



THE LAW SOCIETY  
OF NEW SOUTH WALES

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Dear Mr Glanfield

**NSW Law Reform Commission report 136 *Jury Directions***

Thank you for seeking the views of the Law Society of NSW on the NSW Law Reform Commission report on *Jury Directions*. The Law Society's Criminal Law Committee has reviewed the recommendations and provides its initial response in the attached submission.

As you will be aware, many of the Commission's recommendations are significant and will require further consultation should they be pursued. The Committee is keen to engage in this process and looks forward to the government response to the recommendations.

Your officers may find it convenient to direct any queries about this submission to Heather Moore, Director, Policy and Practice on 9926 0256 or at [heather.moore@lawsociety.com.au](mailto:heather.moore@lawsociety.com.au).

Yours sincerely

John Dobson  
President

**Criminal Law Committee submission on NSW Law Reform Commission Report 136,  
*Jury Directions***

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

Agree.

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

Agree. Given the size of the task, the Committee suggests that the most common Federal offences should be dealt with first, for example importation and possession of drugs under Part 9.1 of the *Criminal Code*<sup>1</sup> and fraud offences under Part 7.3<sup>2</sup>. It would also be helpful to have jury directions for the key provisions on extensions of criminal liability under Part 2.4<sup>3</sup>.

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

- (a) jury directions should aim to inform jurors about as much of the law as they need to know to decide the issues of fact and reach a verdict;**
- (b) the judge should direct the jury whenever necessary to protect the fairness of the trial and to promote the public interest in seeing that justice is done;**
- (c) jury directions must be legally accurate and fairly state the case for the accused and prosecution;**
- (d) jury directions should be tailored to the particular circumstances of the case;**
- (e) the judge's role is to hold the balance between the contending parties and not to enter the fray, for example, by advancing an argument in support of the prosecution case that was not put by the prosecution; and**
- (f) jury directions should be as clear, simple, brief and comprehensible as possible without compromising their legal accuracy.**

Agree in principle.

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<sup>1</sup> In particular, import/export border controlled drugs in sections 307.1, 307.2, 307.3; possession of unlawfully imported border controlled drugs (or reasonably suspected of being imported) in sections 307.5, 307.6, 307.7, 307.8, 307.9, 307.10; import/export of border controlled precursors in sections 307.11, 307.12, 307.13; trafficking controlled drugs in sections 302.2, 302.3, 302.3.

<sup>2</sup> In particular, s 134.1 (obtaining property by deception); s 134.2 (obtaining a financial advantage by deception); s 135.1 (general dishonesty); s 135.2 (obtaining financial advantage); s 135.4 (conspiracy to defraud).

<sup>3</sup> That is, s 11.1 (attempt); s 11.2 (complicity and common purpose); s 11.2A (joint commission); s 11.3 (commission by proxy); s 11.4 (incitement); s 11.5 (conspiracy).

- 3.4 The *Criminal Trial Courts Bench Book* should set out a basic guide and checklist for jury directions, including:
- (a) general guidance on how directions should be composed and delivered;
  - (b) general guidance on how a summing up should be constructed and delivered;
  - (c) general guidance on the use of plain English principles, in particular on forms of legalese and sentence construction that can affect the comprehensibility of directions;
  - (d) a template for use by the judge in giving practical advice to jurors as to how they might go about their deliberations;
  - (e) advice on how to respond to jury questions about directions; and
  - (f) a checklist against which a proposed summing up could be compared for completeness.

Agree in principle.

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

Agree.

- 4.1 (1) The NSW Government should ask the Standing Council on Law and Justice to consider developing uniform legislation on directing juries about the criminal standard of proof in all Australian jurisdictions.
- (2) The options that should be considered and tested include directions that:
- (a) the jury must be satisfied beyond reasonable doubt so that it is sure that the accused is guilty; or
  - (b) without reference to the phrase “beyond reasonable doubt”, the prosecution proves its case if the jury is sure that the accused is guilty; or
  - (c) use one or more of the following explanations of the expression “beyond reasonable doubt”:
    - (i) proof beyond “reasonable doubt” involves a very high standard of proof that requires the jury to be sure that the accused is guilty;
    - (ii) the standard of proof required is higher than a belief that the accused person is probably guilty or even that the accused person is very likely guilty, but does not require absolute certainty;
    - (iii) “reasonable doubt” involves a reasonable uncertainty that remains about the accused’s guilt, after careful and impartial consideration of all of the evidence;
    - (iv) an imaginary, or fanciful or frivolous doubt, or one based on sympathy or prejudice alone does not amount to a reasonable doubt.

The Committee supports the continued use of the expression “beyond reasonable doubt” which in the experience of its members is understood by jurors in criminal trials. The Committee notes that a proposal to change the standard of proof would require amendment of s 141 of the uniform *Evidence*

*Acts.* Any change to the standard of proof or the way it is explained to the jury must be the subject of comprehensive and inclusive consultation. The Committee has no objection to such a process being undertaken under the remit of the Standing Council on Law and Justice as long as there is adequate consultation in each State and Territory.

- 4.2 Any recommendation for reformulation of the direction on the criminal standard of proof should be subject to empirical testing, for the purpose of ascertaining whether the proposed formulation:**
- (a) is more easily understood than the current direction on reasonable doubt;**
  - (b) is consistently applied by a large number of people; and**
  - (c) results in individuals applying a standard of proof that is higher, lower or the same as that applied under the current direction on reasonable doubt.**

As set out under 4.1 above, the Committee supports the continued use of “beyond reasonable doubt”. It is crucial that any recommendation for reformulation must not lower the present criminal standard of proof.

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

The Committee has no objection to a direction on the use and significance of DNA evidence, subject to consultation on its content.

- 5.2 The courts should introduce a practice note in relation to the use of DNA evidence in criminal trials that would:**
- (a) mandate prosecution and defence disclosure of the intention to lead such evidence, to challenge its admissibility or to dispute its accuracy; and**
  - (b) encourage pre-trial determination of the admissibility of such evidence and identification of any issues that might need to be left to a jury in relation to that evidence.**

In the Committee's view, recommendations 5.2, 5.3 and 5.4 extend beyond the subject of jury directions. The Committee notes that significant issues are raised by the proposals which would require a comprehensive consultation process if they are to be pursued.

- 5.3 (1) The Forensic and Analytic Science Service, the Office of the Director of Public Prosecutions and the Public Defenders Office should prepare a standard audio-visual presentation that a party can tender in evidence to provide the jury with a basic understanding of DNA evidence so as to place it in a position to assess that evidence and any issue relating to it. (2) A practice note should require the prosecution to notify the defence that it proposes to use such a presentation and should also require defence notification of any objection to its use in the particular case, with a view to determining the visual aid's admissibility before trial.**

See 5.2 above. The Committee also notes the difficulties which may arise from a standard presentation given the range of complexities which can be present in relation to DNA evidence.

- 5.4 (1) Consideration should be given to amending the *Criminal Procedure Act 1986* (NSW) and to introducing a practice note to permit expert evidence called by the prosecution and defence to be given in a block, and to permit the trial judge to give directions as to the order in which such witnesses should be cross-examined.
- (2) Consideration should be given to amending the *District Court Rules 1973* (NSW) so as expressly to require experts called in criminal trials to be subject to the *Expert Witness Code of Conduct*.

See 5.2 above. In respect of 5.4(2), the Committee agrees in principle that experts called in criminal trials should be subject to the *Expert Witness Code of Conduct*.

- 5.5 (1) The NSW Government should ask the Standing Council on Law and Justice to consider the issue of the evidence of child sexual assault victims and their response to sexual abuse in the light of this report and the report of the NSW and Australian Law Reform Commissions on Family Violence, with a view to:
- (a) commissioning further research on the issue of juror and public misconceptions concerning the reliability of the evidence of children and their response to sexual abuse; and
  - (b) amending the uniform *Evidence Acts* to facilitate the reception of expert evidence concerning the reliability of the evidence of children and their response to sexual abuse, and/or clarifying the extent to which a judicial direction could be given in this respect.
- (2) The *Criminal Trial Courts Bench Book* should include a suggested direction concerning those aspects of childhood development and response to sexual abuse that may be relevant for an assessment of the reliability of the evidence of child sexual abuse victims.

The Committee agrees that the Bench Book should set out how the jury is to be directed to deal with admissible evidence in cases dealing with child sexual assault. However, the amendment to the uniform *Evidence Acts* contemplated in recommendation 5.5(1)(b) goes significantly beyond the subject of jury directions. While the Committee has no objection to further consideration of this proposal, it must be part of a comprehensive consultation process.

- 5.6 The *Criminal Trial Courts Bench Book* should:
- (a) set out the considerations that arise when an identification of an accused is sought to be made from images captured in relation to a crime scene or connected events;
  - (b) confirm that the issue for the jury is whether they are satisfied that the accused is the person shown in the images and not, where a witness gives evidence of an identification made from those images, whether that identification was correctly made; and
  - (c) include a suggested direction that would:
    - (i) draw attention to the considerations that the jury needs to have in mind when asked to determine whether a person shown in the image is the accused; and
    - (ii) deal both with the cases where evidence from a witness is called in support of the images, and the cases where the exercise is confined to a jury comparison alone.

The Committee agrees that it is appropriate for this issue to be dealt with by the Bench Book.

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

The Committee agrees that written information should be provided to the jury on empanelment, subject to consultation on the content. The Committee suggests that this material should cover use of social media and internet during the trial.

- 6.2 The *Criminal Trial Courts Bench Book* should include, in the preliminary directions to the jury in trials involving offences against NSW law, a statement to the effect that:**
- (a) the jury will be asked to return a unanimous verdict; and**
  - (b) a majority verdict may be permitted in certain circumstances that will be explained if the occasion arises.**

There are significant arguments both for and against including a reference to majority verdicts in the preliminary directions to the jury. On balance, the Committee agrees that a statement about majority verdicts should be included but only if reference is also made to the required 11-1 majority.

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

The Committee has no objection to an amendment of s 55C of the *Jury Act 1977* to allow a copy of the transcript of evidence to be provided to the jury at the discretion of the judge (which may be on the judge's own motion or following a request from one of the parties). However, the Committee does not agree that copies of counsel's opening and closing addresses or the summing up should be provided. These are not evidence and, in the case of addresses by counsel, providing written copies may result in the jury relying disproportionately on the content. In appropriate cases, the judge's written directions of law will be provided which is preferable to supplying a copy of the summing up. From time to time, judges can repeat parts of the summing up as requested by the jury.

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

The Committee has no objection to providing electronic access to the transcript of evidence in a searchable form. The Committee notes that there must be equality of access to the transcript by all jurors which may need to be achieved by supplying a number of written copies in conjunction with access to one or more computer terminals.

- 6.5 The *Criminal Trial Courts Bench Book* should provide:**
- (a) guidance concerning the different considerations that apply in relation to the pre-recorded evidence of witnesses, and to the other audio and video recordings and relevant transcripts that may properly be admitted as exhibits; and**
  - (b) suggested directions as to the ways in which the jury should approach each type of recording.**

Agree.

- 6.6 (1) The suggested opening remarks, and the suggested directions for the summing up, in the *Criminal Trial Courts Bench Book* should include a more positive statement to encourage jurors to ask questions where they consider they need clarification about the evidence, the law, or the issues in the trial.**
- (2) The *Criminal Trial Courts Bench Book* should include a basic guide as to the way in which questions can be encouraged and managed.**
- (3) The Jury Guide issued by the Office of the Sheriff, should be amended to make it clear that jurors can ask questions during the trial in relation to the evidence and not only after they have retired to consider the verdict.**

In relation to questions from jurors, the Committee is concerned that a distinction should be made between questions which facilitate understanding of the evidence and those which amount to an inquisition of the evidence or a request for additional evidence. There is no difficulty with questions which clarify the meaning of evidence or which remind the jury of its content. However, jurors should not be in a position where they are effectively causing new or different evidence to be adduced. In the Committee's view, questions from the jury should be in writing and transmitted through the foreperson.

- 6.7 Section 161 of the *Criminal Procedure Act 1986* (NSW) should be amended to permit the judge to deliver a preliminary address to the jury before the closing addresses of counsel.**

The Committee is content for s 161 of the *Criminal Procedure Act 1986* to be amended to permit a preliminary address by the judge before the closing addresses of counsel, as long as it is limited to the items set out in paragraph 6.96 of the Law Reform Commission's report.

- 6.8 The *Criminal Trial Courts Bench Book* should:**
- (a) emphasise the need for judges:**
    - (i) to ensure that oral and written directions are consistent; and**
    - (ii) to invite counsel to identify any potential deficiency or inconsistency in the directions that are given; and**
  - (b) include a suggested direction inviting jurors, if they perceive any inconsistency or have a difficulty in understanding the oral or written directions, to seek clarification.**

Agree.

- 6.9 Section 55B of the *Jury Act 1977* (NSW) should be amended to allow written summaries of the evidence and of the addresses of counsel to be given to the jury in cases where the judge considers that such written summaries would be likely to assist the jury in its deliberations.**

The Committee has concerns about the proposal to amend s 55B of the *Jury Act 1977* to allow written summaries of the evidence and of the addresses of counsel to be provided to the jury. In the Committee's view, producing these summaries would be complex and time-consuming, particularly if there is disagreement between the parties about the content. Even if such summaries could be produced, the Committee queries their usefulness to the jury and notes that summaries can already be admitted as evidence in some circumstances under the *Evidence Act 1995*. There is also the risk that jurors may rely on the summaries rather than their own assessment of the evidence. If this recommendation is to be pursued, it requires comprehensive further consultation.

- 6.10 (1) The *Criminal Procedure Act 1986* (NSW) should be amended to authorise the use of question trails.**  
**(2) The *Criminal Trial Courts Bench Book* should include a suggested direction about the use of question trails along with some possible examples. The model direction should:**
- (a) emphasise that the question trail is a guide only and is a way of working through the jury's deliberations;**
  - (b) make it clear that jurors do not have to address the issues in the same sequence as that set out in the question trail;**
  - (c) explain to jurors that the question trail is intended for their individual use in coming to the jury's verdict; and**
  - (d) direct the jury that if, after considering all of the questions they are unanimous (or after a Black direction, agree by a majority) that one element of the offence charged has not been proved, they should return a verdict of not guilty, even if they do not agree on which particular element that is.**
- (3) The *Criminal Trial Courts Bench Book* should note that it is good practice for the judge to consult counsel on the terms of the question trail before presenting it to the jury.**

The Committee notes the issues which can arise from the use of question trails as set out in paragraph 6.159 of the Law Reform Commission's report. These issues are significant and would require comprehensive further consultation should this recommendation be pursued. In any event, the use and content of questions trails must be subject to agreement by the parties.

- 6.11 Section 55B of the *Jury Act 1977* (NSW) should make it clear that a judge has the power to use visual aids as part of the judge's directions to the jury where the judge considers that this would be likely to assist the jury in its deliberations.**

The Committee has no objection to the use of visual aids as part of the judge's directions subject to prior consultation with the parties.

- 7.1 (1) The Trial Efficiency Working Group should be reconvened to consider further reform of trial management in criminal proceedings on indictment, including revisiting the use of case conferencing.**



**(2) The terms of reference of the Trial Efficiency Working Group should specifically require it to consider the ways in which improved criminal trial management could enhance jury decision-making.**

The Committee considers that recommendation 7.1 extends beyond the subject of jury directions and would require comprehensive consultation if it is to be pursued.

**7.2 The Trial Efficiency Working Group, in looking at possible amendments to the *Criminal Procedure Act 1986* (NSW), should consider giving a discretionary power to the court:**

**(a) to require the prosecution to prepare (and to seek defence agreement to) a draft outline of the issues in the trial that would set out any or all of the following:**

- (i) the elements of the offence or offences charged;**
- (ii) the elements that are and are not in dispute;**
- (iii) a summary of the prosecution case; and**
- (iv) a reference to the defences that the defence intends to raise, based on the notice of the prosecution case and defence response required under s 137 and s 138 of the *Criminal Procedure Act 1986* (NSW), and on any notice of pre-trial disclosure required by an order made under s 141(1) of the *Criminal Procedure Act 1986* (NSW).**

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

- (i) a copy of the outline of issues, if one has been required; or**
- (ii) a summary of the elements of the offence(s) charged and any relevant defences, together with preliminary directions of law in relation to the elements of the offence(s) and defence(s) so identified;**

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

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

In the Committee's view, recommendation 7.2 extends beyond the subject of jury directions. The proposal to require a draft outline of the issues also overlaps with the recent changes to disclosure requirements under the *Criminal Procedure Act 1986* which the Committee submits should be allowed to bed down before further requirements are introduced. In any event, there are significant practical issues including the burden on the prosecution in producing the outline (in an environment where resources are already stretched) and because in many cases it will be difficult if not impossible for the parties to reach agreement. There is also a risk that the outline may distract jurors from their primary task of assessing the evidence or inappropriately restrict the issues in the case.