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11 March 2009

Ms Deborah Sharp
Acting Executive Director
NSW Law Reform Commission
DX 1227 SYDNEY

Dear Ms Sharp,

Re: Jury Directions Consultation Paper

The Law Society's Criminal Law Committee (Committee) has reviewed the NSW Law Reform Commission's Consultation Paper on jury directions.

The Committee has commented on a number of the issues raised in the consultation paper in the attached submission.

Should any further information be required in regard to this submission, please contact Rachel Geare, Legal Officer, Criminal Law Committee, on 9926 0310.

Yours sincerely,

Joseph Catanzariti
President

ISSUE 1.1

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

As outlined in the consultation paper, the aims of judicial instructions are to: ensure a fair trial for the accused; be accurate and adequate with regards to the law, the alleged facts and the arguments of counsel; they should be understandable to the jurors, and assist them in coming to a verdict.

The Committee is of the view that the primary issue with the use of judicial instructions to juries in criminal trials is that they must be easily understood by the jurors.

The model directions should be revised to ensure that they are both legally accurate and readily understandable by jurors in order to ensure a fair trial.

ISSUE 1.2

(1) What approaches are available to deal with the problems associated with judicial instructions?

The Committee agrees with the suggestions set out in paragraphs 1.62-1.65 for possible ways to attain better juror comprehension. The Committee is of the view that jurors should be allowed to ask the judge questions about the directions prior to and during deliberations.

(2) How should any changes to the framing of judicial instructions or the procedures surrounding them be achieved?

The Committee is of the view that the changes should not be achieved through legislative measures. Legislation is inflexible and cannot comprehensively address the changing circumstances in which judicial directions may need to be given.

ISSUE 3.1

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

The Committee supports a general review of the Bench Book by the NSW Judicial Commission in order to formulate directions that jurors can more easily understand.

The review would require consultation with the Bench and members of the NSW Bar Association and the Law Society. It would also be desirable to conduct empirical tests on the draft directions to gauge the level of juror comprehension.

ISSUE 3.2

(1) How can judges be encouraged to make wide use of model directions?

(2) What should be the status of the directions in the *Bench Book* and should that status be identified in legislation or rules of court?

The Committee's experience is that judges are well aware of the benefits associated with using the model directions and do not require encouragement to use them.

The Bench Book directions should not be given legislative status unless the directions appear to conflict with common law authority.

ISSUE 4.1

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

Yes. It would be useful for the judge to reinforce important juror obligations.

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

No. The oath itself does not require amendment. The key is that jurors understand their obligations.

ISSUE 4.2

(1) Should it be mandatory for judges to give certain preliminary directions in their opening remarks to the jury?

No, it should not be mandatory for judges to give certain preliminary directions. However, judges should be encouraged to give broad preliminary directions in appropriate circumstances.

(2) If so, what should be included in the judge's preliminary directions?

The Committee does not consider that it should be mandatory for judges to give certain preliminary directions. However, the judge's preliminary directions should include reference to the role of the foreperson.

In circumstances where there are additional jurors and a ballot for a verdict jury is conducted, the foreperson is excluded from the ballot and is automatically included in the verdict jury (s 55G *Jury Act 1977*). In all other trials it should be stressed to the jury that the foreperson is no more important than the other jurors, that the foreperson can change, and that the foreperson has no more sway in deliberations than any other juror.

(3) Should jurors be given a written copy or summary of these preliminary legal directions?

If the preliminary direction were written down they would need to be very carefully considered.

ISSUE 4.3

(1) Are the current instructions on the role of the judge and the role of the jury adequate?

Yes, the current instructions on the role of the judge and the role of the jury are adequate.

ISSUE 4.4

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

See 4.1(1) above.

ISSUE 4.5

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

Judges should be aware that jurors may lapse in concentration and should make continual assessments as to whether a break is required. If jurors are having difficulty in concentrating they should feel comfortable in requesting a break.

ISSUE 4.6

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

Yes, the standard directions realting to the onus of proof are adequate.

ISSUE 4.7

(1) Should judges continue to use the expression "beyond reasonable doubt"?

Yes, judges should continue to use the expression "beyond reasonable doubt".

(2) If so, how, if at all, should they explain it to the jury?

The possibility of explaining the expression by way of a direction should be investigated further. If the term is to be explained, the specimen direction in the *Crown Court Bench Book* appears satisfactory:

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

The Committee agrees with the current position in Australia that judges should not instruct the jury of the standard of proof in terms of percentages.

(4) How should any changes be brought into effect? By legislation, by changes to the *Bench Book*, by judicial education, or by some other means?

It would be preferable to effect this change by a means other than legislation.

ISSUE 4.8

What warnings, if any, should a judge give:

(a) when evidence is admitted that the accused invoked the right to silence during pre-trial investigations; or

(b) when the accused invokes the right to silence during the trial?

The current directions are adequate, subject to the general suggestion made in response to 3.1 above.

ISSUE 4.9

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

The current directions are adequate, subject to the general suggestion made in response to 3.1 above.

ISSUE 4.10

(1) Are there any circumstances in which a perseverance or "Black" direction should refer to the possibility of a majority verdict?

The existence of majority verdicts in NSW creates problems for a "Black" direction. One position is that a "Black" direction should not raise a majority verdict as a possibility. In the Committee's view this approach does not acknowledge the reality that many jurors are aware of the availability of majority verdicts in NSW. The required majority of eleven to one should be explained to the jury to avoid the risk of jurors arriving at their own majority (e.g. seven to five).

(2) If so, how should the possibility of a majority verdict be referred to?

The jury should be informed that the conditions for a majority verdict have not yet arisen, that if they do arise the jury will be directed further, and that the majority then required is eleven to one.

ISSUE 5.1

(1) Should directions better address the potential problem of jurors being influenced by prejudicial publicity by encouraging them to exercise independent judgment with regards to the evidence before them?

Yes. It must be acknowledged that information is now more widely available than ever, and that prejudicial publicity is extremely difficult to avoid especially in high profile cases. Jurors should be told that it is inappropriate to take any notice of, or give any weight to, anything that they may have read about the trial. It should be stressed to jurors that they are the only people to have heard all of the evidence. Jurors should be encouraged to gauge the probative value of the evidence in reaching a decision, rather than relying on any media publicity.

(2) Should the judicial direction omit reference to jurors avoiding pre-trial and in-trial publicity?

No. However, the direction should stress the importance of jurors ignoring the publicity they are exposed to. Emphasis should also be given to encouraging jurors to exercise their own judgment in relation to the evidence as discussed in 5.1(1) above.

ISSUE 5.2

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

The current direction is sufficient.

ISSUE 6.1

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

Consideration should be given, particularly in complicated directions, to providing the jury with a written copy of the direction after it has been finalised by the judge and trial counsel.

ISSUE 6.2

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

There should be no limits placed on the judge's summary of the evidence in the summing-up. The need for, and the extent of, the summing up will depend on the circumstances of the case and should be left to judicial discretion.

ISSUE 6.3

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

Consideration should be given, particularly in complicated directions, to providing the jury with a written copy of the direction after it has been finalised by the judge and trial counsel. Judges should have a discretion as to whether or not such materials are provided to juries.

ISSUE 6.4

(1) To what extent should a trial judge be able to put matters of law or arguments relevant to the defence that have not been raised or relied on by counsel for the defence?

The Committee agrees with the current position. Trial judges have an obligation to ensure that the accused person has a fair trial according to law. Where an alternative defence is reasonably open on the evidence the judge must put it to the jury to avoid a miscarriage of justice even if defence counsel has deliberately abandoned it.

(2) In what circumstances, if any, should a judge be able to put alternative charges even if the prosecution has not raised them?

Judges should not be able to put alternative charges to a jury that the prosecution has not raised.

ISSUE 6.5

(1) In what circumstances, if any, should judges repeat or summarise the arguments of trial counsel?

Judges should be discouraged, or at least be under no obligation, to repeat or summarise the arguments of trial counsel. Any repetition of the arguments should be in a brief summary form.

ISSUE 6.6

(1) Should the judge's summing-up be delivered before the addresses of counsel?

(2) If so, under what conditions?

No. However, the Committee does support the proposal that trial judges should confer with counsel before the closing addresses and summing-up so that the content of the proposed legal directions can be clarified. This would allow for counsel to proceed with a clear understanding of how the judge is going to put the matter to the jury and may reduce inconsistencies between addresses and the summing up.

ISSUE 6.7

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

Judges should be discouraged from commenting on the merits of the case. The Committee agrees with the Court of Criminal Appeal's position, set out in paragraph 6.67, that the width of a trial judge's discretion to comment upon the evidence is narrower than has been permitted in the past. Judges should most certainly not advance arguments in favour of the prosecution case that the prosecutor has not put forward.

ISSUE 7.1

(1) Are warnings about the use of a prison informer's evidence necessary?

(2) If so, in what circumstances should a judge deliver them?

The current approach should be maintained. Directions about the about the use of evidence of a prison informer are necessary because issues relating to the reliability of evidence are normally outside the experience of jurors.

ISSUE 7.2

(1) Is it necessary for judges to give a warning about the use of evidence of people reasonably supposed to have been criminally concerned in the events giving rise to the proceedings against the accused?

(2) If so, in what circumstances should it be given, and how should such a warning be phrased?

The current approach should be maintained. The direction is necessary due to "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", *Jenkins v The Queen* (2004) 79 ALJR 252, [30].

ISSUE 7.3

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

The current approach should be maintained.

ISSUE 7.4

(1) In what circumstances should warnings be given about the use of identification evidence?

(2) Should warnings about the use of identification evidence extend to relevant observations about matters that would be considered obvious to any jury?

The current circumstances in which such warnings should be given are sufficient.

The Committee is of the view that s 116(1) of the *Evidence Act 1995* does not adequately emphasise the danger of relying on identification evidence. Consideration should be given to amending the legislation and using wording that properly highlights the danger of this form of evidence.

ISSUE 7.5

(1) Should the *Murray* direction be abolished or should it be confined to cases where there is specific evidence indicating that the complainant's uncorroborated evidence may be unreliable?

No, the *Murray* direction should not be abolished or confined, and should continue to be given in appropriate cases.

However, if this is not accepted, the Committee suggests the following modification to the direction:

> "Since the prosecution case depends on the evidence of X, the standard of proof imposed on the prosecution necessarily means that you must scrutinise with great care that evidence and be satisfied beyond reasonable doubt of both the truthfulness and reliability of the critical aspects of the evidence of X required to establish the guilt of the accused."

(2) In either case, how should legislation be drafted to achieve this?

Legislation is not required.

ISSUE 7.6

(1) Is it desirable to amend s 294(3) of the *Criminal Procedure Act 1986* (NSW) to clarify:

- **whether or not judges may continue to use the words "dangerous/unsafe to convict"; and**
- **that its reference to the need for caution by the jury relates to the complainant's evidence and not to "the evidence or question referred to in subsection (1)"?**

(2) Are there other ways by which the statutory provisions relating to the *Longman* warning may be improved?

Section 294 (3) of the *Criminal Procedure Act 1986* has been repealed, and s 165 B of the *Evidence Act 1995* has been amended to modify the Longman direction.

The Committee prefers the position prior to the amendments to the *Evidence Act 1995* (s 165B).

ISSUE 7.7

In what circumstances, if any, is a warning relating to delay ever necessary in non-sexual assault trials?

The current approach should be maintained.

ISSUE 7.8

Is s 294(2) of the *Criminal Procedure Act 1986* (NSW) sufficient to address the issue of what (if any) warning the judge should give the jury on the impact of delay on the complainant's credibility?

The current approach should be maintained.

ISSUE 8.1

Is the direction to the jury suggested by the *Bench Book* in relation to tendency and coincidence evidence adequate?

The current directions are adequate, subject to the general suggestion made in response to 3.1 above.

ISSUE 8.2

(1) Should the *Bench Book* specifically address evidence of other sexual conduct in relation to tendency evidence?

(2) If so, what form should warnings and suggested directions in relation to such evidence take?

No. The current directions in the Bench Book can be adapted to address evidence of sexual conduct.

ISSUE 8.3

(1) Should the lies direction be reformulated in the way suggested by the Supreme Court of Canada or following the Californian model?
(2) Alternatively, should the third point in the *Bench Book's* current suggested direction to the jury be reformulated?
(3) Should the reference to "realisation of guilt" be omitted and the instruction redrafted in more general terms?
(4) Is the current direction effective and adequate?

Consideration should be given to reformulate the direction in the way suggested by the Supreme Court of Canada.

ISSUE 8.4

Should the *Bench Book* contain a direction relating to evidence of lies led by the prosecution for the purpose of attacking the accused's credibility?

If the Supreme Court of Canada's approach is adopted there is no need for a separate direction.

ISSUE 8.5

(1) Is it necessary or desirable to formulate a direction specifically in relation to evidence of flight?

The Canadian model for the lies direction should guide the formulation of a flight direction.

(2) If so, should it be formulated along the lines of the US *Pattern Criminal Jury Instructions for the District Courts of the First Circuit* direction?

The Committee does not agree with the *US Pattern Criminal Jury Instructions for the District Courts of the First Circuit* direction.

ISSUE 8.6

In what circumstances, if any, is it necessary to give directions on the use of evidence of good character?

The current position is satisfactory.

ISSUE 8.7

(1) Are directions on the use of evidence of bad character necessary?

(2) If so, in what circumstances should judges given them?

The current position is satisfactory.

ISSUE 8.8

What directions should a trial judge give in relation to multiple offences that have been tried together?

The judge should give a direction formulated on the basis of *R* v *Robinson* [2000] NSW CCA 59, 9 that:

> "if they hold a reasonable doubt concerning the reliability of a complainant's evidence on one or more counts, whether by reference to the complainant's demeanor or for any other reason, they must take that into account in assessing the reliability of his or her evidence in relation to other counts".

ISSUE 8.9

What can be done to make the directions on the use of evidence relating to a conspiracy easier to follow?

There are real difficulties with the directions required in relating to conspiracy as set out in paragraphs 8.59 and 8.60 of the consultation paper. These directions require review by the Bench Book Committee.

ISSUE 8.10

(1) Does the *Bench Book's* current suggested direction as to how to treat circumstantial evidence adequately explain those facts that need to be proved beyond reasonable doubt and those that, taken individually, do not need to be proved beyond reasonable doubt?

The current position is unsatisfactory.

(2) If not, how could the wording of the direction be improved to clarify the distinction between facts that are like "links in a chain" and facts that are like "strands in a cable"?

The Committee supports the model direction that the NSW Bar Association has suggested in its submission:

> "If you conclude that the existence of any particular circumstance is indispensable, or essential, before you could be satisfied beyond reasonable doubt of the guilt of the accused, I direct you that you cannot find the accused guilty unless the existence of that circumstance is proved beyond reasonable doubt".

ISSUE 8.11

(1) In what circumstances, if any, should judges give warnings with respect to the use of DNA profiling?

The giving of the direction will depend on the circumstances of the case and should be left to judicial discretion.

(2) What should a warning about the use of DNA profiling include?

These directions require review by the Bench Book Committee.

ISSUE 8.12

What instructions, if any, should judges give juries about the use of demeanour evidence?

The research referred to in paragraphs 8.74 and 8.76 of the consultation paper casts serious doubt on the value of demeanor evidence of witnesses as a means of evaluating evidence. Bench Book directions should be developed based on this research and should include instructions to help jurors overcome erroneous assumptions based on cultural and linguistic differences.

ISSUE 8.13

In what circumstances, if any, should a judge give instructions to the jury about cultural or linguistic factors influencing the way some Indigenous people give evidence?

It would be inappropriate for a judge to pre-empt whether a direction is necessary before an Indigenous person gives evidence. The issues should be raised when they occur during the course of the trial.

ISSUE 8.14

If judges may not comment on aspects of social or linguistic differences impacting upon an Indigenous person's evidence, should it be possible to allow expert evidence to be led as to aspects of a particular witness's evidence?

This issue is addressed by new s 108C in the *Evidence Act 1995.*

ISSUE 8.15

In what circumstances, if any, should judges give warnings about avoiding prejudice in assessing the evidence of Indigenous people?

The Committee has grave reservations about judges giving warnings about avoiding prejudice.

ISSUE 9.1

(1) Is recklessness, as currently formulated, adequately explained to juries? If not, what should be done to remedy the problem?

(2) Are there problems with recklessness in relation to specific offences? If so, how can these problems be resolved?

The current position in relation to the meaning of "recklessness" is problematic and unsatisfactory. This is of greater concern in light of its increased use with the recent

removal of the term "maliciously" from the *Crimes Act 1900* and its replacement with various other terms including "recklessly".

The *Crimes Act 1995* should be amended to define "recklessness". Consideration should be given to adopting the definition of "recklessness" used in s 5.4 of the *Criminal Code Act 1995* (Cth).

ISSUE 9.2

Are the *Bench Book* directions on self-defence adequate and/or appropriate?

The current directions are adequate, subject to the general suggestion made in response to 3.1 above.

ISSUE 9.3

(1) Are the *Bench Book* directions on provocation adequate?

(2) Is there a better way of explaining the test of provocation to the jury?

The current directions are adequate, subject to the general suggestion made in response to 3.1 above.

ISSUE 9.4

Are the directions on duress in the *Bench Book* appropriate?

The current directions are adequate, subject to the general suggestion made in response to 3.1 above.

ISSUE 9.5

How can juror confusion about the concepts underlying the defence of substantial impairment be minimised?

The current directions are adequate, subject to the general suggestion made in response to 3.1 above.

ISSUE 9.6

How should the concept of a reasonable or ordinary person in the position of the accused be left to the jury in relation to the relevant defences?

The current directions are adequate, subject to the general suggestion made in response to 3.1 above.

ISSUE 9.7

What other areas of criminal law require revision in order to be more easily explained to juries?

The Bench Book Committee should consider and review the issues surrounding separate trials for co-accused, multiple accused and/or multiple offences.

ISSUE 9.8

(1) Should the use of any of the following terms in directions be reviewed in order to help jurors to understand the law that they must apply:

(a) knowing concern; and

(b) suffer.

The Committee notes that the use of the term "suffers" can be problematic. It is a matter for the legislature to use language that is consistent with common parlance.

ISSUE 9.9

(1) Should judges give preliminary directions on elements of the offence in their opening remarks?

(2) If so, should they also cover available defences?

(3) To what extent should the issues be defined in the preliminary directions?

No. The Committee agrees with the arguments against giving jury directions on substantive law prior to the presentation of evidence for the reasons set out in the consultation paper at paragraphs 9.97-9.99 and paragraph 9.102.

ISSUE 10.1

Is there is a need for judges to give jurors more extensive directions on note-taking? If so, what should these be?

Jurors should not be discouraged from taking notes. Judges should warn jurors that they should not let their note taking distract them from following or keeping up with the trial.

ISSUE 10.2

Should the law be changed so that a judge must give directions of law in criminal proceedings in writing, unless the judge has good reasons for not doing so?

Judges should be encouraged to give written directions after consultation with trial counsel. The decision to give written direction should remain at the judge's discretion.

ISSUE 10.3

Should legislation provide that, in case the written directions are legally deficient in some respect, the oral directions, if legally accurate, overcome the deficiency, and vice versa?

Legislation should provide that written legal directions that contain legal errors cannot be cured by legally accurate oral directions. In certain circumstances, accurate written directions may overcome a legal error in the oral directions.

ISSUE 10.4

Should trial judges be allowed to use visual aids to present jury directions and should such use be encouraged?

Yes, if both trial counsel are consulted and agree on the visual aid and proper appellate review is possible.

ISSUE 10.5

(1) Should judges be encouraged to use model step directions, issues tables or decision trees? If so, how could judges be assisted in using such deliberation aids?

(2) Is it desirable to legislate to confirm the power of judges to use these deliberation aids when they consider it appropriate to do so?

Yes. Deliberation aids could be included in the Bench Book. Courts should implement training programs for judges on how to best use the aids.

ISSUE 10.6

Should trial judges, as part of the summing-up, be required to inform the jurors that they may ask the judge during their deliberations any questions about the directions?

Yes.

ISSUE 10.7

(1) Should jurors be given the opportunity prior to their deliberations to ask questions about the directions given in both the summing-up and in the course of the trial?

Yes. Jurors should be given the opportunity prior to their deliberations to ask questions about the directions given in both the summing-up and in the course of the trial.

(2) What process should be followed if jurors are given this opportunity?

Jurors should ask questions by written request to the judge through a Sheriff's Officer.

ISSUE 10.8

(1) Should judges give greater attention to answering questions from the jury about directions?

(2) What more should be done in this regard?

The Committee's experience is that judges give a great deal of attention to jury questions about directions and should be encouraged to do so. The overseas research does not accord with the Committee's experience.