

Law Council Policy Statement on Jury Directions

1. The jury is an important part of the system of criminal justice in this country. Jury trials allow the community to play an important and direct role in the administration of justice. In that way, jury trials provide a safeguard against the arbitrary or oppressive enforcement of the criminal law by those in authority. Likewise, jury trials help ensure that criminal proceedings are conducted in a manner which is comprehensible to the general public and that the outcomes ultimately achieved are regarded as legitimate and impartial.
2. Justice requires that juries deliver their verdict in accordance with the law, based on the evidence led at the trial. In order to do this, juries must be properly instructed as to legal principles which are, or may be, relevant to determining the particular facts of the case and the application of the law to those facts. The complexity of this task will vary. While every attempt should be made to ensure that the relevant legal principles are communicated to the jury in a comprehensible manner, these principles must, complex or otherwise, nonetheless be communicated the jury and borne in mind by them when evaluating the evidence.
3. Many of the directions and warnings which have evolved over time in relation to particular types of evidence are designed to avert flawed reasoning processes which may result in a miscarriage of justice. It is acknowledged that these directions and warnings need to be understood by juries to be effective and therefore should always be amendable to necessary revisions and review. However, to water them down simply for the sake of simplicity would be

counterproductive and would introduce the risk that a defendant may be denied a fair trial for want of a way to properly instruct the jury.

4. The directions and warnings currently required of trial judges have, for the most part, been developed by the courts in response to particular cases. These directions and warnings will continue to be developed over time as myriad new factual scenarios inevitably present themselves. The law in this area is in a constant state of change because it is impossible to predict all the circumstances in which the need for a warning or direction might emerge. Flexibility and judicial discretion are required to ensure that the directions and warnings which are given and the manner in which they communicated are appropriate in the context of any particular case. For this reason, the legislature should not attempt to codify the law in respect of jury warnings and directions or attempt to reduce the law to one piece of legislation. Unless legislation is essential (for example, to over-ride common law authority) it should be avoided.
5. In formulating directions and warnings, judges may be assisted by the publication of model directions, which are designed in response to the case law. Directions of this type are currently available in the Bench Books produced in a number of state jurisdictions. Given that they do not have legislative status, such directions allow for flexibility and can be readily amended or adapted to take account of developments in the law or to adjust for unforeseen circumstances. There is no need to impose any obligation on judges to use model directions as experience demonstrates that they will naturally tend to do so in order to minimise the chance of successful appeal.
6. Both prosecution and defence counsel have an important role to play in determining the directions and warnings to be given to the jury and must have the opportunity to request or object to particular directions or warnings. However, ultimately it is the responsibility of the trial judge to ensure that the accused receives a fair trial and this obligation must trump the strictly adversarial principle. It follows that:
 - a. Matters potentially beneficial to the defence should be put if reasonably open, notwithstanding the approach taken by trial counsel. For example, defence counsel may for sound tactical reasons choose not to advance before the jury a defence that is reasonably open on the evidence. The trial judge should nevertheless draw that defence to the attention of the jury for its consideration (bearing in mind the onus and standard of proof).
 - b. If prosecution evidence is of a type that may be unreliable and the jury may not fully appreciate that potential unreliability, an appropriate warning should be given unless there are good reasons not to.
 - c. If evidence is admitted for one purpose or use, but may not be used for some other possible purpose or use (to which it could rationally be put), the jury must be so directed.
 - d. The fact that defence counsel at trial has not requested or objected to a direction given by the judge to the jury is relevant to the question of whether or not an appeal on the basis of mis-direction should be allowed, but it should never be determinative. A defence lawyer may be

very inexperienced and, in some cases, even incompetent. Even competent defence lawyers make mistakes or miss issues. Further, cases will arise where it is clear that there has been a miscarriage of justice notwithstanding that the defence lawyer made a competent tactical decision.

7. Without fundamentally interfering with the manner in which juries are directed, there are a number of alternative ways that the efficacy of the criminal trial process could be improved and the number of successful appeals reduced. These include:
- a. Improved judicial education;
 - b. Improved training of prosecutors
 - c. Higher levels of legal aid funding to ensure the quality of defence representation;
 - d. Granting the profession access to the Bench Books in use in their jurisdiction, where it is not currently available; and
 - e. Encouraging research which involves the surveying or interviewing of post trial jurors (with appropriate permission) , in order to gain more informed insight into what they claim they did or did not understand of the process.