Sharpening Up your Summing Up[1]

One of the major chores of judges in the criminal jurisdiction is to prepare and deliver a summing up to a jury at the end of a trial. We all know it can be an extremely time consuming and sometimes stressful experience. The worst is often when the time to sum up has come sooner than we have anticipated and we have not prepared as well as we may have planned. Equally challenging is when we have a trial that has proceeded over a number of weeks where there is a lot of evidence and the legal issues are complex. Add to that a situation where we have multiple accused with evidence admissible against one but not others.

How best to approach the task? How many start by going to the bench book and copying and pasting everything that we think we might need? How many use the traditional structure, starting with the roles and functions of judge and jury; then directions about the onus and standard of proof; then an explanation of the essential elements of the offence(s), perhaps supplemented with written directions; next deal with any specific evidentiary directions or warnings; then providing the jury with a review of the evidence in some, or a lot of, detail; then going over what counsel said in their closing addresses before finally making some concluding remarks before sending the jury out.

Is there a better way? I believe there is but I quickly add that nothing I am going to say is new. A major part of this presentation will be a rehash of what has already been presented to some of us at recent seminars provided for us by the Judicial Commission of New South Wales. I apologise in advance for preaching to any of the converted but my purpose in going over the subject matter of those seminars is to ensure that everyone is aware that there is a better way and to encourage as many as possible to try it out.

The starting point is to remind ourselves what the purpose of a summing up is.

[1] Paper presented at the District Court Annual Conference at Wollongong on 29 March 2016 by the Honourable Justice R A Hulme

What is the purpose of a summing up?

In *Hargraves v The Queen; Stoten v The Queen* [2011] HCA 44; 245 CLR 257 the High Court of Australia (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) explained:

> "As has been repeatedly pointed out, the judge in a criminal trial must accept the responsibility of deciding what are the real issues in the case, must tell the jury what those issues are, and must instruct the jury on so much of the law as the jury needs to know to decide those issues."

A footnote after the words "repeatedly pointed out" cites by way of example 16 cases in the High Court from *Alford v Magee* (1952) 85 CLR 437 at 466 to *Pollock v The Queen* (2010) 242 CLR 233 at 251-252 [67].

The learned authors of Criminal Practice and Procedure NSW, LexisNexis Butterworths at 2-s 161.1 usefully provide the following on the requirements of a summing up:

> "The summing up should not be a “disquisition on jurisprudence or philosophy or a universally applicable circular tour round the area of law affected by the case”: *R v Lawrence* [1981] 1 All ER 974; (1981) 73 Cr App R 1 at 5 referred to in *Holland v R* (1993) 117 ALR 193 at 200. It is not the function of a trial judge to expound to the jury principles of law going beyond those which the jurors need to understand to resolve the issues that arise for decision in the case and the law should be explained to the jury in a manner which relates it to the facts of the particular case and the issues to be decided: *R v Chai* (2002) 187 ALR 436; 76 ALJR 628; [2002]HCA 12; BC200200787 at [18] ; 9(3) Crim LN [1412]. A summing up should be as succinct as possible in order not to confuse the jury: *R v Flesch and McKenzie* (1986) 7 NSWLR 554 at 558. It has been held that judges should generally seek to simplify and shorten summings up and should avoid lectures on the law and unnecessary explanations of legal principles: *R v Williams* (1990) 50 A Crim R 213."

Do judges necessarily have to direct juries on all of the legal issues that are raised by the parties? The answer is, not necessarily. *Huynh v The Queen; Duong v The*

Queen; Sem v The Queen [2013] HCA 6; 295 ALR 624; 87 ALJR 434 provides a fairly recent example of a summing up that was described as "complex and lengthy". The judgment principally deals with what is required to be proved in relation to the concept of "participation" in a joint criminal enterprise, or extended joint criminal enterprise case. But it also involved the High Court questioning the need for a trial judge to direct a jury on accessorial liability (aid and abet) when also directing on joint criminal enterprise. What proved the latter also proved the former so, in effect, what was the point in making a complicated summing up even more complicated by telling the jury about more law than was necessary?

In a very recent case, *Proud v R (No 2)* [2016] NSWCCA 44, the Court of Criminal Appeal dealt with a ground of appeal contending that in a murder case the trial judge had misdirected the jury by confining his directions on joint criminal enterprise to whether the accused was a "party" to the enterprise and not directing that the jury must also be satisfied that she was also a "participant" in its execution. The accused had not been present when the crime was committed so, unlike *Huynh*, it was said that it was necessary for her to have done something in furtherance of the enterprise in order to be liable to conviction. The judge had directed the jury in accordance with the suggested directions in the Bench Book on joint criminal enterprise and extended joint criminal enterprise. The Court quickly rejected the ground because what proved being a party to the enterprise also proved participation in it. Nevertheless, the observation was made that:

> "[81] … the avoidance of technical legal arguments on appeal that have little or no regard to the factual issues a jury was called upon to decide would be fostered if directions in a summing up were posed, wherever possible, in terms of factual questions for the jury to decide. It is an understatement to say that there would also be the benefit of jurors being more readily able to understand the directions.
>
> [82] The language that is often used in directing a jury on complex legal issues such as whether an accused was criminally complicit in an offence that was the product of a joint criminal enterprise, adapted from technical concepts discussed in appellate cases, might be well understood by experienced criminal lawyers and judges but it does not necessarily lend itself to ease of comprehension by lay jurors. The challenge for judges is to provide the jury with only so much of the law as is

necessary in order to guide the jury to a decision on the real issue(s) in the case: *Alford v Magee* [1952] HCA 3; 85 CLR 437 at 466. In the present case, the real issues for determination in relation to the appellant were:

> whether [the accused] had prior knowledge of a plan to cause the deceased really serious harm (alternatively to cause some harm with foresight of the possible infliction of really serious harm) and,
>
> if so, whether she assisted, encouraged or facilitated the execution of that plan. "

What help does the Bench Book provide?

Pollock v The Queen was concerned with provocation in a murder case. The unanimous joint judgment of French CJ, Hayne, Crennan, Kiefel and Bell JJ (at [67]) said the following of the need for a trial judge to explain the concept and the ways the prosecution may eliminate it:

> "Model directions, when appropriately adapted to the case, may assist trial judges in this task, but model directions must not be used in a way that distracts attention from the central task of the judge in instructing the jury. That task is to identify the real issues in the case and to relate the directions of law to those issues."

Mr Pollock had been convicted of murder but the conviction was set aside on appeal to the Queensland Court of Appeal. In the course of its judgment the Court of Appeal formulated a sevenfold test for the defence of provocation. These were incorporated in the Queensland Supreme and District Court Bench Book. In the retrial, the trial judge directed the jury that if the prosecution established any one of the seven propositions, they had to convict the accused of murder. Mr Pollock was again convicted and this time his appeal to the Court of Appeal was dismissed.

The High Court found that two components of the sevenfold test were inapt in the context of the factual matrix of the case. After stating what is quoted above, their Honours continued:

"The seven propositions identified by the Court of Appeal in the earlier appeal in this matter were not intended to be used as a template for jury directions. That they came to be included in the Bench Book may explain their use by the trial judge and trial counsel's acquiescence in that course. But, as these reasons explain, their use in this case misdirected the jury."

(At a further retrial Mr Pollock was found not guilty of murder but guilty of manslaughter. He was refused leave to appeal against the severity of the sentence imposed: *R v Pollock* [2012] QCA 231.)

The Foreword by the Hon JJ Spigelman AC in our Criminal Trial Courts Bench Book includes:

"The overriding responsibility of the trial judge in a criminal trial is to ensure a fair trial. To achieve that result, the summing-up to the jury must be tailored appropriately to the particular circumstances of each case. A summing-up to a trial jury is an exercise in communication between judge and jury, the principal object of which is to explain to the jury the legal principles relevant to the performance of their task and to relate those principles to the facts and circumstances of the particular case. For that reason, it is important for judges to employ easily understood, unambiguous and non-technical language. The authors of this *Bench Book* have striven to ensure that the directions they recommend are in accordance with this approach, even in circumstances where difficult concepts are involved.

There is a danger that publication of standard directions will convert a summing-up into a series of formulae which are not necessarily appropriate to the facts and circumstances of each particular case. For that reason, it is important to recognise that, subject to any appellate indications to the contrary, no particular form of words is required and an individual judge is free to depart from the suggested directions and to direct the jury as he or she thinks fit, provided that the directions are in accordance with the law.

On the other hand, the advantage of standard directions is that, properly used, they improve the efficiency of the administration of criminal justice and assist in eliminating error on the part of trial judges. The draft directions are intended to remind judges of what has to be said and to suggest a way in which it can be said.

> The directions are not intended to constitute an authoritative statement of the law, nor is it the case that the whole of each direction will be appropriate in each case. In all respects the directions ought be adapted to the circumstances of the individual case and the legal issues which have arisen."

There is no need to follow the Bench Book script

Before moving to the next topic I should first warn that what I am about to say is exclusive of certain directions where it is important to repeat almost verbatim the script that is provided in relation to key elements of certain directions. The most obvious in this category are directions concerning the standard of proof that applies to the prosecution where it is well known that attempts to explain the concept of beyond reasonable doubt are beset with problems: see, for example, *Green v The Queen* [1971] 126 CLR 28 at 32-33.

There are some directions in the Bench Book that are amenable to judges adopting their own style with more easily understood language. For example, there is a suggested direction (at [4-385]) for when a warning must be given under s 165 of the *Evidence Act* 1995 concerning the evidence of an alleged accomplice. It commences:

> "The Crown relies upon the evidence of [the witness], who is asserted by the Crown to be *a person who might reasonably be supposed to have been criminally concerned in the events giving rise to the present proceedings*."

The Bench Book uses such language because it reflects the way s 165(1)(d) describes such a witness. But, in my view, it is not mandatory for a trial judge to use that language. One could forgive jurors for thinking that it is a rather convoluted way of describing a witness who the Crown says was also involved in the commission of the (alleged) crime. (I have put "alleged" in parentheses because it is often the case that the fact of the crime having been committed is not in dispute.)

The Bench Book includes a note (at [4-380]) that it avoids use of the term "accomplice" because of what has been said in the Court of Criminal Appeal. It cites

two cases: *Regina v Stewart* [2001] NSWCCA 260; 52 NSWLR 301at [21] (Spigelman CJ), [126] (Howie J) and *Regina v Cornelissen, R v Sutton* [2004] NSWCCA 449 at [117] (James J). What was said in those cases was that using the term "accomplice" might inadvertently convey to the jury that the judge believes that the witness is an accomplice of the accused and therefore the judge has formed the view that the accused is guilty. But provided that a judge does not convey such an impression to the jury there should be no difficulty in using some other expression than the convoluted one used in the statute. Most recently I have used the expression: "a witness who might have been criminally involved in the events".

Jury comprehension of legal directions

Judges have had the benefit of some very helpful seminars arranged by the Judicial Commission of New South Wales in recent years on the subject of how best we should approach the task of summing up to juries in a way that enhances the prospect of understanding the necessary legal directions.

One of these seminars was titled "Developments in Question Trails" and was presented on 29 November 2012 by the late the Hon Justice Rob Chambers of the Supreme Court of New Zealand.

Another seminar held on 20 October 2015 had the title "The Rise of the Digital Natives: Communicating with Juries". It was presented by Dr Jacqueline Horan, Senior Lecturer and Member of the Victorian Bar (academic), University of Melbourne and Professor James Ogloff AM, Director, Swinburne University of Technology and Forensicare.

Dr Horan addressed the impact that technology is having on jury trials and discussed ways in which to manage "digital native jurors"; jurors who are a product of the modern phenomenon of digital communication. How do you communicate with people who are used to getting their information from a little screen they hold in their hands? Professor Ogloff's presentation included a discussion of practical aspects of communicating with a jury and it is this that I want to focus upon.

Professor Ogloff referred to a number of studies relating to juror comprehension of legal directions. There are too many of these for it to be practical to make reference but a somewhat gloomy picture is apparent from just a snapshot of what was referred to. One was a study in 2005 which concluded:

> "Jurors appear largely incapable of understanding judicial instructions as they are traditionally delivered by the judge. … The overwhelming weight of the evidence is that [jury] instructions are not understood and therefore cannot be helpful."

Professor Ogloff also referred to a study carried out for the NSW Bureau of Crime Statistics and Research of 1225 jurors which found that their understanding of "beyond reasonable doubt" was:

> "Sure the person is guilty" (55.4%)
>
> "Almost sure the person is guilty" (22.9%)
>
> "Very likely the person is guilty" (11.6%)
>
> "Pretty likely the person is guilty" (10.1%)

The latter probably has more to do with the elusive term "beyond reasonable doubt" than with the directions given by trial judges but it illustrates how a standard direction can be understood quite differently by a significant number of people.

This seminar by Dr Horan and Professor Ogloff had as much to do with the manner in which a judge sums up to a juror as with the language used. There was discussion about the use of aids such as written directions, checklists and visual presentations. Significantly, Professor Ogloff also spent a deal of time talking about the New Zealand approach and comparing it with our traditional method. To highlight the benefit of it he provided in a PowerPoint slide the following comparison of the average length of trials in Australia and New Zealand:

Offence type	Australia	New Zealand
Child sexual abuse	9 days	5 days
Rape	8 days	3 days
Drug offences	16 days	6 days
Robbery	5 days	2 days
Burglary	8 days	4 days
RCSI/ICSI	9 days	4 days
Murder	24 days	11 days

Differences in the nature and complexity of the law in each jurisdiction would have some bearing on these figures but I would think that would not be the complete explanation.

Some other slides in Professor Ogloff's presentation provided a similarly dramatic contrast between the two jurisdictions. One showed that the median length of a summing up in Victoria was 120 minutes whilst in New Zealand it was 64 minutes. Another showed that the average length of time a jury was involved in deliberation in Australia was 11 hours whilst in New Zealand it was 3 hours. A further slide which might be of particularly personal interest to judges showed that the average number of hours a judge spent on preparing a summing up was 11 hours in Victoria compared to half that in New Zealand.

The New Zealand approach

That brings me to the seminar that I particularly wish to focus upon. It was called "Giving Juries Written Directions" and was presented in November 2015 by his

Honour Judge Tom Ingram of the District Court of New Zealand.[2] A reasonable number of judges from our District and Supreme Courts attended but it is fair to say that a majority did not. In saying that I am not being critical. I appreciate that attendance at such seminars is difficult for some and impossible for others for reasons such as geography.

Judge Ingram, like Professor Ogloff, referred to jury studies that have painted a bleak picture in relation to the ability of jurors to comprehend oral directions delivered in the traditional manner. He described the traditional manner as involving an oral delivery of subject-matter in blocks:

> General matters, onus of proof, standard of proof, presumption of innocence, need for unanimity etc.
>
> Elements of the offence(s), possibly supplemented with written directions.
>
> Specific directions and warnings that arise from the evidence.
>
> Summary of the evidence, in the order in which it was given or by subject-matter.
>
> Summary of the competing cases.
>
> Concluding remarks.

His Honour likened the approach to the judge acting as a law lecturer teaching the jury the law with a requirement that the "students" remember it all and accurately apply it to the facts as found established. He questioned the ability of any juror to absorb, process and utilise all of the information now required to be covered by a purely oral summing up. I would add that even if written directions are given about the essential elements of the offence(s) (as many judges do), the same must still be the case.

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[2] Copies of materials provided at each of the seminars I have referred to, including Judge Tom Ingram's list of steps involved in composing a question trail and his PowerPoint slides are available for downloading from the "Conference Papers" section of the Judicial Information Research System.

How many of us have had the realisation when reading to the jury from our draft summing up that it is incomprehensible, but we press on regardless because we think the law requires us to deliver such gobbledegook, or we are concerned about what the Court of Criminal Appeal might think, or both?

Judge Ingram also provided some very interesting statistics comparing the New Zealand and Australian approaches. The following compared the potential time saving in summing up after a five day trial:

	NSW	Qld	SA	Tas	Vic	WA	***NZ***
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	2hrs 21mins	1hr 40mins	1hr 24mins	2hrs 34mins	2hrs 25mins	1hr 35mins	*1hr 3mins*

Figures for a ten day trial were even starker. The average summing up in New South Wales was said to be 3 hours 37 minutes compared to 1 hour 16 minutes in New Zealand.

The particularly attractive news on a personal level is that judges in New Zealand take half as long as Australian judges to prepare a summing up in the same type and length of trial.

It is not the purpose of this paper to go through the detail of Judge Ingram's presentation; simply to promote awareness and encourage a fearless approach to embracing the New Zealand method. It involves a substantial change in culture which must be led by judges with the co-operation of counsel. Some may be a little cynical about the latter aspect but the New Zealand experience, apparently, has been that counsel do co-operate.

The philosophy of the New Zealand method is perhaps best illustrated by two quotes Judge Ingram provided from an article by Professor Edward Griew, "Summing Up the Law" in [1989] Crim LR 768:

> "It should be the function of a Judge to protect the jury from the law rather than direct them on it."
>
> "[The Judge should] simply identify for the jury the facts which, if found by them, will render the defendant guilty according to the law of the offence charged and of any available defence."

The New Zealand approach is usually referred to as "the Question Trail method". Personally, I find the title misleading because it suggests that it is only concerned with directing juries by means of a series of questions. The word “trail” suggests that there is a pathway or a sequence of steps with the jury only progressing to one after they have dealt with an earlier one. I will come back to that because that is one of the potential pitfalls.

The New Zealand method is a lot more than the term “Question Trail” suggests and the benefits derive as much from the other components of it. The use of question trails in New South Wales thus far, to my knowledge at least, has been confined to the use of what Judge Ingram called a “bare question trail”; the elements of an offence posed as questions. What he described as a “full question trail” involved the following steps (Judge Ingram explained them in detail but I summarise):

1. At or before the commencement of a trial, identify the essential elements of each charge in the indictment.

2. Draft a question for each element, including the required definitions.

3. Draft a question for any potential defence.

4. Make an educated guess as to how the competing cases are put in relation to each element and insert them under each element. (A word limit of 25 was suggested as a target.)

5. Tell the jury what the essential elements are in the course of opening remarks.

6. Tell the jury that they will get a question trail *before* they hear counsel's final addresses.

7. Refine the draft question trail in the light of opening addresses.

8. Provide the draft to counsel, perhaps on the afternoon of the first day.

9. Tell counsel that their help will be needed with drafting concise and accurate questions and summaries of the Crown and defence cases in relation to each element.

10. Regularly (daily?) review the draft with counsel.

11. Copy and paste the question trail into the draft oral summing up, inserting the required offences, defences, and draft evidentiary directions at the point where you will be covering the particular evidence relevant to a specific question.

12. Finally, review the question trail with counsel and give rulings on any points of disagreement with the terms of the questions or other content.

13. Hand the question trail to the jury before counsel's final addresses. Allow them to read it in silence and then read it out to them.

14. Use final addresses to obtain a summary of the evidence relied upon for the Crown and defence cases *for each question*. Also modify any evidentiary directions in the light of addresses. Cut and paste these into

the draft oral summing up for when dealing with the question trail and the evidence summaries.

Step 5, involving telling the jury what the essential elements are in the course of opening remarks, is one I am a bit doubtful about. Even if the jury have been given a short break after empanelment as is suggested best practice, the danger of information overload is, in my view, significant. Much will depend upon the complexity of the case.

General features of the New Zealand method mentioned by Judge Ingram included the use of words that jurors would use themselves. For example, do you have to use "assault" when "punch" would suffice? And if the case is concerned with whether the accused was driving a particular car, why call it a "vehicle"? The avoidance of generic or jargon terms was also suggested. For example, use actual names rather than "the accused" and "the complainant". A personal peeve of mine are the terms "ERISP" and "record of interview"; why not refer to a "police interview"? It was also suggested that the questions be posed in a logical order according to the case – for example, if the crime was not disputed but only that the accused was the perpetrator, commence with the identification aspect.

A particular advantage was said to be that involving counsel at an early stage had the effect of focussing their minds on the real issues in the case. The New Zealand experience was that counsel questioned witnesses and made closing addresses to the jury in a far more relevant way. This was particularly prompted by their knowledge that the jury would be getting the question trail before addresses. Crystallisation of the issues from an early stage of the trial was thought to be a significant matter in shortening trials; it has even brought about a change of plea when the defence was forced to realise that there was no defence. Another advantage in involving counsel was that it spread the workload by having their input into the document.

The New Zealand Bench Book describes the involvement of counsel as follows:

> "Experience has shown that it is critical that counsel “buy in” to the form of the question trail document put before the jury. Accordingly, it is recommended that Judges endeavour to produce at least a draft question trail early in the trial, with a brief and succinct description of what the Judge believes the Crown and defence cases are under each question, in order that the document may be put into the hands of counsel with a request that they provide the Judge with draft alterations as to both the form of the question and the summary of their case under each question. The issues in the trial are thereby substantially refined as early as practicable, with the result very often that the trial generally becomes confined to matters in issue in the question trail. The question trail will then very often be the subject of discussion, debate and usually agreement between counsel and the Judge at the close of the evidence."

The New Zealand Bench Book also describes the advantage in providing the jury with the question trail document before closing addresses as follows:

> "At least some Judges have taken to providing the question trail to the jury prior to counsels’ closing addresses. That course has much to recommend it if it is practicable, allowing counsel to structure their address around the question trail, and allowing the jury to make notes under each question."

Nothing new about this

Judge Ingram referred to a number of Australian authorities, particularly in the High Court commencing with *Alford v Magee*, which support the New Zealand method. In particular, he referred to a question-based method of directing a jury in a Queensland case in 1974: *Stuart v The Queen* (1974) 134 CLR 426. Stuart and a man named Finch were charged with the murder of a person who died in a nightclub fire that Finch had deliberately lit. Stuart was liable under particular provisions of the Queensland Criminal Code as being what we would refer to as an accessory before the fact. The trial judge directed the jury in relation to the case against Stuart that there were six questions to be considered:

(1) Did Finch light the fire?

(2) Did Stuart counsel Finch (in the sense the judge had explained) to light the fire?

(3) Did the fire cause the death of the deceased?

(4) Did Finch light the fire in the prosecution of the unlawful purpose of extortion carried on in conjunction with Stuart?

(5) Was Finch's act in lighting the fire an act of such a nature as to be likely to endanger human life?

(6) Was the offence constituted by the unlawful killing of the deceased a probable consequence of carrying out Stuart's counsel?

The jury was directed that if they answered all questions "Yes", then they would return a verdict of guilty of murder for Stuart. If they answered either or both of questions (4) and (5) in the negative, but the balance in the affirmative, then they would return a verdict of guilty of manslaughter. Any other combination of answers would result in a verdict of not guilty outright. There was no error in these directions; they were "entirely correct" according to McTiernan ACJ at 432.

Advantages

The advantages of using the New Zealand method extend beyond encouraging counsel to focus on the real issues, shortening summing ups and the time taken to prepare them, and enhancing jury comprehension.

Providing the jury with a question trail, with the attributes outlined above, also provides, tacitly, an agenda for the jury to help them focus on the relevant and avoid the irrelevant.

The New Zealand method is also said to provide a useful tool in judge-alone trials in that it serves to focus counsel on the real issues with obvious flow on benefits to the judge in that you have counsel collaborating on identifying the key matters that will fall for decision.

One issue that has concerned me is that the question trails I have seen have sometimes simply converted what would otherwise be a written list of the essential elements of an offence into questions. So, instead of saying in relation to a murder charge that the first element is that "the act of the accused caused the death of the deceased", the judge simply writes, "did the act of the accused cause the death of the deceased"? I wondered whether there was any practical difference. Judge Ingram assured us that there is. Putting the essential matters in the form of questions rather than a list of things that must be proved has, apparently, served to focus deliberations by having the jury concentrate on one topic at a time.

Disadvantages

Apparently a common complaint by judges unfamiliar with the method is that it takes time. However, Judge Ingram assures us that in the end it becomes quicker and easier with the important thing being to get started on preparation as early as possible. Also, once you have prepared a full question trial for a particular offence, you can save time by cutting and pasting from it when you next have a trial for that offence. Sharing amongst colleagues might save time as well.

Another suggested disadvantage is that the case at hand might be too complicated to accommodate this method. The response to this, however, was that it makes the complicated case less so by having a continuous process of review and amendment of the draft at regular intervals through the course of the trial. It also helps to focus counsel on the issues and to avoid meandering into the irrelevant which can only make a complicated case more so.

Concern about how the Court of Criminal Appeal might regard a summing up that adopts the New Zealand method might be a concern to some; perhaps many. The

answer, I believe, is to bear in mind what the High Court has been telling us for over 60 years and remember the Queensland case of *R v Stuart* in 1974.

Whether counsel will co-operate might be another question in your minds. We are assured, however, that the New Zealand experience has been a positive one. The skill and ability of counsel to assist will vary, obviously, but agreeing or disagreeing as to whether something is an issue that the jury will be required to decide might be expected to be within the grasp of most.

Giving an oral direction that conflicts with a question in the written document was said to be one of the potential pitfalls. The solution, however, is to avoid giving any oral directions on the elements of offences, or defences, over and above what is set out in the document the jury will have.

Another potential pitfall that must be borne in mind was one identified by his Honour Judge Berman SC a few years ago. It is that a judge must be careful when posing a list of questions and suggesting that they should be answered sequentially. There is a risk that there will be jury disagreement on an early question that would stand as a road-block to the jury progressing to later questions. One of the later questions might be answered unanimously in the negative which might have the effect of warranting that an accused be acquitted but questions presented in a prescriptive sequence might mean that the jury never got to answer that question. The prospect of a jury being discharged without verdict in such circumstances is a danger. The answer is to identify any such issues and pose questions that will require the jury to answer them. That may mean that critical questions should be posed at an earlier point. Or that putting questions sequentially with a "If yes, go to question 2, if not acquit" edict is probably not appropriate. The *R v Stuart* approach might be preferred.

What might a New Zealand style question trail look like?

A copy of a question trail drafted by Judge Ingram for a case involving an allegation of sexual intercourse without consent, contrary to s 61I of the *Crimes Act* 1900 was

provided and is annexed to this paper. (I have made some slight modifications but nothing of substance.)

Judge Ingram took the definitions included in the document from our Criminal Trial Courts Bench Book in order to make it easier for us to understand but he also suggested that they could be reduced and/or simplified.

Conclusion

This all might sound daunting; to do something so different after sometimes many years of doing it the old way. But give it some thought; perhaps when you are next telling a jury about a joint criminal enterprise and you are saying things like:

> "A joint criminal enterprise exists where two or more persons reach an understanding or arrangement amounting to an agreement between them that they will commit a crime. The agreement need not be expressed in words, and its existence may be inferred from all the facts and circumstances surrounding the commission of the offence that are found proved on the evidence."

The suggested direction goes on in similar vein and contains 8 paragraphs like that without dealing with any factual issues. How much relief would there be, and how much more useful it would be, if you could simply say something like:

> Are you satisfied beyond reasonable doubt of each of the following:
>
> 1. that there was an agreement amongst a group of people to cause Mary Brown really serious physical harm?
>
> 2. that Jane Smith was part of the group and aware of the plan?
>
> 3. that Jane Smith helped carry out the plan by being part of the group that surrounded Mary Brown while one of the group beat her with a baseball bat?
>
> 4. that Mary Brown suffered really serious physical harm as a result of the beating?

The advantages of the New Zealand method cannot be denied. There are advantages for the criminal justice system in that jury comprehension is enhanced and summings up and trials generally are shorter. We are also assured from the New Zealand perspective that work and stress for trial judges is reduced.

Full Question Trail
Trial for offence of sexual intercourse without consent (s 61I *Crimes Act*)

The Crown must satisfy you that the answer to all three of the following questions is "yes" for you to find John Brown guilty. The burden of proof beyond reasonable doubt lies on the Crown on all three questions.

1. **Has the Crown proven beyond reasonable doubt that John Brown had sexual intercourse with Judy Fraser on 16 July 2015 at her apartment?**

"Sexual intercourse" defined

"Sexual intercourse" means penetration of the genitalia to the slightest extent by insertion of a finger or penis.

Crown case: Judy Fraser was drunk and she awoke to find her underclothing removed, John Brown in her bed, and a painful sensation from his penis or finger in her vagina.

Defence case: Nothing was inserted into her vagina.

2. **Has the Crown proven beyond reasonable doubt that Judy Fraser did not consent to having sexual intercourse with John Brown?**

"Consent" defined

A person consents to sexual intercourse if the person freely and voluntarily agrees to have sexual intercourse with another person. That consent can be given verbally, or expressed by actions. Similarly, absence of consent does not have to be in words; it also may be communicated by other ways, such as the offering of resistance.

A person who does not offer actual physical resistance to sexual intercourse is not, by reason only of that fact, to be regarded as consenting to the sexual intercourse.

A person does not consent to sexual intercourse if the person does not have the opportunity to consent to the sexual intercourse because the person is unconscious or asleep.

Consent may be negated if the person was substantially intoxicated by alcohol.

Crown case: Judy Fraser was drunk to the point of passing out when she went to bed, and was asleep when her vagina was penetrated, so she could not have given consent.

Defence case: She assisted with removal of her underclothing and moaned when the outside of her genitalia was rubbed. She did not say or do anything to reject his advances.

3. Has the Crown proven beyond reasonable doubt that when he had sexual intercourse with Judy Fraser, John Brown knew that she did not consent?

"Knowledge" defined

The Crown must prove one of the following:

a) That John Brown either knew that Judy Fraser was not consenting or did not honestly believe that she was consenting, or

b) That he was reckless as to whether she was consenting, or

c) If he did have an honest belief that she was consenting, that he had no reasonable grounds for that belief.

"Reckless" defined

"Reckless" means John Brown either failed to consider whether or not Judy Fraser was consenting at all, and just went ahead with the act of sexual intercourse, even though the risk that she was not consenting would have been obvious to someone with John Brown's mental capacity if he had turned his mind to it, or Mr Brown realised the possibility that Ms Fraser was not consent but went ahead regardless of whether she was consenting or not.

Crown case: Judy Fraser was drunk to the point of passing out when she went to bed, and was asleep when her vagina was penetrated, and no-one could have believed she was consenting. Any such belief was reckless, or without reasonable grounds.

Defence case: John Brown believed on reasonable grounds that Judy Fraser was consenting because she assisted with removal of her underclothing, she moaned when the outside of her genitalia was rubbed, and she did not say or do anything to reject his advances.

If the answer to all three of these questions is "yes", find the accused guilty.

If the answer to any one of the questions is "no", find the accused not guilty.