Victorian
Law Reform
Commission


# JURY DIRECTIONS
## Consultation Paper

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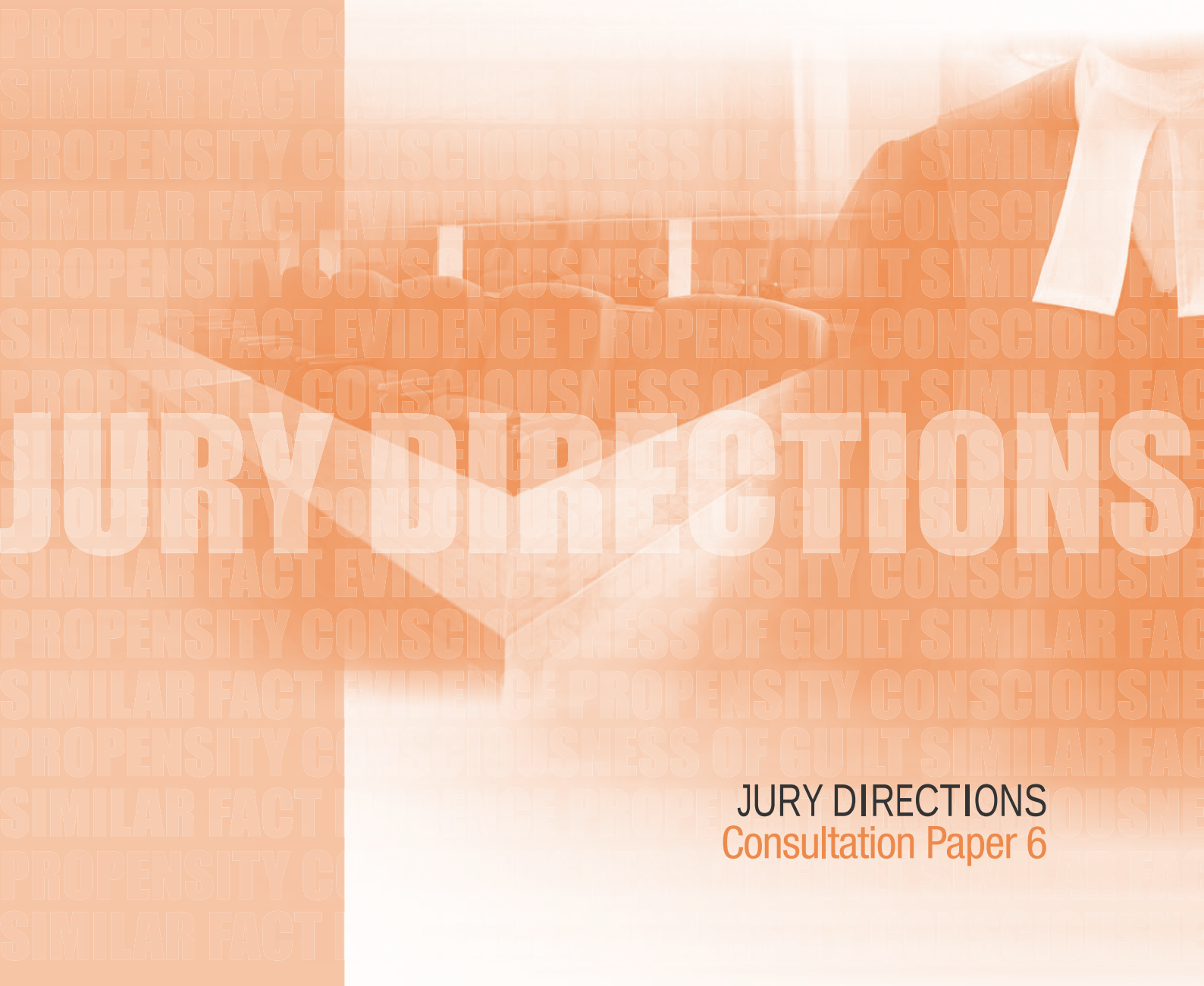



# JURY DIRECTIONS
## Consultation Paper 6

# Contents

# Preface

This Consultation Paper has several purposes. They are: to describe the body of law that governs the directions a judge is required to give to a jury in a criminal trial, to identify some of the problems caused by the density and complexity of that body of law, to suggest reasons for the current problems, and to present reform proposals for discussion.

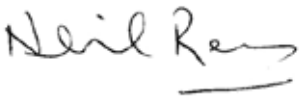
The paper deals with a topic that poses a very significant practical problem for the criminal justice system. Recently, there has been a considerable increase in the number of cases where a conviction has been overturned because the trial judge failed to give the jury a direction required by law. Very few people are acquitted at subsequent re-trials. We have included data which amply demonstrates the extent of the problem.

The Hon. Geoffrey Eames QC has played a major role in the preparation of this Consultation Paper in his capacity as a consultant to the commission. Mr Eames, who retired in 2007 as a judge of the Supreme Court of Victoria, has drawn upon his many years experience at the trial level, as a member of the Court of Appeal, and more recently as an acting justice of the Supreme Court of the Northern Territory, to assist the commission to outline the current problems and to devise proposals for reforming the law.

The team allocated to this project have produced outstanding work within a very short time period. As team leader, Siobhan McCann has demonstrated first-rate organisational and writing skills. Policy and research officers Tanaya Roy and Rupert Watters have produced high quality chapters. Claire Gallagher has provided me with invaluable research assistance. Our communications team, Sally Finlay and Clare Chandler, have been responsible for the production of this document.

I hope that people who are interested in the operations of the criminal justice system will find this paper to be informative and thought provoking. The commission seeks your responses to the many reform proposals and questions it contains.

The submission period will conclude on 30 November because the commission's final report must be submitted to the Attorney-General by 1 March 2009.



Professor Neil Rees
Chairperson

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# Terms of Reference

The Victorian Law Reform Commission is to review and to recommend any procedural, administrative and legislative changes that may simplify, shorten or otherwise improve the charges, directions and warnings given by judges to juries in criminal trials. In particular, the Commission should:

(a) identify directions or warnings which may no longer be required or could be simplified;

(b) consider whether judges should be required to warn or direct the jury in relation to matters that are not raised by counsel in the trial;

(c) clarify the extent to which the judge need summarise the evidence for the jury.

In conducting the review the Victorian Law Reform Commission should have regard to:

- the themes and principles of the Attorney-General's Justice Statement (2004);
- the rights enshrined in Victoria's Charter of Human Rights and Responsibilities
- the overall aims of the criminal justice system including:
  - the prompt and efficient resolution of criminal trials; and
  - procedural fairness for accused people.

The Commission is to report by 1 March 2009.

# Call for Submissions

The Victorian Law Reform Commission invites your comments on this Consultation Paper

### WHAT IS A SUBMISSION?

Submissions are your ideas or opinions about the law being reviewed. Submissions can be anything from a personal story about how the law has affected you, to a research paper complete with footnotes and bibliography.

The commission wants to hear from anyone who has experience with a law under review. It does not matter if you only have one or two points to make; we still want to hear from you.

### WHAT IS MY SUBMISSION USED FOR?

Submissions help the commission understand different views and experiences about the law it is researching. Information in submissions, along with other research and comments from meetings, is used to help develop recommendations.

Once the commission has assessed your submission it will be made available on our website and stored at the commission where it will be publicly available.

### HOW DO I MAKE A SUBMISSION?

A submission can be made in writing or verbally. There is no particular format you need to follow, however, it would assist us if you address the consultation questions listed at the end of the paper.

Submissions can be made by:

Mail: PO Box 4637, GPO Melbourne Vic 3001

Email: law.reform@lawreform.vic.gov.au

Fax: (03) 8619 8600

Phone: (03) 8619 8619, 1300 666 557 (TTY) or 1300 666 555 (freecall)

Face-to-face: please contact us to make an appointment with one of our researchers.

### WHAT HAPPENS ONCE I MAKE A SUBMISSION?

Shortly after you make your submission you will receive a letter confirming it has been received. You are then asked to reply to confirm your details by replying to this letter or email within seven days of receipt.

### ASSISTANCE IN MAKING A SUBMISSION

If you require an interpreter or need assistance to have your views heard, please contact the commission.

If you would like a copy of this paper in an accessible format please contact the commission.

### CONFIDENTIALITY

When you make a submission you must decide how you want your submission to be treated. Submissions are either public, anonymous or confidential.

- ***Public*** submissions can be referred to in our reports, uploaded to our website and made available to the public to read in our offices. The names of people or organisations that make submissions will be listed in the appendices of the final report. Addresses and contact details are removed from submissions put on our website.
- ***Anonymous*** submissions can be referred to in our reports, uploaded to our website and made available to the public to read in our offices but the identity of the author/s will not be revealed.
- ***Confidential*** submissions cannot be referred to in our report or made available to the public.

Please let us know your preference along with your submission. Our website submission form includes a tick box you can use to indicate your preference. If you do not tell us you want your submission treated confidentially we will treat it as public.

More information about the submission process and this reference is available on out website***: www.lawreform.vic.gov.au***

**SUBMISSION DEADLINE**
30 November 2008

# Executive Summary

## SCOPE OF THE REVIEW

At the end of a criminal trial, the trial judge is required to direct the jury on so much of the law as is required to decide the case and to relate the evidence to the law. The giving of these directions has become a major source of criminal appeals in Victoria. The Commission has been asked 'to review and to recommend any procedural, administrative and legislative changes that may simplify, shorten or otherwise improve the charges, directions and warnings given by judges to juries in criminal trials.'

## CONSULTATIONS

The commission has not yet undertaken wide ranging consultations on this reference. In preparing this Paper, the commission established a 'Consultative Committee' consisting of experienced criminal lawyers and judges to identify issues around jury directions.

The commission has had preliminary meetings with members of the judiciary from the County and Supreme Courts and members of the criminal bar as well as the Office of Public Prosecutions and Victoria Legal Aid. The commission has also met with the NSW Law Reform Commission, which is conducting a similar, but broader, reference.

## OVERVIEW OF CONSULTATION PAPER

This paper outlines the major issues in relation to jury directions. Some of these issues, such as the multiplicity and complexity of directions, are generic and apply broadly to many directions. Others, such as the rule in *Pemble's case* or the obligation to summarise evidence, create their own distinct problems. In each case, this paper identifies possible options for reform. In Chapter 2, we outline the law in relation to jury directions, and why they are necessary in criminal trials. We look at factors contributing to problems with jury directions, including the increase in number and stringency of mandatory requirements for judicial warnings and the recent increase in statutory reform which has added to the complexity of some warnings. We outline our approach to the question of reform of jury directions, including the need to support the adversarial process and the jury system and to be clear about the role of the parties within that process. In particular, we have made proposals which are aimed at supporting judicial discretion in relation to the giving of directions and warnings.

## CHAPTER 3 – SEXUAL OFFENCES

In chapter 3 we focus on the law in relation to sexual offences in order to illustrate both multiplicity and complexity in jury directions and warnings in criminal trials. There are four principal factors contributing to this problem:

- The overlapping and contradictory statutory and common law obligations to give warnings.
- The development of specific categories of evidentiary directions which have taken on particular significance in sexual offence cases;
- The fear of appeal and the stringent requirements of appeal courts which have resulted in an over-cautious approach by some trial judges who give unnecessary directions, without proper consideration of what is required in the context of a specific trial.
- The lack of guidance provided by appellate courts to trial judges in ascertaining clear directions from appellate decisions.

The chapter provides examples of the types of directions that trial judges must commonly consider; including:

- Evidentiary warnings about delayed complaint;
- Evidentiary directions relating to 'limited purpose' evidence;
- Directions about propensity evidence

We also look at how the *Evidence Act 2008* (Vic) will affect the way in which judges will direct juries. The problems in relation to directions about propensity are a particular focus. The requirements for propensity warnings are explained and the problems discussed.

The chapter discusses the options of either removing directions in relation to propensity, or alternative models for simplifying them. Three models for the simplification of the warning are considered:

### 1. THE LEACH MODEL

American academic, Thomas Leach, proposes a model based on using common sense experience to address concerns associated with evidence of 'other acts'. The elements of this kind of direction would be as follows:

- Evidence that the accused has committed other similar acts may be considered in determining whether they in fact committed the charged acts.

- Such evidence does not conclusively answer the question – it is one fact to be considered in combination with all the other facts.
- It would be improper to decide simply that 'because he did it before he probably did it again' without considering all the other evidence.
- To ensure that the accused is not unfairly characterised, the jury must be satisfied of the other acts and if so, whether that factor makes it more or less likely that they committed any charged act.
- The jury must not seek to punish the accused for any other act – he is tried only for the charges against him.
- Evidence of other acts must be considered only for determining whether he committed the present charges.

### 2. THE UK MODEL

In the UK there has been a preference for a direction that places more trust in the jury by containing a better explanation of the unfairness of propensity. Suggested directions have contained the following elements:

- If the jury find a propensity is shown, they may take this into account in determining the accused's guilt, however, they must remember that propensity is only one relevant factor, and they must assess its significance in light of all other evidence in the case.
- What really matters is the evidence heard in relation to this case
- The jury must be careful not to be unfairly prejudiced against the accused about what they have heard in relation to previous convictions.
- It would therefore be wrong to jump to the conclusion that he is guilty just because of those convictions.

### 3. THE ZUCKERMAN MODEL

The final model for consideration in Chapter 3 is based on an approach developed by Professor Adrian Zuckerman. Zuckerman, builds on the UK Model, but goes further, arguing that the only way juries will resist the temptation of convicting an accused because of criminal propensity, is if a judge explains the way that jurors' own moral perceptions are reflected in the principles of criminal justice, and that they need to try the accused only for the offence charged.

## CHAPTER 4—CONSCIOUSNESS OF GUILT

Chapter 4 focuses on consciousness of guilt warnings as a specific illustration of how complex the law in relation to directions has become. This complexity relates both to determining whether to give the warning and in relation to what the warning should contain. The chapter includes, in particular, discussion of the High Court's decision in *Edwards v The Queen,* because of its impact on the way in which the current consciousness of guilt warning is framed.

The current law, represented by the *Edwards* line of cases, imposes significant burdens upon, and create serious risks of error for, trial judges. The problems with the current warning, based on *Edwards* are outlined and a number of options for reforming the law in the area are considered. These include the following:

- prohibit the warning
- make the warning discretionary—that is allowing the trial judge to determine whether the warning should be given in a particular case
- remove the corroboration requirements – for example, the requirement that all items of consciousness of guilt evidence be identified. By removing these requirements, it is possible to create a much shorter warning that focuses solely on the risks of jumping to conclusions in relation to consciousness of guilt evidence, without confusing the jury or prejudicing the accused.

## REFORMING THE CONTENT OF THE WARNING

The chapter also considers the extent to which the content of the warning should be prescribed in legislation. Three models are outlined:

- Model directions—based on that already provided by the Judicial College of Victoria, but simplified. A model direction could either be included in legislation, or legislation could provide that a model direction prepared and approved by the Judicial College of Victoria is legally correct.
- Pattern directions—Legislation could prescribe a specific statutory formula to be used in all cases.
- Checklist—an outline could be included in legislation listing the matters that must form part of the direction, but not specifying the precise wording.

# Executive Summary

## CHAPTER 5 – *PEMBLE* AND CHARGING THE JURY

Chapter 5 discusses the duty of the trial judge to instruct the jury about possible alternative defences even where they are not raised by counsel and the duty to sum up the case to the jury. The chapter outlines the problems with the obligation of the judge to instruct the jury about possible alternative defences, as stated in the case of *Pemble v The Queen* including the following:

- It encourages judges to 'appeal proof' their directions by including additional directions of only tangential relevance. This results in longer and more confusing charges to the jury, which is likely to impede juror comprehension.
- It is inconsistent with the adversarial ethos of the common law criminal justice system.
- It is potentially disadvantageous for the accused because it may be in the accused's interests to avoid raising certain defences, or lesser included offences, and instead opt for an 'all or nothing' approach.
- It is also potentially disadvantageous to the accused because it will often leave the jury 'at large' with regard to defences or offences on which they have not heard proper argument from either counsel.
- It is open to manipulation for tactical advantage. A deliberate forensic decision not to take a point at trial may form the basis for an appeal.

The chapter suggests that one solution to the problems with the current operation of the principle would be to legislate so that that the principle does not apply to cases where the accused is legally represented. In those cases, the trial judge would only be required to direct the jury on those defences or alternative verdicts raised by defence counsel. In cases where the accused is unrepresented, however, it would still be appropriate for the judge to direct the jury on defences or alternative verdicts not raised by the accused.

The chapter goes on to discuss the obligation of the trial judge to sum up or 'charge' the jury, based on the principle found in *Alford v Magee*. The current tendency of some trial judges to provide very long summaries of evidence in order to meet this obligation is discussed and some options for clarifying the requirement and reducing the necessity for such long summaries are discussed, including;

- The introduction of a statutory discretion to decide whether to summarise the evidence;
- The introduction of special verdicts such that the jury would only need to be directed on the questions of fact that they need to answer;
- The adoption of an issues based approach to summing up; or
- The adoption of a US style approach in which the judge directs the jury purely on matters of law, with minimal, if any, reference to the facts.

## CHAPTER 6—ISSUE IDENTIFICATION

Chapter 6 explains aspects of the pre-trial process in order to highlight the importance of early issue identification in the context of preparing jury directions. Early identification of the issues in a trial increases the chances that the required directions will be given and a retrial avoided.

## CHAPTER 7 – REFORM PROPOSALS AND OPTIONS

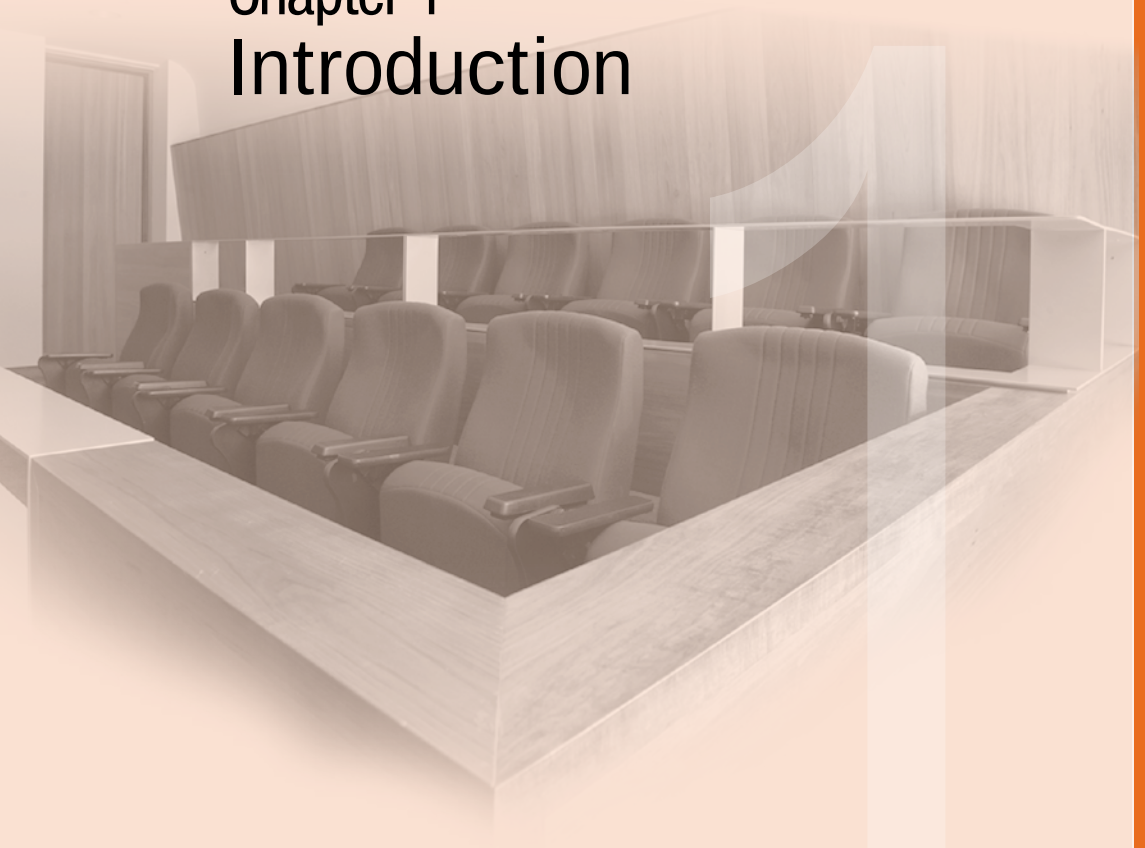
In chapter 7 some of the options from earlier chapter are restated within a broader framework of law reform proposals. Our central reform proposal is to consolidate in one piece of legislation the law relating to the circumstances in which directions and warnings must be given, together with some guidance about the specific content of selected directions and warnings . We consider the options of codification and of ordinary legislation. We suggest the kind of matters that might be dealt with in such legislation, including provisions that protect judicial discretion in relation to the giving of warnings. We propose also that specific guidance in relation to some individual warnings be outlined in the legislation and we consider a number of options for achieving this including model directions, outlines and generic or 'all purpose' directions for adaptation in particular circumstances.

In relation to the issue of issue identification we suggest that a document called an 'aide memoire', based on that used in the Northern Territory, be introduced in criminal trials in Victoria to assist in early identification of issues and to assist the jury to understand what they are being asked to determine.

We suggest amendments to the appeal provisions to restrict the capacity of people convicted at trial from raising points of law on appeal that were not raised, but which could have been raised, during the trial. We reiterate the suggestion made in chapter 5, that legislation provide that the trial judge not be obliged to direct the jury about defences or versions of the facts not put to the jury by defence counsel unless satisfied that a failure to do so will result in the denial of the right to a fair trial.

Finally we pose a number of questions in relation to increasing judicial training and support, about the specialist accreditation of trial counsel and about whether a public defender scheme should be considered in Victoria.

# Chapter 1
# Introduction



# Chapter 1 Introduction

## SCOPE OF THIS REFERENCE

1.1 On 2 January 2008 the Attorney-General asked the Victorian Law Reform Commission to review the law and practice concerning the directions and warnings that judges are required to give juries in criminal trials and to make recommendations for reform.

1.2 The impetus for this reference comes from the growing complexity of directions and warnings. Recently, a significant number of successful appeals from conviction have involved arguments in relation to errors in jury directions. Evidentiary directions have made up the largest proportion of such appeals.

## THE PROBLEM OF APPEALS

1.3 Between 2000 and 2007 there were 538 appeals to the Court of Appeal from conviction at trial. Of these appeals 298, or 55%, contained claims that the trial judge had made an error when giving directions to the jury.[1] In 160, or 30%, of these cases, the appeal was allowed and a retrial ordered.[2]

1.4 Commentary from the Court of Appeal also suggests that over half of the appeals resulting in retrials succeeded on points of law not taken at trial.[3] A common complaint in many cases, is that appeals on the grounds of jury directions relate to technical points rather than to substantive errors that would have had any effect on the verdict of the jury. [4] Many of the rules of law concerning directions that have featured prominently in such cases have become highly technical. They are open to the criticism that they do not promote the prompt and efficient resolution of criminal trials.

### THE OUTCOME OF RETRIALS

1.5 Most retrials conducted as a result of successful appeals from conviction in the period 2000–2007 have resulted either in reconviction or in the retrial not proceeding due to a decision by the Director of Public Prosecutions.[5] In only 10 cases (6%), has the accused person been acquitted at the retrial.

1.6 There are significant economic and non-economic costs caused by retrials. Criminal trials are often extremely stressful events for the victims of crime and their families, for accused people and their families, and for the people who are witnesses to crimes.[6] The issues at stake in any criminal trial are of fundamental importance to the entire community. Our law enshrines the principles that people accused of criminal offences are presumed innocent and that guilt must be proved beyond reasonable doubt at a trial which is fair to everyone concerned. A central aim of the criminal justice system must be trials, conducted once, which produce an outcome that is right and just.

1.7 A high success rate in appeals resulting in retrials because of legal error is an undesirable outcome for the people directly involved in a criminal trial and for the broader community. A person charged with a serious crime is entitled to expect that the jury will be given accurate directions about matters of law, while witnesses may expect that they will be called upon to give evidence only once, unless there are exceptional circumstances. More generally, a high success rate in appeals against conviction, followed by a low rate of acquittals in subsequent retrials, has the capacity to threaten public confidence in the criminal justice system.

1.8 In addition to the social and emotional cost of the current appeal rate, there is also the economic cost to consider. The economic cost of retrials is difficult to estimate because there are so many variables. These include the court that conducts the trial, the length of the trial, the number and expertise of the lawyers, and the number of witnesses. Based on cost approximations provided to the commission by Courts Services in the Department of Justice, the Office of Public Prosecution and Legal Aid, we estimate the cost of a five-day trial in the County Court to be at least $55,000.[7] A retrial therefore is a costly undertaking.

## TERMS OF REFERENCE

1.9 The commission has been directed to:

- identify directions or warnings that may no longer be required or could be simplified
- consider whether judges should be required to warn or direct the jury in relation to matters that are not raised by counsel in the trial
- clarify the extent to which the judge need summarise the evidence for the jury.

1.10 The Attorney-General has asked the commission to recommend any procedural, administrative and legislative changes that may improve the directions and warnings given to juries by judges in criminal trials.[8] The commission's final report is due by 1 March 2009.

## WHAT IS NOT UNDER REVIEW

1.11 The terms of reference do not ask the commission to consider the general issue of juror comprehensibility. The Attorney-General has indicated that the commission may receive a further reference to examine this issue.[9] The commission recognises, however, that juror comprehension of instructions is an important matter to take into account when examining the extent to which the content of directions can be simplified or their number reduced.[10] The proposals in this paper aim to promote jury understanding of directions from the trial judge.

1.12 Judges are required to give juries directions about a range of matters including the substantive criminal law. That is, they must explain to the jury the elements of offences and defences. In making our reform proposals, however, we do not propose reviewing the substantive criminal law in relation to particular offences and defences. This would not only be well beyond the resources of the reference it would overlap with the work already being done by the Department of Justice in relation to reforming the criminal law.

## PURPOSE OF THIS PAPER

1.13 The purpose of this paper is to describe the factors that contribute to errors in jury directions and to advance proposals for reform. We encourage discussion of these proposals and we seek responses to the many questions in this paper that are concerned with the detail of the proposals. Our proposals are based on the premise that the current law governing jury directions is unduly complex and that it does not provide trial judges with sufficient or clear guidance concerning the instructions that must be given to juries about the law and the way in which they should deal with the evidence. In our view, statutory reform is necessary.

1 These figures are drawn from data collected from the Court of Appeal and the Office of Public Prosecution. That data has a number of limitations. The data together with information about how it was collected and its various limitations is set out at Appendix A.

2 Constraints in time and resources mean that we have not been able to analyse each case in detail. We therefore do not have figures on exactly how many of the retrials were ordered on the basis of particular errors in directions.

3 Supreme Court of Victoria, *An Agenda For Reform Of The Criminal Trial Process* (2006) 9.

4 James Wood, 'The Trial Under Siege: Towards Making Criminal Trials Simpler' (Paper presented at the District and County Court Judges Conferences, Fremantle, Western Australia, 27 June–1 July 2007)

5 A decision not to proceed with the charges is known formally as a *nolle prosequi*. Of all the retrials ordered, 76 resulted in conviction. In 30 cases, retrials did not go ahead due to a *nolle prosequi* being entered. A *nolle prosequi* is an application to discontinue proceedings, which is usually determined by the Director of Public Prosecutions. In at least 13 out of the 30 cases, a *nolle prosequi* was entered on the basis that a complainant or victim did not want to proceed. In at least 9 cases, the application was made on the basis that the accused had served most of his or her sentence. We say 'at least' because the reason for the application is not clear in all cases from the available data . There are 27 cases in which a retrial is pending.

6 Geoff Eames, *"Two Different Worlds": Successful Criminal Trial or Successful Appeals* [unpublished] (2006)1;Victorian Law Reform Commission, *Sexual Offences Final Report: Summary and Recommendations in Plain English* (2004).

7 The breakdown of this figure is set out in Appendix A, along with the assumptions made in reaching the figure.

8 The full terms of reference are set out at p 4.

9 Letter from Rob Hulls , Attorney-General [Victoria] to the commission, 2 January 2008.

10 We draw here on the significant body of juror research both overseas and in Australia that makes this point. See, eg, V Gordon Rose and James Ogloff, 'Evaluating the Comprehensibility of Jury Instructions: A Method and an Example' (2001) 25 (4) *Law and Human Behavior* 409;Susan Witt, 'Helping Jurors Listen: Early Jury Instructions and Supreme Court Rule 239' (2000) 88 *Illinois Bar Journal* 80;Jacqueline Horan, 'Communicating with Jurors in the Twenty-First Century' (2007) 29 *Australian Bar Review* 75.

# Chapter 1 Introduction

## OUR PROCESS

### EXPERT CONSULTANT

1.14 In February 2008, retired Supreme Court judge, the Honourable Geoffrey Eames QC, was appointed a consultant to the reference. Since his retirement in 2007 Mr Eames has been an Acting Justice of the Supreme Court of the Northern Territory where he has continued to conduct criminal trials. Mr Eames has published a number of papers about jury directions.[11] He has brought to the commission a wealth of experience as a barrister and judge at the trial and appellate court levels.

### PRELIMINARY CONSULTATIONS

#### Consultative Committee

1.15 The commission has established a Consultative Committee of experienced judges and criminal lawyers to assist the team working on the reference. The committee met twice prior to the preparation of this paper and will be invited to respond to the proposals and questions in this paper.

#### Other consultations and meetings

1.16 We have also consulted members of the criminal bar, judges from the County and Supreme Courts, Victoria Legal Aid, and the Office of Public Prosecutions. Those meetings have focussed on gathering background information about the matters under review and seeking preliminary views about ways of improving the current law and practice.

1.17 In addition we have met commissioners and research staff from the New South Wales Law Reform Commission, which is conducting a similar, but broader, reference. We have also met officers from the Criminal Policy Unit at the Department of Justice and staff from the Judicial College of Victoria which has responsibility for judicial education and for preparing the Criminal Charge Book.

### DATA GATHERING

1.18 The commission has gathered information about conviction appeals from the Office of Public Prosecutions and from the Court of Appeal. This data has enabled us to present information about the number of appeals against conviction, the success rate in appeals resulting in a retrial, and the grounds upon which appeals have succeeded. The relevant data is set out in Appendix A.

### RELATED LAW REFORM COMMISSION REFERENCES

1.19 Both the New South Wales and Queensland Law Reform Commissions have references dealing with jury directions in criminal trials. Both commissions has been asked to consider not only the multiplicity and complexity of directions and warnings, but also juror comprehension of those directions and whether additional help should provided to jurors to assist them in their task.[12]

### OTHER RELEVANT LAW REFORM ACTIVITY IN VICTORIA

1.20 This review of the law concerning jury directions is taking place at a time of significant reform of the criminal law in Victoria. The following reforms are underway or have been recently completed:

#### Crimes Act review

1.21 The Department of Justice is currently undertaking a major review of the *Crimes Act 1958* in response to the Attorney-General's Justice Statement. The contents of the Crimes Act will be reviewed and placed in three distinct Acts: a Criminal Procedure Act, a Criminal Investigation Powers Act, and a Crimes (Offences) Act. The Criminal Procedure Bill is currently before Parliament, with commencement anticipated in 2009. There are plans to introduce the Criminal Investigation Powers Bill in mid-2009 and the Crimes (Offences) Bill at the end of 2009.

1.22 The purpose of the Crimes Act review is to consolidate and clarify the existing law, rather than to reconsider fundamental principles.[13] The commission will continue to consult with the Department of Justice to ensure that our work is complementary.

### Uniform evidence legislation

1.23 In 2005, the Attorney-General asked the commission to advise him about various matters associated with the introduction of the Uniform Evidence Act in Victoria. Those parts of the reference that concerned review of the operation of the Uniform Evidence Act were undertaken in conjunction with the Australian Law Reform Commission and the NSW Law Reform Commission. In the final Uniform Evidence Law report, the three law reform commissions recommended an inquiry into the operation of the jury system that included the issue of warnings and directions.[14]

1.24 *The Evidence Act 2008* which recently recieved royal assent is due to commence no later than 1 January 2010. Some of the proposals in this paper involve reconsideration of the policy that supports some sections in the Uniform Evidence Act.[15]

### Sexual offences reforms

1.25 Between 2001 and 2004, the commission reviewed the law concerning sexual offences. Many changes were made to the law in response to the commission's recommendations. Reforms concerning what the jury should be told about consent and delays in the reporting of sexual offences dealt with legitimate policy concerns, however they may have unwittingly contributed to the complexity of jury directions in sexual offences trials.[16] Some of the proposals in this paper offer simpler means of implementing the policy behind the law.

## VICTORIAN CRIMINAL CHARGE BOOK

1.26 Since late 2005, the Judicial College of Victoria has been developing an online Criminal Charge Book that provides model jury directions ('charges'), explanatory commentary ('bench notes'), statutory extracts, lists of authorities as well as jury decision trees ('checklists') for many offences. This edition replaces the previous charge book written by Judge Kelly and has been available online since May 2006. The Charge Book is a work in progress with new charges published from time to time after an editorial committee comprising research staff from the Judicial College and senior judges has approved them.

1.27 The Charge Book was developed because of the number of successful appeals against conviction and the perception that a suggested form of words for a charge would assist trial judges, particularly new judges with limited criminal law experience.

## THE ATTORNEY-GENERAL'S JUSTICE STATEMENT

1.28 In 2004, the Attorney-General issued a statement—known as the Justice Statement—outlining 'new directions for the Victorian Justice System'.[17] The values identified as essential to the justice system include effectiveness and fairness, both of which have relevance to the current reference.

## VICTORIAN CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES

1.29 The *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic) ('the Charter') commenced operation in January 2008. The Charter contains a number of rights concerned with criminal proceedings. The right to a fair hearing is a fundamental Charter (and common law) right which must inform any recommendations made by the commission.[18] While there have been a number of cases concerning aspects of the right to a fair trial since the introduction of the Charter,[19] it is unclear whether the issue of jury directions is affected by that right. However, the Charter does permit consideration of relevant international and foreign case law when interpreting human rights.[20] Some of those cases deal with the role of the judge in criminal trials. The commission will consider principles that emerge from those cases when developing final recommendations for reform.

11 See, eg, Geoff Eames, 'Tackling the Complexity of Criminal Trial Directions: What Role for Appellate Courts?' (2007) 29 *Australian Bar Review* 161;Geoff Eames, *"Two Different Worlds": Successful Criminal Trial or Successful Appeals* [unpublished] (2006); Geoff Eames, 'Towards a Better Direction – Better Communication with Jurors' (2003) 24 *Australian Bar Review* 35.

12 The terms of reference for the NSW reference can be found at: Law Reform Commission of New South Wales, *Jury Directions in Criminal Trials* <www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_cref116> at 29 August 2008. The Queensland terms of reference are similar.

13 Department of Justice, *New Directions for the Victorian Justice System 2004–2014: Attorney-General's Justice Statement* (2004) 26.

14 Australian Law Reform Commission, NSW Law Reform Commission, Victorian Law Reform Commission, *Uniform Evidence Law* ALRC Report 102, NSWLRC Report 112, VLRC Final Report (2005), 595.

15 The implications of the new legislation are discussed in Chapters 3 and 7.

16 The nature of this complexity is discussed in Chapter 3, para 3.26–3.69

17 Department of Justice, *New Directions for the Victorian Justice System 2004–2014: Attorney-General's Justice Statement* (2004).

18 *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 24 and 25; *Hinch v Attorney-General for the State of Victoria* (1987) 164 CLR 15, 58; *Dietrich v R* (1992) 177 CLR 292, 299.

19 *Kortel v Mirik and Mirik* [2008] VSC 103 (4 April 2008); *R v Benbrika & Ors (Ruling No 20)* [2008] VSC 80 (20 March 2008)

20 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(2).

# Chapter 1 Introduction

1.30 The right of a person convicted of a criminal offence to have the conviction reviewed by a higher court in accordance with the law is another important Charter right.[21] While the number of successful appeals against conviction at trial is a matter of serious concern, the commission is aware of the need to respect and support the right to appeal.

## STRUCTURE OF THIS PAPER

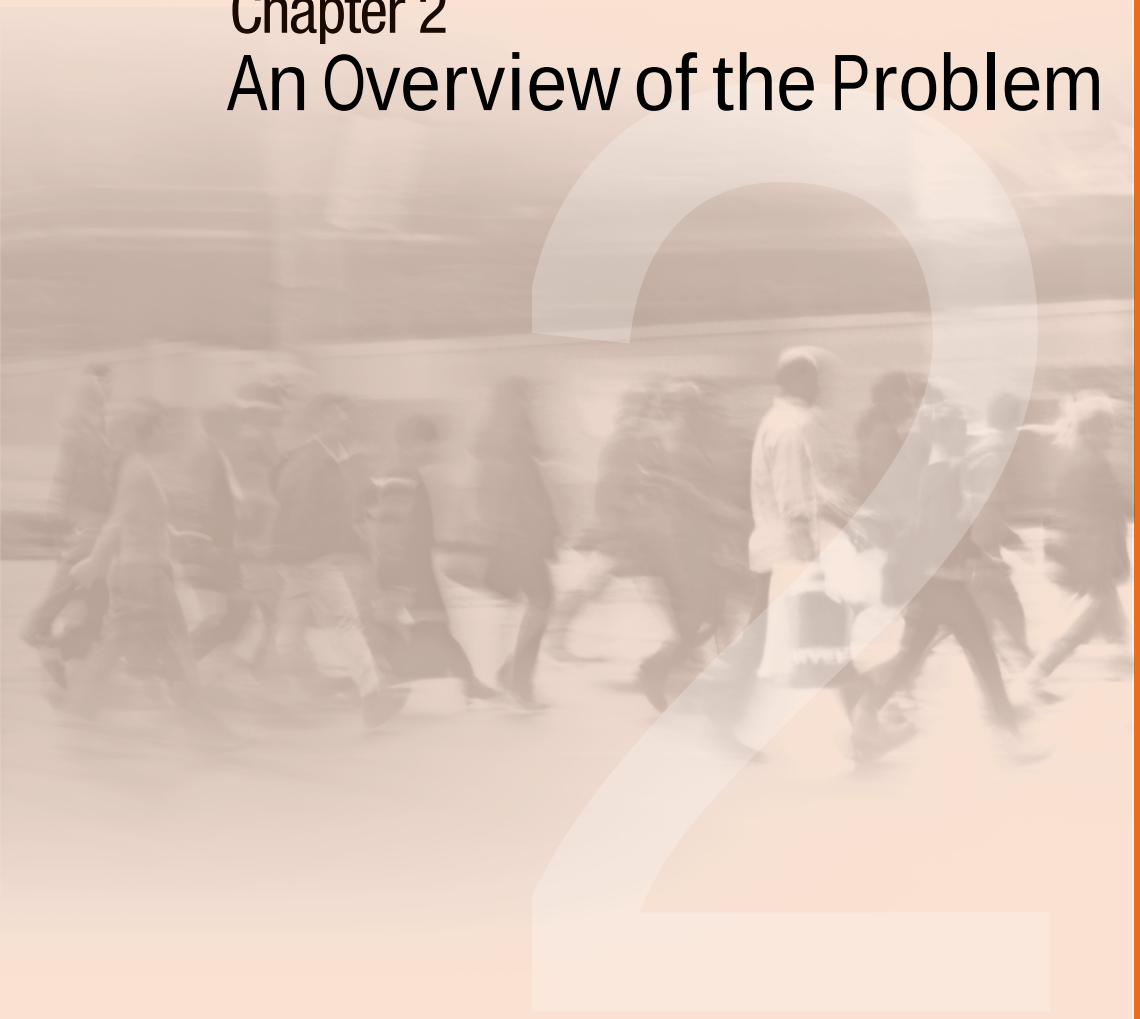
1.31 Chapter 2 of this paper explains what directions and warnings are and why they are required. It identifies factors that contribute to error by trial judges when delivering directions and warnings. Chapters 3 and 4 provide case studies of the multiplicity and complexity of directions and warnings. In Chapter 3, we set out the factors that have contributed to the proliferation (as well as the complexity) of sexual offence warnings and directions. In Chapter 4, consciousness of guilt warnings illustrate how complex some areas of law concerning warnings have become.

1.32 Chapter 5 discusses the requirements that a judge summarise the evidence for the jury at the end of a trial and refer to defences that may not have been raised by counsel. Chapter 6 describes the process of pre-trial issue identification in criminal cases and considers how a failure to properly identify issues at a relatively early stage can adversely affect the judge's capacity to direct the jury.

1.33 In Chapter 7, we present options for reform. This chapter proposes a legislative framework for the law concerning directions and warnings. Specific options about individual warnings and directions discussed in earlier chapters are placed within that broader framework. The Chapter also contains proposals about pre-trial preparation, appeal powers and means of enhanced training for judges and trial counsel.

21 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(4)

# Chapter 2
# An Overview of the Problem



# Chapter 2 An Overview of the Problem

## INTRODUCTION

2.1 The purpose of this chapter is to explain what jury directions are and why they have become the source of an increasing number of appeals. We also explain our approach to the reference, including the assumptions underpinning our proposed reform options.

## WHAT ARE JURY DIRECTIONS?

2.2 Jury directions are statements about or explanations of the law that the jury must follow. The trial judge must give some directions, while others are discretionary.

2.3 Directions generally[1] fall into three broad categories:

- ***Procedural directions*** – these are directions relating to the conduct of the trial and criminal procedure. Examples are directions about the standard and onus of proof, and the role of the judge and the jury. Some procedural directions are mandatory in all criminal trials.
- ***Substantive directions*** – these are directions about the elements of offences and defences. Substantive directions are also mandatory in all criminal trials.
- ***Evidentiary directions*** – these are directions relating to the use of specific pieces of evidence. They typically fit within two sub-categories:
  - *Warnings* – A warning is a particular kind of direction by the judge that the jury should be careful in assessing the weight of a particular kind of evidence, for example, eyewitness testimony.[2]
  - *'Limited Use' Directions* –A limited use direction tells jurors what uses may (and may not) be made of evidence of a particular kind.

Evidentiary directions are sometimes mandatory and sometimes discretionary.

### DISTINCTION BETWEEN DIRECTIONS AND COMMENTS

2.4 Anything the judge says to the jury about the law is binding on it while things that they say about the evidence are not. Sometimes the judge decides that it is necessary to say something about the evidence even though the facts are for the jury alone to decide on the basis of the evidence. The jury may accept or reject what the judge says about the evidence and must be told by the judge that the law allows them to do either. This kind of statement is generally referred to as 'a comment'.[3]

### WHY ARE DIRECTIONS NECESSARY?

2.5 Jury directions provide information to the jury that helps them determine the case.[4] Directions relating to procedural and substantive issues are required in every trial. These directions are necessary because they contain information about the law that the jury needs to reach its verdict. The source of the requirement for jury directions is the judge's common law duty to ensure that the accused has a fair trial.[5] The law says that judges must explain only *as much of the law as is required* by the jury to decide the real issues in the case.[6]

2.6 The need for evidentiary directions is determined by the circumstances of particular cases. Evidentiary directions are designed to prevent the jury from making errors in the way they consider the evidence. Historically, the common law allowed the trial judge to determine whether an evidentiary direction or warning was required to avoid an 'unreasonable risk of wrongful conviction.'[7] However, that broad discretionary power no longer exists. There are now many circumstances in which the trial judge must give the jury a direction about particular types of evidence.[8]

### WHAT ARE THE PROBLEMS WITH JURY DIRECTIONS?

2.7 Over the past two decades, there have been many changes to the law concerning jury directions because of common law developments and statutory reform. While these changes have often sought to clarify the law about specific directions, they have not always had this effect in practice. Some of these changes have added to the complexity and multiplicity of directions and have inadvertently increased the chances that the trial judge will fall into error.

## The impact of High Court development of the common law

2.8 The 'explosion in the number and stringency of mandatory requirements for judicial warnings' about the use of evidence has been characterised as 'arguably the most significant single development in the law of criminal evidence in recent years'.[9]

2.9 One of the decisions that contributed to this 'explosion' is *Bromley v R*.[10] That case is significant because it was the first time the High Court set out a general rule that required the trial judge to give a jury warning in circumstances where evidence may be unreliable.[11] Subsequent cases have followed this lead, requiring warnings about different kinds of evidence thought to be unreliable.[12] More recently, following the decision in *Longman v R*[13], the list of mandatory warnings has expanded further to include not only instances where the evidence is potentially unreliable, but also when it is not capable of being properly tested.

2.10 As well as requiring trial judges to give warnings about an increasing range of matters, the High Court has also imposed very specific requirements about the contents of these warnings. Some warnings are now long, complex[14] and technical.[15]

2.11 The former preference for discretionary rather than obligatory directions and warnings is passing.[16] Recent case law alerts trial judges that if evidence is of a kind that triggers a warning, the judge must give that warning even though there are good reasons for not doing so.[17] In practice, a trial judge has little choice but to give the jury a (potentially) long list of highly complex directions that they may have little chance of understanding, in order to avoid appealable error.

2.12 With a few exceptions, it has not been the practice for judgments of the High Court or of any intermediate appellate courts, to propose the language that trial judges should employ in framing directions or warnings. Such an approach, when adopted, for example in *Black*[18] and *Zoneff* [19], was welcomed by trial judges and might usefully be adopted more often by appellate courts. Experienced, retired judges have suggested that, the increasing complexity and volume of the law has imposed unintended burdens on trial judges in determining both the circumstances in which directions or warnings must be given and their content.[20] Furthermore, as Kirby J noted in *Gillard* [21], and again in *Clayton*[22], when discussing the law of criminal complicity, the High Court has on occasions failed to seize the opportunity 'to clarify and simply the task of trial judges and juries they instruct'.

## The impact of statutory reform

2.13 Recent legislative reforms have added to the complexity of the criminal law and in some instances to the number of directions required in particular cases. Statutory changes, either to the elements of an offence or to the defences, may require a judge to direct the jury about

1 These categories do not take account of special verdicts, fitness to stand trial, complicity, inchoate offences, or the *Alford v Magee* (1951) 85 CLR 437 requirement.

2 See *Azzopardi v The Queen* (2001) 205 CLR 50, 70. The majority of the Court in that case characterised warnings as, in effect, a species of direction.

3 *Mahmood v State of Western Australia* [2008] HCA 1, [6].

4 Richard Fox, *Victorian Criminal Procedure: State and Federal Law* (2005).

5 *Conway v The Queen (*2002) 209 CLR 203. The right to a fair trial is provided for under the *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 24 and 25.

6 *Azzopardi v The Queen* (20010) 205 CLR 50; *RPS v R* (2000) 199 CLR 620; *Alford v Magee* (1952) 85 CLR 437.

7 Andrew Ligertwood, *Australian Evidence* (4th ed., 2004).

8 These circumstances are discussed in Chapters 3, 4 and 5.

9 Jeremy Gans and Andrew Palmer, *Australian Principles of Evidence* (2nd ed., 2004*)* 344.

10 (1986) 161 CLR 315. In *Bromley*, it was argued that evidence given by a witness with a mental disability required a corroboration warning. The High Court rejected the argument that a corroboration warning was required, but accepted that some sort of other warning was required.

11 *Bromley v R* (1986) 161 CLR 315, 320.

12 See, eg, *McKinney v R* (1991) 171 CLR 468; *Pollit v R* (1992) 174 CLR 558.

13 See, eg, *Longman v R* (1989) 168 CLR 79.

14 See, eg, the case law on propensity evidence or consciousness of guilt evidence. The problem of complexity is discussed in more detail in Chapter 4.

15 See the case law relating to eyewitness identification evidence: *Domican v R* (1992) 173 CLR 555; *Festa v R* (2001) 208 CLR 593.

16 Traditionally, the appellate court had deferred to trial judges in this area: see, eg, *Jones v Dunkel* (1959) 101 CLR 298, 314. By contrast, the High Court has recognised that its current approach 'is, and it is expressed to be, stringent': *Dyers v R* (2002) 210 CLR 285, 307 (Kirby J).

17 See, eg, *Doggett v R* (2001) 208 CLR 343. The complainant in that case alleged sexual abuse, but did not report the matter until two years after the final attack. She was, however, supported in her evidence by other witnesses and the case was mainly fought over whether statements by the accused amounted to a confession. The High Court ruled that, regardless of the fact that her evidence was not central to the case, the failure to give a warning meant that a miscarriage of justice had occurred and ordered a retrial.

18 (1993) 171 CLR 44.

19 (2000) 200 CLR 234.

20 James Wood, 'The Trial Under Siege: Towards Making Criminal Trials Simpler' (Paper presented at the District and County Court Judges Conferences, Fremantle, Western Australia, 27 June - 1 July 2007); James Wood, 'Jury Directions' (2007) 16 *Journal of Judicial Administration* 151; Geoff Eames, 'Tackling the Complexity of Criminal Trial Directions: What Role for Appellate Courts?' (Paper presented at the Supreme Court and Federal Court Judges Conference, Perth, 23 January 2007) <www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_jrtw01> at 21 August 2008. The perception that the High Court's approach has added to complexity was expressed repeatedly in early consultations.

21 (2003) 219 CLR 1, [54].

22 (2006) 81 ALJR 439, [38].

# Chapter 2 An Overview of the Problem

both common law and statutory rules. For example, recent changes to the law of homicide mean that juries in homicide cases may need directions about both common law self-defence and the alternative statutory offence of 'defensive homicide'.[23] This requirement adds to the length of the charge and increases the complexity of the judge's directions to the jury.

2.14 Legislative changes to the meaning of particular concepts may also cause unavoidable complexity and add to the number of directions that must be given to the jury. For example, the legal meaning of consent was changed by recent reform of sexual offences law. This means that in cases involving allegations of sexual abuse extending over a lengthy period, the judge must give the jury different directions about the meaning of consent depending upon when a particular offence is alleged to have occurred.[24]

2.15 The introduction of the Uniform Evidence Act may add to the complexity of the law concerning directions and warnings. The *Evidence Act 2008* contains provisions that will change the legal requirements in relation to certain kinds of evidentiary warnings. Those provisions are intended to impose some '… organisation on a miscellaneous collection of rules that have been developed on a case by case basis by the courts.'[25] In practice, the impact of the proposed legislation remains unclear. The potential problems that may arise in relation to jury directions because of the new legislation will be discussed later in the paper.[26]

## Appeals

2.16 The right of an accused person to appeal against conviction is a fundamental right. Over the years appellate courts have done much to protect the rights of people in criminal trials[27] and to improve the operations of the criminal justice system.[28] However, the increasingly complex requirements imposed upon trial judges by both the High Court and the Court of Appeal in the area of jury directions are onerous and they have greatly increased the chance of appealable error.[29]

2.17 The increased involvement of the appellate courts in criminal law, together with the development of legal aid, has lead to a growth in specialist appellate counsel.[30] Where once trial counsel would have also been involved in appeals work they now rarely conduct appeals. Similarly, appellate counsel rarely conduct trials.[31] Trial counsel will usually identify 'holding grounds' for appeal at the end of a trial resulting in conviction, but rely on appellate counsel to scrutinise the trial transcript in order to identify possible errors of law.[32] The grounds for appeal ultimately argued on appeal are usually quite different to those initial 'holding grounds'. The grounds for appeal and the arguments in support of them are often very technical and draw upon an extremely detailed understanding of relevant case law. The case law that emerges from these appeals sometimes contributes to the complexity of jury directions.

2.18 From its inception, the Court of Appeal has been subject to criticism from some trial judges, who say that the requirements it has imposed about jury charges are too technical and onerous. The criticism is not peculiar to Victoria; similar criticisms have been made in other jurisdictions of the intermediate appellate courts.[33] Indeed, some retired appellate judges have voiced similar concerns.[34]

2.19 Criticism of appellate courts is an inevitable by-product of a rigorous process of review of criminal trials. The Court of Appeal has repeatedly acknowledged the complexity of the law and the difficulty trial judges face in translating appellate pronouncements about the law into practical jury directions.[35] The length of Court of Appeal judgments is often shaped by the requirements imposed by the High Court and by the increased complexity of criminal trials generally. The Court of Appeal has been in the forefront of attempts to address the complexity concerning the directions and warnings, and to provide assistance to trial judges. One member of that court chairs the editorial committee for the Criminal Charge Book, while another is a member. In addition, the President of the Court was instrumental in setting up the working party on jury directions from which this reference has developed.[36]

2.20 The complaints of trial judges about the difficulty of delivering charges that will withstand appellate scrutiny are understandable. Given the pressure of trial work, trial judges have limited opportunities to keep abreast of the rapidly growing body of case law from successful appeals. Furthermore, the burden of remaining in command of appellate law is difficult for

counsel, too. The fact that trial lawyers now rarely conduct appeals affects their knowledge of appellate authority. In consequence, trial judges are sometimes given less assistance from counsel than is appropriate when making decisions about appropriate directions. Researchers who interviewed many Supreme and County Court trial judges reported the feeling of many that 'charges are drafted for the appellate courts rather than for the comprehension of juries.'[37] Most judges who were surveyed complained about directions having become increasingly complex, creating an 'over intellectualisation of criminal law'.[38]

### Comprehensibility of jury directions

2.21 One of the consequences of the increased number and complexity of directions is that they have become more and more difficult for a jury to understand. Another is that the major focus for trial judges often has been the avoidance of appeals and retrials, rather than simple and clear directions to the jury about the law and the evidence. In many cases, directions are probably given more for the benefit of appellate courts than to give the jury information they require to decide the case. Yet it is complexity, rather than simplicity, that tends to generate error. This is doubly unfortunate, because it results in the worst of both worlds: complex directions, more appeals and more retrials. It is, of course, impossible to know whether the complexity of jury directions, and/or the force with which some warnings must be given - with the weight of judicial authority - has produced acquittals that constituted miscarriages of justice.

2.22 The Criminal Charge Book developed by the Judicial College of Victoria helps judges to provide the jury with accurate and comprehensible instructions by providing plain language directions for judges to adapt for use in particular cases. While this resource has provided invaluable assistance to judges, it has highlighted the underlying complexity of the law.

2.23 One of the criticisms made by some judges about the Criminal Charge Book is that both the bench notes and the charges are too long.[39] However, the length of the bench notes merely reflects the complexity of the law and the number of matters that trial judges are required by law to consider. Similarly, the length of the charges reflects the numerous legal requirements that apply to different kinds of cases.[40]

## OUR APPROACH

2.24 Enduring solutions to the problem of the complexity and multiplicity of jury directions are not easy to identify. This paper contains proposals for reform that are aimed at reducing complexity and multiplicity while also supporting basic assumptions that underpin the entire criminal justice system. The relevant assumptions are:

23 *Crimes Act 1958* (Vic) s 9AD provides for defensive homicide. In theory, defensive homicide could be charged as a primary offence. In practice, however, it is more likely to be raised as an alternative to a charge for murder. There is nothing to prevent defence counsel from also arguing common law self defence.

24 The complexity of the law in relation to sexual offences, including the statutory reforms in relation to consent are discussed in Chapter 3.

25 Victoria, *Parliamentary Debates,* Legislative Assembly, 26 June 2008, 2632 (Rob Hulls, Attorney General).

26 Chapter 3, 4 and 7.

27 For example, the ruling in *Dietrich v R* (1992) 177 CLR 292 that the right to counsel forms part of the right to a fair trial.

28 For example, the attitude of appellate courts to police evidence of unrecorded confessions was instrumental in encouraging the States to enact mandatory recording legislation.

29 Kirby J made this point in an article, Hon Justice Michael Kirby, 'Why Has The High Court Become More Involved In Criminal Appeals?' (2002) (23) *Australian Bar Review* 4, 16:

> To some extent, stimulated by decisions of the High Court itself that have imposed heavy obligations on trial judges and courts of criminal appeal, criminal proceedings now, typically, take longer.
>
> When I commenced legal practice in 1962, experienced New South Wales judges, such as Clancy J, McClemens J or Brereton J would sum up to the jury in a murder case in little more than an hour or so and do it from their head. The law was clearer and simpler. The trials and the evidence were shorter. The duties of the judge were fewer. The changes that have occurred in this regard have added to the risks that mistakes will creep in.

30 Geoff Eames, *"Two Different Worlds": Successful Criminal Trial or Successful Appeals* (2006) 2.

31 Ibid. This also referred to in Hon Justice Michael Kirby, 'Why Has The High Court Become More Involved In Criminal Appeals?' (2002) (23) *Australian Bar Review* 4, 16.

32 Geoff Eames, *"Two Different Worlds": Successful Criminal Trial or Successful Appeals* (2006).

33 James Wood, 'The Trial Under Siege: Towards Making Criminal Trials Simpler' (Paper presented at the District and County Court Judges Conferences, Fremantle, Western Australia, 27 June - 1 July 2007)15;James Wood, 'Summing Up in Criminal Trials – A New Direction?' (Paper presented at the Conference on Jury Research, Policy and Practice, Sydney, 11 December 2007) 2.

34 Geoff Eames, *"Two Different Worlds": Successful Criminal Trial or Successful Appeals* (2006).

35 See, eg, *R v Chang* (2003) 7 VR 236, 248 (Ormiston JA); see also *R v Mazur* (2000) 113 A Crim R 67 (Brooking JA).

36 Supreme Court of Victoria, *An Agenda For Reform Of The Criminal Trial Process* (2006).

37 Elizabeth Najdovski-Terziovski, et al, *In Your Own Words: A Survey of Judicial Attitudes to Jury Communication ['forthcoming' in the Journal of Judicial Administration]* (2008) 29.

38 Ibid 29-30.

39 Ibid.

40 For example, the simplest Consciousness of Guilt Charge included in the Charge book is one paragraph long – this is the simple 'Zoneff' warning. The most complex charge, dealing with lies and other conduct as implied admission of guilt, is 10 pages long. The complexity of the law in relation to consciousness of guilt is set out in Chapter 4.

# Chapter 2 An Overview of the Problem

- *That the jury system is and continues to be the best way to determine guilt.* In making this assumption, we endorse the sentiments of Lord Justice Auld that juries are 'practical and public manifestations of the citizen's involvement in the administration of criminal justice' and a 'powerful contributor to public confidence in [that] system.'[41]
- *That the adversarial process should continue as our preferred method of determining guilt* – By adversarial, we mean a process in which the issues to be determined are selected by the parties and proven (or not proven) by evidence and argument presented by counsel for the parties.[42]
- *That, as far as possible, the trial judge should have discretion to decide what the jury is told in the context of individual trials.*

2.25 Each participant has a distinct role within an adversarial trial. Counsel determine what issues are in dispute[43] and what evidence should be used to prove the contested matters, or to defend the interests of the accused. The trial judge is an impartial arbiter whose role is to ensure a fair trial, to decide questions of law, and to tell the jury what they need to know about the law to reach a verdict. The jury determines all questions of fact, including the ultimate issue of guilt or innocence.[44]

## DISTORTION OF THE ADVERSARY PROCESS AND THE ROLE OF THE JURY

2.26 There is a danger that the increasing number and complexity of mandatory jury directions is distorting the adversarial process and undermining the role of the jury.

2.27 Warnings given 'with the weight of judicial office', that are required in some instances, may involve intrusion by the judge into the adversarial context. Elaborate, complex and unduly long jury directions may confuse jurors. Rather than highlighting and confirming the relevant issues the jury must resolve, the judge's charge may in fact bury those issues under a weight of technical language.

2.28 The progressive erosion of the trial judge's discretion to decide what directions should be given to the jury and the infrequency with which an accused is held to be bound by the decisions or omissions of counsel also means that the trial is now sometimes governed not so much by the realities of the trial courtroom as by the Court of Appeal. In some instances the requirement to give a direction will override a calculated decision made by trial counsel not to seek the direction, because some jury directions are required notwithstanding what counsel has said to the jury and despite the strategic decisions made by counsel about the conduct of the case.[45]

2.29 The increasing number and complexity of jury directions challenges the basis upon which the jury has the central role in a criminal trial. There is no point in having a jury unless we can confidently assume that the jury understands and complies with the directions given by the trial judge.[46] Yet modern juries are sometimes given directions and warnings that are very difficult, perhaps impossible for a non-lawyer, to understand. The principle that jurors should be told 'only so much' of the law they require to make their determination is frequently ignored in order to guard against an appeal. Sometimes, the amount of technical legal information jurors are given must make it more difficult for them to reach a verdict.

## THE ROLE OF APPELLATE COURTS

2.30 Numerous decisions by appellate courts have contributed to the increasing number and complexity of mandatory jury directions. In some instances, it is difficult to identify principles that can be applied in later cases because of the inability of appellate courts to produce majority judgments and their enthusiasm for individual judgments.[47] Appellate courts have a responsibility to identify errors by trial courts when the law is not correctly applied and to give reasons for making such conclusions. In doing this they should state the law with sufficient clarity so that errors may be avoided and directions can be framed that allow juries to understand the directions given to them by the trial judge.

## ENSURING THE RIGHT TO A FAIR TRIAL

2.31 Any options for reform must support the right to a fair trial. The right to an appeal from a wrongful conviction is also a fundamental right.[48] In order to be fair, a trial must be conducted according to law. Given the complexity of the law, an error free or 'perfect trial' is probably

unachievable. The fairness of a trial must be assessed, therefore, with this reality in mind. The right to a fair trial has been interpreted this way in other common law jurisdictions with an adversarial criminal trial system.[49]

## Remedying Distortion

2.32 Our options for reform have been developed with the following objectives in mind:

- restoring and increasing the discretionary power of trial judges when conducting trials
- trusting the jury to understand the law and to apply it correctly when making findings of fact
- treating counsel as competent and responsible for the conduct of their case
- ensuring that any reform measures support the fundamental rights to a fair trial and to appeal against a conviction.

2.33 The following three chapters contain detailed consideration of some significant problems concerning jury directions. Chapter 3 illustrates how directions have proliferated in sexual offences cases. Chapter 4 illustrates the technical and complex nature of the mandatory requirements in relation to consciousness of guilt warnings. Chapter 5 looks at the current criticisms in relation to the requirements to summarise evidence and address matters not raised by counsel.

41 Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (2001) 7.

42 This is as compared to the inquisitorial system, Mirjan Damaska, 'Of Hearsay and its Analogues' (1991 – 1992) 76 *Minnesota Law Review* 425, 428 – 430.

43 Although the judge also plays an important role in determining what the issues are in the summing up to the jury (see *Alford v Magee* (1952) 85 CLR 437, 466). Summing up to the jury is discussed in more detail in Chapter 5.

44 Our approach is similar to that adopted by the Canadian Supreme Court in *R v Daley* [2007] SCC 53 [28] where it was said:

> When reviewing the adequacy of jury instructions, appellate courts must remember the role of the various actors in the context of the trial as a whole. … The trial procedure is accusatory and adversarial.

45 See, eg, *R v Hartwick & Ors* [2005] VSCA 264, where the Court of Appeal remarked that they were 'constrained by authority to treat the request of defence counsel [to the trial judge, asking the judge not to give a more detailed instruction on consciousness of guilt] as irrelevant. … [T]he law is that the trial judge has no authority to dispense with the directions that the law requires be given in a criminal trial …' As such, where defence counsel has deliberately chosen not to raise an issue, the trial judge may be forced to draw attention to that issue anyway, regardless of the prejudice to the accused.

46 *Gilbert v R* (2000) 201 CLR 414 at 425 (McHugh J).

47 See, eg, *HML v The Queen* [2008] HCA 16.

48 The right to an appeal is also now provided under the *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(4), which provides for the right to an appeal from conviction and sentence. This reflects the ICCPR article 14(5). The right to an appeal is also provided for under the *Human Rights Act 2004* (ACT) s 22(4) and Protocol VII of the *European Convention for the Protection of Human Rights and Fundamental Freedoms,* opened for signature 4 November 1950, 2123 UNTS 221, art 2 (entered into force 3 June 1952) as well as domestic jurisprudence: see, eg, *R v Macfarlane; Ex parte O'Flanagan and O'Kelly* (1923) 32 CLR 518, 541-2 referred to in *Dietrich v R* (1992) 177 CLR 292, 326 (Isaacs J); *Sinanovic v R* 154 ALR 702, 705 (Kirby J); *Young v Registrar, Court of Appeal* (1993) 32 NSWLR 262, 290.

49 The same point has been made in other common law jurisdictions. In the US context, the Fourth Circuit Court of Appeals, relying on Supreme Court caselaw, stated in *Sherman v State* (1986) 89 F.3d 1134, 1139:

> 'Criminal defendants in this country are entitled to a fair, but not a perfect trial. "Given the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial," and the Constitution does not demand one. This focus on fairness, rather than on perfection, protects society from individuals who have been duly and fairly convicted of crimes, thereby promoting "public respect for the criminal process." [internal citations omitted].

See also the Canadian Supreme Court decision in *R v Lyons* [1987] 2 SCR 309, 362 (LaForest J): accused not entitled to 'the most favourable procedures that can possibly be imagined'; and the decision of the House of Lords in *Brown v Stott* [2001] 2 All ER 97, 119 (Lord Steyn) observing 'it is well settled that the public interest may be taken into account in deciding what the right to a fair trial requires in a particular context'.

# Chapter 2 An Overview of the Problem

# Chapter 3
# Directions in Sexual Offence Trials

# Chapter 3 Directions in Sexual Offence Trials

## INTRODUCTION

3.1 Jury directions in sexual offence trials were consistently identified during preliminary consultations as a problem for trial judges, both because of their complexity and because of the number of directions and warnings that might be required in any one trial. The problems identified by judges and trial counsel are supported by the available appeal figures in relation to sexual offences.

3.2 Between 2005-2007, for example, sexual offence cases made up almost 50% of all criminal cases concluding with a jury verdict at trial in the County Court.[1] In the commission's study of the data in relation to appeals dealt with in the Court of Appeal from all courts during the period 2000-2007, approximately 30% of the 538 appeals involved sexual offences. Almost one third of the appeals in sexual offence cases during that period resulted in retrials.

3.3 This Chapter outlines the nature and scope of the difficulties with jury directions and warnings in sexual offence trials in order to illustrate the kinds of problems which arise generally in relation to jury directions. We consider what causes this problem of multiplicity and complexity in sexual offence directions, and its consequences.

3.4 The Chapter provides examples of the types of directions that trial judges must commonly consider under the current law in Victoria, including evidentiary warnings about delayed complaint, evidentiary directions relating to 'limited purpose' evidence, and, in particular, the problems in relation to directions about propensity. We also consider other matters about which judges are required to give instructions, including the way in which juries consider multiple counts, and the use of evidence of character. The Chapter poses some general questions and suggests some options as to ways in which warnings might be simplified under the current law. In particular, the Chapter considers options for possible reforms to directions on propensity. Throughout the Chapter, we consider the ways in which the *Evidence Act 2008* (Vic), may affect the obligation on trial judges to give directions and warnings in these areas. The major reform proposals are set out in Chapter 7.

### WHAT CAUSES MULTIPLICITY AND COMPLEXITY?

3.5 Sexual offences raise particular problems of proof for the prosecution.[2] There is often little evidence apart from the allegations of the complainant. The outcome of the case often depends on the complainant's credibility. Delays in reporting offences can create difficulties for all concerned.

3.6 In addition to the wide range of directions about general issues of law and evidence that arise in most trials, the judge must also give the jury complex directions about the law of sexual offences which is constantly being developed. Trial judges have a difficult task in keeping up to date with the growing body of law concerning the unique evidentiary challenges posed by sexual offences cases, in addition to changes to the elements of some offences.

3.7 In this section, we outline those factors which contribute to the complexity and multiplicity of directions in sexual offence trials. They are:

- the overlapping and often contradictory statutory and common law obligations to give warnings
- the development of specific categories of evidentiary directions which have taken on a particular significance in sexual offence cases
- the giving of unnecessary directions by trial judges in an attempt to avoid error
- the lack of guidance provided by appellate courts.

#### Overlapping and inconsistent common law and statutory obligations

3.8 One of the major factors leading to the extreme complexity of the law concerning warnings and directions in sexual offence cases has been the amount of statutory reform in the area. Historically, jury warnings in sexual offence trials existed solely to protect accused persons against unfair convictions and false allegations of rape. The common law reflected inaccurate assumptions that people who were sexually assaulted would normally report the offence immediately, and that women and children were inherently unreliable witnesses.[3]

3.9 Recent legislative reforms have sought to cast aside myths about the way victims of sexual assaults behave so that juries are not influenced by inappropriate stereotypes. Research has shown that people are no more likely to make false reports of rape offences than any other serious crimes, and that people who are sexually assaulted often do not report the offence for some time.[4] Children abused by family members or others close to them may be reluctant to tell people for a range of reasons, and are even more likely than adults to delay reporting the offences.[5]

3.10 Legislative reforms have dealt with these inaccuracies through changes to the law concerning how judges should direct juries about the definition of consent, the necessary state of mind of the accused, the credibility of complainants, the reliability of witnesses, and any delay in reporting. The common law has also developed in response to these reforms, guided by the trial judge's obligation to ensure that the accused secures a 'fair trial in accordance with the law'.[6] For example, trial judges are required to warn juries where delays in prosecuting offences may have caused disadvantage to the accused.[7]

3.11 These overlapping obligations mean that judges must consider, in each case, the extent to which common law requirements have been displaced by statutory requirements, or whether they continue to operate, perhaps in a more limited way. This can be a complex exercise, especially where offences charged on the same presentment occur over long periods during which the law changed. Statutorily mandated directions based on complex substantive law may also be complicated and lengthy. These issues of complexity are illustrated below in relation to warnings regarding delay in complaint and mandatory consent directions.

3.12 Other legislative changes to evidentiary principles and criminal trial procedure, designed to facilitate evidence from children and other complainants in sexual offence cases, also affect jury directions. The creation of a statutory presumption that multiple sexual offences on the same presentment are triable together, has increased the number of trials with multiple complainants and witnesses, further complicating the directions given to the jury about the consideration of their evidence.[8] Jurors are also instructed about 'hearsay' evidence by child complainants, evidence of prior sexual history, and use of remote witness facilities, VATE[9] procedures and other recorded evidence. Because of these reforms, trial judges must now consider a complex web of statutory provisions before framing the directions required in a sexual offences trial.

3.13 The uniform evidence legislation, which will commence operation in 2010, will add to the body of law that a trial judge must consider. It deals with the judge's

1 Data provided by the County Court of Victoria, 15 May 2008.

2 The commission has previously considered in detail the unique characteristics of sexual offences and the particular challenges they present in the criminal justice system, see Victorian Law Reform Commission, *Sexual Offences: Law and Procedure: Final Report* (2004) 82-87.

3 See generally Dorne Boniface, 'Ruining A Good Boy For The Sake Of A Bad Girl: False Accusation Theory In Sexual Offences, And New South Wales Limitations Periods — Gone But Not Forgotten' (1994) 6 (1) *Current Issues In Criminal Justice* 54.

4 Kathy Mack, '"You Should Scrutinise Her Evidence With Great Care": Corroboration of Women's Testimony About Sexual Assault' in Patricia Easteal (ed) *Balancing the Scales: Rape, Reform and Australian Culture* (1998) 62.

5 For example, they may be reluctant to take action that will result in the break up of their family, or imprisonment of a family member; they may not understand the behaviour is a criminal offence; or they may be coerced or threatened into keeping the behaviour a secret: Victorian Law Reform Commission, *Sexual Offences: Law and Procedure: Final Report* (2004)

6 *Tully v The Queen* (2006) 230 CLR 234, 249 (Kirby J); *RPS v The Queen* (2000) 199 CLR 620, 637.

7 *Longman v The Queen* (1989)168 CLR 79.

8 *Crimes Act 1958* (Vic) s 372.

9 *Evidence Act 1958* (Vic) s 37B provides a procedure for video audio taped evidence (VATE) to be used by the prosecution as the evidence in chief of a witness. This evidence is in the form of an audio/video recording of the witness answering questions put to them by a 'prescribed person' (usually a trained police member) where there are charges of a sexual offence or physical assault or injury, and where the witness is aged under 18 years or is a person with a cognitive impairment. Also see, *Evidence (Recorded Evidence) Regulations 2004*.

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obligation to give the jury a warning about potentially unreliable evidence.[10] The legislation also expressly retains the judge's common law duty to sum up fairly about the facts, and to direct the jury in such a way as to avoid any risk of a miscarriage of justice.[11]

### Development of categories of evidentiary directions

3.14 The development of jury directions about evidentiary issues, identified as one of the main problem areas explained in Chapter 2, has been influenced by a perception that juries cannot be trusted to properly evaluate certain kinds of evidence without judicial guidance. There are two broad reasons that underlie the obligation to give the jury evidentiary directions: to alert jurors to potential defects in certain evidence, or to prevent them from reasoning in a way that is potentially unfair.

3.15 Sexual offences raise a number of unique issues concerning the admission of evidence and limitations on its use. The lack of evidence other than the complainant's has meant that historically sexual assault allegations have been singled out as needing special warnings about matters seen to affect the credibility of complainants.[12] Particular features which commonly arise in sexual offence cases have also been the subject of special categories and rules of evidence. Much case law has developed around areas such as evidence about a complainant's distressed condition, the question of a motive for the complainant to lie, and the use of evidence about sexual acts involving the accused on occasions other than those charged. Although justified historically by reference to the 'accumulated experience' of the courts, many of these directions appear to presume that jurors lack common sense.[13]

3.16 Often these evidentiary directions also involve distinctions between legitimate and illegitimate uses of evidence, which may be too subtle for many jurors to grasp. It is doubtful, for example, whether a jury will be able to make and apply the distinction between evidence that can be used towards 'credit' as opposed to 'proof of the facts'. This distinction, which is frequently drawn in jury directions in sexual offence cases, is sometimes confusing even to lawyers.

### 'Appeal-proofing' charges

3.17 The complexity of the law and a fear of appeal may have lead to an over-cautious approach by some trial judges who give unnecessary directions, without proper consideration of what is required in the context of a specific trial.[14] In *R v BWT*,[15] Chief Justice Wood at CL identified eight different categories of common law directions and warnings which may need to be given by trial judges in sexual assault cases.[16] Subsequent NSW decisions have recommended use of these categories as a 'check list' of directions for judges in sexual offences trials to ensure jury charges are insulated against challenge on the ground that a necessary warning was not given.[17] A similar catalogue of sexual offence directions can be found in the Judicial College of Victoria (JCV) Charge Book.[18]

3.18 Giving unnecessary directions to 'appeal-proof' jury charges has the potential to unnecessarily extend trials and make them more complicated than they need be. It is also likely that the more directions jurors are given, as Justice McHugh warned in *KRM v The Queen*,[19] and as jury research has shown, the more likely it is that the jury may forget or misinterpret them.[20]

### Lack of guidance from higher courts

3.19 Despite the assistance of Charge Books, the complexity of the law has made it impossible to produce model directions that are short, simple and accurately state the law in sexual offence cases.[21] In *HML v R*,[22] Justice Kirby acknowledged this burden on trial judges in sexual offences cases, particularly those concerning children, and emphasised the importance of framing directions and warnings in terms that can be understood by a 'jury of ordinary Australians'.[23] Unfortunately, appellate courts have provided trial judges with little assistance in this task.

3.20 *HML* was a recent, long awaited decision of the High Court about evidence of 'uncharged acts' in sexual offence cases. The law in this area has been extremely confusing. Decisions across most Australian jurisdictions reveal uncertainties about issues of admissibility, the directions to be given to the jury concerning use of the evidence, whether the jury should apply a standard of proof when assessing this type of evidence, and the dangers of 'propensity reasoning' based on evidence of this nature.[24] The problematic nature of directions in relation to this type of evidence is discussed later in this Chapter.

3.21 The amount of assistance provided to trial judges about these complex issues by the seven separate judgments of the members of the High Court bench in *HML* is open to discussion.[25] Several judgments contain qualifications that have raised doubts about the applicability of this judgment to jurisdictions such as Victoria, in which the common law principles relating to admissibility of evidence of 'uncharged acts' has been abrogated by statute.[26] Some have taken the view, however, that *HML* is relevant to Victorian law, notwithstanding the legislative reforms.[27] Given the lack of any clear 'majority' view on most issues, *HML* is illustrative of the almost impossible task faced by trial judges when seeking clear guidance from appellate decisions about the law that must be applied when this type of evidence is presented.

### CONSEQUENCES OF COMPLEXITY AND MULTIPLICITY

3.22 Judges have observed that the combined effect of multiple and complex warnings and directions in sexual assault cases make it difficult to secure a conviction of a person accused of sexual assault because:[28]

- Directions may be given which are unduly favourable to the accused and some warnings may be misinterpreted by the jury as a coded direction to acquit.
- Directions may create 'layers of unnecessary complexity' rather than facilitating jurors to reach a verdict by applying their 'common sense' according to the 'ordinary experiences of ordinary people'.[29] This raises concern if the jury becomes so confused or fatigued that they err on the side of caution and acquit.
- To avoid giving overly complex directions, evidence may be inappropriately excluded.[30]

3.23 The consequences of a successful conviction appeal and retrial in sexual offence cases may be especially devastating for complainants.[31] They sometimes choose not to give evidence at a retrial.[32] As Kirby J has observed, the law has an obligation to protect truthful complainants about sexual abuse.[33] That obligation may involve balancing the rights of the defendant with those of a complainant, particularly where it involves sexual abuse against children by family members who owe them special duties of trust and protection.[34]

## EXAMPLES OF MULTIPLICITY AND COMPLEXITY

3.24 The next part of this chapter provides an overview of some of the many complex directions that must commonly be considered by trial judges when formulating their charge to the jury in sexual offence trials. We examine first the evidentiary warnings

10 See, eg, Evidence Act 2008 (Vic) ss 165, 165A, 165B.

11 Evidence Act 2008 (Vic) s 165(5) which provides that the section: 'does not affect any other power of the judge to give a warning to, or to inform, the jury'.

12 A widely held view was that females complaining about sexual offences were likely to lie, and the rape allegations were 'easily to be made' and difficult to disprove: M. Hale, *Pleas of the Crown*, [1678] 1, 635 cited in Dorne Boniface, 'Ruining A Good Boy For The Sake Of A Bad Girl: False Accusation Theory In Sexual Offences, And New South Wales Limitations Periods — Gone But Not Forgotten' (1994) 6 (1) *Current Issues In Criminal Justice* 54, 60-1; even as recently as *Reg v Henry; Reg v Manning* (1968) 53 Cr App R 150, 153, Salmon LJ reaffirmed the 'rule of practice' of warning the jury of the danger of convicting on the uncorroborated evidence of a woman or girl.

13 *DPP v Hester* [1973] AC 296, 308 (Lord Morris of Borth-y-Gest).

14 See for example, Andrew Haesler, 'Sexual Assault Update: How The Prudent Judge Can Avoid Error' (2005) 17 (5) *Judicial Officers' Bulletin* 21. Elizabeth Najdovski-Terziovski, et al, *In Your Own Words: A Survey of Judicial Attitudes to Jury Communication ['forthcoming' in the Journal of Judicial Administration]* (2008) 29.

15 (2002) 54 NSWLR 241.

16 *R v BWT* (2002) 54 NSWLR 241, 250. The warnings and directions listed in the NSW context were: the *Murray* direction (*R v Murray* (1987) 11 NSWLR 12); the *Longman* warning; the *Crofts* direction (*Crofts v R* (1996) 186 CLR 427); the *KRM* direction (*KRM v The Queen* (2001) 206 CLR 221; credibility warnings; the *Gipp* warning (*Gipp v The Queen* (1998) 194 CLR 106); the warnings regarding use of coincidence evidence; and the *BRS* direction (*BRS v The Queen* (1997) 191 CLR 275). Many of these have their equivalents in the Victorian context.

17 *R v LTP* [2004] NSWCCA 109, [47] (see observations of Dunford J). Compare the criticism of the trial judge's charge in *R v Mueller* (2005) 62 NSWLR 476, 477 by Hunt AJA, which included 'every statement made by this Court and by other courts' in relation to consent 'whether directly relevant to the particular case or not'. In conclusion Hunt AJA considered the directions correct.

18 Judicial College of Victoria, *Title* (2008) <http://www.justice.vic.gov.au/emanuals/CrimChargeBook/default.htm> at Judicial College of Victoria, *Victorian Criminal Charge Book* (2008) <www.justice.vic.gov.au/emanuals/CrimChargeBook/default.htm> at 8 September 2008.

19 *KRM v The Queen* (2001) 206 CLR 221, 234.

20 New Zealand Law Commission, *Juries in Criminal Trials: Part Two: Volume 2* Preliminary Paper 37 (1999) 51-2.

21 Victorian trial judges have received great assistance from Charge Books produced, first, by Judge Kelly and more recently through the agency of the Judicial College of Victoria.

22 *HML v The Queen; SB v The Queen; OAE v The Queen* (2008) 245 ALR 204 ('*HML*').

23 *HML* (2008) 245 ALR 204, 217 (Kirby J).

24 See Kirby J's comments in *HML* (2008) 245 ALR 204, 217.

25 Only the judgment of Gummow J is brief, in agreement with the principles as stated by Hayne J: *HML* (2008) 245 ALR 204, 216.

26 *HML* (2008) 245 ALR 204, 206 (Gleeson CJ), 219, 224 (Kirby J), 216 (Gummow J), 275 at fn 227 (Heydon J).

27 See eg, the observations made by Justice Robert Redlich, 'Propensity Evidence: HML v The Queen [2008] HCA 16' (Paper presented at the Criminal Bar Association, Melbourne, 23 May 2008). In *R v Ellul* [2008] VSCA 106 the position outlined by Hayne J in *HML* (2008) 245 ALR 204, 262 that it would usually be required to instruct a jury as to satisfaction beyond reasonable doubt of the occurrence of uncharged acts, was referred to by the Court of Appeal, but not elaborated on, and the trial judge in that appeal had in any case instructed the jury in those terms.

28 *R v BWT* (2002) 84 NSWLR 241, 250-2 (Wood CJ at CL), 279-80 (Sully J).

29 *Doney v The Queen* (1990) 171 CLR 207, 214; *Black v R* (1993) 179 CLR 44, 49; Dorne Boniface, 'The Common Sense of Jurors VS The Wisdom of The Law: Judicial Directions And Warnings In Sexual Assault Trials' (2005) 28 (1) *University of New South Wales Law Journal* 261.

30 These issues have been raised in the Commission's preliminary consultations.

31 Andrew Haesler, 'Sexual Assault Update: How The Prudent Judge Can Avoid Error' (2005) 17 (5) *Judicial Officers' Bulletin* 21.

32 According to information supplied by OPP, available data regarding filing of a nolle prosequi on retrial following a successful appeal against conviction (over the years 2000-07) showed of the 22 cases for which reasons were available, almost half of these related in some way to complainants and witnesses in sexual offence matters not wishing to proceed.

33 These observations were made in *HML* (2008) 245 ALR 204, 220-3 during Kirby J's consideration of the factors bearing on the question as to what evidence the jury hears about alleged acts of sexual abuse involving an accused with the complainant, other than the charged acts.

34 *HML* (2008) 245 ALR 204, 220 (Kirby J). Between 2000-2007, of 169 appeals in sexual offence cases, 114 related to offences involving children: see Appendix A.

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concerning delayed complaint which have developed through the interplay of common law and statutory reform in the area of sexual offences. We also briefly consider the changes to the law relating to consent, and to the procedural matters which affect the directions judges must give.

3.25 We also consider evidentiary directions in relation to particular categories of evidence which often feature in sexual offence cases, and which are admitted for a 'limited purpose'. These include directions about evidence of 'recent complaint', 'recent invention', distress, or where there is a suggestion of the complainant's 'motive to lie'. We focus, in particular, on the problems in relation to directions about the use of 'propensity evidence', and suggest some ways of rethinking the current approach to these directions. Finally, we discuss other matters about which judges are required to give instructions, including the way in which juries consider multiple counts, and the use of evidence of character. Throughout the Chapter, we consider how the uniform evidence legislation, implemented in Victoria through the *Evidence Act 2008*, will affect these directions.

## EVIDENTIARY WARNINGS ABOUT DELAYED COMPLAINT

### Overlap of statutory and common law obligations in relation to warnings

3.26 As discussed in Chapter 2, the common law historically required judges to warn juries about the danger of convicting by relying solely upon certain categories of 'uncorroborated' evidence. These categories included evidence of complainants in sexual offence cases and children, among others.[35]

### The *Kilby*[36] direction

3.27 An accused was also able to rely at common law on evidence showing a lack of complaint, or delay in complaint, to undermine the credibility of the complainant. In *Kilby v R*,[37] the High Court held that judges should instruct juries that a complainant's failure to complain at the earliest reasonable opportunity may cast doubt on the reliability of their evidence.[38]

3.28 These warnings were considered necessary to minimise the risk of wrongful conviction and to assist juries when dealing with evidence that was doubtful.[39] The warnings reflected mistaken assumptions about the behaviour of 'genuine' victims, and the inherent unreliability of complainants in sexual offence cases and children as witnesses.[40] Substantial law reform has taken place since the 1980s to remove these warnings and directions, in light of research discrediting the misconceptions upon which they were based.[41]

3.29 In Victoria, these reforms have included statutory provisions prohibiting a judge from warning or suggesting that sexual offence complainants,[42] children, or persons with a cognitive impairment,[43] are unreliable witnesses. Also, if delay in complaining about a sexual offence is raised in the course of evidence or in the addresses of counsel, the trial judge is required by section 61 of *the Crimes Act* to advise the jury that there may be good reasons for a complainant's failure to make a prompt complaint.[44]

3.30 The common law has developed further requirements in response to these statutory amendments for instructing the jury where issues of delay arise. Of particular concern at appellate level has been the requirement for trial judges to give '*Longman* warnings'.[45] The growth of these common law warnings has lead to concerns about the effectiveness of s 61, and the provision has been subject to amendment several times. A summary of the history of these changes is set out below.

### *Longman* warnings

3.31 The *Longman* warning, which may also be given in non-sexual offence cases,[46] requires the judge to warn the jury about the forensic disadvantage suffered by an accused where there has been a delay in reporting the offence. Despite the abolition of common law corroboration requirements, the High Court has held that judges still have an obligation to give warnings about the evidence of complainants in some cases.[47] In *Longman v The Queen*,[48] the High Court held that the judge must warn the jury that because delay may have prevented a witness' evidence from being adequately tested, it would be dangerous for them to convict the accused on the basis of that evidence alone unless the jury, after scrutinising the evidence with great care, is satisfied of its truth and accuracy.[49]

3.32 The requirements of this warning have been developed in a series of subsequent High Court decisions.[50] Courts have identified two reasons why the warning is needed: the effect of delay on the memory of witnesses, particularly the complainant;[51] and the forensic disadvantage faced by an accused where there has been a lengthy delay in making a complaint.[52] Most recently, the Victorian Court of Appeal has re-emphasised the need to bring these 'dangers' to the jury's attention. The warning is given out of fairness to the accused, rather than to 'provide a balance between the interests of the prosecution and the interests of the appellant'.[53]

35 *Kelleher v R* (2001) 205 CLR 50 (sexual offence complainants); *Hargan v R* (1919) 27 CLR 13 (children giving sworn evidence); *Davies v DPP* [1954] AC 378 (accomplices); *Pollitt v R* (1992) 174 CLR 558 (evidence of prison informers).

36 *Kilby v R* (1973) 129 CLR 460.

37 (1973) 129 CLR 460.

38 *Kilby v R* (1973) 129 CLR 460, 465.

39 Kathy Mack, '"You Should Scrutinise Her Evidence With Great Care": Corroboration of Women's Testimony About Sexual Assault' in Patricia Easteal (ed) *Balancing the Scales: Rape, Reform and Australian Culture* (1998) 59.

40 Australian Law Reform Commission, NSW Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts* ALRC Discussion Paper 69, NSWLRC Discussion Paper 47 and VLRC Discussion Paper (2005) 488-9.

41 These reforms have previously been considered: see Victorian Law Reform Commission, *Sexual Offences: Law and Procedure: Final Report* (2004) 359-362. The NSW Parliament Standing Committee on Law and Justice found that delay bears no relation to the credibility of the complainant and is typical of sexual assault complainants: Standing Committee on Law and Justice, Legislative Council, New South Wales Parliament, *Report on Child Sexual Assault Prosecutions* Report No 22 (2002). For an overview of the research on reliability of child witnesses see Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process* ALRC Report 84 (1997) paras 14.19-24.

42 *Crimes Act 1958* (Vic) s 61(1)(a). Previously, s 62(3) abolished any mandatory requirement for the judge to give a corroboration warning in sexual offence cases, but did not abolish the right of judges to give such a warning: Law Reform Commission of Victoria, *Rape and Allied Offences: Procedure and Evidence* Report 13 (1988), 39-42.

43 *Evidence Act 1958* (Vic) s 23(2A).

44 *Crimes Act 1958* (Vic) s 61(1)(b). This provision was designed, in particular, to circumvent the decision in *Kilby*.

45 Based on the decision in *Longman v The Queen* (1989) 168 CLR 79. Note that at the time of this decision, abolition of mandatory corroboration warnings was guided by the previous *Crimes Act 1958* s 62(3). According to the data available to the Commission, appeals relating to directions about delay have comprised about 10% of sexual offence appeals over the period 2000-2007. This number appears to vary significantly through these years. For example, in 2003, directions on delay featured in about 42% of sexual offence appeals, whereas the figures for several other years range from 5%-15%. See Appendix B.

46 For example, *Carr v R* (2001) 117 A Crim R 272, where the warning was required in an armed robbery case where the accused was charged 9 years after the alleged commission of the offence.

47 *Longman v The Queen* (1989) 168 CLR 79, 85-90 (Brennan, Dawson, Toohey JJ).

48 *Longman v The Queen* (1989) 168 CLR 79.

49 *Longman v The Queen* (1989) 168 CLR 79, 91 (Brennan, Dawson, Toohey JJ).

50 *Crampton v The Queen* (2000) 206 CLR 161; *Doggett v The Queen* (2001) 208 CLR 343. For example, a majority of the High Court in *Doggett* (McHugh J dissenting) held that a *Longman* warning may be required where there has been a substantial delay in complaint, even where there is corroborating evidence: 355-6 (and in Victoria, see *R v FVK* [2002] VSCA 225). In *R v BWT* (2002) 54 NSWLR 241, 273, Sully J outlined the requirements of the warning required by the approach of the majority of the High Court in these decisions:

> '*first*, that because of the passage of time the evidence of the complainant cannot be adequately tested; *secondly*, that it would be, therefore, dangerous to convict on that evidence alone; *thirdly*, that the jury is entitled, nevertheless, to act upon that evidence alone if satisfied of its truth and accuracy; *fourthly*, that the jury cannot be so satisfied without having first scrutinised the evidence with great care; *fifthly*, that the carrying out of that scrutiny must take into careful account any circumstances which are peculiar to the particular case and which have a logical bearing upon the truth and accuracy of the complainant's evidence; and *sixthly*, that every stage of the carrying out of that scrutiny of the complainant's evidence must take serious account of the warning as to the dangers of conviction.'

51 *R v Mazzolini* (1999) 3 VR 113, 125 (Ormiston JA); *Longman v The Queen* (1989) 79 CLR 79, 101 (Deane J), 107 (McHugh J); *Doggett v R* (2001) 208 CLR 343, 377 (Kirby J).

52 The 'forensic disadvantage' may be, for example, the inability to explore the circumstances of the alleged offending in detail; to identify the alleged events with specificity, to establish an alibi, or the chance of medical examination of the complainant. See *Longman v The Queen* (1989) 168 CLR 79, 91 (Brennan, Dawson, Toohey JJ), 100 (Deane J), 108 (McHugh J); *Crampton v The Queen* (2000) 206 CLR 161, 209 (Kirby J), 181 (Gaudron, Gummow, Callinan JJ), 211 (Hayne J); *Doggett v The Queen* (2001) 208 CLR 343, 356 (Gaudron, Gallinan JJ), 376 (Kirby J).

53 *R v Taylor* (No 2) [2008] VSCA 57 [93], [88] (Kellam JA), in which the Court criticised the trial judge for referring to the loss of ability of the police to fully investigate the events, which was 'irrelevant' to the issue of forensic disadvantage suffered by the accused. In *R v Garbutt* [2008] VSCA 170, [65] Lasry AJA held that this decision made clear that the warning must be 'unequivocally favourable to the occasion' and is 'not an occasion for balance between the parties'. Also see *R v MWL* (2002) 137 A Crim R 282, 286 (Buchanan AJA), where the court held the directions were 'significantly diluted' by a reference to difficulties for the police investigation, as the jury may have construed this as 'excusing any deficiencies in the Crown case'. In *R v RW* [2008] VSCA 79, [55] Neave J expressed reservations about this view.

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## Problems with *Longman* warnings

3.33 Although it has been held that there is 'no set formula' for *Longman* warnings, they must be given as a warning about the character of the evidence in 'clear and unmistakable terms,' with the force of judicial authority.[54] Appellate courts have regarded directions in the forms of comments and cautions as insufficient.[55] Most decisions have supported an emphatic warning in language of the type used in *Longman*.[56]

3.34 The need for giving a warning with judicial authority arises when there are factors which make it 'unsafe' for the jury to rely on counsels' arguments. Where the jury is capable of evaluating a combination of factors or circumstances 'in light of their own experience and with the benefit of counsel's addresses' a judicial warning is only necessary in exceptional circumstances.[57] However, despite corroboration warnings being abolished, some trial judges have been 'retreating to the safety' of issuing *Longman* warnings for fear of appeal.[58]

3.35 The practice of routinely giving *Longman* warnings has raised a number of concerns:[59]

- It is unclear how long a delay is sufficiently 'substantial' to require the warning.[60] As a result the warning is given whether or not it is necessary, in order to 'appeal-proof' decisions.
- It is unclear what language should be used when warning the jury, especially the strength of the warning.[61]
- The use of the words 'dangerous to convict' has been criticised as an implicit instruction to the jury to acquit.[62]
- High Court decisions that have extended the requirements of the warning in *Longman*[63] create an irrebuttable presumption that the accused is prejudiced by delay in their ability to put forward their defence. It has been argued that this has the potential to mislead the jury and usurp its fact-finding function.[64]
- It has also been suggested that judicial interpretation and application of the *Longman* warning in sexual offence cases has gone beyond what is required to achieve fairness for an accused, and has effectively reinstated earlier common law corroboration warnings.[65]

## Amendment of section 61 to limit the effect of *Longman*

3.36 In response to some of these criticisms, Victorian law relating to *Longman* warnings was modified by amendments to section 61 by the *Crimes (Sexual Offences) Further Amendment Act 2006*. These most recent amendments, which apply to proceedings commenced after 1 December 2006,[66] are intended to implement the commission's earlier recommendations that such warnings be restricted to cases where:

- the defence requests a warning to be given
- the court is satisfied the accused has in fact suffered some 'significant forensic disadvantage' due to a delay in reporting.

3.37 In these circumstances, the judge must inform the jury about the nature of the forensic disadvantage suffered, and instruct them to take that disadvantage into consideration.[67] The judge must not give a *Longman* type warning except in accordance with this provision, and 'any rule of law to the contrary' is expressly abrogated.[68]

3.38 The amendments also clarify that passage of time on its own will not necessarily establish a significant forensic disadvantage.[69] This is intended to provide a clear legislative statement that delay alone is not a sufficient reason for giving a warning and to prevent trial judges from routinely giving *Longman* warnings where delay has occurred. Judges are also specifically prohibited from suggesting to the jury, using the *Longman* formulation, that it would be 'dangerous or unsafe' to convict because of the delay.[70]

3.39 The *Evidence Act 2008* also attempts to limit the judge's obligation to give *Longman* warnings.[71]

### The *Crofts* direction

3.40 The '*Crofts*' direction has also caused difficulties for trial judges where there has been a delay in complaining about a sexual assault. In *Crofts v The Queen*,[72] the High Court considered the operation of *Crimes Act 1958* s 61(1)(b). At the time, it required the judge to warn the jury that absence of complaint or delay did not necessarily indicate the allegation was false, and that there may be good reasons for the delay or lack of complaint.[73]

3.41 The court concluded that these provisions were not intended to 'sterilise' sexual offence complainants from criticism, or convert them into an 'especially trustworthy class of witnesses'. The court held that a jury given a section 61(1)(b) direction must also be given a 'balancing' *Kilby* direction. The jury should be told that the absence of a complaint or a delay in making a complaint may, as a matter of law, be taken into account when evaluating the evidence of the complainant, and in determining whether to believe him or her.[74]

3.42 This means that a trial judge in a case involving delayed complaint must give both statutory and common law warnings. They are:

1. Section 61 requires a warning that there may be good reasons for a complainant to delay in complaining;
2. *Crofts* requires a further direction that such delay may indicate the allegations could be fabricated.

3.43 The High Court qualified the obligation to give the direction where the particular facts of the case and conduct of the trial did not give rise to a need for a warning to restore a balance of fairness. The court also held that the direction should not be given using language that revived stereotypes suggesting that sexual offence complainants are unreliable, or that delay is invariably a sign of falsity of the complaint.[75] Despite these qualifications, the obligation to give *Crofts/Kilby* directions has raised several concerns: [76]

- *Crofts* requires the judge to give statutory and common law directions which appear to contradict each other, risking confusion of juries.
- There is uncertainty about when the direction is required and the obligation for judges to give the warning even when not requested by counsel.
- The warning may also be misleading or operate to unfairly disadvantage the complainant, if there is no basis for suggesting any logical nexus between delay in complaint and fabrication.
- The judicially determined obligation to give a warning undermines the purpose of the legislative provisions.

54 *R v WEB* (2003) 7 VR 200, 215-6 (Winneke ACJ); *R v KJ* (2005) 154 A Crim R 282; *R v Taylor* (No 2) [2008] VSCA 57, [77].

55 See eg, *R v MWL* (2002) 137 A Crim R 282; Penny Lewis, 'A Comparative Examination of Forensic Disadvantage Directions in Delayed Prosecutions of Childhood Sexual Abuse' (2005) 29 *Criminal Law Journal* 281, 284.

56 *R v Mazzolini* [19991] 3 VR 113, 141 (Ormiston J); *R v Taylor* (No 2) [2008] VSCA 57, [77] (Kellam JA).

57 *R v Miletic* [1997] 1 VR 593, 606; *Bromley v The Queen* (1986) 161 CLR 315, 324-5; *Carr v The Queen* (1988) 165 CLR 314, 330.

58 See observations of Ormiston JA in *R v Mazzolini* (1999) 3 VR 113, 129. In *R v BWT* (2002) 54 NSWLR 241, 275 Sully J commented that in cases of delay, trial judges would be 'well advised' to give *Longman* warnings unless they can reasonably conclude that the time lapse is so small that 'any reasonable mind' would consider it 'trifling', and that the risk of relevant forensic disadvantage 'far-fetched or fanciful'.

59 These concerns have been discussed in a number of reports on the area: Tasmania Law Reform Institute, *Warnings in Sexual Offences Cases Relating to Delay in Complaint* Final Report No 8 (2006) 9-20; Australian Law Reform Commission, NSW Law Reform Commission, Victorian Law Reform Commission, *Uniform Evidence Law* ALRC Report 102, NSWLRC Report 112, VLRC Final Report (2005) 612-620.

60 See for example the observations of Eames JA in *R v GTN* (2003) 6 VR 150, 169-174.

61 For example, it has been held that the warning must be given in terms which amount to more than merely a direction to 'proceed carefully': *R v KJ* (2005) 154 A Crim R 282; *R v RW* [2008] VSCA 79 [62].

62 *R v BWT* (2002) 54 NSWLR 241, 247, 251(Wood CJ at CL).

63 *Crampton v The Queen* (2000) 176 ALR 369; *Doggett v The Queen* (2001) 182 ALR 1.

64 Penny Lewis, 'A Comparative Examination of Forensic Disadvantage Directions in Delayed Prosecutions of Childhood Sexual Abuse' (2005) 29 *Criminal Law Journal* 281, 293; see, for example, *R v BWT* (2002) 54 NSWLR 241, 244 (Wood CJ at CL).

65 Australian Law Reform Commission, NSW Law Reform Commission, Victorian Law Reform Commission, *Uniform Evidence Law* ALRC Report 102, NSWLRC Report 112, VLRC Final Report (2005) 622-634.

66 In *R v Taylor* (No 2) [2008] VSCA 57, the Court of Appeal found the correct interpretation of the transitional provisions in s 607 to be that s 61 applies in its most recently amended form to trials on a presentment which is filed, or filed over an earlier presentment, after the commencement of the amending Act (the *Crimes (Sexual Offences) Further Amendment Act 2006*), that is after 1 December 2006.

67 This is in line with English jurisprudence which avoids the language of corroboration warnings by requiring the defence to show prejudice as a result of the delay: Penny Lewis, 'A Comparative Examination of Forensic Disadvantage Directions in Delayed Prosecutions of Childhood Sexual Abuse' (2005) 29 *Criminal Law Journal* 281.

68 *Crimes Act 1958* (Vic) s 61(1E).

69 Victoria, *Parliamentary Debates,* Legislative Assembly, 10 August 2006, 2793-4 (Rob Hulls, Attorney-General)

70 *Crimes Act 1958* (Vic) s 61(1B).

71 See further below at paragraph 3.47-3.53.

72 (1996) 186 CLR 427.

73 Note that this provision was amended shortly after the decision in *Crofts* by the *Crimes (Amendment) Act 1997*, removing the words requiring the judge to warn that 'delay in complaining does not necessarily indicate that the allegation is false'.

74 *Crofts v The Queen* (1996) 186 CLR 427.

75 *Crofts v The Queen* (1996) 186 CLR 427, 451.

76 James Wood, 'Sexual Assault and the Admission of Evidence' (Paper presented at the Practice and Prevention: Contemporary Issues in Adult Sexual Assault in New South Wales, 12 February 2003, Sydney); Attorney General's Department of NSW, *Responding To Sexual Assault: The Way Forward* (2005) 97.

# Chapter 3 Directions in Sexual Offence Trials

### Amendment of section 61 to limit the effect of *Crofts*

3.44 The 2006 amendments to *Crimes Act 1958* (Vic) section 61 also responded to these concerns.[77] Section 61(1)(b)(ii) attempts to put 'stricter parameters' around the use of *Crofts*-type directions, by forbidding the judge from telling the jury that the complainant's credibility may be affected by the delay unless there is 'sufficient evidence' to justify such a warning.[78] Judges must not make any comment on the reliability of a complainant's evidence if there is no reason to do so in a particular proceeding.[79] The Tasmanian Law Reform Institute ('TLRI') has questioned whether these provisions effectively displace *Crofts*. It supported legislation that expressly prohibited trial judges from giving a *Crofts* direction.[80]

## Complainant as sole witness

3.45 Regardless of any suggestion of delay, the judge may be required to give the jury a warning where the complainant is the sole witness asserting the commission of an offence. A judge may have to direct the jury that the evidence of a sole witness 'must be scrutinised with great care' before the jury can use it to conclude that the accused is guilty of the charges.[81] In this case, the jury should be told they might convict only if they are satisfied beyond reasonable doubt of the truth of that evidence (at least so far as it establishes the elements of the charge). Standard directions on the burden and standard of proof may not be sufficient.[82]

3.46 Concerns have been raised about the impact of this type of warning on complainants in sexual assault trials because most sexual assaults take place in private and the complainant is usually the sole witness to the assault.[83] In NSW, the law was changed to prevent judges from warning or suggesting that sexual offence complainants are an unreliable class of witness. Section 294AA(2) of the *Criminal Procedure Act 1986* (NSW) specifically prohibits 'a warning to a jury of the danger of convicting on the uncorroborated evidence of any complainant', and makes the warnings provisions of their *Evidence Act 1995* (NSW), discussed below, subject to this provision.

## Effect of the *Evidence Act 2008*

### Warnings under the Evidence Act

3.47 The Victorian *Evidence Act* , which implements the uniform evidence legislation, abolishes mandatory requirements for common law corroboration warnings.[84] Section 164 of the Act provides that a judge does not have to give any warning or direction in relation to the uncorroborated evidence of a witness 'despite any rule' of law or practice to the contrary.[85]

3.48 Section 165 provides for a judge to give the jury a warning about dangers associated with 'evidence of a kind that may be unreliable' at the request of a party. It includes several broad categories of such evidence, including evidence of hearsay, identification evidence, or evidence where reliability is affected by age, physical or mental health, injury, 'or the like'.[86] The judge is not obliged to give a warning 'if there are good reasons for not doing so'.[87]

3.49 When giving a warning the judge is required to:

a) warn the jury that the evidence may be unreliable

b) inform the jury of the matters that may cause it to be unreliable

c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.

3.50 Sections 164 and 165 have been characterised as promoting a flexible and 'common sense' approach to the range of circumstances in which it may be necessary to alert the jury about the risks associated with some kinds of evidence, in place of the technical common law corroboration regime.[88] However, section 165(5) preserves the judge's powers to give common law warnings about particular types of evidence.[89] That has been applied, at appellate level, to support the continued giving of corroboration and other common law warnings.[90] These decisions have maintained that despite the statutory provisions, judicial warnings and directions may be necessary to avoid a 'perceptible risk of miscarriage of justice arising from the circumstances of the case'.[91] Where prosecution evidence is potentially unreliable, the High Court has maintained that the jury should be informed of the dangers of convicting on such evidence.[92]

3.51 In the most recent review of the uniform evidence law, repeal of s 165(5) was not recommended as it 'would not effect any legal change'.[93] The report considered two alternatives:

- subjecting section 165(5) to a limitation that parties must request a warning to be given
- amendment to require that common law obligations continue to operate unless all parties agree a warning should not be given.

3.52 Although referring to the widely acknowledged problems caused by common law warnings in practice, the report considered neither of these alternatives provided a satisfactory solution, and that more fundamental reform, such as codification of judicial warnings, was required.[94]

3.53 The Tasmanian Law Reform Institute (TLRI), on the other hand, has observed that it is principally through section165(5) that *Longman, Crofts* and *Murray* type warnings continued to be given in States in which the uniform evidence law applies. This prompted the recommendation by the TLRI that section165(5) be repealed, to 'encourage trial judges to give warnings in accordance with s 165(1)-(4)' rather than the common law.[95]

**Question: Should the policy underpinning s 165(5) be reviewed so there is a presumption that no warning is required unless the judge is satisfied one is necessary?**

### Evidence Act warnings about evidence of children

3.54 Subsection 165(6) provides that a judge must not warn or inform a jury that the reliability of a child's evidence may be affected by the age of the child except as provided in new s 165A(2) and (3). Subsection 165A(1) provides that in any proceeding in which evidence is given by a child before a jury, a judge is prohibited from warning or suggesting to the jury:

- that children as a class are unreliable witnesses
- that the evidence of children as a class is inherently less credible or reliable, or requires more careful scrutiny, than the evidence of adults
- that a particular child's evidence is unreliable solely on account of the age of the child
- in criminal proceedings, that it is dangerous to convict on the uncorroborated evidence of a witness who is a child.

3.55 At the request of a party, a judge may warn the jury about a child's evidence, when satisfied that the particular circumstances of a child (other than their age) affect the reliability of that child's evidence. The judge

77 Victoria, *Parliamentary Debates,* Legislative Assembly, 10 August 2006, 2793-4 (Rob Hulls, Attorney-General).

78 Explanatory Memorandum, *Crimes (Sexual Offences) (Further Amendment) Act* (Vic) 2.

79 *Crimes Act 1958* (Vic) s 61(3).

80 Tasmania Law Reform Institute, *Warnings in Sexual Offences Cases Relating to Delay in Complaint* Final Report No 8 (2006) 31, 34.

81 A warning in these terms was considered necessary in the NSW case of *R v Murray* (1987) 11 NSWLR 12, 19; and see *Robinson v R* (1999) 197 CLR 162; and *Tully v R* (2006) 230 CLR 234. The failure to give such a warning has not, however, been a frequent ground of appeal in Victoria: see eg, *R v MTP* [2002] VSCA 81 (although much of the argument on appeal was addressed to the alleged weaknesses of the evidence given by way of a VATE recording, requiring a strong warning); and see J. Courtin, 'Judging the Judges: How the Victorian Court of Appeal is Dealing with Appeals Against Conviction in Child Sexual Assault Matters' (2006) 18(2) Current Issues in Criminal Justice 266, 272.

82 In NSW it has been observed that '[t]he direction merely emphasises what should be clear from the application of the onus and standard of proof: if the Crown case relies upon a single witness then the jury must be satisfied that the witness is reliable beyond reasonable doubt': *Smale v R* [2007] NSWCCA 328, [71] (Howie J). It was also held that the failure to give a *Murray* direction would not necessarily give rise to a fundamental defect in the trial (although in that case, a warning about the unreliability of the witness' evidence had been given pursuant to s 165 *Evidence Act 1995* (NSW), and was considered sufficient).

83 Attorney General's Department of NSW, *Responding To Sexual Assault: The Way Forward* (2005) 103.

84 As noted earlier, existing Victorian provisions prevent suggestion that sexual offence complainants, child or cognitively impaired complainants were unreliable classes of witness: *Crimes Act 1958* (Vic) s 61(1)(a) and *Evidence Act 1958* (Vic) s 23(2A). These provisions do not relieve judges from giving warnings required to avoid a perceptible risk of miscarriage of justice: see, for example, *R v NRC* [1999] 3 VR 537, 540. Winneke P commented that although the provisions were 'in pursuit of laudable objectives', as they departed significantly from customary practice and procedure, they must be applied with 'care and discretion' to ensure the accused was 'not exposed to the risk of an unfair trial': *R v NRC* [1999] 3 VR 537, 540. This is in contrast to *R v WEB* (2003) 7 VR 200 where no warning based on special judicial knowledge or experience of the judge in relation to a child's evidence was seen as necessary.

85 Although s 164 abolishes corroboration warnings, it does not prohibit warning a jury that it would be 'dangerous to convict' on uncorroborated evidence: *Conway v R* (2002) 209 CLR 203, 223 (although Spigelman CJ has warned that this terminology is best avoided and should only be used in exceptional circumstances: *Robinson v R* (2006) 162 A Crim R 88, 95). In NSW, therefore, this provision did not prevent *Longman* or *Murray* warnings from being frequently given in sexual offence trials: Attorney General's Department of NSW, *Responding To Sexual Assault: The Way Forward* (2005) 103.

86 *Evidence Act 2008* (Vic) s 165(1).

87 *Evidence Act 2008* (Vic) s 165(3).

88 *R v Stewart* (2001) 52 NSWLR 301, 320; *R v Spedding* [1997] NSWSC 639. Australian Law Reform Commission, NSW Law Reform Commission, Victorian Law Reform Commission, *Uniform Evidence Law* ALRC Report 102, NSWLRC Report 112, VLRC Final Report (2005) 598-599.

89 This was originally intended to address any disadvantage caused by future categories of unreliable evidence which should be subject to similar warnings: Law Reform Commission [Australia], *Evidence, Volume 1* Interim Report 26 (1985) [1017]. However, this was before the original ALRC proposal for s 165 was modified to provide that the provision applies not only to evidence within the listed categories, but also 'evidence of a kind that may be unreliable'.

90 Tasmania Law Reform Institute, *Warnings in Sexual Offences Cases Relating to Delay in Complaint* Final Report No 8 (2006) 3; Australian Law Reform Commission, NSW Law Reform Commission, Victorian Law Reform Commission, *Uniform Evidence Law* ALRC Report 102, NSWLRC Report 112, VLRC Final Report (2005) 597.

91 *Longman v The Queen* (1989) 168 CLR 79, 86 (Brennan, Dawson and Toohey JJ); *R v Stewart* (2001) 52 NSWLR 301, 318; *R v Lewis* [1998] NSWSC 408.

92 See further *Bromley v The Queen* (1986) 161 CLR 315, 319 (Gibbs CJ); *Longman v The Queen* (1989) 168 CLR 79, 86 (Brennan, Dawson, Toohey JJ).

93 Australian Law Reform Commission, NSW Law Reform Commission, Victorian Law Reform Commission, *Uniform Evidence Law* ALRC Report 102, NSWLRC Report 112, VLRC Final Report (2005) 643.

94 Ibid 645.

95 The TLRI notes that s 165(5) was based on recommendations made prior to the decisions in Longman and Crofts, when sexual assault prosecutions involving children were relatively infrequent, and the application of this provision did not carry the same 'practical judicial burden': Ibid 22.

may inform the jury, giving reasons, that the evidence of a particular child may be unreliable, or warn the jury about the need for caution when determining whether to accept the evidence, and the weight to be given to it.[96]

### Evidence Act warning as to delay in prosecution

3.56 The *Evidence Act 2008* also aims to limit the effect of *Longman*. Section 165B deals with warnings in relation to delay in the prosecution of offences. Subsection 165B(2) provides that if the court is satisfied:

- on application by the defendant
- that the defendant has suffered a significant forensic disadvantage because of the consequences of delay

the judge must inform the jury of the nature of the disadvantage and to take it into account when considering the evidence.[97]

3.57 As with section 61of the *Crimes Act*, the 'mere passage of time' is not to be regarded as a significant forensic disadvantage, and judges must not suggest it would be 'dangerous or unsafe to convict' because of the delay. [98]

### Overlapping statutory obligations as to directions on delay

3.58 Currently section 61 is intended to guide the judge's duty in relation to warnings about delay in most sexual offence cases, at least where proceedings are commenced after 1 December 2006. The common law rules articulated in *Longman* have largely been abrogated.[99] However, the Second Reading speech for the Evidence Act indicates that s 165B is intended to replace the provisions found in section 61(1A).[100] It also indicates that s 165B is regarded as being consistent with the *Crimes Act* provisions.[101] However, the terms of s 61(1A) may be subtly different to s 165B.

3.59 Section 165B(3) gives the judge a discretionary power to refuse to give the jury a warning about the forensic disadvantage caused by delay which is requested by defence counsel 'if there are good reasons for not doing so'. This means that the judge must give a warning when requested unless it is possible to identify 'good reasons' for not do so. [102] On the other hand, section 61 stipulates that nothing in the provision 'requires a judge to give a warning … if there is no reason to do so' in the proceeding.[103] This means that no warning is required, unless the judge considers some reason exists for giving one. The provisions of the Evidence Act may remove the presumption against an obligatory warning that is currently found in section 61 of the Crimes Act.

3.60 Even if these statutory provisions successfully eliminate appeals based on *Longman* warnings altogether, there may be trials pending that are not affected by these provisions, because the proceedings started before their commencement date. It is clear that *Longman* continues to be a source of difficulty for trial judges, and plays a role in successful conviction appeals.[104] The *Evidence Act 2008,* unlike the *Crimes Act 1958* provisions, does not address the issue of *Crofts* directions directly.[105] As observed by the TLRI, *Crofts* directions may still apply depending on what is considered 'sufficient evidence' to suggest a complainant's credibility has been affected by delay.

3.61 The effect of this lack of clarity and the overlap between the common law and statute means that trial judges have to consider several different sources of statutory and common law rules when formulating jury directions in sexual offence trials. The commission does not question the policy behind these legislative amendments. However, the implementation of the policy through periodic legislative amendment has significantly increased the burden on trial judges and the prospect of appeals based on errors in the directions.

**Question: Are all of these warnings actually necessary? Are these warnings about matters which are only within the special knowledge and experience of the judge? Could we dispense with the need for some of these warnings where they are based on matters likely to be within the common knowledge of jurors?**

Question: Would codification of necessary warnings in sexual offence cases ease the burden on trial judges, by providing clarity and by removing the need to consider numerous legislative and common law sources of the relevant law?

## CHANGES TO THE LAW RELATING TO CONSENT

3.62 Legislative changes to the substantive and procedural law of consent have altered the content of directions given to juries when consent is an issue in a sexual offence trial.[106] The most recent provisions require trial judges to give the jury mandatory directions to guide their evaluation of the evidence concerning the complainant's consent, and the accused's state of awareness in relation to that consent.[107]

3.63 Recent amendments have sought to address confusion about the distinction between the direction a jury should be given about an accused's 'belief' in consent, and direction about the fault element in rape, and other related offences, concerning the accused's 'awareness' in relation to consent.[108] The amendments also introduced a new statutory fault element of 'inadvertence' in order to prevent an accused person asserting they were not aware the complainant was not, or might not have been, consenting to the sexual act because they had not turned their mind to it.[109]

### Directions which must be given about consent

3.64 The judge must give the jury a direction about consent in all cases where it is relevant to an issue in a proceeding, relating it to the facts in issue and the elements of the relevant offence, to 'aid the jury's comprehension of the direction'.[110]

96 *Evidence Act 2008* (Vic) s 165A(2).

97 This is subject to the judge's overriding obligation to prevent any miscarriage of justice, even where counsel fails to apply for a warning. According to the Second Reading Speech for the Act implementing these provisions in NSW, this could mean that if a judge considered the s 165B requirements could be made out, the judge would be bound to ask counsel (in the absence of the jury) whether such a warning was requested: Victoria, *Parliamentary Debates,* Legislative Council, 24 October 2007, 3198 (Penny Sharpe, Parliamentary Secretary for Mining and Energy).

98 No particular form of words need to be used in informing the jury: *Evidence Act 2008* (Vic) s 165B(4)-(5).

99 There have been no appellate decisions on the most recent amendments to s 61 modifying the common law requirements imposed by *Longman*: see, eg, *R v Taylor (No 2)* [2008] VSCA 57. The intention of *Evidence Act 2008* (Vic) provisions appears to be to limit although not entirely abolish the power to give *Longman* warnings: Australian Law Reform Commission, NSW Law Reform Commission, Victorian Law Reform Commission, *Uniform Evidence Law* ALRC Report 102, NSWLRC Report 112, VLRC Final Report (2005) 626-7. Some concerns appear to remain, 'based on current trends of the appeal courts' that these provisions may be interpreted so as to 'continue to provide the necessary appellate fodder' for successful appeals against conviction: J. Courtin, 'Judging the Judges: How the Victorian Court of Appeal is Dealing with Appeals Against Conviction in Child Sexual Assault Matters' (2006) 18(2) *Current Issues in Criminal Justice* 266, 289-90.

100 Victoria, *Parliamentary Debates,* Legislative Assembly, 26 June 2008, 2637 (Rob Hulls, Attorney-General). This is also the case in NSW: *Evidence Amendment Act 2007* (NSW), sch 2 which removes s 294(3)-(5) of the *Criminal Procedure Act 1986* relating to forensic disadvantage caused by delay, and inserts into the *Evidence Act 1995* (NSW) the new s 165B.

101 Victoria, *Parliamentary Debates,* Legislative Assembly, 26 June 2008, 2637 (Rob Hulls, Attorney-General).

102 NSW decisions have held that 'good reasons' in the context of s 165 means 'good reasons' in the opinion of the trial judge, and that the discretion must be exercised according to 'proper principles': *R v Flood* [1999] NSWCCA 198, [18]. Although appellate courts have allowed trial judges a relatively wide margin of discretion, some cases have been overturned for failure to state reasons. For a discussion of these cases, see Stephen Odgers, *Uniform Evidence Law* (6th ed) (2004) [1.4.2900].

103 Similarly, in s 165 of the *Evidence Act 2008* (Vic) a judge need not give a warning as to unreliable evidence 'if there are good reasons for not doing so'. This is in contrast to the *Crimes Act 1958* (Vic) s 61(3) which provides 'a judge must not make any comment on the reliability of evidence… if there is no reason to do so… in order to ensure a fair trial'.

104 See, eg, most recently: *R v Garbutt* [2008] VSCA 170; *R v RW* [2008] VSCA 79; *R v Taylor (No 2)* [2008] VSCA 57.

105 It was considered that criticisms of *Crofts* could be better dealt with in 'offence-specific legislation' and was a matter more appropriately addressed in a comprehensive review of jury directions: Australian Law Reform Commission, NSW Law Reform Commission, Victorian Law Reform Commission, *Uniform Evidence Law* ALRC Report 102, NSWLRC Report 112, VLRC Final Report (2005) 640-1.

106 The most significant changes to the law have been the introduction of a statutory definition of consent in *Crimes Act 1958* s 36 (inserted by the *Crimes (Rape) Act 1991* s 3), and mandatory jury directions on consent in s 37 (inserted by the *Crimes (Rape) Act 1991* s 3, further amended by the *Crimes (Amendment) Act 1997* s 4. Most recently, s 37 was amended by *Crimes Amendment (Rape) Act 2007*, which also inserted a new s 37AA and s 37AAA).

107 Provisions relating to the meaning of consent and consequent directions are found in *Crimes Act 1958* ss 36-38. In *R v Salih* (2005) 160 A Crim R 310, 329 [69], Harper AJA suggested that the purpose of s 37 was to 'promote the drawing of correct inferences', given that consent can not be proved or disproved by direct evidence, but rather as a matter of inference (note, however, that Harper AJA dissented with the approach taken by Chernov and Nettle JJA as to the construction of s 37 and the application of *R v Yusuf* (2005) 11 VR 492).

108 Victoria, *Parliamentary Debates,* Legislative Assembly, 22 August 2007, 2858-9 (Rob Hulls, Attorney-General).

109 There are other offences in which an element is the absence of consent, and which may be affected by these amendments, for example, compelled sexual penetration (*Crimes Act 1958* (Vic) s 38A), or indecent assault (*Crimes Act 1958* (Vic) s 39).

110 *Crimes Act 1*958 s 37(1), (3). These provisions apply to all trials commencing on or after 1 January 2008: *Crimes Amendment (Rape) Act 2007* (Vic) s 2. *Alford v Magee* (1951) 85 CLR 437 has been reaffirmed in relation to statutory consent directions, and Callaway JA has warned against formulaic adoption of the legal principles set out in the charge book: *R v Zilm* (2006) 14 VR 11, 23.

# Chapter 3 Directions in Sexual Offence Trials

3.65 Where the defence leads evidence or asserts that the accused believed the complainant was consenting, the judge must also give the jury directions to guide their assessment of whether they are satisfied beyond reasonable doubt that the accused was aware the complainant was not or might not be consenting.[111] The judge must direct the jury to consider the evidence relating to that belief, and whether it was reasonable in all the relevant circumstances.[112] These directions are designed to ensure that the jury concentrates upon the accused's *awareness* of lack of consent (or possibility of non-consent), when considering the fault element of the offence.[113]

### Effect of directions where offences over different time periods

3.66 These new directions apply in trials commencing on or after 1 January 2008, even where offences have occurred before their commencement.[114] These mandatory directions do not to purport to change the law. The Scrutiny of Acts and Regulations Committee of the Victorian Parliament observed that the changes 'explain the existing law to juries and imposed a requirement of relevance on the delivery of those directions'. For any trial which commenced before 1 January 2008, however, the judge still has to direct according to the earlier provision in section 37.

3.67 These reforms were directed at concerns that the concept of an 'honest but unreasonable belief' was somewhat artificial and possibly difficult for a jury to grasp.[115] It also provided legislative endorsement of a 'communicative model of consent'. This model reflects what is said to be the community expectation that where a person is intending to engage in a sexual act with another, they will ensure that the other person is freely agreeing to do so.[116]

3.68 While these reforms are soundly based attempts to overturn outdated presumptions and prejudices found in the common law, each amendment has given rise to a raft of potential new directions. The directions have also been the subject of much judicial interpretation and pronouncement on appeal.[117]

3.69 Legislatively mandated directions regarding consent and awareness of consent clearly illustrate the complex web of directions judges have to consider in many sexual offence cases.[118] While the policy that supports these changes is not questioned, the new provisions impose a considerable burden on trial judges to identify and correctly deliver directions about consent. These difficulties are compounded by the ongoing reforms to the substantive law in relation to elements of particular sexual offences, which do not apply retrospectively. When an accused person has been charged with many offences extending over a lengthy period, it is sometimes necessary for a judge to give different directions about what is essentially the same offence, depending upon when the offence was alleged to have occurred. There is a clear risk that highly detailed instructions will simply confuse juries.

**Question: Is there a way of simplifying the directions that are given in sexual offences cases while continuing to support the policy they seek to implement?**

## OTHER PROCEDURAL DIRECTIONS

3.70 Judges may be required to give directions about some procedural matters that arise only in sexual offence trials. For example, warnings usually must be given about the use of the pre-recording process for evidence of particular witnesses, such as complainants or witnesses through a VATE procedure,[119] or a special hearing procedure.[120] While changes to criminal trial procedures have facilitated the giving of evidence by children and other complainants in sexual offence cases, they also add to the array of directions which are a feature of these trials.

## EVIDENTIARY DIRECTIONS RELATING TO 'LIMITED PURPOSE' EVIDENCE

3.71 Courts have emphasised that where the jury may use evidence for a limited purpose only, it is essential that the jury be directed about both the permitted use of the evidence, and its impermissible use. For example, some evidence may not be used for the purpose of determining whether the charged acts occurred.[121] A direction that does not refer to both the permissible and impermissible use of the evidence risks being a ground of successful appeal.[122]

## Evidence of 'recent complaint'[123]

3.72 Generally, a jury is prevented from hearing evidence of a statement made by a complainant or other witness to a third party out of court by the operation of the rule against hearsay. Witnesses are also prevented from using evidence of a prior consistent statement to support their evidence in court.[124] However, these rules have been qualified in sexual offence cases to allow evidence that the complainant made a report or complaint about the sexual assault at the earliest reasonable opportunity.[125] These qualifications reflect historical assumptions, discussed earlier, about the behaviour of the genuine, 'reasonable', rape victim, that they will, as a matter of human experience, report the sexual assault quickly.[126]

3.73 If the judge determines that the evidence is admissible as a complaint made at the first reasonable opportunity, the prosecution may lead the evidence only to show consistency on the complainant's part. That evidence may only be used to support the credit of the complainant. Evidence of 'recent complaint' is not admissible as independent evidence of the truth of the statement, and it is not evidence which is capable of corroborating the complainant's other evidence.[127]

111 The s 37AA directions are not relevant to the directions on the new statutory fault element of 'non-advertence' to consent. This provides that it is no defence for the accused to say because they had not given any thought to whether or not the complainant was consenting, they were unaware whether there was not or might not be consent: *Crimes Act 1958* ss 38(2)(a)(ii), 38(4)(b)(ii)).

112 The jury is directed to take into account any asserted *belief* of the accused, and the reasonableness of that belief, as part of deciding overall whether the element of awareness has been proven by the prosecution. In considering the 'reasonableness' of the belief, the jury should be directed in regard to s37AA(i)-(iii). Some cases suggest this direction should be balanced by a 'clear statement' that the belief does not have to be reasonable as a matter of law, and that the Crown must prove that the accused was aware the complainant was not or might not be consenting: see *R v Munday* (2003) 7 VR 423, 440; *R v Zilm* (2006) 14 VR 11. For a criticism of this provision as potentially confusing or misleading juries as to the relevance of the reasonableness of the accused's belief, see: John Willis, 'Legislatively Mandated Jury Directions in Sexual Offences Cases' (2006) 30 (6) *Criminal Law Journal* 357, 371.

113 These provisions replaced s 37(1)(c) which required the jury to be directed to take into account in assessing the accused's belief about consent, whether it was reasonable in the circumstances. The Court of Appeal has held that as the relevant element for rape offences is the state of 'awareness', the focus of s 37(1)(c) on 'belief in consent' dealt with a matter relevant to the assessment of this awareness: *R v Ev Costa* [1996] VSC 27 (Unreported, Victorian Court of Appeal, Callaway JA and Southwell AJA, 2 April 1996); *R v Munday* (2003) 7 VR 423. In *R v Zilm* (2006) 14 VR 11, 29, however, the Court observed that the accused should not be found guilty if the prosecution 'failed to disprove that his belief, although unreasonable, was genuinely held at the time'.

114 See *Crimes Act 1958* (Vic) s 609 inserted by *Crimes Amendment (Rape) Act 2007* s 9. Section 609(3) defines a trial as commencing, for the purposes of these provisions, on arraignment of the accused in accordance with Subdivision (12) of Division 1 of Part III of the Act.

115 Where the jury finds the accused acted in the honest belief that the complainant had consented to penetration, even where that belief is objectively unreasonable, they may not convict the accused of rape: *R v Saragozza* [1984] VR 187; *DPP v Morgan* [1976] AC 182. Although s 37AA directs the jury to consider the reasonableness of the accused's belief in consent, this is relevant only to the jury's assessment of whether or not the belief was in fact held.

116 Victoria, *Parliamentary Debates,* Legislative Assembly, 22 August 2007, 2858-9 (Rob Hulls, Attorney-General); Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003) 325-30.

117 In *R v Yusuf* (2005) 11 VR 492, 495, Winneke P commented on the difficulties for trial judges seeking to comply with statutory obligations in relation to mandatory directions, and the 'undesirability of imposing inflexible statutory requirements' onto the trial process. Other cases include: *R v Ev Costa* [1996] VSC 27 (Unreported, Victorian Court of Appeal, Callaway JA and Southwell AJA, 2 April 1996); *R v Zilm* (2006) 14 VR 11; *R v Munday* (2003) 7 VR 423; *R v Laz* [1998] 1 VR 453; *R v Alexander* [2007] VSCA 178. There is little information about the impact of these recent reforms on the number of appeals on consent directions, in relation to trials commencing on or after 1 January 2008.

118 These directions do not apply to non-sexual offence cases where consent may be an issue.

119 *Evidence Act 1958* (Vic) s 37B allows the evidence-in-chief of certain witnesses to be given in the form of an audio or video recording of the witness answering questions put to them by a prescribed person. A warning is not mandatory, but a judge should usually remind the jury they are viewing only part of the witness's evidence, and that they are viewing it a second time and well after all the other evidence; the judge should also usually warn the jury not to give the evidence disproportionate weight, and to consider the other evidence in the case: *R v BAH* (2002) 5 VR 517; *R v H* [1999] 2 Qd R 283; *R v MAG* [2005] VSCA 47.

120 *Evidence Act 1958* (Vic) ss 41G-41H require the examination-in-chief, cross-examination and re-examination of child or cognitively impaired complainants to be given in the form of a video recording made at a special hearing, unless the court directs otherwise. The judge must warn the jury not to draw any inference adverse to the accused, and not to give the evidence any greater or lesser weight due to it being given by pre-recorded video: s 41H(5).

121 *R v Demiri* [2006] VSCA 64, 52 (Redlich AJA). His Honour's observations related to the trial judge's failure to properly direct the jury as to the impermissible use of evidence of complaint (see further below).

122 *R v Demiri* [2006] VSCA 64, 52.

123 This term has been criticised. See *R v Munday* (2003) 7 VR 423, 439 (Callaway JA) preferring the term 'proximate complaint' (used by Barwick CJ in *Kilby v R* (1973) 129 CLR 460); *R v Glennon* (No 2) (2001) 7 VR 631, 681.

124 A party to a proceeding may not generally seek to call evidence relevant only for the purpose of bolstering the credibility of their witness: see T H Smith and O P Holdenson, 'Comparative Evidence: Admission of Evidence of Recent Complaint in Sexual Offence Prosecutions—Part 1' (2001) 75 *Australian Law Journal* 623, 623.

125 For a discussion of the history of this see *R v Lillyman* [1896] 2 QB 167; *Kilby v R* (1973) 129 CLR 460, 466-72; *R v Freeman* [1980] VR 1; *R v H* [1997] 1 NZLR 673, 682-9; Ibid 623-638.

126 *R v Munday* (2003) 7 VR 423; 143 A Crim R 318, 433; 328 (Ormiston JA). Admission of such evidence is not strictly an 'exception' to the hearsay rule, as it only permits evidence to be admitted support the credibility of the complainant, and not to support the truth of their statement. In *R v Camilleri* [1999] VSC 160, evidence of a 'recent complaint' was held to be admissible only in cases of sexual offences.

127 Victorian cases have held that a complaint can be proved by the evidence of the complainant alone: *R v GAE* (2000) 1 VR 198, 228-9; *R v J (No 2)* [1998] 3 VR 602. The contrary view has been held in other jurisdictions: *R v White* [1991] 1 AC 210, 216 (Privy Council); *R v Kincaid* [1991] 2 NZLR 1, 9 (New Zealand); also see *Kilby v R* (1973) 129 CLR 460, 474 (Menzies J) and *Ugle v The Queen* (1989) 167 CLR 647, 649 (where the court held that because evidence of complaint could only be used towards the complainant's credit, it was not admissible unless there was evidence from the complainant themselves).

# Chapter 3 Directions in Sexual Offence Trials

## Directions on use of evidence of recent complaint

3.74 Where evidence of an early complaint is given, the trial judge must give the jury directions about the limited purpose for which this evidence has been admitted. The jury must be directed that if they accept the evidence as evidence of a recent complaint,[128] it must only be used for purpose of 'buttressing the credit' of the complainant.[129] They may find, for example, that it supports the credibility of the complainant by demonstrating consistency in both the complainant's conduct at the time of the alleged offence and in the evidence given about those events in court.[130]

3.75 The jury must also be directed that they must not treat the complaint as evidence of the facts stated in the complaint. They may not use evidence of recent complaint as proof of the truth of the facts which are the subject of the complaint. Those facts must be proved by other evidence.[131] For example, in a rape trial, the jury must be told that they may not use 'recent complaint' evidence to prove the complainant's lack of consent to a sexual act, or to show a reaction that was 'consistent with the conduct of a person' who has been raped.[132]

3.76 Recent complaint evidence cannot be used to corroborate other evidence because it is not evidence from a source independent of the complainant. Where complaint evidence is given or confirmed by witnesses other than the complainant, a risk may arise that the jury will 'misunderstand the nature of complaint evidence or misuse it' as evidence which is 'independent of the complainant' and corroborative.[133] For this reason, it has been suggested that where this risk arises, the judge also has a duty to instruct the jury they must not use it as evidence which corroborates the evidence of the complainant in court.[134]

## Problems with the directions on recent complaint

3.77 Clear judicial directions are regarded as being necessary to counter the danger that the jury may treat the evidence of recent complaint as confirming the evidence which a complainant gives about the commission of a sexual offence.[135] Critics observe, however, that the distinction made between the limited permissible use of evidence of complaint as to credit, and its impermissible use as independent proof of the facts alleged, is artificial and may not be easy for the jury to grasp.[136]

3.78 Another criticism made is that the common law in relation to recent complaint is based on false stereotypes and assumptions about behaviour.[137] As this type of evidence is admitted only in cases of a sexual nature, it suggests an assumption that sexual offence cases carry special dangers of fabrication, and that 'people are more likely to lie about sexual offences, than about other matters'.[138] Some have doubted the validity of the rules about admission and use of evidence of complaint altogether.[139] The law, however, continues to require the judge to give the jury careful directions, explaining the distinction between the permissible and the impermissible use of the evidence.[140]

3.79 A further complicating issue is that if there is a dispute about whether a complaint has been made at the first reasonable opportunity, the jury may have to be directed about the lack of recent complaint.[141] The defence may argue, for example, that the complainant did not complain at all, or that the jury should find that the complaint was not made at the earliest reasonable opportunity after the alleged event. In some circumstances, this means the judge may have to direct the jury about recent complaint, and give section 61 and common law directions about how they may deal with any delay in making a complaint.[142]

### Evidence of previous statement to rebut suggestion of 'recent invention'

3.80 A second qualification to the rules excluding hearsay evidence and evidence of a witness' previous consistent statements arises where the defence has suggested that the evidence of a complainant (or other witness) is a 'recent invention'.[143] Evidence of an early complaint may be admitted to rebut the defence suggestion that the claimed sexual assault was a 'recently fabricated story'.[144]

### Directions on use of evidence of previous statement

3.81 Generally, a witness may not support their evidence by proof that on a prior occasion they made a consistent statement. Evidence of a prior complaint about a sexual offence may be admissible, however, as an exception to this evidentiary rule. The jury must be directed that a prior consistent statement can only be used to rebut the suggestion by the defence that a complainant has later fabricated their account of the events and to restore the complainant's credibility.[145]

3.82 As with 'recent complaint' evidence, the jury may use this as evidence of consistency of the complainant's account.[146] The judge must direct the jury that they may not use the contents of the previous statement as evidence of its truth. We repeat the concerns about the assumption that the jury will be able to apply and understand the artificial nature of the distinction between using evidence of a prior statements as relevant only to a complainant's credit, and not as proof of the facts alleged.[147]

## Approach of the Evidence Act

3.83 The *Evidence Act 2008* addresses some of these criticisms by not treating 'recent complaint' as a particular category of evidence. Instead, it addresses admissibility and use of such evidence through rules of general application, depending on how the evidence is relevant.[148] Evidence of a complaint admitted under these provisions is not limited to sexual offence cases.[149]

3.84 One of the major differences to the common law approach is that the artificiality of the distinction between 'fact' and 'credibility' is addressed through exceptions to the hearsay rule. Provided the facts asserted in the complaint are 'fresh in the memory' of the complainant, the prosecution can lead evidence of complaint not only to bolster the credibility of the complainant, but also to prove the facts asserted in the statement, such as the identity of the accused, or lack of consent.[150]

128 Although the judge determines the admissibility of the evidence, once the evidence is admitted, it is for the jury to determine whether the complaint was made and in what circumstances: *R v Freeman* [1980] VR 1, 5-7; *R v GG* [2004] VSCA 238, [28]; *R v MAG* [2005] VSCA 47. If an issue arises, it may be necessary to give the jury directions about what amounts to a complaint at law: *R v Abela* [2007] VSCA 22; *R v GG* (2004) 151 A Crim R 92.

129 For a summary of the directions which are required at common law, see: T H Smith and O P Holdenson, 'Comparative Evidence: Admission of Evidence of Recent Complaint in Sexual Offence Prosecutions—Part 1' (2001) 75 *Australian Law Journal* 623, 627-8; *R v Knigge* (2003) 6 VR 181, 189–190 [14] (Winneke P); *Kilby v R* (1973) 129 CLR 460, 472 (Barwick CJ); 475 (Menzies J); *Ugle v R* (1989) 167 CLR 647, 649; *R v Freeman* [1980] 1 VR 1, 6–8; *Suresh v R* (1998) 153 ALR 153.

130 The jury must be told it is for them to determine whether they find the complaint points to the consistency of the complainant's evidence: *R v Freeman* [1980] VR 1, 6; *R v Knigge* (2003) 6 VR 18. As to directions regarding whether the complaint was made at the first reasonable opportunity, see *R v GG* (2003) 151 A Crim R 92 and *R v Demiri* [2006] VSCA 64. In *R v Munday* (2003) 7 VR 423, 440, Callaway JA noted that it is the fact of complaint that is primarily relevant, rather than the terms of the complaint, although these may be taken into account.

131 *R v Munday* (2003) 7 VR 423, 434-5, 439-40; *Papakosmas v R* (1999) 196 CLR 297, 302-3, 306-7; *Jones v R* (1997) 143 ALR 52.

132 *R v Freeman* [1980] VR 1, 6 (Starke, McInerney and Murphy JJ); *R v Stoupas* [1998] 3 VR 645; see also T H Smith and O P Holdenson, 'Comparative Evidence: Admission of Evidence of Recent Complaint in Sexual Offence Prosecutions—Part 1' (2001) 75 *Australian Law Journal* 623, 629.

133 *R v Stoupas* [1998] 3 VR 645, 652.

134 *R v Freeman* [1980] VR 1, 5; *R v Stoupas* [1998] 3 VR 645, 652–653.

135 *R v Stoupas* [1998] 3 VR 645 (Hayne JA diss); *R v Matthews* [1999] 1 VR 534.

136 See Simon Bronitt, 'The Rules of Recent Complaint: Rape Myths and the Legal Construction of the "Reasonable" Rape Victim' in Patricia Easteal (ed) *Balancing the Scales: Rape, Law Reform and the Australian Culture* (1998) 46. See also McHugh J's criticism of the 'credit and facts-in-issue distinction' in *Palmer v R* (1998) 193 CLR 1, 22-24.

137 Recognition of the difficulties in admitting evidence of statements by child complainants about sexual assault under the recent complaint principles has resulted in the creation of a specific exception to the hearsay rule for such evidence: *Evidence Act 1958* (Vic) s 41D.

138 *M v R* (1994) 181 CLR 487, 514 (Gaudron J).

139 See, eg, *R v Munday* (2003) 7 VR 423, 431 (Ormiston JA); and *R v H* [1997] 1 NZLR 673, 686, 691 in which Thomas J observed that the 'expectations of medieval England as to the reactions of an innocent victim of a sexual attack are no longer relevant' arguing for modification and possibly abandonment of the recent complaint rule.

140 *Jones v* R (1997) 71 143 ALR 52, 54. Ormiston JA has suggested it is preferable for juries to not be directed about the reasons behind the legal principles: *R v Munday* (2003) 7 VR 423, 431.

141 Whether a complaint is 'recent' is a matter of degree: see *R v GG* (2004) 151 A Crim R 92; *R v Knigge* (2003) 6 VR 181. In *R v Knigge* (2003) 6 VR 181, 192, Winneke P confirmed that s 61(1)(b) of the Crimes Act 1958 does not affect the meaning of 'recent complaint' as developed by the courts.

142 *R v Demiri* [2006] VSCA 64; *R v Stoupas* [1998] 3 VR 645.

143 *R v Saragozza* (1983) 9 A Crim R 185.

144 Note that unlike the 'recent complaint exception', this principle is not confined to sexual assault cases: see *Leeks v XY* [2008] VSCA 21; *Gordon Fraser v R* (1995) 65 SASR 260; *The Nominal Defendant v Clements* (1960) 104 CLR 476. There must be an imputation that the witness is recounting an account after the events which are the subject of dispute. Note that in *Leeks v XY* [2008] VSCA 21, [26], Redlich JA expressed the view that it was not necessary for a prior consistent statement to have been made 'shortly after the event in question' to rebut a suggestion of recent invention, rather it must only pre-date the event said to provide the motive for the recent invention, or the time when the recent fabrication is said to have occurred, so as to logically rebut the suggestion.

145 Victorian Law Reform Commission, *Sexual Offences: Law and Procedure: Final Report* (2004) 223-5; *White v R* [1999] 1 AC 210; *R v DJT* (1998) 4 VR 784.

146 Where the statement is equivocal and incapable of assisting the jury as to the possibility of a 'late invention or reconstruction', it cannot be used to demonstrate consistency: *R v Pidoto* [2002] VSCA 60, [56].

147 Victorian Law Reform Commission, *Sexual Offences: Law and Procedure: Final Report* (2004) 223-5.

148 T H Smith and O P Holdenson, 'Comparative Evidence: Admission of Evidence of Recent Complaint in Sexual Offence Prosecutions—Part 2' (2001) 75 *The Australian Law Journal* 694-710, 694.

149 *Papakosmas v R* (1999) 196 CLR 297, 309 (Gleeson CJ, Hayne J). For a discussion of the different approaches to admissibility under the uniform evidence legislation and the common law, see: Stephen Odgers, *Uniform Evidence Law* (6th ed) (2004) ch 3.

150 *Papakosmas v R* (1999) 196 CLR 297, 327-328. The evidence must first satisfy the test of relevance in s 55 to be admissible.

# Chapter 3 Directions in Sexual Offence Trials

3.85 Where evidence of a complaint does not fall within these statutory exceptions,[151] it may still be admissible as a prior consistent statement relevant to the complainant's credibility. Although the Act excludes evidence that is relevant only to a witness's credibility, s 108(3) contains an exception where there is a suggestion that the witness has fabricated or re-constructed the evidence. This exception applies to prior consistent statements in a way that is less confined than the common law rules in relation to 'recent invention'.[152]

3.86 The advantage of this approach is that where evidence of a prior consistent statement is admitted as evidence relevant to the credibility of a complainant, under the credibility exceptions, the jury can also use it for a 'hearsay purpose', to prove the truth of the facts asserted in the complaint.[153]

3.87 As Odgers observes, however, the different ways in which complaint evidence may be admissible under the Act means that careful directions and warnings may be required under both s 165 and the common law.[154] It may be necessary for a judge, where evidence of a recent complaint may be used for a 'hearsay purpose' (that is, as evidence of the facts asserted), to give a warning under s 165 about the reliability of the evidence, if requested by counsel.[155]

**Question: Even where evidence of these types of prior statements by a complainant are admitted under the Evidence Act 2008 as relevant to proof of guilt, is it possible to simplify even further the directions which the jury need to be given about using the evidence?**

**Question: Once the evidence is admitted, could its weight be a matter for the jury with adequate assistance from counsel's addresses?**

### Evidence of distress

3.88 In Chapter 4, we discuss the abolition of common law requirements for mandatory corroboration warnings in relation to consciousness of guilt evidence. Where a judge does give directions about evidence which is capable of constituting corroboration, however, they must give full directions about its use. The judge should inform the jury, where evidence is capable of confirming or supporting the complainant's evidence in relation to an offence, that it makes the other evidence more probable by tending to show the crime charged was committed and the accused was involved.[156] The jury should also be told that it is for them to determine whether they accept it as corroborative, and if so what weight to give it.[157]

3.89 Evidence of the distressed condition of a complainant has historically been considered evidence which can amount to independent evidence capable of corroborating the complainant's evidence.[158] Where this is the case, the jury should be told they may use evidence of distress as evidence which bears upon the probabilities that the offence alleged took place.[159] Before it can be left to the jury as capable of being considered corroborative, the judge must determine whether an inference which the jury could reasonably draw is that there was a causal connection between the alleged offence and the distressed condition, which is not 'tenuous or remote'.[160] In most circumstances, the jury should be warned that evidence of the complainant's distressed condition will carry little weight.[161]

3.90 In cases where both evidence of distress and evidence of recent complaint are raised, the judge's directions to the jury must clearly distinguish between each type of evidence, and the way in which distress may be relied on to corroborate a complainant's account of what occurred, while complaint may not. This distinction is not an easy one to draw.

### Directions where complainant's 'motive to lie' is raised

3.91 Judges acknowledge that a question which hangs over most sexual offence trials is whether the complainant has a motive to make a false allegation about a sexual assault.[162] A complainant's 'motive to lie' may be relevant to their credit and when testing their accusations.[163]

3.92 There is a general rule that it is not appropriate for the prosecution to raise the question 'why would the complainant lie?' where there is no direct evidence of a motive to lie, or evidence from which such a motive could be reasonably inferred.[164] Several reasons are often given for this rule:[165]

- it is for the prosecution to prove their case beyond reasonable doubt
- the jury may be deflected from properly assessing the witnesses' credibility, according to the burden and standard of proof on the prosecution
- the accused does not have to show any motive existed, and the jury should not be invited to speculate
- the issue of whether prosecution witnesses are lying is for the jury to determine and the opinion of the accused is irrelevant.

3.93 In these circumstances, Australian courts have held that a judge should not direct the jury in a way that conveys the central issue is the complainant's motive to lie as this risks inviting the jury to conclude the accused is guilty if they find there is no evidence of any such motive.[166]

### The obligation to give a *Palmer*[167] direction

3.94 The defence, however, may 'specifically allege', that the complainant has been lying. This may be done, for example, through cross-examination of the complainant, or by the accused giving evidence in support of this claim.[168] In these situations, the jury may consider the existence of a motive to lie as being relevant to their assessment of the complainant's credit. The prosecution may seek to rebut this suggestion.[169] Where motive to lie is raised, a direction as outlined by the High Court in *Palmer v The Queen*[170] is required where it is necessary to avoid a miscarriage of justice. The judge has an obligation to give the jury a *Palmer* direction even where defence counsel does not seek one.[171]

3.95 The Judicial College of Victoria Charge Book[172] outlines the type of direction necessary where a specific motive to lie is suggested to a complainant by the defence:

- The judge should direct the jury that even if they reject the motive to lie suggested, that does not enhance the complainant's credibility, and does not mean the complainant is necessarily telling the truth.[173]
- The judge should also emphasise that the jury must be satisfied that the prosecution has proved the complainant is telling the truth.[174]

3.96 Where no specific motive to lie has been alleged by the defence, but the issue of why the complainant would lie is raised, it may not be sufficient for the judge to

151 For example, if it is not considered to be 'fresh in the memory' of the complainant.

152 The statement need not have been made contemporaneously with the event in question, or at a time early enough to be inconsistent with the suggestion that the evidence is a recent invention or reconstruction, unlike under the common law: Stephen Odgers, *Uniform Evidence Law* (6th ed) (2004) 402.

153 *Stanoevski v R* (2001) 202 CLR 115; Ibid 404.

154 Ibid 405.

155 T H Smith and O P Holdenson, 'Comparative Evidence: Admission of Evidence of Recent Complaint in Sexual Offence Prosecutions—Part 2' (2001) 75 *The Australian Law Journal* 694-710, 708. Some examples where the jury has been warned about the potential unreliability of the evidence include: where particular circumstances suggest the complaint has been fabricated (such as 'personal animosity' towards the defendant, or the timing or circumstances of the complaint): *R v Lane* (1996) 66 FCR 144; *R v Vawdrey* (1998) 100 A Crim R 488; where there has been delayed complaint (see discussion above); or where the complaint lacks detail: *R v Kennedy* [1998] NSWSC 671.

156 *R v Taylor* (2004) 8 VR 213, 221-4, 228.

157 *R v Taylor* (2004) 8 VR 213: in that case, evidence of regular phonecalls made by the accused to the child complainant was capable of corroborating the complainant's evidence regarding sexual offences committed against her by the accused.

158 In *R v Flannery* [1969] VR 586, 591, the court considered relevant factors such as the age of the complainant, the time interval between the alleged assault and when she was observed in distress, her conduct and appearance in the interim, and the circumstances existing when she was observed in the distressed condition.

159 *R v Demiri* [2006] VSCA 64, 54.

160 *R v Flannery* [1969] VR 586, 591. The judge must determine if the particular evidence is capable in law of constituting corroboration. This will involve determining whether it is reasonably open to the jury to find that the independently observed signs of distress are consistent only with being sexually assaulted, and not consistent with being caused by other events which may reasonably have occurred: *R v Schlaefer* (1984) 37 SASR 207, 217.

161 *R v Rogers* [2008] VSCA 125 (14 July 2008); *R v Demiri* [2006] VSCA 64 (unless 'special circumstances' arise, for example *R v Redpath* (1962) 46 Cr App R 319 (CA)).

162 For example, *R v Heyde* (1990) 20 NSWLR 235; *R v G* (Unreported NSW Court of Criminal Appeal, 25 March 1991, Gleeson CJ, Lee CJ at CL, Smart J); *R v Rodriguez* [1998] 2 VR 167. Historically, motives of jealousy, shame, spite, or 'unchaste mentality' were suspect of being behind false allegations of rape: see Jeremy Gans, 'Why Would I Be Lying? The High Court in Palmer v R Confronts an Argument that May Benefit Sexual Assault Complainants' (1997) 19 *Sydney Law Review* 568.

163 *Palmer v R* (1998) 193 CLR 1; *R v Uhrig* [1996] 130 NSW 243.

164 *Palmer v R* (1998) 193 CLR 1; *R v B* (1996) 39 NSWLR 450.

165 *R v SAB* [2008] VSCA 150; *R v Davis* [2007] VSCA 276, [22].

166 *R v Rodriguez* [1998] 2 VR 167; *R v F* (1995) 83 A Crim R 502; *Palmer v R* (1998) 193 CLR 1; *R v Hewitt* [1998] 4 VR 862.

167 (1998) 193 CLR 1.

168 *R v SWC* (2007) 175 A Crim R 71. Note (at 77) that this case appears to cite *R v Leak* [1969] SASR with approval, where it was held that a prosecutor was entitled to ask an accused in cross-examination whether a prosecution witness was telling the truth as distinct from whether that witness was lying. This distinction has been criticised as too subtle, if not meaningless, for juries to make: *R v Davis* [2007] VSCA 276, [38] (Coldrey AJA).

169 *R v Noonan* [1998] VSCA 8.

170 (1998) 193 CLR 1.

171 Note that a direction is not mandatory in *every* case where the jury is asked to consider the complainant's motive to lie: *R v PLK* [1999] 3 VR 567, 572-3 (Tadgell JA) 574-5 (Charles JA).

172 Judicial College of Victoria, *Victorian Criminal Charge Book* (2008) <www.justice.vic.gov.au/emanuals/CrimChargeBook/default.htm> at 8 September 2008.

173 *Jovanovic v The Queen* (1997) 98 A Crim R 1. In *R v SAB* [2008] VSCA 150, the Court of Appeal criticised a direction the jury may have understood to suggest that even where they might reject a motive to lie, it remained as a factor they could take into account. The Court held that such a direction created a risk that the jury might proceed on an improper basis: [34].

174 *Palmer v R* (1998) 193 CLR 1; *R v Uhrig* [1996] 130 NSW 243; *R v PLK* [1999] 3 VR 567; *R v Cherry (No 2)* [2006] VSCA 271.

tell the jury the accused is not required to prove innocence and not required to prove a motive for making suggested false charges. If the issue opens up 'new and impermissible avenues of enquiry', a further direction may be necessary:[175]

- The direction must warn the jury against speculating about the complainant's motive to lie, and that it is not for the accused to explain what is in the mind of the complainant, as this would be unfair.
- The direction must warn the jury against thinking there is any onus on the accused to prove a motive of the complainant, or distract the jury from being satisfied whether the prosecution case has been proved beyond reasonable doubt, and a proper assessment of the credibility of all the witnesses.[176]
- Finally, the jury must be warned against reasoning that the lack of apparent motive to lie can be used to enhance the complainant's credit, in particular, that the absence of proven motive does not necessarily mean the complainant is telling the truth.[177]

### Problems raised by the *Palmer* Direction

3.97 Jeremy Gans describes several difficulties with the directions which have developed in response to *Palmer*.[178] Directions which remind the jury that the complainant may be mistaken are problematic in trials where 'mistake' is not a live issue. He also points out that a direction which implies that the complainant may not necessarily be telling the truth and may have hidden motives could cast doubt on the reliability of complainants. It may also give the jury the impression that the prosecution must prove that the complainant has no motive to lie before the complainant's evidence can be accepted.[179]

3.98 Gans suggests that judges give a simple direction that 'appeals to the jury's sense of fairness'.[180] This direction would remind them that the accused is presumed innocent of the acts which are the subject of the complaint, and that it would be wrong and unfair for the jury to accept the evidence of the complainant, simply for the reason that he or she has no apparent motive to lie.

**Question: Is it possible to simplify this direction by simply pointing out the unfairness to the jury without having to spell out each of the requirements as outlined in Palmer?**

**Question: Could it be specified that a judge need only consider giving such a direction where it is requested by counsel? (See discussion in Chapter 7)**

## MULTIPLE AND CONFUSING DIRECTIONS RELATING TO PROPENSITY EVIDENCE

### What is 'Propensity Evidence'?

3.99 In a recent extra-judicial speech, Justice Redlich commented that the issue of propensity has become one of the major causes of trials 'going off the rails'.[181] The term 'propensity evidence' refers to any evidence which, if accepted, discloses 'discreditable' or disreputable conduct, or reflects badly on an accused's character.[182] This includes evidence which discloses the commission of offences other than those with which the accused is charged, and may include prior or subsequent conduct.[183]

3.100 Propensity evidence is seen as having 'logical relevance' based on the assumption that people tend to behave in predictable ways, and that information about the accused's conduct on a previous occasion can give useful insights into how they may have behaved in relation to the offending conduct.[184]

3.101 However, excluding evidence about the bad character or 'propensity' of the accused has been considered one of the most 'deeply rooted' principles of criminal law.[185] In earlier times the prospect of the death penalty on conviction meant that judges strictly enforced evidentiary matters to safeguard against unfair prejudice against accused persons by juries. To ensure that criminal trials are concerned with direct or circumstantial evidence about specified offences, rather than the accused's character or propensity towards criminal conduct, the common law has developed special rules about the admissibility and use of evidence about the accused's character.[186]

### Commonly identified dangers of propensity evidence

3.102 Propensity evidence is generally inadmissible because of the risk that the jury will reason that because the accused has acted unlawfully or disreputably on another occasion, the accused is the 'kind of person' who is likely to have committed the offences charged.[187] The concern is that the jury will overestimate the probative value of the evidence, and underestimate its prejudicial effect, by unfairly reasoning that the mere fact that the accused shows a criminal 'propensity' means they are guilty of the crime charged.[188] The kinds of prejudice to the accused which may arise include:

- the jury may assume that past behaviour is an accurate way to predict how the accused will behave in the future[189]
- the jury may make an incorrect assumption about the improbability of certain types of events 'innocently' occurring, or may ignore the possibility that another person may have committed the offence[190]
- the jury may seek to punish the accused for other misconduct, despite having a reasonable doubt the accused is guilty of the crime charged, which undermines the presumption of innocence'[191]
- the jury may be biased against the accused on the basis of other misconduct where it involves particular types of crime, such as sexual offending against children[192]

3.103 In *HML v R*,[193] several judges recognised the particularly prejudicial effect of evidence of uncharged acts[194] which often arise in child sexual assault prosecutions. Chief Justice Gleeson observed that such evidence is typically disputed and may depend on a complainant's evidence alone, creating 'serious risk of unfairness' from the way in which this type of evidence usually emerges.[195] Where a complainant makes a general assertion that conduct similar to the charges has occurred on many occasions, or over many years, the accused's capacity to test the evidence may be limited.[196]

175 A direction may be required if the 'new and impermissible avenues of enquiry' distract the jury from its task of determining whether the prosecution has proved its case beyond reasonable doubt: *R v RC* [2004] VSCA 183, [7] (Ormiston JA).

176 *R v Rodriguez* [1998] 2 VR 167.

177 The absence of a motive to lie is neutral: *R v SAB* [2008] VSCA 150, [33]; *Palmer v R* (1998) 193 CLR 1, 9.

178 See generally Jeremy Gans, 'Why Would I Be Lying? The High Court in Palmer v R Confronts an Argument that May Benefit Sexual Assault Complainants' (1997) 19 *Sydney Law Review* 568; Judicial College of Victoria, *Victorian Criminal Charge Book* (2008) <http://www.justice.vic.gov.au/emanuals/CrimChargeBook/default.htm> at 8 September 2008.

179 Jeremy Gans, 'Why Would I Be Lying? The High Court in Palmer v R Confronts an Argument that May Benefit Sexual Assault Complainants' (1997) 19 *Sydney Law Review* 568, 578.

180 Ibid 577.

181 In the period 2000-2007, of a total of 538 appeals from conviction, approximately 62 raised issues relating to propensity directions (11.7%). In most individual years, propensity was raised in 12%-15% of all appeals heard in that year (except 2002 and 2003, where it was raised in only 5%). In the same period, propensity was raised in approximately 30% of appeals which were successful, although again, individual years varied significantly. See Appendix A.

182 *R v Best* [1998] 4 VR 603, 608; *R v Mark & Elmazovski* [2006] VSCA 251, [59]-[60].

183 *R v Mateiasevici* [1999] 3 VR 185, 191-2; *R v VN* (2006) 162 A Crim R 195, 204, 206-8; *R v Hopper* [2005] VSCA 214, [97]-[88]

184 In *DPP v Boardman* [1975] AC 421, 456-7, Lord Cross acknowledged that such evidence may be so relevant in some circumstances that 'to exclude it would be an affront to common sense'. Zuckerman argues that as long as there is an understanding that human behaviour is not entirely arbitrary and unpredictable, but depends on a person's 'mental make-up', character has a 'predictive force and probabilistic significance' in relation to a person's past acts: Adrian Zuckerman, 'Similar Fact Evidence – The Unobservable Rule' (1987) 104 *Law Quarterly Review* 187, 190.

185 Viscount Sankey's often quoted words in *Maxwell v DPP* [1935] AC 309, 317.

186 *Phillips v R* (2006) 158 A Crim R 431, 451-2; *Dawson v R* (1961) 106 CLR 1, 18-21 (Taylor and Owen JJ); *Melbourne v R* (1999) 198 CLR 1.

187 Courts have noted that not all evidence of discreditable conduct will necessarily be subject to the exclusionary rule in *Crimes Act 1958* (Vic) s 398A, which governs admissibility of such evidence. It is only where such evidence has features which give rise to the risk of 'propensity reasoning' by the jury: See Callaway JA's observations in *R v Best* [1998] 4 VR 603, 608; *R v Mark & Elmazovski* [2006] VSCA 251 [59]-[60]. The UK Law Commission has recognised that evidence of the bad character of the accused is potentially prejudicial in two ways: the jury may overestimate the significance of prior misconduct ('reasoning prejudice'); and the jury may disregard the evidence relating to the offence charged and convict on the basis that the accused is considered 'deserving' of punishment ('moral prejudice'): Law Commission [United Kingdom], *Evidence of Bad Character in Criminal Proceedings* (2001) [6.33].

188 See discussion in *Pfennig v The Queen* (1995) 182 CLR 461, 512; *BRS v The Queen* (1997) 191 CLR 275, 322. The difficulty of measuring prejudice without reference to the degree of probative value of evidence, and the interdependency of the concepts, has been recognised: Australian Law Reform Commission, NSW Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts* ALRC Discussion Paper 69, NSWLRC Discussion Paper 47 and VLRC Discussion Paper (2005) 81.

189 Psychological research confirms that assumptions are commonly made that people act consistently according to the character traits they exhibit resulting in attributing others' behaviour to enduring personality traits, although in reality a person's behaviour will vary depending on the context: Ibid 72-74.

190 Comments on the impact of evidence of this kind on the presumption of innocence were made in *Pfennig v The Queen* (1995) 182 CLR 461, 512 (McHugh J); *Perry v The Queen* (1982) 150 CLR 580, 594 (Murphy J).

191 Jurors may also be less reluctant to convict an accused where they know of past misconduct because they feel the gravity of making a 'wrong' decision by convicting is lessened ('the regret matrix'): see Australian Law Reform Commission, NSW Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts* ALRC Discussion Paper 69, NSWLRC Discussion Paper 47 and VLRC Discussion Paper (2005) 74-75.

192 See CR Williams and Sandra Draganich, 'Admissibility Of Propensity Evidence In Paedophilia Cases' (2006) 11 *Deakin Law Review* 1.

193 (2008) 245 ALR 204.

194 Evidence of 'uncharged acts' is discussed further below.

195 *HML* (2008) 245 ALR 204, 210.

196 *HML* (2008) 245 ALR 204, 210 (Gleeson CJ), also see 222-3 (Kirby J).

# Chapter 3 Directions in Sexual Offence Trials

### In what circumstances may propensity evidence be admitted?

3.104 In spite of the many risks associated with admitting propensity evidence, it is accepted that it may be highly relevant in sexual offence cases for a variety of reasons.[197] Propensity evidence has been held to be probative of issues, including:

- proving intent, disproving accident, or rebutting a defence[198]
- proving the identity of the accused[199]
- disproving an innocent association, or proving a 'sinister' one[200]
- proving the existence of a 'relationship' between accused and complainant[201]
- pointing to a pattern of conduct involving 'systematic exploitation' or 'the preying nature' of the behaviour
- corroborating a witness's evidence that an event occurred.[202]

3.105 In Victoria, propensity evidence may be admitted under *Crimes Act* section 398A, where it is relevant to a fact in issue in the trial, and the 'court considers that in all the circumstances it is just to admit it despite any prejudicial effect it may have' on an accused.[203] Notwithstanding that provision, common law principles continue to be applied by courts in interpreting this provision,[204] so that the determination of whether it is 'just' to admit propensity evidence will involve balancing its probative value against its prejudicial effect.[205]

3.106 Where Victorian courts have considered it 'just' to admit propensity evidence in sexual offence cases, such evidence has tended to fall into one of two broad categories: 'relationship evidence' and 'similar fact evidence'.[206] It is important to note that general categories and shorthand terms such as 'relationship evidence' must be used with caution. The approach preferred in some appellate decisions is to specifically describe the evidence according to the basis for which it is admitted.[207]

### The content of directions about propensity evidence

3.107 Victorian cases refer to three elements, broadly speaking, of the directions considered necessary when the jury hears propensity evidence:[208]

1. An affirmative direction where the jury is instructed about how they can lawfully use the evidence. The way in which the jury is directed will depend on the purpose for which it has been admitted, for example, whether it can be used as 'relationship evidence' or as 'similar fact evidence'. In some cases, evidence may be used for more than one purpose, and the jury may have to be directed as to each of these uses.[209]
2. A 'propensity' warning which requires the judge to give the jury a negative direction that if they are satisfied the accused has engaged in acts or conduct on other occasions (where those acts disclose a criminal propensity),[210] they must *not* reason that the accused is therefore the kind of person likely to have committed the charged acts.[211] It is not necessary that these specific words be used, provided the warning clearly explains to the jury the reasoning process in which they must not engage.[212]
3. An 'anti-substitution' warning which requires the judge to clearly instruct the jury they must convict the accused only on the evidence of the offence charged, and warn them not to substitute the evidence which establishes the relationship for evidence of the offending itself. This involves directing the jury that unless they are satisfied beyond reasonable doubt that the facts constituting a charged count occurred, they cannot convict an accused where they are only satisfied that some other conduct alleged by the complainant (for example, evidence of other sexual activity) has occurred.[213]

### Evidence of uncharged acts as propensity evidence

3.108 Propensity evidence of other conduct which is not the subject of charges, but which may amount to other criminal offending by the accused, is often referred to as evidence of 'uncharged acts', although again generalised terms should be used with caution.[214] In sexual offence cases, evidence of uncharged acts may relate to other sexual conduct between an accused and complainant outside of the charged acts. This may arise where a child subjected to ongoing sexual abuse finds it difficult to differentiate some incidents sufficiently to provide a basis for an individual charge.

3.109 Evidence of uncharged acts may also relate to conduct taking place between an accused and a person other than the complainant. The law in relation to the admissibility of evidence of uncharged acts, and the directions which must be given to the jury as to its use, is particularly complex. There have been different approaches amongst intermediate appellate courts, as well as between different members of the High Court.[215]

### Directions as to how the jury may use relationship evidence

3.110 The first part of the direction requires the judge to explain to the jury the limited purpose for which the relationship evidence is admitted and how they may use that evidence.[216]

3.111 Until the decision of the High Court in *HML*, evidence which relates to the 'relationship' between the accused and a complainant (or another relevant person)[217] had generally been admitted on two bases in the context of sexual offence cases:

1. as evidence which helps to understand the background or context of the incidents which are the subject of the charges[218]
2. as evidence relating to a history of sexual misconduct which demonstrates some kind of 'improper' or 'unlawful sexual attraction' by the accused for the complainant.

197 Hayne J uses the examples of 'proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident' listed in the United States Federal Rules of Evidence, r 404(b) as examples of the kinds of use of such evidence: *HML* (2008) 245 ALR 204, 238; Justice Robert Redlich, 'Propensity Evidence: HML v The Queen [2008] HCA 16' (Paper presented at the Criminal Bar Association, Melbourne, 23 May 2008).

198 These examples are given in *Makin v The Attorney-General for New South Wales* [1894] AC 57.

199 *Pfennig v R* (1995) 182 CLR 461; *Sutton v The Queen* (1984) 152 CLR 528.

200 *Harriman v R* (1989) 167 CLR 590.

201 *Gipp v R* (1998) 194 CLR 106. Doubts have been expressed about the use of descriptions such as 'relationship evidence': *HML* (2008) 245 ALR 204, 234, 239 (Hayne J).

202 *BRS v R* (1997) CLR 275, 283-284; *R v Buckley* (2004) 10 VR 215.

203 Section 398A was enacted to overrule the common law principle in *Pfennig v R* (1995) 182 CLR 461 that propensity evidence is inadmissible if there is a reasonable view of the evidence that is consistent with the innocence of the accused: Australian Law Reform Commission, NSW Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts* ALRC Discussion Paper 69, NSWLRC Discussion Paper 47 and VLRC Discussion Paper (2005) 311-312.

204 Other than *Hoch v R* (1988) 165 CLR 292 and *Pfennig v R* (1995) 182 CLR 461.

205 *DPP v P [1991] 2 AC 447; DPP v Boardman* [1975] AC 421; *Tektonopoulos v R (*1999) 106 A Crim R 111, 116 (Winneke P). Although the term 'just' is generally seen to direct attention to the fair trial of the accused, Clough suggests it may be given a more expanded meaning, to include taking into account 'the legitimate interests of the Crown and the community: Jonathan Clough, 'Section 398A of the Crimes Act 1958 (Vic): Pfennig Resurrected?' (2000) 24 *Criminal Law Journal* 8-20, 12-13.

206 *R v Best* [1998] 4 VR 603, 606; *R v Tektonopoulos (*1999) 106 A Crim R 111, 116-8 (Winneke P). We do not consider here evidence described as forming part of the '*res gestae*' (conduct which forms 'inseparable features of a transaction of connected events', and which 'embraces the crime charged': *O'Leary v R* (1946) 73 CLR 566, 576; *Harriman v The Queen* (1989) 167 CLR 590, 633. This is usually not considered propensity evidence under Victorian law (even where it discloses other criminal conduct) and will not usually need the strict directions given in relation to other types of propensity evidence: *R v Mark & Elmazovski* [2006] VSCA 251, [62] referring to *R v Best* [1998] 4 VR 603, 608; Geoffrey Flatman and Mirko Bagaric, 'Non-Similar Fact Propensity Evidence: Admissibility, Dangers and Jury Directions' (2001) 75 *The Australian Law Journal* 190, 202 (contrast the approach in *R v FJB* (1999) 105 A Crim R 567, 571, where the Court of Appeal considered it necessary to warn the jury against engaging in propensity type reasoning in relation to uncharged acts which were 'inseparably wound up with the story').

207 See for example, Neave JA in *R v DD* [2007] VSCA 317, and the cases cited at [64]-[66]; *Tully v R* (2006) 230 CLR 234, 276-77 (Callinan J). Also see observations of Hayne J in *HML*(2008) 245 ALR 204, 238-9.

208 *R v Best* [1998] 4 VR 603, 615-6 (Callaway JA) referring to his own judgment in *R v Grech* [1997] 2 VR 609*; R v BJC* (2005) 13 VR 407, 409-10 (Byrne AJA). Note that Byrne AJA's characterisation of the directions in relation to evidence of uncharged acts in a sexual offence case, involves an 'affirmative direction' and a 'negative direction'. The negative direction consists of the 'anti-substitution warning' and the 'propensity warning': 415-421.

209 The sample charge extracted in Appendix B illustrates this.

210 This should not be explained to the jury by referring to the accused having a 'criminal propensity': *R v BJC* (2005) 13 VR 407, 421; *R v Vonarx* [1999] 3 VR 618, 624.

211 *R v Grech* [1997] 2 VR 609, 614 (Callaway JA).

212 *R v DCC* (2004) 11 VR 129, 138 (Eames JA). The test is whether the direction is sufficient to 'avoid the perceptible risk of miscarriage of justice from the impermissible use of the evidence': *R v PZG* (2007) 171 A Crim R 62, 68. A failure to give a propensity warning in these circumstances may result in a successful appeal, even where counsel fail to take any exception at trial: *R v Garbutt* [2008] VSCA 170, [37]-[38].

213 *R v BJC* (2005) 13 VR 407, 419; *R v Best* [1998] 4 VR 603, 615-6; *R v Beserick* (1993) 30 NSWLR 510; *R v Grech* [1997] 2 VR 609; *R v Vonarx* [1999] 3 VR 618; *R v VN* (2006) 162 A Crim R 195.

214 In *R v Ellul* [2008] VSCA 106, [25] 'uncharged acts' included discreditable conduct not limited to conduct constituting a criminal offence outside of the charges. Hayne J has criticised the description 'uncharged acts' for inviting speculation about why no charges were laid: *HML* (2008) 245 ALR 204, 239. Hayne J refers to admissibility of evidence of other conduct which does not amount to an offence 235. If such conduct is 'equivocal' it may be inadmissible as the probative value of such evidence may not outweigh its prejudicial effects (although Hayne J applied the *Pfennig* admissibility test, which does not apply in Victoria).

215 See the cases cited by Kirby J in *Tully v The Queen* (2006) 230 CLR 234, 254-5. Kirby J considered that case was an 'inappropriate' case for clarification of the law on uncharged acts (also see Callinan J in *Tully* (2006) 230 CLR 234, 280).

216 *R v Best* [1998] 4 VR 603, 615; *R v BJC* (2005) 13 VR 407, 409-10 (Byrne AJA). In *HML* (2008) 245 ALR 204, Hayne J observed that proper identification of the real issues at trial may mean that it is unnecessary to give the jury directions about some of the uses to which the evidence may be put: 239.

217 Evidence of a relationship between the accused and an unrelated third party will not be admissible as 'relationship evidence': *R v HG* [2007] VSCA 55; *R v Macfie* [2002] VSCA 51.

218 As discussed below, the decision in *HML* (2008) 245 ALR 204 creates uncertainty, as to the scope, if any, for the admission of evidence of uncharged acts for this purpose.

# Chapter 3 Directions in Sexual Offence Trials

### 1) Evidence used to understand context of offending

3.112 The classic example of relationship evidence as relevant to context, is where evidence of uncharged sexual acts is used to establish a sexual relationship or history of sexual misconduct by the accused towards the complainant.[219] This enables the jury to assess and evaluate the evidence 'within a realistic and contextual setting', to explain, for example, what might otherwise be 'an isolated act occurring without apparent reason'.[220] Some judges have urged caution against admitting evidence of uncharged acts as 'relationship' or 'contextual' evidence, where such evidence does not add or explain anything further about the relationship between accused and complainant than the facts of the offences themselves.[221]

3.113 Most recently, Hayne, Kirby and Gummow JJ, when considering evidence of uncharged acts involving sexual offending against children,[222] expressed the view that providing mere 'background' or 'context' is not a legitimate basis for admission of such evidence.[223] There are differing views as to whether this is the position under Victorian law.[224]

3.114 Prior to the decision in *HML*, Victorian courts have held that where relationship evidence is admitted as 'context', trial judges should direct the jury they may use the evidence for the purpose of assessing and evaluating the prosecution evidence in a realistic contextual setting. The judge should explain how this background information or context is relevant to a fact in issue. For example, in a sexual offence case, relationship evidence may be particularly relevant where it explains an absence of complaint or resistance by a complainant.[225]

### 2) Evidence used to demonstrate 'sexual interest' or 'attraction'

3.115 Another type of relationship evidence has been referred to in older cases as evidence of 'guilty passion'.[226] This is where the evidence may show the accused has a particular attraction towards the complainant. Later cases have held that the term 'guilty passion' is inappropriate to put before the jury, and the evidence should be explained as demonstrating an 'improper sexual relationship' or 'sexual attraction' or 'passion'.[227]

3.116 In *HML*, Hayne, Kirby and Gummow JJ agreed that evidence of other sexual acts, which may reveal other offences or discreditable conduct, can be admitted where it shows that the accused had an ongoing sexual interest in the complainant, and a willingness to act on it.[228] The jury can use evidence in this way to support an inference that the accused is guilty through a process of 'probability reasoning' (discussed further below).[229] Byrne AJA described the reasoning process as allowing the jury to infer from the evidence of an improper sexual relationship that the accused has a *specific propensity* to commit sexual acts with the complainant. The jury may reason that this makes it more likely that the accused gratified this attraction on the occasions charged.[230]

### Should the jury be directed about standard of proof of uncharged acts?

3.117 The position in Victoria has generally been that the judge should avoid directing the jury about the standard of proof to which they should be satisfied when evaluating evidence of uncharged acts.[231] A direction about the standard of proof has been required, however, where the prosecution seeks to rely on evidence of uncharged acts as forming an 'indispensable link in a chain of reasoning' which the prosecution relies on to prove guilt.[232] For example, where evidence of uncharged acts is used to support the existence of a sexual attraction of the accused for the complainant, and it is an essential step in finding the accused guilty beyond reasonable doubt, the jury must be directed that they must be satisfied about that particular evidence beyond reasonable doubt.[233]

3.118 In *HML*, Hayne, Gummow and Kirby JJ, when emphasising that evidence of uncharged sexual acts is 'circumstantial evidence', held that uncharged sexual acts can only be admitted to establish that the accused had a sexual interest in the complainant and was prepared to give effect to that interest, making it more likely that the accused committed the acts charged.[234] In this context, uncharged acts are used as an indispensable step in proof of commission of the offences.

3.119 For this reason, Hayne, Gummow and Kirby JJ held that, in the ordinary course of events, the judge should instruct the jury that they must only find the accused had a sexual interest in the complainant if it is proved beyond reasonable doubt.[235] The view has been expressed in Victoria that the cautious approach would be to follow this line of reasoning.[236] However, the lack of clarity provided by the separate judgments of the High Court leaves trial judges in a position of uncertainty.

### Directions as to how the jury may not use relationship evidence

3.120 Relationship evidence may have particular significance in cases involving sexual offending against children, which often takes place in the home or some other private location where there are no independent witnesses.[237] Children who are sexually abused are often fearful or reluctant to report abuse. Repeat child sex offenders may engage in 'grooming' processes which may be revealed as evidence of uncharged acts, demonstrating a sexual attraction of the accused for a child complainant on which the accused subsequently acts.[238]

3.121 At the same time, the prejudicial effect of propensity evidence in sexual offence cases, especially those involving children, is high. Allegations of this sort, as Kirby J has observed, 'are likely to arouse feelings of prejudice and revulsion in the community which will normally be shared by jurors'.[239] It is only more recently that courts have been willing to allow modern 'better educated and more literate' juries access to evidence which, though relevant, may be sensitive and highly prejudicial.[240]

3.122 Directions concerning the prejudicial nature of evidence and the limited use to which it can be put are designed to reduce the danger that the jury will misuse or overestimate the probative value of propensity evidence, and reduce any unfairly prejudicial effect it might have.[241] The Courts have been very strict in requiring clear directions to the jury where the risk of this type of prejudice may arise.

219 Relationship evidence is not confined to sexual offence cases: *Wilson v R* (1970) 123 CLR 334; *Plomp v R* (1963) 110 CLR 234.

220 *R v Vonarx* [1999] 3 VR 618, 625; *R v Beserick* (1993) 30 NSWLR 510, 515.

221 Even before *HML*, Callinan J had suggested that evidence which is 'non-specific' and 'highly prejudicial' is not admissible merely on the basis that it forms 'part of the essential background': *Gipp v R* (1998) 194 CLR 106, 168-9; *Tully v R* (2006) 230 CLR 234, 277-8.

222 In *HML* (2008) 245 ALR 204, 233 Hayne J confines his reasons to the admissibility of uncharged acts evidence where absence of consent is *not* an element of the charged offences.

223 *HML* (2008) 245 ALR 204, see for eg 250, 254, 262 (Hayne J), 218 (Kirby J), 216 (Gummow J). Compared with the differing views of Gleeson CJ, Kiefel and Crennan JJ: 213-4, 327, 329-330, 333-4, 319, 322, 324. Heydon J does not decide whether uncharged acts may be led as context: 287, 291, 301.

224 See, for example, Justice Robert Redlich, 'Propensity Evidence: HML v The Queen [2008] HCA 16' (Paper presented at the Criminal Bar Association, Melbourne, 23 May 2008) and *R v Ellul* [2008] VSCA 106 where the court referred to the 'majority' view in *HML* that the jury would normally be instructed that they can only find 'the accused has a sexual interest in the complainant if it is proved beyond reasonable doubt'. In *Ellul*, however, evidence of uncharged acts was admitted as context, and the Court of Appeal did not address the criticism of this view of the basis of admission in *HML*: [38]

225 *R v Josifoski* [1997] 2 VR 68; *Gipp v R* (1998) 194 CLR 106, 113, 130-1; *KRM v R* (2001) 206 CLR 221, 230 (McHugh J). Evidence of a violent relationship may be relevant in establishing an accused's intent or motive, or negative a defence of accident or mistake. Evidence of a harmonious relationship can demonstrate that the complainant's allegations are uncharacteristic or improbable: see *HML* (2008) 245 ALR 204, 314 (Crennan J); *Wilson v R* (1970) 123 CLR 334; *R v Portelli* (2004) 10 VR 259; *R v Anderson* (2000) 1 VR 1; *R v Metthey* [2007] VSC 398.

226 *R v Ball* [1911] AC 47.

227 *R v Young* [1998] 1 VR 402; *R v BJC* (2005) 13 VR 407, 418 (Byrne AJA).

228 Gleeson J concludes that evidence of uncharged acts can be led either as 'context' or proof of a sexual interest, while Kiefel J holds that the basis of admissibility can be to show sexual interest, or to provide answers to questions 'that might naturally arise in the mind of the jury'. Crennan J's view is that uncharged acts can be led as 'context', of which a relationship of 'sexual attraction' forms part.

229 In Victoria, see: *R v BJC* (2005) 13 VR 407; *R v Pau* [2007] VSCA 239. Hayne, Gummow and Kirby JJ hold that the evidence must satisfy the *Pfennig* admissibility test, such that the evidence must not be open to other innocent explanation: *HML* (2008) 245 ALR 204. Comments in *HML*, relating to the directions which flow as a result, arguably indicate that these are linked to the basis of admissibility according to this more strict test: 224 (Kirby J), 240 (Hayne J); 321 (Crennan J). Kirby J specifically acknowledges a retreat from his earlier opinion on admissibility of uncharged acts in *KBT v The Queen* (1997) 191 CLR 417 and *Gipp v The Queen* (1998) 194 CLR 106.

230 *R v BJC* (2005) 13 VR 407, 418 (Byrne AJA). Justice Robert Redlich, 'Propensity Evidence: HML v The Queen [2008] HCA 16' (Paper presented at the Criminal Bar Association, Melbourne, 23 May 2008).

231 *R v Loguancio* (2000) 1 VR 235.

232 *Shepherd v R* (1990) 170 CLR 573, 579, 581.

233 In *R v Ellul* [2008] VSCA 106 the Court of Appeal clarified that evidence of non-complainants about uncharged acts could be used in this way.

234 Again, however, it must be noted that admission of the evidence was subject to the *Pfennig* test applicable in those jurisdictions still governed by the common law in this area: *HML* (2008) 245 ALR 204, 229-30 (Kirby J); 240, 262 (Hayne J), 216 (Gummow J); also see 331 (Kiefel J).

235 This is contrasted with the views of Gleeson CJ at 215, and Crennan J at 323; Heydon J considered it unnecessary to decide whether the criminal standard of proof had wider application as the directions in each of the three appeals incorporated the criminal standard: 292, 302, 306-7.

236 Justice Robert Redlich, 'Propensity Evidence: HML v The Queen [2008] HCA 16' (Paper presented at the Criminal Bar Association, Melbourne, 23 May 2008). In *R v Ellul* [2008] VSCA 106, the trial judge had instructed the jury that they should find the evidence of uncharged acts proved beyond reasonable doubt.

237 The *Federal Rules of Evidence* (1975) in the United States have enacted relaxed rules in relation to admissibility of 'evidence of similar crimes' by the defendant in cases of sexual assault and child molestation (Rules 413 and 414). These Rules have been controversial: see discussion in New Zealand Law Commission, *Disclosure to Court of Defendants' Previous Convictions, similar Offending, and Bad Character* Report 103 (2008), 82-3.

238 CR Williams and Sandra Draganich, 'Admissibility Of Propensity Evidence In Paedophilia Cases' (2006) 11 *Deakin Law Review* 1, 23

239 *HML* (2008) 245 ALR 204, 222-3.

240 Ibid.

241 *R v PZG* (2007) 171 A Crim R 62, 70.

3.123 The jury must be told they may not use the accused's prior acts to infer that the accused has a *general propensity* to commit that sort of act, and therefore committed it on the occasion charged.[242] Where the relationship evidence discloses 'disreputable or unlawful acts', for example, the jury must be directed that they may not use that evidence to infer that based on that other conduct, the accused is the kind of person who is more likely to have committed the offence charged.[243]

### 'General' propensity and 'specific propensity'— a fine line

3.124 The difference in reasoning which the jury may and may not use is subtle. In *R v Vonarx*,[244] for example, the Court held that juries 'should be told not to reason that the accused is the kind of person likely to commit the offence charged' based on past misconduct (a 'general propensity') but also that they may use the evidence 'for the purpose of proving an improper sexual relationship' between accused and complainant 'tending to make it more likely' that the offence which is charged was committed (a 'specific propensity').[245]

3.125 The difficulty with this distinction between 'general' and 'specific' propensity is reflected in Byrne AJA's warning to judges to be careful in crafting propensity warnings in relation to evidence of sexual attraction so as to 'not make nonsense of the direction' as to its lawful use.[246] Although the jury may not use the evidence to prove guilt of the offences charged by a general disposition to commit crime, they may use it to show the nature of the relationship from which they may infer that the accused has a disposition to commit the particular crime charged.[247]

3.126 Evidence of uncharged acts can not be used, however, as proof of the truth of the charges, and the jury must be instructed that they can not substitute the evidence of other sexual conduct for the offences charged. This involves a warning against reasoning that because the accused committed other sexual acts with a complainant, they must have committed the acts charged.[248]

## Similar fact evidence

3.127 'Similar fact evidence' is often used to describe evidence that the accused has acted in a similar manner to the alleged offender, or engaged in conduct which is similar to that alleged on another occasion.[249] The evidence may reveal facts which are 'strikingly similar' or share some unusual common feature, or some 'underlying unity',[250] system or pattern, with the conduct or events which are the subject of the charges.[251] In a sexual offence case involving multiple child complainants, for example, evidence of similar misconduct of an accused with children other than the complainant may establish a 'pattern' of behaviour. Similar fact evidence is considered probative as it:

> *discloses some feature which raises, as a matter of common sense and experience, the objective improbability of its bearing an explanation consistent with the accused's innocence ...*[252]

3.128 The similar fact evidence must support the probability that a fact in issue exists or does not exist. Similar fact evidence has been used to establish various matters, such as:

- the identity of the accused
- the accused's guilty mind or particular mental state (for example, by rebutting a defence of accident or coincidence)
- that the accused acted voluntarily
- that several independent witnesses have given truthful evidence (for example, where the 'striking similarity' between the evidence of multiple complainants about the accused's conduct points to the improbability of the complainants making similar allegations if they were not true).[253]

## Directions as to use of similar fact evidence

3.129 As with relationship evidence, the jury must be directed that the evidence can only be used by them for the limited purpose for which it has been admitted. Similar fact evidence may be used by the jury to rely on the improbability of two or more independent events occurring other than

in the way the prosecution suggests in order to infer that the accused is guilty of the acts charged. This is called 'probability reasoning'.[254] Where the similar fact evidence discloses 'disreputable or unlawful conduct' of some kind, rather than 'striking similarity', the judge must warn the jury not to engage in impermissible propensity reasoning.

### The difference between probability reasoning and impermissible propensity reasoning

3.130 In *R v DCC*,[255] a case involving multiple counts of sexual offences involving more than one child, Callaway JA described probability reasoning as involving a different 'train of thought' to propensity reasoning:

- If the jury reasons that a witness' account is more likely to be true because of its similarities with the independent accounts of other witnesses, and the improbability of this being sheer coincidence—this is permissible 'probability reasoning'
- If the jury reasons that because they accept the evidence of one witness in relation to the offences committed against that witness, therefore, the accused is the kind of person who is likely to have committed similar offences against the other complainants, and convict the accused of those other offences on that basis (wholly or in part)—this is impermissible propensity reasoning.

3.131 Where similar fact evidence is used in this way, the concept of probability reasoning must be explained to the jury, and the judge should direct them on what inferences can be drawn using this reasoning.[256] This will depend on the basis for which the evidence has been admitted, and we consider two of these below.

#### Where the evidence is admitted on the basis of establishing the identity of the offender

3.132 One example is where similar fact evidence is used to establish the identity of the accused. The jury may use probability reasoning to infer that it is likely that the same person is responsible for two or more particular offences because of the particular manner or method by which the offences were committed. When propensity evidence is used to determine the identity of an offender in this way, it is considered to have a high prejudicial effect. A strong degree of similarity or unusual features common to the events or conduct is generally needed before it will be admitted.[257] The jury must be instructed that they must be satisfied the accused committed one of the offences, and that both offences were committed in a particular way.[258]

242 *R v BJC* (2005) 13 VR 405, 420 (Byrne AJA).

243 Where relationship evidence does not disclose 'disreputable or unlawful acts' it will not generally require a warning against 'propensity reasoning': *R v VN* (2006) 162 A Crim R 195, 204. For example, in *R v Taylor* (2004) 8 VR 213, 226, evidence of regular calls and visits to the complainant's house by the accused was independent evidence which merely supported the complainant's account, was not propensity evidence.

244 [1999] 3 VR 618.

245 *R v Vonarx* [1999] 3 VR 618, 622, 625 (Winneke P, Callaway JA & Southwell AJA).

246 *R v BJC* (2005) 13 VR 407, 420; this passage was referred to with approval in the judgment of Heydon J in *HML* (2008) 245 ALR 204, 295.

247 *R v BJC* (2005) 13 VR 407, 420.

248 *R v PZG* (2007) 171 A Crim R 62; *R v Grech* [1997] 2 VR 609; *R v FJB* [1999] 2 VR 425; *R v BJC* (2005) 13 VR 407.

249 *Gipp v R* (1998) 194 CLR 106, 111-2 (Gaudron J).

250 *R v GAE* (2000) 1 VR 198, 212 (Chernov JA).

251 For example, through some connection in time or circumstances which make one piece of evidence support another to the necessary degree: *R v Rajakaruna* (2004) 8 VR 340 , 358-9 (Eames JA), 345 (Chernov diss); *R v Josifoski* [1997] 2 VR 68, 83-4.

252 *BRS v R* (1997) 191 CLR 275, 298-9 (per Gaudron J).

253 *BRS v The Queen* (1997) 191 CLR 275, 301 (per Gaudron J). Geoffrey Flatman and Mirko Bagaric, 'Non-Similar Fact Propensity Evidence: Admissibility, Dangers and Jury Directions' (2001) 75 *The Australian Law Journal* 190, 192.

254 Using evidence of uncharged acts to demonstrate a sexual interest in the complainant and a willingness to gratify that interest, and inferring therefore that the accused is likely to have committed the acts charged, is also a form of probability reasoning.

255 *R v DCC* (2004) 11 VR 129, 132 (per Callaway JA).

256 *R v DCC* (2004) 11 VR 129, 132; *R v Buckley* (2004) 10 VR 215, 230-1.

257 These circumstances will often require a 'striking similarity' or 'underlying unity' which, when looked at in the light of the other evidence, make it objectively improbable that the offences charged were not committed by the accused: *Pfennig v R* (1995) 182 CLR 461, 529; *Sutton v R* (1984) 152 CLR 528, 535, 557; *R v Rajakaruna* (2004) 8 VR 340, 358-61 (Eames JA), ; *R v Dupas (No 2)* (2005) 12 VR 601, 621-3 (Nettle JA).

258 *R v Rajakaruna* (2004) 8 VR 340, 370-4 (Eames JA); *R v Dupas (No 2)* (2005) 12 VR 601, 627-8 (Nettle JA).

# Chapter 3 Directions in Sexual Offence Trials

### Where the evidence is admitted on the basis of supporting the credibility of a witness

3.133 In cases involving ongoing sexual offences committed against more than one child, and where the offender is known to the complainants, often no issue of identity arises. In these cases, the issue is usually whether the allegations against the accused are true or whether the complainants have fabricated the evidence.[259] In this case, similar fact evidence may be admitted to support the credibility of the complainants.

3.134 The jury can use evidence (for example, that the accused has engaged in similar conduct with each complainant) to reason that it would be highly improbable that the witnesses would tell similar lies or be mistaken in the same way, and therefore must be telling the truth. In these cases, the jury should be instructed that they may rely on the improbability of independent witnesses making similar allegations against the accused to reason that the evidence is mutually supportive of the truth of the evidence of each of the witnesses, and cannot be explained by mere coincidence.[260]

3.135 The jury must first be satisfied that the evidence is true and is not coincidence before using the evidence for these purposes. If there is any suggestion that the evidence may be 'contaminated' (for example through collusion, innocent influence or fabrication), the judge will also need to direct the jury that they must first be satisfied beyond reasonable doubt that the witnesses' evidence was not contaminated by any such factor, before using the evidence in this way.[261]

## Problems with directions about use of propensity evidence

3.136 The directions which may need to be given when dealing with 'propensity' evidence create a number of problems for trial judges and juries:

- The line between these different 'categories' of propensity evidence may not always be clear. In *DD*, for example, similar accounts of sexual abuse by children against their father were considered not to be admissible as 'relationship evidence' and should not have been used by the jury to demonstrate a context for the charged assaults, or an improper sexual attraction of the accused for his daughters. Rather, the uncharged acts revealed a pattern of similar behaviour, and may have been admissible as similar fact evidence.[262]
- Propensity evidence may also be used for more than one purpose (for example, as relevant to context, demonstrating a sexual interest, and as similar fact evidence) and the judge will need to clearly direct the jury in relation to the permissible uses of the evidence.
- The effect of directions about propensity is that the jury is being told not to reason in the way that the evidence is most probative, leading to overly intellectualised and sophisticated reasoning about how the jury can permissibly use the evidence.
- The distinctions made between permissible 'probability' reasoning and impermissible 'propensity' reasoning, or between 'specific propensity' and 'general propensity' may appear artificial and incomprehensible to a jury.
- Directions can become complex in situations where they overlap with other directions, for example, where propensity evidence is led to rebut good character evidence by the defence and its use must be confined to that purpose.
- If judges feel compelled to give propensity warnings in every case, to avoid error on appeal, directions may be counter-productive where they draw the jury's attention to the issue and increase the risk they will engage in this type of reasoning.
- Propensity warnings may be required in many different situations, and the obligation is on trial judges to identify and deliver the correct directions. The burden on trial judges is increased when the way in which the evidence is being used is not correctly identified by counsel at the admissibility stage.[263]
- The need for giving warnings about use of propensity evidence can arise in a variety of situations which the trial judge will have to consider in a given trial. In trials involving multiple counts against one or more accused, these problems arise frequently. We consider some of these situations in the next part.

## POSSIBLE REFORM TO DIRECTIONS ON PROPENSITY

3.137 Conflicting research and anecdotal evidence has raised doubts about the efficacy of directions to the jury that they may use evidence for only one purpose but not another, when it appears sensibly related to wider purposes.[264] Research indicates that if directions to separate out the 'permissible' and 'impermissible' uses of evidence do not accord with a juror's normal way of thinking, it is likely that they will not be understood or followed.[265] The difficulty with propensity evidence is that it often requires very complex 'limited admissibility directions', and at the same time requires jurors to set aside feelings about other conduct by the accused which they may find 'morally repugnant'.[266]

3.138 In this section we consider some models for rethinking the approach to directions on propensity:

- Removing directions about use and misuse of propensity evidence altogether.
- Simplifying the way in which judges highlight to jurors the 'dangers' of propensity evidence.

### Removing the need for propensity warnings altogether

3.139 If we accept that it is unwise to assume juries can and will follow judicial directions about propensity evidence, should the requirement for a warning be removed? Historically, this type of evidence has been subject to strict tests of admissibility. This was partly based on a 'judicial disdain for the jury' who were not trusted to properly assess the weight of this type of evidence, and on the 'notorious ineffectiveness' of instructions about permissible and impermissible uses of evidence.[267]

3.140 However, several factors have seen a move away from a strict approach to admission of this type of evidence:[268]

- There is better knowledge about sexual abuse of young persons, which often occurs as multiple and repeated incidents over a period of time, and which may not be able to be identified specifically enough to found the basis of individual charges.
- There has been a greater willingness than in the past to trust 'modern' juries with sensitive evidence.
- There are practical consequences resulting from statutory reforms, which have removed the presumption of separate trials for sexual offence allegations involving multiple complainants.

3.141 Once a more liberal approach is taken to admitting propensity evidence, however, there is a clear risk that it may be used to bolster a weak case, or prejudice the minds of the jury against the accused, whatever the purpose of its admission. Some argue that this means strict directions about use and misuse of such evidence are necessary.

3.142 As outlined in Chapter 2, the role of the judge is not only to make decisions about admissibility of the evidence, but also to guide the jury about assessing the weight of the evidence. It has been argued that an important part of the judge's role is to warn to the jury about the prejudicial effect of similar fact evidence.[269] In the absence of any guidance whatsoever, there is a risk that the jury may inevitably find the accused guilty because they are overwhelmed by the nature of such evidence.[270]

**Question: Should we remove the need to give a warning against propensity reasoning altogether? If so would this need to involve reconsidering the admissibility of such evidence?**

### Simplifying propensity directions

3.143 Can the content of the warnings be simplified? We consider three approaches to modifying the instructions given to the jury, which have several benefits:

- They place more trust in the jury to make decisions on questions of fact according to their common experience and sense of fairness.

259 CR Williams and Sandra Draganich, 'Admissibility Of Propensity Evidence In Paedophilia Cases' (2006) 11 *Deakin Law Review* 1, 26.

260 *R v Buckley* (2004) 10 VR 215; *R v DCC* (2004) 11 VR 129; *R v Papamitrou* (2004) 7 VR 375, 391, 393; R v DD [2007] VSCA 216, [68]-[70].

261 In *R v DCC* (2004) 11 VR 129, 147, Eames JA held that the obligation to give a direction to the jury to exclude any explanation of the similar fact evidence by 'collusion and concoction (or innocent infection)' is only mandatory if there is evidence which suggests such a factor possibly exists.

262 In any case, as the trial judge had given the jury an adequate warning to not engage in propensity reasoning, regardless of the basis on which the uncharged acts were admitted, the accused was considered not to have been disadvantaged.

263 As Hayne J observed in *HML* (2008) 245 ALR 204, 239 proper identification of the real issues in the case may mean that it is unnecessary to give any direction to the jury about some of the uses to which the evidence might be put.

264 See the research discussed in New Zealand Law Commission, *Disclosure to Court of Defendants' Previous Convictions, similar Offending, and Bad Character* Report 103 (2008) 110.

265 Ibid 109.

266 Ibid.

267 Adrian Zuckerman, 'Similar Fact Evidence – The Unobservable Rule' (1987) 104 *Law Quarterly Review* 187, 197; Maurice Byers, 'Similar Facts' (1984) *The Australian Journal of Forensic Sciences* 138.

268 Kirby J discusses similar factors favouring admission of such evidence in *HML* (2008) 245 ALR 204, 220-23.

269 Rajiv Nair, for example, emphasises the importance of this role of the judge in the context of the traditional 'similar fact evidence' doctrine under the UK common law: Rajiv Nair, 'Weighing Similar Fact And Avoiding Prejudice' (1996) (112) *Law Quarterly Review* 262.

270 Nair states that the jury's attention should be drawn to the 'relevant descriptive features and warning the jury against other irrelevant connotations of the evidence; in particular, its moral connotations': Ibid 284. Nair is referred to in *Melbourne v The Queen* (1999) 198 CLR 1,19.

- They reinforce the role of the judge as being an impartial arbiter ensuring 'fairness' in the adversarial trial process, and determining questions of law as they arise, while reducing the burden of needing to articulate legalistic and technical processes of reasoning to the jury.
- They emphasise the role of trial counsel in the adversarial process as being primarily responsible for putting arguments before the jury about how evidence should be used.

### The approach suggested by Leach

3.144 One American writer suggests we acknowledge that evidence of 'other acts'[271] by the accused can be relevant to the question of whether that person actually committed the alleged act, and trust that juries are capable of more sophisticated reasoning and assessment of probative value of evidence in their reaction and analysis of human behaviour.[272] He argues that juries are capable of understanding that the fact that the accused has committed similar acts previously adds to the information, and should be discussed in the context of all the other evidence. He also argues that jurors are capable of following a judicial instruction to not punish the accused for earlier conduct, and only use it as one factor in determining how the accused acted in this case.

3.145 Leach proposes a model jury instruction designed to minimise the risk of 'reasoning' prejudice and 'moral' prejudice, by adapting the standard charge against use of character evidence as circumstantial proof of conduct, and using common sense experience to address concerns associated with evidence of 'other acts'.

3.146 The model suggested would contain the following points:

- Evidence that the accused has committed other similar acts may be considered in determining whether they in fact committed the charged acts.
- Such evidence does not conclusively answer the question—it is one fact to be considered in combination with all the other facts.
- It would be improper to decide simply that 'because he did it before he probably did it again' without considering all the other evidence.
- To ensure that the accused is not unfairly characterised, the jury must be satisfied of the other acts and if so, whether that factor makes it more or less likely that they committed any charged act.[273]
- The jury must not seek to punish accused for any other act—he is tried only for the charges against him.
- Evidence of other acts must be considered only for determining whether he committed the present charges.

The model instruction which Leach proposes is set out in Appendix D.

### The approach taken in the UK

3.147 There has also been support in the UK for an approach which places more 'trust in the jury'.[274] Directions containing a better explanation of the unfairness of propensity reasoning has been endorsed in the UK in the context of admission of evidence of prior convictions. In several decisions, directions containing the following points have been suggested in warning the jury not to place undue reliance on bad character evidence (in that context, evidence of prior convictions):

- Although the jury may find the convictions show a criminal propensity, this does not mean the accused committed the offence in this case.
- If the jury find a propensity is shown, they may take this into account in determining the accused's guilt, however, they must remember that propensity is only one relevant factor, and they must assess its significance in light of all other evidence in the case.
- What really matters is the evidence heard in relation to this case.
- The jury must be careful not to be unfairly prejudiced against the accused about what they have heard in relation to previous convictions.

- It would therefore be wrong to jump to the conclusion that he is guilty just because of those convictions.[275]

### The approach taken by Zuckerman

3.148 Professor Zuckerman goes even further in arguing for an approach which places more trust in the jury. Zuckerman argues that the difficulties with propensity evidence relate to a mistaken assumption that the function of the jury is to ascertain facts with 'clinical objectivity'.[276] Zuckerman argues, on the other hand, that the jury in criminal trials fulfils a 'political function' in securing public support for and involvement in the administration of justice',[277] according to 'ordinary standards of justice and morality', rather than being particularly adept at ascertaining the 'objective truth'.[278] He argues that fact-finding is bound up with moral judgment in the jury system, and this must be accommodated when dealing with admission of evidence of bad character or conduct of an accused.

3.149 Zuckerman's argument is that the only way juries will resist the temptation of convicting an accused because of criminal propensity, is if judges explain the way the jurors' own moral perceptions are reflected in the principles of criminal justice, and that the need to try the accused only for the offence charged is a value which they uphold themselves.

**Question: Should we simplify the content of propensity directions? Are there alternative approaches to simplifying the content of propensity directions, other than the models discussed above?**

## OTHER DIRECTIONS TRIAL JUDGES MUST CONSIDER

### Evidence of the accused's character

3.150 Evidence of bad character of the accused is admitted only under strict conditions, including the propensity rule, as already discussed. Evidence of the accused's good character has historically been readily admitted for a number of reasons.[279] Careful directions are usually required in relation to character evidence admitted at trial. A majority of the High Court has held, however, that a judge is not obliged to give a direction about an accused's good character merely because the accused has adduced evidence of good character.[280]

3.151 Evidence of good character and evidence of bad character can be relevant to both 'credibility' and an accused's guilt or innocence. Where unchallenged evidence of good character is led the judge has a discretion whether or not to give a direction regarding evidence of good character after evaluating its probative weight in relation to the likelihood of the accused having committed the offence charged, or their credibility, or both.[281]

271 Leach uses the term 'other acts' instead of 'propensity evidence' (or 'uncharged acts') to avoid the perjorative connations of these other terms: Thomas Leach, '"Propensity" Evidence and FRE 404: A Proposed Amended Rule With An Accompanying "Plain English" Jury Instruction' (2001) 68 *Tennessee Law Review* 825.

272 Ibid 850, 852.

273 Note that Leach requires the jury to be persuaded of the commission of these other acts to the standard of 'clear and convincing evidence' that the other acts did occur and were committed by the accused (evidence that leaves no substantial doubt as to truth – that the proposition is 'highly probable'): Ibid 870.

274 Lord Chief Justice Nicholas Phillips, 'Trusting The Jury' (Paper presented at the Criminal Bar Association Kalisher Lecture, 23 October 2007).

275 These points have been taken from suggested directions in the decisions in: *R v Hanson and Others* [2005] EWCA Crim 824, [18] (Vice-President Rose LJ); *R v Cox* [2007] EWCA Crim 3365, [32]; also see *R v Campbell* [2007] EWCA Crim 1472, [44].

276 Adrian Zuckerman, 'Similar Fact Evidence – The Unobservable Rule' (1987) 104 *Law Quarterly Review* 187, 207.

277 Also see Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (2001) 7.

278 Adrian Zuckerman, 'Similar Fact Evidence – The Unobservable Rule' (1987) 104 *Law Quarterly Review* 187.

279 These range from 'mitigating the rigour of the law', the notion that good character evidence carries little risk of prejudice, and as a 'humane concession' to minimise the risk of a wrongful conviction': see David Ross, 'Accused Introduces His Own Bad Character' (2003) 8 (2) *Deakin Law Review* 291, 292. Good character evidence may not, however, be used to balance the accused's good character against the 'good character' of the prosecution witnesses, as this would shift the burden of proof: see *Cheatley v R* [1981] Tas R 123.

280 The accused may adduce evidence of their good character, for example, through cross-examination of police as to lack of prior convictions, or more general evidence about the accused through other witnesses such as their employer. Note that a character direction may not be necessary where good character evidence is of little merit, or has little probative value: *Melbourne v R* (1999) 198 CLR 1, 20 (McHugh J); *R v Aziz* [1996] 1 AC 41.

281 *Melbourne v R* (1999) 198 CLR 1. This is in contrast to the position in the UK and NZ: see *R v Vye* [1993] 3 All ER 241. The cases are closely analysed in Roderick Munday, 'What Constitutes a Good Character' (1997) *Criminal Law Review* 247.

# Chapter 3 Directions in Sexual Offence Trials

3.152 The purpose of directing the jury is to ensure they understand the relevance of that character evidence and how it can be used. The direction must make clear to the jury that they should have regard to the evidence of good character in assessing the accused's credibility and the unlikelihood of an accused's guilt, in deciding whether they should be satisfied as to the accused's guilt.[282]

### Difficulties with character directions

3.153 Directions about character raise the same difficulties in requiring complicated legal distinctions about evidence admissible for a limited purpose to be explained to the jury. In *R v Campbell*,[283] it was observed that character directions really do little more than assist the jury to use common sense, in saying that an accused's good character may both make it more likely the accused is telling the truth and less likely they committed the offence.

3.154 The judge may also have to consider how good character evidence interacts with other obligations to give directions to the jury, such as where the prosecution seeks to lead evidence to contradict this.[284] For example, where similar fact evidence is admitted, that the accused has engaged in similar conduct in the past, for the purpose of rebutting the accused's claim to good character, the judge must warn the jury that its use is limited to this purpose: it cannot be used as evidence that the accused has a propensity to commit the acts charged, nor be used to corroborate the evidence of the complainant.[285] The New Zealand Law Commission has referred to doubts regarding the limited effect of these type of directions, and whether juries are able, or even willing, to follow directions which require such 'mental agility'. [286]

## Directions relating to the jury's consideration of multiple counts

3.155 In addition to directions about propensity, there are other issues raised by evidence of multiple counts in sexual offence cases.

### Statutory provisions relating to joinder of counts

3.156 Prior to 1998, it was a rule of practice that sexual offence allegations involving different complainants should be tried separately, where the evidence in relation to one complainant was not admissible in relation to other complainants.[287] The view was that the potential prejudice to the accused from a joint trial involving more than one complainant could not be remedied by directions to the jury.[288]

3.157 In 1997, section 372 of the Crimes Act was amended to modify this rule. These amendments created a statutory presumption that multiple sexual offences on the same presentment are triable together, even though evidence on one count is not admissible on the other.[289] Rules relating to multiple counts being tried together serve broader public policy purposes which include maximising resources, convenience, efficiency, and easing the burden on complainants from having to give evidence numerous times.[290]

3.158 However, evidence given in respect of one count, where there are multiple counts against one or more accused in a trial, may also be propensity evidence.[291] Where a trial involves an accused charged with multiple counts involving multiple complainants,[292] the judge will have to give the jury appropriate warnings against reasoning that if they find the accused has committed an offence on one occasion in relation to one complainant, the accused is the kind of person likely to have committed a similar offence on another occasion, or against another complainant.[293] In *R v CHS*, Eames JA observed that whether or not a propensity warning is needed does not depend on a 'rigid factual or evidentiary category' of propensity evidence, but on whether such a warning is necessary and practical to avoid risking a miscarriage of justice.[294]

3.159 The directions that a judge must give the jury about how they use evidence in relation to the counts are further complicated in a trial with multiple accused. The judge must direct the jury that they are to consider the case against each accused separately. The judge must also identify as part of the summing up which evidence the jury can use in relation to each accused, and which evidence they cannot consider against each accused.[295] Where some evidence is inadmissible against an accused in a joint trial the judge is required to give clear directions to limit the risk of prejudice to that accused from the jury hearing the evidence.[296]

### Cross-admissible counts

3.160 Where multiple counts are presented together and all or some of the evidence is cross-admissible in relation to different counts, there is a risk that the jury will convict the accused on the basis of the combined allegations although they may not find the evidence convincing on any one of them. To guard against this risk of circular propensity reasoning the judge must give clear directions. These include a 'separate consideration' direction (discussed below), and directions about the way in which the evidence is admissible in relation to another count. For example, if multiple counts are cross-admissible as similar fact evidence, the directions about use of the evidence (as discussed above), such as an explanation of probability reasoning, and warning against propensity reasoning, will generally be needed.[297]

## Multiple counts involving single complainant[298]

### Separate consideration direction

3.161 Where multiple counts involve a single complainant, the judge will usually only need to give a warning as to 'separate consideration' of each of the counts. As this direction will usually include a warning against propensity reasoning, a discrete propensity warning is usually not needed:[299]

- The judge must direct the jury that they must consider each of the counts separately, and that evidence in relation to one count cannot be used as proof of the essential ingredients of another count.
- The jury must be told that they must not reason that because they found the accused guilty on one count, they are therefore guilty on another count.[300]
- The jury must also be told that they must not reason that because they found the accused not guilty on one count, they are therefore not guilty on another count.

3.162 Many sexual offence cases involve proof of separate counts against an accused being proved by one complainant's evidence alone. In *R v Markuleski*, the Court required a further direction in such cases to supplement the separate consideration direction: the jury should be directed that a reasonable doubt about the complainant's reliability or truthfulness on one count, should be taken into account in assessing the complainant's credibility generally.[301] The requirement for a '*Markuleski* direction' has been doubted in Victoria. Courts have considered that the jury are capable of assessing the complainant's evidence 'in light of their own experience' and with the benefit of counsels' addresses, without needing any further direction as suggested in *Markuleski*.[302]

282 Note that the judge has a discretion to decline to give a character direction in the case of a defendant without previous convictions if the judge 'considers it an insult to common sense': *R v Aziz* [1996] 1 AC 41, 53.

283 *R v Campbell* [2007] EWCA Crim 1472, [21]-[23] (Lord Phillips CJ).

284 It is also possible that the accused may introduce evidence of their own 'bad character' where relevant to an issue, and the judge may have to direct the jury accordingly on the use of such evidence and warn them against reasoning that a person of bad character is likely to have committed the offence charged: see generally, David Ross, 'Accused Introduces His Own Bad Character' (2003) 8 (2) *Deakin Law Review* 291.

285 *BRS v R* (1997) 191 CLR 275.

286 The Commission cites Cross's description of the credibility/ propensity distinction in relation to use evidence of past misconduct as 'enforced gibberish': New Zealand Law Commission, *Disclosure to Court of Defendants' Previous Convictions, similar Offending, and Bad Character* Report 103 (2008) 37.

287 *Sutton v The Queen* (1984) 152 CLR 528, 540-1; *De Jesus v The Queen* (1986) 68 ALR 1, 4-5 (Gibbs CJ) 12 (Brennan J), 16 (Dawson J); *Hoch v R* (1988) 165 CLR 292, 298.

288 *R v KRA* [1999] 2 VR 708, 713-4 (Winneke P).

289 The *Crimes (Amendment) Act 1997* (Vic) inserted s 372 (3AA) which reads: "if, in accordance with this Act, 2 or more counts charging sexual offences are joined in the same presentment, it is presumed that those counts are triable together". Subsection (3AB) provides that the presumption in (3AA) "is not rebutted merely because evidence on one count is inadmissible on another count".

290 Adrian Zuckerman, 'Similar Fact Evidence – The Unobservable Rule' (1987) 104 *Law Quarterly Review* 187, 200-1; David Ross, 'Joinder of Counts Against One Accused' (2004) 9 (1) *Deakin Law Review* 197, 199-200.

291 *R v DCC* (2004) 11 VR 129, 131-2.

292 This may be because an application for severance of the counts has not been sought, or has been refused on the ground that the convenience of trying the charges together far outweighs any risk of prejudice: see *KRM v The Queen* (2001) 206 CLR 221, 235 (McHugh J, with whom Hayne J agreed); *R v T* (1996) 86 A Crim R 293.

293 *R v Taylor* [2006] VSCA 53, [17]-[18] (Buchanan JA).

294 (2006) 159 A Crim R 560, 583-5.

295 See Judicial College of Victoria, *Victorian Criminal Charge Book* (2008) <http://www.justice.vic.gov.au/emanuals/CrimChargeBook/default.htm> at 8 September 2008; see for eg, *R v Nessel* (1980) 5 A Crim R 374; *R v Minuzzo and Williams* [1984] VR 417.

296 This involves a direction to consider each case separately, that evidence led in support of a count involving one accused does not provide proof of a count involving another accused; and that the jury must decide the case against each accused solely on the evidence that is admissible in relation to that accused: *R v Minuzzo and Williams* [1984] VR 417, 431; *R v T* (1996) 86 A Crim R 293.

297 *R v DCC* (2004) 11 VR 129, 131 (Callaway JA); *R v PJO* [2001] VSCA 213, [28] (Buchanan JA with whom Ormiston JA and O'Bryan AJA agreed).

298 In addition to the following directions a judge may need to give a *Murray* warning, discussed earlier.

299 *KRM v R* (2001) 206 CLR 221, 224; *R v Loguancio* (2000) 1 VR 235, 242. For example, there is generally less risk of the jury will reason that guilt on one count entails guilt on another: *R v J (no 2)* [1998] 3 VR 602, 642; *R v DCC* (2004) 11 VR 129, 131.

300 *R v Robertson* [1998] 4 VR 30, 40; *R v J [No 2]* [1998] 3 VR 602, 639.

301 *R v Markuleski* (2001) 52 NSWLR 82, 121-2 (Spigelman CJ). Wood CJ at CL suggests that whether this requires a judge to give a strong comment, a 'neutral reminder', or say nothing, depends on the circumstances of the case: 135.

302 *R v PMT* (2003) 8 VR 50, 59 (Buchanan JA). It was observed that such an additional direction would only undermine the separate consideration direction, and 'promote propensity reasoning and produce confusion'. This was approved in *R v Goss* [2007] VSCA 116, where Redlich JA confined *Markuleski* directions to cases where some unusual feature may give rise to a specific risk that a miscarriage of justice would occur without a direction.

# Chapter 3 Directions in Sexual Offence Trials

### Implications of the Evidence Act

3.163 The *Evidence Act 2008* introduces a statutory regime for dealing with propensity evidence through the provisions which provide for the admissibility of relevant 'tendency and coincidence' evidence.[303] Tendency evidence is evidence of a person's character, reputation or conduct, or tendency, which is used to prove that the person has or had a tendency 'to act in a particular way or to have a particular state of mind'. Coincidence evidence describes 'similar fact' type evidence at common law. It is evidence that two or more events have occurred, which is used to prove that a person 'did a particular act or had a particular state of mind', because of the improbability of the events occurring coincidentally, with regard to the similarities in the events or the circumstances in which they occurred. These provisions may overlap as some evidence may be relevant and admissible as both tendency and coincidence evidence.[304]

#### Directions where evidence not admitted for 'tendency or coincidence' purpose

3.164 In some circumstances, evidence of past conduct by the accused may be relevant and admitted for a purpose which is not a tendency or coincidence purpose.[305] Courts applying the uniform evidence legislation have drawn a distinction in sexual offence cases where evidence of uncharged sexual acts conduct has been admitted as 'relationship evidence'.[306] Relationship evidence has been admitted for the limited purpose of giving a background or 'context' to the charged offences.[307] Once admitted for that purpose, the evidence may not be used as 'tendency evidence', unless it also complies with the requirements in the tendency provisions discussed below.

3.165 Where evidence is relied on as background or context, the way in which it is relevant needs to be clearly articulated. Its relevance to a fact in issue should be shown by a process of reasoning which does not involve the jury drawing an inference based on the accused's 'tendency' to engage in particular behaviour.[308] Careful directions are considered necessary to guard against the risk that the jury will use evidence of 'relationship' or 'context' to engage in tendency reasoning.[309] The approach to the required directions is similar to that found in Victorian cases (at least prior to *HML*).[310]

3.166 The judge must direct the jury that they may not use the evidence for 'tendency reasoning'.[311] If evidence is used in this way as direct evidence going to proof of the elements of the charges, or where its true relevance lies in propensity or tendency reasoning, it ceases to become simply 'background' or 'context' evidence, and is subject to the tendency and coincidence provisions of the uniform evidence legislation, discussed below.[312]

3.167 The jury must be directed not to use the evidence as proof that the accused committed the acts charged, or that because the accused engaged in sexual conduct with the complainant on another occasion, the accused must have done so on the occasion charged.[313] Where evidence of uncharged acts discloses conduct which is similar to the charged offences, an anti-substitution direction has also been required.[314] It is likely that the decision in *HML* will be relevant to the admission of uncharged acts under the Evidence Act, however, the extent of its effect remains unclear.[315]

#### Directions where evidence is admitted for 'tendency or coincidence' purpose

3.168 If the evidence is sought to be used for the purpose of tendency or coincidence reasoning, the judge must first be satisfied that it has 'significant probative value', and the party seeking to adduce it has given the required notice before admitting such evidence.[316] In criminal proceedings, because of the dangers of 'tendency and coincidence' reasoning, the prosecution can only adduce such evidence about the accused by satisfying the judge that the probative value of the evidence 'substantially outweighs' any prejudicial effect it may have on the accused.[317] There are conflicting views about whether the judge should assume the jury will accept the evidence, when assessing its probative value.[318]

3.169 Where evidence is admitted under the tendency or coincidence evidence provisions, the trial judge will need to direct the jury as to the purpose for which it has been admitted.[319] Relationship evidence which shows a 'guilty passion' has been regarded as tendency evidence,

where it is directed to the likelihood that the charged sexual conduct occurred.[320] Directions about use of coincidence evidence may relate to the 'striking similarity or peculiarity' of the events which support an inference that the same person was involved in them.[321]

3.170 There are conflicting views as to whether the jury need to be directed that they must find any such 'tendency' of the accused proved beyond reasonable doubt. In *R v Barton,*[322] the court held that the requirement to direct the jury in this way did not arise in every case, but only in cases where they may use the evidence as an 'indispensable link in a chain of reasoning leading to a conclusion of guilt'.[323]

3.171 In general, decisions about the admission of tendency and coincidence evidence under the uniform evidence legislation reflect differing views as to the reasoning processes involved in determining the relevance and probative value of evidence, and the characterisation of those reasoning processes.

3.172 Judges face similar difficulties in directing juries as to the permissible uses and impermissible uses of this type of evidence under Victorian law currently.[324] Even where evidence is tendered for a non-tendency/coincidence purpose, if there is a real risk that the jury will use propensity reasoning to find the accused guilty, the judge must give clear directions about use and misuse of the evidence. This means that the complex common law relating to propensity evidence will continue to have some relevance even after the commencement of the uniform evidence legislation in Victoria.

## CONCLUSION

3.173 As this Chapter illustrates, the volume and complexity of directions and warnings which may be required in sexual offence trials create difficulties for the judges who are expected to correctly formulate them, and for the juries who are expected to understand and follow them. While this Chapter has made some suggestions about ways in which warnings might be simplified, the principal options in relation to this area relate to the possible introduction of a directions and warnings code. We consider this in more detail in Chapter 7.

303 Evidence is relevant where if accepted, it could 'rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding': *Evidence Act 2008* (Vic) s 55. The tendency and coincidence provisions do not apply where the prosecution adduces tendency or coincidence evidence to 'explain or contradict' similar evidence from the defence, or where evidence of character is adduced under ss 110-11 (relating to admission of evidence of the good character of the accused, and admission of evidence of character of a co-accused).

304 For example, *R v Outtram* [2007] Tas SC 98.

305 Odgers lists cases in which evidence of other conduct by the accused has been admitted for another purpose than proving tendency or coincidence, for example: evidence showing opportunity; evidence of prior conduct revealing a motive; evidence of a 'system' to achieve an outcome, evidence identifying the accused with the crime charged; evidence relevant to a person's state of mind; evidence putting other evidence in context; evidence proving a 'relationship', evidence forming a part of a relevant transaction: Stephen Odgers, *Uniform Evidence Law* (6th ed) (2004) 359-366.

306 *R v Hagarty* (2004) 145 A Crim R 138.

307 *R v AH* (1997) 98 A Crim R 71.

308 Miiko Kumar, et al, *Companion to Uniform Evidence Law* (2nd ed) (2007)

309 Ibid 334-5.

310 In *R v Fraser* [1998] NSWSC 286, the NSW Court of Criminal Appeal held that because there was no clear opinion in *Gipp v R* (1998) 194 CLR 106, the courts should continue to admit 'relationship' and 'context' evidence in line with *R v Beserick* (1993) 30 NSWLR 510. Admissibility and use of such evidence is subject to the discretions in ss135-137, Part 3.11 ('Discretionary and Mandatory Exclusions').

311 See *R v AH* (1997) 98 A Crim R 71, 78-9 (Ireland J).

312 Stephen Odgers, *Uniform Evidence Law* (6th ed) (2004) 362. Odgers notes that fine distinctions are often drawn in cases: see *R v Quach* [2002] NSWCCA 519 where a 'prior relationship of other drug dealings' was admitted to rebut an innocent explanation for a visit to the accused's house and bore on the improbability that there was no drug-related meeting, rather than to prove that the accused had a tendency to engage in drug dealing.

313 *R v ATM* [2000] NSWCCA 475, [76]; *R v AH* (1997) 98 A Crim R 71, 78-9; *BRS v The Queen* (1997) 191 CLR 275, 305; *Qualtieri v R* (2006) 171 A Crim R 463.

314 *R v Lumsden* [2003] NSWCCA 83; *R v Lewis* [2003] NSWCCA 180.

315 In the recent case of *Boney v R* [2008] NSWCCA 165, Hulme J (with whom the other members of the court agreed) referred to *HML*, noting that it was delivered 'well after the instant appeal was argued and made under the common law and not against the background of the restrictive terms of the Evidence Act dealing with the admissibility and use of tendency evidence'. In that case evidence of a violent relationship was inadmissible as it had not been admitted subject to the tendency provisions of the *Evidence Act 1995* (NSW). Hulme J observed, however, that the appellant may have argued that the jury should have been directed that evidence of previous acts could not be used to assess the relationship with the complainant unless they were satisfied of them beyond reasonable doubt: [87]-[89].

316 *Evidence Act 2008* (Vic) s 97(1)(a)-(b); s 98(1)(a)-(b). The notice requirements can be dispensed with by the court: s 100. See *R v Zhang* (2005) 158 A Crim R 504, 535 and *R v AN* (2000) A Crim R 176; *R v AB* [2001] NSWCCA 496, [15] for a discussion of the notice requirements in NSW courts, set out in *Evidence Regulations 2005* (NSW) reg 5.

317 *Evidence Act 2008* (Vic) s 101. Initially courts applied the common law test of admissibility established in *Hoch v R* (1988) 165 CLR 292 and *Pfennig v The Queen* (1995) 182 CLR 461, that the evidence must be so probative 'it bears no reasonable explanation other than the inculpation of the accused in the offence charged'. In *R v Ellis* (2003) NSWLR 700, the NSW Court of Criminal Appeal confirmed that the provision called for a balancing exercise to be conducted on the facts of each case. Special leave to appeal was revoked by the High Court but agreement was indicated with the decision of the NSW Chief Justice as to the construction of the uniform Evidence Acts: *Ellis v R* [2004] HCA Trans 488. See discussion in Australian Law Reform Commission, NSW Law Reform Commission, Victorian Law Reform Commission, *Uniform Evidence Law* ALRC Report 102, NSWLRC Report 112, VLRC Final Report (2005) 382.

318 See *R v Shamouil* (2006) 66 NSWLR 228 cf *Pfennig v R* (1995) 182 CLR 461 (applied in *KJR v R* [2007] NSWCCA 165).

319 *Rolfe v R* (2007) 173 A Crim R 168, 194.

320 *R v AH* (1997) 42 NSWLR 702, 708-709; 78; *R v Greenham* [1999] NSWCCA 8, [23]; *Qualtieri v R* (2006) 171 A Crim R 463, 484.

321 *R v WRC* (2002) 130 A Crim R 89: as with similar fact evidence, the evidence may be probative where it shows that the accused is involved in one of the events, from which the jury can infer that it was the accused involved in all of them. The probative value of coincidence evidence may also arise from the independent evidence about the events given by two or more witnesses in circumstances which make it improbable they would have given such similar accounts unless they had some 'foundation in fact': 102.

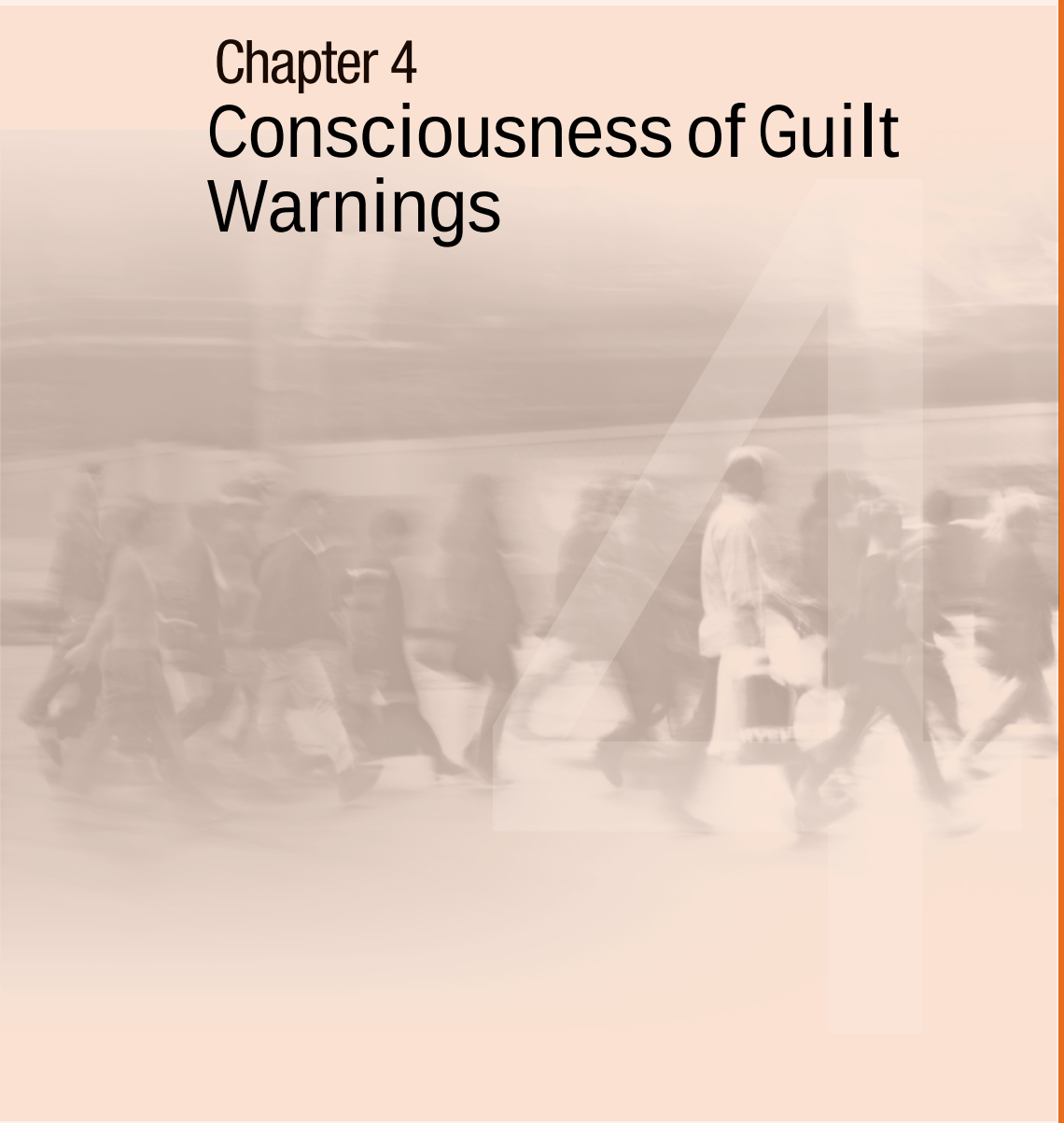
322 [2004] NSWCCA 229.

323 *R v Barton* [2004] NSWCCA 229, [45] (Grove J).

324 See James Wood, 'The Trial Under Siege: Towards Making Criminal Trials Simpler' (Paper presented at the District and County Court Judges Conferences, Fremantle, Western Australia, 27 June - 1 July 2007).

# Chapter 3 Directions in Sexual Offence Trials

# Chapter 4
# Consciousness of Guilt Warnings



# Chapter 4 Consciousness of Guilt Warnings

## INTRODUCTION

4.1 This chapter focuses on the particular area of consciousness of guilt warnings in order to illustrate how complex the law governing directions has become. We have also chosen the area of consciousness of guilt because, like warnings in the area of sexual offences, it has been the subject of a significant number of recent appeals.[1]

4.2 The law in relation to evidentiary directions can be complex in two ways. First, the threshold issue of determining whether a particular piece of evidence falls within a category that requires a warning about its use may be very difficult. Second, some of the directions which trial judges are required to give to juries about the way in which they may, or may not, use particular pieces of evidence are particularly complex. The consciousness of guilt case law illustrates how easy it is for trial judges to fall into error both because of the difficulties associated with identifying evidence that may merit a warning, and of the difficulties with devising a warning that is related to the circumstances of a particular case. The precise content of a consciousness of guilt warning can be difficult to determine because of the complexity, subtlety and questionable logic in the principles that trial judges are required to apply.

4.3 In this chapter we will first explain the meaning of consciousness of guilt evidence and how it may be used in a criminal trial. Secondly, we explain why the law requires a judicial warning to be given about this type of evidence and we describe the content of the warning. Thirdly, we provide a summary of the history of the warning, particularly its relationship to the doctrine of corroboration, in order to demonstrate how the current complexity and uncertainty surrounding the direction has developed. Fourthly, we identify the major criticisms of the warning and describe a number of problems with its practical application. Finally, the chapter contains a number of options for reforming the law.

### WHAT IS CONSCIOUSNESS OF GUILT EVIDENCE?

4.4 Consciousness of guilt evidence[2] is a kind of circumstantial evidence from which a jury may infer that the accused committed the crime. It includes conduct done by the accused such as lying, fleeing or concealing an important object following the occurrence of a crime. It is evidence from which a jury may infer that the accused is guilty because they may reason that the behaviour in question is an implied admission of guilt by the accused person. The term 'consciousness of guilt' is a shorthand way of conveying the suggestion that the accused must have behaved in a certain way because of a consciousness[3] that he or she was guilty of the crime in question. Kirby J explained the origin of the term:

> *[The phrase] can probably be traced to early psychological suggestions, picked up in the writings of Wigmore, that the commission of a crime somehow leaves 'mental traces' on the criminal which show themselves just as surely as 'indelible traces of blood, wounds or rent clothing, which point back to the deed as done by him'. According to this psychological theory, the 'traces' will ultimately find their outlet in the criminal's conduct. They will permit a jury to conclude that the accused is guilty of the offence because it elicits the manifestation of such 'traces'. They are thus equivalent to a confession or admission of guilt. There are illustrations of this theory in literature from Shakespeare to Dostoyevsky.*[4]

4.5 The inference the jury may draw from the conduct that may demonstrate consciousness of guilt is often characterised as a two-stage reasoning process: first, the jury is asked to infer from proof of the *conduct in question* (for example, the lie) that the accused's motivation for the conduct was a belief that he or she was involved in some wrongdoing. Secondly, the jury is asked to infer from that belief that the accused is guilty of the crime charged.[5] A simple example illustrates the process of reasoning that is required.[6]

A man is interviewed over the death of a woman. Shortly after being interviewed by the police, the man moves out of his house leaving no forwarding address. Later, he is found living 150kms away, under an assumed name. In such a case, the prosecution may wish to use the sudden departure and the assumed name as consciousness of guilt evidence. The inferential process sought by the prosecution would be:

1. It is proven that:
   a) the accused left home suddenly
   b) the accused moved a substantial distance from his prior address
   c) at his new home, he lived under a false name
2. Innocent people generally do not do any of these things
3. Therefore, in doing any or all of these things, the accused was motivated by his belief that he had done something wrong
4. A person would not believe they did something wrong unless that has actually done something wrong.
5. Therefore, having shown the accused did 1a), b) and/or c) because they believed they had done something wrong, the accused must be guilty of the crime charged.[7]

If accepted, it is open to the jury to use this evidence in assessing whether the accused committed the offence charged. The significance of consciousness of guilt in any given case is likely to vary, according to the nature of the conduct underlying the inference and any innocent explanations for the conduct offered by the defence.

4.6 A trial judge is required to give the jury a warning about evidence of this nature when the prosecution has invited the jury to treat post-offence conduct as an implied admission of guilt and it is capable of being used in this way, or when the trial judge apprehends that there is a real danger that the jury may use evidence in this way even though the prosecution has not invited them to do so. The precise content of the warning depends upon the circumstances of the particular case.

## THE NEED FOR A JUDICIAL WARNING

4.7 The courts have determined that a warning about the use of consciousness of guilt evidence is required to prevent members of the jury misusing the evidence by inferring guilt directly from the conduct, rather than pausing to consider other possible reasons for the conduct.[8] As Professor Williams put it when discussing a common category of consciousness of guilt evidence—lies by an accused person—there is a 'danger of moving too readily from a conclusion that an accused has lied to a conclusion that the accused is guilty of the crime

1 In the period 2000-2007, approximately 14% of a total of 537 appeals from conviction raised issues relating to consciousness of guilt. In some individual years, consciousness of guilt issues were raised in more than 20% of all appeals heard that year. Further statistical information is contained in Appendix A.

2 The use of the term consciousness of guilt evidence has been criticised, most notably by the Supreme Court of Canada, because it is a misleading label (*R v White* [1998] 2 SCR 72, 85) . Increasingly this evidence is becoming known as 'post-offence conduct': see *R v Arcangioli* [1994] 1 SCR 129; *R v Franklin* (2001) 3 VR 9, 50; *Zoneff v The Queen* (2000) 200 CLR 234, 260 ('*Zoneff*').

3 The word 'consciousness' in this context is unfortunate, because it is ambiguous. On the one hand, a person who is conscious (i.e. aware) that they have committed a crime may well be motivated to certain acts by that 'consciousness of guilt'. On the other hand, 'consciousness of guilt' is sometimes used interchangeably with 'guilty conscience' to suggest a kind of psychic leakage where the accused's actions are motivated at an unconscious level by the fact of the actor's guilt: see *Zoneff v R* (2000) 200 CLR 234, 259; Andrew Palmer, 'Guilt and the Consciousness of Guilt: The Use of Lies, Flight and Other ''Guilty Behaviour'' in the Investigation and the Prosecution of Crime' (1997) 21 *Melbourne University Law Review* 95, 113–114.

4 *Zoneff v R* (2000) 200 CLR 234, 258-259.

5 John Henry Wigmore appears to have been the first to analyse the structure of the consciousness of guilt inference and proposed the two-stage inference: Wigmore, *Treatise on the Anglo-American System of Evidence in Trials at Common Law* (2nd ed, 1923) §§ 267, 273. Later scholars have followed this approach: see Andrew Palmer, 'Guilt and the Consciousness of Guilt: The Use of Lies, Flight and Other 'Guilty Behaviour' in the Investigation and the Prosecution of Crime' (1997) 21 *Melbourne University Law Review* 95; David Hamer, "Hoist with His Own Petard"? Guilty Lies and Ironic Inference in Criminal Proof' (2001) 54 *Current Legal Problems* 377.

6 The facts in this example are based on the recent case of *R v Jakimov* [2007] VSCA 9.

7 A particular difficulty arises in cases of homicide and some other offences where the conduct could be justified by reference not to an innocent explanation such as panic, but to guilt of a lesser offence, eg, manslaughter. This issue has been considered by the Victorian Court of Appeal in recent years on three occasions, most recently in *R v Ciantar*; *DPP v Ciantar* (2006) 16 VR 26 ('*Ciantar*') and is discussed below.

8 *Edwards v the Queen* (1993) 178 CLR 193 ('*Edwards*'); *R v Renzella* [1997] 2 VR 88 (CA); *R v Gallagher* [1998] 2 VR 671; *Ciantar* (2006)16 VR 26.

# Chapter 4 Consciousness of Guilt Warnings

charged'.[9] For this reason, many of the major common law jurisdictions require a trial judge to give the jury some form of warning about the use of consciousness of guilt evidence.[10] In Australia, this requirement stems from the decision of the High Court in *Edwards v the Queen* in 1993.[11]

4.8 The principle Australian common law authority on the need for a warning about the use of consciousness of guilt evidence is Edwards. In that case the primary issue in the appeal was whether a lie by an accused person could corroborate the testimony of a witness which required corroboration. The majority judges discussed matters that extended beyond this issue. It is not clear whether the majority judges saw themselves as laying down a common law rule of general application to be applied in all cases where the jury is required to deal with evidence which may demonstrate a consciousness of guilt. That was, however, the outcome of the case.

4.9 In *Edwards*, the evidence in question was an alleged lie told by the accused person when giving evidence at his trial. The trial judge informed the jury that the alleged lie could corroborate the victim's evidence if it met the four tests stated by Lord Lane CJ in the English case of *R v Lucas*.[12] After resolving the issue of corroboration, the majority of the High Court considered what a jury should be told about the use they could make of evidence which was a lie. As we have seen, lies are a form of post-offence conduct from which a jury may be asked to infer a consciousness, or 'implied admission',[13] of guilt by the accused person.

4.10 After acknowledging that '[o]rdinarily, the telling of a lie will merely affect the credit of the witness who tells it', the majority judges in *Edwards* went on to observe that '[a] lie told by an accused may go further and, in limited circumstances, amount to conduct which is inconsistent with innocence, and amount therefore to an implied admission of guilt'.[14] Because 'not every lie told by an accused person provides evidence probative of guilt',[15] the majority judges were concerned to ensure that juries received sufficient guidance about the use that could be made of a lie. Consequently, they considered in some detail what the jury should be told about a lie by the accused which may exhibit a consciousness of guilt. These statements by the majority judges have become known as the *Edwards* direction. Despite the fact that it is mandatory to give the direction in particular circumstances, seven years later in *Zoneff*, four judges of the High Court stated that 'rigid prescriptive rules as to when and in what precise terms an Edwards-type direction should be given cannot be comprehensively stated'.[16]

## THE CONTENT OF THE WARNING

4.11 In *Edwards*[17] the High Court adopted the approach taken by the High Court of England and Wales in *R v Lucas* when formulating the content of what a jury should be told about consciousness of guilt lies.[18] The majority in *Edwards*[19] ruled that the jury must be told that lies could be used as evidence of guilt only if the lies, in all the circumstances of the case, revealed knowledge of the offence and that the accused's motivation for telling lies was that the truth would implicate him or her in the commission of the offence. They also noted that the jury should be instructed that there may be other possible motives for the lies, apart from consciousness of guilt. The majority judges stated:

> *Thus, in any case where a lie is relied upon to prove guilt, the lie should be precisely identified, as should the circumstances and events that are said to indicate that it constitutes an admission against interest . And the jury should be instructed that they may take the lie into account only if they are satisfied, having regard to those circumstances and events, that it reveals a knowledge of the offence or some aspect of it and that it was told because the accused knew that the truth of the matter about which he lied would implicate him in the offence, or, as was said in* Reg v Lucas (Ruth)*, because of "a realization of guilt and a fear of the truth".*
>
> *Moreover, the jury should be instructed that there may be reasons for the telling of a lie apart from the realization of guilt. A lie may be told out of panic, to escape an unjust accusation, to protect some other person or to avoid a consequence extraneous to the offence. The jury should be told that, if they accept that a reason of that kind is the explanation for the lie, they cannot regard it as an admission. It should be recognized*

*that there is a risk that, if the jury are invited to consider a lie told by an accused, they will reason that he lied simply because he is guilty unless they are appropriately instructed with respect to these matters.*[20]

4.12 Since *Edwards,* trial judges have been required to give juries elaborate and highly detailed directions about consciousness of guilt evidence that complied with these statements in the majority judgment. Recently, a five judge bench of the Victorian Court of Appeal summarised the warning that is currently required:

> *In…charging the jury on any evidence which is capable of constituting evidence of consciousness of guilt for the purpose of an issue, the judge should take each offence left to the jury in turn and, by reference to that offence, identify for the jury:*
>
> (a) the evidence of post-offence conduct upon which the Crown relies;
>
> (b) each issue in respect of that offence for which the Crown relies upon the evidence of post-offence conduct; and
>
> (c) the act, facts and circumstances which are said to show that the post-offence conduct bespeaks consciousness of guilt for the purposes of that issue.
>
> *Consistently with Edwards, the judge should direct the jury that there may be many reasons for post-offence conduct apart from consciousness of guilt.* [21]

4.13 A fundamental problem with the *Edwards* direction is the complex and technical requirements that it places on the use which the jury may make of consciousness of guilt evidence. It may be, as Kirby J observed in *Zoneff v R,* that 'the law has tended to complicate needlessly a subject that calls upon the jury's reserves of common sense'.[22] The difficulty of complying with *Edwards* is well illustrated by the many appeals concerning consciousness of guilt evidence since the decision was handed down.[23] This level of complexity did not exist prior to *Edwards* as the next section illustrates.

## HISTORICAL BACKGROUND: CONSCIOUSNESS OF GUILT PRIOR TO *EDWARDS*

4.14 Consciousness of guilt evidence has long been used to persuade juries of the guilt of the accused. Examples of the use of such evidence can be found as early as 1796.[24] Examples of judicial warnings about the use of this evidence appear as early as 1850.[25] These early warnings appear to have been brief and to have been concerned with the possible equivocal nature of the conduct that is said to found the inference of a consciousness of guilt.

9 CR Williams, 'Lies as evidence' (2005) 26 *Australian Bar Review* 313.

10 Australia (*Edwards v R* (1993) 178 CLR 193), England (*R v Goodway* (1994) 98 Cr. App. R. 11) and Canada (*Gudmondson v the King* (1933) 60 C.C.C. 332) all require warnings. New Zealand has a lies direction, but it is substantially different in tone from the other warnings. Indeed, in New Zealand it has been suggested that trial judges are too reluctant to let lies go to the jury as evidence of actual guilt, as opposed to simply undermining the witness' credibility: New Zealand Law Commission, *Evidence* Report 55 (1999) [481].

11 (1993) 178 CLR 193.

12 In *R v Lucas* [1981] QB 720, it was said that in order to be used as evidence of guilt, a lie must be (a) deliberate, (b) relate to a material issue, (c) be motivated by a 'realization of guilt and a fear of the truth' and (d) be shown to be lies by evidence other than the evidence to be corroborated. This is discussed further below at 4.17.

13 In *Edwards v R* (1993) 178 CLR 193, the High Court used the phrase 'implied admission of guilt' as synonymous with consciousness of guilt evidence. This usage has been the subject of criticism on the grounds that it is inaccurate and misleading: Andrew Palmer, 'Guilt and the Consciousness of Guilt: The Use of Lies, Flight and Other "Guilty Behaviour" in the Investigation and the Prosecution of Crime' (1997) 21 *Melbourne University Law Review* 95, 96, 99; See also Wigmore, §1052.

14 (1993) 178 CLR 193, 208.

15 Ibid, 209.

16 *Zoneff v R* (2000) 200 CLR 234, 244 (Gleeson CJ, Gaudron, Gummow and Callinan JJ).

17 (1993) 178 CLR 193.

18 [1981] QB 720.

19 Deane, Dawson and Gaudron JJ.

20 (1993) 178 CLR 193, 210-211.

21 *Ciantar* (2006) 16 VR 24, 51 – 52.

22 (2000) 200 CLR 234, 246.

23 In the period 2000-2007, approximately 14% of a total of 537 appeals from conviction raised issues relating to consciousness of guilt. In some individual years, consciousness of guilt issues were raised in more than 20% of all appeals heard that year.

24 In 1724, Hawkins, in his Pleas of the Crown, lists conduct which 'betrays a consciousness of guilt' as a ground for a constable to arrest a person without a warrant: quoted in Barbara Shapiro, "Beyond Reasonable Doubt" and "Probable Cause": Historical Perspectives on the Anglo-American Law of Evidence (1991), 138 <www.escholarship.org/editions/view?docId=ft409nb30v&brand=eschol> at 11 September 2008. In 1796, in Crossfield's case (1796) 26 How. St. Tr. 1 the Crown endeavoured to use the accused's flight to France as evidence of consciousness of guilt in a treason case (for defence argument, see 161; for Lord Eyre's summing up, see 216).

25 See *Webster's Trial*, Bemis' Rep. 486, quoted in Wigmore, §273:

> Such are the various temperament of men, and so rare the occurrence of the sudden arrest of a person upon so heinous a charge [as murder], that who of us can say how an innocent or a guilty man ought or would be wholly likely to act in such a case, or that he was too much or too little moved for an innocent man? Have you any experience that an innocent man, stunned under the mere imputation of such a charge, though conscious of innocence, will always appear calm and collected? Or that a guilty man who, by knowledge of his danger, might be somewhat braced up for the consequences, would always appear agitated? Or the reverse? Judge you concerning it.

Another example appears in a textbook of jury instructions from 1881: Frederick Sackett, *Instructions and Requests for Instructions From the Court to the Jury in Jury Trials* (1881). The instruction is:

> Contradictory and Inconsistent Statements— If the jury find, from the evidence, that the accused, at or about the time of his arrest, made false and contradictory statements, calculated to excite suspicion against him, still, these statements, if they can reasonably be attributed to any other motive, or cause, than that of a consciousness of guilt of the crime charged in the indictment, and a desire to conceal it, then they should be so attributed and explained,

# Chapter 4 Consciousness of Guilt Warnings

4.15 Prior to *Edwards* in 1993, there were two distinct lines of cases dealing with consciousness of guilt evidence: those in which consciousness of guilt evidence was used as circumstantial evidence, and those where it was used as corroboration. Each category prompted a distinct response.

### Consciousness of guilt as circumstantial evidence

4.16 Prior to the decision in *Edwards*, trial judges do not appear to have been required to give a warning if consciousness of guilt evidence was simply used as circumstantial evidence. In such cases, where most or all of the evidence used against the accused was circumstantial a direction about this type of evidence was required, but consciousness of guilt evidence was not addressed separately. For example, in *R v Charlton*,[26] the trial judge gave what appears to be a standard circumstantial evidence direction,[27] with no particular direction on the use of lies by the accused. This approach was approved by the Full Court of the Victorian Supreme Court.[28]

### Consciousness of guilt as corroboration

4.17 By contrast, in cases prior to *Edwards* where lies were used as corroboration, a specific and very technical and complex warning about the way in which that evidence could be used was required. The law in relation to corroboration is increasingly defunct due in part to its technicality and complexity.[29] Historically, however, where the testimony of an unreliable witness was relied upon, the judge was required to tell the jury that it would be 'dangerous' to convict on the testimony of that witness alone and that the jury should look for corroborative evidence that confirmed the account given by the unreliable witness.[30] One accepted form of corroborative evidence was lies by the accused.[31]

4.18 Evidence amounted to corroboration when it was:

- independent of the witness whose evidence required corroboration
- material, in that it must relate broadly to a fact in issue or subsidiary fact and
- capable of implicating the accused in the crime charged by tending to show that the crime was committed by the accused. [32]

4.19 Only when these requirements were met could the evidence be used as corroboration of 'unreliable testimony'. In cases where corroboration was required, the prosecution could seek to rely on lies in the form of false denials by the accused to support the evidence of the unreliable witness.

4.20 The judge was required to give a corroboration warning and explain to the jury the requirements of corroboration. The jury would determine what evidence, if any, corroborated the account of the unreliable witness.

4.21 To summarise, prior to *Edwards*, it was unnecessary to give the jury a warning about consciousness of guilt evidence in all cases. A warning was required only when consciousness of guilt evidence was used as corroborative evidence.

## THE IMPACT OF *LUCAS* AND *EDWARDS*

4.22 It is instructive to consider the decisions in the cases of *Lucas* and *Edwards* against this historical background. As we have noted, the reasoning in *Edwards* is largely drawn from the English decision of *R v Lucas.* Both *Edwards* and *Lucas* were cases in which corroboration was required.[33] The High Court decision in *Edwards*, however, expanded the application of the *Lucas* principles beyond corroboration cases and applied them to all cases in which consciousness of guilt evidence is used.[34]

4.23 In *Lucas*, the accused was charged with two drug importation offences. The evidence in relation to one of these charges came from an accomplice. At the end of the trial, the jury were warned of the dangers of convicting on the basis of uncorroborated evidence, however the direction also suggested that lies told by the appellant in court could be considered as corroborative of the accomplice's evidence. In quashing the conviction, the Court of Criminal Appeal[35] held that the mere rejection of an accused's evidence does not imply that an accomplice's evidence has been corroborated. Rather, the nature and the content of the lie may only be capable of providing corroboration if it can be proved to be a lie.

4.24 Lord Lane CJ set out a four-point test for the circumstances in which a lie might amount to corroboration:

1. It must be shown to be a deliberate lie (as opposed to merely a mistake).
2. It must be material to the offence charged.
3. The lie must be told out of a 'realization of guilt and a fear of the truth'.
4. It must be shown to be a lie by evidence other than that to be corroborated.

4.25 As there was no proof that Lucas had lied other than the assertion of an accomplice witness, the fourth requirement was not met.

4.26 The decision in *Lucas* applied the requirements of the doctrine of corroboration, rather than with the separate issue of the instructions (if any) which the jury should be given about the way in which it may use consciousness of guilt evidence.[36]

4.27 In *Edwards*, the accused was a prisoner charged with procuring another prisoner to commit an act of gross indecency upon him in a prison van. The main evidence against Edwards was the testimony of victim, Williams. As the offence was sexual in nature, Williams' testimony was considered unreliable and the jury were warned about the need for corroboration.

4.28 The case against Edwards was that he knew Williams was being attacked by other prisoners in the van. It was alleged that he had offered to protect Williams from further violence, in return for oral sex. At trial, Edwards denied any knowledge of the offence or attacks on Williams by other prisoners. The prosecution argued that Edwards was lying about his awareness of these other attacks and that this lie could be used as corroboration of Williams' testimony. Counsel for the defence argued the lies, if they were lies, were motivated by a desire not be seen as 'a dog' or prison informant. The trial judge directed the jury that if the lies satisfied the criteria set out in *Lucas*, noted above, they could be used as evidence of guilt. Edwards was convicted and appealed. The Queensland Court of Criminal Appeal dismissed the appeal,[37] but the High Court granted special leave to appeal.

4.29 Even though the case was one in which corroboration was required because of the nature of the offence—and could have been dealt with solely on that basis—the majority of the High Court decided that a consciousness of guilt direction should be given whenever the prosecution contends that a lie is evidence of guilt.[38] In doing so, the majority effectively adopted the *Lucas* test, concerning corroboration. The majority judgment goes further than *Lucas* because it requires the trial judge to precisely identify each lie, as well as the circumstances and events said to indicate that the lie constitutes 'an admission against interest'.[39]

26 [1972] VR 758. The charge is extracted at 762 – 763. The Full Court described the trial judge's direction as 'full and careful'.

27 When the prosecution relies on circumstantial evidence to prove the accused's guilt, the judge may be required to direct the jury that:

- The accused's guilt must be the only rational inference from the circumstances established by the evidence; and
- That the jury must be satisfied of the evidence upon which the inference is based beyond reasonable doubt.

See *Chamberlain v The Queen (No. 2)* (1984) 153 CLR 521.

28 [1972] VR 758. The lack of any mandatory obligation to give a warning, however, did not prohibit trial judges from giving a specific warning, if they thought it was necessary: see *R v Perera* [1982] VR 901. In that case, the trial judge specifically directed the jury on the use of consciousness of guilt evidence. The Full Court approved this approach on appeal.

29 See s 61; *Crimes Act 1958* (Vic) and s 164; Uniform Evidence Acts. The need for a corroboration warning in cases involving accomplices and young children still exists in Victoria, but will cease when the Uniform Evidence Act enters into force in Victoria.

30 Generally, the common law allowed people to be convicted on the evidence of one witness except in the case of certain classes of people considered to be unreliable. These classes included accomplices, children and victims of sexual offences. A jury was entitled to convict regardless of whether it found corroboration: *R v Jarvis* (1837) 170 ER 207, although Bentley regards instructing the jury that they can convict in the absence of corroboration as a 'twentieth-century practice': David Bentley, *English Criminal Justice in the 19th Century* (1998) 251.

31 See, eg, *Eade v the Queen* (1924) 34 CLR 154. Whether a specific lie is capable of amounting to corroboration will depend on the circumstances of the relevant case. It is important that the lie can be shown to be false by evidence other than the testimony to be corroborated. Any lie must also be shown to be deliberate, ie not the result of a mistake on the part of the accused.

32 This definition follows that of Lord Reading VC in *R v Baskerville* [1916] KB 658, 665.

33 In *Edwards v R* (1993) 178 CLR 193, corroboration was required because the offence was a sexual offence and the sole witness was the victim. In *Lucas*, corroboration was required because the main prosecution witness was an accomplice.

34 This expansion is consistent with an apparent trend in High Court authority following the decision of *Bromley v the Queen* (1986) 161 CLR 315. In that case, the High Court rejected an argument that mentally impaired witnesses were unreliable as a class and required a corroboration warning to be given. Instead, the Court ruled that a warning was required explaining the risks of accepting that kind of evidence. *Bromley* is important because it appears to be the first case in which the High Court required a warning based on the type of evidence given, rather than on the type of witness giving the evidence.

35 [1981] QB 720, 723.

36 This point was made by the English Court of Criminal Appeal in *R v Richens* (1993) 98 Cr App R 43, 51 (Lord Taylor LCJ).

37 Unreported, Queensland Court of Criminal Appeal, Thomas, Williams and Derrington JJ, 13 December 1991.

38 Certainly, this is how it has been interpreted in Victoria: *R v Renzella* [1997] 2 VR 88, 91 – 92. See also *Zoneff v R* (2000) 200 CLR 234, 244.

39 In corroboration cases, it appears that the jury need only be given 'a broad indication of the sort of evidence' that may be treated as corroboration: *R v Matthews and Ford* [1972] VR 3, 22. At least by the mid 1980s, there appears to have been some discussion about whether the judge was required to specifically identify what evidence was capable of amounting to corroboration (equivalent to the *Edwards* requirement in respect of lies): see discussion of Ormiston J in *R v Rosemeyer* [1985] VR 945, 958. In 1998, however, the Victorian Court of Appeal appears to have adopted the view in *Matthews and Ford*, albeit recognising some cases may call for a more detailed warning: see *R v Rayner* [1998] 4 VR 818, 840 (Winneke P).

# Chapter 4 Consciousness of Guilt Warnings

4.30 *Edwards* enshrined in the Australian common law a new jury warning about lies being used as evidence of guilt. While that warning has been drawn from cases concerning the need for corroboration of the testimony of unreliable witnesses, it is more demanding than the corroboration warning in some ways.[40] As a consequence of *Edwards* trial judges are required to apply a test that is heavily based on an area of law (corroboration) that was considered outmoded and overly technical more than 20 years ago.[41]

## PROBLEMS WITH THE *EDWARDS WARNING*

4.31 The main problems with the warning can be summarised as follows:

- it is effectively compulsory to give the warning when there is any risk that a jury may use post-offence conduct as 'evidence of guilt'
- the application of Edwards is uncertain, as it is difficult to determine whether a warning is required in a given case
- the actual content of the warning is cumbersome
- it has the potential to mislead and confuse the jury
- it has the potential to cause prejudice to the accused
- it has the potential to cause prejudice to the prosecution.

Each of these problems will be outlined in turn.

### EFFECTIVELY COMPULSORY

4.32 The *Edwards* warning is effectively compulsory in any case in which the prosecution leads evidence capable of being used by the jury to establish consciousness of guilt. It is compulsory whenever the prosecution seeks to rely on consciousness of guilt evidence.[42] It is also, however, required in any case where there is a 'real danger' that the jury will improperly use evidence that is incapable of amounting to consciousness of guilt evidence, as consciousness of guilt evidence.[43] Given the potential consequences of not giving a direction, trial judges are likely to err on the side of caution and give the warning whenever evidence of this nature is presented because of a desire to both avoid a re-trial and to ensure the accused receives a fair trial.[44]

### UNCERTAIN IN APPLICATION

4.33 One of the most significant problems with the *Edwards* warning is that it requires the trial judge to identify whether any given piece of evidence is capable of supporting a consciousness of guilt inference.[45] This requirement applies even when the prosecution does not ask the jury to treat the evidence in this way and the defence does not seek an *Edwards* direction.[46]

4.34 A real problem that can arise during a criminal trial is that reasonable people may differ about whether a particular piece evidence is capable of supporting a consciousness of guilt inference. The proper characterisation of evidence is sometimes equivocal. This point is well illustrated by Edwards itself, where Brennan and McHugh JJ were prepared to accept that the lies in question could lead to an inference of an implied admission of guilt,[47] whereas the majority held they could not.[48] More recently, in *R v MMJ*,[49] the Victorian Court of Appeal divided over whether the failure to respond to an allegation of incest was conduct from which an inference could be drawn.

4.35 This uncertainty is particularly problematic when considering the fact that there is no margin for error with determining whether evidence is capable of supporting a consciousness of guilt inference. This can be contrasted with the question of admissibility of evidence, where the trial judge is given a clear discretion and appellate courts will only allow appeals in relation to decisions that were plainly wrong. [50]

4.36 The identification requirement appears to give rise to half of all retrials in the area of consciousness of guilt.[51] A failure to identify 'correctly' which evidence is capable of bearing the inference may result in:

- no warning being given (where there is no evidence identified as being capable of bearing the inference)[52]
- a warning given in relation to some, but not all, of the conduct capable of giving rise to the inference[53]
- a warning being given where the evidence does not justify it.[54]

4.37 Any of these outcomes is an error of law which may result in a successful appeal.[55] The problem of identification has been compounded by the failure of the High Court and the Court of Appeal to provide any assistance, beyond what was said in *Edwards*, in determining which evidence is capable of bearing a consciousness of guilt inference.[56]

4.38 The problem of identification is particularly acute in cases where there is more than one piece of consciousness of guilt evidence.[57] A good example is the recent case of *R v Ali* (No 2).[58] In that case, the trial judge correctly identified two pieces of evidence as giving rise to a consciousness of guilt inference and gave the correct direction on each.[59] The Court of Appeal, however, identified several other items of evidence that could have given rise to a consciousness of guilt inference. As the jury had not received an *Edwards* direction about these matters, the appeal was upheld.[60]

4.39 Additional difficulty arises when the evidence in question is a lie, or lies, told by the accused person. *Edwards* itself makes it clear that the trial judge must distinguish between lies told by the accused that are capable of being consciousness of guilt evidence and lies that only affect the accused's credibility as a witness.[61] As the High Court's decision in *Zoneff*[62] illustrates, if the trial judge wrongly characterises evidence of a lie by an accused as a lie capable of raising an inference of guilt, when it merely goes to credit, and gives the jury an *Edwards* direction, that direction will be an error of law that may cause a conviction to be quashed. If a lie affects only the credit of the accused, the trial judge must give the jury a *Zoneff* direction about not adopting a reasoning process that uses a finding that a person has lied about something as evidence of their guilt of an offence.[63]

40 Ibid.

41 See Law Reform Commission [Australia], *Evidence, Volume 1* Interim Report 26 (1985), [1015]. See also *Vetrovec v R* [1982] 1 SCR 811.

42 *R v Renzella* [1997] 2 VR 88, 90.

43 *Dhanhoa v the Queen* (2003) 217 CLR 1, 12; *R v VN* (2006) 15 VR 113, 129. An alternative formulation, used in respect of evidentiary warnings more generally, is that a warning must be given where the failure to give a warning will result in a 'perceptible risk of injustice': *Osland v the Queen* (1998) 197 CLR 316, 333 – 334.

44 *R v Cuenco* (2007) 16 VR 118, 127. There, Maxwell P. stated 'Understandably, and in my view correctly, trial judges tend to err on the side of caution [in deciding whether to give *Edwards* directions]'.

45 See *R v Ciantar* (2006) 16 VR 26, 51: 'In all cases, it will be for the judge to determine whether evidence of post-offence conduct, taken in conjunction with any specified acts, facts and circumstances, is capable of constituting evidence of consciousness of guilt for the purposes of an issue'.

46 *R v Russo (No. 2)* [2006] VSCA 297; *R v Hartwick & Ors* (2005) 14 VR 125.

47 *Edwards v R* (1993) 178 CLR 193, 205 per Brennan J; 215 (McHugh J).

48 Ibid, 211–212: 'One troubling aspect of the direction given by the trial judge in this case is that it is difficult, if not impossible, to regard the appellant's evidence-in-chief as involving a deliberate lie.' This statement appears to beg the question as to whether *Edwards* was an appropriate vehicle for the wide-ranging rule it laid down.

49 (2006) 166 A Crim R 501.

50 *House v the King* (1936) 55 CLR 499. By contrast, the failure to give a warning will generally lead to the quashing of a conviction and a retrial: *Carr v the Queen* (1988) 165 CLR 314, 325; see also *R v Stewart* (2001) 52 NSWLR 301, 327.

51 Out of the approximately 30 successful appeals on consciousness of guilt grounds in the period 2000–2007, 15 appear to be based, in whole or in part, on the question of whether the evidence was capable of bearing a consciousness of guilt inference.

52 See *R v Dat Tuan Nguyen* (2001) 118 A Crim R 479, although Ormiston JA suggests, in *R v Franklin*, that case involved a deliberate attempt by the prosecution and the trial judge to avoid giving a warning: (2001) 3 VR 9, 50–51.

53 See *R v Ali (No. 2)* (2005) 13 VR 257.

54 This was stated to be an appealable error in *R v Renzella* [1997] 2 VR 88, 91.

55 In principle, the question for the appellate court is whether the failure to give warning (or the giving of a flawed warning) creates a significant risk of a miscarriage of justice. In practice, it appears that the failure to give a warning results in a presumptive miscarriage, unless the evidence is so overwhelming that the accused would have been convicted in any event.

56 See *R v Ciantar* (2006) 16 VR 26, 48 and cases cited there. It should be recognised that intermediate appellate courts 'can do little else than attempt to apply *Edwards*' (per Ormiston JA, *R v Chang* (2003) 7 VR 236, 238). Any attempt to elaborate on its requirements runs the risk of being reversed by the High Court for being incompatible with *Edwards*. The point should not be taken too far, however, since any appellate court decision runs the risk of reversal by the High Court.

57 Again, this problem appears to arise from the law of corroboration: In *Conway v the Queen* (2002) 209 CLR 203, the trial judge directed on 18 pieces of evidence, but erred in relation to 4 of them. The difficulty is more severe in consciousness of guilt cases, since a trial judge could avoid a corroboration warning by opting not to give one, whereas a trial judge has no discretion when it comes to the giving of an *Edwards* warning.

58 (2005) 13 VR 257. See also *R v Vetrovec* [1982] 1 SCR 811 [14].

59 *R v Ali (No. 2)* 266, 267.

60 Ibid, 267.

61 *Edwards v R* (1993) 178 CLR 193, 208.

62 (2000) 200 CLR 234.

63 Ibid, 245.

# Chapter 4 Consciousness of Guilt Warnings

## CUMBERSOME CONTENT OF THE *EDWARDS* WARNING

4.40 An *Edwards* warning can be difficult to devise because of the appellate court determinations concerning its content. An *Edwards* warning must contain the following information:[64]

- the judge must identify precisely the post-offence conduct that may be evidence of consciousness of guilt[65]
- the judge must clearly identify the circumstances and events that indicate that the conduct can amount to evidence of consciousness of guilt[66]
- the judge must clearly identify the precise inference to be drawn from the conduct and the inferential process that the jury may choose to follow[67]
- the judge must relate the conduct to the charges and, if the evidence is relevant to a specific issue only, instruct the jury that the evidence may only be used in that way[68]
- in the case of lies, the judge must identify lies that only affect the accused's credibility and explain why they cannot be used as consciousness of guilt evidence
- the jury should be reminded to consider each lie separately, and by reference to each of the counts on the presentment[69]
- the judge must summarise the test to be met before the jury can use the evidence to show a consciousness of guilt
- the judge must warn the jury that just because a person engaged in the conduct alleged, they must not reason that this means he or she is guilty of the crime charged[70]
- the judge must explain to the jury that people may lie and yet not be guilty of an offence. The judge must give possible innocent explanations for the conduct, 'inventing' them if necessary[71] and
- the judge may direct the jury that an inference of guilt must be proved beyond reasonable doubt.[72]

4.41 Directions of this nature invariably take a long time to prepare and deliver. There is considerable potential for error because of the number and complexity of the matters that must be included in the direction. The entire exercise may be open to the criticism that it requires the trial judge to intrude too far into a function that is best left to the jury. Many years ago, Gowans J criticised a suggestion, made in a different context, that a trial judge ought to give the jury a direction about the many possible ways in which they could use particular pieces of evidence. After noting that this may "leave the minds of the jury in a state of confusion and bewilderment", Gowans J stated:

> *The direction from the judge would presumably require him* [sic] *on a dissection of the evidence to visualize and indicate all hypothetical situations according to the possible views the jury might take of the evidence, accompanied with all the dangers which arise on an occasion when the judge encroaches on the province of the jury.*[73]

4.42 These comments may apply to an *Edwards* warning about consciousness of guilt evidence.

## POTENTIAL TO MISLEAD AND CONFUSE THE JURY

4.43 The difficulty jurors have in understanding directions has been the subject of some recent research and may be the subject of later work by the commission. Kirby J referred to the issue of the comprehensibility of jury directions and to research which has tested jury's understanding of their instructions in *Zoneff v R.*[74] He stated:

> *Instructions to a jury should be comprehensible. They should avoid the unrealistic imposition on a jury of over-subtle distinctions and the imposition on judges of a duty to give directions that may actually be counter-productive to the end sought…*
>
> *The law presumes that triers of fact are able to disregard the prejudicial aspects of testimony and adjust appropriately the weight to be attached to such evidence on the basis of its "probative value". However, such empirical studies as have been performed on jurors' abilities to follow judicial instructions, and to divide and sanitise their minds concerning impermissible uses of evidence, have yielded results which are substantially consistent. They cast doubt on the assumption that jurors can act in this way. Indeed,*

*there is some empirical evidence which suggests that instruction about such matters will sometimes be counter-productive. The purpose may be to require a mental distinction to be drawn between the use of evidence for permissible, and the rejection of the same evidence for impermissible, purposes. Yet the result of the direction may be to underline in the jury's mind the significance of the issue, precisely because of the judge's attention to it. Lengthy directions about lies run the risk of emphasising the lies and their importance.*[75]

4.44 There can be little doubt that the current *Edwards* warning is difficult to understand. While it should remain the duty of a trial judge to caution the jury about the risk of misusing particular pieces of evidence there is strength in the broader warning given by Kirby J in *Zoneff* about 'the need to avoid over-elaboration, unnecessary subtlety and instruction upon excessively sophisticated distinctions, unlikely to be understood'.[76]

### POTENTIAL TO CAUSE PREJUDICE TO THE ACCUSED

4.45 The primary reason for an *Edwards* direction is to ensure that the jury fairly evaluates the evidence and does not jump to a conclusion that is prejudicial to the accused because there is evidence which may demonstrate a consciousness of guilt. The requirement that the judge identify the specific pieces of evidence that are said to give rise to a consciousness of guilt has the potential to prejudice the accused, because it involves the trial judge drawing attention to conduct that may place the accused in a bad light. If the evidence has the capacity to give rise to a consciousness of guilt inference the trial judge must give an *Edwards* direction.

4.46 The potential for an *Edwards* direction to cause prejudice to an accused person was noted by Ormiston JA in *R v Chang*:

*Unfortunately it is the complexity of a conventional Edwards warning, and its need to examine and repeat often damning evidence, that has frightened trial judges and lawyers appearing for the accused into recharacterising evidence which otherwise would be treated as evidence of consciousness of guilt. It is remarkable that a rule, the origin of which can only have been to ensure a fair trial, has so frequently be seen as likely to cause unfairness or prejudice to the accused if followed to the extent apparently laid down in Edwards.*[77]

### POTENTIAL TO CAUSE PREJUDICE TO THE PROSECUTION

4.47 A result of the complexity and uncertainty produced by the current law may be reluctance by prosecutors to characterise evidence of post-offence conduct by the accused as evidence of a consciousness of guilt in order to avoid an *Edwards* warning. Although the evidence for this tactic is primarily anecdotal,[78] Professor Williams has explained why a prosecutor may choose to act in this way:

*From the prosecution point of view, the Edwards direction is sufficiently strong and favourable to the defence that it might be thought to leave little justification for seeking to take advantage of apparent lies told by the accused. Where the accused has told significant lies, that is likely to have occurred in circumstances where the case against the accused is strong. Accordingly, the prosecution may prefer not to seek to make use of such lies.*[79]

## *ZONEFF* WARNING—FURTHER COMPLEXITY

4.48 The difficulties associated with the direction that a trial judge is required to give about consciousness of guilt evidence are compounded by the High Court decision in *Zoneff* which requires a different direction to be given when a lie by an accused does not amount to evidence of consciousness of guilt but may be used when assessing the credibility of the accused person. A *Zoneff* warning requires the jury to be warned that they should 'not follow a process of reasoning to the effect that just because a person is shown to have told a lie about something, that is evidence of guilt.'[80]

64 This list is based on that found in the article by Eames, 'Tackling the Complexity of Criminal Trials Directions: What Role for the Appellate Courts?' (2007) 29 *Australian Bar Review* 161, 166 – 167.

65 *Edwards v R* (1993) 178 CLR 193; *R v McCullagh (No. 2)* [2005] VSCA 109; *R v Ciantar* (2006) 16 VR 26.

66 *R v Edwards* (1993) 178 CLR 193.

67 *R v Ciantar* [2006] VSCA 263; *R v Jakimov* [2007] VSCA 9; *R v Nguyen* [2005] VSCA 120; *R v McCullagh (No. 2)* [2005] VSCA 109;

68 *R v Kaladjic; R v Italiano* (2006) 157 A Crim R 300; *R v Finnan* [2006] VSCA 151; *R v Ciantar* (2006) 16 VR 26; *R v Redmond* [2006] VSCA 75.

69 *R v Woolley* (1989) 42 A Crim R 418; *R v Ciantar* (2006) 16 VR 26.

70 *R v Edwards* (1993) 178 CLR 193; *R v Zheng* (1995) 83 A Crim R 572.

71 *R v Dickinson* [2007] VSCA 111; *R v Ciantar* (2006) 16 VR 26; *R v Nguyen* [2005] VSCA 120. Defence counsel are often reluctant to address juries on consciousness of guilt evidence, for fear of drawing further attention to it. Equally, it is rare that an accused offers an explanation for the conduct in question. In such cases, *Edwards* requires the trial judge to provide innocent explanations for the conduct in question.

72 The majority in *Edwards* stated specifically that a consciousness of guilt lie 'did not have to be proved to any particular standard of proof'. This is consistent with the High Court's treatment of circumstantial evidence generally: *Chamberlain v R [No. 2]* (1984) 153 CLR 521; *Shepherd v R* (1990) 170 CLR 573. It is the practice of Victorian courts to direct a jury not to act on consciousness of guilt unless it is satisfied beyond a reasonable doubt of the inference: *R v Ciantar* (2006) 16 VR 26, 42. This approach is taken for 'prudential reasons', which appears to mean because of the risk the jury might find the conduct in question sufficiently damning to use it as independent evidence of guilt, rather than merely a circumstance pointing to guilt. This appears consistent with High Court's approach to another kind of high impact, high prejudice evidence, propensity evidence: see *HML v the Queen* (2008) 245 ALR 204, in particular the judgment of Hayne J at 262-3.

73 [1972] VR 3, 22

74 (2000) 200 CLR 234, 260–2.

75 Ibid, 261.

76 Ibid, 262.

77 (2003) 7 VR 236, 248.

78 See *R v Chang* (2003) 7 VR 236, 253 (Ormiston JA); *R v Camilleri* (2001) 119 A Crim R 106, 118 (Phillips CJ and Brooking JA) *R v Mazur* (2000) 113 A Crim 67 (Brooking JA); *R v Bandiera & Licastro* [1999] 3 VR 103, 107 (Winneke P).

79 Williams, above n 9, at 321.

80 (2000) 200 CLR 234, 245.

# Chapter 4 Consciousness of Guilt Warnings

4.49 Professor Williams has questioned whether the conceptual distinction between lies calling for a *Zoneff* warning and those calling for an *Edwards* warning is sound:

> *The distinction between probative lies calling for an Edwards warning, and credibility lies calling for a Zoneff warning is, it is submitted conceptually unsound. To be relevant both probative lies and credibility lies depend upon the drawing of an inference as to consciousness of guilt, and reasoning from that conclusion to support a conclusion as to the fact of guilt. The difference between the two is as to the significance of the lies, and the strength of the inference they may give rise to.*[81]

4.50 Williams argues for a more flexible, discretionary approach which would enable the trial judge 'to tailor the warning to the needs of the particular case'.[82]

## OPTIONS FOR REFORM

4.51 There are three broad approaches to reforming the law in relation to consciousness of guilt. One approach is to prohibit the warning, the second is to make the warning discretionary and the third is to change the requirements in relation to what the warnings contains. Each approach is explained below.

### Prohibit the warning

4.52 Legislation could prohibit a trial judge from giving any warning to the jury about consciousness of guilt evidence. This step has been taken in a number of jurisdictions in the United States because of the view that any jury direction about consciousness of guilt will unfairly highlight specific evidence[83] and may be misleading or confusing.[84]

4.53 A blanket prohibition on the giving of a consciousness of guilt warning would place greater responsibility for the conduct of a case with counsel. If the judge is prohibited from commenting on consciousness of guilt evidence, it would be the responsibility of defence counsel to challenge any suggestion that the post-conduct by the accused demonstrated a consciousness of guilt.

4.54 A blanket prohibition would be inconsistent, however, with the principle of enhancing the discretion of trial judges to decide which directions to give a jury. In some cases, a blanket prohibition may also restrict a trial judge's capacity to secure a fair trial.

### Make the warning discretionary

4.55 One of the problems with the current operation of consciousness of guilt warnings is that there is effectively no discretion given to trial judges about whether and when to give them. One possible approach to this problem would be to explicitly reinstate the discretion in legislation. The legislation might provide, for example, that a warning in relation to post offence conduct or consciousness of guilt should be given where a trial judge finds that it is necessary to prevent the jury placing undue weight on evidence of a defendant's lie.

4.56 There is, of course, a risk that this kind of discretion would be exercised wrongly. However, counsel would remain free to use their address to the jury to warn about the possible misuse of evidence.

4.57 There is also a risk that a legislative discretion will soon be eroded and little will actually change because the appellate courts will rigidly define the circumstances in which a warning must (or must not) be given. The challenge in these circumstances is to draft legislation that achieves a delicate balance by supporting the power of a trial judge to exercise a meaningful discretion about the directions given to a jury while continuing to allow appellate courts to ensure that a trial is fair and that a jury receives appropriate assistance to perform its function. The ways in which this balance might be struck are discussed in Chapter 7.

### Remove the corroboration requirements

4.58 Another solution is to simply remove the 'corroboration' requirements from *Edwards* and rely on a pared down direction. The result of this would be that many of the current components of the warning would no longer be required. For example, the judge would no longer need to precisely identify the conduct relied on as an implied admission of guilt, nor the

events relied on by the prosecution to indicate that the post-offence conduct constitutes an admission against interest. There would also be no requirement to 'invent' possible innocent explanations for particular conduct or to distinguish between lies relevant to credit and lies going to consciousness of guilt.[85] What would remain would be a much briefer warning that communicated to the jury the basic point that people lie for reasons other than guilt.[86]

4.59 An example of this approach is that used by the Canadian Judicial Council. Their model direction from 2004 provides:

> *You have heard evidence that [the accused] (describe briefly the relevant words and/or conduct occurring after the alleged offence) … What [the accused] did or said might help you decide whether he/she is guilty of the offence. (Review relevant evidence and relate it to alternative explanations).*
>
> *The first thing to decide is whether [the accused] actually did or said these things. If you find that he/she did not say or do these things, you must not consider this evidence in reaching your verdict.*
>
> *If you find that [the accused] did in fact do or say these things, you should consider next whether this was because he/she committed the offence charged.*
>
> *If so, you should consider this evidence, together with all the other evidence, in reaching your verdict.*
>
> *If, however, you find that the accused did or said these things for some other reason, you should not consider that as evidence of guilt.*

4.60 Adopting such an approach obviously changes the content of the warning, which raises the question of whether and to what extent the specific content of the warning should be prescribed. Options in relation to the ways in which the specific wording of the warning could be prescribed are outlined in the next section.

## REFORM THE CONTENT OF THE WARNING

4.61 There are three approaches that could be taken to outlining the specific content of consciousness of guilt warnings – these are: A model direction; a pattern direction or a checklist. The possible content of these is outlined below.

### A model direction

4.62 Currently, the Judicial College of Victoria includes a model charge on consciousness of guilt. The problem with the current charge is that, because it is bound by the *Edwards* requirements it is long and complex. However, the idea of a model direction or suggested form of words could be used to contain any simplified version of the warning. A model direction could, for example, follow the general terms of the Canadian Judicial Council, set out above. The benefit of a model direction is that it provides a form of words that can be adapted to suit particular situations. A model direction could either be included in legislation, or legislation could provide that a model direction prepared and approved by the Judicial College of Victoria is legally correct. This is discussed in more detail in Chapter 7.

### A statutory formula (pattern direction)

4.63 A legislative direction could be devised for use in all cases where a consciousness of guilt warning is required. There may be two significant problems with this approach:

- The content of the warning would be fixed. This is inconsistent with the principle of adapting a warning to the circumstances of each case and may lead to a fixed warning being given in inappropriate circumstances.[87]
- Statutory amendment would be required to change the warning.

81 Williams, above n 9, 330.

82 Ibid.

83 See, eg, *Fenelon v State* 594 So.2d 292 (1992) (Florida); *United States v Robinson* 154 U.S.App.D.C. 265 (1973) (D.C.); *State v Humboldt* 1 Kan. App. 2d 137 (1977) (Kansas); *People v Weller* 123 Ill. App. 2d 421 (1970) (Illinois); *State v Stilling* 285 Ore. 293 (1979) (Oregon); *State v Grant* 275 S.C. 404 (1980) (South Carolina); *State v Reed* 25 Wn. App. 46 (1979) (Washington); *Renner v State* 260 Ga. 515 (1990) (Georgia). These cases differ from the present option in that the courts, rather than the legislature, decided to prohibit the instruction.

84 See *Dill v State* 741 N.E.2d 1230, 1232–3 (2001) (Indiana).

85 See above [4.31] for the full list of requirements.

86 The direction might finally resemble that given by Lord Devlin in *Broadhurst* [1964] AC 441. This decision has been frequently referred to in Australian cases, including *Edwards v R* (1993) 178 CLR 193, 211.

87 For example, if the statutory warning referred to an 'innocent explanation', the argument that a person is guilty of a lesser included offence rather the crime charged is would not fit with the description of an 'innocent' explanation that is sometimes used in specimen directions: see *R v Richens* (1993) 98 Cr App R 43.

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4.64 Any statutory direction would need to be phrased at a high level of abstraction which may affect the capacity of the jury to make any real use of the warning.[88] The Californian warning is as follows:

> *If you find that before this trial [a] [the] defendant made a wilfully false or deliberately misleading statement concerning the crime[s] for which [he] [she] is now being tried, you may consider that statement as a circumstance tending to prove a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.* [89]

### A Checklist Approach

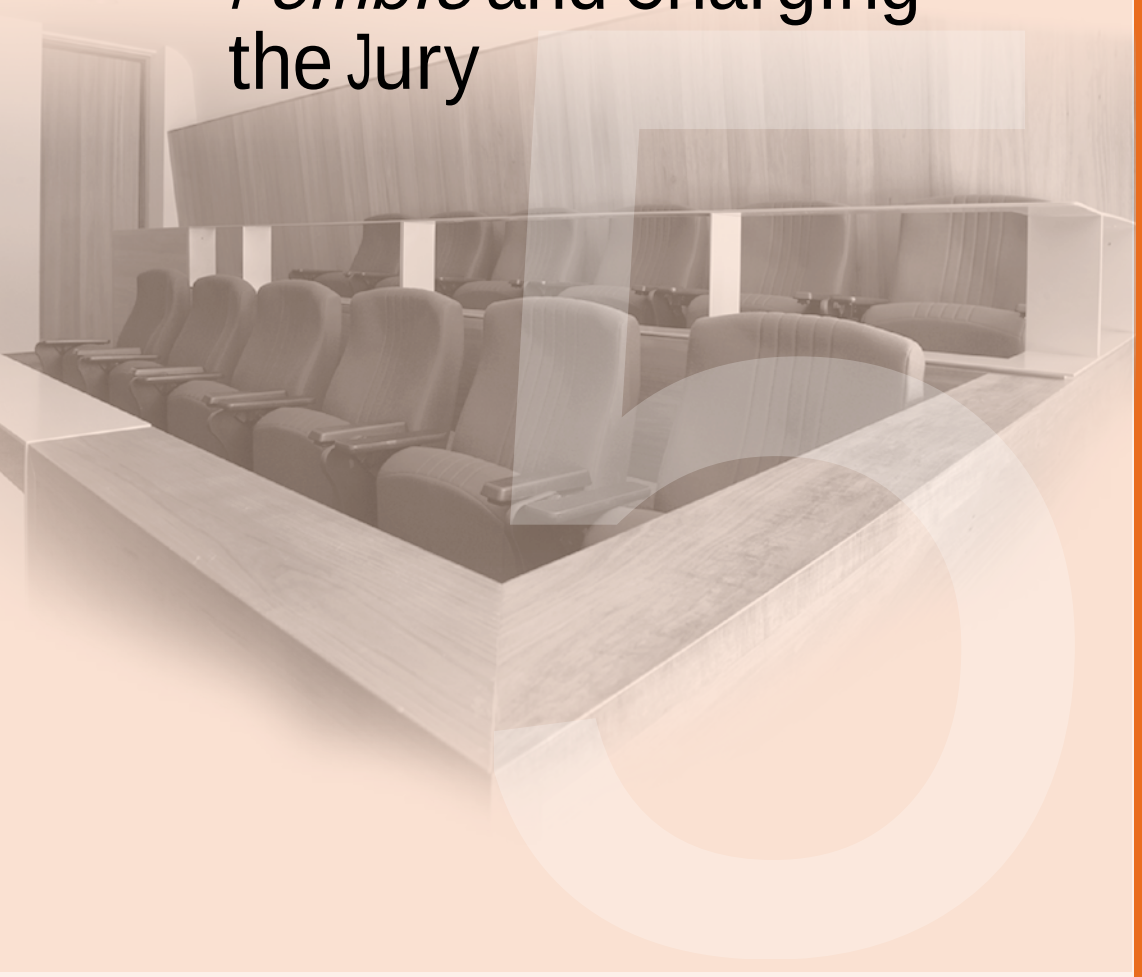
4.65 Another option is to include skeletal outlines of directions in legislation that fall short of providing an express formula. The legislation would identify a number of matters that must form part of any direction, but the trial judge would be required to 'fill in the details'. An example of this approach is found in section 124(3) of the *Evidence Act 2006 (NZ)*:

> *… if, in a criminal proceeding tried with a jury, the Judge is of the opinion that the jury may place undue weight on evidence of a defendant's lie, or if the defendant so requests, the Judge must warn the jury that—*
>
> *(a) the jury must be satisfied before using the evidence that the defendant did lie; and*
>
> *(b) people lie for various reasons; and*
>
> *(c) the jury should not necessarily conclude that, just because the defendant lied, the defendant is guilty of the offence for which the defendant is being tried.*

88 J Alexander Tanford, 'The Law and Psychology of Jury Instructions' (1990) 69 *Nebraska Law Review* 71, 82–3.

89 The Californian example shows what a high level abstract direction might look like. The US states do not appear, however, to put their directions in legislative form.

# Chapter 5
# *Pemble* and Charging the Jury



# Chapter 5 *Pemble* and Charging the Jury

## INTRODUCTION

5.1 This Chapter looks at two related aspects of the trial judge's duty in criminal trials:

- The duty to instruct the jury about possible defences that fairly arise on the evidence, or 'alternative verdicts' for less serious offences, even where these are not raised by trial counsel
- The duty to sum up the case to the jury on the factual issues in the case, and how the law and evidence applies to them.

5.2 The commission's preliminary consultations show that these are both areas which create difficulties for trial judges as part of their obligation to ensure the accused has a fair trial.[1]

5.3 The first part of this Chapter considers the duty of the trial judge to direct the jury in relation to matters not raised by counsel during the trial. This duty may arise in relation to the possible availability of a defence, or an alternative verdict on a less serious offence which is 'included' in the charge of a more serious offence, even where these matters are not relied upon or are expressly abandoned by the defence at the trial.[2] While this issue is included in our terms of reference and identified as a problem in commentary and early consultation, it should be noted that the failure of trial judges to comply with this obligation is rarely raised on appeal.[3] We consider the problems posed by the broad interpretation of this obligation in recent decisions, and ways in which it could be limited.

5.4 The second part of this Chapter looks at the long-standing obligation of the trial judge to sum up the case to the jury. In light of complaints about the length and complexity of the summing up, and the burden on the trial judge in preparing and delivering it to the jury without advance notice of the issues in dispute, the Chapter considers options for reform of the ways in which information about the relevant law can be delivered to the jury, and the extent to which the evidence should be summarised.

## THE MODERN STARTING POINT: *PEMBLE*

5.5 In a wide range of circumstances, the trial judge is obliged to advance arguments and relate evidence to defences[4] which the jury may not have heard either counsel raise during the course of the trial. In many cases, this occurs because counsel has made a forensic decision not to address the issue in order to gain a tactical advantage. In this part, we consider whether imposing this obligation on the judge is appropriate and necessary in an adversarial system, or whether counsel should have the primary responsibility to identify and address the jury about the issues which arise on the evidence.

5.6 *Pemble v R*[5] is often cited as the modern authority for this duty, which is part of the judge's general obligation to ensure that an accused person receives a fair trial.[6] Judges must give adequate directions 'both as to the law and the possible use of the relevant facts upon any matter which the jury could in the circumstances of the case upon the material before them find or base a verdict in whole or in part'.[7] This means that where a defence is open on the evidence, the judge has a duty to put this to the jury.

5.7 This obligation arises despite the course the defence takes in conducting the case, and whether counsel has raised that matter during the trial.[8] The extent of the judge's duty to inform the jury about the possibility of an 'alternative' verdict of guilty of a lesser offence than that charged, when the issue has not been raised by the parties is somewhat complex.[9] Sometimes cases make a distinction between homicide cases and non-homicide cases. However, the duty to inform the jury about an 'alternative' does extend beyond homicide cases.

5.8 *Pemble* was an unusual case. The accused man was convicted of murder following a jury trial lasting only one day. At the trial, it was not disputed that the accused shot and killed the deceased. The accused made an unsworn statement in which he claimed that the shooting was accidental.[10] Although open on the evidence, defence counsel did not invite (or ask the judge to invite) the jury to consider a verdict of acquittal of both murder and manslaughter. Counsel conducted the trial on the basis that the accused lacked the requisite state of mind for murder at the time of the killing, and asked the jury to find his client guilty of manslaughter.[11] Neither trial counsel or the judge suggested to the jury that they could find the accused not guilty of both murder and manslaughter.

5.9 On direct appeal to the High Court,[12] the appellant argued that the trial judge's charge was deficient because of this failure to direct the jury about the option of an acquittal. A majority of the High Court held that the judge's direction that the jury should determine whether the accused was 'guilty of murder, or something less', was tantamount to a direction to convict of either murder or manslaughter.[13] The Court held there had been a substantial miscarriage of justice. It set aside the conviction and substituted a verdict of guilty of manslaughter.

5.10 In a passage often referred to in subsequent appellate decisions, Chief Justice Barwick stated:

> *There is no doubt that the course taken by counsel for the appellant at the trial contributed substantially to the form of the summing up. If the trial had been of a civil cause, it might properly be said that the trial judge had put to the jury the issues which had arisen between the parties. But this was not a civil trial …* Whatever course counsel may see fit to take, no doubt bona fide but for tactical reasons in what he considers the best interest of his client, the trial judge must be astute to secure for the accused a fair trial according to law.[14] [emphasis added]

## DEVELOPMENT OF THE *PEMBLE* OBLIGATION

### Before *Pemble*

5.11 The principle that any defence fairly raised on the evidence should be brought to the jury's attention can be traced back to early English decisions.[15] Development of the principle in these pre-*Pemble* authorities arose out of the 'unique' context of the mandatory death penalty for murder convictions.[16] Cases such as *Mancini v DPP*[17] and *R v Hopper*[18] involved the failure by defence counsel to raise the issue of provocation at trial, thereby reducing the crime from murder to manslaughter.

5.12 The rule developed that where the facts were consistent with the jury bringing in a verdict on the lesser charge of manslaughter, the trial judge should leave open the possibility of a manslaughter verdict to the jury, even where counsel did not raise the possibility of such a verdict during evidence or addresses.[19] This approach to the judge's duty acknowledged the role of tactical decision-making in criminal trials. The defence may not seek to raise the alternative of manslaughter in the hope that the jury will be inclined to acquit the accused of murder altogether.[20] In other cases, the defence may not wish to run a partial defence, such as defensive homicide, which may be inconsistent with their principal defence, for example, accident or self-defence.[21]

1 *RPS v The Queen* (2000) 199 CLR 620, 637. Section 24(1) of the *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic) gives a person charged with a criminal offence the right to a 'fair hearing'.

2 *Pemble v R* (1971) 124 CLR 107, *Murray v The Queen* (2002) 211 CLR 193, *Fingleton v R* (2005) 227 CLR 166, *R v Kanaan* (2005) 64 NSWLR 527, *Gilbert v R* (2000) 201 CLR 414.

3 In the period between 2000-2007, 12 successful appeals from conviction included consideration of questions relating to matters not raised by counsel.

4 Or to the possibility that the jury may find a verdict on a 'lesser' offence than that charged on the presentment (eg that a verdict of manslaughter is open when the accused is charged with murder).

5 (1971) 124 CLR 107.

6 More recent High Court cases have been *Gillard v The Queen* (2003) 219 CLR 1; *Gilbert v The Queen* (2000) 201 CLR 414; *CTM v The Queen* (2008) 247 ALR 1.

7 *R v Pemble* (1971) 124 CLR 107, 117-8 (Barwick CJ).

8 *R v Thompson* [2008] VSCA 144.

9 Provision is made in the *Crimes Act 1958* (Vic) for the jury to return specified alternative verdicts in relation to particular offences, for example: murder (ss421, 6(2), 10(3)); negligently causing serious injury or culpable driving causing death (s422A); offences alleging wounding or causing grievous bodily harm (s423); conduct endangering life (including unlawfully and maliciously administering poison) (s424); rape (s425(1)); incest or sexual penetration of a child under 16 (s425(3)); destroying or damaging property (s427(1)); arson causing death (s427(2)); unauthorised modification of data to cause impairment (s428); unauthorised impairment of electronic communication (s429); riot-related charges (s435); infanticide (s10(3)); child destruction (s10(4)); abortion (s10(3)). There is also a general power under s 421 to return an alternative verdict if a charged offence 'includes' or 'amounts to' another offence.

10 The accused stated to the effect that he intended to frighten the deceased by approaching her with the rifle (which he had not checked to see if it was unloaded) when he stumbled and the rifle discharged: *R v Pemble* (1971) 124 CLR 107.

11 See observations of Menzies J that counsel for the defence took this course 'having no doubt come to the conclusion that there was no chance of obtaining a complete acquittal': Ibid, 128-9.

12 The right existed at the time to appeal directly to the High Court on a point of law pursuant to the then s 47(1)(a) *Northern Territory Supreme Court Act 1961* (Cth).

13 *R v Pemble* (1971) 124 CLR 107, 132.

14 (1971) 124 CLR 107, 117-118.

15 *Reg v Walsh* (1869) 11 Cox 336*; R v May* [1912] 3 KB 572*; R v Horn* [1912] 76 JP 270; *R v Hopper* [1915] 2 KB 431; *Mancini v DPP* [1942] AC 1.

16 See discussion in *R v Kane* (2001) 3 VR 542, 544 (Ormiston J).

17 [1942] AC 1.

18 [1915] 2 KB 431.

19 *R v Kane* (2001) 3 VR 542, 544 (Ormiston JA). See the cases of *R v Hopper* [1915] 2 KB 431; *Mancini v DPP* [1942] AC 1; *Bullard v R* [1957] AC 635.

20 Davies describes the principle in *Hopper* as 'tacit acknowledgement of the humanitarian instinct which will lead many jurors to reject the ultimate state sanction in favour of unconditional liberty if given only the choice between these two extremes': Mitchell Davies, 'Leaving Provocation To The Jury: A Homicidal Muddle?' (1998) 62 *Journal of Criminal Law* 374, 376.

21 In *Lee Chun-Chuen v R* [1963] AC 220, 233 it was observed that if the defence were placed in a position of having to admit a loss of self-control, it would be 'bound to weaken, if not to destroy, the alternative defence and the law does not place the accused in a fatal dilemma'.

# Chapter 5 *Pemble* and Charging the Jury

## Limitations prior to *Pemble*

5.13 Early UK decisions set out some limitations to the rule about instructing the jury in relation to any defence fairly raised on the evidence. Most cases which strictly applied the rule arose in the context of homicide where it was held necessary to put provocation or other defences to the jury if there was some evidentiary foundation for doing so.[22] In non-homicide cases, however, there appears to have been some room for the conduct of the defence to limit the issues about which a judge was required to direct.[23]

5.14 Early Australian formulations of the rule arose in the context of the judge's obligation to secure a fair trial for the accused, and the need for the Crown in homicide trials to exclude to the criminal standard all reasonable views of the facts consistent with innocence.[24] In the Victorian case of *R v Longley,*[25] however, the Court held that the obligation was not limited to provocation in murder cases, but extended to any criminal charge before the jury.[26]

5.15 A further 'common sense' limitation to the rule was that although the trial judge was under an obligation to scrutinise the evidence to determine if a defence was available, the judge did not have to put before the jury any hypothesis which the evidence did not reasonably raise.[27] In extending the judge's obligation to non-homicide cases, the Court confirmed in *R v Longley*[28] that the purpose of the rule was to protect the accused, and that the trial judge's obligation was not removed by the conduct of parties at trial.[29] However, this did not require the judge to 'exhaustively catalogue' every possible view of the facts.[30] The judge's obligation to leave an alternative defence to the jury would only arise when there was a 'credible narrative' at the trial relating to the alternative defence.[31]

## After *Pemble*

*5.16* *Pemble* extended the trial judge's duty to instruct the jury to include any matters about which the evidence permitted the jury find for the accused. The case extended the rule to situations where the defence counsel not only failed to rely upon a matter, but abandoned it and also to instances where counsel expressly confined the defence to other matters which were raised with the jury.[32] Subsequent High Court decisions have confirmed the *Pemble* obligation, emphasising that the trial judge's duty is not subject to 'the tactics or manoeuvring of defence counsel', and arises even where defence counsel concedes a defence is not an issue.[33]

5.17 The law is clear in homicide cases: if there is a 'viable' case for manslaughter on any reasonable view of the facts, the judge must deal adequately with that issue in summing up to the jury, and direct them to consider the alternative verdict.[34] The evidence must be considered in light of the version of events most favourable to the accused when the judge decides whether this rule should be applied.[35] There is some case law which suggests that even when the judge considers the evidence about a particular defence to be weak or tenuous, the judge must direct the jury about that defence.[36] Other cases have held that 'hopeless defences' without any factual basis of support, or which are only a 'remote or artificial possibility', do not have to be left to the jury.[37] It is beyond doubt, however, that the failure of defence counsel to raise an alternative case does not relieve the judge from the obligation to direct the jury about a matter if there is evidence on which a reasonable jury could decide the issue favourably to the accused.[38]

5.18 In the context of non-homicide cases, however, the extent of the application of the *Pemble* obligation is more controversial. Later decisions have observed that the principles laid down in *Pemble*, (and subsequent cases such as *Varley v The Queen*[39] and *Markby v The Queen*[40]) were not limited to cases in which the defence of provocation arose. Neither was the obligation in *Pemble* explicitly confined to homicide cases, a view confirmed by decisions of the High Court,[41] and appeal courts in South Australia,[42] Queensland,[43] and Victoria.[44]

5.19 There has been criticism of the extension of the *Pemble* obligation to non-homicide cases. This distinction between homicide and other cases has some support in NSW, where the Court of Criminal Appeal has observed that the principle is more suited to homicide cases, in which juries are more likely to take a 'merciful view of the facts' given the consequences of a murder conviction.[45] Some Victorian cases have also qualified the judge's obligation in the context of non-homicide cases.[46] In *Kane*,[47] Ormiston JA (in dissent) observed that in non-homicide cases,

where the judge has correctly identified the elements which the Crown must establish, and the jury brings in a verdict on that basis, a verdict should only be set aside on the ground that an alternative verdict should have been left where it would otherwise amount to a miscarriage of justice.[48] Even the majority in that case, although accepting that it was 'too late' for an appellate court to confine the duty to homicide cases, noted that not every alternative verdict must be left to the jury. The majority observed that the decision will depend on what justice requires in the particular case, taking into account 'public interest, fairness to the accused, the course of the trial and the scope for forensic judgment on the part of counsel'.[49]

### Current approach by the High Court

5.20 The most recent High Court decision confirming the broad approach to the judge's obligation to instruct the jury in relation to any matters about which the evidence permitted them to find for the accused is *CTM v The Queen*,[50] a non-homicide case. In *CTM,* the defendant was charged with having sexual intercourse with a child aged between 14 and 16 years. The accused was 17 at the time. He did not give evidence but the defence put to the jury by counsel was that he denied intercourse had taken place at all. In the course of his record of interview the accused said that he had believed the girl to be 16, because that is what she had told him. The complainant was not questioned about this assertion.

5.21 Counsel for the accused advised the judge that he was not going to place the alternative defence of an honest and reasonable belief that the complainant had been over 16 years before the jury, but that he was not 'abandoning' that defence. It was clear that counsel, for forensic reasons, did not want to put that alternative to the jury himself because of its inconsistency with a defence of denial of intercourse. The trial judge accepted that there was an obligation to direct the jury about that alternative defence, although it was inconsistent with the principal line of defence.[51]

22 See for example, the statement by Lord Tucker in *Bullard v R* [1957] AC 635, 636: '[e]very man on trial for murder has the right to have the issue of manslaughter left to the jury if there is any evidence upon which such a verdict can be given. To deprive him of this right must of necessity constitute a grave miscarriage of justice'.

23 For example, in *R v Horn* [1915] 2 KB 431; and see *R v May* [1912] 3 KB 572, involving the issue of consent to indecent assault, where the court held if there were no facts from which the jury might reasonably infer consent and 'particularly if the defence has been so conducted that the question of consent has not been raised or has become a…secondary issue, then it is not necessary for the judge to give a direction to the jury on the point'.

24 *Lee Chun-Chuen v R* [1963] AC 220; *Parker v R* (1963) 111 CLR 610; *Da Costa v R* (1968) 118 CLR 186, *Gammage v R* (1969) 122 CLR 444; see *Koutsouridis v R* (1982) 7 A Crim R 237.

25 [1962] VR 137.

26 *R v Longley* [1962] VR 137, 140.

27 *Mancini v DPP* (1942) AC 1, 8; *R v Longley* [1962] VR 137.

28 [1962] VR 137.

29 Ibid 140-1.

30 Ibid 140.

31 *Lee Chun – Chuen v R* [1963] AC 220. Note, however, the judge's duty to tell the jury of an alternative verdict open to them where a jury expressly asks a question on the subject: *Gammage v R* (1969) 122 CLR 444.

32 *Pemble v The Queen* (1970) 124 CLR 107, 118.

33 *Varley v R* (1976) 12 ALR 347, 351 (Barwick CJ); *Van Den Hoek v R* (1986) 161 CLR 158, 161.

34 *R v Williamson* (2000) 1 VR 58, 68 (Charles JA). Charles JA observes that the cases hold that where no reasonable view of the facts provides a basis for a manslaughter verdict, the judge is not obliged to put manslaughter to the jury unless the jury ask a question on the subject.

35 *R v Yasso* (2004) 148 A Crim R 369.

36 *Zecevic v DPP* (1987) 162 CLR 645; *R v Kear* [1997] 2 VR 555, 565.

37 *R v Fackovec* [2007] VSCA 93 at [19]; *R v Alexander* (2007) 174 A Crim R 297, 306; *R v Tran* [2007] VSCA 19 at [40], *R v Thompson* [2008] VSCA 144, [106].

38 *R v Williamson* (2000) 1 VR 58, 68. Most recently, in *R v Thompson* [2008] VSCA 144, the Court of Appeal did not allow the appellant to 'run a new case on appeal' of accidental knife wounding. The defence case at trial was that the victim had initiated the attack, and been injured in the course of a struggle as the accused attempted to force the victim to drop the knife. The hypothesis that the injuries were caused accidentally in the course of a struggle was not put to the jury in addresses. However, the trial judge left an alternative defence of self-defence, although the Court of Appeal found this to be 'unduly favourable' to the defence, lacking any evidence which made it a 'real issue'. On appeal the argument was rejected that, following this, the judge was obliged to also direct the jury they must be satisfied the act was voluntary and deliberate so as to exclude any accidental act on the part of the accused. The Court of Appeal did confirm, however, that if there was an evidentiary basis on which the jury could have found accident, the judge would be under an obligation to direct that the accused could not be found guilty unless the jury were satisfied beyond reasonable doubt that the injuries were caused to the victim by the accused's conscious and voluntary act: at [36]-[41] (Neave JA). In this case, however, no such evidentiary basis existed.

39 (1976) 12 ALR 347.

40 (1978) 140 CLR 108.

41 *CTM v The Queen* (2008) 247 ALR 1; *Fingleton v R* (2005) 227 CLR 166.

42 *Benbolt v R* (1993) 60 SASR 7.

43 *R v Rehavi* [1999] 2 Qd R 640, 644; *R v Chan* [2001] Qd R 662; *R v Willersdorf* [2001] QCA 183.

44 Most recently,the Court of Appeal acknowledged that the trial judge's obligation could apply in a case involving a count of intentionally causing serious injury, however, it extended only to any 'real issue' arising from the evidence as distinct from a remote or artificial possibility: *R v Thompson* [2008] VSCA 144, [106] (Redlich JA); *R v Fackovec* [2007] VSCA 93; *R v Tran* (2001) 3 VR 349, *R v Alexander* (2007) 174 A Crim R 297; see the majority decision in *R v Kane* (2001) 3 VR 542 ; also see the Canadian approach reflected in the decisions referred to in Australian courts: *R v Longson* (1976) 31 CCC (2d) 421; *R v Paradis* (1976) 38 CCC (2d) 455; *R v Morehouse* (1982) 65 CCC (2d) 231, referred to *R v Jackson* [1993] 4 SCR 573, 593.

45 *R v Kanaan* (2005) 64 NSWLR 527, 554: although the matter was raised in this decision, it was not decided; *R v Elfar* (2000) 115 A Crim R 64.

46 In *R v Saad* (2005) 156 A Crim R 533, 564 Nettle JA observed: 'I take *Gilbert* and *Gillard* to be confined to cases in which the offence charged is murder and the ground of appeal is the judge's failure to leave to the jury an available verdict of manslaughter'. See also Ormiston JA in *R v Kane* (2001) 3 VR 542, 544-5; *R v Doan* (2001) 3 VR 349, 355.

47 (2001) 3 VR 542.

48 *R v Kane* (2001) 3 VR 542, 545.

49 *R v Kane* (2001) 3 VR 542, 588 (Callaway JA), 588 (Batt J agreeing). In *R v Christy* (2007) 16 VR 647, 654 the court confirmed that it may be necessary, in non-homicide cases, to leave an alternative lesser charge to a jury where 'necessary in the interests of justice. In particular, it may be necessary to leave such a lesser charge to the jury, where the course of the trial is such that it would be unfair to one or both of the parties not to do so'. In the UK, the Court of Appeal has also held that the judge is only obliged to leave a lesser alternative only if it is 'necessary in the interests of justice': *R v Fairbanks* [1986] 1 WLR 1202, 1205.

50 (2008) 247 ALR 1.

51 Ibid 22.

# Chapter 5 *Pemble* and Charging the Jury

5.22 The accused was convicted. When his appeal reached the High Court, the majority concluded that the judge had not been obliged to direct the jury about the mistake defence because the issue had not been 'enlivened' by evidence.[52] However, the Court held that where such a defence was raised by the evidence, the mere fact that defence counsel chose not to run the defence, for forensic reasons, did not remove the trial judge's obligation to place the defence before the jury and to relate the evidence to that possible defence.

5.23 In his dissenting judgement,[53] Justice Kirby held that it was not too onerous a burden to require a trial judge to 'cover all the bases' that arise on the evidence, and to deal with all matters that may lead to acquittal.[54] Kirby J noted that *Pemble* recognised the distinct function of judges in criminal trials, and acknowledged the 'forensic privileges' of defence counsel to say nothing about another basis for a defence, where it is inconsistent with their primary case.[55] In *CTM*, Kirby J observed that defence counsel's request that the trial judge put an alternative verdict to the jury, was a proper request, based on the *Pemble* requirement:

> *The judge's duty transcends that of counsel. The judge represents the whole community and the law. And that is what Pemble holds.*[56]

## CRITICISMS OF THE CURRENT APPROACH

5.24 The current approach by the High Court affirms the duty of a trial judge to instruct the jury about alternative defences that arise on the evidence, even when those defences have not been raised by defence counsel or have been specifically rejected or avoided by defence counsel. A judge will be required to raise an alternative defence even if the failure to raise that defence was a deliberate, tactical decision by defence counsel. This rule creates several problems:

- It encourages the judge to 'appeal-proof' the charge, resulting in an added burden on the judge and the jury.
- It does not sit well with the respective roles of the trial judge and of counsel in an adversarial system of criminal justice.
- It may result in unfairness to the accused.
- It allows counsel to 'reserve' appeal points.

### 'Appeal-proofing' of charges

5.25 The current scope of *Pemble* poses a significant burden for the trial judge. The *Pemble* requirement is tempered by the need for a 'viable' case for an alternative verdict to arise.[57] However, cases and commentary suggest that there is uncertainty about the evidentiary burden which activates the judge's obligation.[58] This means that judges feel the need to go to extreme lengths to prevent *Pemble* appeals asserting a miscarriage of justice because of a failure to address an alternative defence. Woods notes that judges now attempt to 'appeal-proof' their summing up, by including directions in relation to alternative verdicts or defences where it is unnecessary, and 'on the most tenuous of bases'.[59]

5.26 Another consequence of 'appeal-proofing' is that the jury must deal with additional directions concerning topics not raised by counsel. The obligation to direct the jury about these issues causes some judicial directions to have an 'air of unreality'.[60] It also creates difficulties for trial judges when reconciling this requirement with the *Alford v Magee*[61] principle, discussed in the second part of this Chapter, that the jury must be directed about only those aspects of the law that they need to help them reach a decision about the real issues in the case.[62]

### Contrary to the adversarial system

5.27 The High Court has stated that *Pemble* and preceding authorities merely 'establish a practical rule …that acknowledges and accommodates the often difficult forensic choices that defence counsel face in conducting a criminal trial, especially before a jury'.[63] In the context of the adversarial system of criminal justice, however, this has been criticised as sitting uneasily with the role of a judge in a criminal trial.[64] The trial judge is faced with the potential difficulty of presenting the jury with a possibility which neither side has sought to raise in the course of the evidence.[65] As Justice Murphy observed, where counsel has made no mention of the matter,

there is a risk that the jury will be confused, or that the accused will unfairly benefit from the jury thinking that this 'new hypothesis' has been raised by the judge as something that the Crown has not disproved. [66]

5.28 As *CTM* demonstrates, the obligation placed upon a trial judge by the rule in *Pemble* allows defence counsel to run a 'principal' defence whilst simultaneously requiring the judge to raise the alternative or 'contingent' defence. Defence counsel may strategically avoid raising an alternative defence during the course of the trial but request the judge to address the jury on both defences in the summing up.[67] The obligation rests with the trial judge even if counsel has not raised the defence as a deliberate tactical decision, because of an obvious inconsistency between the principle defence and the alternative defence.[68] *Pemble* provides experienced, competent defence counsel with the opportunity to pose contradictory defences or versions of events because of the trial judge's obligation to instruct the jury about alternative defences that arise on the evidence.

5.29 The obligation on judges to raise alternative defences not advanced by counsel runs counter to the general rule that counsel's decisions bind the client in an adversarial system. This principle, seen as necessary for the functioning of the adversarial system, was discussed in *Nudd v R*.[69] Chief Justice Gleeson observed that parties are generally bound by the conduct of counsel who exercise a wide discretion in deciding which lines of argument to pursue.[70] In *R v Cardamone,*[71] Justice of Appeal Neave also suggested that the requirement for judges to direct on matters not requested by counsel seemed difficult to justify in the context of an adversarial system.[72]

### Unfairness to the accused

5.30 In some cases, the *Pemble* principle may work to the disadvantage of the accused. Courts have confirmed that a fair trial according to law includes the judge's obligation to give directions that the law requires, even where this is to the detriment of the accused.[73] Ormiston JA has highlighted the difficulties with a rule requiring the judge to intervene when counsel has made a decision in their client's best interests not to raise an alternative defence or verdict. In a case run on the basis that the outcome must be murder or acquittal (for example on grounds of self-defence), the judge may in fact deprive the accused of the 'all-or-nothing' chance which the adversary system permits him to take by introducing the alternative of manslaughter.[74]

5.31 Ormiston JA also highlighted the possible risk of a miscarriage of justice arising from the accused being found guilty of an offence which was not raised by defence counsel. If the jury is 'left at large' as to how they decide the issues in relation to a possible verdict

52 As the accused had not given evidence and the complainant had not been questioned on the topic, the statements in the record of interview, alone, were held to be insufficient to meet the evidential onus in raising the defence.

53 Kirby J dissented for several reasons, including on the point of whether the defence had been sufficiently raised.

54 *CTM v The Queen* (2008) 247 ALR 1, 23.

55 *CTM v The Queen* (2008) 247 ALR 1, 28-9 (Kirby J).

56 *CTM v The Queen* (2008) 247 ALR 1, 23 (Kirby J).

57 For example, in *R v Kanaan* (2005) 64 NSWLR 527, 558, it was stated '…the appellant must persuade this Court that the absence of the alternative verdict of manslaughter may have lost a real chance of being found not guilty of murder but guilty of manslaughter'.

58 Sean Doran, 'Alternative Defences: The "Invisible Burden" On The Trial Judge' (1991) *Criminal Law Review* 878, 886; Murphy J stated in *Waldrope v R* (1987) 29 A Crim R 198, 211: "To determine in a given case whether the evidence in question falls within or outside that category is necessarily a highly subjective exercise".

59 James Wood, 'The Trial Under Siege: Towards Making Criminal Trials Simpler' (Paper presented at the District and County Court Judges Conferences, Fremantle, WA, 27June - 1 July 2007). Similar problems have arisen in the development of the principle in the UK: see Taylor LCJ's observations in *Cambridge v R* [1994] 1 WLR 971, that the duty arising from *Hopper* to introduce provocation, originally tempered by proportionality test, had had its reach extended considerably as a result of decision in *DPP v Camplin* [1978] AC 705, and that some decisions have required the judge to leave provocation to the jury even where the judge considers that that 'no reasonable man would have reacted as the defendant': Mitchell Davies, 'Leaving Provocation To The Jury: A Homicidal Muddle?' (1998) 62 *Journal of Criminal Law* 374, 380

60 Michael Kirby, 'Reasons for Judgement: 'Always Permissible, Usually Desirable and Often Obligatory'' (1994) 12 *Australian Bar Review* 121, 129; *R v Stokes & Difford* (1990) 51 A Crim R 25, 32 (Hunt J).

61 (1951) 85 CLR 437.

62 As to this, see Redlich JA's observations in *R v Tran* [2007] VSCA 19, at [39] that the trial judge must confine directions of law to those the jury need to know in order to resolve the issues in dispute but he said the ambit of those duties will be determined by the evidence, not by the issues which the parties choose to pursue. The obligation is therefore on the trial judge to decide the issues of a case, rather than trial counsel.

63 *CTM v The Queen* (2008) 247 ALR 1, 29 (Kirby J). For example, Murphy J discusses the difficult forensic decisions that sometimes have to be made in *Waldrope v R* (1987) 29 A Crim R 198, 200: 'If the accused at trial, chooses to present an alibi, he cannot be expected at the same time to raise self-defence as an issue, nor yet to plead provocation. His dilemma is clear. In such circumstances, it is the duty of the trial judge to consider whether self-defence or provocation is a possibility…'

64 Criticism can be found as far back as the early 19th Century of the trial judge playing more than an impartial and passive role within the dynamic of the adversary system. The *Edinburgh Review* 74 (1926) 81 observed: "The Judge *cannot* be counsel for the prisoner, *ought* not to be counsel for the prisoner, never *is* counsel for the prisoner': cited in Langbein, The Origins of Adversary Criminal Trial, 312. Sean Doran, 'Alternative Defences: The "Invisible Burden" On The Trial Judge' (1991) *Criminal Law Review* 878, 878-9; Mitchell Davies, 'Leaving Provocation To The Jury: A Homicidal Muddle?' (1998) 62 *Journal of Criminal Law* 374, 380.

65 Sean Doran, 'Alternative Defences: The "Invisible Burden" On The Trial Judge' (1991) *Criminal Law Review* 878, 880.

66 *Waldrope v R* (1987) 29 A Crim R 198, 204. The difficulties facing the trial judge in these circumstances were also emphasised in *Koutsouridis v R* [1982] 7 A Crim R 237 and *R v Lovett* [1972] VR 413.

67 This principally occurs when the 'contingent' defence is inconsistent with the principal defence, as was the case in *CTM v The Queen* (2008) 247 ALR 1.

68 *R v Tran* [2007] VSCA 19. Redlich JA observed that defence counsel may conclude it is impractical to address alternative defences which appear to be inconsistent with the primary defence. See also *Fingleton* v R (2005) 227 CLR 166, 198 (McHugh J).

69 (2006) 225 ALR 161, 164.

70 Ibid.

71 (2007) 171 A Crim R 207.

72 Ibid 226 (Neave JA).

73 See, for example, Nettle JA in *R v Cardamone* (2007) 171 A Crim R 207, 224.

74 Sean Doran, 'Alternative Defences: The "Invisible Burden" On The Trial Judge' (1991) *Criminal Law Review* 878, 888.

(except where the judge raises them in a 'necessarily neutral manner'), the accused may not have had a fair opportunity to contest the issue.[75] One writer has suggested that the *Pemble* obligation should be limited to circumstances where it is necessary to secure a fair trial for the accused, for example, where intervention is needed because of counsel's incompetence.[76]

### The 'unsatisfactory appeal'[77] allowing counsel to 'reserve' issues for appeal

5.32 A further concern about the current approach to the *Pemble* obligation is that it permits trial counsel to say nothing, or to specifically request the trial judge to refrain from raising an alternative defence, but to subsequently 'reserve' as an appeal point the issue of any failure by the trial judge to raise the alternative defence. This has been described in consultations as allowing the defence to have 'two bites at the cherry', or as giving rise to what Kirby J in *Gillard* calls the 'unsatisfactory appeal'.[78] In *Gillard*, defence counsel had persuaded the trial judge to confine the jury to a choice between 'murder and nothing', which gave the accused certain forensic advantages. Following a conviction at trial, Kirby J commented on the 'sense of distaste' in allowing the defence to succeed on appeal based on the trial judge's failure to put the alternative of manslaughter.[79]

5.33 The tactical use of *Pemble* by experienced, competent counsel to 'reserve' an appeal point in this way appears to go far beyond the original circumstances in which the principle was applied in that case to prevent a miscarriage of justice. Recently, the Victorian Court of Appeal has considered whether tactical decisions by counsel at trial should be taken into account at the appeal stage when determining whether a miscarriage of justice has occurred.[80]

5.34 In addition, the fact that competent counsel has failed to raise an issue at trial may indicate that the issue was not significant at trial, rather than because of any 'incompetence or inadvertence' of counsel.[81] If defence counsel has not perceived any disadvantage or injustice to the accused at trial, it may point to the unlikelihood that a substantial miscarriage of justice occurred, and that an appeal on the basis of a failure to bring that point to the jury's attention should not be successful.[82]

5.35 In *CTM*, Kirby J observed that the *Pemble* requirement 'has never been doubted and has frequently been confirmed by this Court'.[83] However, it would seem undesirable that tactical decisions by competent and experienced defence counsel should result in considerable burdens for a trial judge.

## OPTIONS FOR REFORM

5.36 The trial judge has an overriding duty to give any direction that is necessary to avoid a perceptible risk of a miscarriage of justice.[84] However, the unusual circumstances in *Pemble* which obliged the judge to direct the jury about a matter which the defence had expressly avoided in order to ensure 'a fair and accurate trial' do not often arise. In an adversarial system, counsel should have primary responsibility to identify the issues in the case.

5.37 One option is to set aside the common law rule by legislation which provides that, unless the accused is unrepresented, the judge is obliged to charge the jury only about those defences that counsel expressly identified and advanced before the jury, and for which there is an evidential basis. Where counsel, on appeal, raises the failure of the trial judge to leave a defence to the jury, the legislation could provide that counsel's failure to address the defence before the jury provides some evidence that the failure of the judge to do so was not a miscarriage of justice. The proposed *Directions and Warnings Act* could limit the effect of *Pemble* by the inclusion of a provision to the following effect:

- The trial judge is not required to direct the jury about defences or alternative versions of the facts not put to the jury by counsel,

unless

- The trial judge is of the opinion that the failure to do so may lead to an unfair trial, for example, where the trial judge is of the opinion that failure to put an alternative defence was not the result of a tactical decision made by counsel, rather an error or accidental omission.

5.38 In the next part of this Chapter, we outline the duty to summarise the evidence as well as the current criticisms concerning the law, and some options for reform. Like the *Pemble* issue, summaries of evidence do not often form the basis of appeals. It has nonetheless been identified as a question in our terms of reference and as a problem, in preliminary consultations.

## THE DUTY TO CHARGE THE JURY

5.39 At the end of a criminal trial, the judge must 'charge' the jury. Charging the jury means instructing the jury about the relevant law and relating the evidence in the case to the law. A significant part of many jury charges, at least in Victoria, is a general summary of the evidence on both sides. Like the *Pemble* issue, summaries of evidence do not often form the basis of appeals. It has, however, been identified as a question in our terms of reference and as a problem in preliminary consultations.

5.40 The classic Australian statement of the obligation of the trial judge when charging the jury is found in *Alford v Magee*[85] where the High Court stated:

> … *it may be recalled that the late Sir Leo Cussen insisted always most strongly that it was of little use to explain the law to the jury in general terms and then leave it to them to apply the law to the case before them. He held that the law should be given to the jury not merely with reference to the facts of the particular case but with an explanation of how it applied to the facts of the particular case. He held that the only law which it was necessary for them to know was so much as must guide them to a decision on the real issue or issues in the case, and that the judge was charged with, and bound to accept, the responsibility (1) of deciding what are the real issues in the particular case, and (2) of telling the jury, in the light of the law, what those issues are.*[86]

5.41 This is often referred to as 'Sir Leo Cussen's great guiding rule'[87] and seems often to be cited almost ritualistically in cases dealing with the content of the obligation to sum up.[88] This simple statement, however, fails to capture the complexity of the task facing the trial judge when preparing and delivering a summing up. That difficulty has been exacerbated by the substantial increase in the volume and complexity of the criminal law since *Alford v Magee* was decided in 1952.

5.42 *Alford v Magee* is also sometimes said to require the trial judge to summarise the evidence in the case. It does not do so expressly. The obligation of the trial judge to summarise the evidence appears to be much older, apparently predating the adversarial system.[89] The better view appear to be that Alford v Magee requires the judge to only summarise the evidence which directly relates to the facts in issue.[90]

### ELEMENTS OF THE OBLIGATION TO CHARGE THE JURY

5.43 There are three distinct concepts involved in preparing a jury charge:

- issue identification
- directing on the law
- relating the evidence and the law to the issues.

5.44 Although these matters can be separately described, there is a significant degree of overlap in practice.[91]

#### Issue identification

5.45 The jury must be instructed about the issues in a case. A failure to properly identify the issues may lead to the jury being undirected on key areas of dispute. For example, in the case of *R v AJS*, the accused was charged with incest. One strand of the defence case was that, if penetration did occur, it was accidental. The crime of incest requires intentional penetration. The trial judge did not direct the jury about this issue and the matter was successfully appealed.[92]

5.46 The problem of issue identification should be dealt with long before the judge is required to prepare the summing up.[93] Reforms aimed at facilitating the identification of issues are dealt with in Chapters 6 and 7.

75 *R v Kane* (2001) 3 VR 542, 548.

76 Guy Green, 'Basic Values and the Criminal Law' (1993) 17 *Criminal Law Journal* 229, 233.

77 Kirby J in *Gillard v R* (2003) 219 CLR 1, 8-17.

78 Kirby J in *Gillard v R* (2003) 219 CLR 1, 17. Note that Kirby J found that manslaughter was open for the jury to consider.

79 *Wardrope v R* (1987) 29 A Crim R 198.

80 *R v Cardamone* (2007) 171 A Crim R 207, although in that case, this was discussed in the context of the requirement to give an *Edwards* direction, not alternative defences.

81 J D Heydon, 'Reciprocal Duties of Bench and Bar' (2007) 81 (1) *Australian Law Journal* 23, 29.

82 *TKWJ v The Queen* (2002) 212 CLR 124 at 128 [8]; *R v Arundell* [1999] 2 VR 228, 247-250. Note Eames J's observation in *R v Kumar* (2006) 165 A Crim R 48, 56 in relation to failure of counsel to seek a *Zoneff* direction, that the failure to object at trial was a 'strong pointer to the fact that neither counsel discerned there to be the risk which the High Court addressed in that case'.

83 *CTM v The Queen* (2008) 247 ALR 1, 30.

84 *Longman v R* (1989) 168 CLR 79 at 86; *R v Miletic* [1997] 1 VR 593 at 605-6; *R v GTN* (2003) 6 VR 150, *Crampton v R* (2000) 206 CLR 161, 208.

85 (1951) 85 CLR 437.

86 Ibid, 466.

87 See, amongst others, *Tully v R* (2006) 230 CLR 234, 248; *R v VN* (2006) 15 VR 113; *R v Zilm* (2006) 14 VR 11.

88 See, recently, *HML v R* (2008) 245 ALR 204, 237; *R v AJS* (2005) 12 VR 563, 577; R v Thompson [2008] VSCA 144, [136]. See also those cases referred to at footnote 129 of *HML* , footnote 28 of *AJS* and footnote 66 of *Thompson*.

89 Francis Bacon, Lord Chancellor of England, in an essay on the judicial role refers to one of the 'parts' of a judge as being to 'recapitulate, select and collate the material points, of that which has been said': see 'Of Judicature' in Basil Montagu (ed.), *The Works of Francis Bacon, Lord Chancellor of England* (1825), 56, Bacon was active in the 16th and early 17th centuries, whereas the adversarial system only really emerged in the early 18th century.

90 A view apparently endorsed by the Victorian Court of Appeal in *R v AJS* (2005) 12 VR 563.

91 For a recent discussion of these common law obligations see *R v Thompson* [2008] VSCA 144.

92 It should be noted that the issue of intent was squarely raised, indicating that early issue identification would certainly not prevent all misdirections / nondirections.

93 The problem is, however, exacerbated by the *Pemble* principle, which requires the judge to direct on issues not raised by counsel. This heightens the risk that an issue may not be identified and result in a non-direction.

# Chapter 5 *Pemble* and Charging the Jury

## Directing on the law

5.47 One function of the summing up is to provide the jury with sufficient knowledge about the law to reach a decision in the case. The question of what directions are required is governed by the trial judge's determination of the issues. The trial judge must often deliver a large number of complex directions, particularly warnings in the area of evidence. While some of these directions may be delivered during the the trial, most will come at the conclusion, as part of the summing up. Some of the issues relating to the number and complexity of these directions are dealt with in Chapters 3 and 4.

## Relating the evidence and law to the issues

5.48 The third matter is the obligation of the trial judge to relate the evidence and the law to the real issues in the case. The basic principle involved appears well understood: the trial judge must explain to the jury only so much of the law as they require to judge the facts in issue and summarise only that part of the evidence that bears on the resolution of those issues.[94] In our preliminary consultations, however, members of both the bench and the bar criticised the growing length of the summing up.[95]

5.49 Why does the summing up take so long? Two factors are:

- increased complexity of crime and the criminal law
- lack of trust between trial and appellate courts.

### The increased complexity of crime and the criminal law

5.50 One possible reason for longer summaries of evidence is the increased complexity of every aspect of crime and the criminal law. In Chapter 2 we discussed the complexity associated with developments in the law of evidence. Recent decades have seen a substantial growth in complex, non-violent crimes,[96] such as drug offences, money laundering and financial fraud. These crimes, often carried out by groups, rather than individuals, require a more complex investigative response and are often proven by circumstantial, rather than direct, evidence.[97] All of these factors add to the complexity of trials and necessitate longer jury charges, including longer summaries of evidence.

### Lack of trust

5.51 Linked to the increased complexity and technicality of appellate jurisprudence appears to be a lack of trust between the trial and appellate courts. On a number of occasions, the appellate division has indicated to the trial division that the obligation to sum up can be met with something less than a complete recitation of the evidence and law in the case.[98] Nevertheless, some trial judges continue to summarise all of the evidence. In part, this may be motivated by a lack of trust in the appellate courts. In *The Price of Justice*,[99] the authors interviewed a number of lawyers and judges about what they saw as the causes of long trials. One judge stated that the attitude of the appellate judges to criminal law:

> *… is a positive disincentive to taking a bold step in a case and find something different* [sic]. *Now, when you go over the road they will tell you … 'Be strong. Put them off. Do this. Do that. We're going to support you. Crack down on counsel. Take short cuts. Get to the heart of the matter. We'll support you.' None of us have any confidence that they will.*[100]

5.52 There is no suggestion that the judge in question was Victorian, but it is possible that a similar attitude causes some trial judges in Victoria to go into greater detail in summarising the evidence, rather than less.[101]

## OPTIONS

5.53 Some sort of summing up is necessary. The jury need to be directed about the relevant law and the issues in dispute.

5.54 There are number of possible ways of reforming the summing up process, most of which are compatible.[102] In this section, we consider the following options:

- no change
- the introduction of a statutory discretion to decide whether to summarise the evidence
- the introduction of special verdicts
- the adoption of an issues based approach to summing up
- the adoption of a US style approach in which the judge directs the jury purely on matters of law, with minimal, if any, reference to the facts.

### No change

5.55 It is arguable that no specific changes to the summing up are necessary. If other reforms aimed at issue identification and reduction in the number and complexity of jury directions are implemented, the impact of these reforms may sufficiently reduce the difficulty of giving a summing up[103] and its length.

5.56 Changing the directions a judge is required to give, however, is unlikely to have a significant impact in those cases where there are multiple accused, multiple charges, complex issues or any combination of these three things. For example, the Salt nightclub murder case[104] involved seven accused and the evidence ran for 116 days. Even in a relatively simple case, the summary of that quantity of evidence is likely to take a significant amount of time, in some cases taking longer than the trial itself.[105]

### A statutory discretion to summarise the evidence

5.57 The trial judge could be given a discretionary power by statute to decide whether the evidence needs to be summarised in a given case.

5.58 If the discretionary power merely permitted the judge to dispense with a summary of evidence in short cases, the legislation would do nothing more than codify the existing common law position described in *R v Zilm*.[106] A more expansive power would permit the judge to decline to summarise the evidence in any case. This is the current position in New South Wales. Section 161 of the *Criminal Procedure Act 1986* (NSW) allows a judge to decline to summarise the evidence in a case, although it is still necessary for the judge to provide the jury with information about other matters, such as directions on the law. The extent of the power is unclear because section 161 does not appear to have been the subject of judicial consideration[107]

### Special verdicts

5.59 One solution to the problem of relating the evidence to the law and to the findings of fact that the jury must make is to use of special verdicts. In a trial, the jury returns a 'general verdict', where they simply

94 In *R v Thompson* [2008] VSCA 144, [137], Redlich JA observed that this duty is not confined to the ultimate facts in issue (which comprise the elements of the offence) but also relates to 'subsidiary issues' or the 'substratum of facts which are in dispute' and which bear on the resolution of the 'ultimate issues' (citing *R v Yusuf* (2005) 11 VR 492, 501-2 (Winneke P)).

95 See, for example, the doubts expressed by Neave JA about the capacity of jurors to absorb 'lengthy and complex oral charges containing detailed summaries of evidence' in *R v Thompson* [2008] VSCA144 at [102].

96 By 'non-violent', it is meant that the crimes themselves do not necessarily involve an element of violence. Many of them, particularly drug offences, may, however, be associated with separate crimes of violence.

97 Although there is no legal difference between the strength of direct and circumstantial evidence, as a practical matter, it appears more circumstantial evidence will generally be required to prove a point. This is because of the mode of proof involved: direct evidence proves by assertion, whereas circumstantial evidence proves by excluding hypotheses other than the one to be proven. As a matter of logic, it will take more evidence to exclude all other hypotheses than to suggest a single hypothesis.

98 See, recently, *R v DD* [2007] VSCA 317; *R v Nguyen* [2006] VSCA 158; *R v Zilm* (2006) 14 VR 11; *R v AJS* (2005) 12 VR 563; *R v Thompson* [2008] VSCA144.

99 Janet Chan and Lynne Barnes, *The Price of Justice: Long Criminal Trials in Australia* (1995).

100 Ibid, 43.

101 Another comment in *The Price of Justice*, ibid, seems to bear this one as a motivation for giving long summings up: 'The evidence summary … can go for several days, as this one did. And the range of issues that you have to introduce, because if you leave them out … you've got a problem with the appeal.'

102 In Chapter 7, we suggest some other possible reforms concerning the obligation to sum up.

103 It is important to note that some judges in our preliminary consultations expressed a preference for long and detailed summaries of evidence on the basis that they felt that this assisted the jury to understand points that may have been missed during the trial.

104 On appeal, *R v Lam & Ors* [2008] VSCA 109.

105 As it happened, *Lam* did involve complicated issues of law. The jury charge took approximately 20 days.

106 (2006) 14 VR 11, 23-24.

107 Two cases where it has been used are *R v Williams* (1999) 104 A Crim R 260; *R v Davis* [1999] NSWCCA 15. Both appear to have been relatively short trials. If these are the kinds of cases to which s161 applies, it is arguable that it goes no further than the common law discretion mentioned in *Zilm*.

pronounce the accused 'guilty' or 'not guilty' without elaboration. Special verdicts are different; they require the jury to answer specific questions of fact, the results of which point to a legal conclusion.

5.60 Two kind of special verdict are theoretically possible: 'true special verdicts' and 'hybrid special verdicts'.[108] The difference between a 'true' special verdict and a 'hybrid' special verdict is how the conclusion is reached. In a true special verdict, the jury is asked a number of questions of fact. The answers to those questions of fact permit the judge to pronounce a verdict. For example, in a homicide case where intent was the sole issue, a jury might be asked:

- Did the accused intend to kill the victim?
- Did the accused intend to seriously injure the victim?

5.61 If the jury answered yes to either of these questions, the judge would return a verdict of murder.[109]

5.62 In a hybrid special verdict, the jury would still be asked a series of questions based on the elements of the case. Instead of withdrawing the final verdict from the jury, however, the jury would be instructed about the legal consequences of their findings and asked to return a verdict of 'guilty or not guilty'. The significance and usefulness of the hybrid approach is that it leaves the ultimate question of guilt or innocence in the hands of the jury.

5.63 This approach is adopted in the 'checklists'[110] currently prepared by the Judicial College of Victoria as part of its Criminal Charge Book. It is unclear how often these checklists are used in criminal trials. Adopting the hybrid approach would involve mandating the use of such checklists.

5.64 Lord Justice Auld, in the UK Criminal Courts Review, recommended the adoption of special verdicts to address the problems associated with summings up.[111] The advantages of special verdicts are two-fold:

- First, a properly drafted set of questions can overcome the need to direct the jury about much of the law. Many of the legal issues involved in a criminal trial can be resolved by the preparation of straightforward questions of fact.
- Secondly, because the questions for the jury are based on the elements of the offence charged, special verdicts provide a streamlined and structured format for the judge to prepare the summing up and to relate the evidence and the law to the issues in the case.

5.65 The adoption of special verdicts may also have more intangible benefits for the integrity of the adversary system because it may reveal more of the reasoning of the jury. This outcome has the potential to enable sentences to more accurately reflect the verdict and gives an appellate court more information to evaluate when deciding whether the trial was unfair. Special verdicts also provide a partial answer to those critics of the jury system who claim that jury verdicts are not sufficiently transparent.

### The US approach

5.66 In the US, the majority of American states prohibit trial judges from commenting on the evidence,[112] while those that do permit comment tend to place strong restrictions on the power to do so.[113] If this approach were adopted in Victoria, a trial judge would not be required to relate the evidence to the issues in a case.

5.67 The trial judge in many US States issues a series of pattern instructions[114] with minimal, if any, reference to the specific facts of the case. This approach has the advantage of freeing the trial judge from the difficulties involved in preparing a charge which properly relates the evidence and the law and to the real issues in a case.

5.68 The lack of a summary of the evidence poses two problems. The first is that jurors will find it harder to comprehend abstract directions than directions which are related to the facts in the case.[115] Indeed, under current Australian law, an American-style direction would amount to an error of law.[116] Given the impact on juror comprehension, it would be difficult to recommend a wholehearted adoption of the US approach, whatever other benefits it might provide.

5.69 The second, and more intangible, significance of the Anglo-Australian style jury charge is at an institutional level: the summing up may positively affect juror perceptions of the judge (and, potentially by extension, the criminal justice system). In an experiment, [117] American mock jurors sat through different versions of a criminal trial,[118] one of which adopted a variety of English procedural devices, including the summing up. [119] Interestingly, although observers were sharply divided on the merits of a summing up generally,[120] people thought the judge in the trial where English procedural devices were used to be fairer, more authoritative, knowledgeable, likeable and effective than the judge in the American style trial.[121]

5.70 A further point is that the jury charge may undermine efforts by barristers on either side to confuse the jurors. [122] The absence of a summing up and decreased judicial involvement in the case may lead to greater control over the course of the trial by counsel and less focus on the legal issues.[123]

### An issues based approach to jury charges

5.71 A further possibility, building on the special verdicts approach, is to charge the jury on an issue-by-issue basis. For example, rather than charging the jury on the law of murder, the trial judge would begin by charging the jury on the first relevant question of law, such as, whether the accused caused the death of the victim. The jury would be given the opportunity to ask any questions about the issue before being asked to determine that particular question.

5.72 The benefits of this approach are:

- It is likely to produce greater juror comprehension
- It may produce a small reduction in the length of some criminal trials, and
- It may ease the workload of some trial judges.

5.73 One of the current problems with jury instructions is that the jury is exposed to a very large amount information at one time which it is expected to understand and retain. An issues based approach deals with this matter by confining the information which the jury must be given at any one time to a single issue.

5.74 The second and third benefits, relating to time and workload, are interrelated. Under the current system, it is possible for a jury to receive an entire charge, possibly lasting several days, and then swiftly return a not guilty verdict because they are an unsatisfied about the most basic element. Adopting an issues based approach would mean the jury need not receive a 'whole' charge before returning their verdict. If they were unsatisfied of causation, it would be unnecessary for them to be instructed in the law relating to intent or on positive defences before giving their verdict. This could result in shorter charges and a correspondingly reduced burden on the trial judge.

108 See generally Kate Nepveu, 'Beyond Guilty or Not Guilty: Giving Special Verdicts in Criminal Jury Trial [sic]' (2003) 21 *Yale Law and Policy Review* 263. See also John Langbein, 'Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?' (1981) *American Bar Foundation Research Journal* 195, 198, noting both 'true' and 'hybrid' special verdicts in 19th century Germany.

109 As noted, this is premised on the assumption that intent is the only issue. In many other cases, questions such as 'Did the accused kill the deceased?' would have to be asked.

110 So described by the Judicial College of Victoria, but more commonly known as 'decision trees'.

111 Robin Auld LJ, *Review of the Criminal Courts of England and Wales* (2001), [41] – [55].

112 'Commenting' includes relating the facts to the law. Interestingly, however, the States that prohibit comment generally permit recapitulation of the evidence without comment. Of the 41 States that prohibit comment, only 4 prohibit restatement of the facts: Kenneth Krasity, 'The Role of the Judge in Jury Trials: The Elimination of Judicial Evaluation of Fact in American State Courts from 1795 to 1913' (1984 – 1985) 62 *University of Detroit Urbana Journal of Law* 595.

113 For a list of those States that do and do not permit judicial comment, see Kenneth Krasity, 'The Role of the Judge in Jury Trials: The Elimination of Judicial Evaluation of Fact in American State Courts from 1795 to 1913' (1984 – 1985) 62 *University of Detroit Journal of Urban Law* 595. In addition to a small number of States, judges in the US Federal courts retain the ability to comment on evidence.

114 'Pattern jury instructions, sometimes known as standard, model, uniform, approved or recommended jury instructions, are designed to be accurate and impartial statements of the law that can form the skeleton for the judge's charge to the jury.': Steele and Thornburg, 'Jury Instructions: A Persistent Failure to Communicate' (1988 – 1989) 67 *North Carolina Law Review* 77, fn 8.

115 See, Walter Steele and Elizabeth Thornburg, 'Jury Instructions: A Persistent Failure to Communicate' (1988 – 1989) 67 *North Carolina Law Review* 77, 101 – 103. The learned authors observe that restrictions on commenting on the evidence 'diminish greatly' the chance of giving comprehensible instructions. They conclude: 'This kind of silliness should not be required by law'.

116 See, among others, *R v Fingleton* (2005) 227 CLR 166.

117 Recounted in: Dennis Turner and Solomon Fulero, 'Can Civility Return to the Courtroom? Will American Jurors Like It?' (1997 – 1998) 58 Ohio State Law Journal 131.

118 The experiment involved three trials: one conducted by English barristers before an English judge with English procedure; one conducted by American trial lawyers before an American judge with American procedure; and one conducted by American trial lawyers before an American judge with English procedure.

119 Seven procedural reforms were introduced. Other than a summing up, these included deferring defence counsel's opening statement till the close of the prosecution case; the bar handling minor objections between themselves and without recourse to the judge; counsel being required to remain at the bar table; having the jury removed during serious evidentiary objections; having the trial judge question a witness; and having the judge actively prevent the admission of irrelevant evidence (in the US / US trial, the judge waited until defence counsel objected before ruling the evidence inadmissible).

120 Dennis Turner and Solomon Fulero, 'Can Civility Return to the Courtroom? Will American Jurors Like It?' (1997 – 1998) 58 Ohio State Law Journal 131, 153 - 155.

121 The same judge presided in both the American / American trials and the English / American trials suggesting that it was the procedural reforms, rather than the individual judge, that was critical to improving juror perceptions of the judge. Turner and Fulero later should the tapes of the trial to a British group as well, one of whom apparently commented of the judge in the American / American trial: 'The judge just sits there and doesn't do anything. What is he getting paid for?': Turner and Folero, ibid., footnote 49.

122 Turner and Folero, ibid, 155.

123 Ibid. This is not a new argument. The North Carolina Supreme Court made a similar point in *State v Moses* (1830) 13 NC 452, where it observed that judicial comments on the facts would mean that '… success would oftener than it does depend on the justice of the case, rather than the ability or adroitness of the advocates.'

5.75 The difficulty with such an approach is that demands more active attention from the trial judge and counsel. Under the current system, once the charge has been given, the trial judge and counsel have largely discharged their responsibilities. On an issues based approach, the trial judge and counsel might be required to attend on a number of occasions to hear the charge on the relevant issue.

Chapter 6

# Pre-trial Issue
# **Identification**

# Chapter 6 Pre-trial Issue Identification

## INTRODUCTION

6.1 This chapter describes the current practices and problems in relation to pre-trial issue identification and the relevance of early issue identification to the preparation of jury directions. First, we outline what issue identification means in the context of a criminal trial and when it occurs. We then explain why early identification can assist trial judges in the preparation of their jury directions. We also outline the limitations in relation to current practices and how recent reforms to the sexual offence trial management have sought to address these limitations.

## PROCEDURES FOR PRE-TRIAL ISSUE IDENTIFICATION

6.2 Prior to the commencement of a criminal trial, there are a number of opportunities, provided for in the legislation, for parties to identify the issues in the case. The purpose of the legislative provisions is to improve the 'efficiency' of criminal trials[1] by excluding as many undisputed issues of law, fact and procedure as possible. Such procedures also facilitate the early identification of issues that may require special consideration and management by the trial judge.[2]

6.3 The provisions of the *Crimes (Criminal Trials) Act 1999* and the Rules of the County[3] and the Supreme Courts[4] require pre-trial disclosure between the parties at a variety of stages prior to the trial. For example, the *County Court Miscellaneous Rules 1999* provide for a pre-trial conference.[5] Prior to that conference, the prosecution is required to serve a case summary and the defence is required to serve a response. Once a trial date has been set, the *Crimes (Criminal Trials) Act* requires an exchange of certain documents, by stipulated dates, between the parties prior to the commencement of the trial.[6] The Act also requires questions of law that either party intends to raise to be disclosed prior to the trial. Such questions may be resolved on the basis of written submissions,[7]or through a directions hearing.

6.4 Directions hearings are the primary method of raising pre-trial issues for consideration.[8] They are not mandatory, but may be requested by the prosecution, the defence or called for by the court in which the trial is to take place. The *Crimes (Criminal Trials) Act* provides for a 'first directions hearing' and then 'subsequent' directions hearings.[9] While the first directions hearing is generally concerned with gathering of information such as the estimated length of the trial, the number of witnesses to be called and their availability, subsequent hearings may also be called to consider questions of law or procedure which have arisen from the documents exchanged between the parties. [10]

## THE IMPORTANCE OF ISSUE IDENTIFICATION

6.5 The purpose of pre-trial procedural requirements is to improve the efficiency of criminal trials. The exchange of documents can also assist the parties to clarify what the issues in the case are prior to the commencement of the trial. The judge must be aware of the issues in the case in order to properly direct the jury. Failure to identify the issues may cause the trial judge to fall into error, either by failing to direct the jury on the relevant law[11] or by directing the jury on irrelevant law.[12]

6.6 In order to minimise the risk of error, it is preferable to identify relevant issues as early in the trial process as possible. In the absence of pre-trial issue identification, the judge must respond to the legal issues as they arise during the course of the trial or rely upon trial counsel to request warnings and directions where appropriate.[13] While an early understanding of the legal issues will not necessarily prevent errors occurring, preliminary consultations confirmed that a process that requires judges to respond to legal issues 'on the run' increases the risk of errors, particularly in complex trials.

## LIMITATIONS IN THE CURRENT PRE-TRIAL SYSTEM

6.7 There are a number of practical limitations in relation to the present framework and its capacity to allow for accurate identification of issues.

## INCONSISTENT OBSERVANCE OF PRE-TRIAL DISCLOSURE REQUIREMENTS

6.8 It appears from preliminary consultations that existing pre-trial requirements are not consistently observed, and where they are applied, that defence counsel are unlikely to identify issues in any detail before a trial commences.

6.9 Pre-trial disclosure in Victoria is regulated by the Crimes *(Criminal Trials) Act 1999*. Section 7 of that Act requires that the Crown produce a written summary of its case, and the defence a written response at least 14 days prior to trial. That requirement, however, is often not met. Opinions among those consulted differed as to the efficacy of the *Crimes (Criminal Trials) Act* pleading documents. Section 6 of that Act allows the court to waive the requirement for the parties to file pleadings documents. Until recently, it appears, this was the common practice of the Supreme Court. Presumably, this was done because of an assumption that counsel were experienced and could therefore accurately identify the necessary issues without the need for pleadings documents. It is unclear whether this was also the case in the County Court at the time the legislation was first introduced. It does appear that the legislation is now generally applied in both the Supreme and the County Court, although to different degrees.

## LAG BETWEEN COMMITTAL PROCEEDINGS AND TRIAL

6.10 The length of time that elapses between the committal and the trial can mean that issues do not receive proper consideration until closer to the trial. Usually the trial will be set after the pre-trial conference for around 9 months later. It emerged from consultations that the documents required under the *Crimes (Criminal Trials) Act* tend to be prepared by solicitors and that this is, in part, a consequence of the time lag and the reluctance to brief counsel until closer to the trial date. Although counsel may have been asked to advise on the contents of the defence document, the low fee paid by Victoria Legal Aid for counsel to provide such an opinion is a disincentive to making a comprehensive review of the depositions or providing fully informed advice. It was generally agreed that, in spite of the current legislative framework seeking to enforce proper issue identification, in practice it is only when counsel are ultimately briefed for trial that the issues in the trial will really begin to be properly identified.

## LACK OF CONTINUITY IN TRIAL MANAGEMENT

6.11 In the County Court, the trial judge is usually assigned to the case on the Friday before a trial commences.[14] This does not allow very much time for judges to familiarise themselves with the depositions, prosecution

1 *Crimes (Criminal Trials) Act 1999* (Vic) s 1.

2 Richard Fox, *Victorian Criminal Procedure: State and Federal Law* (2005) 239.

3 *County Court Miscellaneous Rules 1999* (Vic).

4 *Supreme Court (Criminal Appeals and Procedures) Rules 1998* (Vic).

5 *County Court Miscellaneous Rules 1999* (Vic) r 11.10.

6 The prosecution is required to serve on the defence and file with the court a summary of their opening and a notice of pre-trial admissions at least 28 days prior to the commencement of the trial (s 6). In response to this, the defence must serve on the prosecution and file in court a response to the summary of the prosecution opening by identifying the facts or other matters that are not conceded and why they are in dispute. A similar response must be filed in response to the notice of pre-trial admissions (s 7). If either party intends to raise a question of law in the trial, they must give notice 14 days before the trial is due to commence or as soon as possible after having become aware of it (s 10).

7 *Crimes (Criminal Trials) Act 1999* (Vic) s 10(3).

8 Pre-trial hearings may also be held to establish the readiness of the parties. Pre-trial hearings are provided for under the *Supreme Court (Criminal Appeals and Procedures) Rules 1998* (Vic) r 4.10; *County Court Miscellaneous Rules 1999* (Vic) r 11.11

9 *Crimes (Criminal Trials) Act 1999* (Vic) s 5.

10 *Crimes (Criminal Trials) Act 1999* (Vic) s5(5).

11 See, eg, *Doggett v the Queen* (2001) 208 CLR 343.

12 *R v Chai* (2002) 187 ALR 436, 441.

15 This new system is set out in the County Court Sexual Offences List Practice Note No PNCR 1-2007 the contents of which are also reflected in the recently passed *Justice Legislation Amendment (Sex Offences Procedure) Act 2008* (Vic), which is intended to extend the requirements in the *Crimes (Criminal Trials) Act 1999* (Vic).

16 For example, in relation to matters involving child and cognitively impaired complainants:

- The first directions hearing is to be held within approximately14 days of the committal
- The final directions hearing is to be held approximately 28 days prior to the trial
- The accused person must be tried within 3 months of having been committed.

See Practice Note PNCR 2-2008, [15], [41] and *Crimes (Criminal Trials) Act 1999* (Vic) s 4(2)(aa). Counsel are also briefed sooner within this system and the trial judge is usually allocated at the first directions hearing.

17 Practice Note PNCR 2-2008 [41].

18 Ibid.

19 This should not be confused with the 'checklists' included in the Judicial College of Victoria Charge Book, which addresses the elements of the relevant offences and defences and a list of questions that the jury must answer in order to reach their decision.

# Chapter 6 Pre-trial Issue Identification

opening and other documents including the defence response. It seems from preliminary consultation that in any case some judges decline to read this material, preferring to leave it to counsel to present the case, dealing with the issues as they then arise.

6.12 The inconsistency in application of various procedural provisions, together with the time delays that can occur during criminal trials and the differing levels of criminal trial experience of those conducting the case at different times means that the issues may not become clear until they arise in the course of the trial. This potentially means that judges are not consistently being given an adequate opportunity to prepare the required directions in criminal trials. While the specification of a long lead time between the fixing of a trial date and the trial provides a degree of certainty to the parties and to witnesses, it provides little encouragement for counsel or for the client to address the issues in the case or the possibility of a plea of guilty.

## SEX OFFENCE PROCEDURAL REFORM

6.13 A new system has recently been implemented in relation to sexual offences that seeks to ensure issues are properly identified before the commencement of the trial. The new system substantially draws on and expands the requirements of the *Crimes (Criminal Trials) Act*.[15] While this timetable would be difficult to apply more generally because of the intensive resource requirements, there may be lessons to draw from those reforms about effective ways of enhancing issue identification.

6.14 The reforms have sought to promote pre-trial identification of contested issues in sexual offence cases by requiring the parties to file documents that are more specific than those required in other cases. Some sexual offence cases are also subject to a timetable imposed by statute.[16]

6.15 For example, at the final directions hearing in sexual offence matters[17] the prosecution and the defence are required to be 'sufficiently familiar' with the case in order to inform the listing judge about issues likely to be contested in the trial.[18] Issue identification is also enhanced in sexual offence cases by the use a 'checklist', or running sheet, at directions hearings.[19] The checklist requires counsel to indicate whether a range of legal issues, such as 'propensity', 'similar fact', 'cross-admissibility', and 'delay in complaint' will arise in the trial. The document also requires the parties to advise the trial judge about directions and warnings that may be needed.

6.16 We have been told that these changes to the law and practice which require timely and precise identification of the issues in sexual offence cases have been widely accepted by legal practitioners. As already mentioned, resource constraints are likely to mean that generalizing such a strict system is not possible. However, the development suggests that attitudes within the legal profession to the preparation of criminal trials may be changing and that there is potential to gain widespread support for further reforms designed to enhance issue identification. In particular it seems that there is growing support for the preparation of pre-trial documentation to assist both the parties and the trial judge. In Chapter 7, we discuss in further detail what such a document might contain and how it might be prepared.

13 The failure of trial counsel to seek a direction, however, does not mean that the trial judge is excused from their obligation to give that direction, if it is necessary to ensure a fair trial: *Pemble v the Queen* (1971) 124 CLR 107; *Doggett v the Queen* (2001) 208 CLR 343.

14 While the counsel briefed for the committal hearing will generally also appear at the trial of an accused, there is no legal requirement and it is far less likely that the judge at any pre-trial hearings would also be the judge assigned to the trial.

# Chapter 7
# Proposals and Options

# Chapter 7 Proposals and Options

## INTRODUCTION

7.1 This chapter contains proposals for reform of the law concerning jury directions and of related matters, such as pre-trial management, appeal powers and the training of judges and trial counsel. We also put forward a number of possible options and questions in relation to how best to implement these proposals.

7.2 Throughout this consultation paper, we have sought to illustrate the many factors contributing to the complexity and multiplicity of jury directions and to describe the negative effects this development has had on the conduct of criminal trials.

7.3 There is no simple solution to the problem of the complexity and multiplicity of jury directions. The response should be as multifaceted as the problem itself. Our central reform proposal is a single piece of legislation that clarifies when directions should be given and—in certain circumstances—what they should contain. This could be done by codification of the law or by introducing an ordinary piece of legislation.

7.4 While we identify some areas where particular problems arise in framing directions in relation to the substantive law,[1] we do not propose amendments to directions about the elements of offences and defences. Reform in this regard is beyond the scope of our reference and the substantive criminal law is the subject of ongoing review by the Department of Justice. Our primary focus is evidentiary directions and warnings.

7.5 In recognition of the importance of early identification of issues, we also propose strengthening pre-trial procedure so that judges are given adequate notice of the issues in the trial and can prepare appropriate directions.

7.6 Various aspects of the appeal process have contributed to the problems presented in this paper. We therefore propose restricting the capacity of people convicted at trial from raising points of law on appeal that were not raised, and could have been raised, during the trial.

7.7 Finally, we propose that further attention should be given to the skill development, on-going training and support of trial judges and counsel.

7.8 A number of key principles and themes underpin our reform proposals. First, the jury system and the adversarial nature of criminal trials are central components of our criminal justice system that should be retained and supported. Secondly, these central components are of such significance that piecemeal reform of the law governing the directions given to juries is no longer desirable. Many of the current problems associated with jury directions are the inadvertent result of fragmented reform to the common law and to legislation. This body of law has not promoted the prompt and efficient resolution of criminal trials and it has encouraged appeals against conviction on grounds that are sometimes highly technical. Thirdly, reform of the law that governs jury directions must support and promote the right to a fair trial. Fourthly, reforms must make jury directions more comprehensible than they are now.

7.9 Our proposals for reform are set out under the following headings and subheadings:

1. Jury directions legislation
   - Act or Code?
   - Protecting judicial discretion
   - Timing of directions
   - Changing the specific requirements as to content of directions and warnings
   - *Alford v Magee*
   - Accommodating future statutory directions
   - Implications of the Uniform Evidence Act for any review of directions
2. Enhancing issue identification
3. The Appeal Process:
   - Potential for misuse of current appeal provisions
   - The *Pemble* direction

4. Skill development, training and support
    - Judicial training and support
    - Specialist accreditation of trial counsel
    - A public defender scheme

## JURY DIRECTIONS LEGISLATION

7.10 Our central reform proposal is that the law governing the directions and warnings that a trial judge gives to a jury in a criminal trial be set out in one piece of legislation. There are two parts to the proposal:

(1) We propose that legislation set out requirements in relation to the circumstances in which a trial judge is required to or required not to give directions.

(2) We propose that the legislation provide guidance in relation to the content of some individual directions. This content could be included within legislation either as a specific form of words or as elements or issues that must be dealt with in order for a direction to comply with the legislation. Within each part of the proposal, there are a number of options for how this could be achieved.

### PROPOSAL 1

All of the circumstances in which the trial judge is required or required not to direct the jury should be set out in legislation.

7.11 Directions and warnings legislation could be either a new and separate Act or an additional part of the *Crimes (Criminal Trials) Act*. It may operate as an ordinary piece of legislation that would permit the continued operation of common law principles not inconsistent with the statute, or it may be a code that would be a complete statement of the law concerning jury directions. The legislation would describe the matters about which the trial judge must, and must not, direct the jury. The legislation would impose obligation on the trial judge to give directions as to:

I. the conduct of trial ('procedural directions')

II. the substantive law that is relevant ('substantive directions')[2]

III. the use of particular items of evidence ('evidentiary directions')

IV. the issues in the case - relating evidence to the law, ('*Alford v Magee*' requirement).

### ACT OR CODE?

#### Option A: Directions and warnings Act

7.12 An ordinary piece of legislation, whether it constituted a new Act or an amendment to an existing Act, would consolidate in a statute the current law about when and in relation to what matters a judge must direct the jury. An ordinary Act would permit the continued operation of common law rules that were not covered by the statute.

7.13 The benefits of this approach include:

- The 'one stop shop': Consolidating these legal obligations into one act provides a useful inventory for the judge of the matters about which directions must, and must not, be given.
- Opportunity to simplify requirements: Introducing a piece of legislation provides an opportunity to clarify and simplify the matters about which directions must be given. An Act might specify, for example, that all evidentiary directions are discretionary unless the judge is satisfied that they are necessary to ensure a fair trial. The Act might also state explicitly that the primary obligation to address the jury about the reliability of evidence rests with counsel.

7.14 A possible effect of introducing an ordinary Act to govern this area of law is that it leaves open the possibility that a court may devise a new obligation to direct the jury about a particular matter by relying upon the common law right to a fair trial. This step would undermine the

1 For example, we highlight difficulties in the substantive law relating to sexual offences. Other areas that have been identified in consultations but not been the subject of close examination include the law relating to murder and the principles of criminal complicity.

2 Primarily the elements of the offences and defences. This would include inchoate offences and areas of the law such as complicity.

notion of a 'one stop shop' and require judges to continue their current task of reconciling statutory provisions with common law rules, albeit within a different statutory structure.

### Option B: Directions and warnings Code

7.15 The introduction of a code would mean not only placing all of the relevant law in one statute, but also doing so in a way that covered the field and ousted the operation of existing common law and statutory rules[3] in relation to the areas covered by the code. While a code would abrogate existing common law rules, it would also need to give trial judges a discretionary power to provide directions not included in the code when necessary to ensure a fair trial. The code might contain some general principles to guide trial judges in these circumstances.

7.16 A code, like an ordinary Act, would consolidate the law, providing a 'one stop shop' for directions. A code would also provide the opportunity to reform and clarify the law in relation to the circumstances in which directions must be given. The major difference between a code and an ordinary Act would be the means by which the law could be developed. Once the specific content of a code was determined, appellate jurisprudence would be restricted to interpretations based on the code.

## GUIDING PRINCIPLES

7.17 Regardless of whether an Act or a Code is adopted, there are a number of guiding principles which we propose should underpin the legislation:

- including guidance on the content of select and/or problematic directions
- protecting judicial discretion
- timing directions
- ensuring juror comprehensibility.

### Include guidance on the content of select and/or problematic directions

7.18 We propose that any directions and warnings legislation would also include specific guidance as to the content of some individual warnings and directions. The commission is not proposing that directions and warnings legislation would include directions relating to the substantive law (that is, the elements of offences and defences). Instead, the legislation would deal only with the detail of selected directions, specifically:

- 'procedural directions'
- the '*Alford v Magee* requirement'
- 'evidentiary directions'.

### Protecting Judicial Discretion

7.19 Regardless of the form of the legislation, it could contain a number of provisions designed to protect and provide guidance in relation to the trial judge's discretion to give evidentiary directions. For example, the legislation could include some or all of the following kinds of provisions:

i. that counsel have the primary responsibility for making comments to the jury about the evidence and relating the evidence to the issues in the case;

ii. a list of matters which the trial judge should consider when deciding whether the obligation to ensure a fair trial requires the judge to give an evidentiary warning;

iii. that except where otherwise provided by law, no direction or warning which is to the benefit of the accused about the use of evidence need be given by the trial judge unless it has been expressly requested by defence counsel and the judge is satisfied that the direction is necessary in order to ensure a fair trial;

iv. that despite the failure of defence counsel to seek a direction or warning, the trial judge must give any direction or warning that is necessary in his or her opinion to ensure a fair trial;[4]

v. a list of warnings that are no longer required because they deal with matters of common sense[5]. Examples might include the fact that memory diminishes with time and the fact that intoxication affects motor skills and cognitive ability. The legislation would specify that warnings of this kind are no longer necessary unless the trial judge considers that counsel has not adequately addressed the evidence concerning the issue.[6]

**Question: Should there be any mandatory directions other than the procedural and substantive directions and the Alford v Magee requirement to 'sum up' to the jury? If so, what criteria should determine whether a direction is mandatory?**

### Timing of directions

7.20 Research undertaken by the New Zealand Law Commission[7] and elsewhere[8] has demonstrated that identifying issues in dispute at the start of a trial greatly assists jurors in their task. Recent jury developments in Arizona[9] have provided an option for trial judges to deliver their final instructions to the jury before counsel address the jury. Although trial judges in Arizona do not summarise or comment on the evidence, there might well be benefit in the judges' charge being 'split', so that it fell to counsel, not the judge to relate so much of the evidence to the issues in the case as counsel thought appropriate, thereby reducing the task of the trial judge in summarising the evidence. There is a case for greater flexibility in the presentation of directions by a trial judge, both in enhancing juror comprehension and in reducing the length of the charge.

7.21 The legislation we propose could provide guidance about the stage of a trial at which the judge may give directions and warnings. It could provide for greater flexibility by permitting the trial judge to 'split' the direction in appropriate circumstances. We accept that some directions, such as the onus and burden of proof, must be given at some stage in the judge's direction, even if these had been addressed earlier in the trial. This power would permit the trial judge to request counsel to address the jury about the evidence and the issues after the judge has directed the jury about the relevant law concerning the elements of the offences and alternative offences, and given some or all of the ineluctable directions.

7.22 Following counsel's addresses the judge would be permitted to give whatever additional directions may be appropriate, such as correcting any errors made by counsel, providing a further summary of the evidence, directing the jury about the arguments of counsel, the process of deliberation, and the verdicts and alternative verdicts open to the jury. The trial judge should be given

3 We draw here on the definition of the New Zealand Law Commission, which states that

> A true code may be defined as a legislative enactment which is comprehensive, systematic in its structure, pre-emptive and which states the principles to be applied… It is systematic in that displaces all other law in its subject area … It is systematic in that all of its parts form a coherent and integrated body. It is comprehensive in that it is sufficiently inclusive and independent to enable it to be applied in a relatively self-sufficient way. It is, however, the final element which particularly distinguishes a code from other legislative enactments: the purpose of a code … is to establish a legal order based on principles.
>
> New Zealand Law Commission, *Evidence Law: Codification – A Discussion Paper* 14 (1991) 3.

4 It may well be appropriate that the language employed by the Court of Appeal by reference to s.568 of the Crimes Act i.e., 'miscarriage of justice' and 'substantial miscarriage of justice', ought not to be applied to the function of a trial judge. This would emphasise the nature of the discretion exercised by the trial judge and distinguishing the trial judge's function from that of the appellate court, thereby discouraging mere 'second guessing' by the latter. The appellate jurisprudence as to the ambit of 'miscarriage of justice' is itself vague and uncertain. As Gleeson CJ observed in *Nudd v the Queen* (2006) 80 ALJR 614 at 618, the concept is as wide as the potential for error. A trial judge might gain more guidance as to his/her obligations by employing language such as 'fair trial', coupled with a definition of that term.

5 We have not developed this list as part of the current reference. It would, rather need to be developed and discussed as part of the development of legislation, should such legislation ultimately be adopted as a result of this reference.

6 *Kelleher v R(1974) 131 CLR 534, 543; see also R v Miletic* [1997] 1 VR 593*, 606.*

7 New Zealand Law Commission, *Criminal Pre-Trial Processes: Justice Through Efficiency* Report 89 (2005) 61.

8 Valerie Hans and Neil Vidmar, 'The Verdict on Juries' (2008) 91 (5) *Judicature* 226, 229; Nancy Marder, 'Bringing Jury Instructions Into the Twenty-First Century' (2006) 81 *Notre Dame Law Review* 449, 498,

9 University of Canberra School of Law, *The Arizona Jury: Past, Present and Future Reform* (2005) 82.

express authority to delay the commencement of the direction until satisfied that the issues in the case and the directions or warnings to be addressed in the direction, have been adequately identified by counsel.

### ENSURING JUROR COMPREHENSION

7.23 Any directions included in new legislation, whether they are model directions, outlines or generic, should be succinct and expressed in plain English. Whenever possible, individual warnings should be accompanied by explanations[10] which tell the jury why they are being instructed to reason, or not to reason, in a particular way.[11]

### PROPOSAL 2

The content of some of the directions that the trial judge is required to give to the jury should be set out in legislation.

7.24 There are a number of options in relation to how the detail of directions could be included: model directions, outlines, and generic or all-purpose directions. These options are not intended to be mutually exclusive, indeed we envisage that different options would be used in relation to different kinds of directions. The details of each option are outlined below.

#### Option A – Model directions

7.25 Model directions or suggested forms of words, on the relevant areas of law could be included in the legislation. Those directions should be drafted so that they are capable of being adapted to the needs of particular cases. The model directions already completed by the Judicial College of Victoria (JCV) in their online Criminal Charge book provide a very useful starting point.[12]

7.26 In those instances where an existing JCV model direction is overly long and complex because of an existing common law rule, the legislation could contain a shorter and simpler approved direction in a schedule. For example, the existing JCV model direction about consciousness of guilt evidence could be replaced by the succinct consciousness of guilt direction used in California or in Canada.

7.27 Alternatively, the legislation could provide that unless the Court of Appeal determines otherwise, a direction approved by the JCV is a legally correct direction and that substantial conformity with the terms of such a direction shall be regarded as meeting the legal requirements for a direction on that topic. If the Court of Appeal declared that a JCV direction was incorrect, the Court could be required to formulate the correct direction.

#### Option B – Outlines

7.28 Alternatively, or in relation to some directions, the legislation could contain 'dot point' essential ingredients for particular directions but leave it to the trial judge to devise the actual words used. The New Zealand evidence provisions relating to consciousness of guilt provides an example of this. [13]

#### Option C Generic or 'all-purpose' streamlined directions

7.29 Alternatively, or in relation to some directions, the legislation could contain generic or 'all-purpose' directions that may be suitable for use in a range of circumstances. For example, the legislation could contain a generic circumstantial evidence direction that may be used when dealing with lies and other post-offence conduct, as well as similar fact evidence and the drawing of inferences. This step would be an extension of the generic approach to 'evidence of a kind that may be unreliable' found in s 165 of the Uniform Evidence Act.[14]

**Question: Which of these three options is the preferable way of dealing with the content of particular directions?**

### CHANGING THE SPECIFIC REQUIREMENTS OF DIRECTIONS AND WARNINGS

7.30 In Chapters 3, 4 and 5 we have discussed other options concerning the content of directions in relation to sexual offences and consciousness of guilt as well as the Pemble obligation and the requirement to summarise evidence. Some overlap with the options set out in this chapter, some go further[15]. In each chapter some consideration was given to changing the requirements for individual warnings. These are worth restating here.

## Sexual Offences - reform to directions on propensity

7.31 In Chapter 3, the options of either removing directions in relation to propensity or simplifying them were explained. Three models for the simplification of the warning were:

- The Leach Model
- The UK Model
- The Zuckerman Model

### The Leach Model[16]

7.32 American academic, Thomas Leach proposes a model based on using common sense experience to address concerns associated with evidence of 'other acts'. The elements of this kind of direction would be as follows:

- Evidence that the accused has committed other similar acts may be considered in determining whether they in fact committed the charged acts.
- Such evidence does not conclusively answer the question—it is one fact to be considered in combination with all the other facts.
- It would be improper to decide simply that 'because he did it before he probably did it again' without considering all the other evidence.
- To ensure that the accused is not unfairly characterised, the jury must be satisfied of the other acts and if so, whether that factor makes it more or less likely that they committed any charged act.[17]
- The jury must not seek to punish the accused for any other act – he is tried only for the charges against him.
- Evidence of other acts must be considered only for determining whether he committed the present charges.

7.33 The text of the model direction is set out at Appendix D.

### The UK Model[18]

7.34 In the UK there has been a preference for a direction that places more trust in the jury by containing a better explanation of the unfairness of propensity. Suggested directions have contained the following elements:

- If the jury find a propensity is shown, they may take this into account in determining the accused's guilt, however, they must remember that propensity is only one relevant factor, and they must assess its significance in light of all other evidence in the case.
- What really matters is the evidence heard in relation to this case.
- The jury must be careful not to be unfairly prejudiced against the accused about what they have heard in relation to previous convictions.
- It would therefore be wrong to jump to the conclusion that he is guilty just because of those convictions.[19]

### The Zuckerman Model[20]

7.35 The final model for consideration in Chapter 3 was the so-called 'Zuckerman' model, based on an approach developed by Professor Adrian Zuckerman. Zuckerman, builds on the UK Model, but goes further, arguing that the only way juries will resist the temptation of convicting an accused because of criminal propensity, is if a judge explains the way that jurors' own moral perceptions are reflected in the principles of criminal justice, and that they need to try the accused only for the offence charged.

## Consciousness of guilt

7.36 In Chapter 4, three approaches to reforming consciousness of guilt warnings were discussed. The first approach was to prohibit the warning entirely, the second was to make the warning discretionary and to provide for the discretion in legislation. The third approach outlined was to remove the corroboration requirements from the warning so that many of the current

10 Some examples are provided in this discussion paper of possible directions, including directions employed in other countries on topics such as consciousness of guilt and propensity reasoning: see Chapters 3 and 4.

11 For example, a direction not to employ propensity reasoning might emphasise why it would be unfair if the accused were to be convicted on a count on the basis of propensity reasoning where the evidence was insufficient to remove reasonable doubt. Examples of such a direction are to be found in Thomas Leach, 'How Do Jurors React To "Propensity" Evidence? — A Report On A Survey' (2004) 27 *American Journal of Trial Advocacy* 559, 586.

12 See Judicial College of Victoria, *Title* (2008) <http://www.justice.vic.gov.au/emanuals/CrimChargeBook/default.htm> at (Accessed 8 September 2008).

13 The *Evidence Act 2006* (NZ), s124(3) provides:

… if, in a criminal proceeding tried with a jury, the Judge is of the opinion that the jury may place undue weight on evidence of a defendant's lie, or if the defendant so requests, the Judge must warn the jury that—

(a) the jury must be satisfied before using the evidence that the defendant did lie; and

(b) people lie for various reasons; and

(c) the jury should not necessarily conclude that, just because the defendant lied, the defendant is guilty of the offence for which the defendant is being tried.

14 Section 165 is dealt with in more detail below at 7.49-7.52.

15 For instance, both Chapter 4 and 5 include the option of including pattern directions.

16 This model is discussed in detail in Chapter 3, para 3.144-3.146.

17 Note that Leach requires the jury to be persuaded of the commission of these other acts to the standard of 'clear and convincing evidence' that the other acts did occur and were committed by the accused (evidence that leaves no substantial doubt as to truth – that the proposition is 'highly probable'): Thomas Leach, '"Propensity" Evidence and FRE 404: A Proposed Amended Rule With An Accompanying "Plain English" Jury Instruction' (2001) 68 *Tennessee Law Review* 825, 870.

18 This model is discussed in detail in Chapter 3, para 3.147.

19 These points have been taken from suggested directions in the decisions in: *R v Hanson and Others* [2005] EWCA Crim 824, [18] (Vice-President Rose LJ); *R v Cox* [32] *(Lord Justice Hughes);* also see *R v Campbell* [2007] EWCA Crim 1472 [44] (Lord Phillips of Worth Matravers CJ).

20 This model is discussed in detail in Chapter 3, para 3.148-3.149.

components of the warning would no longer be required. The Canadian Judicial Council has a model direction on consciousness of guilt which provides an example of such an approach.[21] A checklist version of this kind of approach is also contained in New Zealand legislation.[22] Chapter 4 also includes the text of the Californian pattern direction, which follows the same principle.[23]

### Alford v Magee Requirement

7.37 One of our terms of reference directs the commission to 'clarify the extent to which the judge need summarise the evidence for the jury'. The obligations on the trial judge to direct the jury by relating the law to the issues and the evidence in the case were highlighted many years ago by the High Court in *Alford v Magee,*[24]as discussed in Chapter 5. The court said that it was only necessary for the trial judge to explain as much of the law as 'was necessary … to guide them to a decision on the real issue or issues in the case…' and that the trial judge was responsible for (1) deciding what … the real issues in the case (are) and (2) (for) telling the jury, in the light of the law, what those issues are'.[25]

7.38 Alford v Magee has long been cited as authority for the requirement that the trial judge summarise as much of the evidence in the case as is relevant to the facts in issue and do so by reference to the issues in the case.[26] However, the High Court did not actually impose that obligation. The court held that 'the law should be given to the jury not merely with reference to the facts of the particular case but with an explanation of how it applied to the facts of the particular case'.

7.39 In *R v De'Zilwa* Ormiston JA held that the obligation to summarise the evidence was based upon the concern that trial judges 'should not assume that what a trained and experienced lawyer can recollect will be invariably the same as each member of the jury, without the same or any similar training, can recollect at the end of a trial'.[27] Ormiston JA accepted, however, that in a short trial the obligation imposed by *Alford v Magee* might be met by relating 'sufficient of the evidence and sufficient of counsel's arguments to the jury so as to enable them to determine the issues in question'. In *R v Thompson*[28] Redlich JA held that the duty to expose the facts relevant to the issues is not confined to the ultimate facts in issue concerning the elements of the offence but extends to 'the substratum of facts which are in dispute'. His Honour accepted, however, that the obligation to summarise the evidence did not require recitation of unimportant evidence.

7.40 The conduct of criminal jury trials has changed significantly since 1952 when *Alford v Magee* was decided. On the one hand, trials are generally longer and the length and complexity of the judges' directions to juries are generally greater than in 1952. In that respect, the necessity for reminding jurors of the evidence might be thought to be greater because the volume of evidence in many cases has expanded. On the other hand, modern jurors are likely to be better educated, and to have means to refresh their memory of the evidence that were not available in 1952. Modern juries are more likely to have at least one member who takes notes of the evidence and jurors are often provided with a transcript of the evidence.

7.41 In *Gately v the Queen*[29] Kirby J[30], agreeing with Hayne J[31] said that one of the fundamental characteristics of a criminal trial was that it was essentially an oral process and warned against providing the jury with printed or electronic records of evidence. However, the *Crimes (Criminal Trials Act) 1999*[32] expressly permits the jury to be given transcripts of evidence. Kirby J said that such material created a danger of 'distortion and unbalanced over-persuasion' for jurors, and would not facilitate their task in achieving 'the legitimate merging of opinions'[33], which he held, should distinguish their approach to decision-making from that of a judge. Kirby J held that the dangers of providing this material to the jury necessitated a suitable direction to jurors. Our present view is that any dangers which might exist could be eliminated by a suitable direction. In any event, the dangers of over-persuasion would be outweighed by the benefits which jurors would derive from a shorter, more focussed oral summary of evidence in the charge.

7.42 Determining the extent to which the evidence should be summarised is not easy for trial judges. Some judges err on the side of caution by summarising almost all of the evidence which places an unnecessary burden on the jury. In Chapter 5, we considered several options for reforming the summing up process. Here, we examine in detail the option of introducing a statutory discretion in relation to summarising the evidence and including in legislation the principles concerning this obligation.

7.43 If the judge's obligation to summarise is understood to relate not merely to the evidence relevant to the elements of the offence, but to all facts that are in dispute, that is a significant burden. It also increases the risk that the judge might overlook something that later forms the basis of an appeal. This could be avoided by trial judges requiring counsel to identify the factual disputes that require an evidence summary. Failure of counsel to complain and precisely identify omitted evidence after delivery of the charge could preclude later complaint on appeal about that omission.[34]

7.44 There may also be particular aspects of the evidence which do not need to be summarised. In particular, where no evidence has been given by the accused, or led from witnesses for the accused, it may be that the only 'dispute' about some facts occurs because of assertions put to witnesses in cross-examination and denied by them. In that circumstance there is no 'evidence' to contradict the account of the witness and it should not be necessary for a trial judge to summarise the transcript that deals with those matters. There may be exceptions to this such as in circumstances where the witness' answer provides some positive evidence that the accused could rely on as proof of the disputed 'fact', or perhaps, where the 'puttage' reflects counsels obligations under *Browne v Dunn*.[35]

7.45 It has been the practice of many judges in Victoria to do more than is required by this common law rule. Some judges provide the jury with very detailed summaries of the evidence given by every witness. In a few instances, judges have declined to summarise the evidence at all. The widespread Victorian practice of providing exhaustive summaries of evidence is the primary reason why Victorian jury directions are significantly longer than those delivered in most other States and Territories.[36]

**Question: Should the 'Alford v Magee' requirement to summarise evidence be achieved in appropriate cases by providing a transcript and transcript references rather than oral summaries.**

## PROPOSAL 3

The principles concerning the trial judge's obligation to direct the jury about the real issues in a case should be included in legislation

7.46 The requirement to identify the issues in the case and to summarise the evidence for the jury is an example of a direction that could be included in legislation by way of outline. The legislation could restate the *Alford v Magee* obligation as simply as possible to ensure that trial judges concentrate on telling the jury about the 'real issues'[37] and briefly summarise the evidence that is relevant to the findings of fact they must make when determining those 'real issues'. The legislation could also specifically state that the trial judge has no other obligation to summarise the evidence. Short trials are an obvious example of a circumstance in which this power may be usefully exercised.[38]

7.47 The following is an example of how the principle might be restated in statutory terms:

1. The trial judge must direct the jury about the elements of all the offences charged in the presentment, or open as alternative offences.
2. The trial judge must direct the jury about the findings of fact they must make with respect to the elements of the offence in order to find the accused person guilty of all of the offences or alternative offences charged in the presentment.
3. No complaint may be made on appeal about the failure of the trial judge to direct the jury about any subsidiary fact unless complaint was made to the trial judge before the jurors commenced their deliberations.
4. The trial judge must direct the jury that they must find the accused not guilty if they cannot make the findings of fact referred to in paragraphs 2 and 3 beyond reasonable doubt.
5. The extent to which the trial judge must direct the jury about the detail of the elements of the offences depends upon the trial judge's determination of the real issues in the case.

21 The text of the direction is set out at 4.59.

22 The text of the legislation is set out at 4.65.

23 The text of the pattern direction is set out at 4.64. Pattern directions are not currently our preferred option, due to the level of abstraction at which they must be expressed. Nevertheless, we are interested in hearing views about the potential benefits of adopting a pattern direction approach.

24 (1952) 85 CLR 437 at 466.

25 Ibid.

26 Ibid. See for eg, the cases cited footnotes [88] and [89] in Chapter 5.

27 *R v De'Zilwa* (2002) 5 VR 408, 410 (Ormiston, JA).

28 [2008] VSCA 144 at [137]-[138].

29 (2007) 82 ALJR, 149.

30 Ibid,156-7.

31 Ibid,167.

32 Section 19(1).

33 *Gately v the Queen* (2007) 82 ALJR, 149, citing *Butera v DPP* (Vic) (1987) 164 CLR 180 at 189.

34 See paragraph 7.19 above.

35 (1893) 6 R 67.

36 James Ogloff, et al, *The Jury Project: Stage 1—A Survey of Australian and New Zealand Judges* (2006), 27.

37 Query whether the phrase 'real issues' should be abandoned, following Hayne J's judgment in *Tully v the Queen* (2006) 230 CLR, 234.

38 Trial judges in NSW have possessed a power of this nature for some time, see *Criminal Procedure Act 1986* (NSW), s161.

6. The extent to which the trial judge must direct the jury about the evidence that may be relevant to the findings of fact they must make depends upon the trial judge's determination of the real issues in the case.

7. The real issues in a case are those essential findings of fact that in the opinion of the trial judge are contested by the parties. In determining what are the real issues in the case the judge may have regard to such matters as the judge deems relevant, including any written submissions or pleadings, the addresses of counsel to the jury, and any submissions of counsel.

8. The trial judge is under no obligation to direct the jury about the elements of the offences (or defences) other than to comply with these requirements.

9. The trial judge is under no obligation to direct the jury about the evidence other than to comply with these requirements.

10. The trial judge is under no obligation to direct the jury about the arguments advanced by counsel in the course of addresses but may refer to those arguments if the trial judge is of the opinion that the jury's understanding of the real issues may be enhanced by doing so.

**Question: Are there other options concerning the content of particular directions and warnings that should be considered?**

### ACCOMMODATING FUTURE STATUTORY DIRECTIONS

7.48 While we concede that it is impossible to deal with substantive directions in one piece of legislation, provision could be made within directions and warnings legislation for future statutory provisions that will require jury directions. For example, Parliamentary Counsel or the JCV could be required to certify that the content of jury directions have been considered when preparing new criminal offences or amending existing offences. Draft directions could be drafted at the same time as the explanatory memorandum.

### IMPLICATIONS OF THE UNIFORM EVIDENCE ACT FOR ANY REVIEW OF DIRECTIONS

7.49 The *Evidence Act 2008*, which makes the Uniform Evidence Act part of Victorian law, received the Royal Assent on 15 September 2008 and will commence operation no later than 1 January 2010. The provisions of new directions and warnings legislation and the Evidence Act must be consistent.

7.50 Parts of the Uniform Evidence Act may not be completely consistent with some of our proposals concerning directions and warnings legislation. Section 165 of the *Evidence Act 2008* categorises particular kinds of evidence as 'unreliable' and provides that upon the request of a party the trial judge must provide the jury with a warning about evidence that may be unreliable unless the judge concludes that 'there are good reasons for not doing so'. Section 165(5)[39] of the Act preserves the rules of the common law that concern warnings and directions. The Act also contains provisions that deal with jury directions about identification evidence, propensity evidence and probability reasoning.

7.51 All of these provisions may be inconsistent with the proposals concerning new directions and warnings legislation. The policy that underpins these few provisions in the Uniform Evidence Act should be re-considered in light of the reform proposals in this paper. If a policy choice is made to adopt the proposals in this paper there are two ways of dealing with any inconsistency. First, the relevant provisions in the Evidence Act could be amended so that they are consistent with directions and warnings legislation. Secondly, that legislation could specifically override inconsistent provisions in the Evidence Act.

7.52 Amending the UEA may be difficult because of the need for agreement from other participating jurisdictions. However, passing directions and warnings legislation which overrides parts of the UEA may threaten to undermine some of the benefits associated with refining and consolidating the law of evidence by enacting the Uniform Evidence Act in Victoria.

**Question: How should consistency between new directions and warnings legislation and the Uniform Evidence Act be maintained?**

Question: Should the common law principle that the trial judge identify the issues in a case and relate the law to those issues and to the evidence in his or her charge to the jury be retained and codified? Should the obligation be shared with Counsel?

Should this obligation be modified in some circumstances by giving the trial judge a discretionary power not to summarise the evidence when the judge believes that it is unnecessary to do so?

## ENHANCING ISSUE IDENTIFICATION

7.53 In our consultations, there has been widespread support for the view that the early identification of contested issues assists trial judges to conduct trials fairly and to prepare appropriate directions for the jury. At present, the judge may not be aware of all of the contested issues in a trial and the way in which the parties seek to characterise particular pieces of evidence until all the evidence has been presented and counsel have made their closing addresses to the jury. The trial judge is then under great pressure to quickly prepare a charge to the jury having received little notice of complex matters which must be dealt with in a direction or warning. Not surprisingly, errors sometimes occur and appellate courts must determine whether a convicted person should be re-tried.

7.54 In preliminary consultations, we were told that the prosecution opening document, required by the *Crimes (Criminal Trials) Act 1999)*[40], serves the important functions of focussing defence attention on the advisability of a plea, and/or on dealing with issues that require pre-trial investigation. Defence pleading documents, however, are often expressed in very general terms, making them of limited assistance for identifying issues that will be contested at trial. There is a need to devise improvements in pre-trial procedure that will enhance issue identification and which are both practical and economical.

7.55 While the law has been recently reformed to promote the earlier identification of contested issues, anecdotal evidence suggests that the procedural regime set out in the Crimes (Criminal Trials) Act[41] is not always followed, especially by defence lawyers. Addressing the resourcing and systemic issues underpinning current procedural practices is outside our terms of reference. While there is great benefit in the recent reforms to the sexual offence pre-trial procedures[42], extending these requirements to other cases is not currently viable because of the resource implications of doing so.

7.56 Instead, we propose that available resources be directed towards the preparation of a document called an '*Aide Memoire*'[43] that would contain an agreed statement of the elements of the offences, including any alternative offences. That document should be prepared before the jury is empanelled. This document would be provided to the jury at the beginning of the trial and could form the basis of the judge's charge to the jury and assist in the preparation of specific directions and warnings.

### PROPOSAL 4

A document known as an 'Aide Memoire' should be introduced to assist in the identification of issues.

7.57 The idea of the '*Aide Memoire*' is based upon the document of the same name currently used in criminal trials in the Northern Territory. In the Northern Territory, the *aide memoire* sets out the elements of each offence (and alternative offences) and highlights the matters that are in dispute. This document, which is given to the jury when the judge delivers his or her final charge, is drafted by the trial judge and usually settled with counsel prior to the empanelment of the jury. Examples of these documents that were provided to Northern Territory juries in recent trials are set out in Appendix C.[44]

7.58 We propose that a document of this nature be given to juries at the commencement of each trial. Like the Northern Territory *Aide Memoire*, the document would set out the elements of each offence and it would indicate the matters that are in dispute. Although the Northern Territory model is confined to identifying areas of dispute about the elements of the offences (which can be done simply by highlighting the disputed elements in the text), the use of such a document provides an opportunity to identify subsidiary issues that are also in dispute. Whether or not such subsidiary issues were set out in the document when it was first provided to the jury, or at all, would be a matter for the trial judge to consider.

39 Section165(5) provides: 'This section does not affect any other power of the judge to give a warning to, or to inform, the jury.' The sub-section has been interpreted as retaining the common law in its entirety, see Tasmania Law Reform Institute, *Warnings in Sexual Offences Cases Relating to Delay in Complaint* Final Report No 8 (2006), at 21.

40 *Crimes (Criminal Trials) Act 1999* (Vic), s 6.

41 It should be noted that the new Criminal Procedure Bill would repeal the provisions of the *Crimes (Criminal Trials) Act 1999* (Vic), with the substantive provisions being inserted into the new Act. References to the *Crimes (Criminal Trials) Act* (Vic) in relation to our options are intended to apply to the substantive provisions wherever they ultimately exist.

42 The content of these recent reforms is discussed in Chapter 6, paras 6.13-6.16.

43 We use the term 'aide memoire' because this is what the document is called in the Northern Territory. We would welcome suggestions as to whoat such a document might be called in the Victorian context.

44 See Appendix C. We have changed the names of accused and witnesses. These aide-memoires are provided only for the purpose of illustration of the style of such documents.

7.59 The document, which would require the parties to identify contested issues at the commencement of the trial, would assist the trial judge when formulating directions and warnings for the jury and it would be a reference for jurors during the trial and when considering their verdict. Counsel should be required to prepare and exchange drafts of the *Aide Memoire*, and be encouraged to agree on its terms and to provide copies for the jurors and the Court. The document would need to be approved by the trial judge after considering drafts prepared by counsel.[45] If the parties were unable to agree about the content of the '*Aide Memoire*' or if the judge did not approve the agreed draft, the trial judge would determine the matter.

7.60 Legislation could provide that the jury not be empanelled until the *Aide Memoire* has been finalised to the satisfaction of the judge and the pre-trial issues have been resolved. The law could permit, or require, the judge to address the jury when they are given the aide memoire, perhaps at the conclusion of opening addresses by counsel. At this stage the judge could explain, with the assistance of the *Aide Memoire*, the elements of the offences and indicate which issues are in dispute.

7.61 A document of this nature may be open to the criticism that it might provide the jury with information about issues that are not in dispute. However, it is common practice now for trial judges to direct juries about all of the elements of all offences, even when some elements are not in dispute. If the contested issues change during the course of a trial it should be possible to amend the document so that the focus of the jury remains upon those issues they have to decide.

Questions

**Should a document known as an *Aide Memoire*, modelled on the *Aide Memoire* used in the Northern Territory, be adopted in Victoria?**

**Should responsibility for the preparation of the *Aide Memoire* rest with trial counsel or the trial judge?**

## THE APPEAL PROCESS: RESPECTING THE ROLE OF THE TRIAL JUDGE

7.62 Appellate courts have been criticised for being overly technical in their response to errors or omissions made by trial judges in their directions to juries.[46] The role of the Court of Appeal since its creation in 1995 must be viewed in the broader context of the development of High Court jurisprudence concerning jury directions. Shortly prior to the introduction of the Victorian Court of Appeal, the High Court delivered the first of many groundbreaking judgments that imposed significant new obligations on trial judges to direct and warn juries about a range of matters. These developments in the common law encouraged the growth of a discrete criminal appellate bar, whose members searched transcripts for possible judicial error in order to advance new grounds for appeal. In addition, the more ready availability of Legal Aid funding in criminal law fostered appeals to state appellate courts and special leave applications to the High Court.

7.63 A key proposal in this paper is that the existing common law rules concerning directions and warnings be replaced by legislation which gives trial judges more discretionary power than they have now to determine the directions and warnings which are appropriate in a particular case. This proposal to restore greater discretionary power to trial judges may be undermined if appellate courts are too ready to exercise their powers and if they become too inclined to develop new rules of general application in order to resolve difficulties in particular cases.

7.64 Reform of the law concerning jury warnings and directions is unlikely to be successful unless appeal powers are reviewed in the light of those reforms. The commission is aware of the fact that DOJ is reviewing the appeal provisions in the *Crimes Act* as part of a broader review of criminal procedure. While we do not intend to interfere with this review, it is important that the reform proposals in this paper concerning new directions and warnings legislation be considered when the extent of the Court of Appeal's power to overturn convictions because of error at the trial is determined.

7.65 Three issues that stem from our terms of reference require consideration. First, it is necessary to determine what powers should be exercised by the Court of Appeal if new legislation is enacted which gives the trial judge a broad discretionary power to decide which directions and warnings should be given in a particular case. In what circumstances should it be permissible for the Court of Appeal to override the discretionary powers of the trial judge? Secondly, it is necessary to consider the extent of any power that should be given to the Court of Appeal by new legislation to determine the circumstances in which a particular direction or warning must be given and the contents of any direction or warning. Thirdly, it is necessary to consider the extent of any power that the Court of Appeal should continue to have to overturn a conviction due to error or omission in a direction or warning given to the jury when the matter was not raised by counsel at the trial.

## POTENTIAL FOR MISUSE OF CURRENT APPEAL PROVISIONS

7.66 The former Chief Justice of the High Court recently held that, except in limited circumstances, the parties in a criminal trial should be bound by the conduct of their counsel. [47] Nevertheless, in more than 50% of successful applications for leave to appeal against conviction in Victoria in 2004-2006 the successful grounds of appeal concerned issues that had not been raised at trial by defence counsel.[48] In some instances the failure of counsel to take exception at trial may have been an oversight, but in others the failure may have been a tactical decision.

7.67 In *Nudd v the Queen,* Gleeson CJ said that fairness of process must be assessed objectively. Where counsel made a decision during a criminal trial that was objectively rational, the client should be bound by the decision of counsel, because the process was fair.[49] In New South Wales, the *Criminal Appeal Rules* attempt to limit the opportunity to rely upon 'armchair' appeals.[50] Rule 4 provides:

> *No direction, omission to direct, or decision as to the admission or rejection of evidence, given by the Judge presiding at the trial shall, without leave of the court, be allowed as a ground for appeal or an application for leave to appeal unless objection was taken at trial to the direction, omission, or decision by the party appealing or applying for leave to appeal.*

7.68 The requirement for leave has been interpreted strictly[51] and many appeals are rejected because of the rule.[52]

7.69 The NSW Court of Criminal Appeal sometimes accepts affidavit evidence which explains why counsel failed to take exception to a particular direction at the trial. The value of that procedure has been doubted in a judgment of the Court of Criminal Appeal[53] and Gleeson CJ expressed concern in *Nudd* about a criminal appeal becoming an investigation into the performance of trial counsel[54]. He stated:

> *Criminal trials are conducted as a contest, but the adversarial system does not require that the adversaries be of equal ability. . . Opposing counsel may be mismatched, but this does not make the process relevantly unfair.*[55]

7.70 In light of this, we think that any change to the appeal provisions should restrict the capacity of an accused person to argue on appeal that the trial judge made an error or omission in a direction or warning given to the jury if that matter was not raised by defence counsel during the trial.

### PROPOSAL 5

The appeal provisions should restrict the capacity of people convicted at trial from raising points of law on appeal which were not raised, and could have been raised, during the trial.

7.71 The exception to this restriction would be circumstances where the Court of Appeal is satisfied that there has been a denial of the right to a fair trial. The onus of establishing that there has been a denial of a fair trial would be on the appellant.

**Question: In what circumstances, if any, should it be possible to depart from this general rule?**

45 Precedents could be developed by the Judicial College of Victoria and be accessed by counsel and judges as they now access the JCV model charges and checklists.

46 James Wood, 'The Trial Under Siege: Towards Making Criminal Trials Simpler' (Paper presented at the District and County Court Judges Conferences, Fremantle, Western Australia, 27 June - 1 July 2007),

47 For example, in the case of *Nudd v the Queen*, above n 4, 618 Gleeson CJ held that

> A criminal trial is conducted as adversarial litigation. A cardinal principle of such litigation is that, subject to carefully controlled qualifications, parties are bound by the conduct of their counsel, who exercise a wide discretion in deciding what issues to contest, what witnesses to call, what evidence to lead or to seek to have excluded, and what lines of argument to pursue.
>
> The rule is even stricter in civil litigation (see *Metwally v The University of Wollongong* (1985) 60 ALR 68).

48 Justice Geoffrey Eames, 'Tackling the Complexity of Criminal Trial Directions: What Role for Appellate courts?' (2007) 29 *Australian Bar Review* 161, 162.

49 *Nudd v the Queen*, above n 4, 618.

50 *R v Fowler* (2003) 151 A Crim R 166 at 175.

51 *R v Abusafiah* (1991) 24 NSWLR 531 at 536, (Hunt J); *R v Moussa* (2001) 125 A Crim R 505, at 521 (Howie, J).

52 See *R v Lewis* (2003) 142 A Crim R 254 at 262, (Hodgson JA and Grove J agreeing).

53 *R v Moussa* at 519 - 523 (Howie J, Giles JA and Carruthers AJ agreeing).

54 *Nudd v the Queen*, above n 4, 619.

55 Ibid, 619

# Chapter 7 Proposals and Options

## THE PEMBLE DIRECTION

7.72 A related question is the extent to which the trial judge is obliged to direct the jury about defences or versions of the facts not put to the jury by defence counsel. In Chapter 5, we discussed the requirement which stems from the decision in *Pemble v The Queen*[56] and the problems with that principle. The key problems are that:

- it encourages 'appeal-proofing' of charges by trial judges, resulting in an added burden on trial judges and jurors
- it does not sit well with the respective roles of the trial judge and of counsel in an adversarial system of criminal justice
- it may result in unfairness to the accused, where competent defence counsel, in the interests of the accused, expressly avoided placing an alternative defence before the jury
- it allows counsel to 'reserve' appeal points (where they want the alternative defence placed before the jury by the trial judge and not themselves).

7.73 We propose that any directions and warnings legislation should include a provision stating that the trial judge does not have a '*Pemble*' obligation unless necessary to secure a fair trial for the accused person.

### PROPOSAL 6

The Directions and Warnings Act could limit the effect of *Pemble* by the inclusion of a provision to the following effect:

The trial judge is not required to direct the jury about defences or alternative versions of the facts not put to the jury by counsel,

unless

The trial judge is of the opinion that the failure to do so may lead to an unfair trial, for example, where the trial judge is of the opinion that failure to put an alternative defence was not the result of a tactical decision made by counsel, rather an error or accidental omission.

The legislation could also provide that before granting leave to appeal, the Court of Appeal must be persuaded by the appellant that defence counsel's failure to raise a particular defence resulted in a denial of a fair trial.

The legislation could also explicitly direct the Court of Appeal that neither a miscarriage of justice nor a denial of a right to a fair trial occur when it is not persuaded by the appellant that defence counsel's failure to raise a particular defence was other than for tactical reasons, including that the defence is inconsistent with defences that they did raise.

## SKILL DEVELOPMENT, TRAINING AND SUPPORT

7.74 As the central aspect of any legislation should be to support the power of the trial judge to determine which directions and warnings are required in each case in order to ensure a fair trial, judges must be provided with relevant training and support. Equally, if the responsibility of trial counsel to identify the relevant issues and to explain the evidence to the jury is to be emphasised, assistance in developing the relevant skills to achieve this must also be encouraged. We have no firm proposals in relation to these issues but we have posed a number of questions.

### JUDICIAL TRAINING AND SUPPORT

7.75 Much has been done over the past few years to assist trial judges by providing information and training. New trial judges have the opportunity to attend many training programs organised by the JCV about different aspects of their role. The college has also recently announced a new continuing professional development program that will include training in relation to communication skills and pre-trial preparation.

7.76 Many judges have been appointed without prior criminal trial experience. As has been demonstrated in all jurisdictions over many decades, the competence of a judge to conduct a criminal trial is not determined by prior criminal law experience. Nonetheless, the complexity of modern criminal trials suggests that judges without prior trial experience would benefit from training, as would all new judges. Even long-serving judges would benefit from continuing

training with respect to criminal trials. A particular area of training that would be desirable is with respect to the requirements of *Alford v Magee*. Those requirements are at the heart of the function of a criminal trial judge, and yet, as we understand it, the task set by the High Court has not been subject to concentrated judicial training in any jurisdiction in Australia.

Questions:

Would Judicial College of Victoria seminars on the formulation of directions and warnings be an effective way of building judicial skills in this area? [57]

Would a training video of experienced trial judges conducting trials be a useful tool to assist trial judges to prepare their own charges?

## SPECIALIST ACCREDITATION OF TRIAL COUNSEL

7.77 During initial consultations the failure of some counsel to prepare sufficiently for a trial and to display appropriate knowledge of the relevant law was mentioned on a number of occasions. Some people suggested that lack of knowledge and experience of some counsel contributed to the significant number of convictions that have been overturned because of legal error during the trial.

7.78 In the past, when there were relatively few barristers and more opportunities to gain experience by appearing in contested hearings in the Magistrates Court, the culture of the Bar may have discouraged inexperienced barristers from appearing in criminal trials. Lack of experience no longer appears to discourage junior barristers from appearing in criminal trials.

Questions: In view of the apparent success of specialist accreditation schemes for solicitors, would such a scheme for barristers who appear in criminal trials be desirable?

7.79 There are many ways in which a specialist accreditation scheme for criminal trial barristers could operate. Accreditation might be gained, for example, by acting as junior counsel in a number of criminal trials or by demonstrating an adequate knowledge of criminal law and practice in assessment exercises conducted by experienced or retired criminal trial lawyers. The commission seeks to encourage discussion about the proposal and to explore with all interested bodies means by which it could be implemented.

## A PUBLIC DEFENDER SCHEME

7.80 Another possibility that merits debate about improving and maintaining the knowledge and experience of trial counsel is the establishment of a public defender system in Victoria. Such a system would mean that experienced criminal trial lawyers are employed on a full-time basis by Victorian Legal Aid, or some other appropriate entity, to act for legally aided people in criminal trials and appeals. Public defenders would be the defence equivalent of crown prosecutors.

7.81 Highly regarded public defender schemes have operated for decades in both New South Wales[58] and Queensland. In both States experienced public defenders have been barristers of such high standing that they have been appointed directly to the Supreme and District Courts from these positions. While a public defender scheme has not developed in Victoria, as criminal defence work has traditionally been undertaken by the private bar, it is timely to consider the issue given concerns about the quality of criminal trial lawyers and the apparent success of public defender schemes in other parts of Australia.

Question: Should consideration be given to the introduction of a Public Defender scheme in Victoria?

56 (1971) 124 CLR 107.

57 The comprehensibility of directions delivered to lay jurors is not directly raised by the present Terms of Reference. We therefore do not address that topic exhaustively. It is, however, our assumption that any exemplar directions would be written in simple English, in language appropriate to communication with lay jurors rather than the Court of Appeal, would reflect best practice for juror communication, and would be drafted with the active involvement of lay persons.

58 Mary Rose Liverani, 'Public Defenders: Keeping the Law in Order' (1996) 24 *Law Society Journal* 33.

# Chapter 7 Proposals and Options

# Appendices

# Appendix A
## Data and Statistics

## APPEALS AGAINST CONVICTION AND RETRIALS

### WHAT DATA DID THE COMMISSION COLLECT?

The commission examined data relating to appeals against conviction and the incidence of retrials as a result of successful appeals for the period 2000–2007, in Victoria. There were three main sources of data relied upon in the commission's study: the Victorian Court of Appeal, the Office of Public Prosecutions (OPP), and the Australasian Legal Information Institute (AustLII) caselaw database.

The commission also received data from the County Court of Victoria in relation to criminal cases initiated and finalised for the years 2005–06 and 2006–07.

The OPP provided the commission with basic information relating to retrials of cases following successful appeal, and the results of those retrials. The OPP was also able to provide information about matters in which a retrial had been ordered on appeal, but subsequently a nolle prosequi had been entered, and where available, the reasons on which that decision was based.

The Court of Appeal provided the commission with data relating to criminal appeals lodged between 2000–2007. From this, the commission's researchers were able to extract information in relation to appeals against conviction including the names of parties, the dates appeals were lodged, heard and finalised, the offences, and outcomes. This information was cross referenced with published decisions on AustLII to determine whether the grounds of appeal related to jury directions, the final disposition of the appeal, and issues such as whether the proviso was applied and/or considered, and whether the offence involved a child.

Information extracted from these sources has been consolidated in Tables 1–6 below. For comparative purposes, the commission has also extracted in Table 1.1 information published regarding conviction appeals in the Victorian Court of Appeal for the period 1995-1999.[1]

### LIMITATIONS OF THE DATA

Constraints of time, resources, and available data, mean that the data collected has several limitations:

- The commission has endeavoured to individually follow up several cases which were not published on AustLII or elsewhere (for example, the Supreme Court Library Catalogue). The outcomes of appeals relating to Commonwealth offences were followed up with the Commonwealth Director of Public Prosecutions, and the results of those matters were obtained. In total, the results of all but three of 537 total appeals were able to be obtained.
- The record of issues raised on appeal has been the result of brief scanning of decisions, using catchwords and keyword searches, rather than any detailed analysis of the decisions. For the purposes of the commission report, the focus has been on identifying where issues raised relate to directions on consciousness of guilt, propensity, delay, *Pemble* and errors in the summing up. However, it is important to note that the number of successful appeals recorded do not reflect the grounds on which the appeals were successful, only the overall success of the appeal.
- Issues raised are only recorded where those matters have arisen in these catchword and keyword scans of decisions. In a small number of cases, grounds may have been raised on appeal, but have not been recorded on our tables.
- Where multiple appellants are involved, these have been recorded as separate appeals (even though in many cases, there will only be a single decision published). The data has attempted to reflect where different issues have been raised on appeal in respect of each appellant, and where the overall outcome of the appeal has differed in respect of each appellant.

**TABLE 1 TOTAL NUMBER OF APPEALS AGAINST CONVICTION 2000–2007**

| Year | No. of Appeals Filed | No. of Successful Appeals | Percentage of Successful Appeals % |
|---|---|---|---|
| 2000 | 43 | 3 | 7.0% |
| 2001 | 61 | 31 | 50.8% |
| 2002 | 74 | 28 | 37.8% |
| 2003 | 42 | 12 | 28.6% |
| 2004 | 71 | 23 | 32.4% |
| 2005 | 87 | 36 | 41.4% |
| 2006 | 78 | 35 | 44.9% |
| 2007 | 82 | 39 | 47.6% |
| 2000-07 (Total) | 538 | 207 | 38.5% |

**TABLE 1.1 TOTAL NUMBER OF APPEALS AGAINST CONVICTION 1995–1999[2]**

| Year | No. of Conviction Appeals | No. of Successful Appeals | Percentage of Successful Appeals % |
|---|---|---|---|
| 1995 | 51 | 19 | 37.0% |
| 1996 | 69 | 25 | 36.0% |
| 1997 | 88 | 24 | 27.27% |
| 1998 | 68 | 27 | 39.70% |
| 1999 | 65 | 15 | 23.07% |

**TABLE 2 NUMBER OF APPEALS WHERE DIRECTIONS RAISED AS A GROUND OF APPEAL 2000–2007**

| Year | No. of appeals where directions raised as at least one of the appeal grounds | No. of Appeals on Directions as Percentage of Total Appeals Against Conviction | No. of Appeals where no issue related to directions raised | No. of Appeals where no issue related to directions raised as Percentage of Total Appeals Against Conviction | Successful appeals where directions raised | Appeals where directions raised as percentage of all successful appeals |
|---|---|---|---|---|---|---|
| 2000 | 26 | 60.5% | 17 | 39.5% | 3 | 100.0% |
| 2001 | 39 | 63.9% | 21 | 34.4% | 19 | 61.3% |
| 2002 | 48 | 64.9% | 25 | 33.8% | 21 | 75.0% |
| 2003 | 28 | 66.7% | 14 | 33.3% | 9 | 75.0% |
| 2004 | 52 | 73.2% | 19 | 26.8% | 17 | 73.9% |
| 2005 | 67 | 77.0% | 20 | 23.0% | 30 | 83.3% |
| 2006 | 49 | 62.8% | 28 | 35.9% | 22 | 62.9% |
| 2007 | 54 | 65.9% | 28 | 34.1% | 21 | 53.8% |
| 2000-07 (Total) | 358 | 66.5% | 172 | 32.0% | 142 | 68.6% |

1 Stephen Charles, 'The First Decade of the Victorian Court of Appeal' (2008) 26 (1) *Law in Context* 21, 30-31, citing figures from Phillip Priest and Paul Holdenson, 'The Court of Appeal Five Years On: Some Reflections' (2000) 115 *Victorian Bar News* 16, 17-18.

2 See Phillip Priest and Paul Holdenson, 'The Court of Appeal Five Years On: Some Reflections' (2000) 115 *Victorian Bar News* 16, 19-18; Stephen Charles, 'The First Decade of the Victorian Court of Appeal' (2008) 26 (1) *Law in Context* 21, 30-1.

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## Data and Statistics

As noted above, the number of successful appeals do not reflect which grounds of appeal were successful, only whether the appeal was successful or not overall.

There were 8 appeals in which the decision was not available and the issues raised on appeal are unknown.

Appeals where no issue was raised relating to the trial judge's directions, involved appeal grounds such as wrong admission of evidence or procedural issues relating to the juries.

**TABLE 2.1 NUMBER OF APPEALS WHERE CONSCIOUSNESS OF GUILT DIRECTIONS RAISED 2000–2007 (SEE CHAPTER 4)**

| Year | Appeals where consciousness of guilt raised | No. of Appeals where consciousness of guilt raised as Percentage of Total Appeals Against Conviction | No. of successful appeals where consciousness of guilt raised | Percentage of successful appeals where consciousness of guilt raised |
|---|---|---|---|---|
| 2000 | 3 | 7% | 0 | 0% |
| 2001 | 11 | 18% | 4 | 36.4% |
| 2002 | 5 | 6.8% | 3 | 60% |
| 2003 | 7 | 16.7% | 1 | 14.3% |
| 2004 | 8 | 11.3% | 2 | 25% |
| 2005 | 22 | 25.3% | 12 | 54.5% |
| 2006 | 17 | 21.8% | 8 | 47.1% |
| 2007 | 9 | 11% | 1 | 11.1% |
| 2000-07 (Total) | 82 | 15.2% | 31 | 37.8% |

**TABLE 2.2 NUMBER OF APPEALS WHERE PROPENSITY DIRECTIONS RAISED 2000–2007 (SEE CHAPTER 3)**

| Year | Appeals where propensity raised | No. of Appeals where propensity raised as Percentage of Total Appeals Against Conviction | No. of successful appeals where propensity raised | Percentage of successful appeals where propensity raised |
|---|---|---|---|---|
| 2000 | 6 | 14% | 0 | 0% |
| 2001 | 8 | 13.1% | 2 | 25% |
| 2002 | 4 | 5.4% | 3 | 75% |
| 2003 | 2 | 4.8% | 1 | 50% |
| 2004 | 9 | 12.7% | 1 | 11.1% |
| 2005 | 12 | 13.8% | 4 | 33.3% |
| 2006 | 11 | 14.1% | 4 | 36.4% |
| 2007 | 11 | 13.4% | 4 | 36.4% |
| 2000-07 (Total) | 62 | 11.7% | 19 | 30.2% |

**TABLE 2.3 NUMBER OF APPEALS WHERE *PEMBLE* ISSUE RAISED 2000–2007 (SEE CHAPTER 5)**

| Year | Appeals where Pemble raised | No. of Appeals where Pemble raised as Percentage of Total Appeals Against Conviction | No. of successful appeals where Pemble raised | Percentage of successful appeals where Pemble raised |
|---|---|---|---|---|
| 2000 | 2 | 4.7% | 0 | 0% |
| 2001 | 7 | 11.5% | 1 | 14.3% |
| 2002 | 2 | 2.7% | 0 | 0% |
| 2003 | 0 | 0.0% | 0 | 0% |
| 2004 | 4 | 5.6% | 3 | 75% |
| 2005 | 11 | 12.6% | 5 | 45.5% |
| 2006 | 1 | 1.3% | 1 | 100% |
| 2007 | 4 | 4.9% | 2 | 50% |
| 2000-2007 (Total) | 31 | 5.8% | 12 | 38.7% |

**TABLE 2.4 NUMBER OF APPEALS WHERE SUMMING UP ISSUE RAISED 2000–2007 (SEE CHAPTER 5)**

| Year | Appeals where summing up raised | No. of appeals where summing up raised as percentage of total appeals against conviction | No. of successful appeals where summing up raised | Percentage of successful appeals where summing up raised |
|---|---|---|---|---|
| 2000 | 2 | 4.7% | 1 | 50% |
| 2001 | 4 | 6.6% | 3 | 75% |
| 2002 | 7 | 9.5% | 1 | 14.3% |
| 2003 | 2 | 4.8% | 0 | 0% |
| 2004 | 2 | 2.8% | 1 | 50% |
| 2005 | 6 | 6.9% | 2 | 33.3% |
| 2006 | 6 | 7.7% | 1 | 16.7% |
| 2007 | 1 | 1.2% | 0 | 0% |
| 2000-2007 (Total) | 30 | 5.6% | 9 | 30.0% |

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**TABLE 2.5 NUMBER OF APPEALS WHERE ISSUE RAISED ABOUT DIRECTIONS ON DELAY 2000–2007 (SEE CHAPTER 3)**

| Year | Appeals where directions on delay raised as issue | Appeals where directions on delay raised as percentage of total appeals | No. of successful appeals where delay directions raised | Percentage of successful appeals where directions on delay raised |
|---|---|---|---|---|
| 2000 | 0 | 0% | 0 | 0% |
| 2001 | 2 | 3.3% | 2 | 100% |
| 2002 | 1 | 1.4% | 0 | 0% |
| 2003 | 6 | 14.3% | 2 | 33.3 |
| 2004 | 3 | 4.2% | 0 | 0% |
| 2005 | 3 | 3.4% | 1 | 33.3 |
| 2006 | 0 | 0% | 0 | 0% |
| 2007 | 3 | 3.7% | 0 | 0% |
| 2000-07 (Total) | 18 | 3.3% | 5 | 27.8% |

Appeals on directions about delay include *Longman* warnings, *Crofts/Kilby* directions, and directions under *Crimes Act 1958* s 61.

**TABLE 2.6 NUMBER OF APPEALS WHERE OTHER DIRECTIONS RAISED AS A GROUND OF APPEAL 2000–2007**

| Year | No. of Appeals where Directions Raised | No. of Appeals on Directions as Percentage of Total Appeals Against Conviction | Successful appeals where directions raised | Percentage of successful appeals where directions raised |
|---|---|---|---|---|
| 2000 | 23 | 53.5% | 2 | 8.7% |
| 2001 | 31 | 50.8% | 16 | 51.6% |
| 2002 | 36 | 48.6% | 17 | 47.2% |
| 2003 | 24 | 57.1% | 7 | 29.2% |
| 2004 | 47 | 66.2% | 15 | 31.9% |
| 2005 | 52 | 59.8 | 22 | 42.3% |
| 2006 | 40 | 51.3% | 16 | 40.0% |
| 2007 | 45 | 54.9% | 17 | 37.8% |
| 2000-07 (Total) | 298 | 55.4% | 112 | 37.6% |

"Other directions" includes any other direction not including consciousness of guilt, propensity, consent, delay, *Pemble* related errors, or errors related to the summing up.

### TABLE 3 NUMBER OF APPEALS INVOLVING SEXUAL OFFENCES 2000–2007 (SEE CHAPTER 3)

| Year | Number of appeals involving Sexual offences | Sexual offence appeals as percentage of total appeals | Successful sexual offence appeals as percentage of total appeals |
|---|---|---|---|
| 2000 | 14 | 32.6% | 0% |
| 2001 | 15 | 24.6% | 66.7% |
| 2002 | 23 | 31.1% | 47.8% |
| 2003 | 14 | 33.3% | 21.4% |
| 2004 | 25 | 35.2% | 24% |
| 2005 | 25 | 28.7% | 52% |
| 2006 | 25 | 32.1% | 48% |
| 2007 | 28 | 34.6% | 35.7% |
| 2000-07 (Total) | 169 | 31.5% | 38.5% |

Of these 169 sexual offence cases, offending related to children in 114 cases.

### TABLE 4 NUMBER OF APPEALS RESULTING IN RETRIALS 2000–2007

| Year | Retrial Ordered (Result Unknown) | Retrial resulting in Conviction | Retrial Ordered – Accused pleaded guilty | Retrial resulting in entering of Nolle Prosequi | Retrial resulting in Acquittal | Retrial Pending | Total Retrials Ordered |
|---|---|---|---|---|---|---|---|
| 2000 | 1 | 2 | 0 | 0 | 0 | 0 | 3 |
| 2001 | 4 | 12 | 0 | 6 | 3 | 0 | 25 |
| 2002 | 1 | 10 | 0 | 5 | 5 | 0 | 21 |
| 2003 | 1 | 7 | 0 | 1 | 0 | 0 | 9 |
| 2004 | 1 | 12 | 0 | 3 | 0 | 0 | 16 |
| 2005 | 3 | 19 | 0 | 9 | 0 | 1 | 32 |
| 2006 | 2 | 10* | 0 | 4** | 2 | 5 | 23 |
| 2007 | 3 | 4 | 1 | 1 | 0 | 22 | 31 |
| 2000-07 (Total) | 16 | 76* | 1 | 29** | 10 | 28 | 160 |

* This figure includes one retrial in which one count resulted in conviction, and one count on which a nolle prosequi was entered.

** This figure excludes this same retrial in which one count resulted in conviction, and one count on which a nolle prosequi was entered.

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### TABLE 5 CONSIDERATION OF THE PROVISO 2000–2007

| Year | No. of Appeals Lodged | Proviso Considered | Proviso Applied | Proviso Not Considered |
|---|---|---|---|---|
| 2000 | 43 | 5 | 0 | 38 |
| 2001 | 61 | 6 | 0 | 54 |
| 2002 | 74 | 11 | 0 | 59 |
| 2003 | 42 | 1 | 0 | 41 |
| 2004 | 71 | 10 | 1 | 60 |
| 2005 | 87 | 10 | 2 | 94 |
| 2006 | 78 | 11 | 3 | 62 |
| 2007 | 82 | 14 | 1 | 65 |
| 2000-07 (Total) | 538 | 68 | 7 | 453 |

Over this period there were 10 appeals for which information about the proviso was unavailable.

## COSTS OF RETRIALS

### COLLECTION OF DATA AND LIMITATIONS

The following data reflects estimates of the component costs of retrials.[3] However, there is no existing source of comprehensive data as to the cost of trials and retrials. The commission has received information about various component costs of trials and retrials from Court Services, Victoria Legal Aid (VLA), and the OPP. The commission has calculated estimates based on limited information about component costs on the basis of several assumptions. This means that the estimates given below will vary depending on the following factors:

- the jurisdiction of the court
- the qualifications of counsel
- the number of people involved (for example, where there are multiple accused, or where there is both senior and junior counsel)
- the length of the trial.

#### Data from the Courts

Court Services has provided the commission with an estimate for the total cost to the courts of a five day criminal trial held at the County Court as: $39,809.[4] This figure includes costs of:

- baseline average cost of a judicial officer allocated to a hearing[5]
- Courts Services agreement[6]
- jury services
- court recording and transcription services
- protective services.

#### Data from the OPP

The OPP has provided the commission with an estimate for prosecution costs of a County Court retrial based on the following assumptions:

- 'Base costs' of $2,341 include involvement of a solicitor in preparation and procedure for eight days (regardless of the length of the trial, or whether the trial is heard at the County or Supreme Court).[7]
- The first day of hearing in court consists of costs of $943 for a senior solicitor for that day, and briefing fee for half a day of an experienced advocate.[8]
- Each subsequent day cost consists of costs of $668 per day for a senior solicitor, and half a day of an experienced advocate.

Therefore, for a five day trial at the County Court, with one accused, and involving one solicitor and one counsel for the prosecution, the costs for the prosecution will be approximately: $5,956.

### Data from VLA

VLA has provided an estimate of the defence costs for a retrial at the County Court, based on the following assumptions:

- Based on five day retrial, with one accused, involving a defence solicitor and single defence counsel, fees for preparation,[9] a mention,[10] and conferences,[11] of $2234.
- Counsel's brief fee of $1240, and for each subsequent day a fee of $845.
- Instructing fee for each day of trial of $2630.

Therefore, for a five day trial at the County Court, with one accused, and involving one solicitor and one counsel for the defence, the costs for the defence will be approximately: $9,484.[12]

### Approximate total costs of a retrial

Based on these assumptions and estimates, a retrial for one accused, at the County Court, which runs for five days, and involves a single instructing solicitor and single counsel for prosecution and defence will cost the following:

| | |
|---|---|
| Costs to the Courts | $39,809 |
| Costs of the Prosecution | +$5,956 |
| Costs of the Defence | +$9,484 |
| **Total Cost of Retrial** | **$55,249** |

It is to be noted that this estimate of costs relates only to lawyers' costs, and assumes that defence counsel are paid at legal aid rates. No estimate has been made of the costs incurred by witnesses by virtue of a re-trial, nor of the costs of jurors, nor of the costs incurred by Victoria Police in further preparation for retrial and in the salaries, fees and expenses of police witnesses and expert witnesses engaged by prosecution or defence. These costs would be likely to considerably add to the total cost of re-trial that we have calculated, above.

3 This data focuses on retrials, however, it is noted that where the ordering of a retrial following a successful conviction appeal results in a plea of guilty or a nolle prosequi being entered, costs are still incurred. For example, the OPP has estimated the cost of a nolle prosequi for the prosecution as $1601 (based on 3 days involvement for a solicitor, 1 day review by a Crown Prosecutor, and 'minimal review' by the Director of Public Prosecutions). The VLA fees provided for a nolle prosequi at the Supreme Court are $615.

4 So, for example, the costs of a criminal trial, with jury and transcription services heard in a circuit court location in regional Victoria would differ to the costs of a plea heard in Melbourne County Court with no jury.

5 This baseline cost is calculated irrespective of whether the judicial officer is presiding over a criminal, civil or circuit matter, or the number of cases attended to in one day, and excludes all leave and other activities undertaken by judicial officers (such as professional development).

6 The contractual agreement between the State of Victoria and The Liberty Group Pty Ltd (private contractor) regarding charges relating to use of courtrooms, building, security and technology services.

7 Retrial work is done by a senior solicitor. The OPP figures show that out of 4 retrials at County Court and 4 retrials at the Supreme Court, relating to various offences, the base cost was the same amount for each retrial, although the length of the retrials varied from 1 day to 14 days.

8 An advocate with 7-11 years experience. The briefing fee is given as $650 for a half day. The solicitor's fee is $293 per day. The briefing costs for a Supreme Court hearing are higher.

9 A lump sum fee is payable for preparation for all County Court Criminal Trials. The fee covers all necessary work involved in the obtaining instructions, preparation of any documentation, correspondence, perusals, proofing of witnesses, conferences with advocate and advising client.(HB 137(HB 136) The fee is $1311.

10 Estimated fee is $203.

11 Estimated fee is $720 (based on approximately 5 hours of conferences).

12 As noted, the figure varies depending on the jurisdiction. For the Supreme Court the costs (without factoring in preparation and mention fees) for a 5 day trial, for example, are estimated at around $14825. Figures will also vary where there is both senior and junior counsel.

# Appendix B
## Example Jury Charge in a Sexual Offence Case

The following extracts are taken from the judge's charge to the jury in a trial of a single accused on three counts:

- Count 1: Maintaining a sexual relationship with a child between 1 January 2004 – 1 December 2006 ('Complainant A') (2004-2006)
- Count 2: Committing an indecent act with or in the presence of a child ('Complainant B')
- Count 3: Possession of child pornography.

The charge follows closely the model directions in the JCV Chargebook and is a good example of a sexual offence case involving multiple complainants, and addresses many of the issues which commonly arise in directions in such cases:

- Consideration of multiple counts
- Evidence of uncharged acts
- Propensity – 'relationship' and 'similar fact' evidence
- Motive to lie
- Complaint made at the earliest reasonable opportunity
- Delay in complaint

The charge also illustrates the application of the Alford v Magee requirement of relating the evidence to the issues.

The judge who delivered this charge invited us to publish it in order to illustrate the burden on judges and juries of charges in this area.

This Charge followed a trial which lasted 12 days.

Witnesses' names and names of counsel and accused have been anonymised, and each extract from the charge has been given a subheading for convenience.

Charge – Part 1

The Judge gives the jury directions relating to:

- What each of the three charges are
- Roles of judge, jury & counsel
- Warnings against speculation and directions relating to the presumption of innocence, the onus of proof, the standard of proof, and the need to be unanimous

This is followed by directions relating to the consideration of the multiple counts on the presentment:

### Consideration of Multiple Counts

"I want to say something about the fact that there are three separate charges that the accused is facing and that are all being tried together in this trial.

The reason the three are being tried together in this trial is ultimately a reason of convenience. It would obviously in this case be highly inconvenient and expensive and wasteful to hold three separate trials before three separate judges with three separate juries in respect of these three charges because much of the evidence concerning the counts is common to all counts, and much of the background and surrounding circumstances is common to more than one count.

The witnesses or many of the witnesses were common to more than one count. So it would have been a difficult, time consuming and stressful process for everybody were three separate trials to be held.

However, the convenience of trying the three cases together, because of those pragmatic reasons, cannot supplant the need for you to consider the evidence on each count separately as it relates to the particular count you are considering at any time. The accused and the Crown are both entitled to a separate consideration by you of each of the three counts with which the accused is charged.

Strictly speaking, there are three separate trials that have been conducted in this courtroom, all running at the same time. Although each of the three counts or charges that the accused faces must be considered separately on the evidence relating to that particular count, there is much general

background and context evidence that is common to all counts. That means that it would be illogical for you to accept a particular piece of evidence when considering one count, but to reject exactly that same piece of evidence when considering any other count.

So of course that means that there may be the same logic that applies to more than one count, the same acceptance of a piece of evidence that is applicable to more than one count. Logic may well dictate the same result on part of one count and part of another count on the counts that you have to consider, but that does not diminish the force of this direction that each count must be considered separately on the evidence that relates to it. The verdict on one count cannot automatically determine the verdict on any other count.

If you find the accused not guilty of Count 1, it would be quite wrong to say it automatically follows therefore that he must be not guilty of Count 2 and Count 3. Similarly if you find him guilty of Count 1 it would be wrong to say it automatically follows therefore that he must be guilty of the other two counts. In addition to this direction that you cannot reason not guilty of one, not guilty of all or guilty of one, guilty of all, there is another equally important aspect of the need to consider each count separately on the evidence that relates to it.

If you find the accused guilty of any one charge you cannot reason that as a result of the finding of guilt on that one charge that he is the kind of person who would have committed the other offences and therefore he must be guilty of the others as well. So therefore I repeat, you must consider each count separately on the evidence that relates to it."

Following this, the Judge gives the jury other directions relating to:

- the elements of each of the 3 offences
- categories of evidence and transcript
- assessment of witnesses
- drawing inferences

### Charge – Part 2: Evidentiary Directions

The Judge gives the jury evidentiary directions about the use of evidence in relation to each of the counts.

In relation to Count 1 – the Judge gives directions about use of other sexual acts between the Accused and Complainant A

### Count 1 – Uncharged Acts

"There is also [Complainant A's] evidence about other sexual acts between himself and the accused man that are not particularised in the paragraphs under Count 1, and evidence of his watching pornography, again not the subject of any specific charge, but something I will speak to you about in a moment. Evidence of things such as drinking alcohol and evidence generally of the way he spent his time with the accused and what they did in their time together.

Of course Complainant A's evidence is not just what he said in his VATE, but equally importantly, what he said in response to answers in cross-examination and a scrutiny of whether there are any differences between what he said in his VATE or what he said in answer to questions asked of him after the VATE by the Prosecution and what he said in response to questions in cross-examination.

In addition to that there are other witnesses who gave evidence about matters that are relevant to Count 1. Not only are there witnesses such as Complainant A's mother who gave evidence about the meetings and the knowledge and the stayings over. There is the evidence of (The Psychologist) about the two consultations he had with Complainant A. The evidence of the accused man himself and his account of the relationship; the development of it and the contact they had.

In addition to that there was some physical evidence; things such as the evidence of the finding of the dildos in the wardrobe in the bedroom; them being photographed during the time of the first police visit and then removed by the police under warrant at the time of the second visit, after Complainant A had referred to dildo use in the course of his VATE tape. There is evidence that derives from the finding of those dildos; that is the DNA evidence of (The Scientist) which showed on the grey and white dildo, DNA coming from both the accused and Complainant A, and on the pink one, DNA coming from both of them, but with the accused being the major contributor of the DNA and on the pink one Complainant A being a minor contributor.

# Appendix B
## Example Jury Charge in Sexual Offence Case

Things such as the finding of the dildos in the accused's bedroom; the DNA evidence and the finding of the adult pornography, are all matters which the Crown relies on as being confirmatory of the account given by Complainant A, because the things were where he said they were and because for example, the dildos had the DNA on them and because Complainant A had told (The Psychologist) that he and the accused had watched adult pornography together, as well as Complainant A telling the police in the course of his VATE interview that he and the accused had watched adult pornography together.

The defence of course argues in respect of those matters, that Complainant A knew about them and could have known about them in other quite innocent ways; that it did not necessarily confirm that sexual activity had occurred between them, but because Complainant A stayed at the house; was inquisitive and had access to all areas of the house. So the accused in his evidence, explained where he had originally kept the dildos and that was something that Complainant A was asked about as well, and agreed they had initially been in a black bag. So that inquisitive nature of Complainant A locating the dildos and handling them, is relied on as an alternative reasonable explanation for the DNA finding its way onto the dildos.

In addition to that, the Crown relies upon the evidence of the child pornography on the hard drive and the CDs. The evidence of Witness C as to what happened between the accused and Witness C on the time that he stayed over, and the evidence of Complainant B as to what happened between the accused and Complainant B on the occasion that Complainant B stayed over. I want to give you some specific directions in a moment about the use that you can make and the limitations on the use that you can make of the evidence in respect of the child pornography; of Witness Cs' evidence and of Complainant B's evidence.

In addition to that, there is evidence predominantly again from Complainant A or evidence which the defence relies on as pointing to a number of reasons why Complainant A had a motive to lie; to make false allegations against the accused and to make them at the time that he did. I will want to deal with that in some detail as well. Linked with that is what use you can make of the fact that according to Complainant A, the activity the subject of Count 1, had occurred over a number of occasions over a period of two and a bit years before he told The Psychologist about it.

The Psychologist gave evidence that what was said to him by Complainant A on the first occasion about the accused was enough to sort of make him think it was something he wanted to ask him more questions about. Then on the second occasion that Complainant A made a disclosure of two separate incidents of sexual misconduct; the touching on his penis the previous weekend and the oral sex six months earlier.

The defence has relied on the difference between what Complainant A told The Psychologist had happened between him and the accused, and what Complainant A said in his VATE and told you in evidence. It is clearly a matter for you to take into account; to evaluate what significance you give to the difference between the disclosures made by Complainant A to The Psychologist and what he said in his evidence. What is important though is that you understand that you cannot use The Psychologist's evidence of what Complainant A told him the accused had done, as confirmation of Complainant A' evidence that the accused did do such things to him, because all The Psychologist is doing, is recounting to you what Complainant A told him. So it is not confirmatory evidence; it is simply saying, "This is what I was told." But it is not independent confirmation obviously of what Complainant A says, because it is simply The Psychologist repeating Complainant A's own words.

So it is there partly because it explains the sequence of events of how these matters came to light, and partly because the defence relies on it to show inconsistency in conduct or in account from that first disclosure to The Psychologist to what was then revealed in the VATE tape. But it does not provide independent evidence, and you cannot rely upon it as providing independent confirmation of Complainant A' account of what happened. So it is there to help explain the narrative and the sequence, and for you to make of it what you will in relation to the inconsistency. But it does not provide independent support for Complainant A' evidence.

That is to be contrasted if you like, to the way the Crown argues the dildos; the DNA evidence; the adult pornography. They are matters that provide, they say, independent support to Complainant A' evidence, although the defence says they are equivocal in nature.

### Count 1 - Evidence of uncharged acts (relationship evidence) as context

First I want to say something about the use you can make of the evidence of Complainant A in relation to the other sexual acts that he says the accused engaged in with him in addition to the seven individual types of acts that have been particularised in Count 1. You will recall that from his VATE tape he also referred to things for example like, him masturbating, the accused masturbating and him touching the accused on the penis. Also, what to make of the evidence of Complainant A that the accused showed him adult pornography.

If you accept the evidence of Complainant A that there was sexual activity between him and the accused, other than the seven types of acts that have been particularised and/or you accept the evidence of Complainant A that the accused showed him adult pornography and that they watched it together, you can, if you are satisfied of that evidence beyond reasonable doubt, use it in the following ways. First, to assist you in understanding the relationship between the accused and Complainant A and in providing or assisting to evaluate the context in which Complainant A said the various acts relied on by the Crown as constituting Count 1, were said by him to have been committed or to have occurred.

In one sense this evidence of other sexual acts, apart from the seven particularised, is no different from any other evidence that you have heard and that may be relevant to an understanding of the relationship and the development of the relationship between Complainant A and the accused, and the context in which the acts the subject of Count 1, are said to have occurred.

The other evidence that you may think is relevant or you may want to consider in looking at the context and the development of the relationship, includes evidence of the way Complainant A met the accused; how the visits and sleepovers began and progressed; how he came to stay at the accused's home when the rest of the family moved to Town A; the guardianship or authority letters, the two of them that were signed by Complainant A' mother; the evidence of the accused buying clothes for Complainant A; of taking him out; of giving him money; of giving him alcohol; of letting him use the computer, including with internet access; of allowing him to have friends over to stay with him at the accused's home; of talking him to a solicitor in relation to advice about the intervention order and taking him to the first consultation with The Psychologist; of Complainant A' familiarity with and ability to describe the scars that the accused had, including the scars on the scrotum and the accused telling him about his vasectomy.

It is obviously, that is not meant to be an exhaustive list, but they seem to me to be the main matters that appear to be relied on. It is for you to decide what of the evidence about the relationship in the general context you accept and what you reject and it is for you to decide how you resolve the conflicts in that evidence. I mean for example there is a conflict in relation to clothing, the type of clothing that the accused bought for Complainant A and the sort of occasions when he bought them.

That is simply an example of the conflict in the evidence, that is something that you will have to consider and you may want to resolve before you decide what significance you can give to the buying of clothes in the context of an evaluation of the relationship or the context and whether that is of any assistance in resolving the conflict on the ultimate issues, that is whether you accept and you are satisfied beyond reasonable doubt on the evidence of Complainant A that the sexual acts alleged by him occurred in the context of course of evaluating them for the purpose of the count.

So all of this evidence is capable of being used by you to assist in evaluating the relationship in context. It is up to you to accept what you accept or reject and what weight you give any part of it. However, in relation to the evidence of those other sexual activities, apart from the seven types of acts particularized in Count 1, and the evidence of watching the adult pornography, I must give you this particular warning. If you accept the evidence that there was other sexual activity you cannot, you must not substitute the evidence of that other sexual activity, the masturbation, for example, for the evidence of the other sexual acts relied on by the prosecution to prove Count 1.

So you cannot say for example well I am not satisfied that there were acts of oral sex, but I am satisfied that there were acts of masturbation because acts of masturbation are not the subject of the seven specified particulars to Count 1. Also if you are satisfied that any of these other type of sexual acts apart from the seven sorts particularized in Count 1 were committed by the accused with Complainant A, or if you are satisfied that the accused showed adult pornography to Complainant A, you must not reason that because he did that he must have committed the acts the subject of Count 1.

You can use it to evaluate the context but you cannot substitute those acts for the seven types, and you cannot say because I accept that he did those other acts, therefore he must be guilty of Count 1.

# Appendix B
## Example Jury Charge in a Sexual Offence Case

**Count 1 - Evidence of uncharged acts (relationship evidence) as showing sexual interest**

There is another way in which you may use the evidence of the accused engaged in other sexual acts with Complainant A, including watching the pornography and that is this. If you accept that evidence you may use it as evidence that the accused had a sexual interest in or passion for Complainant A.

If you consider this evidence does evidence a sexual interest in Complainant A by the accused, you may rely on that to support a process of reasoning that it is more likely that the accused acted as Complainant A said he did in relation to the specified acts on the occasions relied upon by the Crown in proof of Count 1. That is that you can reason that it is more probable that the accused committed the offence charged, but you can only apply that process of reasoning if you are satisfied that Complainant A's evidence of the other sexual acts, the masturbation and the like is true.

Of course if you do accept that, whilst you could use evidence of the accused's commission of the other sexual acts or the watching of pornography with Complainant A as demonstrating or evidencing a sexual interest in or passion for Complainant A, whilst that may make it more likely that the accused committed the offence, the subject of Count 1, it does not of itself obviously prove that he committed the offence the subject of Count 1, because that ultimately can only be proved by you being satisfied that on at least three occasions the accused committed one of the seven types of acts.

If you do not accept Complainant A's evidence as to the other sexual acts or the watching of pornography, or if you do not think that it explains the context, or if you do not think that it demonstrates a sexual interest in Complainant A by the accused, then obviously you should put such evidence aside and disregard it. It is important to understand that this evidence about other sexual acts and the watching of pornography has very strict limits. You must not use any evidence that you accept of a sexual interest by the accused in Complainant A as a substitute for any of the acts relied upon by the Crown in proof of Count 1 and you must not reason if you are satisfied the accused did have a sexual interest in Complainant A that he must have committed Count 1.

Nor can you reason, if you are satisfied that this other evidence shows a sexual interest in Complainant A or that it shows that he did commit other sexual acts with Complainant A, you cannot reason that the accused is the type of person who is likely to have committed the offence the subject of Count 1. The law makes it very clear that that type of reasoning is prohibited. Your decision must be based on the evidence in the case, not on assumptions about the type or kind of people who commit crimes.

What I am about to say about those four categories of evidence, Witness C's evidence about the propositioning, his evidence about the viewing of the child pornography; Complainant B's evidence about the laundry and the evidence of possession of child pornography, applies only if you are satisfied beyond reasonable doubt about that particular part of the evidence. If you are not satisfied beyond reasonable doubt for example of Witness C's evidence that he was propositioned by the accused, then you cannot apply this reasoning process that I am about to speak of in respect of Count 1.

If you accept any of those four pieces of evidence; if you are satisfied of any of those four pieces of evidence beyond reasonable doubt, you can use such pieces of evidence of those as you accept also as evidence of a sexual interest by the accused in adolescent boys, of the age of Complainant A, Complainant B and Witness C. If you consider that any of those four categories of evidence; if you are satisfied of them, satisfy you that the accused had a sexual interest in adolescent boys, you may also rely on that evidence to support a process of reasoning that it is more likely that the accused acted as Complainant A said he did in relation to the specific act relied on in relation to Count 1. That is, you could use it to assist a process of reasoning that it is more probable that the accused committed the offence, the subject of Count 1.

But again, you must not reason, if you are satisfied the accused did have a sexual interest in adolescent boys, that he must have committed Count 1. If you are satisfied that this evidence demonstrates the accused had a sexual interest in adolescent boys, that does not of itself prove that he committed the offence, the subject of Count 1. You would still have to be satisfied that he committed on at least three occasions, at least one of the specified acts. You cannot use the general evidence of a sexual interest in or sexual passion for adolescent boys as a substitute for proof of any of the acts you must be satisfied of in order to find Count 1 proven.

Again, if you accept this evidence as demonstrating a sexual interest by the accused in adolescent boys, you cannot use it to reason that the accused is the type of person who is likely to have committed the offence charged, and therefore to say he must be guilty of Count 1; because that is prohibited reasoning, you must rely on the evidence in relation to the count, not to assumptions about the kind of people who commit crimes.

### Count 1 - Similar Fact Evidence

Finally, there is one other way that you can use the evidence of Witness C and Complainant B if you accept it, that is if you are satisfied beyond reasonable doubt of it. If you accept any of those three pieces of evidence; Witness C's about being propositioned; Witness C's about being shown child pornography by or in the presence of the accused or Complainant B's evidence about the circumstances that he says occurred in the laundry between himself and the accused, you can rely on it for this process of reasoning. If you consider that any of that evidence that you accept shows an underlying unity with the evidence of Complainant A, because of similarity of circumstance between what Complainant A said happened and what the witness or witnesses said happened in respect of those particular matters, you can use again that underlying unity or similarity of circumstance in support of a process of reasoning that the accused acted as Complainant A said he did in relation to the specified acts on the occasions of which you must be satisfied, for the purposes of Count 1. That is, to assist you in a reasoning process that it is more probable therefore that the accused committed the offence charged.

What are the matters that are relied upon as showing an underlying unity or similarity of circumstance? They are these so far as Count 1 is concerned. The fact that all three boys were male. I know that sounds stupid, but the fact that all three complainants, all three children who gave evidence about the circumstances, were male. That they were of a similar age; adolescents between the age of 13 and 15; that they were friends of each others; that the acts alleged all occurred when the boys were staying over at the home of the accused; that they were in the care of the accused whilst they were staying over at his home. That in relation to Witness C and Complainant B, the circumstances in which they came to be at the house were that they were friends of Complainant A and they had been invited to stay at the accused's home with Complainant A; that they were permitted to use the computer.

In addition, in relation to the evidence of Complainant B, that they were given alcohol by the accused and in addition in relation to Witness C, that he was shown pornography by or in the presence of the accused. For that last part, that can be adult as well as child pornography, because of course Complainant A said he was shown adult pornography by the accused.

If you accept the evidence of Witness C on either of those aspects; the propositioning or the pornography, or Complainant B as to what he says happened in the laundry, or if you accept all of the evidence of both of them in those three regards and you consider that their evidence shows a unity or a similarity of circumstance, you can therefore use it to assist a process of reasoning that it is more likely that what Complainant A said about the acts the subject of Count 1, is true.

But again, the warnings that I have already given you about the limitations on the use of the evidence apply if you are going to use it as underlying unity in support of the process of reasoning as well. That is, first if you do not accept the evidence you have got to disregard it; put it right out of your mind.

If you do accept it, you cannot substitute the evidence of what happened between the accused and Witness C or what happened between the accused and Complainant B for the evidence of the specific acts of which you must be satisfied of, in proof of Count 1. You cannot reason that the accused is the kind of person who is likely to have committed the offence charged, because that would be dealing with an assumption about types of people who commit offences, rather than what you are satisfied of this particular accused did on the occasions the subject of the charges.

### Count 1 - Evidence of Complaint

The next thing I want to deal with is delayed complaint and reasons for delay. In this case, Defence Counsel on behalf of the accused, asked a number of questions of Complainant A to establish that he did not, from any time after the conduct commenced, complain to his mother; his stepfather; any of his siblings; to the group house mother; to the welfare coordinator at the school; to the Local Police on the day he went in there and asked them to call his mother, or to (The Psychologist) in the first interview with him, about what he said in his VATE tape and said in evidence before you the accused had been doing to him, or with him, between 2004 and 2006.

Defence Counsel also adduced evidence of what Complainant A had said to The Psychologist on the second consultation, being the allegations of only the two discrete acts to which I have referred, and not giving the fuller account relied on in proof of Count 1, until later when he did his VATE interview.

# Appendix B
## Example Jury Charge in a Sexual Offence Case

It was suggested to Complainant A and then argued to you in the course of Defence Counsel's final address, that the reason that Complainant A did not complain to any of those people at an earlier stage was because in fact there was no sexual contact between Complainant A and the accused man, and that Complainant A had invented and then embellished the allegations because people were wanting him to say something about [name withheld], and in order to deflect attention from the trouble that he, Complainant A was in by November of 2006 in order to cast himself as the victim and to induce or to try to persuade his School to reverse its position and re-admit him to the school.

### Count 1 - Motive to Lie

There are a number of matters that arise out of that line of questions and the argument about which I must give you direction. The first is this. The defence argued to you that there are a number of reasons why Complainant A might be telling lies about the conduct of the accused to him. The prosecution on the other hand of course, argued that Complainant A was a truthful witness and you should accept him as a witness of truth in relation to what he says the accused did to him. The prosecution argues that even accepting the combination of events occurring in Complainant A's life at the time, that this does not make his evidence untruthful or unreliable.

It is very important that you understand that if you accept the prosecution argument that notwithstanding all of these things were happening to Complainant A at the time, and therefore that you reject the defence argument that Complainant A was lying because he wanted to divert attention away from his own wrongdoing and to get himself back into the School, and because people were trying to induce him to say things about [name withheld]; if you reject that defence argument all that means is you have rejected one of the arguments advanced by the defence as to why you should reject the evidence of Complainant A. It is not the same by rejecting an argument that these were motives that induced Complainant A to lie; it is not the same as saying, "Because I have rejected these motives, therefore I find he was telling the truth." So it is one thing to say, "I reject the argument that he lied because he had the motive" but it does not automatically convert Complainant A's evidence into the truth. That is a separate and independent assessment that you must make.

Two things flow from that. First is the one I have mentioned. All you have done if you reject the argument, is reject one possible basis for rejecting Complainant A's evidence. It may still be possible that was lying for a motive that you do not know about and that the defence did not know about. So just because you reject, if you reject the possible motives advanced by the defence, does not mean that there could not be other motives. So the rejection of arguments about motive to lie do not make Complainant A's evidence by that reason alone, any more credible. You must assess Complainant A's credibility on the basis of his evidence and consideration of all of the other evidence in the case and the arguments that have been put to you about it; not on the basis of what the accused might be able to point to, to suggest a reason for lying.

Remember, at all times it is for the prosecution to prove that Complainant A is telling the truth about the acts, the subject of Count 1. It is one of the aspects of the accused not being required to prove his innocence, that he does not have to prove to you any particular motive on the part of Complainant A to lie. You can only convict the accused on Count 1 on the basis of all of the evidence, if you are satisfied of his guilty beyond reasonable doubt.

### Count 1 - Section 61 warning

The next matter I want to say to you about that is this. When considering the evidence that you have heard and the arguments you have heard about the fact that Complainant A did not immediately complain when the accused first engaged in any sexual activity with him, or at any time until his second consultation with The Psychologist, you must bear in mind that there may be good reasons why a victim of sexual assault does not immediately complain. Experience has shown that there is a range of reasons why victims of sexual assault may not complain immediately. Not all reasons apply to all victims of course, but reasons why victims of sexual assault may not complain immediately include the following.

They may be embarrassed or ashamed. If they are young, they may not understand at first that what is happening is sexual assault or they may be uncertain about whether what has happened to them is wrong. They may be quite ambivalent about the activity itself. Some may feel guilty, as if what has

happened is their fault or because that they feel that they are complicit in what is happening to them. This may be compounded if they are people who have previously been sexually assaulted.

That in itself may give rise to blurred boundaries about appropriate sexual behaviour. Some may fear that if they say what has happened, that they will be punished or victimised, or subject to retaliation, or lose other benefits which they are getting and which they value. They may fear that their complaint will not remain confidential and they may not want the matter to be widely known or discussed within their circles for fear of being gossiped about or judged. They may feel that they have no-one who they can confide in, or that if they do tell someone, that they will not be listened to or believed or protected. Some of these feelings may be compounded if the victim is a child or a young person, or if they are vulnerable for some reason, whether in addition to these or independently of them. If the perpetrator is a member of the family, a teacher, or a member of their immediate family circle or social circle, that too may be a reason why immediate complaint is not made.

You must consider in this case whether Complainant A's delay in complaining and the circumstances of his disclosure to The Psychologist are understandable. You must do so bearing in mind the factors that I have outlined above, the context in which the disclosure was ultimately made, having regard to Complainant A's circumstances at the time and his history.

Count 1 - ***Crofts/Kilby*** Direction

If you find that the delay in making the complainant or the failure to reveal the whole of it at the time that he made his disclosure to The Psychologist are inconsistent with Complainant A's evidence as he gave it in court, including in his VATE tape, if you think this casts doubts on Complainant A's credibility, then you must and should take that into account in determining what weight you give to the evidence of Complainant A about the acts he says occurred. Ultimately it is a matter for you to determine to what extent, if any, the delay in complaint affects or diminishes the credibility of Complainant A.

They are obviously both arguments with merit, the prosecution argument and the defence argument. Each of them have to be considered and evaluated by you. But it is a matter for you ultimately as to what you make of those arguments. It is important to bear in mind that there is a growing experience in the area of child sexual abuse, that children are often slow to disclose and will make staged disclosures, waiting until they gain the trust of the person they are disclosing to, before they continue to make their disclosures. Some children may want to disclose to a trusted adult; others may disclose to somebody who is independent of their circle. Again, they are matters that you should just bear in mind as something to take into account when weighing those two strong and competing arguments put by the prosecution and the defence.

Count 2 – Uncharged acts, relationship evidence, similar fact evidence

In relation to Count 2, the Crown also relies on the evidence of Complainant A and Witness C, and the possession of the child pornography in a similar way to the way it relied upon the evidence of Complainant B, Witness C, in the possession of child pornography in Count 1, but obviously it transposed to the circumstances of this case.

The Crown argues that if you accept all or any of the following evidence, Complainant A' evidence about the sexual relationship with the accused, Witness C's evidence about being propositioned, or Witness C's evidence about being shown child pornography by or in the presence of the accused, or the possession of child pornography by the accused. The Crown relies on that as demonstrating a sexual interest by the accused in adolescent boys. If you accept any of those four categories of evidence, are satisfied of it beyond reasonable doubt that is, and you accept that it does demonstrate a sexual interest by the accused in adolescent boys then you can rely on that in respect of Count 2 to support a process of reasoning that the accused is more likely to have acted as Complainant B said he did in the laundry, that is that it is more probable that he exposed himself as alleged by Complainant B, and not that he was propositioned or moved in on by Complainant B, as he says.

Again, you must not reason that because you are satisfied the accused has a sexual interest in or passion for adolescents that he must have committed the offence the subject of Count 2. And any of those four bodies of evidence - Complainant A's evidence about the relationship he had, Witness C's evidence, and the two categories or of possession of child pornography does not of itself prove the offence charged here, Count 2. You cannot use the evidence of the accused's sexual interest in or

passion for adolescents as a substitute for the act in Count 2. All it can do is make it more likely and therefore make him more inclined to accept and rely and act on the evidence of Complainant B. And again you cannot if you accept any of those four categories of evidence, reason that the accused is the type of person to have committed the offence charged and therefore to conclude that he is as a result guilty of Count 2. That is the prohibited reasoning because that relates to the type of person rather than the conduct.

Again the Crown relies on the evidence of Complainant A about the sexual relationship between him and the accused, Witness C's evidence about the propositioning and the showing and viewing of pornography, as showing an underlying unity with the evidence of Complainant B because of the similarity of circumstances, and transposed it is the same sort of thing as the similarity of circumstances relied on by the Crown in respect of Complainant A' evidence for Count 1.

If you are satisfied there is an underlying unity and similarity of circumstance between what Complainant B says occurred, and what Complainant A said occurred in respect of Count, and what Witness C said occurred in respect of the propositioning and the showing of pornography you can use that too in support of the reasoning that it is more likely that the accused acted as Complainant B said he did, therefore it is more likely that you can accept the evidence or rely on the evidence of Complainant B.

The similarities here are the same but transpose to the circumstances of Count 2, as were relied upon in Count 1, namely that all three males, all of a similar age, between the ages of 13 and 15, the acts occurring when they were all staying over at the accused's home in his care, the circumstances in which Witness C and Complainant B came to be staying at the home through Complainant A, the permission to use the computer, Complainant A' evidence that he and Complainant B were given alcohol by the accused. If you accept the evidence of Witness C or Complainant A, or both of them, and consider it does show that unity or similarity of circumstances you can use it for that reasoning process that it is more likely that what Complainant B said happened occurred, but again the same warnings about the limitations apply. If you do not believe any of those four categories of evidence you must put it aside for the purpose of considering Complainant B's evidence on Count 2. It cannot be used in substitution for the evidence of the actual act subject to Count 2, and you cannot reason that the accused is the kind of person who is likely to have committed the offence charged and therefore he must be guilty because you must deal with the evidence and not assumptions about people.

In respect of Complainant B the defence there has again argued, and argued very strenuously, that Complainant B had a motive, or a number of motives to lie, and those motives included Complainant B's desire to protect his reputation, his concern about the rumours that he was aware were floating around the School, and the teasing that he was experiencing from children about soliciting, having to have sex with older men for money, and his concern not to get into trouble.

Again the prosecution argues that despite those matters that Complainant B admitted were factors that had occurred, that you should accept Complainant B as a truthful witness whose evidence you should act and rely upon.

Count 2 - Motive to Lie

I want to therefore remind you that what I said about motive to lie, and what happens to the evidence of Complainant B if you decide that notwithstanding these factors that they were not motives that were acted on him to tell lies in respect of his account, that that does not convert Complainant B into a truthful witness in the same way that it does not convert Complainant A into a truthful witness if you reject the things that were happening to him as being motives for him lying. So all you are doing if you reject these motives is eliminating one possible basis for your considering that Complainant B is not telling the truth and not being able to be persuaded by his evidence. Again with Complainant B as with Complainant A, there is a possibility that he was lying for reasons the defence does not know about, and it is important to keep firmly in the front of your mind that the accused does not have to prove a lie or a motive for lying, that it is for the prosecution to satisfy you that Complainant B's evidence is truthful.

The mere fact that you reject any motive advanced by the defence as a basis for Complainant B lying does not convert Complainant B's evidence into more credible because you rejected the motive. All you have done is got rid of one reason for rejecting his evidence. But you still must assess and scrutinise his evidence to decide whether you can accept it or reject it, remembering that the burden of proof stays with the prosecution.

### Count 2 – Complaint made at the earliest reasonable opportunity

Also in relation to Complainant B you have heard evidence from the welfare coordinator about what Complainant B told her on 9 November in relation to what he says occurred between him and the accused in the laundry. The prosecution submitted that the fact that Complainant B complained to the welfare coordinator about the incident in a timely fashion makes it more likely that he is telling the truth in his VATE tape and here in court. The defence disputes that, contending that the complaint is a false one make in the circumstances in which you have heard about, when he was being teased, when he was aware of gossip about him, when he was anxious to protect his reputation, when he did not want to get into trouble, and when he had an obviously significant rift or rupture with Complainant A.

I want to tell you about the uses and limitations of the evidence of Complainant B making the complaint to the welfare coordinator. If you are satisfied that he made his complaint to the welfare coordinator at the first reasonable opportunity you can use the fact that he complained to the welfare coordinator in order to assess Complainant B's credibility, his believability as a witness. But before doing so there are three steps you must follow to determine whether the complaint was made to the welfare coordinator at the first reasonable opportunity.

First, you must decide what he said to the welfare coordinator, and there is clearly a contest between the parties as to his exact words, and you may need to resolve that contest in order to decide what exactly Complainant B said to the welfare coordinator and what significance you place on the difference between what he says he said, and what she says he said.

Second, you need to determine whether the words spoken by Complainant B constituted a complaint about the conduct with which the accused discharged the subject of Count 2. Although there is a dispute about exactly what was said and about how material the differences are between Complainant B's account and the welfare coordinator's account, there is no issue taken really with the fact that on both accounts he intended to convey a grievance or an accusation against the accused in relation to the incident in the laundry. It may be important to consider the way a person, particularly a child, expresses a complaint or a grievance about a sexual assault.

So in determining whether what Complainant B said to the welfare coordinator was a complaint you should take into account his age and those circumstances including the relationship with Complainant A. If you are not satisfied that what Complainant B said was a complaint, then you cannot use the evidence of what he said to the welfare coordinator in any way. To be a complaint the account given by Complainant B must have been spontaneous, that is, it must have been his unassisted statement of what happened.

If you are satisfied that it was spontaneous you then must go on to consider whether it was made at the first reasonable opportunity after the incident. This is not a question of whether it was made at the earliest opportunity but whether it was made at the first opportunity that Complainant B might reasonably have had and been expected to take advantage of had he been a victim of the offence as alleged.

You have got to make an assessment of this considering the situation from the perspective of Complainant B having regard to all of the circumstances which have been extensively canvassed.

If you do find that this was a complaint, spontaneously made at the first reasonable opportunity, this is the way and the only way that you can use it. It is admitted for your consideration in assessing Complainant B's credibility. If you accept it you can rely on it as showing consistency in his account of the event in evidence and consistency with the kind of reaction ordinarily to be expected of a victim of an incident such as the one that he complained of.

So it is for you to determine whether what Complainant B said to the welfare coordinator points to the consistency of his evidence. If you find that his behaviour in making a timely complaint is consistent with the evidence he gave in court, you can take it into account in order to assist his credibility.

Ultimately it is for you to determine to what extent, if any, the evidence of what Complainant B said to the welfare coordinator shows consistency in his conduct. If you do think it does it is important to understand that this is only relevant to your assessment of Complainant B's credibility and you can not use the complaint evidence as independent support for what Complainant B said because at most, as I told you about the evidence in relation to Complainant A and The Psychologist, all that the welfare coordinator can do is repeat what Complainant B has said so it is not independent evidence of Complainant B.

# Appendix B
## Example Jury Charge in a Sexual Offence Case

Count 3

I want to say something very briefly again about the evidence or the other boys in relation to the possession of pornography and that will be the last thing I say, so just bear with me a moment.

In addition to this direct evidence of the finding of the discs, the circumstances of the finding of them, the content of the discs, what Complainant A said about it, what Witness C said about it, what the accused said about it, you have also got the probability reasoning to a more limited extent than the probability reasoning that I have told you about in respect to the other counts.

And that is particularly the evidence of Witness C that he was shown child pornography by or in the presence of the accused. You can use that evidence in respect of you evaluation of Count 3, the guilt of the accused in respect of Count 3, only if you are satisfied, beyond reasonable doubt that Witness C was shown images of child pornography or including child pornography by or in the presence of the accused, on the occasion that Witness C stayed over.

If you are satisfied that Witness C was shown child pornography images by or in the accused's presence on that day you can use that evidence to support a process of reasoning that it is more likely or more probable that the accused was in possession of the child pornography found on the computer, on the hard-drive and the CDs when the police executed their warrant on (the date specified).

Again the same limitations apply as well as the use. That is, you must not reason simply because you are satisfied that Witness C was shown child pornography by or in the presence of the accused, that the accused must be guilty of the offence of possession of child pornography that child pornography on the discs.

That evidence or reasoning does not of itself prove the offence charged. You must still be satisfied the accused was in possession of the child pornography, the subject of the charge. You must not use the evidence of Witness C's viewing of pornography and the child pornography in the accused's presence as a substitute for satisfaction of proof that the accused was in possession, knowingly in possession of the child pornography on the computer and the CDs on (the date specified).

Again, if you accept Witness C's evidence on this issue, you cannot use that to reason that the accused is the type of person who is likely to have committed the offence charged and to use this conclusion as evidence that he is guilty of Count 3 because that is the prohibited reasoning, but you must decide, not on assumptions about the type of people who commit crimes, but rather on the evidence that relates to it.

# Appendix C
## The Aide Memoire: examples from the Northern Territory

### EXAMPLE 1

1 The Indictment contains one charge that the accused had sexual intercourse with "AB" on 9 August 2007 at XXXXXXX without her consent and knowing about or being reckless as to the lack of consent.

2 The offence charged consists of three elements. The Crown must prove each of the elements beyond reasonable doubt.

3 THE THREE ELEMENTS OF THE OFFENCE:

3.1 That the accused had sexual intercourse with "AB"

AND

3.2 That the act of sexual intercourse occurred without the consent of "AB"

AND

3.3 That at the time of the act of sexual intercourse, the accused intended to have sexual intercourse with "AB" without her consent.

**FIRST ELEMENT:**

4. "Sexual intercourse"

4.1 "Sexual intercourse" means the insertion to any extent of the accused's penis into the vagina, anus or mouth of "AB"

**SECOND ELEMENT:**

5. "Consent"

5.1 Consent means free agreement to the act of sexual intercourse.

5.2 If "AB" submitted to an act of sexual intercourse because of force, fear of force, or fear of harm, she would not be consenting, because she would not be in free agreement with the act of sexual intercourse.

5.3 "AB" would not be consenting to sexual intercourse if she submitted because she was unlawfully detained.

**THIRD ELEMENT:**

The Accused's intention:

5.4 The Crown must prove that the accused intended to have sexual intercourse with "AB" without her consent.

5.5 The accused would intend to have sexual intercourse with "AB" without her consent if, at the time of the act of intercourse, the accused

a) knew "AB" was not consenting,

OR

b) realised she might not be consenting and proceeded to have intercourse with her regardless of whether she was consenting or not.

5.6 If the accused mistakenly believed that "AB" was consenting to the act of sexual intercourse, he will NOT have intended to have sexual intercourse with her without her consent.
The Crown must, therefore, prove beyond reasonable doubt that the accused did not mistakenly believe that "AB" was consenting to the act of sexual intercourse.

[A mistaken belief must be genuinely held, but it does not have to be based on reasonable grounds. However, if there is no reasonable basis for him having held such a mistaken belief, you are entitled to take that into account in deciding whether or not the Crown has proved that no genuine mistaken belief really existed.]

# Appendix C
## The Aide Memoire: examples from the Northern Territory

6 If the Crown proves each of the three elements of the charge beyond reasonable doubt, your verdict must be one of "Guilty."

7 If the Crown fails to prove any of the three elements beyond reasonable doubt, your verdict must be one of "Not guilty."

### EXAMPLE 2

**ELEMENTS OF MURDER**

In order to find the accused, Mary Smith, "guilty of murder" you, the jury, must be satisfied beyond reasonable doubt of all of the following essential elements:

(1) On or about 5 April 2007, at Jay Creek, the Accused

(2) did an act,

(3) which caused the death of "John Victim"

(4) and at the time she did the act Mary Smith was either

(a) intending to cause his death,

OR

(b) intending to cause serious harm to him.

The Prosecution must prove EACH ONE of those elements.

**NOTES RELEVANT TO THIS CASE:**

1. "Intending to cause death or serious harm"

   A person intends to cause death or serious harm if the person means to bring it about, or, is aware that it will happen in the ordinary course of events.

2. "Harm" is physical harm, whether temporary or permanent.

3. " Serious harm" means any harm –

   a) that endangers, or is likely to endanger, a person's life; or

   b) that is, or is likely to be, significant and long standing.

If you, the jury, are satisfied beyond reasonable doubt of all of the above four essential elements your verdict will be "GUILTY of MURDER", and you will not need to consider the alternative charge of manslaughter.

If you the jury are not satisfied beyond reasonable doubt of the existence of any one of those elements, your verdict will be "NOT GUILTY OF MURDER".

If your verdict is NOT GUILTY OF MURDER then the jury must go on to consider the alternative count of Manslaughter.

**ALTERNATIVE COUNT: MANSLAUGHTER**

In order to convict the Accused of manslaughter you, the jury, must be satisfied beyond reasonable doubt of all of the following essential elements:

1. On or about 5 April 2007, at X, the Accused
2. did an act
3. which caused the death of John Victim; and
4. the Accused was, either
5. *reckless*

or

*negligent*

as to causing his death.

Each of the above four elements is essential, therefore, if you, the jury, are not satisfied beyond reasonable doubt of the existence of any of them your verdict will be "NOT GUILTY OF MANSLAUGHTER".

If you, the jury, are satisfied beyond reasonable doubt of all of the above four essential elements your verdict will be "GUILTY OF MANSLAUGHTER".

To be satisfied beyond reasonable doubt of the fourth element, the jury must be unanimously agreed either that the accused was reckless as to causing the death of John Victim, or was negligent as to causing the death, but the jury does not have to be unanimous as to one or other of those two alternatives.

"Reckless"

The accused would be reckless in relation to causing the death of John Victim if the jury was satisfied beyond reasonable doubt, both that –

a) she was aware of a substantial risk that the death would happen,

AND

b) having regard to the circumstances known to her, it was unjustifiable for her to have taken the risk.

"Negligent"

The accused would be negligent in relation to the death of John Victim if the jury were satisfied beyond reasonable doubt that her conduct involved both –

a) such a great falling short of the standard of care that a reasonable sober person would exercise in the circumstances;

AND

b) such a high risk that death would result

that her conduct merits criminal punishment for the offence.

1. Thomas Leach, 'How Do Jurors React To "Propensity" Evidence? — A Report On A Survey' (2004) 27 *American Journal of Trial Advocacy* 559; and see Thomas Leach, '"Propensity" Evidence and FRE 404: A Proposed Amended Rule With An Accompanying "Plain English" Jury Instruction' (2001) 68 *Tennessee Law Review* 825.

# Appendix D
## Thomas Leach: Model Jury Instruction on Propensity Evidence

Members of the jury, during this trial you have heard evidence that a person was involved in an act similar to the acts involved in this case. It is critically important for you to understand the proper and improper uses of such evidence.

Our system of justice includes as one of its underlying principles that we judge the participants in the trial on the basis of *what they have done or not done, rather than on the basis of what kind of person they are*. To put this another way, we try a criminal defendant by deciding whether or not he did the act charged, not by deciding whether he has a criminal character; we try a civil defendant by deciding whether she did or did not breach the contract in question, or did or did not act negligently in the accident at issues, not by deciding whether she appears generally to be a disrespecter of contracts or a careless person.

Evidence that an act was done at one time, or on one occasion, is not necessarily evidence or proof that a similar act was done at another time, or on another occasion. That is to say, while evidence that a person may have committed an act similar to the acts involved in this case may be considered by you in determining whether the person in fact committed any act involved in this case, such evidence must not be taken as completely answering the question. Instead, you the jury must decide whether (a) the person did or did not commit the prior acts, and (b) if so, whether that factor appears to you to make it more or less likely that the person committed any act involved in this case.

To put this another way, it would be improper for you to decide simply that "because the person did it once before, he probably did it again." Instead – and this is assuming that you do find that he did it before, which, as I have said, is a decision you must make first – you may include that fact in your entire discussion of whether or not he did any act involved in this case, but it is only one fact, entitled only to the weight you believe it deserves in comparison to and in combination with all the other facts presented in the case.

You should use your experience of human nature and human behaviour in assessing this evidence of other prior acts. For example, you must ask yourselves, and each other, whether a person who is careless on one occasion is necessarily always or often careless after that – or, instead, whether he has "learned from his mistake" and therefore is less likely, rather than more likely, to be careless the next time. Similarly, you must ask yourselves, and each other, whether someone who has committed an act that is generally looked down on by our society in general – whether it be a criminal or merely "anti-social" act – is necessarily always or often likely to repeat such act in the future – or, instead, whether she too has "learned from her mistake." Then you must apply your thoughts on these issues to the person here, and ask yourselves, and each other, whether his prior acts (if you find it proved that he committed them), make it more or less likely that he did or did not do any act involved in this case.

[Three] further issues are important for you to know and consider in your weighing of this evidence of other acts by the person.

First, to ensure that the person is not unfairly characterized by the admission of such evidence of other acts, it is important that you be persuaded that the other acts did in fact occur, and that the person was the actor. The law requires that, in order to make such a finding, you must be persuaded by "clear and convincing evidence." Clear and convincing proof leaves no substantial doubt in your mind. It is proof that establishes in your mind, not only that the proposition at issue is probable, but also that it is highly probable. It is enough if the party with the burden of proof establishes his claim beyond any "substantial doubt"; he does not have to dispel every "reasonable doubt."

Second, the law also requires that such evidence of other acts by the person, standing alone, is not in itself sufficient (a) to prove that the person was the actor in the acts involved in this case, or (b) to prove that the acts involved in this case did actually occur, or (c) to prove that the person acted with the level of intent required by the instructions I have given you on intent. In other words, if you do not find any other credible evidence on any of these points to add to and support whatever findings you are prepared to make based on the evidence of the person's other acts, then you must find one or more of the elements of the acts involved in this case have not been proved.

*[This portion of the instruction is applicable to criminal cases only.]* Third, you must not seek to punish the defendant for any other act or conduct that has been presented in this case. He is being tried here only for the charges you have been instructed on, not for other acts. The evidence of other acts must be considered by you only for determining whether he committed the present charges.

# Making a Submission

**What is a submission?**
Submissions are your ideas and opinions about the law being reviewed. The commission asks for submissions as part of its consultation process.

**Who can make a submission?**
Anyone can make a submission. They can be made on behalf of individuals or organisations.

**What is in a submission?**
Submissions can be anything from a personal story about how a law has affected you, to a well-researched paper complete with footnotes and bibliography.

When we publish a paper it will contain questions to guide your submission. You don't need to answer all questions, your answers don't need to be lengthy and you can provide us with information not covered by the questions.

**How can I make a submission?**
Submissions can be made via, email, post, fax, over the phone and face-to-face.

**What if I need assistance?**
If you require an interpreter, materials in accessible formats or help to make your submission please contact the commission.

**When can I make a submission?**
We invite submissions when we've published a Consultation, Options, Position or Information Paper but you can make a submission at any point before the submission deadline. Your submission may not be considered if it arrives after the deadline. Please speak to a researcher on the project before making a late submission.

**What is a public submission?**
Unless otherwise stated all submissions are considered public. 'Public' means they can be uploaded to the commission website, quoted in reports and kept at the commission for people to look at. Submissions uploaded to the website have contact details removed.

**What is an anonymous submission?**
Anonymous submissions can be uploaded to the commission website, quoted in reports and made available for people to look at but all names and identifying features will be removed.

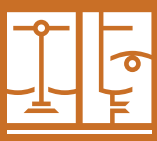
**What is a confidential submission?**
Making your submission confidential means only commissioners and commission staff can look at it. It will not be quoted in reports, appear on our website or be made available to the public.

**Do I need any material to complete my submission?**
The Consultation, Options, Position or Information paper about the law under review will assist you in making your submission. You can download it from our website or order it from the commission

**What happens once I make a submission?**
You will receive a letter acknowledging that your submission has been received and asking you to confirm who it is from and whether it is a public, anonymous or confidential submission. It will then be read by commissioners and commission staff to help them develop recommendations and write reports. If you have made a public submission it will be uploaded to the commission website.

**What is the commission?**
The commission was created by the *Victorian Law Reform Act 2000* as a central agency for developing law reform in Victoria. It is an independent agency that facilitates community-wide consultation and advises parliament on how to improve and update Victorian law. It is committed to transparent and public law reform which is independent of the political process.

**Where can I find out more information?**
The commission website—www.lawreform.vic.gov.au—contains a range of information about current and completed projects. You are also encouraged to contact the commission with any queries.



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