The Australasian Institute of
Judicial Administration Incorporated

The Jury Project 10 Years On – Practices of Australian and New Zealand Judges

Professor Jonathan Clough
Faculty of Law, Monash University

Dr Ben Spivak
Lecturer, Centre for Forensic Behavioural Science
Swinburne University of Technology

Professor James R. P. Ogloff AM
Director, Centre for Forensic Behavioural Science
Swinburne University of Technology

Dr Janet Ruffles
Research Fellow, Centre for Forensic Behavioural Science
Swinburne University of Technology

Professor Jane Goodman-Delahunty
School of Psychology
Charles Sturt University

Dr Warren Young
Independent Researcher

The Secretariat
The Australasian Institute of Judicial Administration Incorporated
Ground floor, 555 Lonsdale Street
Melbourne Victoria 3000
Australia

Telephone: (61 3) 9600 1311
Facsimile: (61 3) 9606 0366

Website: www.aija.org.au

The Australasian Institute of Judicial Administration Incorporated ("AIJA") is an incorporated association affiliated with Monash University. Its main functions are the conduct of professional skills courses and seminars for judicial officers and others involved in the administration of the justice system, research into various aspects of judicial administration and the collection and dissemination of information on judicial administration. Its members include judges, magistrates, legal practitioners, court administrators, academic lawyers and other individuals and organisations interested in improving the operation of the justice system.

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Preface

The past 10 years have seen an unprecedented level of awareness surrounding the challenges faced by jurors in understanding judicial instructions. Although jury trials represent a small percentage of criminal prosecutions, they are still reserved for the most serious criminal offences and the ability of jurors to perform their role effectively is a fundamental component of our system of justice.

The increased awareness of these issues is, in part, due to the early work of the AIJA's Jury Charge Committee. Formed in 2003 and chaired by the Hon Justice Geoffrey Eames of the Victorian Court of Appeal, the Committee included experienced trial judges, academics and law reform experts. Initially focused on approaches to directing juries, the work of the Committee evolved to look more generally at the nature of communication between judge and jury.

The Committee's first major research project was a survey of criminal trial judges in Australia and New Zealand. Published in 2006, this survey was the first in Australasia to provide a comprehensive review of judicial practice in communicating with juries. Since that time, reform in this area has expanded considerably, supported by empirical research carried out by law reform bodies and academic researchers. It is therefore timely to consider what impact these reforms have had on judicial practice. When members of the original research team approached the AIJA with the idea of updating the survey it received the enthusiastic support of the AIJA Research Committee, formerly chaired by the Hon Justice Robert Mazza, Court of Appeal, Western Australia, and currently chaired by the Hon Justice Malcolm Blue, Supreme Court of South Australia.

On behalf of the AIJA, I would like to thank the researchers, Professor Jonathan Clough, Faculty of Law, Monash University, Dr Ben Spivak, Lecturer, Centre for Forensic Behavioural Science, Swinburne University of Technology, Professor James R. P. Ogloff AM, Director, Centre for Forensic Behavioural Science, Swinburne University of Technology, Dr Janet Ruffles, Research Fellow, Centre for Forensic Behavioural Science, Swinburne University of Technology, Professor Jane Goodman-Delahunty, School of Psychology, Charles Sturt University, and Dr Warren Young.

The researchers are to be congratulated on producing a detailed and comprehensive report, giving important insights into the actual practices of judges. Supported by empirical data, it allows for a comparative analysis between jurisdictions, providing judges, policy makers, and scholars with a deeper understanding of judicial communication with jurors.

Amongst the many changes that have occurred in the last 10 years, the researchers note that there is still considerable intra-curial and inter-jurisdictional variation in practice. While this is to some extent to be expected, it is a reminder of the important role for the AIJA and other bodies in ensuring ongoing communication between courts and judges as we strive to ensure that our communication with juries is at its most effective.

The Honourable Justice Robert Gotterson AO
Court of Appeal
Supreme Court of Queensland
President, Australasian Institute of Judicial Administration

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Correspondence should be addressed to:

Professor Jonathan Clough
Faculty of Law, Monash University
15 Ancora Imparo Way
Clayton 3800
Victoria, Australia
jonathan.clough@monash.edu

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INTRODUCTION

In 2002, the Australasian Institute of Judicial Administration ('AIJA') established an Advisory Committee on Jury Charges which comprised experienced trial judges from Australia and New Zealand, as well as representatives of law reform bodies and distinguished researchers.[1] The brief of the Committee was to systematically obtain information about current charge practices in Australia and New Zealand, and to address any shortcomings in the processes identified.[2] As part of its work, in 2006 the Committee undertook a survey of judges who conduct criminal jury trials in Australia and New Zealand to obtain information concerning their practices in communicating with juries.[3] This survey was a first in Australasia and provided a comprehensive review of judicial practice on this crucial aspect of trial management.

Since that time, awareness amongst judges,[4] law reform bodies,[5] and academics[6] of the challenges faced by jurors in comprehending and applying judicial instructions has only increased. Accompanying this awareness has been a steady process of legal reform, with judges and courts adopting new procedures and modifying existing practices in an attempt to facilitate effective communication with juries. Victoria, for example, has undergone a sustained period of reform culminating in the enactment of the *Jury Directions Act 2013* and the *Jury Directions Act 2015*.[7]

However, as identified in the previous report, the process of reform is often *ad hoc*, occurring at the level of individual judges and courts, rather than on a whole-of-jurisdiction basis. One of the crucial lessons in this area has been the importance of sharing best practice amongst judicial officers. Just over 10 years since the publication of the first report, a follow-up survey was administered to capture current practices in judicial communication with jurors, and to identify any trends that have emerged in the interim. It is hoped that this report of the survey findings will be a useful resource for judicial officers, policy makers and researchers to gain an understanding of what is occurring in the field in actual criminal trials, which will in turn inform further improvements in judicial practice across Australia and New Zealand.

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[1] James RP Ogloff, Jonathan Clough, Jane Goodman Delahunty, and Warren Young, *The Jury Project: Stage 1 – A Survey of Australian and New Zealand Judges*, (Australasian Institute of Judicial Administration, 2006) p. 1.
[2] Ibid.
[3] Ibid.
[4] Some extra-curial examples include Judge Nic Madge, 'Summing Up-A Judge's Perspective' (2006) *Criminal Law Review* 817; Justice James Wood, 'Jury Directions' (2007) 16 *Journal of Judicial Administration* 151; the Hon Justice Geoffrey Eames, 'Towards a better direction – better communication with jurors (2003) 24 *Australian Bar Review* 35; Lord Justice Moses, 'Summing Down the Summing-up' (Speech delivered at the Annual Law Reform Lecture. Inner Temple, 23 November 2010); Justice Marcia Neave, 'Jury Directions in Criminal Trials - Legal Fiction or the Power of Magical Thinking' (Paper presented at the Supreme and Federal Court Judges' Conference, Melbourne, 23 January 2012).
[5] Lord Justice Auld, *A Review of the Criminal Courts of England and Wales*, Ministry of Justice (2001); New Zealand Law Commission, *Juries in Criminal Trials*, Report No 69 (2001); Queensland Law Reform Commission, *A Review of Jury Directions*, Report No 66 (2009); Victorian Law Reform Commission, *Jury Directions*, Final Report (2009); New South Wales Law Reform Commission, *Jury Directions*, Report No 136 (2012).
[6] Edward Griew, 'Summing Up the Law' [1989] *Criminal Law Review* 768; Cheryl Thomas, *Are Juries Fair?*, Ministry of Justice Research Series 1/10 (2010); Dan Simon, 'More Problems with Criminal Trials: The Limited Effectiveness of Legal Mechanisms' (2012) 75(2) *Law and Contemporary Problems* 167.
[7] Most recently amended by the *Jury Directions and Other Acts Amendment Act* 2017.

THE RESEARCH

The Survey Instrument

In a departure from the previous survey methodology, this survey was conducted electronically. A copy of the electronic survey questionnaire that was circulated to judges can be accessed here.[8] An electronic survey was preferable for a number of reasons. First, it facilitated more efficient collection and collation of data. Second, it allowed questions to be tailored to the participants' answers. For example, it allowed questions to be asked of Victorian judges in relation to the *Jury Directions Act 2015* (Vic) which were not relevant to other jurisdictions. Third, it facilitated the provision by judges of sample materials by simply uploading files.

The researchers had some concern that an electronic survey might lead to a decrease in the response rate, and this may have been a factor in the lower level of responses received relative to the previous survey. This issue is discussed further below. The substantial number of judges who did respond reported no difficulty completing the survey electronically.

To compare practices over time, the survey content was based largely on the previous survey, and was organised into four parts:

1. Opening remarks and directions during the trial;
2. Counsel openings;
3. Summing up and directing the jury; and
4. Communication with the jury.

There were also some additions to the previous survey form, such as a section specifically related to the *Jury Directions Act 2015* (Vic). Relatively minor changes were made to improve the clarity of the instrument and the quality of the information collected. Where relevant, these are discussed with the associated responses.

As in the previous survey questionnaire, limited demographic information was collected. Information specific to individual judges was limited to jurisdiction, court, years on the bench, and profession before appointment to the bench.

With the assistance of the AIJA, the researchers contacted the heads of jurisdiction, seeking permission to circulate the surveys to judges presiding over criminal trials in their respective courts. Once permission was received, the judges' chambers were contacted via email, and a link to the survey was provided. In some cases, particularly in the smaller jurisdictions, the survey was circulated by the head of jurisdiction. In the majority of cases, contact details were either provided by the court or were publicly available, and judges were contacted by the researchers.

Responses

With the assistance of court staff, the researchers calculated the approximate number of criminal trial judges across all jurisdictions to be 407. In total, 128 surveys were completed (AU = 94, NZ = 34). This represented a response rate of 31%. Response rates for individual courts are displayed in Table 1.

[8] https://app.formassembly.com/forms/test/448331.

Table 1

Surveys completed and response rates by jurisdiction

Court	Estimated number of criminal trial judges	Number of surveys completed	Percentage of surveys completed
ACT Supreme Court	5	3	60
Northern Territory Supreme Court	6	3	50
NSW Supreme Court	23	9	39
NSW District Court	60	15	22
Queensland Supreme Court	20	6	22
Queensland District Court	30	6	15
Supreme Court of South Australia	11	1	9
District Court of South Australia	19	7	37
Supreme Court of Tasmania	6	1	17
Supreme Court of Victoria	8	3	38
County Court of Victoria	44	20	45
Supreme Court of Western Australia	10	6	30
District Court of Western Australia	27	14	52
High Court of New Zealand	38	13	34
District Court of New Zealand	100	21	21
Total	407	128	31

Note: Percentages refer to total number of criminal trial judges in each court.

This response rate represented a decrease from that obtained in the previous survey. On that occasion, of approximately 310 surveys distributed[9] (AU = 215, NZ = 95), 185 were completed (AU = 136, NZ = 49), representing an overall response rate of 68% (AU = 63%, NZ = 52%).

A number of possible reasons may account for the decrease. First, some judges may have had difficulty with an online survey. Second, in many cases the link was provided via the judge's associate, providing an additional step in communication with judges. Third, when the initial survey was conducted, these issues were relatively new and perhaps more topical. Over subsequent years,

[9] The number of surveys was based on an estimate by members of the Project Committee that approximately 310 judges were eligible to participate; Ogloff et al., above n 1, p. 9. However, this figure did not take into account that some judges may have been on leave or in retirement when the survey questionnaires were distributed.

judges have been surveyed much more frequently, by both researchers and the courts themselves. Given competing demands on their time, it may be that judges were less willing to participate. Finally, some judges may not see the value in research of this type. Although the response rate for the present survey was lower, it is still a respectable rate and represents the views and experience of approximately thirty percent of Australian and New Zealand criminal trial judges.

The experience of participants is summarised in Table 2. Overall, the average number of years sitting was 8.7, with similar averages in both jurisdictions (AU = 9.1, NZ = 7.9). Participants from the County/District Courts had, on average, been sitting for slightly longer (9.3 years) than participants from the Supreme/High Courts (7.8 years).

Table 2

Average number of years sitting as a judge

Jurisdiction	Mean years
ACT	10.8
New South Wales	7.8
Northern Territory	4.8
Queensland	11.3
South Australia	9.1
Tasmania	3.0
Victoria	11.8
Western Australia	6.5
Australia	9.1
New Zealand	7.9
County/District	9.3
Supreme/High	7.8
Total	8.7

As shown in Table 3, the vast majority of judges had been barristers (67.2%, 86/128) or barristers and solicitors (16.4%, 21/128) prior to appointment to the bench, with 5.5% (7/128) solicitors and 7% (9/128) magistrates. Nearly 4.0% (3.9%, 5/128) nominated ‘other’. Almost 30% had practised primarily in the civil jurisdiction before appointment, 42.2% in criminal, and 15.6% practising in both. (11.7% did not answer this question).

Table 3

Experience prior to appointment as a judge

Occupation	Number	Percent
Barrister	86	67.2
Barrister and solicitor	21	16.4
Solicitor	7	5.5
Magistrate	9	7.0
Other	5	3.9
Total	128	100.0

The Survey Questionnaire

As noted above, the survey questionnaire consisted of four sections. In the first section, questions ranged from obtaining information about the areas that judges cover with the jury in their opening remarks, to directions given (if any) during the trial. The second part of the survey included questions in relation to prosecution and defence opening addresses, while Part Three sought information about the judges' practices when summing up and instructing the jury. This included questions relating to the availability and use of bench books, the extent to which judges provide any written assistance to the jury as part of the summing up, and estimates of how long, on average, they would instruct the jury. Finally, the fourth part of the survey asked judges about their specific practices when communicating with the jury, including dealing with questions from the jury, concepts that judges believe jurors have difficulty understanding, and what factors enhance/impede good communication with jurors.

The survey included both open-ended and closed (forced-choice) questions. While frequencies of responses are obviously easy to compare between jurisdictions, natural language comments provide greater insights into judicial perspectives. Researchers coded the open-ended comments to gain a more accurate understanding of participants' responses and to facilitate comparison. Finally, judges were also asked to provide examples of written material that they used in communicating with jurors. This request was a particular strength of the online survey, as many judges uploaded examples of materials that they considered of assistance in their communication with jurors.

It is important to note that the results of the survey are presented without reference to theories and empirical findings from the social sciences. There are two primary reasons for this. First, as mentioned in the introduction, the survey was conceived of as a broad information gathering exercise to examine whether there had been changes to judicial perceptions and practices over ten years after the original survey. As a result, information gathering was not driven by any scientific hypotheses. Second, the results presented aim to provide an accessible overview of the survey findings. To do justice to the vast canon of scholarly literature on all of the topics the survey touches on would be a monumental task, more suited to a large book than a technical document.

Given the nature and purpose of the report, we have not employed standard tests of statistical significance that are commonly employed in the social sciences. The purpose of the report is to provide a purely descriptive overview of the survey results and to provide some contrast with the findings obtained in the original survey now more than a decade earlier.

RESULTS AND DISCUSSION

In contrast to the previous survey, this survey was administered in all Australian jurisdictions, including the ACT and the Northern Territory. Because of the relatively low response rates in individual Australian jurisdictions, the results are generally summarised across Australia and compared with results for New Zealand. Where responses from individual jurisdictions appear to be noteworthy, this finding is identified in reporting the results. The low response rates in some jurisdictions influenced the approach taken to reporting frequencies of responses. When reporting overall trends or results comparing Australia and New Zealand, proportions (percentages) were reported for ease of understanding. However, when comparing individual jurisdictions, the reporting of proportions could be misleading where, for example, there were only one or two responses from the jurisdiction. For this reason, the number of responses rather than proportions are specified for comparisons of individual jurisdictions.

Another issue that informed the approach used in presenting results concerned the treatment of missing responses. The proportion of missing responses to individual questions ranged between 0% and 23.4%. In order to give the clearest picture of the results, the proportion of responses to each question is accompanied by a note specifying the number of responses on which the percentages are based.

The organisation of the results broadly follows the same sequence as the survey questions. Response frequencies are presented in tabular format, followed by examples of judges' responses within each section. This approach provides a comprehensive presentation of the responses received and the judges' comments and perceptions.

Opening Remarks and Directions during the Trial

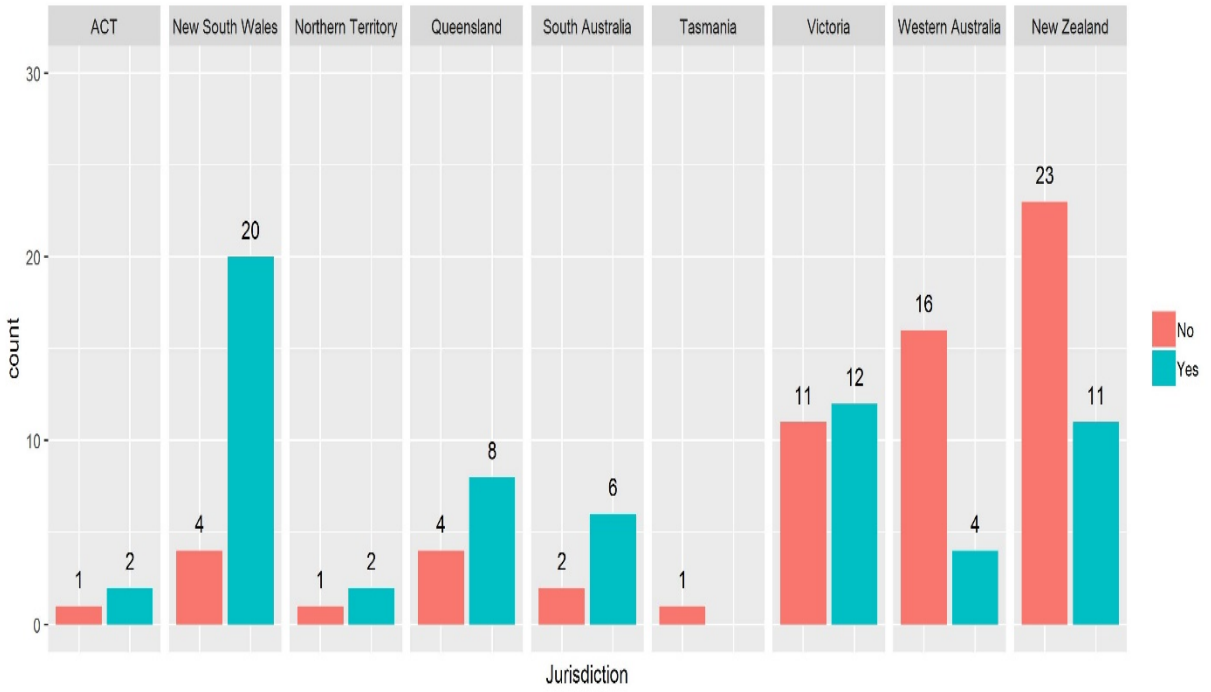
The trial judge's opening remarks are crucial in providing the jury with important information to complete their task. They set the tone for what is to follow, and establish rapport with jurors. To a lesser extent, they may be used by the trial judge to assist the jury in understanding the legal issues that they will be required to address. Although the latter are typically seen as the responsibility of counsel, the absence of an organising framework is one of the challenges faced by jurors in understanding the material presented to them. Judges may play a role, together with counsel, in providing some structure to the evidence that is to follow.

The material covered in opening remarks may also be influenced by the extent to which such information is presented to jurors during their induction process. As was noted in the 2006 report, the inclusion in the jury induction of standard matters, not specific to the trial, could reduce the length of the judge's opening remarks, and provides an opportunity for the jury to absorb important information in a less intimidating atmosphere.[10]

Jury Orientation

Judges were first asked whether they allow the jury settling-in time before the trial commences. Overall, judges were evenly split on this issue, with 49.2% (63/128) answering 'no', and 51.8% (65/128) answering 'yes'. Broken down by jurisdiction, only one-third of New Zealand judges (32.4%, 11/32) but almost three-fifths (57.4%, 54/128) of Australian judges allow the jury some settling-in time before the trial commences. This finding is different from the previous report, where almost two-fifths of the judges in New Zealand (43%), and just over one-quarter of those in Australia (29%), allowed some settling-in time.[11] Responses across jurisdictions are displayed in Figure 1.

[10] Ogloff et al., above n 1, p. 13.
[11] Ibid, p. 22.



Note: n = 128.

Figure 1. Number of judges who permit settling-in time, by jurisdiction

The amount of time allowed for settling-in is similar in both jurisdictions with an average of 23 minutes in Australia, and 20 minutes in New Zealand. Between courts, the average is also similar at 21 minutes in the County/District and 24 minutes in the Supreme/High Courts. The amount of time given is, however, highly variable in both jurisdictions, from as little as 5 minutes to a full hour

As noted in the previous report, whether a break is taken to afford jurors time to settle in can depend on when empanelment is completed, and it may be that other aspects of the trial process provide some settling-in time by default. For example, the need to address legal matters in the absence of the jury or the process of selecting a jury foreperson may fulfil the same function.[12]

Procedural matters

1. Burden/onus of proof/presumption of innocence

Almost all judges always provide information to the jury during their opening remarks about the burden (93.5%, 115/123) and standard (93.4%, 114/122) of proof. There is little difference on this issue between jurisdictions, with over 90% of Australian and New Zealand judges always covering these issues. This finding, however, revealed a notable increase over the previous survey findings where 65 and 66% of Australian judges discussed the burden and standard of proof respectively, while 74% of New Zealand judges discussed the burden and standard of proof in their opening remarks.[13]

In the present survey there was some difference in discussion of the presumption of innocence. Overall, 93.3% (112/120) of judges always raised this issue in their opening remarks, but this was slightly less common in New Zealand (89.7%, 26/29) than Australia (94.5%, 86/91). Overall, only

[12] Ibid.
[13] Ibid, p. 21.

3.3% of judges would never discuss the burden (4/123) and standard of proof (4/122) during their opening remarks, while only 2.5% (3/120) would never discuss the presumption of innocence. For the remainder, it would depend on the nature of the trial. Again, this was an increase on the previous survey findings, where 63.0% of Australian and 61.0% of New Zealand judges would discuss the presumption of innocence during their opening remarks.

2. Interruptions by objections over matters of law and procedure

Most typically, jurors retire to the jury room while matters of law and procedure are resolved, and it is usual practice to advise jurors that this is routine and that they should not infer anything from it. It is therefore unsurprising that 88.8% (111/125) of judges overall (AU = 87.9%, 80/91; NZ = 91.2%, 31/34) always discuss with the jury the fact that interruptions will occur because of objections over matters of law and procedure. As noted in the previous report, given the importance of such an explanation and the fact that it is relatively standard in form, it may be useful to determine whether it is, or should be, given during the jury induction process.[14]

3. The need to keep an open mind.

Almost all judges in New Zealand (94.1%, 32/34) and an overwhelming majority (87.1%, 81/93) in Australia, always inform jurors of the need to keep an open mind during the trial.

4. What to do in the event of disputation within the jury.

In their opening remarks it was relatively rare for judges always to instruct jurors what to do in the event of disputation within the jury (AU = 14.0%, 12/86; NZ = 6.3%, 2/32; overall = 11.9%, 14/118). Tellingly, 81.4% (96/118) of judges (AU = 79.1%, 68/86; NZ = 87.5%, 28/32) would never mention these matters in their opening remarks. This finding is consistent with the previous survey findings when only 17.0% of Australian judges, and 4.0% of New Zealand judges, mentioned this in their opening remarks.[15] More typically, matters relating to disputes are addressed only once they arise, or towards the end of the trial after final deliberations have commenced.[16]

5. Prohibitions on seeking/discussing certain information.

At the time of the previous survey, concerns about access to social media and materials online were in their relative infancy. For example, beyond the general admonition not to talk to non-jurors about the case, relatively few judges explicitly told jurors not to access newspapers (AU = 10%; NZ =12%), not to access the Internet (AU = 35%; NZ = 18%) and/or not to consult any books (AU = 11%; NZ = 6%).[17]

Since that time, awareness by judges of the changing nature of the jury and of the dangers associated with ready access to material on the Internet has increased.[18] This is reflected in the fact that now virtually all judges (99.2%, 126/127) always inform jurors that they may not seek information outside of the trial process. In particular, this includes prohibitions on discussing the case with friends or family (100.0%, 125/125) and not accessing the Internet (97.6%, 122/125) or social media (95.2%, 119/125) in relation to the case. Less common is a prohibition against discussing the case with court staff, with 77.2% (95/123) of judges raising this in their opening remarks, the percentage in Australia being higher (82.4%, 75/92) than in New Zealand (62.5%, 20/32).

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[14] Ibid, p. 13. Also see Elizabeth Najdovski-Terziovski, James Ogloff, Jonathan Clough, and Rudy Monteleone, 'What are we doing here? An analysis of juror orientation programs' (2008) 92 *Judicature* 70, 73.
[15] Ogloff et al., above n 1, p. 12.
[16] See p. 47.
[17] Ogloff et al., above n 1, p. 19.
[18] See, for example, Jacqui Horan, *Juries in the 21st Century* (Federation Press, 2012).

6. Information about the deliberation process

More than one-third (36.4%, 44/121) of judges provide information about the deliberation process at this early stage (AU = 38.5%, 35/91; NZ = 30.0%, 9/30). While some judges would provide information on deliberation depending on the case (15.7%, 19/21), a large number of judges (AU = 46.2%, 42/91; NZ = 53.3%, 16/30) would never discuss it in their opening remarks.

7. The role of the jury

The vast majority of judges (91.0%, 111/122) in both Australia (93.3%, 84/90) and New Zealand (84.4%, 27/32) always discuss the role of the jury in their opening remarks. Previous survey findings yielded even higher numbers: (AU = 93%, NZ = 100%).[19]

8. Procedure for submitting questions to the court

It is common practice for judges to explain to jurors that if they wish to ask a question, they must communicate it to the trial judge, preferably in writing, via the foreperson/speaker or through the tipstaff or equivalent court officer. The trial judge will then determine how best to deal with the question.[20]

As discussed in the previous report, judges often experience a tension between wanting jurors to feel included in the process and to ask questions to seek clarification, and not wanting jurors to become too actively involved in questioning a witness.[21] Previous survey findings were that just over half (54%) of Australian judges, and only 39% of New Zealand judges discussed in their opening remarks the process for submitting questions to the court.[22] In the present survey, overall 84.0% (105/125) always discuss this issue with the jury, while 9.6% (12/125) never do. However, although the number of New Zealand judges who at least sometimes discuss these matters has increased from 39% to 70.6% (24/34), in Australia the increase is even greater, from 54% to 97.8% (89/91). While 29.4% (10/34) of New Zealand judges said they would never discuss this issue with jurors during their opening remarks, the equivalent result in Australia was only 2.2% (2/91). This finding appears consistent with an ongoing trend towards facilitating greater involvement by the jury in the trial process, while not altering the nature of the trial by 'drawing the jury into the process of questioning'.[23]

9. Access to the trial transcript

At the time of the previous survey there was considerable debate amongst Australian judges as to whether jurors should be given access to the transcript of evidence. Despite common law and legislative authority to support the practice, it was a highly controversial issue.[24] Virtually all judges in New Zealand (88%) but only 40% of Australian judges discussed with the jury whether they would have access to the trial transcripts. As one Australian judge put it, 'Don't mention the "t" word.'[25]

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[19] Ogloff et al., above n 1, p. 46.
[20] This procedure is consistent with authority relating to the jury's right to question witnesses: *Lo Presti v R* [1992] 1 VR 696 at 702 per Crockett J for the Court. Special leave to appeal to the High Court refused: *Lo Presti v R* (1994) 68 ALJR 477.
[21] Ogloff et al., above n 1, p. 17. See, for example, the comments in *R v Parata* [2002] BCL 103 at [18]-[19] per Doogue J for the Court.
[22] Ogloff et al., above n 1, p. 12.
[23] *Tootle v R* (2017) 94 NSWLR 430, [59] per Simpson JA.
[24] Ogloff et al., above n 1, p. 15.
[25] Ibid.

Responses to this survey revealed that overall, approximately three-quarters (74.0%, 91/123) of judges always discuss access to the trial transcript with the jury, with more equivalence between the two jurisdictions (AU = 71.4%, 65/91; NZ = 81.3%, 26/32). In Australia, close to 20% of judges (17.6%, 19/91) never discuss access to transcript with the jury, while in New Zealand the proportion is closer to 10% (9.4%, 3/32).

10. Permission to take notes during the trial.

As with the previous survey findings, the vast majority (90.3%, 112/124) of judges specifically discuss the taking of notes during their opening remarks.[26] However, there is a difference on this issue between Australia and New Zealand, with almost all Australian judges (94.6%, 87/92) but relatively fewer New Zealand judges (78.1%, 25/32) discussing the issue. This was a change from the previous findings where 84% of New Zealand judges and 71% of Australian judges discussed this issue. While only 2.2% (2/92) of Australian judges never discuss taking notes in their opening remarks, the figure for New Zealand judges is almost 20% (18.8%, 6/32).

There are a number of possible explanations for judges not specifically mentioning this issue in their opening remarks. Given that it is standard practice for jurors to be provided with note paper and pens, it may be that some judges do not feel it requires specific comment. Equally, the large number of judges mentioning the issue in their opening remarks may do so as part of a template of opening comments, such as those suggested in some bench books.[27]

As noted in the previous report, it is one thing to allow jurors to take notes; it is another to encourage them to do so.[28] The Victorian Charge Book states that '[p]ractices vary as to whether such note-taking is to be encouraged or discouraged.'[29] It may be that some judges emphasise the importance of listening to, and evaluating, the evidence of the witness, rather than actively discouraging note taking.[30]

Information about the nature of the trial

1. Hours of sitting/likely duration of trial/matters of comfort

Almost all judges always discuss hours of sitting (93.8%, 120/128) and likely duration of the trial (95.3%, 122/128), with similar responses in both jurisdictions: hours of sitting (AU = 94.7%, 89/94; NZ = 91.2%, 31/34); likely duration of trial (AU = 94.7%, 89/94; NZ = 97.1%, 33/34). These findings were similar to the previous survey findings where the proportions were: hours of sitting (AU = 85%, NZ = 98%) and likely duration of trial (AU = 87.5%; NZ = 100%). Although a clear majority always discuss matters of comfort (72.0%, 90/125), this practice is more common in Australia (79.4%, 73/92) than in New Zealand (51.5%, 17/33). While these outcomes are similar to those obtained in the previous survey for Australia (72%), they demonstrate a considerable decrease in New Zealand (80%). It is unclear why this would be the case, unless such matters are addressed during the jury induction.

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[26] In the previous survey, 71% of Australian judges, and 84% of New Zealand judges discussed note taking as part of their opening remarks; ibid, p. 12.

[27] See, for example, T*he Queensland Supreme and District Courts Bench Book*, October 2017 no. 4.8 (accessible at http://www.courts.qld.gov.au/court-users/practitioners/benchbooks/supreme-and-district-courts-benchbook).

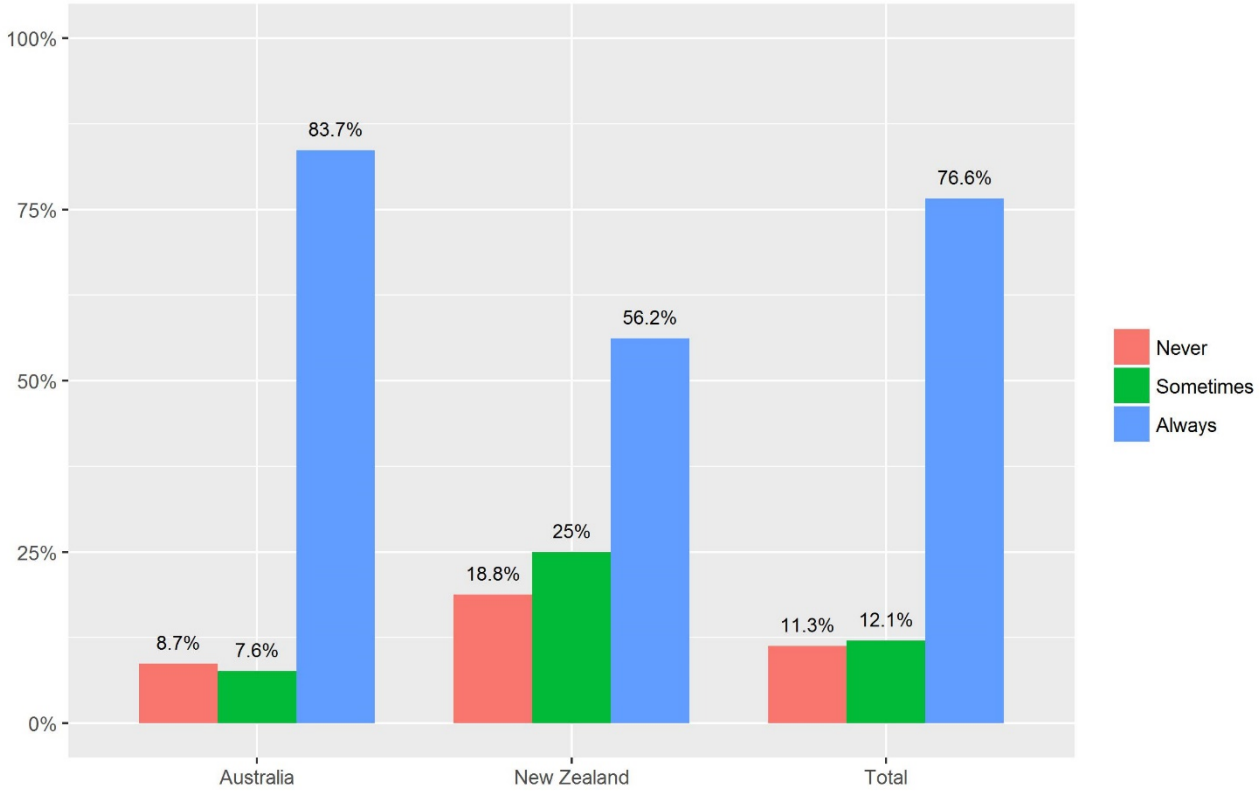
[28] Ogloff et al., above n 1, p. 14.

[29] Judicial College of Victoria, *Victorian Criminal Charge Book* (2018) (accessible at http://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#19193.htm) [1.9.1].

[30] Also see *Queensland Bench Book*, above n 27, [70].

2. Nature of the trial

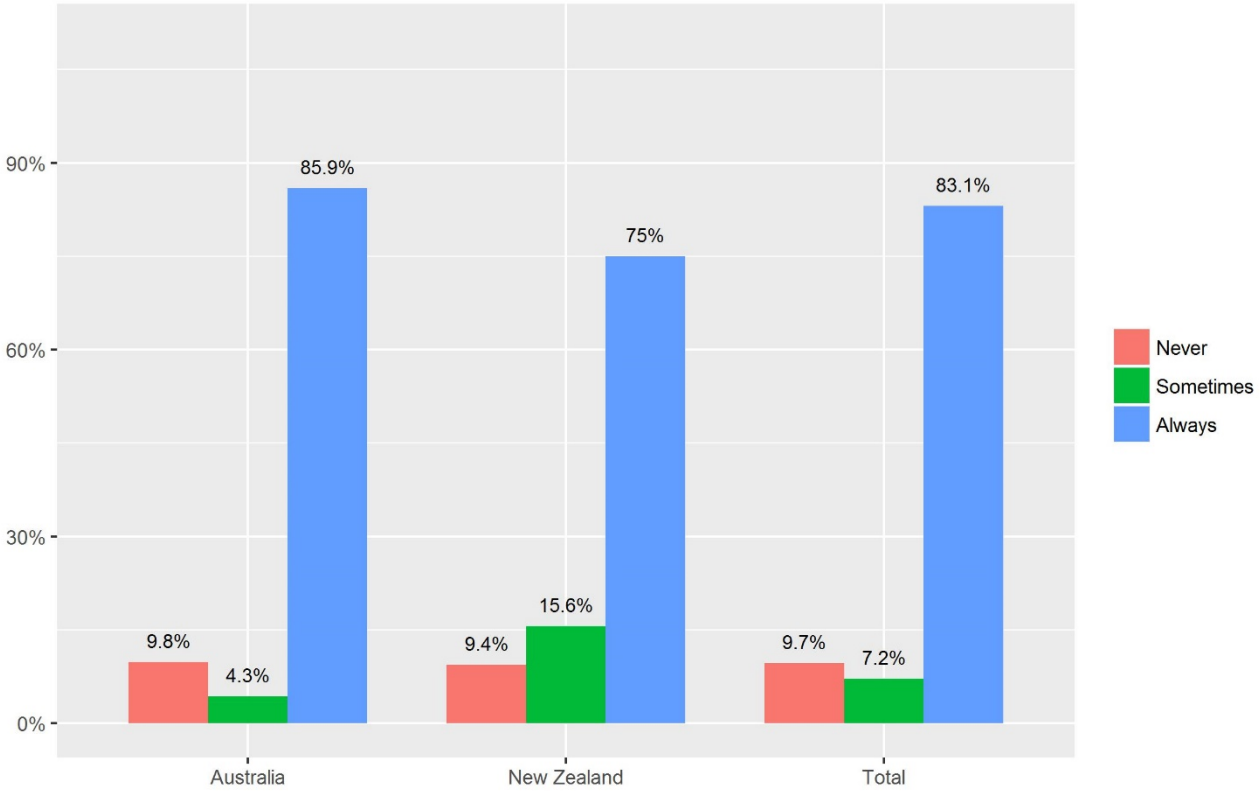
In relation to the specific trial, it is less common for the trial judge always to provide a description of the offences (63.1%, 77/122), with the practice slightly more common in Australia (64.8%, 59/91) than New Zealand (58.1%, 18/31). While overall 76.6% (95/124) of judges always discuss (where applicable) the number of charges, Figure 2 shows that the pattern is quite different between jurisdictions, the practice being more common in Australia than New Zealand.



Note: n = 124, excluding missing responses (3 from Australia, 1 from New Zealand).

Figure 2. Specification of the number of charges in opening remarks, by jurisdiction (percent)

Similarly, as illustrated in Figure 3, 83.1% (103/124) of judges discuss the number of accused persons in their opening remarks where applicable, a practice more common in Australia (85.9%, 79/92) than New Zealand (75.0%, 24/32). In total, 90% of Australian, and 91% of New Zealand judges, always or sometimes discuss, where applicable, the number of accused persons.



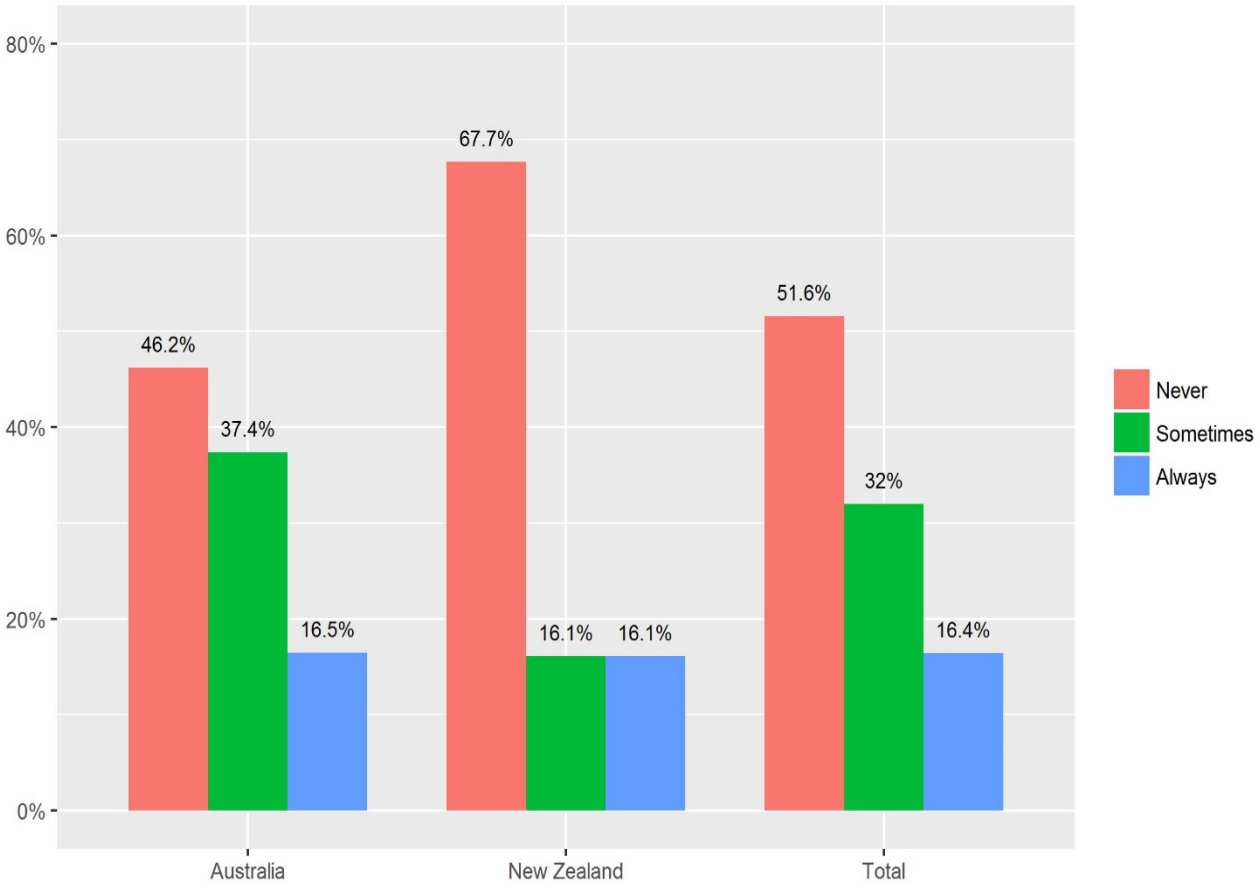
Note: n = 124, excluding missing responses (2 from Australia, 2 from New Zealand)

Figure 3. Specification of the number of accused persons in opening remarks, by jurisdiction (percent)

Description of issues in dispute during opening remarks is much less common, with only 15.5% (19/123) of judges always discussing issues in dispute, 43.8% (54/123) 'sometimes' and 40.7% (50/123) 'never'. The pattern is slightly different between Australia and New Zealand. While almost 20% (19.6%, 18/92) of Australian judges always discuss issues in dispute, only 3.2% (1/31) of New Zealand judges do so. Even where the parties agreed on matters that were hence undisputed, only 8.9% (11/123) of judges always mention this in their opening remarks, 58.5% (72/123) do so sometimes, and almost a third (32.5%, 40/123) never discuss matters not in dispute in their opening remarks. New Zealand judges are less likely to always make mention of matters in dispute (3.2%, 1/31) compared to Australian judges (10.9%, 10/92). In both jurisdictions, approximately one-third (AU = 33.7%, 31/92; NZ = 29.0%, 9/31) never mention undisputed matters to the jury in their opening remarks.

As Figure 4 illustrates, it is relatively rare for Australian judges to give directions on substantive law in their opening remarks, and even more unusual in New Zealand. This finding is in stark contrast to the previous survey results where 45% of judges in New Zealand and 24% of judges in Australia indicated that they discussed the elements of the relevant substantive law with the jury in their opening remarks.[31]

[31] Ogloff et al., above n 1, p. 21.



Note: n = 122, excluding missing responses (3 from Australia, 3 from New Zealand)

Figure 4. Provision of directions on substantive law in opening remarks, by jurisdiction (percent)

Information about foreperson selection

Almost all of the judges (91.3%, 116/127) always inform jurors about the role of the foreperson. This is similar to the previous survey results, where 84% of Australian and 98% of New Zealand judges discussed this issue.[32] Most judges in Australia (79.4%, 73/92) and New Zealand (71.9%, 23/32) always mention that all 12 jurors are eligible to be foreperson.

It is much less common, at least during opening remarks, for judges to provide guidance as to how to go about choosing a foreperson (50.8%, 64/126), although there is a stark contrast between Australian judges, of whom just over a third (37.6%, 35/93) always provide such guidance, compared to 87.9% (29/33) who do so in New Zealand. This pattern reflects the previous survey results showing that only 17% of Australian judges provided guidance on choosing a foreperson, compared to 74% of New Zealand judges.[33]

The type of guidance provided by judges includes comments regarding 'the type of skill and experience it is useful for a foreperson to have' and advising jurors that prior jury experience does not necessarily mean that someone is the best qualified to act as the foreperson. Three judges criticised the use of the term 'foreperson', and two commented that they never use the term because 'it is a silly word that sounds false' and is an 'unfortunate misnomer'. Preferred terms include the gender-neutral terms 'jury representative' and 'spokesperson'. Two judges emphasised that they explain to jurors

[32] Ibid, p. 12.
[33] Ibid.

that the foreperson 'has no authority whatsoever (unlike a foreperson in the workplace)', that 'all jurors have an equal vote' and that the foreperson 'gets no more say in [the] decision and no casting vote'.

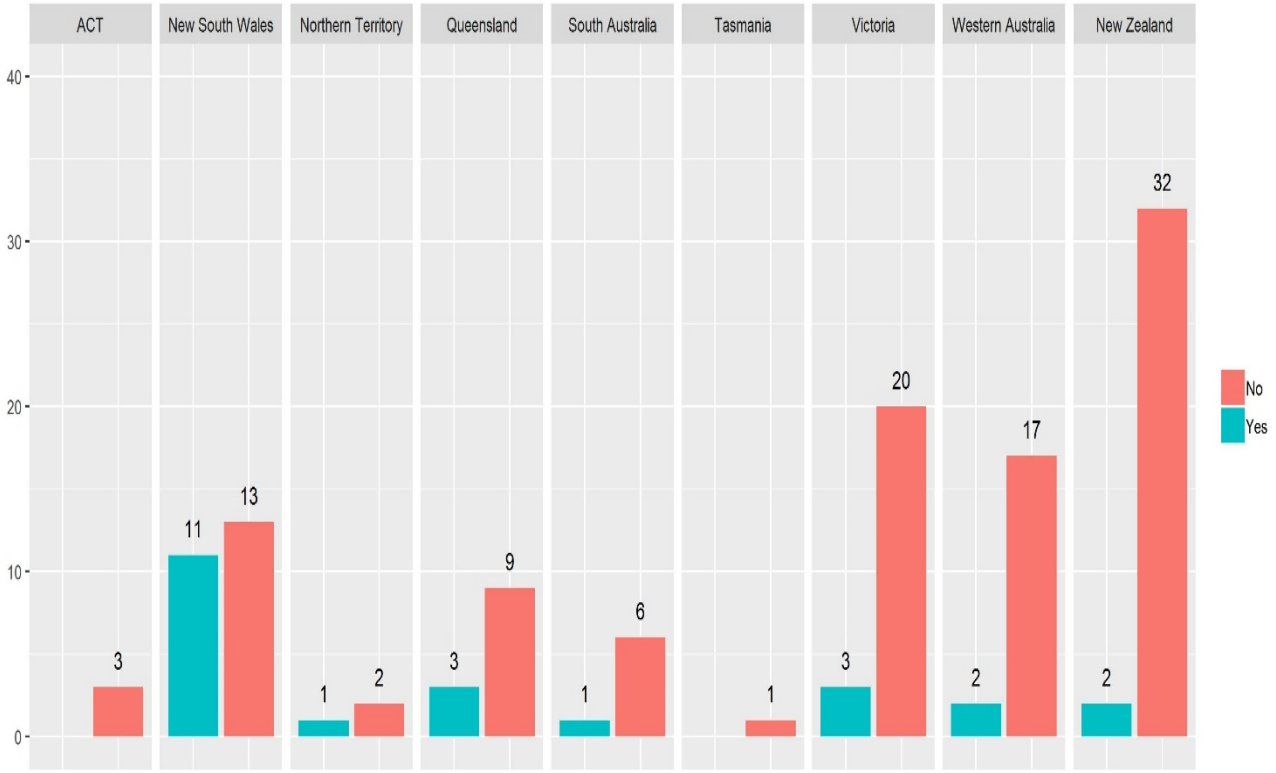
Most Australian judges (77.4%, 72/93) but relatively fewer New Zealand judges (52.9%, 18/34) always mention the point in the trial when jurors should choose a foreperson. New Zealand judges are much more likely to always mention how long the process of selecting a foreperson is likely to take (AU = 15.4%, 14/91; NZ = 46.9%, 15/32). Of those judges who always advise jurors when to select their foreperson, just over a quarter (27.8%) state that they typically advise jurors to do so at the very start of the trial, after empanelment. Almost one-fifth of judges (17.8%) direct jurors to make the selection on the first day of the trial, either after the judge's opening remarks or during the first break, with a further 14.4% stating that they suggest that the decision be made within the first two to three days.

Ten judges advise jurors that there is 'no rush' and that selection should only occur once jurors have taken the time to get to know each other and 'work out the dynamics of the panel'. A further 11 judges stated that they advise jurors that 'they can have as much time as they require'; three judges advise that a foreperson should be selected at any time, provided it is before the jury retire to deliberate, with a further two judges stating that, 'given that the formal role of the foreperson is to announce the verdict(s), I tell the jury to make sure that they select before that point'. Two judges commented that they advise the jury to select the foreperson towards the end of the trial. Eight judges qualified their comments by stating that their advice depends on the anticipated length of the trial, with additional time given in longer trials.

Information in writing covering opening remarks

Judges were asked whether they give the jury any documents to supplement their oral opening remarks. Only 22.8% (21/92) of Australian judges, and even fewer (5.9%, 2/34) New Zealand judges, report doing so. Figure 6 sets out responses by jurisdiction. This finding reverses the pattern of the previous survey findings, where 8% of Australian and 20% of New Zealand judges provided written material.[34]

[34] Ibid.



Note: n = 126, excluding 1 missing response from South Australia and 1 from Western Australia.

Figure 5. Number of judges providing written information covering opening remarks, by jurisdiction

Responses from Australian participants comprised the bulk of responses in this context as set out in Figure 6, derived from 21 judges who responded affirmatively to this question.

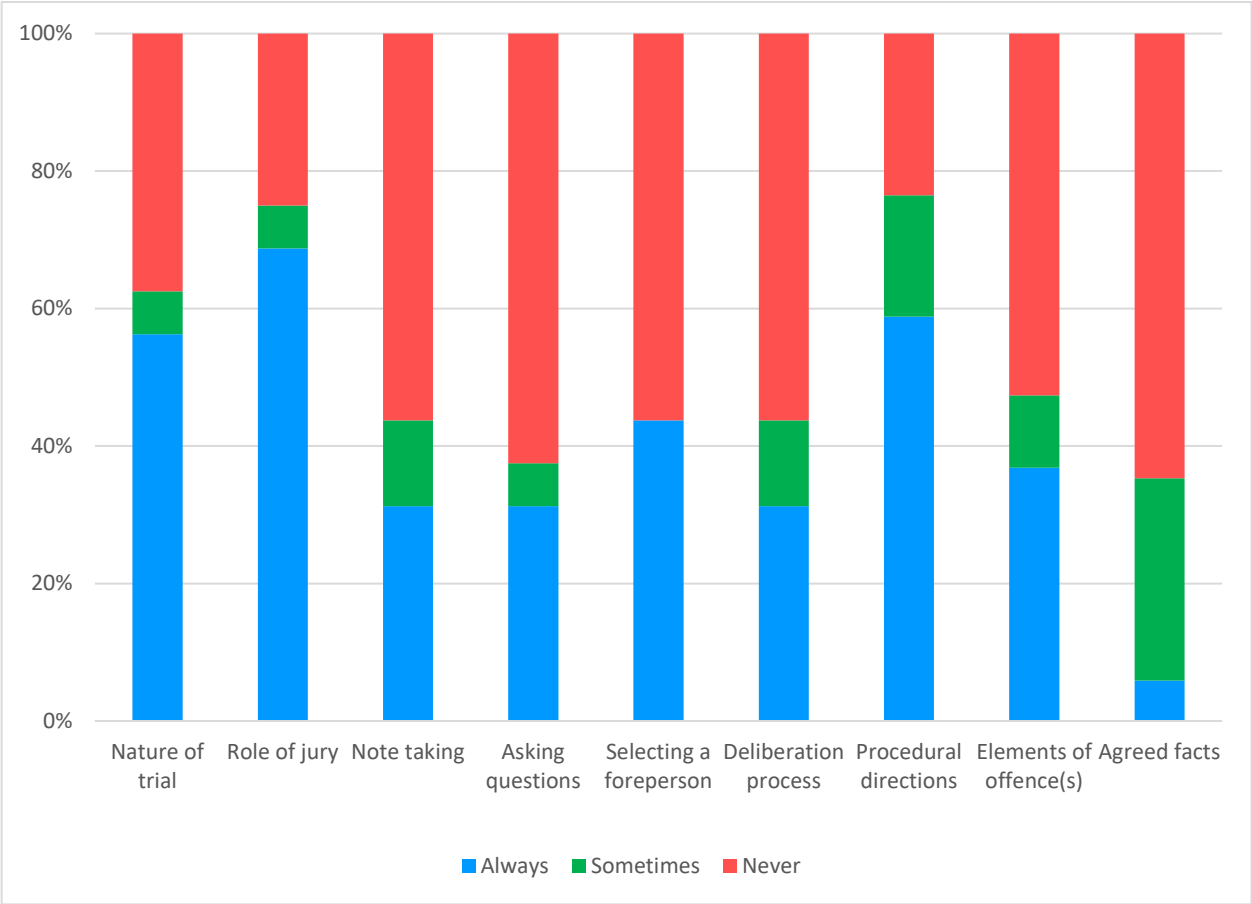


Figure 6. Types of written material provided by Australian judges with opening remarks

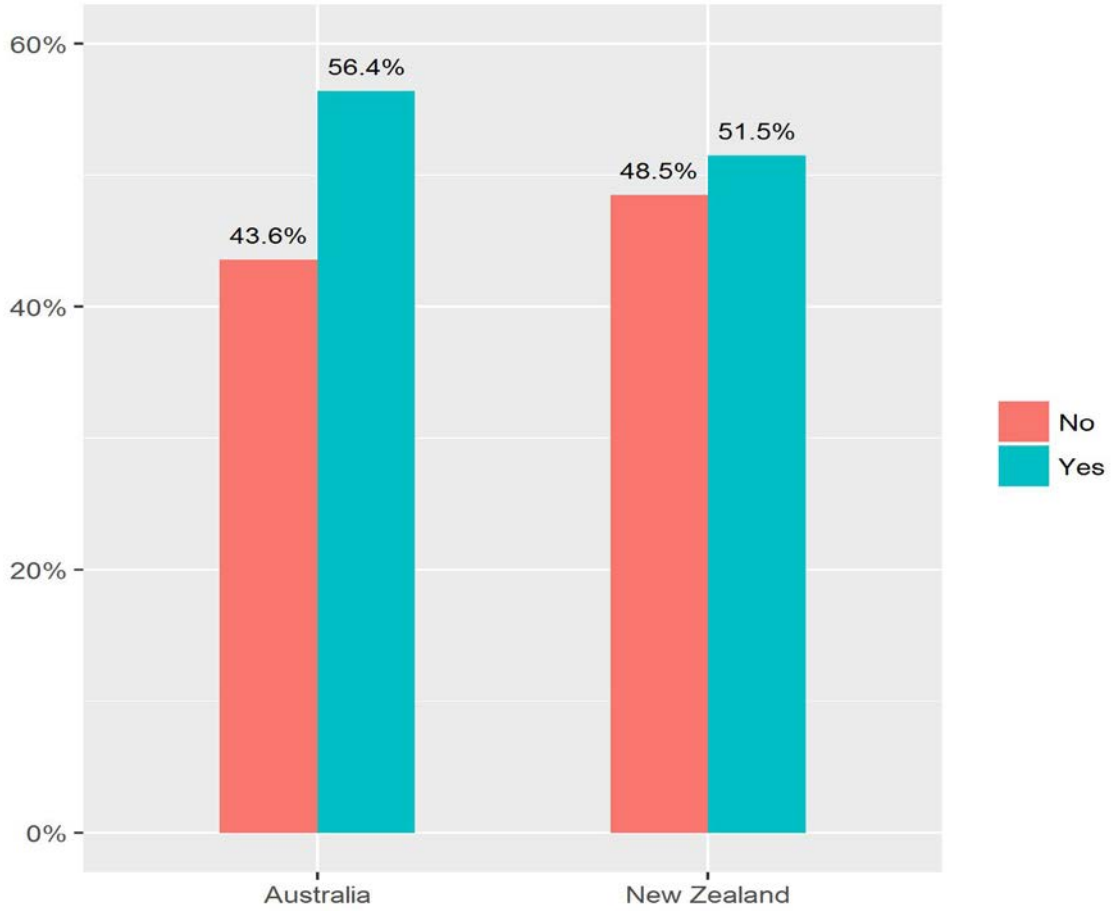
Beyond these topics, eight judges (38.1%, 8/21) noted that they also provide written information to the jury regarding jury misconduct, including prohibited independent enquiries and avoidance of the media. A further four judges (19.1%, 4/21) stated that they provide jurors with a copy of the indictment.

Of the two New Zealand judges who responded in the affirmative, one judge reported always providing written material on the nature of the trial and the role of the jury, both judges always provide written information about the elements of the case and sometimes provide a list of agreed issues, while one judge sometimes provides a written copy of procedural directions.

Directions during the trial

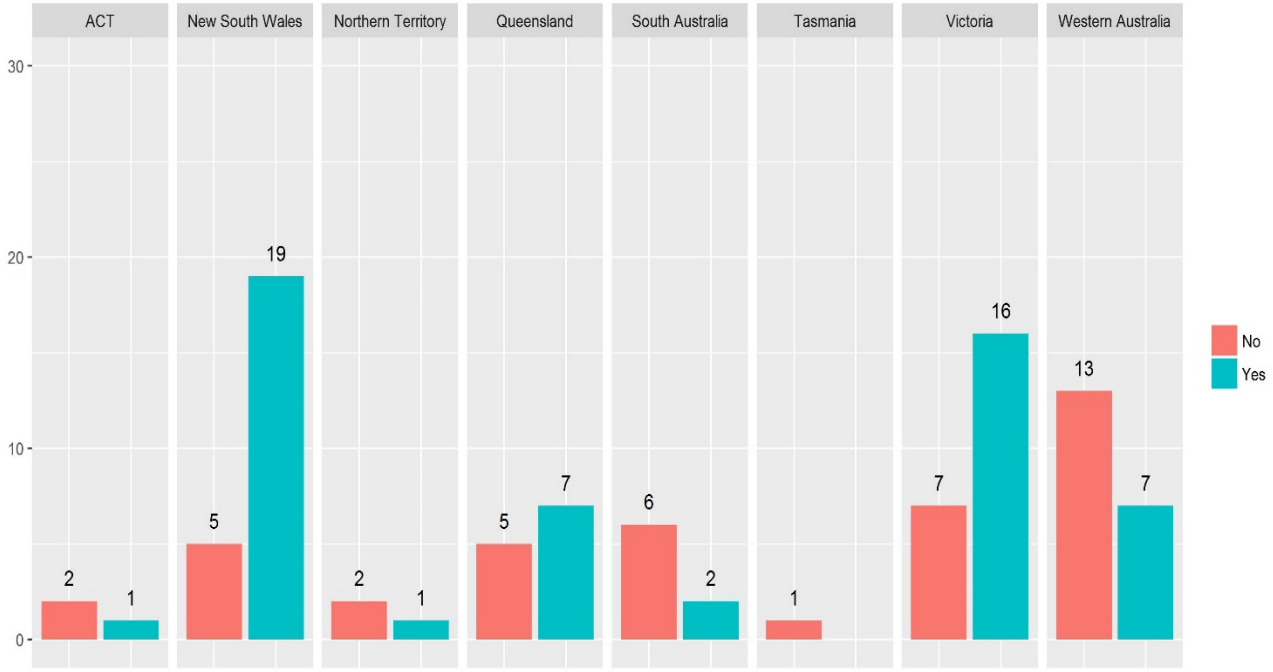
Next, judges were asked whether they routinely provide legal directions to the jury in the course of the trial. Overall, 55.1% (70/127) indicated they do, and 44.9% (57/127) indicated they do not.[35] This pattern is consistent across both Australia and New Zealand. As shown in Figure 7, slightly more judges in both countries provide directions during the trial, although the pattern varies within individual jurisdictions (Figure 8).

[35] One judge answered 'N/A'.



Note: n = 127, excluding 1 missing response from New Zealand.

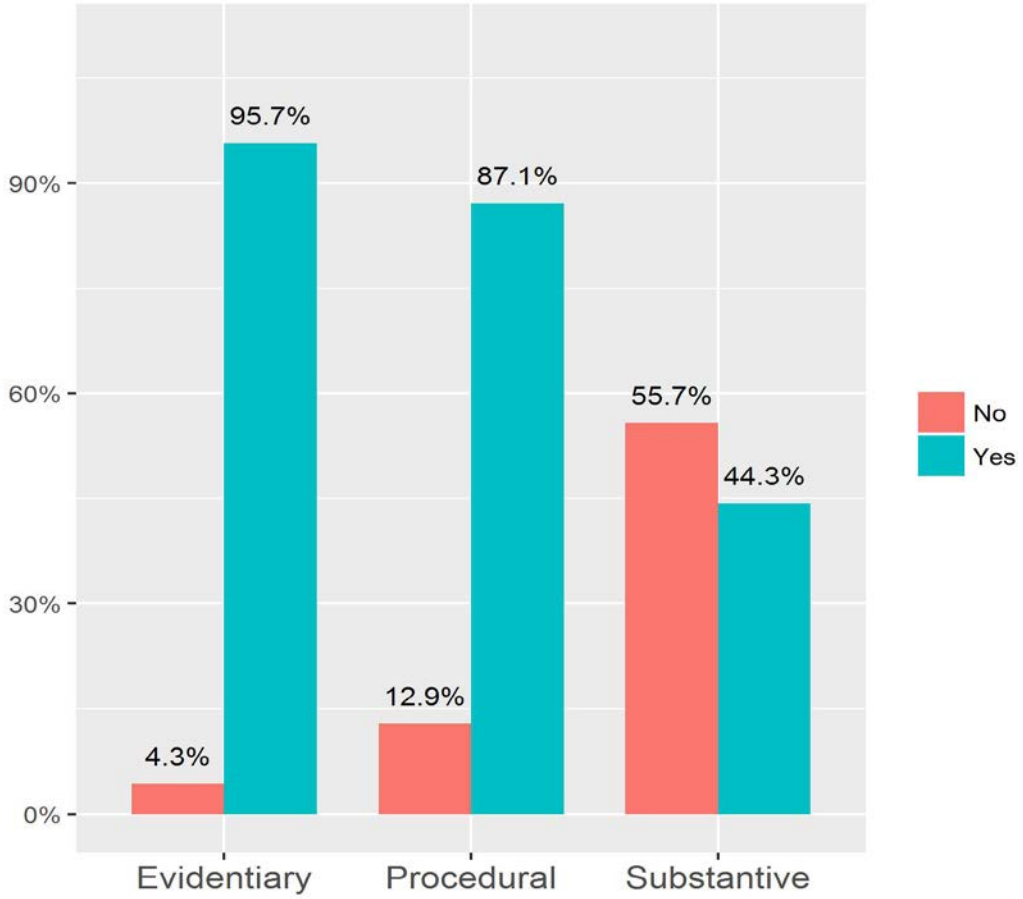
Figure 7. Provision of directions during the trial, by jurisdiction



Note: n = 94

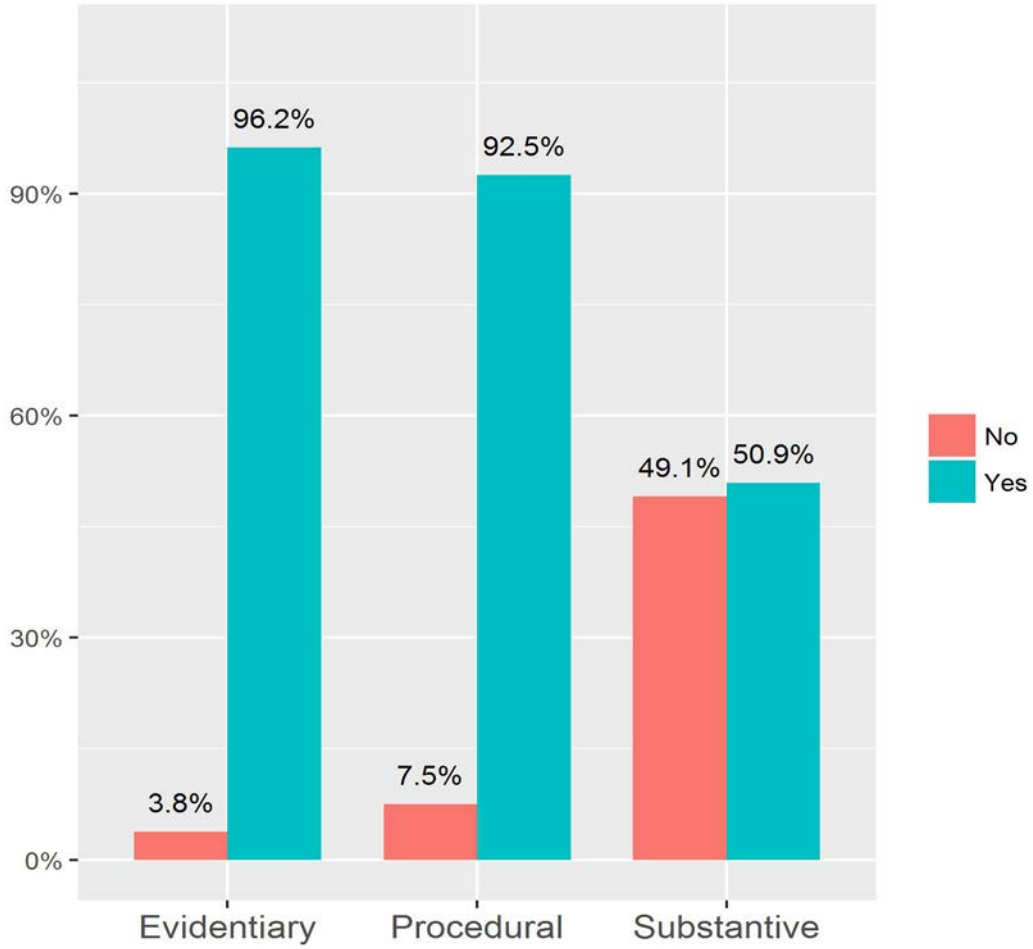
Figure 8. Number of Australian judges providing directions during the trial, by jurisdiction

In regards to the type of directions commonly provided (procedural, evidentiary, or substantive), evidentiary and procedural directions are the most common overall, with substantive directions more rare (Figure 9). However, a difference in practice emerged, with Australian judges more likely to provide substantive directions in running than New Zealand judges (Figures 10 and 11).



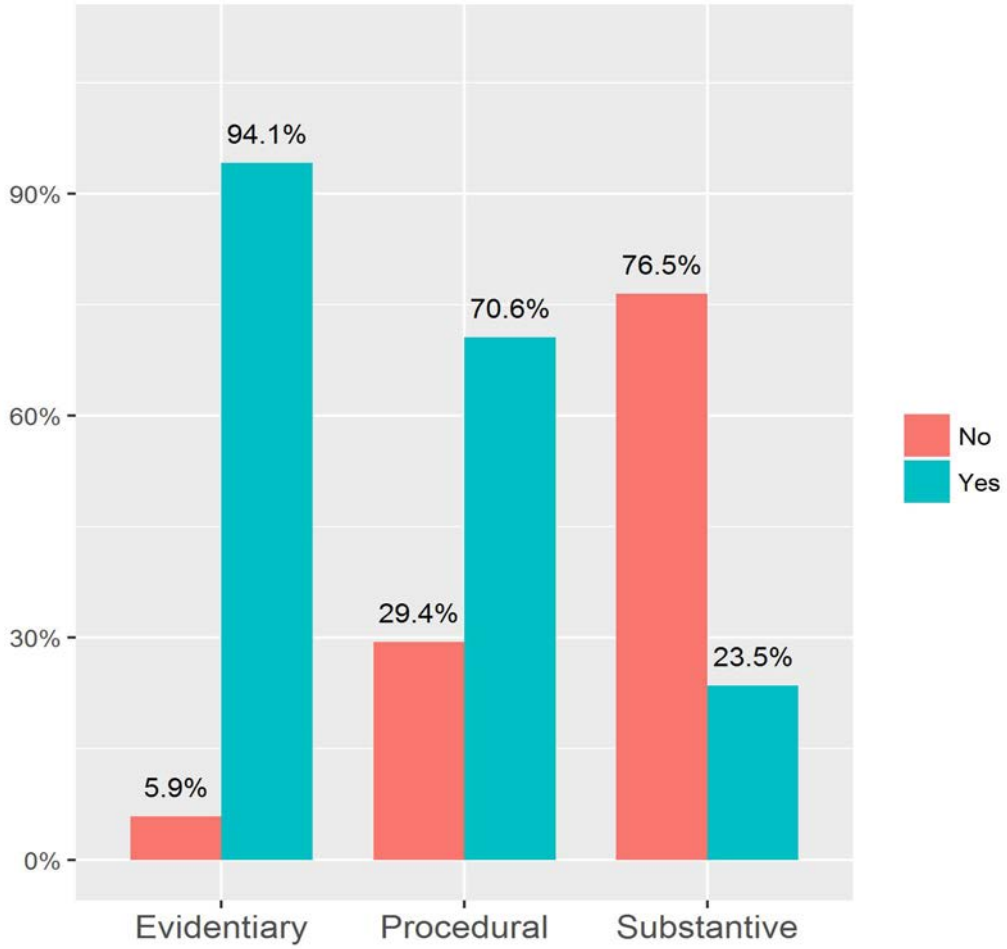
Note: Responses exclude judges who indicated they do not provide any directions during the trial (n = 57).

Figure 9. Percentage of judges providing different types of directions throughout the trial



Note: Responses exclude 41 Australian judges who indicated they do not provide any directions during the trial.

Figure 10. Percentage of Australian judges providing different types of directions throughout the trial



Note: Responses exclude 16 New Zealand judges who indicated they do not provide any directions during the trial.

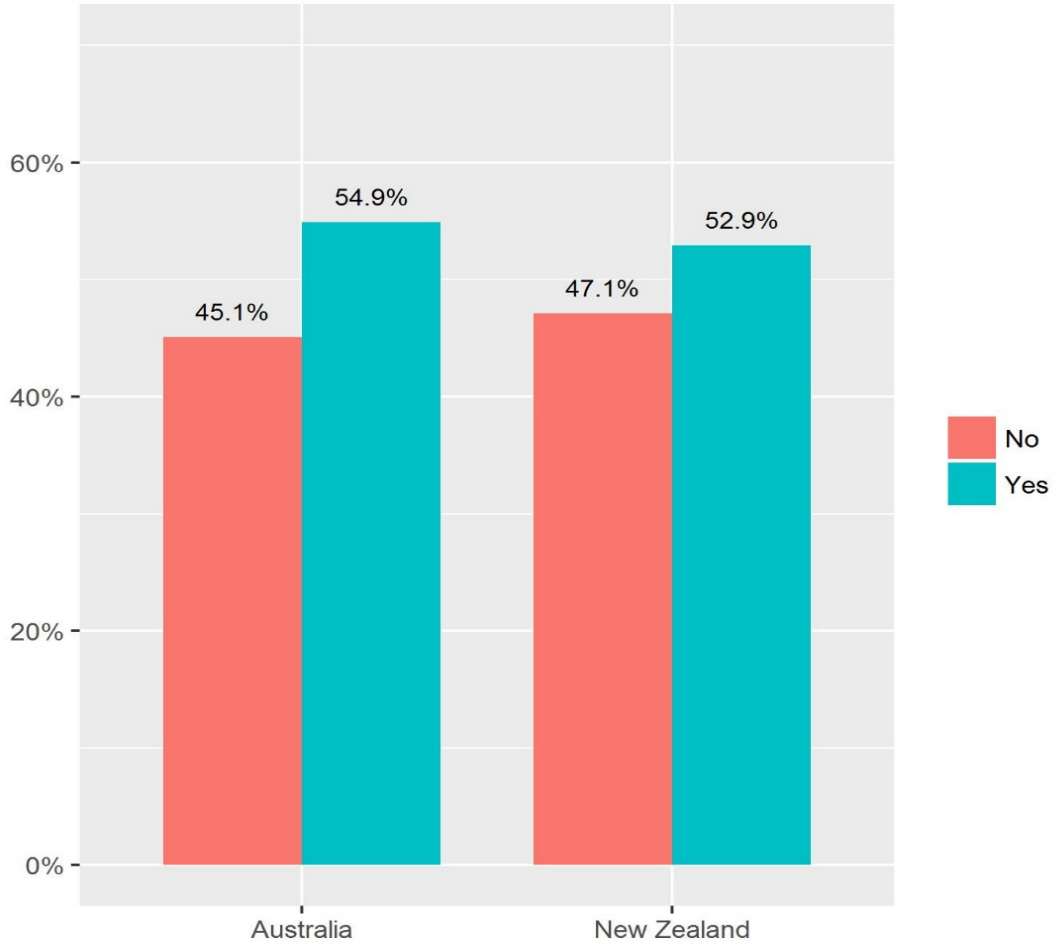
Figure 11. Percentage of New Zealand judges providing different types of directions throughout the trial

Counsel Openings

Prosecution opening

Judges were asked whether they send jurors on a break before the prosecution opening. Overall, judicial practice in this regard was fairly evenly split, with a small majority (54.4%, 68/125) giving such a break.

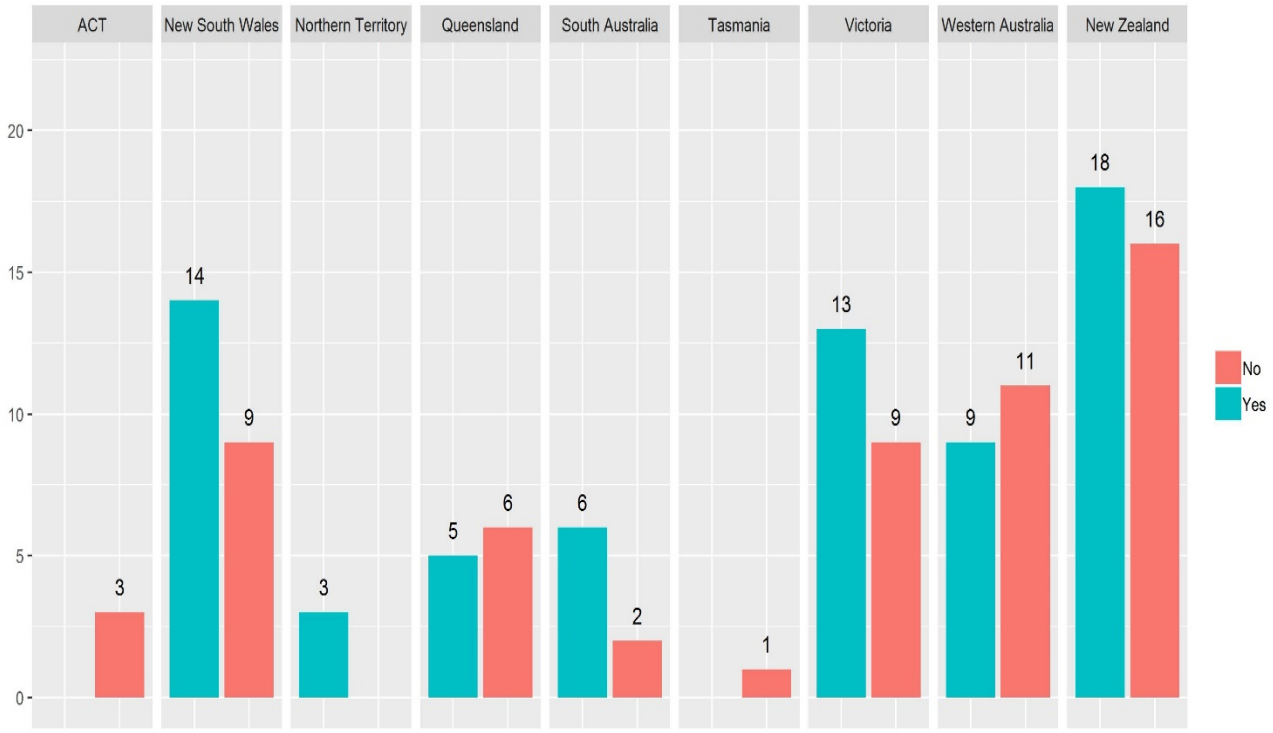
As illustrated in Figure 12, the pattern of responses is almost identical in Australia and New Zealand.



Note: n = 125, excluding missing responses (3 from Australia).

Figure 12. Percentage of judges who send jurors on a break before the prosecution opening, by jurisdiction

A breakdown of practice by jurisdiction is displayed in Figure 13. As shown in Figure 14, judges most often reported breaking for an average of 15 minutes.



Note: n = 125, excluding missing responses (1 each from New South Wales, Queensland, and Victoria)

Figure 13. Number of judges who send jurors on a break before the prosecution opening, by jurisdiction

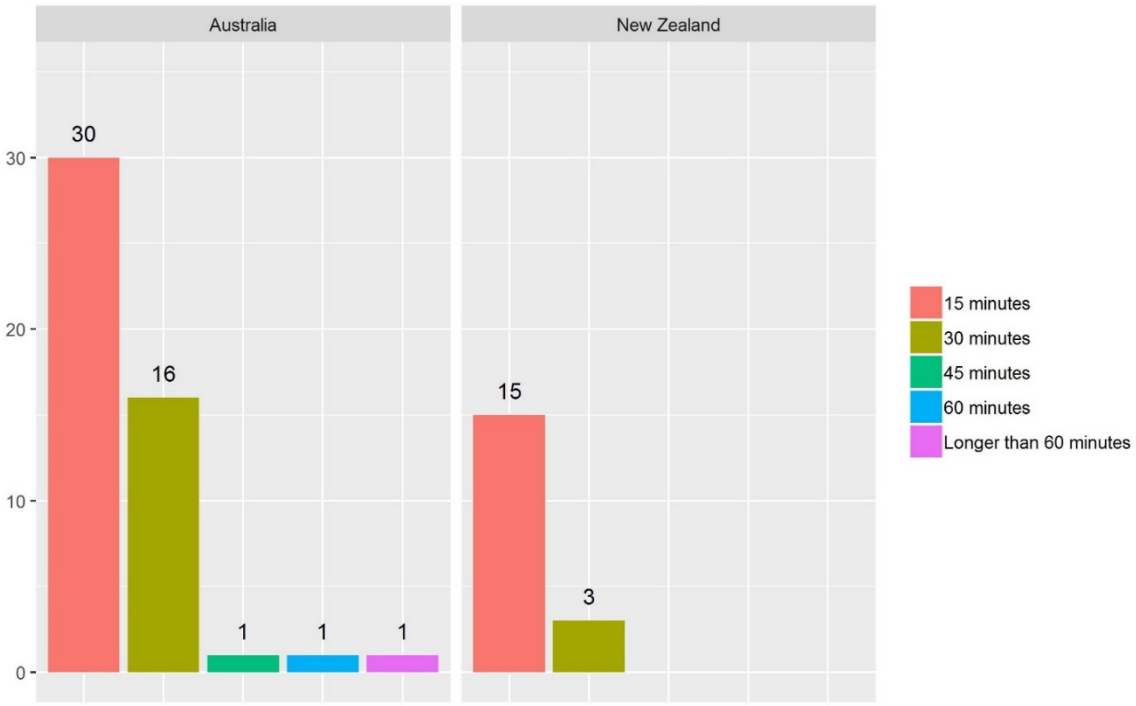
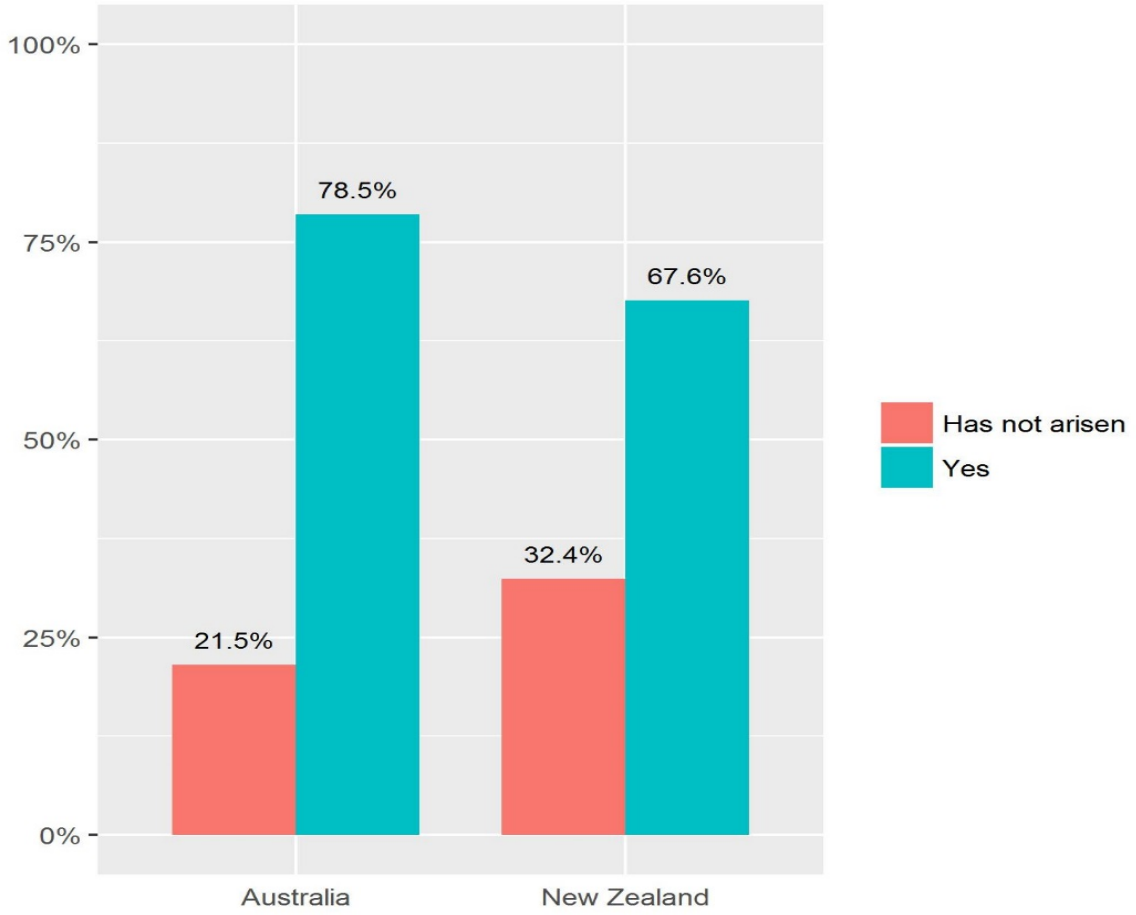


Figure 14. Average duration of break before prosecution opening, by jurisdiction

Written/visual material during prosecution opening

Results regarding whether or not judges allow the prosecutor to present written or visual material during their opening address are displayed in Figure 15.



Note: n = 125, excluding 1 missing response from Australia.

Figure 15. Judges who allow presentation of written material during prosecution opening, by jurisdiction (percent)

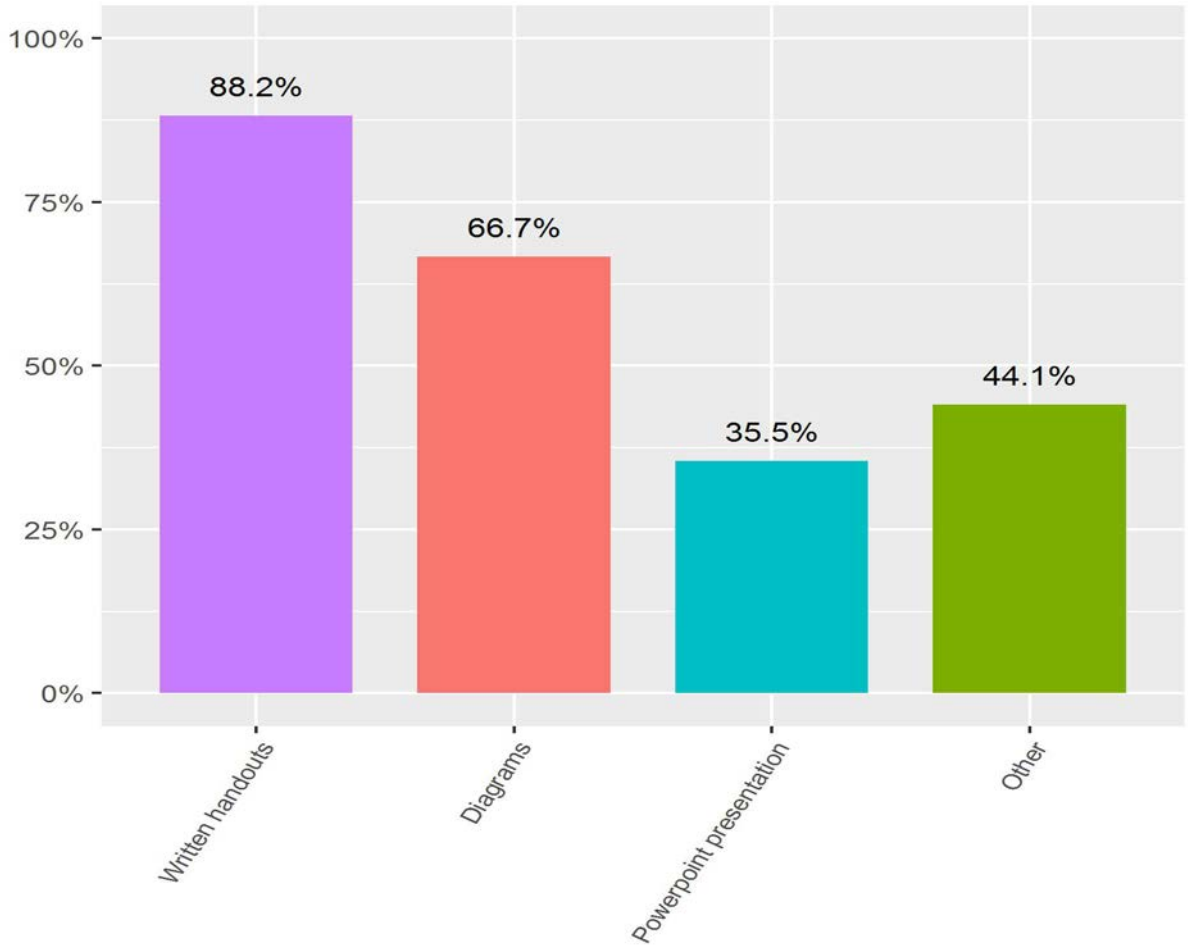
In both jurisdictions, where the issue arose the answer was 'yes', with no judges indicating that it had arisen but been refused. The difference between the two jurisdictions appears to be that the issue arises more often in Australia than in New Zealand.

Judges were asked to estimate the percentage of cases in which the prosecution opening was entirely oral. Of the 73 Australian judges who responded to this question, the average estimate was 70% while the average estimate for the 23 New Zealand participants was 55%. When compared to the previous survey results, this revealed a decrease in Australia from 83.8%, but an increase from 34.5% in New Zealand.[36]

Judges who indicated that they permit the use of written or visual material by prosecutors were also asked to identify the types of written and visual material that they would allow. These responses did not necessarily mean that judges had permitted these forms of material, but that they would if asked. As shown in Figure 16, the most common type of written material that would be permitted is written handouts (88.2%, 82/93), followed by diagrams (66.7%, 62/93) and the use of PowerPoint (35.5%, 33/93). Just over 44% (44.1%, 41/93) of judges would accept 'other' means of presentation, including photographs (75.0%, 24/32) and DVD/video footage (31.3%, 10/32). Only two judges in

[36] Ogloff et al, above n 1, p. 23.

this group (6.3%, 2/32) would permit any form of visual or written material to be presented by the prosecution.



Note: Responses from 93 judges who answered that they would permit some form of visual or written material during prosecution opening statements.

Figure 16. Acceptable/approved visual or written material for prosecution use during opening statements (percent)

Of written/visual material approved for prosecution use, Figure 17 demonstrates that the indictment is overwhelmingly the most common. Less common are other forms of assistance such as the elements of the offence charged (35.1%, 33/94), event chronologies (38.3%, 36/94) and witness lists (37.2%, 35/94). Forty percent of the sample referred to 'other'.

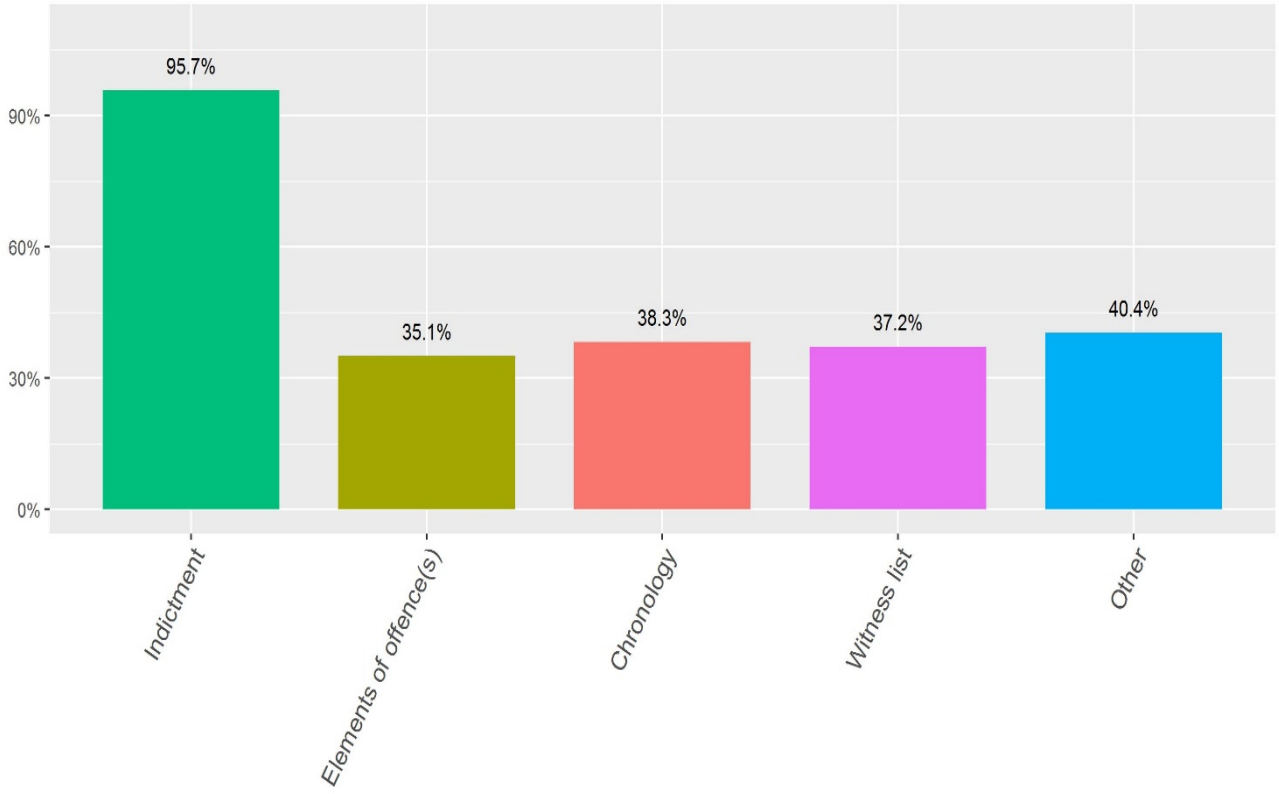


Figure 17. Judges who would permit various forms of visual/ written information during prosecution opening, by jurisdiction

However, as Figures 18 and 19 illustrate, some differences emerged between jurisdictions, and also in common practices over the past decade. For example, the previous survey results showed that almost all judges in New Zealand (94%), but just over half of judges in Australia (54%), reported that they allowed the prosecutor to present the jury with a copy of the indictment during the prosecution's opening remarks. The findings in the present survey revealed greater equivalence in the two jurisdictions, with 94% (67/71) of Australian and 100% (23/23) of New Zealand judges indicating that they allow such material.

In relation to written guidance on the elements of the charged offence, the previous survey findings were that two-thirds of New Zealand judges allowed such material, compared to only 13% of Australian judges. The present survey indicates greater equivalence between the two (AU = 34%, 24/71; NZ = 39%, 9/23), suggesting a decrease in the practice in NZ and an increase in Australia. Similar developments occurred with respect to whether judges allow prosecutors to provide the jury with a chronology of events and/or copies of the witness list. The proportion of Australian judges allowing prosecutors to provide the jury with a written chronology increased from 19% to 32% (23/71), and witness lists from 9% to 23% (16/71). In New Zealand, the proportions remained relatively stable: the proportion of judges allowing a written chronology decreased from 65% to 57% (13/23), and the proportion permitting written witness lists remained consistent (84% vs 83% (19/23)).

The proportion of Australian judges allowing prosecutors to provide 'other' material increased from 36% to 48% (34/71), while in New Zealand there was a decrease from 53% to 17% (4/23). As with the previous survey results, 'other material' includes copies of exhibits, crime scene photographs or videos, maps, transcripts of tapes, charts, and diagrams.

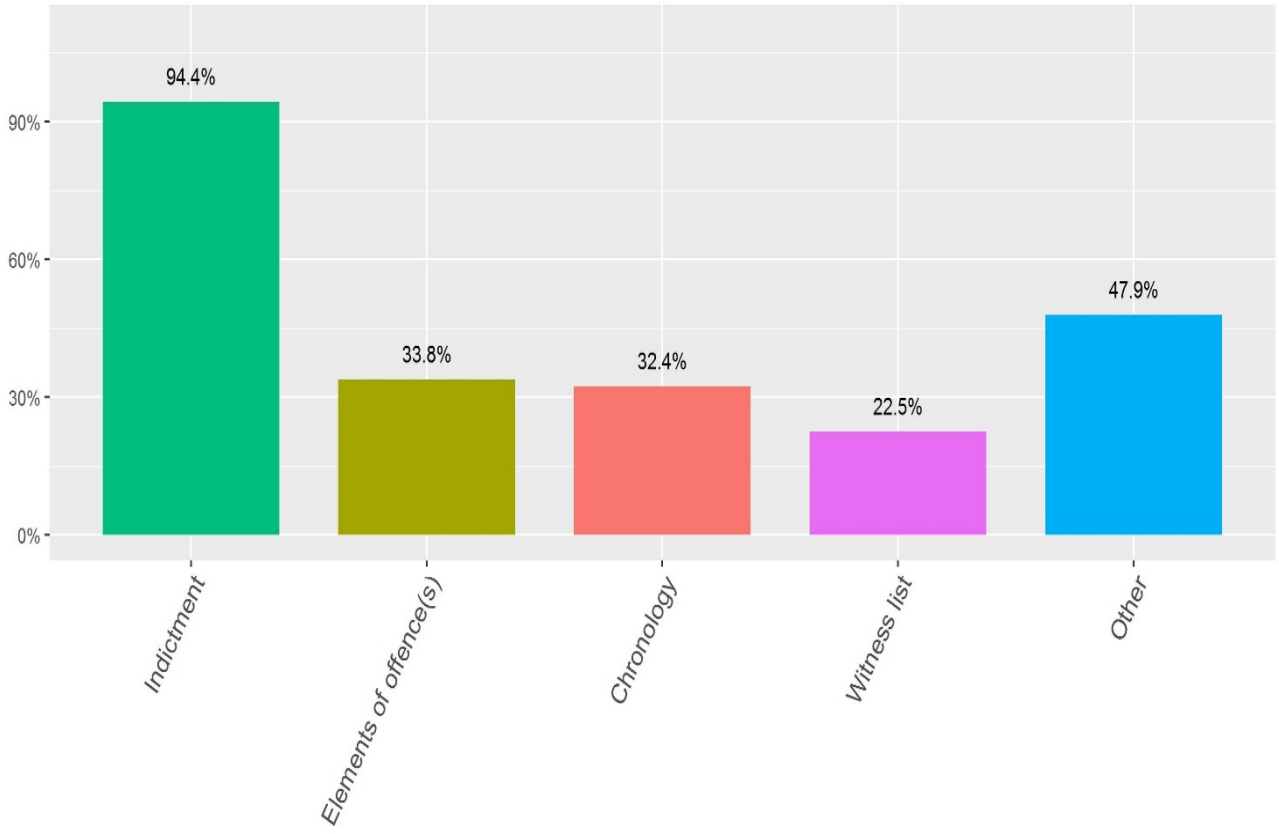


Figure 18. Australian judges who would permit visual/written information to be presented during the prosecution opening (percent)

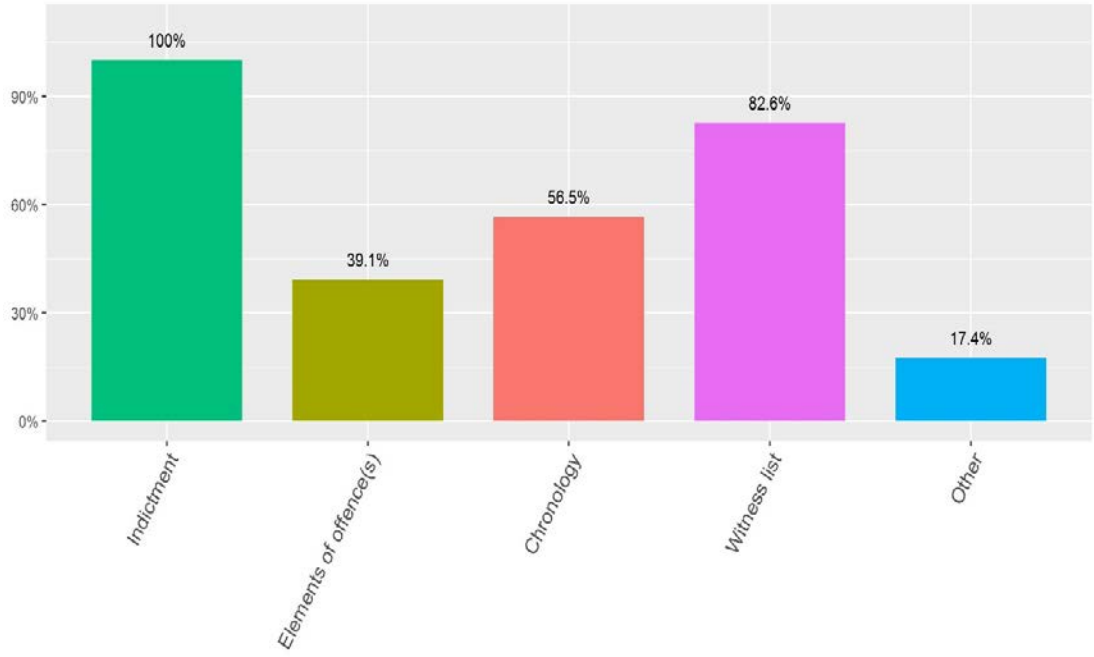
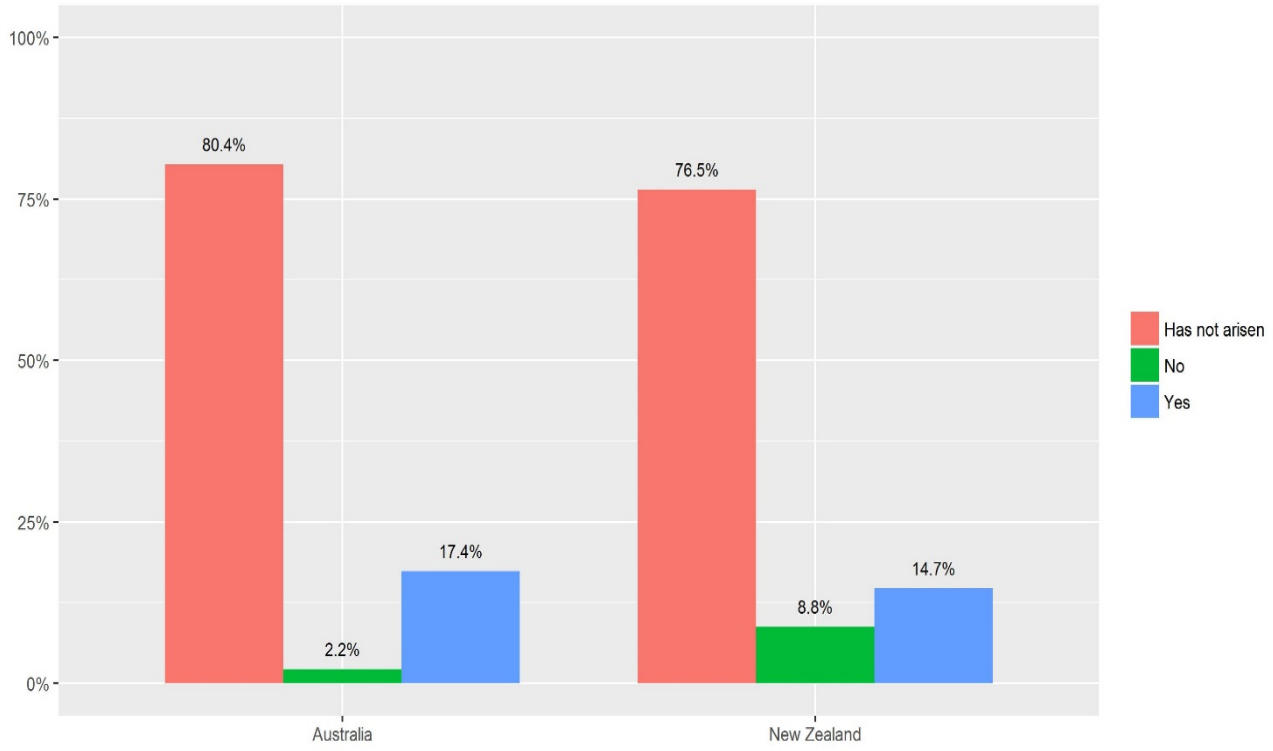


Figure 19. Approved forms of written/visual information during prosecution opening (percent)

Defence Opening/Response

Results regarding whether judges allow defence counsel to present written or visual material during their opening address are displayed in Figure 20.



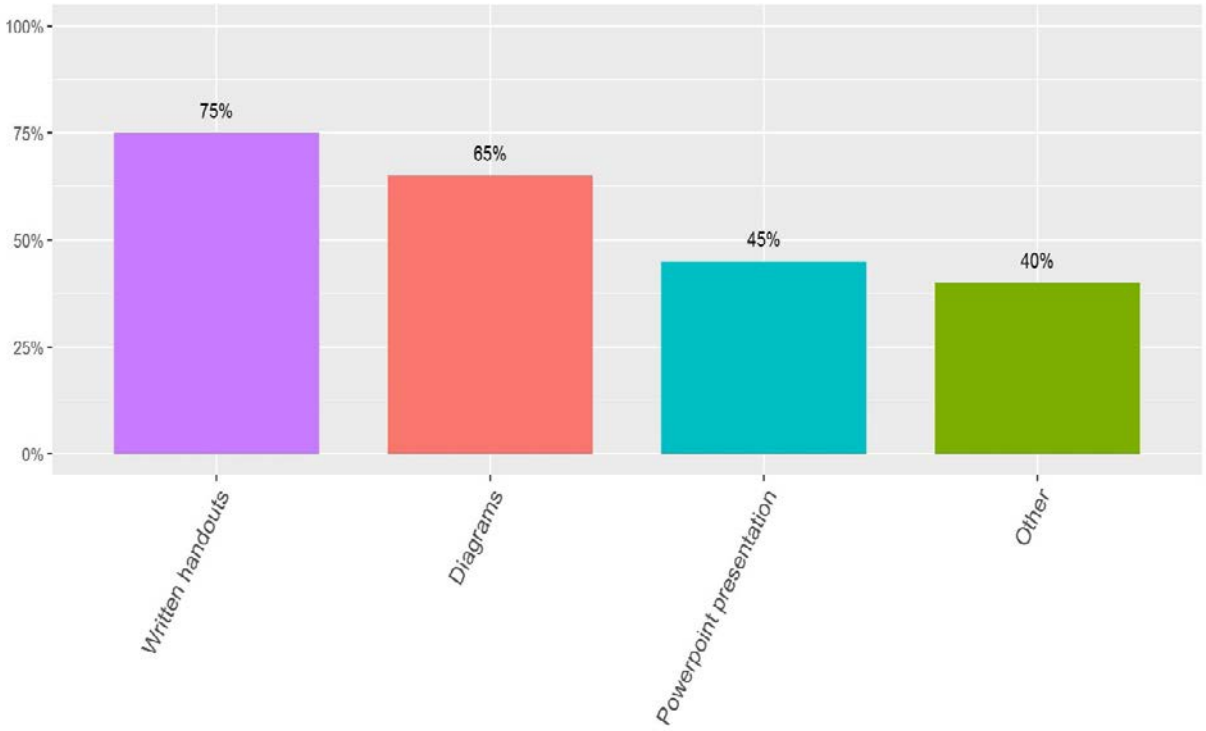
Note: n = 126, excluding missing responses (2 from Australia).

Figure 20. Approved written/visual material for defence use in opening statements, by jurisdiction

In the vast majority of cases, in both jurisdictions, the issue does not arise (AU = 80.4%, 74/92; NZ = 76.5%, 26/34). The fact that defence counsel do not typically choose to use such material is confirmed by the responses to the question 'in approximately what percentage of cases would you estimate the defence opening was entirely oral?' Of the 16 Australian judges who responded, the average estimate was that 88% of defence openings are entirely oral, while the four New Zealand participants gave an average estimate of 75%. Although it appears that in both Australia and New Zealand the majority of openings are entirely oral, this response represented a decrease from proportions obtained in the previous survey, where the respective responses were 97.4% (AU) and 94.5% (NZ).[37]

Despite the largely oral nature of defence openings, Figure 21 shows the proportion of judges who would permit written/visual material during the defence opening if requested. As with the prosecution opening, the most common type of written/visual material that would be approved is written handouts (75.0%, 15/20), followed by diagrams (65.0%, 13/20), PowerPoint (45%, 9/20) and 'other' (40%, 8/20).

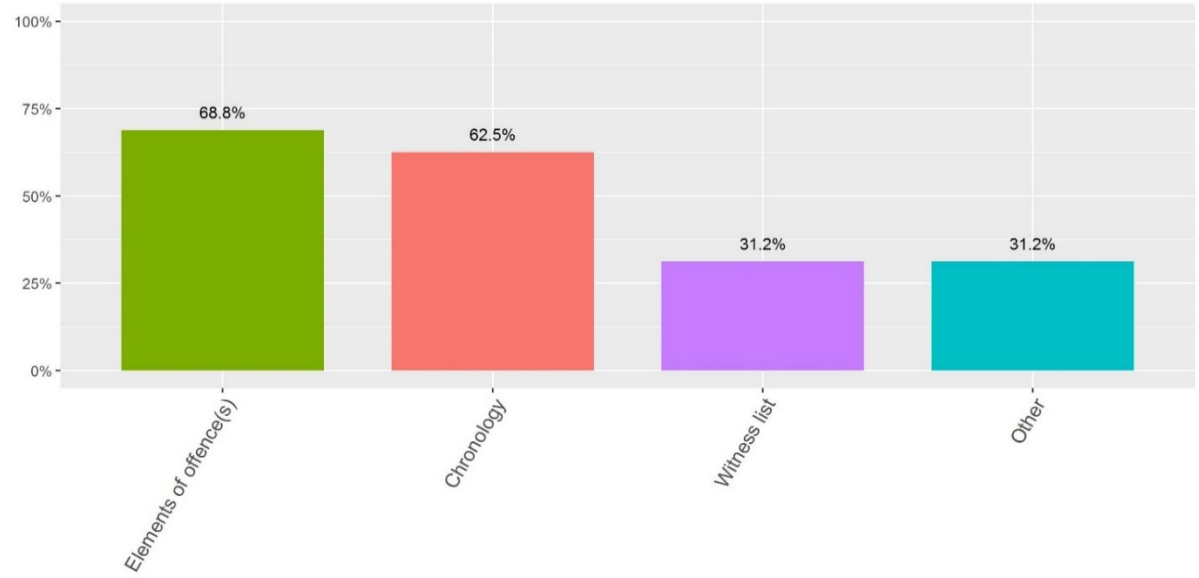
[37] Ibid.



Note: Responses from 21 judges who answered that they would permit visual/written material during defence opening statements, excluding one missing response (n = 20).

Figure 21. Judges who would permit various forms of visual/written material during defence opening (percent)

In terms of the information that the defence would be allowed to include in written/visual form, Figure 22 demonstrates that the most common are the elements of the offence charged (68.8%, 11/16) and event chronologies (62.5%, 10/16), followed by witness lists (31.2%, 5/16) and 'other' (31.2%, 5/16).



Note: Responses from 21 judges who would permit some form of visual or written material during defence opening statements, excluding 5 missing responses (n = 16).

Figure 22. Judges who would permit visual/written information during defence opening (percent)

Narrowing issues in dispute

In regards to whether judges take steps to narrow the issues in dispute, almost three-quarters of participants (73.4%, 94/128) answered in the affirmative. The response pattern was similar across jurisdictions (AU = 74.5%, 70/94; NZ = 70.6%, 24/34). Beyond pre-trial directions hearings, including reading transcripts of pre-trial rulings, some judges identified reading the transcripts of prosecution openings and defence responses as important to clarifying the issues in dispute. Six judges commented that, if any issues are unclear or if rulings have not been made, they will enquire of counsel and request that they 'clarify any areas in dispute prior to empanelling'. One judge did not rely on the final directions hearing to identify all issues in dispute and 'always asked counsel to identify all pre-trial issues, and the elements in dispute, before empanelment'. Another judge would 'sometimes identify what seems to me to be the main issues from the depositions and ask counsel whether I am correct in my assumptions'.

Average Duration of the Summing Up

Judges were asked to provide an estimate of the range of time they take on average to instruct the jury on the law, the evidence, and summary of addresses for trials lasting five, ten or twenty days. As with the previous survey findings, many judges, across jurisdictions, did not answer this question on the basis that they had insufficient experience, or that it was impossible to generalise. In regards to the latter, common observations included that the 'length of trial is not always indicative of the complexity of the law or evidence' and that it 'depends entirely on the complexity of the issues in dispute'. As was noted by one judge, 'a 5- or 10-day trial may involve really complex directions whereas a 50 count indictment may allege the same simple offence committed 50 times'. Other judges commented that any attempt to separate the time taken to instruct the jury on each topic (the law, the evidence and counsel addresses) is 'artificial' because they 'do not divide charges into these categories'. Rather, many judges noted that 'it is a much more enmeshed process'.

Consistent with these comments, a high proportion of judges (87.2%, 102/117) indicated that estimates would vary according to the type of trial. These figures were consistently high in Australia (85.7%, 72/84) and New Zealand (90.9%, 30/33).

Amongst these judges, approximately half identified that trials involving multiple co-accused tend to require more time to sum up, particularly if 'there are differences in the Crown case against individual accused or if instances of joint liability arise'. One judge estimated that such trials increased summing up by 25%. Almost one-quarter of the judges also identified trials involving multiple charges as requiring additional time. One judge noted that 'the type of offence perhaps is less significant than the numbers of different offences'.

A similar proportion of judges commented that trials involving sexual offences often required 'more elaborate and extensive directions', with one judge noting that, by comparison, trials involving 'murder, often a whodunnit, are straight-forward'. Interestingly, however, two judges directly disagreed with this view. One Australian judge commented that summing up time 'would not vary significantly for sexual crimes', while a New Zealand judge stated that 'sex offences are usually simpler and shorter in summing up than violence offences'.

Other types of trials identified as requiring more time included matters involving particular defences (namely, self-defence and mistake of fact), trials concerning fraud or regulatory offences, terrorism trials, and cases involving a substantial amount of circumstantial or tendency evidence, or complex expert evidence 'requiring repetition and marshalling into issues to make it more easily understood'.

Nonetheless, all judges who responded to this question were faced with the same difficulty in providing accurate estimates. Consequently, despite the variability of responses within jurisdictions,

notable differences in the length of time taken to sum up emerged across jurisdictions. These results are presented in Figure 23.

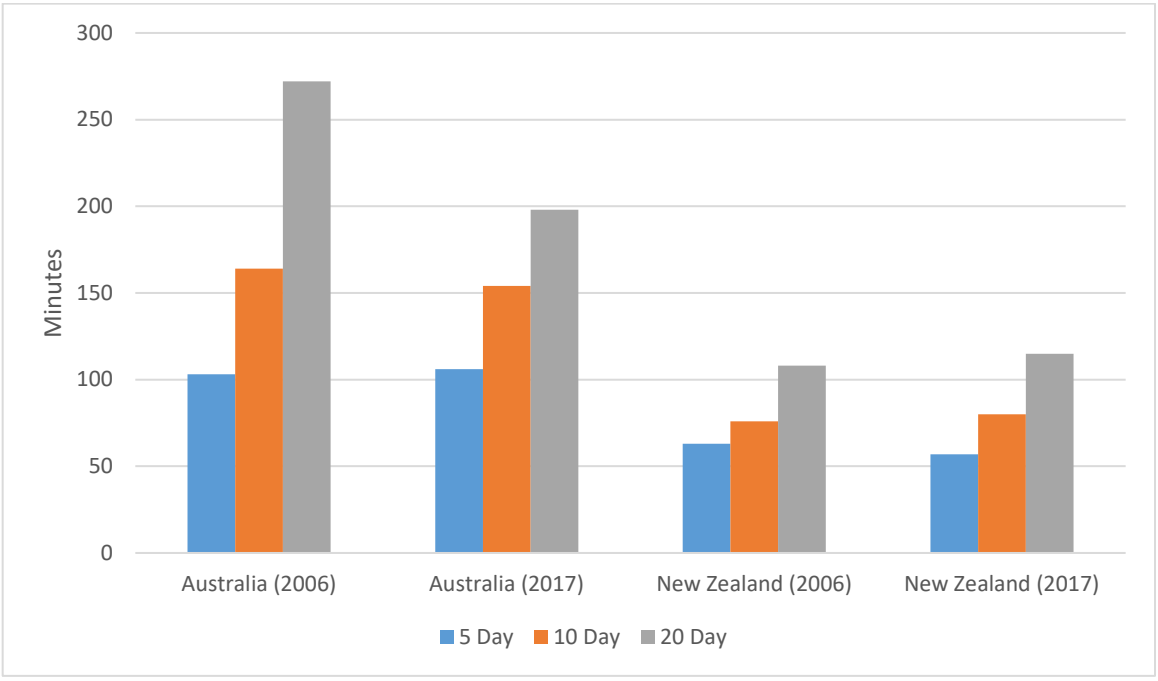


Figure 23. Average estimated duration of summing up by trial duration and year

Unsurprisingly, the length of time required to instruct the jury increases as trial duration increases. Consistent with the previous survey results, estimates of the duration of summing up are shorter in New Zealand than Australia. Responses from Australian jurisdictions revealed that each estimated period is considerably longer than estimates of their counterparts in New Zealand.[38]

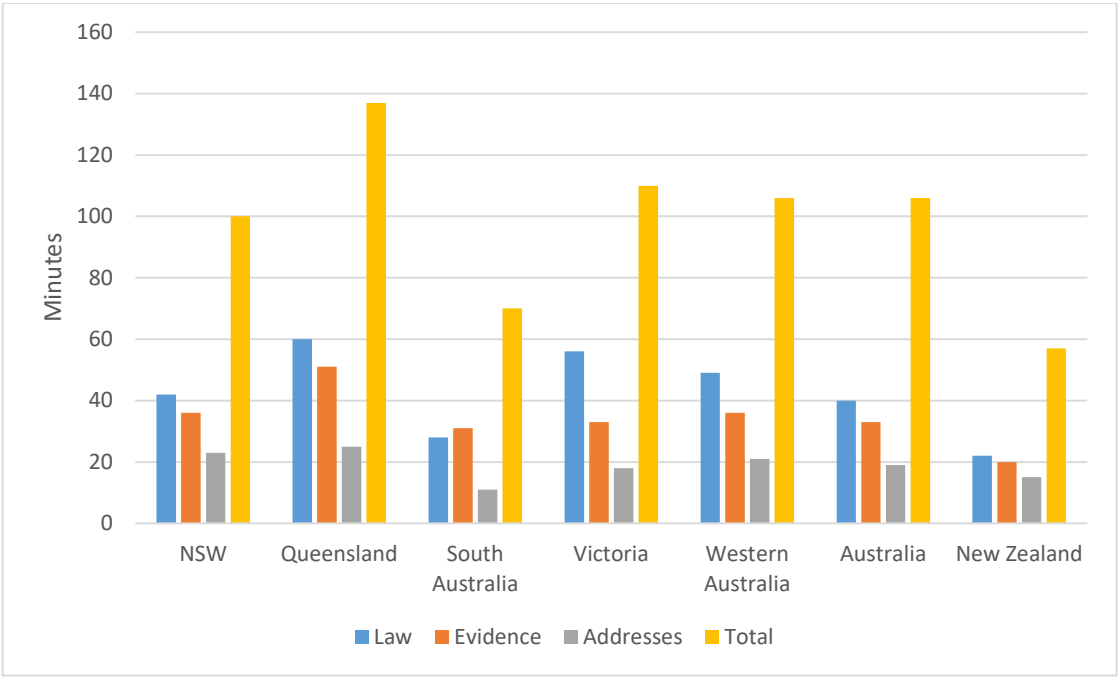


Figure 24. Estimated average duration of components of summing up for 5-day trials, by jurisdiction

[38] Proportions from ACT, NT and Tasmania were excluded due to low response rates.

Figures 25, 26 and 27 display an unexpected trend since the last survey period. Irrespective of trial duration, the estimated length of summing up decreased in Australia, while increasing in New Zealand. This is particularly pronounced in relation to the summary of addresses, which appeared to increase in length in New Zealand, but decrease in Australia.

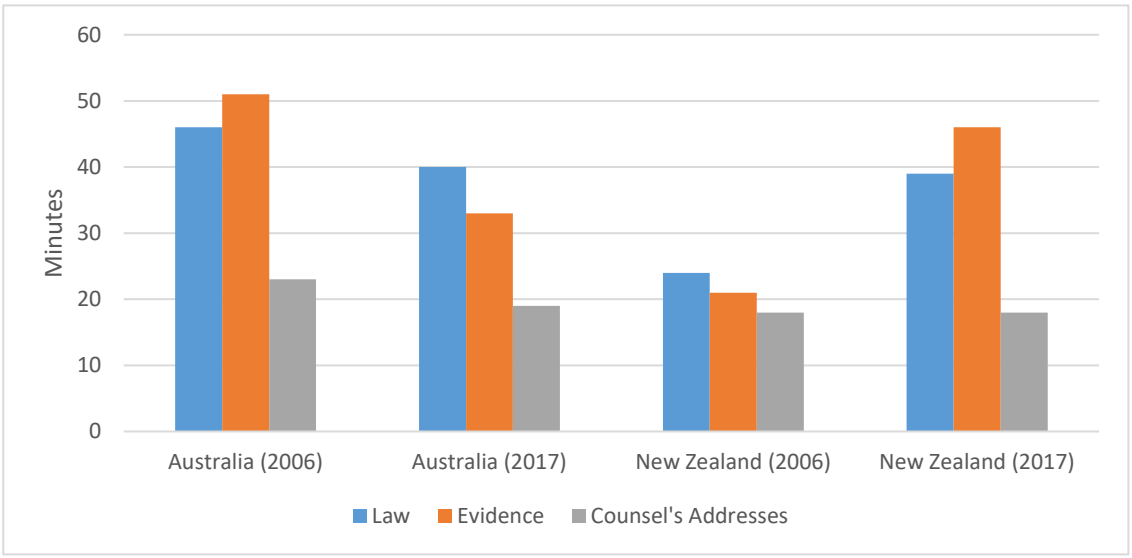


Figure 25. Estimated average duration of components of summing up for 5-day trials in Australia and New Zealand in 2006 and 2017

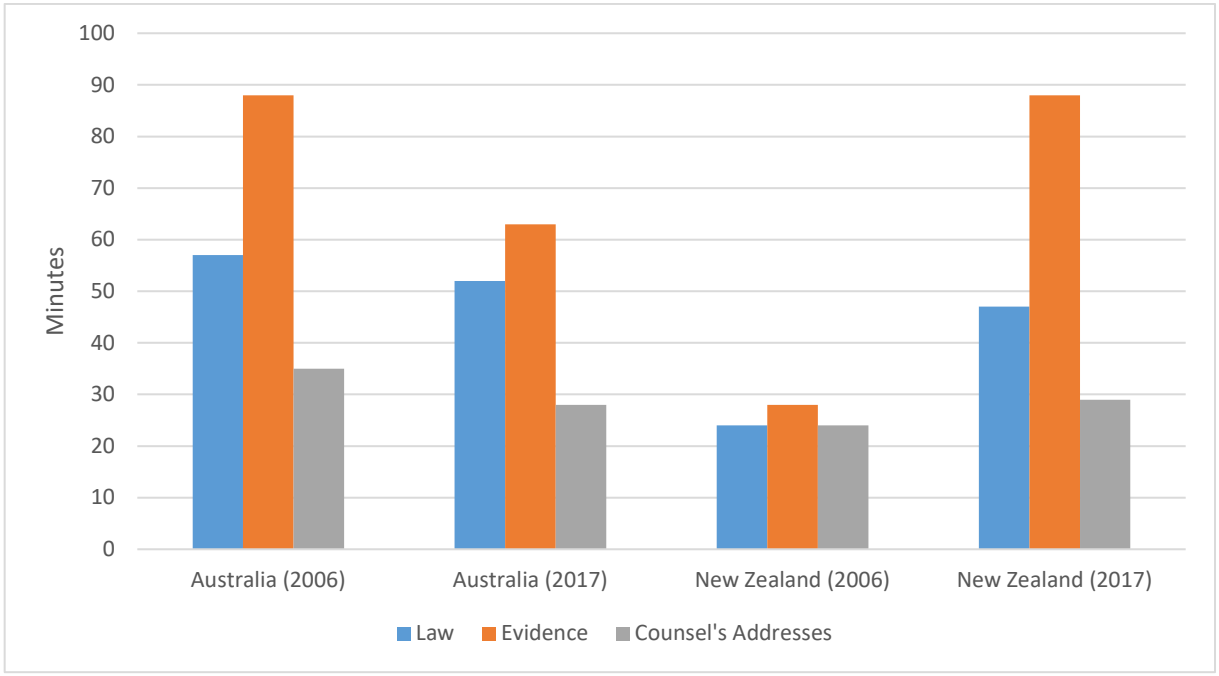


Figure 26. Estimated average duration of components of summing up for 10-day trials in Australia and New Zealand in 2006 and 2017

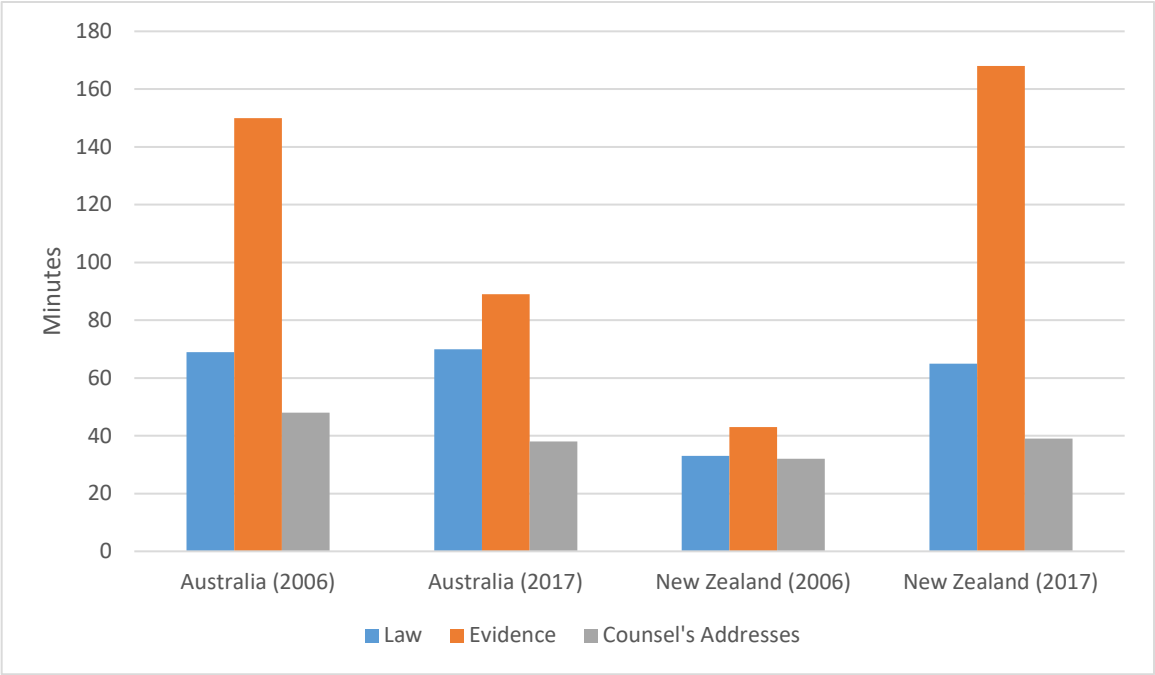


Figure 27. Estimated average duration of components of summing up for 20-day trials in Australia and New Zealand in 2006 and 2017

A comparison of 2006 and 2017 responses across Australian jurisdictions suggests a trend towards decreasing the duration of summing up, particularly in relation to the summary of evidence, in New South Wales (Figure 28), South Australia (Figure 29) and Victoria (Figure 30), while their duration estimates increased in Queensland (Figure 31) and Western Australia (Figure 32).

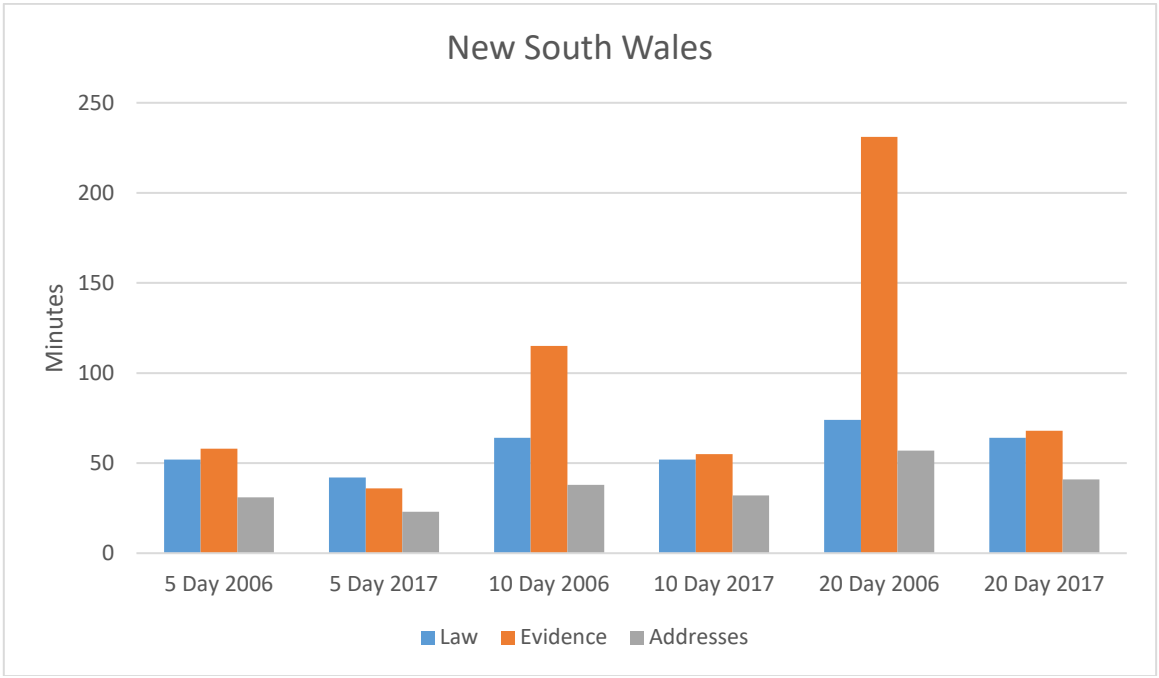


Figure 28. Estimated average duration of components of summing up in New South Wales in 2006 and 2017

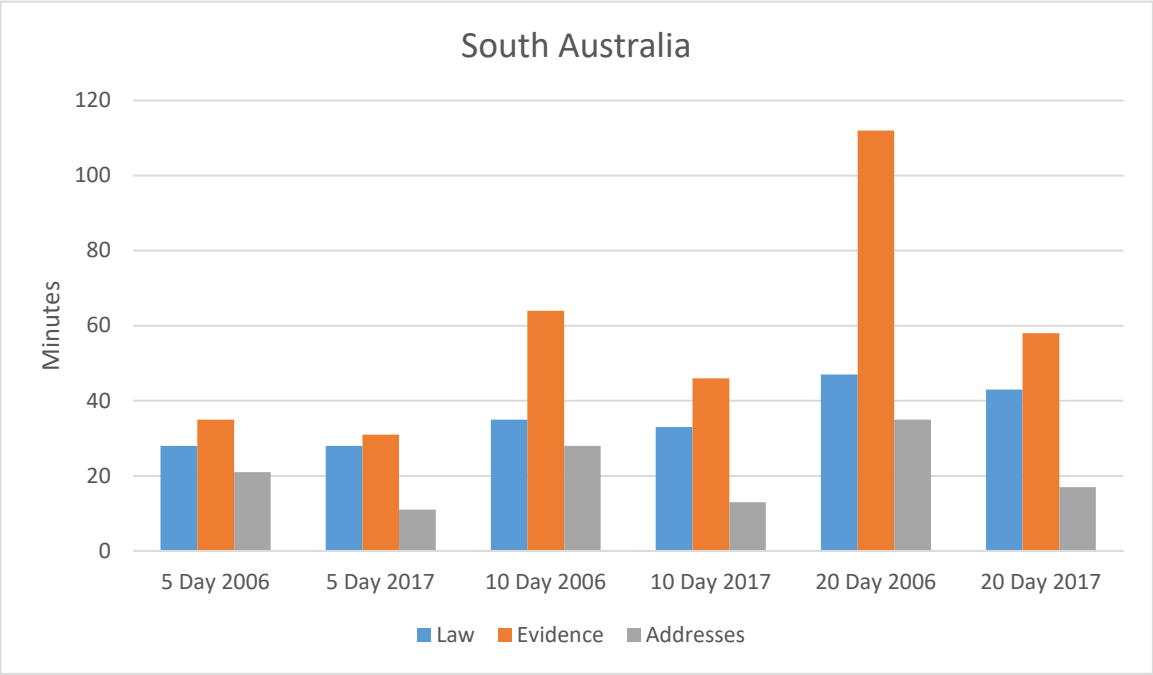


Figure 29. Estimated average duration of components of summing up in South Australia in 2006 and 2017

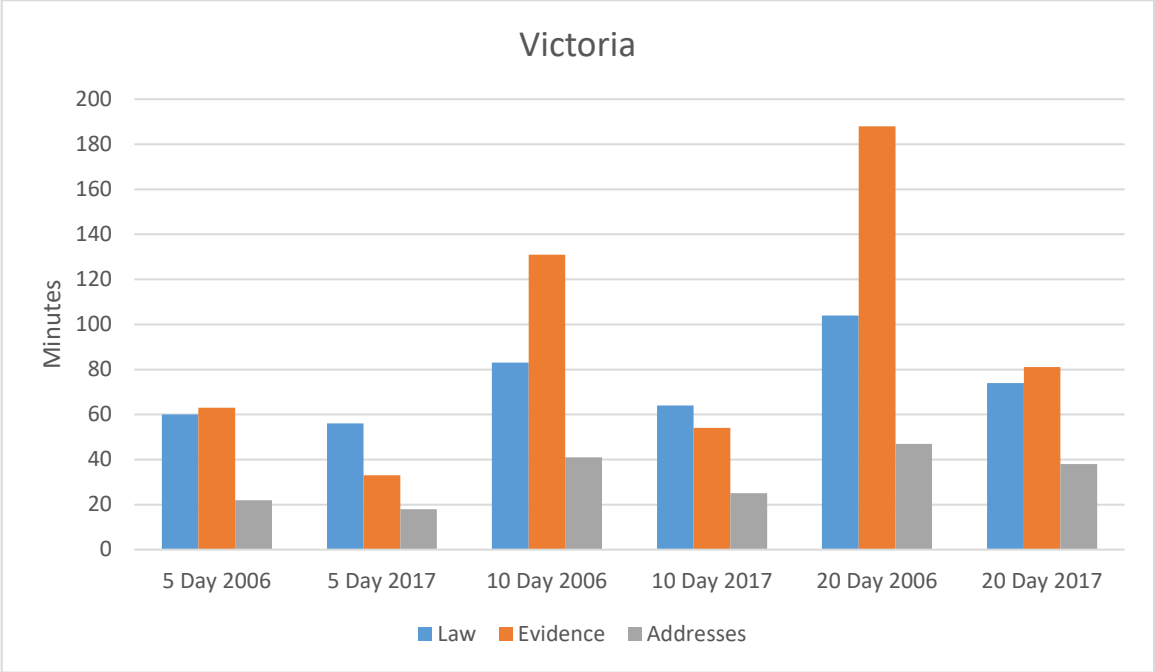


Figure 30. Estimated average duration of components of summing up in Victoria in 2006 and 2017

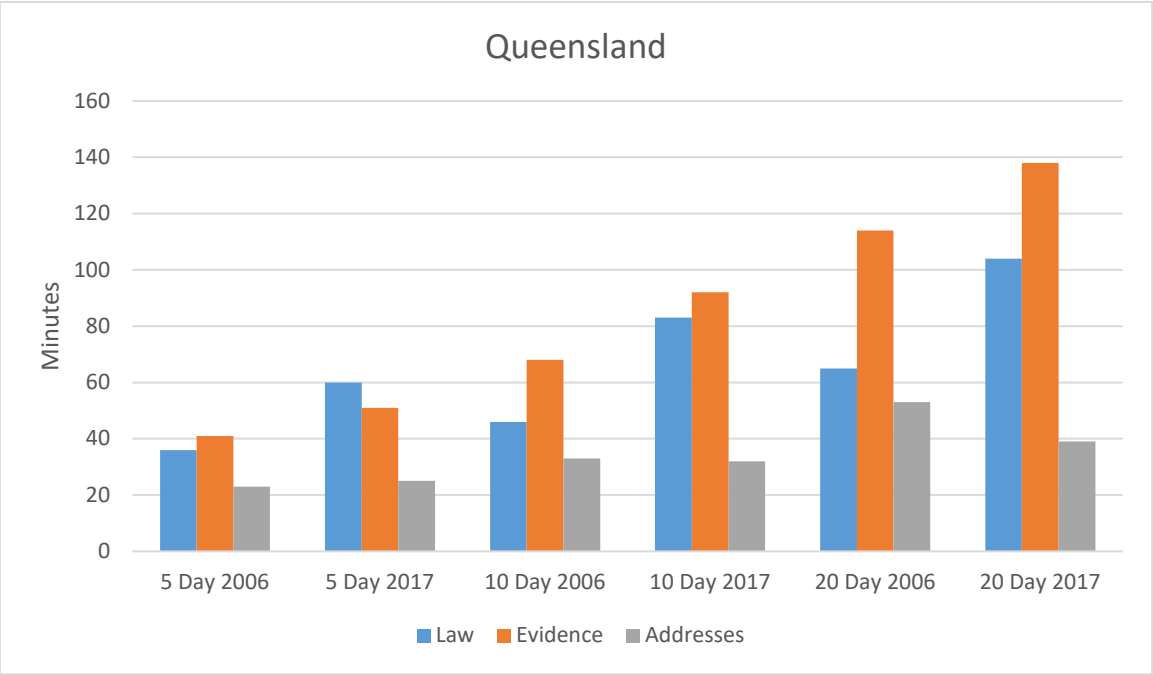


Figure 31. Estimated average duration of components of summing up in Queensland in 2006 and 2017

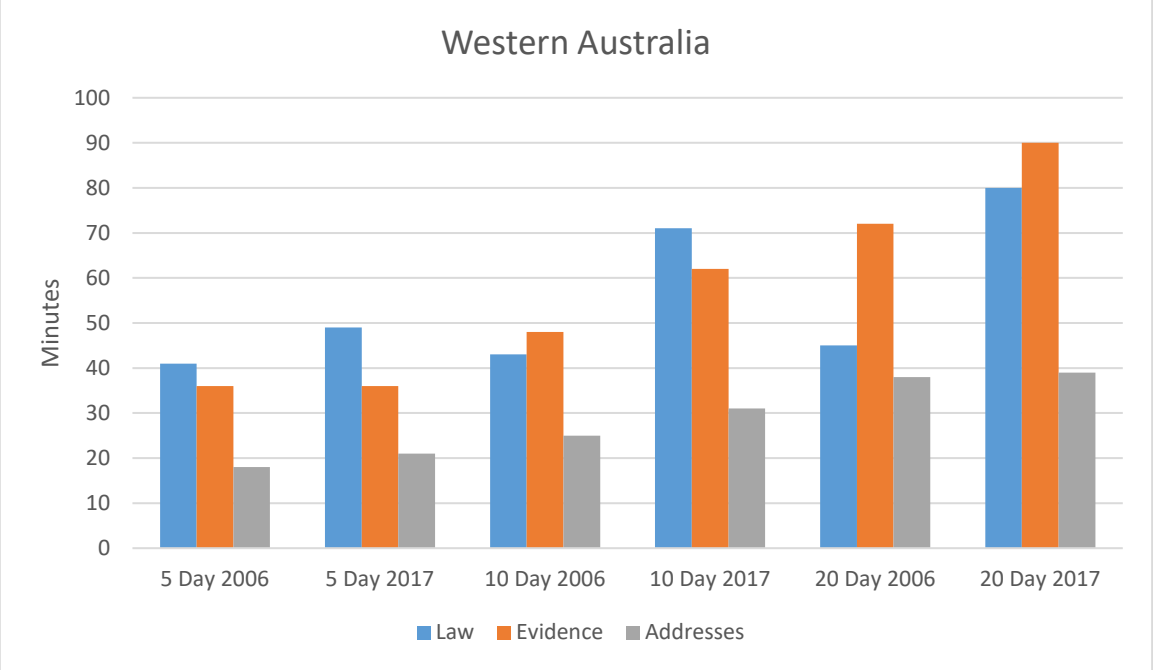


Figure 32. Estimated average duration of components of summing up in Western Australia in 2006 and 2017

The cause of this trend is unclear. Given the awareness amongst judges of the challenges faced by jurors when the summing up is too long, and that summarising the evidence is a major contributor to instructional length, the apparent trend of increasing length in these two states, and in New Zealand, is surprising.

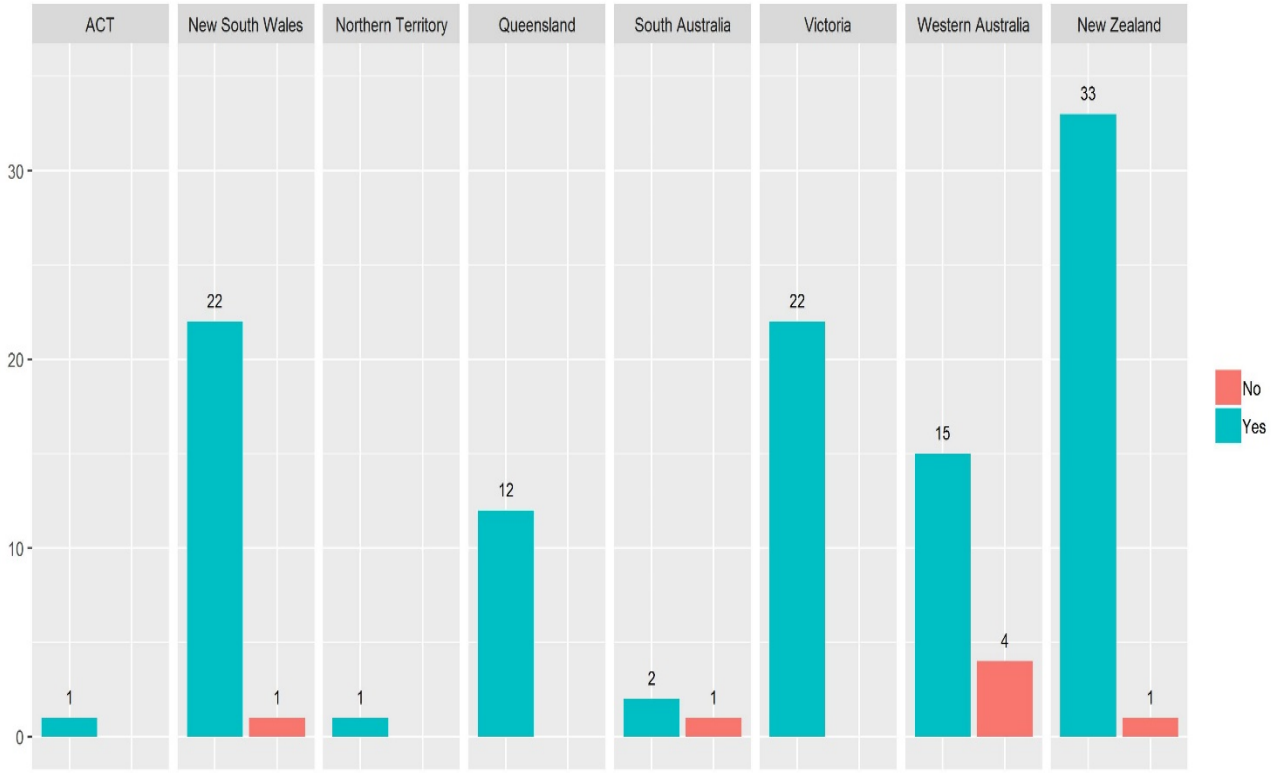
Use of Bench Books

Use of bench books is now routine, with judges in all jurisdictions other than the ACT, Northern Territory, South Australia, Western Australia and Tasmania indicating that a bench book is available in their jurisdiction. This finding is consistent with those of the previous survey, when all of the judges in New South Wales, Queensland, and Western Australia, and most of the judges in Victoria (86.8%) and New Zealand (98%), indicated that a bench book was available in their jurisdiction. The lowest availability was reported in South Australia (70%) and Tasmania (50%).[39]

In both the previous and present survey, there was some confusion in these answers, with some judges indicating a bench book is available in their jurisdiction when, as far as we are aware, it is not. For example, in the present survey some judges from the ACT, Northern Territory, and Western Australia indicated a bench book is available in their jurisdictions. To the best of our knowledge, bench books are publicly available in New South Wales,[40] Queensland,[41] and Victoria,[42] available but not publicly accessible in South Australia and New Zealand, and unavailable in the ACT, NT, Tasmania and WA.[43] Some judges in jurisdictions where there is no bench book may be referring to their use of available bench books from other jurisdictions.

In those jurisdictions where a bench book is available, it was used by the vast majority (96.8%, 91/94) of judges to assist in the preparation of their summing up (AU = 96.6%, 56/58; NZ = 97.1%, 33/34). Even in those jurisdictions where judges indicated a bench book is not available, just over 81% (17/21) made use of bench books from other jurisdictions. The relative use of bench books in each jurisdiction is displayed in Figure 33.

[39] Ogloff et al, above n 1, pp. 28-30.
[40] https://www.judcom.nsw.gov.au/publications/benchbks/criminal/index.html
[41] http://www.courts.qld.gov.au/court-users/practitioners/benchbooks/supreme-and-district-courts-benchbook
[42] http://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm
[43] Western Australia does have an 'Equality before the law' Bench Book: (http://www.supremecourt.wa.gov.au/_files/equality_before_the_law_benchbook.pdf). As discussed below, it appears that Western Australian judges also make use of an ad hoc Bench Book; see p 38.



Note: n = 94, excluding 34 missing responses (2 from the ACT, 1 from NSW, 2 from the NT, 5 from SA, 1 from Tasmania, 1 from Victoria and 1 from WA).

Figure 33. Number of judges who use a bench book to prepare summings up by jurisdiction

Judges who use bench books were then asked to indicate how they made use of them when preparing their instructions. The feature of the bench books most frequently used by judges is the model directions, with nearly 90% (88.8%, 95/107) of judges who use bench books indicating that they use the model directions when preparing instructions. Approximately two-thirds (70.1%, 75/107) read the case notes and utilise the jury checklists (64.5%, 69/107). Just over 40% (43.0%, 46/107) of judges use all three features.

When comparing judges in Australian jurisdictions with those in New Zealand, a high proportion of judges in both countries use the model directions when preparing their instructions: (AU = 91.3% (73/80); NZ = 84.9% (28/33)). Case notes are used more frequently by Australian judges – 73.8% (59/80) of Australian judges commented that they read case notes, compared to 57.6% (19/33) of New Zealand judges. The reverse is true of jury checklists, with 84.9% (28/33) of judges in New Zealand using checklists compared to 53.8% (43/80) of Australian judges.[44] Beyond model directions, jury checklists and case notes, judges also identified question trails as a useful feature of bench books.

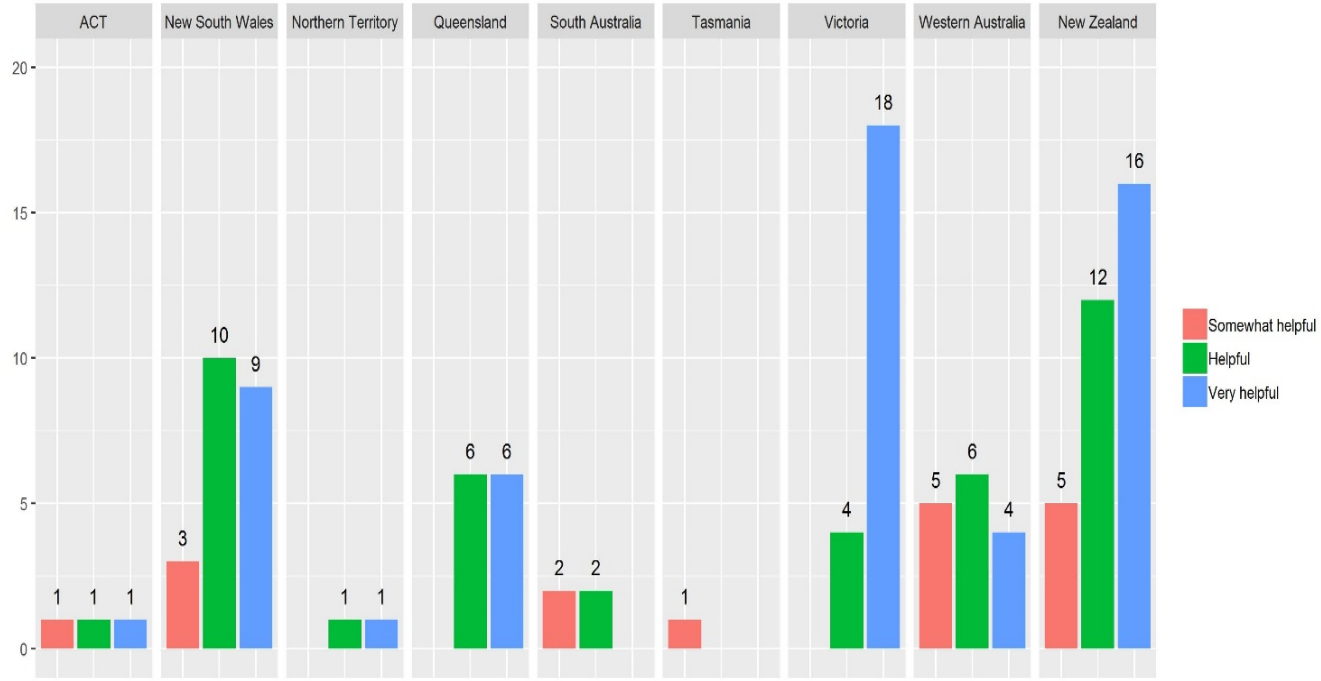
Many judges use bench books, and the model directions in particular, as a 'useful starting point' or 'guide' to ensure that all relevant elements are covered, and then tailor or modify the model directions to meet the circumstances of the case at hand. As was stated by one judge, 'I am not a slave to the model directions. I tend to either look at them as a guide and then prepare my own directions or I will prepare my directions without reference to the bench book and then cross-check to see if I

[44] It may be that some New Zealand judges understood 'checklist' to include 'question trail.

have missed anything'. Another judge stated that 'I copy and paste the model direction into my summing up document and then edit it *in situ*, so that it is appropriate to the particular case. I will add and subtract both law and fact from the model direction. Often there is little of the original left, but this method provides me with some reassurance that I have not overlooked anything'.

Some judges commented that they often modify the language used in the model directions to simplify the wording to 'ensure the language [is] comprehensible' and to avoid repetition, while 'still maintaining the integrity of the direction'. Conversely, while some judges 'attempt to couch [the model directions] in my own words', other judges state that they do not depart from the wording of model directions because 'if the Bench Book directions are given then there is little chance of falling into error'.

Of those judges who indicate they use a bench book, either from their own or another jurisdiction, 49% consider it 'very helpful' and 37% 'helpful', while only 14% consider it 'somewhat helpful'. Similar proportions emerged in Australia (47.5%; 37.5%; 15%) and New Zealand (48.48%; 39.39%; 18.18%). Relative ratings for each jurisdiction are displayed in Figure 34.



Note: n = 114, excluding 14 missing responses (1 each from the NT, Victoria and NZ, 2 from NSW, 4 from SA,) and 5 from WA).

Figure 34. Judicial ratings of the usefulness of the bench book, by jurisdiction

The Victorian bench book was rated most favourably, with 81.8% (18/22) of those using it rating it 'very helpful', and the remaining 18.2% (4/22) rating it helpful. This was followed by Queensland (50% (6/12) very helpful; 50% (6/12) helpful), New Zealand (48.5% (16/33) very helpful; 36.4%

(12/33) helpful; 15.1% (5/33) somewhat helpful), and New South Wales (25.8% (9/22) very helpful; 32.3% (10/22) helpful; 9.7% (3/22) somewhat helpful).[45]

Following from the previous survey results, judges were asked whether the bench books could be improved. Approximately three-fifths (60.6%, 66/109) of those who responded believe that they could. Judges most commonly note the need for the language in bench books to be simplified, with almost 50% of participants commenting on some variation of the need for better use of Plain English principles in bench book content.[46] For judges in New South Wales and Victoria, this is the primary issue of concern, comprising over four-fifths of responses. Common comments on the language used in bench books are that it is 'far too verbose', 'unduly complex', 'unnatural', 'old fashioned' 'legalistic', and 'clunky'. Others commented that model directions are 'overly lengthy', 'repetitive', 'pedantic', 'condescending' and 'patronising' to jurors.

The second most common concern, noted by almost 20% of judges who use bench books, is the need to ensure that bench books are updated to reflect the latest case law and legislative developments. This is of particular concern to judges in New Zealand – over half (55%) of the participants commenting on this issue are New Zealand judges. The other major area for improvement identified by New Zealand judges is that bench books should include more examples, including model directions and case examples – five of the seven judges making this recommendation are from New Zealand. Only New Zealand judges commented on the need for a greater range of offences to be covered in bench books.

Other suggestions for improvement of bench books include the addition of question trails (noted by judges from New Zealand and Queensland) and ways to improve the 'ease of use' of bench books, by enabling judges to extract relevant sections, and by using the same key words throughout the document, 'thereby shortening luddite search time'. Judges from Western Australia advocate for the development of a formal bench book, as opposed to the current version which is 'prepared and updated by volunteer judges and a committee' but not endorsed by a formal body.

Suggestions for improved processes for the ongoing development of bench books include better coordination of possible amendments with the committee supervising the bench book when issues arise in a case that are not already covered. Another judge posited that 'all directions should be submitted and used as references as there are often cases where novel issues arise and they have been covered elsewhere in the system'.

Finally, while many judges note areas requiring improvement, five judges (four in Victoria and one in New South Wales) made positive comments, including that, while improvement is always possible, the bench book in their jurisdiction is 'an extremely useful tool' that 'adapts quickly to changes in practice/case law and legislation'. A comment was also made that, in relation to some areas of the law, 'directions have been tightened as best they can'.

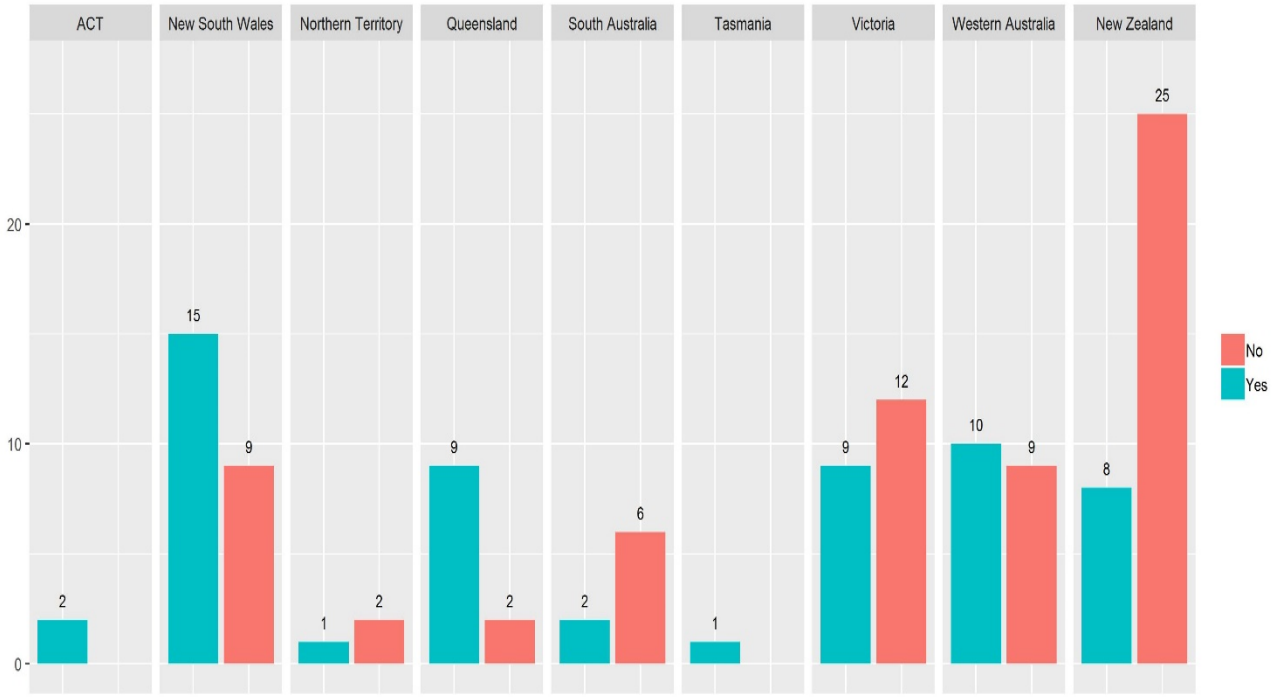
While it is clear that, in the majority of jurisdictions, bench books are the primary form of assistance provided to trial judges in preparing their summing up, almost 60% (59.0%, 36/61) make use of materials in addition to legislation and case notes. Of the 61 judges who responded to this question, the most common forms of assistance identified are a personal library of jury directions (*n* = 31), jury directions provided by other judges (*n* =14), specialist texts/annotated legislation such as 'Australian Criminal Trial Directions' (*n* = 10), case transcripts (*n* = 10) and trial notes (*n* = 7).

[45] Responses from South Australia were limited, with three judges indicating there was a bench book and five indicating none. Of the three who responded that there is a bench book, two used it, with one indicating it is 'helpful', and the other that it is 'somewhat helpful'.

[46] Many judges also identified this as an impediment to good communication; see p. 54.

Timing of the Summing Up

Judges were also asked whether they begin summing up to the jury directly after counsel have finished their closing remarks. Responses are almost evenly split: 46.7% (57/122) begin immediately and 53.3% (65/122) take a break. However the difference is quite stark between Australia and New Zealand, with 55.1% (49/89) of Australian judges and 24.2% (8/33) of New Zealand judges beginning immediately. Results for individual jurisdictions are displayed in Figure 35.



Note: n = 122, excluding six missing responses (1 each from the ACT, New Zealand, Queensland and WA, 2 from Victoria)

Figure 35. Number of judges who sum up directly after closing remarks, by jurisdiction

Again, the judges' comments add texture to these responses. The majority of judges are aware of the importance of giving the jury a break, with one judge noting that 'the last part of the trial is very tiring for juries as they have to listen to two final addresses and then my charge, so I give them lots of breaks at that end of the trial'. Many judges rely upon natural breaks in the proceedings, for example, a number of judges commented that, where counsel's closing addresses finish in the afternoon, they delay summing up to the following day to 'avoid overloading the jury'. In such circumstances, one judge 'will usually offer the jury the option [of recommencing the following day]'. Many judges also note the need for the trial judge to have a break to 'weave counsel's arguments into my summing up' and finalise the directions to the jury.

Written Assistance for Jurors

In the next section of the survey, judges were asked whether they provide the jury with any written material to assist them with the summing up. Overall, judges overwhelmingly do so, with 91.2% (114/125) answering 'yes' to this question (AU = 89.0%, 81/91; NZ = 97.1%, 33/34) and 8.8%

(11/125) ‘no’. Figure 36 displays the relative frequency with which various written materials are provided to jurors during the summing up.[47]

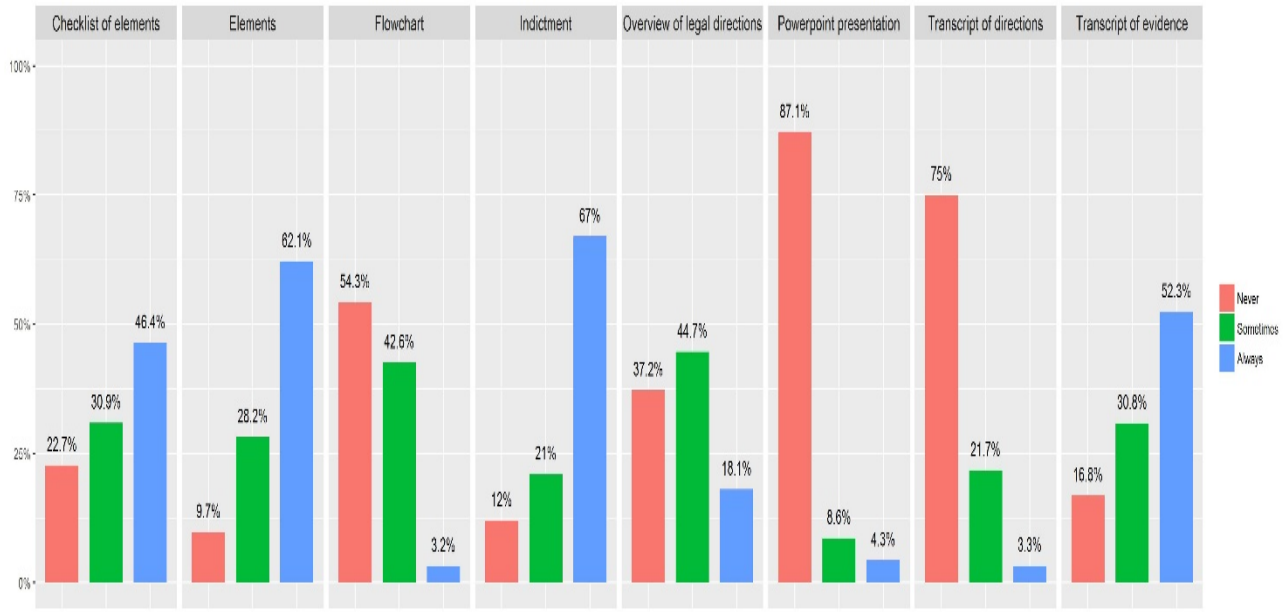
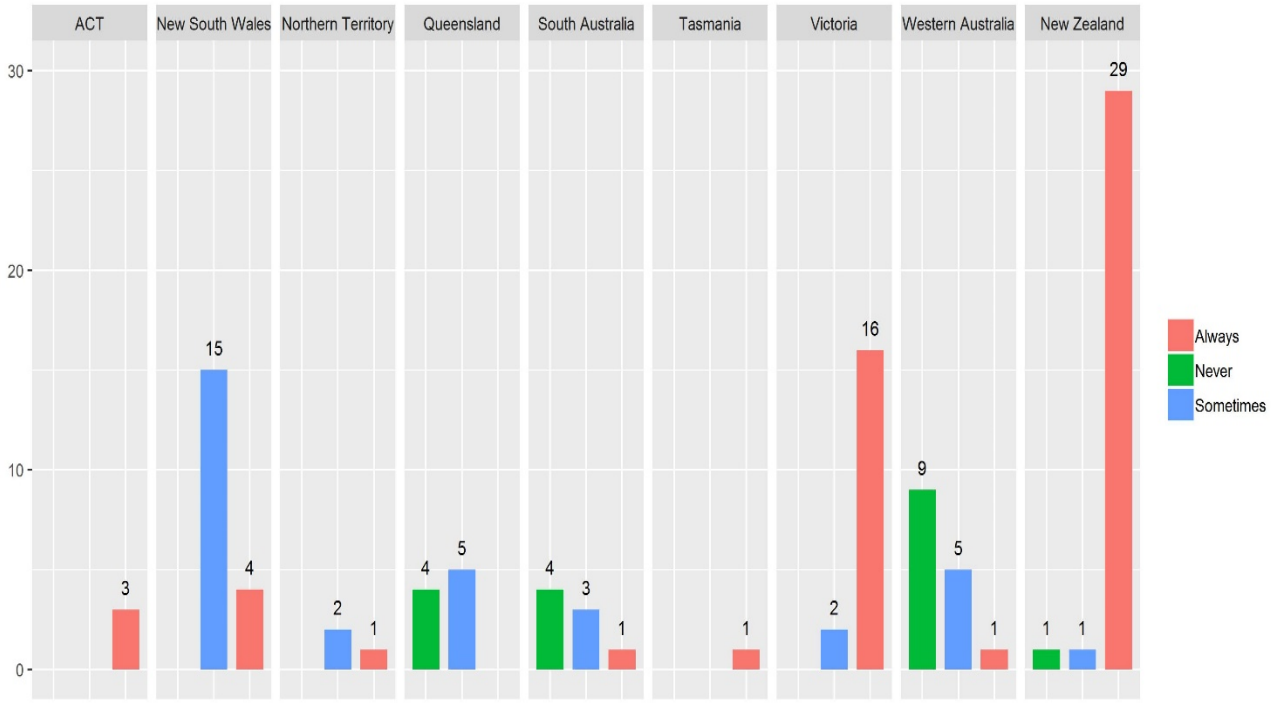


Figure 36. Percentage of judges who provide jurors with different forms of written material

Trial transcript

Particularly notable is the provision to juries of a trial transcript. Consistent with the previous survey findings, this is almost standard practice in New Zealand, with 93.6% (29/31) of judges indicating they always provide it. In contrast, just over one-third of Australian judges (35.5%, 27/76) always provide a trial transcript, although a further 42.1% (32/76) indicate that they ‘sometimes’ provide it. This brings the proportion of Australian judges who are prepared to provide a trial transcript to over three-quarters (77.6%, 59/76). This is a considerable increase from 40% in the previous survey,[48] although a sizable 22.4% (17/76) indicated they ‘never’ provide a trial transcript, compared with only one New Zealand judge. As Figure 37 illustrates, amongst Australian jurisdictions, the practice of providing a trial transcript is most common in Victoria (88.9%, 16/18).

[47] A number of these questions had a particularly high level of ‘missing; (i.e. unanswered) responses.
[48] Ogloff et al, above n 1, p. 15.



Note: n =107, excluding seven missing responses (2 from New South Wales, 2 from New Zealand, 2 from Western Australia and 1 from Queensland)

Figure 37. Judges who provide jurors with a trial transcript, by jurisdiction

Checklist of elements of the offence charged

A checklist of elements of the offence charged provides a structured approach to determining whether these elements have been proven. Given the widespread use of question trails in New Zealand, it is unsurprising that this is the next most common form of written assistance provided to juries in that country, with almost 90% (27/30) of the judges indicating they always provide one. Only one judge never provides a checklist (3.3%, 1/30). In Australia, far fewer judges (26.9%, 18/67) 'always' provide a checklist, with a further 41.8% (28/67) doing so 'sometimes'. A substantial proportion, almost one-third, (31.3%; 21/67) indicated that they never provide such checklists. The term 'checklist' was left open as to its form, but was intended to incorporate question trails as well as other forms of structured assistance. It is possible, however, that differences in terminology impacted the results for this and related questions.

List of elements of the offence charged

In contrast to a checklist, a list of elements is simply a memory aid in the form of a written list of elements, but does not provide a structured approach to determining whether the elements have been proven. The latter are much more common in Australia, with 61.3% (46/75) of judges 'always' providing a written list of elements, and a further 32.0% (24/75) 'sometimes' doing so. Only 6.7% (5/75) of judges indicated they never provide a written list of elements. Given the use of question trails in New Zealand, it may be that a list of elements is seen as less useful and more likely to complicate the jury task than to assist, but almost two-thirds (64.3%, 18/28) of New Zealand judges always provide such a list, 17.9% (5/28) sometimes, and 17.9% (5/28) 'never'. It may also be that some New Zealand judges understand a list of elements to be the same as a question trail.

Flowcharts

Apart from the use of checklists of elements, it is notable that two judges in Australia (2/70, 2.9%) always utilise flowcharts as a written aid to jurors. Not surprisingly given the widespread use of question trails, 58.3% (14/24) of New Zealand judges indicated that they 'never' provide a flowchart, while 37.5% (9/24) indicated that they do so 'sometimes'. Only one judge (4.2%, 1/24) indicated that this practice was 'always' followed. As with the previous questions, it may be that some judges understand a flowchart to be the same as a question trail.

Indictment

The indictment is the most common form of written assistance provided to juries by Australian judges, with over 90% always (67.1%, 49/73) or sometimes (26.0%, 19/73) providing a copy, and only 6.8% (5/73) never providing it. As with the list of elements, the indictment may have limited utility where a question trail is also provided, but it is still always (66.7%, 18/27) or sometimes (7.4%, 2/27) given to juries by New Zealand judges, although 25.9% (7/27) never provide it.

Written overview of directions

Given widespread awareness of the complexity of many legal directions, it is surprising that no Australian judges indicated they provide a written overview of the legal directions. Even in New Zealand, some legal directions are inevitable, yet 54.2% (13/24) of judges indicated they never provide such an overview, 33.3% (8/24) do so sometimes, and only 12.5% (3/24) always provide an overview. This is particularly noteworthy given that it is rare for jurors to be provided with a transcript of the summing up. In Australia, 31.4% (22/70) of judges indicated it is never provided, 48.6% (34/70) sometimes and 20% (14/70) always. In New Zealand, the responses are even stronger, with 87.0% (20/23) of judges indicating they never provide a transcript of the summing up, and 13.0% (3/23) sometimes. In Australia, for many judges not providing a transcript of the summing up relates to practical matters; i.e. the transcript is simply not available. In New Zealand, although it is within the discretion of the trial judge what material they will provide to the jury to assist with the summing up,[49] it is general practice to not distract the jury with a written copy, instead preferring that they concentrate on the oral directions with the question trail.[50]

PowerPoint

Interestingly, a small number of judges do make use of PowerPoint during their summing up and provide written copies to the jury. In Australia, 4 judges (5.7%, 4/70) always do so, while 8.6% (6/70) do so sometimes. Overwhelmingly, Australian judges do not use PowerPoint, with 85.7% (60/70) indicating 'never'. In New Zealand, no judges always use it, 8.7% (2/23) do so sometimes, but 91.3% (21/23) never use it.

Other forms of written assistance

Judges were also asked whether there were others forms of written material that they provide that had not been listed. Nine Australian judges answered this question, with some referring to sequences of questions, question trails, 'roadmaps' and similar aids to jury deliberation. Others mentioned that in complex matters they are more likely to provide checklists, summaries of principles, and/or copies of definitions to assist the jury. One judge mentioned that he or she provides a DVD of the evidence so that the jury could watch it again if they wished to.

Amongst the 12 New Zealand judges who answered this question, most emphasised the use of question trails, while others noted that in New Zealand jurors are given a 'charge notice' at the

[49] *Singh v R* [2014] NZCA 306.
[50] *R v Calder* (Unreported, High Court of New Zealand, Tipping J, 13 October 1995).

beginning of the trial, which includes the indictment and a written list of elements. One judge mentioned a chronology or timeline while another provides the evidential interview disc.

Requests for Written Assistance

Judges were asked whether juries ever requested written material related to the summing up. Overall, 45.3% (58/128) indicated yes, while 54.7% (70/128) of judges had not received such a request. Looked at by country, the proportions are quite different, with 47.9% (45/94) of Australian judges receiving such a request, compared to 38.2% (13/34) of New Zealand judges. The lower proportion of requests in New Zealand may be due to more material, in particular transcript of evidence, being provided as a matter of course. The relative proportions for each jurisdiction are set out in Figure 38.

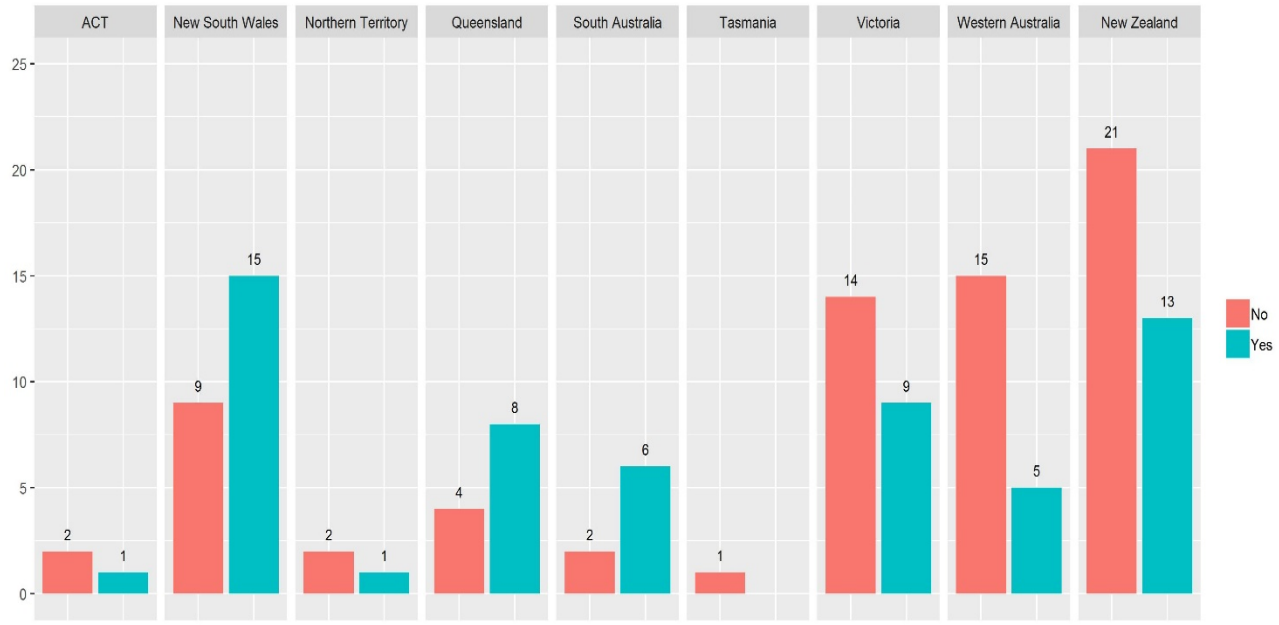


Figure 38. Number of judges who received requests for written assistance from juries, by jurisdiction

Overwhelmingly, the requests are for transcripts or copies of oral material in one form or another; either transcripts of the proceedings, written copies of the summing up or, less commonly, transcript of counsels' addresses. There are also requests for transcript of particular directions, or particular pieces of evidence, such as interviews with the defendant. In New Zealand, requests for written material almost entirely related to transcripts of the summing up.

Table 4 *Requests for different types of transcripts*

Type of transcript requested	Australia		New Zealand	
	n	Percent	*n*	Percent
Entire summing up	25	59.5	10	76.9
Specific directions	9	21.4	1	7.7
Evidence	4	9.5	1	7.7
Specific forms of evidence	4	9.5	0	0.0
Elements	4	9.5	0	0.0
Counsel closing addresses	4	9.5	1	7.7
Unspecified transcript	9	21.4	1	7.7
PowerPoint slides	2	4.8	0	0.0
Answers to jury questions about legal directions	0	0.0	1	7.7
Sections of criminal code	1	2.4	0	0.0

Note: Percentages based on number of judges who answered this question (Australia = 42, New Zealand = 13); sum of percentages exceeds 100 because some participants reported requests for more than one type of transcript.

Of those judges who had received a written request, just over half (55.2%, 32/58) granted the request. The proportions of judges granting requests is quite different between Australia (62.2%, 28/45) and New Zealand (30.8%, 4/13). Amongst Australian judges, the most common reason for refusing access to written material related to transcripts of the summing up, where almost all judges who refuse the request do so because it is not in a form that is available, or can be readily made so, in time to give to the jury. A very small number of judges indicated an in-principle objection to doing so, and it may be that more would have done so had it been a realistic possibility.

Where the request was for the transcript of sections of evidence, those judges who refused the request indicated they did so because reading the evidence to the jury ensured that all had equal access, and that there was not the risk that by providing the written transcript of certain evidence, that might assume greater importance in the minds of the jury.

In New Zealand, the majority of judges who refuse the request do so on the basis that it is the practice in that jurisdiction not to provide a written transcript of the summing up. The reasons for not doing so are that it is likely to distract the jury from focusing on the question trail and/or counsels' addresses. Although it is said not to be the practice,[51] a number of New Zealand judges reported that they provide transcripts of the summing up (or part thereof) when requested by the jury. A small

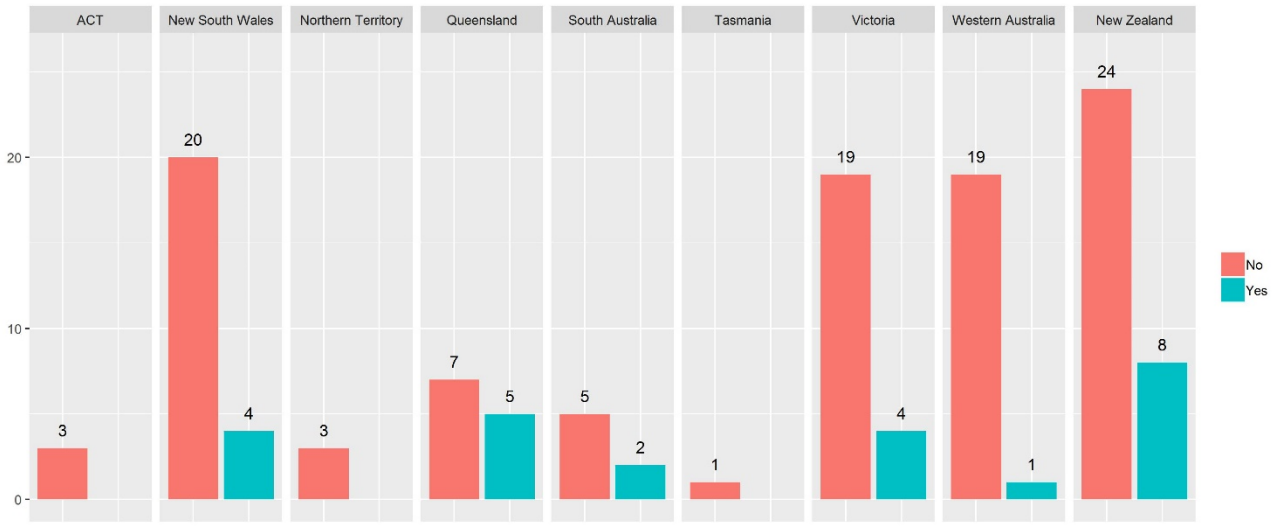
[51] See p. 42.

number of judges indicated that they did not provide it because it was not available and/or the summary document was not sufficiently accurate.

Overall, it appears that in both jurisdictions there is increased awareness of the utility of providing some written material to jurors, but equally not overwhelming them. Particularly in New Zealand it can be seen that the question trail is the primary form of written assistance, and that other material is intended to complement the use of that document, and also not distract from the judge's oral summing up.

Asking Questions

Judges were asked whether they had ever refused to answer a jury's questions. The overwhelming majority of judges answer juries' questions, and the refusal to do so is relatively rare. Overall, 80.8% (101/125) of judges said they had never refused, while 19.2% (24/125) indicated they had. There was some difference between jurisdictions, with 82.8% (77/93) of Australian judges never having refused to answer a question, compared to 75.0% (24/32) of New Zealand Judges.



Note: n = 125, excluding 3 missing responses (1 from South Australia, 2 from New Zealand)

Figure 39. Number of judges who have refused to answer a jury's question, by jurisdiction

Of those judges who refused to answer a jury's question, the most common reason was that the question related to a matter that was outside the scope of the evidence or otherwise irrelevant. It is likely many of these judges do not actually 'refuse' to answer, but rather make clear to the jury that they cannot answer the question and, where possible, the reasons for that. Less common were questions on beyond reasonable doubt which could not, by law, be answered, and three judges had instances where juries asked about the likely penalty for the defendant.

As Figure 40 demonstrates, where judges do answer questions this is most commonly done by repeating the directions or paraphrasing them. It is also common (82.6%, 90/109) for judges sometimes to try to answer the question by providing an example. Less common is replaying recorded evidence, with just over half (55.5% 66/119) of judges sometimes doing this, and 41.2% (49/119) never doing so. It is rare for judges to replay recorded directions, with 90.4% (103/114) never doing so. Given the practical issues raised in other contexts, it may be that this is due to the material being

unavailable as much as a principled objection. Similar patterns appear when the results are broken down by jurisdiction.

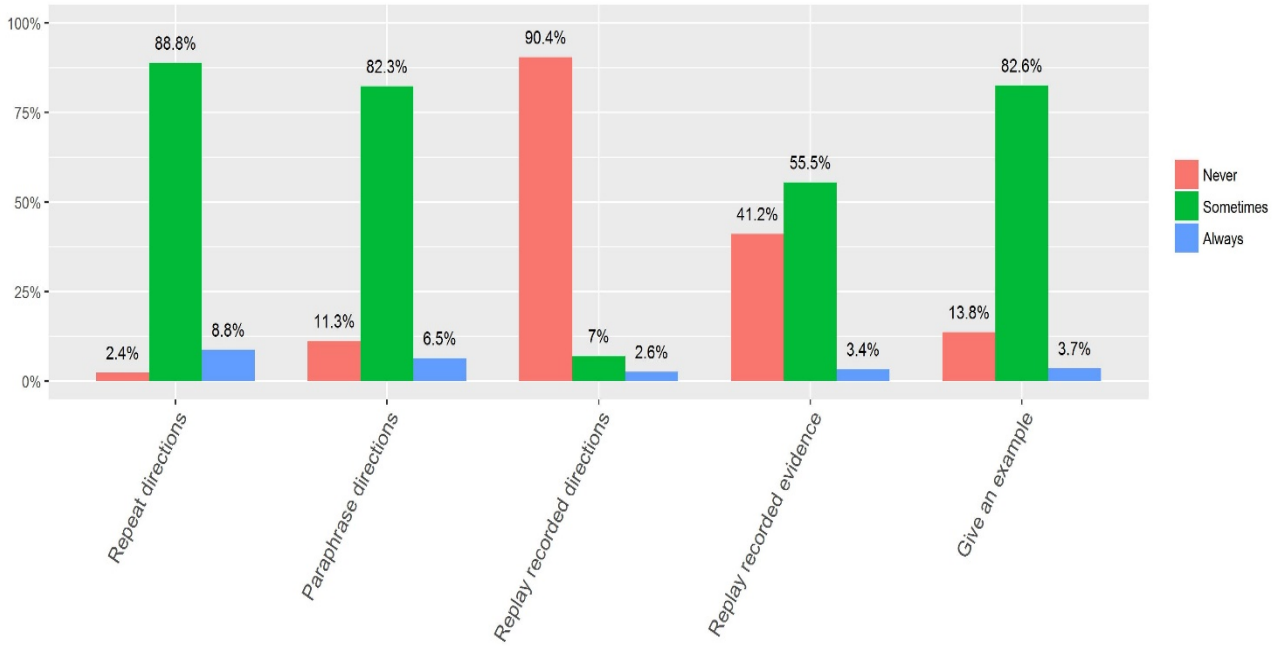


Figure 40. Extent to which judges use various methods to respond to jury questions

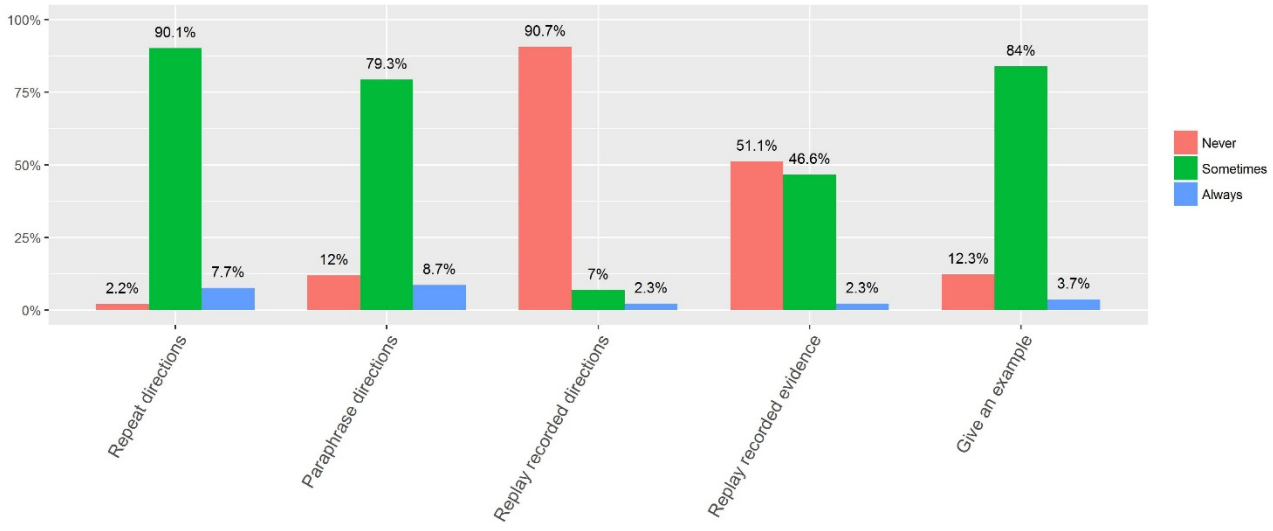


Figure 41. Extent to which Australian judges use various methods to respond to jury questions

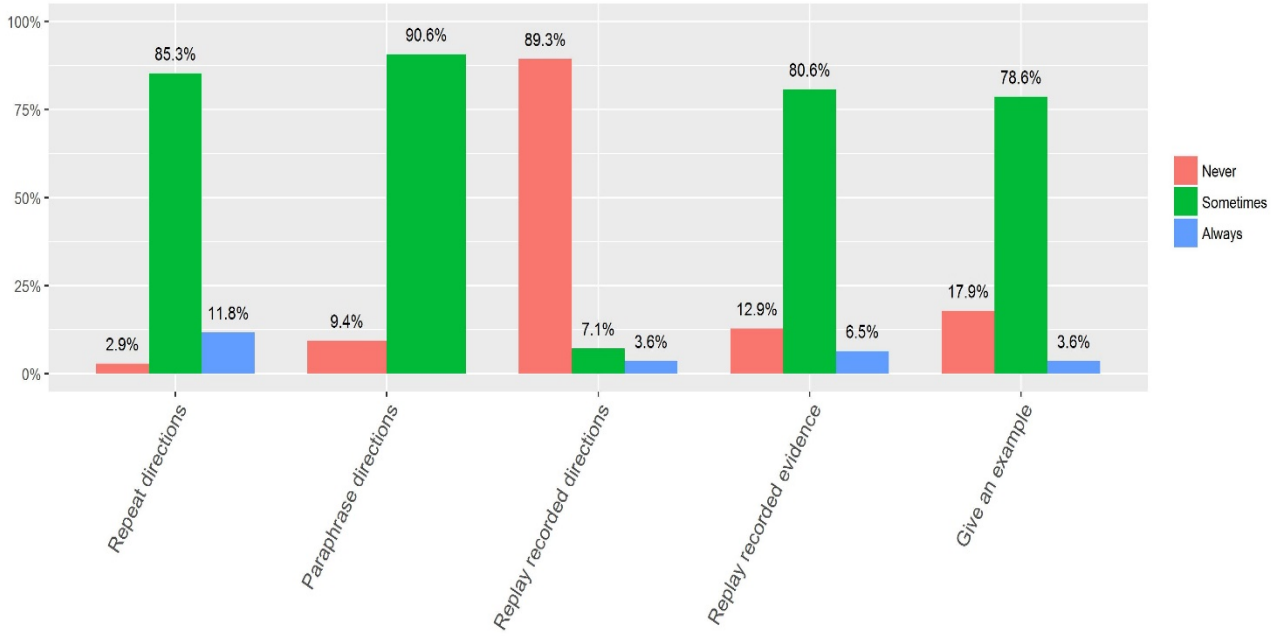


Figure 42. Extent to which New Zealand judges use various methods to respond to jury questions

Deliberations

Judges were asked about their practice with respect to providing juries with information or advice as to the approach they ought or might adopt when deliberating. This was broken down into four categories: (1) information about dealing with disputes, (2) asking questions, (3) advice about deliberating, and (4) how to address conflict/bullying. The overall results, as well as the results for Australia and New Zealand, are summarised in Figures 43 – 45.

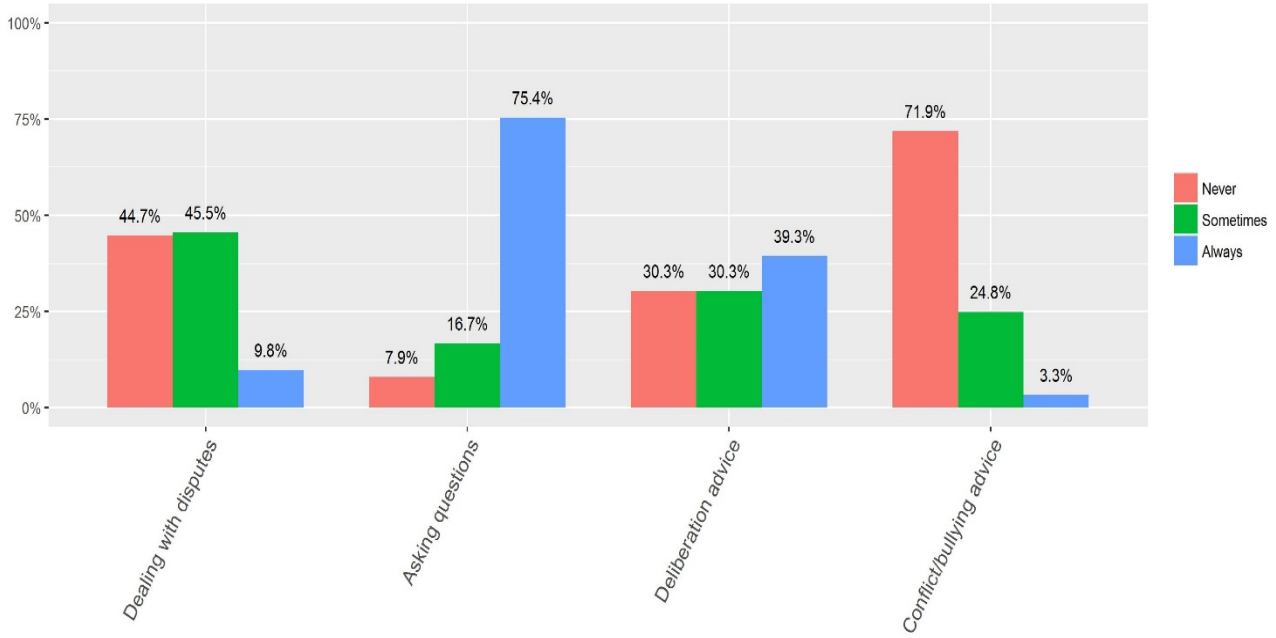


Figure 43. Extent to which judges provide information and advice about deliberation (percent)

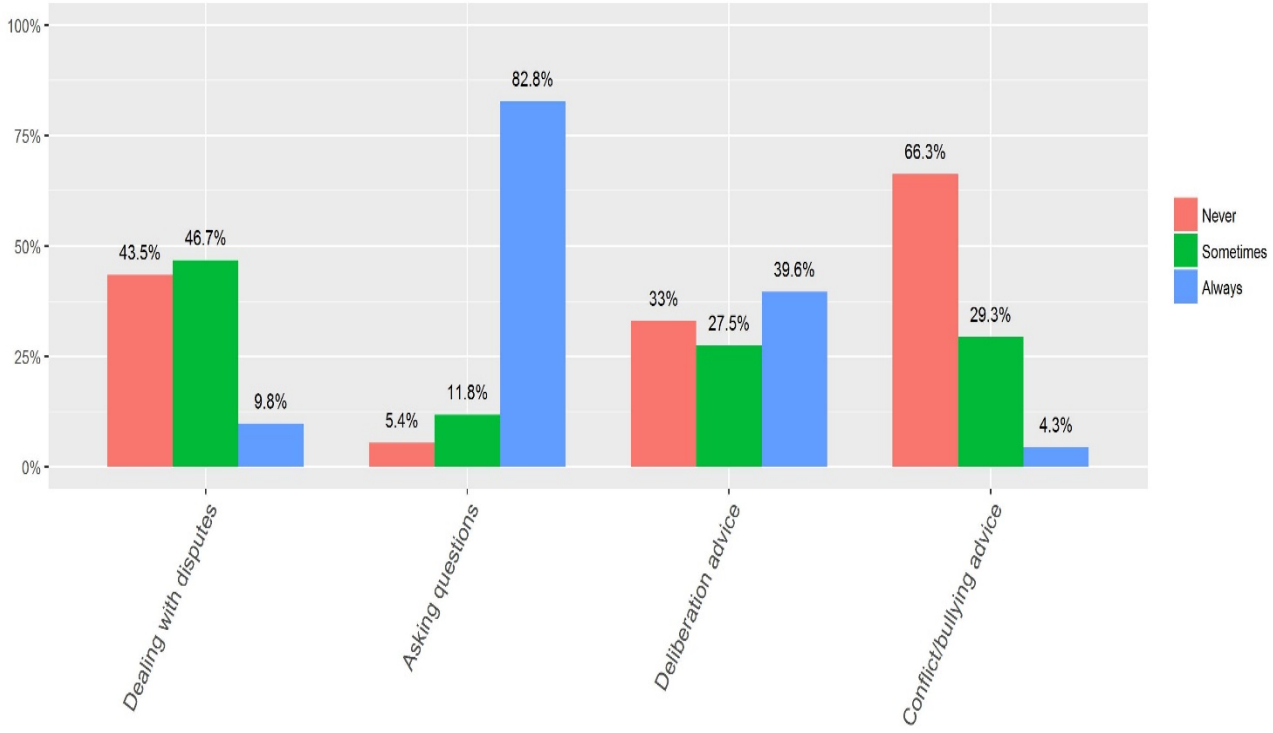


Figure 44. Extent to which Australian judges provide information and advice about deliberation (percent)

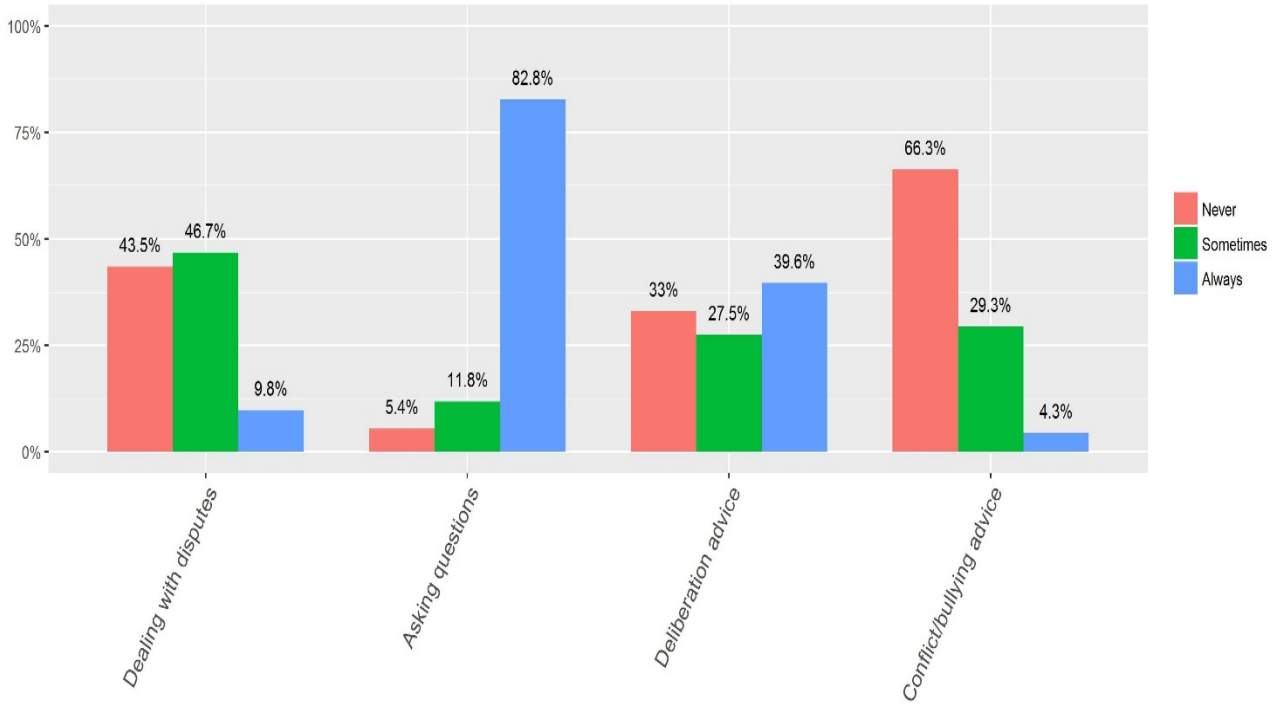


Figure 45. Extent to which New Zealand judges provide information and advice about deliberation (percent)

Information in relation to asking questions is the most common form of assistance provided, with overall 75.4% (95/126) of judges always, and 16.7% (21/126) sometimes, providing such information. Only 7.9% (10/126) never mention asking questions. However, the pattern is quite different between jurisdictions, with 82.8% (77/93) of Australian judges always providing such

information, 11.8% (11/93) sometimes, and only 5.4% (5/93) never doing so. In New Zealand, the proportions are more spread with just over half (54.6%, 18/33) always providing information on asking questions, 30.3% (10/33) sometimes, and 15.2% (5/33) never.

In contrast, information relating to the deliberation process is much less commonly provided in both jurisdictions. In terms of advice about deliberating, judges overall were split three ways on whether they always (39.3%, 48/122), sometimes (30.3%, 37/122) or never (30.3%, 37/122) provide such information. It can be seen from Figures 44 and 45 that this pattern is largely replicated in both Australia and New Zealand.

When it comes to information about dealing with disputes or managing conflict, it is much less commonly provided, with 44.7% (55/123) of judges never providing such information, 45.5% (56/123) sometimes, and only 9.8% (12/123) always. It is likely that the percentage of judges sometimes providing such information may have done so when there was some indication that the jury was in dispute; for example, a perseverance direction. Again, the breakdown by jurisdiction was similar.

Least common was information relating to how to deal with conflicts or bullying, with just over 70% of judges (71.9%, 87/121) never providing such information, 24.8% (30/121) sometimes, and only 3.3% (4/121) always. There is some difference between jurisdictions, with no New Zealand judges always providing such information, 10.3% (3/29) sometimes and over 85% (89.7%, 26/29) never. In Australia, 4.3% (4/92) of judges always provide such information, 29.4% (27/92) sometimes and 66.3% (61/92) never.

Consistent with the previous survey findings, judges continue to be reluctant to provide information to jurors in relation to their deliberations. As noted above, it is likely that those judges who do provide such information do so only after they have some indication that the jury are experiencing some difficulty, in which case judges may give a perseverance direction.[52] However, this does not address the issue of disputation during the trial itself, where there may be difficulties encountered within the jury room. Nor does it provide jurors with any form of guidance prior to difficulties arising during their deliberations.

Some indication of the practice of some judges in this respect was found in responses to the question asking whether they provide any other information not already listed. Here, a number of judges identified pre-emptive efforts to stave off any conflicts or bullying behaviour amongst jurors during the course of the trial. For example, one judge noted that ‘at least twice in a trial I will tell a jury of my assumption that they will talk to and listen to each other with genuine courtesy when deliberating’, while another judge commented that they emphasise to the jury their oath as a juror and ‘the need to express his or her opinion when deliberating consistent with that undertaking’. Other points stressed to jurors include that the ‘foreperson [has] no greater role than any other’ and that there is no time pressure, with one judge commenting that they tell jurors that ‘they must take the time they need – there is no polite minimum time that they must deliberate for and no maximum’. One judge stated that they ‘would of course provide information on dealing with disputes/conflict if it were necessary’ but went on to note that ‘it has not been’.

There is, of course, a tension between the assistance that juries might gain from being provided with some guidance, and juries being ‘free to organise their individual processes of reasoning, or their discussions as a group, in whatever manner appears to them to be convenient.’[53] However, there is arguably a clear distinction between telling juries how they must deliberate, as opposed to providing guidance for their deliberations.

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[52] *Black v R* (1993) 179 CLR 44. Also see ss. 64 and 65 *Jury Directions Act* 2015 (Vic) and *R v Accused* [1988] 2 NZLR 46.

[53] *Stanton v R* (2003) 198 ALR 41 at 49 per Gleeson CJ, McHugh and Hayne JJ.

Fact-Based Directions

Judges were next asked whether they were aware of the fact-based (integrated) approach to summing up to juries. Overall, 60.9% (78/128) answered yes, while 39.1% (50/128) said no. When asked to explain what they understood the approach to be, just over half of the judges described it as involving question trails which address the elements of the offence and 'identifies the factual questions to be answered by the jury in a logical sequence to arrive at their decision (are you sure that … yes/no)'. Other descriptions of the approach included: 'a careful intertwining of the facts/cases for each side with the legal directions'; 'explaining the law by reference to the facts/evidence/issues of that individual case rather than explaining the law in a vacuum'; and 'to direct on matters of law and on legitimate/illegitimate reasoning by reference to examples taken from the facts of the trial or counsel's submissions rather than a generic formula'.

Not surprisingly, there is a stark difference in the level of awareness of the approach between New Zealand, where such directions are commonplace, compared to Australia where they are not. 85.3% (29/34) of New Zealand judges are aware of this approach, while in Australia it is evenly split, with 52.1% (49/94) aware and 47.9% (45/94) unaware. Broken down by jurisdiction, it can be seen in Figure 46 that awareness in Victoria is similar to New Zealand, with 86.9% (20/23) of participants aware of the fact-based approach. This is likely due to the extensive promotion of this approach by the Department of Justice and the Judicial College of Victoria, culminating in it being expressly included in the *Jury Directions Act*. It may also reflect a skewed sample, in that judges responding to the survey may be more likely to be aware of this approach.

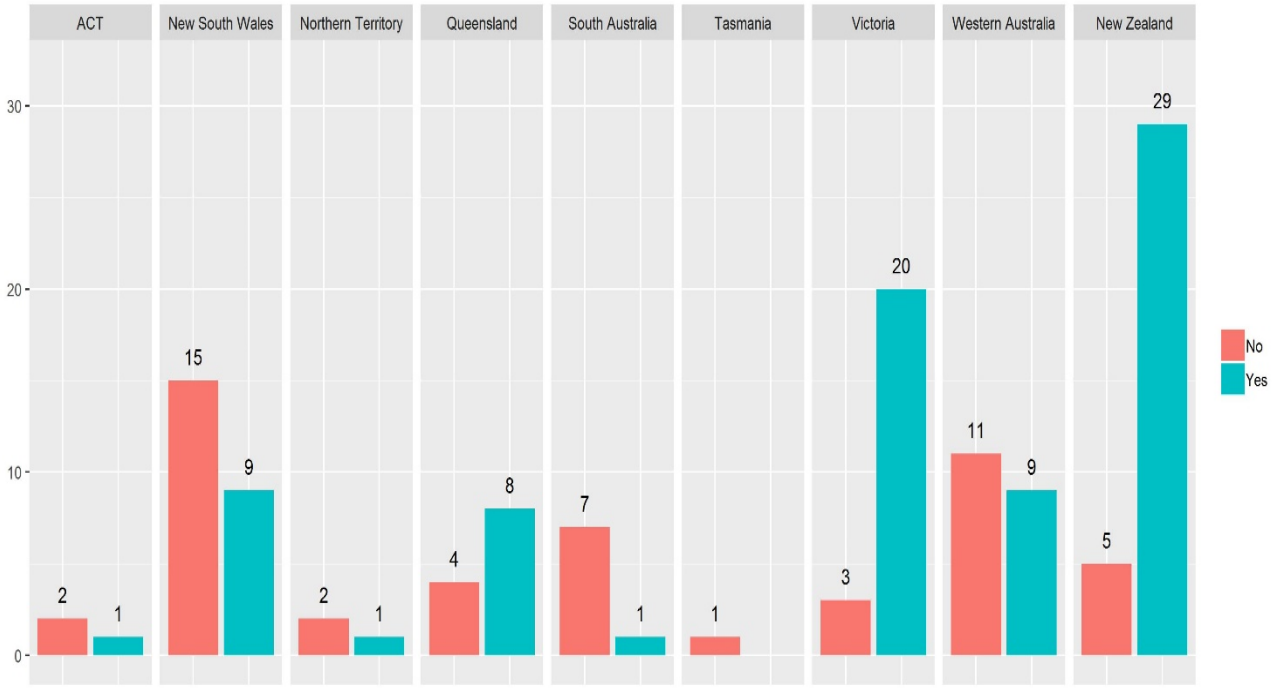


Figure 46. Number of judges aware of the fact-based approach, by jurisdiction

Of those judges who are aware of this approach, 75.6% (59/78) have used the approach when instructing a jury. In New Zealand, the figure is 96.5% (28/29), whereas in Australia it is 63.3% (31/49). In Victoria, despite high levels of awareness, only 40% (8/20) have tried this approach. Of those judges who are aware of the approach, but have not used it, 84.2% (16/19) said they would consider using it in the future.

Judges overwhelming endorse the fact-based approach, with 85% of judges who have used it identifying significant benefits, and one judge summarising their view that the approach is 'invaluable'. Only one judge stated that there are no positive impacts, with a further two judges commenting that they are unable to draw any conclusion because 'it is inevitably impressionistic as all you ever get from a jury is an answer'. While there is no clear pattern as to the observed benefits according to jurisdiction, the positive aspects of the approach tend to revolve around two main areas: (a) judge-focused benefits; and (b) jury-focused benefits.

In regards to benefits to the judge from using the fact-based approach, a number of judges commented that the approach 'clarifies [their] own understanding of the issues' and assists judges to 'be clear about what needs to be asked'. Similarly, one judge stated that the approach 'creates a discipline on the judge to think about the essential questions of law and fact from an early stage in the trial' and another noted that it 'ensures that the trial judge has properly analysed the case'. Other judges commented that this focus on the relevant elements and issues makes 'charge writing less time consuming' and shortens the charge, making 'summing up more focused' and allowing judges to '[get] straight to the point'. In this regard, one judge noted that the approach 'provides a helpful template around which the summing up may be fashioned'. The ability to put the legal directions 'in the context of the factual issues in the particular case, not in an abstract way' is also noted as a positive attribute.

Flowing from these judge-focused benefits, a number of consequential benefits to the jury were noted. Several judges commented that the fact-based approach results in greater comprehension of the legal directions and issues on the part of juries, with one judge stating that 'the fact based approach is clearly the simplest for jurors to understand'. Similar comments included that that the approach 'is logical, cogent and focusses the jury on the issues', that it 'makes it easier for the jury to understand the legal direction and its relevance to the case', and it 'ensures that the jury approaches its function in a logical and ordered way'. Three judges noted that this had been confirmed to them via positive feedback from jurors.

Other jury-focused benefits included simplification and shortening of the directions which 'greatly reduces the time taken such that jury attention does not wane', and embedding the law in the factual issues of the particular case 'greatly simplifies the jury's task and makes instruction on the law much more active, interesting and clear'. A number of judges also commented that juries are better able to perform their function, with one judge explaining that 'if the jury follows the question trail, they will know precisely when they are satisfied of guilt, or not satisfied of guilt'. Similar comments included that the approach provides them with 'assurance that the verdict will be a true verdict on the law and the facts', that it 'enhances the accuracy of the verdict', and 'ensures that the jury's error in approach is minimised'. One judge simply noted that 'it is hard to imagine any other approach for a lay jury'.

In addition to these jury- and judge-focused benefits, other general benefits of the fact-based approach included 'shorter simpler trials', the creation of 'an enduring written summary of the essential issues and questions of fact which must be considered and answered', and 'greatly improved focus' on the issues by counsel. In regards to the latter point, one judge commented that 'defence have no comeback if they take this approach'.

When asked whether there were any reasons for not employing the fact-based approach, three-quarters of judges in New Zealand responded that there are no reasons not to use the approach. A far greater rate of reservation is expressed by judges in Australian jurisdictions, with 81% of judges in Victoria identifying a range of issues and circumstances which may lead them not to employ the approach. A common concern includes time pressure involved in preparation of directions and 'pre-preparing' to enable input from counsel. Other judges raised concerns about not having a high level of familiarity or experience with the fact-based approach. A New Zealand judge observed, in relation to judges, that 'some are more experienced, better than others … some make a complete hash of it'. In regards to counsel, one Victorian judge noted that 'it takes more time initially to get out of the

habit of traditional questions, and needs more discussion with counsel to get sign-off, particularly if they have had little experience with fact-based question trails, or are resistant to them. Arguing with counsel, or not getting cooperation can make giving in and going back to [traditional directions] a tempting option at times'. Another judge from Victoria observed, 'none of the barristers seem ready, willing and able to engage in a discussion of what the integrated directions should be. Changing the culture so that barristers are ready to engage in the discussions required by the Jury Directions Act has taken some time'.

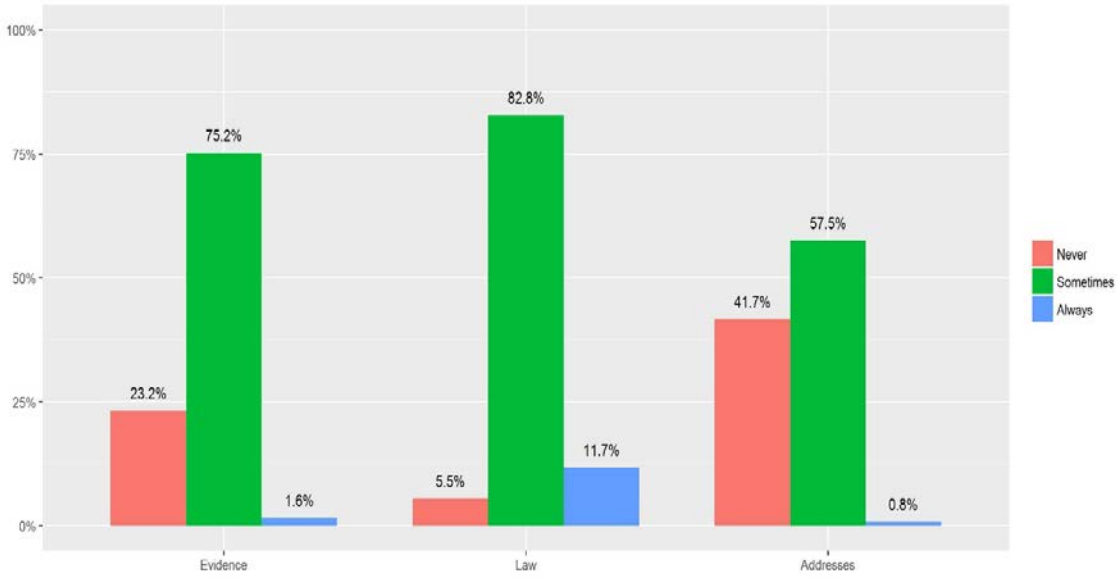
Other reasons for not employing the fact-based approach included a greater risk of appeals, with one judge noting that 'the problem with question trails is that there is a potential to miss a fork or wrongly dictate a logical path', while other judges commented on difficulties in applying the fact-based approach in certain cases. For some judges, problematic cases are those involving only one issue which can be easily addressed without potentially complicating the task through the use of question trails, with a Victorian judge stating that 'in most cases the jurors do not need a fact-based approach if the live issues in the trial are clearly specified by counsel and the judge'. However, other judges commented that the fact-based approach is not suitable in complex cases, because 'it can take a very long time to get a fact-based approach correct in cases which are not run of the mill' and 'sometimes where there are such a number of factual permutations and alternatives, it becomes very difficult to produce something which is not overwhelming'. Similarly, a judge from Queensland explained that their reason for not using the approach is 'primarily because of an obligation to put defences which are barely open, barely argued or which rely on a view of the facts falling between the two extremes contended for by the parties. Such situations make it safer to simply explain the law so as to equip the jury to apply it to the facts as they find them to be'.

When directly asked the question, just under half of the judges surveyed (46.1%, 35/76) consider that the approach is indeed particularly suited to certain types of cases but not others. Again, divergent views are expressed, with some judges nominating uncomplicated, single issue cases as being most suitable, whilst others stated that the approach is best suited to complex cases involving multiple issues. Similarly, some judges consider that the approach is best suited to cases involving a single defendant, whilst others consider that the most suitable cases are those involving multiple defendants.

It should be noted that all of the judges from New Zealand nominated cases involving multiple defendants, multiple charges and multiple issues as being best suited to the fact-based approach, with none commenting that the approach is particularly suitable in single issue cases. Representative of the view in favour of complex cases, one judge stated that the fact-based approach is 'not so well suited to cases where there is [a] single issue … [because there is] … [n]o point in directing the jury to questions that are not in issue … [and it is] … [b]etter to just focus on the one matter that is in issue'. Conversely, another judge stated that they 'have abandoned attempts to use [the approach] in cases where there are numerous alternative charges, and cases where there is reliance on the parties provisions'. The judge went on to note that 'perhaps I will get better at thinking of ways to make these cases fit the approach, the more I use it'. Five judges, from a range of jurisdictions, consider that the approach is suited to all cases.

Judges' Perceptions of the Jury's Comprehension of the Instructions

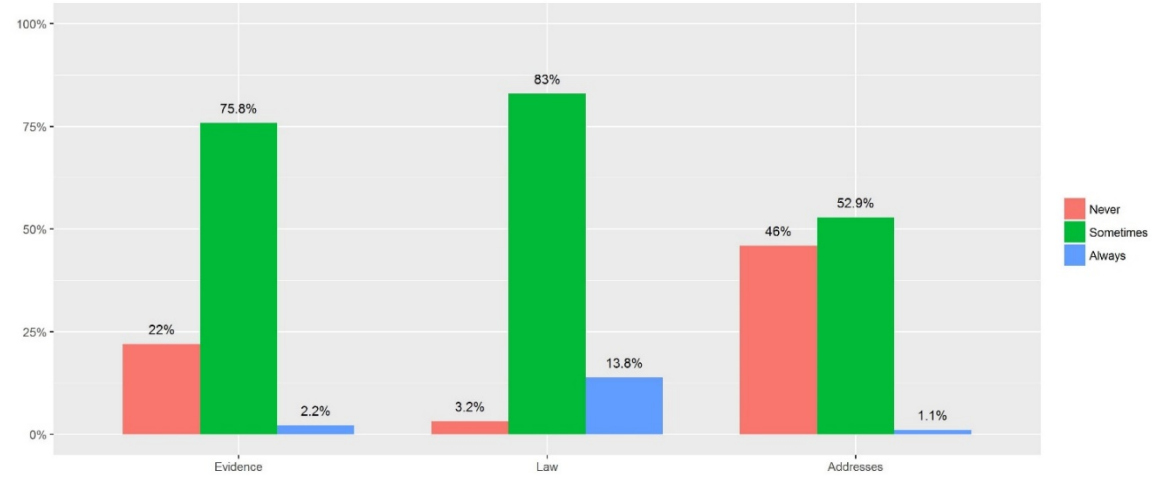
Judges were asked to provide an indication of the extent to which they consider that juries have difficulty comprehending the matters on which they instruct them. As with the previous survey results, we acknowledge that judges are often reluctant to generalise, as comprehension may vary from trial to trial, jury to jury. In addition, judges' assessments of comprehension are based on limited information, such as questions asked by jurors or the general demeanour of the jury. Results depicting judges' answers to this question are presented in Figure 47.



Note: Excludes 8 missing responses related to addresses (n = 120) and 3 missing responses related to evidence (n = 125)

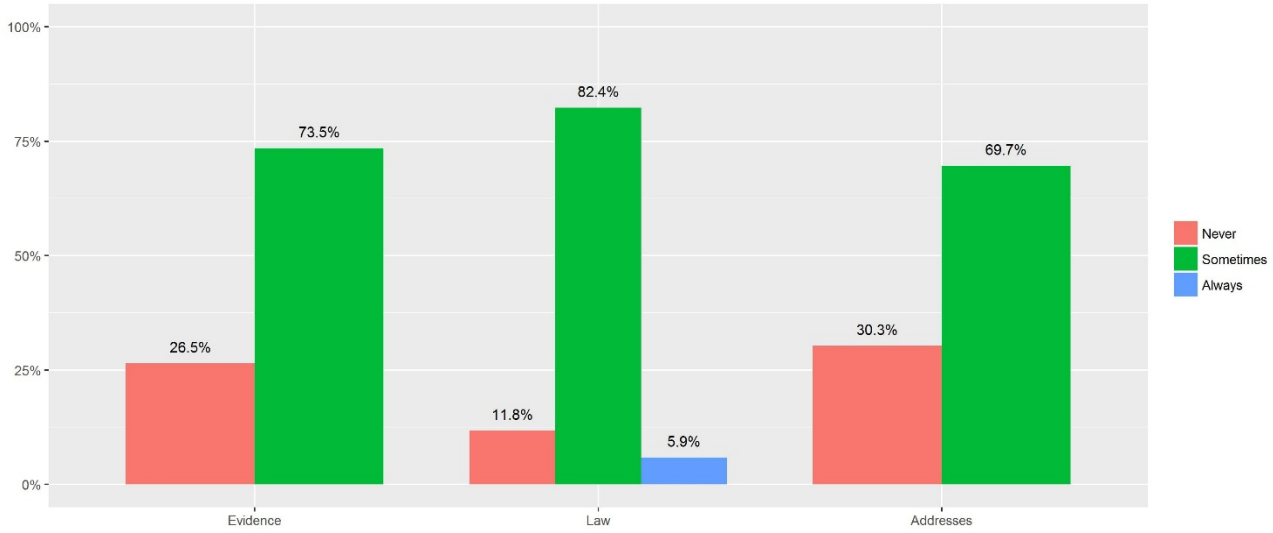
Figure 47. Judges' perceptions of jury comprehension of components of summing up (percent)

Consistent with the previous survey results, judges believe that jurors have least difficulty with the summary of addresses, followed by the evidence, and most difficulty with the law. The pattern is essentially the same in both Australia and New Zealand (see Figures 48 and 49). To provide more detail to these figures, judges were asked to nominate the legal concepts with which they believed jurors had difficulty. The examples given are similar to those reported in the previous survey, the most common being complex legal issues such as the meaning of 'beyond reasonable doubt', propensity/tendency cases, and parties in criminal cases. Also notable are complex provisions such as Commonwealth offences, reverse-onus provisions, and mental elements in sexual offences cases. A number of judges also mentioned self-defence as particularly challenging for jurors.



Note: Excludes 7 missing responses related to evidence (n = 87) and 3 missing responses related to addresses (n = 91).

Figure 48. Australian judges' perceptions of jury comprehension for different aspects of summing up (percent)



Note: Excludes 1 missing response in relation to addresses (n = 33).

Figure 49. New Zealand judges' perceptions of jury comprehension of components of summing up (percent)

Factors which Impede Good Communication

When asked what factors impede good communication, judges overwhelmingly referred to the complexity of legal language and counter-intuitive concepts such as double negatives. This was exacerbated by the length of many directions, and the problem of reciting standard directions to juries without linking them to the facts of the case. The manner of delivery was also mentioned, with judges cautioning against pompous or condescending delivery, and a failure to pitch the information, as much as possible, to the level of the jury. Some judges also mentioned that the layout of the courtroom, particularly poor acoustics, is an impediment to good communication.

Factors which Enhance Good Communication

To a large extent, the factors that enhance good communication are the opposite of those that impede it, and a number of judges simply wrote 'the opposite' of their previous answer. Overwhelmingly, simplifying language is seen as crucial to good communication, particularly when combined with the use of helpful explanations and referring to the facts of the case. The importance of brevity is also noted by several judges. Particularly notable is the number of judges who indicated that written summaries, visual aids, or other aids to comprehension are important in assisting the jury. A number of judges specifically mentioned the importance of guided deliberation tools such as flowcharts or question trails/fact based directions.

Several judges also mentioned the importance of achieving the right manner of delivery, with a difficult balance to be struck between formality and approachability: that is, ensuring that jurors are addressed in a relaxed manner and that they feel able to ask questions, speaking to them not at them, and maintaining eye contact. However, also important is ensuring the jury are aware of the importance of the directions and the need to follow legal instructions.

Counselling Services

The experience of being a juror may cause significant stress and anxiety for some jurors, and for many years courts have offered counselling services to jurors should they encounter difficulties in the course of or as a result of their jury service. This question was a new addition to the survey and first asked whether the court provided counselling services. Overall, 73.0% (92/126) of judges

indicated that such services were provided, representing all jurisdictions. Interestingly, more than a quarter (27.0%; 34/126) answered that such services were not available. These negative responses were given in all jurisdictions, other than the ACT and Tasmania, and indicate there may be a lack of awareness amongst some judges as to the availability of such services. This was confirmed, to some extent, by open responses to the survey in which two judges indicated they were unaware whether counselling services were available.

Of those judges who indicated that a counselling service is available to jurors, a clear majority (59.5%, 53/89) indicated they do not inform jurors of the availability of such services. This leaves 40.5% (36/89) who make jurors aware of the availability of counselling services. Even amongst those judges, it is clear that it is not mentioned in all cases. Of the 36 judges who inform jurors about counselling services, precisely 50% (18/36) encourage them to use counselling services, while 50% (18/36) do not. Some indicated that they only make jurors aware of the availability of such services in particularly distressing trials. Where a comment is made it is almost invariably done post-verdict, with some judges also mentioning it at the beginning of the trial. Many judges mention it to jurors personally, while others ensure that it is mentioned by the jury administrator's staff.

This raises a broader point which likely explains the large number of judges who do not mention the availability of such services; that it is mentioned to the jury as part of their induction, and/or communicated to jurors by jury administrative staff. Judges may therefore feel it is not necessary to mention it other than in particularly distressing cases. This was confirmed by two judges who commented that they would only refer jurors to counselling services where 'necessary', and that this would be the case if the facts of the case were traumatic.

To some extent, it is not surprising that judges refer to counselling at the end of the trial. However, while the issue may arise most acutely at the end of the trial, it may be that being aware of the availability of such support could address anxiety felt by some jurors as they commence their jury service. Further, although it is understandable that judges consider some cases more stressful than others, it may be difficult for them to put themselves in the position of the jury. Accordingly, there may be cases that do not appear to be particularly 'distressing' to the judge, but which may cause stress and anxiety for a particular juror or jurors. For example, jurors may feel the anxiety of making an incorrect decision, or may empathise with the circumstances of an accused or victim. Such instances cannot necessarily be predicted, making it arguably important that counselling services are not presented to jurors as 'necessary' for particular types of trial, but rather are available to address any substantial stress or anxiety arising from their jury service.

Jury Directions Act 2015 (Vic)

The *Jury Directions Act 2015* (Vic) ('JDA') is arguably one of the most significant legislative reforms specifically aimed at improving jury directions, both in Australia and internationally. First enacted as the *Jury Directions Act* 2013, the 2015 Act was itself recently amended by the *Jury Directions and Other Acts Amendment Act 2017*. The legislation adopts a comprehensive approach to reforming jury directions, giving judges greater flexibility in how and when they give directions, reducing the need to summarise the evidence and counsels' addresses, placing greater responsibility on counsel to request directions, permitting fact-based and integrated directions, allowing judges to provide some explanation of 'beyond reasonable doubt', and reforming many of the more problematic directions such as post offence conduct.[54]

[54] See generally, Criminal Law Review, *Jury Directions: A Jury-Centric Approach Part 2* (Department of Justice and Regulation, 2017).

In total, 19 of 23 (82.6%) Victorian judges responded to questions relating to the JDA; 16 (84.2%) from the County Court, three (15.8%) from the Supreme Court. Those who responded have considerable trial experience, having on average been a judge for 13 years.

Judges overwhelmingly consider that the JDA had an effect on their trial communication practices, with 17 of the 19 (89.5%) judges answering in the affirmative.[55] Fifteen participants (79.0%) consider that the JDA decreased the amount of work they had to do, while four (21.0%) consider that it had no effect. No judge indicated that it increased their workload. In terms of specific effects, judges were asked whether the JDA had affected the way in which they communicate the law to the jury, summarise the evidence, summarise counsel's addresses, and trial management.

Communicating the Law to the Jury

In relation to communicating the law to the jury, 15 judges responded. Of these, 11 judges (73.3%) commented that the JDA has made the process of communicating the law to the jury much simpler, enabling them to provide shorter and more concise directions. Four judges (26.7%) noted that the JDA enabled them to 'confine the directions to the issues', reducing directions 'to the minimum necessary for the needs of the case'.

Summarising the Evidence

Fifteen judges indicated that the JDA affected the way in which they summarise the evidence. Of these, six judges (40%) commented that they no longer summarise all the evidence but rather confine their summaries to the issues in dispute. It was also noted by the same number of judges that the JDA reduced the amount of time required to summarise the evidence. One judge stated 'it has cut many hours off the task'. Another judge identified benefits to both the judge and the jury of being able to confine their summary only to evidence relevant to the issues in dispute, stating that 'since the requirement to summarise the evidence has gone, I have saved many hours of trial preparation and can focus on the important parts of the charge. I am certain this makes it easier for the jury. My charges are much shorter and less tedious for all concerned.' Three judges stated that they no longer summarise the evidence, but rather identify the topics or witnesses relevant to an issue, with one judge emphasising their use of fact-based question trails to explain the law and counsels' addresses 'to demonstrate how each side views that evidence'.

Summarising Counsel's Addresses

The impact of the JDA on summarising counsel's addresses was commented on by 13 judges. Similar to the responses regarding summarising the evidence, six judges (46.2%) commented that their summaries of counsel's addresses are now much shorter and do not include as much detail. Five judges stated that they no longer summarise counsel's addresses as a 'block', but rather only summarise addresses insofar as they are relevant to the issues in dispute. Four judges (30.8%) noted that, for them, the provision of a summary of counsel's addresses has now become 'part of the whole process', with the main points being incorporated into the relevant part of the directions rather than being separately summarised. Two judges (15.4%) stated that they do not summarise counsel's addresses at all, with one (7.7%) explaining that they only refer to the addresses as necessary when giving directions 'or if something particular needs to be said'.

Trial Management

Finally, in terms of the JDA's impact on trial management, 12 judges responded, identifying a range of positive effects. Three judges (25.0%) alluded to a more efficient and organised trial process because 'the necessary directions can be anticipated from the start of the trial, providing a focus for

[55] One judge answered 'no', and another answered 'not applicable'.

the trial'. In this regard, one judge noted that there are 'no more surprises about finding out how the case is really put until addresses', with another judge commenting that 'now counsel must inform the court what directions they seek'.

Four judges (33.3%) noted that they are now able to direct the trial process more effectively, with one judge stating that they felt that they 'have more authority to insist on pre-empanelment isolation of issues, and in discussion of issues remaining and directions required and how some matters are to be put or relied upon after close of evidence'. Similarly, another judge commented that 'counsel can be directed to the issues and possible directions with more specificity', while two further judges noted their use of question trails to 'keep everyone on track, saving a lot of time and argument'. One judge stated that they 'give the question trail to the jury before addresses so counsel can structure their address around the questions they know the jury will ultimately be asked to answer'.

Three judges (25.0%) commented on the positive impact of the JDA on the task of directing the jury, with one judge stating that 'it makes charging juries much easier, more efficient, less time consuming and less stressful', another noting that 'I am not as burdened with summarising the evidence as previously' and another stating that they are now able to 'tailor my charge to the particular trial I am hearing'. Finally, one judge simply stated that, as a result of the JDA, trials seem to proceed more quickly.

Counsel's Approach to Trial Preparation

In regards to counsel's approach to trial preparation, 12 judges (63.2%) are of the view that counsel's approach has changed as a result of the JDA, while seven (36.8%) consider there is no effect. Of those judges who consider that there has been a change, all expressed a view revolving around the common theme of the JDA requiring counsel to be better prepared. Seven judges commented positively on the need for counsel to pay increased attention to the directions they seek and to engage in crafting them, with one judge noting that counsel now 'have to turn their mind in advance to what directions they want, instead of throwing a spanner into the charge part way through (for tactical reasons) as they often did before'. One judge did, however, note that while this is a positive development, 'unfortunately, however, judges cannot rely on forensic decisions being made by counsel at trial … should convictions be taken to [the] Court of Appeal'.

Four judges (21.1%) observed that counsel are now required to concentrate on and confine central issues, with one judge noting that 'amongst the more progressive counsel, they are more prepared to identify and focus on winnable issues, rather than leaving everything open for as long as possible'. One judge did, however, state that some counsel 'are reluctant to change old ways, and will spend enormous time trying to justify why they should not have to provide the information the judge seeks or a response as to whether or not they pursue a certain argument or place some fact or element in issue'.

Requests for Directions

Seventeen participants had received a request for directions from counsel in line with Part 3 of the JDA.[56] Of the 17 judges, 14 (82.4%) estimated a request for directions had been made in between 80% and 100% of trials, two (11.8%) said in 50%, while one indicated such requests were received in only 10% of trials. In terms of the impact of Part 3 on the number of directions typically given, 10 (52.6%) of the 19 consider it has decreased the number, seven (36.8%) consider there is no change, while two (10.5%) judges find that it increased the number of directions. Under s. 16 (formerly s. 15) of the JDA, the trial judge must give a direction if there are substantial and compelling reasons to do so, even if it has not been requested by counsel under s. 12 (formerly s. 11). Only seven judges

[56] One judge had not received a request, the other indicated it was N/A.

(36.8%) had given directions in these circumstances, and estimated that this occurred in between 10 and 30% of trials.

Beyond Reasonable Doubt

Ten judges had been asked about the meaning of 'beyond reasonable doubt' since the enactment of the JDA,[57] with eight (80%) considering that s. 64 (formerly s. 21) enhanced their capacity to explain the standard of proof. Two (20%) indicated they explain some of the matters referred to under s. 64(1), three (30%) explain all of the matters referred to in that section, while the remaining four (40%) combine an explanation of some or all of the factors listed, together with an explanation that beyond reasonable doubt is the highest standard of proof and/or comparing 'beyond reasonable doubt' to the 'balance of probabilities'.

Post-offence Conduct

Eleven judges responded that the prosecution increasingly gives notice where it intends to rely on post-offence conduct evidence, and 100% of those found it assisted them in identifying post-offence conduct. Overall, 14 judges had given the mandatory direction on post-offence conduct under s. 21 (formerly s. 25) with 13 also giving the additional direction under s. 22 (formerly s. 26). Sixteen judges indicated they had given a direction to avoid the improper use of evidence not being relied upon as evidence of post-offence conduct under s. 23 (formerly s. 27). Thirteen of the 19 judges (68%) consider that Part 4, Div. 1 (formerly Part 6) enhanced their capacity to explain directions on post-offence conduct to jurors.

General Comments

Two Victorian County Court judges made comments in relation to the JDA in their general feedback responses. Both were very positive, with one judge commenting that the JDA is 'excellent' and had 'changed [his/her] life.' In their view, it allowed trials to be run more sensibly and is 'an extremely reassuring piece of legislation!' The second judge stated that the JDA 'has radically improved my capacity to clearly and succinctly instruct the jury. It has streamlined trials, made answering typical jury questions (e.g. please explain beyond reasonable doubt) far more simple and overall has been of enormous assistance.'

It therefore appears from this relatively small sample that the JDA has been received positively, and is generally making a positive contribution to the work of trial judges. There is clearly a need for more detailed evaluation on a larger sample, and some consideration may be given to an analysis of the JDA on matters being taken on appeal.

LIMITATIONS OF THE STUDY

The results presented in this report should be interpreted in light of some limitations of the study. First, the percentage of judges participating in the current survey is lower than we achieved in the original study. It is impossible to know why this is. With approximately thirty percent of eligible judges participating, questions arise regarding the extent to which the current findings are representative of the views of the judiciary. Although the response rate achieved here is respectable when compared to other judicial surveys, the risk remains that the findings may not fully represent the diverse views of the judiciary.

The second major limitation is that the information obtained is largely based on judges' subjective perceptions, not objective measures. As such, judges' perceptions and estimates must not be taken as definitive determinations of the content responsive to the questions asked. For example, estimates of

[57] Seven had not, while two indicated N/A.

the duration of judges' directions would likely vary somewhat with precise measurements of time. Nonetheless, the estimates provided are informative in considering the matters addressed in the survey.

Third, as noted in the method section, we have not included a comprehensive summary of the empirical literature and the approach to the survey and this report is atheoretical. The work is presented as a descriptive summary of the survey undertaken and to provide some contrast with the results that were obtained following a similar survey undertaken by the AIJA more than a decade ago. However, it is not a tightly controlled scientific study of the subject matter. To this end, we have not undertaken statistical tests to determine whether the differences that have emerged are greater than those that would exist by chance. We have attempted to comment on the strength of some of the findings, but this does not reflect robust empirical testing.

Finally, comparisons made between the current survey and the previous one must also be considered with caution. As noted, the relatively small sample size does not ensure that the findings obtained are an accurate reflection of the broader views of the judiciary. Moreover, one would not reasonably expect proportions reported in 2006 to be unchanged at time in 2017. Given the nature of the estimates obtained, one would expect differences in reporting even if judges completed the same survey only one week later. Similarly, we have no way to know how many judges in the current sample completed the previous survey; as such, some observed disparities can be expected, as different groups may interpret the same questions differently due to contextual changes or influences. The terms we have employed, such as "always" and "sometimes," require subjective interpretation, and different people interpret these words differently. Also, the same individuals may even use these labels differently on different occasions.

CONCLUSION

'It is true that, in modern times, it is seen as important that the jury be accorded respect, and not treated as passive recipients or mere observers of the trial process.'[58]

As researchers in the field of jury communication, we submit that the most striking development in this field in the last 10 years is the extent to which judges and policy makers now accept that jurors are likely to struggle to comprehend jury instructions and other communications from the court in the course of a criminal trial. Crucially, their awareness has been matched by a willingness to embrace reform and seek ways to improve juror comprehension, and the experience of jurors more broadly. Overall, this survey demonstrates the generally positive direction of pragmatic reforms in jury communication across courts and jurisdictions.

The 2006 survey was the first attempt to solicit the opinions of judges across Australia and New Zealand about their communication with juries. The results provided a comprehensive portrait of judges' communication practices with the jury at a time when awareness of these issues was relatively low. More than a decade on, the present survey results have updated that picture. Rather than revisit the specific findings here, we would like to highlight the major findings that emerged in the responses.

First, there appears to be a general trend towards the provision of a wider range of information to jurors throughout the trial. The opening remarks to the jury now typically include a broader spectrum of relevant information, including more recent additions such as guidance proscribing Internet and social media access. Notably, at the beginning of the trial, judges are more likely to discuss the procedure for jurors to ask questions. However, certain topics remain less likely to be raised with jurors at an early stage, such as selection of a foreperson, guidance in relation to information about the deliberation process, and what to do in the event of disputation within the jury. Although many of these topics will be addressed in the summing up, there may be merit in advising jurors of the

[58] *Tootle v R* (2017) 94 NSWLR 430, [59] per Simpson JA.

process that they will be following as a group, particularly in light of the practice in Australia and New Zealand of allowing juries to commence their discussions about the case before the summing up, after which the jury conducts its final formal deliberations.

Second, research demonstrates that jurors benefit from an organising framework, and that the process of communicating with the jury begins before the start of the trial[59]. We noted in the previous survey report that there appears to be increasing acceptance of the possible utility of providing jurors with a framework for their decision-making, and with tools to assist them in reaching their verdict. The results of the present survey confirm that this trend has continued. It is therefore surprising that relatively few judges specify the matters in dispute in the case in their opening remarks, given the fact that a majority take steps to narrow the issues in dispute prior to the trial. Moreover, directions given to juries in running are largely restricted to evidentiary and procedural directions, with substantive directions rarely given in the course of the trial, although this practice is more common in Australia than New Zealand.

Although some judges may hold the view that many of these topics should be left to counsel to address, the survey findings revealed that the majority of opening addresses, both by prosecution and defence, are entirely oral. This remains the case notwithstanding the willingness of many judges to permit counsel to use written or visual material during addresses. This finding raises an important broader point, namely that while the judiciary have generally been proactive in adopting new practices, it is equally important that counsel be informed of their capacity to implement innovative communication practices.

Third, a noteworthy finding in the previous survey was the duration of summings up in Australia relative to New Zealand. Particularly in Victoria, directions were considerably longer, on average, than their New Zealand counterparts. Accordingly, it is gratifying to observe in this report that while Australian summings up are still longer than those in New Zealand courts, there has been a general decrease in their estimated length, other than in courts in Queensland and Western Australia. Surprisingly, the estimated length has increased in New Zealand, specifically the summaries of evidence. While we once again note the methodological challenges associated with this question, they remain constant across the two surveys, suggesting that some weight may be placed upon the trend.

Fourth, the increasing availability and sophistication of bench books has generally benefited judges. Comments about bench books were generally very positive, suggesting they are well-utilised, even by judges from jurisdictions without bench books. Consistent with the previous survey findings, the most common call for improvement to bench books related to simplification of the language. Importantly, linguistic complexity is also seen by many judges as one of the most significant impediments to juror comprehension. However, the complexity of the law is such that, while every effort should be made to use plain language principles, there is only so much that can realistically be done. This serves to underscore the importance of other aids to comprehension, such as checklists and fact-based directions as discussed below.

Fifth, in contrast to common practice in making their opening remarks, which are almost exclusively oral, most judges provide some form of written material to accompany their summing up; most commonly the indictment and/or a list of elements of the offence charged. Notably, the controversy in Australia surrounding access to the trial transcript appears to have dissipated somewhat over the last decade. Although not standard practice, it appears that a majority of Australian judges are prepared to provide access to the transcript of evidence in some cases.

Although less common, a number of judges provide juries with more structured forms of decision-making assistance such as checklist or flowcharts. Interestingly, it was relatively uncommon for

[59] Neil P Cohen, 'The timing of jury instructions' (1999-2000) 67 *Tennessee Law Review* 681; Vicki L Smith, 'Impact of pretrial instruction on jurors' information processing and decision making' (1991) 76 *Journal of Applied Psychology* 220.

judges to provide a written summary of their directions. However, while it appears that this was a conscious decision for many judges in New Zealand, given their focus on the written question trail, amongst Australian judges it was as much a practical matter, because no transcript of the directions was available at the start of jury deliberations.

Where jurors ask for copies of written documents, or ask questions about the meaning of the jury directions, judges generally try to accommodate their requests. The most common reported requests from juries were for transcripts of evidence, and these were typically refused on the practical ground that they were not available. In New Zealand, judges would often decline to provide a copy of the summing up on the basis that the jury should be focussed on the question trail. Where jury questions were not answered, it was typically because they pertained to a matter that was inadmissible or irrelevant.

In relation to deliberations, judges were more willing to provide guidance on the asking of questions by juries, but less likely to provide guidance on how to deal with conflicts/bullying and jury disputes. While it is understandable and appropriate that judges wish to avoid intruding on the deliberations of the jury, there is arguably a clear distinction between telling jurors how they must deliberate, and providing welcome guidance to assist their deliberations.

One of the most notable reforms in relation to jury communication in recent years is the use of fact-based directions. Questions on this topic were a new addition to the survey, and as expected, awareness is very high (though surprisingly, not uniform) in New Zealand. However, particularly striking is the level of awareness of this approach in some Australian jurisdictions, especially Victoria. Nonetheless, despite quite high levels of awareness, the survey findings reveal a number of important reasons why some judges do not adopt this form of instruction. Some are practical and related to time pressure, others are concerned that it is not suitable for all cases, while others want further instruction in the approach. The vast majority of judges who have adopted a fact-based approach identified its many benefits. These diverse responses highlight the importance of ongoing judicial education.

The survey findings also provide important qualitative feedback on the *Jury Directions Act*. It appears from the relatively small sample of judges surveyed that the Act has been well received, and is generally making a positive contribution to the work of trial judges. There is clearly a need for more detailed evaluation on a larger sample, and some consideration may be given to an analysis of the impact of the Act on matters being taken on appeal.

A new addition to the survey questionnaire was the availability of counselling services. While these services are an important recognition of the stress that jurors may experience as a result of jury duty, not all judges communicate their availability to jurors. In some instances, judges are unaware of their availability. Others leave the conveying of this information to jury administrators. For some judges, it depends upon the type of case. This topic warrants consideration to ensure that, by whatever means, jurors are made aware of the availability of such services in all cases and jurisdictions.

As with the previous survey results, although many judges perceive a need for improvement in communication with jurors, and are willing to consider and implement changes, there is still a very high level of intracurial and inter-jurisdictional variation in communication practices. To some extent this is inevitable in a multi-jurisdictional system, and where judicial autonomy and independence are important values. This variability is also an important opportunity for particular judges and courts to trial certain practices. The challenge is ensuring that this experience is then shared with other courts. The work of the AIJA, the National Judicial College of Australia, the Institute of Judicial Studies in New Zealand, equivalent state bodies such as the NSW Judicial Commission and the Judicial College of Victoria, as well as individual courts, is vital in ensuring these experiences are shared and reflected upon.

The sharing of information has the further advantage of taking some of the pressure off individual judges. While many strive to ensure that jurors are ‘not treated as passive recipients or mere

observers', jury communication is complex. Reform occurs in the context of actual criminal trials. The concern to avoid error, and particularly to avoid a retrial, is understandable and underscores the importance of jurisdiction-wide reform, as has occurred in Victoria.

As researchers, we are particularly gratified to see the extent to which jury reform over the past decade has been based on empirical research conducted by scholars and law reform bodies. This survey contributes to that body of research. One of the challenges of jury research is ensuring that it engages the experience of judges. The perspectives of approximately thirty percent of practising criminal trial judges in Australia and New Zealand provides that crucial understanding. The results of this survey are an important snapshot of actual judicial practice and judicial perspectives, in their own words, and will inform the ongoing process of evidence-based reform.