Where the jury are to be provided with transcripts

Commentary

In a trial before Burns J (*R v Gregory Lee Roser*), in 2022, it was agreed that the jury would receive a copy of the transcript – that is, one to share.

His Honour drafted a transcript protocol and directions, both of which appear below.

His Honour ultimately arranged for the jurors to receive a copy of the transcript each, although the following protocol was drafted on the assumption that there would be one copy only provided.

Trial judges may provide a transcript of the trial to the jury at their discretion. The copy of the transcript provided must exclude anything that is not evidence. Also, the parties must agree that the transcript provided to the jury is accurate; and bear the burden of checking it.

The timing of the giving of the direction will depend on when it is decided that the jury will receive a transcript. If that decision is made early in the trial, and a direction is given at that time, it may be prudent to repeat the direction (or some of it) during the summing up.

Also attached as an appendix to this direction is a briefing note about the provision of transcripts to juries generally. It was written by Dr Joseph Lelliott – an academic who assists the bench book committee.

Jury Transcript protocol

1. **Within one business day of the receipt by the parties of the transcript, counsel will confer for the purpose of agreeing (if possible) on any revisions to the transcript. A schedule of those agreed revisions must then be prepared. The schedule must be emailed to the associate to the trial judge and handed up to the court at the first available opportunity in the absence of the jury.**

2. **In the event that agreement cannot be reached on any of the revisions, the trial judge will resolve any such disagreement after hearing submissions from the parties and, if necessary, by having recourse to the audio recording of the relevant part or parts of the evidence.**

3. **The associate to the trial judge will then prepare an "evidence only" copy of the transcript incorporating the revisions. Only the evidence**

shall appear, with any part of the proceeding that has taken place in the absence of the jury excised.

4. **As soon as the "evidence only" transcript has been revised by the associate, a tracked version will be emailed to counsel.**

5. **On receipt of the tracked version, counsel should consider whether it faithfully incorporates the revisions and, further, that it only contains a transcript of the evidence. Counsel should then confer with a view to authorising a joint email to be sent to the associate to the trial judge indicating their agreement to the tracked version or, where they do not agree, indicating any area of disagreement.**

6. **Once there is agreement on the tracked version, the changes will be accepted by the associate to the trial judge and a "clean copy" saved in PDF format and emailed to each counsel.**

7. **The transcript will as soon as convenient in the trial, be received as an exhibit for identification and marked TFI1, TFI2, etc and then provided to the jury.**

8. **A folder with numbered dividers will be provided to the jury to house the evidence only transcript. The associate to the trial judge will prepare an index to the contents to be provided to the jury by the bailiff and update the index as and when required.**

9. **Only one copy of the transcript will be provided to the jury. It shall remain in the jury room at all times for the jury to use and be destroyed at the conclusion of the trial.**

Suggested Direction

As you have no doubt already picked up, this proceeding is, like all trials, being recorded. Everything that is being said is being recorded, including what I am saying to you now, and from that recording a transcript will be prepared on a more or less daily basis. Sometimes there are delays, but we will get the transcript progressively as the trial proceeds.

Now, you will be provided with a hard copy of the transcript to assist as an aid during your deliberations. To that end, I will arrange for anything that is not evidence to be removed from it, such as what I am saying now.

Please understand, though, that will take a bit of time, but I will make sure that you receive an "evidence only" transcript for each day of evidence as soon as it is to hand. It will not be on the same day and it may even not be on the day following, but you will get it.

It is important that you keep in mind at all times that a transcript is not evidence. It is merely an aid for your use. The evidence is what you hear the witnesses say when giving evidence from that witness box. The transcript is simply being provided to you to help you recall the evidence the witness gave. Bear in mind, also, that a transcript is only ever at best another person's opinion of what can be heard on the recording, that is, what the person typing up the transcript believe he or she can hear. Usually, the transcript will be fairly accurate and the parties will have been given the opportunity to indicate whether they believe any part of it is not accurate before it is given to you but, even then, that does not mean that the transcript is, in all respects, an accurate transcription. I am yet to see a transcript that is 100 per cent accurate, despite any amount of revision, so caution is required on your part.

The critical thing to remember, though, and to act on, is that if you see something in the transcript which is different to what you heard the witness say, you must act on what you heard the witness say, not on the transcript.

Also, you are not at all restricted to the transcript. You may, for example, when deliberating, decide that you would like to hear the audio recording of a witness' evidence or part of a witness' evidence. In that event, all you need to do is to jot that down on a note to the Bailiff identifying, as best you can, the part you would like to hear played to you. That note will make

sit sway to me and we will then all come back here to listen to the audio od that part.

Lastly, you should not give the evidence more weight than it deserves merely because there is an aid to your recall of the evidence which is in written form. It is important to recall the evidence as it was given during the trial and what, if anything, you thought about the reliability of the evidence as you heard it.

You will have one copy of the transcript and it will remain in the jury room at all times. It may not be taken home. A folder with numbered dividers will be provided to house the transcript, along with an index to the contents identifying, for each witness, where the transcript of that witness' evidence can be found.

The binder and its contents, just like your notebooks, the whole thing will be destroyed at the conclusion of the trial.

Appendix

The provision of evidence-only transcripts to juries – briefing note

Whether or not a transcript of some or all of the evidence given at trial is provided by the trial judge to the jury falls within the discretion of the trial judge.

However, there are several ancillary considerations which relate to the nature of the transcript (or parts of it), including where the evidence is pre-recorded.

Key Points

- There is no statutory bar in Queensland to providing the jury with a copy of the transcript. Per *R v Tichowitsch*,[1] this is a matter of discretion. The key considerations are fairness, balance, and affording the jury the best opportunity of reaching a true verdict.
- Numerous law reform bodies have supported the provision of transcripts to juries. This was the position of the Queensland Law Reform Commission in its review of jury directions in 2009.
- Other jurisdictions have laws that expressly permit a Judge to provide transcripts to a jury, including transcripts of audio or audio-visual recordings of evidence.[2] Such a provision in Queensland may be desirable. The Queensland Law Reform Commission has previously suggested an amendment to the *Criminal Code* (Qld) to this effect.

There are, nonetheless, some concerns over provision of transcripts:

- In general, juries may focus on written transcripts and, in doing so, overlook the context of how words were spoken.[3] Per Dalton JA in *R v Taylor*: '[i]n general, there are good reasons for refraining from giving a jury the transcript of evidence, or the transcript of part of the evidence, unless it is absolutely necessary […] Evidence at a criminal trial is oral for the most part, and during the oral evidence of a witness the jury has a chance to form views about their credibility and about the reliability of the evidence they are giving'.[4]
- Problems may arise where the jury is able to review a part, or parts, of the evidence; in particular, there is a well-recognised risk that they may accord such evidence undue or disproportionate weight. Though not required, Trial Judges may need to give directions to jurors or replay competing evidence.[5] Key considerations are fairness and balance.
- Such problems are, however, quite arguably unlikely to arise where the jury has, or has been allowed to review, all the evidence (as recorded/transcribed)

[1] (2007) Qd R 462.
[2] See, eg, *Criminal Procedure Act 2009* (Vic) s 223; *Jury Act 1977* (NSW) s 55C; *Criminal Procedure Act 2004* (WA) s 110.
[3] *R v Le* [2007] QCA 259, [29].
[4] *R v Taylor* [2017] QCA 169.
[5] See, eg, *R v LAK* [2018] QCA 030.

relevant to the real issues at trial: *R v Peniamina* (per Sofronoff P)[6] and *R v Gately*.[7]

Several further matters must be borne in mind if provision of transcripts is to become more common:

- The decision of the High Court in *R v Gately* may pose a barrier to access to certain pre-recorded evidence (e.g. statements of children). This may need to be overcome by legislative amendment. Nonetheless, it appears to the author of this briefing note that the concern of the Court here is of greater relevance to situations where a jury has access only to (or is being replayed) such evidence. Access to all the evidence would, arguably, ameliorate this concern.
- If transcripts are to be provided, care must be taken to ensure that sections recorded in the absence of the jury are removed. See, for a successful appeal in such a case: *R v Martinez* [2015] QCA 169; [2016] 2 Qd R 54.
- There may be a concern in some cases over the volume of material left with juries, such that it is overwhelming. This concern has been rejected in at least one case (*R v OT* [2017] QCA 257, [35]-[36]), but may be worth keeping in mind.

The 2009 Queensland Law Reform Commission Report

As a starting point, the Queensland Law Reform Commission conducted a review of jury directions in 2009.[8] It contains substantial discussion (at pages 314-323 and 330-335) of providing transcripts to juries and includes submissions from numerous stakeholders. A summary of some the commission's findings is set out here.

First, the Commission observed that there is no statutory bar in Queensland to providing the jury with a copy of the transcript; as such, it remains a matter for the trial judge's discretion. Williams JA in *R v Tichowitsch* confirms that '[t]here is no legislative provision preventing a judge from giving the jury a transcript of evidence, and the trial judge is in control of procedure during the trial … The overriding considerations must be that of ensuring the jury are in the best position to arrive at a true verdict, and ensuring that the accused receives a fair trial'.[9] Keane JA and Philippides J agreed with Williams JA on that point.[10] Philippides explains that 'a discretionary power exists to provide a transcript as part of the inherent or implied power of the court to control its own processes'.[11] This position is further confirmed in, among other cases, *R v Le* and *R v Lake; R v Carstein; R v Geerlings*.[12] In *R v Le*, the Court cautioned that

> a transcript of oral evidence is merely words on a page, without any indication of how the true meaning may be influenced by how the words were spoken, nor any means of finding out. Where

[6] [2018] QSC 283, [21]-[24].
[7] (2007) 232 CLR 208 as explained in *R v SDL* [2022] QCA 207, [35].
[8] Queensland Law Reform Commission, *A Review of Jury Directions* (Report 66, December 2009).
[9] (2007) Qd R 462 [2] and [9].
[10] Ibid [52] and [90].
[11] Ibid [90].
[12] [2007] QCA 259; [2007] QCA 209.

> that ephemeral element of oral evidence is lost, the risk that merely reading the words without necessarily retaining the memory of how they were spoken, especially in a lengthy trial, may lead to an unfair outcome, as well as creating a risk that the transcript will be given undue prominence over evidence that is not provided in transcript form. The need for careful judgment when deciding whether and, if so, how much transcript of oral evidence is given, is emphasised in *Tichowitsch*.[13]

The Commission noted that concern over the giving of undue weight to the transcript is not uncommon. Most importantly, in *R v Gately*,[14] the High Court held that the jury should not have a copy of a statement made by a child in the jury room. Hayne J stated that

> If a jury asks to be reminded of the evidence of an affected child that was pre-recorded under subdiv 3 of Div 4A of the Evidence Act and played to the jury as the evidence of that child, that request should ordinarily be met by replaying the evidence in court in the presence of the trial judge, counsel, and the accused. Depending upon the particular circumstances of the case, it may be necessary to warn the jury of the need to consider the replayed evidence in the light of countervailing evidence or considerations relied upon by the accused. It may be desirable, in some cases necessary, to repeat the instructions required by s 21AW [of the *Evidence Act 1997* (Qld)]. Seldom, if ever, will it be appropriate to allow the jury unsupervised access to the record of that evidence.[15]

His Honour also noted that

> Replaying the evidence given by one witness, after all the evidence has been given, carries risks. First, there is the risk inherent in the form in which it is presented. As was said in Butera, there is the risk that undue weight will be given to evidence of which there is a verbatim record when it must be compared with evidence that has been given orally. Secondly, there is the risk that undue weight will be given to evidence that has been repeated and repeated recently. Other risks may arise from the circumstances of the particular trial.[16]

The Queensland Law Reform Commission stated that it did not share these concerns, 'particularly if the transcript is provided only at the end of the trial, and these exceptional instances should be re-considered. Section 223(1)(i) of the *Criminal Procedure Act 2009* (Vic), for example, expressly allows the judge to give the jury a copy of any audio or audio-visual recordings of evidence'.[17]

A submission by the Brisbane Office of the Commonwealth Director of Public Prosecutions to this 2009 review is notable. The Office stated that '[t]he transcript should be made available to jurors', though '[c]are would need to be exercised to ensure that the jury was not given access to parts of the trial transcript relating to matters arising in the absence of the jury (e.g. legal arguments, voir dire evidence, etc.)'. The Office further noted that

> transcripts of any evidence given extra-curially would also need to be provided e.g. transcripts of evidence of an 'affected child' prerecorded pursuant to [section] 21AM of the *Evidence Act 1977* (Qld). It would be inconsistent to allow a jury access to a transcript of the parts of the evidence given in the court room and not access to parts of the transcript of the evidence not given in the court room. Allowing access to a transcript of extra-curial evidence such as the prerecorded

[13] [2007] QCA 259, [29].
[14] (2007) 232 CLR 208.
[15] Ibid [96].
[16] Ibid [95].
[17] Queensland Law Reform Commission, *A Review of Jury Directions* (Report 66, December 2009) 318.

> evidence of an 'affected child' may be contrary to the decision in *Gately v The Queen* (2007) 232 CLR 208 and there may, therefore, need to be some legislative amendment to facilitate this.

The Queensland Law Reform Commission, in conclusion, stated that it was 'completely unpersuaded' by any argument for more restrictive use of transcripts and other written aids. In particular, it was not persuaded by a submission of the Bar Association that copies of evidence taken outside of court (e.g statements of children) should be excluded. It did note the effect of *Gately* and that legislative amendment could be required. In sum, the Commission found that while there are no formal barriers to provision of transcripts, a legislative statement of the judge's discretion to use, or allow the use, of such techniques would usefully encourage these practices. It recommended an amendment to the *Criminal Code*.

Of related interest is a Banco Court Lecture by Bell AC in 2018. The Lecture observes that '[t]o date, little action has been taken in Queensland or New South Wales to act on the recommendations of the QLRC and NSWLRC', notwithstanding that '[t]he good sense of giving the trier of fact the transcript is to my mind evident. Among other considerations, it permits more economical reference to the evidence in the course of the summing up'.[18]

Relevant Queensland Cases

Set out here are extracts of some more recent cases relevant to the provision of transcripts to juries, for consideration.

R v Martinez [2015] QCA 169

The sole ground of appeal in this case was that the transcript provided to the jury contained material that should have been removed. Gotterson JA notes at [16] that

> Contrary to his Honour's expectation, the exhibit "F" given to the jury did, in fact, contain at least eight pages of transcript in which statements made by him or counsel in the absence of the jury were transcribed. These statements were made before addresses in discussions concerning the directions that his Honour might give during his summing up, and later after addresses concerning something that defence counsel had said during his address

His Honour found this to be an irregularity causing a miscarriage of justice.[19]

R v Taylor [2017] QCA 169

In *R v Taylor*, the appellant had been convicted of attempted murder, and murder. The sole ground of appeal was that

> a miscarriage of justice occurred as a result of the provision to the jury of transcript of the trial evidence of three prosecution witnesses:
>
> (a) without any directions or warnings as to its use; and/or

[18] <https://cdn.hcourt.gov.au/assets/publications/speeches/currentjustices/bellj/bellj20Sep2017.pdf>.
[19] *R v Martinez* [2015] QCA 169, [41].

(b) without also providing transcript of the evidence of the appellant or reminding the jury of the appellant's evidence in respect of those witnesses.

With reference to *Tichowitsch*, it was conceded that it was within the discretion of the trial judge to give a transcript to the jury.[20] The appellant argued, inter alia, that 'giving the transcript of only some of the witnesses to the jury produced an unfair imbalance. It was submitted that it served to emphasise part of the evidence, which favoured the Crown, by giving it to the jury in permanent form'.[21] Dalton J held that this was not the case, and that there was no need for the jury to be given further parts of the transcript, including parts speaking to the appellant's evidence. Her Honour did, however, state that

> In general, there are good reasons for refraining from giving a jury the transcript of evidence, or the transcript of part of the evidence, unless it is absolutely necessary. These are discussed by the High Court in *Butera* (above), and in *Gately v R*. Evidence at a criminal trial is oral for the most part, and during the oral evidence of a witness the jury has a chance to form views about their credibility and about the reliability of the evidence they are giving. Further, the jury must consider the whole of the evidence in reaching its verdict, and reading or replaying part of the evidence carries a risk of disproportionately emphasising that part. If part of the evidence is replayed, read to, or given to the jury in written form, it is generally appropriate that all the evidence on the particular topic be given to them again. Those principles are undoubted, and in my view very important to the conduct of a fair trial. Nonetheless, the application of all principle must be fitting to the particular circumstances before the Court. In this regard I refer to the dicta of Williams JA in *Tichowitsch* (above), "… the overriding requirement is that what is done be fair and balanced so that the trial of the accused person is in no way prejudiced while affording the jury the best opportunity of arriving at a true verdict."

R v OT [2017] QCA 257

In *R v OT*, the appellant had been convicted of various sexual offences against a child. The convictions were challenged on two grounds, one of which was '[t]hat a miscarriage of justice resulted from the jury being provided with transcripts of the entirety of the complainant's evidence, all of that of another witness in the prosecution case as well as transcripts of the entirety of the evidence of the three witnesses in the defence case, including the appellant'. This volume of material was argued to have 'overwhelmed the jury'.

To this point, McMurdo JA (Fraser JA and McMeekin J agreeing) held that

> It is argued that the jury should not have been burdened with so much written material, and that the proper course would have been for the complainant's evidence to be replayed in open court, with appropriate directions from the judge that not too much weight was given to the complainant's evidence because it had been replayed. Instead, it is argued, the jury was presented with an overwhelming task by having to consider all of this material. The appellant also argues that there was a miscarriage of justice from the judge not instructing the jury, when providing this material, that they should focus upon the evidence which they had heard and not place undue weight on the written material.
>
> In my view there was no risk of a miscarriage of justice from the provision of these transcripts and from what the judge did and did not say about them. By the course which was taken, there

[20] *R v Taylor* [2017] QCA 169, [13].
[21] *R v Taylor* [2017] QCA 169, [15].

> was no prospect of an undue emphasis upon the evidence of the prosecution case. The jury had seen and heard the witnesses only two or three days earlier and would have read the transcripts with a recollection of the way in which the oral evidence had been given. The volume of material was not so considerable that it made the jury's task too difficult for there to be a proper deliberation by them. The second ground of appeal is unpersuasive.[22]

R v Peniamina [2018] QSC 283

This is a ruling of Sofronoff P, concerning a question arising during the trial of the accused as to whether the jury could take with them into the jury room recordings of evidence and transcripts of those recordings. The evidence included a recording taken immediately after the offence, between the accused, police, and medical attendants, audio recording between the accused and an undercover police officer, and three video recordings pursuant to s 93A of the *Evidence Act 1977* (Qld). Sofronoff P noted that 'the parties agreed to furnish the jury with an agreed transcript of each of these recordings. I gave the jury a direction that the evidence that they were to rely upon was what they saw or heard on recordings and not the interpretation of words on the transcript'.[23]

His Honour observes first that

> The courts have generally been sensitive to permitting juries to have access to recordings while deliberating. Many of the cases that deal with the use of recordings by juries concern evidence of child complainants in sexual offence cases. Such cases raise special problems. When it is the complainant's evidence alone that is in issue, or largely in issue, the strong trend of authority is that there could be a real danger that the jury might place too much emphasis upon a recording of a complainant's evidence if that evidence is available for the jury's repeated review while deliberating while the evidence of other witnesses is not available.[24]

Nonetheless, his Honour notes that '[t]he particular problem of over-emphasis, that is, of misuse, does not arise when, as in this case, the recordings are almost the whole of the oral evidence at the trial concerning the real issue for the jury's determination'.[25] Thus, in the case at hand: '[t]here is, therefore, no risk, in my opinion, that the recordings and the transcripts could have an influence upon the jury's deliberations which is out of all proportion to their real weight, or that the jury might give that evidence an over-emphasis and perhaps an undue air of credibility'.[26]

Sofronoff P observes that '[w]hether or not, in any particular case, a jury should have unrestricted access to recordings and transcripts must depend upon whether there is, or is not, a real risk that an accused might be prejudiced by giving such access. That is very much a judgment that must be made by the trial judge who is in an advantageous position to decide the question'.[27]

[22] *R v OT* [2017] QCA 257, [35]-[36].
[23] *R v Peniamina* [2018] QSC 283, [10].
[24] *R v Peniamina* [2018] QSC 283, [14].
[25] *R v Peniamina* [2018] QSC 283, [23].
[26] *R v Peniamina* [2018] QSC 283, [21].
[27] *R v Peniamina* [2018] QSC 283, [24].

R v LAK [2018] QCA 030

Philippides J (Sofronoff P and Gotterson JA agreeing), in a case where some of the complainant's evidence in a police interview, together with part of the complainant's pre-recorded cross examination evidence, was replayed for the jury:

> The authorities establish that where all or part of the complainant's evidence is replayed to the jury after they have retired, it is desirable that the jury be warned not to give undue weight to that evidence and, where applicable, to remind the jury of evidence called by the defendant. The giving of such a direction is not, however, an immutable standard. As was emphasised in *Gately*, whether such a direction is necessary depends on the circumstances of the particular case. The overriding consideration is whether fairness and balance gives rise to the need to guard against the risk that undue weight might be given to a complainant's evidence where it is played a second time without a warning, or where no reminder is given to the jury about the competing evidence or considerations relied on by the defence.
>
> Ensuring fairness and balance may give rise to particular difficulties in emotive sexual cases which are particularly likely to arouse feelings of prejudice in the jury. Factors that will be relevant include those identified in *SCG*, namely, the time that has elapsed after completion of the defence evidence; the time that has elapsed since the conclusion of the summing up; the character of the complainant's evidence, including the manner in which it is given; the course of the trial, in particular the stage of deliberations that the jury has reached; and the length of time that the relevant evidence occupies.[28]

R v Smith [2021] QCA 105

With reference to *Tichowitsch* and *Peniamina*, Sofronoff P in a footnote notes that '[i]n the absence of considered submissions, the jury was also told, incorrectly, that they could not be allowed to have a transcript of Helen's evidence or the expert evidence in the jury room "because it was not an exhibit". They were offered an opportunity to rehear her recorded evidence in the courtroom in full which they declined'.[29]

R v SDL [2022] QCA 207

In this case, an appeal was made on the basis that a miscarriage of justice occurred because, after the complainant's evidence was replayed, the trial judge failed to remind the jury of the details of the appellant's evidence, and failed to warn the jury about the risk of giving disproportionate weight to the complainant's evidence because it was played to them twice.[30]

Dalton JA spent some time going through the relevant case law concerning instances where a jury may have only part of the evidence replayed or with them in the jury room. Her Honour referred to *R v H*,[31] where McMurdo P 'concluded that if a jury requests to hear recorded evidence of a child a second time, the trial judge must deal with the situation as appropriate in that case. It was not necessary in every case that the jury be reminded of cross-examination and re-examination where that was not requested

[28] *R v LAK* [2018] QCA 030, [35]-[36].
[29] *R v Smith* [2021] QCA 105, [94] fn 28.
[30] *R v SDL* [2022] QCA 207, [23].
[31] [1999] 2 Qd R 283 .

by the jury'.[32] Her Honour further referred to *R v TQ*,[33] where the Court of Appeal 'approved the dicta in *R v H* to the effect that when a judge decides that video-recorded evidence should be replayed to a jury, the judge, defendant and counsel should all be present in court.[34]

Dalton JA also referred to *Gately*, noting that

> apart from the recorded police statement and pre-recorded evidence containing cross-examination, there was almost no other evidence in the trial. In those circumstances, no warning was given about undue weight and the High Court took the view that none was necessary. It may be that in another case, even though the defendant does not give oral evidence, there is still a need to remind the jury of other Crown evidence if it was relevant to the point, or the defence case, as it was put in submissions.[35]

Her Honour, in conclusion, found that 'the trial was distorted or unbalanced because nearly all the Crown case was replayed to the jury without any reminder of the defence case'.[36]

Some Observations on Other Jurisdictions

A few brief notes on the position in other jurisdictions are set out here.

NSW

Section 55C of the *Jury Act 1977* (NSW) expressly permits a transcript of evidence to be supplied to 'members of the jury if the judge or coroner considers that it is appropriate and practicable to do so'.

The 2009 NSW Trial Efficiency Working Group of the Criminal Law Review Division of the Attorney General's Department of NSW observed that '[p]roviding a jury with a transcript, where one is available, is a way of ensuring that the evidence is recounted accurately in the jury room rather than recalled from memory. Likewise, the contemporaneous examination of an exhibit will give a jury a much greater appreciation for the evidence and ensure that the relevance of the exhibit is better comprehended'.[37]

[32] *R v SDL* [2022] QCA 207, [28].
[33] [2007] QCA 255.
[34] *R v SDL* [2022] QCA 207, [29].
[35] *R v SDL* [2022] QCA 207, [35].
[36] *R v SDL* [2022] QCA 207, [39].
[37] Trial Efficiency Working Group, Criminal Law Review Division, Attorney General's Department of NSW, *Report of the Trial Efficiency Working Group* (2009) 69.

Victoria

In its review of Jury Directions in 2008, the Victorian Law Reform Commission stated that '[t]he commission believes that trial judges should be encouraged to provide juries with copies of the transcript of the evidence'.[38] Section 223 of the *Criminal Procedure Act 2009* (Vic), which has been amended several times since the 2008 Review, states:

> For the purpose of helping the jury to understand the issues or the evidence, the trial judge may order, at any time during the trial, that copies of any of the following are to be given to the jury in any form that the trial judge considers appropriate—
>
> […]
>
> (ha) the transcript of the evidence in the trial;
>
> (i) transcripts of evidence or audio or audiovisual recordings of evidence;
>
> (j) transcripts of any audio or audiovisual recordings;
>
> […]

The effect of this section was recently considered in the case of *Carson (a pseudonym) v R* [2019] VSCA, where at trial the Judge had provided the jury with a full transcript in addition to disks of pre-recorded evidence of the complainant. Forrest JA (Niall and Ashley JA agreeing), rejecting a ground of appeal contesting this decision, explained that '[t]he jury had already been provided, without objection, with a full transcript of the evidence in the case. The provision of AVRs of what the jury already had in transcript form, can only have been to enable the jury to better recall or understand the evidence in the case, which is the purpose contemplated by s 223(1) of the CPA'.[39]

Western Australia

Section 110 of the *Criminal Procedure Act 2004* states that

> On the application of a party or on his or her own initiative, the judge may order that the jury be given, on any conditions the judge orders, any record (including any document in the court's record) or thing that may assist the jury to understand the issues or the law, or to understand and assess the evidence.

In *Cooper v The State of Western Australia*, the Court of Appeal held that a trial judge has the power to provide a transcript of evidence under s 110. It is a 'record' or 'thing'.[40] The recent case of *YBG v The State of Western Australia* [2019] WASCA 126 is of note, in which the Court held that, where the Trial Judge provided a transcript of an interview with the complainant in preference to replaying it in open court, this was appropriate.

[38] Victorian Law Reform Commission, *Jury Directions* (Consultation Paper, 2008) 99.
[39] *Carson (a pseudonym) v R* [2019] VSCA, [108].
[40] [2009] WASCA 37, [18].

New Zealand

It is mentioned in numerous judgements and other sources that juries in New Zealand are commonly given transcripts of evidence.[41]

Joseph Lelliott, 11/11/2022

[41] See, eg, Queensland Law Reform Commission, *A Review of Jury Directions* (Report 66, December 2009) 314.