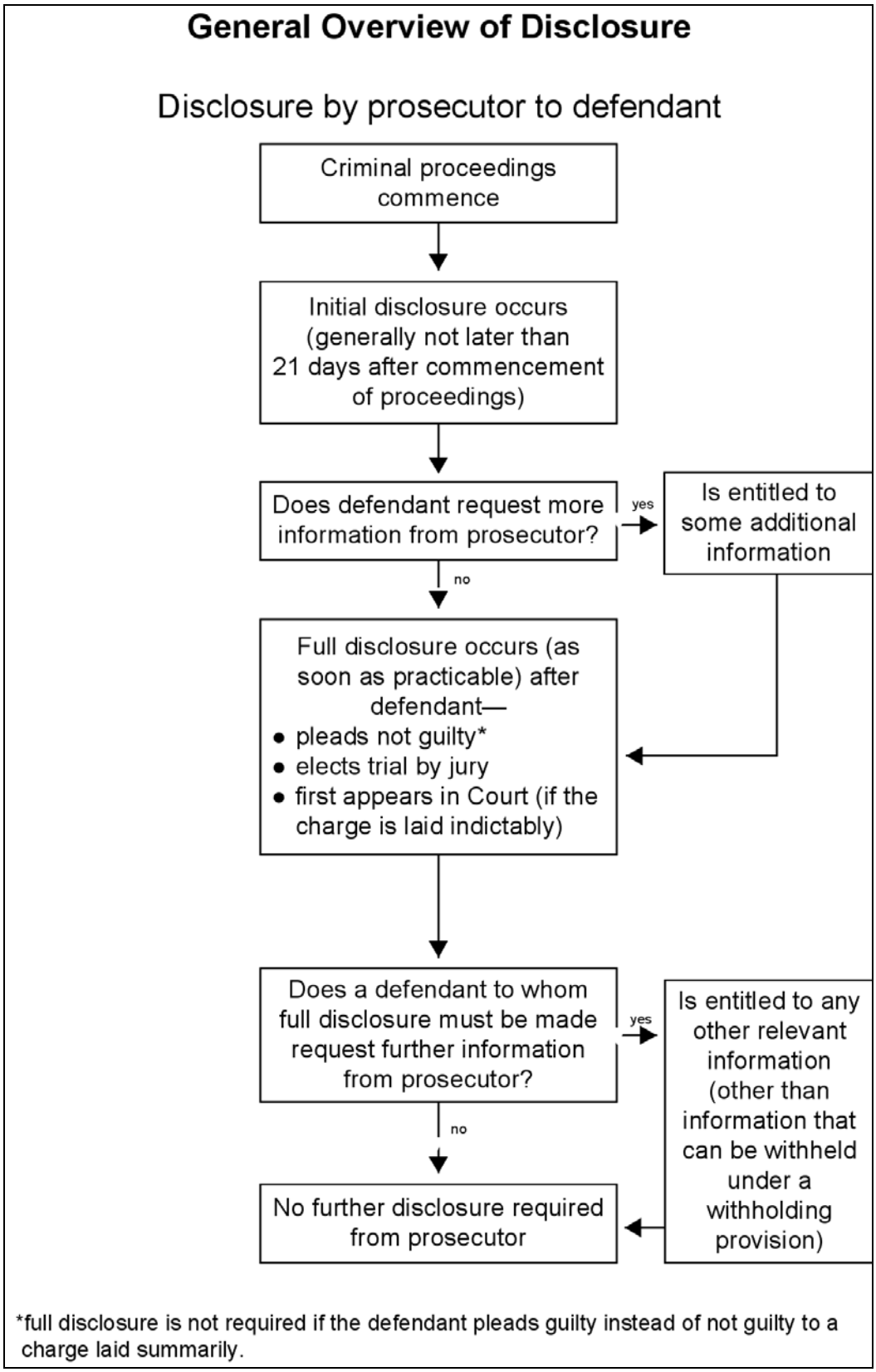
General Overview of Disclosure
Disclosure by prosecutor to defendant
Criminal proceedings commence
Initial disclosure occurs (generally not later than 21 days after commencement of proceedings)
Does defendant request more information from prosecutor?
yes
Is entitled to some additional information
no
Full disclosure occurs (as soon as practicable) after defendant—
• pleads not guilty*
• elects trial by jury
• first appears in Court (if the charge is laid indictably)
Does a defendant to whom full disclosure must be made request further information from prosecutor?
yes
Is entitled to any other relevant information (other than information that can be withheld under a withholding provision)
no
No further disclosure required from prosecutor
*full disclosure is not required if the defendant pleads guilty instead of not guilty to a charge laid summarily.

Figure 8.1

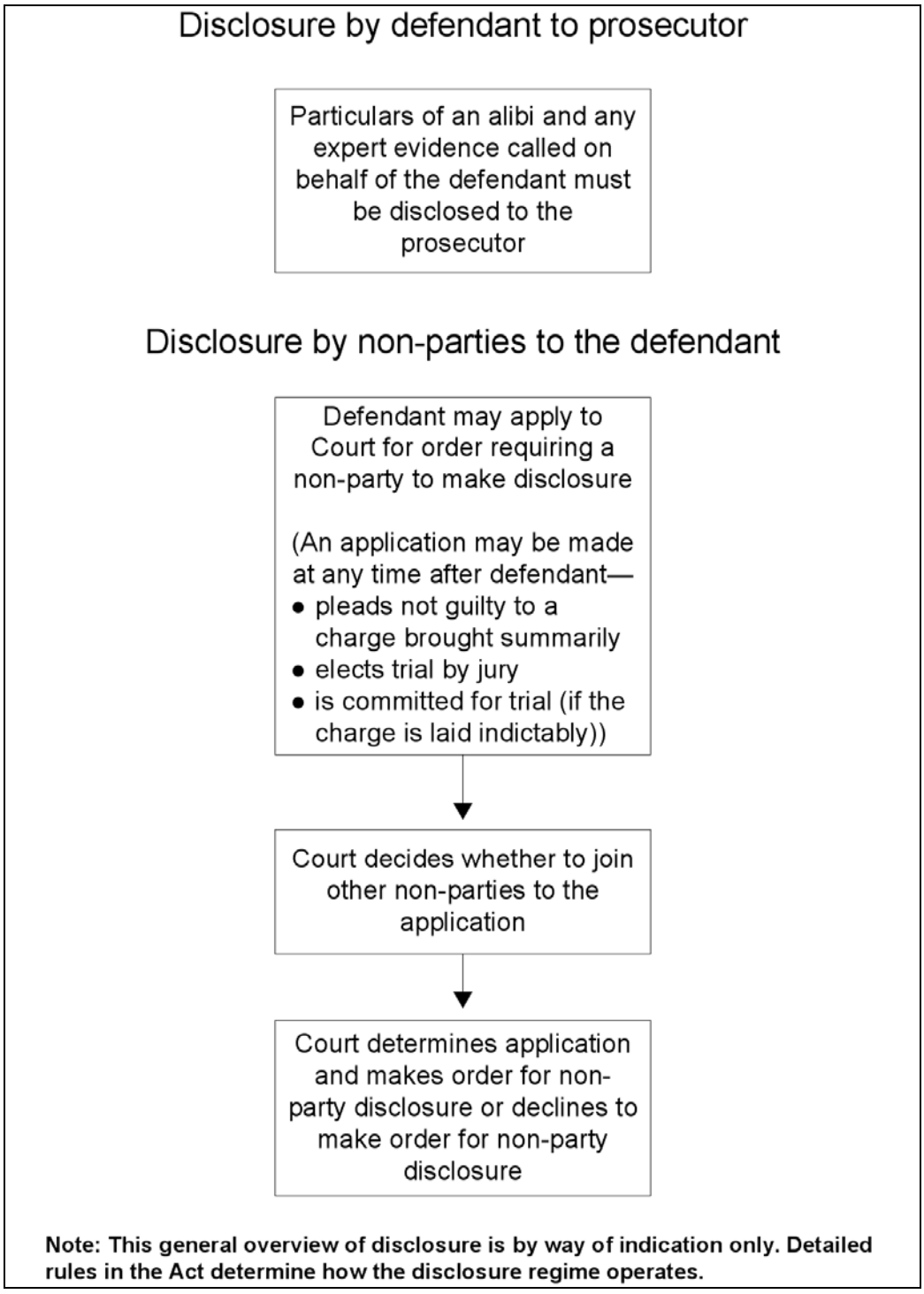
Disclosure by defendant to prosecutor
Particulars of an alibi and any expert evidence called on behalf of the defendant must be disclosed to the prosecutor
Disclosure by non-parties to the defendant
Defendant may apply to Court for order requiring a non-party to make disclosure
(An application may be made at any time after defendant—
• pleads not guilty to a charge brought summarily
• elects trial by jury
• is committed for trial (if the charge is laid indictably))
Court decides whether to join other non-parties to the application
Court determines application and makes order for non-party disclosure or declines to make order for non-party disclosure
Note: This general overview of disclosure is by way of indication only. Detailed rules in the Act determine how the disclosure regime operates.

Figure 8.2

8.83 Significantly, the legislation does not go as far as the LCNZ's recommendation for compulsory disclosure of the issues in dispute. The court has powers to set a time-table for compliance with the parties' various disclosure obligations.[135] Failure to comply may result in further directions or, if the court is satisfied that there was no reasonable explanation for the failure, the court may deal with the failure as a contempt of court.[136]

8.84 If the court is satisfied that at the trial a party has sought to lead evidence that should have been disclosed but was not, it may exclude the evidence, adjourn the trial with or without requiring the evidence to be disclosed, or admit the evidence if 'it is in the interests of justice to do so.'[137]

8.85 However, the court must not order the exclusion of evidence tendered by the defendant (whether of an alibi, as expert evidence, or otherwise) if it appears that the defendant was not given notice in accordance with the Act of its requirements but must adjourn the hearing if the prosecution requests an adjournment.[138]

England and Wales[139]

8.86 The relevant provisions in England and Wales are contained in the *Criminal Procedure and Investigations Act 1996* (Eng).[140] Prior to this coming into effect, the defendant's obligations of disclosure where confined to the familiar areas of alibi and expert evidence (although more elaborate disclosure could be ordered in complex fraud cases).[141]

8.87 The scheme of pre-trial disclosure in this Act has been described as a triumph of 'arguments based on efficiency and convenience' over principle, and as 'radically' shifting the 'axis of pre-trial disclosure by reducing the obligations on the prosecution and increasing those on the defence'.[142] The prosecution's obligations previously based on the common law were codified in this Act with the effect that they were in fact narrowed.[143]

8.88 The regime comes into effect after committal. After primary disclosure by the prosecution of any material that has not previously been disclosed or which might undermine the prosecution case,[144] defendants in indictable cases only are required to give their defence statements to the court and prosecution within 14 days of receiving

135 *Criminal Disclosure Act 2008* (NZ) s 32(1).

136 *Criminal Disclosure Act 2008* (NZ) s 32(3).

137 *Criminal Disclosure Act 2008* (NZ) s 34(2).

138 *Criminal Disclosure Act 2008* (NZ) s 34(3).

139 The 'distinctive and well-established' scheme of defence disclosure in Scotland is described briefly in Kevin Dawkins, 'Defence Disclosure in Criminal Cases' [2001] *New Zealand Law Review* 35, 58.

140 See Kevin Dawkins, 'Defence Disclosure in Criminal Cases' [2001] *New Zealand Law Review* 35, 43, 46–8; Trial Efficiency Working Group, Criminal Law Review Division, Attorney General's Department of NSW, *Report of the Trial Efficiency Working Group* (2009) 39–50.

141 Kevin Dawkins, 'Defence Disclosure in Criminal Cases' [2001] *New Zealand Law Review* 35, 43.

142 Ibid 35, 43, 46–8.

143 Trial Efficiency Working Group, Criminal Law Review Division, Attorney General's Department of NSW, *Report of the Trial Efficiency Working Group* (2009) 41.

144 *Criminal Procedure and Investigations Act 1996* (Eng) s 3(1)(a).

the prosecution's primary disclosure (or statement that there is nothing further to disclose).[145] Under section 6A:

> (1) [A] defence statement is a written statement—
>
> (a) setting out the nature of the accused's defence, including any particular defences on which he intends to rely,
>
> (b) indicating the matters of fact on which he takes issue with the prosecution,
>
> (c) setting out, in the case of each such matter, why he takes issue with the prosecution,
>
> (ca) setting out particulars of the matters of fact on which he intends to rely for the purposes of his defence, and
>
> (d) indicating any point of law (including any point as to the admissibility of evidence or an abuse of process) which he wishes to take, and any authority on which he intends to rely for that purpose.
>
> (2) A defence statement that discloses an alibi must give particulars of it, including—
>
> (a) the name, address and date of birth of any witness the accused believes is able to give evidence in support of the alibi, or as many of those details as are known to the accused when the statement is given;
>
> (b) any information in the accused's possession which might be of material assistance in identifying or finding any such witness in whose case any of the details mentioned in paragraph (a) are not known to the accused when the statement is given.

8.89 The prosecution remains under an on-going obligation of disclosure.[146]

8.90 The consequences of a failure to comply can be severe: the court or any other party may make such comment as appears appropriate and the court and jury may draw such inference as appear proper in deciding whether the defendant is guilty of the offence concerned.[147] In other words, the defendant's conduct (or that of the prosecution or a co-defendant) may be taken into account by a jury in assessing the defendant's guilt. However, a defendant cannot be convicted solely on the basis of such an inference.[148] Conduct which can trigger these consequences includes failing to disclose, late disclosure, setting out inconsistent statements in the defence statement, and advancing a defence at the trial that has not been disclosed.[149]

8.91 This is apparently the only jurisdiction in relation to which the Commission has information that goes this far. Others make it clear that no comment can be made to a

145 *Criminal Procedure and Investigations Act 1996* (Eng) s 5; Kevin Dawkins, 'Defence Disclosure in Criminal Cases' [2001] *New Zealand Law Review* 35, 45.

146 *Criminal Procedure and Investigations Act 1996* (Eng) s 7A.

147 *Criminal Procedure and Investigations Act 1996* (Eng) s 11(5).

148 *Criminal Procedure and Investigations Act 1996* (Eng) s 11(10).

149 *Criminal Procedure and Investigations Act 1996* (Eng) s 11(2)–(4); Kevin Dawkins, 'Defence Disclosure in Criminal Cases' [2001] *New Zealand Law Review* 35, 46.

jury that intimates that it can draw any inference about guilt from the defendant's compliance with pre-trial disclosure requirements.[150] The legislation in some other jurisdictions is silent on this question.[151] However, the duty to ensure a fair trial might in other circumstances require a judge to limit the extent of such comment if it purported to suggest that the defendant's guilt could be inferred from non-compliance. Comment on the conduct of unrepresented defendants may need to considered with particular care. However, the judge's leave is no longer required before comment can be made in England and Wales.

8.92 The Act also provides for preparatory hearings where 'it appears to a judge of the Crown Court that an indictment reveals a case of such complexity, a case of such seriousness or a case whose trial is likely to be of such length, that substantial benefits are likely to accrue from a hearing … before the time when the jury are sworn'.[152] A preparatory hearing may be ordered on the motion of either party or the court itself.[153] The purposes of preparatory hearings are those of:

> (a) identifying issues which are likely to be material to the determinations and findings which are likely to be required during the trial,
>
> (b) if there is to be a jury, assisting their comprehension of those issues and expediting the proceedings before them,
>
> (c) determining an application to which section 45 of the *Criminal Justice Act 2003* applies,
>
> (d) assisting the judge's management of the trial,
>
> (e) considering questions as to the severance or joinder of charges.[154]

8.93 The second of these is of clear relevance to this enquiry.

8.94 The judge's powers at a preparatory hearing include ordering the prosecutor:

- to give the court and the defendant a written case statement setting out the principal facts of the case for the prosecution, the witnesses who will speak to those facts, any exhibits relevant to those facts, any proposition of law on which the prosecutor proposes to rely, and the consequences that appear to flow from any of these matters;
- to prepare the prosecution evidence and any explanatory material in such a form as appears to the judge to be likely to aid comprehension ***by a jury*** and to give it in that form to the court and to the each defendant;

150 *Criminal Procedure Act 1986* (NSW) s 148(4); *Criminal Procedure Act 2009* (Vic) s 237(3)(a), (b)(i).

151 See *Criminal Law Consolidation Act 1935* (SA) s 285BB(3); *Criminal Procedure Act 2004* (WA) s 97(4).

152 *Criminal Procedure and Investigations Act 1996* (Eng) s 29(1). A preparatory hearing must be ordered in every case where at least one of the offences charged by the indictment against at least one of the persons charged is an offence carrying a maximum of at least 10 years' imprisonment; and it appears to the judge that evidence on the indictment reveals that conduct in respect of which that offence is charged had a terrorist connection: s 29(1C).

153 *Criminal Procedure and Investigations Act 1996* (Eng) s 29(4).

154 *Criminal Procedure and Investigations Act 1996* (Eng) s 29(2).

- and to give the court and the defendant written notice of documents the truth of the contents of which ought in the prosecutor's view to be admitted and of any other matters which in his or her view ought to be agreed.[155]

8.95 Where this is done, defendants may be ordered to:

- give the court and the prosecutor written notice of any objections that they have to the prosecutor's case statement;

- provide a written statement setting out the extent to which they agree with the prosecutor as to documents and other matters in relation to which notice has been given, and the reason for any disagreement.[156]

8.96 The defendant must be warned by the judge of the possible consequences of failing to comply with such an order.[157] Those consequences include that the judge or (with the leave of the judge) any other party may make such comment as appears to be appropriate — and the jury (or, in the case of a trial without a jury, the judge) may draw such inference as appears proper.[158] In doing any such thing, and in deciding whether to do it, the judge shall have regard to the extent of the departure or failure, and whether there is any justification for it.[159] Except in those circumstances, no part of any statement given by the defendant, or any other information relating to the defence case, may be disclosed without the consent of the defendant at any stage in the trial after the jury has been sworn.[160]

8.97 The scheme established by the 1996 Act has not been entirely successful. In 2001 its operation was evaluated by the Home Office:

> The report found a general dissatisfaction with the operation of the disclosure scheme amongst the majority of barristers, solicitors and judges. Most of the dissatisfaction related to factors such as administration, bad practice, and mistrust between the parties. This suggested problems with the implementation and management of the disclosure provisions, rather than inherent problems with the provisions themselves. The report found that, anecdotally, the average length of trials in the Crown Court had not fallen as hoped.
>
> Some of the key problems identified by the report were:
>
> - competence and or inclination of police to discharge their disclosure obligations;
>
> - inadequacy of defence case statements; and
>
> - judicial attitudes.
>
> The report also indicated that in some areas, practice had moved away from the [Act] and the pre-existing common law scheme was being applied.

155 *Criminal Procedure and Investigations Act 1996* (Eng) s 31(4), (5).

156 *Criminal Procedure and Investigations Act 1996* (Eng) s 31(6), (7).

157 *Criminal Procedure and Investigations Act 1996* (Eng) s 31(8).

158 *Criminal Procedure and Investigations Act 1996* (Eng) s 34(2).

159 *Criminal Procedure and Investigations Act 1996* (Eng) s 34(3).

160 *Criminal Procedure and Investigations Act 1996* (Eng) s 34(4).

> Prosecution disclosure
> Eighty-two percent of judges thought it was unrealistic to expect police officers to identify material which undermined the prosecution case, and there were concerns that the only person with the knowledge and skill to understand what should be disclosed was the prosecution counsel, and that provision should be made to remunerate them for this work.
>
> There were also concerns that non-sensitive material which should have been disclosed to the defence was being withheld by the prosecution.
>
> Defence disclosure
> At the time the provisions were enacted, there was widespread opposition to defence disclosure and the idea that prosecution disclosure should be linked to a statement about the nature of the defence. According to the report, this has been manifested in an unwillingness of the defence to submit meaningful defence case statements and judicial reluctance to deny defence applications for unused prosecution material; defence statements often contained little of substance about how the prosecution evidence would be challenged at trial.
>
> In the view of the writers of the Home Office report, of the matters prosecuted on indictment, 52% of the defence case statements reviewed contained either a bare denial of guilt, or did not meet the requirements of the [Act].
>
> There also appeared to be little incentive for the defence to act otherwise. Many judges appeared to be as uneasy about the [Act] as the defence and were reluctant to resist defence disclosure requests, regardless of the quality of the defence case statements.
>
> Unsurprisingly, most respondents thought that the defence case statements had not narrowed the issues at trial. The responses received from judges indicated that no judge found defence case statements useful. There were also concerns expressed by disclosure officers that it was impossible to fulfil their secondary disclosure obligations when provided with a defence statement which was without substance.
>
> Judicial attitudes
> While 59% of judges said that they would order a non-compliant defence statement to be amended, only 4% of prosecution and defence practitioners thought that most judges did so. It would seem that although judges complain that defence case statements are without substance, they do not enforce compliance with the requirements of the [Act].
>
> As mentioned above, judges appeared reluctant to resist defence disclosure requests regardless of the inadequacy of the defence case statements. The report noted that it was hard to see how any legislation could operate effectively if there was judicial reluctance to enforce its provisions.[161]

8.98 The introduction of these measures in England and Wales over a number of years has met with some strong opposition. Lord Justice Auld reported (without much sympathy for their arguments), for example, that:

> Professor Michael Zander, the dissenting member of the Runciman Royal Commission on this and two other matters, considered that to require a defendant to indicate the general nature of his defence was wrong in principle and, given the way the system works, would cause inefficiency. As to principle, his view appears to have depended on his equation of a defendant's right of silence to a right, not only

161 Trial Efficiency Working Group, Criminal Law Review Division, Attorney General's Department of NSW, *Report of the Trial Efficiency Working Group* (2009) 45–7.

to make the prosecution prove all or some of its case, but to leave it guessing until the last minute precisely what parts he requires it to prove. He said:

> '1. The most important objection to defence disclosure is that it is contrary to principle for the defendant to be made to respond to the prosecution's case until it has been presented at the trial. The defendant should be required to respond to the case the prosecution makes, not to the case it says is going to make. They are often significantly different.
>
> 2. The fundamental issue at stake is that the burden of proof lies throughout on the prosecution. Defence disclosure is designed to be helpful to the prosecution and more generally, to the system. But it is not the job of the defendant to be helpful either to the prosecution or to the system. His task, if he chooses to put the prosecution to proof, is simply to defend himself. Rules requiring advance disclosure of alibis and expert evidence are reasonable exceptions to this general principle. But, in my view, it is wrong to require the defendant to be helpful by giving advance notice of his defence and to penalise him by adverse comment if he fails to do so.'[162]

As to efficiency, his argument was that there was little or nothing that could be done to improve case management measures of this sort because of defence counsel's inefficient ways of working and their likely uncooperative attitude to any such reform, and because of a reluctance by the judiciary to enforce it. But even in 1993 both of those stands had a certain period flavour to them, treating the defendant's right to silence more as a right of non cooperation with the criminal justice process than of putting the prosecution to proof of his guilt, and a defeatist attitude[163] to the advantages to all, including the defendant, of efficient and speedy preparation for trial.[164] (notes as in original)

8.99 Lord Justice Auld pointed out that the Runciman Royal Commission had in mind 'only the barest outline when it spoke of defence disclosure' except in relation to serious fraud cases.[165] His report continues in terms that demonstrate the priority given to early identification of issues over concerns about a defendant's right to remain silent until the prosecution case has been closed at trial:

> It seems to me that the 1996 Act was logical in principle in treating the test of ultimate prosecution disclosure as dependent on its materiality to the issues in the case. Only the defendant knows for sure what issues he is going to take. They may be obvious enough to the prosecution at the stage of primary disclosure or they may be a mystery to all until the defendant gives some post-charge indication. I do not see it as an attack on the prosecution's obligation to prove its case and the defendant's right of silence that he should be required to identify the allegations or facts that he intends to put in issue. It does not require him to set out his defence other than by reference to what he disputes. If he intends to put the prosecution to proof of everything, he is entitled to do so. But if his intention is, or may be, to take issue only on certain matters, the sooner he tells the court and the prosecutor the better, so that both sides knows the battleground and its extent.
>
> … To the extent that the prosecution may legitimately wish to fill possible holes in its case once issues have been identified by the defence statement, I can understand why, as a matter of tactics, a defendant might prefer to keep his case close to his chest. But that is not a valid reason for preventing a full and fair hearing

162 Note of Dissent, paras 1 and 2, p 221

163 later manifested again in relation to Lord Woolf's Civil Justice reforms

164 The Right Honourable Lord Justice Auld, *Review of the Criminal Courts of England and Wales*, Report (2001) ch 120 [150]–[151].

165 Ibid ch 120 [152].

> on the issues canvassed at the trial. A criminal trial is not a game under which a guilty defendant should be provided with a sporting chance. It is a search for truth in accordance with the twin principles that the prosecution must prove its case and that a defendant is not obliged to inculpate himself, the object being to convict the guilty and acquit the innocent. Requiring a defendant to indicate in advance what he disputes about the prosecution case offends neither of those principles. …
>
> …
>
> In my view, there is a sound need for a defence statement as an aid to early identification of the issues and, in consequence, an efficient process and one that is fair both to the defence and to the prosecution as the representative of the public interest.[166] (notes as in original)

8.100 He made the following recommendations in relation to pre-trial disclosure:

- retention of the present 1996 Act scheme of material disclosure in particular, of two stages of prosecution disclosure under which the second stage is informed by and conditional on a defence statement indicating the issues that the defendant proposes to take at trial;
- replacement of the present mix of primary and subsidiary legislation, Code, Guidelines and Instructions by a single and simply expressed instrument setting out clearly the duties and rights of all parties involved;
- the same test of disclosability for both stages of prosecution disclosure providing in substance and, for example, for the disclosure of 'material which, in the prosecutor's opinion, might reasonably affect the determination of any issue in the case of which he knows or should reasonably expect' or, more simply but tautologically, 'material which in the prosecutor's opinion might weaken the prosecution case or assist that of the defence';
- in addition, automatic primary disclosure in all or certain types of cases of certain common categories of documents and/or of documents by reference to certain subject matters;

  …

- the requirement for a defence statement should remain as at present, as should the requirement for particulars where the defence is alibi and/or the defence propose to adduce expert evidence;
- there should be more effective use of defence statements facilitated by the general improvements to the system for preparation for trial that I have recommended, and encouraged through professional conduct rules, training and, in the rare cases where it might be appropriate, discipline, to inculcate in criminal defence practitioners the propriety of and need for compliance with the requirements;
- a clearly defined timetable for each level of jurisdiction for all stages of mutual disclosure unless the court in any individual case orders otherwise;[167]

166 Ibid ch 10 [153]–[154], [156].

167 Ibid ch 10 [184].

8.101 The Act was amended in 2003. These changes, among other matters:

- provided for a single objective test for the disclosure by the prosecution of any material that might reasonably be considered capable of either undermining the case for the prosecution against the defendant or assisting the defendant's case;

- expanded the scope of the defendant's mandatory disclosure by imposing greater specificity on the content of the defence statement, including the nature of the defence (including all particular defences that will be relied on), particulars of all matters of fact with which the defendant takes issue, the names, addresses and dates of birth of all defence witnesses other than the defendant, details of experts retained by the defendant even where their reports are not relied on; and

- removed the requirement in many cases that the prosecution seek leave of the court before commenting on a fault in the defendant's disclosure.[168]

8.102 The Act was amended again in 2008 to require defendants to set out the particulars of the matters of fact on which they intend to rely for the purposes of their defences, in addition to all the other details that they are required to disclose.[169]

Canada

8.103 Canadian pre-trial disclosure obligations for defendants are limited to advance notice of expert testimony to be introduced at trial. Although details of the defendant's proposed expert witnesses must be disclosed, their reports do not have to be disclosed until the end of the prosecution case at the trial. As this is the defendant's only obligation, sanctions are limited: the court must adjourn the trial to allow the prosecution to prepare for cross-examination of the expert witness and allow the prosecution to call or re-call any witnesses to testify on matters relating to the expert's evidence.[170]

NSWLRC's Consultation Paper

8.104 In its Consultation Paper on jury directions, the NSWLRC specifically addressed the need for pre-trial disclosure obligations to facilitate judges in giving key legal directions to the jury as part of the judge's opening remarks; without pre-trial disclosure, judges will not usually know the issues that are going to arise in the trial, making it impractical for them to give directions at the start of the trial.[171]

168 Trial Efficiency Working Group, Criminal Law Review Division, Attorney General's Department of NSW, *Report of the Trial Efficiency Working Group* (2009) 47–9.

169 See Ibid 50.

170 *Criminal Code*, RS C 1985, c 46, s 657.3(3)–(7), inserted by *Criminal Law Amendment Act, 2001* (2002, c 13). See Kevin Dawkins, 'Defence Disclosure in Criminal Cases' [2001] *New Zealand Law Review* 35, 56–7; Trial Efficiency Working Group, Criminal Law Review Division, Attorney General's Department of NSW, *Report of the Trial Efficiency Working Group* (2009) 51–2.

171 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [9.99]–[9.103].

8.105 The NSWLRC noted, however, that the existing pre-trial disclosure obligations in New South Wales, based on recommendations made by that Commission in an earlier Report, operate only in 'complex criminal trials'.[172]

8.106 The NSWLRC considered that pre-trial disclosure of the issues in the case would require, 'at a minimum', the identification by the prosecution of the elements of each of the offences charged and the identification by the defence of any elements it disputes and any positive defences to be relied upon.[173] Such obligations were endorsed in a preliminary submission made to the NSWLRC by the Office of the Director of Public Prosecutions of NSW.[174]

8.107 The NSWLRC recognised that some issues may not become apparent until later in the trial, but noted that this could be addressed by giving revised directions:

> [E]ven with such disclosure, preliminary instructions on the defence or defences may still be problematic because the issues relevant to the defence may not be crystallised or fully evident until after all the evidence has been presented. At times, an unanticipated defence may arise from the evidence. Alternatively, the defendant's instructions to his or her legal team might change when the prosecution's evidence is presented in full. The defendant may change his or her mind about testimony upon which the defence hinges.[175] This problem, if it arises, could be addressed by giving the jury revised directions on the defence or defences in the course of the trial and in the summing-up.[176] (notes in original)

VLRC's proposals and recommendations

8.108 The VLRC discussed what it saw as the benefits of early issue identification in its Consultation Paper on jury directions:[177]

> The purpose of pre-trial procedural requirements is to improve the efficiency of criminal trials. The exchange of documents can also assist the parties to clarify what the issues in the case are prior to the commencement of the trial. The judge must be aware of the issues in the case in order to properly direct the jury. Failure to identify the issues may cause the trial judge to fall into error, either by failing to direct the jury on the relevant law[178] or by directing the jury on irrelevant law.[179]
>
> In order to minimise the risk of error, it is preferable to identify relevant issues as early in the trial process as possible. In the absence of pre-trial issue identification, the judge must respond to the legal issues as they arise during the course of the trial or rely upon trial counsel to request warnings and directions where appropriate.[180] While an early understanding of the legal issues will not necessarily prevent errors occurring, preliminary consultations confirmed that a process that requires

172 Ibid [9.103]. See [8.34] above.

173 Ibid [9.100].

174 Ibid [9.101], citing Office of the Director of Public Prosecutions of NSW, *Preliminary Submission*, 3.

175 See D Watt, *Helping Jurors Understand* (Carswell, Toronto, 2007) 111.

176 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [9.103].

177 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) ch 6.

178 See, eg, *Doggett v the Queen* (2001) 208 CLR 343.

179 *R v Chai* (2002) 187 ALR 436, 441.

180 The failure of trial counsel to seek a direction, however, does not mean that the trial judge is excused from their obligation to give that direction, if it is necessary to ensure a fair trial: *Pemble v the Queen* (1971) 124 CLR 107; *Doggett v the Queen* (2001) 208 CLR 343.

> judges to respond to legal issues 'on the run' increases the risk of errors, particularly in complex trials.[181] (notes in original)

8.109 To this end, the VLRC proposed that the jury be given an agreed statement of the elements of the offence and matters in dispute at the commencement of the trial.[182]

Submissions

8.110 The greater use of pre-trial interlocutory processes was endorsed in submissions to the VLRC:

> Early identification of legal issues will assist the trial Judge in both the running and the directions to be given in a trial.
>
> - Presently, the problem is that, prior to the trial, whilst issues are sometimes identified that is not always the case and where those issues are identified they are not usually argued or determined. Ideally, the best way to overcome this problem is for jury directions issues to be argued before the trial Judge. This requires a Judge to be assigned to a case at a much earlier stage.
>
> - A list of topics relevant (or potentially relevant) to jury directions should be provided to the trial judge at an early stage by the parties. We think this helps to crystallise the issues for the parties and the judge. It also serves to shorten the time that the jury is left waiting later on. A reference to the leading authorities and relevant deposition page references would assist. This document might then assist in the formation of the 'Aide Memoire' referred to in par. 7.56 of the Consultation Paper.[183] We agree that an 'Aide Memoire' would assist in the identification of issues and should cover the elements of the offence and indicate the matters that are in dispute or alternatively those matters that aren't in dispute.
>
> - Subsection 12(2) of the *Crimes (Criminal Trials) Act 1999* [(Vic)] provides that any rulings made by a judge at a directions hearing may bind a different judge at trial. When viewed in combination with ss.5(5), these provisions could encompass jury directions issues. It is less than ideal that different judges determine different issues, but the legislation permits it, and it may suit all parties in some instances.[184] (note added)

8.111 Bernard Lindner, a member of the Criminal Bar Association, while agreeing with a greater use of pre-trial disclosure, noted a number of practical concerns, including the need for additional resources:

> Many issues of law can be anticipated. But criminal trials are not static events; they are often 'organic'. They grow. The quantum of evidence often changes — some matters may be excluded. It is not unusual for the prosecution to call additional evidence, after a Notice of Additional Evidence has been given. That may have any number of consequences — for directions, for warnings etc. Important decisions are constantly being made by both prosecution and defence both at the pre-trial stage and during a trial. At the pre-trial stage, as far as defence preparation is concerned, there is a pitiable fee paid to counsel. Case conferences and Directions hearings are poorly funded. If this stage of the criminal justice process is to be given greater

181 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [6.5]–[6.6].

182 Ibid [7.53]–[7.56], Proposal 4. See [8.115]–[8.116] below.

183 This paragraph is set out in [10.48] below.

184 Daniel Gurvich and Mark Pedley, Submission to the Victorian Law Reform Commission, 23 December 2008. The use of materials such as the Aide Memoire referred to in this submission is discussed in chapter 10 of this Report.

> priority (and I agree that it should), it is imperative to inject proper resources at it to enable the defence to properly devote the time and effort required. Without a considerable increase in 'front-end' funding of criminal trials, a less than optimal system will continue.[185] (note added)

8.112 Similarly, the greater use of pre-trial interlocutory proceedings was endorsed by the Law Reform Committee of the County Court of Victoria, but with a word of caution about practical implementation:

> The provision of a jury guide is supported. The efficacy of a proposal that it be prepared by counsel in advance depends on the early preparation of trial counsel, their co operation, and their ability or preparedness to identify what is in issue in the trial. The experience of the County Court in the use of the Criminal Trials Act to attempt to identify in advance the real issues in a trial before its commencement has been patchy. This is so despite its consistent use of the Act in its pre trial procedures, both in its less intensive case management of routine trials and its intensive, individual case management of sexual offence trials, and problem and long trials. The main reasons for the lack of early issue identification are late briefing of trial counsel on both sides, and a lack of incentive for counsel to co operate in such an exercise. There is a concern, based on experience, that a requirement that counsel produce a jury guide setting out the elements and the issues will be too often honoured in the breach. Any proposal to delay the commencement of the trial until the guide has been prepared will only add to the length of trials, and further increase in the backlog of trial. In addition, it cuts across the provision of date certainty for the giving of evidence by complainants in sexual offence trials.
>
> It is recognised these may be problems more likely to be encountered in the County Court, than in the Supreme Court. The County Court is the major trial court. It deals with the vast majority of jury trials in the State, has experienced a considerable increase in trials in recent years, and its listing practices are more aggressive, in order to keep delay to a minimum. In the Supreme Court, the combination of the smaller caseload, the nature of the trials and the greater resources available to prosecution and defence for preparing and running such trials encourage more effective early issue identification.
>
> Despite these reservations, there is support for the provision of a jury guide setting out the elements and the issues and support for any proposal which is more successful than the existing processes of the court in forcing early briefing and early preparation and cooperative communication between counsel before trial.
>
> The listing processes in the County Court, whilst keeping delay to a minimum, mean that trial judges often have little time to prepare a trial (or even read the file) before it is due to start. Preparation of a series of standardised documents in template form, setting out the elements, and making provision for the insertion of the matters in issue would assist judges, and would also assist counsel in complying with what is required.[186]

8.113 Other similar procedural changes might also enhance jury comprehension, in the view of the Law Reform Committee:

> **The [VLRC] proposes**, in addition to the provision of the jury guide, making specific provision permitting the adjourning of the trial after addresses and before delivery of the charge. It also suggests giving consideration to splitting the charge.

185 Bernard Lindner (Criminal Bar Association), Submission to the Victorian Law Reform Commission, 30 November 2008.

186 Law Reform Committee of the County Court of Victoria, Submission to the Victorian Law Reform Commission, 13 March 2009, 5–6.

Response
Although it is open at present to delay delivery of the charge after addresses, a legislative provision to that effect may assist in changing practices and expectations about the timing of the charge. It is unclear whether splitting the charge would shorten it, or assist the judge in better understanding the issues or discretionary directions before delivery of the charge. Splitting may cut across the reformulated *Alford v Magee* requirement. Early identification of the real issues in the trial, and of what discretionary directions are required to be given in the interests of a fair trial can be better achieved through discussions between the trial judge and counsel before and during the trial. A more effective means of ensuring all issues are identified and all directions are sought before addresses is to require the judge after the close of the evidence and before addresses to ensure that the issues are defined and all directions sought by the parties, or considered by the judge as necessary are raised, and ruled on.[187]

8.114 Judge MD Murphy of the County Court of Victoria submitted that 'the issues ought to be at least identified at the time of the opening addresses but that counsel should not necessarily be obliged to provide the issues in writing.[188]

VLRC's recommendations

8.115 The VLRC strongly advocated the development ***and enforcement*** of procedural rules that sought, among other matters, to identify so far as possible before the trial (and certainly before the jury is empanelled) the real issues in dispute and, therefore, the matters that the jury is likely to have to decide in order to arrive at a verdict. This would in turn assist judges and the parties in assessing what directions might or will need to be given, and what other material might usefully be placed before the jury other than the evidence itself. A note of frustration was sounded as the VLRC also catalogued the history of failure to comply with and enforce the various similar rules that had been introduced from time to time in Victoria since 1993.[189]

8.116 Indeed, this sense of frustration appears to have been a goad to the VLRC, which went so far as to recommend that a failure by legal practitioners to observe the rules relating to criminal trial procedure which resulted in the lengthening of the trial or the exacerbation of the jury's tasks should result in appropriate cases in professional censure or disciplinary action:

> 40. Legislation should provide that notwithstanding section 250 of the *Criminal Procedure Act 2009* (Vic)[190] where, after summary inquiry at the conclusion of the trial, in the opinion of the trial judge:
>
> a. the trial was unnecessarily protracted; or

187 Ibid 7.

188 Judge MD Murphy, Submission to the Victorian Law Reform Commission, 5 February 2009, 6.

189 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [6.6]–[6.26].

190 Section 250 of the *Criminal Procedure Act 2009* (Vic) reads:

> **250. Complaints about legal practitioners**
>
> If a court considers that a legal practitioner for a party has failed to comply with—
>
> (a) a requirement of Part 5.5 or an order made under Part 5.5, including an order or requirement under section 181; or
>
> (b) an order under section 404 or 410—
>
> the court may make a complaint about the legal practitioner's conduct to the Legal Services Commissioner under Chapter 4 of the *Legal Profession Act 2004*.

> b. the task of the jury made unnecessarily or unreasonably burdensome
>
> by reason of the failure of counsel for the prosecution or defence or other legal practitioners to comply with the provisions of the *Criminal Procedure Act 2009* (Vic) or the relevant Practice Direction or Practice Notes, the trial judge may send a report to this effect to the Solicitor for Public Prosecution, the Managing Director of Victoria Legal Aid or such other body as the judge deems appropriate.[191]

Changes to Criminal Procedure in NSW

NSW Trial Efficiency Working Group Report

8.117 In March 2009, the Trial Efficiency Working Group of the Criminal Law Review Division of the Attorney-General's Department of NSW issued its report which focussed in large measure on the identification of issues at trial.[192] The Working Group concluded that:

> Recent studies have indicated that criminal trials are not always conducted to best facilitate the understanding of jurors. It is the view of the Working Group that steps should be taken to enhance the comprehension of jurors. It is anticipated that improvements in jury comprehension will follow from other recommendations made in this Report in relation to the pre-trial identification of issues, the way technology is used, and the conduct of counsel.
>
> …
>
> The Working Group proposes that all parties to a criminal trial take responsibility for the early identification of issues. This will require a significant cultural change from the legal profession. The parties will be required to give early notice of information such as the list of witnesses to be called at trial; the identity of the counsel briefed to appear on behalf of the Crown/accused; whether the Crown intends to adduce evidence in the form of a summary; and whether the defence objects to the presentation of evidence in this way. Fundamental to the Working Group's recommendation is a mechanism to identify the issues to be tried. The court, either on its own initiative or on application from a party, should be able to impose an intensive case management regime where this is considered necessary. This may require the parties to engage in a pre-trial case conference and/or revised form of the existing pre-trial disclosure provisions. This will be directed at the identification of issues and effective presentation of the evidence.[193]

8.118 Its more specific recommendations included the following:

> 7. Amend the *Criminal Procedure Act 1986* to provide for three tiers of case management:
>
> o compulsory prosecution and defence disclosure of specified matters in all criminal trials;
>
> o the establishment of a system of pre-trial case conferences which may take place on the application of the parties or by initiation of the court; and

191 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) 17, [6.6]–[6.26].

192 Trial Efficiency Working Group, Criminal Law Review Division, Attorney General's Department of NSW, *Report of the Trial Efficiency Working Group* (2009).

193 Ibid 6–7.

> o intensive pre-trial case management on the application of the parties or by initiation of the court.
>
> Statutory powers should be conferred on the courts to make directions concerning the conduct and management of the trial.
>
> 8. Statutory power to be conferred on the courts to require the parties in all criminal trials to identify the issues for determination in the trial.

8.119 Although the focus of the Working Group was on the efficient management and disposition of criminal trials, many of its observations relate to, and its recommendations would affect, the way in which information is presented to the jury:

> Identification of the issues
> Working Group members agreed that insufficient efforts were being made by trial counsel to narrow the issues for trial before empanelment of the jury. This could have a number of flow-on effects, including the presentation of unimportant or uncontested evidence, difficulties for the jury in understanding the issue to which a piece of evidence was relevant, and an inability of the judge to curtail irrelevant lines of questioning or argument.
>
> Presentation of evidence
> Working Group members considered that in some cases, the prosecution had a tendency to 'over prove' matters by calling repetitive evidence, or calling non-contentious witnesses. This problem is tied to the identification of the issues, and may share a common solution.
>
> …
>
> The inefficiencies that can arise from the failure to identify the issues to be determined at trial are obvious, including an increased likelihood that evidence of little or no ultimate relevance will be called. A less obvious, but equally important effect of the failure to narrow the issues is the impact on the ability of the judge to manage the trial. It has already been mentioned that a significant inefficiency of the criminal justice system is the lack of adequate legislative authority enabling judges to curtail irrelevant cross-examination or repetitive legal argument. However, even if such authority were to be introduced, it would be impossible for judges to exercise that authority if the relevant issues have not been identified before the trial.
>
> Related to the failure of parties to define the issues at trial is the calling of non-contentious witnesses. The Commonwealth DPP … identified the calling of non-contentious witnesses as a significant contributor to trial inefficiency. These witnesses include those who are being relied upon to support surveillance evidence or to establish the continuity of evidence. This concern was shared by the Working Group which also expressed the view that the prosecution sometimes 'over proved' cases by calling repetitive evidence or evidence of very marginal importance. To some degree this is attributable to the increasing size of police briefs, which in turn reflects the increasing complexity of forensic and other evidence. This increasing complexity only heightens the need for careful management of the trial process given its impact on the length of trials and on the trial experiences of jurors. [194]

8.120 The Working Group ultimately proposed a three-tiered approach to reform of criminal trial procedure.

194 Ibid 18, 75.

8.121 The first step is the pre-trial exchange of information.[195] When the prosecution files the indictment, it should also file and serve a disclosure document that:

- meets the requirements of section 138 of the *Criminal Procedure Act 1986* (NSW), which are currently imposed only where there has been an order for pre-trial disclosure;
- identifies the prosecutor to appear at the trial (in order to encourage the early briefing of counsel); and
- indicates whether the prosecution intends to lead evidence in summary form[196] in order to encourage an early consideration of the way in which the prosecution will present its evidence at the trial.

8.122 The defendant would be required to file and serve a defence response within 28 days that would:

- identify the legal representative proposed to appear at the trial;
- specify which witnesses will be required for cross-examination at the trial;
- notify any consent by the defendant to the admission into evidence of witness statements or documentary summaries; and
- comply with the current requirements for notice of alibi and the defendant's intention to lead evidence of substantial mental impairment.

8.123 The matter will then be listed before the court.

> Estimates of likely trial length will be given and, in most cases, a date for the beginning of the trial set if this has not already occurred. Both parties will be required to confirm that the compulsory disclosure has occurred and, in most cases, no additional pre-trial case management will be required. Even if the compulsory disclosure has not occurred, the court may proceed to trial without further management.
>
> Alternatively, non-compliance with the compulsory disclosure requirements, or a view that further disclosure is required in the particular circumstances, may lead the court to conclude that a higher level of court-ordered case management is required.
>
> The aim of each of the procedures is to ensure that the parties and the court are fully cognisant of the facts and legal issues by the time the jury is empanelled. This is considered critical if trials are to run efficiently. It is important therefore that judges in all criminal trials, at the commencement of the trial, be given a statutory power to ensure that the parties have identified the issues in dispute.[197]

8.124 The second tier proposed by the Working Group is higher-level case management.[198] Either on its own motion or that of a party, the court could order either a pre-

195 See ibid 79–81.

196 Under *Evidence Act 1995* (NSW) s 50.

197 Trial Efficiency Working Group, Criminal Law Review Division, Attorney General's Department of NSW, *Report of the Trial Efficiency Working Group* (2009) 81.

198 Ibid 81–6.

trial conference or an amended version of the pre-trial disclosure scheme set out in the legislation, which is the third tier.

8.125 The latter option is intended to circumvent the problems associated with the high threshold of 'complexity' required before the mandatory statutory scheme is enlivened. The Working Group envisages that it would apply after a failure to comply with the compulsory scheme, after a failed pre-trial conference or in any case where the issues require more intensive court intervention.[199] Nothing could be ordered that would go beyond the compulsory scheme, which would therefore represent a high-water mark in relation to the scope of disclosure.

8.126 The Working Group does not propose imposing 'an obligation on the defence to disclose its case, although in many instances disclosure of those aspects of the prosecution case that are disputed will indirectly reveal the defence case.'[200] However, its report specifically noted some disquiet among members of the Taskforce on this issue:

> Some members of the Taskforce consider that imposition of an explicit obligation on the defence to disclose the defence case conflicts with the fundamental accusatorial system of criminal procedure in this country: *RPS v The Queen* [2000] HCA 3; (2000) 199 CLR 620 at [22]–[28]; *Azzopardi v R* [2001] HCA 25; (2001) 205 CLR 50 at [34]; *Dyers v R* [2002] HCA 45; (2002) 210 CLR 285 at [9]–[10], [52], [191]; *MWJ v R* [2005] HCA 74; (2005) 80 ALJR 329 at [41].[201]

8.127 The Working Group also recommended that:

- the rule under section 130A of the *Criminal Procedure Act 1986* (NSW) that one judge's pre-trial rulings in sexual offence cases are binding on the trial judge be extended to all criminal cases;[202] and
- section 50 of the *Evidence Act 1995* (NSW) be amended to permit a party to adduce a summary document of the evidence of a witness where the admission of that summary would not result in unfair prejudice to any party in the proceedings.[203]

8.128 The Working Group's reform proposals also cover sanctions for non-compliance.[204] The Working Group noted the apparent reluctance of the judiciary in Victoria and England and Wales to permit adverse comments to be made to a jury about defendants' non-compliance with their disclosure obligations, and rejected the use of such comment as a sanction for a failure to comply.[205] It also rejected a statutory prohibition on the admission of prosecution evidence outside the time permitted for prosecution disclosure.[206] The Commission can foresee, however, that concerns about defendants' failure to make proper pre-trial disclosure could well arise.

199 Ibid 82–3.

200 Ibid 84.

201 Ibid n 132.

202 Ibid 84–5.

203 Ibid 86.

204 See Ibid 87–8.

205 Ibid 88.

206 Ibid.

Criminal Procedure Amendment (Case Management) Act 2009 (NSW)

8.129 The NSW Government introduced the Criminal Procedure Amendment (Case Management) Bill 2009 in October 2009 to implement those recommendations of the Working Group that required statutory intervention. The Bill was assented to on 14 December 2009, but has not yet commenced.[207] The purpose of the amending legislation is to replace the existing Part 3, Division 3 of the *Criminal Procedure Act 1986* (NSW) with a new Division that will provide for multi-tier case management of criminal cases involving a more comprehensive pre-trial disclosure regime. Its functions were described on its introduction into Parliament in this way, from which it is clear that the NSW Parliament's focus was on case management or the 'administration of justice':

> … there are indications that criminal trial durations in the State have been trending upwards in the last 10 years. This general upward trend in New South Wales is not of itself a cause for concern. The duration of criminal trials has increased drastically in all Australian jurisdictions in recent decades. Gone are the days when a murder trial could be conducted in under a week. For the most part, there are good reasons for this. Advances in technology have resulted in forensic evidence that is greater in both volume and complexity than in years gone by, and the rapid adoption of electronic communication in the last 20 years has resulted in an exponential increase in the amount of electronic evidence that is adduced in criminal trials.
>
> However, not all causes of increased trial durations can be said merely to reflect scientific progress, and steps should be taken to provide mechanisms to minimise unnecessary delays in trials, whatever their cause. Further, steps should be taken to manage the impact of the volume of technical evidence on the duration of criminal trials, as this volume is only likely to increase with further advances in technology. With these issues in mind, the Government formed the Trial Efficiency Working Group, made up of members of the judiciary and senior representatives of the legal profession from both sides of criminal practice, and government and non-government bodies, to consider the causes of delay in criminal trials and to propose possible solutions. This bill seeks to implement those recommendations of the working group that require legislative change, and is the result of discussion and agreement between the Chief Judge at Common Law of the Supreme Court of New South Wales, the Chief Judge of the District Court, the Director of Public Prosecutions, and the Senior Public Defender on the best way to give effect to those recommendations.
>
> The bill replaces part 3, division 3 of the Criminal Procedure Act 1986, which contains provisions relating to pre-trial disclosure in complex trials, with new provisions that provide for multiple tiers of case management. The first level is the mandatory exchange of notices between the prosecution and defence prior to the commencement of the trial. These notices will comprise non-sensitive information about each party's case, and in most matters no further case management will be required beyond the exchange of notices. The amendments recognise that the majority of criminal trials do not require substantial case management. Most trials are straightforward affairs and it is not the intention of the Government to impose unnecessary red tape on comparatively simple cases. Rather, the focus is on those criminal trials that would benefit from pre-trial case management, due to the complexity of the relevant issues, the volume of evidence involved, or for other reasons that are apparent to the courts.
>
> In less straightforward matters the court will be able to order intermediate levels of case management, in the form of pre-trial hearings and pre-trial conferences. The purpose of the hearings and conferences will be to determine issues such as the

207 Parliament of New South Wales, 'Current Session Bills (by Bill Title) <http://www.parliament.nsw.gov.au/prod/parlment/nswbills.nsf/V3BillsListCurrent> at 1b December 2009.

admissibility of evidence prior to the empanelment of the jury. At the highest level of case management courts will be able to order pre-trial disclosure, requiring the defence to give a more detailed response to the initial prosecution notice. This response will not require the defence to disclose its case, although the defence will be required to identify those parts of the prosecution case as outlined in the initial prosecution notice that are in dispute, and the prosecution evidence that will be the subject of an objection, among other things.

Courts may refuse to admit evidence where it was not disclosed to the other party in accordance with the requirements for pre-trial disclosure. Similarly, courts may refuse to admit evidence from an expert witness where a copy of a report by the expert witness was not provided to the other party in accordance with the pre-trial disclosure requirements. Where a court allows the admission of such evidence, and doing so would prejudice the case of the other party, the court may grant an adjournment to the affected party.

A court is currently able to order a similar form of pre-trial disclosure under section 136 of the Criminal Procedure Act where, having regard to the likely length of the trial, the nature of the evidence to be adduced at the trial, or the legal issues likely to arise at the trial, the court is satisfied that the trial will be complex.

In practice, however, the provisions were very rarely invoked, particularly in the District Court, and the working group formed the view that the test for identifying complex criminal trials was unnecessarily restricting the application of section 136. A key distinction of the new pre-trial disclosure provisions will be that a court will be able to order them in any case where it would be in the interests of the administration of justice to do so, rather than applying the existing complex criminal trial test. The higher tiers of case management do not merely represent escalating responses to failures by one or both of the parties to comply with the lower tiers, although it is open to the courts to utilise them in this fashion. Where it becomes immediately apparent to the court that a case would benefit from pre-trial disclosure, it will be able to make relevant orders without first needing to conduct pre-trial hearings or conferences.

In addition to these pre-trial measures, courts will be given a general power to manage the trial on or after its commencement. The power will allow the court to make such orders, determinations and findings, or give directions or rulings, as it thinks appropriate for the efficient management and conduct of the trial. This will include making orders for disclosure that were made or could have been made prior to the commencement of the trial under the proposed amendments. Unexpected and unnecessary delays can arise during the course of a trial, whether due to the nature of the evidence involved, the conduct of the parties, or other factors. This power will allow a judge to deal with these situations regardless of whether pre-trial case management was ordered in that case.

The aim of the bill is to increase the efficiency of the trial process and it does so by introducing a number of mechanisms which will give those involved the means to identify and resolve issues at the beginning of a matter rather than during the trial itself. This will also assist members of the judiciary in undertaking their role in the trial by allowing them to be informed early in the trial process of the relevant issues. For these efficiencies to be achieved it will need the profession to embrace the changes and fully utilise the procedures that have been made available. In this regard, the Attorney General has been greatly assisted by the Trial Efficiency Working Group, which has assisted in identifying what can usefully be introduced and used by the profession and the judiciary.[208]

208 New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 October 2009 (Barry Collier), 18869.

8.130 At the first mention of the proceedings, the court may give directions as to the future conduct of the case, including directions in relation to the giving of the prescribed notice by the prosecution and the prescribed response by the defendant.[209] New section 137 sets out the contents of the notice of the prosecution case that must be given to the defendant. New section 138 requires the defendant to give notice of the following matters in response:

> (a) the name of any Australian legal practitioner proposed to appear on behalf of the accused person at the trial,
>
> (b) notice of any consent that the accused person proposes to give at the trial under section 190 of the *Evidence Act 1995* in relation to each of the following:
>
> (i) a statement of a witness that the prosecutor proposes to adduce at the trial,
>
> (ii) a summary of evidence that the prosecutor proposes to adduce at the trial,
>
> (c) a statement as to whether or not the accused person intends to give any notice under section 150 (Notice of alibi),
>
> (d) a statement as to whether or not the accused person intends to give any notice under section 151 (Notice of intention to adduce evidence of substantial mental impairment).

8.131 The court may order the parties to attend a pre-trial hearing that may cover any of the following issues:

> (a) hear and determine an objection to the indictment,
>
> (b) order the holding of a pre-trial conference under section 140,
>
> (c) order pre-trial disclosure by the prosecutor or the accused person under section 141,
>
> (d) give a direction under section 145(3),
>
> (e) give a ruling or make a finding under section 192A of the *Evidence Act 1995* as if the trial had commenced,[210]
>
> (f) hear and determine a submission that the case should not proceed to trial,
>
> (g) give a ruling on any question of law that might arise at the trial.[211]

---

209 New s 136: *Criminal Procedure Amendment (Case Management) Act 2009* (NSW) Schedule 1.

210 *Evidence Act 1995* (NSW) s 192A reads:

> **192A Advance rulings and findings**
>
> Where a question arises in any proceedings, being a question about:
>
> (a) the admissibility or use of evidence proposed to be adduced, or
>
> (b) the operation of a provision of this Act or another law in relation to evidence proposed to be adduced, or
>
> (c) the giving of leave, permission or direction under section 192,
>
> the court may, if it considers it to be appropriate to do so, give a ruling or make a finding in relation to the question before the evidence is adduced in the proceedings.

8.132 The sting comes in new section 139(6): except with the leave of the court, a party to proceedings may not raise a matter referred to in sub-sections 139(3)(a) or (e) at trial if a pre-trial hearing was held in the proceedings and the matter was not raised at the pre-trial hearing. Thus either party may find itself constrained at trial on certain evidentiary matters that could have been raised at a pre-trial hearing, if such a hearing was held. Leave will not be granted under sub-section 139(6) 'unless the court is of the opinion that it would be contrary to the interests of justice to refuse leave to raise the matter concerned.'[212]

8.133 Under the amended legislation, the court may order a pre-trial conference to be held at any time after the indictment has been filed.[213] A principal function of this conference is to identify 'areas of agreement and disagreement between the accused person and the prosecutor regarding the evidence to be admitted at the trial'.[214] Under new s 140(10), except with the leave of the court, a party to proceedings may not object to the admission of any evidence at trial if the pre-trial conference form indicates that the parties have agreed that the evidence is not in dispute. Leave is not to be granted under sub-section (10) unless the court is of the opinion that it would be contrary to the interests of justice to refuse leave.[215]

8.134 Further disclosure may be ordered by the court on the motion of a party or on its own initiative but only 'if it would be in the interests of the administration of justice to do so'.[216] Under this provision, the prosecution may be ordered to produce a copy of any information, document or other thing in its possession that would reasonably be regarded as adverse to the credit or credibility of the accused person, and a list identifying the statements of those witnesses who are proposed to be called at the trial by the prosecutor, in addition to any matter that it is already obliged to produce under new section 137.[217]

8.135 The defence response, if ordered 'in the interests of the administration of justice' under new section 141, 'is to contain the following':

> (a) the matters required to be included in a notice under section 138,[218]
>
> (b) a statement, in relation to each fact set out in the statement of facts provided by the prosecutor, as to whether the accused person considers the fact is an agreed fact (within the meaning of section 191 of the *Evidence Act 1995*) or the accused person disputes the fact,
>
> (c) a statement, in relation to each matter and circumstance set out in the statement of facts provided by the prosecutor, as to whether the accused person takes issue with the matter or circumstance as set out,
>
> (d) notice as to whether the accused person proposes to dispute the admissibility of any proposed evidence disclosed by the prosecutor and the basis for the objection,

211 New s 139(3): *Criminal Procedure Amendment (Case Management) Act 2009* (NSW) Schedule 1.

212 New s 139(7): *Criminal Procedure Amendment (Case Management) Act 2009* (NSW) Schedule 1.

213 New s 140(1): *Criminal Procedure Amendment (Case Management) Act 2009* (NSW) Schedule 1.

214 New s 140(9)(a): *Criminal Procedure Amendment (Case Management) Act 2009* (NSW) Schedule 1.

215 New s 140(11): *Criminal Procedure Amendment (Case Management) Act 2009* (NSW) Schedule 1.

216 New s 141(1): *Criminal Procedure Amendment (Case Management) Act 2009* (NSW) Schedule 1.

217 New s 142: *Criminal Procedure Amendment (Case Management) Act 2009* (NSW) Schedule 1.

218 See [8.130] above.

(e) if the prosecutor disclosed an intention to adduce expert evidence at the trial, notice as to whether the accused person disputes any of the expert evidence and which evidence is disputed,

(f) a copy of any report, relevant to the trial, that has been prepared by a person whom the accused person intends to call as an expert witness at the trial,

(g) if the prosecutor disclosed an intention to adduce evidence at the trial that has been obtained by means of surveillance, notice as to whether the accused person proposes to require the prosecutor to call any witnesses to corroborate that evidence and, if so, which witnesses will be required,

(h) notice as to whether the accused person proposes to raise any issue with respect to the continuity of custody of any proposed exhibit disclosed by the prosecutor,

(i) if the prosecutor disclosed an intention to tender at the trial any transcript, notice as to whether the accused person accepts the transcript as accurate and, if not, in what respect the transcript is disputed,

(j) notice as to whether the accused person proposes to dispute the authenticity or accuracy of any proposed documentary evidence or other exhibit disclosed by the prosecutor,

(k) notice of any significant issue the accused person proposes to raise regarding the form of the indictment, severability of the charges or separate trials for the charges,

(l) notice of any consent the accused person proposes to give under section 184 of the *Evidence Act 1995*.[219] (note added)

8.136 It is relevant to note that this does not extend disclosure by a defendant to statements of the general nature of any defences to be raised, except to the extent that they are required by new section 138, which relevantly mentions only notices of alibi and of intention to adduce evidence of substantial mental impairment.[220]

8.137 If ordered 'in the interests of the administration of justice', the prosecution response to the defence response 'is to contain the following':

(a) if the accused person has disclosed an intention to adduce expert evidence at the trial, notice as to whether the prosecutor disputes any of the expert evidence and, if so, in what respect,

(b) if the accused person has disclosed an intention to tender any exhibit at the trial, notice as to whether the prosecutor proposes to raise any issue with respect to the continuity of custody of the exhibit,

(c) if the accused person has disclosed an intention to tender any documentary evidence or other exhibit at the trial, notice as to whether the prosecutor proposes to dispute the accuracy or admissibility of the documentary evidence or other exhibit,

(d) notice as to whether the prosecutor proposes to dispute the admissibility of any other proposed evidence disclosed by the accused person, and the basis for the objection,

219 New s 143: *Criminal Procedure Amendment (Case Management) Act 2009* (NSW) Schedule 1.

220 See [8.130] above.

(e) a copy of any information, document or other thing in the possession of the prosecutor, not already disclosed to the accused person, that might reasonably be expected to assist the case for the defence,

(f) a copy of any information, document or other thing that has not already been disclosed to the accused person and that is required to be contained in the notice of the case for the prosecution.[221]

8.138 The parties' disclosure requirements are on-going until the conclusion of the proceedings.[222]

8.139 The court may waive any of the pre-trial disclosure requirements on such conditions (if any) that it thinks fit.[223]

8.140 The sanctions for non-compliance are set out in proposed section 146:

146 Sanctions for non-compliance with pre-trial disclosure requirements

(1) **Exclusion of evidence not disclosed**

The court may refuse to admit evidence in proceedings that is sought to be adduced by a party who failed to disclose the evidence to the other party in accordance with requirements for pre-trial disclosure imposed by or under this Division.

(2) **Exclusion of expert evidence where report not provided**

The court may refuse to admit evidence from an expert witness in proceedings that is sought to be adduced by a party if the party failed to give the other party a copy of a report by the expert witness in accordance with requirements for pre-trial disclosure imposed by or under this Division.

(3) **Adjournment**

The court may grant an adjournment to a party if the other party seeks to adduce evidence in the proceedings that the other party failed to disclose in accordance with requirements for pre-trial disclosure imposed by or under this Division and that would prejudice the case of the party seeking the adjournment.

(4) **Application of sanctions**

Without limiting the regulations that may be made under subsection (5), the powers of the court may not be exercised under this section to prevent an accused person adducing evidence unless the prosecutor has complied with the requirements for pre-trial disclosure imposed on the prosecution by or under this Division.

8.141 The effect of these amendments is to be reviewed as soon as possible after two years from the date of their commencement, but only to determine if they have been effective in reducing delays and their cost impacts.[224]

221 New s 144: *Criminal Procedure Amendment (Case Management) Act 2009* (NSW) Schedule 1.

222 New s 147: *Criminal Procedure Amendment (Case Management) Act 2009* (NSW) Schedule 1.

223 New s 148: *Criminal Procedure Amendment (Case Management) Act 2009* (NSW) Schedule 1.

224 New s 314A: *Criminal Procedure Amendment (Case Management) Act 2009* (NSW) Schedule 1.

8.142 The Bill was reviewed by the NSW Parliament's Legislation Review Committee. The Committee noted the differences between the pre-trial disclosure regime before and after the amendments this way:

> The major difference with the new pre-trial disclosure provisions is that a court will be able to order them in any case where it would be in the interests of the administration of justice to do so, rather than applying the existing complex criminal trial test. Schedule 1[3] substitutes section 130A of the principal Act to extend its application to all proceedings on indictment, not just sex offences. All orders made during the course of a trial, not just pre-trial orders, will be binding on a subsequent trial judge.[225]

8.143 The Committee's main concern was the impact of the amendments on civil liberties:

> 22. The Committee notes that the general debate about pre-trial disclosure and the specific debate about compulsory defence disclosure, had a long history in NSW and in Australia, as far back as in the mid-1980s. Pre-trial disclosure had been considered by the NSW Law Reform Commission on a number of occasions.
>
> 23. The Committee also notes that the main argument against defence disclosure focuses on principles such as the right to silence, onus of proof and the presumption of innocence.
>
> …
>
> 25. Under the Bill, clause 146 provides the sanctions for non-compliance with pre-trial disclosure requirements. Together with clauses 143 and 145, this may undermine the principle that the prosecution usually carries the onus of proof and, that the failure by the defendant to meet the disclosure requirements may lead to the undermining of the presumption of innocence.
>
> 26. The Committee observes that both the SCAG Working Group on Criminal Trial Procedure and the SCAG Deliberative Forum had opposed the introduction of formal sanctions for breaches of or non-compliance of disclosure requirements and instead, preferred a sentencing discount scheme as an incentive for co-operation.[226]
>
> 27. However, the Committee also considers the recommendations of the NSW Law Reform Commission in its Report 95 on The Right To Silence (2000), which recommended judges be given a discretion to impose consequences for nondisclosure including a discretion to refuse to admit material not disclosed in accordance with the requirements, and a discretion to grant an adjournment to a party whose case would be prejudiced by material introduced by the other party which was not disclosed in accordance with the requirements.
>
> 28. Clause 146 (3) provides [for] the court to grant an adjournment to a party if the other party seeks to adduce evidence in the proceedings that the other party failed to disclose in accordance with pre-trial disclosure requirements. The Committee further notes that under clause 148, the court, by order, may also waive requirements of the pre-trial disclosure that apply under Division 3 of the Bill.

225 Legislation Review Committee, Parliament of NSW Legislative Assembly, *Legislation Review Digest*, No 15 of 2009, 16.

226 Gareth Griffith, Briefing Paper No. 12/2000, Executive Summary.

> **29. The Committee, therefore, is of the view that clauses 143, 145 and 146 potentially undermine the right to silence, onus of proof or the presumption of innocence notwithstanding that clause 148 enables discretion for the courts to waive any requirements of the pre-trial disclosure requirements under Division 3.**
>
> **30. The Committee also notes the relevant reports of the SCAG Working Group on Criminal Trial Reform, the SCAG Deliberative Forum, the Law Reform Commission of Western Australia and the NSW Law Reform Commission during the period of 1999 and 2000, which had recommended reciprocal pre-trial disclosure for the prosecution and the defence. Accordingly, the Committee does not consider the Bill as unduly trespassing on individual rights and liberties.**[227] (notes and emphasis in original)

The Issues Paper

8.144 In its Issues Paper, the Commission specifically sought submissions on the extent to which an early exploration of the issues for the trial might usefully be expanded.[228]

Submissions

8.145 Only two of the respondents to the Commission's Issues Paper addressed this issue.

8.146 The greater use of pre-trial directions was endorsed by a judge of the District Court of Queensland.[229]

8.147 A Supreme Court judge submitted that there was merit in considering a regime of greater pre-trial disclosure on the part of defendants, though the judge appreciated that this was unlikely to be popular with the legal profession.[230] The judge noted that pre-trial disclosure was already required in relation to alibis and expert evidence.[231] However, the judge pointed out that the requirement for defendants to give notice of their proposed expert evidence is triggered when they form the intention to adduce that evidence, and that some defence counsel, cynically or otherwise, postponed giving that notice until very late, even during the trial, on the basis that the defendant had not yet made the decision to call that evidence.[232]

The Discussion Paper

8.148 The merits and possible features of a compulsory pre-trial disclosure regime were discussed in detail in chapter 3 of the Commission's Discussion Paper.

---

227 Legislation Review Committee, Parliament of NSW Legislative Assembly, *Legislation Review Digest*, No 15 of 2009, 19–20.

228 Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [8.12].

229 Submission 6.

230 Submission 7.

231 See Criminal Code (Qld) ss 590A, 590B respectively.

232 Submission 7.

8.149 The Commission's tentative view was that the presentation of directions, warnings and all other information to the jury (including the evidence) would be improved by the early identification — wherever possible, before the trial itself — of all contentious issues of law and fact, and of the issues that the jury would be likely to be asked to determine. It noted, however, that some of these matters could not necessarily be resolved or even fully outlined before trial, especially where it would involve defendants disclosing whether they intend to give evidence either personally or (unless specifically required by statute) from other witnesses on any specified issue or generally.[233]

8.150 To that end, the Commission proposed a strengthened regime of pre-trial disclosure in Queensland. As there are already significant obligations on the prosecution, the main changes would fall on defendants, but the regime that the Commission proposed was more limited than those applying in some other jurisdictions.

8.151 It was clear to the Commission (and remains clear) that the courts must retain final control over the implementation of any of these procedures in each case to which the regime would apply to ensure flexibility, fairness and that unnecessary steps could be dispensed with. The Trial Efficiency Working Group of the Criminal Law Review Division of the Attorney General's Department of NSW noted that:

> It is not the intention of the Working Group that the implementation of its recommendations result in excessive and unnecessary pre-trial management of routine, and generally short, criminal trials. There should be sufficient flexibility in the use by trial judges of some, or all, of the proposed and existing pre-trial management tools to cater for every trial within the spectrum. It would be counter-productive to institute a pre-trial management regime that significantly increased demand on judicial resources and/or contributed to delay between committal and trial. There is no reason to suppose that the more straightforward trial management tools, such as the identification of the issues in dispute and directions allowing for the presentation of evidence in summary form, cannot be employed on the morning of the first day of trial. Of course, in more lengthy and complex matters, it may be appropriate to devote judicial resources to pre-trial hearings so that the jury's time is more efficiently utilised.[234]

8.152 The Commission considered that a strengthened regime of pre-trial issue identification should be instituted, and sought further submissions on the details of such a regime.

8.153 The Commission's provisional view was that this regime should be compulsory for both the prosecution and defendants, recognising that in practice this may represent a significant change in approach for defendants and their lawyers, but not for prosecutors. However, the Commission advocated that this regime should be mandatory — though the courts should retain a proper discretion to moderate or waive the precise requirements to meet the demands of any particular case — for at least two reasons:

- to reflect the importance of proper pre-trial case management; and
- to reflect that the point of departure is that proper disclosure should be given in all cases and that any moderation or waiver by the courts should be exceptional and take into account unrepresented defendants and, for

233 Queensland Law Reform Commission, *A Review of Jury Directions*, Discussion Paper WP67 (2009) [3.125]–[3.141].

234 Trial Efficiency Working Group, Criminal Law Review Division, Attorney General's Department of NSW, *Report of the Trial Efficiency Working Group* (2009) 16.

example, the straight-forward nature of a particular case that does not warrant a full array of pre-trial disclosure.

8.154 The Commission made the following proposal, on which it sought further submissions:

3-1 Chapter 62 of the Criminal Code (Qld) should be amended to include a pre-trial disclosure regime that has the following features:

(a) The regime of pre-trial disclosure should apply to all parties in any trial for an indictable offence, and should provide for a timetable for the completion of pre-trial interlocutory steps, subject to any other order of the court.

(b) In other criminal cases, the court should retain the power to hold pre-trial directions hearings on its own motion or the motion of any party. The court should have the power at any such pre-trial directions hearing to make directions in similar terms to the compulsory pre-trial disclosure regime for trial on indictable offences.

(c) The prosecution should have the initial obligations to provide disclosure of the material that it is already required to disclose under sections 590AA to 590AX of the Criminal Code (Qld). Any other disclosure obligations, such as a statement of the facts, matters and circumstances relied by the prosecution, ought to be given statutory effect in this regime.

(d) The prosecution's obligations of disclosure of all information that is in any way material to the case should be on-going until the end of the trial.

(e) The prosecution should have the right to serve on each defendant a notice requiring the defendant to admit certain facts that the prosecution considers are not or cannot be properly in dispute, and requiring the defendant to waive the requirement that certain witnesses be called for the sole purpose of proving formal matters not in dispute.

(f) The pre-trial disclosure regime should require defendants to disclose the general nature of their defences, which issues or facts asserted by the prosecution are in dispute, and which witnesses to be called by the prosecution for the sole purpose of proving formal matters can be dispensed with.

(g) The pre-trial disclosure regime under the Criminal Code (Qld) should never require defendants to state whether they intend to give evidence themselves or to lead evidence, or to identify any witnesses whom they intend to call, except to the extent that this is currently required by sections 590A, 590B and 590C of the Criminal Code (Qld), which should be retained.

(h) Both parties should have an opportunity before the trial to apply to the court for orders in relation to any shortcomings in another party's disclosure.

(i) No comment may be made by any party in the presence of the jury about any other party's failure to comply with its obligations of pre-trial disclosure without the leave of the trial judge.

(j) No comment may be made by the trial judge or any party in the presence of the jury that suggests that the failure by any defendants to comply with their obligations of pre-trial disclosure can lead to any inference about the guilt of that defendant on any charge before than jury. Comment may be made on other matters such as that party's credit.

(k) The conduct of all parties in relation to pre-trial disclosure and otherwise during the preparation for and the hearing of the trial can be taken into account on appeal, including any consideration of the application of the provision [*sic*] in section 668E(1A) of the Criminal Code (Qld).

(l) In exceptional circumstances, the court should have the power to waive or modify any of the requirements of the pre-trial case management procedure to meet the needs and circumstances of any particular case.[235]

8.155 The Commission also gave specific consideration to the consequences that should follow from non-compliance with its proposed disclosure regime. It noted that such a regime would succeed only if the consequences of non-compliance are sufficient to force changes in practice and attitude. They must not be so stringent as to lead to unfair trials, though this should not mean that defendants cannot be compelled to participate constructively in the preparation for trial.

8.156 The Commission expressed the provisional view that the full range of possible consequences, having regard to those available in other jurisdictions, should be provided for unless, after receiving further submissions on this issue, it appears there is a good reason to exclude any of them.[236] The Commission made the following Proposal on the question of sanctions for non-compliance with the proposed regime of pre-trial disclosure:

3-2 The consequences of non-compliance with the proposed pre-trial disclosure regime should include the following (unless there is good reason to exclude one or more of them):

(a) comment by a party to the jury about another party's non-compliance:

(i) either with or without the need to obtain the leave of the trial judge; and

(ii) either with or without statutory limitations on a party's ability to comment on any inferences about a defendant's guilt that might arise from his or her non-compliance;

(b) comment by the trial judge to the jury about a party's non-compliance (including any comment that may be required following a comment by a party);

(c) the denial of the right to lead evidence that goes to a matter that ought to have been disclosed, or the denial of that right without the leave of the trial judge;

235 Queensland Law Reform Commission, *A Review of Jury Directions*, Discussion Paper WP67 (2009) 94, Proposal 3-1.

236 Ibid [3.142]–[3.145].

(d) a requirement that the court take a defendant's compliance or non-compliance into account when determining the sentence if the defendant is convicted;

(e) a requirement that an appellate court take the parties' compliance or non-compliance into account when determining an appeal, including its consideration of the application of the proviso in section 668E(1A) of the Criminal Code (Qld);

(f) the referral of any non-compliance by a legal practitioner to the relevant professional disciplinary bodies; or

(g) the court's right to impose sanctions directly against any legal practitioner who advises or acquiesces in any non-compliance.[237]

8.157 The Commission also noted one other possible, non-legislative, consequence of pre-trial disclosure: that a party's case may be regarded as weaker by a jury if it is seen to differ from the one advanced at the start of a trial (unless clearly based on unexpected developments during the trial itself).

8.158 The Commission proposed that these suggested provisions would be inserted into Chapter 62 of the Criminal Code (Qld), which already includes provisions covering directions and rulings before trial (Division 2, section 590AA), disclosure by the prosecution (Division 3, sections 590AB to 590AX) and disclosure by the defendant (Division 4, sections 590A to 590C).

Further submissions

8.159 The Commission received a number of submissions in response to the Proposals on these issues in its Discussion Paper.

8.160 The Office of the Director of Public Prosecutions was generally content with the proposals for a regime of pre-trial disclosure, though it sounded some notes of caution in relation to them and the related proposals for procedural change.[238] The ODPP submitted, for example, that the proposed scheme risked inserting another layer of procedural delays.[239]

8.161 The Brisbane Office of the Commonwealth Director of Public Prosecutions ('CDPP') made the following submission expressing some support for Proposal 3-1:

(a) Disclosure timetable — it may not be necessary for a disclosure timetable in all trials. A disclosure timetable would bring forward the obligations to provide the particular material (e.g. particulars, outline of the prosecution case, etc).

(b) Pre-trial directions hearings — it is agreed these should continue to be available for indictable matters[240] and be extended to other criminal prosecutions.

(c) Additional prosecution disclosure — if additional obligations are given to the prosecution in respect of disclosure, it would be better to have them specified in chapter 62 as is recommended.

---

237 Ibid 96, Proposal 3-2.

238 Submission 15A. See also [9.58]–[9.59] below in relation to opening statements.

239 Submission 15A.

240 See section 590AA(2)(ba) Criminal Code (Qld).

(d) Duration of disclosure obligation — the disclosure obligation is currently ongoing until the end of trial or, in the case of exculpatory evidence, if an accused is convicted, the obligation is ongoing until the death of the person convicted.[241]

(e) Disclosure notice — the CDPP supports a facility to serve a defendant with a notice requiring the defendant to admit certain facts that the prosecution considers are not or cannot be properly in dispute and requiring the defendant to waive the requirement that certain witnesses be called for the sole purpose of proving formal matters not in dispute. Currently in many cases in practice a de facto system operates whereby the prosecution requests admissions of formal matters. A legislative system may encourage and reinforce this process.

(f) Defence pre-trial disclosure — this would be a good development and could further assist in identification of issues in the trial that were genuinely in dispute.[242] (notes in original)

8.162 The CDPP submitted that it would not be necessary to legislate in respect of the consequences of non-compliance: 'consequences of non-compliance … should be at the discretion of the trial judge.'[243]

8.163 The Bar Association of Queensland, however, strongly opposed any reform of the nature proposed by the Commission, with some exceptions. Firstly, it raised a general objection which covers a number of the Proposals in the Discussion Paper:

> In respect of instances where objection to particular proposals is raised, one or both of two critical issues typically arise:
>
> 1. First, in respect of intrusion into the most fundamental precept of criminal justice, which is that it is for the prosecution to prove the allegations brought and to do so beyond reasonable doubt. This standard of proof is peculiar to criminal trials and tends to inform the presumption of innocence said to attach to defendants. In this regard, it is a sobering reflection that not only is it the case that all accused persons are presumed to be innocent, but some may be or actually are innocent. Our system of criminal justice sensibly, in this context, is premised on the understanding that some guilty defendants may not be convicted (in the case of inadequate proof) so that the unacceptable consequence of conviction of the innocent be avoided …
>
> …
>
> It is this Association's firm view that sight must not be lost of the fact that in the criminal justice system a defendant is compulsorily brought before a court in circumstances where the prosecution must satisfy an onus of proof of guilt of an offence or offences, to the standard of beyond reasonable doubt before that person is convicted of that offence and amenable to punishment in respect of any such offence. It is in this respect that criminal trials proceed upon the basis that such an accused comes before the Court with a presumption of innocence and the reality is that it is in a minority rather than majority of cases that a positive defence case is put forward in a criminal trial, as opposed to what might be termed a negative defence case, in the sense of a case conducted upon the basis of the inability of the prosecution to prove at least an element of an offence, to the requisite standard.

241 See section 590AL(3).

242 Submission 9A.

243 Ibid.

> It is a fundamental right of any person charged with a criminal offence to so conduct his or her case and it is our view that such a fundamental right should not be whittled away by procedural requirement.[244]

8.164 The second general point is the statement that it will be the practitioners, largely those who are members of the Bar Association of Queensland, who will 'bear the brunt of any reforms and particularly reforms which tend to alter or affect that fundamental balance in the criminal justice system'.[245] However, that is true of any change to any aspect of the law: legal practitioners are of necessity the people whose profession it is to advise on and apply the law.

8.165 The Bar Association also had more specific objections to Proposal 3-1, including (significantly in the context of this review) a submission that mandatory pre-trial disclosure of the nature of the defence would not assist juries:

> We accept that there are good reasons for there to be certain obligations on accused persons to make pre-trial disclosure. The requirement to provide notice of alibi is a long standing one. More recent developments are requirements to provide a notice of expert evidence to be called at trial, and advanced notice if the defence relies on a representation under s.93B *Evidence Act 1977*.
>
> It is noted with relief that the proposed reforms will not require an accused person to state whether they intend to give evidence themselves or to call evidence, or to identify any witnesses they intend to call. However, it is noted with considerable alarm that it is proposed that before the trial commences an accused person has to advise as to the general nature of their defences.
>
> The proposed requirement that a defendant disclose the general nature of his or her defence is not likely to assist juries, nor for that matter judges. The reality is that criminal trials are often dynamic events and issues may develop or disappear as the evidence proceeds in the prosecution case and attempts are made at laying evidential foundations for defences. Further, the prospect of this occurring is enhanced by the current proposals to restrict the availability of committal proceedings. It will often be difficult to be categorical in advance of the evidence, as to what will be the issues that the jury have to decide.
>
> As is noted in the Discussion Paper in another context (at 7.89), in a criminal trial some issues are not capable of full consideration and attention until all of the evidence is adduced.[246]

8.166 The Bar Association also objected on the basis that the Proposals eroded the prosecution's onus of proof:

> However this proposal has a clear capacity to assist the prosecution, and to tip them off to weaknesses in their case. There are cases where a lawyer acting for the accused will identify a weakness or a gap in the prosecution case. If the prosecution fails to do its job properly, then an accused person is entitled to argue at the end of the prosecution's case that there is an essential element missing, and a prosecution case should fail. This is only consistent with the 'golden thread' that runs through the common law of Australia, namely that an accused person never has to prove his innocence, and that the prosecution must always prove its case beyond reasonable doubt. We remain of the view that pre-trial disclosure of the general nature of

244 Submission 13A, 3, 4. The Queensland Law Society endorsed and supported the whole of the submissions by the Bar Association of Queensland: Submission 13B.

245 Ibid 3.

246 Ibid 6–7.

> defence to a criminal charge does in this way detract from the prosecution's burden of proof and that an accused person should not be required to flag deficiencies or weaknesses in the prosecution case, in advance of that case being presented.[247]

8.167 It did express some support, however, for the admission of non-contested facts:

> In our view and subject to the availability of appropriate funding to enable compliance, the objective of early identification as to which issues of fact are in dispute (particularly as to any facts which will not be in dispute), and which witnesses to be called by the prosecution for the sole purpose of proving formal matters and can be dispensed with, is more worthwhile.[248]

8.168 The Bar Association submitted, however, that there are dangers in being overly prescriptive, and that in many cases the parties already co-operate to identify the issues before trial:

> However and as noted in the Discussion Paper, there are good reasons for not introducing a regime that is unnecessarily prescriptive, in cases that do not require these steps. The reality is that in practice and where appropriate, the issues or facts that are in dispute are discussed with the prosecution, in any event. In our experience quite often admissions are made by the defence or the defence indicate on the record that an issue is not in dispute.
>
> In practice, particularly in homicide cases or lengthy fraud cases, the defence will at the outset of a trial identify what the issues are, and in particular what is the defence case. Quite frequently it will be indicated, for example, that it is not disputed that the accused person stabbed the deceased, and that caused his death but the defence will assert that he acted in lawful self defence. In fraud cases the issue will sometimes be clearly flagged as whether the accused had knowledge of, for example a fraudulent scheme.
>
> In most cases the likely defences are clearly obvious to everyone at the outset and where it is not, it will often become clear as the prosecution case is presented and the accused is engaged with that case by cross-examination but it is, in our view, fundamentally wrong to mandate that accused persons must disclose their defence before the crown presents it's [*sic*] case. It is after all the prosecution obligation to prove its case, beyond reasonable doubt. An exception which is now recognized and accepted may be the need to disclose whether or not a particular line of defence is to be pursued, in order to seek particular rulings from the trial judge but that exception is adequately catered for within existing practices and involves an element of defence election.[249]

8.169 Finally, the Bar Association urged caution in interfering with the fundamental rights of defendants:

> It must be borne in mind that a criminal defendant who wishes to contest his or her guilt of the charged offence, has no option but to answer to the Court process and whilst the objective of the criminal trial process is the achievement of justice, that is not achieved where fundamental rights of an accused person are interfered with and where an accused person does not have the means to adequately comply with the imposed processes.[250] (notes in original)

247 Ibid 7.

248 Ibid 7–8.

249 Ibid 8.

250 Ibid 9–10.

8.170 In response to Proposal 3-2 in relation to the sanctions for non-compliance, the Bar Association submitted that they were unfair to defendants, could lead to conflicts of interest for defence lawyers and should have no bearing on appeals:

> In many trials that occur in Queensland the defence will make admissions of fact pursuant to s.644 of the *Criminal Code*. However, a failure to admit such facts should not lead to sanctions against the accused. For a start, an accused person is bound by the conduct of their legal representatives. It is grossly unfair to penalise an accused on sentence, or on appeal, for the conduct of their legal representatives.
>
> Equally there are numerous sound tactical reasons why a lawyer acting for an accused will not admit a fact as requested by the prosecution. The threat of disciplinary or other sanctions against a lawyer as proposed by the Commission strikes at the very heart of a lawyer's duty to his or her client. There will be undue pressure on lawyers to admit facts that they should not, in fear of being subject to disciplinary proceedings and this has a tendency to introduce an undesirable element of conflict of interest.
>
> It is inconceivable that a failure to disclose the general nature of the defence case can somehow be relevant to whether the proviso in s.668E(1A) of the *Criminal Code*, should be applied on appeal. This is because the proviso is concerned with whether there has been a substantial miscarriage of justice and this question only arises once a misdirection by the trial judge, the wrongful admission of evidence or other miscarriage of justice has been established and is concerned with the merit and integrity of the trial process rather than the procedures by which issues were identified. A failure to comply with procedural matters of the kind proposed cannot ever relate to the question of whether there has been a substantial miscarriage of justice.[251]

8.171 The Bar Association did support, however, the imposition of appropriate sanctions for non-compliance by prosecutors:

> We agree with proposals that will provide meaningful sanctions to the prosecution for failing to meet its obligations of disclosure, as the party bearing the primary obligation of proof. This is a reform which is long overdue. However we believe that the proper sanction for the prosecution's failure to make disclosure, or to make timely disclosure, is the denial of the right to lead that evidence, unless the defence agrees with that course.[252]

8.172 It also commented that, if the recommendations were adopted, 'the appropriate course, in extreme cases of deliberate non-disclosure (which fortunately on the part of lawyers is rare), would be referral to the appropriate disciplinary body.'[253]

8.173 Legal Aid Queensland also strongly opposed the Commission's proposals as they would not 'in practice provide meaningful additional assistance to juries and trial judges'.[254]

> But in any event, and more importantly, such changes to criminal law procedure would, in our view, undermine the presumption of innocence to which the accused is entitled, and potentially displace the burden of proof.[255]

---

251 Ibid 10–11.

252 Ibid 11.

253 Ibid 11.

254 Submission 16A, 5.

8.174 Legal Aid Queensland noted the apparently imminent implementation by the Queensland Government of many of the recommendations of the Moynihan Report,[256] and submitted that any further amendment to criminal procedure would be unnecessary.

> It is noteworthy, in our submission, that Mr Moynihan's review was directed towards the workings of the courts, with a view to making more effective use of public resources. While that review considered the issue of disclosure at considerable length, no recommendations were made for changes to the existing disclosure obligations of the defence. [257]

8.175 Legal Aid Queensland was strongly of the view that the present system of disclosure, if properly adhered to, provided an efficient method of managing criminal cases whilst not unnecessarily undermining the rights of defendants.

> Consistent with the observations made by the Chief Justice in *Spizzirri's* case,[258] it is our experience that in matters that proceed to jury trial the parties, and the court, are aware of the real issues in contest by the time the trial starts. This occurs through many means, beyond the current limited disclosure that is required of the defence, including:
>
> - Many accused have participated in records of interview with police, in which they are questioned about the alleged offence and in which they provide a version of events.
>
> - Ordinarily matters proceeding to trial will have involved a committal proceeding, possibly involving cross-examination of prosecution witnesses.
>
> - Typically, given the systemic problems with late and incomplete disclosure in Queensland (as addressed below), the defence will correspond with the police and/or the Office of the Director of Public Prosecutions seeking additional disclosure of material said to be within those categories of things the prosecution must disclose either as of right or on request.
>
> - In most matters that proceed to trial there will have been negotiations between the defence and the prosecution, regarding evidentiary issues, possible pleas to some or lesser charges, and so on.
>
> - Consideration will have been given to the need for pre-trial applications and hearings.
>
> - Adjournments may have been sought for specific purposes.
>
> - Defence subpoenas seeking production of documents may have been issued and returned, and any consequent issues resolved, prior to trial.
>
> - Consideration will have been given to the making of formal admissions. Accused persons, through their counsel, routinely choose not to dispute routine matters such as continuity of exhibits.

255 Ibid 5.

256 The Hon Martin Moynihan AO QC, *Review of the civil and criminal justice system in Queensland*, Report (2008).

257 Submission 16A, 6.

258 *R v Spirrizzi* [2001] Qd R 686, 688–9. See submission 16A, 3.

- All of the above steps take place in an environment where the court will proactively monitor and case manage the progress of matters following the presentation of an indictment, especially those flagged by the defence as proceeding to a trial. Detailed interlocutory timetables are frequently set at mentions and call-overs, listing (not infrequently in excess of 10) multiple further court dates so that progress of matters can be reviewed after discrete steps are undertaken.

> All of the above framework provides, in our view, ample means for the parties and the court to understand what really is in contest at the trial by the time the trial commences. That knowledge may not extend to a deep understanding of the likely defence case and the precise evidence supporting it, but nor should it, given the presumption of innocence and the adversarial nature of our system, where the Crown bears the onus of proof.[259] (note added)

8.176 In any event, Legal Aid Queensland submitted that any changes to the disclosure obligations of defendants were predicated on a 'flawed' assumption that the prosecution will comply with its disclosure obligation in a full and timely manner: a defendant cannot be expected to make disclosure when it has not been provided with all relevant material by the prosecution.[260] Legal Aid Queensland reiterated part of its submission in response to the Moynihan Report:[261]

> It is the view of Legal Aid Queensland that there are many instances where the disclosure regime does not operate in practice as effectively as is necessary either to properly accord fairness to accused persons, or to promote the earliest possible disposition of appropriate cases.
>
> This is due to common failures, most usually by the investigating police, in making both adequate and timely disclosure of all relevant evidentiary material and information. Additionally, the current system does not, in practice, result in any real sanction being imposed on the police and/or the prosecution when such failures occur. Accordingly, problems about the adequacy and timeliness of disclosure are now in effect systemic in their nature. In response, defence lawyers are often compelled (if they are to properly discharge their duty to their clients) to make repeated requests to have material disclosed and to sometimes fully traverse issues of disclosure with relevant witnesses at committal, in order to ensure proper compliance with the Criminal Code requirements.
>
> …
>
> It is simply unfair to impose further disclosure obligations on the defence, such as committing to whether certain issues of fact are in dispute or not, in an adversarial system where prosecutorial default upon its own disclosure obligations is systemic. The time to consider enhanced defence disclosure obligations is only if and when the Moynihan reforms improve prosecutorial compliance to an acceptable level.[262]

8.177 As noted above, the Moynihan Report did not recommend any extension to the defendants' current obligations of disclosure. Legal Aid Queensland was also concerned that any disclosure by the defence (including that which is already mandated by

259 Submission 16A, 5–6.

260 Ibid 6–7.

261 The Hon Martin Moynihan AO QC, *Review of the civil and criminal justice system in Queensland*, Report (2008). In support of this submission, Legal Aid Queensland cited a number of cases and a report by the Criminal and Misconduct Commission: see submission 16A, 7–8.

262 See submission 16A, 7.

the Criminal Code (Qld)[263]) allowed the prosecution to remedy defects or other shortcomings in its case that the defence had in effect drawn to their attention.[264]

8.178 Legal Aid Queensland accepted that it would be naïve to assert that further improvements could not be made, but argued that in some instances this was the fault of the individuals involved rather than any systemic or procedural default. Legal Aid Queensland submitted that these failings could not be corrected merely by imposing procedural change, 'which in itself can never be a panacea for such problems, but rather should be addressed by professional training and development.'[265]

8.179 The Law Council of Australia has provided the Commission with a copy of its submission to the Senate Legal and Constitutional Affairs Committee in relation to the then proposed grant of criminal jurisdiction to the Federal Court of Australia in the Federal Court of Australia Amendment (Criminal Jurisdiction) Bill 2008 (Cth). The Law Council noted that this Commission's review was under way; it was concerned that developments in the Federal Court may be inconsistent with developments and views expressed in Queensland, New South Wales and Victoria, and suggested that the Senate Committee consider its recommendations as well as those of the New South Wales Law Reform Commission and the Victorian Law Reform Commission.[266]

8.180 The Law Council had particular objections to proposed section 23CF(1)(a) and (b) to be inserted into the *Federal Court of Australia Act 1976* (Cth):[267]

> Such disclosure implies that the defence is required at the pre-trial stage to assert what the true facts are and reveal the client's instructions and the evidence to be led.
>
> Traditionally the accused was not required to disclose his/her defence or even whether s/he intended to lead evidence at all. This reflected the fundamental principle underlying criminal proceedings, namely that the accused has a right to remain silent while the prosecution bears the onus of proof and must discharge this burden with respect to every element of the offence.
>
> While the Law Council supports the policy objective as stated in the Explanatory Memorandum to ensure that the Court is in a position to take control of the proceedings at an early stage and narrow the issues to be dealt with at trial, the Law Council does not consider that this objective should be achieved at the expense of the accused's right to require the prosecution to prove its case before the accused is called on to present his or her defence. The provisions currently in the Bill go too far in requiring the defence to disclose the details of its case and not just the nature of the issues which are in dispute with the prosecution or the general nature of the defence.
>
> The Law Council understands that there have been issues with similar provisions in Victoria which may not be being adhered to in practice.

---

263 See Criminal Code (Qld) ss 590A, 590B, 590C.

264 Submission 16A, 9. Legal Aid Queensland cited *R v ZSK* [2006] QDC 16 as an example in which the District Court ordered a stay on grounds of abuse of process when the Crown improperly sought to widen dates on an indictment in response to a notice of alibi given by the defence.

265 Submission 16A, 4.

266 Law Council of Australia, *Federal Court of Australia Amendment (Criminal Jurisdiction) Bill 2008*, Submission to the Senate Legal and Constitutional Affairs Committee, 16 January 2009, 4.

267 Proposed section 23CF is set out at [8.73] above. As noted in n 118 above, this Bill has since been passed by the Australian Parliament and commenced operation on 4 December 2009. Section 23CF(1) was passed in an amended form: see [8.74] above.

> The Law Council submits that the NSW review[268] has resulted in proposals which allow sufficient judicial control over the pre-trial process but do not overturn the principles of the adversarial process. The Law Council understands that the accused is required to respond to the prosecution's case statement in NSW and the Court will allow the prosecution to summarise its case unless this will cause prejudice to the defence. The NSW proposals enhance the Court's power to narrow the issues but do not require the defence to disclose its case. These proposals better reflect Commonwealth Constitutional principles in s 80 and Chapter III, which have inbuilt due process mechanisms.[269] (note added)

PRACTICAL IMPLICATIONS OF REFORM

8.181 In its Discussion Paper, the Commission noted that its suggested strategy would only succeed in the long run with leadership from the judges and co-operation from the legal profession. It has been noted in many places that a scheme of pre-trial disclosure or case management generally will succeed only if enforced by the judiciary and complied with by the legal profession generally.[270]

8.182 The Commission recognised (and continues to recognise) that the emphasis on pre-trial issue identification that it proposed would have some impact on the way in which criminal cases are prepared, more so for defendants and their lawyers than for the prosecutors as they are already subject to extensive pre-trial disclosure obligations. This has been the case when amendments of this nature have been introduced in the past.[271]

8.183 The Commission considered, however, that in many respects these new obligations should do no more than bring forward trial preparation that would have to be done in any event. The mere fact that it is being done earlier should not of itself lead to any appreciable increase in costs for defendants or Legal Aid Queensland. Even so, the Commission anticipated that there would be offsetting benefits with the earlier identification of untenable prosecutions and defences, more pleas of guilty or *nolle prosequi*, and a reduction in the number and length of trials.

8.184 The Commission acknowledged that its proposals would require defendants in particular to document matters that are not currently reduced to writing in many trials, and that this might entail some increase in work for legal representatives, at least until the new procedures became routine. This may be seen by some as an erosion of the oral tradition of the criminal trial, but may be countered by the observation that the need for oral presentation is much less urgent in days of near-universal literacy and in

---

268 This refers to a review by the NSW Attorney General's Department which ultimately led to the *Criminal Procedure Amendment (Case Management) Act 2009* (NSW): Email from the Law Council of Australia to Queensland Law Reform Commission, 24 November 2009.

269 Law Council of Australia, *Federal Court of Australia Amendment (Criminal Jurisdiction) Bill 2008*, Submission to the Senate Legal and Constitutional Affairs Committee, 16 January 2009, 4.

270 See Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [6.4], [6.8], [6.11]–[6.13], [6.21]–[6.25]; Kevin Dawkins, 'Defence Disclosure in Criminal Cases' [2001] *New Zealand Law Review* 35, 41; Trial Efficiency Working Group, Criminal Law Review Division, Attorney General's Department of NSW, *Report of the Trial Efficiency Working Group* (2009) 7; Ray Gibson, 'The *Crimes (Criminal Trials) Act 1999* — a radical change' *Law Institute Journal,* October 1999, 50, 53.

271 See, for example, Ray Gibson, 'The *Crimes (Criminal Trials) Act 1999* — a radical change' *Law Institute Journal,* October 1999, 50, 51–2.

a society where many people are used to receiving and processing information in written rather than oral form.[272]

8.185 A submission to the Victorian Law Reform Commission noted that radical change comes at a cost.[273] Although that respondent was commenting in relation to the more sweeping proposals of the VLRC, it is nonetheless true that no change to the law or criminal justice procedure comes without cost.

8.186 In its Discussion Paper, the Commission noted that it did not have any information as to how the proposed reforms might impact upon Legal Aid Queensland or the Office of the Director of Public Prosecutions in relation to file management and funding, apart from any other issues. However, the Commission noted that it had been argued that the introduction of a significant increase in the formal pre-trial obligations of defendants without a commensurate adjustment to legal aid funding represents an erosion of defendants' rights in practice even if not in principle, and that 'real injustice' might result if statutory sanctions are imposed on defendants whose resources do not stretch to full compliance with a compulsory longer and earlier pre-trial preparation regime.[274] However, the Commission provisionally indicated a view that the early identification of the issues both before the trial ***and before the jury*** would not impact adversely on the fairness of the trial and will help the jury examine the evidence and arguments of both sides more effectively, and thus enhance the fairness of the trial.

8.187 The Trial Efficiency Working Group of the Criminal Law Review Division of the Attorney General's Department of NSW recommended that judges 'should be encouraged to refer breaches of the Bar Rules by counsel appearing before them to the NSW Bar Association'.[275] The VLRC also made a strongly worded recommendation about the referral of defaulting legal practitioners to their respective professional disciplinary authorities.[276]

8.188 The Commission was not inclined to make any specific recommendation along these lines. The proposed pre-trial disclosure regime would be a series of court rules and orders like any other interlocutory orders given by the courts, and breaches of them should not be treated any differently. Any breach caused, advised, or acquiesced in, by any legal practitioner should (as now) be the subject, if appropriate in the view of the trial judge, of referral to the appropriate professional disciplinary authority.

Further submissions

8.189 The submission by Legal Aid Queensland addressed a number of practical issues that arose from the Commission's Discussion Paper,[277] in addition to its con-

272 See Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [9.9]. See also Ray Gibson, 'The *Crimes (Criminal Trials) Act 1999* — a radical change' *Law Institute Journal,* October 1999, 50, 51.

273 Law Reform Committee of the County Court of Victoria, Submission to the Victorian Law Reform Commission, 13 March 2009, 3–4. See [7.57] above.

274 Greg Martin, 'Defence disclosure: should it be accompanied by legal aid reform?' (2004) 31(10) *Brief* 14, 15–16 in relation to amendments to the pre-trial disclosure regime in Western Australia.

275 Trial Efficiency Working Group, Criminal Law Review Division, Attorney General's Department of NSW, *Report of the Trial Efficiency Working Group* (2009) 13.

276 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) 17, 115.

277 Submission 16A, 8–10. It is worth noting in this regard that Legal Aid Queensland employs 17 in-house counsel led by the Public Defender, who represent defendants charged with criminal offences in all courts in Queensland. They undertake 20% of all legally-aided criminal matters in Queensland each year, conducting

cerns about, amongst other matters, inadequate disclosure by the prosecution.[278] Any further disclosure (or other procedural) obligations on the defence would need to take into account the difficulties that defendants face in providing complete instructions to their lawyers:

> The proposed defence disclosure recommendations also operate on an assumption that accused persons will always co-operate in the preparation of their defence in a timely and rational way. This is not always the case — often an accused will seek to avoid confronting difficult issues in their case for as long as possible. Other accused may experience difficulties in instructing their lawyers and in preparing their defence because of one or more factors such as mental illness; intellectual disability; physical disability; language issues; their confinement in custody; or geographic remoteness.[279]

8.190 Additional problems arise on circuit:

> We also note that many higher court trials in Queensland occur on circuit. This reality, and the resourcing available to fund circuit matters conducted by the ODPP and Legal Aid Queensland, impact on when certain steps are taken in preparation. Accused persons and particularly witnesses often cannot be conferenced extensively by counsel who will have the conduct of their trial[280] before the circuit actually commences. Also, with the use of running lists, matters often come on during a circuit earlier than initially anticipated and must be finally prepared in short timeframes.[281] (note in original)

8.191 In general terms, Legal Aid Queensland submitted:

> We have noted above our views that some of the proposed reforms may result in additional resources and delay. The specific impact upon agencies such as Legal Aid Queensland cannot be measured at present, particularly as the full impacts of the Moynihan reforms are yet to be seen. For present purposes, we would think that some of the reforms mooted in this Chapter would have the potential to impact upon legal aid resources; primarily through increasing interlocutory proceedings (for instance, in respect of disputed disclosure issues); requiring more preparation work (associated with the supply of additional information and the preparation of additional documents prior to trial) and also through increasing the length of trials. Similar impacts would be visited upon the other parties in the criminal justice system, including the courts and the ODPP. Longer trials and more pre-trial mentions reduce the number of trials that can be conducted in a sittings, increasing backlogs and costs. Increased preparation and trial times will increase the costs of funding criminal law legal aid and the ODPP, and also visit additional expense upon privately funded accused persons (in turn increasing demand for legal aid).
>
> In this respect, we note the results of the 2001 evaluation of the disclosure provisions adopted in England and Wales, to the effect that average trial length had not reduced.[282] The evidence arising from this evaluation does not support the types of reforms proposed by the Commission.

---

nearly all legally-aided criminal appeals in the Court of Appeal. During 2007–08, Legal Aid Queensland counsel appeared in 82 trials in the Supreme and District Courts over 262 hearing days, and in 1,031 sentencing hearings, bail applications and other hearings: Submission 16A, 1.

278 Submission 16A, 7–8; see [8.176]–[8.177] above.

279 Ibid 8.

280 It is not unusual for different counsel to conduct consecutive circuits in a location.

281 Submission 16A, 8.

282 Discussed at p. 76 of the Discussion Paper. See also [8.97] above.

> Increasing the length of trials will also have an adverse impact on accused persons who, after all, should be the focus of the entire process.[283] (note in original)

8.192 The Bar Association of Queensland submitted in strong terms that the Discussion Paper had failed to take into account some of the practical implications of the suggested reforms, notably in the area of costs, including legal aid funding, a point not taken up in a comparable fashion by Legal Aid Queensland itself.[284] The Discussion Paper did acknowledge that the Commission did not then have, and specifically sought, information about the practical implications of its Proposals.[285]

> It is a reality that the large majority of legal representation for accused persons within the criminal justice system is performed with the assistance of legal aid funding. That funding is largely drawn from the public purse and similarly, the funding on the prosecution side comes from the public purse. It is generally well accepted that the funding available on both sides of the bar table is inadequate, having regard to current expectations and we would suggest that the inadequacies are gross. What the Discussion Paper does not adequately recognize is the potential impact that the proposals would have in relation to introducing additional expectation and therefore cost into the criminal justice system and the impact that this might have in relation to such funding constraints.
>
> To put the matter more simply and whilst it is this Association's view that generally the lawyers involved in criminal cases and particularly where they are experienced lawyers, do assiduously and effectively attend to the early identification of issues and resolution of matters, a fundamental impediment to doing this is the lack of funding directed towards the 'front-end' of matters. This is an issue that has been identified by this Association over a long period and has been specifically noted more recently in the Moynihan Report. This consideration is an obvious impediment to the expectation that underlies the proposal as to pre-trial disclosure and early identification of trial issues.
>
> It can also be noted that the proposals arising from the Moynihan Report and which will limit or preclude the availability of committal proceedings before trial of matters on indictment, will also make it more difficult for lawyers to be in a position to identify issues that will not be in contest or may be safely admitted in a criminal trial.
>
> …
>
> We note that the proposals put forward by the Commission are to reflect a 'tentative view'[286] and that the Commission also correctly recognised the risk of producing an impact on funding requirements for the criminal justice system. In our view, these are very real concerns in respect of the introduction of a pre-trial disclosure regime as proposed and we respectfully suggest that these concerns cannot be swept away, as is purported in paragraphs 3.195 of the Discussion Paper.
>
> The inadequacies of funding available for the operation of the criminal justice system are well documented and acknowledged. This applies to the courts themselves and the prosecution offices, but particularly to the defence through the availability of legal aid funding.
>
> It is also well acknowledged that most criminal defence work is done with the benefit of legal aid funding. The inadequacies of that funding and accordingly the

283 Submission 16A, 10.

284 Submission 13A, 3–4.

285 See Queensland Law Reform Commission, *A Review of Jury Directions*, Discussion Paper WP67 (2009) [3.191]–[3.197].

286 See [3.140] of the Discussion Paper.

> fees available to recompense work required for criminal defences has been an issue raised by this Association for decades. It has been this Association's position over that period that there is a need to inject funds into the 'front end' in order to allow for the involvement of appropriately experienced counsel at early stages of criminal proceedings, in order to achieve the efficiencies of the early resolution of matters and identification of issues, where that is appropriate.
>
> The reality is that this has never occurred and the structure of available legal aid funding is generally dependent upon court appearances. Generally it can be observed that, except in the more complex and serious cases, very little is allowed by way of funding towards preparation of cases, notwithstanding the obvious arguments that we have made as to the potential for achievement of savings in respect of the occurrence of and length of trials. A primary problem has been convincing governments responsible for funding decisions, to recognize the potential for overall savings by spending money in the legal aid budget.
>
> The fact of the matter is that the present availability and structure of Legal Aid funding is not geared towards early preparation of cases. Further, the nature of the criminal justice system with its running lists (a necessary concomitant of the involvement of juries) also makes this difficult. For instance, a matter listed as a No. 4 or No. 5 trial for a given week in the District Court, may never be reached and may be re-listed at a time when the originally briefed Counsel is not available. Accordingly, it cannot be concluded that early preparation is never wasted and we are confident that the experience following the introduction of the requirement of pre-recording of the evidence of affected child witnesses, bears this out and the contention that significant extra cost was introduced for Legal Aid Queensland.[287]

THE QLRC'S VIEWS

8.193 The Commission is not persuaded by the various submissions received in response to its Discussion Paper to step away from its Proposal 3-1.

8.194 That Proposal fell far short of the more extreme regimes applying in, for example, England and Wales. Many of the concerns in the recent submissions seem to over-state what the Commission proposed and express concerns that were already largely accommodated. It is also unclear what the fear of longer trials is based on,[288] though the Commission notes that the reforms in England and Wales have not resulted in shorter trials.[289]

8.195 The Proposal requires defendants to disclose little more of their defences than the law currently requires other than to clarify what is not in dispute. There can be no fear of self-incrimination by stating what is denied or in dispute. It would also provide a mechanism by which unnecessary formalities can be avoided by appropriate admissions.

8.196 Part of the opening processes of any trial should include a statement to the jury, in whatever form may be convenient in the context of each case, of the principal issues that they will need to determine and any major issues (such as elements of offences or defences) that are not in dispute. However, it is important that matters that are conceded or not disputed by the defendant are presented to the jury in a neutral fashion and not by way of evidence lead by the prosecution, by way of background or on any

287 Submission 13A, 4, 8–9.

288 See [8.191] above.

289 See [8.97] above.

other basis — matters that are not disputed should not be seen by the jury as part of the prosecution case. Such matters should wherever possible be presented to the jury in a neutral form, such as a statement (oral and written) by the trial judge, even if prepared by the parties, to remove any suggestion that this represents any evidentiary 'win' by the prosecution or capitulation by the defendant. The Commission makes a recommendation to this effect.

8.197 The Commission's recommended pre-trial disclosure scheme would also require defendants to indicate the basic nature of their defences. This is novel ground in Queensland. However, the scheme should not require defendants, any more than is currently required by law, to disclose any part of the evidence (if any) that they intend to call, or even whether they intend to call evidence. What the regime should seek to uncover before the trial starts is the overall scope of the contested issues that the jury will have to determine to reach its verdict.

8.198 As with any scheme of trial procedure, little may be achieved without some system of sanctions that discourages non-compliance effectively. In this regard, the Commission considers that a critical distinction must be drawn between non-compliance with the court's procedural regulations and any acts or omissions by the defendant that go to culpability. There should be no scope for arguing before a jury that non-compliance with the scheme by a defendant allows the jury to draw some inference about the defendant's guilt: guilt must be determined only by reference to the substantive evidence admitted during the trial.

8.199 This principle restricts the range of sanctions that the court can fairly impose. However, the Commission considers that, as a matter of principle, no comment about any such procedural default by a party should be made to the jury without the leave of the trial judge and that, even then, no comment should be made to the jury suggesting that any inference about a defendant's guilt can be drawn from any such default by that defendant. Other inferences might be permissible, such as inferences going to the credit of the defendant or other witnesses.

8.200 The Commission does not consider that any special provisions need to be introduced to punish legal practitioners who fail to comply, or acquiesce in non-compliance, with the recommended disclosure regime. The courts already have powers to refer defaulting practitioners in appropriate cases to their professional disciplinary bodies. The Commission regards these as adequate in the context of these recommendations and does not see any need to make any special provision for non-compliance with its recommended scheme in addition to the powers that the courts currently have.

8.201 Nonetheless, the conduct of a party, especially that of a defendant, should be a matter that an appellate court should take into account when considering any appeal, especially any appeal in which it is alleged that the jury was wrongly or inadequately directed. This might be particularly relevant in some cases where the appellate court has to consider whether to invoke the proviso in section 668E(1A) of the Criminal Code (Qld).[290]

8.202 At all times, trial judges must remain in control of the procedure in each trial over which they preside. Numerous submissions discussed in this Report have rightly stressed the need to avoid regimentation and to preserve a trial judge's discretions in

290 That proviso is discussed at [6.14] above.

relation to the conduct of trials. Consistently with those submissions, the Commission considers it important that the scheme that it recommends in this chapter (and other recommended amendments in later chapters) be subject to the trial judge's discretion to modify any procedural requirements on the parties to meet the interests of justice in each case. The Commission has in mind, in particular, the needs of unrepresented defendants who cannot be expected to comply in all respects with some of these (and current) procedural requirements of the criminal justice system.

8.203 The Commission accepts that there is no point introducing any new procedural scheme if the legal practitioners and other public bodies upon whom particular additional responsibilities may fall are not properly resourced to put the amendments into effect to achieve the desired outcomes. In the context of this review, and the recommendations in this chapter in particular, the Commission considers that it is critical to the success of the proposed pre-trial disclosure regime that legally aided practitioners are suitably and fairly remunerated for any additional preparatory work that may be required and for doing so sufficiently far in advance of a trial that pre-trial directions hearings, pre-trial disclosure and the resolution (to the extent practicable) of any pre-trial legal issues can be accomplished properly.

8.204 It would defeat the purpose of these recommendations if legal aid funding failed to acknowledge with fairness work done well in advance of any trial, the benefits of which will in due course lead, the Commission anticipates, to trials that are more focussed, more efficient and that better inform juries both as to the issues properly in dispute and the factual and legal issues that they will need to determine in order to arrive at their verdicts. In time, this should lead to a more efficient criminal justice system overall. But that can only be achieved if there is proper encouragement to prepare trials well in advance and proper incentives against last-minute preparation.

8.205 The Commission is not in a position in the context of this review to make any specific recommendations in this regard. However, it does recommend that there be an urgent review of legal aid funding dealing with the issues raised in this chapter and elsewhere in this Report to ensure that any implementation of these recommendations (and other comparable changes that might be introduced following the Moynihan Report) are not compromised by funding arrangements that do not provide fair remuneration for practitioners who embrace these changes.

Recommendations

8.206 The Commission makes the following recommendations:

8-1 Chapter 62 of the Criminal Code (Qld) should be amended to include a pre-trial disclosure regime that has the following features:

(1) The regime of pre-trial disclosure should apply to all parties in any trial for an indictable offence, and should provide for a timetable for the completion of pre-trial interlocutory steps, subject to any other order of the court.

(2) In other criminal cases, the court should retain the power to hold pre-trial directions hearings on its own motion or the motion of any party. The court should have the power at any such pre-trial directions hearing to make directions in similar terms to the compulsory pre-trial disclosure regime for trial of indictable offences.

(3) The prosecution should have the initial obligations to provide disclosure of the material that it is already required to disclose under sections 590AA to 590AX of the Criminal Code (Qld). Any other disclosure obligations, such as a statement of the facts, matters and circumstances relied on by the prosecution, ought to be given statutory effect in this regime.

(4) The prosecution's obligations of disclosure of all information that is in any way material to the case should be on-going until the end of the trial.

(5) The prosecution should have the right to serve on each defendant a notice requiring the defendant to admit certain facts that the prosecution considers are not or cannot be properly in dispute, and requiring the defendant to waive the requirement that certain witnesses be called for the sole purpose of proving formal matters not in dispute.

(6) The pre-trial disclosure regime should require defendants to disclose the general nature of their defence, which issues or facts asserted by the prosecution are in dispute, and which witnesses to be called by the prosecution for the sole purpose of proving formal matters can be dispensed with.

(7) Defendants should not be required by the pre-trial disclosure regime under the Criminal Code (Qld) to state whether they intend to give evidence themselves or to lead evidence, or to identify any witnesses whom they intend to call, except to the extent that this is currently required by sections 590A, 590B and 590C of the Criminal Code (Qld), which should be retained.

(8) Both parties should have an opportunity before the trial to apply to the court for orders in relation to any shortcomings in another party's disclosure.

(9) No comment may be made by any party in the presence of the jury about any other party's failure to comply with its obligations of pre-trial disclosure without the leave of the trial judge.

(10) No comment may be made by the trial judge or any party in the presence of the jury that suggests that the failure by any defendant to comply with his or her obligations of pre-trial disclosure can lead to any inference about the guilt of that defendant on any charge before the jury. Comment may be made on other matters, such as that party's credit.

(11) The conduct of all parties in relation to pre-trial disclosure and otherwise during the preparation for and the hearing of the trial can be taken into account on appeal, including any consideration of the application of the proviso in section 668E(1A) of the Criminal Code (Qld).

(12) In exceptional circumstances, the court should have the power to waive or modify any of the requirements of the pre-trial case management procedure to meet the needs and circumstances of any particular case.

8-2 The consequences of non-compliance with the recommended pre-trial disclosure regime should include the following:

(1) the denial of the right to lead evidence that is relevant to a matter that ought to have been disclosed pursuant to the provisions recommended in Recommendations 8-1(3), (4) or (6) above without the leave of the trial judge;

(2) a requirement that the court take a defendant's compliance or non-compliance into account when determining the sentence if the defendant is convicted; and

(3) a requirement that an appellate court take the parties' compliance or non-compliance into account when determining an appeal, including its consideration of the application of the proviso in section 668E(1A) of the Criminal Code (Qld).

8-3 The jury should wherever possible be informed of matters not in dispute in an agreed statement of facts or similarly neutral manner by the trial judge.

8-4 No special sanctions are necessary in relation to either the referral of any non-compliance by a legal practitioner to the relevant professional disciplinary bodies or the court's right to impose sanctions directly against any legal practitioner who advises or acquiesces in any non-compliance with the proposed regime of pre-trial disclosure. These issues should be handled under the courts' general powers in this regard.

8-5 There should be an urgent review of legal aid funding to remove any disincentive that might operate to discourage the early delivery of criminal defence briefs; for example, by adequately remunerating legal practitioners for interlocutory work, especially any additional pre-trial work required by the Commission's other recommendations or other proposed changes to the criminal justice system.

Chapter 9

Reforming Jury Directions: Engaging the Jury

INTRODUCTION

9.1 Chapter 8 set out the Commission's view on the need for an expanded scheme of pre-trial disclosure by the defence, and prosecution, for criminal matters. The Commission's recommendations in that regard are directed at facilitating judges and the parties in defining before the trial the issues in the trial and the questions the jury is likely to have to consider to reach its verdict so that juries can be better informed in their approach to the evidence and their tasks as the trial progresses.

9.2 With those recommendations in mind, this chapter considers, and makes recommendations about, the following related matters:

- the greater use of opening statements by judges and the parties; and

- a restructuring of the summing up to present the questions that the jury must answer in order to reach its verdict in an integrated and comprehensible way that avoids the need for lengthy, abstract statements of the law by embedding the legal issues in questions of fact.

9.3 This chapter also gives consideration to the need for continued professional training and accreditation.

9.4 Chapter 10 discusses the greater use of written materials and access to transcripts, and other practical ways of assisting juries and facilitating their understanding of the evidence and other information presented during the trial.

OPENING STATEMENTS AND SPLIT SUMMINGS UP

9.5 It has been suggested that, particularly in complex cases, juries may benefit from more detailed opening statements from the judge and from counsel that address aspects of the law and evidence that are likely to arise in the trial. It has also been suggested that an early statement by a defendant of a good defence may well be to the defendant's advantage.[1]

9.6 In his review of criminal courts in England and Wales, Lord Justice Auld noted that one of the matters about which former jurors had expressed dissatisfaction was the 'lack of objective information at the start of the case about the essential issues and the law applicable to them'.[2]

> When [the jurors] embark upon [their task] they are given no objective and convenient outline in oral or written form of its essentials, the nature of the allegation, what facts have to be proved, what facts are in issue and what questions they are there to decide. And, mostly they have little in the way of a written aide-memoire to which they can have recourse as the case unfolds to relate the evidence to such questions. Any experienced court observer has only to note the exhaustion, and sometimes the distress, of jurors as a case of some length or complexity moves towards its end and the enormity and complications of their decision-making task is belatedly brought home to them. Trevor Grove, in his informative and entertaining book, 'The Juryman's Tale', quotes an American Judge who said that it was like 'telling jurors to watch a baseball game and decide who won without telling them what the rules are until the end of the game'.[3]

9.7 Lord Justice Auld recommended that the judge's opening address should give the jury 'an objective outline of the case and the questions they are there to decide', and that this should be supplemented by a written 'case and issues' summary.[4] He also recommended that defence counsel should be entitled to make a short opening speech, 'normally of no more than a few minutes', after that of the prosecution.[5]

---

1 Geoff Flatman QC and Mirko Bagaric, 'Accused Disclosure—Measured Response or Abrogation of the Presumption of Innocence?' (1999) 23 *Criminal Law Journal* 327, 334.

2 The Right Honourable Lord Justice Auld, 'Chapter 5: Juries' in *Review of the Criminal Courts of England and Wales*, Report (2001) [216].

3 Ibid [18].

4 Ibid [24].

5 Ibid [28].

Judges' opening remarks

9.8 The judge's preliminary remarks 'are the first real opportunity for the judge to communicate with the group of citizens who will decide the issues in the case',[6] and their importance in providing initial instruction on the law to juries has been noted.[7] A series of model remarks for the beginning of a trial is set out in Chapter 5B of the Queensland Benchbook.[8] They outline the procedure at the start of a criminal trial, including the formal arraignment of the defendant and the empanelling of the jury. Then follows a model series of remarks to introduce the jury to the nature of the trial, the charges faced by the defendant, the people involved in the trial and the their roles (including the jury's own role), the procedure to be followed, and some of their obligations:[9]

> 18. When the jury has been sworn, the judge must ensure that the jury is informed—
>
> (a) in appropriate detail, of the charge contained in the indictment;
>
> (b) of the jury's duty on the trial;[10]
>
> and should inform them
>
> (c) of the prohibition on the jury inquiring about the defendant in the trial.[11]
>
> 19. In addition to telling the jury of the charge(s), and the prohibition on inquiry about the defendant, the judge might then wish to mention the following:[12]

---

6 E Najdovski-Terziovski, J Clough and JRP Ogloff, 'In your own words: A survey of judicial attitudes to jury communication' (2008) 18 *Journal of Judicial Administration* 65, 71.

7 Ibid 71; Hon J Wood, 'Jury directions' (2007) 16 *Journal of Judicial Administration* 151, 162.

8 Queensland Courts, *Supreme and District Court Benchbook*, 'Trial Procedure' [5B] <http://www.courts.qld.gov.au/2265.htm> at 30 November 2009.

9 In this and all other extracts from the Queensland Benchbook in this Report, the formatting follows that of the original in that text in bold indicates material that is to be spoken to the jury and material in normal type is only notes and commentary for the judges.

10 Section 51 *Jury Act.*

11 Section 69A *Jury Act.*

12 Other outset matters and directions could include:
Elements of offence/defence: If there is consensus concerning the elements of the offence(s), or as to the defence(s), those could be mentioned so that the jury may focus primarily upon them. Consideration might also be given to a short address to the jury by defence counsel after the prosecutor's opening: *Nona* [1997] 2 Qd R 436.

Joint trial: If there is a joint trial, it might be pointed out that, for example: **More than one person is being tried. The separate cases against each of them must be decided solely on evidence admissible against that defendant. Some evidence may be admissible against one and not against the other(s), [or in respect of one charge and not another]. Later, I will give you detailed directions about the evidence in the respective cases.**

Speaker's role
Although the Jurors' Handbook and the Video touch upon the speaker's role, more might be said about that: for example:
The person selected as your speaker may, of course, be male or female. The speaker announces the verdict(s) at the end. While you may conduct your deliberations as you see fit, usually a speaker chairs jury discussions. Further, while ordinarily your speaker will be the channel of communication between us, that does not prevent an individual juror's raising a matter with me.
You can change your speaker without reference to me. And every juror has the right to say so if his or her position has been misstated in anything said here in the courtroom by another juror, including the speaker.

Personae

> (Name) **is the prosecutor, who presents the case against the defendant(s).** (Name) **represents the defendant(s).**

Nature of the verdict

> **You were just given, through my associate, the responsibility of returning a verdict. The verdict is your judgment whether the defendant is guilty or not guilty.**

Burden and standard of proof[13] (note added)

> **A defendant in a criminal trial is presumed to be innocent. So before you may return a verdict of guilty, the prosecution must satisfy you that the defendant is guilty of the charge in question, and must satisfy you of that beyond reasonable doubt.**

What is evidence

> **The prosecution will endeavour to discharge this burden by means of evidence. Evidence is what the witnesses say from the witness box and the exhibits, if any, admitted into evidence by me during the trial.**

Judge's function

> **A few words about our functions: My task is to ensure that the trial is conducted according to law. Questions of law that arise are for me to decide. If a question of law arises during the trial, I may ask you to retire to the jury room while I decide it. While you are waiting, the lawyers and I will be here working. The purpose of your leaving the courtroom is not to exclude you from participating in the trial. Rather, it is to avoid your minds being cluttered by matters irrelevant to your tasks.**

Jury's function

> **Your function of deciding whether the defendant is guilty or not guilty involves considering the facts of the case based on the evidence to be placed before you in this courtroom.**
>
> …

No outside influence or investigation

> **Pay careful attention to the evidence, and ignore anything you may hear or read about the case out of court.[14] You may discuss the case amongst yourselves. But you must not discuss it with anyone else. The reason is this: you are the 12 people who are to determine the outcome of this trial; and solely on the evidence presented here in the courtroom. Do not take the risk of any external influence on your minds. So do not speak to anyone who is not a member of this jury about the case. If anyone else attempts to talk to you about this trial, try to discourage them, do not tell anyone else who is on this jury, but**

13 Directions on the standard of proof (beyond reasonable doubt) are discussed at [17.3]–[17.48] below.

14 Where there has been pre-trial publicity, further emphasis may be required both at the beginning of the trial and in the summing-up: *Bellino & Conte* (1992) 59 A Crim R 322, 343; *Glennon* (1992) 173 CLR 592, 603–604, 616, 624.

mention the matter to the bailiff when you get back to court so that it can be brought to my attention. In the same way if, while you are outside this courtroom, you inadvertently overhear something about this trial, do not tell anyone else on the jury but tell the bailiff so that can also be brought to my attention. And do not attempt to investigate it or to inquire about the defendant yourselves.[15]

It is inherently unjust for you to act on information which is not in evidence and the prosecution and defence do not know you are acting on. This is because they have not had an opportunity to test the accuracy of the information and whether it is applicable to the particular person. Information in the public area is not always accurate. It may be referring to someone else, e.g. with a similar name. The prosecution and the defence have not had the opportunity to test the material as they do with evidence.

There have been instances where a jury has made private investigations and mistrials have resulted or new trials have been ordered on successful appeals. That illustrates the unfairness. Also private inquiries may lead to inaccuracies, for example, a scene may well have changed dramatically over time. Private inspections would not reveal what changes have occurred.

Order of events

What can you expect as the order of events? Typically in a criminal trial, things happen in this way:

First, the prosecutor gives an outline of the case, summarising the evidence the prosecution intends to rely on;

Next, the prosecution witnesses testify. The prosecutor questions the witness. When the prosecutor has finished, defence counsel can question the witness. Sometimes, after a cross-examination has completed, the prosecutor asks more questions;

This is done for every prosecution witness;

When all the prosecution witnesses have completed their evidence, the defendant will be asked if he intends to adduce evidence. A defendant is not obliged to give or to call evidence. If evidence is to be adduced, the procedure for opening the evidence of, and for examining, defence witnesses is the same as for prosecution witnesses;

After all the evidence has been given, counsel will address you;

Next comes my summing-up. In it, I shall, among other things, explain to you the law that applies; and

After that, you will retire to the jury room to consider your verdict(s).

Open mind

Keep an open mind[16] **as the case progresses.**

15 This warning might be repeated at the end of the first day.

16 *Haw Tua Tau* [1982] AC 136, 150–151.

Note-taking

> **Writing materials will be made available to you just before the evidence commences[17] so that you can take notes if you wish. However, be careful not to let detailed note-keeping distract you from hearing and observing the witnesses. Any notes that you take must remain in the court precincts and must not be taken home. The Bailiff will ensure they remain confidential by being destroyed.**

Assistance

> **Finally, if you experience a problem related to this trial, arrange to let me know. I will help you as much as I can. If you wish to communicate with me while you are here in the courtroom, write the question down and ask the bailiff to give it to me, or attract my or the bailiff's attention so that the matter can be addressed. If the problem arises when you are not in the courtroom, hand the bailiff[18] a note of it, or else tell the bailiff that there is a matter you wish to raise with me. I will then decide how to deal with it. As you can see, these proceeding are being recorded. It is not the practice in Queensland for a jury to be supplied with a copy of the transcript of the evidence so recorded. If you need to be reminded of what any of the witnesses said, I can arrange for it to be read back to you. Just give the Bailiff a note identifying the evidence.**[19] (notes and formatting as in original)

9.9 The importance of the judge's opening remarks in helping the jury settle in to their role cannot be overlooked. Jurors interviewed as part of the University of Queensland research that was conducted for this enquiry commented that the beginning of the trial can be very overwhelming:

> 'It was all very full on to start with, and you know, I've never done it before, so I didn't actually realise what the process was going to be like. As soon as you sat down, it just basically, you already knew the charges, 'cause you'd hear it over in the other courtroom, and basically, they just went straight full into it. And it was very full on, very, not intimidating, but, it was very, I guess, you didn't really feel like you were actually in reality. It was sort of like "what on earth is going on". So, you were, I thought that the way that they did it was, you know, very well structured and, in the way that they all take their time. I thought that it was good that they started off, you know, explaining, like the judge spoke to us and made sure that we were aware of what was expected and things like that. And then the prosecutor then started and made his address, or her address, and then the people that, the defendants ... It was a lot to take in. And it can be a little intimidating.' — Juror 27[20]

17 Cf *Sandford* (1994) 33 NSWLR 172, 182.

18 The limited nature of the assistance the bailiff can provide to the jury is mentioned in the Handbook and Video. A judge wishing to supplement this information might say: **The bailiff will be your custodian and a channel of communication between the jury room and the court. He can tell you about such administrative matters as meals. While you can discuss administrative matters with him, you are not to discuss with him matters concerning the trial itself.**

19 Queensland Courts, *Supreme and District Court Benchbook*, 'Trial Procedure' [5B] <http://www.courts.qld.gov.au/2265.htm> at 30 November 2009.

20 School of Psychology, University of Queensland (Blake McKimmie, Emma Antrobus and Kathryn Havas), 'Jurors' Trial Experiences: The Influence of Directions and Other Aspects of Trials', Report (November 2009) 24.

9.10 Research conducted by the Australian Institute of Judicial Administration ('AIJA') found that a very high proportion of the responding judges — 83% in Australia[21] and 94% in New Zealand — said that they reviewed the nature of the trial at the beginning of the trial, including administrative matters such as sitting hours.[22] The survey revealed, however, that there was considerable variation as to what aspects of the trial and the jury's role were explained. Table 9.1 is an abridged version of the results of the survey published by the AIJA outlining the various aspects of the trial that are covered by judges in their opening remarks to the jury:[23]

Issue	Aust judges (%)	Qld judges (%)	NZ judges (%)
Nature of the trial	83	89	94
Role of the jury	93	89	100
That interruptions will occur due to objections over questions of law and procedure		89	
• That the jury will be asked to retire while these matters are dealt with	79	86	69
• Whether the judge will provide a reason	79	83	59
Whether jurors may take notes	71	80	84
• If so, are additional instructions given?	41	46	43
Whether they will have access to the transcript	40	54	88
Whether jurors may ask questions	54	60	39
• If so, are they told of the procedures?	43	57	41
What to do if there is a dispute within the jury	17	26	4
That jurors may not talk to non-jurors about the case during the trial	95	94	98
That they must base their decisions only on what they hear in the courtroom		94	
• Do not access newspapers	10	3	12
• Do not access the internet to seek information about the case	35	26	18
• Do not bring any books	11	6	6
• Do not conduct your own investigations or visit the crime scene	43	49	57
Are the jurors also told why they must not?	47	51	49

21 When the survey did not distinguish amongst the Australian States, it meant that there was a high degree of consistency among them; the information was presented separately for each State when there was any significant variation: Australian Institute of Judicial Administration (James RP Ogloff, Jonathan Clough, Jane Goodman-Delahunty & Warren Young), *The Jury Project: Stage 1 — A Survey of Australian and New Zealand Judges* (2006), 11.

22 Ibid.

23 Ibid 12, 49–51; see also ibid 15 in relation to the provision of the transcript of evidence to jurors.

Issue	Aust judges (%)	Qld judges (%)	NZ judges (%)
Information about choosing a speaker	84	86	98
• All 12 are eligible	51	46	76
• Guidance as to whom they might choose	17	14	74
• The role of the speaker	75	60	98
• Other information	32	40	10
Do you give the jury anything in writing to cover your opening remarks?	8	9	10
Do you record your opening remarks?	85	94	76
Do you allow the jury any settling-in time before the trial?	29	34	43

Table 9.1: Contents of judges' opening remarks.

9.11 It is clear that the vast majority of Australasian judges gave nothing or little in writing to the jurors to reinforce what they are told at the start of the trial.

9.12 Table 9.2 outlines the matters of law covered judges' opening remarks to the jury:[24]

Issue	Aust judges (%)	Qld judges (%)	NZ judges (%)
Outline of main legal concepts in the case	69	83	74
• Presumption of innocence	63	77	61
• Burden / onus of proof	65	80	74
• Standard of proof	66	80	74
• Beyond reasonable doubt	57	66	59
• Elements of relevant substantive law	24	37	45
Do you anticipate the defence and provide 'mini-directions' on it?	7	9	22

Table 9.2: Matters of law in judges' opening remarks.

9.13 What is perhaps most unexpected here is the number of judges who do ***not*** cover these issues, which are at the heart of every criminal trial.

9.14 The University of Queensland research also sheds some light on the matters covered in the judge's opening remarks. Jurors were asked whether the judge explained any of the following matters at the start of the trial:

Nature of the offence(s)	94%
Outline of legal issues	73%
People in the courtroom and their roles	76%
Need to choose a speaker	94%

24 Ibid 21.

How to choose a speaker	58%
When to choose a speaker	76%
Possibility of taking notes	94%
Possibility of asking questions	85%
That jurors must not make their own enquiries	100%

Table 9.3: Percentage of jurors reporting elements explained in judges' opening remarks[25]

9.15 As can be seen from Table 9.3, 73% of the participating jurors reported that the judges' opening remarks included an outline of the legal issues that were likely to arise in the trial. It is not clear from these responses just what those legal issues were: they could have been confined to the burden and standard of proof, but could also have included information about the elements of the offence(s), and may even have anticipated aspects of the defence case. A number of the jurors who participated in follow-up interviews (37.5%) also indicated that the judge had given them an outline of the questions the jury would have to answer to arrive at a verdict at the beginning of the trial.[26]

9.16 There were mixed responses among the interviewed jurors, however, as to the appropriate timing of a such an outline of questions (and the researchers commented that there may have been some confusion as to what was meant by this). One juror said he would have liked to have received the questions earlier in the trial. Others commented, however, that those questions were not relevant earlier in the trial or would have 'clouded their impressions of the evidence' if given earlier:

> 'I don't think you possibly could. I mean you're working towards a conclusion, aren't you. And you'd conclude before you get there.' — Juror 9

> 'Ah, no, because any earlier, it would have made no bearing, in the particular case. So, it only was relevant while we were deliberating.' — Juror 26

> 'Ah, no, because it would've clouded it, I think, um, all the other things you needed to consider, so... Yeah, even though it made a lot of, it was important that it was made last, so that then we could, not sort of be confused by things, you know, because, the way that it was, you had to concentrate on, you know, the evidence.' — Juror 27[27]

9.17 The surveyed jurors were also asked whether the judge's opening remarks included any other matters. A small number of jurors (fewer than 5) said the judge had explained 'his or her role concerning points of law, the possible length of the trial, and the need to be impartial'. Only three jurors said the judge had given them written materials to supplement the opening remarks.[28]

25 School of Psychology, University of Queensland (Blake McKimmie, Emma Antrobus and Kathryn Havas), 'Jurors' Trial Experiences: The Influence of Directions and Other Aspects of Trials', Report (November 2009) 9, Table 3.

26 Ibid 20.

27 Ibid 20.

28 Ibid 9.

9.18 Information in relation to judicial practice concerning the summing up at the end of the trial is covered in chapter 10 of this Report.[29]

Opening statements by the parties

9.19 As discussed in chapter 3 of this Report, both the prosecution and the defence may open their cases with an opening statement, but are not required to do so.[30] The right of the defence to make an opening statement is not, however, expressly provided for in the Criminal Code (Qld) and so remains a matter for the trial judge's discretion.[31] Typically, the prosecution will always make an opening statement but the defence may be more reticent, and more circumspect if the option is taken up.

9.20 Both parties, of course, have the right to address the jury at the conclusion of the evidence,[32] and do so. The impact that these addresses have on jurors, measured in terms of how much assistance the jurors themselves thought they derived from them, may be less than anticipated by the legal profession: see the results of the survey conducted by the NSW Bureau of Crime Statistics and Research in 2007–08.[33]

9.21 The University of Queensland research provides some information about the use of opening addresses by the parties. While the research does not indicate how often opening statements by each of the parties were made, jurors were asked about the matters covered in the parties' addresses when they were made:

	Prosecutor's opening	**Defence opening**
Nature of the offence(s)	97%	N/A
Outline of case	100%	82%
Outline of legal issues	76%	58%

Table 9.4: Percentage of jurors reporting matters included in opening remarks of prosecution and defence[34]

9.22 Half of the surveyed jurors (51%) also reported that the prosecutor gave them written materials as part of the opening address: most of these were summaries of the indictment or charges, and some related to the evidence. A few jurors (9%) also said that the defence provided written materials relating to the evidence as part of their opening remarks.[35]

29 See in particular [10.30]–[10.36] below in relation to judicial practice in relation to providing written summaries of summings up and other similar material.

30 Criminal Code (Qld) s 619(1), (3); see [3.58]–[3.59] above. Criminal Code (Qld) s 619 is set out in Appendix C to this Report.

31 *R v Nona* [1997] 2 Qd R 436 (Fryberg J).

32 Criminal Code (Qld) s 619(3); see also [3.69] above.

33 NSW Bureau of Crime Statistics and Research (L Trimboli) 'Juror understanding of judicial instructions in criminal trials' *Crime and Justice Bulletin* No 199 (2008), 7–8. See [3.87] above.

34 School of Psychology, University of Queensland (Blake McKimmie, Emma Antrobus and Kathryn Havas), 'Jurors' Trial Experiences: The Influence of Directions and Other Aspects of Trials', Report (November 2009) 9, Table 3.

35 Ibid 9.

9.23 In the follow-up interviews in that research, all but one of the jurors said the order of opening addresses by the judge, prosecutor and defence had been appropriate. One juror reported, however, that it would have been better to hear from the defence earlier (that juror said the defence did not address until after the presentation of the prosecution case):

> 'I would've liked to have heard the defence address, simply to extend what their strategy was because I felt that others were left wondering, well, you know, when is the defence gonna come on and say something?' — Juror 11[36]

Room for improvement

9.24 The judges' standard opening remarks are of general application to all criminal trials. However, a jury may also be assisted by some opening directions from the judge that relate specifically to the law that they will have to apply and, perhaps, some aspects of the evidence that is likely to be led.

9.25 There is some empirical research supporting the conclusion that jurors who receive instruction at the beginning of a trial about fundamental issues in the case (which would include the presumption of innocence and the onus and standard of proof, but which could also include an outline of the elements of the offence):

- were better able to recall evidence that is relevant to facts in issue;
- were more likely to defer their final decision until all the evidence had been presented; and
- were better able to integrate the facts and the law.[37]

9.26 It has been suggested variously that this result is based on the primacy effect (that people are better able to recall information that is given to them first) or that it provides a framework against which they can better process information which comes later (ie, the evidence during the trial itself).[38]

9.27 The survey conducted by the NSW Bureau of Crime Statistics and Research ('BOCSAR'), the results of which were published in September 2008,[39] asked for jurors' reactions to the timing of the judge's summing up. Of the 1,215 jurors who responded to this question:

- just under half (46.3%) answered that they would have preferred to receive the judge's instructions on the law at the end of the trial, which is the conventional practice;
- about a quarter (26.0%) said that they would have preferred to receive these instructions at the beginning of the trial;

36 Ibid 9.

37 See RK Cush & J Goodman-Delahunty, 'The Influence of Limiting Instructions on Processing and Judgments of Emotionally Evocative Evidence' (2006) 13 *Psychiatry, Psychology and Law* 110, 110 and the sources cited there.

38 Ibid 110.

39 NSW Bureau of Crime Statistics and Research (L Trimboli) 'Juror understanding of judicial instructions in criminal trials' *Crime and Justice Bulletin* No 199 (2008). See [3.87] above.

- another quarter (25.7%) said that they would have preferred to receive instructions just after the relevant evidence was given; and

- a small group (2.0%) responded that they would have preferred some combination of the three other options.[40]

9.28 Although it is impossible to assess if there was some particular aspect of certain trials that might have led many jurors to prefer the timing of instructions other than conventionally at the end of the addresses, it seems clear that many jurors feel that they would benefit from directions on the law given at the start of the trial or at other appropriate times during the trials.

9.29 This conclusion becomes starker when the jurors' first language is not English:

> Jurors whose first language was not English were 1.5 times more likely than jurors whose first language was English to prefer to receive the instructions at the *beginning* of the trial (35.9% vs 24.5%).[41] (emphasis in original)

9.30 It would seem, therefore, that the jurors' wish to receive instruction at the beginning of the trial reflects an underlying psychological basis that this helps them to come to a better decision. It has been said that jurors do not operate in a vacuum and that, if they do not have a factual framework to work with, they begin to speculate within the range of their pre-conceptions. Jurors who have an understanding about the evidence that is still to be called and the overall structure of the case are more likely to suspend their judgment until all the evidence has been presented than jurors who do not have the benefit of any such understanding, who start to process the evidence as they receive it. A written framework has been described as 'indispensable'.[42]

9.31 Research conducted by the Australian Institute of Criminology has found that:

> In the opinions of jurors, the judges perform this task very competently … About three-quarters of jurors agreed that the jury as a group understood the instructions given to them by the judge, while less than 20 percent felt that they needed more information about the role of the foreperson. Only a small percentage of jurors reported feeling confused about what they were allowed to discuss with other jurors serving on the case or with people not involved in the case. Furthermore, only a small percentage of jurors were confused about what it meant 'to draw inferences from evidence'.[43]

9.32 It has also been suggested that juries would benefit from more detailed preliminary statements from the parties, especially in cases where the evidence or the legal questions that the jury must resolve are complex, unusual or lengthy or if accompanied by chronologies or lists of witnesses or similar material. This could be of particular assistance to juries at the outset of long trials to understand the evidence and place it in context in cases involving, for example, multiple defendants, multiple charges and alternative charges.

---

40 Ibid 9, 10.

41 Ibid 9.

42 Jury Directions Symposium, Melbourne, 5–6 February 2009. See also [9.25] above.

43 Australian Institute of Criminology, *Practices, policies and procedures that influence juror satisfaction in Australia*, Research and Public Policy Paper No 87 (2007) 138–9.

9.33 Care would always have to be taken to ensure that any such preliminary exposition of the likely issues did not improperly anticipate evidence that might not be admitted for any reason. Any such early direction to the jury on the law or evidentiary issues that it would have to resolve would, therefore, need to be rather circumspect. It has been said that the judge's opening remarks should refer to the issues 'if they are sufficiently known.'[44] Even so, such an exposition could well help jurors to understand the general context of evidence as it is given, and to understand how it may fit in with, or be challenged by, evidence to come. Prior agreement between the judge and the parties should help ensure that any documents given to the jury at the start of a trial are limited to statements of law and legal issues, and to factual matters that have been agreed or admitted, or are stated to be in dispute where this is the case.

Other jurisdictions

New South Wales

9.34 Under section 159 of the *Criminal Procedure Act 1986* (NSW), the defence is entitled, but not obliged, to make an opening statement immediately after the opening address of the prosecutor. An opening address by the defence is to be 'limited generally to address on':

> (a) the matters disclosed in the prosecutor's opening address, including those that are in dispute and those that are not in dispute, and
>
> (b) the matters to be raised by the accused person.[45]

South Australia

9.35 In South Australia at the end of the prosecutor's opening address a defendant is invited to address the court to outline the issues in contention between the prosecution and defence. The defendant is free to decline that invitation. The invitation and response are to be done in the absence of the jury and may not be commented on to the jury.[46]

Victoria

9.36 In Victoria, the judge may address the jury at any time on:

> (a) the issues that are expected to arise or have arisen in the trial;
>
> (b) the relevance to the conduct of the trial of any admissions made, directions given or matters determined prior to the commencement of the trial;
>
> (c) any other matter relevant to the jury in the performance of its functions and its understanding of the trial process, including giving a direction to the jury as to any issue of law, evidence or procedure.[47]

---

44 The Hon Justice Michael Murray, 'Bad Press: Does the Jury Deserve It? Communicating with Jurors' (Paper presented at the 36th Australian Legal Convention, Perth, 17–19 September 2009) 7.

45 *Criminal Procedure Act 1986* (NSW) s 159(2).

46 *Criminal Law Consolidation Act 1935* (SA) s 288A.

47 *Criminal Procedure Act 2009* (Vic) s 222.

9.37 The prosecutor in that State must give an opening address to the jury before any evidence is given,[48] and the defendant is obliged to respond in all jury trials if represented, and may do so if not represented.[49] Defendants may also make an opening address before they call any evidence if they intend to give or call any evidence.[50]

Western Australia

9.38 In Western Australia defendants are entitled to give an opening address about their case, irrespective of whether they intend to call evidence.[51] This may be done either immediately after the prosecutor's opening address or, if the defendant intends to lead any evidence, immediately after the close of the prosecution case.[52]

New Zealand

9.39 The Law Commission of New Zealand ('LCNZ') considered trial judge's preliminary remarks and opening statements by the defence in its 2001 report on juries in criminal trials.[53]

9.40 The LCNZ conceded that there may be little about the law that judges could say in their preliminary remarks to a jury, particularly if the defence has not disclosed any part of its case, and came to the fairly general conclusion that to 'the greatest extent possible, counsel should co-operate to identify issues in advance of trial. Directions for best practice will be included in the [Criminal Practice Committee] Manual.'[54]

9.41 The LCNZ noted with approval an amendment to section 367 of the *Crimes Act 1961* (NZ), after which the relevant parts of that section read:

> (1) Upon the trial of any accused person, counsel for the prosecution may open his case and after such opening (if any) shall be entitled to examine such witnesses as he thinks fit; and the accused person, whether he is defended by counsel or not, shall be allowed at the end of the case for the prosecution, if he thinks fit, to open his case, and after such opening (if any) shall be entitled to examine such witnesses as he thinks fit.
>
> (1A) Without limiting subsection (1), the Court may give an accused person leave to make an opening statement, after any opening by the prosecution and before any evidence is adduced, for the purposes only of identifying the issue or issues at the trial.
>
> (1B) Nothing in an opening statement made under subsection (1A) limits the rights of an accused person to raise any other issue or issues at the trial.[55]

9.42 However, the LCNZ considered that its use by defence counsel needed some formal constraint:

---

48 *Criminal Procedure Act 2009* (Vic) s 224.

49 *Criminal Procedure Act 2009* (Vic) s 225.

50 *Criminal Procedure Act 2009* (Vic) s 231.

51 *Criminal Procedure Act 2004* (WA) s 143(2).

52 *Criminal Procedure Act 2004* (WA) s 143(3).

53 Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001).

54 Ibid 117.

55 See ibid [310]–[311].

> We consider that this amendment will be of considerable use in allowing defence counsel to clarify the issues for the jury from the outset of the trial. Clearly it is not intended to allow the defence to give two opening addresses, and some judicial control will be required to ensure that defence counsel are limited at this stage to a short statement of the matters at issue.[56]

NSWRLC's Consultation Paper

9.43 In its Consultation Paper on jury directions, the NSW Law Reform Commission noted arguments both for and against the practice of a trial judge giving the jury an opening outline of the issues:

> **Arguments for**
>
> 9.93 The first argument in support of giving directions on substantive law to the jury both before and after the presentation of evidence is that it may improve jurors' recall and comprehension. Some studies have found that multiple exposure to the law enables jurors to understand the legal directions and to apply them better to the evidence.
>
> 9.94 Secondly, giving jurors the key legal directions during the opening remarks would give them a legal framework and a context for the evidence at the start of the trial. This has been shown to enable jurors to evaluate the evidence more effectively as it is being presented. In other words, it may assist jurors to fit the various pieces of evidence being presented into a coherent story that makes sense to them. It may also prevent jurors from relying solely on pre-existing and inaccurate beliefs about the law or on personal biases that might be triggered by the nature of the case or the characteristics of the defendant.
>
> 9.95 Finally, the enhancement in their ability to evaluate the evidence as a result of the preliminary directions on substantive law increases jurors' satisfaction in the trial process.
>
> 9.96 Justice McClellan has recently spoken about the benefits of identifying the issues early in the trial:
>
> > one source of significant time wasting in some trials is a failure to isolate the issues requiring determination before the trial commences. They are sometimes not identified until final address. This has two consequences. The jurors lose track of the evidence, having no means of appreciating its significance and the issues to which it relates. The trial itself is inefficient. Without knowing the issues the trial judge can exert little influence over the advocates to confine the evidence and discipline the questioning of witnesses.
>
> **Arguments against**
>
> 9.97 There are, however, several arguments against giving jury directions on substantive law prior to the presentation of evidence. Firstly, some judges fear that this might overload jurors with too much information at the beginning of the trial.
>
> 9.98 Secondly, giving the jury a legal framework at the start of the trial may encourage individual jurors to view the trial from a single perspective. It is argued that there is a danger that jurors may reach a verdict before the jury deliberations (or even before all the evidence has been presented) without regard to the variety of views that the other jurors bring to the jury room.

56 Ibid [312].

> 9.99 Finally, it is impractical to give directions at the beginning of the trial because the trial judge, in many cases, may not know which issues will arise, and thus what directions to give. The nature of the prosecution case and the defence or defences that the defence team is intending to use will usually be unclear to the judge at the start of the trial.[57]

9.44 The NSWLRC noted that preliminary statements by the judge would require some degree of pre-trial disclosure by the parties, including the defendant.[58]

VLRC's proposals and recommendations

9.45 In its Consultation Paper on jury directions, the VLRC discussed the possibility of providing for greater flexibility in the timing and delivery of the judge's summing up (or 'charge') as part of its proposed jury directions statute. In particular, it suggested that judges could be permitted, or required, to address the jury at the start of the trial when the jury is given its proposed 'Aide Memoire' on the elements of the offences, and noted the potential benefits of 'splitting' the charge by allowing judges to deliver their directions before the final addresses of the parties.[59]

Submissions

9.46 As noted by Associate Professor John Willis of La Trobe University in his submission to the VLRC:

> *The importance of early directions*
> There is evidence, and it would appear to conform with common sense, that jurors should be given certain information early in a trial.
>
> The prosecution opening does some of this but there is an important role for the judge especially in informing the jury of the elements of the offences with which the defendant has been charged. In this way, the jury is given some idea of what they should be looking for as the case unfolds.
>
> *Ongoing directions*
> Revision and reinforcement should, at least for certain directions, be a real consideration. For example, it maybe useful for the judge to review at the start of the day, the elements of the offences with which the defendant has been charged. It is not uncommon for a jury to be asked to decide the guilt of one or more defendants on a number of offences.
>
> …
>
> They have to understand the elements of each of the offences and then be able to apply the evidence (as they interpret it) to the law. In addition, they have to apply only so much of the evidence as is relevant and admissible in respect of each defendant. As a teacher of law students for many years, I can say with confidence that it would be quite optimistic (unrealistic) to expect law students, having been

57 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [9.93]–[9.99].

58 See ibid [9.100]–[9.103], [6.13].

59 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [7.20]–[7.22], [7.60]. A similar suggestion about allowing the judge to direct the jury prior to counsel's closing addresses was made by the NSWLRC: New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [6.55]–[6.60].

> given brief oral instructions, to understand the relevant elements of these various offences and then apply the evidence to those legal elements.[60]

9.47 In response to the VLRC's Consultation Paper, the Criminal Bar Association of Victoria and Benjamin Lindner, one of its members, supported a more flexible approach to the timing of directions to meet the exigencies of the case in hand:

> Directions of law may be given at any time in a trial. We do not oppose directions being given when convenient rather than being restricted to after final addresses of counsel. Particularly in long, complex trials involving multiple accused (eg a trial of 12 accused charged with all being members of a terrorist organisation) it is sensible and conducive to a fair trial, that a judge directs the jury early in the trial as to the importance of separate trials and the meaning of hearsay. Such directions should be repeated after counsel's addresses as part of the Charge. In other words, to ensure a fair trial, a judge might give a direction on certain matters of law and of evidence at convenient points in the trial to ensure fairness. Thus, in appropriate cases, a trial judge should give binding directions of law more than once; but always at the end with completeness. In our submission, completeness of directions, with the authority of the judge's office, requires that the facts be related to the issues in dispute as required by *Alford v Magee*.[61]

9.48 Judge Murphy of the County Court of Victoria also argued that splitting the judge's charge may have its advantages:

> I am a supporter of a proposal to allow the charge to be split. In relation to the issues in dispute this may allow the trial judge to identify the elements of the relevant offence at the commencement of the trial, give appropriate directions as to those elements, and then the trial can proceed where the jury know right from the beginning what are the issues in dispute.
>
> …
>
> I am of the view that there is much duplication in addresses by Counsel. At the moment I give preliminary directions to the jury as to the onus of proof, the role of the judge, the burden of proof, and evidence being the witnesses' answers. Generally, counsel for the prosecution repeat the bulk of those directions in their opening addresses. Counsel for the defence often repeat significant amounts in their closing address. Counsel for the prosecution may also do the same thing. This may be a technique of advocacy but it is effectively a lazy technique of advocacy. A further argument, in favour of allowing or a charge to be split, is that often Counsel will premise any comment about the content of the law with the comment that it is subject to anything that the trial judge might say as, for example, to the elements of the offence. In my view it would be better if a trial judge was in a position to identify the elements of the offence, or as part of a direction, endorse the elements of the offence that have been articulated by Crown Counsel in opening, or even provided in writing at that stage, so that the jury is not forever in a position waiting for the ultimate direction as to the content of the law from the trial judge in his/her final charge. Splitting the charge would also mean that the trial judge would be in a position to encapsulate or make reference to the evidence comments that Counsel have made in their closing addresses. I am of the view that this would also expedite the running of the trial.[62]

---

60 Associate Professor John Willis, Submission to the Victorian Law Reform Commission, 16 December 2008, 4–5.

61 Benjamin Lindner (Criminal Bar Association), Submission to Victorian Law Reform Commission, 30 November 2008; Criminal Bar Association of Victoria, Submission to the Victorian Law Reform Commission, 15 December 2008, 27.

62 Judge MD Murphy, Submission to the Victorian Law Reform Commission, 5 February 2009, 6–7.

9.49 The Victorian Office of Public Prosecutions also supported proposals that the timing of a trial judge's charge could be varied or split if, in the circumstances of the particular trial, doing so would assist the presentation of the charge and enhance the jury's comprehension of the evidence.[63]

VLRC's recommendations

9.50 Although the VLRC recommended that in due course the content of jury directions would be set out in its proposed jury directions statute, it nonetheless recognised that much of the presentation of jury directions, including when and how they should be given, must remain in the hands of the trial judge:

> 11. The trial judge should have a discretionary power to determine the timing and frequency of the directions given to the jury.[64]

9.51 This Commission would not dispute that, but there would appear to be no need to formally state that discretionary power in the absence of a statute covering the field such as that recommended by the VLRC.

The Issues Paper

9.52 In its Issues Paper, the Commission considered the use of opening directions by the judge, and opening statements by the parties, and sought submissions on the extent to which any reforms to these practices might be introduced to better assist juries.[65]

Submissions

9.53 Several respondents to the Commission's Issues Paper specifically commented on this issue. Both judges of the District Court who responded to the Issues Paper supported the use of opening addresses from defence counsel as well as the prosecution: 'These ought to be encouraged, if not mandated.'[66]

9.54 Some submissions argued that it would be beneficial for the judge to give information to the jury at the start of the trial:

> It may be helpful if trial judges addressed jurors at the beginning of the case to outline potential issues that may arise during the trial. For example, the trial judge could outline to the jury the elements of the offence and legal issues they will be required to consider. This may help the jury put the evidence in context as it is presented during the trial. As is noted in paragraph 8.24 of the [Issues Paper][67] in

63 Office of Public Prosecutions, Submission to the Victorian Law Reform Commission, 12 February 2009, 19–20.

64 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) 13, 72.

65 Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [9.52]–[9.59], [9.66]–[9.69], 206.

66 Submission 6. See also Submission 10.

67 Paragraph [8.24] of the Issues Paper reads:

> 8.24 This research seems to squarely raise real doubts about the efficacy of limited-use directions: once evidence has been admitted, it will be used for all purposes that a jury considers appropriate. However, it also seems that jurors are best equipped to deal with instructions on how they are to apply evidence if they have some guidance in advance as to the context in which that evidence is led.

> the context of discussion of the efficacy of limited use directions, jurors are best equipped to deal with concepts such as this when they receive some guidance in advance. This may also be applicable to an understanding of issues likely to arise in the case as a whole, in particular the elements of the offence. An understanding of the elements of each offence in the indictment may help the jury to focus on the evidence in relation to each of these when the evidence is given. It would be important that the directions were focused and short so there was no undue delay in the commencement of the trial however it may overall aid juror comprehension of the evidence.[68] (note added)

9.55 Legal Aid Queensland adopted a more cautious approach:

> On the timing of the directions, we are doubtful as to whether detailed directions about the law can meaningfully be given at the commencement of all trials. … as the trial and evidence unfolds the real issues will emerge and assume their appropriate degree of relative importance, bringing clarity to the trial judge's task of identifying those issues the jury in a summing up, and relating the relevant evidence to the relevant law. We suspect that in many cases, particularly complex trials, it would be more confusing for juries to receive detailed directions about the law which may be of possible application to the case, in the absence of having heard any evidence or having seen any of the witnesses.
>
> However, we accept there are some benefits in giving juries certain directions at the beginning of a trial. There are some directions, such as those involving what is evidence; the drawing of inferences; the onus and standard of proof; and, in some simpler cases, the law relating to the charge itself, which could helpfully be given at the start of the trial. Many judges give such directions now, and the Bench Book, in section 5B, deals with some of these directions.[69]

9.56 The Office of the Director of Public Prosecutions expressed some reservations about more frequent opening statements by defence counsel as they tended to become opportunities for advocacy rather than a statement of the issues.[70]

The Discussion Paper

9.57 After a consideration of the merits of opening directions and statements to the jury, the Commission made the following proposals in its Discussion Paper:

> 3-3 The Criminal Code (Qld) should be amended to make the use of opening statements by both parties, including the defendant, in order to clarify in advance (so far as practicable) the factual and legal issues for the jury, mandatory.
>
> 3-4 In particular, the jury should be informed as early as is practicable, of the issues that it will have to decide, the issues that have been admitted or are otherwise not in dispute, and the overall context in which these issues arise.[71]

68 Brisbane Office of the Commonwealth Director of Public Prosecutions, Submission 9.

69 Submission 16, 6.

70 Submission 15.

71 Queensland Law Reform Commission, *A Review of Jury Directions*, Discussion Paper WP67 (2009) 104.

Further submissions

Defence opening statements

9.58 The Office of the Director of Public Prosecutions ('ODPP') was somewhat indifferent to these proposals. It observed that a statement by the defence that it was putting the prosecution to proof would probably be sufficient compliance with any obligation to make an opening statement. Moreover, where they are used at present, they are 'routinely' used by defence counsel for 'advocacy' (that is, for submissions to the jury in relation to evidence yet to come) rather than a true opening statement.[72]

9.59 The ODPP also noted that the greater use of more detailed and specific opening statements by the defence would require a 'culture change' and judicial enforcement.[73]

9.60 The ODPP's concerns about the use of defence opening statements as argumentative rather than expositive was echoed in the submission by the Brisbane Office of the Commonwealth Director of Public Prosecutions ('CDPP'), who supported mandatory opening defence statements but also advocated a legislative restriction on the range of matters that could be covered in any such opening statement:

> The CDPP supports the use of mandatory opening statements by the defence in criminal trials. I note that in paragraph 3.160 of the [Discussion Paper] it is noted that the Queensland Director of Public Prosecutions expressed reservations about opening statements by defence counsel 'as they tended to become opportunities for advocacy rather than a statement of the issues'. Provisions in other jurisdictions permitting defence opening statements are referred to in the paper. Experience in some of those jurisdictions has been that the opening statement is used as a further opportunity to present a closing argument to the jury rather than an opportunity to identify issues. For example, section 159 of the *Criminal Procedure Act 1986* (NSW) provides that an accused or his counsel may address the jury immediately after the opening address of the prosecutor. The section then provides:
>
> > 'Any such opening address is to be limited generally to an address on:
> >
> > (a) the matters disclosed in the prosecutor's opening address, including those that are in dispute and those that are not in dispute; and
> >
> > (b) the matters to be raised by the accused person.'
>
> In *R v MM* (2004) 145 A Crim R148, Howie J noted that:
>
> > 'the purpose of the defence opening address under section 159(2), therefore, is to define, for the jury's benefit, the real issues in the trial and what the accused might say in answer to the Crown's allegation. It is not an opportunity for defence counsel to embark upon a dissertation on the onus and standard of proof, or the functions of judge and jury, or to anticipate the directions or warnings to be given by the trial judge, or to urge upon the jury the way that they should assess the evidence for witness to be called in the Crown case. It behoves trial judges to ensure that the addresses of counsel are not open to abuse, particularly in a case where the contents of the address is circumscribed by a provision of an act. To permit counsel to ignore

72 Submission 15A. The Commission notes that concerns about the proper scope of a defence opening have been accommodated in the legislative provisions of some jurisdictions, such as New South Wales and South Australia: see [9.34]–[9.35] above.

73 Submission 15A.

> such limitation is not in the interest of justice, either generally or in the particular case. It may be appropriate for a trial judge to ensure, before the defence opens and in the absence of the jury, that defence counsel is aware of the limited basis of an opening under section 159 and that the address will comply with it.'

Similar comments were made in *R v Karapandzk* (2008) 184 A Crim R 320. In that case the South Australian Court of Criminal Appeal noted that section 288A of the *Criminal Law Consolidation Act 1935* (SA) permits defence counsel to address the jury 'to outline the issues in contention between the prosecution and the defence'. In that case Doyle CJ noted that:

> 'the section does not permit counsel to address the jury on the defence case generally, or even on such aspects of the defence case's counsel might wish to raise with the jury. Nor does the section allow counsel to address the jury on the case at large, or on matters such as the burden of proof, that routinely arise in a criminal trial. There is a distinction between identifying issues in contention and referring to the evidence relevant to those issues. That distinction should be observed. There may be circumstances in which the identification of an issue calls for a brief reference to the facts of the case, but that should be so in exceptional circumstances only.'

Similar comments were made in *R v Hansen* (2002) 134 A Crim R 227 at 236 para 91 where it was noted by Lander J in the South Australian Court of Criminal Appeal that: 'it is not appropriate for counsel to use the occasion to make what is in effect a closing address and an argument'.

Were any amendments to be made to the law in Queensland to allow defence opening statements, the provision would have to specify the matter to be covered so as to ensure the opening address is limited to the identification of matters in issue.[74]

9.61 Legal Aid Queensland opposed making opening statements by defendants mandatory: the current position that such statements are permitted is 'sound and should be retained.'[75] Many of its objections to greater pre-trial disclosure by defendants also applied to this proposal.[76] It submitted that:

> The trial process is a dynamic one. Given that the Crown bears the burden of proof final decisions by an accused about calling and/or giving evidence will often be the subject of ongoing review during the course of a trial. The Discussion Paper acknowledges that defence opening statements 'that touch on the evidence and issues cannot go into great detail,' and that the defence should not be required or expected to indicate whether they will testify, or what witnesses they may call.
>
> In this context, imposing some mandatory duty on the defence must be viewed in the context of the prosecution's opening, which ordinarily will inform the jury of the nature of the case, the witnesses to be called and the general content of what their evidence will be about. The Crown bears the onus of proof and the defence is entitled to proceed on that basis. It needs to be remembered that while the accused enjoys a presumption of innocence, many accused persons are in fact innocent. They are entitled to put the Crown to proof. Where the defence proceeds on the basis of putting the Crown to proof, it would be unthinkably unfair to require an

74 Submission 9A, 3–4.

75 Submission 16A, 9.

76 Ibid.

> accused to make some type of mandatory opening statement informing the jury of that position.[77]

9.62 The Bar Association of Queensland had no objection to legislating the principles stated by Fryberg J in *R v Nona*,[78] if that were considered necessary, it was 'firmly of the view that it should not be made mandatory for the defence to make an opening statement.'[79]

> For reasons that have been canvassed above, we suggest that it is unrealistic to expect that in criminal trials, the issues can always be categorically outlined at the outset. However and in practice, experienced prosecutors usually do take advantage of the opportunity provided by their right to provide an opening address to outline and clarify the issues that are likely to arise in the case.
>
> … An opening by defence counsel does happen with some regularity, particularly in the Supreme Court in complex and difficult cases. However, this should always be at the discretion of the defence and the court, and we can see no logical reason why the defence should be compelled to make such an opening in every case. Just as there will be a concern that such an opportunity is not to make a speech such as in a closing address, there should be no expectation that the opportunity be availed. The position in South Australia referred to at paragraph 3.152 on page 98 of the QLRC report seems in our view an eminently sensible one.[80]
>
> We do not accept the contention made by the office of Director of Public Prosecution set out in 3.160 (page 101 of the report).[81] In our experience opening statements made by counsel on behalf of the accused person are done properly, and are done with a view to identification of the issues.
>
> In many trials an opening statement by the defence would be unlikely to be much assistance to the Jury. For example, the average trial of sexual offences that occur in the District Court, the most the defence counsel would say is that the accused denies that the alleged events ever happened. This is pretty well evidenced by the plea of 'not guilty' made at the commencement of trial.[82] (notes added)

9.63 However, one respondent to the Discussion Paper, who had appeared as a defendant in two trials, strongly supported the proposal that opening statements by both parties should be mandatory. In this respondent's view, opening statements (including that by the defence) would allow the jury to focus on key issues as the evidence was led and would give them some balance as they would have some idea of the defence's arguments or evidence.[83]

---

77 Ibid.

78 [1997] 2 Qd R 436. See [9.19] above.

79 Submission 13A, 12. The Queensland Law Society endorsed and supported the whole of the submissions by the Bar Association of Queensland: Submission 13B.

80 See [9.35] above.

81 See [9.56] above.

82 Submission 13A, 11–12.

83 Submission 4A. This respondent's approach is influenced by his experience. At his first trial, the jury was unable to reach a verdict after nine hours of deliberations. At the re-trial, his counsel made an opening statement in which the jurors were told which aspects of the evidence the defence wanted them to focus on; emphasising the need to concentrate on certain details of the evidence. The second jury acquitted the respondent after deliberating for an hour, though of course there were many other differences in the two trials.

Split summings up

9.64 The ODPP was also cautious about the use of split summings up or greater instructions or commentary from the judge at the start of the trial. Any comments or directions given at the start of the trial would have to be repeated at the end in any event, and there was always a risk that any remarks that anticipated the evidence would be wrong if the evidence turned out to be other than as expected or if the judge had not had an opportunity to become familiar with all the issues in the case. Furthermore, much of what could be said by the judge at the start of the trial would be covered in the prosecutor's opening.[84]

9.65 The CDPP noted, however, that the early identification of the issues 'may assist the jury in their consideration of the evidence.'[85] The CDPP and the Bar Association of Queensland also expressed support for limited use directions to be given at the time the relevant evidence is heard.[86] Those submissions and those issues are discussed in chapter 12 of this Report.

9.66 Legal Aid Queensland also re-stated its earlier submission in relation to the issue of the judge providing the jury with more information and directions at the start of the trial:[87] see [9.55] above.

The QLRC's view

9.67 The law at present permits the judge and both parties to make opening statements. The judge's opening remarks to the jury include some more or less standardised statements about the respective roles of the jury and judge, the burden and standard of proof, and other matters that relate to the way in which the jurors should carry out their duties. The prosecution will always make some opening that will introduce the jury to some aspects of the issues in the case and the evidence that it will seek to lead and the conclusions that it will ask the jury to reach. The defendant, or defence counsel, may make an opening statement following the prosecution's opening near the start of the trial but do so less frequently and rarely go into any detail. They may also make an opening statement following the close of the prosecution case if the defendant is going to call any evidence.

9.68 The duties of all three major participants in the conduct of the trial, and the legal and tactical positions of the parties, are of course quite different from each other, which accounts in large measure for the differences in approach taken by each in their opening statements, both in terms of content and detail and, in the case of the defendant, whether to make such a statement at all.

9.69 However, from the jurors' point of view, the more relevant information that they have at any early stage of the trial, the more likely that they will be able to understand the evidence as it is led, the way in which the testimony of different witnesses will relate to each other, and the better they will understand it and its relationship to the law. The parties and their lawyers should have a very good understanding at the start of a trial of how the evidence is likely to emerge, and where areas of doubt and conflict are likely to

84 Submission 15A.

85 Submission 9A.

86 Ibid; Submission 13A.

87 Submission 16A, 9.

arise, especially if a regime of mandatory pre-trial disclosure such as that recommended by the Commission is introduced. The judge may have some understanding of these matters from pre-trial proceedings but will at least have the professional experience and training to suspend drawing conclusions until the evidence is complete. Juries come to each trial completely fresh and without any professional training in following evidence as it is presented in a manner that is dictated by legal procedural rules rather than the chronological order of the events of the alleged offences.

9.70 Evidence in criminal trials can only be presented witness by witness, and this may prevent it emerging in a strictly coherent chronological or logical fashion for a jury hearing it for the first time. Jurors with some preliminary indication of the overall structure of the issues and the evidence at the outset can only be assisted in understanding both the content and context of the evidence as it is presented. It will help them better to avoid making conclusions at an early stage if they know that other witnesses will follow who will deal with the same matters. It may well assist a defendant to let the jury know at an early stage what evidence it may rely on or issues it may raise so that the jurors can bear these in mind when hearing the prosecution evidence and not form premature conclusions, consciously or otherwise, until the later evidence that it has been told will be given is in fact led.

9.71 Naturally, all opening statements that touch on the evidence and issues cannot go into great detail, especially where this relates to evidence where witnesses are known or suspected to be in conflict or evidence is of doubtful admissibility. And current practice accepts that defendants (unless otherwise required by statute)[88] are entitled to reserve giving specific details of their defences or evidence until their case progresses. But even they may well find it tactically advantageous in some cases to alert the jury either at the start of their case, or even at the start of the trial, to the particular issues that they will be asking the jury to focus on in their deliberations.

9.72 In the Commission's view, defendants should participate in this opening process, and the Criminal Code (Qld) should be amended to encourage this, though not to make it mandatory. The content of the opening statements by both parties should remain a matter for them. Defendants might well be expected to be more circumspect in their openings and should not be required, or expected, to indicate whether they will be testifying nor the details of any witnesses that they propose calling. So, for example, in cases where defendants have already given notice to the prosecution of their intention to call alibi or expert evidence,[89] there is no reason in principle why those matters could not be raised by the defence in its opening.

9.73 Even if this approach were generally adopted, some restraint would need to be exercised. Too much information at the outset may be confusing to a jury when there is little means of putting it in context. Moreover, it would be critical that neither the trial judge nor the parties stray into conjectural areas that may not be supported by admissible evidence during the trial itself.

9.74 The Commission concludes that it is preferable to adopt a legislative approach along the lines of the legislative provisions for defence openings in New South Wales and South Australia. This would entail amending the Criminal Code (Qld) to expressly

88 Criminal Code (Qld) ss 590A, 590B, 590C.

89 These are already matters for pre-trial disclosure and are not dependent on the implementation of any of the Commission's other recommendations or any other expansion of defendants' current obligations under the Criminal Code (Qld).

permit an opening statement by the defence near the start of the trial (following the prosecution's opening), but keeping any such opening statement optional rather than mandatory, and limiting what they can contain. If the Criminal Code (Qld) were in this way to require a judge to invite the defence (if represented) to make an opening statement, defence opening statements are likely to become more common; the defence (if represented) will know that the invitation to make an opening statement will come and that declining to make one, even if this cannot be the subject of comment, might be disadvantageous in front of a jury.

9.75 In the Commission's view, this better recognises the need for flexibility and the strategic or tactical considerations of the defence. A permissive approach is also consistent with the section 619 of the Criminal Code (Qld) in relation to defence statement made at the close of the prosecution case, which is in terms of an entitlement but not an obligation.

9.76 However, a judge should not be required to invite an unrepresented defendant to make any opening statement as a defendant declining to do so might be seen in an unfavourable light by the jury. A judge might well feel it appropriate to do so if the defendant, though unrepresented, is nonetheless articulate about his or her defence, but that should be a matter for the judge's discretion.

9.77 The Commission also recommends the amendment of the Criminal Code (Qld) by the insertion of a provision similar to section 222 of the *Criminal Procedure Act 2009* (Vic).[90] Again, this does not require trial judges to do anything but recognises in express terms the powers and discretions that they already have. This express recognition may, however, encourage judges and legal practitioners alike to consider flexible approaches to the ways in which a criminal trial might proceed that will improve the presentation of the case and evidence to the jury.

Recommendations

9.78 The Commission makes the following recommendations:

9-1 The Criminal Code (Qld) should be amended to require the trial judge to invite the defendant (if represented) to make an opening statement at the close of the opening address by the prosecution. The defendant should not be required to make any opening statement at that time.

9-2 The jury should be informed as early as is practicable of the issues that it will have to decide, the issues that have been admitted or are otherwise not in dispute, and the overall context in which these issues arise.

9-3 The Criminal Code (Qld) should be amended to provide that the judge may address the jury at any time on:

(1) the issues that are expected to arise, or have arisen, in the trial;

90 See [9.36] above.

(2) the relevance to the conduct of the trial of any admissions made, directions given or matters determined prior to the commencement of the trial;

(3) any other matter relevant to the jury in the performance of its functions and its understanding of the trial process, including giving a direction to the jury as to any issue of law, evidence or procedure.

INTEGRATED DIRECTIONS

Structured question paths

9.79 Structured question paths, ideally presented (where warranted by the issues in the case) either as sequential lists of questions or in the form of a flowchart, collapse the relevant legal issues into a number of factual questions that guide the jury to its verdict. The following example of the use of structured questions is set out in Chapter 146 of the Queensland Benchbook:

1. Did A kill B?
   a. If 'no' to question 1, A is not guilty of any offence;
   b. If 'yes' to question 1, go to question 2.

2. Has the prosecution proved that A was not acting in self-defence?
   a. If 'no' to question 2, A is not guilty of any offence;
   b. If 'yes' to question 2, go to question 3.

3. When he killed B, did A intend to kill him or cause him grievous bodily harm?
   a. If 'no' to question 3, A is not guilty of murder but guilty of manslaughter;
   b. If 'yes' to question 3, go to question 4.

4. Has the prosecution proved that A was not provoked by B?
   a. If 'no' to question 4, A is not guilty of murder but guilty of manslaughter.
   b. If 'yes' to question 4, go to question 5.

5. Has A provided (on the balance of probabilities) a defence of diminished responsibility?
   a. If 'no' to question 5, A is guilty of murder;
   b. If 'yes' to question 5, A is guilty of manslaughter.[91] (underlining in original)

9.80 This is a relatively straight-forward example. It could also be arranged like a flowchart diagrammatically or schematically illustrating the consequences of each intermediate decision.[92] However, it should be noted that the questions ask the jurors to reach conclusions of law and are not factual questions based on the elements of the offences or defences into which the legal issues have been embedded .

---

91 Queensland Courts, *Supreme and District Cour*t Benchbook, 'Manslaughter: Code s 303' [146] <http://www.courts.qld.gov.au/2265.htm> at 30 November 2009.

92 Eg, Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) 122.

9.81 In complex cases, a flowchart may make the sequence of decisions and consequences easier to follow, though it might be easy to over-complicate the diagram, in which case it might well be useful to break it up into logically discreet components.[93]

9.82 Although the example just cited does break down the questions that the jury must decide, they are not purely factual. They still ask the jury to make decisions about the law, not just the facts: the relevant law concerning murder and manslaughter has not been embedded in factual questions but left in terms of the final legal decisions about the defendant's guilt of the two offences.

9.83 However, the jury still returns a conventional verdict of 'guilty' of one of the two offences or 'not guilty', as the case may be, and its intermediate decisions are not disclosed. In this way, the traditional form and delivery of a verdict by the jury is preserved but its decision-making process in reaching it has been structured in advance by the court, and questions of law, which juries may not be well equipped to resolve, have been removed.

9.84 The use of structured factual questions as a framework for a jury is not new, as is demonstrated by another, older example from Queensland cited with approval by the High Court in *Stuart v The Queen*.[94] The trial judge, Lucas J, summed up to the jury ex tempore in these words:

> Turning from that to Stuart's case, and remember that there are two possible approaches to Stuart's case — what I have called the counselling approach, that is the proposition that Stuart and Finch made a plan to light a fire, that is to commit the offence of arson, that in pursuance of that plan Finch lit the fire — that is, in law Stuart is held to have procured the commission of that offence and is punishable as a principal offender — and the further proposition that the offence constituted by the causing of the death of Jennifer Davie was a probable consequence of Finch carrying out the plan to commit arson which they had evolved between them — to put it technically, a probable consequence of carrying out Stuart's counsel — these are the questions which arise, and in considering them I must again warn you that you may only consider evidence admissible in the case of Stuart. The first four questions are the same as those in Finch's case —
>
> (1) Did Finch light the fire?
>
> I put them in a different order —
>
> (2) Did Stuart counsel Finch to light the fire, in the sense which I have tried to explain it to you?
>
> (3) Did the fire cause the death of Jennifer Davie?
>
> (4) Did Finch light the fire in the prosecution of the unlawful purpose of extortion carried on in conjunction with Stuart?
>
> (5) Was Finch's act in lighting the fire an act of such a nature as to be likely to endanger human life?
>
> (6) Was the offence constituted by the unlawful killing of Jennifer Davie a probable consequence of carrying out Stuart's counsel?

93 Other examples from the Northern Territory are set out in Appendix C to the Victorian Law Reform Commission's Consultation Paper: *Jury Directions*, Consultation Paper (2008) 127–9.

94 (1974) 134 CLR 426; [1974] HCA 54.

> Those are the six questions, gentlemen, and if you answer all six of them 'Yes', then it would be your duty to bring in a verdict of guilty of murder against Stuart. If you answer all questions 'Yes' except the question relating to Finch's lighting of the fire in the prosecution of the unlawful purpose of extortion, or the question as to the nature of Finch's act, whether it was an act of such a nature as to be likely to endanger human life, if you give a negative answer to one of those questions, or both, but only one is necessary to reduce it to manslaughter, and if you answer all the other questions in the affirmative, then your verdict in Stuart's case would be guilty of manslaughter. Any other combination of answers would result in a verdict of not guilty in Stuart's case.
>
> The other possible way to look at Stuart's case is what I have called the common intention approach, that the offence constituted by the unlawful killing of Jennifer Davie was committed in the course of the prosecution of an unlawful purpose as to which Finch and Stuart had formed a common intention to prosecute it in conjunction with one another and was a probable consequence of the prosecution of such purpose. Under this approach — and again you may only look at evidence admissible against Stuart — there are again six questions arising, including all the questions which arise in the case of Finch and in the case of Stuart under the other approach.
>
> The first question, I suggest, is: did Stuart and Finch form a common intention to prosecute the unlawful purpose of extortion in conjunction with one another? That is the first question. The second question is: did Finch light the fire? The third question is: did the fire cause the death of Jennifer Davie? The fourth question is: did Finch light the fire in the prosecution of the unlawful purpose? The fifth question is: was the offence constituted by the unlawful killing of Jennifer Davie a probable consequence of the prosecution of the unlawful purpose? The sixth question is: was Finch's act in lighting the fire an act of such a nature as to be likely to endanger human life? Gentlemen, if you answer all six questions 'Yes', your verdict in Stuart's case should be guilty of murder. If you answer them all 'Yes' except the question of the nature of Finch's act in lighting the fire — that is, whether it was an act which was likely to endanger human life — if that is the only question which you answer 'No', then your verdict should be guilty of manslaughter in Stuart's case. Any other combination of answers to the questions will result in a verdict of not guilty in Stuart's case.[95]

9.85 McTiernan J considered that this summing up was 'entirely correct' and that the trial judge was 'under no misapprehension as to the facts of the case as they affected Stuart or Finch and that he correctly applied the criteria of liability in the sections of the Code'.[96] Menzies J agreed, and went further:

> … in finally leaving the matter to the jury the learned trial judge adopted what I regard as a course which could not have been bettered to ensure that, after a difficult trial of two accused extending over thirty-two days during which evidence was given which occupies some 1700 pages of transcript, the jury in its difficult task of fact-finding, was not encumbered by any concern about the intricate legal problems which it fell to his Honour himself to decide in formulating his charge.[97]

9.86 Gibbs J, delivering the principal judgment of the Court, described the summing up as 'notable for its care and clarity'.[98] Nonetheless, the jury may well have benefited from a written summary of the six critical questions articulated by Lucas J, and that

95 Ibid [4].

96 Ibid [5] (McTiernan J).

97 Ibid [2] (Menzies J).

98 Ibid [3] (Gibbs J, Mason J agreeing).

summary prepared during the weeks of the trial may well have allowed his Honour to refine his questions even further.

9.87 The use of flowcharts and sequential lists of questions has been widely considered as a technique to assist juries in their decision-making processes. It is already used by some Queensland judges though this practice has not been formalised in any way and remains a matter for the discretion, and perhaps personal preferences, of the trial judge.

Integrated directions

9.88 The Commission uses the term 'integrated directions' to refer to a summing up that combines the summary of (or references to) the evidence with the relevant directions on the law and an outline of the questions that the jury must answer into a single logical unit. This can be contrasted with a more conventional summing up structured as separate blocks of instruction each with different purposes:

- a block of directions about general matters such as the onus and burden of proof, the presumption of innocence and the need for unanimity;
- the elements of the offence (which may often be accompanied by a written version, which may have been distributed by the prosecution);
- a block of directions covering warnings or other specific directions that arise on the evidence;
- the summary of the evidence, which may be done sequentially or thematically;
- a summary of the parties' addresses; and
- some concluding remarks, which may include a warning about the use of the transcript in jurisdictions or cases where the jury is provided with this for its deliberations.

9.89 Integrated directions can also be contrasted with the use of structured questions, illustrated in the examples given above, in that they seek to refine the questions given to the jury even further, reducing them to questions of fact: for example, 'Did Jack stab Jill with the knife?', 'Did Jill die as a result of the stabbing?' rather than 'Did Jack kill Jill?'

9.90 If it is accepted that juries tend to apply directions better when they are presented in direct connection with the case before them rather than as abstract principles of law, then judges may be well advised to seek to incorporate instructions on the law and directions or warnings on the evidence into an integrated review of the case and the factual decisions that the jury must make. Indeed, this is consistent with the thrust of the principle in *Pemble v The Queen*:

> Besides formally expounding the elements of the law … with simplicity and precision, the summing up must assist the jury in connexion with the facts relevant to their consideration of that aspect of the [offence].[99]

9.91 Thus, in a summing up using integrated directions, the instructions to the jury largely or completely avoid explicit references to the detail of the law by framing the questions for the jury to answer in such a way that the law is embedded in them; although these questions answer the legal issues in the case, they are framed as questions of fact. In effect, the law is subsumed in these directions without the need for overt statement — the law (for example, the elements of the offences and defences) dictates the form of the questions of fact that the jury must answer.

9.92 Thus, the legal questions set out in [9.79] above, for example, would not be given. Instead, they would be reduced to a series of factual questions such as these:

1. Did Adrian stab Belinda in the stomach?

2. Did Belinda die as a result of injuries caused by the stabbing?

3. Did Adrian intend to kill Belinda or cause her grievous bodily harm?

9.93 In relation to each of these questions, the judge can insert comments about or references to the relevant evidence, and can give any directions or warnings that are called for by that evidence or those issues.

9.94 Directions of this sort are 'integrated' in that they do not lecture the jury with blocks of information about the law, whether that is about the substantive law of the charges and defences involved in the case or procedural law that governs the way in which they may or may not use certain evidence. Those instructions are inserted into the 'narrative' of the directions when they arise for consideration in the flow of issues discussed in the summing up.

9.95 These would need to be developed by trial judges over time, and no doubt some more experienced trial judges already incorporate some of these ideas into the structuring of their summings up, consciously or otherwise.

9.96 An example of an integrated direction follows. It was given by Justice Robert Chambers of the New Zealand Court of Appeal to the Commission and other participants at a Symposium hosted by the Victorian Law Reform Commission in February 2009. Given its utility to this discussion, it is set out in full here.[100] The written material given to the jury starts at 'QUESTIONS FOR THE JURY'.

Fact Situation

[1] John Smith has been charged with:

a) aggravated robbery;

b) kidnapping; and

c) indecent assault.

99 *Pemble v The Queen* (1971) 124 CLR 107, 120 (Barwick CJ).

100 It is also set out, with minor changes only, in Appendix E to the VLRC's Final Report: Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) Appendix E, 169–171.

[2] He has pleaded not guilty to all charges. A judge has declined an application for severance of the charges.

The Crown case

[3] The Crown case is that, on 3 February this year, the ANZ Bank in Mount Wellington was robbed. The men who entered the bank were Bill Brown and Mark Menzies. Brown was armed with a sawn-off shotgun. The men, after they threatened the bank teller, were given bags of money which they stuffed into two duffel bags. They then ran out of the bank and got into a Camry car parked outside. The Crown case is that John Smith was driving that car. Smith drove away towards St Johns.

[4] When they reached College Road, Smith dropped Brown and Menzies off at a friend's house. They took the duffel bags and the money. Smith drove off. As he was driving along St Heliers Bay Road, he saw a girl he vaguely knew, who had her thumb out to hitch a ride. The girl was Samantha Evans. Smith pulled over and said hello to Evans and asked where she wanted to go. She said, 'St Heliers Beach'. She said she was going to meet some girlfriends there.

[5] He told her to hop in and they sped off. After a short time, Smith changed course and, instead of heading for St Heliers Beach, turned instead towards Glen Innes. Evans asked him where they were going, but Smith didn't answer. She then noticed he had locked the car doors. As well, he started speeding. Evans asked to be let out of the car, but again Smith said nothing. As they approached a set of lights which were red, Evans tried to open her door, but Smith sped through the lights.

[6] Eventually they reached Wimbledon Reserve in Glen Innes. The park was deserted. He parked in a secluded part. Smith then began to feel Evans's breasts, under her t-shirt but over her bra. Evans thought she was going to be raped. She realised she had to get herself out of the car. She suggested they would be more comfortable out on the grass. He unlocked the door, and Evans took her chance and fled. Smith chased her for a bit, but was unfit and soon gave up. Evans hid in a neighbouring property until the coast was clear. She then went into the house and phoned the police.

[7] The police later came calling on Smith. He declined to make a statement. He was charged with kidnapping and indecent assault.

[8] Later, the police tracked down Brown and Menzies as the bank robbers. They entered early pleas of guilty and were convicted. Brown indicated he was prepared to give evidence as to who the driver of the getaway car was. He said it was Smith. He said he had discussed the bank job with Smith prior to doing it and that Smith had agreed to be the driver of the getaway car. Brown has given evidence for the Crown to this effect.

[9] At trial, the Crown also called an eye-witness to the robbery get-away. Her description of the driver closely matches Smith. But the eye-witness was not able to pick Smith in a photo montage.

[10] Evans, under cross-examination, strenuously denied that she had touched Smith in any way. She said she had made it clear she wanted to get out of the car. She had not consented to Smith touching her breasts.

The defence case

[11] Smith gave evidence. He denied being the driver of the getaway car. He said he had been that day at a friend's house in College Road, St Johns. Brown

and Menzies had come in and they had all had a cup of coffee. They did not say where they had been and Smith did not ask. Smith then asked if he could borrow their car to go for a drive to the shops. They said, 'Sweet as.'

[12] He took off in the Camry. As he was driving along St Heliers Bay Road, he saw Samantha Evans, whom he knew well. They had been at parties together and had got on well. He saw she was hitching a lift. He pulled over and asked her where she wanted to go. She said, 'Wherever.' He drove off with her. She then started to come on to him and reached over and started stroking his penis over his trousers. He asked her whether she would like to go somewhere private and she said, 'Mmm.' So he took her to a park in Glen Innes. They parked and started kissing. Evans continued to rub his penis over his trousers. He reached in, under her t-shirt and touched her breasts.

[13] Evans then said she wasn't 'on the pill' and didn't want sex. He was annoyed with her, because he felt she had led him on. He told her to get out of the car, which she did. He then drove off.

[14] In answer to questions asked in cross-examination, he denied locking the doors in the car. He said that, even if he had, that would not have prevented Evans getting out the passenger door, as the child-locks worked only with the back doors. He denied speeding or travelling through red lights.

[15] The defence have challenged Brown's veracity. They cross-examined him on his prior convictions, which are many. The defence also contend the bank eye-witness was mistaken. They point to her inability to identify Smith in the photo montage.

QUESTIONS FOR THE JURY

COUNT 1 — AGGRAVATED ROBBERY

Note: On all issues, the burden of proof beyond reasonable doubt lies on the Crown

Not in dispute:
Mr Brown committed an aggravated robbery of the ANZ Bank on 3 February 2008.

1.1 Are you satisfied beyond reasonable doubt[101] that Mr Smith was the driver of the car into which Messrs Brown and Menzies got after robbing the bank?

If 'yes', go to question 1.2.

If 'no', find Mr Smith 'not guilty' on this count and go to count 2.

1.2 Are you satisfied beyond reasonable doubt that, prior to the robbery, Mr Smith knew that Mr Brown intended to rob the ANZ Bank and to threaten violence, if necessary, to ensure the success of the operation?

If 'yes', go to question 1.3.

If 'no', find Mr Smith 'not guilty' on this count and go to count 3.

101 The original example used by Justice Chambers used the expression 'Are you sure', which has received the approval of the New Zealand Court of Appeal: see [17.22]–[17.23] below.

1.3 Are you satisfied beyond reasonable doubt that, prior to the robbery, Mr Smith had agreed to assist by driving the get-away car?

If 'yes', find Mr Smith 'guilty' on this count and go to count 2.

If 'no', find Mr Smith 'not guilty' on this count and go to count 2.

COUNT 2 — KIDNAPPING

Note: On all issues, the burden of proof beyond reasonable doubt lies on the Crown

2.1 Are you satisfied beyond reasonable doubt that Mr Smith:

a) took Ms Evans to a place different from the place she had told him she wanted to go to; and/or

b) locked the doors of the car while driving; and/or

c) drove at speed and failed to stop traffic lights so as to prevent Ms Evans leaving the car?

If 'yes', go to question 2.2.[102]

If 'no', find Mr Smith 'not guilty' on this count and go to count 3.

2.2 Are you satisfied beyond reasonable doubt that Ms Evans did not consent to being in the car as Mr Smith drove to Wimbledon Reserve?

If 'yes', go to question 2.3.

If 'no', find Mr Smith 'not guilty' on this count and go to count 3.

2.3 Are you satisfied beyond reasonable doubt that Mr Smith knew Ms Evans was not consenting to remaining in the car as he drove to Wimbledon Reserve?

If 'yes', go to question 2.4.

If 'no', find Mr Smith 'not guilty' on this count and go to count 4.

2.4 Are you satisfied beyond reasonable doubt that Mr Smith intended to keep Ms Evans in the car without her consent?

If 'yes', find Mr Smith 'guilty' on this count and go to count 3.

If 'no', find Mr Smith 'not guilty' on this count and go to count 3.

COUNT 3 — INDECENT ASSAULT

Note: On all issues, the burden of proof beyond reasonable doubt lies on the Crown

***Not in dispute**:*
Mr Smith touched Ms Evans on her breasts, over her bra and under her t-shirt.

102 This question might be improved by specifying whether the jury has to find all three elements proved beyond reasonable doubt or just any one (or more) of them.

3.1 Are you satisfied beyond reasonable doubt that Ms Evans did not consent to Mr Smith touching her breasts?

If 'yes', go to question 3.2.

If 'no', find Mr Smith 'not guilty' on this count and STOP.

3.2 Are you satisfied beyond reasonable doubt that Mr Smith, when he was touching Ms Evans's breasts, knew she was not consenting to it?

If 'yes', go to question 3.3.

If 'no', find Mr Smith 'not guilty' on this count and STOP.

3.3 Are you satisfied beyond reasonable doubt that, in the circumstances, right-thinking people would regard this act as indecent?

If 'yes', find Mr Smith 'guilty' on this count and STOP.

If 'no', find Mr Smith 'not guilty' on this count and STOP.

9.97 The Commission has prepared a sample set of questions that might be put to a jury in a hypothetical homicide case in which provocation is the only possible defence raised on the evidence. These questions are a re-working of the questions set out in [9.79] above to make them factual rather than a blend of factual and legal:

1. Did Andrew Brown hit Christine Darwin over the head with a rock?
   a. If 'no' to question 1, Andrew Brown is <u>not guilty</u> of any offence;
   b. If 'yes' to question 1, go to question 2.

2. Did the blow with the rock by Andrew Brown kill Christine Darwin?
   a. If 'no' to question 2, Andrew Brown is <u>not guilty</u> of any offence;
   b. If 'yes' to question 2, go to question 3.

3. When Andrew Brown hit Christine Darwin on the head with the rock, did he intend to kill her or cause her grievous bodily harm?
   a. If 'no' to question 3, Andrew Brown is not guilty of murder but <u>guilty of manslaughter</u>;
   b. If 'yes' to question 3, go to question 4.

4. Before he was hit on the head by the rock, did Christine Darwin say to Andrew Brown words to the effect that she was sick and tired of his lack of sexual prowess and was leaving their relationship?
   a. If 'no' to question 4, Andrew Brown is <u>guilty of murder</u>.
   b. If 'yes' to question 4, go to question 5.

5. Would any ordinary person in those circumstances have lost control and acted as Andrew Brown did with intent to cause death or grievous bodily harm?
   a. If 'no' to question 5, Andrew Brown is <u>guilty of murder</u>;
   b. If 'yes' to question 5, go to question 6.

6. Did Andrew Brown lose self-control?
   a. If 'no' to question 6, Andrew Brown is <u>guilty of murder</u>;
   b. If 'yes' to question 6, go to question 7.

7. Was Andrew Brown's loss of self-control caused by Christine Darwin saying words to the effect that she was sick and tired of his lack of sexual prowess and was leaving their relationship?
   a. If 'no' to question 7, Andrew Brown is guilty of murder;
   b. If 'yes' to question 7, go to question 8.

8 Was Andrew Brown's loss of self-control sudden?
   a. If 'no' to question 8, Andrew Brown is guilty of murder;
   b. If 'yes' to question 8, go to question 9.

9. Did Andrew Brown hit Christine Darwin on the head with the rock while his self-control was lost?
   a. If 'no' to question 9, Andrew Brown is guilty of murder;
   b. If 'yes' to question 9, go to question 10.

10. Did Andrew Brown hit Christine Darwin on the head with the rock before there had been time for his self-control to return?
   a. If 'no' to question 5, Andrew Brown is guilty of murder;
   b. If 'yes' to question 5, Andrew Brown is guilty of manslaughter.[103]

9.98 The preparation of integrated directions might be assisted by a checklist of mandatory and discretionary directions that can be fed into the integrated summing up at their most apposite locations, and would benefit from a discussion in advance with counsel so that they could understand what is proposed and could fill any gaps or offer advice. This might also help focus their minds on the real issues in the case.

9.99 Any such shift in practice would require a shift in thinking on the part of judges and counsel, which could no doubt be the subject of specialist professional training.

9.100 A similar change in the structure of the summing up was recommended by Lord Justice Auld in his review of criminal courts of England and Wales:

> Under the simpler scheme that I have in mind, the judge's prime function would be to put a series of written factual questions to the jury, the answers to which could logically lead only to a verdict of guilty or not guilty. The questions would correspond with those in the up-dated case and issues summary, supplemented as necessary in a separate written list prepared for the purpose. Each question would be tailored to the law as the judge knows it to be and to the issues and evidence in the case.[104]

9.101 Lord Justice Auld noted that the present system, which 'is to burden the jury with often highly technical and detailed propositions of law', at length, is 'frankly, an embarrassment in its complexity and in its unreality as an aid to jurors in returning a just verdict':

> To return to Professor Griew and the passage from which the above quotation came:
>
> > '... a more radical simplification of the summing up should be achieved by freeing it of any implications of the theory that the jury are concerned with the law as well as the facts. It should be the function of the judge to protect the jury from the law rather than to direct them on it. The judge does in

103 Questions 4 to 10 are based on the elements of the defence of provocation enunciated by McMurdo P in *R v Pollock* [2008] QCA 205 [7]; the relevant passage is set out in [4.55] above.

104 The Right Honourable Lord Justice Auld, 'Chapter 11: The Trial: Procedures and Evidence' in *Review of the Criminal Courts of England and Wales*, Report (2001) [50].

> practice typically tell the jury that the law is for him and facts are for them. This should become more profoundly true than it now is. A brief statement of the law will be unavoidable if the case is to be intelligible. But what is said should not be by way of formal instruction. When it comes to instructing the jury on their task, the job of the judge should be to filter out the law. He should simply identify for the jury the facts which, if found by them, will render the defendant guilty according to the law of the offence charged and of any available defence'.[105]

9.102 He also noted that, while it would take time to prepare a summing up in this way, judges would be assisted if a written case and issues summary were prepared and given to the jury at the start of the trial, as he had also recommended.[106]

NSWLRC's Consultation Paper

9.103 In its Consultation Paper, the NSWLRC also noted the need for a reconsideration of the framing and content of a summing up to the jury, having regard to the common law requirement for the summing up to provide only so much detail as is necessary, and the view that summings up have failed to achieve this aim.[107]

9.104 In particular, the NSWLRC noted the views of Lord Justice Auld in his recent review of the criminal courts of England and Wales:[108]

> Lord Justice Auld has argued for a stricter enforcement of the traditional distinction that the judge should be concerned with the law and the jury should be concerned with the facts. Adopting the view that the function of the judge should be 'to protect the jury from the law rather than to direct them on it',[109] he suggested that a 'fundamental, and practical review of the structure and necessary content of a summing-up' was required 'with a view to shedding rather than incorporating the law and to framing simple factual questions that take [the law] into account'.[110] One way of implementing this might be through 'decision trees' and other deliberation aids.[111] (notes in original)

9.105 The NSWLRC also considered the possible use of sequential questions 'issues tables' and decision trees or flowcharts which it felt could simplify the issues jurors need to resolve.[112]

VLRC's proposals and recommendations

9.106 In its Consultation Paper, the VLRC identified a number of possible options to reduce the length and complexity of the summing up ('charge'). One option was the

---

105 Ibid [45], citing Professor Edward Griew, 'Summing Up the Law' [1989] *Criminal Law Review* 768, 779.

106 Ibid [41], [50]. As to the written summary of the issues and the case that Lord Justice Auld recommended, see [10.25] below.

107 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [6.5]–[6.12].

108 Ibid [6.12].

109 E Griew, "Summing Up the Law" [1989] *Criminal Law Review* 768, 779.

110 R E Auld, *Review of the Criminal Courts of England and Wales*, Report (2001) 535.

111 See para 10.36–10.41 [of the NSWLRC's Consultation Paper].

112 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [10.36]–[10.43]. Also see the discussion of written deliberation aids in chapter 10 below.

introduction of special verdicts.[113] Another option was to charge the jury 'on an issue-by-issue basis', whereby the jury would be instructed, and asked to decide, each relevant question of law in turn, thus possibly removing the need for the jury to receive a 'whole' charge before returning their verdict.[114] A third option was to restrict the summing up to a 'series of pattern instructions with minimal, if any, reference to the specific facts of the case', as happens in some US States.[115]

Submissions

9.107 In response to the VLRC's Consultation Paper, Stephen Odgers SC submitted that the issues-based approach to summing up 'offers the possibility of more precision as to what a jury determines', and may make the system 'more transparent'. He noted, however, that since care would need to be taken in instructing the jury this way, it 'could all get quite complicated'.[116]

9.108 The Criminal Bar Association and Benjamin Lindner, one of its members, opposed the issues-based approach (as well as the use of special verdicts and pattern instructions). In their view, 'judicial directions should not be a "one size fits all" approach', must relate the facts to the issues in the dispute, and should allow the jurors 'the freedom to approach the evidence as they see fit, not as the judge requires them to'.[117]

VLRC's recommendations

9.109 In its Final Report, the VLRC recommended the use of a 'Jury Guide': a written document to be given to the jury, drawing upon the flow charts, decision trees and lists of questions sometimes already given to juries, and which explains the questions of fact the jury must decide. It also recommended that the Jury Guide be used as the basis for the judge's summing up.[118]

> 6.56 Juror comprehension of the relevance and importance of the trial judge's instructions should be enhanced by providing them with a series of questions to answer. Important directions could be delivered in the context of relevant questions in the Jury Guide. For example, the jury could be given a direction about standard of proof when presented with the first question which asked whether they were satisfied about something beyond reasonable doubt.
>
> 6.57 The judge should refer the jury to the evidence relevant to each question in the Jury Guide, and to the competing arguments of counsel. Jurors would receive directions about the use of evidence or the testimony of particular witnesses in the context of the judge's reference to the evidence concerning each question. For example, directions about treating identification evidence with care could be given

113 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [5.59]–[5.65]. Special verdicts were discussed in Queensland Law Reform Commission, *A Review of Jury Directions*, WP66 (2009) [9.106]–[9.113].

114 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [5.71]–[5.75].

115 Ibid [5.66]–[5.70].

116 Stephen Odgers SC, Submission to the Victorian Law Reform Commission, 12 November 2008.

117 Criminal Bar Association of Victoria, Submission to the Victorian Law Reform Commission, 15 December 2008, 26–7; Benjamin Lindner (Criminal Bar Association), Submission to Victorian Law Reform Commission, 30 November 2008.

118 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [5.17], [6.46]–[6.60], Rec 43. Also see the discussion at ibid [6.61]–[6.80]. The 'Jury Guide', as a written document, is discussed in more detail at [10.54]–[10.59] below.

> in the context of a question which required the jury to determine the contested issue of whether they were satisfied beyond reasonable doubt that it was the accused person, and not someone else, who performed a particular act. Directions about matters ranging from evidence of good or bad character to propensity evidence would be given when relevant to the evidence for the jury to consider in answering a particular question. By following this process, the jury would receive instructions about the law only when it was relevant to a question of fact in the Jury Guide.
>
> …
>
> 6.64 The Jury Guide approach to a summing up relates the relevant law to the facts of the particular case and to the issues to be decided.
>
> 6.65 The Victorian Court of Appeal recently described the trial judge's obligation when summing up:
>
> *Axiomatically, it is the responsibility of the trial judge in every jury trial:*
>
> *(a) to decide what are the real issues in the case;*
>
> *(b) to direct the jury on only so much of the law as is necessary to enable the jury to resolve those issues;*
>
> *(c) to tell the jury, in the light of the law, what those issues are;*
>
> *(d) to explain to the jury how the law applies to the facts of the case; and*
>
> *(e) to summarise only so much of the evidence as is relevant to the facts in issue, and to do so by reference to the issues in the case.*[119]
>
> 6.66 The Jury Guide approach to a summing up enables the trial judge to fulfil this responsibility by providing the jury with a series of questions which integrate all of these tasks.[120] (note in original)

The Issues Paper

9.110 The Commission discussed and sought submissions on the possible use of structured question paths and 'integrated directions' in its Issues Paper.[121]

Submissions

9.111 The idea of directing juries to answer questions or return a verdict based on factual questions rather than questions of law found support in a submission from an individual who had participated in two trials as a defendant,[122] and from a District Court judge:[123]

---

119 *R v RJS* (2005) 12 VR 563, 577.

120 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [6.56]–[6.57], [6.64]–[6.66].

121 Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [9.92]–[9.105], 206.

122 Submission 4.

123 Submission 10.

> The real issues should … be put to the jury, in the form of questions for them to decide. That process is discussed in the Issues Paper at pages 196–197.[124] That is, the law should be subsumed into the questions, which are framed as questions of fact. That avoids the pointless exercise of reading out sections of the Criminal Code, particularly the provisions about self defence and provocation, which are impossible to understand. Judges should also avoid giving lectures about the law. There is only a need to say something in a very general way about such defences, so that the jury have some understanding of the law, which leads to the questions before them.
>
> Judges should avoid even mentioning the expression 'elements of the offence'. Those elements should be sorted into those which are not in dispute, and those which are in issue. Once in issue, they form the basis of the questions to be put to the jury.
>
> As the Issues Paper says at para 9.95:
>
> > '… the questions are purely factual. They do not ask the jury to make any decision as to the law, or even to apply it to the facts; the relevant law concerning [the offence charged] has been embedded in the questions prepared by the trial judge.'
>
> I commend that approach. Some judges explain it to the jury by the use of decision trees. I am not sure which technique is easier for the jury — but I suspect that the use of questions in plain English is more easily understood.[125]

The Discussion Paper

9.112 In its Discussion Paper, the Commission noted that while lengthy directions on the law may leave juries confused, juries are nonetheless adept at examining the evidence and reaching factual conclusions. Given this, and the common law obligation to relate the law to the facts and instruct the jury on only so much of the law as it requires, the Commission expressed the provisional view that summings up should be restructured so that the jury is left with the factual questions it must decide, rather than discreet blocks of instruction on the law and the evidence.[126] It made the following proposals for the use of integrated directions in the judge's summing up to the jury on which it sought further submissions:

> 3-5 A summing up to a jury should culminate in a series of factual questions put to the jury which it must determine in order to reach its verdict based on and in which are embedded the legal issues in the case (such as the elements of the offence and any specific defences).
>
> 3-6 Jury directions and warnings should be re-worked into an integrated summing up that avoids long statements of the law and relates the evidence (and the limits to which some of it may be used by the jury) directly to the questions of fact which the jury must determine in order to reach its verdict.

---

124 That is, the discussion of structured question paths at Queensland Law Reform Commission, *A Review of Jury Directions*, Discussion Paper WP66 (2009) [9.92]–[9.96].

125 Submission 10.

126 Queensland Law Reform Commission, *A Review of Jury Directions*, Discussion Paper WP67 (2009) [3.183]–[3.190].

> 3-7 These integrated directions should be supplemented wherever appropriate by written guides to the law, directions and questions to be answered by the jury.[127]

Further submissions

9.113 Most of the respondents to the Discussion Paper expressed equivocal support for the Commission's proposals.

9.114 The Office of the Director of Public Prosecutions indicated in its submission that it was 'not unhappy' with the proposed use of integrated directions.[128]

9.115 Legal Aid Queensland was not opposed in principle to the concept of a jury being given integrated directions, particularly in more complex cases.[129] However:

> we note that the specific recommendations of the Commission at 3.5 and 3.6 are, in effect, no more than restatements of the existing law about the requirements of a summing-up — that is, instructing the jury about so much of the law as it needs to know in order to dispose of the issues in the case, and identifying those issues in the case and relating the law to those issues.[130] As the Commission notes, this is not an area that is amenable to statutory reform, it is more a situation of how judges in practice run particular trials.
>
> The Commission's recommendation 3.7 is that such integrated directions should be supplemented, where appropriate, by written guides to the law, directions and questions to be answered by the jury.
>
> Again, we do not oppose such a measure in principle in appropriate cases. But it must be remembered that such material needs to be prepared by someone — presumably the parties, in consultation with the trial judge (in the absence of the jury) — and could not go before a jury unless the form had been agreed upon between the parties, or was the subject of a ruling. This could well involve considerable time and resources, to the extent that in many more straightforward matters it is questionable whether any benefits for the jury would be outweighed by the additional resources and delay involved.
>
> Practices such as those recommended by the Commission are not unknown at present. They may assist all parties in appropriate cases. It is hard to be definitive about such issues — this is perhaps an area to be addressed in ongoing education for judges and lawyers, and one to be explored in more detail in appropriate cases.[131] (note in original)

9.116 The Bar Association of Queensland saw 'significant merit' in Proposals 3-5, 3-6 and 3-7, though 'it should be remembered that the trial process, as it currently stands, almost invariably embodies those concepts already, albeit in differing forms.'[132] For example:

---

127 Ibid 74, Proposals 3-5 to 3-7.

128 Submission 15A.

129 Submission 16A, 9.

130 Section 620 of the Criminal Code and *RPS v The Queen* (2000) 199 CLR 620 at 637.

131 Submission 16A, 9–10.

132 Submission 13A, 13. The Queensland Law Society endorsed and supported the whole of the submissions by the Bar Association of Queensland: Submission 13B.

> we have referred to decision trees being a desirable aspect for documents to be provided to a jury. These decision trees have frequently been used to assist a jury in working through what would otherwise be a complex series of elements of particular indictable offences.[133]

9.117 However, the use of these techniques should not be made mandatory for trial judges:

> A trial judge is in a unique position to judge the level of comprehension of the jury, as a whole and individually, as the trial progresses. In these circumstances, the judge should have a wide discretion as to how he or she approaches a particular summing-up, taking into account the type of jury involved the complexity of the facts and legal issues that have arisen in the trial to enable the judge to customise his or her approach to the particular case in question. There will be many cases which are so straight forward that such an approach will be unnecessary, whereas there will be other cases where clearly, such an approach is not only sensible, but required. The ultimate approach taken will be one that is decided upon by the trial judge following submissions from both counsel, taking into account the particular circumstances of the case in question.
>
> In reality and in most trials where it is appropriate to do so, what is proposed is currently occurring as part of the trial process. It is unnecessary in the view of the Association to mandate any change.[134]

9.118 The Brisbane Office of the Commonwealth Director of Public Prosecutions ('CDPP') made no comment in relation to integrated directions but submitted that the approach in Proposal 3-5 'may be helpful.' Although any changes in practice would need to implemented by counsel and judges, and in the Queensland Benchbook, the CDPP was sceptical that legislative amendment would be desirable (as noted in the Discussion Paper at [3.188]).[135] In any event, the CDPP agreed that 'a list of elements' could be given to the jury before the evidence began.[136]

9.119 One respondent, who had been involved in two trials as a defendant, strongly supported these three proposals: it is 'vital', in his opinion, that juries be left in no doubt about the issues that they have to decide. The use of structured question paths and integrated directions would be 'excellent for juries' and would help to reduce the spent in deliberations, but they needed to be accompanied by a written set of questions for the jury.[137]

The QLRC's views

9.120 As a general approach to some of the difficulties surrounding jury directions and warnings, the Commission is attracted to solutions that result in changes in the ways in which directions and warnings, especially those in the summing up, are presented to juries that seek to direct jurors' attention to their key role of resolving questions of fact and, from the answers to those questions, answering the key question whether the defendant is guilty as charged.

---

133 Ibid.

134 Ibid 13–14

135 See [9.125] below.

136 Submission 9A, 4.

137 Submission 4A.

9.121 The final arbiters of guilt in our criminal justice system are jurors who are not schooled as lawyers; indeed, practising lawyers are positively excluded from jury service.[138] There is no reasonable basis to expect jurors to be able to absorb the detail and subtlety of the substantive and procedural criminal law while sitting in uncomfortable and unfamiliar surroundings listening to a potted lecture on the law from the judge. Research suggests that in fact jurors have difficulty accurately re-stating key points of the law raised in trials that they have just sat on.[139] It follows that directions that simply expound the law may well leave jurors mystified and confused.

9.122 If it is accepted that jurors are, on the other hand, adept at examining the evidence and coming to reliable factual conclusions, then the focus of jury directions, and the summing up as a whole, should be on the factual conclusions that the jury must reach, and how they use their answers to those questions to determine if the defendant is guilty or not.

9.123 This is not to say that all reference to the law should be shunned; in many cases it cannot be avoided. In any event, jurors appreciate that they are in a court of law and would expect to hear about the law. Moreover, many jurors are able, or better able, to absorb it, understand its effect (if perhaps not the detail of its content) and apply it when it is explained ***in context***.

9.124 The Commission, therefore, is strongly attracted to a revision of jury directions and warnings into an overall structure of a summing up that seeks to relate the law and evidence in a natural way where the context of the evidence to which the judge is referring is connected with both the questions of fact that the jury must determine, and the constraints placed on them as to the way in which they may or may not apply certain evidence.[140] These integrated directions should be supplemented wherever appropriate by written guides to the law, directions and questions to be answered.[141]

9.125 The Commission notes that the concern of these respondents that directions need to be tailored to the facts of the particular case is precisely what the use of integrated directions is directed to achieving.

9.126 If implemented, these proposals would not result in any statutory reform, nor formal reform of the rules of practice governing criminal trials. However, the Commission appreciates that it would involve a considerable amount of work, primarily on the part of trial judges but also by criminal trial advocates, as these reforms represent changes in practice and in the overall approach to informing the jury by all professional participants in criminal trials. It would involve judges re-considering the ways in which they individually have directed juries and the way in which model directions in the Queensland Benchbook are drafted. Advocates are also involved in these reforms because they too should review the way in which they approach informing the jury (though, of course, their professional objectives and constraints are different from those

138 *Jury Act 1995* (Qld) s 4(3)(d), (e), (f). The Commission also has current a review on jury selection, which will involve the publication of a separate consultation paper in 2010.

139 See Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) ch 7; especially [7.52]–[7.53]; and James RP Ogloff and V Gordon Rose, 'The Comprehension of Judicial Instructions' in Neil Brewer & Kipling D Williams (eds) *Psychology and Law: an Empirical Perspective* (2005) 411–16.

140 See the discussion in chapter 12 of this Report about directions on the use of evidence admitted only for particular limited purposes.

141 See the discussion about these supplementary aids in chapter 10 of this Report.

of trial judges) and because their attitudes to jury instruction will influence the approach that judges may take, both at trial and on appeal.

9.127 The Commission also appreciates that some trial judges (and advocates) are alert to the difficulties in providing instructions and guidance to juries that are sound at law and comprehensible and useful to non-lawyers, and actively review the ways in which they present directions and other information to juries. For those judges and advocates, any proposal along the lines suggested by the Commission ought, therefore, be little more than a specific suggestion about how such review might constructively continue.

9.128 For these reasons, the Commission's preferred reform strategy involves the court and the parties working together to identify before the trial the real issues — legal, factual and evidentiary — that are likely to arise at the trial so that the evidence, the opening statements by the judges and those by the prosecution and the defence, the parties' closing addresses, the judge's summing up and all other information given to the jury is directed to giving the jury the clearest possible instruction as to the factual questions that it must answer in order to return its verdict.

9.129 The Commission's recommendations can, however, only be exhortative and cannot result in statutory or formal regulatory amendment. Integrated directions cannot be reduced to a template or boilerplate text, except in the most general terms; their virtue is that they are tailored to deal with the factual circumstances of each case. The extent to which this approach is adopted by any trial judge or in any particular case must remain a matter for each judge.

Recommendations

9.130 The Commission makes the following recommendations:

9-4 A summing up to a jury should culminate in a series of factual questions put to the jury which it must determine in order to reach its verdict based on and in which are embedded the legal issues in the case (such as the elements of the offence and any specific defences).

9-5 Jury directions and warnings should be re-worked into an integrated summing up that avoids long statements of the law and relates the evidence (and the limits to which some of it may be used by the jury) directly to the questions of fact which the jury must determine in order to reach its verdict.

9-6 These integrated directions should be supplemented wherever appropriate by written guides to the law, directions and questions to be answered by the jury.

PROFESSIONAL TRAINING AND ACCREDITATION

9.131 Recent research on Victorian judicial practices in communicating with juries suggested there may be a need for improved judicial training and education:

> it seems that many judges, rather than holding a firm view for or against certain practices, were equivocal by virtue of their unfamiliarity with the practices. Such responses suggest that a more intensive training and education regime is required, which will enable judges to not only become aware of the practices being implemented by their peers, but also to develop their own practices within a framework of judicial best practice.[142]

9.132 Various techniques to improve juries' comprehension of the law and evidence and to assist them in their tasks — such as the provision of written materials and aids — are adopted from time to time by judges in Queensland but on a largely ad hoc basis.[143]

9.133 In its Consultation Paper on jury directions, the NSWLRC also noted that at least some changes in the practice and manner of presentation of jury directions might be achieved through judicial education, without the need for legislative reform.[144]

The VLRC's proposals and recommendations

9.134 The VLRC also posed some questions for consideration in relation to judicial training and support in its Consultation Paper:

> 7.75 Much has been done over the past few years to assist trial judges by providing information and training. New trial judges have the opportunity to attend many training programs organised by the JCV about different aspects of their role. The college has also recently announced a new continuing professional development program that will include training in relation to communication skills and pre-trial preparation.
>
> 7.76 Many judges have been appointed without prior criminal trial experience. As has been demonstrated in all jurisdictions over many decades, the competence of a judge to conduct a criminal trial is not determined by prior criminal law experience. Nonetheless, the complexity of modern criminal trials suggests that judges without prior trial experience would benefit from training, as would all new judges. Even long-serving judges would benefit from continuing training with respect to criminal trials. A particular area of training that would be desirable is with respect to the requirements of *Alford v Magee*.[145] Those requirements are at the heart of the function of a criminal trial judge, and yet, as we understand it, the task set by the High Court has not been subject to concentrated judicial training in any jurisdiction in Australia.

142 E Najdovski-Terziovski, J Clough and RP Ogloff, 'In your own words: A survey of judicial attitudes to jury communication' (2008) 18 *Journal of Judicial Administration* 65, 84.

143 See Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) ch 9. These techniques are discussed in chapter 10 of this Report.

144 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [1.62]–[1.65], 78 Issue 4.7(4).

145 See [11.3] below.

> Questions:
>
> Would Judicial College of Victoria seminars on the formulation of directions and warnings be an effective way of building judicial skills in this area?
>
> Would a training video of experienced trial judges conducting trials be a useful tool to assist trial judges to prepare their own charges?[146] (note omitted)

9.135 The VLRC also asked whether a specialist accreditation scheme for barristers appearing in criminal trials would be desirable and whether consideration should be given to the introduction of a Public Defender scheme in Victoria.[147]

Submissions

9.136 A number of respondents to the VLRC's Consultation Paper commented on the need for judicial support. Training, of both counsel and judges, received support in some of those submissions, but was thought to be unnecessary by others.

9.137 One respondent to the VLRC's Consultation Paper said this:

> Just like legal practitioners and members of the bar in New South Wales are obliged each year to undertake mandatory continuing legal education, judicial officers would benefit from completing a mandatory training course with respect to criminal trials. This program could be offered through the Judicial College of Victoria with the use of training videos being helpful in assisting trial judges in preparing their own charges.[148]

9.138 Victoria Legal Aid expressed support for ongoing judicial training:

> [Victoria Legal Aid] supports proposals that assist judicial officers in the performance of their function … [Victoria Legal Aid] recognises the valued role of the Judicial College of Victoria in providing a high standard of training for judicial officers. It is clear from the high uptake and attendance of their course by judicial officers that there is a strong commitment to ongoing training and information.[149]

9.139 The Law Reform Committee of the County Court of Victoria supported professional training for both advocates and judges:

> The high rate of successful appeals, and the lack of correlation between the inexperience of the judge and successful appeal suggests that trial judges would benefit from more assistance in the preparation and delivery of charges which an appeal court will find to be adequate, free of error or not to have resulted in an unfair trial. The criticisms made by trial judges of complexity and length of the model directions in the charge book suggest that in its current form it is not providing as much assistance to trial judges as they would like. In our view emphasis should be placed upon assistance in the preparation of jury directions, and of written material to provide to juries. Although it should be expected that anyone appointed as a

146 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [7.75]–[7.76].

147 Ibid [7.77]–[7.81].

148 Maria Abertos, Submission to the Victorian Law Reform Commission, 29 November 2008 [13]; see also Patrick Tehan QC, Submission to the Victorian Law Reform Commission, 26 November 2008 [7].

149 Victoria Legal Aid, Submission to the Victorian Law Reform Commission, 9 December 2008. See also Law Council of Australia, Submission to the Victorian Law Reform Commission, 30 January 2009 [18]; Law Reform Committee of the County Court of Victoria, Submission to the Victorian Law Reform Commission, 13 March 2009, 4; Bernard Lindner (Criminal Bar Association), Submission to the Victorian Law Reform Commission, 30 November 2008.

> judge of a trial court would be a competent lawyer, the complexity of the law, the volume of appellate decisions and legislative change affecting criminal trials had increased, and with great rapidity in recent years. It is unreasonable to expect any new appointee, even one experienced in the criminal law, to be able to navigate the complexity of a modern trial (say, for example a sex offence trial) without assistance. Specialist training is desirable, not only upon appointment, but throughout a judicial career.[150]

9.140 That respondent also supported the VLRC's proposal for specialist accreditation for criminal advocates:

> Specialist accreditation of trial counsel is welcomed and encouraged. Careful consideration needs to be given to the criteria for achieving specialist accreditation, and the process for accreditation. Experience as a criminal trial lawyer is not of itself necessarily a determinant of skill or competence. In addition to demonstrating up to date knowledge of criminal law, evidence and procedure, advocacy skills should be assessed and there should also be training in cultural awareness, and in matters relevant to questioning children cognitively impaired and other vulnerable witnesses.[151]

9.141 Specialist accreditation for advocates was 'not opposed' by the Victorian Office of Public Prosecutions; nor was further training for judges.[152]

9.142 Although in a somewhat different context, the Criminal Bar Association of Victoria also commented about the need for more 'educational processes':

> We submit that much could be achieved by an educational and collaborative approach to the issues described in [the VLRC's Consultation Paper].[153]

9.143 On the other hand, Judge Murphy of the County Court of Victoria felt that specialist accreditation for advocates was not necessary, and that adequate assistance was available to trial judges, rendering it unnecessary 'to mandate any form of training before allowing judges to preside over criminal trials'.[154]

VLRC's recommendations

9.144 The VLRC made some extensive and detailed recommendations for judicial training, and training and specialist accreditation for advocates in chapter 7 of its recent Final Report on jury directions:

> 45. The Victorian Bar Council should consider whether counsel who appear in criminal trials should be able to seek accreditation to conduct such trials.
>
> 46. The Victorian Bar Council should consider establishing an assessable skills training course for barristers who wish to obtain specialist accreditation to conduct criminal trials.

---

150 Law Reform Committee of the County Court of Victoria, Submission to the Victorian Law Reform Commission, 13 March 2009, 8.

151 Ibid 7.

152 Office of Public Prosecutions, Submission to the Victorian Law Reform Commission, 12 February 2009, 21, 22–23.

153 Criminal Bar Association of Victoria, Submission to the Victorian Law Reform Commission, 15 December 2008, 11.

154 Judge MD Murphy, Submission to the Victorian Law Reform Commission, 5 February 2009, 8.

> 47. The Office of Public Prosecutor and Victorian Legal Aid should consider whether barristers who are accredited as specialists in criminal trials should receive a fee loading.
>
> …
>
> 49. Because of the complexity of sexual offence trials, the Office of Public Prosecutor and Victorian Legal Aid should consider increasing the fees paid to counsel in these trials in order to ensure that suitable counsel are engaged.
>
> 50. Subject to the discretion of the head of jurisdiction, all newly appointed judges who will conduct criminal trials should be required to complete a skills training program concerning the law and practice of criminal trials.
>
> 51. The Judicial College of Victoria should provide judges with skills training courses designed to assist them to conduct criminal trials and, in particular, to formulate jury directions and warnings.
>
> 52. Ongoing refresher courses concerning the law and practice of criminal trials should be provided to judges who conduct criminal jury trials.[155]

9.145 In coming to its recommendations, the VLRC considered the requirements for admission to practice for barristers in Victoria and compared that with the more stringent requirements in New South Wales and England and Wales, and also looked at the continuing professional developments requirements in Victoria as well as professional accreditation schemes for solicitors in Victoria and the United Kingdom, and for attorneys in the United States.[156] The VLRC compared these with the educational and accreditation requirements imposed on medical practitioners.[157]

9.146 The absence of any comparable arrangements for counsel in Victoria (or elsewhere) — apart from the formal appointment of senior counsel — is notable.

9.147 There is no body in Queensland equivalent to the Judicial College of Victoria or the national Judicial College of Australia, though that is not to say that the judges and magistrates of Queensland do not take the maintenance and development of their own professional standards seriously. The Court of Appeal advocated strongly for formal and on-going judicial professional training:

> 7.127 It takes time to develop and maintain the knowledge and skills required of a judge.[158] Because of rapid developments in the law and changes to the entire community, even the most competent judges need access to educational resources. It is no longer controversial to suggest that judges require ongoing education and professional development.[159] Early resistance to judicial edu-

---

155 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) 17–18, ch 7. Recommendation 48 advocated that 'The Attorney-General should consider whether a Public Defender scheme should be established.' In Queensland, such a scheme is already provided by Legal Aid Queensland: see Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [7.109]–[7.123].

156 The Queensland Law Society also runs a specialist accreditation scheme for solicitors. In 2010, this will be available in five areas of legal practice: Business Law, Commercial Litigation, Immigration, Criminal Law and Workplace Relations: <http://www.qls.com.au/content/lwp/wcm/connect/QLS/Professional+Development/Specialist+Accreditation/> at 16 December 2009.

157 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) ch 7.

158 National Judicial College of Australia, Judicial Education in Australia (2007) <http://njca.anu.edu.au/-Publications/Documents/Judicial%20Education%20in%20Australia%202007.pdf> at 7 May 2009.

159 See, eg [Christopher] Roper, [*A National Standard for Professional Development for Australian Judicial Officers* (2006) 4].

> cation appears to have disappeared[160] and professional development programs are now accepted and valued by judicial officers.[161]

7.128 Former High Court Chief Justice Murray Gleeson has said:

> Judicial education is no longer seen as requiring justification. We are past the stage of arguing about whether there should be formal arrangements for orientation and instruction of newly-appointed judges and magistrates, and for their continuing education. Of course there should.[162]

7.129 All judges are likely to be assisted by training that deals with the application of new laws. While most members of the judiciary are appointed from the practising profession, the increasing specialisation of legal practice means that the breadth of experience of trial level judges may be more limited than it has been in the past:

> How many modern barristers, before being appointed to a trial court of general jurisdiction … will have appeared in anything like the full range of matters that come before the court? Many barristers find, upon judicial appointment, that much of the work they are required to do is outside their range of experience … A specialist in personal injury cases at the bar … will be listed routinely to sit on major criminal trials, perhaps without recent criminal trial experience.[163] (notes in original)

9.148 Jury directions would form only one of many aspects of professional training for judges. Though magistrates do not preside over jury trials, there is no doubt that they too could benefit significantly from formalised professional training, including induction programs (which were specifically noted by the VLRC).[164]

NSW Trial Efficiency Working Group Report

9.149 In March 2009, the Trial Efficiency Working Group of the Criminal Law Review Division of the Attorney General's Department of NSW recommended:

> 6. That Legal Aid NSW—
>
> a. Create a panel of solicitors for District Court (general crime panel) and Supreme Court (serious crime panel) work and that all practitioners undertaking legally aided work be bound by and subject to audit against minimum practice standards for the conduct of work in those jurisdictions.
>
> b. Consider, in consultation with the NSW Bar Association and Law Society of NSW, the creation of a panel of barristers to be briefed in District Court and Supreme Court trials of the kind that currently exists for Court of Criminal Appeal and High Court matters.

160 Murray Gleeson, 'Judicial Selection and Training: Two Sides of the One Coin' (2003) 77 *Australian Law Journal* 591, 596.

161 [Christopher] Roper, [*A National Standard for Professional Development for Australian Judicial Officers* (2006) 4.], 20.

162 Murray Gleeson, 'The Future of Judicial Education' (1999) 11(1) *Judicial Officers' Bulletin* 1.

163 [Murray] Gleeson, ['Judicial Selection and Training: Two Sides of the One Coin' (2003) 77 *Australian Law Journal* 591], 594.

164 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [7.139]–[7.141].

…

11. Briefing of Crown Prosecutors, Public Defenders and trial advocates sufficiently in advance of the trial date to allow for participation by that counsel/ advocate in pre-trial management proceedings.

The Issues Paper

9.150 In its consideration of techniques, such as the use of integrated directions, that might assist the jury in Chapter 9 of its Issues Paper, the Commission noted that their active consideration by judges and parties might be encouraged by making them the subject of on-going professional development.

9.151 In this context, the Commission sought submissions on the following:

9-6 Should any such techniques be the subject of mandatory or optional professional development for criminal trial lawyers (counsel and solicitors), judges or other judicial officers?[165]

Submissions

9.152 Two respondents to the Commission's Issues paper commented on this issue. The Brisbane Office of the Commonwealth Director of Public Prosecutions submitted that the provision of training 'in relation to use of techniques to assist the jury would be of benefit'.[166] Legal Aid Queensland submitted that '[o]bviously … the level of related continuing legal education provided to and accessed by judges and lawyers involved in criminal trials, is critical.'[167]

The Discussion Paper

9.153 The Commission did not make any specific proposals on this issue in its Discussion Paper, but expressed the provisional view that on-going professional training for judges and advocates practising in criminal law should be encouraged. That training should include education about juries and the ways in which they receive, process and apply the information that they are given during criminal trials, including particular directions and warnings.[168]

Further submissions

9.154 As noted above, the Office of the Director of Public Prosecutions submitted in relation to the greater use of opening statements by the defence that this would require a 'culture change' and judicial enforcement.[169] The same could be said of other aspects of the Commission's proposals and recommendations, particularly those relating to criminal justice procedure, both before and during trials.

---

165 Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) Issue for consideration [9-6].

166 Brisbane Office of the Commonwealth Director of Public Prosecutions, Submission 9, 29 May 2009, 6.

167 Submission 16, 3

168 Queensland Law Reform Commission, *A Review of Jury Directions*, Discussion Paper WP67 (2009) [3.216].

169 Submission 15A; see [9.59] above.

9.155 No other respondents commented specifically on this issue or suggested any specific need for reform.

The QLRC's view

9.156 Although the Commission does not make any formal recommendation for reform, it is strongly of the view that on-going professional training for judges and advocates practising in criminal law should be encouraged. That training should include education about juries and the ways in which they receive, process and apply the information that they are given during criminal trials, including particular directions and warnings.

Chapter 10

Assisting the Jury

INTRODUCTION

10.1 The Terms of Reference required the Commission to enquire about the information needs of jurors on a broader footing than a review of the trial judge's formal directions and warnings, encompassing a consideration of 'possible solutions to identified problems relating to jury directions and warnings, including whether other assistance should be provided to jurors to supplement the oral summing up'.[1] This chapter considers various techniques, some of which are already in use, which assist both the judge and the parties in presenting the evidence and the issues to juries.

10.2 A jury has to make the most important decision in any criminal trial: determining the guilt or otherwise of the defendant. Yet jurors are typically the people least familiar with the legal process (other than, perhaps, the defendant); they are not professional lawyers or otherwise involved in the criminal justice system; and they must perform their tasks in an unfamiliar environment.

10.3 In the past, juries have been expected to carry out their tasks with a limited amount of assistance from the court, and certainly without the vast array of documents, references, copies of evidence, copies of transcript and the preparation that the judge and the parties and their lawyers rely on. Significant steps have been taken in recent years by the courts in Queensland and elsewhere to improve the conditions under which juries must work, both in terms of their accommodation and other facilities within the court buildings, and in terms of the assistance provided to them to help them in their decision-making processes.

10.4 The use of written directions and other similar materials and aids has been widely canvassed in contemporary literature about juries. This chapter considers issues such as the use by the jury of the transcript of evidence, and contemporary forms of presentation such as PowerPoint, decision flowcharts and tree diagrams, and the presentation of information about the law in similar graphic styles. The Commission posed a number of issues for consideration in this regard in its Issues Paper.[2]

10.5 The techniques discussed in this chapter are not expressly mandated (or otherwise restricted) by any statute, regulation, court rules or practice notes. To a large extent, their use in any given case depends on the nature of the case and the attitudes and levels of preparation of the counsel and the trial judge. Their approaches will be heavily influenced by the complexity and length of the trial, the evidence to be led and the evidence that is ultimately admitted, the nature and scope of the charges, the number of defendants, and the range and complexity of the legal issues involved and the decisions that the jury will have to make.

10.6 Much of this can be anticipated well before the trial, though the progress of any trial can be radically altered without notice. As a result, judges and counsel can give thought in advance to the methods that might be applied to assist juries in understanding the law that they have to apply. Counsel will also consider their options in the presentation of their evidence as part of their case preparation.

10.7 The Commission is aware that judges of the Supreme and District Courts of Queensland do from time to time adopt some of the techniques discussed in this

1 The Terms of Reference are set out in Appendix A to this Report.

2 These are set out at [8.2] above.

chapter, and do so from an individual consideration of the requirements of the case in hand.[3] The very nature of their work means that judges are unable to observe other judges at work directly — even the special circumstances where they sit on an appeal in which they must consider a trial judge's directions, summing up or other procedural rulings does not amount to direct observation. The Commission understands that judges do not consider the options that might be useful in any given case from any formal checklist or other similar aide mémoire; nor do counsel. However, the Commission has been informed that judges do discuss these techniques informally amongst themselves and formally at conferences and similar gatherings.

10.8 The use in a criminal trial of any of these techniques would, in an appropriate case, no doubt be a ground of appeal if a convicted defendant felt that a miscarriage of justice had resulted, and the Attorney-General would no doubt consider an appeal if the procedural ruling in question amounted to a point of law.[4] The greater use of these techniques in trials might be thought to give rise to an unwelcome or problematic potential increase in the number and scope of appeals. This apprehension might be alleviated if the techniques in question are applied only after discussion with counsel in advance of their actual use.

10.9 At the heart of this chapter is the objective of improved communication between the jury and the other participants in the trial. Of course, communications from the jury are essentially limited to the verdict itself and the questions that it may put either to the judge or, through the judge (if permitted), to a witness. Juries are conventionally passive participants during the presentation of evidence. Although the Commission is not advocating an expanded role for juries as active participants, this chapter also looks at means by which their passivity can by tempered through note-taking and questions.

WRITTEN MATERIALS AND OTHER AIDS

10.10 Criminal trials have historically been dominated by oral presentation, although many trials now involve substantial amounts of written evidence and juries are often provided with one or more documents, in addition to items admitted into evidence, to assist their understanding. Research by the Australian Institute of Judicial Administration suggests, however, that Queensland judges supplement their oral summings up with written directions and other aids less frequently than their counterparts in some other States.[5]

10.11 It has been observed that the conventional oral presentation of evidence, addresses and directions in criminal trials lags behind recent trends in the way in which people generally receive, process and apply information, and then communicate their

3 For example, the trial judge in *R v Falzon* in the Supreme Court of Queensland used PowerPoint to 'replicate parts of her summing up electronically'. From the Court of Appeal's judgment in that case, it does not appear that the use of PowerPoint *per se* was a ground of appeal, but the appellant did complain about the layout of the presentation. This was dismissed as 'specious' by the Court of Appeal:

> In similar vein was a complaint that the type in the PowerPoint was larger at some places, emphasising parts of the Crown case. But it is quite obvious that the size of the print depended on how much had to be conveyed in the particular slide; in fact, the presumption of innocence was set out in some of the largest print in the PowerPoint: [2009] QCA 393 [46] (Holmes JA; Keane and Fraser JJA agreeing).

4 See Criminal Code (Qld) s 669A(2), (2A).

5 Australian Institute of Judicial Administration (James RP Ogloff, Jonathan Clough, Jane Goodman-Delahunty & Warren Young), *The Jury Project: Stage 1 — A Survey of Australian and New Zealand Judges* (2006). See [4.89]–[4.92] above, [10.35] below.

decisions. Increasingly, all of these functions are done in writing or visually (including through electronic media such as television, email and the Internet) and not orally. The oral tradition of criminal trials originated in times well before these modern developments, indeed well before general literacy.

> I am not advocating abandonment of the oral tradition or the adversarial process of trial, which, within reasonable limits, allows counsel the capacity to use persuasive skills and to draw upon the theatre of the court room, but it has become increasingly clear that as lawyers and judges we must be prepared to aid the jury to better understand and to better perform their task. We are coming to a recognition that to listen to the spoken word and observe the demeanour of a witness does not provide all jurors with information in a form which they may readily assimilate. Most people process information both orally and visually and the use of records as aids to the information process is, I am sure, on the way to becoming a routine feature of the jury trial process.
>
> …
>
> there is some indication developing around the country that appellate courts, particularly intermediate appellate courts, will not need to be dragged unwillingly into a recognition of the need to provide juries with suitable written adjuncts to the oral trial process.[6]

10.12 This is not to say that the oral tradition will not retain an important role in criminal trials, especially of shorter and less complicated matters:

> The oral tradition of criminal trials may still in some cases — short, simple matters which do not involve a multiplicity of issues or witnesses — be the most efficient and easy to control trial process.[7]

10.13 Arguably, the persistence of a mostly oral tradition frustrates the ability of the parties and the judge to communicate effectively with jurors. Jurors have expressed their concern in surveys, for example, that evidence is not always presented in the clearest ways, and that maps, diagrams, photographs and other visual aids are underused.[8] Jurors responding to Lord Justice Auld's review of criminal courts in England and Wales also complained about an 'insufficient use of visual and written aids both by the parties and the judge',[9] and research with former jurors in Western Australia found that some jurors were disappointed at not having access to expert witness's reports.[10]

10.14 However, the oral processes of the trial are increasingly supplemented by documentary and visual evidence and other material. In the survey conducted by the Australian Institute of Criminology, 74% of jurors reported seeing charts or visual aids during the trial.[11] This is more commonly done in the various Supreme Courts than in

---

6 The Hon Justice Michael Murray, 'Bad Press: Does the Jury Deserve It? Communicating with Jurors' (Paper presented at the 36th Australian Legal Convention, Perth, 17–19 September 2009) 3, 6.

7 Ibid 3.

8 Home Office (UK), *Jurors' perceptions, understanding, confidence and satisfaction in the jury system: a study in six courts*, Home Office Online Report 05/04 at 17 February 2009, 7.

9 The Right Honourable Lord Justice Auld, *Review of the Criminal Courts of England and Wales*, Report (2001) [216].

10 See Judith Fordham, 'Illuminating or Blurring Truth: Jurors, Juries, and Expert Evidence' in B Brooks-Gordon and M Freeman (eds) (2006) 9 *Law and Psychology* 338, 356. Similar results were reported by the University of Queensland: see [10.17]–[10.18] below.

11 Australian Institute of Criminology, *Practices, policies and procedures that influence juror satisfaction in Australia*, Research and Public Policy Paper No 87 (2007) 139.

the District or County Courts.[12] Any map, chart, diagram or similar document that is admitted into evidence will be with the jury during their deliberations but documents that are simply marked for identification will not. It is not known how many of the written aids and similar materials (such as notes of the elements of the offence) that were reported in the survey by the Australian Institute of Criminology had been allowed into the jury room during deliberations.

10.15 In addition, it is now not unusual in criminal trials in Queensland for juries to be provided with other documents to assist them in understanding the law or the evidence. These are often provided at the time of the parties' addresses after the end of the evidence or during the judge's directions and summing up, but they may be distributed earlier, for example, during the opening by either party or as particular aspects of the evidence are reached or particular procedural or evidentiary rulings are made by the judge.

10.16 These documents can take various forms:

- chronologies and lists of witnesses and other relevant people;
- outlines of evidence;
- statements of issues;
- decision-tree diagrams or flowcharts; and
- glossaries of legal or other technical terms.

10.17 The University of Queensland's research project suggests that, while supplementary materials are given in many trials, judges appear to give them less frequently than the prosecution:[13]

	Judge's opening	**Judge's summing up**	**Prosecution's opening**	**Prosecution's closing address**	**Defence opening**	**Defence closing address**
Description of the charges	9%	—	33%	3%	—	—
Material relating to the evidence	—	6%	18%	15%	9%	9%
List of witnesses	—	—	—	3%	—	—

Table 10.1: Percentage of jurors reporting additional materials given to them during the opening and closing statements[14]

10.18 Jurors participating in the University of Queensland research project rated the materials they did receive as helpful or very helpful,[15] and frequently reported that

12 Ibid 141.

13 School of Psychology, University of Queensland (Blake McKimmie, Emma Antrobus and Kathryn Havas), 'Jurors' Trial Experiences: The Influence of Directions and Other Aspects of Trials', Report (November 2009) 9, 11.

14 The figures presented in this table are derived from the numbers reported in Ibid 9, 11.

15 Ibid 11.

written summaries of the law, directions, and the evidence would have been helpful in improving their understanding.[16]

10.19 In Queensland, there is no statutory or similar prohibition on the giving of written materials to the jury, but neither is it expressly permitted or required. In contrast, use of this material is specifically authorised in Victoria by section 223 of the *Criminal Procedure Act 2009* (Vic), which re-enacts and slightly expands section 19 of the *Crimes (Criminal Trials) Act 1999* (Vic):

> **223 Jury documents**
>
> (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) the summary of the prosecution opening;
>
> (c) the response of the accused to the summary of the prosecution opening and the response of the accused to the notice of pre-trial admissions of the prosecution;
>
> (d) any document admitted as evidence;
>
> (e) any statement of facts;
>
> (f) the opening and closing addresses of the prosecution and the accused;
>
> (g) any address of the trial judge to the jury under section 222;
>
> (h) any schedules, chronologies, charts, diagrams, summaries or other explanatory material;
>
> Note See sections 29(4) and 50 of the *Evidence Act 2008*.[17]
>
> (i) transcripts of evidence or audio or audiovisual recordings of evidence;
>
> (j) transcripts of any audio or audiovisual recordings;
>
> (k) the trial judge's directions to the jury under section 238;
>
> (l) any other document that the trial judge considers appropriate.
>
> (2) The trial judge may specify in an order under subsection (1) when any material is to be given to the jury. (note added)

16 Ibid 24–6.

17 Section 29(4) of the *Evidence Act 2008* (Vic) provides that evidence may 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. Section 50 of that Act deals with proof of voluminous or complex documents.

10.20 Similarly, but without going into the same degree of detail, section 110 of the *Criminal Procedure Act 2004* (WA) provides that at any time in a trial before the jury gives its verdict, the judge may order that the jury be given 'any record (including any document in the court's record) or thing that may assist the jury to understand the issues or the law, or to understand and assess the evidence'. Such an order may be made on the judge's own initiative or on the application of a party.[18]

10.21 In New South Wales, section 55B of the *Jury Act 1977* (NSW) expressly permits judges to give written directions to the jury:

> **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.

10.22 In considering what types of assistance juries should receive — whether in terms of written aids of any sort or generally — it may be useful to begin from the assumption that, as they are the principal decision-makers in the trial, they should be given as much material as a judge would have if faced with that task. There may be good reason to step back from this general statement but, if so, this should be justified firmly from a theoretical and a practical perspective because the proposition being advanced is that the jury should be given ***less assistance*** than an experienced lawyer in the same position.[19]

10.23 The Law Commission of New Zealand came to this conclusion about the provision to juries of written aids generally in its 2001 report on juries in criminal trials:

> The use of written and visual aids has increased … and the Commission recommends that their use should be encouraged. We recommend that consideration be given to a practice note which would direct that:
>
> - copies of the indictments, the exhibits and the witness list be made available to the jury as a matter of course;
> - other written and visual aids should be made available to the jury unless there is good reason not to make them available;
> - the prosecution should disclose to the defence prior to the pre-trial call-over those written and visual aids it proposes to use. Defence counsel should be required, a reasonable time prior to trial, to raise any objections to the presentation of that material to the jury;
> - the [Criminal Practice Committee] Manual should contain detailed guidelines on the appropriate use and presentation of written and visual aids.[20]

10.24 It might also be noted that some jury systems assume a preponderance of written evidence at trial, so the oral nature of Anglo-Australian trials should not necessarily be assumed to be the natural or default state of affairs.[21]

---

18 See The Hon Justice Michael Murray, 'Bad Press: Does the Jury Deserve It? Communicating with Jurors' (Paper presented at the 36th Australian Legal Convention, Perth, 17–19 September 2009) 4–5.

19 See Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) [342]. See also Mark Findlay, 'Juror Comprehension and Complexity: Strategies to Enhance Understanding' (2001) 41 *British Journal of Criminology* 56, 74–75.

20 Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) 136–7.

10.25 In his review of the criminal courts of England and Wales, Lord Justice Auld recommended that the judge's opening statement should be supplemented by a written 'case and issues summary':

- each juror should be provided at the start of the trial with a copy of the charge or charges;
- the judge at the start of the trial should address the jury, introducing them generally to their task as jurors and giving them an objective outline of the case and the questions they are there to decide;
- the judge should supplement his opening address with, and provide a copy to each juror of, a written case and issues summary prepared by the parties' advocates and approved by him;
- the judge, in the course of his introductory address, and the case and issues summary, should identify:
  - the nature of the charges;
  - as part of a brief narrative, the evidence agreed, reflecting the admissions of either side at the appropriate point in the story;
  - also as part of the narrative, the matters of fact in issue; and
  - with no, or minimal, reference to the law, a list of likely questions for their decision; and
- if and to the extent that the issues narrow or widen in the course of the trial, the case and issues summary should be amended and fresh copies provided to the judge and jury.[22]

10.26 He also recommended that the written summary of the case and the issues should be reviewed by the judge and the parties at the close of the evidence and before the closing speeches and the summing up with a view to amending it, where necessary, for the jury.[23] Lord Justice Auld considered that the written summary, and any other written or visual aids provided to the jury, should be used 'as an integral part of his summing-up, referring to the points in them, one by one, as he deals with them orally'.[24] He also recommended that:

> courts should equip judges with, and in cases meriting it they should consider using, other visual aids to their summings-up, such as PowerPoint and evolving forms of presentational soft-ware.[25]

21 Mark Findlay, 'Juror Comprehension and Complexity: Strategies to Enhance Understanding' (2001) 41 *British Journal of Criminology* 56, 65 (Russian juries).

22 The Right Honourable Lord Justice Auld, 'Chapter 11: The Trial: Procedures and Evidence' in *Review of the Criminal Courts of England and Wales*, Report (2001) [24].

23 Ibid [37].

24 Ibid [42].

25 Ibid.

Glossaries

10.27 The use of glossaries of legal terms and concepts was also considered by the Law Commission of New Zealand.[26]

10.28 Research there,[27] in Australia[28] and elsewhere has shown that jurors have difficulty understanding legal terms and concepts. It was suggested that glossaries with short, standard definitions of key or problematic terms might be of assistance to clarify these uncertainties, and could be referred to by jurors throughout the trial and deliberations. This technique could perhaps be adapted to help jurors understand technical evidence that will emerge during the case.

10.29 Submissions to the Law Commission of New Zealand argued that glossaries should not be a substitute for clear explanations from the judge and counsel. The Law Commission agreed, but felt that this was not of itself inconsistent with the proposition that glossaries could be used. It concluded:

> Glossaries may be helpful to the jury, although they should never be seen as a substitute for plain English and clear explanations from counsel and judges. Where required, glossaries should be compiled by the prosecutor with the consent of defence counsel and the trial judge. The [Criminal Practice Committee] Manual will include a list of legal terms with definitions, which can be copied into glossaries.[29]

Copies of judges' directions and summing up

10.30 The survey conducted by the NSW Bureau of Crime Statistics and Research in 2007–08[30] canvassed jurors' views on the utility to them of certain written materials provided to them during trials. The 1,225 jurors participating were asked to what extent the judge's summing up of evidence assisted them. Virtually all responded: 30.3% said that it helped 'a lot'; 37.0% answered that it helped 'quite a bit'; 27.2% said that it helped 'a little bit'; and the remaining 5.5% said that it did not help at all.[31]

10.31 However, importantly:

> There was a significant relationship between whether jurors received a written transcript of the judge's summing-up of the trial evidence[32] and the extent to which it helped the jury reach a verdict. Jurors who did not receive a written transcript of the judge's summing-up were more than twice as likely as those who received a transcript (34.2% vs 15.1%) to say that the judge's summing-up did not help the jury 'at all' in reaching a verdict or only helped 'a little bit' … Conversely, jurors who received a transcript of the judge's summing-up of the trial evidence were 1.3 times

26 Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) [379]–[382].

27 Ibid [379].

28 NSW Bureau of Crime Statistics and Research (L Trimboli) 'Juror understanding of judicial instructions in criminal trials' *Crime and Justice Bulletin* No 199 (2008); see [3.87] above.

29 Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) 143.

30 NSW Bureau of Crime Statistics and Research (L Trimboli) 'Juror understanding of judicial instructions in criminal trials' *Crime and Justice Bulletin* No 199 (2008).

31 Ibid 7. These statistics are considered in more detail at [5.28]–[5.32] above. See also [3.87] above.

32 Importantly, this was not a transcript of any of the evidence itself, just of the judge's summing up of it.

> as likely as those who did not receive a transcript (84.9% vs 65.8%) to say that the judge's summing-up helped the jury 'quite a bit' or 'a lot' in reaching a verdict.[33]

10.32 The provision of a written transcript of the judge's summing up also had a significant effect on how well the jurors felt they understood the summing up.

> Jurors who did not receive a transcript [of the summing up] were more than twice as likely as those who received a transcript (14.5% vs 5.8%) to say that they understood 'very little' or only 'most things' that the judge said in the summing-up …[34]

10.33 This is consistent with the results of research carried out in New Zealand. Most jurors who were given written directions found them to be useful, and most jurors who were not given any said that they would have found them useful because:

- it was difficult to absorb all of the judge's instructions at the time they were given, and a written summary could have been digested at a more leisurely pace back in the jury room;
- some jurors differed in their interpretation of what the judge said, even when jurors had themselves made notes; and
- some jurors felt that written instructions would have reduced deliberation time.[35]

10.34 The Law Commission of New Zealand agreed with the approach of the judges of the High Court of New Zealand, who had submitted:

> The general view of High Court Judges was that written directions referable to the case (and particularly to the legal elements of the offence) should be given, if at all, at the end of the case. Further, there was a preference for the directions to be focused on the issues raised by the case rather than in the abstract. Particularly useful is provision of a suggested step-by-step approach to the issues raised by the case.
>
> It is not practical to be prescriptive as to when directions in writing should be given or as to their nature. Practice is likely to vary depending upon the nature of the case and the personal style of the judge and the extent to which the matters truly in issue are identified at an early stage, perhaps through a defence opening or early admissions of fact … Where a judge proposes to give written directions or identify a series of questions for the jury to answer, these should be submitted in draft to counsel wherever possible prior to their closing addresses. The written directions should be treated as an integral part of the summing-up and should be referred to as oral instructions are given.[36]

10.35 Opposed to these remarks are the results of the research by the Australian Institute of Judicial Administration which showed that in practice only 11% of Australian

---

33 NSW Bureau of Crime Statistics and Research (L Trimboli) 'Juror understanding of judicial instructions in criminal trials' *Crime and Justice Bulletin* No 199 (2008), 8.

34 Ibid 6. These results should be read bearing in mind that the jurors' other options were that they understood 'everything' or 'nearly everything' that the judge said: ibid.

35 Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) [313].

36 Ibid [314].

judges and 10% of New Zealand judges provide the jury with anything in writing that covers their opening remarks.[37]

10.36 Similarly, the University of Queensland's research showed that judges infrequently gave jurors written materials, none of the jurors reported having received a written summary of the judge's directions, and the jurors frequently reported that they would have liked written summaries of the judge's directions, the law and the evidence:[38]

> Given the problems that were highlighted regarding difficulties with deliberations and conflicts regarding directions, most jurors who were interviewed felt that having something written down, either regarding the exact wording of the law (or, alternatively, the law in layman's terms), a summary of all the evidence, or the Judge's summation, to refer to during deliberations would have aided them.[39]

10.37 As noted above, judges in New South Wales are expressly permitted to give copies of their directions in writing to the jury.[40]

Expert evidence

10.38 Research has indicated that the provision of experts' reports would improve the quality of juries' decision-making, and that jurors think that this would assist them.[41]

10.39 Of those jurors participating in the University of Queensland's research and whose trial involved expert testimony, 59% said that they had received an expert witness's report, which most of them rated as being 'useful':

> Twenty-two jurors indicated that expert witnesses testified in the trial they served on. Thirteen of these jurors said that they received a report from the expert witness, and all but one juror said they were able to take this report with them into the deliberation room. Jurors said that the reports varied in utility however, using the entire range of the 7-point rating scale. The average rating of helpfulness in deliberations was 5.77 (95% CI = 4.63 to 6.90), and average rating of helpfulness in verdict was 4.85 (95% CI = 3.72 to 5.97).The majority did say the report was useful (rating of 6 or 7).[42]

Judicial practice

10.40 Research by the Australian Institute of Judicial Administration has shown that, although there is significant variation in the practices of trial judges around Australia and in New Zealand, there is still a slow adoption of practices involving giving the juries

---

37 Australian Institute of Judicial Administration (James RP Ogloff, Jonathan Clough, Jane Goodman-Delahunty & Warren Young), *The Jury Project: Stage 1 — A Survey of Australian and New Zealand Judges* (2006) 12, 22; see also [4.89] above.

38 School of Psychology, University of Queensland (Blake McKimmie, Emma Antrobus and Kathryn Havas), 'Jurors' Trial Experiences: The Influence of Directions and Other Aspects of Trials', Report (November 2009)11, 24–6.

39 Ibid 25.

40 See [10.21] above.

41 Judith Fordham, 'Illuminating or Blurring the Truth: Jurors, Juries, and Expert Evidence' in B Brooks-Gordon and M Freeman (eds) (2006) 9 *Law and Psychology* 338, 356.

42 School of Psychology, University of Queensland (Blake McKimmie, Emma Antrobus and Kathryn Havas), 'Jurors' Trial Experiences: The Influence of Directions and Other Aspects of Trials', Report (November 2009) 10.

written assistance.[43] This survey could not identify the reasons for that and whether or not it might be based on judicial reluctance or conservatism. However, the authors did note that it was not unknown for written aids to be refused even when requested by juries.

10.41 The results of the survey are set out in the following table; the figures refer to the percentage of judges in each jurisdiction who report that they give (or deny) juries the assistance in question:[44]

	NSW	Qld	SA	Tas[45]	Vic	WA	NZ
Do you provide the jury with any written assistance about the summing up?	83	43	70	775	47	44	69
If yes, which items are provided?							
• Legal directions	70	23	55	75	21	38	47
• Elements of the offences	78	34	55	75	47	44	65
• Flow charts, decision trees or lists of decisions	22	26	30	75	13	50	41
Have juries ever requested but been denied any written aids?	39	29	20	75	24	13	2

Table 10.2: Written assistance at summing up

10.42 Queensland judges were amongst the least likely to provide any such written assistance in all categories, and the second most likely to refuse such aids if requested (apart from Tasmania).[46] The University of Queensland research also showed a low rate of written materials given to the jury by the judge.[47]

10.43 Recent research by the Australian Institute of Criminology showed that about half of surveyed jurors in South Australia (54%) and New South Wales (56%) reported receiving copies of written directions, compared with 29% in Victoria.[48]

NSWLRC's Consultation Paper

10.44 The NSWLRC outlined the following benefits from written directions in its Consultation Paper on jury directions:[49]

43 Australian Institute of Judicial Administration (James RP Ogloff, Jonathan Clough, Jane Goodman-Delahunty & Warren Young), *The Jury Project: Stage 1 — A Survey of Australian and New Zealand Judges* (2006).

44 Ibid 30.

45 Data was obtained from only four Tasmanian judges: ibid 30.

46 See n 45 above.

47 School of Psychology, University of Queensland (Blake McKimmie, Emma Antrobus and Kathryn Havas), 'Jurors' Trial Experiences: The Influence of Directions and Other Aspects of Trials', Report (November 2009) 9, 11. See [10.17] above.

48 Australian Institute of Criminology, *Practices, policies and procedures that influence juror satisfaction in Australia*, Research and Public Policy Paper No 87 (2007) 140.

49 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [10.12]–[10.25]. See also ibid [6.25]–[6.30] in relation to the provision of written summaries of evidence.

Benefits from written directions

> 10.13 There are a number of benefits from this practice. Studies have shown that giving jurors a copy of the directions improves their comprehension. This may be because, when jurors refer to the written directions, they are referring to the law as directly told to them by the judge, and this repeated exposure may lead to greater familiarity with and understanding of the directions they need to apply.
>
> 10.14 Further, written directions may reduce deliberation time, as juries spend less time trying to recall the directions. They may assist in resolving disputes among jurors about what directions the judge gave.
>
> 10.15 Next, the written directions can be a useful way of identifying the final issues in the trial to which the directions can be related.
>
> 10.16 Finally, the improved comprehension of the directions and evidence that results from the presence of written directions may increase the jurors' confidence in their verdict.[50] (notes omitted)

10.45 While the NSWLRC noted that judges are expressly permitted to give written directions, and commonly do so in the Supreme Court,[51] it raised the possibility of legislating to require that written directions be given 'unless the judge has good reasons for not doing so'.[52]

10.46 The NSWLRC also considered the use of deliberation aids such as 'step directions', 'issues tables' and decision trees:[53]

> Their usefulness lies in simplifying the issues jurors need to resolve, and in providing an easy-to-use roadmap that takes jurors through the crucial steps required to reach a decision. It must be emphasised that these tools are not stand-alone items, and juries should be told to use them together with the directions given by the judge in the summing-up (which contains in full the relevant legal principles and how these relate to the real issues in the case) and any written directions provided. It is also important for the judge to consult both prosecution and defence counsel in crafting any deliberation aid to be given to the jury.[54]

10.47 It noted that the use of these techniques could be facilitated by the inclusion of models in the NSW Bench Book.[55]

VLRC's proposals and recommendations

10.48 In its jury directions Consultation Paper, the Victorian Law Reform Commission proposed the use of written assistance for juries in the form of the aide mémoire used in the Northern Territory. The VLRC's Proposal 4 reads:

> 7.56 Instead, we propose that available resources be directed towards the preparation of a document called an 'Aide Memoire' that would contain an agreed statement of the elements of the offences, including any alternative offences.

50 Ibid [10.13]–[10.16].

51 See [10.21] above.

52 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper (2008) 229, Issue 10.2.

53 Ibid [10.36]–[10.43].

54 Ibid [10.42].

55 Ibid [10.43].

> That document should be prepared before the jury is empanelled. This document would be provided to the jury at the beginning of the trial and could form the basis of the judge's charge to the jury and assist in the preparation of specific directions and warnings.
>
> **PROPOSAL 4**
> A document known as an 'Aide Memoire' should be introduced to assist in the identification of issues.
>
> 7.57 The idea of the 'Aide Memoire' is based upon the document of the same name currently used in criminal trials in the Northern Territory. In the Northern Territory, the aide memoire sets out the elements of each offence (and alternative offences) and highlights the matters that are in dispute. This document, which is given to the jury when the judge delivers his or her final charge, is drafted by the trial judge and usually settled with counsel prior to the empanelment of the jury. …
>
> 7.58 We propose that a document of this nature be given to juries at the commencement of each trial. Like the Northern Territory Aide Memoire, the document would set out the elements of each offence and it would indicate the matters that are in dispute. Although the Northern Territory model is confined to identifying areas of dispute about the elements of the offences (which can be done simply by highlighting the disputed elements in the text), the use of such a document provides an opportunity to identify subsidiary issues that are also in dispute. Whether or not such subsidiary issues were set out in the document when it was first provided to the jury, or at all, would be a matter for the trial judge to consider.[56] (notes omitted)

Submissions

10.49 This proposal found some support in submissions to that Commission. Associate Professor John Willis submitted to the VLRC that:

> Clearly juries should be given as much assistance as possible. This will generally include written information to which they can refer at will. Such written information should generally include the elements of each of the offences before them.[57]

10.50 In the context of the early identification of the real issues in a trial, one respondent to the VLRC said this:

> Furthermore, the obligation on trial judges to direct the jury about the real issues in a case should be included in the code by way of an outline. The example of how the principle may be stated in statutory terms as drafted in the Consultation Paper is ideal. The preparation of an Aide Memoire … would make identification of the real issues easier. The judge would then need to make a summation of that evidence relevant to the findings of fact the jury must make when determining those real issues.
>
> The Aide Memoire (as modelled on the Northern Territory example) should be introduced to assist in the identification of issues and be provided to juries at the commencement of each trial. Its preparation should be the task of Counsel and be settled by the judge prior to the empanelment of the jury.
>
> The document would help in the identification of the issues early on and would assist the trial judge when formulating directions and warnings to the jury.[58]

---

56 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [7.56]–[7.58].

57 Associate Professor John Willis, Submission to the Victorian Law Reform Commission, 16 December 2008, 5.

10.51 Not all respondents supported the provision of such a document to the jury, however:

> The OPP [Victorian Office of Public Prosecutions] would not agree to providing a document at the commencement of a trial that would ultimately … be used for the purpose of the trial judge's charge. The jury is commonly provided with a presentment at the commencement of a trial and may also be provided with a basic document that outlines that the issues and evidence in a case may be. Such a document should be distinguished from a document outlining what the judge should say in his charge — such a document should only be settled by the judge after the evidence has been heard and the trial judge has consulted with counsel.[59]

10.52 But with that distinction in mind, the OPP was prepared to assist with the provision of material to assist juries understanding the issues of cases:

> The Aide Memoire (with the qualifications outlined above) would be one means to do this however depending on the complexity of the case handouts, flowcharts and utilising technology (for instance PowerPoint presentations) may also be beneficial in assisting comprehension.[60]

10.53 Stephen Odgers SC made this submission to the VLRC:

> I strongly support use of written directions. However, I do not agree with any proposal to require drafting of such a document at the beginning of the trial. What should be contained in the written directions may not be clear until the end of the trial. I oppose an obligation on counsel to draft it (although competent counsel will no doubt take the opportunity to provide a draft to the judge). A judge should be able to ask for, but not compel, assistance from counsel.[61]

VLRC's recommendations

10.54 The VLRC recommended the use of two principal documents to be given to juries by trial judges during criminal trials, both optional, extending its earlier proposals in relation to an aide mémoire:

> 41. When addressing the jury about the issues that are expected to arise in a trial, the judge may provide the jury with a document known as an 'Outline of Charges' which identifies the elements of the offences charged in the indictment (including alternate offences) and which indicates the elements disputed by the accused.
>
> 42. If the trial judge decides to give the jury an 'Outline of Charges' the trial judge may direct the prosecutor to prepare a draft of that document and to attempt to settle the document with counsel for the accused before filing it with the court. Section 223 of the *Criminal Procedure Act 2009* (Vic) should be amended to expressly refer to this document and to provide the trial judge with an express power to direct counsel to prepare a draft of the document.

---

58 Maria Abertos, Submission to the Victorian Law Reform Commission, 29 November 2008 [10]–[11]. See also Daniel Gurvich and Mark Pedley, Submission to the Victorian Law Reform Commission, 23 December 2008 quoted at [8.110] above; Bernard Lindner (Criminal Bar Association), Submission to the Victorian Law Reform Commission, 30 November 2008, where the provision of an aide mémoire was described as 'unobjectionable'.

59 Office of Public Prosecutions, Submission to the Victorian Law Reform Commission, 12 February 2009, 16.

60 Ibid 25.

61 Stephen Odgers SC, Submission to the Victorian Law Reform Commission, 12 November 2008, 8. Odgers' submission was expressly endorsed by the Queensland Law Society and Bar Association of Queensland in their joint submission to this Commission: Queensland Law Society and Bar Association of Queensland, Submission 13.

> 43. The trial judge should be expressly permitted to provide the jury with a document known as a 'Jury Guide', which contains a list of questions of fact designed to guide them towards their verdict. The jury must not be required to provide answers publicly to the questions in the document, but should be directed that they may use the 'Jury Guide' to assist them to reach a verdict.
>
> 44. If the trial judge decides to give the jury a 'Jury Guide' a draft of that document must be shown to the prosecutor and counsel for the accused prior to it being handed to the jury and counsel must assist the trial judge to finalise the questions of fact that will be included in that document.[62]

10.55 As can be seen from the VLRC's Recommendation 42, these recommendations are to supplement provisions in the new *Criminal Procedure Act 2009* (Vic) which expressly permit a wide range of written materials that the judge may direct be given to the jury under section 223.[63]

10.56 The Outline of Charges is to be given to the jury before any evidence is led to introduce them to the elements of each offence charged (and alternative charges), identifying which of them are disputed by the defendant and therefore have to be determined by the jury.[64] The VLRC acknowledged that the elements in dispute can change during a trial and that a defendant should not be bound by this document; it would be a 'reference point' to help the judge to conduct a fair and efficient trial.[65] The jury should be told that the issues as set out in this document could change during the trial.[66]

10.57 The VLRC considered that it is reasonable to require the prosecutor to prepare the first draft of the Outline of Charges as the Victorian rules of procedure already require the prosecutor to prepare an opening document well in advance of the trial. Furthermore, the VLRC was confident that over time a bank of precedent Outlines would be developed.[67]

10.58 The Jury Guide would be a distillation of the decision trees, flow charts or jury checklists that are variously used in Australian courts to assist jurors in understanding the decisions that they must make in reaching their verdicts.[68] The VLRC notes that reliance on the on-line Criminal Charge Book of the Judicial College of Victoria, though it is a 'brilliant resource tool',[69] can nonetheless present the jury with the 'extraordinary task' of absorbing and applying a complex statement of the law.[70]

10.59 Over concerns that the Jury Guide might in some way distort the role of the jury and the duties of the judge, the VLRC concluded that it would in fact assist judges to discharge their responsibilities as well as assisting the jury.[71] The VLRC also noted the

---

62 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) 17, 118, 120.

63 Section 223 is set out in [10.19] above.

64 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [6.29]–[6.45].

65 Ibid [6.30]. The Outline of Charges would have some similarities to, but also some differences from, the Aide Mémoire used in the Northern Territory: ibid [6.32], Appendix D. One difference is that the Outline of Charges would be given to the jury at the end of opening statements, not at the end of the closing addresses as is the case in the Northern Territory: ibid [6.41].

66 Ibid [6.45].

67 Ibid [6.39]–[6.40].

68 Ibid [6.46]–[6.60].

69 Ibid [6.51].

70 Ibid [6.53].

71 Ibid [6.61]–[6.66].

considerable support for this approach in England and Wales, and in particular in New Zealand.[72] The VLRC endorsed the approach of the New Zealand Court of Appeal in *R v Dixon*:

> Potter J had given the jury an elements sheet. We applaud that: elements sheets or question trails are of significant benefit to juries in cases such as this, with multiple charges and difficult issues arising from the defences being run. When it came to insanity, however, all the judge did was reproduce s 23 of the *Crimes Act*. To give the jury the unvarnished section would be unfortunately likely to lead them into error as to the correct focus of their inquiry. It would have been preferable had the judge posed the question in the simple terms we have expressed above, namely: Did Mr Dixon, because of the disease of his mind, not know that what he was doing was morally wrong?[73]

The Issues Paper

10.60 In Chapter 9 of its Issues Paper, the Commission considered and sought submissions on whether juries should be provided with written materials, such as written directions, outlines of evidence, and glossaries of legal or other technical terms.[74]

Submissions

10.61 There was generally a great deal of support in submissions for the provision to juries of a variety of written material and similar aids,[75] and for the proposition that a purely oral summing-up was 'ineffective and out of kilter with our modern society.'[76] One Queensland District Court judge commented:

> In substance, the time has really come to recognise that the tradition of the oral trial has been overtaken by technology and the increasing literacy and education of jurors.[77]

10.62 Some of this material could be given to juries at the start of the trial: a note about basic principles and a checklist of things that they ought to bear in mind, such as the concepts of the burden and standard of proof:

> An effort should be made to give directions as early as possible.[78]

10.63 A judge of the District Court of Queensland noted that:

> Queensland judges are increasingly giving written directions to juries. Practices vary. …

---

72 Ibid [6.67]–[6.80].

73 [2007] NZCA 398 [41].

74 Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [9.9]–[9.20], [9.60]–[9.65], [9.70]–[9.72], [9.135], 206.

75 Submission 6; Submission 10; South West Brisbane Community Legal Centre, Submission 11; Marcus Taylor, Submission to the Victorian Law Reform Commission, 30 January 2009; Judge MD Murphy, Submission to the Victorian Law Reform Commission, 5 February 2009, 1.

76 Submission 6. And see Submission 10; South West Brisbane Community Legal Centre, Submission 11. See also Judge MD Murphy, Submission to the Victorian Law Reform Commission, 5 February 2009, 1.

77 Submission 10.

78 Ibid.

> It is most useful to give the jury written directions about the key aspects of the trial.
> …
>
> Such a summary has several advantages. Preparing it concentrates the judge's mind on the relevant issues. It is an agenda for discussion with counsel. Writing down the issues reduces the chance of the judge explaining them inaccurately to the jury. They give the jury a written statement, which should allow for clear understanding, and less misunderstanding about the issues they have to keep in mind and the decisions they have to make.[79]

10.64 One respondent to this Commission, who had recently been a defendant acquitted at a re-trial, was concerned that the only written information the jurors in his re-trial had at their disposal was their own notes. He regarded it as 'vital' that juries receive written, visual or graphical assistance. This could include a glossary of terms such as 'uncorroborated' and especially 'beyond reasonable doubt', with clear examples.[80]

10.65 Various respondents to the Commission's Issues Paper specifically supported the provision of the following written materials to juries:

- a copy of the indictment;[81]
- a copy of the elements of the offence or offences charged;[82]
- a copy of the elements or the 'law governing' some defences such as provocation and self-defence;[83]
- an agreed schedule of expert evidence;[84]
- any re-direction or reminder about the content of any evidence (rather than it being read out to the jury);[85]and
- a glossary of terms.[86]

10.66 The use of other forms of presenting information, such as visual aids, also received support.[87]

10.67 One submission noted that the adoption of written aids and the use of modern systems of communication is allied to an awareness of the limitations of human attention spans, and argued that consideration should be given to giving juries appropriate

---

79 Ibid.

80 Submission 4. The difficulties associated with defining 'beyond reasonable doubt' were discussed in some detail in the Issues Paper at [7.55]–[7.63], and the submissions in response to those issues are discussed at [17.32]–[17.35], [17.37]–[17.39] below.

81 Submission 6; Submission 10.

82 Submission 6; Submission 10.

83 Submission 6.

84 Ibid.

85 Ibid.

86 Submission 4. See [10.63] above.

87 South West Brisbane Community Legal Centre, Submission 11.

breaks rather than expecting them to be able to concentrate fully on extended periods of instruction, especially if delivered only orally.[88]

10.68 The use of decision trees is one possible technique that was considered by the Brisbane office of the Commonwealth Director of Public Prosecutions:

> Decision trees may also be useful in difficult cases where there are complex legal issues. It is important that decision trees are settled after discussion with Counsel and are compliant with the law. A decision tree should be accompanied by appropriate direction by the trial judge. For example, a decision tree in a complex case may have many steps. Because of the way the trial has been conducted and issues have developed, some of these steps may not be of particular significance. Reducing the steps to writing may, however, lend it more significance than it actually should have in the circumstances of the trial. The decision tree would therefore need to be accompanied by careful and deliberate direction about the significance of each step. This was observed in a recent Supreme Court trial involving Commonwealth charges where decision trees were used. There, the trial judge carefully directed the jury about the particular issues in the trial and noted that certain steps in the decision tree, although legal requirements, were not matters that should necessarily unduly concern the jury.
>
> …
>
> In this Office's experience, Judges are quite willing to provide written directions in consultation with counsel where there are complex factual and legal issues to be determined. In our view, it is not necessary to legislate to make written directions compulsory in criminal trials as some trials, by nature of their simplicity, do not call for written directions.
>
> Model step directions, tables and decision trees are useful, particularly in circumstantial cases or where alternative verdicts are available. In our view, it is not desirable to legislate to confirm the power of Judges to use such deliberation aids. Judges should use such aids when appropriate and in consultation with counsel.[89]

10.69 One Supreme Court judge noted that, while there may be some benefits in the use of flow charts or tree diagrams, they could be exploited by defendants (especially in more complex cases) who over-emphasised the need for each step to be satisfied (beyond reasonable doubt, where appropriate) before a verdict of guilty could be reached.[90]

10.70 Although not opposing the use of written materials generally, the Office of the Director of Public Prosecutions expressed some reservation about the use of decision trees or other materials that directed the jury's attention to structured decision-making in a particular order as they tended to force that order upon the jurors when their own inclination might be to tackle the issues in a different order.[91]

10.71 Legal Aid Queensland was concerned that the use of these materials was not as straight-forward as might first be thought, and submitted that they should be used with some circumspection:

---

88 Ibid.

89 Brisbane Office of the Commonwealth Director of Public Prosecutions, Submission 9, 5–6.

90 Submission 7.

91 Submission 15.

> We do not oppose in principle measures that might supplement oral directions and which are designed to give greater assistance to juries.
>
> However, suggested 'aids' such as chronologies, statements of the relevant issues and flowcharts would obviously require preparation, consultation and perhaps agreement (probably after argument) between the prosecution and defence, or even a ruling.
>
> Given that the defence, quite properly, is usually not required to disclose much of its case until trial, measures such as agreed statements of the relevant issues, in a form that might be able to be put before the jury, could only be prepared as the trial unfolds. Different issues will emerge as a lengthy trial progresses — evidence will change under cross-examination and the emphasis on certain evidence will vary. The trial process is a dynamic one.
>
> In practice, such measures could well extend the length and cost of trials.
>
> Additionally, whatever documents a jury has will create discussion, and possibly argument and debate. Where the documents are exhibits, that is appropriate because the jury are thereby deliberating on the evidence. The danger with schedules or lists of facts, agreed or otherwise, is that the jury argues and debates them instead of the evidence.
>
> Moreover, such proposals assume jurors would prefer to read something rather than listen to an explanation. That assumption might apply to lawyers who read things for a living but might not apply to others, whose tradition is to speak, listen and discuss.
>
> It may well be that any benefits of such measures would be outweighed by these sorts of consequences.[92]

10.72 The provision of written materials to juries was considered in chapter 4 of the Commission's Discussion Paper together with juries' access to transcripts and the use of technology, such as PowerPoint, in the presentation of information to juries. The Commission's proposals and recommendations on those matters are outlined at [10.126] to [10.154] below.

TRANSCRIPT OF EVIDENCE

10.73 There is no statutory bar to a judge in Queensland providing the jury with a copy of the transcript and it remains a matter for the trial judge's discretion.[93] The usual practice in Queensland is for judges to read to the jury any part of the evidence that it wishes to be reminded about, rather than give them a copy of the relevant part of the transcript. This was also the previous practice in New South Wales.[94] But in *R v Tichowitsch*, Williams JA in the Queensland Court of Appeal noted:

> 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

92 Submission 16, 6–7.

93 *R v Tichowitsch* [2006] Qd R 462; [2006] QCA 569 [2], [9] (Williams JA), [52], [58] (Keane JA), [90] (Philippides J). See also *R v Le* [2007] QCA 259 [20] (the Court); *R v Lake; R v Carstein; R v Geerlings* [2007] QCA 209.

94 *R v Taousanis* (1999) 146 A Crim R 303; [1999] NSWSC 107 [8] (Sperling J).

> the best way of ensuring that the jury properly considers and evaluates the relevant evidence.[95]

10.74 However, calls for the jury to be allowed the whole or part of the transcript of evidence are not new.[96] In 1987 the *Jury Act 1977* (NSW) was amended to specifically permit the whole or any part of the transcript of evidence to be given to the jury:

> **55C Supply of transcripts to jury**
>
> 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.

10.75 As noted earlier,[97] section 223 of the *Criminal Procedure Act 2009* (Vic) also allows the trial judge to order copies of transcripts of evidence or of audio or audio-visual recordings to be given to the jury.

10.76 Research conducted by the Australian Institute of Criminology and published in 2007 indicates that the transcript of evidence is fairly routinely given to juries in some Australian States. Just over half of surveyed jurors in New South Wales (59%) and Victoria (53%) reported receiving a copy of the transcript, with a lower percentage reported in South Australia (36%).[98]

10.77 Transcripts of evidence are also commonly given to juries in New Zealand, even without a specific statutory discretion to do so;[99] a practice that appears to have had a significant effect on shortening the time of jury charges (summings up) by allowing summaries of the evidence to be replaced by simple references to the relevant witnesses or parts of the transcript itself.

10.78 The University of Queensland research also showed that while transcripts are not infrequently given to juries in Queensland, jurors would like to receive them more often.[100] Two of the surveyed jurors (6%) said that the judge had read back portions of the transcript when requested. In the follow-up interviews, most jurors who had received transcripts in this way thought it had helped them.

10.79 Fourteen of the participating jurors (42%) also said that they were given a hard copy of the transcript, either in whole or in part. Of those, five jurors said that they had to ask for the transcript, and four said that they were permitted to take the transcript into the jury room during deliberations. About 46% of the jurors who had received transcripts rated them as 'very helpful' in their deliberations and in reaching a verdict.

10.80 Most of the jurors who had not received a transcript (including 68% of the jurors in the survey) said that they would have liked a copy or that it would have helped them

---

95 [2006] QCA 569 [13].

96 See, for example, Alex Castles, 'The mediaeval trappings of criminal trials' (1991) 65 *Australian Law Journal* 468, 470; Liz Porter, 'Matters of judgement and conviction', *The Sunday Age* (Melbourne) 31 March 1991, 9.

97 See [10.19] above.

98 Australian Institute of Criminology, *Practices, policies and procedures that influence juror satisfaction in Australia*, Research and Public Policy Paper No 87 (2007) 141.

99 Eg *R v Haines* [2002] 3 NZLR 13 [28]–[29] (McGrath J).

100 School of Psychology, University of Queensland (Blake McKimmie, Emma Antrobus and Kathryn Havas), 'Jurors' Trial Experiences: The Influence of Directions and Other Aspects of Trials', Report (November 2009) 9–10, 24–5.

in their deliberations, but very few had specifically asked for one. As one juror commented:

> 'Well, I got the impression that we weren't allowed to ask. That the transcript wasn't something that we were allowed to have. Which I found quite strange, because, if we're there listening to all the evidence, why shouldn't you be allowed to get the transcript? But that was the impression I got, that we were not allowed, well, we weren't supposed to get it.' — Juror 7[101]

10.81 Indeed, access to transcripts was the most frequently cited type of assistance that jurors said they would have liked.[102]

10.82 The exercise by Queensland judges of their discretion to give the jury the transcript of evidence does not remove their obligations in the summing up to draw the jury's attention to relevant parts of the evidence and the use that may, or may not, be made of it.[103] It may, of course, shorten the summing up (especially the summary of the evidence) and make both the summing up and the evidence more comprehensible to they jury.

10.83 Williams JA's judgment in *R v Tichowitsch* sets out many of the concerns about the provision of the transcript to the jury that are summarised here, and includes this key statement:

> As already noted the overriding requirement is that what is done be fair and balanced so that the trial of the accused person is in no way prejudiced while affording the jury the best opportunity of arriving at a true verdict.[104]

10.84 One important distinction that is often reinforced by the courts is that between the evidence itself and a record or copy of it, which is a secondary form of the evidence. During the trial and their deliberations, jurors are ordinarily given access to the evidence admitted during the trial (or, where appropriate, copies of it). The exhibits are left with the jury in the jury room when it retires to consider its verdict. However, a transcript of a conversation or an interview is not regarded as the evidence; the evidence is the words spoken, or the oral testimony. Those words, of course, vanish as soon as they are uttered though some record of them will be retained by each juror in his or her memory and in his or her notes, however incomplete and inaccurate they may be. Transcripts of oral evidence, whether given live or by video-tape, have thus not usually been given to the jury.

10.85 In *R v Le*, the Queensland Court of Appeal rejected an appeal based on the allegedly improper provision of the transcript of certain parts of the evidence.[105] In that case the jury had heard tape recordings of the records of interview given by the defendant to the police. The jury was given copies of the transcripts of those interviews while they were being played but they were collected by the court before the jury retired.

---

101 Ibid 10.

102 Ibid 25.

103 *R v Tichowitsch* [2006] Qd R 462; [2006] QCA 569 [15] (Williams JA).

104 Ibid [16] (Williams JA). This statement was endorsed by the Queensland Court of Appeal in *R v Falzon* [2009] QCA 393 [40] (Holmes JA; Keane and Fraser JJA agreeing). The trial in that case lasted 11 sitting days. Although the provision of the transcript to the jury was initially opposed by the defendant at trial (and was a ground of appeal argued when the appeal was heard), it appears that his opposition became more muted as the trial progressed: ibid [38], [40].

105 *R v Le* [2007] QCA 259.

During deliberations the jurors asked the judge for the transcripts so that they could locate the parts of the tapes that they wanted to listen to in the jury room. The judge agreed, over the objection of defence counsel. The judge had given the jury no specific direction about the transcripts in his summing up as it was not anticipated then that the jury would have them. However, before the tapes were played in court during the evidence he had given them this warning:

> Members of the jury, you're about to hear a tape recording of a conversation said to have been between the defendant and Detective Frilingos and transcripts are going to be provided for your assistance however it is important for you to remember that it is the sounds you hear from the tape recording that constitute the evidence. The transcript itself is not evidence. It is merely an aid to your understanding. It is really someone else's opinion as to what the conversation on the tape is. It is what you hear that matters so if you hear something different from what appears in the transcript you should act on what you heard not on the transcript.[106]

10.86 The trial judge's warnings in this case exemplify the primacy given in criminal trial procedure to the oral evidence. Concerns have been expressed about a perceived risk of undue weight being given to the transcript rather than to the evidence itself (ie, the words spoken) and to those parts of the evidence for which a transcript (or, for example, a video-recording) is provided to the jury.

10.87 For example, in *Gately v The Queen*,[107] the High Court held that the jury ought not to have in the jury room a copy of a statement made by a child under section 93A of the *Evidence Act 1997* (Qld). During deliberations, the jurors had asked for videotapes of the complainant's evidence to be re-played to them; these had been recorded before the trial and played to the jury in court. The tapes were replayed in the presence of the bailiff but the court was not formally re-constituted while this happened. Although the appeal was dismissed it was said that:

> If a jury asks to be reminded of the evidence of an affected child that was pre-recorded under subdiv 3 of Div 4A of the *Evidence Act* and played to the jury as the evidence of that child, that request should ordinarily be met by replaying the evidence in court in the presence of the trial judge, counsel, and the accused. Depending upon the particular circumstances of the case, it may be necessary to warn the jury of the need to consider the replayed evidence in the light of countervailing evidence or considerations relied upon by the accused. It may be desirable, in some cases necessary, to repeat the instructions required by s 21AW [of the *Evidence Act 1997* (Qld)]. Seldom, if ever, will it be appropriate to allow the jury unsupervised access to the record of that evidence.[108]

10.88 Part of the reason for this is the risk of undue weight being given to the transcript rather than to the evidence itself (ie, the words spoken):

> Replaying the evidence given by one witness, after all the evidence has been given, carries risks. First, there is the risk inherent in the form in which it is presented. As was said in *Butera*,[109] there is the risk that undue weight will be given to evidence of which there is a verbatim record when it must be compared with evidence that has been given orally. Secondly, there is the risk that undue weight will be given to

106 Ibid [13]–[14]. A shorter warning to similar effect was given before the trial judge gave the jury the transcripts following their request: ibid [17].

107 (2007) 232 CLR 208.

108 Ibid [96] (Hayne J).

109 *Butera v Director of Public Prosecutions (Vic)* (1987) 164 CLR 180, 189–90.

> evidence that has been repeated and repeated recently. Other risks may arise from the circumstances of the particular trial.[110]

10.89 However, the Commission does not share this concern, particularly if the transcript is provided only at the end of the trial, and these exceptional instances should be re-considered.[111] Section 223(1)(i) of the *Criminal Procedure Act 2009* (Vic), for example, expressly allows the judge to give the jury a copy of any audio or audio-visual recordings of evidence.

10.90 Aside from those issues, there are some technical and practical hurdles to be overcome in the provision of transcripts. For example, the preparation of an appropriately corrected and edited transcript may take some time and effort; a feat more likely to be achieved in metropolitan areas than in smaller regional courts.

10.91 While the version of any transcript to be provided to a jury would need to be carefully reviewed and edited, concerns about the excision from the transcript of material that should not go to the jury (such as inadmissible evidence) might be alleviated by simple expedients such as starting the transcript of argument on *voir dire*, or other proceedings when the jury is absent, on a new page, a practice that apparently occurs in Victoria.[112]

10.92 Another concern is that the length of a complete transcript of admissible evidence may in fact be counter-productive and be a burden or distraction to a jury rather than a help. Some of the jurors interviewed as part of the University of Queensland research commented, for example, that they had difficulties remembering which particular parts of the transcript they wanted to hear or see again. For example, one juror said:

> 'It was hard to be specific on what we might want to read over again. So, if you think, "oh, I wouldn't mind seeing a bit of that evidence again.", "Which part?" … You know, you can't really pinpoint what you want to re-read.' — Juror 17[113]

10.93 Furthermore, the transcript of oral testimony and exchanges between counsel and witnesses is rarely as articulate and readable as most prepared written material. This is because it is the rendition in writing of an oral exchange, and therefore puts into a written format — which a reader expects to be clear, planned and well structured — an oral exchange which, notwithstanding the skill and preparation of counsel, rarely meets these standards. On the other hand, some of the jurors interviewed by the University of Queensland said that they found it helpful to have the judge read back parts of the transcript because it 'took all the emotion out of it'.[114]

10.94 These concerns might be reduced if the jury is provided with only a short specified portion of the transcript; for example, technical expert evidence that jurors without the relevant expertise may find difficult to grasp or retain. If the evidence is contested or challenged in any way, the jury may also need to be provided with the tran-

---

110 (2007) 232 CLR 208 [95] (Hayne J). See also

111 See *R v Tichowitsch* [2006] Qd R 462; [2006] QCA 569 [16] (Williams JA).

112 Jury Directions Symposium, Melbourne, 5–6 February 2009.

113 School of Psychology, University of Queensland (Blake McKimmie, Emma Antrobus and Kathryn Havas), 'Jurors' Trial Experiences: The Influence of Directions and Other Aspects of Trials', Report (November 2009) 10.

114 Ibid.

script of any relevant cross-examination (or re-examination) of the same witness — or even conflicting transcript from contradicting witnesses — to ensure that the jury has a balanced presentation of the evidence on the relevant issues.

10.95 The Commission understands that many trials in Queensland are now video-recorded. This may open the opportunity for the jury to be given a copy of the video-recording so that they can review during deliberations whatever portion of the oral evidence they choose.[115] This would reproduce as accurately as is currently possible what the jury saw and heard during the trial.

10.96 Irrespective of the medium, thought would need to be given to the use of an appropriate indexing system so that any advantage gained by providing the transcript or video-recording is not lost by an inability to efficiently locate any particular part of the evidence.[116]

10.97 Consideration would also need to be given to whether juries should receive a hard or soft copy of the transcript. The answer to this may depend on the technical facilities available within the court and the technical skill or preference of the jurors themselves.

10.98 Nonetheless, it may well be thought that none of these problems suggests a reason in principle why the jury — the principal trier of fact — should be denied the basic record of the evidence that it is required to assess, something that any judge sitting alone would rely on if it were available.

10.99 The recent case of *Bropho v Western Australia*[117] is an example where the trier of fact, in order to comply with the direction to 'scrutinise with great care' the evidence of a particular witness, re-read that witness's evidence from the transcript in order to be satisfied of the extent to which it should be relied on. That case was tried by a judge alone, who would have been accustomed to ready access to the transcript. However, it is interesting to consider what a jury would have been able to rely on in the same circumstances if it were denied the transcript.

10.100 One judge responding to the survey by the Australian Institute of Judicial Administration said that it was 'absurd' that the jury did not have the transcript. Another, whose practice was to provide the jury with a running copy of the transcript, summarised his reasons as:

- it avoids the jury having to take notes, which they cannot hope to do accurately, and they will not be distracted from their primary task;
- jurors should not have to guess as to what the evidence was;
- the judge's summary necessarily reflects what the judge believes to be important, whereas it is what the jury thinks is important that is relevant;
- it does away with arguments that the summary favours one side or the other;
- counsel can refer to passages in the evidence with accuracy; and

115 See also Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) [350].

116 See *Gately v The Queen* (2007) 232 CLR 208.

117 *Bropho v Western Australia (No 2)* [2009] WASCA 94. This case is discussed at [15.23]–[15.25] below.

- it is permitted by s.19(1) *Crimes (Criminal Trials) Act 1999* (Vic) and has been referred to without apparent disapproval in the Victorian Court of Appeal.[118]

10.101 In a recent paper, Justice Murray of the Supreme Court of Western Australia listed a number of ways in which juries could be better assisted during criminal trials, including these:

- … jurors should be provided with transcript during the trial, if it is of any length.

- Jurors should routinely be provided with transcript of video records of interview, and audio recordings admitted into evidence although made out of court.

- Exhibits should be provided to jurors as the trial proceeds.

- Not only should the jury be provided at an early stage with a copy of the indictment but they should be provided with an issues chart, a separate flow-chart or decision tree if thought to be useful, and a verdict chart, unless the verdict is guilty or not guilty on a single charge. …[119]

New Zealand

10.102 The Law Commission of New Zealand considered the provision of the transcript of evidence (called the 'judge's notes' or the 'notes of evidence' in New Zealand) to the jury in its 2001 report on juries in criminal trials.[120] The Law Commission's research revealed that:

- jurors expressed a strong wish to receive the judge's notes.

- research did not support any concerns that jurors would be side-tracked by the judge's notes and become immersed in irrelevant details.

10.103 The Law Commission of New Zealand concluded that:

> The jury should be provided with a copy of the judge's notes, at the beginning of their deliberation, although judges should have the discretion to provide the notes earlier if appropriate in longer or more complex cases. It is not practical or necessary for courts to provide computer search facilities for the jurors to use with the notes, but this issue may be reconsidered in the future once other changes have been embedded.[121]

10.104 The provision of judge's notes in New Zealand is now a common practice[122] and this appears to have a significant effect on shortening the time of the jury charges in that country as summaries of the evidence, however abridged, can be replaced by

118 Australian Institute of Judicial Administration (James RP Ogloff, Jonathan Clough, Jane Goodman-Delahunty & Warren Young), *The Jury Project: Stage 1 — A Survey of Australian and New Zealand Judges* (2006) 15–16. See also *R v Nikolaidis* [2003] VSCA 191 [57]–[59] (Eames J).

119 The Hon Justice Michael Murray, 'Bad Press: Does the Jury Deserve It? Communicating with Jurors' (Paper presented at the 36th Australian Legal Convention, Perth, 17–19 September 2009) 7.

120 Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) [341]–[354].

121 Ibid 134.

122 Eg *R v Haines* [2002] 3 NZLR 13 [28]–[29] (McGrath J).

simple references to the witnesses or transcript pages, which jurors can follow through as they see fit during deliberations.

NSW Trial Efficiency Working Group Report

10.105 The Trial Efficiency Working Group of the Criminal Law Review Division of the Attorney General's Department of NSW noted in its report, issued in March 2009, that:

> … some judges do not permit juries copies (edited or otherwise) of transcripts of the trial. Similarly, there was a concern that some juries were not being granted access to the exhibits until the end of the trial when they were sent away to deliberate.
>
> The Working Group acknowledges that if this practice exists, it is not across the board and that most judges allow juries access to a transcript of the proceedings, where appropriate to do so. The majority of courts also permit jurors access to the exhibits soon after they are tendered.
>
> It is not the intention of the Working Group to fetter the discretion of a judge to run his or her court as they see fit, however it is important that jurors are placed in the best position possible to assess the evidence they hear. Providing a jury with a transcript, where one is available, is a way of ensuring that the evidence is recounted accurately in the jury room rather than recalled from memory. Likewise, the contemporaneous examination of an exhibit will give a jury a much greater appreciation for the evidence and ensure that the relevance of the exhibit is better comprehended.[123]

VLRC's proposals and recommendations

10.106 The VLRC also sought submissions on this issue in its Consultation Paper.[124] One of the respondents to that Paper felt that the provision of transcript was no substitute for a summing up:

> **Should the '*Alford v Magee*' requirement to summarise evidence be achieved in appropriate cases by providing a transcript and transcript references rather than oral summaries?** — No, that would tend to lead to juries poring over transcript, lengthening deliberations. Further, it would not be an adequate substitute for the judge's task of relating the issues to the facts in a case to the law. To provide transcript references would not assist in applying the evidence to the law.[125]

10.107 In its Final Report, the VLRC expressed the view that provision of the transcript of evidence to the jury should be encouraged:

> 5.18 The commission believes that trial judges should be encouraged to provide juries with copies of the transcript of the evidence. Justice Virginia Bell of the High Court has endorsed this practice which is becoming more widespread.[126] When the jury has a copy of the transcript the time taken to remind the jury of the evidence can be reduced. The trial judge can refer the jury to the evidence which is relevant

123 Trial Efficiency Working Group, Criminal Law Review Division, Attorney General's Department of NSW, *Report of the Trial Efficiency Working Group* (2009) 69.

124 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) 99.

125 Bernard Lindner (Criminal Bar Association), Submission to the Victorian Law Reform Commission, 30 November 2008.

126 Justice Virginia Bell, Conference Address, National Judicial College of Australia, Sydney, 10 November 2007 <http://njca.anu.edu.au/Professional%20Development/programs%20by%20year/2007/Communic%20and%20the%20courts%20NOV/papers/Virginia%20Bell%20transcript.pdf> at 27 April 2009.

> to an issue they must decide by giving a brief oral summary of that evidence and referring them to the appropriate parts of the transcript for a more detailed account of the evidence.[127] (note in original)

10.108 It also recommended a legislative restatement of the common law obligation to sum up to the jury which would allow judges to limit their oral summaries of the evidence having regard, among other things, to whether the jury will be provided with a written or electronic transcript or summary of the evidence.[128]

The Issues Paper

10.109 The question of whether a jury should be provided with a copy of the transcript of evidence was considered in Chapter 9 of the Commission's Issues Paper.[129]

Submissions

10.110 The provision of the transcript of evidence to the jury received some support from respondents to the Issues Paper. For example, the Brisbane Office of the Commonwealth Director of Public Prosecutions made this submission in support, though with some qualifications:

> The transcript should be made available to jurors. The jury should be given only one copy of the transcript. In appropriate cases where there are many days of evidence, the jury could be given a copy of the transcript in electronic form that is searchable. Care would need to be exercised to ensure that the jury was not given access to parts of the trial transcript relating to matters arising in the absence of the jury (e.g. legal arguments, voir dire evidence, etc.) Although in *R v Tichowitsch* [2007] 2 Qd R 262 the Queensland Court of Appeal noted that it is clear that a trial judge does have discretion to provide a jury with a transcript of evidence, it may be appropriate for that the trial judge's discretion in this regard be confirmed by legislation similar to that in section 55C of the *Jury Act 1977* (NSW). Any transcript provided would of course have to be a corrected copy. Although it would only rarely arise in a trial for a Commonwealth offence, transcripts of any evidence given extra-curially would also need to be provided e.g. transcripts of evidence of an 'affected child' pre-recorded pursuant to [section] 21AM of the *Evidence Act 1977* (Qld). It would be inconsistent to allow a jury access to a transcript of the parts of the evidence given in the court room and not access to parts of the transcript of the evidence not given in the court room. Allowing access to a transcript of extra-curial evidence such as the prerecorded evidence of an 'affected child' may be contrary to the decision in *Gately v The Queen* (2007) 232 CLR 208 and there may, therefore, need to be some legislative amendment to facilitate this.
>
> … There will also be other trials where the provision of the transcript is not useful or appropriate.[130]

10.111 One respondent who had participated in two trials as a defendant said that it was 'essential' that the jury receive a copy of the transcript of evidence.[131]

---

127 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [5.18].

128 Ibid 91–2, Rec 23(2), (f). The VLRC's recommended legislative restatement of the obligation to sum up to the jury is discussed at [11.41] below.

129 Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [9.25]–[9.49], 206.

130 Brisbane Office of the Commonwealth Director of Public Prosecutions, Submission 9, 5–6.

131 Submission 4.

10.112 On the other hand, some respondents were more equivocal: one District Court judge had 'mixed views about providing a full transcript of evidence' as it may 'distract the jury'.[132] Another judge felt that the jury 'should routinely be given transcripts of the evidence. (Present technology means that editing can be done quickly).'[133]

> Every effort should be made to give the jurors as much help as possible. That means that they should usually have transcripts, which they can take into the jury room, rather than having to rely on their memories of oral evidence sometimes given days before. Such an approach would get rid of the present uncertainties about the use of transcripts of police interviews, and when the jury have to hand them back, rather than take them into the jury room, including during deliberations.[134]

10.113 In a similar vein, a Supreme Court judge submitted that there seems to be no reason why juries could not be played the video-recordings of witness interviews made more or less contemporaneously with the alleged crime, rather than having to rely on oral testimony from witnesses given years later. There would have to be some editing on occasion, but this is already done in relation to confession evidence.[135]

10.114 The provision of transcripts was considered, in chapter 4 of the Commission's Discussion Paper, as part of the Commission's general consideration of the greater use of written materials and aids. The Commission's proposals and recommendations on these matters are outlined at [10.126] to [10.154] below.

USE OF TECHNOLOGY

10.115 Several commentators have noted that the oral tradition of criminal trials is incompatible with the modern reality that a great deal of the information that we all process is in writing of one form or another, and increasingly in electronic format:[136]

> It is the change in the media of communication — both in the outlets of broadcasting and in the Internet — which may have penetrated most deeply the cognitive processes of the generation of young citizens now coming to jury service. The change effects an alteration in the way in which those potential jurors commonly receive, and expect to receive, information and the way they themselves communicate with others and expect others to communicate with them.[137]

10.116 Some Australian judges have themselves noted that visual aids such as PowerPoint displays enhance their communication with juries.[138] Jurors have also reported a desire for more use of visual aids.[139] Only one juror in the University of Queensland

---

132 Submission 6.

133 Submission 10.

134 Ibid.

135 Submission 7.

136 Eg Australian Institute of Judicial Administration (James RP Ogloff, Jonathan Clough, Jane Goodman-Delahunty & Warren Young), *The Jury Project: Stage 1 — A Survey of Australian and New Zealand Judges* (2006) 5. See also New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [10.26]–[10.35].

137 Hon Michael Kirby AC, 'Speaking to the modern jury — New challenges for judges & advocates' (Paper presented at the Worldwide Advocacy Conference, London, 2 July 1998).

138 Australian Institute of Judicial Administration (James RP Ogloff, Jonathan Clough, Jane Goodman-Delahunty & Warren Young), *The Jury Project: Stage 1 — A Survey of Australian and New Zealand Judges* (2006) 5.

139 Eg New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [10.31].

survey reported the use of PowerPoint, and this by some of the witnesses, not the judge or counsel.[140]

NSW Trial Efficiency Working Group Report

10.117 In anticipation of the increasing use of technological aids in jury trials, in March 2009 the Trial Efficiency Working Group of the Criminal Law Review Division of the Attorney General's Department of NSW recommended that:

> 12. Attorney General's Department to convene meetings of relevant agencies, including the Police and the DPPs at appropriate intervals to identify likely future technological requirements for trials to facilitate planning of funding and equipment.
>
> 13. Attorney General's Department to conduct an audit of technology and technological capacity for all criminal trial courtrooms. This information should be available to NSW courts and online to all court users.
>
> 14. Practice notes should require the parties to proceedings to submit for approval to the court, advice of the technological requirements (both hardware and software) for the trial. The submission should be made no later than 20 working days before a trial is to commence. The list of hardware and software should indicate who is to provide it (e.g. in terrorism matters the equipment is supplied by the Commonwealth).
>
> 15. The position descriptions of court officers should be reviewed to ensure that the operation of courtroom technology is a required competency.
>
> 16. Court officers should be given ongoing training to ensure that they can meet the technology requirements of their role.
>
> 17. A single standard procedure should be developed for all NSW courts to require technology to be tested in location within 2 working days of a hearing.

10.118 The Working Group also noted that:

> The absence of aids to increase jury understanding, such as chronologies and summaries of evidence was identified as a problem in the presentation of evidence. This is particularly so in cases involving a large volume of listening device and/or surveillance evidence, where the only contentious issue is the inferences to be drawn from that evidence in combination with other evidence. The Working Group was of the view that such aids could greatly enhance the jury's comprehension of complex or voluminous evidence. However, these aids are seldom used, probably because of the reluctance of the parties to a criminal proceeding to agree to the presentation of evidence in such a fashion or due to gaps in the relevant provisions of the *Evidence Act 1995*.
>
> …
>
> Improving the trial experience for jurors will require the use, where appropriate, of aids to understanding such as chronologies or summaries bringing together voluminous evidence. The jury's comprehension of complex evidence can present significant problems. Many criminal trials, such as major drug trials, are now complex,

140 School of Psychology, University of Queensland (Blake McKimmie, Emma Antrobus and Kathryn Havas), 'Jurors' Trial Experiences: The Influence of Directions and Other Aspects of Trials', Report (November 2009) 11.

> and advances in technology have resulted in more sophisticated forensic evidence. It can be difficult for juries to easily comprehend and absorb some of the evidence. This issue must be given further consideration. [141]

10.119 The *Criminal Procedure Amendment (Case Management) Act 2009* (NSW), which received assent on 14 December 2009 but has not commenced operation, seeks to implement the Working Group's recommendations to the extent that they require legislative intervention. Although the Act deals extensively with pre-trial rulings on evidence, it does not make any reference to the increased use of technological aids to assist juries.[142]

NSWLRC's Consultation paper

10.120 The NSW Law Reform Commission considered the potential for judges to use audio-visual aids when directing juries (including 'whiteboards, slide shows, overhead projectors, and computer-based projections such as PowerPoint') in its Consultation Paper.[143]

10.121 The NSWLRC reported the comments of one judge in Western Australia who uses PowerPoint without 'any major changes to the oral presentation of the summing up':[144]

> She believes this method of presentation helps focus jurors' attention on the main points of the summing-up and improves their comprehension of the legal directions. She reports that both prosecutors and defence counsel have been supportive of this technique. Further, the Court of Appeal of WA has noted the use of PowerPoint in the summing-up and has not objected to this practice.[145] (note in original)

10.122 The NSWLRC also noted the increasing use of modern technologies in courts for other purposes, particularly in relation to the presentation of evidence; 'as a matter of practicality, most courts could very easily adopt the technology needed to allow trial judges to make audio-visual presentations of jury directions'. This would probably require judicial training and perhaps the development of some specimen visual aid directions.[146]

---

141 Trial Efficiency Working Group, Criminal Law Review Division, Attorney General's Department of NSW, *Report of the Trial Efficiency Working Group* (2009) 18, 67.

142 This Act is discussed at [8.129]–[8.143] above.

143 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [10.33]–[10.34].

144 Ibid [10.27].

145 See *Dawson v The Queen* [2001] WASCA 2; *Nguyen v R* [2005] WASCA 22. By contrast, the use of PowerPoint is not favoured by another judge of the Supreme Court of Western Australia: The Hon Justice Michael Murray, 'Bad Press: Does the Jury Deserve It? Communicating with Jurors' (Paper presented at the 36th Australian Legal Convention, Perth, 17–19 September 2009) 7. This difference of opinion highlights the fact that any approach to reform in the area of jury directions and the provision of other information to a jury is very much in the hands of the trial judges, both individually and collectively.

146 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [10.26]–[10.35].

The Issues Paper

10.123 The Commission sought submissions on the techniques that might be used to better inform the jury about the law or the evidence in the trial in chapter 9 of its Issues Paper.[147]

Submissions

10.124 The use of computerised information aids such as PowerPoint received some qualified support from one respondent:

> Electronic aids such as PowerPoint might assist juries in their understanding of the evidence and the law in their deliberations. PowerPoint may be useful for some of the standard parts of the judge's directions. PowerPoint may not always be an option for trial Counsel given the time constraints which usually operate in preparing addresses during trials. Therefore, time may sometimes be an issue. PowerPoint must be used carefully. As a general observation, sometimes a user of PowerPoint may include too much information in each slide and the visual presentation may become a distraction. A preferable technique may be to confine the PowerPoint slide to concise propositions and to then speak to each proposition.
>
> …
>
> The use of PowerPoint presentations or decision trees may be suitable in some cases but not in others. The mandating of techniques may be too prescriptive and insufficiently flexible for the wide variety of issues that may potentially arise in a criminal trial.[148]

10.125 The Office of the Director of Public Prosecutions did not favour the use of PowerPoint for directions and addresses: in its view, presentations of this sort are no more effective than written lists and similar documents, but could lead to an escalation of efforts to impress juries with visual effects.[149]

SUPPLEMENTS TO ORAL PRESENTATION

The Discussion Paper

10.126 The Commission considered the use of written materials, the provision of transcripts, and use of technology in the presentation of directions and other information to juries in chapter 4 of its Discussion Paper.[150] It noted that there are no formal barriers to the adoption of such practices and that they are used from time to time by some judges. The Commission expressed the provisional view, however, that a legislative statement of the judge's discretion to use, or allow the use, of such techniques would usefully encourage these practices.[151] It therefore made the following proposal, based

147 Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [9.127], [9.135], 206.

148 Brisbane Office of the Commonwealth Director of Public Prosecutions, Submission 9.

149 Submission 15.

150 Queensland Law Reform Commission, *A Review of Jury Directions*, Discussion Paper WP67 (2009) [4.4]–[4.58].

151 Ibid [4.46]–[4.58].

on section 223 of the *Criminal Procedure Act 2009* (Vic), on which it sought further submissions:

> 4-1 The Criminal Code (Qld) should be amended by the insertion of provisions to the following effect:
>
> (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) the summary of the prosecution opening;
>
> (d) the defendant's response of the accused to the summary of the prosecution opening and the defendant's response to any notice of pre-trial admissions of the prosecution;
>
> (e) any document admitted as evidence;
>
> (f) any statement of facts;
>
> (g) the opening and closing addresses of the prosecution and the defendant;
>
> (h) any address of the judge to the jury;
>
> (i) any schedules, chronologies, charts, diagrams, summaries or other explanatory material;
>
> (j) transcripts of evidence or audio or audiovisual recordings of evidence;
>
> (k) transcripts of any audio or audiovisual recordings;
>
> (l) the judge's directions to the jury;
>
> (m) any document setting out decision trees, flowcharts or check-lists of questions for consideration by the jury; and
>
> (n) 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.
>
> (3) At the start of the trial the jury should be provided with written material, unless the trial judge considers that there are good reasons why this should not happen, that covers matters such as:
>
> (a) the burden and standard of proof;
>
> (b) the role of the judge and jury; and

(c) the elements of each offence charged (and any alternative charge) and each defence.[152]

Further submissions

10.127 In responding to the Discussion Paper, the Office of the Director of Public Prosecutions again noted its concern that structured decision trees might have the effect of limiting the jury's decision-making processes by constraining them to considering and dealing with the issues (however presented in directions) in a fixed order. This could in some cases unduly restrict and delay a jury's deliberations if there were, for example, a single issue that might be for the jury the critical matter on which their verdict hung but which was positioned low in the decision tree structure.[153]

10.128 The Brisbane Office of the Commonwealth Director of Public Prosecutions, however, was in general agreement with Proposal 4-1:

> [Proposal 4-1] is consistent with the general approach that any material that makes the jury's task easier and more efficient is appropriate. It is noted that items listed at sub paragraphs (c), (f), (g), and (h) may make reference to the facts of the case and yet are not evidence. There may be a danger in providing material to the jury that attempts to summarise evidence In the first place such material may have been prepared before the evidence is given and refer to evidence recorded in written statements of witnesses or in their depositions. Regard must be had to the evidence given in the trial and in the event of conflict the original evidence must prevail. It may be preferable that anything which potentially detracts from the paramountcy of the oral evidence of the witnesses in such a way not be provided to the jury.
>
> …
>
> Subject to the comments in relation to [Proposal] 4-1(1) above, it may be preferable that any material to assist the jury be given in written form. Juries should also be given some things in electronic form if this would be of assistance (eg transcript of the evidence). Many jurors would be familiar with at least basic computer searching techniques.
>
> [Proposal 4-1(3)] makes logical sense and is uncontroversial.[154]

10.129 The Bar Association of Queensland noted that it is arguable that a trial judge already has the power to do everything recommended by the Commission:[155]

> Currently, many of the documents suggested in the QLRC proposal are provided to the jury without any controversy. Some of the other suggestions depend on the adoption of other recommendations made in the Discussion Paper. It is routinely the case that a copy of the indictment is given to the jury to enable the jury to understand the nature of the charge/s. It is also common place for a separate document setting out the elements of each offence and short sensible directions on the law for the jury's consideration. On many occasions, if not most, the provision of such documentation to the jury will be sensible and beneficial.
>
> …

---

152 Ibid 139–40, Proposal 4-1.

153 Submission 15A; see [10.70] above.

154 Submission 9A, 5.

155 Submission 13A, 15. The Bar Association of Queensland referred to *R v Taousanis* (1999) 146 A Crim R 303, 305. The Queensland Law Society endorsed and supported the whole of the submissions by the Bar Association of Queensland: Submission 13B.

> Any documents admitted into evidence would routinely be available for the jury's consideration. It is not uncommon for a jury book containing most of the more important documents in a long case to be assembled by consent and provided to the jury for their consideration during the course of the trial.
>
> Any statements of fact, by which we understand the proposal to mean any formal admissions or agreed statements of facts, should be provided to the jury.
>
> …
>
> Schedules and Chronologies can be provided to the jury by consent for their assistance and routinely are. Where there is dispute about the usefulness of such documents, they should not routinely be provided to the jury because again they can distract the jury from the important function of deciding the facts of the case on the oral and documentary exhibited material.
>
> …
>
> The provision of decision trees to assist the jury in following what otherwise is a complex series of steps either through an indictment contained in the charges or other documentary evidence placed before them is supported by the Association. The provision of such material can usually assist a jury and expedite not only their deliberations but their understanding of the trial process as it proceeds and is to be encouraged.
>
> The Association also supports the proposition that the trial judge has an overriding discretion as to the format and timing of the provision of any of this material to the jury.
>
> Similarly, the provision of written material to the jury concerning topics such as the burden and standard of proof, the roles of judge and jury and counsel and the elements of the offence are all supported by the Association. However … we do not support the suggestion of attempting to identify the elements of alternative verdicts and defences at the commencement of trials, except where it is then clear (without any requirement of defence disclosure) that the jury will be required to consider such matters.[156]

10.130 However, the Bar Association's support for these proposed techniques was qualified and did not apply to all of the matters covered in Proposal 4-1. It emphasised the need to maintain the judge's flexibility:

> However, we do not think that such steps should be mandatory in every trial. The trial judge needs to retain the discretion to evaluate the proposition on its merits on a case by case basis. There will be some cases where the provision of such documentation is unnecessary and should be avoided.[157]

10.131 It also opposed the provision of a written summary of the prosecution opening:

> In general, the Association does not support a proposition whereby a summary of the prosecution opening or the opening itself would be provided to the jury. After all, the opening is not evidence and simply meant to place in context the evidence the jury is about to hear. It is the evidence that is ultimately placed before the jury that is to be relied upon in proof of the prosecution case. Provision of a copy of the opening or a summary of it could well distract the jury from its important task in listening to and evaluating the evidence.

156 Ibid 15, 16, 17, 18.

157 Ibid 15.

> If, despite the Association's position, a summary of the prosecutions opening is determined to go to the jury, then any defence opening should likewise go to the jury in similar fashion.[158]

10.132 Nor did the Bar Association think a copy of the closing addresses of either of the parties should be given to the jury:

> The Association does not support the proposition that copies of the opening and closing addresses by the prosecution and defence should be provided to the jury. Once again, these do not constitute evidence and whilst designed to assist the jury in promoting the arguments of each side during the course of the trial, the jury retires to consider its verdicts close to the delivery of those addresses and at a point when they theoretically should be fresh in their minds. It should be borne in mind also that the judge in summing-up, immediately after the address and immediately before the jury retires to consider its verdicts, is obliged to provide the jury with a summary of the essential features of the prosecution and defence cases, again reiterating what has been submitted to them in both the prosecution and defence closing addresses. In these circumstances, it doesn't seem appropriate to the Association that there be provision to the jury of copies of those addresses.[159]

10.133 The Bar Association similarly objected to a written copy or transcript of the judge's summing up being provided to the jury:

> Likewise, the Association, for similar reasons, does not support the provision to the jury of a copy of the judge's summing-up. That summing-up is the last thing the jury hears before they retire to consider their verdicts and should be fresh in their minds at that time. They also have the ability, frequently exercised, to seek further assistance from the judge on any points of law or fact. This is the desirable course in respect of matters of confusion or lack of understanding and allows instructions to be re-expressed and, if necessary, enlarged upon, rather than allowing perhaps imperfect interpretation of the written transcript.[160]

10.134 The Bar Association submitted that the circumstances of the use of particular material in a particular trial might militate against its use even if that material were often provided to juries:

> Whenever a jury is provided with a transcript or other document 'the over riding requirement is that what is done be fair and balanced so that the trial of the accused person is in no way prejudiced while affording the jury the best opportunity of arriving at a true verdict.'[161]
>
> It is broadly accepted that providing certain documents and not others can create a danger of disproportionate weight being given to the document/evidence that is provided to the jury. In such circumstances it would not be appropriate to protect such decisions from appellate review.
>
> …
>
> Where there is dispute about the usefulness of such documents, they should not routinely be provided to the jury because again they can distract the jury from the

158 Ibid 15–16.

159 Ibid 16.

160 Ibid.

161 *R v. Tichowitsch* [2006] QCA 569.

> important function of deciding the facts of the case on the oral and documentary exhibited material.[162] (note in original)

10.135 The provision to juries of various forms of transcript, however, received qualified support from the Bar Association:

> With respect to transcripts of evidence or audio visual recordings of evidence, the category of material referred to here is broad and needs to be broken down into two separate parts.
>
> Dealing first with transcripts of evidence, the Association can see no reason in principle why a jury should not be provided be with one copy of the whole of the trial transcript, excluding of course any transcript of legal argument or other irrelevant submissions. In such circumstances, the jury should be instructed that they should access the transcript as part of a joint exercise during their deliberations and that they should be careful to look at the evidence-in-chief, together with cross-examination on any given topic that they are interested in. They should also be warned to be sure that they gather all of the evidence on a particular topic from all of the witnesses who gave evidence on that topic and that the transcript is provided as an aid to and not as a substitute for the jury's consideration of the evidence, as it was seen and heard.
>
> The suggestion in 4-1(k)[163] is more problematic, as this category will include evidence admissible pursuant to s.93A and 21AA of the *Evidence Act 1977 (Qld)*. As is noted in paragraph 4.57 of the Discussion Paper,[164] there are particular sensitivities attaching to how evidence of this kind is dealt with in the trial process and if it is in audio or visual recorded form, as to whether and upon what basis the jury is provided with transcripts. These issues are also touched upon in the Supreme and District Courts Bench Book in Chapter 10.
>
> In our view, these issues should not be swept up in the more generally based proposals contained in recommendation 4-1 and require particular and close consideration of the principles reflected in the decided cases as to these issues. As far as we can observe, this has not been done in the Discussion Paper and therefore we are opposed to the inclusion of the recommendation in 4-1(k), at least until these issues are the subject of careful consideration.[165] (notes added)

10.136 One member of the public, who had participated in two trials as a defendant, strongly supported the introduction of legislation along the lines of section 223 of the *Criminal Procedure Act 2009* (Vic)[166] and supported Proposal 4-1 in the Discussion

---

162 Submission 13A, 15, 17.

163 Proposal 4.1(1)(k) reads:

> The Criminal Code (Qld) should be amended by the insertion of provisions to the following effect:
>
> (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:
>
> …
>
> (k) transcripts of any audio or audiovisual recordings;

164 Paragraph [4.57] of the Discussion Paper reads (notes omitted):

> The Brisbane Office of the Commonwealth Director of Public Prosecutions expressed some concern that providing the jury with a copy of a recording of evidence taken outside the court (such as a statement by a child) might not comply with the High Court's decision in *Gately v The Queen* and that express legislative amendment would be required to overcome this. The Commission considers that this concern would be accommodated by the proposed provision.

See also [10.87] above, [10.150] below.

165 Submission 13A, 17–18.

166 Section 223 of the *Criminal Procedure Act 2009* (Vic) is set out at [10.19] above.

Paper. He also submitted that there was no reason that juries should not be provided with a copy of the transcript, especially as judges received a copy. This should cover transcript of the court proceedings as well as transcript of recorded evidence. In relation to the latter, his experience in court indicated that any transcript of recorded evidence should be prepared by independent transcribers and not the Police. This respondent did not share the reservations about the use of PowerPoint in court expressed by the Office of the Director of Public Prosecutions:[167] in his opinion, PowerPoint presentations would not over-awe the jury — it was a very good way to present information; it was no longer a new phenomenon and was no longer a 'gimmick'. In any event, the material in any such presentation should be given to the jury in the form of a printed handout, which would tend to lose any 'gimmicky' aspect of an overly slick in-court presentation.[168]

10.137 Legal Aid Queensland reiterated the views that it had previously expressed in this regard in response to the Commission's Issues Paper[169] with particular reference to the proposals that the trial judge may order that a jury may be given copies of a summary of the prosecution opening, any response from the defence,[170] and a statement of facts and any of the addresses: see [10.71] above.[171]

The QLRC's views

10.138 The Commission is completely unpersuaded by any of the submissions resisting the greater use of written aids for juries in criminal trials. This is especially so given that the Proposal sought to formally permit practices that respondents to the Discussion Paper conceded are already adopted from time to time.[172] Nothing in the Proposal mandates changes in practice, and it does not represent any substantive change in the law. It does, however, represent a change in the way that the law might in practice be followed.

10.139 The value of inserting such a provision lies in directing the attention of both judges and counsel to the options that they have in presenting information to juries, and in underscoring the idea that these techniques should be actively and routinely considered, and not regarded as exceptional.

10.140 So far as the Commission is aware, there are no formal barriers in the form of rules of court or statements of appellate courts that prevent the use of written and other supplementary aids, though there are many statements advocating caution and a conservative approach in using them.[173] However, the Commission notes that in Victoria, for example, the distribution to the jury of certain written materials is expressly permitted under section 223 of the *Criminal Procedure Act 2009* (Vic).[174]

---

167 See Queensland Law Reform Commission, *A Review of Jury Directions*, Discussion Paper WP67 (2009) [4.39].

168 Submission 4A.

169 Submission 16A, 10–11.

170 Bearing in mind Legal Aid Queensland's opposition to the proposal that the defence be required to make an opening: Submission 16A, 9, 11.

171 Submission 16A, 11.

172 See [10.63], [10.129] above.

173 Eg Submissions 7, 9, 15, 16.

174 Section 223 is set out in [10.19] above.

10.141 It was submitted by the Brisbane Office of the Commonwealth Director of Public Prosecutions in response to the Commission's Issues Paper that:

> it is not desirable to legislate to confirm the power of Judges to use such deliberation aids. Judges should use such aids when appropriate and in consultation with counsel.[175]

10.142 However, strong reform measures, such as legislation, are sometimes necessary to overcome entrenched practices and reluctance to innovate. Legislation which confirms a power that trial judges already have should not create any concerns or problems.

10.143 In the Commission's view, a useful starting point is to ask what the trial judge would expect to receive by way of written assistance if he or she were trying the case without a jury. It is unsustainable in principle to argue that the point of departure is that juries should sit and listen mute until they retire to deliberate.

10.144 If trial judges would expect to receive transcript on a regular basis in order to refresh their recollection of evidence or to scrutinise particular portions of it with great care, as the law would require them to do from time to time, why, as a matter of principle, should a jury not receive the same benefit? If a judge would receive chronologies, lists of dramatis personæ and similar summaries and notes, why should the jury not receive them as well? In cases involving extensive documentary evidence, why should jurors not receive bundles of documents as and when evidence is admitted that they can follow as evidence is led or addresses are made, and that they can consult during deliberations? It should also be remembered that jurors are aware that the judge and counsel have access to transcript and similar aids which, in some courts, are not made available to them.

10.145 Alternatively, it may be more useful, at least during the presentation of evidence, for documents to be displayed on large screens so that jurors can be directed to the particular parts of documents or other exhibits as witnesses are speaking about them or as the parties are addressing the jury about that evidence.

10.146 The circumstances in a criminal trial that would warrant the use of, or the decision not to use any of, the techniques discussed in this Report must be a matter for the trial judge to determine in the light of the demands of each case, in consultation with counsel or the parties as appropriate. The Commission is satisfied that there should be no inhibition to the use of these techniques, and that there should be open-minded consideration of them by all professional participants in criminal trials. If, for example, a chronology proposed by one party is not agreed to by the other, it could nonetheless be used as the basis of addresses and described to the jury as being disputed, with a clear indication of those portions which are agreed and which are disputed, and of the factual issues that remain for the jury to resolve.

10.147 The Commission's confirmed view is that a provision similar to section 223 of the *Criminal Procedure Act 2009* (Vic)[176] should be enacted in Queensland. It is permissive only and leaves it up to the judge what, if any, of this material may be given to the jury in any particular case, and when. The Commission sees no need to restrict the number of copies of any such material, including the transcript of evidence, that may be

175 Brisbane Office of the Commonwealth Director of Public Prosecutions, Submission 9.

176 Section 233 is set out at [10.19] above.

given to the jury.[177] Practical concerns may dictate a lower number if the material is long or hard to reproduce, but in any event this is a matter of detail that should be left to the trial judge.

10.148 The VLRC recommended the development and use of two specific documents — the Outline of Charges and the Jury Guide — and that section 223 of the *Criminal Procedure Act 2009* (Vic) be amended to include them in the list of documents in that section.[178] They would presumably be caught by the catch-all provision in section 223(1)(l) in any event. The Commission agrees with this approach and its recommendation, which is an amended version of section 223, is adjusted accordingly without giving these documents any particular title.

10.149 The Commission also considers that the recommended provisions should state that a document similar to the Outline of Charges that was recommended by the VLRC should, as a matter of course, be given to the jury at the start of the trial, unless the trial judge considers that there are good reasons why this should not happen. This would be facilitated by the Commission's recommended regime of pre-trial disclosure and issue identification.[179]

10.150 The Brisbane Office of the Commonwealth Director of Public Prosecutions expressed some concern that providing the jury with a copy of a recording of evidence taken outside the court (such as a statement by a child) might not comply with the High Court's decision in *Gately v The Queen*[180] and that express legislative amendment would be required to overcome this.[181] The Commission considers that this concern would be accommodated by the recommended provision.

10.151 The Commission is not persuaded by the Bar Association's submission that these items should be excluded from the recommended provision. The Commission notes again that the provision is permissive only and would not remove the judge's obligation to consider the appropriateness, or otherwise, of giving any such material to the jury.

10.152 The Commission suggests that this provision would be best located in Division 11 of Chapter 62 of the Criminal Code (Qld) (ie, sections 618 to 625), which otherwise deals with certain procedural aspects of the trial.

10.153 One consequence of the implementation of these recommendations would be the desirability of reviewing the relevant model directions in the Queensland Benchbook to ensure that those directions adequately reflect the new provisions.

177 See [10.110] above.

178 See [10.54]–[10.58] above.

179 See chapter 8 of this Report.

180 (2007) 232 CLR 208

181 See [10.87], [10.135] above.

Recommendations

10.154 The Commission makes the following recommendation, which is different in some minor details from the version proposed in the Discussion Paper:

10-1 The Criminal Code (Qld) should be amended to provide that:

(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.

(3) At the start of the trial the jury should be provided with written material, unless the trial judge considers that there are good reasons why this should not happen, that covers matters such as:

(a) the burden and standard of proof;

(b) the role of the judge and jury;

(c) the elements of each offence charged (and any alternative charge) and each defence (to the extent that defences have been identified by the defendant); and

(d) admissions, agreed facts or other matters about which there is no dispute between the parties.

MORE ACTIVE PARTICIPATION BY JURIES

10.155 In his review of criminal courts in England and Wales, Lord Justice Auld noted the importance of assisting prospective jurors in understanding their role and the trial process. He recommended that prospective jurors be given a booklet explaining the administrative and procedural matters associated with jury selection and participation as well as

> some guidance on certain matters on which jurors are frequently unsure when sitting for the first time, including note-taking, asking questions, selection of the foreman and the deliberation process …[182]

10.156 The remainder of this chapter considers the information given to jurors about their right to ask questions, the importance of note-taking, and the selection of the jury speaker.

QUESTIONS FROM THE JURY

10.157 Juries are entitled to ask questions of the judge, seeking to be reminded of some part of the evidence, or seeking further clarification of the law. The judge's statement to the jury to this effect is found in Chapter 24 of the Queensland Benchbook, which sets out the general matters to be covered in the judge's summing up:

> **If you find that you need further direction on the law, please send a written message through the bailiff. Likewise, if you wish to be reminded of evidence, let the bailiff know, and make a note of what you want. When you return to the courtroom, I will provide such further assistance on the law as I can or arrange for the relevant part of the transcript to be read out for you.**[183] (formatting as in original)

182 The Right Honourable Lord Justice Auld, 'Chapter 5: Juries' in *Review of the Criminal Courts of England and Wales*, Report (2001) [220].

183 Queensland Courts, *Supreme and District Court Benchbook*, 'General' [24.7] <http://www.courts.qld.gov.au/2265.htm> at 30 November 2009.

10.158 Similar information is provided in the *Guide to Jury Deliberations* given to jurors when they retire to consider their verdict.[184]

10.159 Juries are also entitled to seek to put questions to a witness during the trial. However, a jury may only seek to put a question to a witness by first submitting the question to the judge, who will rule on whether the question will be put; if the question is to be asked, the judge (or counsel) will ask it on behalf of the jury. Chapter 15 of the Queensland Benchbook provides for a specific direction to the jury, which, the Benchbook suggests, should only be given if a jury has sought to put a question to a witness or inquired about its entitlement to do so:

Jury Questions[185]

> **When the lawyers have finished questioning a witness, you may submit to me, in writing, any question that you wish the witness to answer. I will review each such question. I may discuss the matter with the lawyers before deciding whether the witness should be required to answer it. If the question is to be asked, I will put it to the witness. I may decide that the question is not proper under the rules of evidence. Even if it is proper, you may not get an immediate answer. For example, a later witness, or an exhibit you are yet to see, may be going to answer the point later on.**[186] (note and formatting as in original)

10.160 While the Benchbook therefore provides, as part of the judge's summing up, for jurors to be expressly invited to put questions to the judge after they retire, little is done to encourage them to ask questions of the judge or of witnesses (through the judge) during the trial itself; in some instances, they are discouraged.[187]

10.161 Jurors tend to report that they were discouraged from asking questions or were unsure if they could or of the procedure to follow.[188] However, the research conducted by the Australian Institute of Criminology found that in New South Wales at least one-fifth of juries (22%) submitted questions for witnesses through the judge, and over half (57%) submitted questions to the judge. Lower figures were reported in Victoria and South Australia.[189]

---

184 Queensland Courts, *Guide to Jury Deliberations* (2008) 7–8 <http://www.courts.qld.gov.au/Factsheets/SD-Brochure-JurorsGuideDeliberations.pdf> at 30 November 2009.

185 This should only be said after a juror has sought to question a witness or inquired about the jury's entitlement to do so; *Lo Presti* [1992] 1 VR 696, 702.

186 Queensland Courts, *Supreme and District Court Benchbook*, 'Jury Questions' [15.1] <http://www.courts.qld.gov.au/2265.htm> at 30 November 2009.

187 Australian Institute of Judicial Administration (James RP Ogloff, Jonathan Clough, Jane Goodman-Delahunty & Warren Young), *The Jury Project: Stage 1 — A Survey of Australian and New Zealand Judges* (2006) 16–17; Judith Fordham, 'Illuminating or Blurring the Truth: Jurors, Juries, and Expert Evidence' in B Brooks-Gordon and M Freeman (eds) (2006) 9 *Law and Psychology* 338, 355; Judith Fordham, 'Bad Press: Does the Jury Deserve It?' (Paper presented at the 36th Australian Legal Convention, Perth, 17–19 September 2009) 23.

188 Australian Institute of Judicial Administration (James RP Ogloff, Jonathan Clough, Jane Goodman-Delahunty & Warren Young), *The Jury Project: Stage 1 — A Survey of Australian and New Zealand Judges* (2006) 16–17; Christine Richardson, *Symbolism in the Courtroom: An Examination of the Influence of Non-Verbal Cues in a District Court Setting on Juror Ability to Focus on the Evidence*, (Doctoral thesis, Griffith University, 2006) 294; Home Office (UK), *Jurors' perceptions, understanding, confidence and satisfaction in the jury system: a study in six courts*, Home Office Online Report 05/04 at 17 February 2009, 40.

189 Australian Institute of Criminology, *Practices, policies and procedures that influence juror satisfaction in Australia*, Research and Public Policy Paper No 87 (2007) 140.

10.162 Research by the Australian Institute of Judicial Administration shows that there is also significant variation as to the frequency with which judges give advice during their summings up to juries in relation to asking questions of the judge during deliberations.

- In most Australian States (South Australia, Victoria and Western Australia) and in New Zealand around 65% of judges referred to this topic in their summing up.
- In New South Wales, the figure rose to 91.3%, and in Tasmania to 100% (though the authors of the report point out that they only had data from four Tasmanian judges).
- In Queensland, by contrast, the figure dropped to 28.6%.[190]

10.163 The low percentage for Queensland is perhaps surprising, given the inclusion of a standard direction for the summing up in Chapter 24 of the Benchbook.[191]

10.164 In contrast, 85% of jurors in the University of Queensland research project reported that the judge's opening remarks (rather than the summing up) included an explanation of the possibility of asking questions.[192]

10.165 Questions from juries are one of the few means available to a trial judge to assess how a jury is coping with the legal and forensic tasks that it faces. They are about the only practical means a judge has of being alerted to errors in a jury's comprehension of its tasks, the evidence or the law before the jury delivers its verdict and these matters are entirely out of the judge's hands.[193]

10.166 In this regard, one shortcoming of inviting questions from juries is that juries are only likely to ask questions or otherwise seek clarification when they feel that they do not understand something. If they feel (perhaps mistakenly) that they have understood the evidence or the judge's directions and the law as expounded in them, jurors are unlikely to feel any need to seek further guidance.[194]

10.167 The Commission is not aware of any suggestion that juries should in any way take a significantly greater role in the forensic process in court, but there may be some advantage in trying to ensure that jurors make their decisions free from any doubt as to whether they have understood the evidence or the law, and comfortable that all available relevant evidence has been put before them. This might, apart from anything else, reduce any temptation for jurors to make their own enquiries about the case they are

190 Australian Institute of Judicial Administration (James RP Ogloff, Jonathan Clough, Jane Goodman-Delahunty & Warren Young), *The Jury Project: Stage 1 — A Survey of Australian and New Zealand Judges* (2006) 30.

191 Chapter 24 in its present form was inserted in February 2009, well after the AIJA conducted its research. The Commission is unable at present to locate a version of Chapter 24 pre-dating November 2008. The AIJA research was conducted between August 2004 and January 2005: ibid 9.

192 School of Psychology, University of Queensland (Blake McKimmie, Emma Antrobus and Kathryn Havas), 'Jurors' Trial Experiences: The Influence of Directions and Other Aspects of Trials', Report (November 2009) 9.

193 See *R v RAI* [2008] QCA 364 for an example of a case where the jury's questions were said on appeal to have been an indication of the difficulty it was having with some of the counts that it had to determine.

194 JRP Ogloff and VG Rose, 'The Comprehension of Judicial Instructions' in N Brewer and KD Williams, *Psychology and Law: An Empirical Perspective* (2005) 407, 417.

hearing by reducing jurors' concerns or frustration about particular aspects of the evidence that seem to them to be inadequately covered.

10.168 A feeling that they cannot be meaningfully involved in proceedings is a source of concern for jurors.[195] Frustration of this sort might well lead jurors to undertake their own enquiries, contrary to the law and contrary to their oath, if they feel that their task is being thwarted.[196] It may be moot whether jurors' questions lead to any better or more complete evidence coming forth, but it appears to be one significant factor in increasing juror satisfaction and is one way in which the trial judge and other observers can assess how a jury's decision-making process is going.

New Zealand

10.169 In its 2001 report on juries in criminal trials, the Law Commission of New Zealand ('LCNZ') considered both questions asked by juries of witnesses (through the judge) during the trial itself and questions of the judge seeking further clarification of evidence or law during deliberations.[197]

10.170 The LCNZ noted that judges ask questions in judge-only trials to clarify matters of concern and that juries should be accorded the same respect.[198]

10.171 Submissions to the LCNZ indicated few real objections to jury questions, provided that the formality of asking them through the judge was maintained, but showed very little positive support for them. However, the LCNZ's research, and research from the United States that it reviewed, did not seem to establish any real grounds for not making it clear to jurors that they are entitled to ask questions, albeit in the conventional formal way.[199] Where jurors did in fact ask questions, the questions were not inappropriate or disruptive, although they did not usually alert counsel or the judge to areas of evidence that might have been overlooked.

10.172 There was no support for any relaxation of the formality of the process. The judge clearly has a role in checking that questions can or should be asked. Although this formality did tend to discourage questions, a bigger discouragement was that jurors did not realise that they could ask questions.[200]

10.173 The LCNZ felt strongly that questions during deliberations should be encouraged,[201] and suggested that the handbook issued to jurors be expanded to cover some matters in more detail in order to:

---

195 Australian Institute of Judicial Administration (James RP Ogloff, Jonathan Clough, Jane Goodman-Delahunty & Warren Young), *The Jury Project: Stage 1 — A Survey of Australian and New Zealand Judges* (2006) 17; Home Office (UK), *Jurors' perceptions, understanding, confidence and satisfaction in the jury system: a study in six courts*, Home Office Online Report 05/04 at 17 February 2009, 7. See also Judith Fordham, 'Illuminating or Blurring the Truth: Jurors, Juries, and Expert Evidence' in B Brooks-Gordon and M Freeman (eds) (2006) 9 *Law and Psychology* 338, 355; Judith Fordham, 'Bad Press: Does the Jury Deserve It?' (Paper presented at the 36th Australian Legal Convention, Perth, 17–19 September 2009) 23–4.

196 Chris Richardson, 'Juries: What they think of us' (December 2003) *Queensland Bar News* 16.

197 Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) [360]–[371].

198 Ibid [361].

199 Ibid [361]–[362].

200 Ibid [371].

201 Ibid [370].

- advise the jury that it may, through the judge, ask a witness questions when aspects of the witness' evidence are not understood or when information which they believe to be relevant has not been elicited;
- give examples of the types of questions it may be appropriate to put to witnesses through the judge;
- advise that the jury may ask questions of the judge during deliberations, and these can be more wide-ranging, and may include, for example, clarification of legal instructions and the elements of the charge;
- explain how and when jurors can question witnesses through the judge; and
- explain that when the judge does not put a juror's question to the witness it is most likely because of limitations on certain questions imposed by the rules of evidence, rather than reflecting adversely on the questioner.[202]

10.174 The LCNZ concluded that:

> Jurors have the right to submit questions to the judge which the judge may then put to the witness. This right is seldom used because juries are often not aware that they may do this. We recommend that juries should be routinely advised of their right to ask the judge to put questions to the witness, and that these questions are only for the purpose of clarification. The process should remain formal, with written questions. Details of the process will be contained in the [Criminal Practice Committee] Manual.
>
> …
>
> The formal procedure of written questions should be retained. Juries should be actively encouraged to ask questions during deliberation, as that is likely to decrease deliberation time and confusion.[203]

NSWLRC's Consultation Paper

10.175 In its Consultation Paper on jury directions, the NSWLRC explained the importance of allowing, and encouraging, jurors to ask clarifying questions about the law:[204]

> The ability of juries to ask questions is an important mechanism for assisting jurors to understand the directions. It may also decrease deliberation time and increase jurors' sense of satisfaction with jury service.[205] Questions from jurors indicate difficulties in their deliberations, and the answers to these questions exert an influence in the decision-making process, an influence that some commentators believe may be just as important as the actual directions.[206]
>
> Empirical evidence confirms the importance of allowing juries to ask questions. An American study on jurors who sat in trials found that jurors who requested and

202 Ibid [369].

203 Ibid 140, 141

204 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [10.45]–[10.46].

205 New Zealand, Law Commission, Juries in Criminal Trials, Report 69 (2001) [369]; M Dann, "'Learning Lessons' and 'Speaking Rights': Creating Educated and Democratic Juries" (1993) 68 *Indiana Law Journal* 1229.

206 D Watt, *Helping Jurors Understand* (Carswell, Toronto, 2007) 257–258.

> received help from the judge understood the law better than jurors who did not ask questions.[207] (notes in original)

10.176 While jurors in New South Wales are told of their right to ask questions in their orientation materials, the NSWLRC noted that jurors may not read, or recall, this information and, if they do, may be reluctant to ask questions because they feel intimidated or embarrassed. It suggested that it therefore seems 'important for the judge, at the end of the trial, to encourage jurors to ask questions if they have any difficulties with the directions'.[208]

The Issues Paper

10.177 In its Issues Paper, this Commission noted that jurors sometimes felt a sense of frustration at not being able to participate in the forensic process, and reported that they were discouraged from asking questions or unsure how to do so if they wanted to.[209] The Commission sought submissions on whether it may be advantageous to expand or otherwise modify a jury's right to ask questions.[210]

Submissions

10.178 One respondent to the Commission's Issues Paper who had sat on three juries in one jury service period said that he was 'impressed' with participating by asking questions which, as speaker, other jurors had requested him to put to the judge: 'It made decision making easier', particularly as the 'average punter is not equipped to deal with many issues'.[211]

10.179 A District Court judge submitted that the Queensland Benchbook's reticence to inform jurors about their rights to put questions to witnesses, 'based on a conservative Victorian practice outlined in *R v Lo Presti*', should be altered along the following lines:

> 'You have a right to ask questions of a witness, through the judge. We must be careful not to go outside the issues raised by counsel. They know a lot about the case, and the facts, and what the real issues are. We can usually rely on them to ask the witnesses the questions that matter.
>
> But, when evidence is given, you might want to understand better some detail, or have a witness make clear something that you haven't fully understood, or ask something more about an issue that has been raised.'
>
> (Then go on with the present direction, except that the requirement for questions in writing is not usually necessary. A raised hand from a jury member should be enough, in most cases.)[212]

---

207 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.

208 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [10.47]–[10.50]. Also see ibid [10.51] as to 'whether there is sufficient judicial responsiveness' to juries' questions about the judge's directions.

209 Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [3.34]–[3.39], [9.73]–[9.83].

210 Ibid [9.75].

211 Submission 1.

212 Submission 10.

10.180 On the other hand, a Supreme Court judge did not agree with 'measures that encourage jurors to think that their role is an investigative one'.[213]

The Discussion Paper

10.181 In its Discussion Paper, the Commission's provisional view was that, while jurors' rights to ask questions should not be expanded, jurors should be more openly informed of their right to ask questions as part of the judge's preliminary remarks at the start of the trial.[214] It therefore made the following proposals on which it sought further submissions:

> 4-2 The Queensland Supreme and District Court Benchbook should be amended by:
>
> (a) amending the model opening remarks by the judge in Chapter 5B to inform jurors of their right to ask questions of the judge through the bailiff or their speaker similar to the model directions in Chapters 15 and 24 of the Benchbook; and
>
> (b) removing the reservation about informing juries of their right to ask questions based on *Lo Presti* [1992] VR 696.[215]

Further submissions

10.182 Legal Aid Queensland agreed with the Commission's position that the current restriction on jurors' questions should remain, and that jurors should not be granted more rights to ask questions directly of either the parties or of witnesses.[216]

10.183 The Bar Association of Queensland submitted that there 'is really no good reason' why jurors should not be told at the start of trial that they can ask questions through the judge; it would seem artificial not to do so.[217]

10.184 However, the Association submitted that it should be emphasised to jurors that the process is controlled by the parties and that any questions should be limited to seeking clarification of the evidence before them. The jury should also be told that their questions may not be answered from time to time because of a point of law or because it is inappropriate to their function during the course of the trial.[218]

The QLRC's views

10.185 Jurors do not have a role in the investigation of any criminal offence or in the presentation of the prosecution or defence at any criminal trial, and neither should they. However, they have the considerable burden in each case of determining whether the defendant is guilty or not. To discharge that duty, jurors should be informed as well as

213 Submission 7.

214 Queensland Law Reform Commission, *A Review of Jury Directions*, Discussion Paper WP67 (2009) [4.63]–[4.70].

215 Ibid 142, Proposal 4-2.

216 Submission 16A, 11.

217 Submission 13A, 18. The Queensland Law Society endorsed and supported the whole of the submissions by the Bar Association of Queensland: Submission 13B.

218 Ibid.

the evidence and powers of the judge and counsel permit. Jurors should also feel that they have all the relevant and admissible evidence, and that they understand both the evidence and the issues that they must determine as well as they need to, both in terms of the facts that they must resolve and the verdicts that they must reach.

10.186 It cannot be advantageous to the juries, or to the integrity of the criminal justice system as a whole, if any jury feels at a loss in relation to the evidence or their tasks.

10.187 A frustrated jury is more likely to seek outside information about the case or the defendant than one that is satisfied that it has, or will in due course be given, all the information that it needs.[219] Given the ease with which jurors can make their own enquiries of the circumstances of cases that they are trying, every reasonable effort should be made to seek to ensure that they are not motivated to do so by a feeling of frustration with the trial itself.

10.188 Therefore, juries should continue to be informed of their right to voice their concerns, through their speaker or the bailiff as appropriate, so that their concerns about the evidence, the law, the procedure or their own tasks are ventilated and resolved. Jurors are allowed to seek to put questions to witnesses (albeit through the judge), and to put questions to the judge. This should not be hidden from them. It should certainly be explained that there may be good reason why a particular question cannot be put to a witness given the laws of evidence, or because the jury's query will be covered by a later witness or will be covered in addresses rather than by evidence. However, that is no reason to shrink from the reality that jurors have a right to ask questions, or at least to seek to do so. Freely acknowledging this to juries (which is not the same as encouraging them to do so) may give juries some reassurance that they can seek to clarify their uncertainties rather than simply debating these issues amongst themselves without guidance or, worse still, not discussing them at all.

10.189 Although juries should not take a significant role in asking questions of witnesses, they should be openly informed of their right to do so through the trial judge.

10.190 The Commission's view is that juries should be informed of their rights to ask questions at the beginning of the trial, and that the model opening statement by the judge set out in Chapter 5B of the Queensland Benchbook should be amended accordingly. Useful statements of these rights appear in Chapters 15 and 24 of the Queensland Benchbook and can be used in amending Chapter 5B.

10.191 However, the statement based on *Lo Presti*[220] that these directions should only be given if the issue has been raised by the jury should be deleted.

10.192 The Commission does not suggest that the current restrictions on jurors' questions — that they must be made to the judge, even if they are in fact questions directed to a witness — be removed or amended. The Commission is satisfied that these restrictions should remain and that jurors should not be granted more liberal rights to ask questions directly of witnesses or parties. The Commission accepts the Bar Association of Queensland's concerns referred to in [10.184] above, but these

219 See Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [9.76]–[9.77].

220 [1992] VR 696.

appear to be accommodated by the remaining words of the model direction in the Benchbook.[221]

Recommendations

10.193 The Commission makes the following recommendation:

10-2 The Queensland Supreme and District Court Benchbook should be amended by:

(1) amending the model opening remarks by the judge in Chapter 5B to inform jurors of their right to ask questions of the judge through the bailiff or their speaker similar to the model directions in Chapters 15 and 24 of the Benchbook; and

(2) removing the reservation about informing juries of their right to ask questions based on *Lo Presti* [1992] VR 696.

NOTE-TAKING BY JURORS

10.194 Jurors are free to take their own notes during trials and notebooks are provided to them for that purpose. Those notebooks are left in the juryroom when deliberations are completed and are then destroyed by the court.

10.195 Jurors are instructed during orientation and during the judge's directions at the start of the trial that they may take notes.[222] Chapter 5B of the Queensland Benchbook, which sets out the general matters to be covered in the judge's preliminary remarks, provides the following standard direction:

> Note-taking
>
> **Writing materials will be made available to you just before the evidence commences[223] so that you can take notes if you wish. However, be careful not to let detailed note-keeping distract you from hearing and observing the witnesses. Any notes that you take must remain in the court precincts and must not be taken home. The Bailiff will ensure they remain confidential by being destroyed.**[224] (formatting and note as in original)

10.196 Although a large number of jurors (93%) report sitting on juries where notes were taken, the number of jurors who take notes would appear to be much smaller.[225]

---

221 See [10.159] above.

222 See [3.41], [3.54] above. Ninety-four percent of the jurors responding to the University of Queensland's survey reported that the judge explained the possibility of taking notes during his or her opening remarks: School of Psychology, University of Queensland (Blake McKimmie, Emma Antrobus and Kathryn Havas), 'Jurors' Trial Experiences: The Influence of Directions and Other Aspects of Trials', Report (November 2009) 9.

223 cf *Sandford* (1994) 33 NSWLR 172, 182.

224 Queensland Courts, *Supreme and District Court Benchbook*, 'Trial Procedure' [5B.8] <http://www.courts.qld.gov.au/2265.htm> at 20 November 2009.

225 Australian Institute of Criminology, *Practices, policies and procedures that influence juror satisfaction in Australia*, Research and Public Policy Paper No 87 (2007) 140. See also Queensland Law Reform Commission, *A*

Along with the right to ask questions, jurors' ability to take notes may not only aid comprehension and recall but may be an important means of encouraging jurors to feel more actively involved in the trial.[226]

10.197 Although the benefits of note-taking have been noted by the courts and note-taking judicially encouraged,[227] some concerns have been identified in research, although other research suggests that some of these are unfounded:

- jurors might give undue weight to their notes, which may be inaccurate and incomplete, even over transcript;
- jurors with few or no notes tended to defer to those who had taken extensive notes, who might exert more influence during deliberations than those who have not;
- many jurors interpreted the caution from the judge that they should be careful to listen to and observe witnesses as meaning that they should avoid taking notes as far as possible;
- some jurors reported that inconsistencies between their notes became a source of disagreement during deliberations;[228] and
- jurors may be distracted from observing the demeanour of witnesses;[229]

10.198 Turning to this last objection, if note-taking can be distracting and jurors are expected to concentrate on the oral evidence as it is given, one might ask how they are expected to be able to deliberate on the basis of an accurate record of the evidence if their only principal sources and points of reference are their individual and collective memories.

10.199 Research indicates that jurors view note-taking positively.[230]

Review of Jury Directions, Issues Paper WP66 (2009) [9.24]. Note-taking has been described as commonplace in Western Australia, though apparently not elsewhere: Judith Fordham, 'Illuminating or Blurring the Truth: Jurors, Juries, and Expert Evidence' in B Brooks-Gordon and M Freeman (eds) (2006) 9 *Law and Psychology* 338, 354; Judith Fordham, 'Bad Press: Does the Jury Deserve It?' (Paper presented at the 36th Australian Legal Convention, Perth, 17–19 September 2009) 22.

226 Eg JK Robbennolt, JL Groscup and S Penrod, 'Evaluating and assisting jury competence in civil cases' in IB Weiner and AK Hess, *The Handbook of Forensic Psychology* (2005, 3rd ed) 402 <http://books.google.com.au/books?id=7Eu7smWHX3YC&printsec=frontcover> at 1 September 2009. See also Judith Fordham, 'Illuminating or Blurring the Truth: Jurors, Juries, and Expert Evidence' in B Brooks-Gordon and M Freeman (eds) (2006) 9 *Law and Psychology* 338, 354–5; Judith Fordham, 'Bad Press: Does the Jury Deserve It?' (Paper presented at the 36th Australian Legal Convention, Perth, 17–19 September 2009) 22–3.

227 See New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [10.6]–[10.7]. See also The Hon Justice Michael Murray, 'Bad Press: Does the Jury Deserve It? Communicating with Jurors' (Paper presented at the 36th Australian Legal Convention, Perth, 17–19 September 2009) 7: 'Note taking should be uniformly facilitated'.

228 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [10.8]–10.11]; Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) [342].

229 Jurors are warned not to let excessive note-taking distract them from the evidence in the standard opening by judges set out in the Queensland Benchbook: Queensland Courts, *Supreme and District Court Benchbook*, 'Trial Procedure' [5B.8] <http://www.courts.qld.gov.au/2265.htm> at 30 November 2009; see [10.195] above.

230 Judith Fordham, 'Illuminating or Blurring the Truth: Jurors, Juries, and Expert Evidence' in B Brooks-Gordon and M Freeman (eds), 9 *Law and Psychology* (2006) 338, 354.

NSWLRC's Consultation Paper

10.200 The NSWLRC also discussed juror note-taking in its Consultation Paper on jury directions.[231] It expressed concern that jurors may require more extensive directions in this regard, noting the results of a jury survey conducted in New South Wales that found, for example, that:

> - Some jurors misinterpreted the advice (given in relation to note-taking) that jurors should ensure that they observe the demeanour of witnesses as discouraging them from taking any notes whatsoever during the trial.
>
> …
>
> - One juror thought that where a discrepancy arose between her notes and the transcript of evidence, the notes took precedence.
>
> - When jurors are informed that they may request all or part of the transcript of the evidence, the judge does not make it clear that such a request may be denied. One juror assumed that the transcript would definitely be given and, as a consequence, did not take extensive notes. It would now appear that any such request would have to be granted.[232]

The Issues Paper

10.201 The Commission discussed, and sought submissions on, the role of juror note-taking in Chapter 9 of its Issues Paper.[233]

Submissions

10.202 A number of former jurors who responded to the Commission's Issues Paper had relied on their notes and were concerned by the fact that most of their fellow jurors did not take notes during the trials in which they served.

> As a juror I was somewhat disturbed by the fact that at this hearing [the first trial] I was the only person on the panel who took notes during the three days of evidence. I was left wondering whether it was a reflection on my lack of confidence in my memory retention, or the remaining panel members probability of outstanding retention capabilities. With the benefit of hindsight my note taking was by far the more accurate recall.
>
> …
>
> The third trial … was a lengthy trial, this time I was encouraged by the fact that two other jury members were taking notes.
>
> The evidence was taken over three days …
>
> … during discussions on the [initial] straw poll it became obvious that because the police evidence had occurred early in the [third] trial some members of the panel

231 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [10.4]–[10.11].

232 Ibid [10.11], citing M Chesterman, J Chan and S Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (Law and Justice Foundation of NSW, 2001) [462]–[468].

233 Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [9.21]–[9.24], 206.

> had difficulty recollecting their early evidence. Fortunately the note takers were able to refresh some of the issues which were of concern …[234]

10.203 Another respondent, who took notes during the trials on which she sat, queried how jurors could remember the details of the evidence if they did not take notes.[235]

The Discussion Paper

10.204 In its Discussion Paper, the Commission noted the importance of allowing, and facilitating, jurors to take notes during the trial. It expressed the provisional view, however, that provided there is no formal inhibition on juror note-taking, and apart from making the facilities for note-taking available, courts and judges can do little other than to remind jurors that these facilities exist, leaving the rest to the jurors themselves. The Commission did not, therefore, make any proposal for reform in this area.[236]

Further submissions

10.205 One member of the public, who had participated in two trials as a defendant, submitted that, although note-taking by jurors was important, jurors who knew that they would receive a copy of the transcript would be able to take notes more effectively as they would need to note only those matters that seemed important to them rather than struggle to take down lengthy notes of large parts of the evidence to use (if required) during their deliberations. This would also allow jurors more time to watch the witnesses more closely.[237]

The QLRC's views

10.206 Currently, jurors in Queensland are told during the orientation session before being empanelled that they may take notes, and they are given notebooks which are retained and destroyed by the court when the jury is discharged.

10.207 Again, a starting point may well be a consideration of what judges do in cases that they are trying without a jury. They take notes. They also receive copies of the transcript and other forms of written assistance such as outlines of submissions and so on. In some instances, note-taking will not be necessary in light of the nature of that written assistance, or will supplement it with the judge's comments about the evidence or the witness noted while the evidence or address is given for later reference when it comes time to write a judgment.

10.208 Noting the only difference that juries do not have to write their reasons for judgment, juries are in essentially the same position.

10.209 The Commission's concern is simply that there be no formal inhibition on jurors' rights to take notes, and that they should be encouraged to do so if they want. Again, comments by judges or counsel in advance of particular evidence or particular direc-

234 Submission 2.

235 Submission 3.

236 Queensland Law Reform Commission, *A Review of Jury Directions*, Discussion Paper WP67 (2009) [4.75]–[4.80].

237 Submission 4A.

tions or warnings may well alert some jurors that they should be paying particular attention and making notes of what is being said or done.

10.210 But jurors' note-taking practices will vary considerably, as was noted by the former jurors who made submissions to the Commission. Note-taking is a skill that different jurors possess to varying degrees. Some will take notes of much that is said; some will note only matters (such as the physical appearance of witnesses) that may help them recall the evidence later; others will take no notes at all. Written material given to jurors to refer to at various times during the trial may reduce the need for some note-taking. Apart from making the facilities for note-taking available (and for notes to be destroyed at the end of the trial) courts can do little other than to remind jurors that these facilities exist. The rest is a matter for the jurors themselves.

10.211 The Commission considers that there are currently adequate measures in place in Queensland to inform jurors of their right to take notes and to assist them in doing so, and makes no formal recommendation for reform in this area.

SELECTING A SPEAKER

10.212 As noted in chapter 3 of this Report, a jury typically selects its speaker soon after being empanelled.[238]

10.213 Rule 48 of the *Criminal Practice Rules 1999* (Qld) provides that the proper officer, in practice usually the judge's Associate, must use the following words, or words otherwise complying with section 51 of the *Jury Act 1995* (Qld),[239] when giving the defendant into the charge of the jury immediately after it has been empanelled:[240]

> Members of the jury, AB (and CD) is/are charged that on [state date] at [state place] he/she/they [state the offence charged in the words of the indictment or by stating the heading of the schedule form for the offence].
>
> To this charge he/she/they say that he/she/they is/are not guilty.
>
> You are the jurors appointed according to law to say whether he/she/they is/are guilty or not guilty of the charge.
>
> It is your duty to pay attention to the evidence and say whether he/she/they is/are guilty or not guilty.
>
> Members of the jury, as early as is convenient, you must choose a person to speak on your behalf. You may change the speaker during the trial and any of you is free to speak. (emphasis added)

238 See [3.53] above. The speaker is also called the 'foreman', 'foreperson' or 'jury representative' in other jurisdictions.

239 *Jury Act 1995* (Qld) s 51 provides:

> **51 Jury to be informed of charge in criminal trial**
>
> When the jury for a criminal trial has been sworn, the judge must ensure the jury is informed—
>
> (a) in appropriate detail, of the charge contained in the indictment; and
>
> (b) of the jury's duty on the trial.

240 Also see Queensland Courts, *Supreme and District Court Benchbook*, 'Trial Procedure' [5B.3], fn 13 <http://www.courts.qld.gov.au/2265.htm> at 20 November 2009.

10.214 The empanelled jurors are thus instructed on the need to choose a speaker even before the judge has commenced his or her opening remarks. Chapter 5B of the Benchbook provides, in a footnote, that the speaker's role is one of the 'outset matters' the judge may wish to include in the opening after having informed the jury of the charge and the prohibition on making independent inquiries about the defendant:

> **Speaker's role**
>
> Although the Jurors' Handbook and the Video touch upon the speaker's role, more might be said about that: for example:
>
> **The person selected as your speaker may, of course, be male or female. The speaker announces the verdict(s) at the end. While you may conduct your deliberations as you see fit, usually a speaker chairs jury discussions. Further, while ordinarily your speaker will be the channel of communication between us, that does not prevent an individual juror's raising a matter with me.**
>
> **You can change your speaker without reference to me. And every juror has the right to say so if his or her position has been misstated in anything said here in the courtroom by another juror, including the speaker.**[241]

10.215 The *Juror's Handbook* and the introductory video shown to all potential jurors before being empanelled also provide some information on the role of the speaker.[242] However, the *Juror's Handbook* gives no real guidance as to how to select a speaker, what qualities or experience might be desirable in that person, the speaker's role in, for example, dispute resolution amongst jurors, and so on. In fact, the *Handbook* specifically says that 'it is up to the jurors to decide the role of the speaker in the jury room.'[243] Although that might be quite true, it might equally be true that jurors are in fact looking for some indication as to what is expected of them and their speaker rather than being left entirely to their own devices.

10.216 The *Guide to Jury Deliberations*, which is left for jurors in the jury room does provide some further guidance in these terms (in addition to information and suggestions about deliberations and information about the legal obligations in relation to confidentiality):

> **The role of the jury speaker**
>
> **When should the speaker be elected?**
>
> The judge may direct the jury regarding this, but generally you should elect your speaker at the first opportunity.
>
> **What are the responsibilities of the jury speaker?**
>
> The jury speaker should:
>
> - Encourage discussion that includes all jurors.
> - Keep the deliberations focused on the evidence and the law.

241 Ibid [5B.4], fn 16.

242 Queensland Courts, *Juror's Handbook* (2008) 14 <http://www.courts.qld.gov.au/Factsheets/SD-Publication-JurorsHandbook.pdf> at 10 December 2009.

243 Ibid.

- Let the judge know if the jury wants a break.
- Let the judge know when a verdict has been reached.
- Speak on behalf of the jury in court.

Does this mean the jury speaker's opinion is more important than mine?

No. the opinion of each juror counts equally. There is no casting vote.

Once elected, do we have to keep the same jury speaker?

No. The jury can agree to elect a different jury speaker at any time before delivering the verdict.[244]

10.217 Jurors participating in the University of Queensland research project were asked about the judge's instructions on choosing a speaker. Ninety-four percent of the responding jurors said that the judge explained the *need* to choose a speaker as part of the judge's opening remarks, 76% said that the judge also included information about *when* to choose a speaker, but only 58% said that the judge explained *how* to choose a speaker. Despite this, only one juror reported difficulties in choosing the speaker (although the jurors were not specifically asked to comment on this beyond identifying any instructions from the judge they found difficult to apply).[245]

10.218 Research with former jurors in Western Australia has found, however, that the choice of speaker 'was often regretted, depending on their competence in running meetings'.[246] As jurors meet for the first time when empanelled, it is hard for them to choose the most effective speaker early in the trial. There has been some suggestion that jurors should receive some guidance as to what to look for in their speaker, and that the choice might be delayed, if practicable, to a time when the jurors know each other better. The Commission understands that in Queensland some judges do suggest to juries that they can delay the choice of speaker until they know each other better.

10.219 The choice of a speaker can be critical to a jury's deliberations; a jury, like any other group of individuals, can be easily swayed by one or two strong personalities in their midst.[247]

10.220 Obviously, the selection should be made before the jury retires to consider its verdict. In short trials, there may be little option but to select the speaker at the earliest opportunity. Indeed, as the speaker will act as a leader of the jury, lengthy delay in selecting a speaker may mean that any issues or problems that ought to be raised with the judge are not ventilated, promptly or at all.

---

244 Queensland Courts, *Guide to Jury Deliberations* (2008) 14–15 <http://www.courts.qld.gov.au/Factsheets/SD-Brochure-JurorsGuideDeliberations.pdf> at 10 December 2009.

245 School of Psychology, University of Queensland (Blake McKimmie, Emma Antrobus and Kathryn Havas), 'Jurors' Trial Experiences: The Influence of Directions and Other Aspects of Trials', Report (November 2009) 8–9.

246 See Judith Fordham, 'Illuminating or Blurring the Truth: Jurors, Juries, and Expert Evidence' in B Brooks-Gordon and M Freeman (eds) (2006) 9 *Law and Psychology* 338, 358.

247 Eg MJ McCusker, 'Bad Press: Does the Jury Deserve It?' (Paper presented at the 36th Australian Legal Convention, Perth, 17–19 September 2009) 6.

10.221 Research conducted by the Australian Institute of Criminology published in 2007 showed that:

> the methods utilised by judges in South Australia were effective, as fewer jurors in South Australia reported feeling confused about their role, compared with jurors in New South Wales and Victoria. The South Australian practice of suggesting that jurors delay in selecting a foreperson was appreciated by jurors, as significantly fewer jurors in South Australia felt that they were 'required to choose the foreperson too soon', compared with jurors from New South Wales and Victoria … One area where jurors in all states indicated they would value more guidance is in how they should deliberate, with approximately one-fifth of all jurors agreeing with this statement.[248]

10.222 There has been some suggestion that the concept of speaker should be abandoned but that 'the judge should ensure that there is instruction about the process of deliberation.'[249]

New Zealand

10.223 This issue was considered by the Law Commission of New Zealand ('LCNZ') in its 2001 report on juries in criminal trials. The LCNZ's research had indicated that juries were often rushed into selecting a foreman, taking an average of four minutes.[250]

10.224 New Zealand judges predominantly favoured the selection of the foreman at the start of the trial. It was also felt that the jury could be helped by some guidance from the judge as to the foreman's role and tasks, and a number of judges had adopted such a practice, or a practice of delaying selection until the morning tea adjournment on the first day.[251] The LCNZ concluded that:

> The foreman plays an important role from the beginning of the trial and should continue to be appointed then. However, jurors need more information on how to choose a foreman and more time in which to make their decision.
>
> They need to be told what is required of a foreman, and what sort of experience could assist a foreman in performing his or her role. The jury should be allowed a reasonable period of time in which to choose their foreman. Where practicable, the jury should retire to choose their foreman at the same time as a scheduled adjournment, so that they are not hurried.[252]

10.225 The LCNZ also formally recommended that information on how to select the speaker and the role and tasks of the speaker should be included in one of the introductory videos shown to jurors and printed on a poster to be displayed in jury rooms.[253]

---

248 Australian Institute of Criminology, *Practices, policies and procedures that influence juror satisfaction in Australia*, Research and Public Policy Paper No 87 (2007) 139.

249 The Hon Justice Michael Murray, 'Bad Press: Does the Jury Deserve It? Communicating with Jurors' (Paper presented at the 36th Australian Legal Convention, Perth, 17–19 September 2009) 7. The use of facilitators and deliberation guidebooks to assist juries during their deliberations has also been suggested, but consideration of that question is outside the Terms of Reference of this enquiry: see Judith Fordham, 'Bad Press: Does the Jury Deserve It?' (Paper presented at the 36th Australian Legal Convention, Perth, 17–19 September 2009) 4–5, 25.

250 Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) [287]–[299].

251 Ibid [290]–[299].

252 Ibid 113.

253 Ibid [287]–[289].

The Issues Paper

10.226 The timing of the selection of a jury speaker was discussed in chapter 9 of the Commission's Issues Paper. The Commission sought submissions on whether any further guidance might usefully be given to the jurors and whether juries might be assisted by delaying the selection of their speakers.[254]

Submissions

10.227 A number of former jurors who responded to the Commission's Issues Paper expressed concerns about the lack of any real guidance given to them about the role and responsibilities of the speaker and what qualities should be sought in that person. One juror was concerned about the lack of definition of the speaker's responsibilities:

> The first adjournment [in a three-day trial] saw the election of a jury foreman, on all three trials I participated in this position was awarded to the first person who claimed to have done jury service previously, to a first timer this seemed to be a reasonable method of selection but … hindsight proved this system of selection can introduce its own problems.
>
> …
>
> The foreman role can be a very determining and yet not necessarily accurate role during jury deliberations.
>
> …
>
> In the practical situation 'our foreman' displayed less fear of his final confrontation with the good Lord than to put a question or request for clarification for the jurors to the judge. The greatest contribution to jury room discussions by our 'volunteer' was concerning lunch selections … and frequent warnings throughout the jury room discussions 'that a decision must be reached otherwise the jury would be detained overnight. A threat or promise that seemed to weight the decision process remarkably.[255]

10.228 Another respondent was concerned that the election of the speaker in the juries on which she sat was 'ad hoc' and that a volunteer was chosen regardless of that person's skills or ability (or perhaps willingness) to properly direct jury deliberations or otherwise take a leadership role. She suggested that there should be some sort of training for the speaker.[256]

10.229 It would seem from these responses that the jurors in question were unaware of their power to change speaker; at least they did not refer to it in their responses if they were aware of it.

10.230 A District Court judge also suggested that haste in choosing a speaker was counter-productive:

> If the Juror's Handbook says that choosing a speaker usually happens during the first break after empanelling, then that suggestion should be changed. It is better

254 Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [9.122]. And see ibid [9.114]–[9.121].

255 Submission 2.

256 Submission 3.

> that jurors get to know each other before making that choice. A hasty choice is more likely to lead to the selection of an inappropriate speaker.
>
> Rather, the jury should be told that there is no hurry to choose a speaker, particularly in straightforward trials, where it is often the case that the only communication from the speaker will be the delivery of the verdict.[257]

The Discussion Paper

10.231 In its Discussion Paper, the Commission expressed the view that while the best choice of speaker, and whether to change speaker, is an administrative matter for the jurors, they should not be put under pressure to choose a speaker too soon. It therefore proposed that:[258]

> 4-3 Rule 48(1) of the *Criminal Practice Rules 1999* (Qld) should be amended by deleting the last paragraph of the wording set out in that Rule to be spoken by the proper officer.

Further submissions

10.232 Legal Aid Queensland submitted that there might be some modification to, rather than deletion of, the last paragraph in Rule 48(1):

> There are benefits in the jury having chosen a speaker in matters where the jury has questions or issues to raise, as the trial unfolds. The reality is that issues may arise early in a trial, and, where they do, there must be benefit in the jury raising any issue in a timely manner.
>
> Perhaps, rather than deleting the above paragraph from the rules, some further wording could be added, either to cover the above concern or to make the prescribed information more general and open to adaptation by the trial judge depending on the case.[259]

10.233 The Brisbane Office of the Commonwealth Director of Public Prosecutions supported Proposal 4-3:

> As noted in paragraph 4.90 of the [Discussion Paper], anecdotal evidence suggests that the final words of rule 48(1) of the Criminal Practice Rules 1999 (Qld) may potentially put jurors under undue pressure to select a foreperson too early. Jurors should be allowed to deal with this administrative matter 'in their own time'. The recommendation that the wording in the last paragraph of the rule be deleted is supported.[260]

10.234 The Bar Association of Queensland saw no difficulty with the deletion of the direction to choose a speaker as soon as possible or convenient.[261]

---

257 Submission 10.

258 Queensland Law Reform Commission, *A Review of Jury Directions*, Discussion Paper WP67 (2009) [4.87]–[4.90], Proposal 4-3.

259 Submission 16A, 11–12.

260 Submission 9A, 5.

261 Submission 13A, 19. The Queensland Law Society endorsed and supported the whole of the submissions by the Bar Association of Queensland: Submissions 13B, 14A.

The QLRC's views

10.235 The concerns in this area are that jurors may feel under pressure to select a speaker too soon, especially in longer trials where they may well have the time to get to know each other better before any of the speaker's obligations arise and before the speaker's duties are fully appreciated by the jurors. An allied concern is that jurors are unaware, forget or are too reticent to change a speaker who turns out to be an inappropriate choice for any reason.

10.236 It is, of course, difficult to be specific about the best choice of a speaker, and impossible for anyone other than the jurors to advise them on the best choice of a speaker on any jury once it has been empanelled. Only the jurors themselves can do that.

10.237 Accordingly, with one qualification, the Commission is not satisfied that any formal or informal reform in this area is warranted.

10.238 The Commission does note, however, that the last paragraph of the wording to be spoken by the proper officer as set out in rule 48(1) of the *Criminal Practice Rules 1999* (Qld) may be seen to put pressure on a jury too soon, even if the right to change speaker is also expressed. The Commission was also concerned that this statement may be somewhat out of place when the defendant is being formally put in to the charge of the jury.

10.239 Noting the submission of Legal Aid Queensland set out in [10.232] above, the Commission has concluded that, rather than deleting the last paragraph of the passage read by the judge's Associate to the jury at the start of the trial,[262] that paragraph should be amended, though not necessarily in the way contemplated by Legal Aid Queensland. The amendments consist of the deletion of the words 'as early as is convenient' and the addition at the end of the words 'The speaker will deliver your verdict at the end of the trial.'

10.240 The purpose of these changes is to remove any suggestion that the speaker must be chosen quickly but informing jurors of the key function of the speaker and thus, albeit indirectly, that they must choose a speaker before they return to deliver their verdict although there is no requirement that they do so at any time before then.

262 See [10.213] above.

Recommendations

10.241 The Commission makes the following recommendation:

10-3 Rule 48(1) of the *Criminal Practice Rules 1999* (Qld) should be amended by:

(1) deleting the words 'as early as is convenient' from the last paragraph of the wording set out in that Rule to be spoken by the proper officer; and

(2) adding at the end of that paragraph the words, 'The speaker will deliver your verdict at the end of the trial.'