# JURIES ADVISORY COUNCIL

**Submission to the Victorian Law Reform Commission in relation to its inquiry into Improving the Response of the Justice System to Sexual Offences**

## Contents



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## Overview

> If getting rid of juries is the only way to ensure justice in sex offence trials, then let it be done. I just wish we'd try a little harder to get them right first.[1]

Victoria has introduced significant changes to improve sexual offence trials. However, this is just the tip of an iceberg of changes that could be made to improve criminal trials by jury. This submission proposes significant changes to the methods used to determine how best to guide juries with their task.

Victoria should establish a Juries Advisory Council ('JAC') to drive changes to trial by jury. This is especially important in sexual offence trials. Juries perform a critical role in our criminal justice system. It is a necessary but not a sufficient condition of a fair trial that the jury understands the issues that they must determine. However, jurors are untrained in their task. It is the trial judge's responsibility to guide jurors so that they determine the issues in accordance with the law. Therefore, it is critical to determine what guidance jurors need and the best way to guide them. More than 40% of criminal trials involve sexual offences.

Over centuries courts have developed methods for guiding the jury. Much of this guidance comes in the form of jury directions. However, research indicates that 'jurors appear largely incapable of understanding judicial instructions as they are traditionally delivered by the judge'.[2] This is not the fault of jurors. As Justice Neave of Victoria's Court of Appeal said in 2012, the 'way jury directions are given, and their content fails to reflect at least 30 years of linguistic and psychological research about what helps people to understand and apply what they are told'.[3]

A significant amount of responsibility for ensuring that jury directions effectively guide jurors has been placed in the hands of the trial judge: it is the trial judge's duty to tailor jury directions to the specific circumstances of each case.[4] Consistent with this more individualised approach, research in Australia found that changes to jury trials have often been 'ad hoc, occurring at the level of individual judges and courts, rather than on a whole-of-jurisdiction basis'.[5]

We have a systemic problem that needs a systemic solution. We cannot reasonably expect every judge to become an expert in juror comprehension research and developing strategies to improve judicial guidance. Judges need assistance.

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[1] Bri Lee, 'Juries are often prejudiced, just like society. Should we get rid of them?', *The Guardian*, 20 July 2018. Bri Lee is the author of *Eggshell Skull: A Memoir About Standing Up, Speaking Out and Fighting Back*, (Allen & Unwin 2018).

[2] James R P Ogloff and V Gordon Rose, 'The Comprehension of Judicial Instructions' in Neil Brewer and Kipling D Williams (ed) *Psychology and Law: An Empirical Perspective* (Guilford Press, 2005) 407, 425.

[3] Justice Marcia Neave, 'Jury Directions in Criminal Trials — Legal Fiction or the Power of Magical Thinking' (Speech delivered at the Supreme and Federal Court Judges' Conference, Melbourne, 23 January 2012) 2–3.

[4] See, eg, *Alford v Magee* (1952) 85 CLR 437, 466; *R v Lawrence (Stephen)* [1982] AC 510, 519; *R v Ménard* [1998] 2 SCR 109.

[5] Jonathan Clough et al, *The Jury Project 10 Years On — Practices of Australian and New Zealand Judges*, (2019) 1.

Victoria needs a Juries Advisory Council to improve our jury system. The JAC's work must be evidence informed: conducting research will be essential to its task. The JAC must focus on jurors and determine what support they need to perform their task. The JAC must then support judges by providing them with the information and resources that they need to guide jurors.[6]

Another way of conceptualizing what jurors need is to consider professional development. The Judicial College of Victoria's responsibilities include the professional development of judges. The transient nature of jury service means that direct professional development of jurors is not practicable. However, indirect strategies are possible — improving the information, instruction, and systems of work that jurors must use when undertaking their task. The JAC's focus on jury guidance and the trial system in which jurors work provide an indirect method of professional development for jurors.

The composition of the JAC will be critical. It will need to include judges, academics with interdisciplinary experience, and former jurors. Because jurors do not have an advocate or representative to speak from their perspective, the inclusion of former jurors is essential.

Victoria has already undertaken more reforms to improve jury guidance than most common law jurisdictions. However, Victoria started from an extremely poor position.[7] Victoria's Jury Directions Advisory Group focused primarily on jury directions, did not undertake research on juror comprehension and did not complete its task. Therefore, the opportunity remains to significantly improve the way in which judges guide jurors in Victoria.

The JAC would promote community confidence in the administration of justice. Further, as knowledge about jurors grows, laws change, and technology improves, continuous improvement will be essential. No other common law jurisdiction has a Council of this nature. The Sentencing Advisory Council and the Judicial College provide helpful models to draw from to envisage ho a JAC would work. Former Chief Justice of the Supreme Court Marilyn Warren described the first tranche of jury directions reforms as the 'most significant criminal law reforms in this State's history'.[8] Establishing a Juries Advisory Council would be of similar importance.

[6] This would involve working with the Judicial College — the focus would be much broader than charge books.

[7] See, eg, Victorian Law Reform Commission, *Jury Directions*, Final Report No 17 (May 2009).

[8] Andrea Petrie, 'Making Trials Easier to Follow', *The Sunday Age* (Melbourne), 30 June 2013.

## 1. Purpose

The purpose of this submission is to propose the creation of a Juries Advisory Council ('JAC') in Victoria. This submission discusses:

- sexual offence reforms and trial by jury
- using an evidence-based approach for determining what jurors understand and how best to guide them
- why juror comprehension research has played such a limited role in the law in understanding juries
- why a Juries Advisory Council is necessary, its membership and purposes, and
- how the JAC would interact with other bodies in the criminal justice system.

## 2. Background

The issues specific to this submission arose from my discussion with the Victorian Law Reform Commission — the Hon Tony North QC (Chair), Jacinth Pathmanathan (Team Leader), and Hana Shahkhan (Senior Research and Policy Officer) — on 26 November 2020. In particular, it concerns our discussion about whether juries should continue to play a role in sexual offence trials given the number of challenges that remain with jury trials and in the context that many changes to sexual offence trials have already been made over the last three decades.

My interest and experience with these issues arises from (amongst other things):

- leading the sexual offence reform process in the Department of Justice (2010–16)
- being Chair of Victoria's Jury Directions Advisory Group (2010–19)
- being Chair of Victoria's Juries Advisory Group (which commenced in 2020)
- having completed much of the work for my PhD which focuses on developing a methodology for improving juror comprehension of the issues that the jury must determine in a criminal trial.

## 3. Summary of recommendations

In this submission, I propose that:

(1) Victoria establishes a Juries Advisory Council
(2) the JAC should be comprised of a diverse range of representatives including
    (a) judges and legal practitioners (including the Criminal Bar, VLA and DPP)
    (b) academics with expertise in juries and jury research from disciplines such as law, psychology, and psycholinguistics
    (c) former jurors

(d) the Juries Commissioner, and
(e) (as required) other bodies such as the Judicial College of Victoria and the Department of Justice and Community Safety, and

(3) the JAC's purposes would be to:
(a) conduct research about juror comprehension of their task (including laws)
(b) consider and test ways of improving juror comprehension of their task
(c) advise on ways to support jurors in performing their task
(d) disseminate information to members of the judiciary, legal profession and other interested persons and the public on jury issues
(e) consult on jury issues with the courts, legal profession, government departments, and other interested persons and bodies including former jurors as well as the public
(f) advise the government, courts, legal profession, and other bodies (eg, Judicial College of Victoria, Victorian Law Reform Commission) on jury issues generally and on strategies to assist jurors in performing their task
(g) develop new jury directions and improve jury guidance, and
(h) provide the Court of Appeal with the JAC's written views on juror comprehension issues as requested.

## 4. Sexual offence reforms and trial by jury

Over the last thirty years there have been significant reforms to sexual offence laws and trials in Victoria. These reforms have covered sexual offence laws, the culture in agencies involved in investigating, prosecuting, and conducting sexual offence cases, improvements to the way evidence is given and recorded and much more. The extent of change and the ongoing need for improvement reflects how poorly the criminal justice system did respond to sexual offences and sexual offence victim-survivors ('victims'). It also reflects community wide problems with sexual offences, where victims were often not believed, or were shamed, and offences often covered up.[9] Less than fifty years ago, senior judges said that a complaint of a sexual offence is 'easy to fabricate, but extremely difficult to refute'.[10] The provenance of that mistaken view can be traced to Chief Justice Hale in the 17th century. Chief Justice Barwick repeated this mistaken view in the High Court of Australia in 1974.[11] This view, and similar views, permeated many of our sexual offence laws and trials — and these views were not limited to the courts. In this context, cultural change to reverse such views requires sustained effort over a long period of time.

[9] For example, as revealed by the Royal Commission into Institutional Responses to Child Sexual Abuse.

[10] *R v Henry; R v Manning* (1969) 53 Cr App R 150, 153 (Lord Salmon).

[11] This statement by Lord Salmon reflects similar statements made by Chief Justice Hale before 1676 and first published in 1736, reflecting their long provenance. Chief Justice Barwick in Australia said that the statements from Chief Justice Hale and Lord Salmon were important to remember: *Kelleher v The Queen* (1974) 131 CLR 534, 543 (Barwick CJ).

Sexual offence trials comprise approximately 40% of all jury trials in Victoria.[12] The outcomes of these trials are often scrutinized to assess whether changes have been effective. When the focus falls to juries, this often concerns perceptions about whether juries got a verdict 'right' or 'wrong'. When combined with research about misconceptions about sexual offences that are prevalent in the community, there is a concern that these misconceptions may contribute to jury verdicts. Sometimes, this leads people to think that there is a significant problem with juries determining sexual offence trials and that we have done nearly all we can to improve trials for jurors. Further, because problems remain, one solution is to remove juries from sexual offence trials.

This view assumes that we know what jurors think and how they think, and that we have tried to address the problems and there is little else that can be done. My contention is that:

- law reform usually does not consider juror comprehension research in any detail
- there is much more we could learn about jurors, and
- there is much more that we could do to improve jury trials.

Recent history with sexual offence trials is also important in considering whether the problem is with juries. While the VLRC's 2004 review of sexual offences led to many important policy changes, the resulting amendments to sexual offences and jury directions were complex and flawed.[13] It led to the President of the Court of Appeal saying that the 'law governing the trial of sexual offences … [was] so extraordinarily complex as to throw into doubt the expectations on which the system of trial by jury is founded'.[14] Those expectations included that the judge could explain the law to the jury and that the jury could understand the law. Thus, Victorian sexual offence laws between 2006 and 2014 were flawed and extremely complicated for juries.

During that time there were also many changes to the admissibility of tendency and coincide evidence. First, by virtue of the introduction of the *Evidence Act 2008* (Vic) which changed the laws from 1 January 2010 and then ongoing appellate cases that ultimately led to High Court decisions[15] that started to settle those laws in recent years. I understand those laws may change again if the Victorian government implements changes based on laws introduced in New South Wales following discussions at the Council of Attorneys-General.

In recent years there have also been changes to the way in which judges direct juries following the introduction of the *Jury Directions Act 2013 (Vic)* and *Jury Directions Act 2015 (Vic)*. The 2015 Act includes amendments to address some misconceptions in sexual offence trials.

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[12] County Court of Victoria, *Annual Report* (2015–16), 20.

[13] *Crimes (Sexual Offences) Act 2006* (Vic) and *Crimes (Sexual Offences) (Further Amendment) Act 2006* (Vic). See discussion in Criminal Law Review, *Review of Sexual Offences: Consultation Paper*, Department of Justice (Vic) (September 2013) 1–6.

[14] *Wilson v The Queen* [2011] VSCA 328, [2] (Maxwell P). See also *NT v The Queen* [2012] VSCA 213; (2012) 225 A Crim R 102, [19].

[15] See, eg, *IMM v The Queen* (2016) 257 CLR 300; *The Queen v Dennis Bauer* [2018] HCA 40; *McPhillamy v The Queen* [2018] HCA 52.

This brief sketch highlights that even within recent years, there has been considerable change and uncertainty in sexual offence laws and trials. It is not an environment in which jury trials have been running as best as they possibly could. It is only for trials involving sexual offences in recent years that sexual offence laws, jury directions and evidence laws have been working better for juries in sexual offence trials. However, much more could be done to improve sexual offence trials.

For example, there are misconceptions relevant to sexual offences that the *Jury Directions Act* has not addressed. There is no research concerning jurors' common sense understanding of the law that may impede or affect their comprehension of sexual offence laws. Further, few judges give integrated directions to juries.[16] If judges use integrated directions, this can lead to counsel changing how they present their case which may further help jurors. Integrated directions can be highly effective in improving juror comprehension.[17] There has been no review of the Criminal Charge Book for comprehensibility. There are many ways in which the Charge Book could be improved from a linguistic and communications perspective.[18] There is much to learn about juries and how to communicate more effectively with them.

It can be incredibly challenging for lawyers, familiar with the justice system, to understand what it is like for jurors to enter the justice system for the first time and perform their task. We need a different approach to understanding jurors and their task. This can then lead to evidence-based changes to sexual offence trials that will assist juries with their task.

Calls to abolish juries generally, or for particular offences, are not new. Trial by jury is one of the most 'venerated and venerable'[19] institutions of the common law world:[20] it has been described as 'the glory of English law'[21] and 'fundamental to the freedom that is so essential to our way of life'.[22] However, juries also have strident critics who argue that jurors are all too often

[16] Greg Byrne and Chris Maxwell, 'Putting Jurors First: Legislative Simplification of Jury Directions' (2019) 43(3) *Criminal Law Journal* 180, 199. After four years of operation only four judges in one survey said they had tried giving integrated directions.

[17] See, eg, Jonathan Clough et al, 'The Judge as Cartographer and Guide: The Role of Fact-based Directions in Improving Juror Comprehension' (2018) 42(5) *Criminal Law Journal* 278; Benjamin Spivak, James R P Ogloff and Jonathan Clough, 'Asking the Right Questions: Examining the Efficacy of Question Trails as a Method of Improving Lay Comprehension and Application of Legal Concepts' (2019) 26(3) *Psychiatry, Psychology and Law* 441; Benjamin Spivak et al, 'The Impact of Fact-Based Instructions on Juror Application of the Law: Results from a Trans-Tasman Field Study' (2020) 101(1) *Social Science Quarterly* 346.

[18] This is discussed in an unpublished master's thesis by a former judge.

[19] Geoffrey Robertson QC, 'Magna Carta Today', British Library, <http://www.bl.uk/magna-carta/articles/magna-carta-and-jury-trial>; Valerie P Hans, 'Jury Systems Around the World' (2008) 4 *Annual Review of Law & Social Sciences* 275, 276.

[20] Nancy S Marder, 'Introduction to the Jury at a Crossroad: the American Experience' (2003) 78 *Chicago-Kent Law Review* 909, 909; Mark Findlay, 'The Role of the Jury in a Fair Trial' in Mark Findlay and Peter Duff (ed) *The Jury Under Attack* (Butterworths Pty Ltd, 1988) 161, 161.

[21] Sir William Blackstone, *Commentaries on the Laws of England: In Four Books:* (Gale, 1857, A new ed., Robert Malcolm Kerr ed, 2017) 411.

[22] Criminal Justice Commission of Queensland, *The Jury System in Criminal Trials in Queensland*, Issues Paper (1991) 4.

prejudiced,[23] ignorant and inexperienced at their task.[24] Expressing similar sentiments, Lord Roskill recommended abolishing juries from complex fraud trials because he believed 'that many jurors are out of their depth', despite acknowledging that there was no accurate evidence of a higher proportion of acquittals in complex fraud cases.[25]

This debate about the value of juries in criminal trials[26] is often based on strongly held policy or philosophical views rather than evidence about the effectiveness of juries as decision-makers.[27] Despite the often overstated virtues and deficiencies of the trial by jury, it is an essential and valuable feature of common law criminal justice systems[28] that enjoys considerable public support.[29] The most important issues are how, and how well, trial by jury 'works'.[30] For a system that is fundamentally premised upon the importance of evidence in a criminal trial, it is ironic that evidence about juries has played such a small role in assessing and shaping how trial by jury works.

## 5. An evidence-based approach to juror comprehension and guidance

While persuading or communicating clearly to juries is critical for counsel and judges, the knowledge that judges and counsel have about jurors is surprisingly limited. Information about juries, what they understand and how they function is primarily limited because of the confidentiality of jury deliberations and the limitations of other sources of information about jurors such as the questions they ask during a trial. In the absence of direct and reliable

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[23] See, eg, Glanville Williams, *The Proof of Guilt* (Stevens & Sons Ltd, 1955) 209; Colin Howard, '"Weak Link" in Justice Chain', *Adelaide Advertiser*, 2 August 1985 quoted in Richard W Harding, 'Jury Performance in Complex Cases' in Mark Findlay and Peter Duff (ed) *The Jury Under Attack* (Butterworths Pty Ltd, 1988) 74, 75; Valerie P Hans and Neil Vidmar, *Judging the Jury* (Plenum Press, 1986) 131–2.

[24] See, eg, Glanville Williams, *The Proof of Guilt* (Stevens & Sons Ltd, 1955) 207–8; Colin Howard, '"Weak Link" in Justice Chain', *Adelaide Advertiser*, 2 August 1985 quoted in Richard W Harding, 'Jury Performance in Complex Cases' in Mark Findlay and Peter Duff (ed) *The Jury Under Attack* (Butterworths Pty Ltd, 1988) 74, 75; Valerie P Hans and Neil Vidmar, *Judging the Jury* (Plenum Press, 1986) 113–6; *Kingswell v The Queen* (1985) 159 CLR 264, 302–3 (Deane J).

[25] Fraud Trials Committee (Lord Roskill), Fraud Trials Committee Report, London HMSO (1986) [8.35] c.f. Richard W Harding, 'Jury Performance in Complex Cases' in Mark Findlay and Peter Duff (ed) The Jury Under Attack (Butterworths Pty Ltd, 1988) 74.

[26] Juries in civil trials is beyond the scope of this thesis. The debate about the value of juries in civil trials cab be quite different.

[27] John Baldwin and Michael McConville, 'Trial by Jury: Some Empirical Evidence on Contested Criminal Cases in England' (1979) 13 *Law and Society Review* 861, 861; Peter Duff and Mark Findlay, 'Jury Reform: of Myths and Moral Panics' (1997) 25 *International Journal of the Sociology of Law* 363, 365; Queensland Law Reform Commission, *A Review of Jury Directions*, Report 66 (2009) 29; Valerie P Hans and Neil Vidmar, *Judging the Jury* (Plenum Press, 1986) 116.

[28] New Zealand Law Commission, *Juries in Criminal Trials: Part Two: A Summary of the Research Findings*, Report 69 (2001) 1.

[29] Valerie P Hans, 'Jury Systems Around the World' (2008) 4 *Annual Review of Law & Social Sciences* 275, 280–3; Neil Brewer Jane Goodman-Delahunty, Jonathan Clough, Jacqueline Horan, James RP Ogloff, David Tait and Jessica Pratley, *Practices, Policies and Procedures that Influence Juror Satisfaction in Australia*, Australian Institute of Criminology (2007) 148–55.

[30] Lord Justice Moses, 'Summing Down the Summing-Up' (Speech delivered at the Annual Law Reform Lecture, The Hall, Inner Temple, 23 November 2010) 2.

information from jurors, the law has developed its own way of determining what jurors understand and has made assumptions about how they perform their task.

## 5.1 Sources of knowledge about juries: deliberations and questions

Jury deliberations are conducted in secret and evidence about jury deliberations is generally inadmissible.[31] Many jurisdictions have laws that prohibit soliciting or obtaining information about jury deliberations and prohibit the disclosure or publication of information about jury deliberations. In most jurisdictions, it is a statutory offence,[32] for jurors to discuss their deliberations.

Disclosure of deliberations might reveal whether jurors understood the judge's directions.[33] The general prohibition on discussing deliberations prevents judges, lawyers, academics, journalists and so on from asking jurors questions about jury deliberations,[34] including questions about what jurors did or did not understand.

Further, it is often assumed that if jurors have a question, they will ask the trial judge for assistance. Drawing inferences about juror comprehension from jury questions may be misleading and unreliable. There are several reasons for this.

It initially depends upon jurors correctly identifying when they do not understand something. Research shows that a juror's subjective assessment of their comprehension is significantly higher than when their comprehension levels are tested objectively.[35] It then depends upon jurors asking a question whenever they have one. Research suggests that jurors often feel 'an overwhelming inhibition against asking questions'.[36] They feel intimated by judges and are reluctant to ask questions or feel discouraged from asking questions.[37] Further, it depends upon

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[31] *Vaise v Delaval* (1785) 1 Durn & E 11; see also Dorne Boniface, 'Juror Misconduct, Secret Jury Business and the Exclusionary Rule' (2008) 32 *Criminal Law Journal* 18, 24–6; Diane E Courselle, 'Struggling with Deliberative Secrecy, Jury Independence, and Jury Reform' (2005) 57 *South Carolina Law Review* 203, 210–28; Justice Michael McHugh, 'Jurors' Deliberations, Jury Secrecy, Public Policy and the Law of Contempt' in Mark Findlay and Peter Duff (ed) *The Jury Under Attack* (Butterworths Pty Ltds, 1988) 56; Marie Comiskey, 'Initiating Dialogue About Jury Comprehension of Legal Concepts: Can the "Stagnant Pool" Be Revitalized?' (2010) 35 *Queen's Law Journal* 625, 660–1.

[32] *Juries Act 2000 (Vic)* s 78; *Jury Act 1977 (NSW)* ss 68A and 68B; *Jury Act 1995 (Qld)* s 70; *Contempt of Court Act 1981 (UK)* s 8 and *Juries Act 1974 (UK)* s 20A; *Criminal Code RSC 1985 (Can)* C-46, s 649.

[33] Justice Michael McHugh, 'Jurors' Deliberations, Jury Secrecy, Public Policy and the Law of Contempt' in Mark Findlay and Peter Duff (ed) *The Jury Under Attack* (Butterworths Pty Ltds, 1988) 56, 59–60. There are limits to what it would reveal primarily because jurors generally believe they understand much more of the judge's directions than objective testing finds.

[34] Justice Michael McHugh, 'Jurors' Deliberations, Jury Secrecy, Public Policy and the Law of Contempt' in Mark Findlay and Peter Duff (ed) *The Jury Under Attack* (Butterworths Pty Ltds, 1988) 56, 58.

[35] The differences between subjective and objective measures of juror comprehension 'suggest that subjective measures are relatively inconsequential in understanding comprehension and the relationship between instruction complexity and case outcomes': Blake M McKimmie, Emma Antrobus and Chantelle Baguley, 'Objective and Subjective Comprehension of Jury Instructions in Criminal Trials' (2014) 17 *New Criminal Law Review* 163, 167.

[36] Penny Darbyshire, Andy Maughan and Angus Stewart, *What Can the English Legal System Learn From Jury Research Published up to 2001?*, Kingston Law School (2001) <http://www.sixthformlaw.info/06_misc/pdf_files/penny_darbyshire.pdf> 48.

[37] See eg, Phoebe C Ellsworth and Alan Reifman, 'Juror Comprehension and Public Policy: Perceived Problems and Proposed Solutions' (2000) 6 *Psychology, Public Policy and Law* 788, 804; Jacqueline Horan, *Juries in the 21st*

the judge understanding the jury's question. In a highly publicised case in England, the judge said that the jury's questions revealed 'absolutely fundamental deficits in understanding'.[38] However, if the judge had been aware of juror comprehension research, the judge may have understood that several jury questions were common to juries (eg, what does 'proof beyond reasonable doubt' mean) and others reflected the complexity of legal and nebulous terminology (eg, what does it mean for a 'will to be overborne').

## 5.2 Judicial knowledge and experience about juries

In the absence of direct and reliable information from jurors about what they do and do not understand, the courts have relied on their 'corporate' or 'collective' 'judicial knowledge and experience'.[39] The courts' judicial knowledge and experience has been accurate and important in some areas and harmful in others. For example, as discussed above, some jury directions developed based on the incorrect assumption[40] that a complaint of a sexual offence is 'easy to fabricate, but extremely difficult to refute'.[41]

The courts' 'judicial knowledge and experience' has played a critical role in how courts determine what jurors know, the reasoning errors they might make, and in determining what guidance is necessary to ensure a fair trial. For example, a majority of judges in *Zecevic v The Queen*[42] concluded that the formulation of self-defence in *Viro v The Queen*[43] could not be explained in 'readily understandable' terms.[44] However, the majority concluded that their new test was 'readily understandable' to a jury.[45] The judges reached both conclusions without any

*Century* (Federation Press, 2012) 84–5. In New South Wales, 30% of jurors surveyed wanted further directions or explanations during deliberations but only half of those jurors sought such information: Mark Findlay, 'Juror Comprehension and Complexity' (2001) 41 *British Journal of Criminology* 56, 71.

[38] Caroline Davies, 'Vicky Pryce Faces Retrial After Jury 'Fails to Grasp Basics'', *The Guardian* (UK News), <https://www.theguardian.com/uk/2013/feb/20/vicky-pryce-retrial-jury>. The prosecutor similarly expressed concern about the jury questions and their understanding of their task.

[39] See, eg, *IMM v The Queen* (2016) 257 CLR 300, 346 (Nettle and Gordon JJ); *R v Barker* [2010] EWCA Crim 4, [40]; *R v Miller* [2010] EWCA Crim 1153, [21]; Justice Peter McClellan, 'Legislative Facts And Section 144 — A Contemporary Problem?' (Speech delivered at the Supreme Court of New South Wales Annual Conference 2015, Bowral, New South Wales, 4 September 2015). See also Chris Maxwell and Greg Byrne, 'Making Trials Work for Juries: Pathways to Simplification' (2020) (11) *Criminal Law Review* 1034, 1047–8.

[40] See, eg, Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence — A National Legal Response* (2010) 1311–34.

[41] *R v Henry; R v Manning* (1968) 53 Cr App R 150, 153 (Lord Salmon); *Kelleher v The Queen* (1974) 131 CLR 534, 543 (Barwick CJ). For a summary of the chequered relationship between the law and psychology, see Justice Peter McClellan, 'Legislative Facts And Section 144 — A Contemporary Problem?' (Speech delivered at the Supreme Court of New South Wales Annual Conference 2015, Bowral, New South Wales, 4 September 2015) 7–8.

[42] *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645.

[43] *Viro v The Queen* (1978) 141 CLR 88.

[44] *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645, 660 (Wilson, Dawson and Toohey JJ). The High Court based its assessment of comprehension difficulties on the courts' experience and not on juror comprehension research. The courts' experience included the experience recounted by trial judges, see, eg, *Lawson and Forsythe v The Queen* [1986] VR 515, 547 (McGarvie J).

[45] *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645, 665.

evidence — research suggests jurors find even simplified jury directions difficult to comprehend.[46] This kind of reasoning remains important today.[47]

## 5.3 Assumptions about how jurors perform their task

There are few clear general statements about what jurors know, how they reason, or a set of decision-making skills that the law assumes an ordinary juror possesses.[48] However, it can be inferred that the ideal juror will passively observe trial proceedings, suspend any judgement while recording all the evidence, understand and remember all the jury directions and then apply those directions correctly to the evidence they have recorded.[49] Social science research reveals that the courts' ideal juror is a legal fiction — no 'research-based support can be found for this model in social science, legal, or political science literature'.[50]

Jurors are not blank slates, passively listening, recording, and then evaluating evidence at the end of the trial. The juror is 'an active participant, struggling to make sense of the trial'.[51] Many legal concepts are difficult to understand.[52] In trying to understand directions, jurors 'bring their lay expectations and understandings to the task of interpreting legal instructions'.[53] It can then be particularly difficult for jurors to follow and apply directions that contradict their intuitions or preconceptions about judicial processes (eg, jurors may think that circumstantial evidence does not carry the same weight as direct evidence).[54]

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[46] See, eg, Cheryl Thomas, Ministry of Justice, *Are Juries Fair?* (2010) 36–8. See also Carolyn Semmler and Neil Brewer, 'Using a Flow-chart to Improve Comprehension of Jury Instructions' (2002) 9 *Psychiatry, Psychology and Law* 262.

[47] Recently, a judge in Victoria's Court of Appeal said longstanding experience has demonstrated that the … [directions on 'recklessness'] are straightforward and relatively simple for juries to apply'. No evidence was cited that supported this proposition. See *Director of Public Prosecutions Reference No 1 of 2019* [2020] VSCA 181, 44 [124] (Priest JA).

[48] Nancy Pennington and Reid Hastie, 'A Cognitive Theory of Juror Decision Making: The Story Model' (1991) 13 *Cardozo Law Review* 519, 519. The authors say that 'psychological literature also lacks any general unified discussion, although an unflattering image of the juror can be discerned in the multitude of references to a bias-prone creature who constructs a decision from a toolbox of prejudices and heuristics'.

[49] Justice David Watt, *Helping Jurors Understand* (Thomson Carswell, 2007) 63–4. See also Nancy Pennington and Reid Hastie, 'Juror Decision-Making Models: The Generalization Gap' (1981) 89 *Psychological Bulletin* 246, 249–55.

[50] B Michael Dann, '"Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries' (1993) 68 *Indiana Law Journal* 1229, 1241.

[51] Lora M Levett et al, 'The Psychology of Jury and Juror Decision Making' in Neil Brewer and Kipling D Williams (ed) *Psychology and Law: An Empriical Perspective* (Guilford Press, 2005) 365, 373.

[52] James R P Ogloff and V Gordon Rose, 'The Comprehension of Judicial Instructions' in Neil Brewer and Kipling D Williams (ed) *Psychology and Law: An Empirical Perspective* (Guilford Press, 2005) 407, 434.

[53] Shari Seidman Diamond and Judith N Levi, 'Improving Decisions on Death by Revising and Testing Jury Instructions' (1996) 79 *Judicature* 224, 232.

[54] Bradley Saxton, 'How Well do Jurors Understand Jury Instructions? A Field Test Using Real Juries and Real Trials in Wyoming' (1998) 33 *Land and Water Law Review* 59, 95.

Further, the cognitive load on jurors is significant.[55] This may limit their capacity to understand their task (including jury directions).[56] The extent of cognitive load will depend upon many factors. For example, the amount and nature of the evidence, the complexity of the law the jury must apply, the issues that are in dispute in the trial, and whether there are multiple charges.[57] Cognitive load is also higher for jurors where evidence is emotionally stressful — as is often the case in sexual offence trials.[58]

Understanding who the real jurors is, and the challenges they face in performing their task, is critical to improving sexual offence trials and trial by jury generally.

There is already a significant amount of research from other jurisdictions, and some research conducted in Victoria, about juries and juror comprehension.[59] However, it has had comparatively little impact on the justice system.

## 6. The limited role of juror comprehension research in the law

There are three principal reasons why juror comprehension research has had comparatively little impact on the justice system:

- courts have limited capacity to introduce change based on juror comprehension research
- there is scepticism within the law about juror comprehension research, and
- there are significant differences in the gaols, values and methodology of the law when compared with social science research about juror comprehension.

### 6.1 Challenges in using juror comprehension research in courts

Common law appellate courts have some capacity to change, adapt or refine the law, but they cannot — for obvious reasons — function like a law reform commission.[60] The scope for an

[55] Ryan Essex and Jane Goodman-Delahunty, 'Judicial Directions and the Criminal Standard of Proof: Improving Juror Comprehension' (2014) 24 *Journal of Judicial Administration* 75, 77.

[56] See, eg, Carolyn Semmler and Neil Brewer, 'Using a Flow-chart to Improve Comprehension of Jury Instructions' (2002) 9 *Psychiatry, Psychology and Law* 262.

[57] See, eg, Tamsin Ede and Jane Goodman-Delahunty, 'Question Trails in Trials: Structured Versus Unstructured Juror decision-Making' (2013) 37 *Criminal Law Journal* 114, 118.

[58] Dawn E McQuiston, M Dylan Hooper and Abbey E Brasington, 'Vicarious Trauma in the Courtroom: Judicial Perceptions of Juror Distress' (2019) 58 *Judges' Journal* 32, 33.

[59] See, eg, Penny Darbyshire, Andy Maughan and Angus Stewart, *What Can the English Legal System Learn From Jury Research Published up to 2001?*, Kingston Law School (2001) <http://www.sixthformlaw.info/06_misc/pdf_files/penny_darbyshire.pdf>: The authors said that examining research 'almost overwhelmed us, as a search in just one of the law or criminal justice English language databases will retrieve 3-5000 items'

[60] Sir Anthony Mason, 'The Judge as Law-maker' (1996) 3 *James Cook University Law Review* 1, 6–7; Chief Justice Susan Kiefel, 'The Adaptability of the Common Law to Change' (Speech delivered at the The Australasian Institute of Judicial Administration, Banco Court, Brisbane, 24 May 2018).

intermediate appellate court in Australia (like the Victorian Court of Appeal) to revisit its own decisions is heavily constrained.[61]

There are several obstacles to changing jury directions through appellate decisions.[62] First, it is a large step for a trial judge to depart from precedent to create an opportunity for an appellate court to reconsider previous decisions. Second, an individual case is an unsuitable vehicle for introducing evidence-based changes to jury directions. Despite extensive research concerning juror comprehension problems,[63] research can never test the actual directions used in identical trial conditions. Third, the process is wholly unsystematic, relying as it does on the initiative of a particular appellant. Waiting for the right case may take years. In the meantime, trials continue to be conducted with jury directions that are known to be problematic. Fourth, judges may be sceptical about research that conflicts with or seems to criticise established practices.

## 6.2 Awareness and scepticism of juror comprehension research

Despite notable exceptions, it is not clear that many judges are aware of the extent of social science research concerning juror comprehension,[64] though awareness appears to be growing.[65] Of those judges that are aware that such research exists, scepticism of the research and its implications limit acceptance and/or the weight given to this research.

First, there may be scepticism that research tests the right things. For example, studies may refer to the comprehension of individual jurors rather than the ability of 12 jurors working together to understand and apply directions.[66] Further, simulated studies cannot fully replicate a trial.

Second, judges may be sceptical about research that conflicts with or seems to criticise established practices, particularly if the judge's own view is that the instructions are comprehensible or that juries mostly 'get it right'.[67] Research indicates that judges often agree

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[61] *RJE v Secretary, Department of Justice* [2008] VSCA 265; (2008) 21 VR 526 at [48] (Maxwell P and Weinberg JA); *Commissioner of State Revenue v Challenger Listed Investments Ltd* [2011] VSCA 272; (2011) 34 VR 617 at [20] (Sifris AJA, Buchanan and Tate JJA agreeing at [1] and [2]); *Director of Public Prosecutions Reference No.1 of 2019* [2020] VSCA 181 at [8]–[11] (Maxwell P, McLeish and Emerton JJA).

[62] This paragraph draws extensively from Chris Maxwell and Greg Byrne, 'Making Trials Work for Juries: Pathways to Simplification' (2020) (11) *Criminal Law Review* 1034, 1043.

[63] See, eg, Phoebe C Ellsworth and Alan Reifman, "Juror Comprehension and Public Policy: Perceived Problems and Proposed Solutions" (2000) 6 *Psychology, Public Policy and Law* 788, 788; James R P Ogloff and V Gordon Rose, "The Comprehension of Judicial Instructions" in Neil Brewer and Kipling D Williams (ed) *Psychology and Law: An Empirical Perspective* (Guilford Press, 2005) 407, 426–7.

[64] William Young, 'Summing-up to Juries in Criminal Cases — What Jury Research Says About Current Rules and Practice' (2003) *Criminal Law Review* 665, 669. See also Penny Darbyshire, Andy Maughan and Angus Stewart, *What Can the English Legal System Learn From Jury Research Published up to 2001?*, Kingston Law School (2001) <http://www.sixthformlaw.info/06_misc/pdf_files/penny_darbyshire.pdf> 1.

[65] See, eg, Jonathan Clough et al, *The Jury Project 10 Years On — Practices of Australian and New Zealand Judges*, (2019) 1; Justice David Watt, *Helping Jurors Understand* (Thomson Carswell, 2007) 17–21.

[66] See, eg, Nancy S Marder, 'Bringing Jury Instructions into the Twenty-First Century' (2006) 81 *Notre Dame Law Review* 449, 471; *Free v Peters* (1993) 12 F.3d 700, 705 (Posner CJ).

[67] For example, "[e]xperienced trial judges will tell you that juries mostly get it right": Justice Peter McClellan, "Looking Inside the Jury Room", the Law Society of New South Wales Young Lawyers 2011 Annual Criminal Law Seminar,

with jury verdicts.[68] When robust statistical evidence is contradicted by one or two vivid personal experiences, a person's own logic and experience usually prevails.[69]

Third, conclusions from the research can be difficult to accept. Accepting that juries have significant problems understanding their task challenges a fundamental feature of the adversarial system.[70] There may be a fear that admitting that there is a problem may be used to argue for the abolition of the jury.

## 6.3 Social science research and the law — different disciplines / systems of knowledge

Lack of awareness and scepticism about juror comprehension research may also arise because the law and social sciences are different disciplines with different systems of knowledge.

Juror comprehension research is generally conducted outside of the discipline of law (eg, psycholinguistics and psychology). Judges may find it difficult to understand the research because it uses different methodologies, statistical analysis, and unfamiliar terms of art.[71]

Verdicts of guilty and not guilty provide a method through which the law claims 'to establish the truth of [disputed] events'.[72] It is a 'truth certifying' procedure[73] where the jury makes findings of fact within a trial system that is framed by the law.

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Sydney, 5 March 2011, 15. Similarly, "properly-directed juries have over the years shown a remarkable instinct for fairness": H [2004] UKHL 3; [2004] 2 Cr App R 10 [13] (Lord Bingham).

[68] See, eg, Thomas Eisenberg et al, 'Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven and Zeisel's The American Jury' (2005) 2 *Journal of Empirical Legal Studies* 171; Bradley Saxton, 'How Well do Jurors Understand Jury Instructions? A Field Test Using Real Juries and Real Trials in Wyoming' (1998) 33 *Land and Water Law Review* 59, 102–4.

[69] See generally, Nancy S Marder, "Bringing Jury Instructions into the Twenty-First Century" (2006) 81 *Notre Dame Law Review* 449, 470; Phoebe C Ellsworth and Alan Reifman, "Juror Comprehension and Public Policy: Perceived Problems and Proposed Solutions" (2000) 6 *Psychology, Public Policy and Law* 788, 790; Jeffrey J Rachlinski, "Evidence-based law" (2011) 96 *Cornell Law Review* 901, 919. For example, the Queensland Bar Association rejected jury directions research saying it was "no substitute for the views of experienced and effective practitioners in the criminal justice system": the Bar Association of Queensland's submission to the Queensland Law Reform Commission, quoted in Queensland Law Reform Commission, *A Review of Jury Directions*, 144 [7.86].

[70] See, eg, Geoff Mungham and Zenon Bankowski, 'The Jury in the Legal System' in Pat Carlen (ed) *The Sociology of the Law* (University of Keele, 1976) 202, 213; B Michael Dann, '"Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries' (1993) 68 *Indiana Law Journal* 1229, 1237. This may involve cognitive dissonance, namely, our tendency to confirm our belief system and avoid challenges to our assumptions: Kylie Burns, 'Judges, 'Common Sense' and Judicial Cognition' (2019) 23(3) *Griffith Law Review* 319, 334–5.

[71] See, eg, Walter W Steele Jr and Elizabeth G Thornburg, 'Jury Instructions: A Persistent Failure to Communicate' (1988) 67 *North Carolina Law Review* 77, 78–9; J Alexander Tanford, 'The Limits of a Scientific Jurisprudence: The Supreme Court and Psychology' (1990) 66 *Indiana Law Journal* 137, 144; William Young, 'Summing-up to Juries in Criminal Cases — What Jury Research Says About Current Rules and Practice' (2003) *Criminal Law Review* 665, 669; Kylie Burns and Terry Hutchinson, 'The Impact of "Empirical Facts" on Legal Scholarship and Legal Research Training' (2009) 43(2) *The Law Teacher* 153; Jacqueline Horan and Mark Israel, 'Beyond the Legal Barriers: Institutional Gatekeeping and Real Jury Research' (2015) 49 *Australia and New Zealand Journal of Criminology* 422, 430.

[72] Carol Smart, *Feminism and the Power of Law* (Routledge, 1989) 10.

[73] Zenon Bankowski, 'The Jury and Reality' in Mark Findlay and Peter Duff (ed) *The Jury Under Attack* (Butterworths, 1988) 8, 17.

Judicial knowledge and experience emerges from the truth certifying procedure of the trial process. However, courts do not scrutinise this knowledge and experience in the same way they do juror comprehension research. For example, judicial knowledge and experience would not qualify as expert opinion evidence.[74] Further, in a criminal trial, a jury may only draw an inference from the evidence if it is the only reasonable inference' to draw from this 'evidence'.[75] Applying that test, concluding that jurors do understand their task is not the only reasonable inference to draw from a trial.

Despite these shortcomings, courts treat their judicial knowledge and experience as the 'truth': it becomes the starting point for any discussion about what jurors know and how they reason. It is difficult for knowledge about jurors derived from a different 'truth' seeking process — social science research — to dislodge this perspective.

Further, the law has failed to consider the experiences and perspective of the jury. The role of the jury, judge, lawyers, and the accused have changed significantly over the centuries. Power dynamics in the criminal justice system have shaped criminal trials. The jury maintained its most fundamental role, determining the guilt of the accused. However, the jury progressively became increasingly passive and largely voiceless. The law has failed to consider the jury's perspective.

To overcome these challenges, Victoria needs a reform and improvement process that focuses on jurors and their perspective and is informed by social science research. I recommend that a Juries Advisory Council be established to undertake this role.

## 7. Establishing a Juries Advisory Council

A Juries Advisory Council must be statutory authority that operates independently from government.[76] Given how closely it will work with the judiciary, and some of its functions, independence will be essential to its credibility. The primary focus of the JAC should be to improve trial by jury because it is a necessary condition of a fair trial that jurors understand the issues that they must determine. The JAC must start by asking what jurors need to understand and perform their task in accordance with the law. This requires evidence, an interdisciplinary approach to understanding the problems and developing solutions, and a capacity to recommend and/or implement improvements. While the focus of this submission is on sexual offence trials, the JAC's remit should extend to criminal trials generally and civil trials.

The proposal for a Juries Advisory Council draws in part from the success of the Sentencing Advisory Council and the Judicial College of Victoria. Examining the purposes of these bodies provides a useful starting point for determining the purposes of a JAC. The following discussion

[74] See, eg, *Evidence Act 2008* (Vic) s 79(1), which creates an exception to the prohibition on opinion evidence from a person with 'specialised knowledge based on the person's training, study or experience'.

[75] See, eg, *Chamberlain v The Queen (No. 2)* (1984) 153 CLR 521; Judicial College of Victoria, *Criminal Charge Book*, http://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#19953.htm, 3.5.1; Criminal Law Review, Department of Justice & Regulation, *Jury Directions: A Jury-Centric Approach* (March 2015) 114–16.

[76] For a discussion of the nature of this kind of independence in a similar setting, see generally, Tim Holroyde, 'The Sentencing Council: Reflections on its 10th Anniversary' (2020) (5) *Criminal Law Review* 378, 383.

does not discuss in any detail how the Sentencing Advisory Council or Judicial College go about fulfilling their purposes given this is well known to the VLRC.

## 7.1 Composition of the Juries Advisory Council

To be effective the Juries Advisory Council needs both a strong understanding and connection to the justice system and the ability to engage effectively with social science research about juries and juror comprehension. Accordingly, the JAC should be comprised of a diverse range of representatives including:

(a) judges and legal practitioners

(b) academics with expertise in juries and jury research from disciplines such as the law, psychology, and psycholinguistics

(c) former jurors, and

(d) the Juries Commissioner.

Judges and legal practitioners will form the major audience for the work of the JAC. Recommendations made by the JAC must be practical and depend upon expertise in the justice system. Any changes made must be consistent with the requirements of a fair trial. Much of the research that informs an evidence-based approach to improving juror comprehension depends on research from disciplines outside of the law. Therefore, it is essential that the JAC have, and have access to, experts from other disciplines, such as psychology and psycholinguistics. The expertise of the JAC would also be enhanced by former jurors who can bring their perspective to the JAC's consideration of what jurors need. In jury reforms conducted in Arizona, Judge Dann said that the 'inclusion of five jurors with recent experience in lengthy trials of complex cases was the most important organizational decision made'.[77] Because of the range of issues that the JAC would consider, the Juries Commissioner will also have valuable knowledge of the jury management system that will be critical to ensuring that the system is improved in a seamless manner from the point the justice system first contacts potential jurors and until after a juror's service has been completed.

The JAC's work may sometimes be relevant to other bodies such as the Judicial College of Victoria or the Department of Justice and Community Safety. However, that does not require them to be represented as members of the JAC.

## 7.2 The Juries Advisory Council's purposes

The Sentencing Advisory Council provides the closest analogous body to what I would recommend for a JAC. This set of purposes draws from the purposes of the Sentencing

[77] B Michael Dann and George Logan III, 'Jury Reform: the Arizona Experience' (1996) 79 *Judicature* 280, 281.

Advisory Council[78] and adapts them to the context in which a JAC would operate. It includes two additional purposes, set out in paragraphs (c) and (g). The purposes of a Juries Advisory Council should be to:

(a) conduct research about juror comprehension of their task (including laws)

(b) consider and test ways of improving juror comprehension of their task

(c) advise on ways to support jurors in performing their task

(d) disseminate information to members of the judiciary, legal profession and other interested persons and the public on jury issues

(e) consult on jury issues with the courts, legal profession, government departments, and other interested persons and bodies including former jurors as well as the public

(f) advise the government, courts, legal profession, and other bodies on jury issues generally and on strategies to assist jurors in performing their task

(g) develop new jury directions and improve jury guidance, and

(h) provide the Court of Appeal with the JAC's written views on juror comprehension issues as requested.

The reason for each of these purposes is discussed briefly below.

### *(a) Conduct research about juror comprehension of their task (including laws)*

Evidence-based reforms are critical in the justice system.

> The delivery of facts is at the heart of every criminal trial. Myth, anecdote, and hearsay are excluded from the evidence. If the legal system wants to continue to lay claim to operate in a fair and logical manner, empirical research must replace the dominance of myth, anecdote, and judicial hearsay in jury reform and replace them with facts.[79]

The goal of evidence-based reforms is to 'create better law — law informed by reality'.[80] Evidence-based policy and practice is an approach that:

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[78] *Sentencing Act 1991 (Vic)* s 108C.

[79] Jacqueline Horan and Mark Israel, 'Beyond the Legal Barriers: Institutional Gatekeeping and Real Jury Research' (2015) 49 *Australia and New Zealand Journal of Criminology* 422, 434.

[80] Jeffrey J Rachlinski, 'Evidence-based law' (2011) 96 *Cornell Law Review* 901, 910. See generally, Lord Chief Justice of England and Wales, 'Reshaping Justice' (3 March 2014) 6 <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/lcj-speech-reshaping-justice.pdf>; Jacqueline Horan and Shelley Maine, 'Criminal Jury Trials in 2030: A Law Odyssey' (2014) 41 *Journal of Law and Society* 551, 552.

> helps policymakers make better decisions, and achieve better outcomes, by using existing evidence more effectively, and undertaking new research, evaluation and analysis where knowledge about effective policy initiatives and policy implementation is lacking.[81]

While there is substantial evidence about juror comprehension generally across the common law world to draw from — primarily from the USA — we need a process for systematically collecting data that focuses on specific issues in Victoria. England and Wales have undertaken some research in relation to specific issues (eg, the use of written directions, understanding self-defence). A small amount of research has been disproportionately effective in engendering change in England and Wales.[82] This is probably because the research has been conducted in England and Wales and the research was connected with the development of the Crown Court Compendium and supported by significant reviews.[83]

There is substantial research that indicates the kinds of linguistic problems that arise in jury directions. However, conceptual complexity is far more challenging for jurors. In the context of sexual offences, research on jurors' understanding of concepts like 'free agreement' and 'reasonable belief' would be essential. So too is understanding what jurors think the law is. Common sense ideas provide the lens through which jurors understand the judge's directions about the law and may thereby affect their understanding of the law.[84] Alternatively, if jurors do not understand the law, they will apply their common sense ideas of justice. In either case, jury directions must address common sense ideas to assist jurors in correctly applying the law.[85] Understanding what misconceptions are common in sexual offence cases is also critical and challenging[86] (eg, concerning delay, victim demeanour and behaviour, the presence of forensic evidence).

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[81] Philip Davies, 'The State of Evidence-based Policy Evaluation and its Role in Policy Formation' (2012) (219) *National Institute Economic Review* R41, R42. See also, Adrian Cherney and Brian Head, 'Evidence-based Policy and Practice: Key Challenges for Improvement' (2010) 45(4) *Australian Journal of Social Issues* 509, 510; Wayne Parsons, 'Not Just Steering but Weaving: Relevant Knowledge and the Craft of Building Policy Capacity and Coherence' (2004) 63(1) *Australian Journal of Public Administration* 43, 47.

[82] For example, a small study showing modest benefits of using written instructions to improve juror comprehension of self-defence has been used to support much more significant changes in the use of written directions like the 'route to verdict': Judicial College, *The Crown Court Compendium — Part I: Jury and Trial Management and Summing Up*, (2020) <https://www.judiciary.uk/wp-content/uploads/2016/06/Crown-Court-Compendium-Part-I-July-2020-1.pdf> 1–19.

[83] For example, Sir Brian Leveson, *Review of Efficiency of Criminal Proceedings*, Judiciary of England and Wales (2015). See generally, Chris Maxwell and Greg Byrne, 'Making Trials Work for Juries: Pathways to Simplification' (2020) (11) *Criminal Law Review* 1034, 1038–40.

[84] See, eg, Norman J Finkel, 'Commonsense Justice and Jury Instructions: Instructive and Reciprocating Connections' (2000) 6(3) *Psychology, Public Policy, and Law* 591, 608–9. See also Vicki L Smith, 'Prototypes in the Courtroom: Lay Representations of Legal Concepts' (1991) 61(6) *Journal of Personality and Social Psychology* 857, 869.

[85] James R P Ogloff and V Gordon Rose, 'The Comprehension of Judicial Instructions' in Neil Brewer and Kipling D Williams (ed) *Psychology and Law: An Empirical Perspective* (Guilford Press, 2005) 407, 426.

[86] See, eg, Chris Maxwell and Greg Byrne, 'Making Trials Work for Juries: Pathways to Simplification' (2020) (11) *Criminal Law Review* 1034, 1052–4.

In utilising an evidence-based approach, consideration should also be given to streamlining jury research processes.[87] For example, the *Juries Act 2000* should be amended to allow the Juries Advisory Council to approve research on juries. However, a significant part of the research process can be conducted without actual jurors.

### *(b) Consider and test ways of improving juror comprehension of their task*

With better understanding of what jurors find challenging to comprehend, it is likely that better solutions can be developed. However, it is essential to test proposed solutions to determine whether they achieve their objective.

It was not necessary to test juror comprehension of the wording of reforms contained in the *Jury Directions Act 2015* because section 6 provides that the judge is not required to use any particular form of words. Model directions are then set out in the Victorian *Criminal Charge Book*. However, the words used in model directions must be tested. The Charge Book is a valuable resource and significantly improves on anything before it. However, its model directions have never been systematically tested. It has been drafted by lawyers, without input from experts of different backgrounds such as linguists and psychologists.[88] Analysis on some key terminology like 'decide', 'must', 'satisfied', are good examples of words for which many different synonyms are used in the Charge Book — the inconsistent use of terms, especially some that will be unfamiliar to jurors may be confusing and increases their cognitive load.[89]

### *(c) Advise on ways to support jurors in performing their task and making the issues the jury must determine comprehensible to jurors*

This purpose is specific to juries. It is not based on any of purposes of the Sentencing Advisory Council that are set out in the *Sentencing Act*.

It can be difficult for judges and lawyers to understand the juror's perspective. In part this is because of the nature of jury trials. In addition to the confidentiality of jury deliberations, jury service is transient. Jurors come together to determine a case and then depart the courtroom. The jury's foreperson[90] speaks for the jury in the trial for limited purposes. The foreperson will not usually have any legal training and will not usually have had experience as a juror.

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[87] Jacqueline Horan and Mark Israel, 'Beyond the Legal Barriers: Institutional Gatekeeping and Real Jury Research' (2015) 49 *Australia and New Zealand Journal of Criminology* 422, 426–7. The authors indicate that research involving 55 trials across three Australian states during 2011–12 required 14 ethics applications, took two years to complete, and required an application being formally made and heard in a court in Queensland.

[88] Greg Byrne and Chris Maxwell, 'Putting Jurors First: Legislative Simplification of Jury Directions' (2019) 43(3) *Criminal Law Journal* 180, 199.

[89] This draws from an unpublished Master's thesis on linguistics. The conclusions are consistent with major research in this area. See, eg, Amiram Elwork, Bruce D Sales and James J Alfini, *Making Jury Instructions Understandable* (The Michie Company, 1982); Peter M Tiersma, 'Communicating with Juries: How to Draft More Understandable Instructions' (2005-06) 10 *The Scribes of Journal Legal Writing* 1.

[90] There are different descriptions for the jury's representative (eg, the jury's foreperson or speaker). See, eg, Queensland Law Reform Commission, *A Review of Jury Directions*, Report No 66 (September 2009) 348–51 [10.212]–[10.222]; Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book — Trial Procedure*,

Jurors do not have an official and ongoing representative, or a 'juror's union',[91] to speak about their views about how the trial system is working — the 'jurors' perspective so often gets lost, largely because jurors are not in a position to advocate for themselves'.[92] Jurors may speak out occasionally, but even in the USA where there are significantly less restrictions on what a juror may say after a trial about their deliberations, speaking out is quite limited. A juror might write a book[93] or speak to the media[94] but this is an ad hoc process, often based on an individual juror's experiences of one case and primarily occurs where the case itself attracted significant media attention.

There are two ways in which the JAC could address this problem.

First, as discussed above, the JAC's membership should include former jurors.

Second, professional development is generally an essential part of improving performance in workplaces. This is especially important in the jury's workplace where the consequences of a jury's decisions are so important. The Judicial College of Victoria assists in the professional development of judicial officers and providing continuing education and training for judicial officers.[95] The definition of a judicial officer does not include a juror. However, the jury is the 'constitutional tribunal for deciding issues of fact'[96] in almost all criminal trials and in some civil trials. Where the jury performs this function, it takes on a judicial function.

However, because jury service is temporary, professional development is not relevant to jurors. Instead, the focus must be on shaping the decision-making environment in which jurors operate and the guidance provided to jurors to perform their task. Continuing to improve jurors' decision-making environment and adapting to their changing needs and technology is critical. To improve the decision-making environment in which jurors operate, we need:

(1) evidence about what jurors find most challenging

(2) to identify any impediments to jurors performing their task, and

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<https://www.judcom.nsw.gov.au/publications/benchbks/criminal/the_jury.html> [1–480]; Judicial College of Victoria, *Victorian Criminal Charge Book*, <http://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#19193.htm> [1.3].

[91] Malcolm Knox, *Secrets of the Jury Room* (Random House Australia, 2005) 295.

[92] Nancy S Marder, 'Answering Jurors' Questions: Next Steps in Illinois' (2010) 41 *Loyola University of Chicago Law Journal* 727, 742.

[93] See, eg, D Graham Burnett, *A Trial By Jury* (Alfred A Knopf, 2001); Malcolm Knox, *Secrets of the Jury Room*, (Random House Australia, 2005): however, because of jury secrecy laws, the author fictionalised some aspects of the trial and jury deliberations, at xiii–xix.

[94] See, eg, Malcolm Knox, *Secrets of the Jury Room* (Random House Australia, 2005) xi–xix; Farah Farouque, 'Judge and Jury', *The Age*, <https://www.theage.com.au/national/victoria/judge-and-jury-20120215-1t6em.html>; Keegan Hamilton, 'Inside El Chapo's Jury: a Juror Speaks for First Time About Convicting the Kingpin', *Vice*, <https://www.vice.com/en_us/article/vbwzny/inside-el-chapos-jury-a-juror-speaks-for-first-time-about-convicting-the-kingpin>.

[95] *Judicial College of Victoria Act* 2001, s 5.

[96] *Hocking v Bell* (1945) 71 CLR 430, 440 (Latham CJ).

(3) a process for developing changes that will assist jurors with their task.

The JAC could provide this leadership and 'professional development' focus for jurors.

### *(d) Disseminate information to members of the judiciary, legal profession and other interested persons and the public on jury issues*

Much valuable research that already exists, and evidence produced by the JAC, will come from disciplines other than the law. This research needs to be transformed into information the judges and lawyers can understand and use. This is like some of the Sentencing Advisory Council's work which may gauge public opinion about sentencing or provide statistical analysis of sentencing data. The information must be user friendly. This can be particularly challenging. The evidence must be robust and able to be criticised by those with expertise in the relevant field (eg, psychology) and yet be easy to read for lawyers and connected to issues of practical relevance to judges and lawyers.

The Council could also provide information to the public about juries. Myths and misconceptions about juries can easily arise. For example, a common myth appears to be that juries are comprised of disproportionate numbers of unemployed people and pensioners[97] and that this contributes to juror comprehension problems. This assumes that those with higher levels of education and training 'will be able to think abstractly, follow complex evidence and feel comfortable sitting down for long periods'.[98] A number of studies in different jurisdictions across Australia indicate that jurors are, in fact, likely to be better educated than the general population.[99]

In the context of sentencing, Lord Holroyde said that myths and misconceptions can be 'powerful forces in undermining [public] confidence in the criminal justice system'.[100] Providing correct and accurate information to the public and to the media addressing myths and misconceptions about juries would therefore be valuable.

### (e) *Consult on jury issues with the courts, legal profession, government departments, and other interested persons and bodies including former jurors as well as the public*

The JAC's work would involve multiple stakeholders. The JAC would need to understand jury issues from the perspective of jurors, while understanding how trials works and what is necessary to ensure a fair trial. While juror comprehension is a necessary condition of a fair

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[97] Cheryl Thomas and Nigel Balmer, *Diversity and Fairness in the Jury System*, (June 2007) 190; Queensland Law Reform Commission, *A Review of Jury Selection*, Report No. 68 (February 2011) 48–9.

[98] Jacqueline Horan and David Tait, 'Do Juries Adequately Represent the Community? A Case Study of Civil Juries in Victoria' (2007) 16 *Journal of Judicial Administration* 179, 197.

[99] Queensland Law Reform Commission, *A Review of Jury Selection*, Report No. 68 (February 2011) 45–55; Jacqueline Horan and David Tait, 'Do Juries Adequately Represent the Community? A Case Study of Civil Juries in Victoria' (2007) 16 *Journal of Judicial Administration* 179, 196–7.

[100] Tim Holroyde, 'The Sentencing Council: Reflections on its 10th Anniversary' (2020) (5) *Criminal Law Review* 378, 386.

trial, there are many other features of a fair trial that judges are responsible for. Lawyers also have essential roles to play in ensuring that an adversarial trial is fair. Further there will be many people and stakeholders with ideas to explore and proposals for change.[101]

Like the Sentencing Advisory Council, the government may wish to give the JAC references to examine specific issues that arise concerning juries and jury trials. While the JAC would have a significant ongoing work program with stakeholders, issues of public concern may arise that could potentially be addressed by the JAC. However, because of the composition of the JAC and its ongoing role with stakeholders, its policy role would be essentially limited to jury related issues. For instance, if the JAC researched issues concerning sexual offences and the comprehensibility of a particular provision, their role may be limited to how best to give effect to a policy decision rather than conducting a substantive policy review themselves. It may also be possible for the JAC to undertake specific research on issues that are relevant to a broader reference to the VLRC on sexual offences (or other jury related issues) that would assist the VLRC in subsequent references.

### *(f) Advise the government, courts, legal profession, and other bodies (eg, Judicial College of Victoria, Victorian Law Reform Commission) on jury issues generally and on strategies to assist jurors in performing their task*

One of the significant deficiencies in the current approach to improving jury trials is that there is no integrated process where one body is responsible for improving jury trials and improvements often arise on an ad hoc basis through the efforts of individual judges. Many different changes could be made, and an integrated system of reform is essential to maximise (and evaluate) the benefits of each reform proposal. The JAC could play an important leadership role in this regard.

Part of the policy work that I recommend be undertaken by the JAC has previously been performed by the Jury Directions Advisory Group (JDAG) and the Juries Advisory Group (JAG). Between 2010–19, JDAG led major reforms to simplify jury directions,[102] resulting in the *Jury Directions Act 2015*. JDAG's work predominantly focused on legislative reform. However, it did also produce Victoria's Jury Guide to assist jurors in performing their task. JDAG undertook this work because there was no other body responsible or set up to undertake this kind of work. The Guide was independently evaluated: jurors reported that they found it helpful. It has since been revised for further use.

[101] For a discussion of the importance of wide consultation to the Sentencing Advisory Council in the UK, see Tim Holroyde, 'The Sentencing Council: Reflections on its 10th Anniversary' (2020) (5) *Criminal Law Review* 378, 383–5.

[102] See discussion in Greg Byrne and Chris Maxwell, 'Putting Jurors First: Legislative Simplification of Jury Directions' (2019) 43(3) *Criminal Law Journal* 180; Criminal Law Review, *Jury Directions: A Jury-Centric Approach* (March 2015).

The Juries Advisory Group commenced in 2019.[103] Its members include the Juries Commissioner and judges of the Supreme and County Courts (from criminal and common law jurisdictions). Its focus is primarily on improving jurors' experience of criminal and civil trials, supporting jurors in their task, and improving the management of the jury system by formalising information flows between the courts and the Juries Commissioner. It has a non-legislative focus. For example, the Juries Advisory Group is currently developing materials to provide better support to jurors in coping with the stress of jury service.

The work of the JAC could replace the work of both groups. Even without evidence of specific juror comprehension problems, there is considerable work that could be undertaken to improve jury trials.

For example, there are many misconceptions in sexual offence cases.[104] The JAC could advise on the best way to address these misconceptions. Those approaches could be tested on mock jurors. This may result in changes to legislation or to the Charge Book.

As discussed above, research indicates that integrated directions could significantly assist juror comprehension. However, despite legislative support for their use in Victoria, judicial uptake has been slow. There are several reasons for this. In a survey from 2017, some judges explained this was because of 'inexperience with the format and fear of departure from the charge book discourage their use', that preparation 'takes time' and may be 'complex' and that 'jury checklists usually suffice'.[105] Experience in New Zealand indicates that integrated directions are not time-consuming once judges become familiar with them. Judges in New Zealand also have the benefit of more than 140 draft question trials to use.[106] The Criminal Charge Book does not contain any draft question trials or factual questions. Further, research shows that checklists do not 'suffice' and may be of little use to juries.[107] While not limited to sexual offence trials, finding ways to promote the use of integrated directions would assist jurors and improve juror comprehension.

The JAC could, more generally, provide advice to courts about how to tailor their guidance to the jury. Judges tailor their guidance to juries to determine whether jurors understand their guidance primarily by drawing on collective judicial knowledge and experience and their own intuition, observations, and impressions of juror demeanour (eg, do they appear to understand). In addition, judges often rely on what they have seen as counsel and practices tend to continue. Research on jurors has had comparatively little influence on this process. While judges are

[103] I am the Chair of the Juries Advisory Group and a consultant to the Group.

[104] There are also misconceptions in other areas such as family violence.

[105] Judicial College of Victoria, *Jury Directions Act 2015 Evaluation: Judicial Survey Results*, quoted in Greg Byrne and Chris Maxwell, 'Putting Jurors First: Legislative Simplification of Jury Directions' (2019) 43(3) *Criminal Law Journal* 180, 199.

[106] Courts of New Zealand, *A Guide to the Question Trails*, <https://www.courtsofnz.govt.nz/for-lawyers/question-trails/>.

[107] Jonathan Clough et al, 'The Judge as Cartographer and Guide: The Role of Fact-based Directions in Improving Juror Comprehension' (2018) 42(5) *Criminal Law Journal* 278, 289.

experts in their field, they are not experts on jury communication and assessing what jurors understand. However, Victorian trial judges have generally expressed willingness to be involved in anything that may 'preserve, enhance and simplify the jury process'.[108]

Trials could also be improved through greater use of existing research. For example, a recent article on memory science, seen through the prism of the appeals in the Pell case,[109] explained memory science in ways that are relevant to many historical sexual abuse cases. This information would be invaluable for judges and counsel. Some of the jury directions in the *Jury Directions Act 2015* are already consistent with memory science research.[110] However, with broader ranging research, not limited to the Pell case for the purposes of an article, there may be more useful information to assist judges, counsel, and juries to understand this kind of evidence. At present there is no systemic mechanism for making any use of this research.

The experience of evidence-based medicine is that it is hard 'to translate … evidence into improving the quality of practice and outcomes'.[111] Practitioners may be sceptical of and give little weight to evidence. The 'inherently clinical focus on individual doctors and individual patients can make it difficult for many doctors to think like statisticians and scientists'.[112] The JAC could integrate this information with knowledge of the legal system in a way that would help counsel in the presentation of their case and judges in guiding the jury. This will then help jurors in performing their task in accordance with the law.

### *(g) Develop new jury directions and improve jury guidance*

The next two purposes provide mechanisms for the JAC and the Court of Appeal to take on more responsibility for improving jury directions and the guidance more generally provided to juries.

One of the challenges with developing new jury directions through legislative processes is that they can take time and momentum can be lost. This is currently the case in Victoria where there is no longer any ongoing process for legislative improvements to jury directions. A recent survey of the different approaches used in Victoria and England and Wales to address juror comprehension problems showed that courts in England and Wales have much greater capacity and responsibility for improving jury directions than Victoria's courts.[113] The approach in

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[108] Elizabeth Najdovski-Terziovski, Jonathan Clough and James R P Ogloff, 'In Your Own Words: A Survey of Judicial Attitudes to Jury Communication' (2008) 18 *Journal of Judicial Administration* 65, 82.

[109] Jane Goodman-Delahunty, Natalie Martschuk and Mark Nolan, 'Memory Science in the Pell appeals: Impossibility, Timing, Inconsistencies' (2020) 44 *Criminal Law Journal* 232.

[110] Greg Byrne, 'The High Court in *Pell v The Queen:* An 'Unreasonable' Review of the Jury's Decision' (2020) 45(4) *Alternative Law Journal* 235.

[111] Fredric M Wolf, 'Lessons to be Learned from Evidence-based Medicine: Practice and Promise of Evidence-based Medicine and Evidence-based Education' (2000) 22(3) *Medical Teacher* 251, 253. See also Adrian Cherney and Brian Head, 'Evidence-based Policy and Practice: Key Challenges for Improvement' (2010) 45(4) *Australian Journal of Social Issues* 509, 512.

[112] Jeffrey J Rachlinski, 'Evidence-based law' (2011) 96 *Cornell Law Review* 901, 902.

[113] Chris Maxwell and Greg Byrne, 'Making Trials Work for Juries: Pathways to Simplification' (2020) (11) *Criminal Law Review* 1034, 1038–42.

England and Wales also places more responsibility on the courts to lead cultural change in the courts and profession. When Scotland introduced legislation to address misconceptions, the Cabinet Secretary for Justice said legislation was necessary because 'the courts have not been sufficiently innovative in this area'.[114]

The first way of improving non-legislative approaches to jury directions and jury guidance generally would be to provide the JAC with the power to develop authoritative jury directions. This power would be of limited application, if any, where the content of directions is governed by the substantive law of offences and defences, or evidence laws. However, this power would be helpful in addressing misconceptions that arise in sexual offence and family violence cases. Jury directions on the differences in a complainant's account[115] could have been developed pursuant to this kind of power. They did not change any existing jury directions, or at least did not require any directions to be abolished.

This process would also overcome limitations in existing processes where a judge tries to inform the jury about research concerning a misconception. For example, Judge Sexton directed a jury about research concerning the memory of children and their honesty.[116] In the absence of expert evidence being called in the trial, Judge Sexton was not permitted to refer to such research when directing the jury. However, in a subsequent case, Judge Hampel was able to make a comment about children's reaction to sexual abuse.[117] The Court of Appeal accepted this comment because a jury is free to reject a judge's comment — even if the comment is based on incontrovertible evidence. However, that leaves open the possibility that jurors may reject a comment that seeks to debunk a misconception precisely because jurors hold that misconception. This proposed new power would enable new directions to be developed, based on evidence, that jurors must follow. Of course, directions of this kind must only challenge the misconception and must leave the task of evaluating the evidence to the jury. This is the approach that has been used in the *Jury Directions Act*.

Directions of this kind would be like the power of the Sentencing Advisory Council in the UK to issue sentencing guidelines. In England and Wales, a court must follow any relevant sentencing guidelines when sentencing a person.[118] This would provide the authority for judges to give directions that have been developed in this way.

Because of the proposed composition of the JAC, it would have the necessary expertise to develop authoritative jury directions, that are evidence-based and developed following consultation. The JAC's jury direction would similarly be a guideline in the sense that a judge would not need to use the precise words in a guideline. However, directions would need to follow the guideline and a judge could not simply refuse to give a direction or give an

[114] Scottish Parliament, *Official Report*, 22 March 2016, 93 (Cabinet Secretary for Justice Michael Matheson).
[115] *Jury Directions Act 2015* (Vic) ss 54A–54D.
[116] *CMG v The Queen* [2011] VSCA 416, 6 [14].
[117] *KRI v The Queen* [2012] VSCA 186.
[118] *Sentencing Act 2020* (UK) s 59(1)(a).

inconsistent direction because they disagreed with the content of the direction. Given the research and consultation process that the JAC should undertake, this should prevail over any views an individual judge may have (eg, about whether jurors do hold misconceptions like the one that is the subject of the guideline). If the JAC has developed a jury direction guideline, a judge would need to give that direction if it is requested by a party unless there were good reasons for not doing so (in accordance with Part 3 of the *Jury Directions Act 2015*).

Parliament could pass legislation abolishing or amending such jury directions if it so desired. The JAC would also need the power to amend or withdraw a guideline (eg, if new evidence suggested there was an error in the initial guideline or that there was a better way of directing the jury on a matter).

While the primary focus will most likely be on jury directions, this power should also extend more broadly to matters that may improve jury guidance so that jurors understand their task. For example, there may be changes to integrated directions, processes for developing factual questions, selecting a foreperson, providing summaries of a case as it progresses and so on that may not involve jury directions. Whether such matters are best dealt with through this power or through court rules or practice directions will need to be determined in each case. However, the evidence supporting such changes will most likely come from the JAC.

### *(h) Provide the Court of Appeal with the JAC's written views on juror comprehension issues as requested*

As discussed above, individual court cases have proved to be inappropriate vehicles for improving jury directions based on social science research. However, there may be situations where the Court of Appeal would be assisted by the expertise of the JAC. This might be either in an appeal against conviction or a Director's reference. This could be based on the existing power of the Court of Appeal to give or review a guideline judgment for the purposes of sentencing.[119] This provides the second way of improving non-legislative approaches to jury directions and jury guidance more generally.

For example, the Court of Appeal may wish to provide a guideline judgment on the kinds of directions which should be given, or not given, about reasonable belief, free agreement, consent negating factors, misconceptions in sexual offence cases etc. The Court of Appeal may wish to give such a judgment even if it is not necessary to do so to determine an appeal (as can be done with a sentencing guideline). This power would be in addition to the power of the JAC to issue guidelines concerning the types of guidance/directions that judges should provide.

As Victoria's Court of Appeal said in relation to guideline judgments for sentencing:

[119] *Sentencing Act 1991* (Vic) s 6AB.

> The great advantage of a guideline judgment is that it enables this Court to deal systematically and comprehensively with a particular topic or topics relevant to sentencing, rather than being confined to the questions raised by particular appeals.[120]

The Court went on to say that a guideline judgment can promote 'consistency and public confidence in the sentencing process'.[121] Promoting consistency and public confidence in how the courts guide juries with their task would similarly be a goal of a guideline judgment involving jury issues.

In addition to sexual offence specific matters, this power could be used to provide further support for the use of integrated directions. There is good evidence that integrated directions assist jurors with their task.[122] However, the uptake of integrated directions has been slow. As discussed above there are several reasons for this. Endorsement from the Court of Appeal, as occurred in England and Wales,[123] may provide further impetus for their use once the necessary practical support is also provided to trial judges.[124]

## 8. JAC and the Juries Commissioner and the Judicial College

Victoria has a Juries Commissioner. The Commissioner is responsible for managing the jury system. This is a significant administrative task. It is quite different from the role of the JAC. The JAC should not have any managerial oversight of the Commissioner's role. The JAC may, however, make recommendations that the Commissioner would need to implement or administer.

The Judicial College plays an important role in the professional development of judges and in developing resources like the Criminal Charge Book. The research and resources of the JAC will be of significant assistance to the Judicial College. The JAC would be able to conduct research on jurors (in actual or simulated jury research) that will provide information about the effectiveness of the model directions used in the Charge Book. Research generally about communicating with jurors will also be valuable o the College. The existence of the JAC would not change the role of the College but would provide valuable information to the College to assist the College in achieving its objectives.

## 9. Conclusion

Establishing an independent Juries Advisory Council should make a significant difference to trials generally, and especially for sexual offence trials as they often present very difficult issues

[120] *Boulton v The Queen* [2014] VSCA 342, [26].

[121] *Boulton v The Queen* [2014] VSCA 342, [40].

[122] See, eg, Jonathan Clough et al, 'The Judge as Cartographer and Guide: The Role of Fact-based Directions in Improving Juror Comprehension' (2018) 42(5) *Criminal Law Journal* 278.

[123] *R v Atta-Dankwa* [2018] 2 Cr App R 16.

[124] This was mentioned recently by the Court of Appeal: *Charlie Thomas Star v The Queen* [2020] VSCA 331, [42].

for juries to determine. It is almost twenty years since the Sentencing Advisory Council was established in Victoria. It is now difficult to conceive of our system without it. The same is likely for a JAC after twenty years of operation.

Juries are vital to our criminal justice system, but they must deliver justice in sexual offence cases. There is much we could learn about jury decision-making and much that the justice system could do to help jurors with their difficult task. Rather than abolishing trial by jury for some or all offences, we should face these problems and improve our jury system.

A Juries Advisory Council would provide the mechanism through which substantial evidence-based improvements can be made to jury trials. Given the number of sexual offence trials, and the challenges they present, it is essential that we undertake this process. Critical to this process will be harnessing information from different disciplines, being proactive in identifying problems, developing innovative solutions, and supporting judges and practitioners to change practices in ways that assist jurors. This evidence-informed process must consider issues from the jury's perspective and ask what they need to determine the issues in a trial. A Juries Advisory Council could therefore improve sexual offence trials and public confidence in sexual offence trials (and trials generally).

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