The New South Wales Bar Association

06/359-2

14 May 2013

The Hon Greg Smith SC MP
Office of the Attorney General
Level 31 Governor Macquarie Tower
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SYDNEY NSW 2001

Dear Attorney

Report number 136 of the New South Wales Law Reform Commission: Jury Directions

The New South Wales Law Reform Commission recently released a report that makes recommendations in relation to jury directions.

The Association responds as set out below in relation to various aspects of the Commission's report.

Chapter 3: Formulating jury directions

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

The Association strongly supports a comprehensive review of the Bench Book. Such review should be conducted with the assistance of appropriately qualified experts in psychology, plain English writing and communication, and with careful attention to any underlying legal or conceptual complexity. Please also refer to our observations below at 3.5.

The Association prefers the retention and improvement of the Bench Book to codification of jury directions. The Association would also oppose efforts to abolish directions currently required.

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

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The Association supports this recommendation. Attention should be paid to simplifying the expression of jury directions. Any proposed changes should also be subject to empirical testing by appropriately qualified psychologists.

In addition, consideration should be given as to how jury directions can be given in forms other than oral directions that will aid jurors in understanding those directions. An example would be the giving of directions in writing or by way of diagram.

It should be noted that the Association considers that the complexity of many jury directions is not purely a problem of expression. The complexity in many cases reflects underlying legal and conceptual complexity. Efforts should be made to ensure that any simplifications do not introduce legal inaccuracy. Any proposed changes should be the subject of full consultation with stakeholders.

Chapter 4: Directing the jury on the criminal standard of proof

Recommendation 4.1:

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

The Association would support empirical research to improve the communication of the criminal standard of proof. However, it notes that this may be a particular instance of the issue addressed above, in response to Recommendation 3.5.

To some degree the difficulties that juries may have with the expression 'beyond reasonable doubt' may be with the underlying concept rather than this expression. The criminal standard of proof expresses a concern with the risk of convicting an innocent person, which clearly would be a 'searing injustice': *Van der Meer v The Queen* (1988) 82 ALR 10, 31 (Deane J). However, the only way in which this risk can be avoided altogether is to demand absolute certainty. This is rarely, if ever, achievable, and so wrongful convictions would only be avoided by massively inflating mistaken acquittals.

A major difficulty underlying the criminal standard of proof is determining where the balance should lie. It may be this underlying dilemma that makes the criminal standard a difficult concept for juries. According to the High Court in *Green v The Queen* (1971) 126 CLR 28, 32-33, this is a matter for the jury: 'A reasonable doubt is a doubt which the particular jury entertain in the circumstances. Jurymen themselves set the standard of what is reasonable in the circumstances.' The expression 'beyond reasonable doubt' appears to capture this as well as any of the alternatives. An effort to explain to juries the underlying difficulty with the standard of proof may be more successful than providing them with a rag bag of synonyms.

Recognising that reasonable doubt is a legal term of art underlines the danger of attempting explain the phrase by merely replacing it with another term that is similarly concise and in common use for other purposes. Hence the Association considers that a simple instruction that the jury be "sure" that the defendant is guilty is likely to only perpetuate the confusion in juror's minds as to the appropriate standard.

Nevertheless, there is certainly merit in avoiding the commonly given direction that the phrase 'beyond reasonable doubt' is a 'well understood, everyday phrase'(4.5). The Association notes the observations of Cory J in *Lifchus* [1997] 3 SCR 320:

> [23] ...[A] reasonable doubt should not be described as an "ordinary" concept. Jurors should not be invited to apply to the determination of guilt in a criminal trial the same standard of proof that they would apply to the decisions they are required to make in their everyday lives, or even to the most important of these decisions. In this aspect, I agree with the comments of Scott C.J.M. set out in the judgment below (at pp. 234-35):
>
> > Reasonable doubt, no matter how elusive the concept, cannot be equated to an ordinary everyday phrase. It is not, as we have seen, a "perfectly ordinary concept" -- far from it. The reason for this is that the word "reasonable" can, depending on the circumstances, have two very different meanings. The first is the meaning thoroughly canvassed by Wood J.A. in *Brydon*. The other more common use is that in ordinary parlance: we hold "reasonable" views, we have "reasonable" opinions, and we make "reasonable" prognostications. <u>This is the standard by which we make our everyday decisions and by which we habitually govern ourselves. It is a standard of probability and, often within that, at the low end of the scale. It is very different from the criminal standard of proof which requires a much higher degree of certitude to arrive at a conclusion of guilt</u>.
>
> To instruct the jury that reasonable doubt means nothing more than the "everyday sense" of the words is misleading and constitutes reversible error.

The Association supports an examination by empirical study of the efficacy of the fuller explanations of reasonable doubt contained in the Canadian Judicial Council's specimen direction (reproduced at 4.19). The suggestions of Justice Martin in "Beyond Reasonable Doubt" (2010) 10 Judicial Review 83 at 115 (reproduced at 4.50 and 4.51) are similar. The Association is particularly mindful of the need for instructions to emphasise that there is a presumption of innocence; that the onus of proof lies on the prosecution; and that the standard of proof lies much closer to absolute certainty than to probable guilt.

The Association does not consider that the recommended options advanced by the Law Reform Commission make these complex and nuanced points with any clarity. As already

noted, the replacement of reasonable doubt with an even less defined notion of "sure" in alternatives (2)(a),(b) and (c)(i) is unlikely to advance the cause of certainty for jurors. Alternative (c)(ii) is badly drafted. It distinguishes 'probably' and 'very likely', but then does not provide a clear indication of which is the lower boundary for the criminal standard. Further, because of the use of both probability and likelihood in proving the elements of offences involving recklessness, the use of the terms to describe the overall standard of proof should be avoided if possible to avoid juror confusion. Alternatives (c)(iii) and (iv), focusing on the 'reasonable doubt', carry the risk of reversing the burden of proof.

Recommendation 4.2: Any recommendation for reformulation of the direction on the criminal standard of proof should be subject to empirical testing, for the purpose of ascertaining whether the proposed formulation:

- *a) is more easily understood than the current direction on reasonable doubt;*
- *b) is consistently applied by a large number of people; and*
- *c) results in individuals applying a standard of proof that is higher, lower or the same as that applied under the current direction on reasonable doubt.*

Again, the Association would not discourage such empirical research, however, it reiterates its concerns at 4.1 and more generally at 3.5. With regard to (c), the Association would not support a direction that reduced the criminal standard of proof.

Chapter 5: Assisting jurors in areas requiring special knowledge

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

The Association supports this recommendation, subject to its comments at 3.5.

Recommendation 5.2: The courts should introduce a practice note in relation to the use of DNA evidence in criminal trials that would:

- *a) mandate prosecution and defence disclosure of the intention to lead such evidence, to challenge its admissibility or to dispute its accuracy; and*
- *b) encourage pre-trial determination of the admissibility of such evidence and identification of any issues that might need to be left to a jury in relation to that evidence.*

The Association considers that this recommendation has been superseded by the very recent reforms to the *Criminal Procedure Act* extending mandatory disclosure. These reforms place significant extra demands on the prosecution and defence. The Association considers that these reforms should be given time before further changes are made to the pre-trial disclosure regime.

Recommendation 5.3 (1): The Forensic and Analytic Science Service, the Office of the Director of Public Prosecutions and the Public Defenders Office should prepare a standard audio-visual presentation that a party can tender in evidence to provide the jury with a basic understanding of DNA evidence so as to place it in a position to assess that evidence and any issue relating to it.

The Association supports this recommendation. Such a presentation should merely provide an introduction to the science and technology that underpins DNA profiling, rather than

seeking to enter the more complex issues that DNA evidence may present (see Report 136 at [5.57]). These issues are more controversial and so less susceptible to a standard presentation, and in any case would not be raised in most cases.

Recommendation 5.3 (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.

The Association supports this recommendation, however, it notes its broader concerns at 5.2.

Recommendation 5.4 (1): Consideration should be given to amending the Criminal Procedure Act 1986 *(NSW) and to introducing a practice note to permit expert evidence called by the prosecution and defence to be given in a block, and to permit the trial judge to give directions as to the order in which such witnesses should be cross-examined.*

The Association does not oppose Recommendation 5.4 (1). However, this option should be made subject to the consent of the defence counsel, as suggested in the Report at [5.65].

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

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

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

The Association would not discourage the carrying out of further research on the public's inaccurate preconceptions of child sexual assault. However, a large amount of applicable research has already been conducted. Any further research should be targeted towards the development of appropriate legal responses.

The Association points out that the uniform Evidence Acts have already been amended with this goal – s 79(2) was introduced with this very purpose (as noted in the Report at [5.86]). It may be too early to assess the effectiveness of this reform.

Recommendation 5.5 (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 Association opposes this recommendation. Directions should not be given by trial judges unless it is not reasonably open to question the correctness of the direction. That requirement is most unlikely to be met in this context. This is not an area where there is expert consensus. Any proposed direction would be controversial – or so innocuous as to be unhelpful. It is more appropriate that expert evidence be adduced on these issues pursuant to s 79 of the

Evidence Act and any disagreements between expert witnesses tested by appropriate cross-examination.

Recommendation 5.6: The Criminal Trial Courts Bench Book should:

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

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

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 Association supports these recommendations, subject to its general observations at 3.5.

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

The Association recognise that tools for navigating a transcript will be useful in a long and complex trial, however, it considers that there may be better alternatives to a text-search facility, such as a table of contents hyperlinked to the text. This may enable a jury to jump to a particular passage of the transcript without pulling that passage out of context. There may be other alternatives as well. The Association considers that these alternatives should be properly considered and tested before juries are provided with text-searchable electronic transcripts.

Recommendation 6.5: The Criminal Trial Courts Bench Book should provide:

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

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

The Association supports these recommendations, subject to its general observations at 3.5.

Recommendation 6.6:

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

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

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

The Association supports these recommendations. As suggested in the Report at [6.77] it may be helpful to set aside particular times for juries to ask these questions.

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

The Association sees potential benefit in the judge providing a brief scene-setting address to the jury prior to counsel's closing addresses. The Association's concern, however, is that the real issues in the case may not emerge until the addresses are given, posing the risk of inconsistency between the judge's address and the counsels' closing addresses. This risk would need to be obviated for this proposal to work.

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

The Association supports this recommendation. However, the risk that the summaries are inaccurate or selective would need to be addressed. Counsel should be given the opportunity to examine the summaries and raise any objections before they are provided to the jury.

Chapter 7: Setting the scene for the jury – early issue identification

Recommendation 7.1:

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

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

The Association repeats its observations at 5.2.

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

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

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

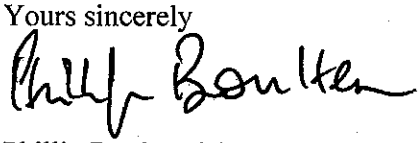
(c) *to require the prosecution and the defence to identify, in the course of a pre-trial conference, any warnings or limitations on use that they consider the judge should give the jury in relation to the evidence that is likely to be admitted;*

(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.*

The Association supports Recommendation 7.2(d). Otherwise, the Association repeats its observations at 5.2.

Should you or your officers require any further information, please do not hesitate to contact me or the Association's Executive Director Mr Philip Selth on 9232 4055 or at pselth@nswbar.asn.au.

Yours sincerely



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