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# **GUIDE TO JURY TRIAL PRACTICE**

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**Criminal Practice Committee**

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## **DISCLAIMER**

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## Introduction

1. The guide arises out of work undertaken by the New Zealand Law Commission. In 1997, the Law Commission agreed to collaborate with the Victoria University of Wellington Faculty of Law (through Victoria Link Limited) in undertaking a research project on jury decision making (“the Research”). The chief researchers were Warren Young, Neil Cameron, and Yvette Tinsley. The Research involved a sample of 48 jury trials from both urban and provincial courts throughout New Zealand, and from both District and High Court jury trials. Jurors were individually interviewed as soon as possible after the conclusion of the trial in which they were involved. The objectives of the Research were:<sup>1</sup>
  - to examine the extent to which, and the way in which, jurors individually and collectively assimilate and interpret the evidence and identify the issues in the case;
  - to identify the problems which jurors experience during the trial process;
  - to assess the extent to which jurors individually and collectively understand and apply the law, and to investigate how their perception of the “law” modifies and influences their approach to the “facts”;
  - to explore the processes used by the jury to reach a decision, including their strategies for resolving disagreement and uncertainty;
  - to identify the impact and effects of pre-trial and trial publicity on the attitudes and responses of each individual juror to the case he or she is dealing with; and
  - to describe jurors’ reactions to, and concerns about, their experience as a juror.

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<sup>1</sup> See Warren Young, Neil Cameron and Yvette Tinsley *Juries In Criminal Trials: Part Two: A Summary of the Research Findings* (NZLC PP37 vol 2, November 1999) chapter 1.

2. The Law Commission published its preliminary paper on jury trials in two parts, *Juries In Criminal Trials: Part One* (published in July 1998) and *Juries In Criminal Trials: Part Two* (published in November 1999) (“*Juries II*”). The preliminary paper was divided into two parts because the Law Commission was awaiting the results of the Research. A summary of the Research was published as a companion volume to *Juries II* (“*Juries II vol II*”). The Law Commission published its final report *Juries in Criminal Trials* (“*Juries Report*”) in February 2001. All these papers are available in full text from the Law Commission’s website,<sup>2</sup> or in hard copy from the Law Commission.
  
3. The Research provided a unique insight into the way that juries function and their perceptions of the trial process, and we would recommend the careful study of *Juries II vol II* by anyone intending to practice in the jury trial jurisdiction. A survey of trial practitioners conducted by the Law Commission in April 2000<sup>3</sup> indicated that they had found the Research very interesting and useful, and had altered their practices as a result. In particular, many reported:
  - a heightened awareness of the comprehension difficulties that jurors have, and the need for clarity, brevity, and structure;
  - increased use of visual and written aids, plans, maps and photographs to aid juror comprehension;
  - a greater consciousness of body language and demeanour, and how that was perceived by the jury.
  
4. From the Research and subsequent consultation, the Law Commission concluded that the jury system remains an essential and desirable feature of our criminal justice system.<sup>4</sup> However, it also identified the need to improve the way that material, both factual and legal is presented to the jury, and that was a central theme of the *Juries Report*.<sup>5</sup> The Criminal Practice Committee (“CPC”) undertook to address that need by preparing this guide for the use of counsel and judges. While this publication is a guide only and therefore is not binding on the courts, it is intended that it may provide assistance on practical issues relating to the conduct of jury trials, and encourage consistency in practice.

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<sup>2</sup> [www.lawcom.govt.nz](http://www.lawcom.govt.nz).

<sup>3</sup> *Juries Report*, page xvi.

<sup>4</sup> *Juries Report*, para 3.

<sup>5</sup> *Juries Report*, preface.

5. The CPC is chaired by the Chief Justice and includes representatives of the judiciary, the prosecution and defence bars, the Solicitor-General, the Ministry of Justice, the Police, the Law Commission and the New Zealand Law Society. Its function is to keep under review matters of criminal practice and procedure, and it may take such action as is required to carry out this function, including making recommendations to the Secretary for Justice and other government agencies as may be necessary for dealing with and remedying any practice defect. It is interesting to note that as long ago as 1991 the CPC was concerned to clarify and refine the issues put to the jury, and published guidelines for the conduct of pre-trial conferences and callovers<sup>6</sup> which, like this guide, is intended to assist all those involved with jury trials.
6. The CPC acknowledges the assistance of Tim Brewer, former Law Commissioner and Louise Symons, formerly senior researcher at the Law Commission, in the preparation of this guide.

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<sup>6</sup> Criminal Jury Trials Practice Note (*Law Talk* 343, February 1991; Garrow and Turkington *Criminal Law* S345(b).) and Adams

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## Before the accused is given in charge

### SCREENING JURORS

7. The sequence of events at the beginning of the trial is as follows: the persons who have been called for jury service (“the jury panel”) are brought into the courtroom where they sit at the back.<sup>7</sup> Once court staff, counsel, the accused and the Judge have entered the court room the counts in the indictment are put to the accused, who pleads to them. Then the jury is chosen by ballot from the jury panel. The Registrar calls out each name as it is chosen, and that person walks from the back of the court to the jury box. If the person sits down before being challenged, they become a member of the jury unless they are discharged.

### Advice to jury panel by Judge before empanelling

8. The Judge may address the jury panel before the jury is selected. Where appropriate, the following matters may be addressed:
- (a) A description of the sort of case it is, the nature of charges, and the likely duration of the trial.
  - (b) That if their names are called individual jurors should approach the Judge if they know the accused, a witness or are otherwise connected to the case.
  - (c) Reading the list of witnesses (see paragraph 16 below).
  - (d) That jurors may ask the Judge to be excused from service for special reasons.<sup>8</sup>
  - (e) That the parties have the right of peremptory challenge and may exercise it for a variety of reasons, and that anyone who is challenged should not take it as a personal slight.

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<sup>7</sup> It is standard practice for the jury panel to be shown a video explaining trial procedure, or to have been given a briefing on trial procedure by court staff, before the court begins.

<sup>8</sup> Sections 15 and 16 Juries Act 1981.

## JURY LISTS

9. At any time not earlier than five days before the commencement of the week for which the jurors are summoned to attend for jury service, any party to the proceedings (including the accused) or any person acting on their behalf, may inspect and receive a copy of the jury list (that is, the list of those people who will comprise the jury panel.)<sup>9</sup> The usual practice is for the accused's solicitor or counsel to collect a copy of the list and show it to the accused to ascertain the accused's views on the composition of the jury.
10. Jurors are sensitive about their names and addresses being known to the accused or parties interested in the outcome of the trial. Because of concerns that are sometimes publicly raised about the danger to jurors of their details becoming known, the *Juries Report* considered whether this practice should continue, but concluded that because the accused must be able to challenge those who they believe may be prejudiced against them, they must be able to see the list.<sup>10</sup>
11. Crown counsel should retain their copy of the list and treat it as confidential. Defence counsel may show the list to their client when planning the exercise of their peremptory challenges but, mindful of their duty to the court and in accordance with good practice, should avoid giving their client a copy of the list unless otherwise instructed.
12. If the accused is unrepresented, he or she has the right to inspect and receive a copy of the jury list.

## CHOOSING A JURY

13. As stated in paragraph 7, the jury panel is the group of potential jurors who answer their summonses and who attend at court on the first day of a trial. They are available to be balloted for service as jurors in the trial. In the court, the Registrar selects names from the jury panel at random and calls them out. A person whose name is called walks to the jury box and, if he or she takes a seat there, is, subject to section 22 of the Jurors Act 1981 (Judge may discharge juror who is not disinterested), a member of the jury. There are a number of reasons why a person whose name is called by the Registrar might not take a seat in the jury box. This part of the guide considers them.

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<sup>9</sup> Juries Act 1981, s 14.

<sup>10</sup> *Juries Report*, paras 246-268.

14. **Challenge for want of qualification** – A juror may be challenged if they fall outside the eligibility criteria for jury service.<sup>11</sup> A challenge on this ground is rare because court staff have the task of vetting the jury list and removing the names of those who are ineligible for service. If counsel does challenge for want of qualification the Judge must discharge the juror if he or she is satisfied that the juror is in fact ineligible for service. It is suggested that the Judge ask the juror to approach the bench and ascertain the juror’s views. If there is a dispute, or if there is doubt about eligibility, then it might be preferable that the juror “stand by” (see below) rather than delay the commencement of the trial.
  
15. **Challenges without cause (peremptory challenges)** - Each party is entitled to six peremptory challenges, and where there are two or more accused the Crown has a maximum of twelve challenges. The right of peremptory challenge and the practice of jury “vetting” (that is, obtaining information about jurors prior to trial in order to decide whether to challenge them or not) are discussed in chapter 7 of the *Juries Report*.
  
16. While the peremptory challenge may be used for any reason, it may be used to exclude people who have knowledge about the events to which the trial relates or who know people involved in the trial (including the defendant, the witnesses, the complainant, or the Police). To ensure that such people are identified, it is suggested that the following practice be adopted:
  - (a) The Crown witness list should be filed in advance of trial and thus be available to be read out. There is no such requirement on the Defence and the Defence has no obligation to disclose its witnesses in advance. However, the Defence can be asked if they wish to name possible witnesses for inclusion in the list, so as to reduce the possibility of a mistrial. We recommend that Crown counsel routinely enquire of the Defence whether they wish to reveal the names of possible witnesses for inclusion in the list, and that Defence counsel should consider whether, in the circumstances of the case, it would be appropriate to disclose this information.
  
  - (b) The list should contain the names of both Crown and Defence witnesses without differentiation or indication of which side is to call them, and be read or given to the panel as persons who *might* give evidence.

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<sup>11</sup> Juries Act 1981, s 23.

- (c) The list may be read to the jury panel by the Judge or, if it is a list of Crown witnesses only, by the Crown prosecutor at the Judge's direction.
- (d) Copies of the written list may also be given to the jurors when they retire to choose a foreman, or in any event before the accused is put in charge, with the direction that they should each read it, as a second sweep to catch any known names. If Defence witnesses are included they should not be identified as such. The list should be retrieved from the jury once the foreman has been selected.
17. **Challenges for cause** – In addition to the right to challenge for want of qualification, or to make a peremptory challenge, each party to the proceedings is entitled to any number of challenges for cause on the ground that a juror is not indifferent between the parties or is not capable of acting effectively as a juror because of physical disability.<sup>12</sup>
18. Challenges for cause are rare, possibly because of the availability of the peremptory challenge. Most counsel would prefer to quietly dispose of a problem juror through peremptory challenge rather than confront the issue directly with the attendant risk of delaying the start of the trial.
19. Counsel have a duty not to permit jurors they know to be biased or disabled from serving on a jury. If there is a doubt counsel should advise opposing counsel of their knowledge of a particular juror so that opposing counsel has the opportunity of challenging for cause or exercising a peremptory challenge.<sup>13</sup>
20. If there is a challenge for cause the Judge must determine it in private and in such manner and on such evidence he or she thinks fit.<sup>14</sup>

The need for privacy is obvious. Not only might the waiting jurors hear of matters prejudicial to the accused, there is the likelihood of embarrassment to the juror challenged. Therefore, if a counsel wishes to challenge for cause he or she should simply state: "I challenge for cause". At that point the Judge should retire to Chambers and hear what counsel have to say. It might be that the challenge can be determined easily. It might be that the Judge would need to interview the juror (and, if so, that should be in the presence of counsel and the accused) or would need to hear sworn evidence. It might be that, to avoid delay and embarrassment to the juror, the Judge decides to stand the juror by (see below).

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<sup>12</sup> Juries Act 1981, s 25.

<sup>13</sup> See the discussions below "Disclosure by counsel", paras 27-30

<sup>14</sup> Juries Act 1981, s25(3).

21. **Directions to stand by** – there is an intermediate position between a juror being discharged and a juror taking a seat in the jury box. A Judge may direct that a juror “stand by” until all the other jurors have been called.<sup>15</sup> This can be done either of the Judge’s own motion or on an application by either party with the other party’s consent. In practice, the jury panel is seldom exhausted so those who have been stood by almost invariably do not get on to the jury.
22. The touchstone is “interests of justice”. Within this concept it is suggested that Judges might decide to stand by a juror in a variety of situations, including:
- (a) Where a juror advises the Judge of some personal difficulty in serving on the jury but is nevertheless eligible for service (e.g., a sick child, a wedding to attend, a series of job interviews).
  - (b) Where there is a challenge for want of qualification that is not immediately determinable.
  - (c) Where there is a challenge for cause that is not immediately determinable.
  - (d) Where the juror advises the Judge of related personal experience (see paragraph 23 et seq) and the Judge does not feel able to discharge the juror.

### **Related Personal Experience**

23. The Research clearly indicated that, while most jurors find jury service a worthwhile experience and are proud to do their civic duty in this way, some suffer high degrees of stress.<sup>16</sup> While that is to a large extent unavoidable given the nature of jury trials and the events that must be described in them, there is a smaller group of people who may suffer particular stress because they have themselves, or people close to them have, been the victims of criminal offending similar to that at issue in the trial. There are two reasons why such people should be excused.<sup>17</sup> The first is that they are unlikely to be able to concentrate fully or be completely impartial. The second is humanitarian, because these people are likely to suffer much more than others, so the burden of jury service is just too great for them.
24. Section 22(1) of the Juries Act 1981 provides:

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<sup>15</sup> Juries Act 1981, s27.

<sup>16</sup> *Juries II vol II*, paras 10.1-10.27.

<sup>17</sup> *Juries Report*, para 259.

*The Judge may discharge a juror if, at any time after the jury is constituted but before the case is opened or the accused is given in charge, it is brought to the attention of the Judge that -*

*(a) the juror is personally concerned with the facts of the case, or is closely connected with one of the parties or with one of the prospective witnesses...*

25. This provision does not on the face of it allow the excusal of a juror who has no knowledge of or connection with the facts of the case, but who because of personal experiences similar to the facts of the case is unable to be objective about it or who would simply suffer unduly if they were obliged to serve on the jury. There is no statutory provision to deal with such people. However, in practice Judges do excuse on this basis. Alternatively, the Judge may direct the juror to “stand by” under section 27.<sup>18</sup>
26. It is suggested that when the trial Judge believes that a trial is one that could be especially difficult for jurors who may have had some similar life experience, the Judge should outline to the panel the general nature of the allegations and indicate that if potential jurors would find such a case particularly difficult to judge fairly, they should ask to be stood aside. Considerable sensitivity will be required. People will not feel comfortable about publicly mentioning some personal tragedy. The Judge should indicate that only he or she will hear what the juror has to say, and that the process will be no different from jurors coming forward to indicate that they know a witness. The Judge should indicate other reasons why jurors can come forward to seek to be excused – such as family or employment problems – so that if a juror does approach the bench, it is not apparent to other people in the court why they are doing so. The Judge might also ask the jury that if, while in retirement to choose the foreman, any particular problem about a juror serving on the trial is revealed a note to that effect should be given to the Judge.

### **Disclosure by counsel**

27. Section 7 of the Juries Act 1981 provides:

*The following persons are not qualified to serve on any jury in any Court on any occasion:*

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<sup>18</sup> See paras 21 and 22

(a) *Any one who, at any time, has been sentenced to imprisonment for life or for a term of 3 years or more, or to preventive detention:*

(b) *Any one who, at any time within the preceding 5 years, has been sentenced to imprisonment for a term of 3 months or more, or to corrective training.*

28. The names of persons who are disqualified by section 7 are removed by the Registrar when the jury list is prepared. However, section 7 only excludes those with relatively recent or serious convictions. Persons on the list may have convictions which do not disqualify them under section 7 but which arguably make them unsuitable to serve. For example, it is arguable that someone with several minor non-disqualifying cannabis possession charges should not serve in a case involving cannabis. Information about non-disqualifying convictions may be in the possession of the Crown prosecutor because he or she has been informed of it by the Police, or simply knows it from other dealings. The Crown prosecutor may also be aware of other matters which may affect the ability of the person to serve as a juror, such as a known association with criminals, or a family or social connection with a police officer who is involved with the case.
29. The Crown prosecutor may choose to peremptorily challenge a juror on the grounds of such information. If the Crown prosecutor chooses not to challenge, he or she should give the information to the Defence so that the Defence may consider whether to peremptorily challenge that person. If the Crown prosecutor has a written list of non-disqualifying convictions, they should show that to the Defence, but not hand over the list. Other information which is not in writing should be advised orally to the Defence.
30. There is an obligation on the Defence to disclose any such information which they might have to the Crown. For example, if a potential juror is a former secretary of counsel, or has some connection to a Defence witness. This is because the overriding duty of all counsel is to the court and hence to the holding of a fair trial.

#### CHOOSING A FOREMAN

31. In the past juries were given very little opportunity to make the choice of a foreman a considered decision, and little guidance on how best to make the choice.<sup>19</sup> Instead they were asked to retire to choose a foreman knowing that the court was sitting waiting. No time was allowed to jurors to sort out personal matters arising from the fact that they

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<sup>19</sup> *Juries II vol II* paras 2.48-2.52.

had been chosen for a jury. As a result of the Research, this problem is now recognised and more time is generally allowed.

32. Many Judges outline the responsibilities a foreman will have; in particular the chairing of the discussions about a verdict. They emphasise the importance of trying to choose a person who seems to have the skills to guide a discussion along an ordered and logical path, and to ensure that every jury member has a fair opportunity to express an opinion.
33. Rather than simply sending the jury out to choose a foreman and waiting in court for their return, many Judges now take a formal, but not time-limited adjournment. As well as guidance about the role of the foreman, they also give an estimate of the length of the trial and suggest that the adjournment may also be a suitable opportunity for them to get a message to home or work that they are committed for that length of time.
34. Doing that allows the jurors to gather their thoughts and to deal with practical arrangements about work and family that would otherwise preoccupy them. Given that opportunity, the research shows that they are much more likely to take in what is said to them in the early parts of the trial. If this practice is followed the balance of the panel will have to be kept waiting a little longer.
35. In provincial courts that may not cause practical problems, but in metropolitan courts where more than one jury is being empanelled, it may cause down-stream delays.
36. Given the disadvantage of the balance of the jury panel being kept waiting Judges might consider the option of providing two breaks. The first to give the jury the chance to choose the foreman and to ensure that no juror has a problem with serving on the jury that might necessitate discharge and further selection. The second after the rest of the jury panel has been released and before the trial proper begins.

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## After the accused is given in charge

37. Once the jury has been sworn in and the foreman chosen the accused is given in charge to the jury, which means that the Registrar formally advises the jury of the charges against the accused and that it is their task to decide whether the accused is guilty or not guilty of those charges.

### WRITTEN AND ORAL INFORMATION FOR JURORS AT THE COMMENCEMENT OF A TRIAL

#### **Advisable for counsel to agree pre-trial on issues**

38. Although the Defence has no obligation to make any disclosure beyond a notice of alibi evidence, as a matter of practice Defence counsel will usually co-operate with the prosecution to eliminate the unnecessary proving of facts that are not disputed. It is now usual for pre-trial conferences to be held in all jury trial matters.<sup>20</sup> The objectives of a pre-trial conference include obtaining some agreement as to admissions, evidence to be read and disputed areas which may be able to be resolved by interlocutory application. At some point pre-trial the court will enquire as to whether there has been any agreement between the Crown and the Defence as to the issues to be raised at trial. The clear identification of issues, elimination of irrelevant material and agreement on facts works to the advantage of the Defence as much as to that of the prosecution. The Research indicates<sup>21</sup> that jurors do not appreciate counsel who they see are disorganised or who fail to identify and address the issues, or who fail to produce a coherent story. Sometimes verdicts are affected by such failings, and by the failure to set out argument in a logical and clear way. Defence counsel are more likely to be perceived by the jury as having these problems than Crown counsel. While to some extent that is inevitable because of the reactive nature of Defence work and the right to put the Crown to proof, it is clear that where it is possible to identify and focus on the real issues, that makes the process easier for the jury.
39. Defence counsel should be encouraged to admit non-contentious facts and to use the admissions as a tool to focus on the points that are actually in issue. Section 369 of the

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<sup>20</sup> Criminal Jury Trials Caseflow Management Practice Note, 7 December 1995

<sup>21</sup> *Juries II vol II*, chapter 5.

Crimes Act 1961 provides the statutory basis for making formal admissions of fact. If possible, a copy of the written admissions should be filed in court before trial. Because of the usefulness of section 369 admissions in reducing the volume of unnecessary evidence which must be put to the jury, we encourage their use whenever possible.

#### OPENING REMARKS

40. Part of the Judge's role is to direct the jury on matters of law. Juries find it helpful if at the beginning of the trial there is some direction on the law, at least in a preliminary way. Judges may provide the jury with a brief written summary of the elements of the charge(s), the onus and standard of proof, and any other issues that are obviously going to arise (for example, self-defence) only if these are not to be covered by the Crown and, dependent on the nature of the trial, with all parties' consent. Necessarily, because just how the issues might develop cannot then be known, these need to be dealt with in the abstract, but nevertheless the assistance seems to be well received by juries, and regarded by them as helpful. If only because the issues may not be clearly defined at that point, it is essential that the contents of any such summary be shown to counsel before being given to the jury, and their comments invited. This is particularly necessary if the summary goes beyond the elements of the charges. A copy of any such material should of course form part of the trial file. There is a growing practice (see paragraph 42 below) for Crown counsel to prepare material of this sort. The Judge should indicate whether this will be done, and of course any summary provided by the Judge should not duplicate material prepared by the Crown.
41. Additionally, the Judge will frequently mention other matters to the jury before the Crown opens. All of the Judge's opening remarks should be recorded verbatim, as they are regarded as part of the Judge's directions.

#### OPENING ADDRESSES

##### **Materials for prosecution opening**

42. As a result of the Research, it has become a common practice for Crown counsel to prepare booklets for the jury containing a copy of the indictment, the list of witnesses (including a brief description of them), plain English definitions of charges, and non-contentious documentary exhibits. Room for note taking is generally and usefully provided. The purpose of the booklet is to provide a convenient reference source for the jury, not as a partisan tool of advocacy. It may be that Defence counsel who want

the jury to be aware of their theory of the case from the outset may find it convenient to include documentary materials in the booklet, and we would encourage prosecution counsel to routinely enquire as to whether this is desired. Some Judges prefer to give the booklet to the jury themselves during their opening remarks, to avoid any perception that the prosecution is better organised or that it is a partisan document; others are content to let Crown counsel introduce it in their opening address. We suggest that if the Defence has contributed materials to the booklet it may be more appropriate for the Judge to introduce it. We emphasise that the booklet must not contain material the admissibility of which will be contentious. We also make the point that it is possible to “overdo a good thing” and that the provision of a booklet of materials is most useful where the trial is to be long or the issues complex.

### **Defence opening statement**

43. Section 367(1) of the Crimes Act 1961 provides:<sup>22</sup>

*(1) Upon the trial of any accused person, counsel for the prosecution may open his case and after such opening (if any) shall be entitled to examine such witnesses as he thinks fit; and the accused person, whether he is defended by counsel or not, shall be allowed at the end of the case for the prosecution, if he thinks fit, to open his case, and after such opening (if any) shall be entitled to examine such witnesses as he thinks fit.*

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While some trial Judges have in the past allowed Defence counsel to make a brief opening statement after the prosecution opening and before the first prosecution witness is called, this was not specifically contemplated by legislation and arguably was not in accordance with section 367(1) (*Juries Report* paras 309-312). To rectify this, sections 367(1A) and (1B) were inserted into the Act in November 2000.

*(1A) Without limiting subsection (1), the Court may give an accused person leave to make an opening statement, after any opening by the prosecution and before any evidence is adduced, for the purposes only of identifying the issue or issues at the trial.*

*(1B) Nothing in an opening statement made under subsection (1A) limits the rights of an accused person to raise any other issue or issues at the trial.*

44. There is no obligation on the Defence to make an opening statement. It is a matter entirely within counsel's discretion. However, the Research suggests that a Defence opening may be to the advantage of the Defence.<sup>23</sup> The Research emphasised that jurors need mental frameworks to process the information which they receive, and that during a trial they are actively processing the information they receive and fitting it into that framework.<sup>24</sup> An opening statement gives Defence counsel the chance to ensure that this framework includes matters which comprise the Defence case. If the Defence theory of the case is clear, expressing that at the outset will help the jury understand, for example, the purpose behind cross-examination, which might otherwise be seen as directionless and even irritating. If however there is no clear Defence theory of the case, and the Crown is simply being put to the proof, Defence counsel may well decide that an opening statement would not be helpful. We emphasise that the limited purpose of the opening statement is set out clearly in the sub-section. Judges should not hesitate to intervene if Defence counsel go beyond it. We also consider that it would be preferable for a Judge making inquiry as to whether Defence counsel wishes to make an opening statement to do so in the absence of the jury but in the presence of the accused.

#### USE OF AIDS TO UNDERSTANDING EVIDENCE

45. The Research indicated<sup>25</sup> that juries find the use of written and visual aids very useful, but that such aids are not used as frequently or as well as they should be. The Law Commission's subsequent survey of trial practitioners indicated that this is an area which counsel are actively focussing on and trying to improve.
46. Written and visual aids should be made available to the jury unless there is good reason not to do so. The prosecution should disclose to Defence a reasonable time before trial

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<sup>23</sup> *Juries II vol II*, paras 2.29-2.31 and 2.58.

<sup>24</sup> *Juries II vol II*, paras 2.56-2.57.

<sup>25</sup> *Juries II vol II* paras 3.7 and 3.8.

those written and visual aids it intends to use, and Defence should, within a reasonable time raise any objections to it.

47. Written and visual aids can be divided into two categories:
- (i) Those which are themselves going to be produced as an exhibit by a witness, for example a diagram prepared by an expert witness to illustrate a point, or a genealogical table. For these to be produced, an evidential foundation must be laid in the normal way, or else they may be put in by consent.
  - (ii) Those which are not themselves part of the evidence, but summarise or analyse the evidence for the jury, or otherwise aid their understanding. They include copies of the indictment, lists of witnesses, plain English definitions of charges (all of which are included in the jury booklet, see paragraph 42 above); chronologies, and check-lists of issues.
48. The second category can only be given to the jury with the consent of the trial Judge, and should be copied to the other side before judicial consent is sought, so that they have the chance to comment and if necessary object. Such documents must be accurate, complete, and clear.
49. If a documentary exhibit (of either category) is produced, it is helpful (subject to not giving the jury a burdensome volume of paper to manage) to have a copy for each juror so they are not required to attempt to see the court copy at a distance.
50. Sometimes witnesses may create a document in the court, for example where an expert witness draws a diagram on a whiteboard to illustrate a point. Such a document should be able to be preserved, so if possible a board which can produce a copy should be used. This should be arranged with court staff well in advance.
51. One type of aid which may be helpful to the jury is a physical demonstration of the point which a witness is trying to make. Demonstrations and experiments are acceptable, but not reconstructions.<sup>26</sup>

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<sup>26</sup> see *R v Baker* [1989] 3 NZLR 635, 638; *Stratford v MOT* [1992] 1 NZLR 486, 492.

52. There is available now technology such as PowerPoint and CD-ROMs that can be used to create visual aids that might fall into either category. New technology is capable of being used in court provided the other party has consented to it (and the Judge has approved it) or the Judge has made an order permitting its use. A copy of material thus put before the jury must be preserved for the trial file.

#### THE JUDGE'S NOTES OF EVIDENCE

53. The provision of the Judge's notes of evidence to the jury is a matter of some controversy. Some oppose it on the basis of a belief that jurors will get absorbed in the notes and side-tracked from issues of credibility and demeanour. However, the Research indicated that such concerns are unfounded and that the provision of the notes would be a positive step.<sup>27</sup> Many juries spend a lot of time trying to agree on a version of the evidence from the notes they have collectively taken, which gives rise to arguments about what the evidence actually was, and the need to ask the Judge to read evidence back. On the basis of the Research, and influenced by the increasing use of real-time recording of oral evidence, the Law Commission concluded that the notes should be provided to the jury, in every case.<sup>28</sup> The provision of the Judge's notes in any specific case is a matter for the discretion of the trial Judge. If, for instance, he or she is not satisfied with the standard of accuracy or legibility,<sup>29</sup> the transcript should not be provided.<sup>30</sup>
54. This is a matter of evolving practice. If a Judge does decide that notes of evidence should be given to the jury he or she will have to consider a number of issues:
- (a) **The number of copies to be provided.** It is probably not necessary for each juror to have a copy of the notes. The purpose of giving notes of evidence to the jury is to enable jurors to be sure about what a witness actually said. This can be served by giving, say, three copies to the jury. This might be influenced by the length of the trial. The longer the trial the more helpful it might be to have a greater number of copies.
- (b) **Whether the notes should be provided progressively as the trial proceeds or all at once at retirement.** It is suggested that for long trials providing the notes

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<sup>27</sup> *Juries II*, para 88.

<sup>28</sup> *Juries Report*, paras 336-354.

<sup>29</sup> We note that the Department for Courts is in the process of implementing new evidence-recording systems, and that technical problems have been experienced in some courts: *Juries Report* para 340.

<sup>30</sup> see *R v Haines* [2002] 3 NZLR 13 and *R v McLean* [2001] 3 NZLR 794.

progressively might be of benefit. Jurors might want to refresh their memories as to what witnesses said before in order to evaluate the evidence of current witnesses. But for short trials (five days or less) it might be best for the notes to be provided upon retirement. If the notes are to be provided, consideration should be given to what is said to jurors when they are invited to make their own notes. It might be that it would be helpful to tell them that since they will have the Judge's notes their own might focus on points of significance for later discussion.

- (c) **The procedure to be adopted to ensure the accuracy of the notes.** Counsel should be invited to check the transcript regularly and to advise the Judge before the start of the next day's evidence of any errors or omissions.
  - (d) **The procedure to be adopted to ensure that the notes do not contain material that should not be taken into account by the jury in reaching its verdict.** A Judge will need to ensure that rulings, evidence taken on voir dire and submissions of counsel do not form part of the notes provided to the jury.
  - (e) **The need to instruct the jury on the proper use of the notes.** It is suggested that in opening remarks the Judge should tell the jury that it will receive copies of the notes of evidence but that is only so the jury will have a convenient means of confirming what witnesses said. The jury should be told that it is of prime importance to listen to, and evaluate, the credibility and reliability of the witnesses. In summation the Judge should again emphasise the use to which the notes can be put and suggest that if the notes are referred to it is vital to check all three parts of a witness's evidence (chief, cross-examination and re-examination) not just one of them. It might also be useful for a Judge to say that the provision of the notes does not preclude the jury from asking the Judge to identify the passages of evidence relevant to any particular issue. This might be of special significance in a long trial. Finally, the jury should also be told that the notes are not to be removed from the court.
  - (f) **The procedure to be adopted with the statements of witnesses read to the jury.** Copies of the statements should be provided to the jury since their contents will not be recorded in the notes.
55. It may be appropriate for a witness index to be provided to help the jury find relevant portions; if this is required it should be prepared by the Judge's associate or by the transcriber on behalf of the Judge. At least two copies should be provided to avoid any individual or faction gaining "control" of the information.

56. It is possible for computer facilities to be provided to allow for easier searching of the transcript by the jury. In the *Juries Report*, the Law Commission concluded<sup>31</sup> that the routine provision of such facilities is unnecessary and impractical, and in any event the computer equipment is not routinely available from the Ministry of Justice. However, there is no reason in principle why such facilities should not be provided if, in the circumstances of the case, the Judge is satisfied that it would materially assist the jury. This is likely to be required only in particularly lengthy or complex cases. Such facilities should be notified, agreed or permitted before trial.
57. Jurors who wish to take notes should be left to them but the charge to listen and observe should remain.

#### ASKING QUESTIONS DURING THE TRIAL

58. Jurors may ask questions during the trial, either of a witness (through the Judge) or of the Judge. However, it is not common for juries to ask questions during trials, particularly if they are not encouraged to do so. Some Judges and counsel are reluctant to encourage questions, because of a perception that jurors will disrupt proceedings with irrelevant or inadmissible questions, and also because asking questions is seen as contrary to the adversarial process. However, the Research indicated<sup>32</sup> that where the jury does ask questions, they were relevant and useful. The Law Commission concluded<sup>33</sup> that juries should be routinely advised of their right to submit questions to the Judge, which the Judge may then put to the witness. The jury should be told that it is not certain that any question they want put will actually be asked because evidence is for counsel. The process for asking questions must be formal, to ensure that it remains controlled and is only used where necessary and appropriate.

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<sup>31</sup> *Juries Report* paras 352-354.

<sup>32</sup> *Juries II vol II* para 4.16.

<sup>33</sup> *Juries Report* para 368.

59. The following process for asking questions is recommended:
- (a) The Judge in his or her opening remarks should advise the jury that they may ask questions during the trial, and that this should be done only for the purpose of clarifying what has been said, and advise them of the process to be followed. The process is that questions should be put in writing and given to the Judge who might or might not put it to the witness or give it to counsel to decide whether they want to put it to the witness. The jury should be advised that the rules of evidence prevent some questions from being asked, so they should not be concerned if their question is not put to the witness.
  - (b) If the jury has a question, the foreman should write it down and give it to the court taker during an adjournment, and the court taker will then deliver it to the Judge.
  - (c) The Judge may wish to where appropriate show the written question to counsel and hear their views on an appropriate response.

#### EXPERT TESTIMONY

60. The technical nature of the evidence which is often presented by expert witnesses can lead to difficulties for some jurors. The Research indicated that although some jurors had difficulty understanding expert evidence, they were a minority and other jurors were able to assist them.<sup>34</sup> Because of the complex or unfamiliar nature of much expert evidence, this is an area where visual and written aids may be particularly useful in assisting jurors to understand the evidence.

#### CLOSING ADDRESSES

61. For the reasons already given, the use of written and visual aids is to be encouraged in closing addresses as well as in the earlier stages of the trial, where that will assist juror comprehension. If such aids have already been used in the course of the trial, their use in closing is unproblematic. Counsel may (obviously) use in closing materials already seen by the jury in the course of the trial.
62. The question is what counsel can *create* for use in closing. One possibility is Powerpoint<sup>35</sup> presentations, an option which counsel were refused permission to use in

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<sup>34</sup> *Juries II vol II* paras 3.14-3.17.

<sup>35</sup> Powerpoint is a commonly used Microsoft software product. It can be used to create slides, speaker notes and handouts. Information can be displayed using 35mm slides, coloured or black and white transparencies

*R v Haanstra*,<sup>36</sup> because of the novelty of using such presentations and the need for the judiciary collectively to consider whether such use is appropriate. Another is the creation of a video using selected portions from evidential videos. In *R v Murphy*<sup>37</sup> an application to do so was declined.

63. The central concern with such techniques must be their very effectiveness, and the possibility of creating a very powerful display of advocacy that would be much more persuasive than the traditional oral presentation referring to exhibits. Whether they are appropriate in a particular case is a matter for the trial Judge, and counsel should not attempt to use these methods without first seeking the consent of the trial Judge. The use of Powerpoint presentations (or similar techniques) may be appropriate in complex cases where the purpose of the presentation is to summarise voluminous or complex evidence for the jury. The use of edited highlights of videos is more difficult because taking pictures out of their context may distort the evidence. However, there may be cases where it is appropriate, for example where there has been a large volume of such evidence. There is also the over-riding need to be fair to both sides. It might not be fair to allow the Crown to use its access to the assets of the State to produce a compelling presentation if the Defence, through lack of access to such assets, cannot compete.

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or as a screen presentation from a computer. The same information can be printed out so that jurors can be given a hard copy to retain for deliberations, while counsel uses the screen version in their address.

<sup>36</sup> 16 November 2000, unreported, High Court, Wellington Registry, T1155/00 (Minute (No 3)).

<sup>37</sup> [1996] DCR 998.

## JUDGE'S SUMMING-UP

### **Advice on structuring deliberations**

64. The practice of giving juries flowcharts or written sequential issues as a structure for making decisions is becoming common and is generally a useful thing to do. Obviously such material is part of the summing up and will form part of the trial record. If the Judge intends to do this, drafts should be given to counsel for comment prior to it being given to the jury.

### **Jury questions during deliberations**

65. Juries receive more encouragement to ask questions during deliberations than during the trial itself, and questions are more common at this stage. There was some indication in the Research that juries were put off asking questions during deliberations by the formality of the procedure,<sup>38</sup> but the more common reason for not asking was that the jurors did not realise that they could.
66. It is suggested that the procedure for asking questions during deliberations should be the same as for asking questions during the trial but that the jury should be informed routinely of the right to ask questions on fact or law, and encouraged to refer matters to the Judge, particularly matters of law, if those matters are preventing or hindering deliberations. They can be advised of the procedure by the Judge during his or her summing-up.

## DELIBERATION

67. The length and hour of deliberation is a matter entirely within the discretion of the trial Judge. The Law Commission has recommended, as a general guideline, that a day's deliberation should end by 9pm,<sup>39</sup> although it may be necessary to continue longer if circumstances dictate: there may be an administrative need to get the trial finished, or the foreman may indicate that the jury is still making progress and happy to continue later into the night. It is recommended that Judges should not tell the jury that deliberations will be permitted to a certain hour and that then the jury will be taken to a hotel. The approach of that hour should be a trigger to inquire as to progress and whether it is likely that hotel accommodation will be necessary.

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<sup>38</sup> *Juries II vol II* para 4.14.

<sup>39</sup> *Juries Report* para 399.

68. The time at which the jury goes out to deliberate is also entirely within the jurisdiction of the trial Judge. If the summing-up would finish in the afternoon, the trial Judge must consider whether to ask the jury to retire then, and risk their deliberations continuing late into the night, or sending them home and letting them deliberate in the morning. This is something that can only be decided in the circumstances of the case. However, we suggest that where possible the jury should be consulted as to their preference. The point at which the adjournment is taken will need to be chosen carefully, having regard to balance between the parties, and to the coherence of the summing up as a whole.
69. Where possible, the addresses by counsel should follow each other in the same day as this helps the jury understand the opposing cases. For the same reason it is better for the Judge's summation to follow addresses directly. Of course, this is not always possible – particularly if there is to be an overnight adjournment.

#### JURY SECRECY

70. Counsel should always be aware of the confidentiality of the deliberation process and not discuss any aspect of the trial with a juror. If a juror approaches counsel, either during or after the trial, with a concern about what has happened in the jury room, counsel should refuse to discuss the matter with the juror except to advise the juror to put the concern to the Judge. Counsel should at once advise opposing counsel and the Judge (if the trial is still in progress) of the approach or file a memorandum recording the contact, and copy it to the other side, if the trial has concluded.

#### THE MEDIA

71. The media is forbidden to broadcast pictures of or take photographs of any juror.<sup>40</sup> However, there is evidence that the media sometimes breach these rules.<sup>41</sup> The Law Commission has recommended<sup>42</sup> that it should be a statutory offence to publish material which may lead to a juror being identified, and the power to punish this form of contempt should be extended to the District Court. If counsel believes that the media have breached these rules, they should draw the matter to the attention of the trial Judge immediately.

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<sup>40</sup> Ministry of Justice *Guidelines for Expanded Media Coverage of Court Proceedings* (May 2000, available on [www.justice.govt.nz](http://www.justice.govt.nz)).

<sup>41</sup> K Allan, J McGreor, and S Fountaine *The Impact of Television, Radio and Still Photography Coverage of Court Proceedings* (prepared for Department for Courts, unpublished, April 1998).

<sup>42</sup> *Juries Report*, paras 470-473.

## COMMUNICATION WITH THE JURY

72. The Research found<sup>43</sup> that jurors often felt, with good reason, that they were not valued by the justice system and their needs were seen as either secondary or unimportant. This was highlighted by the poor level of facilities provided to them. While the Research concluded that it is the institutional arrangements that marginalise jurors, rather than the Judges, court staff or counsel, it is important that all those who work in the system remain alert to the needs and feelings of jurors and accommodate them wherever possible.
73. One problem which the Research highlighted as an irritant for jurors was excessive delays.<sup>44</sup> While some delays are inevitable and jurors by and large accept that, it is appropriate that if there is a delay the jury should be given at the least an apology and an indication of how long the delay will be. Where practicable, juries should be given an explanation of the reason for a delay. Some Judges, in their opening remarks, explain to the jury that delays are at times unavoidable and that jurors should take nothing for or against the accused or the prosecution from the fact that delays occur.

## JURY EMERGENCIES DURING TRIAL OR DELIBERATIONS

74. If a juror has a problem during the trial or deliberations which could be the basis of their discharge under section 374 of the Crimes Act 1961,<sup>45</sup> any necessary inquiry should be made by the Judge in closed court, in the presence of counsel and accused, to preserve the juror's privacy.

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<sup>43</sup> *Juries II vol II* para 10.49.

<sup>44</sup> *Juries II vol II* paras 4.4-4.7.

<sup>45</sup> section 374(3) allows a juror to be discharged if the Court is of the opinion that the juror is incapable of continuing to perform his or her duty; or the juror's spouse or family member, or a family member of a juror's spouse, is ill or has died.

## JURY COUNSELLING

75. The Research found that some jurors have real difficulties coping with the stress of jury service, and concluded that counselling would be useful for a number of jurors.<sup>46</sup> While counselling for jurors is available through the Ministry of Justice, there is no national co-ordination for it. The Ministry of Justice has now issued best practice guidelines on counselling for all trial courts, which includes a leaflet to be given to all jurors, advising them how to get counselling if they need it.

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<sup>46</sup> *Juries II, vol II* paras 10.13-10.26.