Queensland
Law Reform Commission

A Review of Jury Directions

Issues Paper

WP No 66
March 2009

Queensland
Law Reform Commission

A Review of Jury Directions

Issues Paper

WP No 66
March 2009

The short citation for this Issues Paper is QLRC WP 66.
Published by the Queensland Law Reform Commission, March 2009.

ISBN: 978 0 7242 7760 9

COMMENTS AND SUBMISSIONS

You are invited to make comments and submissions on the issues and questions in this Issues Paper.

Written comments and submissions should be sent to:

Email: **qlrcjuries@justice.qld.gov.au**

Facsimile: (07) 3247 9045

The Secretary
Queensland Law Reform Commission
PO Box 13312
George Street Post Shop Qld 4003

Oral submissions may be made by telephoning: (07) 3247 4544

Closing date: 31 May 2009

It would be helpful if comments and submissions addressed specific issues or questions in the Issues Paper.

CONFIDENTIALITY AND PRIVACY

The Commission may refer to or quote from submissions in future publications.

If you do not want your submission or any part of it to be used in this way, or if you do not want to be identified, please indicate this clearly.

The Commission will list in an appendix to the Report for this review the names of those people who have made a submission to this Issues Paper. Please indicate clearly if you do not want your name to be included in that appendix.

Unless there is a clear indication from you that you wish your submission, or part of it, to remain confidential, submissions may be subject to release under the provisions of the *Freedom of Information Act 1992* (Qld).

Any information you provide in a submission will be used only for the purpose of the Commission's review. It will not be disclosed to others without your consent.

QUEENSLAND LAW REFORM COMMISSION

COMMISSION MEMBERS

Chairperson:	**The Hon Justice R G Atkinson**
Full-time member:	**Mr I P Davis**
Part-time members:	**Mr J K Bond SC** **Mr B J Herd** **Ms R M Treston** **Dr B P White**

SECRETARIAT

Director:	**Ms C E Riethmuller**
Assistant Director:	**Mrs C A Green**
Commission Secretary:	**Mrs S Pickett** **Mrs J Manthey**
Legal Officers:	**Ms M T Collier** **Ms P L Rogers** **Ms S-N Then**
Administrative Officers:	**Ms K Giles** **Mrs A Lathouras**

Address:	7th Floor, 50 Ann Street, Brisbane.
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:	www.qlrc.qld.gov.au

Table of contents

Chapter 1

Introduction

INTRODUCTION

1.1 This Issues Paper is the first publication in the Queensland Law Reform Commission's enquiry into jury directions in criminal trials, which will culminate in its report to the Attorney-General at the end of 2009.

THIS REVIEW

1.2 On 7 April 2008, the Attorney-General and Minister for Justice and Minister Assisting the Premier in Western Queensland, the Honourable Kerry Shine, referred to the Commission a review of the directions, warnings and summing up given by a judge to jurors in criminal trials in Queensland. The Terms of Reference are set out in full in Appendix A to this Paper.

BACKGROUND TO THE REVIEW

1.3 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.[1] In the federal jurisdiction and in New South Wales, this was a review of the operation of the Act in those jurisdictions

1 The expression 'Uniform Evidence Act' refers to the *Evidence Act 1995* (Cth), which applies in all federal courts and all other courts when they exercise federal jurisdiction, and the *Evidence Act 1995* (NSW), which is in essentially identical terms.

in the ten years since its introduction. In Victoria, it was designed to facilitate the introduction of the Act into that State.[2] The Commissions reported jointly in December 2005.[3]

1.4 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.

1.5 This recommendation has been adopted to some extent by the Standing Committee of Attorneys-General ('SCAG'). In its Annual Report for 2006–07, the Committee 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.[4]

SCOPE AND STRUCTURE OF THIS REVIEW

Issues covered by this enquiry

1.6 The Terms of Reference for this enquiry direct 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;
- 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.

---

2 The Uniform Evidence Act will commence operation in Victoria on 1 January 2010.

3 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).

4 Standing Committee of Attorneys-General, *Annual Report 2006–07*, <http://www.scag.org.au/lawlink/scag/ll_scag.nsf/vwFiles/Annual_Report_06-07.doc/$file/Annual_Report_06-07.doc> at 11 March 2009.

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

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

- the legal content of jury directions, and their length and complexity; and
- the language used in delivering directions to the jury.

1.9 However, it is also clear that the Terms of Reference require 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

1.10 There are many aspects of the use and operation of juries in Queensland that are not covered by this enquiry.

1.11 One notable area that is excluded is the range of issues concerning jury selection, which will be covered in the Commission's reference in that area pursuant to separate Terms of Reference issued by the Attorney-General on 7 April 2008.[5]

1.12 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,[6] access by jurors to the media (including the internet) during trials, and juror misconduct. Neither is the Commission asked to review the range of criminal (or civil) cases in which juries are used.

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

Research involving jurors

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

---

5 See [1.46] below and Appendix B.

6 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.

- the view 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.

1.15 Section 70(2) of the *Jury Act 1995* (Qld) imposes a strict prohibition on the publication to the public of 'jury information'.[7] '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.

1.16 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.

1.17 Any research that the Commission may wish to undertake in the course of this enquiry would ordinarily be severely constrained by the operation of section 70(3).

1.18 However, under section 70(9), the Attorney-General may apply to the Supreme Court 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).

1.19 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

7 Section 70(2) reads:

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

(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

(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.

1.20 The Commission is currently in discussion with various experts in the psychology of juries and juror decision-making processes with a view to developing a line of practical research into jurors' information needs and the application by juries of jury directions. The Commission is interested in learning what lines of enquiry lawyers, psychologists, academics and others feel would be relevant, of assistance to the Commission in this enquiry, and would advance research into the jury system in Australia.[8]

OTHER LAW REFORM PROJECTS

Current projects

1.21 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 currently underway in other States of Australia.

1.22 The Terms of Reference for this enquiry refer expressly to reviews currently being 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 refer to a project being undertaken by the Australian Institute of Judicial Administration. That project has since been incorporated into the VLRC's reference.

Victoria

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

8 See, in particular, chapter 7 of this Paper; see also chapters 8 and 9.

9 See [1.4] above.

> 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:
>
> (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]

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

1.25 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.[13] The VLRC has also published a short background paper that summarises the key proposals that were advanced in its Consultation Paper.[14]

1.26 The VLRC is now due to report by 1 June 2009.[15]

---

10 Victorian Law Reform Commission, 'Jury Directions — Terms of Reference', <http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/Home/Current+Projects/Jury+Directions/LAWREFORM+-+Jury+Directions+-+Terms+of+Reference> at 11 March 2009.

11 But see Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [1.11] n 9.

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

13 Victorian Law Reform Commission, 'Jury Directions submission deadline extended', <http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/Home/Newsroom/LAWREFORM+-+Jury+Directions+submission+deadline+extended> at 11 March 2009.

14 Victorian Law Reform Commission, *Jury Directions — a closer look*, Background Paper (2008). Both Papers are available on the VLRC's website: <http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/Home/Current+Projects/Jury+Directions/> at 11 March 2009.

15 The VLRC had originally been required to report by 1 March 2009.

New South Wales

1.27 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]

1.28 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]

1.29 The NSW Judicial Commission is currently undertaking a survey of conviction appeals for the period 2001–2007, which is expected to be published in 2009.[19]

Earlier jury reform projects in Queensland

1.30 The law of evidence and the use of juries in criminal trials have been the subject of numerous reports by other law reform bodies in recent years. Some deal with aspects of evidence and procedure that are not relevant to the present enquiry. However, there is also a focus on jury directions in law reform projects that deal with sexual offences generally; as will become apparent,

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 11 March 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). This research is discussed in chapters 2, 7, 8 and 9 of this Paper.

19 Judicial Commission of New South Wales, *Annual Report 2007–08*, 26; <http://www.jc.nsw.gov.au/publications/annrep.php> at 11 March 2009. See also New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [1.36] n 60. The results of a survey by the NSW Judicial Commission in relation to appeals in sexual offence cases are discussed at [5.57]–[5.58] below.

much of the controversy surrounding jury directions relates to trials for sexual offences.

Jury reform in Queensland

1.31 This Commission has also been involved into research and reform of the jury system in Queensland:

- In November 1984, the Commission published its *Working Paper on Legislation to Review the Role of Juries in Criminal Trials*.[20] In October 1985, the Commission published its report on various aspects of the criminal justice system, including juries.[21]

- Some aspects of the jury system had previously been considered by the Commission in 1978 in its report on certain aspects of the practice in criminal courts.[22]

1.32 In the early 1990s, there were several other inquiries and reports in relation to the operation of the jury system in Queensland, which culminated in the introduction of the *Jury Act 1995* (Qld):

- Criminal Justice Commission Queensland, *Report of an Investigative Hearing Into Alleged Jury Interference* (1991);

- Criminal Justice Commission Queensland, *The Jury System in Criminal Trials in Queensland*, Issues Paper (1991);

- *Report of the Committee to Review Certain Aspects of the Jury Act* (1992) (the 'Nolan Committee Report');

- Litigation Reform Committee, *Reform of the Jury System in Queensland*, Report (1993); and

- Criminal Justice Commission Queensland, *Report by the Honourable WJ Carter QC on His Inquiry into the Selection of the Jury for the Trial of Sir Johannes Bjelke-Petersen*, Report (1993).

CJC Report (1991)

1.33 In 1990–91, the Criminal Justice Commission of Queensland (the 'CJC') conducted an investigation into allegations of jury interference in relation to two District Court trials, those of George Herscu and Brian Austin. The investigation was triggered by concerns raised by the Special Prosecutor, the Sheriff

---

20 Queensland Law Reform Commission, *Working Paper on Legislation to Review the Role of Juries in Criminal Trials*, WP 28 (1984).

21 Queensland Law Reform Commission, *A Report of the Law Reform Commission on a Bill to Amend and Reform the Jury Act, the Justices Act and the Criminal Code insofar as those Acts Relate to Committal Proceedings and Trial by Jury in Criminal Courts*, Report No 35 (1984).

22 Queensland Law Reform Commission, *Proposals to Amend the Practice of Criminal Courts in Certain Particulars*, Report No 27 (1978).

and the Attorney-General about approaches made to a number of prospective jurors for those trials.[23]

1.34 The CJC's investigation found that there was evidence of an approach to prospective jurors by the defence in the Herscu trial but that it did not constitute contempt of court or other improper behaviour.[24] However, the CJC made the following two recommendations:

> 1. That, as an interim measure, a notice is issued by the Sheriff's office with the summons to prospective jurors, warning that if any approach which is made to them causes them any concern with respect to the discharge of their duties as members of a jury panel, they should immediately notify the Sheriff of that approach.
>
> 2. That the Attorney-General of Queensland establish a committee consisting of members of the legal profession and the community to consider the need for and extent of reform of the law relating to the distribution of jury lists and the inquiries which can be made in respect of prospective jurors.[25]

CJC Issues Paper (1991)

1.35 The CJC's investigation of juror interference revealed a diversity of opinion about the extent of permissible juror inquiries and concerns about jury selection.[26] The focus of the Issues Paper was on jury vetting and selection, composition and empanelment. It also examined other issues such as the protection and privacy of jurors, majority verdicts, special juries and the education of juries. It canvassed those issues and matters for consideration in any subsequent review of the jury system in an accompanying Issues Paper.[27]

Nolan Committee Report (1992)

1.36 The Attorney-General established a committee, comprised of representatives of the legal profession and the community, to consider the issues raised in the CJC's 1991 Issues Paper.[28] Chaired by Mr P Nolan, the Committee to Review Certain Aspects of the Jury Act (the 'Nolan Committee') considered and made recommendations about:

- the publication and distribution of jury lists;
- inquiries which may be made in respect of prospective jurors;

---

23 Criminal Justice Commission Queensland, *Report of an Investigative Hearing Into Alleged Jury Interference* (1991) 1–4.

24 Ibid 35.

25 Ibid 36.

26 Ibid 1–2.

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

28 Criminal Justice Commission Queensland, *Report of an Investigative Hearing Into Alleged Jury Interference* (1991) 36, Rec 2; Criminal Justice Commission Queensland, *The Jury System in Criminal Trials in Queensland*, Issues Paper (1991) 2–3.

- provision of information about prospective jurors to the prosecution and defence from Government sources such as police records; and
- the composition of juries, including disqualifications and exemptions.[29]

1.37 It also considered some other miscellaneous issues. The Committee reported in 1992.

Litigation Reform Committee Report (1993)

1.38 The Nolan Committee report was referred by the Minister for Justice to the Litigation Reform Committee, which reported in August 1993.[30] That Committee examined a range of issues concerning the functioning of the jury system including:

- eligibility for jury service;
- assembly of jury panels;
- the publication of jurors' names and personal details, and jury vetting;
- challenges to and selection of juries;
- security of jurors during trials;
- secrecy of jury deliberations;
- limiting jury trials, such as smaller jury sizes and judge-only trials;
- unanimous or majority verdicts; and
- improvements in the conditions of jury service, including reimbursement.

1.39 The core recommendation was that a new Jury Act be introduced in order to effect comprehensive change.[31]

CJC/Carter Report (1993)

1.40 A report was published in August 1993 by the CJC of a public enquiry conducted by Mr WJ Carter QC into concerns about jury interference in the selection of the jury for the Bjelke-Petersen trial.[32] The Report concluded that reform was necessary in relation to pre-trial jury vetting.[33]

---

29 *Report of the Committee to Review Certain Aspects of the Jury Act* (1992) 1–2.

30 Litigation Reform Committee, *Reform of the Jury System in Queensland*, Report (1993).

31 Ibid 81–2.

32 Criminal Justice Commission Queensland, *Report by the Honourable WJ Carter QC on His Inquiry into the Selection of the Jury for the Trial of Sir Johannes Bjelke-Petersen*, Report (1993) [1.1].

33 Ibid 486.

Introduction of the Jury Act 1995 *(Qld)*

1.41 As a result of these reports, the Jury Bill 1995 (Qld) was introduced into Parliament.[34] The *Jury Act 1995* (Qld) repealed the *Jury Act 1929* (Qld) and was intended to:

> ensure that juries are more representative of the community, that jury vetting is a thing of the past therefore protecting the privacy of potential jurors and that the confidentiality of jury deliberations is secured.[35]

1.42 The *Jury Act 1995* (Qld), as passed, included provisions to deal with the representativeness of juries, jury vetting, peremptory challenges and challenges for cause, judges' discretion to discharge a jury, unanimous verdicts and confidentiality of jury deliberations.

Jury reform outside Queensland

1.43 Without being exhaustive, 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 that month.[36]
- 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.[37]
- 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,[38] and its report on criminal pre-trial processes in June 2005.[39] In August 1999 the Law Commission published its report on evidence and the evidence legislation of that country[40] and a paper on the reliability of witness testimony.[41]

---

34 See the Second Reading Speech of the Jury Bill 1995 (Qld): Queensland, *Parliamentary Debates*, Legislative Assembly, 14 September 1995, 210 (Hon MJ Foley, Minister for Justice and Attorney-General, Minister for Industrial Relations and Minister for the Arts). Also see, generally, K Sampform, 'Reforming Queensland's Jury System: The Jury Bill 1995', *Legislation Bulletin No 2/95* (1995).

35 Explanatory Notes, Jury Bill 1995 (Qld) 626.

36 Tasmanian Law Reform Institute, *Warnings in sexual offences cases relating to delay in complaint*, Final Report No 8 (2006).

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

38 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).

39 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).

40 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.[42]

- In 2002, the South African Law Commission[43] 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 directions to juries.[44]

- 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[45] and final[46] reports on evidence that led to the enactment of the Uniform Evidence Act.[47]

- In March 1986, the NSWLRC published its report on the role of juries in criminal trials.[48]

- In 1983, the Scottish Law Commission published its report on evidence in sexual offence cases.[49]

1.44 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.[50] As will emerge, the use of language in jury directions will feature in this reference.[51]

1.45 The Commission expects that the work of all the interstate law reform bodies, as well as that of the Law Commission of New Zealand, will be useful in its own work in this reference. The Commission will consult closely with both 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

---

41 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.

42 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.

43 Now called the South African Law Reform Commission.

44 South African Law Commission, *Sexual Offences Report*, Project 107, especially chapter 5.

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

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

47 *Evidence Act 1985* (Cth).

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

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

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

51 See chapters 6 to 9 of this Paper.

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.[52]

Jury Selection Reference

1.46 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. Those Terms of Reference are set out in Appendix B to this Paper.

1.47 The jury selection reference will be covered in a separate preliminary paper and, in due course, by a separate report. The Commission is to report in that reference by 31 December 2010, one year after its report in the current jury directions reference.

1.48 As with jury directions, issues surrounding the selection of jurors have been the subject of numerous law reform projects, including the following:

- The Law Reform Commission of Western Australia is also currently working on a project involving jury selection. Its Terms of Reference require it to examine and report on the operation and effectiveness of the system of jury selection giving consideration to:

  (i) whether the current statutory criteria governing persons who are not eligible, not qualified or who are excused from jury service remain appropriate;

  (ii) the compilation of jury lists under Part IV of the *Juries Act 1957* (WA);

  (iii) recent developments regarding the selection of jurors in other jurisdictions; and

  (iv) any related matter.[53]

- The Law Reform Commission of Western Australia previously conducted a review of the law relating to exemption from jury service, which resulted in the publication of their report on that subject in June 1980.[54]

- In 2008, the Law Reform Commission of Ireland commenced a project that deals generally with the law of juries. Although this is said to involve a general review of the jury system in Ireland, the focus of their enquiry appears to be on reform of the *Juries Act 1976* and issues such as

52 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.

53 Law Reform Commission of Western Australia, 'Selection, eligibility and exemption of jurors', <http://www.lrc.justice.wa.gov.au/3_jurors_tor.html> at 11 March 2009.

54 Law Reform Commission of Western Australia, *Exemption from Jury Service*, Report in Project No 71 (1980).

qualification for jury service, jury selection and the consequences of failure to attend for jury service. The Law Reform Commission had proposed to publish a Consultation Paper by the end of 2008.[55] It published a Consultation Paper on expert evidence in December 2008.[56]

- The Law Reform Commission of Hong Kong currently has a project relating to the criteria for selection as a juror. It published a consultation paper in January 2008.[57]

- In 2007, the UK Ministry of Justice published a research report on jury selection and composition.[58] Changes to the rules of jury service (among other matters) were introduced in the United Kingdom in 2003 following a comprehensive report on the criminal justice system by the Honourable Lord Justice Auld.[59]

- The NSWLRC published its report on jury selection in September 2007[60] and its report on blind and deaf jurors in September 2006.[61]

- In 1994, the Law Reform Committee of the Victorian Parliament was given a reference on jury selection. It published two issues papers in 1994–95[62] and a three-volume report in 1996–97.[63] A number of the recommendations made in the report were implemented with the introduction of the *Juries Act 2000* (Vic).[64]

- In 1984, the NSWLRC published a report on conscientious objection to jury service.[65] It recommended that conscientious objection to jury service be recognised as a ground of exemption as of right under the *Jury Act 1977* (NSW).[66] At present, the *Jury Act 1977* (NSW) does not provide for such a ground.[67]

---

55 Law Commission of Ireland, *Current Work Programme — Law under Review*, <http://www.lawreform.ie/lawunderreview/lawreview.htm> at 11 March 2009.

56 Law Commission of Ireland, *Expert Evidence*, Consultation Paper 52 (2008).

57 Law Reform Commission of Hong Kong, *Criteria for Service as Jurors*, Consultation Paper (2008).

58 Ministry of Justice (UK), *Diversity and Fairness in the Jury System*, Research Report 2/07 (2007).

59 The Hon Lord Justice Auld, *Review of Criminal Courts in England and Wales* (2001). See also [2.37] and n 111 below in relation to changes in England and Wales in relation to jury composition.

60 New South Wales Law Reform Commission, *Jury selection*, Report 117 (2007).

61 New South Wales Law Reform Commission, *Blind or Deaf Jurors*, Report 114 (2006).

62 Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria*, Issues Paper No 1 (1994); Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria*, Issues Paper No 2 (1995).

63 Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria*, Final Report Vol 1 (1996), Vol 2 (1997), Vol 3 (1997).

64 See the Second Reading Speech of the Juries Bill 1999 (Vic): Victoria, *Parliamentary Debates*, Legislative Assembly, 27 May 1999, 1349 (Mrs Wade, Attorney-General). The *Juries Act 2000* (Vic) repealed and replaced the *Juries Act 1967* (Vic).

65 New South Wales Law Reform Commission, *Community Law Reform Program: Sixth Report — Conscientious Objection To Jury Service*, Report No 42 (1984).

66 Ibid [5.21].

67 See *Jury Act 1977* (NSW) s 7, sch 3. See also New South Wales Law Reform Commission, *Jury Selection*, Report No 117 (2007) [7.30]–[7.34].

- The Law Reform Commission of Nova Scotia released its final report on the reform of the provincial jury system in 1994.[68]

METHODOLOGY

This Paper

1.49 The purpose of this Issues Paper is 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.

1.50 Chapter 2 of this Paper contains an outline of the history of juries in England and Australia, and a review of their current role in Queensland criminal trials. That chapter also considers in more detail the dynamics of a jury's involvement in a trial, and compares its role with that of the judge and counsel.

1.51 Chapter 3 focuses on a judge's directions, warnings and instructions to a jury, and a judge's summing up of the evidence and legal arguments. Particular reference is made to the model directions in the Benchbook of the Queensland Supreme and District Courts.

1.52 Chapter 4 concentrates on the growing list of specific directions that must be given in particular cases. Much of the law and literature in relation to specific directions relates to sexual offences in particular, although there is scope for a broader application of the principles involved.

1.53 Chapter 5 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 exercise conducted by the VLRC.[69]

1.54 Chapter 6 deals with some areas in which problems with jury directions arise, as identified by academic and legal writings, and some decided cases. These problematic areas include:

- the length and number of directions;
- the complexity of directions with regard to the legal concepts contained in them; and
- the style and range of language used to convey them to the jury.

1.55 Two areas of concern that arise in more complicated cases that are also dealt with in chapter 6 are :

---

68 Law Reform Commission of Nova Scotia, *Final Report on Juries in Nova Scotia*, Final Report (1994).

69 See Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008), Appendix A.

- the concatenation of directions in cases of multiple or alternative charges, and cases involving multiple defendants; and

- whether judges should give directions on alternative or lesser verdicts that may be available on the evidence but which have not been raised specifically by either side during the trial itself.

1.56 It is no less important — indeed, it may well be *more* important — to consider jury directions from the point of view of the juries themselves. Chapter 7 outlines the results of empirical research into the way in which juries respond to the directions, instructions and advice given to them by judges.

1.57 Finally, this Paper considers a range of approaches that may assist juries in reaching their verdicts which, although not jury directions as such, may well go some way to providing juries with their information needs. This is, as previously noted, expressly raised in the Terms of Reference.[70] Chapter 8 looks at some means of improving jury directions themselves while chapter 9 identifies some other procedural, technological and documentary techniques that may assist juries during the course of trials and in their deliberations.

1.58 This Paper also contains four Appendices:

- Appendices A and B set out the Commission's Terms of Reference in relation to both this enquiry and its enquiry into jury selection;

- Appendix C contains a number of extracts from the Criminal Code (Qld), 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*; and

- Appendix D contains some extracts from the Queensland Benchbook referred to elsewhere in this Paper, especially in chapter 4.

Submissions and consultations

1.59 The Commission invites submissions in relation to this enquiry.

1.60 Submissions may be in any format and may respond to some, or all, of the issues raised in this Paper, or any other issue relevant to the Terms of Reference that might not have been covered in this Paper.

1.61 Details on how to make a submission are set out at the front of this Paper.

1.62 The closing date for submissions in response to this Paper is **31 May 2009**.

70 See [1.14] above and Appendix A.

1.63 All submissions will be taken into consideration when the Commission formulates its proposals for further discussion and its final recommendations. At the end of this enquiry, the Commission will publish its recommendations in its final Report, which will be presented to the Attorney-General for tabling in Parliament.

1.64 In addition, the Commission will be seeking to hold consultations as widely as possible in the timeframe open to it, and invites all interested people and organisations to contact it to discuss the issues that concern them or to arrange a face-to-face consultation.

1.65 The Commission is to provide its Report by 31 December 2009.

Chapter 2

The Role of Juries

THE CENTRAL ROLE OF THE JURY IN CRIMINAL TRIALS

2.1 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.

2.2 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.'[71] 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.[72]

2.3 The use of juries in criminal trials is said to serve a number of important and related functions.[73] The use of juries comprised of ordinary, impartial

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

72 Ibid.

73 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 [2.4]–[2.6] below, and generally, for example, D Watt, *Helping Jurors Understand* (2007) §1–6.

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

2.4 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 …[74]

2.5 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

74 *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.

> portrayed as being, over-responsive to authority or remote from the affairs and concerns of ordinary people. The random selection of a jury panel, the empanelment of a jury to try the particular case, the public anonymity of individual jurors, the ordinary confidentiality of the jury's deliberative processes, the jury's isolation (at least at the time of decision) from external influences and the insistence upon its function of determining the particular charge according to the evidence combine, for so long as they can be preserved or observed, to offer some assurance that the accused will not be judged by reference to sensational or self-righteous pre-trial publicity or the passions of the mob.[75]

2.6 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.[76]

2.7 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.[77]

2.8 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.[78]

2.9 This 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 necessarily withstand scrutiny and are challenged by some of the empirical evidence, particularly from psychological and psycho-linguistic sources.[79]

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

---

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

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

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

78 See *Jury Act 1995* (Qld) s 70, and [1.15]–[1.16] above and [2.46], [2.73]–[2.76] below.

79 See chapters 6 to 9 of this Paper.

> [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.[80]

2.11 Despite the strength of such rhetoric, 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. 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. Almost 30 years ago this Commission endorsed a warning that 'uncritical veneration' of juries must end.[81]

2.12 The operation of the jury system is not questioned in this enquiry;[82] it 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.[83] On the other hand, the Commission's preliminary consultations indicate that there is a considerable body of opinion that juries generally perform their tasks conscientiously and with application, and usually deliver verdicts that accord with other informed observers' and the community's expectations.

2.13 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.

2.14 Little of this commentary is based on empirical research, which is understandable given the great difficulties associated with conducting proper empirical research of juries and their decision-making processes. But that means that a great deal of this commentary is anecdotal or may be based on casual observation only. Even those commentators who see juries on a daily basis — judges and trial lawyers — may be prone to basing their comments on assumptions on 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.

Jurors' perceptions of the jury system

2.15 It has been noted that the participation by ordinary members of the community in juries is their last direct involvement in the democratic processes

---

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

81 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.

82 See [1.13] and the Terms of Reference in Appendix A.

83 See, for example, D Watt, *Helping Jurors Understand* (2007) §8.

of a modern state — the others, such as participation in the legislative process, have been taken over by representative bodies or other indirect systems.[84]

2.16 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. 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.

2.17 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 were not empanelled showed high confidence levels, though not as high as those shown by jurors.[85]

> 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.

---

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

85 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.

> 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.
>
> …
>
> … 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.[86]

2.18 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.[87]

> 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.[88]

86 Ibid 148–152.

87 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.

88 Ibid 9.

2.19 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.[89] 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 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; frustration at not being able to ask questions was also noted.

2.20 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 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.[90]

2.21 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.[91]

HISTORICAL BACKGROUND

2.22 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.[92]

---

89 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.

90 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.

91 Ibid 295.

92 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: see ch 1 and Appendix B to this Paper.

2.23 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.[93] 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.[94]

CONTEMPORARY SOURCES OF THE LAW

2.24 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

2.25 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 court-room.
- 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.[95]

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

HOW CRIMINAL TRIALS OPERATE

Basic concepts

2.27 In Queensland, generally speaking all indictable offences are to be tried by a judge and jury in the Supreme Court or the District Court,[96] although there is now scope in Queensland for some indictable offences to be heard by a judge sitting alone without a jury.[97] Indictable offences are the more serious

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

94 For example, the *Evidence Act 1977* (Qld), the *Evidence Act 1995* (Cth) and the Criminal Code (Qld).

95 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.

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

97 The *Criminal Code and Jury and Another Act Amendment Act 2008* (Qld) introduced a new chapter division 9A (ss 614–615E) into the Criminal Code (Qld) allowing for trials of some indictable offences by a judge alone. See [2.69]–[2.72] below.

crimes such as murder and manslaughter. People charged with indictable offences must be 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.[98]

2.28 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.[99]

2.29 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.

2.30 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.[100]

2.31 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, after the jury has left the court room so that the jury does not hear any evidence that the judge ultimately rules should not be admitted.

2.32 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.

2.33 In a criminal trial, the jury consists of 12 people[101] but the trial may continue without the full complement of jurors provided that there are at least ten jurors.[102] Up to three additional people may be selected as reserve jurors.[103]

---

98 See the *Justices Act 1886* (Qld) for the procedural requirements of committal proceedings: Criminal Code (Qld) s 554.

99 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*.

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

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

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

Preliminary matters

2.34 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.[104]

2.35 A trial begins with arraignment of the defendant.[105] 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.[106] Section 604 of the Criminal Code (Qld) provides:

> **604 Trial by jury**
>
> (1) Subject to chapter division 9A[107] 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

2.36 The jurors are then empanelled from a pool of prospective jurors randomly selected from the Electoral Role who have been summoned from the community for jury service.[108] 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.[109] The ways in which juries are selected in Queensland is not in issue

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

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

105 Ibid.

106 Ibid [5.76].

107 Chapter division 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). See [2.69]–[2.72] below.

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

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

in this enquiry; however, the Commission has received separate Terms of Reference from the Attorney-General to report on that topic.[110]

2.37 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.[111]

2.38 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)[112] 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 or is not impartial.[113] 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.[114]

2.39 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. They 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 jury-room 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.

2.40 After this introduction, potential jurors are shown a video that outlines the empanelling and trial process.[115] The video includes:

---

110 See [1.11] above and Appendix B to this Paper.

111 *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 [1.11] above and Appendix B to this Paper. 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.

112 *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).

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

114 *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.

115 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 handbook: Queensland Courts, *Juror's Handbook* (2008) <http://www.courts.qld.gov.au/103.htm> at 11 March 2009.

- 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;
- an explanation of the jury's role and trial processes once the jury has been empanelled;[116] and
- an outline of jurors' responsibilities in relation to jury deliberations.[117]

2.41 Potential jurors each also receive a booklet, the *Juror's Handbook*, which covers similar topics.[118]

2.42 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.[119]

2.43 Empanelled jurors are also supplied with a booklet entitled *Guide to Jury Deliberations*[120] 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.

---

116 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.

117 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*.

118 Queensland Courts, *Juror's Handbook* (2008).

119 This might not be strictly true, but transcript, or portions of transcript, are rarely given to jurors in Queensland (although it is common in some other jurisdictions, such as New Zealand). The issues associated with doing so are outlined in ch 9: see [9.25]–[9.49].

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

2.44 Both booklets are available on the Queensland Courts' website.[121]

Jurors' oath

2.45 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.[122]

2.46 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. Furthermore, this oath or affirmation requires jurors to give a verdict in accordance with the evidence and not their own inclinations, for example, to extend mercy in an apparently deserving case.
- They must keep their deliberations confidential.[123]

Choosing a speaker

2.47 Each jury is required to choose one of themselves as their speaker.[124] 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.[125]

The trial begins

2.48 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

---

121 For both booklets, go to <http://www.courts.qld.gov.au/103.htm>, or <http://www.courts.qld.gov.au/Factsheets/SD-Publication-JurorsHandbook.pdf> and <http://www.courts.qld.gov.au/Factsheets/SD-Brochure-JurorsGuideDeliberations20081215.pdf> (at 11 March 2009)

122 *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.

123 See [1.15]–[1.16], [2.8] above and [2.73]–[2.76] below.

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

125 Queensland Courts, *Juror's Handbook* (2008) 14. See also [9.114]–[9.122] below.

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 defendant. The jurors are also told that they can take notes and seek assistance by asking questions through the bailiff.[126]

2.49 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.

2.50 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).[127]

2.51 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 only at the end of the trial.

Hearing of evidence

2.52 The prosecution then opens its case with an opening address in which its case is outlined.[128] The opening address may be accompanied by some form of written outline or other aide mémoire for the jury, though this is not usual.

2.53 The defendant may also make an opening statement at this stage, but this is a matter within the discretion of the court.[129] This might be more appropriate in cases where it is likely that the defendant will give evidence so that the

126 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 in at [4.26] below.

127 These are set out in Appendix C to this Paper.

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

129 *R v Nona* [1997] 2 Qd R 436 (Fryberg J). This is 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].

jury's attention can be drawn in advance to issues that are likely to arise during the trial for the jury's determination.[130]

2.54 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.

2.55 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.[131] 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.[132]

2.56 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.

2.57 Before the defendant leads any evidence, the defence counsel (or the defendant, if unrepresented) may address the jury to outline the defence case.[133] 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.

2.58 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.[134]

2.59 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

---

130 The only requirement on defendants to give notice of any part of their defence in advance of the trial is the requirement under Criminal Code (Qld) s 590A to give notice of the particulars of an alibi within 14 days after the defendant has been committed for trial.

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

132 See Queensland Courts, *Supreme and District Court Benchbook*, 'Directed Verdict' [14] <http://www.courts.qld.gov.au/2265.htm> at 11 March 2009.

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

134 See [3.34]–[3.39], [9.73]–[9.77] below.

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.

2.60 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. 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.

2.61 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. These issues are considered in more detail in chapters 8 and 9 of this Paper.

Matters of law and procedure

2.62 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*.[135]

Addresses and summing up

2.63 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.[136]

2.64 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) provides:

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

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

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.

2.65 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 considered in detail in chapter 3 of this Paper.

2.66 The jury then retires to consider its verdict.[137]

Verdict and sentencing

2.67 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. It is for the judge to decide the facts relevant to sentencing,[138] though the judge's view of the facts must be consistent with the jury's verdict.[139] The jury has no role in the determination of the sentence.[140]

2.68 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.[141]

2.69 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.[142]

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

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

139 See generally *Cheung v The Queen* (2001) 209 CLR 1 [4]–[5], [14], [16]–[17] (Gleeson CJ, Gummow and Hayne JJ).

140 This lack of involvement in the sentencing process is not a matter for consideration in this enquiry: see [1.12] above and the Terms of Reference in Appendix A.

141 *Lucas v the Queen* [1970] HCA 14 [7]–[9] (Barwick CJ, Owen and Walsh JJ). See [3.15] below.

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

2.70 However, in other cases a jury may be asked to deliver a majority verdict if it is unable to reach a unanimous verdict.[143] 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 majority verdict.[144] If a majority verdict can be reached, that then becomes the verdict of the jury.[145]

2.71 In these circumstances, a majority 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).[146]

2.72 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.[147]

Confidentiality of jury deliberations

2.73 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.[148] 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.[149] 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.[150] It is now common in Queensland for juries to separate during the hearing of a trial and even during their deliberations.

2.74 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.[151]

2.75 When a jury is kept together, no-one outside the jury is permitted to communicate with a juror without the judge's leave.[152]

---

143 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). Majority verdicts were introduced in Queensland in 2008 by the *Criminal Code and Jury and Another Act Amendment Act 2008* (Qld).

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

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

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

147 *Jury Act 1995* (Qld) s 59A(6); see also [4.51]–[4.55] below in relation to the Black direction.

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

149 *Jury Act 1995* (Qld) s 53(3)–(6).

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

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

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

2.76 Information identifying a person as a juror in a particular proceeding must not be published.[153] Information about jury deliberations is also to be kept confidential.[154]

RESEARCH INTO JUDICIAL PRACTICES

2.77 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.[155] All Australian jurisdictions were represented except the two Territories.[156]

Judges' opening remarks

2.78 A very high proportion of the responding judges — 83% in Australia[157] 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.[158] The survey revealed, however, that there was considerable variation as to what aspects of the trial and the jury's role were explained. The following table 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:[159]

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

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

154 *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 [1.15]–[1.16], [1.19]–[1.20], [2.8], [2.46] above.

155 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.

156 Ibid 11.

157 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.

158 Ibid.

159 Ibid 12, 49–51; see also 15 in relation to the provision of the transcript of evidence to jurors.

Issue	Aust judges (%)	Qld judges (%)	NZ judges (%)
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
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 2.1: Contents of judges' opening remarks.

2.79 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.

2.80 The following table outlines the matters of law covered by judges in their opening remarks to the jury:[160]

160 Ibid 21.

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 2.2: Matters of law in judges' opening remarks.

2.81 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.

2.82 Information from the same research in relation to judicial practice concerning the summing up at the end of the trial is covered in chapter 9 of the Paper.[161]

WHO ARE THE JURORS?

2.83 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:[162]

- 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 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

161 See in particular [9.60]–[9.65] below in relation to judicial practice in providing written summaries of summings up and other similar material.

162 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.

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 2.3: 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 2.4: Queensland jurors' employment status.

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

2.84 The participating jurors reported on their previous experience, if any, as jurors. Most had had no prior experience as a juror[163] and just over 20% had

163 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.

'experienced jury duty'[164] once or twice before. Incredibly, it seemed that one (or a very small number) had had up to nine previous experiences of jury service.[165]

2.85 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.[166]

> 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.[167]

2.86 Of the 1,225 jurors in the survey, about 1,200 answered several questions about themselves. The following figures emerged:[168]

- 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 2.5: 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:

---

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

165 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.

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

167 Ibid 1.

168 Ibid 3–4, 15.

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 2.6: 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:

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 2.7: 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.

2.87 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.[169]

2.88 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.[170]

169 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 11 March 2009.

170 Ibid 7.

2.89 However, significantly, over 40% claimed that they had a good knowledge of the court process before their jury service, apparently largely from the media.[171]

171 Ibid.

Chapter 3

What are Jury Directions?

INTRODUCTION

3.1 This chapter explains what jury directions are and describes the difference between directions, warnings and comments, and what comprises the judge's summing up.

JUDGES' DIRECTIONS TO JURIES

3.2 As noted in chapter 2, the judge and jury have different functions in a criminal trial. It is the judge's duty to decide questions of law and to ensure a fair trial for the defendant. It is for the jury to decide the facts from the evidence and to reach a verdict of guilty or not guilty on each of the charges laid against the defendant by applying the law to the facts.

3.3 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, and may also add some of their own comments about the evidence.[172]

Directions

3.4 Jury directions are statements about the law made by the judge that the jury must follow. These are also referred to as jury instructions[173] and some-

172 Criminal Code (Qld) s 620; see [2.64] above.

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

times as jury charges.[174] The judge is required, as part of the 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'.[175]

> 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 [the alleged offence].[176]

3.5 Jury directions may relate to substantive, procedural or evidentiary points of law. Some directions 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).[177]

3.6 Some directions may be given during the course of the trial.[178] Directions will also form a major part of the judge's summing up to the jury at the end of the evidence.

3.7 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'.[179] 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.

Warnings

3.8 Jury warnings are evidentiary directions. They direct the jury about 'how they should *not* reason or about particular care that must be shown before accepting certain kinds of evidence'.[180]

3.9 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'.[181] They should be couched in terms that tell the jury that it is bound to

---

174 For example, Judicial College of Victoria, 'Victorian Criminal Charge Book' <http://www.judicialcollege.vic.edu.au/CA256DC1001D124B/page/Publications-Victorian+Criminal+Charge+Book?OpenDocument&1=38-Publications~&2=40-Victorian+Criminal+Charge+Book~&3=~>at 11 March 2009.

175 *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.

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

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

178 See generally Queensland Courts, *Supreme and District Court Benchbook* <http://www.courts.qld.gov.au/2265.htm>.

179 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.

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

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

follow them.[182] Warnings are also required in particular cases; for example, in relation to certain types of evidence in sexual offence cases.[183] The content of some of these directions required in particular cases, such as sexual offence cases, or in relation to certain types of evidence is outlined in chapter 4 of this Paper.

3.10 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.[184]

Summing up

3.11 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 been made.[185] This is also called the judge's 'summing up' or 'charge' to the jury.[186] 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.[187] A misdirection given in the judge's summing up may be grounds for appeal.[188]

3.12 The objective of the summing up was considered by the High Court in *RPS v R*:

> Before parting with the case, it is as well to say something more general about the difficult task trial judges have in giving juries proper instructions. The fundamental task of a trial judge is, of course, to ensure a fair trial of the accused. That will require the judge to instruct the jury about so much of the law as they need to know in order to dispose of the issues in the case.[189] No doubt that will require instructions about the elements of the offence, the burden and standard of proof and the respective functions of judge and jury. Subject to any applicable statutory provisions it will require the judge to identify the issues in the case and to relate the law to those issues.[190] It will require the judge to put fairly

182 *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 [8.32]–[8.33].

183 See Queensland Courts, *Supreme and District Court Benchbook*, [62]–[66] <http://www.courts.qld.gov.au/2265.htm> at 3 October 2008.

184 See [3.16] below.

185 Criminal Code (Qld) s 620(1); see [2.64] above. 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).

186 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 11 March 2009.

187 *RPS v The Queen* (2000) 199 CLR 620 [41]–[42] (Gaudron ACJ, Gummow, Kirby and Hayne JJ).

188 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].

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

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

> before the jury the case which the accused makes. In some cases it will require the judge to warn the jury about how they should *not* reason or about particular care that must be shown before accepting certain kinds of evidence.[191]
>
> But none of this must be permitted to obscure the division of functions between judge and jury. It is for the jury, and the jury alone, to decide the facts. As we have said, in some cases a judge must give the jury warnings about how they go about that task.[192] (notes and emphasis in original)

3.13 The judge must instruct the jury on 'the law applicable to the case' with such observations on the evidence as he or she thinks fit to make.[193] The judge must identify the issues, relate the law to the issues and the facts, and outline the main arguments of counsel.[194] The summing up will include directions and, where necessary, warnings. It may also include comments on the facts. In the Queensland Court of Appeal, Thomas JA stated:

> The consensus of longstanding authority is that the duty to sum up is best discharged by referring to the facts that the jury may find with an indication of the consequences that the law requires on the footing that this or that view of the evidence is taken.[195] I do not understand the statements of Gaudron ACJ, Gummow, Kirby and Hayne JJ in *RPS v The Queen,*[196] which encourage reticence in making comments on the facts, to be contrary to that view.[197] (notes as in original)

3.14 It has been pointed out that the summing up should be, but is not always, clear and comprehensible.[198] To properly assist the jury, the summing up 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.[199] (notes omitted)

3.15 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:

---

191 For example, *Longman v The Queen* [1989] HCA 60; (1989) 168 CLR 79; *Domican v The Queen* [1992] HCA 13; (1992) 173 CLR 555.

192 [2000] HCA 3 [41]–[42] (Gaudron ACJ, Gummow, Kirby and Hayne JJ).

193 Criminal Code (Qld) s 620(1).

194 *Mogg* (2000) 112 A Crim R 417 [54] (McMurdo P).

195 *Alford v Magee* (1952) 85 CLR 437, 466; *R v Jellard* [1970] VR 902; *Nembhard v R* (1982) 74 Cr App R 144, 148; *Holland v R* [1993] HCA 43*;* (1993) 117 ALR 193, 200–201.

196 [2000] HCA 3; (2000) 74 ALJR 449 paras 41–43.

197 *Mogg* (2000) 112 A Crim R 417, [73].

198 See, for example, 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.

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

> 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 should, refer in such cases to the consequences of the verdict can only arise in special circumstances.[200]

Judges' comments

3.16 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.[201] 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.[202]

3.17 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

200 *Lucas v the Queen* [1970] HCA 14 [7]–[9] (Barwick CJ, Owen and Walsh JJ). See [2.68] above.

201 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.

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

a conclusion of guilt.[203] Because it is not a direction, the jury is not bound to follow a judge's comment.[204]

3.18 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 by the judge are no more than some factors that they can take into account.[205] 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.[206] 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.[207] (notes and emphasis in original)

PURPOSE OF JURY DIRECTIONS

3.19 The overall purpose of jury directions, and of the summing up in general, is to ensure that the defendant has a fair trial.[208] To that end, the object of directions and the summing up is to assist the jury to avoid 'erroneous or unfair reasoning'[209] and reach a proper verdict — a failure to give proper directions may amount to a miscarriage of justice.[210] 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'.[211]

3.20 In its introduction, the Queensland Supreme and District Court Benchbook makes the following statement based on *R v Sparrow*:

> 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

---

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

204 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).

205 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.

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

207 [2000] HCA 3 [42] (Gaudron ACJ, Gummow, Kirby and Hayne JJ).

208 Eg *RPS v The Queen* (2000) 199 CLR 620 [41] (Gaudron ACJ, Gummow, Kirby and Hayne JJ); *R v BBO* [2008] QCA 276 [36] (McMurdo P).

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

210 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].

211 *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].

> 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.[212]

3.21 The judge's directions and summing up should, therefore, be concise and tailored to the particular case.[213] The High Court has explained in relation to the summing up, for example, that:

> 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.[214]

LENGTH OF SUMMING UP

3.22 The research by the Australian Institute of Judicial Administration ('AIJA') mentioned in chapter 2 of this Paper[215] also asked judges to estimate the lengths of their summings up and directions (or charges) to juries at the end of addresses.[216] 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.

3.23 The results are summarised in the following table, 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.

	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**

212 [1973] 1 WLR 488, 495. See Queensland Courts, *Supreme and District Court Benchbook*, 'Introduction' [4.2] <http://www.courts.qld.gov.au/2265.htm> at 12 March 2009. The Introduction to the Queensland Benchbook has some other interesting comments about the purpose of a judge's directions and summing up; it is reproduced in full in Appendix D to this Paper.

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

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

215 See [2.77] above.

216 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
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 54m**	**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 49m**	**2h 35m**	**1h 48m**

Table 3.1: Estimated duration of summing up.

3.24 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 Australian States (New South Wales, Victoria and Tasmania) were relatively close to each other but all significantly longer than the 'quicker' States.

3.25 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.[217]

JURORS' UNDERSTANDING OF THE LAW

3.26 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.[218] More than half the judges surveyed reported that jurors had either some or a great deal of difficulty understanding judicial instructions on the law.[219] Many judges also reported that complex defences, such as provocation, may be especially difficult for jurors to grasp.[220]

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

218 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).

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

220 Ibid 34–5.

3.27 Other Australian research has tended to confirm that jurors have difficulty understanding judicial instructions on the law.[221] Examination of this issue is ongoing.[222]

3.28 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 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.[223]

3.29 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.

3.30 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.[224] 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.[225] These issues are discussed more fully in chapter 7 of this Paper.

---

221 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.

222 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 has taken over the work that had previously been conducted by the Australian Institute of Judicial Administration) published its Consultation Paper on this subject in September 2008: Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008). The NSWLRC published its Consultation Paper in December 2008: New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008).

223 See [3.34]–[3.38] below.

224 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. Also see, 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.

225 For example, 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.

3.31 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.[226]

3.32 Even if steps are taken to improve communication with the jury, it may remain difficult for jurors to understand inherently complex legal principles.[227] As noted above, 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.[228] In *R v Makotia*, Smart J in the New South Wales Court of Criminal Appeal made the following comment about the provocation test:

> In practice the gravity of the provocation/self-control distinction has proved hard to explain to a jury in terms which are intelligible to them.
>
> …
>
> Many trial judges in this State give juries both verbal and written directions on provocation. Juries struggle with the distinction and find it hard to grasp. Many do not do so. The directions on provocation and the distinction frequently lead to a series of questions indicating that these issues are causing difficulty, prolonged deliberation by juries and, not infrequently, to juries being unable to agree whether the accused is guilty of murder or manslaughter. This leads to a retrial. I have been left with the firm impression that, despite extensive endeavours to explain the directions, the jury has had trouble appreciating their import. Other trial judges have had similar experiences. It is important that juries have a good understanding of what they are required to do.[229]

3.33 In *R v Voulkelatos*, Murphy J in the Victorian Court of Criminal Appeal stated that when faced with the complexities of the provocation test, jurors may 'dismiss such refinements and decide as they thought to be fair and just in the circumstances'.[230]

QUESTIONS FROM THE JURY

3.34 Juries are entitled to seek to put questions to a witness, and also to put questions to the judge.

---

226 These techniques, the use of which is not restricted in law, are considered in more detail in chapters 8 and 9 of this Paper. 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].

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

228 For example, *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.

229 (2001) 120 A Crim R 492 [18]–[19].

230 [1990] VR 1, 12.

3.35 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. The Queensland Benchbook contains a specific direction to the jury, which, the Benchbook suggests, should only be made once a jury has sought to put a question to a witness or inquired about its entitlement to do so:

Jury Questions[231]

> **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.**[232] (note and formatting as in original)

3.36 Juries may also 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 also found in the Benchbook:

> **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.**[233] (formatting as in original)

3.37 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 comprehensions 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.[234]

3.38 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 mistakenly feel that they

231 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.

232 Queensland Courts, *Supreme and District Court Benchbook*, 'Jury Questions' [15.1] <http://www.courts.qld.gov.au/2265.htm> at 12 March 2009.

233 Queensland Courts, *Supreme and District Court Benchbook*, 'General' [24.7] <http://www.courts.qld.gov.au/2265.htm> at 12 March 2009.

234 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.

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.[235]

Judicial practice

3.39 The AIJA research shows that there is significant variation as to the frequency with which judges give advice during their summing 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%.[236]

235 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.

236 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.

Chapter 4

Specific Directions

INTRODUCTION

4.1 This chapter provides an overview of the range of specific directions that must be given in particular cases. In a number of these the complexity of the legal concepts behind the directions, which is reflected in the directions themselves, becomes obvious.

DEVELOPMENT OF SPECIFIC DIRECTIONS

4.2 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.[237]

4.3 Appellate decisions of the High Court have mandated that particular directions be given (for example, in relation to various types of unreliable evidence[238]) as well as the required content of such directions (as with warnings

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

238 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.

about consciousness of guilt evidence[239]). With few exceptions, however, the High Court has not translated the legal principles into standard directions. As a result, juries may be given multiple and complex directions. These developments have attracted some criticism:

> Over the past 20 years[240] 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 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.[241] (note in original)

4.4 Statutory provisions 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 abrogated or limited particular common law requirements.

Evidence Act 1977 (Qld)

4.5 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.[242]

4.6 Other jury directions required under the *Evidence Act 1977* (Qld) relate to evidence given by an operative whose identity has been protected,[243] the

239 *Edwards v The Queen* (1993) 178 CLR 193. See [4.63]–[4.65] below.

240 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.

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

242 *Evidence Act 1977* (Qld) ss 21A(8), 21AW are discussed at [4.121]–[4.128] below.

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

defendant's prevention from cross-examining a protected witness in person[244] and the admission of hearsay evidence.[245]

Criminal Code (Qld)

4.7 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.[246]

Evidence Act 1995 (Cth)

4.8 Provisions in the *Evidence Act 1995* (Cth) may also be relevant.[247]

4.9 That Act requires specific jury directions in relation to identification evidence,[248] unreliable evidence, such as hearsay or accomplice evidence,[249] and any significant forensic disadvantage suffered by the defendant as a result of a delay in prosecution.[250]

4.10 In addition, the Act removes the requirement to give uncorroborated evidence warnings[251] and limits the warnings that may be given in respect of children's evidence.[252]

THE QUEENSLAND BENCHBOOK

4.11 The Queensland Supreme and District Court Benchbook (the 'Queensland Benchbook') is a compilation of model directions prepared by a committee of Supreme and District Court Judges in Queensland and published by the Courts.[253] 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

244 *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.

245 *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.

246 Criminal Code (Qld) s 632 is discussed at [4.82]–[4.86] below.

247 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.

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

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

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

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

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

253 Queensland Courts, *Supreme and District Court Benchbook* <http://www.courts.qld.gov.au/2265.htm>.

> 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.

4.12 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 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.[254]

4.13 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.[255]

4.14 By covering the full range of specific directions that may be required, the Queensland Benchbook is necessarily lengthy; it sets out some 188 model 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.[256] 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.[257]

4.15 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:

---

254 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: Queensland Courts, *Supreme and District Court Benchbook* 'Trial Procedure' [5B.6]–[5B.7] <http://www.courts.qld.gov.au/2265.htm> at 12 March 2009. See [4.26] below.

255 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.

256 Queensland Courts, *Supreme and District Court Benchbook*, 'Foreword' [2] <http://www.courts.qld.gov.au/2265.htm> at 12 March 2009.

257 [2008] QCA 371 [62]. See also, for example, *R v Clarke* (2005) 159 A Crim R 281 [53] (McMurdo P).

> 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'.[258] (note omitted)

4.16 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.[259] There have been a number of cases where a divergence from the Benchbook has resulted in a successful appeal by the defendant.[260]

4.17 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.

4.18 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.

4.19 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.[261]

4.20 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.[262] As a result of recommendations made

---

258 Queensland Courts, *Supreme and District Court Benchbook*, 'Introduction' [4.1] <http://www.courts.qld.gov.au/2265.htm> at 12 March 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.'

259 See, for example, Queensland Courts, *Supreme and District Court Benchbook*, 'Reasonable Doubt' [57] <http://www.courts.qld.gov.au/2265.htm>12 March 2009, discussed at [7.57]–[7.58] 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)).

260 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)).

261 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.

262 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.

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 judiciary and the legal profession, published a *Guide to Jury Trial Practice*.[263] 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.

4.21 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.[264] Some followed benchbooks and use 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.

4.22 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.[265]

> 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.[266]

4.23 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.

CATEGORIES OF SPECIFIC DIRECTIONS

4.24 Jury directions are usually given during three phases of the trial: as part of the judge's preliminary remarks to the jury at the start of the trial; as the need arises during the course of the trial; and in the judge's summing up at the conclusion of the evidence and closing addresses by counsel. This is reflected in the Queensland Benchbook.

---

263 Criminal Practice Committee, *Guide to Jury Trial Practice* (November 2003) 3–5 <http://justice.govt.nz/practicenotes/> at 19 February 2009. Also see Law Commission (New Zealand), *Juries in Criminal Trials*, Report No 69 (2001) xv–xvi.

264 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; see [2.77] above.

265 Ibid 29.

266 Ibid 36.

4.25 The following is an overview of some of the specific directions that may be required in a criminal trial, by reference to the Queensland Benchbook. This is intended to convey some idea of the number and range of specific directions that may be required, but is not comprehensive. 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.[267] Some of these more controversial directions are set out in some length in this Paper to exemplify some of the major concerns that have arisen in relation to the content in, and proliferation and complication of, certain jury directions.

Procedural and other directions at the start of the trial

4.26 As noted earlier, judges will often give short instructions in their opening remarks to the jury on general legal concepts and procedural matters.[268] These 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',[269] and their importance in providing initial instruction on the law to juries has been noted.[270] A series of model remarks for the beginning of a trial is set out in Chapter 5B of the Queensland Benchbook.[271] 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:[272]

> 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;[273]
>
> and should inform them

267 See Queensland Courts, *Supreme and District Court Benchbook* 'Delay between (Sexual) Incident and Complaint (Longman Direction)' [65.1] <http://www.courts.qld.gov.au/2265.htm>. This direction is based on the High Court's decision in *Longman v The Queen* (1989) 168 CLR 79. See [4.104] below.

268 See [2.48]–[2.51], [2.80] above. 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. In Victoria, 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.

269 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.

270 Ibid 71; Hon J Wood, 'Jury directions' (2007) 16 *Journal of Judicial Administration* 151, 162.

271 Queensland Courts, *Supreme and District Court Benchbook*, 'Trial Procedure' [5B] <http://www.courts.qld.gov.au/2265.htm>.

272 In this and all other extracts from the Queensland Benchbook in this Paper, 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.

273 Section 51 *Jury Act.*

(c) of the prohibition on the jury inquiring about the defendant in the trial.[274]

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:[275]

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[276] (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**

---

274 Section 69A *Jury Act.*

275 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.

276 Directions on the standard of proof (beyond reasonable doubt) are discussed at [7.55]–[7.63] below.

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.[277] **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 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.**[278]

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.

277 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.

278 This warning might be repeated at the end of the first day.

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[279] as the case progresses.

Note-taking

Writing materials will be made available to you just before the evidence commences[280] 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

279 *Haw Tua Tau* [1982] AC 136, 150–151.

280 Cf *Sandford* (1994) 33 NSWLR 172, 182.

> **bailiff[281] 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.**[282] (notes and formatting as in original)

Evidentiary directions during the trial and before summing up

4.27 Jury directions might also be given during the course of a trial.[283] This may especially be true in lengthy or complex trials.[284] Typically, these are evidentiary directions and are given as the need arises:

> It will often be appropriate and desirable that the jury be given directions at about the time that the evidence is introduced which affect the way in which they may view the testimony of a particular type of witness or which explain how a particular category of evidence may be used or warn the jury as to the impermissible use of such evidence. Directions given in this timely fashion ensure that the jury will receive the greatest assistance in assessing the significance of the evidence which it hears.[285] (note omitted)

4.28 The Queensland Benchbook covers a range of issues that may require directions during the course of a trial.[286] Some of these might be regarded as fairly routine, or at least as not presenting any particular legal issue or difficulty for the jury. These include directions dealing with:

- the defendant's discharge of his or her counsel part-way through the trial;
- the limited use to be made of evidence admitted against one only of a number of co-defendants, and of transcripts of tape recordings;
- 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;

---

281 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.**

282 Queensland Courts, *Supreme and District Court Benchbook*, 'Trial Procedure' [5B] <http://www.courts.qld.gov.au/2265.htm> at 12 March 2009.

283 These are sometimes referred to as 'instructions in running' or 'ongoing instructions'.

284 *R v Kirby* [2000] NSWCCA 330 [68] (Wood CJ).

285 *R v PZG* (2007) 171 A Crim R 62 [22], citing *R v Kirby* [2000] NSWCCA 330 [68] (Wood CJ). 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, 78.

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

- 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.[287]

4.29 The Queensland Benchbook also deals with directed verdicts when there is insufficient evidence on which to return a verdict of guilty.[288]

Directions on the law and evidence in the summing up

4.30 The majority of jury directions are given as part of the judge's summing up. The judge is required at this stage of the trial to instruct the jury on the law applicable to the case.[289] This will require general directions, such as directions on the elements of the offences charged, and relevant evidentiary directions and warnings. Evidentiary directions and warnings are discussed separately below.[290]

4.31 The summing up is 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 which the trial judge must attempt to straddle the needs of good communication and the scrutiny of the Court of Appeal.[291]

4.32 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.[292] However, 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'.[293]

---

287 See [3.34]–[3.35] above.

288 Queensland Courts, *Supreme and District Court Benchbook*, 'Directed Verdict' [14.1] <http://www.courts.qld.gov.au/2265.htm> at 12 March 2009.

289 Criminal Code (Qld) s 620(1); see [3.11]–[3.15] above.

290 See the discussion beginning at [4.56] below.

291 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.

292 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.

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

General directions

4.33 The summing up will include general directions that are required in every criminal jury trial.[294] This includes procedural directions on the burden and standard of proof and the respective functions of the judge and jury, including a direction that the jury is the sole judge of the facts and may ignore any comment the judge makes on the facts.[295] The Queensland Benchbook also provides suggested directions on the requirement for a unanimous verdict, 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.

Specific offences

4.34 More than 80 specific offences, including some Commonwealth offences, are the subject of suggested directions in the Queensland Benchbook.[296] These are designed to assist in directing the jury on the elements of the offences charged which the prosecution must prove.

4.35 The length and complexity of the suggested directions is necessarily determined by the law. Some of the directions are longer and more detailed than others.[297] Some directions set out in detail and in a structured way the elements of the specific offences charged. One example is the direction relating to the offence of Dangerous Operation of a Motor Vehicle under section 328A of the Criminal Code (Qld):

> **The prosecution must prove that the defendant:**
>
> **(1) Operated a motor vehicle.[298]**
>
> **(2) In a place,[299] namely: ……,**
>
> **(3) Dangerously.**
>
> **(4) [As a result of the dangerous operation of the motor vehicle, causing the death of the deceased/grievous bodily harm].**

---

294 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' [24.1]–[24.6] <http://www.courts.qld.gov.au/2265.htm> at 12 March 2009.

295 *Azzopardi v The Queen* (2001) 205 CLR 50 [50].

296 Queensland Courts, *Supreme and District Court Benchbook*, 'Offences' [90]–[156] <http://www.courts.qld.gov.au/2265.htm>.

297 Compare, for example, the suggested directions on arson and possession of a dangerous drug: Queensland Courts, *Supreme and District Court Benchbook*, 'Offences' [92.1], [106.1] <http://www.courts.qld.gov.au/2265.htm>.

298 'Operated' is not defined in the Code, but in most cases it will be sufficient to read out to the jury such parts of the definition of 'operates … a vehicle dangerously' in sub-section (5) as are relevant to the facts of the case. If it is alleged that the defendant was not the driver, then the prosecution would have to plead 'dangerously interfered with the operation of a vehicle' as provided for in sub-section (4). If it is alleged that the defendant was the driver, then proof of that fact will be sufficient to satisfy the requirement that the defendant 'operated' a motor vehicle. The Macquarie Dictionary defines the term as 'to work or use a machine'.

299 The 1997 amendments provide that the offence can occur in 'any place' (other than a place being used to test vehicles from which other traffic is excluded at the time), whereas previously the offence was confined to 'on a road or in a public place'.

> **(5) [The defendant was adversely affected by alcohol].**[300]
>
> **(6) [If it has been alleged that the defendant has been previously convicted of any of the offences referred to in s 328A(2) or (3) this circumstance of aggravation must be pleaded and proved.]**
>
> **The term 'operates a motor vehicle dangerously' means 'operates a vehicle at a speed or in a way that is dangerous to the public having regard to all the circumstances' including:**
>
> **'(A) the nature, condition and use of the place; and**
>
> **(B) the nature and condition of the vehicle; and**
>
> **(C) the number of persons, vehicles or other objects that are, or might reasonably be expected to be, in the place; and**
>
> **(D) the concentration of alcohol in the operator's blood; and**
>
> **(E) the presence of any other substance in the operator's body.'**
>
> **The operation of a vehicle includes the speed at which the vehicle is driven and all matters connected with the management and control of the vehicle by the driver, such as keeping a lookout, turning, slowing down and stopping.**
>
> **The expression 'operates a vehicle dangerously' in general does not require any given state of mind on the part of the driver as an essential element of the offence. A motorist may believe he or she is driving carefully yet be guilty of operating a vehicle dangerously. 'Dangerously' is to be given its ordinary meaning of something that presents a real risk of injury or damage.**
>
> …[301] (notes and formatting as in original)

4.36 Other directions are concerned with criminal responsibility and defences, and relevant evidentiary directions, adding to the overall detail of the law on which the jury is instructed.

Commonwealth offences

4.37 The Queensland Benchbook also includes specific directions in relation to Commonwealth drug offences.[302] These suggested directions take the same form as those for other specific offences in setting out the elements of the offences that must be proved by the prosecution.

---

300 In *R v Anderson* [2005] QCA 304 Keane JA, with whose reasons Williams JA agreed, approved at [70] a direction to the jury which explained 'adversely affected by alcohol' as meaning some material influence upon the person from the consumption of alcohol; Keane JA added at [71] that the trial judge was referring to a material detraction from the driver's ability to control a vehicle in consequence of the driver's consumption of alcohol, and that that was a correct understanding of the words.

301 Queensland Courts, *Supreme and District Court Benchbook*, 'Dangerous Operation of a Motor Vehicle s 328A' [103.1]–[103.2] <http://www.courts.qld.gov.au/2265.htm> at 12 March 2009. This direction continues with a discussion of other factors that may be relevant, such as the driver's consumption of alcohol as a circumstance of aggravation.

302 Queensland Courts, *Supreme and District Court Benchbook*, 'Offences' [105]–[105B] <http://www.courts.qld.gov.au/2265.htm> at 12 March 2009.

4.38 The Queensland Benchbook also includes suggested directions on general criminal responsibility under the Criminal Code 1995 (Cth), which differs from the position in Queensland.[303]

Criminal responsibility

4.39 As part of directing the jury on the law applicable to the case, the judge will need to address relevant matters of criminal responsibility in the summing up. The Queensland Benchbook contains several suggested directions relevant to criminal responsibility under the Criminal Code (Qld), including:[304]

- attempts;
- conspiracy and evidence in conspiracy cases;
- aiding, counselling and procuring the commission of an offence, and the commission of an offence by common unlawful purpose (ie, parties to offences);
- charges of being an accessory after the fact;
- defences such as unwilled acts, accident, mistake of fact, insanity, intoxication, and capacity;
- acts or omissions done or made in circumstances of sudden or extraordinary emergency, or under compulsion;
- defence of dwelling and defence of moveable property;
- self-defence, provocation, and diminished responsibility; and
- criminal negligence.

4.40 Some suggested directions on criminal responsibility are lengthier and more complex than others — directions on parties to offences, self-defence and provocation[305] are examples of the lengthier directions. The judge's directions will also become more complicated in cases involving multiple defences.

Parties to offences

4.41 Sections 7 and 8 of the Criminal Code (Qld) deem all of the following persons to be criminally responsible for an offence:[306]

303 Queensland Courts, *Supreme and District Court Benchbook*, 'Offences' [89] <http://www.courts.qld.gov.au/2265.htm> at 12 March 2009.

304 Queensland Courts, *Supreme and District Court Benchbook*, 'Offences' 'Criminal Responsibility' [68]–[88] <http://www.courts.qld.gov.au/2265.htm> at 12 March 2009.

305 See [6.19]–[6.22], [6.24]–[6.25] below.

306 Criminal Code (Qld) ss 7, 8 apply to all offences against the statute law of Queensland: *Renwick v Bell* [2002] 2 Qd R 326; LexisNexis Australia, *Carter's Criminal Law of Queensland* [s 7.10], [s 8.15] (at January 2009).

- every person who actually does the punishable act;[307]
- every person who does an act, or makes an omission, to enable or aid another person to commit the offence;[308]
- every person who aids another person in committing the offence;[309]
- any person who counsels or procures any other person to commit the offence;[310] and
- each of two or more persons who commit an offence in the prosecution of a common unlawful purpose.[311]

4.42 Each of these party provisions involves different elements. In respect of aiding, for example, the defendant must have known, when assisting the offender, that the principal offender intended to commit the offence.[312] For counselling or procuring, however, as long as the offence was a probable consequence[313] of carrying out the defendant's counsel, the defendant is criminally responsible, even if the offence differs from that which was counselled.[314]

4.43 The party provisions also involve both subjective and objective elements. For example, under section 8 there must have been a common intention to prosecute an unlawful purpose, with the result that the defendant's state of mind is relevant.[315] It also requires the offence so committed[316] to have been a probable consequence of the prosecution of the common unlawful purpose, such that actual foresight of the defendant is not necessary.[317]

4.44 It is not uncommon for more than one of these party provisions to be relevant in a trial.[318] Where a group of people is involved in the commission of an offence, it may be difficult to single out a principal offender,[319] but this does not prevent a person being convicted as a party.[320] In addition, the Criminal

307 Criminal Code (Qld) s 7(1)(a).

308 Criminal Code (Qld) s 7(1)(b).

309 Criminal Code (Qld) s 7(1)(c).

310 Criminal Code (Qld) s 7(1)(d).

311 Criminal Code (Qld) s 8.

312 *R v Lowrie* [2000] 2 Qd R 529; *R v Jeffrey* [2003] 2 Qd R 306.

313 A 'probable consequence' is more than a possible consequence and is probable in the sense that it could well happen: *Darkan v The Queen* (2006) 227 CLR 373.

314 Criminal Code (Qld) ss 7(1)(d), 9; *Stuart v The Queen* (1974) 134 CLR 426, 445.

315 *R v Barlow* (1997) 188 CLR 1, 13.

316 The offence must have been committed in the prosecution or furtherance of the common intention. See generally, LexisNexis Australia, *Carter's Criminal Law of Queensland* [s 8.25]–[s 8.35] (at 12 March 2009).

317 *Darkan v The Queen* (2006) 227 CLR 373 [60], [125]; *Stuart v The Queen* (1974) 134 CLR 426.

318 For example, *R v Da Costa* [2005] QCA 385; *R v Palmer* [2005] QCA 2.

319 For example, *R v Lowrie* [2000] 2 Qd R 529, 535 (McPherson JA).

320 *R v Jeffrey* [2003] 2 Qd R 306.

Code (Qld) provides that a person charged as a party under section 7 or 8 may be convicted of the same or a lesser offence as the principal offender.[321]

4.45 The complexity of the operation of the party provisions is reflected in the model directions of the Queensland Benchbook, which run to some 15 pages.[322] After setting out the substance of the relevant provision, the Benchbook provides directions on the matters of which the jury need to be satisfied and the meaning of relevant terms such as 'probable consequence'. The model directions are set out in full in Appendix D to this Paper.

Self-defence

4.46 The defence of self-defence covers three separate but related defences under sections 271(1), 271(2) and 272 of the Criminal Code (Qld).[323] Each of those defences is addressed to different circumstances and is comprised of different elements.

- Section 271(1) provides a defence if the force used is reasonably necessary and is not intended, and is not such as is likely, to cause death or grievous bodily harm.

- Section 271(2) provides a defence for the use of force that is necessary even if such force may cause death or grievous bodily harm, on certain conditions.

- Section 272 provides a defence for the use of such force as is reasonably necessary for the person's preservation from death or grievous bodily harm from a provoked assault[324] even though such force may cause death or grievous bodily harm.

4.47 These defences all involve both subjective and objective elements. For example, under section 271(2), the defendant's state of mind is relevant as he or she must have an apprehension of death or grievous bodily harm and a belief as to the action necessary to preserve himself or herself. It also requires the defendant's apprehension to be reasonable and the defendant's belief to be based on reasonable grounds, thereby importing objective requirements.[325]

4.48 In any given trial, one or more of these alternative defences may be raised, so that multiple jury directions may be required. The Queensland Benchbook contains suggested directions addressing the defences under sections

321 Criminal Code (Qld) s 10A.

322 Queensland Courts, *Supreme and District Court Benchbook*, 'Parties to An Offence: ss 7, 8' [71] <http://www.courts.qld.gov.au/2265.htm> at 12 March 2009.

323 Also see Criminal Code (Qld) s 273 (Aiding in self-defence).

324 That is, this defence applies if a person has unlawfully assaulted another or has provoked an assault from another: Criminal Code (Qld) s 272(1). If the use of force causes death or grievous bodily harm and, before the necessity of preservation arose, the person intended or endeavoured to cause death or grievous bodily harm, the defence applies only if the person declined further conflict and quitted it or retreated from it as far as was practicable before the necessity arose: s 272(2).

325 *R v Gray* (1998) 98 A Crim R 589.

271 and 272.[326] The Benchbook also contains the following general notes which highlight the potential complexity of the directions:

> ***General Notes on Self-defence***
>
> The two limbs of s 271 are more commonly raised than any other section. The following notes concentrate largely upon s 271, and make brief mention of s 272.
>
> *Preliminary question — which limb or limbs of the above defences should be considered by the jury?*
>
> 'Sometimes both limbs of s 271 will be appropriately left to the jury. But more often than not the consequence of summing-up on both limbs may be confusion which detracts from proper consideration of the true defence. Speaking very generally, in homicide cases the first limb of s271 seems best suited for cases where the deceased's initial violence was not life-threatening and where the reaction of the [defendant] has not been particularly gross, but has resulted in a death that was not intended or likely; in other words cases where it can be argued that the unlikely happened when death resulted. The second limb seems best suited for those cases where serious bodily harm or life-threatening violence has been faced by the [defendant], in which case the level of his or her response is not subject to the same strictures as are necessary under the first limb. The necessity for directions under both limbs may arise in cases where the circumstances are arguably but not clearly such as to cause a reasonable apprehension of grievous bodily harm on the part of the [defendant]. In cases where the initial violence is very serious, most counsel will prefer to rely upon s 271(2) alone. It is only cases in the grey area where it is arguable but not sufficiently clear that the requisite level of violence was used by the deceased person that directions under both subsections will be desirable. The above general statements are not intended to paraphrase the meaning of the subsections. They are given with a view to identifying the broad streams of cases under which one or other or both of these defences may be appropriate'.[327]
>
> Sometimes directions on a third alternative defence (under s 272) are requested. Generally speaking that defence helps a defendant who has started to fight and has then been threatened by massive over-reaction, or at least by such violence as to cause reasonable apprehension of death or grievous bodily harm.
>
> Where there is a conflict in the evidence concerning who was responsible for the initial assault, or for provocation for the assault, it may be necessary to give the jury an alternative direction under s 272, to be applied if they consider that the defendant was responsible for the commencement of hostilities.
>
> Discussion with counsel and commonsense will often narrow the true defence down to sensible limits and avoid the highly confusing exercise of multiple alternative directions under ss 271(1), 271(2) and 272. But there will be rare cases where all three will be necessary.[328] (note in original)

326 Queensland Courts, *Supreme and District Court Benchbook* [86]–[86B] <http://www.courts.qld.gov.au/2265.htm> at 12 March 2009.

327 *Bojovic* [2000] 2 Qd R 183, 186.

328 Queensland Courts, *Supreme and District Court Benchbook*, 'Self-Defence: s 271(1)' [86.1] <http://www.courts.qld.gov.au/2265.htm> at 12 March 2009.

4.49 The model directions on self-defence are set out in full in Appendix D to this Paper.

Provocation

4.50 The suggested directions dealing with the defences of provocation are among the more detailed and complicated directions in the Benchbook. The model direction on the partial defence of provocation to murder is set out in full in Appendix D to this Paper and is discussed in some detail in chapter 6 of this Paper as an example of the difficulties of simplifying jury directions when the law itself is particularly complex.[329]

Directions after the jury retires

Black direction

4.51 Specific 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.[330] The standard direction was enunciated by the High Court in *Black v The Queen*:

> 'Members of the jury,
>
> I have been told that you have not been able to reach a verdict so far. I have the power to discharge you from giving a verdict but I should only do so if I am satisfied that there is no likelihood of genuine agreement being reached after further deliberation. Judges are usually reluctant to discharge a jury because experience has shown that juries can often agree if given more time to consider and discuss the issues. But if, after calmly considering the evidence and listening to the opinions of other jurors, you cannot honestly agree with the conclusions of other jurors, you must give effect to your own view of the evidence.
>
> Each of you has sworn or affirmed that you will give a true verdict according to the evidence. That is an important responsibility. You must fulfil it to the best of your ability. Each of you takes into the jury room your individual experience and wisdom and you are expected to judge the evidence fairly and impartially in that light. You also have a duty to listen carefully and objectively to the views of every one of your fellow jurors. You should calmly weigh up one another's opinions about the evidence and test them by discussion. Calm and objective discussion of the evidence often leads to a better understanding of the differences of opinion which you may have and may convince you that your original opinion was wrong. That is not, of course, to suggest that you can, consistently with your oath or affirmation as a juror, join in a verdict if you do not honestly and genuinely think that it is the correct one.
>
> Experience has shown that often juries are able to agree in the end, if they are given more time to consider and discuss the evidence. For that reason, judges usually request juries to reexamine the matters on which they are in disagreement and to make a further attempt to reach a verdict before they may be

329 See [6.19]–[6.22], [6.24]–[6.25] below.

330 *Black v The Queen* (1993) 179 CLR 44, 51 (Mason CJ, Brennan, Dawson and McHugh JJ).

> discharged. So, in the light of what I have already said, I ask you to retire again and see whether you can reach a verdict.'[331]

4.52 The direction set out in the Queensland Benchbook is in substantially the same terms.[332]

4.53 Until recently, in Queensland all jury verdicts were required to be unanimous. Amendments to the *Jury Act 1995* (Qld) in 2008, however, introduced majority verdicts (of 11 jurors out of a jury of 12, or of 10 jurors out of a jury of 11) in certain circumstances.[333]

4.54 The possibility of accepting a majority verdict has been noted as presenting difficulties for the Black direction.[334] It has been suggested in Victoria and New South Wales that the effect of the Black direction may be undermined if the possibility of taking a majority verdict is mentioned before the preconditions have been met.[335]

4.55 This issue has not yet been judicially considered in Queensland. The Queensland Benchbook, however, contains the following bench notes cautioning against premature mention of the possibility of taking a majority verdict:

> Black Direction
>
> Where the jury indicate that they are unable to reach a verdict and the preconditions for allowing a majority verdict direction under s 59A of the *Jury Act* are not or not yet satisfied, a direction as outlined by the High Court in *Black v The Queen* (1993) 179 CLR 44 at 51 should be given, keeping in mind of course that the jury must be free to deliberate without any pressure being brought to bear on them:
>
> …
>
> Where the jury indicates it is deadlocked before the time has come to consider a majority verdict, a trial judge in giving a Black direction, should not make reference to the circumstances being imminent for the taking of a majority verdict: see *R v VST* (2003) 6 VR 569; [2003] VSCA 35 at [38] and *RJS v R* (2007) 173 A Crim R 100; [2007] NSWCCA 241 at [22]–[23] where such reference was found to undermine the Black direction.
>
> In *Hanna v R* [2008] NSWCCA 173 the Court of Appeal left open for future consideration the question of whether the combining of a Black direction with a direction that a majority verdict could be accepted had the effect of undermining the Black direction so as to amount to error. Hoeben J, without expressing a final decision on the matter, was inclined to view that the effect of the Black direction was undermined by the giving of a simultaneous direction that a majority verdict could be returned. James J observed at [23] that a preferable course

331 (1993) 179 CLR 44, 51–2 (Mason CJ, Brennan, Dawson and McHugh JJ).

332 Queensland Courts, *Supreme and District Court Benchbook*, 'Jury Failure to Agree' [52] <http://www.courts.qld.gov.au/2265.htm> at 12 March 2009.

333 *Jury Act 1995* (Qld) ss 59, 59A. See [2.69]–[2.72] above.

334 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper No 4 (2008) [4.74].

335 *R v VST* (2003) 6 VR 569 [38] (Phillips JA); *RJS v The Queen* (2007) 173 A Crim R 100 [21]–[22] (Spigelman CJ); *Hanna v The Queen* [2008] NSWCCA 173 [23] (James J), [25] (Hoeben J).

for the trial judge to have adopted in that case was to have given a Black direction without referring to the possibility of a majority verdict so as to allow the jury further time in which to endeavour to reach a unanimous verdict. See also *RJS v R* [2007] NSWCCA where Spigelman CJ at [25] made similar observations to those of James J in respect of the circumstances that arose in *RJS*.[336]

EVIDENTIARY DIRECTIONS AND WARNINGS

4.56 A number of directions relating to evidence may be required in a criminal trial. Evidentiary directions may sometimes be given during the course of the trial.[337] They will also be given during the summing up. The review of certain evidentiary directions in this chapter is not intended to be exhaustive but to outline some of the issues that recur in relation to some of the more difficult or controversial directions.

4.57 Concerns have been expressed that some evidentiary directions are particularly complex and difficult for jurors to comprehend.[338] Perhaps the most controversial area of jury directions is that of warnings to be given, or not given, about the unreliability of certain evidence and the restricted use that a jury should make of it.

4.58 Both the common law and statute bear on this area and are not entirely consistent. For example, while the Criminal Code (Qld) limits the warnings that can be given in relation to the unreliability of uncorroborated evidence, the common law duty of a trial judge to ensure a fair trial may require, in the particular circumstances of a case, that an unreliable-evidence warning be given.[339]

4.59 The problem of potentially unreliable evidence can arise in any criminal case but difficulties and concerns have arisen, primarily in relation to the evidence of children and in sexual offence trials. Both are dealt with expressly in the Queensland Benchbook.[340]

4.60 The Queensland Benchbook also contains a number of other suggested evidentiary directions and warnings, which vary in detail and complexity. Examples of the range of evidentiary directions that may be required, including those given in sexual offence trials and in relation to children, are outlined later in this chapter.

336 Queensland Courts, *Supreme and District Court Benchbook*, 'Jury Failure to Agree' [52] <http://www.courts.qld.gov.au/2265.htm> at 12 March 2009.

337 See [4.27]–[4.29] above.

338 Eg Hon J Wood AO QC, 'Jury directions' (2007) 16 *Journal of Judicial Administration* 151.

339 See [4.80]–[4.86] below.

340 Queensland Courts, *Supreme and District Court Benchbook* [8]–[12], [62]–[66] <http://www.courts.qld.gov.au/2265.htm> at 12 March 2009.

Adverse inference warnings

When the defendant declines to testify

4.61 If the defendant has not given evidence, the common law provides that it will 'almost always be desirable' for the judge to give a warning that no adverse inference should be drawn from the defendant's silence.[341] The warning should convey, in the context of the presumption of innocence and the burden and standard of proof,[342] that the defendant's failure to give evidence:[343]

- is not evidence against the defendant;
- does not constitute an admission by the defendant;
- may not be used to fill gaps in the evidence; and
- does not strengthen the prosecution case or supply additional proof against the defendant.[344]

4.62 It may also be appropriate in 'rare and exceptional' circumstances for a judge to comment on the defendant's failure to give evidence.[345] This will occur only if the defendant has failed to offer an explanation of evidence by reference to additional facts that are peculiarly within the defendant's knowledge.[346] It will not be appropriate merely because the defendant has failed to contradict some aspect of the prosecution's case.[347] The Queensland Benchbook includes suggested directions dealing with both these issues.[348]

Consciousness of guilt warnings

Lies as evidence of guilt

4.63 Lies told by the defendant may bear on the defendant's credibility.[349] Lies, or other post-offence conduct such as fleeing from the scene of the alleged crime, may also go further and be used as evidence of the defendant's

341 *Azzopardi v The Queen* (2001) 205 CLR 50 [51].

342 Ibid [34]; *R v DAH* (2004) 150 A Crim R 14 [86] (White J).

343 *Azzopardi v The Queen* (2001) 205 CLR 50 [51]; *R v DAH* (2004) 150 A Crim R 14 [86] (White J).

344 Or, put another way, that the defendant's silence does not change or make any easier the prosecution's task: *R v Nicholson* [2004] QCA 393 [5]–[6] (de Jersey CJ), [34]–[36] (Jerrard JA).

345 *Azzopardi v The Queen* (2001) 205 CLR 50 [68].

346 Ibid [52], [68].

347 Ibid.

348 Queensland Courts, *Supreme and District Court Benchbook*, 'Summing-Up' [28A], [28B] <http://www.courts.qld.gov.au/2265.htm> at 12 March 2009.

349 A warning may need to be given if there is a danger the jury may misunderstand the significance of lies going only to credit: *Zoneff v The Queen* (2000) 200 CLR 234 [23]–[24] (Gleeson CJ, Gaudron, Gummow and Callinan JJ). See Queensland Courts, *Supreme and District Court Benchbook*, 'Lies Told by The Defendant (Going Only to Credit)' [39] <http://www.courts.qld.gov.au/2265.htm> at 12 March 2009.

'consciousness of guilt'. That is, a lie told by a defendant may amount to an implied admission of guilt.[350]

4.64 When lies are relied on as probative of the defendant's guilt, the common law requires a warning to be given to the jury so that the jury does not reason that, because the defendant lied, he or she must be guilty.[351]

4.65 The requirements of the warning were set out in the High Court's decision in *Edwards v The Queen*:

> [I]n any case where a lie is relied upon to prove guilt, the lie should be precisely identified, as should the circumstances and events that are said to indicate that it constitutes an admission against interest. And the jury should be instructed that they may take the lie into account only if they are satisfied, having regard to those circumstances and events, that it reveals a knowledge of the offence or some aspect of it and that it was told because the accused knew that the truth of the matter about which he lied would implicate him in the offence, or, as was said in *Reg v Lucas (Ruth)*, because of 'a realisation of guilt and a fear of the truth'.
>
> Moreover, the jury should be instructed that there may be reasons for the telling of a lie apart from the realization of guilt. A lie may be told out of panic, to escape an unjust accusation, to protect some other person or to avoid a consequence extraneous to the offence. The jury should be told that, if they accept that a reason of that kind is the explanation for the lie, they cannot regard it as an admission.[352] (notes omitted)

4.66 The Edwards direction is in the following terms in the Queensland Benchbook:

> **Lies Told By The Defendant**
> **(Consciousness of Guilt)**
>
> **The prosecution relies on what it says are lies told by the defendant as showing that he is guilty of the offence.[353]**
>
> [Here identify precisely the lies relied upon by the prosecution together with the basis on which they are said to be capable of implicating the defendant in the commission of the offence charged and not of some lesser offence[354]].[355]

350 *Edwards v The Queen* (1993) 178 CLR 193, 208 (Deane, Dawson and Gaudron JJ).

351 For example, *Zoneff v The Queen* (2000) 200 CLR 234 [58].

352 (1993) 178 CLR 193, 210–11 (Deane, Dawson and Gaudron JJ).

353 As a general rule an *Edwards* (1993) 178 CLR 193 direction should only be given if the prosecution contends that a lie is evidence of guilt, in the sense that it was told because 'he accused knew that the truth would implicate him in (the commission) of the offence': *Edwards*, 211, 363, as explained in *Zoneff* (2000) 200 CLR 234 [17]. Courts of Appeal have warned of the need for circumspection and care in the use of this direction: *Brennan* [1999] 2 Qd 529, 531; *Walton and Harman* [2001] QCA 309 [61]. See *Chang* (2003) 7 VR 236 as to the circumstances whether an Edwards direction should be given concerning post-offence conduct, particularly flight and concealment, where that conduct is relied upon by the prosecution as evidence of guilt or is likely to be used by the jury as such.

354 *Richens* [1993] 4 All ER 877, 886.

355 *Osland* (1998) 197 CLR 316, *Zoneff* [17].

Before you can use this evidence against the defendant, you must be satisfied of a number of matters. Unless you are satisfied of all these matters, then you cannot use the evidence against the defendant.

First, you must be satisfied that the defendant has told a deliberate untruth. There is a difference between the mere rejection of a person's account of events and a finding that the person has lied. In many cases, where there appears to be a departure from the truth, it may not be possible to say that a deliberate lie has been told. The defendant may have been confused; or there may be other reasons which would prevent you from finding that he has deliberately told an untruth.

Secondly, you must be satisfied that the lie is concerned with some circumstance or event connected with the offence. You can only use a lie against the defendant if you are satisfied, having regard to those circumstances and events, that it reveals a knowledge of the offence or some aspect of it.

Thirdly, you must be satisfied that the lie was told because the defendant knew that the truth of the matter would implicate him in the commission of the offence [and not of some lesser offence].[356] The defendant must be lying because he is conscious that the truth could convict him. There may be reasons for the lie apart from a realisation of guilt. People sometimes have an innocent explanation for lying.

(The judge should direct attention to any innocent explanation that may account for the telling of a lie. For example; in an attempt to bolster up a just cause, or out of shame, or out of a wish to conceal embarrassing or disgraceful behaviour. A lie may be told out of panic, or confusion, or to escape an unjust accusation; to protect some other person or to avoid a consequence extraneous to the offence.) [If a lesser offence is open or charged then the judge should tell the jury that the lie cannot be used as consciousness of guilt of the offence if the lie was told to conceal involvement in the lesser offence.][357]

If you accept that a reason of this kind is the explanation for the lie, then you cannot use it against the defendant. You can only use it against the defendant if you are satisfied that he lied out of a realisation that the truth would implicate him in the offence.

[If the lie is relied upon to materially support (corroborate) the evidence of a particular witness, e.g. an accomplice, a prison informant etc., the jury should be directed that the statement must be clearly shown to be a lie by evidence other than that of the evidence to be corroborated.[358] In such an eventuality the judge should precisely identify the evidence (independent of the witness whose evidence is said to be supported by the lie) which shows that the defendant has lied.]

---

356 See *Meko v R* (2004) 146 A Crim R 131 the WA Court of Criminal Appeal for a discussion on the possible directions where the lie reveals confessions of guilt in respect of one only of the number of alternative charges. See also *R v MAX* [2007] QCA 267 per Keane JA at [48], [50] and comments of Williams JA at [31] 'where, as here, murder is the offence charged and manslaughter is available as an alternative verdict, it is incumbent upon the trial judge, if a Edwards direction is given, to indicate the element of the offence that is said to be admitted by the telling of the lie in question. If that element is merely the implication of the accused in the killing then the jury should be instructed that the admission is so limited. If the admission is said to establish the element of intent then the jury should be so instructed and they should be warned that they ought not simply infer from the fact that the accused was implicated in the killing that he had the requisite intention.'

357 *Box & Martin* [2001] QCA 272 [8]; *Wehlow* [2001] QCA 193 [5], [33].

358 *Edwards* 211, 363,

> [If the lie relied upon by the prosecution is the only evidence against the defendant, or is an indispensable link in a chain of evidence necessary to prove guilt then the following direction must be given.][359]
>
> **Finally, in this case the alleged lie is the only evidence against the defendant [or is a critical fact in the prosecution's circumstantial case against him]. Before you can use the lie against the defendant, you must be satisfied beyond reasonable doubt not only that he lied but also that he lied because he realised that the truth would implicate him in the offence.**[360]
> (notes and formatting as in original)

4.67 The Edwards direction has been criticised as unnecessarily complex and technical. The VLRC has suggested that the requirements of the direction risk 'smothering the warning in the surrounding contextual information' causing confusion for juries.[361] Difficulties may also arise for judges in deciding whether to give an Edwards direction or a more general warning about lies going only to credit.[362] As noted in chapter 5, the Edwards direction has recurred as a ground of appeal in recent Queensland cases.[363]

Propensity warnings

4.68 Propensity or similar fact evidence is admissible in a criminal trial in limited circumstances and only if it is relevant to a fact in issue.[364] Similar fact evidence may be relevant, for example, to show the identity of the defendant in relation to the charged acts, or to establish the defendant's modus operandi.[365]

4.69 Such evidence, however, carries a risk of prejudice against the defendant if a jury unfairly reasons that the defendant is guilty of the offences with which he or she is charged because he or she committed other similar acts. The judge may therefore need to instruct the jury about the legitimate use to which the evidence may be put.[366] As Kirby J explained in *BRS v The Queen*:

> The basis in legal policy for judicial directions to juries on the differential use of evidence admitted in a trial is the judge's obligation to assist the jury in the performance of their task. Without assistance, there could be a risk that a jury will act upon prejudice towards, or revulsion against, the accused. They might fall into the trap of propensity reasoning, ie concluding that because the

---

359 *Edwards* 210, 362.

360 Queensland Courts, *Supreme and District Court Benchbook*, 'Lies Told By The Defendant (Consciousness of Guilt)' [38.1]–[38.3] <http://www.courts.qld.gov.au/2265.htm> at 12 March 2009. The Benchbook also contains a suggested direction dealing with flight as demonstrating consciousness of guilt: Queensland Courts, *Supreme and District Court Benchbook*, 'Flight as demonstrating consciousness of guilt' [48] <http://www.courts.qld.gov.au/2265.htm> at 12 March 2009.

361 Victorian Law Reform Commission, *Jury Directions — a closer look*, Background Paper (2008) 7.

362 Eg CR Williams, 'Lies as evidence' (2005) 26 *Australian Bar Review* 313.

363 See [5.50] below.

364 Such evidence is admissible only where there is no reasonable view of it consistent with the innocence of the defendant: *Pfennig v The Queen* (1995) 182 CLR 461. In Queensland, also see Criminal Code (Qld) ss 132A, 132B.

365 See generally, LexisNexis Australia, *Cross on Evidence*, 'Similar Fact Evidence' [21040]–[21075] (at February 2009). Also see, eg, *Gipp v The Queen* (1998) 194 CLR 106 [9]–[10] (Gaudron J).

366 *BRS v The Queen* (1997) 191 CLR 275, 329; *Gipp v The Queen* (1998) 194 CLR 106 [10] (Gaudron J).

> accused did another act, he or she must be guilty of the acts charged. They might divert their attention from considering whether the prosecution has proved the crimes charged, as distinct from different acts which are not before the jury for trial.
>
> The judge should not invite the jury to act irrationally for such invitations will be ignored. In a limited number of cases, propensity reasoning will be permitted. But otherwise, the judge must assist the jury in the limited use to which the evidence may be put since the jury, uninstructed, are not likely to be aware of such considerations and of the need for particular care.[367] (notes omitted)

4.70 The warning given will therefore depend on the purpose for which the evidence is admitted and can be used. Suggested directions dealing with similar fact evidence are included in the Queensland Benchbook. The Benchbook includes, for example, the following direction about evidence of the defendant's modus operandi:

> B. Where the Crown seeks to establish the defendant's modus operandi
>
> **First of all you would have to accept the evidence of the witnesses as to what happened [on the other occasions]. I will go through that evidence and what the Crown and the defence said about it shortly. If you don't accept that evidence you should disregard it entirely.**
>
> **If you do accept that evidence, it can still be of no use to you unless you can be satisfied that there is so strong a pattern, that the conduct on each occasion is so strikingly similar, that as a matter of common sense, and standing back, looking objectively at it, the only reasonable inference is that the same sequence of events occurred on this occasion. If you are not satisfied of that, you should put the evidence out of your mind. It would be entirely irrelevant to this case and it would be wrong to use it against the defendant. You certainly must not proceed on the basis that if you thought he'd [committed the other offences] he was generally the sort of person who might, or even would, commit [this offence].**
>
> Similar acts may of course be later than the act the subject of a charge, so the directions would require modification if that were the case.[368] (formatting as in original)

4.71 Warnings against propensity reasoning have been criticised, however, as being somewhat over-intellectualised in that 'the jury is being told not to reason in the way that the evidence is most probative'.[369]

4.72 Moreover, any attempt to instruct a jury to use a given piece of evidence for a limited use only is asking it to do something that lawyers find hard as it is an inherently difficult and artificial intellectual exercise.[370]

---

367 *BRS v The Queen* (1997) 191 CLR 275, 326–7.

368 Queensland Courts, *Supreme and District Court Benchbook*, 'Similar Fact Evidence' [50] <http://www.courts.qld.gov.au/2265.htm> at 12 March 2009.

369 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper No 6 (2008) [3.136].

370 See, for example, JRS Forbes, *Evidence Law in Queensland* (7th ed, 2008) [15.69].

Character evidence directions

4.73 At common law, the defendant is entitled to adduce evidence of good character to disprove guilt on the basis that, being of good character, it is unlikely that he or she committed the offence charged. If the defendant has given evidence, it may also be used in assessing his or her credibility.[371]

4.74 While a direction as to how the jury may use good character evidence may be desirable, it is not necessary in every case. The judge retains discretion whether to give a direction having regard to the probative significance of the evidence in relation to the defendant's propensity to commit the offence charged and the credibility of the defendant.[372]

4.75 The Queensland Benchbook contains the following suggested direction dealing with good character evidence:

> **Good Character/Bad Character**
>
> Suggested direction where evidence that defendant has no previous convictions/ has a general reputation for honesty/ has a general reputation for not being violent.
>
> [Refer to evidence] **This evidence is part of the evidence to be taken into account in deciding whether you are satisfied beyond reasonable doubt of his guilt. The influence that this evidence has on you is a matter for you. It is relevant in two respects.**
>
> **The first is in considering whether a person with the kind of reputation sworn to by the witnesses would do the acts alleged by the prosecution.**
>
> **The second is in considering the credibility of the defendant's evidence [and/or any exculpatory statements made out of court which are in evidence.] When considering his evidence, do you think that his general reputation adds weight to it?**
>
> **Evidence of general reputation, like any other evidence, is simply part of the framework within which you reach your decision. You consider it in the context of the other evidence. How much weight you give it, in that context and using it for the purposes I have told you about, is a matter for you.**[373] (formatting as in original)

4.76 The position in relation to bad character evidence differs. Under section 15 of the *Evidence Act 1977* (Qld), the prosecution may cross-examine the defendant as to bad character in four circumstances:

- if the defendant has sought to establish his or her own good character or has impugned the character of the prosecutor, a prosecution witness or any other person charged in the proceeding;

---

371 *Attwood v The Queen* (1960) 102 CLR 353, 359; *Melbourne v The Queen* (1999) 198 CLR 1 [156] (Hayne J).

372 *Melbourne v The Queen* (1999) 198 CLR 1; *R v Hinschen* [2008] QCA 145 [68] (Fraser JA).

373 Queensland Courts, *Supreme and District Court Benchbook*, 'Good Character/Bad Character' [41]] <http://www.courts.qld.gov.au/2265.htm> at 12 March 2009.

- if the defendant has given evidence against another person charged in the proceeding;
- if the matter is probative of guilt; or
- if the questions are directed to showing that another defendant is not guilty of the offence charged.[374]

4.77 In the first two situations, the evidence of bad character will go to credit only; in the latter two, however, the evidence will be relevant to specific issues in the case. Directions to the jury will therefore depend on the purpose for which the evidence has been permitted. If the evidence goes to credit only, the jury should be clearly directed about the limited use which it may make of the evidence.[375]

4.78 Suggested directions dealing with each of these scenarios are included in the Queensland Benchbook.[376] For example, the following direction is suggested when bad character evidence is led in rebuttal of evidence of good character adduced by the defendant:

> **Evidence has been given that defendant has convictions for .....**
>
> **That fact must not be used by you to say that because he has committed offences before, therefore he must be guilty of the present offence.**
>
> **Its use is more limited than that. It is this. The manner in which the defence has been conducted has involved a challenge to the truthfulness of prosecution witnesses. In evaluating the defendant's evidence and determining what impact it has on your assessment of the truthfulness of the prosecution witnesses, you are entitled to take into consideration that the defendant is a person who has convictions for offences of [.....].**
>
> **A finding that you reject his evidence and accept that of the prosecution witnesses may lead you to find him guilty if the challenged evidence proves or helps to prove the elements of the offence. But you must come to any finding of guilt by that process, not by assuming that because of his criminal record he must have committed the offence for which he is now on trial.**[377] (formatting as in original)

4.79 The efficacy of expecting juries to apply the 'esoteric distinction' between evidence on the issues and evidence as to credit has, however, been queried.[378]

---

374 Except where the cross-examination is made where the defendant has given evidence against another person charged in the proceeding, when leave is required from the court: *Evidence Act 1977* (Qld) s 15(3).

375 *Donnini v The Queen* (1972) 128 CLR 114, 123 (Barwick CJ).

376 Queensland Courts, *Supreme and District Court Benchbook*, 'Bad Character/Previous Convictions' [42.2]–[42.6] <http://www.courts.qld.gov.au/2265.htm> at 12 March 2009.

377 Queensland Courts, *Supreme and District Court Benchbook*, 'Bad Character/Previous Convictions' [42.2]–[42.3] <http://www.courts.qld.gov.au/2265.htm> at 12 March 2009.

378 JRS Forbes, *Evidence Law in Queensland* (7th ed, 2008) [15.69].

Unreliable evidence warnings

4.80 To ensure a fair trial[379] and as part of instructing the jury on the law that they need in order to decide the issues in the trial,[380] the judge may need to warn the jury 'about how they should *not* reason or about particular care that must be shown before accepting certain kinds of evidence'.[381] Whether a warning of this sort is required depends on the circumstances of the case and whether it is necessary to avoid a miscarriage of justice.[382] As Brennan J explained in *Carr v The Queen*:

> In the majority of cases the assessment of the evidence can be left to the jury's experience unaided by judicial warnings but there are some occasions when a warning is needed. A warning is needed when there is a factor legitimately capable of affecting the assessment of evidence of which the judge has special knowledge, experience or awareness and there is a perceptible risk that, unless a warning about that factor is given, the jury will attribute to an important piece of evidence a significance or weight which they might not attribute to it if the warning were given.[383]

4.81 While it is not possible, therefore, to define *a priori* the cases in which a warning is needed, the common law has historically recognised certain categories of evidence which, it was said, 'judicial experience (actual or inherited) has shown to be unsafe to act upon so frequently that a warning has become mandatory'.[384] In particular, warnings were required in respect of the uncorroborated evidence of certain classes of reputedly unreliable witnesses such as accomplices, children, and sexual offence complainants.[385]

4.82 Legislation has sought to abolish these categories. In Queensland, section 632 of the Criminal Code (Qld) provides that a judge is not required to warn the jury that it is unsafe to convict the defendant on the uncorroborated evidence of one witness.[386] It also specifically provides that the judge 'must not warn or suggest in any way to the jury that the law regards any class of persons

---

379 *RPS v The Queen* (2000) 199 CLR 620 [41]; *Zoneff v The Queen* (2000) 200 CLR 234 [55] (Kirby J).

380 *Alford v Magee* (1952) 85 CLR 437, 466.

381 *RPS v The Queen* (2000) 199 CLR 620 [41].

382 *Bromley v The Queen* (1986) 161 CLR 315, 325 (Brennan J).

383 *Carr v The Queen* (1988) 165 CLR 314, 325. See also, eg, *FGC v Western Australia* [2008] WASCA 47 [3] (Wheeler JA).

384 *Carr v The Queen* (1988) 165 CLR 314, 325 (Brennan J). Also see *Jenkins v The Queen* (2004) 211 ALR 116 [25].

385 *Bromley v The Queen* (1986) 161 CLR 315, 323 (Brennan J). A fourth category of 'persons of admittedly bad character' had also been recognised. See generally, LexisNexis Australia, *Carter's Criminal Law of Queensland* [s 632.25] (at 12 March 2009). In Queensland, the Criminal Code (Qld) also specifically required a warning to be given about uncorroborated accomplice evidence: Criminal Code (Qld) s 632, reprint 1B.

386 Criminal Code (Qld) s 632(2), as inserted by *Criminal Law Amendment Act 1997* (Qld) s 113. The amending legislation repealed the previous s 632, which required a warning in relation to accomplice evidence, and replaced it with a new provision. In the other jurisdictions, see *Evidence Act 1995* (Cth) s 164; *Evidence Act 1995* (NSW) s 164; *Evidence Act 1929* (SA) s 12A(1); *Evidence Act 2001* (Tas) s 164(3); *Evidence Act 1906* (WA) s 50.

as unreliable witnesses'[387] but may otherwise comment on the evidence if it is in the interests of justice to do so.[388] Section 632 provides:

> **632 Corroboration**
>
> (1) A person may be convicted of an offence on the uncorroborated testimony of 1 witness, unless this Code expressly provides to the contrary.
>
> *Editor's note—*
>
> See sections 52 (Sedition), 125 (Evidence on charge of perjury) and 195 (Evidence).
>
> (2) On the trial of a person for an offence, a judge is not required by any rule of law or practice to warn the jury that it is unsafe to convict the accused on the uncorroborated testimony of 1 witness.
>
> (3) Subsection (1) or (2) does not prevent a judge from making a comment on the evidence given in the trial that it is appropriate to make in the interests of justice, but the judge must not warn or suggest in any way to the jury that the law regards any class of persons as unreliable witnesses.

4.83 The effect of a similar provision in Western Australia, directed to the uncorroborated evidence of sexual offence complainants,[389] was considered by the High Court in *Longman v The Queen*.[390] The Court held that the provision abolished only the requirement to warn of the general danger of acting on the uncorroborated evidence of alleged victims of sexual offences as a class.[391] The provision did not affect the responsibility to give a warning whenever necessary 'to avoid a perceptible risk of miscarriage of justice arising from the circumstances of the case'.[392] There may be matters personal to the uncorroborated witness or other circumstances that give rise to the need for a direction in the particular case.[393]

---

387 In the other jurisdictions, see *Evidence (Miscellaneous Provisions) Act 1991* (ACT) ss 69, 70; *Evidence Act 1995* (NSW) s 165A(1)(a), (b); *Evidence Act* (NT) s 9C; *Sexual Offences (Evidence and Procedure) Act* (NT) s 4(5)(a); *Evidence Act 2001* (Tas) s 164(4); *Crimes Act 1958* (Vic) s 61(1)(a); *Evidence Act 1906* (WA) s 106D.

388 Criminal Code (Qld) s 632(3), as inserted by *Criminal Law Amendment Act 1997* (Qld) s 113 and amended by *Criminal Law Amendment Act 2000* (Qld) s 31.

389 *Evidence Act 1906* (WA) s 36BE(1). Now see s 50.

390 (1989) 168 CLR 79.

391 Ibid 86–7 (Brennan, Dawson and Toohey JJ), 95 (Deane J), 104 (McHugh J).

392 *Longman v The Queen* (1989) 168 CLR 79, 86 (Brennan, Dawson and Toohey JJ); *Bromley v The Queen* (1986) 161 CLR 315, 325 (Brennan J). Such warnings are sometimes referred to as 'Longman warnings': eg, *FGC v Western Australia* [2008] WASCA 47 [1]–[2] (Wheeler JA). This is distinguished from the specific direction required to be given about the forensic disadvantage to the defendant of the complainant's delay in making the complaint which was also mandated in *Longman v The Queen* (1989) 168 CLR 79 and which, consequently, is commonly referred to as the 'Longman direction'. See [4.104] below.

393 *Robinson v The Queen* (1999) 197 CLR 162 [19], [21].

4.84 The High Court made a similar finding in *Robinson v The Queen* in respect of section 632 of the Criminal Code (Qld).[394]

4.85 The position in Queensland was recently summarised by Keane JA in *R v Hayes*:[395]

> The enactment of the present s 632 of the *Criminal Code* in 1997 involved a decisive legislative rejection of judicial stereotyping of witnesses because of their membership of a particular class. It meant that it was no longer proper for trial judges to warn juries against the reliability of particular classes of witnesses. …
>
> …
>
> There are, of course, cases where the circumstances are such as to create a risk of miscarriage of justice perceptible as to the trial judge for reasons other than an assumption about the unreliability of a witness in a particular category.[396]

4.86 If a warning is required on this basis, it should be given with reference to the particular factors giving rise to the perceived risk of miscarriage of justice.[397] As was explained, for example, by Atkinson J in *R v A*:

> The prohibition found in s632(3) does not relieve a judge from the duty to comment on the evidence as necessary or appropriate in the interests of justice but the judge should be careful to ensure that in doing so he or she does not suggest that any class of witness is unreliable.[398]

4.87 Difficulties with the requirement to give an unreliable evidence warning have been noted. For example, Wheeler JA of the Western Australian Court of Appeal has made the following observations:

> While the principle can be readily stated, it cannot be so readily applied. It is a principle which gives rise to difficulty and confusion, not only for trial judges, but also for courts of appeal. A search of a database of Australian decisions in the 18 years since ***Longman*** was decided throws up hundreds of cases grappling with the question of whether a warning was or was not required in the light of particular circumstances. Trial judges are, of course, generally alive to the need to give a warning where it is necessary to avoid a perceptible risk of a miscarriage of justice, and are anxious to ensure that no risk of a miscarriage of justice

394 Ibid [20]. This was prior to the amendment made to s 632(3) substituting 'persons' for 'complainants'. See n 406 below.

395 Also see *R v Tichowitsch* [2007] 2 Qd R 462 [61]–[74] (Keane JA); *R v A* [2000] QCA 520 [142]–[143] (Atkinson J); *Tully v The Queen* (2006) 230 CLR 234 [89], [92] (Hayne J).

396 [2008] QCA 371 [91]–[94]. Also see *R v Tichowitsch* [2007] 2 Qd R 462 [72] (Keane JA), citing *Tully v The Queen* (2006) 230 CLR 234:

> The need for a judicial warning that it would be unsafe to convict the accused had to be found in the perception of a risk of a miscarriage of justice where the risk arose for reasons, apparent to the judge but not the jury, beyond the mere fact that the prosecution case depended on the uncorroborated evidence of a child complainant.

397 *Robinson v The Queen* (1999) 197 CLR 162 [26]. In that case, the factors that gave rise to the need for a warning included the witness's age, the witness's apparent suggestibility, and the inconsistency in the witness's evidence together with the uncorroborated nature of the witness's evidence: [25]–[26].

398 [2000] QCA 520 [143].

> arises in the cases over which they preside, so that the cases do not as a rule stem from any overlooking of relevant principle. The difficulty is not one of principle, but of fact (see, for example, the differing views expressed in ***Tully v The Queen*** [2006] HCA 56; (2006) 81 ALJR 391 [57], [87] and [91], [132], [151], [186]).
>
> …
>
> In the case of ***Winmar***, this court considered, in relation to identification evidence, the problem of identifying aspects of evidence about which courts have special experience or expertise. The reasons in that case note that there is a danger, when judges attempt to assist juries by warning them about particular aspects of the evidence, that judges themselves may be basing their views upon their own misapprehensions of 'general' experience, or of human psychology, or of the state of scientific understanding. That danger is increased by the tendency, in appeals of this kind, for counsel to put forward a 'grab bag' of 'factors' which may bear upon the reliability of the evidence, without any coherent explanation of their significance, in an attempt to persuade either the trial judge, or an appellate court, that these are factors which common sense, or universal judicial experience, demonstrate must always affect reliability. … It is an approach which, if successful, creates unnecessary and undesirable uncertainty in the conduct of criminal trials.[399]

4.88 The difficulty of proposing or relying on standard unreliable evidence directions is apparent from those observations. The duty to tailor the summing up to the needs of the particular case is such that no particular formula is required so long as the warning is clear enough.[400]

Accomplice evidence

4.89 At common law, the judge was required to warn the jury that it is dangerous to convict the defendant on the evidence of an accomplice unless it is corroborated.[401] The rationale for the warning was explained by the High Court in *Jenkins v The Queen*:

> The principal source of unreliability, although it may be compounded by the circumstances of a particular case, is what is regarded as the natural tendency of an accomplice to minimise the accomplice's role in a criminal episode, and to exaggerate the role of others, including the accused. Accomplices are regarded by the law as a notoriously unreliable class of witness, having a special lack of objectivity. The warning to the jury is for the protection of the accused. The theory is that fairness of the trial process requires it. It is a warning that is to be related to evidence upon which the jury may convict the accused. The reference to danger is to be accompanied by a reference to a need to look for

399 *FGC v Western Australia* [2008] WASCA 47 [4]–[6].

400 See, eg, *R v Stewart* [1993] 2 Qd R 322, 323, 324.

401 See [4.81] above. See *Davies v DPP* [1954] AC 378, 399 in relation to the requirement to give a warning when an accomplice has given evidence for the prosecution. Also see former s 632 of the Criminal Code (Qld), reprint 1B which required a corroboration warning for accomplice evidence and *R v CBR* [1992] 1 Qd R 637, 642; *R v Button* [1992] 1 Qd R 552. However, as noted in *Jenkins v The Queen* (2004) 211 ALR 116 [32], the common law rule about accomplice warnings was 'not so mechanical as to call for a warning in any case' but required 'a consideration of the issues as they have emerged from the way in which the case has been conducted'.

> corroboration. The hypothesis is that the evidence in question is in contest, and that it inculpates the accused.[402]

4.90 As discussed above, the common law position has been modified by section 632 of the Criminal Code (Qld). Thus, only if it is necessary in the interests of justice[403] or to avoid a perceptible risk of miscarriage of justice[404] should the judge should warn the jury about the need to scrutinise the evidence of an accomplice witness carefully or to approach the assessment of such evidence with caution.[405] If an accomplice warning is given, it 'must be given in a way that does not warn or suggest that the law regards any class of persons as unreliable'.[406]

4.91 Prior to the statutory modification of the requirement to give a corroboration warning, the warning was to be accompanied by an explanation of the reason for the warning and why it might be dangerous to rely on the uncorroborated evidence of an accomplice.[407] A difficulty in giving such directions now is the extent to which they may suggest, contrary to section 632(3) of the Criminal Code, that the law regards accomplices as an unreliable class of witnesses; as a result, the wording of any such warning must now be carefully considered. The model directions dealing with accomplice evidence in the Queensland Benchbook are in these terms:

> **You should approach your assessment of the evidence of** [the witness] **with caution. A person who has been involved in an offence may have reasons of self-interest to lie or to falsely implicate another in the commission of the offence. *The evidence of such a person is of its nature potentially unreliable, and it is therefore necessary for you to scrutinise the evidence carefully before acting on it.*** (The witness)**, having been involved in the** [offence] **is likely to be a person of bad character. For this reason, his evidence may be unreliable and untrustworthy. Moreover** [the witness] **may have sought to justify his conduct, or at least to minimise his involvement, by shifting the blame, wholly or partly, to others.** (italics added)
>
> **Perhaps** [the witness] **has sought to implicate the defendant and to give untruthful evidence because he apprehends that he has something to gain by doing so. [He has pleaded guilty and indicated that he is prepared to give evidence against his co-accused, the defendant in this case. You may consider that he has an expectation of being dealt with more leniently as a result of his co-operation with the authorities.** [To be adapted if

402 (2004) 211 ALR 116 [30].

403 Criminal Code (Qld) s 632(3).

404 *Longman v The Queen* (1989) 168 CLR 79, 86; *Robinson v The Queen* (1999) 197 CLR 162, 168–9.

405 For example, *R v LX* [2007] QCA 450 [14]; *R v Willett* (2005) 156 A Crim R 214 [10]–[13]; *R v Pearl* [2005] QCA 237 [12]; *R v Lowe* [2004] QCA 398 [3]. See [7.66], [8.29]–[8.32] below in relation to the use of these expressions.

406 *R v LX* [2007] QCA 450 [26] (McMurdo P); *Criminal Code* (Qld) s 632(3). Prior to amendments made in 2000, the proviso in s 632(3) of the Criminal Code (Qld) applied only in relation to 'any class of complainants' and so did not apply in the case of accomplices. This difficulty was noted in *Robinson v The Queen* (1999) 197 CLR 162 [22] and in 2000 the section was amended to refer to 'any class of persons' thus encompassing accomplices: *Criminal Law Amendment Act 2000* (Qld) s 31. As to the judge's discretion to give an accomplice warning under s 632 prior to the 2000 amendment, see *R v Rhodes* [1999] QCA 55 [34] (McMurdo P).

407 *R v Button* [1992] 1 Qd R 552.

> witness has been sentenced pursuant to s 13A of the *Penalties and Sentences Act 1992*].
>
> **Whilst it is possible to identify some reasons why he may have for giving false evidence, there may be other reasons for giving false evidence which are known only to him.**
>
> (The witness's) **evidence, if not truthful, has an inherent danger. If it is false in implicating the defendant, it will nevertheless have a seeming plausibility about it, because he will have familiarity with at least some of the details of the crime.**
>
> …
>
> **Other matters which you may think bear upon the reliability of the evidence of** (the witness) **are** (briefly describe evidence).
>
> **In view of the matters I have touched upon, it would be dangerous to convict the defendant on the evidence of** (the witness) **unless you find that his evidence is supported in a material way by independent evidence implicating the defendant in the offence.**[408] (formatting as in original)

4.92 Difficulties with the giving of such directions might be overlooked, however, given that where an accomplice gives evidence for the prosecution inculpating the defendant, an accomplice warning is unlikely to be challenged by the defendant on appeal.[409]

4.93 Particular dangers also attend the giving of a warning when the accomplice is a co-defendant in the trial, particularly when each co-defendant seeks to incriminate the other. To avoid the risk of undermining the presumption of innocence,[410] an accomplice warning in respect of a co-defendant must make it clear that the warning relates only to the use of the evidence as against the co-defendant and that it has no application to the accomplice's evidence in his or her own defence.[411] Such directions may tend to confuse, rather than enlighten, the jury, as Brennan J pointed out in *Webb v The Queen*:

> Confusion would be especially likely when the same part of an accused witness' testimony exculpates the accused witness and inculpates the co-accused. The jury would then be directed to treat that evidence in one way in deciding the guilt or innocence of the accused witness and in another way when deciding the guilt or innocence of the co-accused inculpated by the evidence.[412]

---

408 Queensland Courts, *Supreme and District Court Benchbook*, 'Accomplices' [37] <http://www.courts.qld.gov.au/2265.htm> at 12 March 2009. The suggested directions also include bench notes referring to s 632 of the Criminal Code (Qld) and to the decisions in *Longman v The Queen* (1989) 168 CLR 79 and *Robinson v The Queen* (1999) 197 CLR 162.

409 See, for example, the comments made in *R v Lowe* [2004] QCA 398 [4]; *R v Henning* (Unreported, New South Wales Court of Criminal Appeal, Gleeson CJ, Campbell and Mathews JJ, 11 May 1990).

410 *Robinson v The Queen* (1991) 180 CLR 531; *Webb v The Queen* (1994) 181 CLR 41.

411 *Webb v The Queen* (1994) 181 CLR 41; *R v Lowe* [2004] QCA 398 [14], [20].

412 (1994) 181 CLR 41, 65.

4.94 The potential self-interest of each defendant is also likely to be 'blindingly obvious' to the jury, making an accomplice direction 'otiose'.[413] Trial judges must therefore exercise considerable care in deciding whether a warning should be given[414] and are to be given 'considerable latitude' in their approach.[415]

4.95 The suggested accomplice warning in the case of a co-defendant in the Queensland Benchbook is in these terms:

> **Evidence of Defendant in Respect of a Co-Defendant**
>
> **What the defendant** (insert name) **has said while giving evidence may be used not only for or against him but also for or against the other defendant(**s**).**[416]
>
> **However, to the extent to which that evidence implicates** (name of other(s)) **in the** (describe offences), **scrutinize it carefully. There is a danger that, in implicating** (name of other(s))**,** (defendant witness) **may have been concerned to shift the blame.**[417]
>
> **This warning is restricted to those parts of the evidence of** (defendant witness) **which inculpate** (name of other(s)) **in the offence: it does not apply to the evidence as it relates to** (name of witness)**'s own case.**
>
> *Warning: do not give the direction in the second paragraph without giving the direction in the third.*[418] (notes and formatting as in original)

Prisoner informer evidence

4.96 As with accomplices, it is generally recognised that the evidence of a prisoner informer is attended by a risk of unreliability.[419] In *Pollitt v The Queen*, the High Court considered that, because such evidence will be potentially unreliable in all but exceptional cases, it will ordinarily be necessary to warn the jury that it is dangerous to act on the evidence unless the informer's account is substantially confirmed by independent evidence:

---

413 *R v Pearl* [2005] QCA 237 [16] (de Jersey CJ).

414 *R v Lowe* [2004] QCA 398 [20].

415 *R v Henning* (Unreported, New South Wales Court of Criminal Appeal, Gleeson CJ, Campbell and Mathews JJ, 11 May 1990), quoted with approval in *Webb v The Queen* (1994) 181 CLR 41. See also *R v Pearl* [2005] QCA 237 [15] (de Jersey CJ).

416 *Nessel* (1980) 5 A Crim R 374, 383.

417 There are difficulties in formulating a direction where an accomplice testifies in the defence case. It is contrary to *Robinson* (1999) 180 CLR 531 to direct that a defendant's evidence may be subjected to particular scrutiny because of his interest in the outcome. To do so is to undermine the presumption of innocence. Accordingly, when a defendant who gives evidence implicates a co-defendant, the nature and extent of an accomplice warning, if any, cannot be answered without reference to the circumstances of the particular case: *Webb & Hay* (1994) 181 CLR 41, 65-66, 92-95. But if some warning is to be given, the judge must not permit the jury to believe that it might attach to the defendant's evidence in his own case: *Webb & Hay*, 165. See also *R v Skaf, Ghanem, and Hajeid* [2004] NSWCA 74 at [159]–[168]; *R v Johnston* [2004] NSWCA 58 at [141]; *R v Lewis & Baira* [1996] QCA 405; *R & G v R* (1995) 63 SASR 417; and *R v Rezk* [1994] 2 Qd R 321 at 330.

418 Queensland Courts, *Supreme and District Court Benchbook*, 'Evidence of Defendant in Respect of a Co-Defendant' [26] <http://www.courts.qld.gov.au/2265.htm> at 12 March 2009.

419 See, for example, *R v Carroll* [2001] QCA 394 [30].

> There is no rule of law or practice identifying evidence from a source of that kind as evidence which must be corroborated or as evidence upon which it is dangerous to convict without corroboration. However, it is always the duty of a trial judge to warn of the danger of convicting on evidence which is potentially unreliable and it would only be in an exceptional case that the evidence of a prison informer would not fall into that category. Thus, in all but the exceptional case, it is necessary for a trial judge to warn of the danger of convicting on evidence of that kind unless corroborated by other evidence connecting or tending to connect the accused with the offence charged.[420] (note omitted)

4.97 As McHugh J explained in that case:

> Many years of experience in hearing prisoners give evidence for and against accused persons has alerted the judiciary to the unreliability of the evidence of serving prisoners. But it is by no means certain that every juror fully appreciates that unreliability which arises not so much because the prisoner has been convicted of serious crime but because the character of that person has been altered for the worse by exposure to the values and culture of prison society.[421]

4.98 In *R v Clough*, Hunt CJ at CL in the New South Wales Court of Criminal Appeal made the following remarks about what is required at common law:[422]

> The direction to be given must be moulded to fit the circumstances of the particular case, and not follow any set formula. It should, however, include warnings:
>
> (a) that the experience of the courts over the years has demonstrated that the evidence of such witnesses is potentially unreliable, together with the explanation as to why that is so;
>
> (b) that it is for that reason necessary to scrutinise the evidence of the particular witness in question with great care;
>
> (c) that, in the absence of substantial confirmation provided by independent evidence that the confession was in fact made, it is dangerous to convict upon the evidence of that witness;
>
> (d) that such independent evidence is unlikely to be provided by a fellow prisoner, because he is likely to be motivated to concoct his evidence for the same reasons; and
>
> (e) that, having regard to the potential unreliability of the evidence, there is a risk of a miscarriage of justice if too much importance is attached to it.
>
> The judge must as well instruct the jury to consider any specific matters which could reasonably be regarded as undermining the credibility of the witness.

---

420 *Pollitt v The Queen* (1992) 174 CLR 558, 599 (Dawson and Gaudron J). See also 585–6 (Brennan J); 614–15 (McHugh J).

421 Ibid 614.

422 Since that case was decided, s 165 of the *Evidence Act 1995* (NSW) has been enacted. Under s 165(1)(e), (2), (3) the trial judge must, if a party so requests and unless there a good reasons for not doing so, warn the jury that evidence given by a prison informer may be unreliable, inform the jury of matters that may cause it to be unreliable, and warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it. See also *Evidence Act 1995* (Cth) s 165; *Evidence Act 2001* (Tas) s 165.

> On the other hand, the judge should also draw to the jury's attention any matters which could reasonably be regarded as confirming the evidence of the prisoner informant.[423]

4.99 In Queensland, however, the common law position is modified by statute. The warning will need to be carefully framed to avoid offending section 632(3) of the Criminal Code (Qld), which prevents a judge from suggesting that the law regards any particular class of people as unreliable witnesses. The Queensland Benchbook includes the following suggested directions:

> Confession to a prison informer
>
> **The prosecution relies on the evidence of (**Y**), a former cellmate of (**X**), who says that (**X**) confessed the offence to him while they were in custody together. Before you act on the evidence of (**Y**), you should consider whether you are satisfied of his reliability, accuracy and honesty. You should take into account the fact that while it would be easy enough for (**Y**) to concoct that evidence, it is very difficult for someone in (**X**)'s position to refute it. [There is no independent evidence available either way.] You should also take into account the prospect that (**Y**) may have been motivated to fabricate his evidence, thinking that he will derive some benefit in terms of sentence, treatment or release on parole.**
>
> **You would have regard to (**Y**)'s record of convictions for dishonesty, and you would have regard to what he stood to gain, or thought he stood to gain, by giving evidence against the defendant. It would be dangerous to act on the evidence of (**Y**), if there were no independent evidence confirming it. [However you should consider whether the following evidence does provide confirmation of what (**Y**) says about (**X**)'s having admitted the offence to him: …].**[424] (note omitted)

Identification evidence

4.100 Identification evidence is also recognised as potentially unreliable, thus necessitating a warning in some circumstances. At common law, where identification evidence is relied on as 'any significant part of the proof of guilt of an offence', a warning must be given if the reliability of the evidence is disputed.[425] In giving the warning, the judge must identify the factors that may affect consideration of the evidence in the circumstances of the case and any matters of significance that may reasonably be regarded as undermining the reliability of the evidence.[426]

4.101 The Queensland Benchbook contains suggested directions and bench notes dealing with this.[427]

---

423 (1992) 28 NSWLR 396, 406.

424 Queensland Courts, *Supreme and District Court Benchbook*, 'Out-of-Court Confessional Statements' [36.3] <http://www.courts.qld.gov.au/2265.htm> 12 March 2009.

425 *Domican v The Queen* (1992) 173 CLR 555, 561.

426 Ibid 562.

427 Queensland Courts, *Supreme and District Court Benchbook*, 'Identification' [49] <http://www.courts.qld.gov.au/2265.htm> at 12 March 2009.

4.102 As noted in chapter 5, directions on identification evidence have featured in at least some recent Queensland criminal appeal judgments.[428]

Sexual offence trials

4.103 The evidence in sexual offence trials may require a number of evidentiary warnings and directions, some of which can be complex.[429] These matters are dealt with in a separate part of the Queensland Benchbook.[430]

Longman direction as to delay in complaint

4.104 One of the most controversial standard jury directions is the Longman direction about the forensic disadvantage to the defendant of the complainant's delay in making the complaint, named after the High Court case in which it was mandated.[431] In the Queensland Benchbook it is in these terms:

Delay between (Sexual) Incident and Complaint
(Longman[432] Direction)

> **The complainant's long delay in reporting the incident she says happened on (**insert date**) has an important consequence: her evidence cannot be adequately tested or met after the passage of so many years, the defendant having lost by reason of that delay means of testing, and meeting, her allegations that would otherwise have been available.**
>
> **By the delay, the defendant has been denied the chance to assemble, soon after the incident is alleged to have occurred, evidence as to what he and other potential witnesses were doing when, according to the complainant, the incident happened. Had the complaint instead been made known to the defendant soon after the alleged event, it would have been possible then to explore the pertinent circumstances in detail, and perhaps to gather, and to look to call at a trial, evidence throwing doubt on the complainant's story [or confirming the defendant's denial] — opportunities lost by the delay.[433]**
>
> **The fairness of the trial (as the proper way to prove or challenge the accusation) has necessarily been impaired by the long delay.**

---

428 See [5.50] below.

429 See, for example, the Hon J Wood, 'Jury directions' (2007) 16 *Journal of Judicial Administration* 151, 153; D Boniface, 'The common sense of jurors vs the wisdom of the law: Judicial directions and warnings in sexual assault trials' (2005) 28(1) *University of New South Wales Law Journal* 261; Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [3.1].

430 Queensland Courts, *Supreme and District Court Benchbook*, 'Directions on Sexual Offences' [62]–[66] <http://www.courts.qld.gov.au/2265.htm> at 12 March 2009.

431 *Longman v The Queen* (1989) 168 CLR 79. This is distinguished from the more general obligation, also enunciated in that case, to give a warning 'wherever necessary to avoid a perceptible risk of miscarriage of justice arising from the circumstances of the case': 86. Such warnings are sometimes also referred to as Longman warnings or directions. See [4.83] and note [392] above.

432 *Longman* (1989) 168 CLR 79. As regards uncharged acts, a similar warning may be necessary — see the Uncharged Sexual Acts direction at 66.3.

433 Elaboration is sometimes required: eg 'Where it appears from the course of evidence, including cross-examination, or the conduct of the trial, including submissions, that specific difficulties were encountered by the [defence] in testing the evidence of the prosecution or adducing evidence in defence, then those specific difficulties should be highlighted in the summing-up in such a way as makes it clear that delay, for which the [defendant] had not been responsible, had created those difficulties' *Johnston* (1998) 45 NSWLR 362, 375.

> **So I warn you that it would be dangerous to convict upon the complainant's testimony alone[434] unless, after scrutinizing it with great care, considering the circumstances relevant to its evaluation,[435] and paying heed to this warning, you are satisfied beyond reasonable doubt of its truth and accuracy.**[436] (notes and formatting as in original)

4.105 The Longman direction is not restricted by the terms of the High Court's decision to sexual offence cases but is used most often in that context.[437]

4.106 The issues surrounding this direction have been noted in many places. For example, the Chair of the New South Wales Law Reform Commission, the Hon James Wood AO QC has made these observations:[438]

> Problems with this direction relate to:
>
> - its emergence as a rigid and ritual incantation, even for cases with a relatively short delay;
> - the irrebuttable presumption, which is logically questionable, that the accused has in fact suffered a prejudice through delay (which is not the case where he did in fact commit the offence);
> - the re-introduction, through a back door, of the inherent unreliability of complainants in sexual assault cases;
> - uncertainty as to the length of delay that is required for its use;
> - the use of the expression 'dangerous (or unsafe) to convict' with its inherent invitation to acquit;
> - the use of unfamiliar language in a convoluted, formulaic direction, which inevitably raises questions, for example, as to what more is meant by the requirement to 'scrutinise the evidence with great care' than that which is already embodied in the conventional direction as to the standard of proof; and

---

434 If there is such corroboration, the jury may be informed that there is evidence which, if the jury accepts it, might support or confirm the complainant's account, describing that evidence.

435 Such circumstances may often need to be stated to the jury: eg, the age of the complainant; that the likelihood of error in recollection can be expected to increase with time; and where the complainant was a child when the incidents are said to have occurred, that experience has shown that the recollection of events occurring in childhood is often erroneous and liable to distortion over time. Further, sometimes those and other factors tending to suggest distorted recollection or which otherwise detract from the reliability of a complainant's account (eg the absence of a timely complaint, subject to any reasonable explanation therefor) should be the subject of a further warning, not just comment, about the dangers of reliance on the testimony: C [2002] QCA 166, [20]–[27]; *Crampton* (2000) 75 ALJR 133, [42], [45]; (2000) 176 ALR 369; *Doggett* [2001] QCA 46 [46]–[55]; cf *Robinson* (1999) 197 CLR 162, [25]–[26]; *Christophers* (2000) 23 WAR 106, 117 ff.

436 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 12 March 2009.

437 See 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) [18.70] and n 139 for a description of other circumstances when this direction may be required.

438 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) 5. The Hon James Wood is a former Justice of the Supreme Court of New South Wales and is currently the Chairperson of the New South Wales Law Reform Commission. See also Tasmania Law Reform Institute, *Warnings in sexual offence cases relating to delay in complaint*, Final Report No 8 (2006).

- the tendency of trial judges to use it in virtually every case, so as to appeal-proof the summing up.

Some of these difficulties were noted by Chief Justice Doyle in *R v [BFB]*.[439]

4.107 In the South Australian Court of Criminal Appeal, Doyle CJ also noted in *R v BFB* the potential difficulties faced by trial judges in giving the Longman direction:

> The difficulty that trial judges are experiencing in this area is probably due to the fact that there are no hard and fast lines to be drawn. The issue is whether there is a circumstance in the case that gives rise to a perceptible risk of a miscarriage of justice, and accordingly gives rise to the need for a warning. That will depend on the circumstances of the case, the time that elapsed, and whether the accused is placed at a significant disadvantage. Sometimes a relatively short lapse of time will put the accused at a disadvantage. Sometimes a lengthy lapse of time will not put the accused at a disadvantage. It all depends on the circumstances. Alternatively, there may be a factor that calls for a comment rather than a warning. These are matters on which views can differ. Views have differed in appeal courts. Nor can trial judges resort to the easy course of giving a warning when there is a possibility that one might be called for. The giving of excessive and inappropriate warnings will be unfair to complainants, contrary to the public interest in a regularly conducted trial process, confusing to juries and runs the risk of returning this aspect of the law to an approach from which Parliament endeavoured to extract it, when Parliament enacted provisions such as s 34I(5) of the *Evidence Act 1929* (SA) [which provides that the judge is not required to warn the jury that it is unsafe to convict the accused on the uncorroborated evidence of the alleged victim of the offence].[440]

4.108 In 2008, section 34I(5) of the *Evidence Act 1929* (SA) was repealed and a new provision, section 34CB, was enacted abolishing the requirement to give a Longman direction as to delay in complaint.[441] It provides:

> **34CB—Direction relating to delay where defendant forensically disadvantaged**
>
> (1) A rule of law or practice obliging a judge in a trial of a charge of an offence to give a warning of a kind known as a Longman warning is abolished.
>
> **Note—**
>
> See *Longman v The Queen* (1989) 168 CLR 79
>
> (2) If, in a trial of a charge of an offence, the court is of the opinion that the period of time that has elapsed between the alleged offending and the trial has resulted in a significant forensic disadvantage to the defendant, the judge must—
>
> (a) explain to the jury the nature of the forensic disadvantage; and

439 (2003) 87 SASR 278.

440 (2003) 87 SASR 278 [38].

441 *Statutes Amendment (Evidence and Procedure Act) 2008* (SA) ss 16, 17.

(b) direct that the jury must take the forensic disadvantage into account when scrutinising the evidence.

(3) An explanation or direction under subsection (2) may not take the form of a warning and—

(a) must be specific to the circumstances of the particular case; and

(b) must not include the phrase 'dangerous or unsafe to convict' or similar words or phrases.

4.109 Similar provision is not made in Queensland, but provisions in New South Wales and Victoria also prevent a trial judge from warning or suggesting to the jury that it is dangerous to convict on the evidence of the complainant because of the delay in making the complaint.[442]

Crofts direction

4.110 Another problematic direction relating to sexual offences is the Crofts direction, also named after the High Court decision in which it was discussed.[443] In some jurisdictions, statute requires a direction to the effect that delay in making a complaint does not necessarily mean the complainant's allegations are false.[444] In *Crofts v The Queen*, the High Court held that this does not prevent a judge from commenting, in appropriate circumstances, that the delay may nevertheless be taken into account in evaluating the complainant's credibility.[445]

4.111 Difficulties with this direction have been noted by, for example, the Hon James Wood, who has observed:

> [This is a] direction which is given, as is commonly required by statute, that the failure of a victim of a sexual assault to make a complaint, or a timely complaint, does not necessarily mean that the victim's allegations are false, because there may be good reasons why a victim may hesitate to complain, is then counterbalanced by a direction to the effect that the absence of a complaint, or a delay in a complaint, may be taken into account in evaluating the victim's credibility and reliability.

442 *Evidence Act 1995* (NSW) s 165B; *Crimes Act 1958* (Vic) s 61. Also see *Evidence Act 1995* (Cth) s 165B. Under those provisions, the judge must, if he or she considers that the defendant has suffered a forensic disadvantage because of the delay, inform the jury of the nature of the forensic disadvantage and the need to take it into account in scrutinising the evidence of the complainant, but must not warn or suggest that it would be dangerous or unsafe to convict the defendant solely because of the delay or the forensic disadvantage suffered as a consequence of the delay.

443 *Crofts v The Queen* (1996) 186 CLR 427.

444 See, for example, *Crimes Act 1958* (Vic) s 61, which was the subject of *Crofts v The Queen* (1996) 186 CLR 427, 448. See also *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 71; *Sexual Offences (Evidence and Procedure) Act* (NT) s 4(5)(b); *Evidence Act 1929* (SA) s 34M; Criminal Code (Tas) s 371A; *Evidence Act 1906* (WA) s 36BD.

445 *Crofts v The Queen* (1996) 186 CLR 427, 451. This reflected the position under *Kilby v The Queen* (1973) 129 CLR 460, which predated the enactment of *Crimes Act 1958* (Vic) s 61.

Problems with this direction relate to:

- the inherent inconsistency between the two propositions and lack of any guidance as to the way they are to be reconciled;
- the dubious assumption which underlies this balancing direction that victims of sexual assaults will raise a complaint at the first reasonable opportunity, an assumption that was questioned by Justices Gaudron and Gummow in *Suresh v The Queen*;[446]
- the justification for the balancing direction when there is nothing beyond the fact of delay in complaint to raise any question as to the complainant's credibility; and
- the re-introduction of the inherent unreliability of such victims.[447] (note in original)

4.112 In Queensland, the matter is dealt with by section 4A of the *Criminal Law (Sexual Offences) Act 1978* (Qld). It provides that the Crofts direction cannot be given,[448] although the judge may make such other comments on the complainant's evidence as may be appropriate in the interests of justice:

> **4A. Evidence of complaint generally admissible**
>
> …
>
> (4) If a defendant is tried by a jury, the judge must not warn or suggest in any way to the jury that the law regards the complainant's evidence to be more reliable or less reliable only because of the length of time before the complainant made a preliminary or other complaint.
>
> (5) Subject to subsection (4), the judge may make any comment to a jury on the complainant's evidence that it is appropriate to make in the interests of justice.

4.113 The fact that the requirement to give this direction varies within Australia is just one aspect of the difficulties surrounding it.

Evidence of discreditable conduct

4.114 Other directions that have attracted criticism in the context of sexual offence trials are those required to be given in relation to evidence of discreditable conduct involving uncharged sexual acts.[449]

4.115 The admission of such evidence involves the possibility of prejudice and will be allowed for limited purposes only. The judge must therefore explain

---

446 (1998) 72 ALJR 769.

447 Hon J Wood AO QC, 'Jury directions' (2007) 16 *Journal of Judicial Administration* 151, 154.

448 See Queensland Courts, *Supreme and District Court Benchbook*, 'Absence of Fresh Complaint — (this direction is made redundant by s 4A of the *Criminal Law (Sexual Offences) Act 1978)*' [63] <http://www.courts.qld.gov.au/2265.htm> at 12 March 2009.

449 See, for example, Hon J Wood AO QC, 'Jury directions' (2007) 16 *Journal of Judicial Administration* 151, 155.

to the jury the purposes for which the evidence was admitted and the permissible and impermissible uses of the evidence. The nature and scope of those directions will depend on the issues in the particular case and the purposes for which the evidence was admitted and may be used.

4.116 For example, the evidence may be led for the limited purpose of explaining the background or context against which the charge came about, which may help the jury in evaluating the complainant's evidence. In that case, the jury will need to be directed about the limited purpose to which it may put the evidence and should be warned against general propensity reasoning to a conclusion of guilt. Different directions will need to be given if the evidence is instead led to establish the defendant's sexual interest in the complainant to support an inference of guilt.[450]

4.117 These matters were recently examined by the High Court in *HML v The Queen*.[451] There was some divergence between the judgments; Hayne J gave the following remarks about framing the appropriate directions:

> The directions that should be given where a complainant gives evidence of sexually improper conduct, other than the conduct which is the subject of the charges preferred against the accused, will vary from case to case. …
>
> …
>
> First, framing appropriate directions self-evidently depends upon how the trial has proceeded. Accordingly, in most cases it will be desirable, before evidence is led, to ask the prosecutor to identify: (a) what evidence will be adduced which may demonstrate sexual conduct towards the complainant, other than the conduct founding the charges being tried; and (b) how it is alleged the evidence is relevant. It will usually be necessary, and helpful, to have the prosecutor describe each step along the path (or paths) of reasoning from the intended proof of other sexual conduct which it is expected that the prosecutor will submit that the jury may follow. The evidence may be relevant for more than one reason.
>
> …
>
> Second, as is often the case in relation to disputed questions of admissibility of evidence at a criminal trial, comparisons between prejudicial effect and probative value may be invited when considering reception of the evidence of sexual conduct other than the offences being tried. …
>
> If it is submitted that a comparison must be made between the probative value and prejudicial effect of evidence of other conduct it would be rare that the comparison will be important in framing directions to the jury, but possible forms of prejudice that are identified, and are distinct from what the evidence proves, may inform consideration of what the jury should be told about use of the evidence.

450 See generally *R v Rae* [2008] QCA 385. The difference between these two bases of admission, and their effect on the directions required to be given, was explained by Crennan J in *HML v The Queen* (2008) 245 ALR 204 [425]–[426], [462], [477], [482].

451 (2008) 245 ALR 204.

Third, if not by the end of the evidence, then certainly by the end of counsel's addresses, it will be apparent what use the parties have sought to make of the evidence of other sexual conduct. And in any event, the trial judge will then have to decide what are the real issues in the case and what is the law that the jury need to know to decide those issues. Both the relevance of the evidence of other events, as that relevance was identified at the outset of the trial, and any possible forms of prejudice that were said to follow from its admission, will very likely bear upon how the directions should be framed. And proper identification of the real issues in the case may mean that it is unnecessary to give any direction to the jury about some of the uses to which the evidence might be put (in particular its use in providing the context within which events the subject of charges are said to have occurred).

Fourth, in framing directions to the jury about evidence of events of a sexual kind other than those that are the subject of charge it will seldom, if ever, be helpful to speak of 'propensity' or 'disposition'. 'Propensity' and 'disposition' are words that jurors are not likely to find helpful. And as pointed out in *Pfennig*, the evidence of other criminal acts or other discreditable conduct *is* propensity evidence. Further, it will usually be better not to describe the evidence of other events of a sexual kind as evidence of 'uncharged acts'. 'Uncharged acts' suggests that what is described could have been the subject of charges. That may not be right. The conduct described may not be criminal; the description of the conduct may not be sufficiently specific to found a charge. Describing the events as 'uncharged acts' may invite speculation about why no charges were laid.

Fifth, the jury must be told to consider separately each charge preferred against the accused. The jury must be told to consider all of the evidence that is relevant to the charge under consideration. The jury must be told that they may find some evidence of a witness persuasive and other evidence not. And the jury must be told, therefore, that they must consider all of the evidence that the complainant gave and, if the accused gave evidence, all of his or her evidence, but that, like the evidence of every witness, they may accept or reject parts of the evidence each gave.

Sixth, it may be appropriate, in some cases, to tell the jury that they do not have to decide whether the other sexual conduct occurred. That is, it may be appropriate to tell the jury that they may be persuaded of the accused's guilt of one or more charges even if they are unable to decide, or do not find it necessary to consider, whether any of that conduct occurred. Conversely, if they are persuaded that the other conduct did occur they may entertain a reasonable doubt of guilt in respect of any of the charges.

Seventh, the directions about how the evidence may be used by the jury will reflect not only what uses the parties have sought to make of it in argument, but also the legal basis for its admission. The evidence of other acts is admissible if it meets the test in *Pfennig*. That being so, it will be necessary to tell the jury that if, on all the evidence, they are persuaded beyond reasonable doubt that some or all of the other acts did occur, that conclusion may help them in deciding whether the charge under consideration is established. It may help them because showing that the accused had acted in that sexual way towards the complainant on one or more other occasions may show that the accused had demonstrated that he had a sexual interest in the complainant and had been willing to give effect to that interest by doing those other acts. If persuaded of those facts, the jury may think that it is more likely that the accused did what is alleged in the charge under consideration.

> But whether any of the other events happened, and if any did, whether their occurrence makes it more likely that, on a different occasion, the accused did what he is charged with doing, are matters for the jury. And even if the other events did happen, the conclusion that the accused did what is charged is not inevitable. The jury must always decide whether, having regard to all the evidence, they are persuaded beyond reasonable doubt that the charge they are considering has been proved.[452] (notes omitted; emphasis in original)

4.118 Hayne J also noted the difficulties and dangers of formulating and relying on model directions in this area:

> 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.[453]

4.119 The Queensland Benchbook has the following suggested direction:

> **Evidence of other Sexual (or violent) Acts or other 'Discreditable Conduct'**
>
> **Other Sexual Activity**
>
> **The defendant is charged with only the [number] offences set out in the indictment. You must consider each charge separately. If you find that you have a reasonable doubt about an essential element of a charge, you must find the defendant not guilty of that charge.**
>
> **In addition to the evidence of the complainant concerning the [number] offences charged on the indictment, you have also heard evidence from him or her of other alleged incidents in which he or she says sexual activity involving the defendant occurred, [describe evidence if necessary].**
>
> **As you have heard, the complainant has not been specific about when that activity occurred or in what circumstances. You can only use this evidence if you accept it beyond a reasonable doubt.[454] If you do not accept it then that finding will bear upon whether or not you accept the complainant's evidence relating to the charges before you beyond a reasonable doubt.[455] If you do accept the complainant's evidence that these other acts of a sexual nature took place then you can only use that against the defendant in relation to the charges before you if you are satisfied that the evidence demonstrates that the defendant had a sexual interest in the complainant and that the defendant had been willing to give effect to that interest by doing those other acts.[456] If persuaded of that, you may think**

452 (2008) 245 ALR 204 [119]–[133].

453 Ibid [120].

454 *HML v R* [2008] HCA 16; 82 ACRJ 723 per Hayne J at [196]. Because the jury may use this evidence as a step towards inferring guilt the jury may use it in that way only if persuaded of its truth beyond a reasonable doubt.

455 See also Separate Consideration of Charges — Single Defendant (Direction 34) for a *Markuleski* direction.

456 *HML*, Hayne J at [132].

that it is more likely that the defendant did what is alleged in the charge(s) under consideration.[457] If you are not so satisfied then the evidence cannot be used by you as proof of the charges before you.

Of course, whether any of those other acts occurred and if they did, whether those occurrences make it more likely that, on a different occasion, the accused did the act(s) with which he/she is charged, is a matter for you to determine. Remember even if you are satisfied that some or all of those other acts did occur, it does not inevitably follow that you would find him/her guilty of the act(s) the subject of the charge(s). You must always decide whether, having regard to the whole of the evidence the offence(s) charged has/have been established to your satisfaction beyond reasonable doubt.

NOTE: A general propensity warning may be required depending on the circumstances of the case. For example, the other sexual activity may be of a different type or magnitude than the charged offences. See below for the form of a general propensity warning.[458] (notes and formatting as in original)

4.120 The Queensland Benchbook also contains a suggested general propensity warning:

General Propensity Warning

You should have regard to the evidence of the incidents not the subject of charges only if you find it reliable. If you accept it, you must not use it to conclude that the defendant is someone who has a tendency to commit the type of offence with which he is charged; so it would be quite wrong for you to reason you are satisfied he did those acts on other occasions, therefore it is likely that he committed a charged offence or offences.

Further, you should not reason that the defendant had done things equivalent to the offences charged on the other occasions and on that basis could be convicted of the offences charged even though the particular offences charged are not proved beyond reasonable doubt.

Remember that the evidence of incidents not the subject of charges comes before you only for the limited purpose mentioned, and, before you can find the defendant guilty of any charge, you must be satisfied beyond reasonable doubt that the charge has been proved by evidence relating to that charge.

If you do not accept the complainant's evidence relating to incidents not the subject of charges, take that into account when considering her evidence relating to the alleged events the subject of the charges before you.

NOTE: In *HML v R* [2008] HCA 16; (2008) 82 ALJR 723, the High Court considered the admissibility of evidence of the 'discreditable conduct' and the jury directions to be given. The court expressly stated that the terms 'uncharged acts' and 'relationship evidence' are to be avoided.[459] (notes omitted)

---

457 *HML*, Hayne J at [132].

458 Queensland Courts, *Supreme and District Court Benchbook*, 'Evidence of other Sexual (or violent) Acts or other "Discreditable Conduct"' [66.1]–[66.2] <http://www.courts.qld.gov.au/2265.htm> at 12 March 2009.

459 Queensland Courts, *Supreme and District Court Benchbook* [66.4] <http://www.courts.qld.gov.au/2265.htm> at 12 March 2009.

Children's evidence

4.121 The way in which children's evidence is received will also require specific directions to be given.

4.122 The *Evidence Act 1977* (Qld) makes special provision for the way in which evidence from an 'affected child' is to be received.[460] Those provisions are intended to limit the distress and trauma that child witnesses might otherwise experience whilst preserving the integrity of the evidence.[461]

4.123 Evidence from an affected child for a criminal proceeding is to be pre-recorded or given with the use of an audio-visual link or the benefit of a screen.[462] An affected child is also entitled to a support person, and the court may exclude members of the public when an affected child is giving evidence about an offence of a sexual nature.[463]

4.124 When any of these measures is taken, section 21AW(2) of the *Evidence Act 1977* (Qld) requires the judge to give a number of specific directions to the jury:[464]

> (2) The judicial officer presiding at the proceeding must instruct the jury that—
>
> (a) the measure is a routine practice of the court and that they should not draw any inference as to the defendant's guilt from it; and
>
> (b) the probative value of the evidence is not increased or decreased because of the measure; and
>
> (c) the evidence is not to be given any greater or lesser weight because of the measure.

4.125 The *Evidence Act 1977* (Qld) also makes provision for the receipt of evidence from 'special witnesses', including children under 16 years to the

460 An affected child is a child witness in a criminal proceeding for an offence involving violence, if there is a prescribed relationship between the child and the defendant, or an offence of a sexual nature: *Evidence Act 1977* (Qld) s 21AC. For the purpose of those provisions, a child is an individual who is under 16 years, or who is 16 or 17 years and is a special witness, when the defendant is arrested, or a complaint is made under s 42 of the *Justices Act 1886* (Qld) in relation to the defendant, or a notice to appear is served on the defendant under s 382 of the *Police Powers and Responsibilities Act 2000* (Qld): *Evidence Act 1977* (Qld) s 21AD(1)(a). A prescribed relationship between the child and the defendant means a relationship, whether it is a half, adoptive or step relationship, where the defendant is the child's parent, grandparent, brother, sister, uncle, aunt, nephew, niece or cousin; a relationship arising because the defendant lived in the same household as the child at the time of the alleged offence; or a relationship arising because the defendant had the care of, or exercised authority over, the child in a household on a regular basis: *Evidence Act 1977* (Qld) s 21AC.

461 *Evidence Act 1977* (Qld) s 21AA.

462 *Evidence Act 1977* (Qld) ss 21AB(a), 21AK, 21AQ.

463 *Evidence Act 1977* (Qld) ss 21AU, 21AV.

464 Failure to give those directions amounts to an error of law and will ordinarily result in a miscarriage of justice resulting in any conviction being set aside, unless the proviso in s 668E(1A) of the Criminal Code (Qld), that no substantial miscarriage of justice actually occurred, can be invoked: *R v Hellwig* [2007] 1 Qd R 17. See also *R v SAW* [2006] QCA 378; *R v HAB* [2006] QCA 80; and *R v DM* [2006] QCA 79; *R v TN* (2005) 153 A Crim R 129 [87] (Keane JA).

extent that the affected child provisions do not apply.[465] Those provisions empower the court to make a number of directions or orders about the way in which evidence from a special witness is given.[466] For example, the court may exclude the defendant or members of the public from the room while the witness gives evidence or order that the evidence be given by a video-taped recording.[467]

4.126 Specific jury directions are also required when evidence is received pursuant to these measures. Section 21A(8) of the *Evidence Act 1977* (Qld) provides:

> (8) If evidence is given, or to be given, in a proceeding on indictment under an order or direction mentioned in subsection (2)(a) to (e), the judge presiding at the proceeding must instruct the jury that—
>
> (a) they should not draw any inference as to the defendant's guilt from the order or direction; and
>
> (b) the probative value of the evidence is not increased or decreased because of the order or direction; and
>
> (c) the evidence is not to be given any greater or lesser weight because of the order or direction.

4.127 The jury directions required under the *Evidence Act 1977* (Qld) in the case of evidence given by children were based, in part, on the recommendations of this Commission in its report on the receipt of children's evidence by Queensland courts.[468] As explained by Chesterman and Mullins JJ in *R v Hellwig*, the directions are mandated to avoid possible prejudice:

> Division 4A has provided, for reasons which Parliament deems sufficient, that a different procedure should be followed in cases involving a certain class of witness. The difference is such as is likely to surprise jurors who have some knowledge, whether first or second hand, of ordinary court proceedings. Without the benefit of the instructions required by s. 21AW(2) that surprise may well turn into conjecture adverse to an accused. The subsection is intended to dispel the surprise and to prevent the conjecture. That that occurs is clearly of the utmost importance to a fair trial. Parliament cannot have intended that the new procedures should prejudice the fair trial of an accused. It has enacted that, to ensure a fair trial, the jury must be instructed how to evaluate evidence led in this way.[469]

---

465 *Evidence Act 1977* (Qld) s 21A(1)(a), (1A).

466 *Evidence Act 1977* (Qld) s 21A(2).

467 *Evidence Act 1977* (Qld) s 21A(a), (e).

468 Queensland Law Reform Commission, *The Receipt of Evidence of Queensland Courts: The Evidence of Children*, Report No 55, Part 2 (2000) 219. *Evidence Act 1977* (Qld) ss 21AW(2), 21A(8) were inserted by *Evidence (Protection of Children) Amendment Act 2003* (Qld) ss 59, 60.

469 [2007] 1 Qd R 17 [22].

4.128 These statutory requirements are reflected in the Queensland Benchbook.[470]

ISSUES FOR CONSIDERATION

4.129 The Commission is interested to learn which directions, or which classes of directions are of particular concern or give rise to recurrent problems in practice. This may encompass directions not covered specifically in the is chapter. Concerns may arise out of the wordings of particular directions, the complexity of the legal concepts that express, the apparent inconsistency with other directions, or the cumulative effect of these problems. Identifying particularly problematic directions may suggest possible avenues of reform.

4-1 Which particular directions, or classes of directions, give rise to particular concern or cause recurrent problems in practice?

4-2 What is the basis of these concerns or problems?

4-3 Are there any directions or classes of directions that can be simplified or abolished as part of the Commission's present enquiry?

470 Queensland Courts, *Supreme and District Court Benchbook*, 'Evidence of Affected Children' [10]; 'Special witnesses' [11] <http://www.courts.qld.gov.au/2265.htm> at 12 March 2009.

Chapter 5

Appeals Involving Jury Directions

INTRODUCTION

5.1 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,[471] and sets out some provisional conclusions drawn from the Commission's own preliminary statistical analysis of relevant criminal appeals in Queensland.

APPEALS AND RE-TRIALS

5.2 In any analysis of the issues surrounding jury directions, it is important to consider whether the difficulties discussed in this Paper 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.

5.3 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.

471 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008), Appendix A.

5.4 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.

5.5 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

5.6 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[472] but the Attorney-General may appeal against the leniency of the sentence imposed.[473] The appellate court may in its unfettered discretion replace the original sentence with such sentence as seems proper to it.[474] In Queensland, appeals by the prosecution against sentence account for only 7% of all criminal appeals on average.[475]

5.7 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.[476] 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

472 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.

473 Criminal Code (Qld) s 669A(1).

474 Criminal Code (Qld) s 669A(1).

475 See the statistics in Table 5.1 later in this chapter, discussed at [5.31]–[5.39].

476 Criminal Code (Qld) s 669A(1A).

- where the defendant was convicted of another charge (with or without a circumstance of aggravation).[477]

5.8 The Attorney-General also has comparable rights of appeal from rulings in relation to pre-trial rulings on points of law.[478] However, the Criminal Code (Qld) provides for no re-trial in the event that any such appeal is upheld.

Appeals by defendant after conviction

5.9 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.[479] 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.

5.10 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.[480]

5.11 Subject to the provision discussed in [5.14] 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.[481]

5.12 In all other circumstances, an appeal against conviction must be dismissed.[482]

5.13 If the appeal is allowed, the Court must quash the conviction and direct a judgment and verdict of acquittal to be entered.[483] 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.[484] Ordinarily, a re-trial will be ordered (as is borne out by the statistics in Table 5.3 below). However, a re-trial is not to be

477 Criminal Code (Qld) s 669A(2), (2A).

478 Criminal Code (Qld) s 668A.

479 Criminal Code (Qld) s 668D(a).

480 Criminal Code (Qld) s 668D(b), (c).

481 Criminal Code (Qld) s 668E(1), but subject to s 668E(1A): see [5.14] below.

482 Criminal Code (Qld) s 668E(1).

483 Criminal Code (Qld) s 668E(2).

484 Criminal Code (Qld) s 669(1).

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,[485] 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[486] (such as misdirection to the jury). On the other hand, the Privy Council has 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.[487]

5.14 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.[488] 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.[489]

5.15 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.[490] 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.[491]

5.16 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.'[492]

5.17 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

485 See, eg, *Rabey v The Queen* [1980] WAR 84, 95 (Wickham J).

486 *R v Leak* [1969] SASR 172, 176; *Rabey v The Queen* [1980] WAR 84, 96 (Wickham J).

487 *Reid v The Queen* [1980] AC 343, 348.

488 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].

489 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.

490 Criminal Code (Qld) s 668E(3).

491 Thomson Reuters, *Queensland Sentencing Manual* (at 2 February 2009) [18.18].

492 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 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, 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.[493]

5.18 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.

5.19 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.[494] The Commission has also commenced its own review of criminal appeals in Queensland, and its provisional results are set out in this chapter. The statistics from both States warrant some consideration at this stage.

5.20 It should be borne in mind that appeals will only bring to light defects in jury directions that disadvantage 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

5.21 The results of the VLRC's statistical analysis are set out in detail in Appendix A to its 2008 Consultation Paper.[495] The salient figures are summarised in the following paragraphs.

493 See *Juries Act 1995* (Qld) s 70, and see [1.15]–[1.16], [2.8], [2.46], [2.73]–[2.76] above.

494 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008), [1.3]–[1.8], Appendix A.

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

5.22 From 2000 to 2007, a total of 538 appeals against conviction were filed in the Victorian Court of Criminal Appeal.

5.23 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%.[496] 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%.

5.24 The figures published by the VLRC do not indicate what percentage of all trials heard in the relevant period is represented by those 538 appeals.

Frequency of appeals on the basis of misdirection

5.25 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 wrong admission of evidence or other procedural matters.

Frequency of successful appeals

5.26 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.

5.27 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 5.3 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

5.28 Between 2000 and 2007, 160 re-trials were ordered by the Victorian Court of Criminal Appeal. This represents 77.3% of successful appeals against

496 The success rate of 7% for appeals filed in 2000 (3 successful appeals out of 43 filed) is inconsistent with the overall success rate.

conviction. The orders made in the remaining 47 successful appeals presumably quashed the convictions but did not involve re-trials.[497]

5.29 Of those 160 re-trials, 28 (17.5%) were pending and the outcome of a further 16 (10.0%) was unknown. Of the 116 re-trials where the outcome was known:

- 76 (65.5% or two-thirds) resulted in conviction;
- one resulted in a plea of guilty;
- in 29 cases (25.0%), the prosecution did not pursue the re-trial, entering a plea of *nolle prosequi*,[498] as a result of which the convictions remained quashed; and
- 10 (8.6%) resulted in an acquittal.

VLRC's views

5.30 In the Preface to its Consultation Paper,[499] 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.[500]

Queensland statistics

5.31 The Commission has not yet had the opportunity to conduct a statistical analysis of the depth of that carried out by the VLRC. However, it has been able to undertake some preliminary statistical research based on the annual reports of the Supreme and District Courts of Queensland published between 2001–02 and 2006–07, the annual reports published by the Office of the Director of Public Prosecutions between 2003–04 and 2006–07, and a review of relevant published decisions of the Court of Appeal from 1999–2000 to 2006–07.

---

497 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.

498 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.

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

500 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.

5.32 Table 5.1 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 2006–07.[501] 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

5.33 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.

Supreme Court (Trial Division)

5.34 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 1,330 in 2006–07; no similar pattern can be discerned in the District Court. 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 2006–07 this had risen to 17.5%. The total number of criminal cases finalised in both Courts between 1999–2000 and 2006–07 varied from 7,444 to 8,147 with no appreciable pattern over time.

5.35 Recent Supreme Court annual reports do not reveal how criminal cases were finalised, but between 1 July 1999 and 30 June 2003,[502] only 189 of the 2,176 cases finalised (8.7%) were disposed of by trial.[503] 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.

Court of Appeal — matters lodged

5.36 The total number of criminal appeals commenced in the Court of Appeal has dropped markedly in recent years from a high of 475 in 2002–03 to only 338 in 2006–07.

5.37 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

501 The annual reports for 2006–07 were the most recent available to the Commission when preparing this Paper.

502 The Courts' annual reports all cover financial years running from 1 July to 30 June.

503 The Commission presumes that these were all jury trials although this is not made explicit in the relevant annual reports.

2001–02 the Supreme Court finalised 6.2% of all criminal matters[504] and was the source of 24.9% of all criminal appeals. In 2006–07, the Supreme Court was still the source of 24.0% of all criminal appeals although it finalised 17.5% of all criminal cases that year.

	1999-00	2000-01	2001-02	2002-03	2003-04	2004-05	2005-06	2006-07	Totals	Averages
District Court Criminal Jurisdiction										
Lodged	7663	7461	7427	7306	7092	6772	7205	6577	57503	7188
Finalised	7384	7546	7599	6991	6866	6694	7224	6393	56697	7087
Active	2236	2159	1910	1829	1945	2122	2127	2303	16631	2079
Supreme Court Criminal List										
Lodged	594	578	445	478	727	800	999	1330	5951	744
Finalised	603	601	503	469	639	750	863	1354	5782	723
Active	186	158	100	181	265	305	444	474	2113	264
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	56697	7087
Percentage	92.5%	92.6%	93.8%	93.7%	91.5%	89.9%	89.3%	82.5%		90.7%
Supreme Court	603	601	503	469	639	750	863	1354	5782	723
Percentage	7.5%	7.4%	6.2%	6.3%	8.5%	10.1%	10.7%	17.5%		9.3%
Total	7987	8147	8102	7460	7505	7444	8087	7747	62479	7810
Court of Appeal (criminal matters)										
from Supreme Court	89	100	94	108	76	90	91	81	729	91
	22.0%	24.9%	22.8%	22.7%	19.0%	20.7%	24.1%	24.0%		22.5%
from District Court	314	296	319	364	323	344	287	257	2504	313
	77.7%	73.8%	77.2%	76.6%	80.5%	79.3%	75.9%	76.0%		77.2%
Other	1	5		3	2				11	1
Total	404	401	413	475	401	434	378	338	3244	406
Lodged	404	401	413	475	401	434	378	338	3244	406
Finalised	356	321	338	360	330	357	296	352	2710	339
Active	115	140	149	145	114	99	112	111	985	123
Nature of matters lodged:										
Sentence applications	192	162	191	225	184	197	184	145	1480	185
	47.5%	40.4%	46.2%	47.4%	45.9%	45.4%	48.7%	42.9%		45.6%
Conviction appeals	73	78	58	85	64	58	50	55	521	65
Conviction & sentence appeals	47	62	61	59	63	58	56	53	459	57
Sub-total	120	140	119	144	127	116	106	108	980	123
	29.7%	34.9%	28.8%	30.3%	31.7%	26.7%	28.0%	32.0%		30.2%
Ratio	1.60	1.16	1.61	1.56	1.45	1.70	1.74	1.34	1.51	0
Extensions (sentence applications)	11	24	27	26	24	18	24	18	172	22
Extensions (conviction applications)	15	14	18	12	8	20	13	12	112	14
Extensions (conviction & sentence)	7	13	9	6	13	18	13	11	90	11
Sentence appeals by prosecution	42	23	35	45	20	26	20	17	228	29
	10.4%	5.7%	8.5%	9.5%	5.0%	6.0%	5.3%	5.0%		7.0%
Other	17	25	14	17	25	39	18	27	182	23
	404	401	413	475	401	434	378	338	3244	406

Table 5.1: Statistics of Criminal Cases in Queensland Courts, 1999–2007.

504 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.

5.38 The material currently available to the Commission does not allow it to calculate the number of trials from which appeals are lodged.

5.39 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 appeals against sentence, appeals against conviction, appeals against both, applications for time extensions for lodging appeals, and appeals by the prosecution against sentence. The following key points emerge from these figures (see Table 5.1):

- Appeals against sentence alone accounted for between 40.4% and 48.7% of all appeals lodged in criminal matters (at an average of 45.6%) 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 30.2%), 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 1.51), although the ratios in 2000–01 and 2006–07 were both significantly lower than this range.

- Appeals 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 7.0%.

Court of Appeal — outcomes

5.40 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 2006–07, which contain statistics that go as far back as 1998–1999. These figures are set out in Table 5.2.

5.41 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). The Commission is unable to reconcile these discrepancies at present, but in many cases the differences are not great and might easily be resolved by understanding the precise criteria used by each body in compiling their respective reports.[505]

505 For example, the ODPP does not handle all criminal appeals, such as those commenced by the Commonwealth.

	1999–00	2000–01	2001–02	2002–03	2003–04	2004–05	2005–06	2006–07	Totals	Averages
AG's appeals against sentence										
Filed								16	16	
Allowed	28	12	15	34	9	13	2	10	123	15
	57.1%	50.0%	55.6%	73.9%	37.5%	61.9%	28.6%	76.9%		58.3%
Dismissed	21	12	12	12	15	8	5	3	88	11
Other			1			1				
	49	**24**	**27**	**46**	**24**	**21**	**7**	**13**	**211**	**26**
Appeals by defendants										
Against sentence								166	166	
								55.5%		55.5%
Against conviction								91	91	
Against conviction & sentence								26	26	
								39.1%		39.1%
Application for extension of time - sentence								10	10	
Application for extension of time - conviction								6	6	
								299	299	
Outcomes										
Appeal against conviction										
- allowed	12	22	27	23	23	22	24	31	184	23
	25.0%	32.4%	27.6%	21.1%	21.7%	27.5%	30.4%	36.9%		27.4%
- dismissed	36	46	71	86	83	58	55	42	477	60
- abandoned								11	11	
Total	**48**	**68**	**98**	**109**	**106**	**80**	**79**	**84**	**672**	**84**
Percentage of all appeals	24.6%	39.8%	37.1%	34.3%	37.2%	32.3%	34.5%	36.2%		34.6%
Appeals allowed as percentage of all appeals	6.2%	12.9%	10.2%	7.2%	8.1%	8.9%	10.5%	13.4%		9.5%
Appeal against sentence										
- allowed	61	40	48	65	56	61	43	49	423	53
	41.5%	38.8%	28.9%	31.1%	31.3%	36.3%	28.7%	33.1%		33.3%
- dismissed	86	63	118	144	123	107	107	65	813	102
- abandoned								34	34	
Total	**147**	**103**	**166**	**209**	**179**	**168**	**150**	**148**	**1270**	**159**
Total appeals	**195**	**171**	**264**	**318**	**285**	**248**	**229**	**232**	**1942**	**243**
Applications for extension of time										
- sentence - dismissed								2	2	
- conviction - dismissed								2	2	
- sentence - allowed								8	8	
- conviction - allowed								1	1	
Total	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**13**	**13**	
Total of appeals finalised	**195**	**171**	**264**	**318**	**285**	**248**	**229**	**245**	**1955**	**244**
Decision reserved								40	40	5
Other			7	4			75	20	106	13
Total of all outcomes	**195**	**171**	**271**	**322**	**285**	**248**	**304**	**305**	**2101**	**263**
Judgments										
Appeals against sentence								114	114	
Appeals against conviction								73	73	
								187	187	

Table 5.2: Statistics from the Office of the Director of Public Prosecutions.

5.42 The value of the ODPP's figures lies in their analysis of the outcomes of appeals each year. They demonstrate that, on average:

- 84 appeals against conviction were resolved per year, which represented 34.6% of all appeals by defendants that were finalised;[506]
- 27.4% of appeals against conviction were allowed, though the ODPP's figures do not specify the basis on which any appeal succeeded;[507]
- successful appeals against conviction represented 9.5% of all appeals resolved per year;
- the percentage of successful appeals against conviction each year appears to be rising over the period studied, but the trend in this regard is not clear;
- appeals by defendants against sentence fared rather better than appeals against conviction, with an average of 33.3% being allowed;[508]
- appeals by the Attorney-General against sentence, though very few in number, had a much higher success rate, with an average 58.3% being allowed.

Appeals involving jury directions — numbers

5.43 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 5.3.

5.44 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 appear not to be published.

5.45 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.[509]

506 This is coincidentally the same number as the number of appeals by defendants resolved in 2006–07.

507 The figures for 2006–07 are also somewhat different from those for other years as they alone include appeals which were abandoned by defendants.

508 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.

5.46 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.

	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	504
Criminal judgments	253	272	308	326	284	312	263	237	2255	282
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**	**26**
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**	**8**	**12**	**26**	**19**	**34**	**18**	**17**	**142**	**18**
	80.0%	88.9%	70.6%	76.5%	70.4%	75.6%	45.0%	68.0%		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 5.3: Court of Appeal Judgments published 1999–2007.

509 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 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.

5.47 Finally, the Commission has commenced a review of each of the published appeal judgments in which jury directions were considered. So far, 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.

5.48 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.

5.49 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.

5.50 The Commission's provisional analysis of the nature of the jury directions that were challenged successfully and unsuccessfully on appeal (which is on-going) 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.[510]

Appeals involving directions to juries — analysis

5.51 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 5.2 and 5.3 together. This allows a closer comparison with the VLRC's statistics.

- From Table 5.2, it appears that the Queensland Court of Appeal finalised on average 84 appeals against conviction each year between 1999–2000 and 2006–07.
- On average, 23 of these appeals (27.4%) were allowed (see Table 5.2).
- Table 5.3 indicates that on average 26 published criminal appeal judgments concerned alleged misdirections (31.0% of 84 finalised on average each year).

510 The Commission's work in this area is continuing.

- Table 5.3 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

5.52 The Commission has not yet been able to compile any statistics about re-trials in Queensland.

Comparison between Victoria and Queensland

5.53 At this stage 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)[511] appears to be much lower than the frequency with which they appear as grounds for appeal in Victoria (67.5%): compare Table 5.3 in this Paper with the figures in paragraph [5.25] above and in Table 2 in the VLRC's Consultation Paper.[512]

5.54 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)[513] than in Queensland (26.6% of judgments concerning alleged misdirection and 8.3% of appeals against conviction finalised per year).[514]

5.55 However, the Commission is keen to hear whether statistics in either State do in fact represent a major systemic problem. 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 that people convicted of an offence may appeal as of right against their conviction or sentence with minimal direct court fees involved.[515]

5.56 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

511 See [5.51] above.

512 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.

513 See [5.26] above.

514 See [5.51] above.

515 Although such people would, of course, have to bear their own legal fees, subject to the availability and provision of legal aid.

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

5.57 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.[516] 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.

5.58 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.

Issues for consideration

5.59 The Commission is interested in learning whether the frequency of criminal appeals in Queensland in relation to alleged misdirections or other similar procedural errors, create any problems for the criminal justice system. These problems might emerge from the statistics presented in this chapter or from the experience in practice of the courts, lawyers and the parties themselves.

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?

COST OF APPEALS AND RE-TRIALS

5.60 The cost of these appeals and re-trials is very difficult to assess. In its Consultation Paper,[517] the VLRC estimated that the cost of a five-day appeal in

516 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.

517 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008), Appendix A.

the County Court was $55,250, but conceded that this figure included only the lawyers' fees and the cost to the Court itself. Many other costs were not taken into account in this figure, and the actual financial cost of such a re-trial would be much higher. Moreover, this amount did not include the costs of the appeal itself.[518]

5.61 Importantly, these figures cannot include any measure of the immense emotional and other stress that is placed on many participants in any criminal trial, especially the non-professional participants: the defendants, the victims, the witnesses, and the families and supporters of each of these people. For many of these, the first trial may well have been a traumatic experience; a re-trial may simply repeat that pain.

5.62 Although this might be seen to be a very high price for an acquittal in a statistically small minority of cases, it may well be seen to be overridden by the proper public interest in allowing convictions to stand only after a fair trial. The fact, and public perception, of a fair process is a fundamental basis of the legitimacy and public acceptance of courts and their outcomes.[519] The participation of the public in the form of the jury is of itself a key part of ensuring that legitimacy and public acceptance,[520] as is the participation of the person affected.[521]

5.63 Moreover, research has suggested that people — including both winning and losing parties in court cases — assess their satisfaction with the outcome of trials in terms of the fairness of the procedures involved and not just the favourability of the outcome.[522]

Issues for consideration

5-3 Are the financial costs and other burdens associated with re-trials an acceptable cost of ensuring as far as possible that no-one is convicted without a fair trial?

518 At present, the Commission has not been able to conduct any research that considers the frequency or cost of re-trials in Queensland.

519 TR Tyler, *Why People Obey the Law* (1990) 106; EA Lind and TR Tyler, *The Social Psychology of Procedural Justice* (1998) 64; RA Hughes, GWG Leane and A Clarke, *Australian Legal Institutions: Principles, Structure and Organisation* (2nd ed, 2003) 195; P Cane, *An Introduction to Administrative Law* (2nd ed, 1990) 160–1.

520 TR Tyler, *Why People Obey the Law* (1990) 101–4; TR Tyler et al, *Social Justice in a Diverse Society* (1997) 83; EA Lind and TR Tyler, *The Social Psychology of Procedural Justice* (1998) 71.

521 See LB Solum, 'Procedural Justice' (2004) 78 *Southern California Law Review* 181, 262–3.

522 T Tyler, *Why People Obey the Law* (1990) 163; T Tyler and H Smith, 'Social justice and social movements' in D Gilbert, S Fiske and G Lindzey (eds), *The Handbook of Social Psychology* (4th ed, 1998) Vol II, 604.

Chapter 6

Difficulties with Jury Directions

INTRODUCTION

6.1 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. This chapter examines these issues. Some of the problems associated with the legal content of directions and the legal issues that lie behind these problems are covered in chapter 4 of this Paper.

6.2 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. These issues are examined in chapter 7 of this Paper.

A SUMMARY OF THE PROBLEMS

6.3 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.[523]

6.4 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 problems within the criminal justice system, which may be summarised in these points:[524]

- 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.

- 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 dictate 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 in the terms in which directions are to be given. 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.[525] 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.[526]

  However, there is a concern that trial judges may feel that, in order to avoid 'unnecessary' appeals and re-trials on procedurals grounds, they must include in their summings up all directions that might possibly be considered relevant or required, however tangentially, and thus lengthen

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

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

525 See Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [2.20], [2.21].

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

and over-complicate those directions, reducing their comprehensibility and the jury's ability to apply them.

- Trials that involve multiple defendants 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.

- Many trials 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). 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.

- The multiplicity of directions cannot be reduced in cases involving alternative charges which are not found on the indictment or in the Code 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.[527] 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.[528]

- The development of detailed model directions set out at length in compendiums such as the Queensland Benchbook (and its counterparts in other jurisdictions) encourages 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

527 *Pemble v the Queen* (1971) 124 CLR 107, 117–18 (Barwick CJ); see [6.32] below.

528 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.

> 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.[529]

6.5 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 that they are empanelled until they are discharged. Formal jury directions are only part of these communications.[530]

6.6 The Commission is interested in discovering the extent to which any of these concerns are well founded in Queensland. The experience of other jurisdictions may not apply, or apply as strongly, in Queensland. Moreover, the Commission is concerned that any reforms that it might ultimately recommend be based on empirical findings, to the extent that this is possible,[531] rather than on apprehension alone, however plausible.

FUNDAMENTAL PRINCIPLE

6.7 At all stages of any consideration of the criminal trial process, it must be remembered that the central objective of the procedural formality and rules associated with the criminal justice system is to ensure, so far as reasonably possible, that the defendant receives a fair trial — jury directions are part of that, as noted by the High Court:[532]

> The fundamental task of a trial judge is, of course, to ensure a fair trial of the accused. That will require the judge to instruct the jury about so much of the law as they need to know in order to dispose of the issues in the case.[533] No doubt that will require instructions about the elements of the offence, the burden and standard of proof and the respective functions of judge and jury. Subject to any applicable statutory provisions it will require the judge to identify the issues in the case and to relate the law to those issues.[534] It will require the judge to put fairly before the jury the case which the accused makes. In some cases it will require the judge to warn the jury about how they should *not* reason or about

529 *HML v R* (2008) 82 ALJR 723, [2008] HCA 16 [120]–[122] (Hayne J).

530 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 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.

531 See chapter 7, 8 and 9 of this Paper.

532 *RPS v R* (2000) 199 CLR 620, [2000] HCA 3 [41] (Gaudron ACJ, Gummow, Kirby & Hayne JJ).

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

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

> particular care that must be shown before accepting certain kinds of evidence.[535] (notes and emphasis in original)

6.8 It is this over-arching principle that should inform the decision of any trial judge and any appellate court when considering the necessity, adequacy or appropriateness of any jury direction.

6.9 The balanced application of this principle may be seen to underlie the discretion given to the Court of Appeal in Queensland in section 668E(1A) of the Criminal Code (Qld), which states:

> 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.[536]

6.10 Nonetheless, the need to ensure, and be seen to ensure, a fair trial will mean that some directions must be given to a jury even though they might be felt to be peripheral to the core issues in the trial. These could include matters that were not raised by either party expressly but which emerge from the evidence as a whole.[537]

6.11 This principle might be seen as inconsistent with, for example, statutory rules, that might otherwise have had the effect of limiting or permitting more abridged directions. However, in at least some cases, the judge's discretion to give a warning where the interests of justice require it is expressly preserved by statute: see, for example, section 632 of the Criminal Code (Qld).[538]

LENGTH AND NUMBER OF DIRECTIONS

6.12 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.[539] 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.[540]

6.13 It also 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.

---

535 For example, *Longman v The Queen* [1989] HCA 60; (1989) 168 CLR 79; *Domican v The Queen* [1992] HCA 13; (1992) 173 CLR 555.

536 See [5.14] above.

537 See [6.28]–[6.37] below.

538 See [4.82] above and Appendix C to this Paper.

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

540 This is said to have become a real problem in Victoria: Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [2.16]–[2.17].

COMPLEXITY OF DIRECTIONS

Complexity of the evidence

6.14 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.[541] 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.[542]

6.15 The length of the trial, however, seems to produce a clear decline in juror comprehension of the evidence and law.[543] 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, especially expert evidence, among others[544] — 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.

6.16 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.[545] 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.

Complexity of the law

6.17 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.

6.18 The Commission's review of the law in this enquiry should distinguish the substantive criminal law (and the statements from high appellate courts that may govern the content of any particular direction) from the style, structure and presentation of directions in general. A review of this general nature ought not

---

541 See Mark Findlay, 'Juror Comprehension and Complexity: Strategies to Enhance Understanding' (2001) 41 *British Journal of Criminology* 56, 64.

542 Ibid 56, 73.

543 Ibid 56, 76.

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

545 See [2.83], [2.86] above.

readily seek to overturn the statute or clear common law that governs the content of jury directions — that should only be done after proper review of the substantive law in question. This review can, however, consider and recommend reform in relation to the overall structure and form of directions, the courts' procedures in relation to them and other techniques of providing information to juries that will improve the effectiveness of judges' directions and of juries' decision-making. This review may suggest, for example, that the impact of any future reform of the criminal law should take into account the effect that the reform will have on a judge's task in directing a jury.

6.19 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. This defence has both objective and subjective elements. It is found in section 304 of the Criminal Code (Qld):

> When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation, and before there is time for the person's passion to cool, the person is guilty of manslaughter only.

6.20 A judge is required to leave this defence to be considered by the jury whenever it is open on the version of events disclosed by the evidence most favourable to the defendant.[546] The judge must, therefore, direct the jury on it even if it is tenuous or barely raised on the evidence, and even if not expressly raised as a defence by the defendant.[547]

6.21 A jury faced with the task of applying this defence must first come to grips with the language of the section itself. It must then be instructed that there is a two-fold test that it must apply, which does not emerge immediately from the words used in the Code. The jury must determine (a) whether the defendant was in fact so provoked as to lose self-control and act in the heat of passion, and (b) in cases where the defendant's immaturity may be relevant, whether an ordinary person (or, in some cases, an ordinary person of the defendant's age) could have lost self-control in the same circumstances. The model direction in the Queensland Benchbook runs for several pages, without any reference to the specific evidence in any given case.[548]

6.22 An examination of the model direction demonstrates the complexity of the concepts behind the defence. It is difficult to state them clearly and concisely, and as a result it is difficult for jurors to apply them.

Inverse onus of proof

6.23 One central aspect of the criminal law that may in some respects be seen to complicate a number of jury directions is the 'golden thread' of Anglo-

546 *R v Stingel* (1990) 171 CLR 312, 318.

547 *Pemble v the Queen* (1971) 124 CLR 107, 117–18 (Barwick CJ); see [6.32] below.

548 The model direction is set out in full in Appendix D to this Paper.

Australian criminal jurisprudence: that the prosecution always bears the onus of proof of all elements of any criminal offence charged, and (with rare exceptions) also bears the onus of negativing any defence that may be raised in the case.[549] This often means that directions to juries about defences need to be couched in negative or double negative terms.

6.24 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*:[550] '… 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.[551] (note in original)

6.25 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 direction to the jury on this defence will almost certainly need to re-state each of these elements using the words of

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

550 (2005) 227 CLR 319 at 371.

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

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.

Judges' views of complex directions

6.26 In 1985 as part of it 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.[552]

6.27 In the survey of Australian and New Zealand judges conducted by the Australian Institute of Judicial Administration published in 2006,[553] 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.'[554] 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

552 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].

553 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 [2.77] below.

554 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.

particular defendants, *Longman* warning, propensity evidence, hearsay and the drawing of inferences.

- Difficult grounds of liability such as conspiracy, joint offenders and complicity;
- 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.[555]

Multiple and alternative charges

6.28 It follows as a simple matter of logic that the higher the number of alternative or additional counts or charges on an indictment, the higher the number of directions that must be given.

6.29 A similar increase can occur when statute provides for automatic alternatives for certain offences. For example, manslaughter is always an 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.

(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.

6.30 This proliferation of directions in cases of multiple offences is perhaps most dramatically seen in cases of multiple fraud and multiple sexual

555 Ibid 35.

offences.[556] 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.

6.31 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 will fall into error, and will amplify any other systemic problems associated with jury directions.

Matters not raised by the parties

6.32 The rule in *Pemble v The Queen*[557] requires trial judges to direct the jury on any defence that arises on the evidence, irrespective of whether that defence has been expressly advanced or embraced by the defendant. This is part of the judge's duty to 'be astute to secure for the accused a fair trial according to law' no matter what course defence counsel may adopt at the trial.[558]

> This involves, in my opinion, an adequate direction both as to the law and the possible use of the relevant facts upon any matter upon which the jury could in the circumstances of the case upon the material before them find or base a verdict in whole or in part.[559]

6.33 Indeed, this rule entitles a defendant to abandon, or withhold addressing the jury on, a particular defence but to require the judge to direct on that same defence. This might be done tactically if, for example, this defence is not consistent with the main defence advanced at the trial.[560]

6.34 However, the rule does not mean that a judge must put every possible alternative defence or charge to the jury. The rule in *Pemble v The Queen* was considered by the Queensland Court of Appeal in *R v Willersdorf*,[561] where the Court placed some broad limits on the rule:

> The duty to inform the jury of available alternative verdicts is an aspect of the duty of a trial judge to see that the trial is conducted according to law and that the jury is properly instructed in relation to available defences. The proper discharge of that duty does not require the presentation of every conceivable defence. To do so might tend to obfuscate the true defence. A familiar example of this arises in homicide cases in which there may arise the theoretical possibility of multiple alternative forms of the defence of self-defence. Defence counsel commonly ask that not too many alternatives be placed before the jury for this

556 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].

557 (1971) 124 CLR 107; 45 ALJR 333.

558 (1971) 124 CLR 107, 117 (Barwick CJ).

559 Ibid 117–8 (Barwick CJ).

560 See, for example, *CTM v The Queen* (2008) 82 ALJR 978, [2008] HCA 25; *R v TC* [2008] VSCA 282.

561 [2001] QCA 183.

> very reason. The selection of the live issues depends on the evidence in the particular case.[562]
>
> A stricter approach may, however, be seen in cases where manslaughter has not been left to the jury as an alternative to murder.[563] The duty to allow manslaughter to go to the jury in cases of murder if there is any basis on the evidence for such a verdict, is well recognised.[564] For historical reasons, a person on trial for murder has sometimes been given an opportunity to receive a merciful verdict of manslaughter even when strict logic might suggest that such a verdict is not really open.[565] I do not think that the same attitude should necessarily be taken in relation to the entire criminal calendar of offences. …
>
> The ultimate conclusion in *Rehavi* is that a jury should be permitted to return any verdict available on the evidence if this is consistent with justice to the accused. The reservation 'consistent with justice to the accused' of course recognises inter alia that there are situations such as a true 'all or nothing' case, where the offering of conviction on a lesser charge might jeopardise the accused's chance of complete acquittal. Consistently with the authorities including *Rehavi*,[566] I conclude that whenever an alternative verdict *fairly arises for consideration on the whole of the evidence* then failure to leave it to the jury prima facie deprives the accused of a chance of acquittal of the principal offence. A tactical request from defence counsel is a matter that must be taken into account in the overall assessment of miscarriage of justice, but it is not conclusive. The ultimate duty to ensure fairness rests with the trial judge, and this is not always achieved by acquiescing in the request of defence counsel.[567] (notes and emphasis as in original)

6.35 This issue also arose in the High Court in *Keenan v The Queen*,[568] on appeal from the Queensland Court of Appeal.[569] Kiefel J (with whom Hayne, Heydon and Crennan JJ agreed) discussed the Court of Appeal's conclusion that the alternative charge of grievous bodily harm (an alternative to unlawfully doing grievous bodily harm with intent) should have been left to the jury:[570]

> A trial judge's duty to ensure a fair trial does not mean that the lesser charge must be left to a jury in every case. It is a question of what justice to the accused requires. Putting the lesser charge to a jury might jeopardise the accused's chance of a complete acquittal in some cases.[571]

562 See *R v Bojovic* [2000] Qd R 189; *R v Craig* [1998] QCA 277; CA No 139 of 1998, 15 September 1998.

563 *Gilbert v The Queen* [2000] HCA 15; (2000) 74 ALJR 676 per Gleeson CJ, Gummow and Callinan JJ; McHugh and Hayne JJ dissenting.

564 *Mancini v DPP* [1942] AC 1; *Pemble* (1971) 124 CLR 107; *Markby* (1978) 140 CLR 108, 113.

565 Note discussion in *Gilbert* (above) at paras [14] to [17].

566 *R v Rehavi* [1999] 2 Qd R 640; *Benbolt* [1993] 67 A Crim R 11, 14–17, 27–29; *R v Pureau* [1990] 19 NSWLR 372, 377.

567 [2001] QCA 183 [18]–[20] (Thomas JA).

568 [2009] HCA 1.

569 *R v Keenan* [2007] QCA 440.

570 *R v Keenan* (2009) 83 ALJR 243, [2009] HCA 1 [138]–[139].

571 *R v Willersdorf* [2001] QCA 183 at [20] per Thomas JA, McPherson JA and Chesterman J agreeing.

> … The fact that the [defendant's] counsel did not seek to have the lesser charge put to the jury confirms that a forensic advantage was sought by its omission.[572] (notes in original)

6.36 It seems that the trial judge's duty is to assess which set of directions (especially those concerning defences) should be left to the jury on the basis of an analysis of what is most advantageous to the defendant; the defendant's avowed or implied tactics are a guide to this but are not necessarily decisive.

6.37 The model direction in the Queensland Benchbook on the issue of defences not raised by counsel is in these terms:

> **Direction where a defence is not raised by counsel but raised on the evidence[573]**
>
> **I wish to say something to you about a further possible defence that arises for your consideration. It concerns the defence of [provocation etc]. It is my duty to direct with all possible defences which arise and therefore need to be considered by you in reaching your verdict, even where they are not raised by defence counsel. And the fact that I am mentioning this matter does not mean I have some particular view about it.**
>
> **It is for you to consider this additional matter, as with all matters. (You will not need to consider it, should you find the defendant not guilty on the basis that the prosecution had not excluded [eg self defence] beyond a reasonable doubt).[574]** (notes and formatting as in original)

Multiple defendants

6.38 Co-defendants may be tried together, though they are often tried separately. The trial of multiple defendants raises a number of issues that complicate the judge's directions to the jury.

6.39 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.

---

572 See *Harwood v The Queen* (2002) 188 ALR 296 at 300 [16]; [2002] HCA 20.

573 The judge is obliged to instruct the jury concerning any defence (even one not raised or pressed by a party or indeed disclaimed by the parties) that fairly arises on the evidence and therefore needs to be considered by the jury in reaching their verdict. See *Stevens v The Queen* (2005) 80 ALJR 91, *Fingelton v The Queen* (2005) 79 ALJR 1250 at [77]–[80], *Murray v The Queen* (2002) 211 CLR 193 at [78.4], [151], *Stingel v The Queen* (1990) 171 CLR 312 at 333–334.

574 Queensland Courts, *Supreme and District Court Benchbook*, 'Direction where a defence is not raised by counsel but raised on the evidence' [61A] <http://www.courts.qld.gov.au/2265.htm> at 12 March 2009.

6.40 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.[575]

6.41 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[576]) based on the risks associated with relying on uncorroborated accomplice evidence are discussed in chapter 4.[577]

Limited-use directions[578]

6.42 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.[579] Similar limited-use directions will be given in cases where evidence of uncharged discreditable conduct on the part of a defendant is admitted.[580]

6.43 Concerns have been raised that limited-use directions of this nature are in effect futile.[581] 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.

6.44 The risk is that these directions will be simply too esoteric to understand or too difficult to follow and apply, and that as a result the task of sequestering certain evidence for particular functions will simply not happen. This is a difficult task for lawyers; how much harder is it then for lay jurors to master this feat of evidentiary gymnastics? In the end, the evidence, having been admitted, may well be applied by jurors in accordance with whatever weight they choose to give for all purposes that they feel it relates to.

6.45 The model direction in the Queensland Benchbook about evidence admitted against one defendant only, which is a form of limited-use direction, is

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

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

577 See [4.89]–[4.95] above.

578 Also called 'limiting directions'.

579 See [4.89]–[4.95] above.

580 See [4.114]–[4.120]; see also [4.68]–[4.72] in relation to propensity warnings and similar fact evidence.

581 See, for example, Kirby J in *Zoneff v The Queen* (2000) 200 CLR 234 [66]–[67] quoted at [7.6] above.

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:[582]

> **Evidence admitted[583] 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).[584]** (notes and formatting as in original)

6.46 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:

> 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.[585]

6.47 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'.[586] 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.[587]

6.48 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.

---

582 Queensland Courts, *Supreme and District Court Benchbook*, 'Evidence admitted against one defendant only' [16] <http://www.courts.qld.gov.au/2265.htm> at 12 March 2009.

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

584 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).

585 *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].

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

587 Ibid 455.

New Zealand

6.49 Changes to the rules of evidence in New Zealand were introduced in 2006[588] following a comprehensive review by the Law Commission of New Zealand.[589] Under the *Evidence Act 2006* (NZ), the circumstances in which particular evidence may be admitted have been clarified and simplified as a result of which instances of limited-purpose evidence have been reduced significantly.[590] For example:

- Once admitted, all hearsay statements and prior consistent statements are offered for the truth of their contents.[591]
- The recognised purpose of all propensity evidence is to show the person's propensity to act in a particular way or to have a particular state of mind.[592]
- There is no longer a distinction between lies going to credit and lies going to guilt.[593]

6.50 In relation to evidence of lies told by the defendant, the judge may still give a warning (if the defendant requests or the judge considers that a jury may place undue weight on the lie) that before using the evidence, the jury must be satisfied the defendant did lie, that people lie for a variety or reasons and that the jury should not conclude that the defendant is guilty just because he or she lied.[594] However, there is no obligation to instruct the jury about what inference it may draw from the evidence.[595]

6.51 The *Evidence Act 2006* (NZ) also gives trial judges a general discretion to warn the jury about the need for caution in deciding whether to accept, and

588 *Evidence Act 2006* (NZ). Also see the First Reading Speech of the Evidence Bill (2005): New Zealand, *Parliamentary Debates*, House of Representatives, 10 May 2005, 20412 (Hon P Goff, Minister of Justice).

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

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

591 *Evidence Act 2006* (NZ) ss 4 (definition of 'hearsay statement'), 35(2).

592 *Evidence Act 2006* (NZ) s 40(1). A defendant may only offer propensity evidence about a co-defendant if it is relevant to a defence raised or proposed to be raised by the defendant and the judge permits it: s 42(1). The prosecution may only offer propensity evidence about the defendant if it has a probative value in relation to an issue in dispute in the proceeding which outweighs the risk that the evidence may have an unfairly prejudicial effect on the defendant: s 43(1).

593 *Evidence Act 2006* (NZ) ss 37, 124(2).

594 *Evidence Act 2006* (NZ) s 124(3).

595 *Evidence Act 2006* (NZ) s 124(2).

what weight to give to, potentially unreliable evidence.[596] Warnings about uncorroborated evidence are not required.[597]

PRESENTATION OF EVIDENCE AND DIRECTIONS

6.52 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.[598]

6.53 The research conducted by the Australian Institute of Judicial Administration and published in 2006[599] 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.[600] 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;
- 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,

596 *Evidence Act 2006* (NZ) s 122. Judges must consider giving a warning with respect to some types of evidence, such as hearsay or evidence by a witness who may have a motive to give false evidence that is prejudicial to the defendant: s 122(2). A party may request a warning be given but the judge need not do so if he or she considers that to do so might unnecessarily emphasise evidence or there is another good reason for not complying with the request: s 122(3).

597 *Evidence Act 2006* (NZ) ss 121(2), 125. The *Evidence Act 2006* (NZ) also includes other provisions about jury directions. For example, in the case of a delay in complaint, a direction may be given that there can be good reasons for the victim of a sexual offence to delay making a complaint: s 127; if a witness gives evidence in an alternative way or a defendant is prevented from cross-examining a witness, an adverse inference warning must be given: s 123; and in the case of visual or voice identification on which the case against the defendant wholly or substantially depends, a warning is required: s 126.

598 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.

599 Ibid.

600 Ibid 35–36.

making sure they understand what is happening and why, and ensuring that they felt comfortable about asking questions.[601]

6.54 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.[602]

6.55 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.[603]

6.56 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. Chapters 8 and 9 of this Paper consider some options that might reduce these problems faced by jurors.

601 Ibid 35.

602 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.

603 Ibid 5.

Chapter 7

How Juries Apply Directions

JURORS' COMPREHENSION OF DIRECTIONS

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

7.2 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 somewhat greater leisure, pore over their words in the light of the law and the outcome of the case. Some of those lawyers are doing 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.[604]

7.3 Nonetheless, judges will strive to ensure as best they can that the summing up and directions are also correct in law, and will 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.

7.4 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.

7.5 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.[605]

7.6 These concerns have come to the attention of the High Court on numerous occasions. 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[606] 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;[607] the relatively low rate of comprehension of concepts which lawyers assume to be central to the performance of their duties;[608] and their lack of

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

605 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.

606 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.

607 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').

608 Kramer and Koenig at 429.

> comprehension of subtle directions requiring conditional acceptance of evidence for one but not another purpose.[609]
>
> 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'.[610] 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.[611] 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.[612] Lengthy directions about lies run the risk of emphasising the lies and their importance.[613] (notes as in original)

7.7 And, as noted by McHugh J:

> The more directions and warning juries are given the more likely it is that they will forget or misinterpret some directions or warnings.[614]

7.8 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.

7.9 Notwithstanding the high standing of these remarks from the High Court, the Commission will seek to learn during its consultation processes the

---

609 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.

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

611 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.

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

613 (2000) 200 CLR 234 [66]–[67].

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

current state of research in Australia and the applicability of concerns such as those expressed by Kirby J and McHugh J to juries in Australia generally, and in Queensland in particular.

JURY RESEARCH METHODS

Surveys and simulations

7.10 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[615] 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 debated.

7.11 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.[616] 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.

7.12 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.

7.13 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.

7.14 The main alternative research strategy of jury trial simulations has often been criticised, or at least their results are said to be less reliable, because the

615 Also called 'mock trials'.

616 See, for example, *Jury Act 1995* (Qld) s 70, discussed at [1.15]–[1.16], [2.8], [2.46], [2.73]–[2.76] above. This does not apply in all jurisdictions (eg, the United States).

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.

7.15 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 or no summary but 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 charge, 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.

7.16 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.

7.17 In addition, some United States research deals with juries in civil trials, which are 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 Paper.[617] The consideration of evidence drawn from research into civil juries overseas in relation to criminal jury trials in Queensland should be undertaken with care.

617 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

7.18 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 a little 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'.

7.19 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 fair and even-handed the jurors dealt with each other in coming to a unanimous, or almost unanimous, decision.

7.20 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.

7.21 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.[618] 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.

7.22 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.

7.23 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.[619] Overseas research has also demonstrated that jurors pay a great deal of attention to the judges' directions and often re-read them where they had written versions.[620] 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 warning to the jury are, the greater the scope for them to be ignored, forgotten, misinterpreted or misapplied.[621] Accordingly, it is important to understand how

618 See [7.6]–[7.9].

619 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.

620 Ibid 412.

621 See, for example, ibid 408.

jurors interpret and apply directions and which particular directions or methods of presenting directions are most effective.

HOW JURIES INTERPRET AND UNDERSTAND DIRECTIONS

Jurors' views of summings up, directions and addresses

7.24 The degree of help that jurors feel they receive from judges' directions on the law, summings up of the evidence,[622] and from the parties' addresses at the end of the evidence, was one aspect of a survey conducted by Lily Trimboli and published by the NSW Bureau of Crime Statistics and Research ('BOCSAR') in September 2008.[623]

> 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. The survey found that the vast majority of jurors self-report that they understand the phrase 'beyond reasonable doubt' to mean either 'sure' or 'almost sure' that the person is guilty; 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'.[624]

Summings up of the evidence and addresses

7.25 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 7.1.[625]

622 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.

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

624 Ibid 1.

625 Ibid 7, table 8.

	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 7.1: Jurors' reactions to summings-up and addresses.

7.26 It is perhaps 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.[626] 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 to him or her by the jury.[627] Even so, jurors watch counsel closely throughout the trial and pay attention to their conduct and demeanour.[628]

7.27 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 and directions.

7.28 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.

7.29 This in turn reinforces the concern that a judge's directions, warnings and summing up should be prepared, structured and worded so as to best assist jurors in ways that are accessible to them.

7.30 It also supports the contention that statements by counsel on the law are no substitute for directions by the judge.

7.31 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,[629] though the extent to which they were helped was not assessed. Those relatively few jurors who felt that the summing up was unhelp-

626 Consultation, Dr B McKimmie, School of Psychology, University of Queensland, 9 December 2008.

627 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.

628 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).

629 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [2.20].

ful 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; and some jurors had difficulty with the complexities of the case that the summing up did not solve.[630]

7.32 Some similar responses came from jurors in a survey conducted in New South Wales between 1997 and 2000.[631]

7.33 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.[632]

7.34 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.[633] For example, when asked about the length of the summing up, a 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%.[634]

7.35 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 the 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'.[635]

7.36 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.[636]

7.37 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 refer-

630 Ibid [2.21].

631 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].

632 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [2.4].

633 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.

634 Ibid 4–6.

635 Ibid 6–7.

636 Ibid 7.

red 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.[637]

Directions on the law

7.38 The jurors in the BOCSAR study were also asked to what extent they understood the judge's instructions on the law.

7.39 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.[638]

7.40 Although the accuracy of the jurors' views about their own understanding of the law and the comprehensibility of the judge's instructions cannot be assessed objectively in a survey such as this, the subjective views of the jurors involved are nonetheless instructive. Jurors who think that they know much of the law that the judge is talking about must be taking into the jury room a great deal of information about the law and ideas of justice that they have gleaned from life generally; given the exclusion of lawyers from juries in Australia, it can be assumed that this information has come from sources other than formal legal training. This general life experience is of course, part of the 'genius' of the jury that the community relies on for juries to give fair decisions that are strongly grounded in community values and community experience.

7.41 However, it might be questioned whether this general life experience is sufficient grounding for jurors to carry out the legal and technical aspects of their duties. Much of it may be wrong in law. This is, no doubt, part of the reason that such importance is placed on directions and warnings that are accurate but not burdensome. 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

7.42 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.[639] However, over 40% claimed that they had a good knowledge of the court process before their jury ser-

637 See [7.25]–[7.28] above.

638 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.

639 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.

vice, 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.[640]

7.43 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.

Judges' perceptions of jurors' comprehension

7.44 In the survey of Australian and New Zealand judges by the Australian Institute of Judicial Administration,[641] judges were asked about their views of how well jurors comprehended the judges' directions and summings up.[642] 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.

7.45 As has been noted, judges have quite limited means to assess a jury's comprehension[643] and their observations in this regard are necessarily quite impressionistic.[644]

Overseas research

7.46 Research in Chicago in the 1960s[645] revealed that judges agreed with juries' verdicts 75.4% of the time. In a further 16.9% of cases, the disagreement

640 Ibid.

641 See [2.77] above.

642 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.

643 See [3.37] above

644 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.

645 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.

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.

7.47 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.[646] This last result suggests 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.

7.48 A survey conducted by the Law Commission of New Zealand reported in 2001[647] 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.

7.49 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.[648] Nonetheless, the directions were still given; no doubt, in many instances the judges had little option.

DO JURORS UNDERSTAND THE LAW?

7.50 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.

Research overseas

7.51 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 'helpful'.[649] These results reflect the results of the research conducted by the NSW Bureau of Crime Statistics and Research.[650]

7.52 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

646 Ibid 414.

647 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) 414.

648 Reported in ibid 415. The size of the sample of judges was not given.

649 See ibid 411.

650 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.

about which they need to be satisfied beyond reasonable doubt before convicting.[651] This outcome has been found in other similar research in the United States and Canada.[652]

7.53 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.[653]

7.54 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.[654]

'Beyond reasonable doubt'

7.55 One series of directions that is given in every criminal trial concerns the burden and standard of proof. The expression 'beyond reasonable doubt' long ago passed into common usage in the English vernacular, but this was not necessarily accompanied by a common understanding of what it in fact means in law. No doubt many members of the public, and therefore many jurors, have

651 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.

652 See ibid 412, 415–6.

653 Reported in ibid 411–2. See [7.49] above. It should be noted that this research involved jurors and potential jurors for both criminal and civil juries.

654 See [9.92]–[9.105] below.

their own view of what the expression means, though they, like many lawyers, may well have great difficulty explaining it or articulating it using other words that avoid a circular definition.

7.56 The model direction to be given at the opening of every criminal trial found in the Queensland Benchbook includes the following:

> Burden and standard of proof
>
> > **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.**[655] (formatting as in original)

7.57 The Queensland Benchbook also contains the following additional model direction, which adds a standardised gloss to the meaning of 'beyond reasonable doubt'.[656] As if acknowledging that this expression does not require further definition — or perhaps in concession to the inherent difficulties associated with paraphrasing or giving it a non-circular definition, even for experienced lawyers — the model direction specifies that it should only be given when the jury is struggling with the concept (as disclosed, presumably, by questions from the jury to the judge), and judges are discouraged from adding their own comments.

> **Reasonable Doubt**
>
> The suggested direction should only be given where the jury indicates that it is struggling with the concept.[657] It draws on *Krasniqi* (1993) 61 SASR 366; cf *Chatzidimitriou* [2000] 1 VR 493, 498, 503, 509.
>
> **A reasonable doubt is such a doubt as you, the jury, consider to be reasonable on a consideration of the evidence. It is therefore for you, and each of you, to say whether you have a doubt you consider reasonable. If at the end of your deliberations, you, as reasonable persons, are in doubt about the guilt of the defendant, the charge has not been proved beyond reasonable doubt.**[658] (notes and formatting as in original)

---

655 Queensland Courts, *Supreme and District Court Benchbook*, Trial Procedure' [5B.4] <http://www.courts.qld.gov.au/2265.htm> at 12 March 2009.

656 Queensland Courts, *Supreme and District Court Benchbook*, 'Reasonable Doubt' [57] <http://www.courts.qld.gov.au/2265.htm> at 12 March 2009.

657 The direction is not intended to be an inflexible and all encompassing code: *R v Clarke* [2005] QCA 483, [53].

658 Explanatory glosses on the classical formula of proof beyond reasonable doubt are discouraged: see *Darkan v The Queen* (2006) 80 ALJR 1250, [69], [131], *Green v The Queen* (1971) 126 CLR 28, 31; *Ketchup* [1982] Qd R 732; *Holman* [1997] 1 Qd R 373; *Reeves* (1992) 29 NSWLR 109, 117; *Goncalves* (1997) 99 A Crim R 193, 196, 203 (see Footnote 9 to 24.4)

Expansion of the direction through use of impermissible expressions has resulted in misdirection: see *Green v The Queen* (1971) 126 CLR 28, 32–33; *R v Punj* [2002] QCA 333, [11]; *R v Irlam; ex parte A-G* (Qld) [2002] QCA 235, [53], [56], [58]; *R v Kidd* [2002] QCA 433, p4; *R v Bain* [2003] QCA 389, [18], [33]. Cf *R v Booth* [2005] QCA 30, [4]–[5]; *R v Moffatt* [2003] QCA 95, pp 5–6; *R v Clarke* [2005] QCA 483, [53].

The High Court in *Darkan v The Queen* (2006) 80 ALJR 1250, [69], has recently reiterated that the expression beyond reasonable doubt ought not be elaborated explaining the justification as follows.

7.58 The Commission notes that the Benchbook's default position is that the trial judge should not try to explain the expression, which is consistent with authority that it is not an expression that can be defined or paraphrased easily, or possibly at all.[659]

7.59 Jurors' understanding of this expression was canvassed in the recent survey conducted by the NSW Bureau of Crime Statistics and Research.[660] The relevant question asked of the jurors who agreed to participate was a multiple-choice question with four possible answers in these terms:

> People tried in court are presumed to be innocent, unless and until they are proved guilty 'beyond reasonable doubt'. In your view, does the phrase 'beyond reasonable doubt' mean [*Pretty likely* the person is guilty / *Very likely* the person is guilty / *Almost sure* the person is guilty / *Sure* the person is guilty].[661]

7.60 It is not hard to identify shortcomings in the way in which these jurors were surveyed, notably the self-reporting nature of the questionnaire, which are acknowledged by the authors.[662] Others concerns arise out of the range of answers from which the jurors were required to choose. For example, none of the answers from which the jurors had to choose was in fact a correct statement in law of the meaning of the expression.[663] Nonetheless, the jurors' responses shed some light on their understanding of the expression and what may be seen as its 'translation' in to more common language.

> "… One is that 'beyond reasonable doubt' is an expression 'used by ordinary people and is understood well enough by the average man in the community'. … A second consideration is that departures from the formula 'have never prospered'. … A third consideration is that expressions other than 'beyond reasonable doubt' invite the jury 'to analyse their own mental processes', which is not the task of a jury. … Finally, as Kitto J said in *Thomas v The Queen*:
>
> > Whether a doubt is reasonable is for the jury to say; and the danger that invests an attempt to explain what 'reasonable' means is that the attempt not only may prove unhelpful but may obscure the vital point that the accused must be given the benefit of any doubt which the jury considers reasonable." (footnotes omitted)

Where the jury frame a question about proof beyond reasonable doubt in terms of percentage or odds: "It is inherent in the expression of the standard by reference to a percentage chance of guilt or by some assessment of the odds as in a wager, that some doubt must exist that is to be disregarded once the arbitrarily fixed percentage or rate is reached … that misconception could have been removed by instructing them that the question that they had to determine was whether the prosecutor had established the guilt of the accused … beyond reasonable doubt. If, after carefully considering the evidence, reasonable doubt existed in their minds, then it was their duty to acquit. They should have been told that they were not to approach their task by reference to some calculation or percentages. To do so, of course, acknowledges the existence of a doubt which may or may not be reasonable, but which is then disregarded": *R v Carkic, Athanasai & Clarke* [2005] VSCA 182 at paragraphs 227, 228.

659 The Commission also notes that the last sentence of the Queensland Benchbook entry on 'beyond reasonable doubt' introduces the idea that jurors are 'reasonable' people and that doubts that they hold, being reasonable, are reasonable doubts. There might be some doubt as to the accuracy (or helpfulness) of blending concepts of reasonable doubt and reasonable people.

660 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 [2.83] above.

661 NSW Bureau of Crime Statistics and Research (L Trimboli) 'Juror understanding of judicial instructions in criminal trials' *Crime and Justice Bulletin* No 199 (2008), 4.

662 Ibid 10–11.

663 However, the standard of proof in England has been changed, and in New Zealand is changing, to a formula based on 'Are you sure …?' In that context, questions seeking to paraphrase 'beyond reasonable doubt' in terms of being sure could be seen as more relevant.

7.61 A total of 1,178 jurors responded to this question. Of them, 55.4% answered 'Sure the person is guilty' and 22.9% answered 'Almost sure the person is guilty', a combined sub-total of 78.3%. Of the remainder, 11.6% answered 'Very likely the person is guilty' and 10.1% answered 'Pretty likely the person is guilty'.[664]

7.62 The survey also considered these responses in the light of other self-reported responses and characteristics of the jurors:

- Jurors who reported that they 'completely understood' the judge's instructions were more likely than others to answer 'Sure' or 'Almost sure'.
- Jurors who heard cases involving sexual offences against adults or children were 1.4 times as likely to answer 'Pretty likely' or 'very likely', whereas jurors hearing other cases were 1.1 times more likely to answer 'Sure' or 'Almost sure'.
- Jurors whose first language was English were more likely to answer 'Sure' or 'Almost sure' than other jurors, but other socio-economic factors did not appear to be related.
- The provision of written materials to the jury did not appear to be related to the responses.[665]

7.63 The authors of the survey suggest that future research might test jurors' understanding of judicial instructions by asking them to paraphrase directions from the judge. The same approach might be adopted for testing their understanding of key concepts such as 'beyond reasonable doubt'. But, even if jurors could accurately repeat the words of a direction such as that found in the Queensland Benchbook, that might do little more than test their memory and not their understanding or ability to apply the test properly during deliberations.

HOW DIRECTIONS INFLUENCE DELIBERATIONS AND VERDICTS

7.64 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.

7.65 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

664 NSW Bureau of Crime Statistics and Research (L Trimboli) 'Juror understanding of judicial instructions in criminal trials' *Crime and Justice Bulletin* No 199 (2008), 4.

665 Ibid.

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 elsewhere in this Paper.[666] 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.

7.66 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. A direction that certain evidence should be 'scrutinised with great care' may be taken as an instruction to disregard it.[667] Similarly, expressions such as 'dangerous and unsafe to convict', although intended as advisory only, may be taken as a coded instruction not to convict.[668] Problems associated with these two examples may be compounded because neither expression is in common usage and would not be familiar to jurors.

CAN JURORS' COMPREHENSION BE IMPROVED?

7.67 A key aspect of this enquiry is a consideration of various strategies that might be adopted to improve juror comprehension. Research shows that jury directions are influential in determining a jury's decisions.[669] If so, then efforts should be made to consider techniques to improve the rate of comprehension. These would include matters of both the content and presentation of directions, and are considered in chapters 8 and 9 respectively of this Paper.

7.68 However, as the present state of research here and overseas indicates that juries have major difficulties in comprehending the law, it may be better to shift the focus of juries charges away from the law and onto the facts, where juries are more comfortable and more competent. This idea is reinforced if one accepts that it is simply 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 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.

---

666 See [4.63]–[4.72], [4.89]–[4.99], [6.42]–[6.51] above

667 Consultation, Dr B McKimmie, School of Psychology, University of Queensland, 9 December 2008.

668 Ibid.

669 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.

Use of model directions

7.69 There seems to be some general acceptance that model directions such as those found in the Queensland Benchbook[670] 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.

7.70 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.[671]

Does it matter?

7.71 If the reality is that many jurors simply 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 use) of certain warnings and directions.

7.72 It is critical 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.

7.73 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 worthy of continued community acceptance.

SUMMARY

7.74 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

670 Queensland Courts, *Supreme and District Court Benchbook*, <http://www.courts.qld.gov.au/2265.htm>.

671 See *HML v R* (2008) ALJR 723, [2008] HCA 16 [120]–[122] (Hayne J); see [6.4] above and [9.7] below.

> 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.[672]

7.75 Balanced against this are findings and a general appreciation that juries are reasonably good at assessing the evidence and coming to reliable conclusions of fact.

> 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.[673]

7.76 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 and other proposals are considered in more detail in chapters 8 and 9 of this Paper.

ISSUES FOR CONSIDERATION

7.77 The Commission is currently in discussion with various experts in the fields of jury psychology and juror decision-making processes with a view to developing a line of practical research into jurors' information needs and the application by juries of jury directions.

7.78 The Commission is interested in learning what lines of enquiry in these fields lawyers, psychologists, academics and others feel would be relevant, of assistance to the Commission in this enquiry, and would advance research into the jury system in Australia.

---

672 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.

673 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.

7-1 What avenues of research or other lines of enquiry into the psychology of the application by juries of jury directions or jury decision-making processes would be useful for the purposes of this enquiry and in advancing our understanding of these processes generally?

Chapter 8

Improving Jury Directions

IMPROVING JURY DIRECTIONS OVERALL

8.1 To the extent that complicated law leads to complicated jury directions, it may well be beyond the scope of this enquiry to make recommendations to change the content of any particular direction without also seeking to make changes — possibly quite radical changes — to the underlying law. This enquiry is not the occasion, for example, to reconsider in any detail the law of complicity under the Criminal Code (Qld). Any such amendment should only follow a detailed consideration of the legal principles in question, although any review of the substantive criminal law in any jurisdiction should probably include a consideration of the jury directions that might by required under the amended law.

8.2 Conversely, it is quite conceivable that a consideration of jury directions necessitated by any change to the substantive law in any future reform project could influence the terms of the amendments themselves.

IDENTIFYING THE ISSUES BEFORE TRIAL

8.3 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.[674] It is not necessary to consider directions hearings under those Rules in detail here; it is sufficient to note that the likely nature of the issues in the trial would often be well known to all parties well in advance.

8.4 The Commission acknowledges that criminal trials are not to be likened to civil hearings, and that the mutual obligations of discovery and disclosure on all parties to civil proceedings does not find a parallel in criminal proceedings.

674 See especially Chapter 9 of those Rules.

Defendants facing criminal trials have important rights restricting the extent to which any aspects of their defence have to be disclosed in advance of the trial or, indeed, the beginning of the defendants' own cases.

8.5 The Court and the parties are nonetheless in a position 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,[675] but also some preliminary statement 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.

8.6 The Commission accepts that care would always have to be taken to ensure that any such preliminary exposition of the likely issues did not improperly anticipate evidence that failed to 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. Even so, such an exposition could well be helpful to 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.

8.7 A clear identification of the likely evidentiary and factual issues before a trial starts could also assist a judge in considering what directions and warnings may be necessary during the course of the evidence and as part of the judge's summing up.[676]

8.8 In the discussion that follows in chapter 9 of this Paper, it becomes clear that a number of the suggested reforms to criminal trial procedure that have been considered in Australia and elsewhere hinge to some extent on an early identification by 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 Although the *Criminal Practice Rules 1999* provide for pre-trial directions hearings, 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 alibi notices required under section 590A of the Criminal Code (Qld).[677]

8.10 It would seem to be 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:

675 See [2.34]–[2.53] above.

676 See Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [6.2]–[6.4], [7.20]–[7.22].

677 See n 130 above.

> To the greatest extent possible, counsel should co-operate to identify issues in advance of the trial.[678]

8.11 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.[679] This might well 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.[680]

8.12 The Commission is interested to learn to what extent an early exploration of the issues is in fact conducted prior to trials in Queensland, and to what extent this might usefully be expanded.

RE-STRUCTURING DIRECTIONS

8.13 This chapter considers some methods by which formal jury directions may be structured and given in order to assist juries in better understanding the law and applying the law to the evidence. Chapter 9 reviews other methods of providing information to juries.

Limited-use directions

8.14 The problems associated with limited-use directions[681] are discussed in chapters 4 and 6 of this Paper.[682]

8.15 In practice, these issues will often arise in conjunction with issues surrounding the admission (or rejection) of problematic evidence. Of course, the allegedly wrongful admission or rejection of evidence is a possible basis for appeal no less than a wrongful jury direction (or failure to direct on a particular use). However, the question of the admission or rejection of evidence is one controlled by lawyers, both at the trial as well as on appeal, and does not involve giving the jury a demanding and artificial — and possibly unnecessary — forensic task.

8.16 One solution may lie in the reform of the substantive and procedural law to remove the artificial distinctions created by limited-use directions, and to concentrate attention on the rules of admissibility of evidence. By doing so, jury directions will be simplified. This will also remove from the jury an unreasonable

678 Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) 117.

679 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).

680 Mark Findlay, 'Juror Comprehension and Complexity: Strategies to Enhance Understanding' (2001) 41 *British Journal of Criminology* 56, 74.

681 These are also described as 'limiting directions'.

682 See [4.63]–[4.67], [4.114]–[4.120] and [6.42]–[6.51] above.

task that they have little prospect of being able to accomplish. It might also be both more elegant in practice and more rigorous in principle to focus on whether material should be admitted as evidence at all rather admitting quasi-evidence with a shadowy function.

8.17 Section 137 of the Uniform Evidence Act[683] may be seen as one step in the process of removing limited-use directions.[684] It reads:

> Exclusion of prejudicial evidence in criminal proceedings
>
> In a criminal proceeding, the court ***must refuse*** to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant. (emphasis added)

8.18 The section removes the trial judge's discretion to reject evidence if the prejudicial risk of it being used by a jury is outweighed by its value in proving (or tending to prove) a fact in issue. However, it still requires a decision by the judge as to the relative weight of the prejudice and the probative value. But this at least makes it a purely legal decision and not one, the consequence of which is to leave a difficult and artificial forensic exercise to the jury.

8.19 Empirical evidence suggests strongly that juries are influenced by graphic evidence, even when conveyed to them in words only, and demonstrate a tendency to convict.[685] This would support the conventional legal wisdom that a warning, often in strong terms, is required to counteract the prejudicial effect. Such a direction was given in *R v Zammit* and approved of on appeal:

> Members of the jury, the issue in this case … is whether or not the Crown can prove that the accused was the perpetrator of the killing and the robbery, therefore you should look at the photographs[686] in a calm deliberate and dispassionate fashion. I have ruled that it is appropriate that you should see these photographs in order that you make the determination in the context of the reality of what happened, but you should bear in mind that you shouldn't use any emotion.[687]

8.20 In delivering the leading judgment in the NSW Court of Criminal Appeal, Wood CJ at CL (with whom Ireland and Kirby JJ agreed) said that, 'There is no reason to suppose that the jury failed to take account of this direction.'[688]

8.21 Notwithstanding, judicial confidence in the efficacy of directions of the nature, the question remains whether any such direction has its desired effect, or any effect, on the jury.

---

683 *Evidence Act 1975* (Cth).

684 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, 111.

685 Ibid 111–112.

686 Which showed the mutilated face of the deceased.

687 *R v Zammit* [1999] NSWCCA 65 [157] (Wood CJ at CL).

688 Ibid [158] (Wood CJ at CL).

8.22 There has been research on the effect, if any, that warnings of this nature have on a jury, and whether a jury can in fact nimbly apply the evidence for certain purposes but remain immune from any further, improper influence of that evidence by following the instructions to limit their use of it. Put in those terms, it would seem over-optimistic to expect that they can, especially if the evidence plays to the jurors' emotions rather than their intellects. The results of the research are mixed but most has yielded 'unfavourable results';[689] that is, that limited-use directions did not have their intended effect.[690] Several reasons have been put forward for this:

- Jurors may be unwilling or unable to comply as it is perceived as a constraint on their ability to review all of the evidence.
- Attempts at thought-suppression 'rebound' or simply draw more attention to the evidence which the directions seek to de-emphasise.[691]
- Conversely, jurors' attempts to comply with the instruction may result in over-compensation.[692]

8.23 The evidence suggests that giving a warning about the use of prejudicial evidence before that evidence is presented may reduce its prejudicial effect, but research has produced mixed results.[693] However, results do suggest that a warning after the evidence has been presented comes too late for some jurors, who will have already processed, weighed and possibly judged the evidence,[694] which is more likely to happen when juries are presented with evidence without having a clear framework given to them at the outset of the trial within which to work.[695]

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.

Use of plain English

8.25 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

689 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, 112.

690 Ibid 112–3.

691 Ibid.

692 Ibid 119–120.

693 Ibid 113–120.

694 Ibid 110, 113–114, 120.

695 See [9.52]–[9.69] below.

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.

8.26 Plain English is clear, uncomplicated expression. It is not simple English[696] 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.[697]

8.27 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.

8.28 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 by on clarity and not just on sentence length;
- using active rather than passive verbal structures;
- avoiding double and multiple negatives;[698] and
- avoiding jargon, legal shorthand, Latin and archaic terms where other expressions are available.

8.29 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.[699] Many directions, 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.[700]

---

696 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).

697 *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.

698 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 [6.23]–[6.25] above

699 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

700 The problems associated with attempting to define ‘beyond reasonable doubt’ are discussed above at [7.55]–[7.63] above. See also New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [1.32]–[1.34], [3.14]–[3.36].

8.30 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.[701] These pre-conceptions may be quite inaccurate — such as a misconception that a defendant cannot be convicted on circumstantial evidence alone[702] — but entrenched and therefore difficult to displace by a judicial direction.

8.31 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*[703] for example, the trial judge fell into error in trying to paraphrase the expression 'beyond reasonable doubt'.[704]

8.32 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 overstate 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.[705]

8.33 It has been suggested to the Commission that juries 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 lead them to read too much into cautionary expressions.[706]

---

701 See [7.35]–[7.41] above.

702 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 omitted and commentary)

Queensland Courts, *Supreme and District Court Benchbook*, 'Circumstantial Evidence' [46] <http://www.courts.qld.gov.au/2265.htm> at 12 March 2009.

703 [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].

704 The problems associated with attempting to define 'beyond reasonable doubt' are discussed above at [7.55]–[7.63].

705 Consultation, Dr B McKimmie, School of Psychology, University of Queensland, 9 December 2008.

706 Ibid.

8.34 In the survey of jurors' understanding of judicial instructions conducted by NSW Bureau of Crime Statistics and Research ('BOCSAR') in 2007–08, the results of which were published in September 2008,[707] 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 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.[708]

8.35 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.[709] Of course, as the authors of the BOCSAR report acknowledge,[710] the actual extent of the jurors' understanding cannot be objectively measured in a self-reporting study such as this one.

ISSUES FOR CONSIDERATION

8.36 In the light of the evidence raising doubt about the efficacy of some directions, the Commission is interested in learning whether any particular jury directions, or jury directions generally, can be re-styled to work more effectively.

8-1 Is it necessary or desirable to re-cast any of the jury directions given in criminal trials in Queensland?

8-2 If so, how might that be done? Would it involve any reduction or simplification of, or other change in, the directions as currently formulated?

8-3 Is it necessary or desirable to consider a reform of the law concerning the admissibility of prejudicial or other evidence for certain limited purposes only?

8-4 Is it necessary or desirable to consider a reform of the law concerning limited-use directions?

8-5 Are there ways in which the language used in jury directions can be changed to make them more comprehensible to jurors?

707 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 [2.85] above.

708 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.

709 Ibid.

710 Ibid 3, 10–11.

RE-ASSERTING THE TRIAL JUDGE'S DISCRETION

8.37 The Victorian Law Reform Commission ('VLRC') has proposed what might be seen as a very radical proposal to cut through the Gordian Knot of jury directions in that State. It is perhaps not overstating their position as expressed in their Consultation Paper[711] 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 answer, as the VLRC sees it, may well lie in a single piece of legislation, a Directions and Warnings Act. It would have a threefold objective: to consolidate, simplify and organise the law.[712]

8.38 This is, of course, not the VLRC's final recommendation, merely a proposal in a discussion paper, and one that may well be seen as less radical on closer examination than it first appears. The VLRC is due to report by 1 June 2009, and its final recommendations will not become public until some time after that.

8.39 At the heart of the 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.

8.40 The VLRC proposes 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.[713]

> 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

711 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/Current+Projects/Jury+Directions/> at 17 February 2009. The VLRC has also published a shorter discussion paper that summarises the key proposals advanced in its Consultation Paper: Victorian Law Reform Commission, *Jury Directions — a closer look*, Background Paper (2008). This is also available on its website.

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

713 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) 93–4; Victorian Law Reform Commission, *Jury Directions — a closer look*, Background Paper (2008) 3.

> 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.[714] (notes omitted)

8.41 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 Consultation Paper: consciousness of guilt and propensity.[715] 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.

8.42 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.[716]

8.43 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 receive the benefit of directions on defences that were not raised or addressed on by defence counsel.[717]

8.44 The proposed Act also contemplates 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.[718]

8.45 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 … 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.'[719] The Charter applies to courts and tribunals.[720]

---

714 Victorian Law Reform Commission, *Jury Directions — a closer look*, Background Paper (2008) 4.

715 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) 93–4; Victorian Law Reform Commission, *Jury Directions — a closer look*, Background Paper (2008) 5–8.

716 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) 98–9.

717 Ibid 104.

718 Ibid 101–5.

719 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 1(2)(b), (c).

720 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 6(2)(b).

8.46 The right to a fair trial is found in section 24(1) of the Charter:

> A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge of proceeding decided by a competent, independent and impartial court or tribunal after and a fair and public hearing.

8.47 The possible difficulties that might be associated with the introduction of an Act such as that proposed 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.

8.48 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. The Commission understands that the VLRC is currently considering the implication of the Charter in the preparation of its final report.

Statutory reform in Queensland?

8.49 The Commission is interested in hearing any views as to whether statutory intervention such as that suggested by the VLRC — or an any other basis — might have any place in Queensland.

8.50 Alternatively, it may be desirable to adopt, or adapt, aspects of this approach for use in Queensland without introducing a statutory or codifying scheme of the same breadth of scope as that envisaged by the VLRC's proposals.

8.51 Preliminary research by the Commission suggests that the strength of views that the law of, and judicial practice concerning, jury directions in Victoria is in serious disarray and needs radical reform is not echoed in Queensland.[721] Nonetheless, the Commission is concerned to learn whether this perception, and the statistics set out in chapter 5 of this Paper, belie or simply fail to identify systemic problems that might need fundamental overhaul.

8.52 It may be, on the other hand, that there is a need for significant change but that this need only be done on a procedural level. Procedural matters are covered in chapter 9 of this Paper.

8.53 The Commission invites submissions from the Courts, the legal profession, legal and psychological academics and the general public in relation to any of the issues for consideration, or any related question.

---

721 See chapter 5 of this Paper, especially [5.21]–[5.58] setting out a review of statistics of criminal appeals in Queensland and Victoria concerning alleged jury misdirection.

ISSUES FOR CONSIDERATION

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?**

Chapter 9

Assisting Juries

JURIES' INFORMATION NEEDS

9.1 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.

9.2 Conventionally 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 months of preparation that the judge and 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.

9.3 Chapter 8 of this Paper considers ways in which formal jury directions might be improved; this chapter looks at other methods that might assist juries in coming to their decisions.

9.4 At the heart of a number of the techniques canvassed in this Paper 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.

9.5 There are good reasons why questions from a jury to witnesses might be constrained, though questions of a judge for further guidance are not necessarily bound by the same concerns. However, there could well be numerous techniques for improving communication to a jury of both evidence and the law so that the jury is better equipped to make its decisions. Many of these are in practice already in some courts. The Terms of Reference for this enquiry specifically direct the Commission to enquire about the information needs of jurors and to consider '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'.

9.6 At present, there are no formal rules which prevent (or promote) the use of the techniques discussed below. One of the issues for consideration in this enquiry is whether any such rules should be promulgated and, if so, what form and what level of formality any such rules should have.

HELPING JURIES MAKE BETTER DECISIONS

9.7 Any constructive reform of the substantive law and procedural law and practice concerning jury directions might usefully take into account some 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.
- 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.
- 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.

- A lengthy incantation of legal principles in the abstract, however important, will do little to help the jury apply the law to the facts.[722]

9.8 Much of this might well be otiose, however, if jurors in fact make up their mind before they retire to consider their verdicts, as some empirical evidence has indicated.[723]

Use of written materials

9.9 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 in our society generally receive, process and apply information, and then communicate their decisions. Increasingly, all of these functions are done in writing or visually (including 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.

9.10 However, the oral processes are increasingly supplemented by documentary and visual evidence and other material. This enquiry must consider these methods, their benefits or limitations, and any means that may be appropriate to assist their wider use.

9.11 It is now commonplace in criminal trials in Queensland for juries to be provided with one or more documents to assist them in understanding the law or the evidence. These are often provided at the time of the parties' addresses

722 See *HML v R* [2008] HCA 16 [120]–[122] (Hayne J) quoted in [6.4] below.

723 Mark Findlay, 'Juror Comprehension and Complexity: Strategies to Enhance Understanding' (2001) 41 *British Journal of Criminology* 56, 75.

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.

9.12 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.[724]

9.13 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 propose that, as they are the principal decision-makers in the trial, they should be given as much material as a judge would 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.[725]

9.14 The Law Commission of New Zealand came to this conclusion about the provision to juries of written aids generally:

> 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;

724 These various forms of written aids are discussed in more detail later in this chapter: see [9.50], [9.60]–[9.72] and [9.92]–[9.95] below.

725 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.

- the [Criminal Practice Committee] Manual should contain detailed guidelines on the appropriate use and presentation of written and visual aids.[726]

9.15 In surveys, jurors have expressed their concern that evidence is not always presented in the clearest ways, and that maps, diagrams, photographs and other visual aids were under-used.[727] Nonetheless, in the survey conducted by the Australian Institute of Criminology, 74% of jurors reported seeing charts or visual aids during the trial.[728] This is more commonly done in the various Supreme Courts rather than the District or County Courts.[729] 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 material (such as notes of the elements of the offence) were allowed into the juryroom during deliberations.

9.16 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.[730]

Judicial practice

9.17 Research by the Australian Institute of Judicial Administration has shown that, although there is significant variation on the practices of trial judges around Australia and in New Zealand, there is still a slow adoption of practices involving giving the juries written assistance.[731] 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.

9.18 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:[732]

726 Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) 136–7.

727 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.

728 Australian Institute of Criminology, *Practices, policies and procedures that influence juror satisfaction in Australia*, Research and Public Policy Paper No 87 (2007) 139.

729 Ibid 141.

730 Mark Findlay, 'Juror Comprehension and Complexity: Strategies to Enhance Understanding' (2001) 41 *British Journal of Criminology* 56, 65 (Russian juries).

731 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).

732 Ibid 30.

	NSW	Qld	SA	Tas[733]	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 9.1: Written assistance at summing up.

9.19 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).[734]

9.20 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.[735]

Notetaking

9.21 Jurors in Queensland are free to take their own notes of the evidence and directions, 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. Jurors in Queensland are advised during the orientation process that they should take notes as they will not receive a copy of the transcript.[736]

9.22 Notetaking is not without its disadvantages, however:

- In long cases, jurors' notes can become very lengthy and unwieldy.
- Jurors' notes will not necessarily be accurate or complete, and disputes may arise as to the accuracy of one or more jurors' note of a particular

733 Data was obtained from only four Tasmanian judges: 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.

734 See n 733 above.

735 Australian Institute of Criminology, *Practices, policies and procedures that influence juror satisfaction in Australia*, Research and Public Policy Paper No 87 (2007) 140.

736 See [2.42] above.

piece of evidence. Juries can spend a lot of time trying to agree on a version of the evidence from their notes.[737]

- Some jurors are simply better note takers than others, which could give them a disproportionate say in the jury's deliberations.

- Extensive notetaking may distract jurors while testimony is being given, and they may fail to adequately observe witnesses' demeanour and other non-oral cues.[738]

9.23 Turning to this last objection: if notetaking 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 source and point of reference is their individual and collective memory.

9.24 Notetaking is common: 93% of jurors in three Australian States report serving on juries with members who took notes.[739]

Transcript of evidence

9.25 To a large extent, the issues of notetaking and the provision of the transcript of evidence are closely related. They both relate to the jury having an accurate copy of the oral evidence.

9.26 However, the provision of the transcript of evidence to juries, either upon request or routinely, is a more problematic and controversial issue than the provision of other forms of documentary assistance described in this chapter, and warrants careful consideration.

9.27 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%).[740]

9.28 There is no statutory bar to a judge in Queensland providing the jury with a copy of the transcript. However, although this is not usually done, an appeal based on a trial judge's doing so was rejected by the Court of Appeal in *R v Tichowitsch*, in which all three judges affirmed that this is a matter within the

737 Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) [342].

738 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 12 March 2009; [4.26] above.

739 Australian Institute of Criminology, *Practices, policies and procedures that influence juror satisfaction in Australia*, Research and Public Policy Paper No 87 (2007) 140.

740 Ibid.

discretion of the trial judge.[741] By contrast, the *Jury Act 1977* (NSW) was amended in 1987 to specifically permit the whole or any part of the transcript of evidence to be given to the jury 'if the judge or coroner considers that it is appropriate and practicable to do so.'[742] The previous usual practice in New South Wales,[743] and the current common practice in Queensland, is for judges to read to the jury any part of the evidence that it wishes to be reminded about.

9.29 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.[744]

9.30 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.[745] 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. 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.[746]

9.31 The trial judge's warnings in this case exemplify the primacy given in criminal trial procedure to the oral evidence. It must be noted that the transcript of any oral evidence, whether given in or outside court, is a secondary form of

741 *R v Tichowitsch* [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).

742 *Jury Act 1977* (NSW) s 55C.

743 *R v Taousanis* (1999) 146 A Criminal R 303; [1999] NSWSC 107 [8] (Sperling J).

744 *R v Tichowitsch* [2006] QCA 569 [16] (Williams JA).

745 *R v Le* [2007] QCA 259.

746 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].

evidence, the primary form being the words spoken, which are inherently transient.

9.32 In *R v Lake; R v Carstein; R v Geerlings*, the Queensland Court of Appeal dismissed an appeal based on the retention by the jury of transcripts of taped phone intercepts, which were the basis of the prosecution's evidence.[747]

9.33 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.[748] 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.

9.34 The question of the provision of the transcript of evidence to the jury needs to be considered in light of the fact that some parts (or records) of the evidence ought not to be given to the jury. For example, in Queensland it has been said 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). However, these exceptional instances may also need to be re-considered.[749]

9.35 Section 93A was considered by the High Court in *Gately v The Queen*.[750] During deliberations in that case the jurors had asked for videotapes of the complainant's evidence to be re-played to them; these had been recorded prior to 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.[751]

9.36 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 pre-

747 [2007] QCA 209.

748 *R v Tichowitsch* [2006] QCA 569 [15] (Williams JA).

749 See *R v Tichowitsch* [2006] QCA 569 [16] (Williams JA).

750 (2007) 232 CLR 208.

751 Ibid [96] (Hayne J).

> sented. As was said in *Butera*,[752] 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 evidence that has been repeated and repeated recently. Other risks may arise from the circumstances of the particular trial.[753]

9.37 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. 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.

9.38 Independently of any issues of principle, there are a number of practical considerations that need to be accommodated in this regard. The most obvious of these is availability of the technical facilities in some or all courts to provide transcript within any useful time frame.

9.39 Clearly, the jury's version of the transcript must not include anything other than the admissible evidence that it heard or saw. The version of any transcript to be provided to a jury would need to be carefully reviewed and, where necessary, edited to make sure that it is accurate and that all inadmissible evidence and other portions that the jury should not review have been removed. Concerns about the excision from the transcript of material that should not go to the jury might be alleviated by simple expedients such as starting the transcript of argument on *voir dire*, or other proceedings when the jury was absent, on a new page, a practice that apparently occurs in Victoria.[754]

9.40 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. 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.

9.41 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 people without the relevant technical expertise may find difficult to grasp or retain. However, care must still be taken. If the evidence is contested or challenged in any way, it may be critical that the jury also be provided with the transcript of any relevant cross-examination (or re-examination) of the same

752 *Butera v Director of Public Prosecutions (Vic)* (1987) 164 CLR 180, 189–90.

753 (2007) 232 CLR 208 [95] (Hayne J).

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

witness — or even conflicting transcript from contradicting witnesses — to ensure that the jury has a balanced presentation of the evidence on the relevant issues.

9.42 The Commission understands that many trials in Queensland are now video-recorded. One solution to this issue may be to provide the jury with a copy of the video-recording so that they can review during deliberations whatever portion of the evidence they choose.[755] This would reproduce as accurately as is currently possible what the jury saw and heard during the trial.

9.43 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.[756]

9.44 Furthermore, thought would need to be given as 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.

9.45 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. One judge responding to the survey by the Australian Institute of Judicial Administration[757] 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

755 See also Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) [350].

756 See *Gately v The Queen* (2007) 232 CLR 208.

757 See [2.77] above.

- 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.[758]

9.46 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.[759] 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 sidetracked by the judge's notes and become immersed in irrelevant details.

9.47 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.[760]

9.48 The provision of judge's notes in New Zealand is not uncommon[761] 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 simple references to the witnesses or even transcript references, which jurors can follow through as they see fit during deliberations.

9.49 It would seem that this is an area where changes in practice and the law have been, and might well be in future, predicated upon advances in technology.

Copies of evidence

9.50 During the trial and their deliberations, jurors have traditionally had 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, but not a transcript of the oral evidence, whether given live or by video-tape.

---

758 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).

759 Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) [341]–[354].

760 Ibid 134.

761 See, eg, *R v Haines* [2002] 3 NZLR 13 [28]–[29] (McGrath J).

9.51 In this regard, the distinction between evidence in the form of oral testimony (spoken words) and a record of them (a transcript) is important.[762]

Opening directions by the judge

9.52 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):

- are 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.[763]

9.53 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).[764]

9.54 The Queensland Benchbook suggests a series of opening remarks to be given by the trial judge to the jury. These are set out in chapter 4 of this Paper.[765] These 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.

9.55 The survey conducted by the NSW Bureau of Crime Statistics and Research ('BOCSAR'), the results of which were published in September 2008,[766] 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;

762 See [9.37] above.

763 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.

764 Ibid 110.

765 Queensland Courts, *Supreme and District Court Benchbook*, Trial Procedure' [5B] <http://www.courts.qld.gov.au/2265.htm> at 12 March 2009; see [4.26].

766 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 [2.85] and [7.24] above.

- about a quarter (26.0%) said that they would have preferred to receive these instructions at the beginning of the trial;
- 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.[767]

9.56 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.

9.57 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%).[768] (emphasis in original)

9.58 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 is 'indispensable'.[769]

9.59 Research recently conducted by the Australian Institute of Criminology 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'.[770]

---

767 NSW Bureau of Crime Statistics and Research (L Trimboli) 'Juror understanding of judicial instructions in criminal trials' *Crime and Justice Bulletin* No 199 (2008), 9, 10.

768 Ibid 9.

769 Jury Directions Symposium, Melbourne, 5–6 February 2009. See also [9.52] above.

770 Australian Institute of Criminology, *Practices, policies and procedures that influence juror satisfaction in Australia*, Research and Public Policy Paper No 87 (2007) 138–9.

Copies of judges' directions and summing up

9.60 The BOCSAR survey in 2007–08[771] 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.[772]

9.61 However, importantly:

> There was a significant relationship between whether jurors received a written transcript of the judge's summing-up of the trial evidence[773] 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 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.[774]

9.62 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 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 'most things' that the judge said in the summing-up …[775]

9.63 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.[776]

---

771 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 [2.85] and [7.24] above.

772 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. These statistics are considered in more detail at [7.24]–[7.30] above.

773 Importantly, this was not a transcript of any of the evidence itself, just of the judge's summing up of it.

774 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.

775 Ibid 6.

9.64 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.[777]

9.65 Opposed to these remarks are the results of the research by the Australian Institute of Judicial Administration outlined in chapter 2 of this Paper which showed that in practice only 11% of Australian judges and 10% of New Zealand judges provide the jury with anything in writing that covers their opening remarks.[778]

Opening statements by the parties

9.66 As discussed in chapter 2 of this Paper, both the prosecution and the defence may open their cases with an opening statement, but are not required to do so.[779] Typically, the prosecution does but the defence may be more reticent, and more circumspect if the option is taken up.

9.67 Both parties, of course, have the right to address the jury at the conclusion of the evidence,[780] 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 BOCSAR survey conducted in 2007–08.[781]

9.68 It has been suggested that, especially in cases where the evidence or the legal questions that the jury must resolve are complex, unusual or lengthy, juries would benefit from more detailed preliminary statements, especially if

---

776 Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) [313].

777 Ibid [314].

778 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 [2.77].

779 Criminal Code (Qld) s 619(1), (3); see [2.52]–[2.53] above.

780 Criminal Code (Qld) s 619(3); see also [2.63] above.

781 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 [7.24]–[7.30] above.

accompanied by chronologies or lists of witnesses and so on. Much of this may well be unnecessary in short cases, but could assist juries at the outset of long trials to understand the evidence and place it in context in long cases involving, for example, multiple defendants, multiple charges and alternative charges, and complex decision-making processes.

9.69 If done at the beginning of a trial, some care is necessary as the case may not proceed as anticipated; for example, some evidence may be ruled as inadmissible, or a witness's evidence may turn out other than as expected. However, a general statement of the legal issues and decisions that the jury will have to make, accompanied by documents that help the jury understand the context of the case as a whole — especially if discussed and agreed between the judge and parties before the jury is empanelled — is less likely to be controversial. 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.

Glossaries

9.70 The use of glossaries of legal terms and concepts was considered by the Law Commission of New Zealand in its 2001 report on juries in criminal trials.[782]

9.71 Research there,[783] in Australia[784] 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.

9.72 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, although 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.[785]

782 Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) [379]–[382].

783 Ibid [379].

784 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 [2.85], [8.25]–[8.35 above.

785 Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) 143.

Questions from juries

9.73 As noted above in chapter 3 of this Paper, a jury can ask questions of a judge seeking further directions in relation to the law or seeking to be reminded of some evidence.[786] A jury can also seek to put questions to a witness. However, little is done to encourage them to ask questions (through the judge) during the trial itself; in some instances, they are discouraged.[787] On the other hand, they are expressly invited to put questions to the judge after they retire.

9.74 Jurors tend to report that they were discouraged from asking questions or were unsure if they could or the procedure to follow.[788] However, the research conducted by the Australian Institute of Criminology 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.[789]

9.75 The Commission is interested in learning whether there might be any advantage in seeking to expand, or otherwise modify, a jury's right to ask questions.

9.76 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 maybe 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 hearing by reducing jurors' concerns or frustration about particular aspects of the evidence that seem to them to be inadequately covered.

9.77 A feeling that they cannot be meaningfully involved in proceedings is one source of concern for jurors.[790] Frustration of this sort might well lead jurors to undertaking their own enquiries, contrary to the law and contrary to their oath, if they feel that their task of finding the truth is being thwarted.[791] It may be moot

786 See [3.34]–[3.39] above.

787 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.

788 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.

789 Australian Institute of Criminology, *Practices, policies and procedures that influence juror satisfaction in Australia*, Research and Public Policy Paper No 87 (2007) 140.

790 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.

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

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

9.78 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.[792]

9.79 The LCNZ noted that judges ask questions in judge-only trials to clarify matters that concern and that juries should be accorded the same respect.[793]

9.80 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.[794] 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.

9.81 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.[795]

9.82 The LCNZ felt strongly that questions during deliberations should be encouraged,[796] and suggested that the handbook issued to jurors be expanded to cover some matters in more detail in order to:

- 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

792 Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) [360]–[371].

793 Ibid [361].

794 Ibid [361]–[362].

795 Ibid [371].

796 Ibid [370].

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.[797]

9.83 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.[798]

Summaries of the evidence

9.84 A great deal of time in the judges' summings up in some jurisdictions is occupied by summarising the evidence. In Queensland, where a typical summing up and directions by a judge may occupy two to three hours, the summary of the evidence necessarily takes only a portion of this time, and is a relatively short time in comparison with the duration of the trial as a whole. No summary of the evidence is required by section 620 of Criminal Code (Qld) beyond 'such observations upon the evidence as the court thinks fit to make.'

9.85 This may be contrasted with a relatively recent case in Victoria where the trial judge, Redlich J, summarised the evidence for 19 hearing days, just under four weeks. The trial itself had taken about seven months before the summing up. The case involved seven defendants charged with two counts of murder and alternative charges, and involved complex issues of complicity. The issues also included alleged lies as evidence of the co-defendants' consciousness of guilt. The Commission is not aware to what extent the summing up was supported by written material provided to the jury but it seems highly unlikely that any jury could effectively apply any summary of this length without reference to written aids of some sort.

9.86 In its judgment on appeal in this case, the Court of Appeal approved the trial judge's directions in relation to the limit on the use the of evidence of

797 Ibid [369].

798 Ibid 140, 141

one co-defendant against another co-defendant, which were described as 'more than adequate'.[799] The Court of Appeal then concluded that, 'There is no reason to consider that the jury did not fully comprehend and properly apply his Honour's directions'.[800] The basis of the Court's confidence in the jury in this regard is not stated or otherwise obvious from the judgment. But the Court's faith in the jury had its limits. It is clear from the later findings of the Court in upholding some of the appeals that it did not agree with some of the jury's conclusions as some of the convictions of some of the appellants were quashed on appeal because the evidence did not support the inference of guilt beyond reasonable doubt.[801]

9.87 By contrast, trial judges in New Zealand rarely summarise the evidence at all. Their summings up will refer to the witnesses whose evidence relates to particular key issues in the case, but the evidence itself is not repeated or summarised. Juries in New Zealand are typically provided with a full copy of the transcript of evidence (known there as 'judge's notes' or 'notes of evidence'), and the practice there appears to rely on jurors' checking the evidence for themselves.

9.88 It has been said that a summary of the evidence is counter-productive because it simply repeats what the jurors have already heard and is therefore not particularly helpful to them, and because it overlooks the difference between the roles of counsel and the role of the judge.[802] It may become necessary, however, if the parties' addresses do not adequately cover the evidence or do so in an overly selective way.

9.89 By the time that jurors hear a judge summarising the evidence, they will have already heard the evidence itself and both addresses, in which the prosecution and the defence will each have spent some time pointing the jury to the evidence on which they rely and suggesting to the jurors how they should regard it. Of course, the nature of particular evidence may require the judge to give certain directions or warnings which are mandated by law and which are not themselves a re-statement of the evidence.

9.90 It is unclear to what extent a third detailed review of the evidence by the judge can assist, rather than confuse or bore, jurors. The Commission is therefore interested in learning whether any real advantage may be gained by a judge summarising the evidence at any length as part of the final summing up of the case to the jury. It would seem that a judge would need to deal with evidence that is the subject of specific warnings or is otherwise controversial or difficult to consider. Otherwise, however, it may be that any further recitation of the evidence itself (as opposed, say, to references to the witnesses or their evidence) is unnecessary or even counter-productive.

---

799 *The Queen v Lam* [2008] VCSA 109 [45].

800 Ibid.

801 Ibid [99], [113], [140]–[141].

802 Jury Directions Symposium, Melbourne, 5–6 February 2009. A judge who simply repeats counsel's submissions also runs the risk of repeating counsel's errors: ibid.

9.91 Any reform that is directed to a shortening of summaries of evidence may well need to proceed in tandem with other reforms improving and expanding the written material provided to assist jurors in their understanding of the case as it proceeds and in their deliberations.

Structured question paths

9.92 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 used in practice 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.

9.93 The following is an example of a structured series of questions put to a jury in a Queensland murder trial in which the partial defence of provocation was raised:

> 1. Are you satisfied beyond reasonable doubt that [the defendant] killed [the deceased]?.
>
> a) If 'no' to Question 1, [the defendant] is not guilty of any offence;
>
> b) If 'yes' to Question 1, go to question 2.
>
> 2. When he killed [the deceased], are you satisfied beyond reasonable doubt that [the defendant] intended to kill him or cause him grievous bodily harm?
>
> a) If 'no' to question 2, [the defendant] is not guilty of murder but guilty of manslaughter;
>
> b) If 'yes' to question 2, go to question 3.
>
> 3. Has the prosecution proved beyond reasonable doubt that [the defendant] was not provoked by [the deceased]?
>
> a) If 'yes' to question 3, then [the defendant] is guilty of murder;
>
> b) If 'no' to question 3, [the defendant] is not guilty of murder but guilty of manslaughter.[803] (emphasis in original)

9.94 This is a relatively straight-forward example. It could also be arranged like a flowchart illustrating graphically the consequences of each intermediate decision.[804] In complex cases, a flowchart may make the sequence of decisions and consequences easier to follow, though it might be easy to over-complicate

803 In the actual trial, the names of the defendant and the deceased were used rather than the abstract 'the defendant' and 'the deceased' used here. The jury was also provided with a written set of questions that they needed to consider in relation to provocation: see [6.24]–[6.25] above. The questions had been shown to counsel for both parties before being given to the jury during the judge's summing up.

804 See, for example, Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) 122.

the diagram, in which case it might well be useful to break it up into logically discreet components.[805]

9.95 One key aspect of the example just cited is that 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 murder and manslaughter has been embedded in the questions prepared by the trial judge.

9.96 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.

Integrated directions

9.97 One other technique that might be contemplated would involve a review of the order in which the various components of the final summing up are presented and of the structure of the summing up as a whole.

9.98 One conventional approach is to the present the various components of the summing up in blocks:

- 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.

9.99 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 inte-

805 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.

grated 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].[806]

9.100 In this context, 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 directions of the law and an outline of the questions that the jury must answer into a single logical unit, rather than as blocks of instruction with different purposes. These would need to be developed by trial judges over time, and no doubt some more experienced trial judges either incorporate some of these ideas into the structuring of their summings up, consciously or otherwise.

9.101 An example of an integrated direction might be this:

> The first charge against Reverend Green is the murder of Miss Scarlet.
>
> On all aspects of the offence, the prosecution must satisfy you beyond reasonable doubt. *[This might be the time to explain the onus and standard of proof.]*
>
> The following facts have been agreed and are not in dispute: *[eg, Reverend Green had a disagreement with Miss Scarlett on the day of her death or Miss Scarlett is dead or Reverend Green punched Miss Scarlett in the head]*.
>
> The first question that you must decide is whether Reverend Green killed Miss Scarlett. The prosecution relies on the evidence of an eyewitness, Professor Plum … *[This might be an appropriate place to give a warning about identification evidence.]* … and the evidence of a confession to a cellmate while Reverend Green was on remand … *[This might be an appropriate place to give a warning about prison informants].* The defence relies on the evidence of …
>
> If you decide that Reverend Green did not kill Miss Scarlett, then he is not guilty of any offence and you must acquit him.
>
> If you decide that Reverend Green did kill Miss Scarlett, then the second question that you must decide is whether Reverend Green killed her with the intention to kill her or cause her grievous bodily harm. The prosecution relies on the evidence of Colonel Mustard, who testified about an earlier attack by Reverend Green on Miss Scarlet. *[This might be an appropriate place to give a warning about propensity or similar fact evidence.]*
>
> *[and so on, going through the elements of each charge and alternative charge such as manslaughter in this example].*

9.102 The law of homicide has been subsumed into the questions, which are framed as questions of fact only.

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

9.103 The preparation of such a direction 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.

9.104 Of course, the use of integrated directions such as this 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.

9.105 The Commission acknowledges that 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.

Special or factual verdicts

9.106 A jury's task, particularly in more complex cases or in cases where the law to be applied is inherently complicated, might be simplified — and therefore their own and the public's confidence in the verdict might be enhanced — if, rather than giving an overall verdict of guilty or not guilty, juries were only required to answer factual questions. The court would then apply those factual answers to the relevant law and from that determine guilt.

9.107 To take a simple example, in a murder case a jury might be required to determine the various factual elements of the offence (such as whether or not the defendant did in fact kill the victim; whether the defendant had the requisite intention to kill or cause grievous bodily harm to the victim or someone else, and so on) rather than return a verdict of guilty or not guilty. The same approach could be applied to the elements of any relevant defence.

9.108 This would have the effect of exposing the jury's decision-making processes to a much greater degree than at present as it would disclose where a jury failed to be satisfied of an element of an offence or defence. Currently, an observer has little real means of identifying any of a jury's intermediate decisions on factual matters or elements of offences or defences as these are never disclosed. An observer familiar with the details of the case might be able to make some educated guesses, particularly if admissions or agreement on certain facts had narrowed the range of issues in dispute.

9.109 Any such proposal may well attract opposition on the basis that it removes from the jury, and therefore the community, the fundamental task of determining guilt in important criminal cases, even if the court's decision on guilt must flow inevitably and without any further deliberation on the judge's part from the jury's factual findings. There may be some apprehension that apparently reducing the jury's pre-eminent role in determining guilt somehow undermines its position notwithstanding that it is still making the same fundamental factual decisions.

9.110 Special verdicts are specifically provided for in section 624 of the Criminal Code (Qld), which reads:

> **624 Special verdict**
>
> In any case in which it appears to the court that the question whether an accused person ought or ought not to be convicted of an offence may depend upon some specific fact, or that the proper punishment to be awarded upon conviction may depend upon some specific fact, the court may require the jury to find that fact specially.

9.111 They are rare in Queensland but have been considered on a number of occasions:

- *R v Jackson*,[807] where a special verdict under section 624 was taken in a fraud case. The judge then directed a verdict of guilty on the basis of the jury's special verdicts given that the effect in law of its answers to the factual questions was that the defendant was guilty. The Court of Appeal approved of that course.

- *R v Labanon*,[808] where a special verdict was taken into account in sentencing in a drug import case.

- *R v Kimmins*,[809] where a special verdict was taken in an unlawful wounding case in relation to what wounding the verdict of guilty related to.

- *R v Ali*,[810] where the question on appeal was whether the trial judge ought to have requested a special verdict to assist in sentencing in a case on charges of stalking which involved more than 150 particularised acts. The Court of Appeal held there was no duty to do so.

- *R v Organ*,[811] where the question on appeal was whether the trial judge ought to have taken special verdicts with respect to each item of property in a stealing case. The Court of Appeal held there was no duty to do so under section 624; whether to do so was a matter for the discretion of the trial judge.

9.112 In any event, the use of structured question paths with written flowcharts might well overcome any need to consider special verdicts as a option for reform as a result of any perceived problems with jury directions.

9.113 In this regard, the Law Commission of New Zealand concluded in their 2001 report on juries in criminal trials:

---

807 [1975] Qd R 388.

808 [2006] QCA 529.

809 [2006] QCA 438.

810 [2002] QCA 64.

811 [1999] QCA 284

> While the residual power to use special verdicts should remain, in practice they will continue to be seldom used as flowcharts and sequential questions can play largely the same function. The use of flowcharts and sequential questions to assist the jury is to be encouraged, especially in complex cases.[812]

Choosing a speaker

9.114 As noted above, a jury typically selects its speaker soon after being empanelled.[813]

9.115 In its 2001 report on juries in criminal trials, the Law Commission of New Zealand 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.[814] This is done to some extent in Queensland in the introductory video shown to all potential jurors before being empanelled, and is referred to in the *Juror's Handbook*.[815]

9.116 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.'[816] Although that might be quite true, it might be equally 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. 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.

812 Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) 121

813 See [2.47] above. The speaker is also called the 'foreman', 'forepreson' or 'jury representative' in other jurisdictions.

814 Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) [287]–[289].

815 Queensland Courts, *Juror's Handbook* (2008) 14.

816 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.[817]

9.117 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.

9.118 Obviously the selection should be made before the jury retires to consider its verdict. In shirt 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.

9.119 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.[818]

9.120 This issue was raised by the Law Commission of New Zealand ('LCNZ') in its Preliminary Paper *Juries in Criminal Trials Part Two*. The LCNZ's research had indicated that juries were often rushed into selecting a foreman, taking an average of four minutes.[819]

---

817 Queensland Courts, *Guide to Jury Deliberations* (2008) 14–15.

818 Australian Institute of Criminology, *Practices, policies and procedures that influence juror satisfaction in Australia*, Research and Public Policy Paper No 87 (2007) 139.

819 Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) [297].

9.121 In response to this Preliminary Paper, 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.[820] 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.[821]

9.122 The Commission is interested in learning whether any further guidance might usefully be given to jurors once empanelled to guide them in the selection of their speaker, and whether juries might be assisted by delaying, even slightly, the selection of their speakers.

Expert evidence

9.123 Expert evidence is one area where some jurors seem to have difficulty. It would be surprising if they did not, confronted with highly specialised and technical material for the first time, presented in the very artificial environment of a criminal trial.

9.124 The Law Commission of New Zealand has considered a number of proposals in relation to the presentation of expert evidence:[822]

- One would allow a trial judge to vary the order of witnesses so that a defendant's expert witness could be called immediately after the prosecution's expert witness dealing with the same topic, which received some support from practitioners but less from judges.
- Another suggestion was that the parties' expert witnesses should file a joint memorandum setting out what they agree on and the areas of dispute between them.
- A third called for the involvement of a court-appointed expert who would give the jury an introduction to the subject matter without discussing the evidence or merits of the case in question, which would be left to the parties in the usual way. The Law Commission did not agree with this approach on the bases that this role should be covered by the prosecu-

820 Ibid [290]–[299].

821 Ibid 113.

822 Ibid [372]–[378].

tion's experts, that it would add to the costs of the trial and that it would detract from the adversarial nature of the proceedings.

9.125 The Law Commission concluded that:

> The Commission agrees that counsel bear the primary onus to make evidence comprehensible to jurors. In rare cases the calling of defence expert evidence immediately after the prosecution expert may facilitate better understanding by jurors of the issues between the competing experts.

9.126 This Commission is interested in learning whether the presentation of expert evidence in criminal trials in Queensland presents any real problems in practice, and whether there are any possible procedural reforms that might lead to it being better comprehended and applied by juries.

Other techniques

9.127 The Commission is interested in learning whether there are any other techniques by which a jury can effectively and fairly be informed about the law or the evidence.

STATUTORY OR PROCEDURAL REFORM?

9.128 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 very largely 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.

9.129 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.

9.130 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 chapter, and do so from an individual consideration of the requirements of the case in hand. The very nature of their work means that judges do not get to directly observe other judges at work — 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.

9.131 The Commission is interested in learning whether there is felt to be any need to formalise the range of techniques that may be used in assisting juries and providing them with information about the law (and with properly admissible and useful forms of evidence). It would seem unlikely that any particular technique could be required in any given case or class of cases, and in each case the techniques applied will almost certainly be discussed between the judge and counsel.

9.132 In light of the concerns raised by the Victorian Law Reform Commission in its Consultation Paper[823] about the preservation of the trial judge's discretion in relation to jury directions generally, this Commission is interested in learning whether any formalisation of the use of these techniques need also incorporate any statement about the trial judge's discretion in relation to the application of them in any particular criminal trial.

9.133 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.[824] 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.

9.134 It may be that no or little formalisation of these methods is required, but that a perceived need for them to be actively considered in each criminal trial means that they should be the subject of on-going professional development for criminal trial lawyers and judges alike.

ISSUES FOR CONSIDERATION

9.135 The various issues raised in this chapter suggest that a variety of procedural reforms might, if adopted in Queensland, improve the way in which evidence and the directions on the law will be understood and applied by juries. The Commission is interested in learning which of them warrant further consideration and possible implementation.

823 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008). See also [8.37]–[8.39] above.

824 See Criminal Code (Qld) s 669A(2), (2A).

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?**

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?**

Appendix A

Terms of Reference — Jury Directions

Jury directions review

I, Kerry Shine, Attorney-General and Minister for Justice and Attorney-General and Minister Assisting the Premier in Western Queensland, having regard to:

- the critical role juries have in the justice system in Queensland to ensure a fair trial;
- the reviews currently being undertaken by the New South Wales Law Reform Commission and Victorian Law Reform Commission of directions and warnings given by a judge to a jury in a criminal trial; and
- the Jury Charges Research Project currently being undertaken by the Australian Institute of Judicial Administration;

refer to the Queensland Law Reform Commission (the Commission) pursuant to section 10 of the *Law Reform Commission Act 1968* (Qld), the review of directions, warnings and summing up given by a judge to jurors in criminal trials in Queensland and to recommend any procedural, administrative and legislative changes that may simplify, shorten or otherwise improve the current system.

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;
- The nature of the split for hung juries;
- The reason/s for a juror or jurors' dissent in hung juries;

(b) directions or warnings which could be simplified or abolished;

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

(d) the extent to which the judge needs to summarise the evidence for the jury;

(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; and

(f) recent developments and research in other Australian and overseas jurisdictions.

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

The Commission is to provide a report to the Attorney-General and Minister for Justice and Minister Assisting the Premier in Western Queensland on the results of the research and the review by 31 December 2009.

Dated the 7 day of April 2008

Kerry Shine MP
Attorney-General and Minister for Justice
And Minister Assisting the Premier in Western Queensland

Appendix B

Terms of Reference — Jury Selection

Jury selection review

I, Kerry Shine, Attorney-General and Minister for Justice and Attorney-General and Minister Assisting the Premier in Western Queensland, having regard to:

- The critical role juries have in the justice system in Queensland to ensure a fair trial;
- The fact that jury duty is an important civic duty and those who become involved in criminal trials have an expectation that they will be determined by a judge and jury;
- It is an essential feature of the institution of juries that a jury is a body of persons representative of the wider community, to be composed in a way that avoids bias or the apprehension of bias and that one of the elements of the principle of representation is that the panel of jurors be randomly or impartially selected rather than chosen by the prosecution or the State;
- The importance of ensuring and maintaining public confidence in the justice system;
- The recent reports released by the New South Wales Law Reform Commission report on Jury Selection (Report 117, 2007) and Blind or deaf jurors (Report No 114, 2006) which make a number of recommendations;
- The review of the selection, eligibility and exemption of jurors currently being undertaken by the Western Australia Law Reform Commission;
- Reforms concerning the composition of juries and conditions of jury service which have occurred in other jurisdictions;[825]
- The Australian, New South Wales and Victorian Law Reform Commissions' Report on *Uniform Evidence Law* recommended that the Standing Committee of Attorneys-General should initiate an inquiry into the opera-

825 For example, Victoria and Tasmania have removed a juror's right to claim exemption from jury service and limit the categories of people who are ineligible to serve on a jury. The United Kingdom has also removed exemptions for most people and the only people who are disqualified include people in prison or in mental institutions or who have served lengthy prison sentences within a certain period.

tion of the jury system, including matters such as eligibility, empanelment, warnings and directions to juries.

- The provisions in the *Jury Act 1995* (Qld) prescribing those persons who are ineligible for jury service have not been reviewed or amended since 2004.

refer to the Queensland Law Reform Commission (the Commission) pursuant to section 10 of the *Law Reform Commission Act 1968* (Qld), a review of the operation and effectiveness of the provisions in the *Jury Act 1995* (Qld) relating to the selection (including empanelment), participation, qualification and excusal of jurors.

The scope of this review does not include review by the Commission of Part 6 of the *Jury Act 1995* which contains provisions about jury trial in Queensland, including, for example:

- consideration of whether juries should have a role in sentencing;
- the merits or desirability of trial by jury; or
- the requirement for majority verdicts in Queensland.

In undertaking this review, the Commission is to have particular regard to:

- Whether the current provisions and systems relating to qualification, ineligibility and excusals for jury service are appropriate, including specifically whether:

  (a) there are any additional categories of persons who should be ineligible for jury service, such as:

    (i) a person employed or engaged in the public sector in law enforcement, criminal investigation, the provision of legal services in criminal cases, the administration of justice or penal administration; and

    (ii) local government chief executive officers.

  (b) there are any categories of persons currently ineligible for jury service which are no longer appropriate;

  (c) the ineligibility of a person who has a physical or mental disability that makes the person incapable of effectively performing the functions of a juror remains appropriate, particularly in the context of persons who are profoundly deaf or have a significant hearing or sight impairment, having regard to the *Anti-Discrimination Act 1991* (Qld), the *Disability Discrimination Act 1992* (Cth), and the

need to maintain confidence in the administration of justice in Queensland.

- Possible improvements to proceedings for offences and a review of the appropriateness of maximum penalties under the *Jury Act 1995* (Qld), including:

  - Whether the Act should be amended to specifically allow a prosecution for an offence against the Act to be commenced by complaint of the Sheriff of Queensland or someone else authorised by the Minister or Chief Executive; and

  - Review the current level of maximum penalties for offences in the *Jury Act 1995* (Qld), particularly relating to the return of notices by prospective jurors and compliance with a summons requiring a person to attend for jury service and, if selected as a member of a jury, to attend as instructed by the court until discharged and whether the maximum penalties should be increased and having regard to the level of penalties for similar offences in Queensland and in other Australian jurisdictions;

- Possible alternative options for excusing a person from jury service, such as deferment;

- The extent to which juries in Queensland are representative of the community and to which they may have become unrepresentative because of the number of people who are ineligible for service or exercise their right to be excused from service, including whether there is appropriate representation of minority groups (such as Aboriginal people and Torres Strait Islanders), the factors which may contribute to under-representation and suggestions for increasing representation of these groups;

- Recent developments in other Australian and international jurisdictions in relation to the selection of jurors; and

- Any other related matters.

In performing its functions under this reference, the Commission is asked to prepare, if relevant, any legislation based on the Commission's recommendations and undertake consultation with stakeholders.

The Commission is to provide a report to the Attorney-General and Minister for Justice and Minister Assisting the Premier in Western Queensland on its review by 31 December 2010.

Dated the 7 day of April 2008

Kerry Shine MP
Attorney-General Minister for Justice
And Minister Assisting the Premier in Western Queensland

Appendix C

Extracts from Queensland Statutes

CRIMINAL CODE (QLD)

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; 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

(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; 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.

590A Notice of alibi

(1) An accused person shall not upon the person's trial on indictment, without the leave of the court, adduce evidence in support of an alibi unless, before the expiration of the prescribed period, the person gives notice of particulars of the alibi.

(2) An accused person shall not upon the person's trial on indictment, without the leave of the court, call any other person to give evidence in support of an alibi unless—

(a) the notice under subsection (1) includes the name and address of the person or, if the name or address is not known to the accused person at the time the accused person gives the notice, any information in the accused person's possession that may be of material assistance in locating the person; or

(b) where the name or address is not included in the notice, the court is satisfied that the accused person, before giving the

notice, took and thereafter continued to take all reasonable steps to secure that the name or address would be ascertained; or

(c) where the name or address is not included in the notice and the accused person subsequently discovers the name or address or receives other information that may be of material assistance in locating the person, the accused person gives notice forthwith of the name, address or, as the case may be, other information; or

(d) where the accused person is notified by or on behalf of the director of public prosecutions that the person has not been traced by the name or located at the address given, the accused person gives notice forthwith of any information then in the accused person's possession or subsequently received by the accused person that may be of material assistance in locating the person.

(3) The court shall not refuse leave under this section if it appears to the court that the accused person was not, upon the accused person's committal for trial, informed by the justices of the requirements of this section.

(4) Evidence tendered to disprove an alibi may, subject to a direction by the court, be given before or after evidence is given in support of the alibi.

(5) A notice purporting to be given under this section on behalf of the accused person by the person's solicitor shall, until the contrary is proved, be deemed to be given with the authority of the accused person.

(6) A notice under this section—

(a) shall be in writing; and

(b) shall be given to the director of public prosecutions; and

(c) shall be duly given if it is delivered to or left at the Office of the Director of Public Prosecutions or sent by certified mail addressed to the director of public prosecutions at the director's office.

(7) In this section—

evidence in support of an alibi means evidence tending to show that by reason of the presence of the accused person at a particular place or in a particular area at a particular time the accused

person was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission.

the prescribed period means the period of 14 days after the date of the committal for trial of the accused person.

604 Trial by jury

(1) Subject to chapter division 9A 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.

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.

619 Speeches by counsel

(1) Before any evidence is given at the trial of an accused person the counsel for the Crown is entitled to address the jury for the purpose of opening the evidence intended to be adduced for the prosecution.

(2) If the accused person or any of the accused persons, if more than 1, is defended by counsel, and if such counsel or any of such counsel says that the accused person does not intend to adduce evidence, the counsel for the Crown is entitled to address the jury a second time for the purpose of summing up the evidence already given against such accused person or persons for whom evidence is not intended to be adduced.

(3) At the close of the evidence for the prosecution the accused person, and each of the accused persons, if more than 1, may by himself, herself or the person's counsel address the jury for the purpose of opening the evidence (if any) intended to be adduced for the defence, and after the whole of the evidence is given may again address the jury upon the whole case.

(4) If evidence is adduced for an accused person, the counsel for the Crown is entitled to reply.

(5) If evidence is adduced for 1 or more of several accused persons, but not for all of them, the counsel for the Crown is entitled to reply with respect to the person or persons by whom evidence is so adduced, but not with respect to the other or others of them.

(6) However, a Crown Law Officer is entitled to reply in all cases, whether evidence is adduced by any accused person or not.

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.

624 Special verdict

In any case in which it appears to the court that the question whether an accused person ought or ought not to be convicted of an offence may depend upon some specific fact, or that the proper punishment to be awarded upon conviction may depend upon some specific fact, the court may require the jury to find that fact specially.

632 Corroboration

(1) A person may be convicted of an offence on the uncorroborated testimony of 1 witness, unless this Code expressly provides to the contrary.

(2) On the trial of a person for an offence, a judge is not required by any rule of law or practice to warn the jury that it is unsafe to convict the accused on the uncorroborated testimony of 1 witness.

(3) Subsection (1) or (2) does not prevent a judge from making a comment on the evidence given in the trial that it is appropriate to make in the interests of justice, but the judge must not warn or suggest in any way to the jury that the law regards any class of persons as unreliable witnesses.

646 Discharge of persons acquitted

If the jury find that the accused person is not guilty, or give any other verdict which shows that the person is not liable to punishment, the person is entitled to be discharged from the charge of which the person is so acquitted.

668D Right of appeal

(1) A person convicted on indictment, or a person convicted of a summary offence by a court under section 651, may appeal to the Court—

(a) against the person's conviction on any ground which involves a question of law alone; and

(b) with the leave of the Court, or upon the certificate of the judge of the court of trial that it is a fit case for appeal, against the person's conviction on any ground of appeal which involves a question of fact alone, or question of mixed law and fact, or any other ground which appears to the Court to be a sufficient ground of appeal; and

(c) with the leave of the Court, against the sentence passed on the person's conviction.

(2) A person summarily convicted under section 651 may appeal to the court, with the leave of the court, against the sentence passed on conviction, including any order made under that section.

668E Determination of appeal in ordinary cases

(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.

(2) Subject to the special provisions of this chapter, the Court shall, if it allows an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered.

(3) On an appeal against a sentence, the Court, if it is of opinion that some other sentence, whether more or less severe, is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal.

668F Powers of Court in special cases

(1) If it appears to the Court that an appellant, though not properly convicted on some count or part of the indictment, has been properly convicted on some other count or part of the indictment, the Court may either affirm the sentence passed at the trial or pass such sentence, whether more or less severe, in substitution therefor, as it thinks proper, and as may be warranted in law by the conviction on the count or part of the indictment on which it considers the appellant has been properly convicted.

(2) Where an appellant has been convicted of an offence, and the jury could on the indictment have found the appellant guilty of some other offence, and on the finding of the jury it appears to the Court that the jury must have been satisfied of facts which proved the appellant guilty of that other offence, the Court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity.

(3) Where, on the conviction of the appellant, the jury have found a special verdict, and the Court considers that a wrong conclusion has been arrived at by the court of trial on the effect of that verdict, the Court may, instead of allowing the appeal, order such conclusion to be recorded as appears to the Court to be in law required by the verdict, and pass such sentence, whether more or less severe, in substitution for the sentence passed at the trial, as may be warranted in law.

(4) If on any appeal it appears to the Court that, although the appellant committed the act or made the omission charged against the appellant, the appellant was not of sound mind at the time when the act or omission alleged to constitute the offence occurred, so as not to be responsible therefor according to law, the Court may quash the sentence passed at the trial, and order the appellant to

be kept in strict custody in the same manner as if a jury had found that fact specially under section 647.

669 Power to grant new trial

(1) On an appeal against a conviction on indictment, the Court may, either of its own motion or on the application of the appellant, order a new trial in such manner as it thinks fit, if the Court considers that a miscarriage of justice has occurred, and that, having regard to all the circumstances, such miscarriage of justice can be more adequately remedied by an order for a new trial than by any other order which the Court is empowered to make.

(2) If the Court makes an order for a new trial and the appellant is not granted bail, the order is taken to be a warrant for the appellant's detention under the *Corrective Services Act 2006*, section 9(1)(a).

669A Appeal by Attorney-General

(1) The Attorney-General may appeal to the Court against any sentence pronounced by—

(a) the court of trial; or

(b) a court of summary jurisdiction in a case where an indictable offence is dealt with summarily by that court;

and the Court may in its unfettered discretion vary the sentence and impose such sentence as to the Court seems proper.

(1A) The Attorney-General may appeal to the Court against an order staying proceedings or further proceedings on an indictment.

(2) The Attorney-General may refer any point of law that has arisen at the trial upon indictment of a person in relation to any charge contained therein to the Court for its consideration and opinion thereon if the person charged has been—

(a) acquitted of the charge; or

(b) discharged in respect of that charge after counsel for the Crown, as a result of a determination of the court of trial on that point of law, has duly informed the court that the Crown will not further proceed upon the indictment in relation to that charge; or

(c) convicted, following a determination of the court of trial on that point of law—

(i) of a charge other than the charge that was under consideration when the point of law arose; or

(ii) of the same charge with or without a circumstance of aggravation.

(2A) The Attorney-General may refer to the Court for its consideration and opinion a point of law that has arisen at the summary trial of a charge of an indictable offence, if the person charged has been—

(a) acquitted of the charge at the summary trial; or

(b) discharged on the charge after the prosecution, because of a decision on the point of law by the court of trial, indicates to the court that it will not further proceed on the charge in the proceeding before the court; or

(c) convicted, following a determination of the court of trial on that point of law—

(i) of a charge other than the charge that was under consideration when the point of law arose; or

(ii) of the same charge with or without a circumstance of aggravation.

(3) Notice of the reference shall be given to the person acquitted or, as the case may be, discharged.

(4) Upon the reference the Court shall hear argument—

(a) by the Attorney-General or by counsel on the Attorney-General's behalf; and

(b) if the person so desires, by the person acquitted or discharged or by counsel on his or her behalf;

and thereupon shall consider the point referred and furnish to the Attorney-General its opinion thereon.

(5) Where the reference relates to a trial in which the person charged has been acquitted or convicted, the reference shall not affect the trial of nor the acquittal or conviction of the person.

(6) If a person convicted summarily of an indictable offence appeals to a District Court judge under the *Justices Act 1886*, section 222 or the *Juvenile Justice Act 1992*, part 6, division 9, subdivision 3, and, in relation to the same conviction, the Attorney-General appeals under this section—

(a) the convicted person's appeal is, by force of this section, removed to the Court of Appeal; and

(b) both appeals must be heard together by the Court of Appeal.

(7) In this section—

discharged includes the dismissal or striking out of a charge at a summary trial.

JURY ACT 1995 (QLD)[826]

Part 5 Formation of juries

Division 1 Number of jurors in trials

32 Juries for civil trials

The jury for a civil trial consists of 4 persons.

33 Juries for criminal trials

The jury for a criminal trial consists of 12 persons.

34 Reserve jurors

(1) The judge before which a civil or criminal trial is to be held may direct that not more than 3 persons be chosen and sworn as reserve jurors.

(2) Reserve jurors—

(a) are to be selected in the same way as ordinary jurors; and

(b) are liable to be challenged and discharged in the same way as ordinary jurors; and

(c) must take the same oath as ordinary jurors; and

(d) are otherwise subject to the same arrangements as other jurors during the trial.

(3) If a juror dies or is discharged after a trial starts but before the jury retires to consider its verdict, and a reserve juror is available, the reserve juror must take the vacant place on the jury.[827]

826 The footnotes to the extracted sections of the *Jury Act 1995* (Qld) are those found in reprint No. 3B, which is the most recent reprint.

(4) If 2 or more reserve jurors are available, the juror to take the place on the jury must be decided by lot or in another way decided by the judge.

(5) When a jury retires to consider its verdict, a reserve juror who has not been called on to take a place on the jury must be discharged from further attendance at the trial.

(6) The death or discharge of a reserve juror before the juror has been called on to take a vacant place on the jury does not affect the validity of the trial.

Division 2 Suitability of jurors

35 Information about prospective jurors to be exchanged between prosecution and defence in criminal trials

(1) If a party to a criminal trial obtains information about a person who has been summoned for jury service that may show the person is unsuitable to serve as a juror in the trial, the party must disclose the information to the other party as soon as practicable.

(2) The *Criminal Law (Rehabilitation of Offenders) Act 1986* does not apply to the disclosure of information under this section.[828]

Division 4 Supplementary jurors

38 Supplementary jurors

(1) If a trial is likely to be delayed because there are no persons or not enough persons, who have been summoned for jury service, available for the selection of a jury, the judge may, on application by a party to the proceeding, direct the sheriff to make up or supplement a jury panel by selecting from among persons who are qualified for jury service and instructing them to attend for jury service.

(2) The number of persons to be selected, and the way the selection is to be made, must be as directed by the judge.

(3) The persons instructed to attend for jury service under this section become (subject to being excused or discharged under this Act) members of the jury panel from which the jury for the trial is to be selected.

827 See section 56 (Discharge or death of individual juror).

828 The *Criminal Law (Rehabilitation of Offenders) Act 1986*, section 6, places restrictions on disclosure of the criminal history of a person by someone if the rehabilitation period under the Act has come to an end.

(4) Unless the person has a reasonable excuse, a person must not fail to comply with—

(a) an instruction to attend for jury service under this section; or

(b) a further instruction about jury service given by the sheriff or the judge.

Maximum penalty—10 penalty units or 2 months imprisonment.

(5) A contravention of subsection (4) may be dealt with either as an offence or a contempt of the court.

Part 6 Jury trials

Division 1 Procedure following selection of jury

50 Jury to be sworn

The members of the jury must be sworn to give a true verdict, according to the evidence, on the issues to be tried, and not to disclose anything about the jury's deliberations except as allowed or required by law.[829]

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.

Division 3 Segregation of jury in criminal cases

53 Separation of jury

(1) After the jury in a criminal trial has been sworn, the jury must not separate until it has given its verdict or has been discharged by the judge.

(2) However, a jury may separate in accordance with this section.

829 For the form of the oath, see the *Oath Act 1867*, sections 21 (Swearing of jurors in civil trials) and 22 (Swearing of jurors in criminal trials). Under the *Oaths Act 1867*, section 17, a juror may make an affirmation instead of an oath in certain cases (see also section 5 of that Act).

(3) Before a jury retires to consider its verdict, the judge must allow the jury to separate during a lunch or dinner adjournment to obtain meals.

(4) However, if the judge considers that allowing the jury to separate during a lunch or dinner adjournment may prejudice a fair trial, the judge may order the jury not to separate.

(5) Subsection (6) applies subject to subsections (3) and (4).

(6) Also, before a jury retires to consider its verdict, the judge may, if the judge considers that allowing the jury to separate would not prejudice a fair trial, allow the jury to separate—

(a) during an adjournment of the court; or

(b) while proceedings are held in the jury's absence.

(7) After the jury has retired to consider its verdict, the judge—

(a) may allow the jury to separate, or an individual juror to separate from the jury, if the judge considers that allowing the jury or juror to separate would not prejudice a fair trial; and

(b) may impose conditions to be complied with by the jurors or juror.

(8) A juror must comply with any conditions imposed by the judge under subsection (7)(b), unless the juror has a reasonable excuse.

Maximum penalty—10 penalty units or 2 months imprisonment.

(9) If a juror separates from the rest of the jury in contravention of a provision of this section, the juror may be punished summarily for contempt of the court.

(10) The validity of proceedings is not affected if a juror contravenes a provision of this section but, if the contravention is discovered before the verdict is given, the judge may discharge the jury if the judge considers that the contravention appears likely to prejudice a fair trial.

54 Restriction on communication

(1) While a jury is kept together, a person (other than a member of the jury or a reserve juror) must not communicate with any of the jurors without the judge's leave.

(2) Despite subsection (1)—

(a) the officer of the court who has charge of the jury may communicate with jurors with the judge's leave; and

(b) if a juror is ill—communication with the juror for arranging or administering medical treatment does not require the judge's leave.

(3) A person who contravenes subsection (1) may be punished summarily for a contempt of the court.

(4) The validity of proceedings is not affected by contravention of this section but, if the contravention is discovered before the verdict is given, the judge may discharge the jury if the judge considers that the contravention appears likely to prejudice a fair trial.

57 Continuation of trial with less than full number of jurors

(1) If a juror dies or is discharged after a trial begins, and there is no reserve juror available to take the juror's place, the judge may direct that the trial continue with the remaining jurors.

(2) However, a civil trial cannot continue with less than 3 jurors and a criminal trial cannot continue with less than 10 jurors.

(3) The verdict of the remaining jurors has the same effect as if all the jurors had continued present.

59 Verdict in criminal cases for particular offences must be unanimous

(1) This section applies to the following criminal trials on indictment—

(a) a trial for any of the following offences—

(i) murder;

(ii) an offence against the Criminal Code, section 54A(1) if, because of the circumstances of the offence, the offender is liable to imprisonment for life, which can not be mitigated or varied under the Criminal Code or any other law;

(iii) an offence against a law of the Commonwealth; or

(b) a trial before a jury consisting of only 10 jurors when it gives its verdict.

(2) For subsection (1)(b), it does not matter that at any time before its verdict was given the jury consisted of more than 10 jurors.

(3) The verdict of the jury must be unanimous.

(4) However, if on the trial of an offence mentioned in subsection (1)(a)(i) or (ii)—

(a) the jury is unable to reach a unanimous verdict; and

(b) the defendant is liable to be convicted of another offence

not mentioned in subsection (1)(a)(i) or (ii); in relation to the conviction for the other offence, section 59A applies as if the defendant were originally charged with the other offence.

59A Verdict in criminal cases for other offences

(1) This section applies to a criminal trial on indictment other than the following trials—

(a) a trial for an offence mentioned in section 59(1)(a); or

(b) a trial before a jury as mentioned in section 59(1)(b).

(2) If, after the prescribed period, the judge is satisfied that the jury is unlikely to reach a unanimous verdict after further deliberation, the judge may ask the jury to reach a majority verdict.

(3) If the jury can reach a majority verdict, the verdict of the jury is the majority verdict.

(4) For the definition in subsection (6), prescribed period, paragraph (a), the periods mentioned in subparagraphs (i), (ii) and (iii) are the periods reasonably calculated by the judge.

(5) A decision of the judge under subsection (4) is not subject to appeal.

(6) In this section—

majority verdict means—

(a) if the jury consists of 12 jurors—a verdict on which at least 11 jurors agree; or

(b) if the jury consists of 11 jurors—a verdict on which at least 10 jurors agree.

prescribed period means—

(a) a period of at least 8 hours after the jury retires to consider its verdict, not including any of the following periods—

(i) a period allowed for meals or refreshments;

(ii) a period during which the judge allows the jury to separate, or an individual juror to separate from the jury;

(iii) a period provided for the purpose of the jury being accommodated overnight; or

(b) the further period the judge considers reasonable having regard to the complexity of the trial.

60 Jury may be discharged from giving verdict

(1) If a jury cannot agree on a verdict, or the judge considers there are other proper reasons for discharging the jury without giving a verdict, the judge may discharge the jury without giving a verdict.

(2) If proceedings before a jury are to be discontinued because the trial is adjourned, the judge may discharge the jury.

(3) A decision of a judge under this section is not subject to appeal.

Part 8 Miscellaneous

69A Inquiries by juror about accused prohibited

(1) A person who has been sworn as a juror in a criminal trial must not inquire about the defendant in the trial until the jury of which the person is a member has given its verdict, or the person has been discharged by the judge.

Maximum penalty—2 years imprisonment.

(2) Subsection (1) does not prevent a juror making an inquiry being made of the court to the extent necessary for the proper performance of a juror's functions.

(3) In this section—

inquire includes—

(a) search an electronic database for information, for example, by using the Internet; and

(b) cause someone else to inquire.

70 Confidentiality of jury deliberations

(2) A person must not publish to the public jury information.

Maximum penalty—2 years imprisonment.

(3) A person must not seek from a member or former member of a jury the disclosure of jury information.

Maximum penalty—2 years imprisonment.

(4) A person who is a member or former member of a jury must not disclose jury information, if the person has reason to believe any of the information is likely to be, or will be, published to the public.

Maximum penalty—2 years imprisonment.

(5) Subsections (2) to (4) are subject to the following subsections.

(6) Information may be sought by, and disclosed to, the court to the extent necessary for the proper performance of the jury's functions.

(7) If there are grounds to suspect that a person may have been guilty of bias, fraud or an offence related to the person's membership of a jury or the performance of functions as a member of a jury, the court before which the trial was conducted may authorise—

(a) an investigation of the suspected bias, fraud, or offence; and

(b) the seeking and disclosure of jury information for the purposes of the investigation.

(8) If a member of the jury suspects another member (the suspect) of bias, fraud or an offence related to the suspect's membership of the jury or the performance of the suspect's functions as a member of the jury, the member may disclose the suspicion and the grounds on which it is held to the Attorney-General or the director of public prosecutions.

(9) On application by the Attorney-General, the Supreme Court may authorise—

(a) the conduct of research projects involving the questioning of members or former members of juries; and

(b) the publication of the results of the research.

(10) The Supreme Court may give an authorisation under subsection (9) on conditions the court considers appropriate.

(11) Information identifying or likely to identify a person as, or as having been, a juror in a particular proceeding may be disclosed—

(a) in the course of the proceeding—by any person with the court's permission or with lawful excuse; or

(b) after the proceeding has ended—by the juror or someone else with the juror's consent.

(12) A former member of a jury may disclose jury information to a health professional who is treating the former member in relation to issues arising out of the former member's service on the jury.

(13) The health professional may ask the former member to disclose jury information for the purpose of treating the former member in relation to issues arising out of the former member's service on the jury.

(14) The health professional must not disclose jury information to anyone else unless the health professional considers it necessary for the health or welfare of the former member.

Maximum penalty—2 years imprisonment.

(15) Subsection (14) does not apply in as far as the health professional discloses information that identifies the health professional's patient to the sheriff for the purpose of the sheriff advising whether the patient was a former member of a jury.

(16) The sheriff may disclose to the health professional information advising whether the patient was a former member of a jury.

(17) In this section—

doctor includes a person registered as a medical practitioner under a law of the Commonwealth, or another State, that corresponds to the *Medical Practitioners Registration Act 2001*.

health professional means a person who practices a profession prescribed under a regulation for the definition, and includes a doctor and a psychologist.

jury information means—

(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.

psychologist means a person registered as a psychologist under the *Psychologists Registration Act 2001* or under a law of the Commonwealth, or another State, that corresponds to that Act.

treat, in relation to a patient of a health professional, means provide a service to the patient in the course of the patient's seeking or receiving advice or treatment.

EVIDENCE ACT 1997 (QLD)

21R Jury direction

(1) This section applies if there is a jury and a person charged—

(a) does not have a legal representative other than for the cross-examination of a protected witness; or

(b) does not have a legal representative for the cross-examination of a protected witness.

(2) The court must give the jury any warning the court considers necessary to ensure the person charged is not prejudiced by any inference that might be drawn from the fact the person charged has been prevented from cross-examining the protected witness in person.

21S Orders, directions and rulings concerning protected witnesses

The court may make any orders or give any directions or rulings it considers appropriate for the purposes of this division on the court's own initiative or on an application made to the court by a party to the proceeding.

93C Warning and information for jury about hearsay evidence

(1) This section applies if evidence is admitted under section 93B (***hearsay evidence***) and there is a jury.

(2) On request by a party, the court must, unless there are good reasons for not doing so—

(a) warn the jury the hearsay evidence may be unreliable; and

(b) inform the jury of matters that may cause the hearsay evidence to be unreliable; and

(c) warn the jury of the need for caution in deciding whether to accept the hearsay evidence and the weight to be given to it.

(3) It is not necessary for a particular form of words to be used in giving the warning or information.

(4) This section does not affect another power of the court to give a warning to, or to inform, the jury.

CRIMINAL LAW (SEXUAL OFFENCES) ACT 1978 (QLD)

4A Evidence of complaint generally admissible

(1) This section applies in relation to an examination of witnesses, or a trial, in relation to a sexual offence.

(2) Evidence of how and when any preliminary complaint was made by the complainant about the alleged commission of the offence by the defendant is admissible in evidence, regardless of when the preliminary complaint was made.

(3) Nothing in subsection (2) derogates from the power of the court in a criminal proceeding to exclude evidence if the court is satisfied it would be unfair to the defendant to admit the evidence.

(4) If a defendant is tried by a jury, the judge must not warn or suggest in any way to the jury that the law regards the complainant's evidence to be more reliable or less reliable only because of the length of time before the complainant made a preliminary or other complaint.

(5) Subject to subsection (4), the judge may make any comment to a jury on the complainant's evidence that it is appropriate to make in the interests of justice.

(6) In this section—

complaint includes a disclosure.

preliminary complaint means any complaint other than—

(a) the complainant's first formal witness statement to a police officer given in, or in anticipation of, a criminal proceeding in relation to the alleged offence; or

(b) a complaint made after the complaint mentioned in paragraph (a).

Example—

Soon after the alleged commission of a sexual offence, the complainant discloses the alleged commission of the offence to a parent (***complaint 1***). Many years later, the complainant makes a complaint to a secondary school teacher and a school guidance officer (***complaints 2 and 3*)**. The complainant visits the local police station and makes a complaint to the police officer at the front desk (***complaint 4***). The complainant subsequently attends an appointment with a police officer and gives a formal witness statement to the police officer in anticipation of a criminal proceeding in relation to the alleged offence (***complaint 5***). After a criminal proceeding is begun, the complainant gives a further formal witness statement (***complaint 6*)**.

Each of complaints 1 to 4 is a preliminary complaint. Complaints 5 and 6 are not preliminary complaints.

CRIMINAL PRACTICE RULES 1999 (QLD)[830]

Chapter 10 Trial proceedings

44 Definition for ch 10

In this chapter—

proper officer means a judge, a judge's associate or the person appointed by a judge as the proper officer for this chapter.

45 Application of ch 10

(1) This chapter applies at an accused person's trial.

(2) This chapter also applies, with the necessary changes, to the hearing of a charge of a summary offence against an accused person under the Code, section 651.[831]

830 The footnotes relating to the *Criminal Practice Rules 1999* (Qld) are as set out in those Rules.

831 Criminal Code, section 651 (Court may decide summary offences if a person is charged on indictment)

46 Procedure on arraignment—Code, s 594[832]

(1) The proper officer must address the accused person as follows—

(a) for an accused person arraigned alone—

'AB, you are charged that on [state date] at [state place] you [state charge in the indictment using the second person].

'AB, how do you plead, guilty or not guilty?';

(b) for accused persons arraigned together—

'AB and CD, you are charged that on [state date] at [state place] you [state charge in the indictment using the second person, and repeating the names of each accused person as to anything alleged against the accused person, to the exclusion of any other accused person].

'AB, how do you plead, guilty or not guilty?

'CD, how do you plead, guilty or not guilty?'.

(2) The proper officer is taken to have complied with subrule (1) if the proper officer uses other words complying with the requirements of the Code, section 594.

47 Statement to accused person of right of challenge—Jury Act, s 39

(1) If the accused person pleads not guilty, the proper officer must address the accused person as follows—

'AB (and CD), these representatives of the community whom you will now hear called may become the jurors who are to decide between the Crown and you on your trial.

'If you wish to challenge them, or any of them, you, or your representative, must do so before the bailiff begins to recite the words of the oath or affirmation.'.

(2) In a private prosecution, the reference to the Crown must be replaced by a reference to the private prosecutor.

(3) In a Commonwealth prosecution, the reference to the Crown must be replaced by a reference to the prosecuting authority.

832 Section 594 has been renumbered as section 597C under the *Evidence (Protection of Children) Amendment Act* 2003, section 20

(4) The proper officer is taken to have complied with subrule (1) if the proper officer uses other words complying with the requirements of the *Jury Act 1995*, section 39.

48 Giving the accused person into the charge of the jury—Jury Act, s 51

(1) After the jury who have been sworn are called and they have answered, the proper officer must address the jury as follows—

> '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.'.

(2) The proper officer is taken to have complied with subrule (1) if the proper officer uses other words complying with the requirements of the *Jury Act 1995*, section 51.

49 Giving jury a copy of the indictment

After the jury has been sworn, the judge may give to the jury a copy of the indictment with any changes, including omissions, the judge considers appropriate in the circumstances.

50 Addressing an accused person at the end of the prosecution evidence—Code, s 618

(1) At the end of the prosecution evidence, the proper officer must address the accused person as follows—

> 'The prosecution having closed its case against you, I must ask you if you intend to adduce evidence in your defence. This means you may give evidence yourself, call witnesses, or produce evidence.

‘You may do all or any of those things, or none of them.’.

(2) The proper officer is taken to have complied with subrule (1) if the proper officer uses other words complying with the requirements of the Code, section 618.

51 Addressing a convicted person before sentencing—Code, s 648

(1) If the plea or verdict is guilty, the proper officer must address the convicted person as follows—

‘AB, you have been convicted [for a plea of guilty say ‘on your own plea of guilty’] of [state the offence charged in the words of the indictment or by stating the heading of the schedule form for the offence]. Do you have anything to say as to why sentence should not be passed on you?’.

(2) The proper officer is taken to have complied with subrule (1) if the proper officer uses other words complying with the requirements of the Code, section 648.

Appendix D

Extracts from the Queensland Benchbook

These model directions are taken from the Queensland Benchbook: see Queensland Courts, Supreme and District Court Benchbook, available online at <http://www.courts.qld.gov.au/2265.htm> at 12 March 2009.

Footnotes and formatting appear as in the model directions themselves, except for the footnote numbering, which follows the consecutive numbering used in this Paper.

Text in **bold** indicates the material that is to be read to the jury. Text in normal weight includes notes to the judge and discussion of the law in relation to the directions in question.

Introduction[1]

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.[2]

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

1 Queensland Courts, *Supreme and District Court Benchbook*, 'Introduction' [4] <http://www.courts.qld.gov.au/2265.htm> at 12 March 2009.

2 *McGreevy* [1973] 1 WLR 276, 281.

tailored to fit the facts of the particular case, and not merely taken ready-made 'off the peg'.[3]

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.[4]

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.[5]

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.[6]

Trial Judge's role in summing up

Gaudron A-CJ, Gummow, Kirby and Hayne Justices said in *RPS v The Queen* (1999) 199 CLR 620 at 637 that:

- the fundamental task of a Trial judge is to ensure a fair trial of the accused;
- this will require the judge to instruct the jury about so much of the law as the jury need to know in order to dispose of the issues;
- that will require instructions about the elements of the offence, the burden and standard of proof and of the respective functions of judge and jury;

---

3 *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].'

4 *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].

5 *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'.

6 *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'.

- and will require the judge to identify the issues in the case and to relate the law to those issues; it will require the judge to put fairly before the jury the case which the accused makes.

- In some cases it will require the judge to warn the jury about how they should *not* reason or about particular care that must be shown before accepting certain kinds of evidence.

- None of this must be permitted to obscure the division of functions between judge and a jury, and that it is for the jury and it alone to decide the facts.

- 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.

McMurdo P described it this way in *R v Mogg* (2000) 112 A Crim R 417 at 427 at [54]:

> 'The onerous duties of a Trial judge will ordinarily include identifying the issues, relating the issues to the relevant law and the facts of the case and outlining the main arguments of counsel'.

In *R v ITA* [2003] NSWCA 174 that court remarked at [90] *inter alia* that:

> 'The precise nature of the task of the judge depends on many things, including the context of the trial, its length, its complexity, the way that it has been run, the issues that arise and, importantly, whether counsel seek more from the judge than that which has been provided. The judge must ensure that the case of the accused is put fairly before the jury and, of course, must ensure that the accused has a fair trial. In fulfilling this duty, the judge will derive important assistance from counsel. The atmosphere at a criminal trial is not easy to assess on appeal. Counsel at trial are well placed to determine whether, in the light of the way in which the case has been run, particular directions to the jury are defective'.

Parties to An Offence: ss 7, 8[7]

Section 7

(Read the section or relevant parts to the jury).

General:

This section extends criminal responsibility to any person who is a party to an offence. The section makes each of the following persons guilty of an offence.

- **The person or persons who actually do the act or one or more of the acts in the series which constitute the offence.[8]**
- **Each person who does an act for the purpose of aiding another to commit the offence.**
- **Each person who aids another to commit the offence.**
- **Each person who counsels or procures another to do it.**

So it is not only the person who actually does a criminal act who may be found guilty of it. Anyone who aids — that is, assists or helps or encourages — that person to do it may also be guilty of the (same or a less serious**) offence.[9]**

Aiding (general):

That is the basis on which the defendant is charged with [offence] **in the case before you. The prosecution argues that, although it was not the defendant who actually committed the** [offence]**, the defendant is also guilty of** [that offence] **because he aided** (the alleged principal offender) **to commit it.**

Proof of aiding involves proof of acts and omissions intentionally directed towards the commission of the principal offence, by the perpetrator and proof that the defendant was aware of at least the essential matters constituting the crime in contemplation.[10] To aid means to assist or help.[11]

---

7 Queensland Courts, *Supreme and District Court Benchbook*, 'Parties to An Offence' [71.1]–[71.15] <http://www.courts.qld.gov.au/2265.htm> at 12 March 2009.

8 *R v Wyles*; *ex parte A-G* [1977] Qd R 169, approved in *R v Webb; ex parte A-G* [1990] 2 Qd R 275.

9 See *Barlow v R* (1997) 188 CLR 1 (now apparently confirmed by s 10A of the Code)

10 *R v Tabe* [2003] QCA 356 at [12]

11 *R v Sherrington* [2001] QCA 105

The prosecution do not need to prove that the person who actually committed the offence has also been convicted.[12] It is enough if the prosecution proves, not necessarily the identity of the perpetrator, but that there was a principal offender or perpetrator, and proof of the commission of an offence by that someone, and that the defendant aided that person to commit it. The prosecution must prove that that other perpetrator was guilty of committing the offence by evidence which is admissible against the defendant.[13]

The prosecution must prove that the defendant knew that the type of offence which was in fact committed was intended; but not necessarily that that particular offence would be committed on that particular day at that particular place.[14] It is not enough if the prosecution prove the defendant knew only of the possibility that the offence might be committed.

S 7(1)(b)(c) direction (shorter version)

You may find the defendant guilty of the (offence) **only if you are satisfied beyond reasonable doubt of three things. The first is that** (an identified or unidentified perpetrator) **committed the offence; that is, that** (the perpetrator) [outline elements of offence]. **The second is that the defendant in some way assisted** (the perpetrator) **to** [commit offence]**.[15] The third is that, when he assisted** (the perpetrator) **to do so, the defendant *knew*[16] that** (the perpetrator) **intended to** [identify acts of which offence is comprised].

As to the first two, there is evidence [outline elements of offence as to which there is evidence of assistance].

However, the defendant can be found guilty of the [offence] **only if you are satisfied beyond reasonable doubt that, when he** [identify respects in which the defendant is said to have given assistance] **he knew** (the perpetrator) **was going to** [identify acts, and intent if relevant, constituting offence]. **If you are not satisfied that the defendant knew that** (the perpetrator) **meant to do those things, or if you have a reasonable doubt about it, then you must find him not guilty of** [the offence charged].[17]

12 *R v Lopuszynski* [1971] QWN 13

13 *R v Buckett* (1995) 132 ALR 669 at 676

14 *R v Ancutta* [1991] 2 Qd R 413

15 Generally, mere presence during the commission of a crime by another is not of itself sufficient to involve criminal responsibility as an aid under s 7; but is nevertheless capable of affording some evidence to that effect; *Jefferies v Sturcke* [1992] 2 Qd R 392, 395.

16 See *Lowrie* [2000] 2 Qd R 529

17 *Jefferies* CA 154 of (1997) *Lowrie* (2000) 2 Qd R 529

S 7(1)(b) direction (expanded version)

The prosecution must prove to your satisfaction beyond reasonable doubt each of the following things:

1. **that** (the identified perpetrator or an unidentified perpetrator) **committed the offence.**

2. **that the defendant did acts or made omissions for the purpose of enabling or aiding that person to commit the offence.**

3. **that the defendant did so with the intention to aid** (the alleged perpetrator or unidentified perpetrator) **to commit the offence.**

4. **that the defendant had actual knowledge or expectation of the essential facts of that offence, that is, all the essential matters which make the acts done a crime,**[18] **(including** [where relevant]**) the state of mind of the** (alleged perpetrator or unidentified perpetrator)[19] **when that person committed the offence**.

S 7(1)(c) direction (expanded version)

The crown must prove to your satisfaction beyond reasonable doubt that:

1. **(the identified or alleged perpetrator, or an unidentified perpetrator) committed the offence.**

2. **the defendant knowingly aided**[20] **that person.**

3. **that the defendant had actual knowledge or expectation of the essential facts of the principal offence, (including,** [where relevant]**) the state of mind of the principal offender.**

Counselling s 7(1)(d)

For the prosecution to prove beyond reasonable doubt that the defendant is guilty because he counselled (the perpetrator) **to commit the offence of** (identify offence), **the prosecution must prove beyond reasonable doubt:**

1. (the perpetrator) **committed the offence of ……** (acts which constitute the offence, with intent if relevant)**.**

18 *R v Giorgianni* (1984-5) 156 CLR 493 at 482

19 *R v Stokes and Difford* (1990) 51 A Crim R 135; *R v Pascoe* CA No 242 of 1997

20 *R v Beck* [1990] 1 Qd 30 and *R v Tabe* [2003] QCA 356 at [36], judgment of Mackenzie J

2. **that the defendant counselled, in the sense of urging or advising,** (the perpetrator) **to commit that offence.**
3. **that** (the perpetrator) **committed that offence after being urged or advised by the defendant to commit** (that offence or an offence of –- describe offence)**.**
4. **that** (the perpetrator) **committed the offence when carrying out that counsel.**

[Section 7(1)(d) direction combined with s 9]

5. **that the facts constituting the offence actually committed** (by the perpetrator) **were a probable consequence of carrying out the counsel given by the defendant. A probable consequence is more than a mere possibility. For a consequence to be a probable one, it must be one that you would regard as probable in the sense that it could well have happened. So, the facts constituting the offence actually committed (by the perpetrator) must be shown to be 'a probable consequence' of carrying out the counselling, in the sense that they could well have happened as a result of carrying out the counselling.**[21]

In considering whether the defendant urged or advised the perpetrator to commit (the offence) **you must consider with care what it was that the defendant urged or advised** (the perpetrator) **to do, if anything.**

In *R v Georgiou* [2002] QCA 206 the Court of Appeal suggested that explanation for the meaning of 'counselled' was not essential; while noting that Gibbs J used the terms 'urged' or 'advised' in *Stuart v R* (1976) 134 CLR 426 at 445.

S 7(1)(d) counselling with s 9 — example

In the present case, the defendant did not tell (the perpetrator) **to kill** (the victim) **or to injure him seriously; but the question for you is whether the killing of** (the deceased) **by** (the perpetrator) **with an intention to kill or do grievous bodily harm to him was a probable consequence of his carrying out the defendant's plan to assault** (the deceased) **with a baseball bat. In law each of them has taken to have murdered** (the deceased) **if** (but only if) **murdering** (the deceased) **was a probable consequence of** (the perpetrators) **carrying out the defendant advising or urging to give** (the deceased) **a beating.**

A probable consequence is more than a mere possibility. For a consequence to be a probable one, it must be one that you would regard as probable in the sense that it could well have happened. So, the facts con-

21 See *Darkan v The Queen* (2006) 80 ALJR 1250, [72]–[81], [130]–[132]

stituting the offence actually committed must be shown to be 'a probable consequence' of carrying out the counselling, in the sense that they could well have happened as a result of carrying out the counselling.

If you are left in doubt whether murder was a kind of offence that was a probable consequence of (the perpetrators) **carrying out the defendant's advice, then you may find the defendant guilty of the lesser offence of manslaughter. For that you need to be satisfied beyond reasonable doubt that** (the perpetrator's) **killing of** (the deceased), **without any intention to cause death or grievous bodily harm, was the probable consequence of carrying out the advice to give** (the deceased) **a beating. If you are left with a reasonable doubt about that, then you must return verdicts of not guilty of murder and not guilty of manslaughter.**

S 7(1)(d): procure

To procure means to bring about, cause to be done, prevail on or persuade, try to induce. To procure means to procure by endeavour. You procure a thing by setting out to see that it happens and taking the appropriate steps to produce that happening.[22]

Procuring involves more than mere encouragement, and means successful persuasion[23] **to do something. You may find the defendant guilty of the** [offence charged] **on the basis of procuring only if you are satisfied beyond reasonable doubt of these things:**

- **That** [the perpetrator, identified or unidentified] **committed the offence;**
- **That the defendant procured** (that perpetrator) **to commit that offence by successfully persuading** (the perpetrator) **to do it and thereby bringing about the commission of the offence;**
- **The defendant knew that** (the perpetrator) **intended to** (commit the acts constituting the offence).

Presence at scene — aiding by encouraging

A defendant may assist or aid another by giving actual physical assistance in the commission of an offence, but it is not necessary for the crown to show actual physical assistance. Wilful encouragement can be enough, certainly if the defendant intended that (the perpetrator) **should**

22 *R v F*

23 *R v Adams* [1998] QCA 64 [6]

have an expectation of aid from the defendant in the commission of (the offence).

Where the prosecution alleges aiding by encouragement, such as from the presence of the person charged at the commission of the offence, the prosecution must prove both that the person charged as an aider did actually encourage the perpetrator in the commission of the offence, such as by presence at the scene; and also that the person charged intended to encourage the commission of that offence (by his or her presence).[24] Voluntary and deliberate presence during the commission of a crime without opposition or real dissent may be evidence of wilful encouragement or aiding.[25]

Assault by a number of persons resulting in the victim's death.

For the prosecution to establish criminal responsibility for murder under either s 1(b) or (c) it is necessary for it to prove that the defendant committed his act to enable or aid one or more of the others to kill or do grievous bodily harm to the victim, knowing that that other or others intended to kill or inflict grievous bodily harm upon the victim. It is not necessary to prove that the defendant himself had such an intention; it is sufficient (and necessary) that the defendant knew that one or more of the others had it and that, knowing this, did an act to aid or enable that or those others to kill or do grievous bodily harm.[26]

24 *R v Clarkson, Carroll, and Dodd* (1971) 55 Cr AR 445; *R v Beck* [1991] Qd R 30

25 *R v Beck* at [37]

26 This direction follows the decision in *R v Pascoe* (CA No 242 of 1997 unreported)

Section 8

Read the section to the jury:

So, if two or more people plan to do something unlawful together and, in carrying out the plan, an offence is committed, the law is that each of those people is taken to have committed that offence if (but only if) it is the kind of offence likely to be committed as the result of carrying out that plan.

For the prosecution to prove the defendant guilty relying on this section, it is necessary for you the jury to be satisfied beyond reasonable doubt:

1. **that there was a common intention to prosecute an unlawful purpose. You must consider fully and in detail what was the alleged unlawful purpose, and what its prosecution was intended to involve;**

2. **that** (the offence charged) **was committed in the prosecution or carrying out of that purpose. You must consider carefully what was the nature of that actual crime committed;**

3. **that the offence was of such a nature that its commission was a probable consequence of the prosecution of that purpose.**[27]

Common unlawful purpose

Obviously, a great deal depends on the precise nature of any common unlawful purpose, proved by the evidence in the light of the circumstances of the case, particularly the state of knowledge of the defendant.[28] **It is the defendant's own subjective state of mind as established by the evidence, which decides what was the content of the *common* intention to prosecute an unlawful purpose.**[29] **That common intention is critical because it defines the restrictions on the nature of the acts done or omissions made which the defendant is deemed by the section to have done or made.**

When considering what any common intention was, and what was any common unlawful purpose, you should consider whether you are satisfied beyond reasonable doubt that the defendant agreed to a common purpose:

---

27 This direction combines what Gibbs J (and Mason J) wrote in *Stuart v R* at CLR 443 with the words of s 8

28 Jacobs J in *Stuart v R* at CLR 454

29 So held in the joint judgement of Brennan CJ, Dawson and Toohey JJ in *R v Barlow* (1996–1997) 188 CLR at page 13

(by way of example only)

- **that involved the possible use of violence or force; or**
- **to carry out a specific act;[30] or**
- **that involved inflicting some serious physical harm on the victim.[31]**

Commission of the offence in the prosecution of the common unlawful purpose

If you are satisfied beyond reasonable doubt there was a common intention to prosecute an unlawful purpose and what that was, you must ask if you are satisfied beyond reasonable doubt that an offence of (describe offence)[32] **was committed in the prosecution or furtherance or carrying out that purpose. If you are so satisfied, then in considering whether you are satisfied beyond doubt that the nature of the offence committed was such that its commission was a probable consequence of the prosecution or furtherance or carrying out of the common unlawful purpose,[33] the probable consequence is a consequence which would be apparent to an ordinary reasonable person in the position of** (the defendant) **with** (the defendant's) **state of knowledge at the time when the common purpose was formed. That test is an objective one and is not whether** (the defendant) **himself recognised the probable consequence or himself realised or foresaw it at the time the common purpose was formed.[34]**

Probable Consequence

A probable consequence is more than a mere possibility. For a consequence to be a probable one, it must be one that you would regard as probable in the sense that it could well have happened. So, for the offence

30 See *The Queen v Keenan* [2009] HCA 1 at [118].

31 See *The Queen v Keenan* [2009] HCA 1. Care must be taken in identifying the common intention by focusing only on the means used to effect the common unlawful purpose (per Hayne J at [85]). Where a method by which physical harm is to be inflicted has been discussed, or may be inferred as intended, it does not follow that the use of other means will prevent a person being held criminally responsible. In some cases the means intended to be used may permit an inference as to the level of harm intended. (per Kiefel J at [121]). An inference about the level of harm involved in the common purpose to be prosecuted may be drawn from the general terms in which an intended assault is described, the motive for the attack and the objective sought to be achieved, amongst other factors (per Kiefel J at [120].)

32 Refer to the act or omission and its nature, the harm it causes and the intention with which it is inflicted. Where, for example, the act is one of shooting, the question for the jury may be whether the shooting which caused grievous bodily harm was an offence of such a nature that its commission was a probable consequence of the common purpose, such as it is found to be (per Kiefel at [132, 133].

33 See *The Queen v Keenan* [2009] HCA 1.

34 *Stuart v R,* at CLR 453-5, (Jacobs J); *R v Pascoe* CA 242 of 1997 (McPherson JA at page 9; Davies JA at page 12)

actually committed to be 'a probable consequence' of carrying out the counselling, the commission of the offence must be not merely possible, but probable in the sense that they could well have happened in the prosecution of the unlawful purpose.[35]

S 8 — Direction on alternative verdict open — s 10(A)

If you are satisfied that acts constituting an offence were committed, and that the commission of those acts was the probable consequence of the prosecution of the unlawful common purpose, it does not matter that the actual perpetrator who committed those acts did so with a specific intent, where the fact the perpetrator had that intent was not itself either subjectively agreed or an objectively probable consequence of the prosecution of that unlawful common purpose. The defendant can still be convicted of the offence constituted by those acts, but not the offence of committing those acts with that extra specific intent, where that specific intent was not an agreed or probable consequence of carrying out that purpose.

For example, if you are satisfied beyond reasonable doubt that in fact a murder occurred, which is an unlawful killing of another person committed by a perpetrator who intended to cause the victim death or grievous bodily harm, you must obviously ask yourselves whether you are satisfied beyond reasonable doubt that that offence of unlawful killing with that specific intent was objectively a probable consequence of the prosecution of the subjectively agreed unlawful purpose held in common, if any, which you have found to exist. If you were so satisfied, (and satisfied of other relevant matters) you could find the defendant guilty of murder.

However, if you are not so satisfied, you would then consider whether the commission of an offence of manslaughter was a probable consequence of carrying out the agreed unlawful purpose. Manslaughter is an offence of unlawful killing when one person kills another in circumstances not authorised, justified, or excused by law. There is no element of intention to kill or do grievous bodily harm in manslaughter.

If you were satisfied beyond reasonable doubt that an unlawful killing of another person in circumstances which would amount to manslaughter, and the acts constituting such an offence, were committed, and that the commission of those acts and that offence of manslaughter was objectively a probable consequence of prosecuting the subjectively agreed unlawful purpose, then you could find the defendant guilty of manslaughter; even though satisfied that the actual perpetrator went *beyond* the agreed or probable consequences and committed the more serious offence of murder.

35 See *Darkan v The Queen* (2006) 80 ALJR 1250, [72]–[81], [130]–[132]

Section 8 — direction on group assault resulting in death

For the Crown to prove beyond reasonable doubt that the defendant is guilty of murder on the basis of s 8, it must prove to your satisfaction beyond reasonable doubt that a probable consequence of the prosecution of the common purpose of assaulting (the deceased) must have been that one or more of the people attacking (the deceased) would have the intention of doing (the deceased) at least grievous bodily harm. The relevant common intention which must be proven beyond reasonable doubt, contemplated by s 8 and necessary to support a verdict of guilty of murder, is one to commit an assault of sufficient seriousness that an intention to cause death or grievous bodily harm on the part of at least one or more of those attacking (the deceased) was a probable consequence of the prosecution of that purpose. If that probable consequence is absent, but the assault the subject of the common intention was nevertheless of sufficient seriousness that a death was the probable consequence and it occurred, the proper verdict is manslaughter. It is not necessary in either case that those consequences were intended or even foreseen by the defendant.[36]

[Example] **Here the evidence is that the defendant and (**B**) planned to rob a bank together, and, in carrying out that plan together, (**B**) murdered Mr Smith the bank teller. In those circumstances, the defendant is in law taken to have murdered Mr Smith if (but only if) murdering someone was the kind of offence that was a probable consequence of carrying out the plan to rob the bank.**

If you are satisfied of those matters, then the offence committed by the defendant [or by each of the defendants**] is murder. I have already told you that murder is killing someone with the intention of causing death or doing grievous bodily harm. If you are not satisfied that murder, in the sense of killing with such an intention, was the kind of offence that was a probable consequence of carrying out such a plan, then you may find the defendant guilty (if at all) only of the lesser offence of manslaughter. For that, you would have to be satisfied that death was something that was likely to result from carrying out the plan.**[37]

Here the defendant may be found guilty of murdering Mr Smith the bank teller (if but only if) you are satisfied beyond reasonable doubt that killing him with that intention was something that was a probable consequence of carrying out the plan to rob a bank. If you are not satisfied of that, then you may find the defendant guilty at most only of manslaughter.

---

36 This direction is taken from *R v Pascoe* CA No 242 of 1997 unreported

37 Where there is an 'escalating' plan or intention, it is essential that the defendant be proved to have been a party to that expanded intention: *Ritchie* [1998] QCA 188.

If you are left in doubt whether murder was the kind of offence likely to result from carrying out their plan, then you may find the defendant guilty of the lesser offence of manslaughter. For that you need to be satisfied beyond reasonable doubt that killing Smith, without any intention to cause death or grievous bodily harm, was something that was a probable consequence of carrying out the plan to rob. If you are left with a reasonable doubt about that, then you must return verdicts of not guilty of murder and not guilty of manslaughter.

To establish criminal responsibility on the part of a defendant under s 7(1)(b) or s 7(1)(c), the prosecution must prove that he knows 'the essential facts constituting or making up the offence that is being or about to be committed by the person he is aiding or assisting'.[38] It is not necessary to prove that the defendant had a specific intention to commit the offence, but it is necessary to show that he knew of the intention of the principal offender to do so.[39] Knowledge of no more than a possibility that the offence might be intended will not suffice.[40] Thus, where the charge is murder under s 302(1)(a), it must be shown that the defendant assisted or aided the principal offender in carrying out the killing knowing that the time of doing so that the other was intending to kill the victim or do him grievous bodily harm. If that state of knowledge is not established the defendant may be guilty of manslaughter, subject to defences under s 23(1) of the *Criminal Code*.

A person 'aids' another to commit an offence if he assists or helps him to do so. It is not necessary for the aider to be present at the crime but he must be 'aware at least of what is being done…by the other actor.'[41]

'Procuring' in s 7(1)(d) has been defined as 'effort, care, management or contrivance towards the obtaining of a desired end'.[42] It has been said that it involves more than mere encouragement; it entails successful persuasion.[43] A person may be charged under s 7(1)(d) with procuring another to commit an offence with a circumstance of aggravation where the circumstance of aggravation merely attracts additional punishment rather than constituting a specific offence.[44]

Section 9 expands criminal responsibility for 'counselling' by making the counsellor liable for an offence committed by the principal other than what was

38 *R v Jeffrey* [1997] QCA 460; [2003] 2 Qd R 306; *Giorgianni v The Queen* (1985) 156 CLR 473 at 482; *R v Brown* [2007] QCA 161, [48].

39 *Jeffrey; Lowrie*, 535.

40 *Lowrie*, 525, 541.

41 *Sherrington & Kuchler* [2001] QCA 105, 7.

42 *Castiglione* [1963] NSWR 1, 6, a meaning adopted in *Chan* [2000] QCA 347, [52].

43 *Adams* [1998] QCA 64, 6.

44 *Webb* [1995] 1 Qd R 680, 685.

counselled where the facts constituting the committed offence are a probable consequence of carrying out the counsel.[45]

Section 10A(1) *Code*, which was inserted shortly after the decision in *Barlow*[46] (although the amending bill was introduced before the High Court's decision), provides that the criminal responsibility of a secondary party under s 7 extends to any offence that, on the evidence admissible against him is either the offence proved against the principal offender 'or any statutory or other alternative to that offence.' While the meaning of the sub-section is far from clear, it does seem that its effect includes enabling a jury to convict of a lesser offence when the secondary offender's intent as an aider, counsellor or procurer extends no further than that offence. It does not allow a person charged under s 7(b) (c) or (d) to be convicted of an offence which, though technically a statutory alternative, is independent in its factual basis of the offence committed by the principal offender.[47]

'Offence' should be given the same meaning in both ss 7 and 8 *Code*, that is 'the element of conduct (an act or omission) which, if accompanied by prescribed circumstances, or causing a prescribed result or if engaged in with a prescribed state of mind, renders a person engaging in the conduct liable to punishment'.[48]

Section 10A(2) *Code* provides that a defendant's criminal responsibility under s 8 'extends to any offence that, on the evidence admissible against him or her, is a probable consequence of the prosecution of a common intention to prosecute an unlawful purpose, regardless of what offence is proved against any other party to the common intention'. Consistently with the analysis in *Barlow,* it follows that a defendant may be found guilty of the principal offence to the extent that its elements were the probable consequence of a common intention to prosecute an unlawful purpose. So, in the case of murder under s 302(1)(a), the 'nature' of the offence for the purposes of s 8 is to be regarded as consisting of the *elements* of murder (unlawful killing plus intent), rather than murder itself.[49]

Thus an defendant charged under s 302(1)(a) may be convicted of manslaughter, notwithstanding that the principal offender is convicted of murder, if intentional killing was not a probable consequence of their mutual plan but an unlawful killing, objectively speaking, was.[50]

---

45 For an examination of the relationship between s 7(1)(d) and s 9 see *Oberbillig* [1989] 1 Qd R 342, 345; *Hutton* (1991) 56 A Crim R 211. See also *Darkan v The Queen* (2006) 80 ALJR 1250.

46 *Barlow* (1997) 188 CLR 1, 9.

47 *Sullivan & Marshall* [2000] QCA 393.

48 *Barlow; Sullivan & Marshall*.

49 *Brien & Paterson* [1991] 1 Qd R 634, 645.

50 It is, conversely, conceivable that the secondary party may be guilty of a more serious offence than the principal offender: See *Barlow,* 14, eg. diminished responsibility. See *R v Hallin* [2004] QCA 18.

Where acts of violence escalate beyond the level of force initially contemplated, it is necessary, before a secondary party can be held criminally responsible under s 8, that the jury be satisfied he shared in the expanded intention to inflict such greater violence.[51]

Where the prosecution relies on s 8 responsibility in relation to a murder charge brought under s 302(1)(b) ('death … caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life'), the question as what extent the elements of the offence were a probable consequence of the unlawful purpose will entail a consideration of whether it was a probable consequence that an act of such a nature as to be likely to endanger human life as the act which caused death would occur. If that element were missing a secondary offender could not be convicted of murder but might be convicted of manslaughter.[52]

The expression 'a probable consequence' used in s 8 and s 9 *Code* was considered recently in *Darkan v The Queen* (2006) 80 ALJR 1250. The High Court held that the expression 'a probable consequence' does not mean a consequence likely to happen on the balance of probabilities (which would be unduly generous to a defendant). A more exacting standard than a 'possibility' is imposed by the expression. The expression means more than a real or substantial possibility (a test which would be unduly harsh to a defendant). The expression 'a probable consequence' means the occurrence of the consequence is probable in the sense that it could well happen. It was stated at [81]:

> 'It is not necessary in every case to explain the meaning of the expression 'a probable consequence' to the jury. But where it is necessary or desirable to do so, a correct jury direction under s 8 would stress that for the offence committed to be 'a probable consequence' of the prosecution of the unlawful purpose, the commission of the offence had to be not merely possible, but probable in the sense that it could well have happened in the prosecution of the unlawful purpose. And where it is desirable to give the jury a direction as to the meaning of the expression 'a probable consequence' in s 9, a correct jury direction would stress that for the facts constituting the offence actually committed to be 'a probable consequence' of carrying out the counselling, they had to be not merely possible, but probable in the sense that they could well have happened as a result of the carrying out the counselling.'

51 *Ritchie* [1998] QCA 188.

52 *Brien & Paterson*.

SELF-DEFENCE: S 271(1)[53]

General Notes on Self-defence

The two limbs of s 271 are more commonly raised than any other section. The following notes concentrate largely upon s 271, and make brief mention of s 272.

Preliminary question — which limb or limbs of the above defences should be considered by the jury?

> 'Sometimes both limbs of s 271 will be appropriately left to the jury. But more often than not the consequence of summing-up on both limbs may be confusion which detracts from proper consideration of the true defence. Speaking very generally, in homicide cases the first limb of s271 seems best suited for cases where the deceased's initial violence was not life-threatening and where the reaction of the [defendant] has not been particularly gross, but has resulted in a death that was not intended or likely; in other words cases where it can be argued that the unlikely happened when death resulted. The second limb seems best suited for those cases where serious bodily harm or life-threatening violence has been faced by the [defendant], in which case the level of his or her response is not subject to the same strictures as are necessary under the first limb. The necessity for directions under both limbs may arise in cases where the circumstances are arguably but not clearly such as to cause a reasonable apprehension of grievous bodily harm on the part of the [defendant]. In cases where the initial violence is very serious, most counsel will prefer to rely upon s 271(2) alone. It is only cases in the grey area where it is arguable but not sufficiently clear that the requisite level of violence was used by the deceased person that directions under both subsections will be desirable. The above general statements are not intended to paraphrase the meaning of the subsections. They are given with a view to identifying the broad streams of cases under which one or other or both of these defences may be appropriate'.[54]

Sometimes directions on a third alternative defence (under s 272) are requested. Generally speaking that defence helps a defendant who has started to fight and has then been threatened by massive over-reaction, or at least by such violence as to cause reasonable apprehension of death or grievous bodily harm.

Where there is a conflict in the evidence concerning who was responsible for the initial assault, or for provocation for the assault, it may be necessary to give the jury an alternative direction under s 272, to be applied if they consider that the defendant was responsible for the commencement of hostilities.

Discussion with counsel and commonsense will often narrow the true defence down to sensible limits and avoid the highly confusing exercise of multiple alternative directions under ss 271(1), 271(2) and 272. But there will be rare cases where all three will be necessary.

---

53 Queensland Courts, *Supreme and District Court Benchbook*, 'Self-Defence: s 271(1)' [86] <http://www.courts.qld.gov.au/2265.htm> at 12 March 2009.

54 *Bojovic* [2000] 2 Qd R 183, 186.

The following observations were made by McPherson JA in R v Young [2004] QCA 84 at [6] and [7]:

> '[6] Both subsections of s 271 are predicated upon the happening of an unlawful assault, and both make it 'lawful' (and as such not criminal) to use force as a defence against the assailant, although the extent of the force that is authorized under s 271(1) differs from that permitted under s 271(2). In the case of the former, it is limited to such force 'as is reasonably necessary to make effectual defence against the assault', and the force used must not be intended or likely to cause death or bodily harm. The standard adopted is objective and it does not depend on the impression formed by the person assaulted about the degree of force needed to ward off the assailant. If an honest and reasonable mistake is made about it, the exculpatory provisions of s 24 of the *Code* are doubtless available in appropriate circumstances.
>
> [7] Section 271(2), on the other hand, is concerned with a different state of affairs. It authorizes the use of more extreme force by way of defence extending even to the infliction of death or grievous bodily harm on the assailant. It is available where the person using such force cannot otherwise save himself or herself from death or grievous bodily harm, or believes that he or she is unable to do so except by acting in that way. The belief must be based on reasonable grounds; but, subject to that requirement, it is the defender's belief that is the definitive circumstance.'

S 271(1) Directions

I must now give you instructions on the law about self-defence. If the prosecution cannot, to your satisfaction beyond reasonable doubt exclude the possibility that [the wounding or injury] occurred in self-defence as the law defines it, that is the end of the case. The defendant's use of force would be lawful and you should find him not guilty.[55]

The criminal law does not only punish; it protects as well. It does not expect citizens to be unnaturally passive especially when their safety is threatened by someone else. Sometimes an attacker may come off second best but it does not follow that the one who wins the struggle has committed a crime. The law does not punish someone for reasonably defending himself or herself, as I will shortly explain when I read a section from our Code. You should appreciate that the law is drawn in fairly general terms to cover any situation that may arise. Each jury has to apply it to a particular situation according to the facts of the particular case. No two cases are exactly alike, so the results depend heavily on the commonsense and community perceptions that juries bring into court.

[Read the sub-section].

You will see that there are four matters you must consider in respect of this defence:

1. **There must have been an unlawful assault on the accused defendant.**

2. **The defendant must not have provoked that assault. 'Provocation' means any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, to deprive him of the power of self control, and to induce him to assault the person by whom the act or insult is done or offered.**

3. **The force used by the defendant was reasonably necessary to make effectual defence against the assault.**

4. **The force used was not intended and was not such as was likely to cause death or grievous bodily harm.**

55 The following cases may be of assistance: *Bojovic* [2000] 2 Qd R 183; *Gray* (1998) 98 A Crim R 589; *Prow* [1990] 1 Qd R 64; *Muratovic* [1967] Qd R 15; *Marwey* (1977) 138 CLR 630; *Zecevic v DPP* (1987) 162 CLR 645 (re requirements in a common law summing-up).

The burden remains on the prosecution at all times to prove that [the defendant**] was not acting in self-defence, and the prosecution must do so beyond reasonable doubt before you could find [**the defendant**] guilty.**

The first matter that arises is whether [the defendant**] was unlawfully assaulted by [**name other person**]. If you conclude [**the other person**] did not assault the defendant, this defence is not open.**

[If appropriate, direct the jury] i**t is common ground** [or that the evidence suggests] **that the** [deceased] [complainant] **unlawfully assaulted the defendant and that on that basis the first part of the section is satisfied in the defendant's favour.**

The second matter that arises is that, if there was such an assault, whether the defendant provoked it.

[It has been suggested[56] that a jury should treat an assault as unprovoked unless they decide beyond reasonable doubt that the assault was provoked by the defendant. If there is an issue on this first point, deal with the competing contentions and then proceed.]

If you conclude that [the defendant**] provoked the assault then this particular defence is not open to him. On this basis the prosecution has properly excluded the defence and you need not consider it further.[57] Otherwise you go on to consider these further matters.**

The next way the prosecution seeks to exclude the defence is this. It argues that the force that [the defendant**] used was not reasonably necessary to make effectual defence against that assault.**

In considering this, bear in mind that a person defending [himself] cannot be expected to weigh precisely the exact amount of defensive action that may be necessary. Instinctive reactions and quick judgments may be essential. You should not judge the actions of the defendant as if he had the benefit of safety and leisurely consideration.

[Here an example might help e.g. if the assault is a push or a punch, a person may not be justified in shooting the other person who pushed or punched him.]

When considering this question, you should understand that whether the degree of force used was reasonably necessary to make effectual defence against an assault is a matter for your objective consideration and does not depend on the defendant's state of mind.

---

56 Kerr [1976] 1 NZLR 335

57 On this basis, then s 271(2) is not open either. But it might be necessary in an appropriate case to give directions under s 272.

The final matter is whether the force the defendant used was not intended and was not such as was likely to cause death or grievous bodily harm. 'Grievous bodily harm' means any bodily injury of such a nature that, if left untreated, it would endanger or be likely to endanger life or cause or be likely to cause permanent injury to health. The fact that the force used did cause death or grievous bodily harm is not the point. The question is whether it was likely to happen in all the circumstances.

[In appropriate cases] **there remains a question of whether the prosecution has satisfied you that the defendant intended to kill the complainant or to do him grievous bodily harm?[58] So, if the prosecution satisfies you beyond reasonable doubt:**

1. **That the defendant was not unlawfully assaulted by the [complainant]; or**

2. **That the defendant gave provocation to the [complainant] for the assault; or**

3. **That the force used was more than was reasonably necessary to make effectual defence; or**

4. **That the force used was either intended or was likely to cause death or grievous bodily harm;**

then the prosecution has proved that the defendant does not apply.

Remember there is no burden on the defendant to satisfy you that he was acting in self-defence. The prosecution must satisfy you beyond reasonable doubt that he was not.

58 *R v Gray* (1998) 98 A Crim R 589, *R v Greenwood* [2002] QCA 360 at [20]. This does not often arise as a separate issue under s 271(1), because in cases where this is likely counsel usually opt for a direction under s 271(2).

Section 271(2) — Self-Defence against unprovoked assault when there is death or GBH[59]

I must now tell you the law concerning self-defence. If the prosecution cannot, to your satisfaction beyond reasonable doubt exclude the possibility that [the killing] occurred in self-defence as the law defines it, that is the end of the case. The defendant's use of force would be lawful and you should find him not guilty.[60]

The criminal law does not only punish; it protects as well. It does not expect citizens to be unnaturally passive especially when their safety is threatened by someone else. Sometimes an attacker may come off second best but it does not follow that the one who wins the struggle has committed a crime. The law does not punish someone for reasonably defending himself or herself, as I will shortly explain when I read a section from our Code. You should appreciate that the law is drawn in fairly general terms to cover any situation that may arise. Each jury has to apply it to a particular situation according to the facts of the particular case. No two cases are exactly alike, so the results depend heavily on the commonsense and community perceptions that juries bring into court. You will not be surprised to know that if the violence of the attacker is such that the person defending [himself] reasonably fears for his life or safety then the violence that might be justified will be great[er] also. The level of justifiable self-defence depends very much on the level of danger created by the attacker and the reasonableness of the defendant's reaction.

Read the first part of 271(1), and all of s 271(2) to the jury.

The first matter that arises is whether [the defendant**] was unlawfully assaulted by [**name other person**]. If you conclude [**the other person**] did not assault the defendant, this defence is not open.**

[If appropriate, direct the jury] **it is common ground** [or that the evidence suggests] **that the [**deceased/complainant**] unlawfully assaulted the defendant and that on that basis the first part of this section is satisfied in the defendant's favour.**

The second matter is that if there was such an assault, whether the defendant provoked that assault.

---

59 Queensland Courts, *Supreme and District Court Benchbook*, 'Section 271(2) — Self-Defence against unprovoked assault when there is death or GBH' [86A] <http://www.courts.qld.gov.au/2265.htm> at 12 March 2009.

60 The following cases may be of assistance: *Bojovic* [2000] 2 Qd R 183; *Gray* (1998) 98 A Crim R 589; *Prow* [1990] 1 Qd R 64; *Muratovic* [1967] Qd R 15; *Marwey* (1977) 138 CLR 630; *Zecevic v DPP* (1987) 162 CLR 645 (re requirements in a common law summing-up).

[It has been suggested[61] that a jury should treat an assault as unprovoked unless satisfied beyond reasonable doubt that the assault was provoked by the defendant. If there is an issue on this first point, deal with the competing contentions and then proceed.]

If the nature of the assault is such as to cause reasonable apprehension of death or grievous bodily harm, and the person using force by way of defence believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm, it is lawful for the person to use such force as is necessary for defence, even though such force may cause death or grievous bodily harm.[62]

'Grievous bodily harm' means any bodily injury of such a nature that, if left untreated, it would endanger or be likely to endanger life or cause or be likely to cause permanent injury to health.

The critical question is whether the defendant believed on reasonable grounds that the force used was necessary for defence.[63] The important issue is the state of mind or belief of the defendant. The question is whether the prosecution has proved beyond reasonable doubt that the defendant did not actually believe on reasonable grounds that it was necessary to do what the defendant did to save (himself or another**) from death or grievous bodily harm.**

The defendant does not have to prove that his response was reasonable. The prosecution must satisfy you that the defendant did not actually believe on reasonable grounds that he had to do what he did to save himself from being killed or from a very serious injury.

You will need to assess, looking at all the circumstances of the case, the level of physical menace which you think that the deceased [or complainant**] was actually presenting before the fatal [**or serious**] force was used by the defendant.**

Remember that a person defending himself cannot be expected to weigh precisely the amount of defensive action which may be necessary.

Instinct to reaction and quick judgment may be essential and you should not judge the actions of the defendant as if he had the benefit of safety and leisurely consideration.[64] [65]

---

61 *Kerr* [1976] 1 NZLR 335.

62 In 'Battered Woman Syndrome' cases, expert evidence may be adduced as to the defendant's heightened awareness of danger, and the jury should be directed to its relevance to the defendant's belief as to the risk of grievous bodily harm or death. (General directions as to evidence of experts will be appropriate in such instances). Equally, the actual history of the relationship may require direction as going to the existence of reasonable grounds for any belief; *Osland* (1998) 197 CLR 316 at 337.

63 *R v Wilmott* [2006] QCA 91.

64 *Gray* (1998) 98 Crim R 589.

If the prosecution satisfies you beyond reasonable doubt that:

1. **That the defendant was not unlawfully assaulted by the [**deceased/complainant**]; or**

2. **That the defendant gave provocation to the [**deceased/complainant**] for the assault; or**

3. **That the nature of the assault was not such as to cause reasonable apprehension of death or grievous bodily harm; or**

4. **The defendant did not actually believe on reasonable grounds that he could not otherwise save himself [**or another**] from death or grievous bodily harm; or**

then the defence is excluded.

Remember there is no burden on the defendant to satisfy you that he was acting in self-defence. The prosecution must satisfy you beyond reasonable doubt that he was not.

65 The prosecution can no longer rely upon a submission that the force used by a defendant was not 'necessary' for defence. Under 271(2) the crucial factor is said to be the appellant's actual state of belief, and that it be based on reasonable grounds. For discussion see *Julian* (1998) 100 A Crim R 430; *Corcoran* (2000) 111 A Crim R 126, and *R v Wilmott* (2006) QCA 91.

Section 272 — Self-Defence against provoked assault, when there is death or grievous bodily harm[66]

Section 272

The three basic propositions in s 272(1) are:

(a) Reasonable apprehension of death or grievous bodily harm by the defendant,

(b) belief by the defendant on reasonable grounds that it is necessary to save himself from death or grievous bodily harm that he use force; and

(c) that the force which the defendant used was reasonably necessary for his preservation.

A conflict of opinion exists concerning the application of the requirement in the last part of s 272 (2) that the defendant should decline further conflict and quit or retreat.[67] Although it does not directly deal with the point, *Gray v Smith*[68] tends to suggest that this is not generally an additional requirement to a defence arising under s 272(1). Until clarified by authority, the safer course would seem to be to confine this additional requirement of retreat to the exceptional cases with which subsection (2) deals.

It is not necessary to set out particular forms of summing-up under s 272. It is suggested that subsection (1) be taken proposition by proposition, and the evidence and submissions applied to each proposition, followed by the question whether the prosecution has excluded that proposition beyond reasonable doubt. The exclusion of any one of the consecutive propositions is of course enough for the exclusion of that defence.

66 Queensland Courts, *Supreme and District Court Benchbook*, 'Section 272 — Self-Defence against provoked assault, when there is death or grievous bodily harm' [86B] <http://www.courts.qld.gov.au/2265.htm> at 12 March 2009.

67 Contrast *Muratovic*, 28 with *Johnson* [1964] Qd R 1, 14.

68 [1997] 1 Qd R 485.

PROVOCATION: S 304[69]

You only need to consider the issue of provocation if you provisionally reach the view that the defendant had the necessary intent to kill or cause grievous bodily harm and that he would be guilty of murder.

Under our law, the defence of provocation operates in the following way. When a person kills another under circumstances which would constitute murder, and he/she does so in the heat of passion caused by sudden provocation and before there is time for his/her passion to cool, he/she is guilty of manslaughter only. The defence therefore operates as a partial defence, not a complete defence, because if it applies its effect is to reduce what would otherwise be a verdict of murder to one of manslaughter.

What then is provocation? In this context, provocation has a particular legal meaning.[70] Provocation consists of conduct which:

(a) causes a loss of self-control on the part of the defendant; and

(b) could cause an ordinary person to lose self-control and to act in the way which the defendant did.

Was the defendant actually provoked?
You must consider whether the deceased's conduct, that is, the things the deceased did or said, or both, caused the defendant to lose his/her self control and to [here insert the fatal act]**? In that regard, you must consider the conduct in question as a whole and in the light of any history of disputation between the deceased and the defendant, since particular acts or words which considered separately could not amount to provocation, may, in combination or cumulatively, be enough to cause the defendant to actually lose his/her self control.[71]**

In considering whether the alleged provocative conduct caused the defendant to lose control, you must consider the gravity or level of seriousness of the alleged provocation so far as the defendant is concerned, that is, from this particular defendant's perspective. This involves assessing the nature and degree of seriousness *for the defendant* of the things the deceased said and did just before the fatal attack.

---

69 Queensland Courts, *Supreme and District Court Benchbook*, 'Provocation' [87] <http://www.courts.qld.gov.au/2265.htm> at 12 March 2009.

70 Provocation for this purpose takes its meaning from the common law, not from s 268: *Callope* [1965] Qd R 456; *Young* [1957] St R Qd 599; *Angelina* [2001] 1 Qd R 56, 64. Cf *Masciantonio* (1995) 183 CLR 58 at 66. For useful cases see: *Buttigieg* (1993) 69 A Crim R 21; *Stingel* (1990) 171 CLR 312; *Romano* (1984) 36 SASR 283, 289.

71 *Stingel* at 326.

Matters such as the defendant's [race, colour, habits, relationship with the deceased and age] are all part of this assessment. And you must appreciate that conduct which might not be insulting or hurtful to one person may be extremely hurtful to another because of such things as that person's age, sex, race, ethnic or cultural background, physical features, personal attributes, personal relationships or past history.[72]

So you must consider the gravity of the suggested provocation to this particular defendant. The acts relied on by the defendant as relevant in affecting his/her mind and causing him/her to lose self-control include ... [Summarise evidence of provocative conduct and of its effect upon the defendant. Refer to the special characteristics of the defendant raised by the evidence. This would include in an appropriate case the 'battered wife syndrome'. It will be necessary to relate any expert evidence as, for example, with regard to the 'battered wife syndrome' to the particular facts and circumstances of the subject case. Summarise the defence and prosecution cases.]

Was the defendant acting while provoked?
A further matter for your consideration is whether the defendant acted in the heat of passion, caused by sudden provocation and before there was time for his/her passion to cool. You must consider whether the defendant was actually deprived of self-control and killed the deceased whilst so deprived.[73] [Summarise the competing defence and prosecution cases.]

Could an ordinary person have been so provoked?[74]
You must also consider whether the alleged provocation was such that it was capable of causing an ordinary person to lose self control and to form an intention to kill or do grievous bodily harm and to act upon that intention as the deceased did, so as to give effect to it.[75]

An 'ordinary person' is simply one who has the minimum powers of self control[76] **expected of an ordinary citizen [who is sober, not affected by drugs] of the same age as the defendant.**[77] **The ordinary person is expect-**

---

72 *Stingel* at 326.

73 Where there is evidence of intoxication it may be appropriate to add:
A person's intoxication may be taken into account when considering whether the defendant did in fact lose control as the result of provocative behaviour. It is a question of fact for you, the jury, as to whether the defendant's loss of self control was caused by the deceased's words or conduct, or solely by the inflammatory effects of drink or drugs. (Note that intoxication is not a relevant consideration in determining the impact of the provocation on the ordinary person.)

74 *Stingel*, 327–32.

75 See *Masciantonio* at 69; also *Johnson v The Queen* (1976) 136 CLR 619, 639, 642.

76 *Stingel*, 327.

77 Note that in *Stingel* at 331 the High Court stated that the preferable approach is to attribute the age of the defendant to the ordinary person of the objective test, at least in any case where it may be open to the jury to take the view that the defendant is immature by reason of youthfulness. However, age is the only characteristic or attribute of the particular defendant which may be attributed to the 'ordinary person' for the purposes of the objective test; the sex of the defendant is not an attribute which the High Court considered to be available for similar application in this context.

ed to have the ordinary human weaknesses and emotions common to all members of the community, and to have self-control at the same level as ordinary citizens, so that extraordinary aggressiveness or extraordinary want of self control on the part of the defendant confers no protection against conviction for murder.

It is for the prosecution to prove beyond reasonable doubt that the suggested provocation in all its gravity for this defendant was insufficient to cause an ordinary person in the defendant's position to lose self control and act as he/she did.

So you must ask yourself whether an ordinary person, reacting to the alleged level of provocation, could[78] suffer a similar loss of control. That is, could an ordinary person who is subjected to … [describe the alleged conduct, for example, a sexual advance by the victim which is aggravated because of the defendant's special sensitivity to a history of violence and sexual assault within the family[79]] **have lost self control and acted as you find the defendant did?** [By eg stabbing the deceased, reacting by inflicting serious violence on the deceased, accompanied by intention to kill or to cause at least grievous bodily harm].

Onus

It is for the prosecution to satisfy you beyond reasonable doubt that the defendant did not act under provocation before a verdict of murder is appropriate. The prosecution will have succeeded in satisfying you that provocation is excluded as a defence, if it has satisfied you beyond reasonable doubt of any one of the following matters:

1. **the potentially provocative conduct of the deceased did not occur; or**
2. **an ordinary person [where relevant *of the same age as the defendant*] in the circumstances could not have lost control and acted like the defendant acted with intent to cause death or grievous bodily harm; or**
3. **the defendant 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 pre-meditated); or**
6. **the defendant did not kill while his/her self-control was lost; or**

78 *Stingel*, 329.

79 Note that none of the attributes or characteristics of the particular defendant will be necessarily irrelevant to an assessment of the content and extent of the provocation involved in the relevant conduct: *Stingel* at 324.

7. when the defendant killed there had been time for his/her loss of self-control to abate.

If you are satisfied beyond reasonable doubt as to any of these matters, then the prosecution has disproved provocation, and if you are satisfied beyond reasonable doubt as to all the elements of murder, to which I have earlier referred, the appropriate verdict is 'guilty of murder'. If, however, a reasonable doubt remains as to provocation, you must acquit the defendant of murder. In that event, you would convict him/her of manslaughter if satisfied beyond reasonable doubt of all the elements of manslaughter to which I have referred.[80]

Preliminary question — when is the issue sufficiently raised to let it go to the jury as an issue?

It is sufficient to raise provocation if there is some evidence which might induce a reasonable doubt as to whether the prosecution has negatived the question of provocation.[81] A trial judge in determining whether the issue of provocation is raised on the evidence must look at the version of events most favourable to the defendant open on the evidence which could lead a jury acting reasonably to be satisfied beyond reasonable doubt that the killing was unprovoked.[82] More needs to be raised than the reasonable possibility of dispute and friction. Various forms of conduct capable of producing anger in others have been ruled to be incapable of raising this issue (eg a bare confession of adultery is not enough). The cases are usefully reviewed in *Buttigieg*.[83] Note that in *Buttigieg*[84] the Court of Appeal observed that in respect of provocation as a defence to murder, 'It seems now to be accepted in the cases that the use of words alone, no matter how insulting or upsetting, is not regarded as creating a sufficient foundation for this defence to apply to a killing, except perhaps in 'circumstances of a most extreme and exceptional character'.' However, the issue should be left to the jury if the trial judge is 'in the least doubt whether the evidence is sufficient'[85], even if it is not requested by the defence and is in fact inconsistent with a defence raised.[86]

Directing the jury

The gravity of the provocative conduct must be assessed from the perspective of the particular defendant, so that his 'age, sex, race, physical features, personal attributes, personal relationships and past history may be relevant to an objective assessment of the gravity of a particular wrongful act or insult.'[87] In a case of 'battered person syndrome' expert evidence as to the defendant's state

80 *R v Rae* [2006] QCA 207, [37].

81 *Van Den Hoek v The Queen* (1986) 161 CLR 158, 162.

82 *Stingel*, 334; *Masciantonio*, 67–68; *Buttigieg*, 27, *Rae*, [29].

83 *Buttigieg*, 26–35.

84 *Buttigieg*, 37.

85 *Pangilinan*, 64, *Van Den Hoek*, 161–162, 169.

86 *Pangilinan*, 64. See also *R v Cowan* [2005] QCA 424 at [21], [22].

87 *Stingel*, 326.

of ‘heightened arousal’ may be of significance as providing the context in which an apparently minor insult is to be viewed.[88] The history of an abusive relationship will of course be relevant also.

The doctrine of provocation is not confined to loss of self-control arising from anger or resentment but extends to a sudden and temporary loss of self-control due to emotions such as fear or panic as well as anger or resentment; the central element in the doctrine is the sudden and temporary loss of self-control.[89]

A critical matter for assessment is whether a hypothetical ordinary person could under such provocation lose self-control and do the act causing death. In that objective test, the age of the defendant where it is relevant to level of maturity should be attributed to the ‘ordinary person’.[90] It is to be noted that the reference is to the ordinary person and not to the average person.[91] Reference should not be made in this context to a ‘reasonable person’; to do so is to suggest a requirement of a higher level of control.[92] An instruction that the jury put themselves, as the embodiment of the ordinary person, in the defendant’s shoes should be avoided.

88 *Osland* (1998) 197 CLR 316, 337.

89 *Van Den Hoek*, 168; *Pangilinan*, 64.

90 *Stingel*, 329, 331; *Mogg* (2000) 112 A Crim R 417.

91 *Stingel*, 322.

92 *Stingel*, 326-8; *Vidler* (2000) 110 A Crim R 77.