



Victorian
Law Reform
Commission



JURY DIRECTIONS

Final Report

Published by the Victorian Law Reform Commission

The Victorian Law Reform Commission was established under the *Victorian Law Reform Commission Act 2000* as a central agency for developing law reform in Victoria.

This report reflects the law as at 1 May 2009

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The publications of the Victorian Law Reform Commission follow the Melbourne University Law Review Association Inc, *Australian Guide to Legal Citations* (2nd ed, 2002).

Photograph of jury box by Peter Glenane

National Library of Australia
Cataloguing-in-Publication
Victorian Law Reform Commission
Jury Directions: Final Report

ISBN 978-0-9758466-5-0 (pbk.)

Bibliography

1. Instructions to Juries - Victoria
2. Criminal Justice - Administration of - Victoria

347.9450758

This publication can be provided in accessible formats by contacting the commission.

Ordered to be Printed

Victorian Government Printer
PP 206, Session 2006–09



Victorian
Law Reform
Commission

PROPENSITY CONSCIOUSNESS OF GUILT SIMILAR FACT EVIDENCE

JURY DIRECTIONS

Final Report 17

Victorian Law Reform Commission

GPO Box 4637
Melbourne Victoria 3001 Australia
DX 144 Melbourne, Vic

Level 3, 333 Queen Street,
Melbourne Victoria 3000 Australia

Telephone +61 3 8619 8619
Facsimile +61 3 8619 8600
TTY 1300 666 557
1300 666 555 (within Victoria)
law.reform@lawreform.vic.gov.au
www.lawreform.vic.gov.au

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Preface

In January 2008 the Attorney-General asked the commission to review the law and practice concerning the directions which judges give to juries in criminal trials and to recommend changes for improvement. There has been concern that the law in this area is too complex, that it does not encourage judges to use modern means of communicating with juries, that juries are sometimes given very lengthy directions that are not particularly helpful, and that some appeals against conviction succeed because of highly technical errors in the directions which the trial judge gave to the jury.

Jury trials lie at the centre of our criminal justice system. They are, as well, an important means by which members of the public actively participate in the governance of our society. Fair trials are also an essential component of the criminal justice system.

There is widespread acceptance in the community that people charged with a serious criminal offence should have their guilt or innocence determined by a jury comprised of men and women drawn from the community at random. We also accept that the jury should make that determination after a fair and public trial during which they are given clear directions by the judge about the law they must apply when reaching their verdict. That body of law, as well as the manner in which the jury are directed about its use, is what the commission has examined in this report.

The Honourable Geoff Eames QC, a retired Justice of the Supreme Court of Victoria, has played a major role in the preparation of this report as a consultant to the commission. Mr Eames was a Supreme Court judge for 15 years prior to his retirement in 2007 and has also been an Acting Justice of the Supreme Court of the Northern Territory. The commission has benefited greatly from his extensive trial and appellate court experience.

The commission established a Consultative Committee comprised of trial and appellate court judges, Crown Prosecutors and members of the private Bar who practise in the area of criminal law. I extend to all members of that Committee my thanks for their contribution to our work.

In February 2009 the commission conducted a Jury Directions Symposium with members of the New South Wales, Queensland, Tasmanian and New Zealand law reform commissions, judges and academics from a number of disciplines. This was an important event which shaped a number of the recommendations in the report. Our New Zealand colleagues, in particular, will recognise some of the changes proposed by the commission as we have recommended the use of practices first developed in that country.

Throughout the reference many judges have given generously of their time to provide us with practical information about the manner in which they conduct criminal trials and to respond to tentative reform proposals.

I express my thanks to the members of the Division of the commission who worked with Mr Geoff Eames, the commission's staff headed by CEO Padma Raman, and me on this reference. The division members are: Mandy Chambers, Hugh de Kretser, Judge Felicity Hampel and Judge Iain Ross.

The commission team allocated to the reference have worked tirelessly to produce this report. Policy and Research officers Matt Andison, Jennifer Powell, Tanaya Roy and Rupert Watters have all made major contributions. Miriam Cullen and Sarah Zeleznikow have assisted with referencing while both Claire Gallagher, Simone Marrocco and Aviva Berzon have provided me with research assistance. Interns Sarah Notarianni and Minh Le assisted with research tasks.

This report has been edited by Sally Finlay and produced by Clare Chandler. Vicki Christou has provided administrative support. I thank all of them for their professionalism.

Geoff Eames has been at the centre of Australian jury research for many years. As well as producing his own research and conference papers, he has encouraged and supported the work of many others. It has been a privilege to work with Geoff Eames on this reference. We have all benefited from his deep understanding of the issues dealt with in this report and from his desire to support and improve the important institution of trial by jury.



Professor Neil Rees

Chairperson

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 June 2009.

REFERENCE TEAM

Hon. Geoff Eames QC
Matthew Andison
Jennifer Powell
Tanaya Roy
Rupert Watters

VICTORIAN LAW REFORM COMMISSION

Chairperson

Professor Neil Rees

Part-time Commissioners

Paris Aristotle AM
Magistrate Mandy Chambers*
Hugh de Kretser*
Her Honour Judge Felicity Hampel*
Professor Sam Ricketson
His Honour Judge Iain Ross AO*

Chief Executive Officer

Padma Raman

Operations Manager

Kathy Karlevski

Community Law Reform Manager

Myra White

Policy and Research Team Leader

Emma Cashen

Communications Manager

Sally Finlay

Communications Officer

Clare Chandler

Policy and Research Officers

Matthew Andison
Emily Minter
Lara Rabiee
Tanaya Roy

Librarian

Julie Bransden

Project Officer

Simone Marrocco

Administrative Officers

Vicki Christou
Failelei Siatua

* Members of the Jury Directions division, constituted under the *Victorian Law Reform Commission Act 2000* s 13.

Abbreviations

ABA	American Bar Association	NSW	New South Wales
ACT	Australian Capital Territory	NZLC	New Zealand Law Commission
AIJA	Australian Institute of Judicial Administration	OPP	Office of Public Prosecutions
AJA	Acting Justice of Appeal	PGY1	postgraduate year one
ALRC	Australian Law Reform Commission	PGY2/3	postgraduate years two and three
AMC	Australian Medical Council	PMCV	Postgraduate Medical Council of Victoria
BVC	Bar Vocational Course	QAA	Quality Assurance Agency
CCTA	<i>Crimes (Criminal Trials) Act 1999</i>	QC	Queen's Counsel
CJ	Chief Justice	QLD	Queensland
CLE	Continuing Legal Education	RACS	Royal Australasian College of Surgeons
CPA	<i>Criminal Procedure Act 2009</i>	RANZCOG	Royal Australian and New Zealand College of Obstetricians and Gynaecologists
CPD	Continuing Professional Development	RANZCP	Royal Australian and New Zealand College of Psychiatrists
DNA	Deoxyribonucleic Acid	SC	Senior Counsel
ICCPR	International Covenant on Civil and Political rights	SET	Surgical Education and Training programme
J	Justice	SRA	Solicitors Regulation Authority
JA	Justice of Appeal	SWT	Supervised Workplace Training
JJ	Justices	the Charter	<i>Victorian Charter of Human Rights and Responsibilities Act 2006 (Vic)</i>
JCV	Judicial College of Victoria	TLRI	Tasmania Law Reform Institute
JOIN	Judicial Officers Information Network	UK	United Kingdom
LIV	Law Institute of Victoria	US	United States
LJ	Lord Justice	VGSO	Victorian Government Solicitor's Office
LPA	Legal Profession Act 2004	VLA	Victoria Legal Aid
MPBV	Medical Practitioners Board of Victoria		
NJCA	National Judicial College of Australia		

Executive Summary

INTRODUCTION

This report recommends significant legislative reform of the law concerning jury directions in criminal trials. It also recommends procedural and administrative changes that would improve jury directions.

Trial judges give juries directions in order to assist them reach fair and just verdicts. Our recommendations aim to improve this process. The recommendations also seek to reduce the possibility of error when judges give juries directions. This step would lead to a reduction in the number of retrials. In addition, we have recommended new procedures when the trial judge sums up a case for the jury which are designed to improve their understanding of the real issues they must decide in order to reach a verdict.

STRUCTURE OF THE REPORT

The report contains seven chapters:

- Chapter 1 is an introduction.
- Chapter 2 contains an overview of the law concerning jury directions and discusses problems with its application in practice.
- Chapter 3 contains a detailed description of particular problem areas.
- Chapter 4 provides an overview of our recommended legislation.
- Chapter 5 describes how our proposed legislation would deal with particular directions and makes recommendations about the problem areas discussed in Chapter 3.
- Chapter 6 recommends new ways of directing the jury about the issues in dispute in a trial and makes recommendations designed to promote the early identification of those issues.
- Chapter 7 discusses the current training requirements for judges and barristers and makes recommendations concerning the further development of their skills.

CONSULTATIONS

The Honourable Geoffrey Eames QC was expert consultant to this reference. Mr Eames brought to the reference his long experience as a criminal barrister and as a judge of the Supreme Court of Victoria in both the Trial Division and the Court of Appeal, and as an acting judge of the Supreme Court of the Northern Territory. He was also the former chairperson of the advisory committee of The Jury Project, a national research program established in 2003 and conducted under the auspices of the Australian Institute of Judicial Administration.

The commission established a Consultative Committee of experienced judges and criminal lawyers whom we consulted on a number of occasions.

In September 2008 we published a Consultation Paper in which we made a number of reform proposals. Prior to publishing the Consultation Paper we consulted members of the criminal bar, judges of the County and Supreme Courts, Victoria Legal Aid and the Office of Public Prosecutions.

We also consulted commissioners and research staff from the New South Wales Law Reform Commission, officers from the Criminal Policy Unit at the Department of Justice and staff from the Judicial College of Victoria.

Following the publication of the Consultation Paper, we met with the Criminal Bar Association, the Law Institute of Victoria, Victoria Legal Aid, the Office of Public Prosecutions, Crown Prosecutors, the Chairman of the Victorian Bar and judges of the County and Supreme Courts.

To encourage further responses to our reform proposals, we published an abridged version of the Consultation Paper, 'Jury Directions - a closer look', in late 2008.

In February 2009, we conducted a two-day symposium comprising members of law reform commissions in New Zealand, Queensland, New South Wales, Tasmania and Victoria, members of the judiciary and leading academics to discuss common problems and solutions.

We received submissions from judges, barristers, solicitors, statutory authorities, professional associations, academics and members of the public.

We are grateful to all those we consulted and to those who made submissions.

Executive Summary

THE CURRENT LAW

The law of jury directions is located in the common law, legislation and in decisions of the courts concerning the meaning of that legislation. This body of law lacks organisation, which makes it difficult to locate particular rules. The only organising common law principle is that a trial judge should give all directions necessary to avoid 'a perceptible risk of [a] miscarriage of justice'.¹ The generality of this important principle makes it difficult to apply in particular cases. Additionally, the content of the law concerning some jury directions is unnecessarily complex.

The state of the law of jury directions is conducive of judicial error. Trial judges often face problems in determining when to give directions and in formulating the content of directions. Errors in jury directions have resulted in many retrials being ordered on appeal.

The complexity of jury directions does not assist effective communication with juries. In addition, some judges give unnecessary directions out of concern about appeals which further complicates the juries' task.

The state of the law of jury directions is discussed in overview in Chapter 2 and in detail in Chapter 3.

The commission recommends that the law of jury directions be placed in a single statute. Initially, the legislation would address particular directions known to cause problems, and would address other directions more generally by setting out guiding principles. Over time, the statute would replace all of the common law rules concerning jury directions and include all existing legislation dealing with directions.

The statute would provide trial judges with guidance about when to give directions and about the content of directions. It would require trial judges to give any direction necessary for a fair trial and provide guidance about when a direction is necessary for a fair trial. The statute would ultimately govern all jury directions in criminal trials.

The statute would require all jury directions to be as clear, brief, simple and comprehensible as possible. This would make it easier for judges to give directions and easier for juries to follow them.

The nature of the statute and its potential interaction with other legislation such as *the Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Evidence Act 2008* (Vic) is discussed in Chapter 4.

THE OBLIGATION TO SUM UP THE CASE

Trial judges are obliged by the common law to direct the jury about so much of the law and the evidence as is necessary for them to decide the case. There is some uncertainty about the extent of this obligation. Some judges direct the jury about all the elements of the offences and defences that arise in the case and then go over most of the evidence of every witness, concluding with a comprehensive summary of the addresses of counsel. Other judges only inform the jury about the elements of the offences and defences that are in dispute and refer only to the evidence relevant to those elements, as well as the arguments of counsel. This means that some judges probably provide juries with too much information, while others provide them with too little information when summing up the case.

There is also uncertainty about the extent to which judges can use written documents and the transcript of the evidence when summing up. We consider these issues in Chapter 3.

The commission recommends that the extent of the obligation to sum up should be set out in legislation. In particular, we recommend the statute provides that the judge is only required to direct the jury about the elements of the offences and defences that are in dispute and to refer to the evidence relevant to those elements. We also suggest that trial judges should be encouraged to provide an edited copy of the transcript to the jury and to use the transcript in summing up. Trial judges should be able to give a brief summary of the evidence relevant to an issue and then refer the jury to the transcript for a more detailed account of that evidence. It should be unnecessary in most cases for a trial judge to provide the jury with a lengthy oral restatement of all the evidence. These recommendations are discussed in Chapter 5.

The traditional summing up often involves the trial judge giving the jury instructions which amount to lectures about complex legal principles. We recommend an alternative approach, which judges might choose to adopt, that concentrates upon the questions of fact the jury must decide rather than abstract principles of law.

We propose the introduction of two new documents, which trial judges would be permitted, but not required, to give the jury:

- At the commencement of the trial, jurors could be given a document setting out the elements of the offences (and alternative offences) on the indictment which we have called an 'Outline of Charges'. This document would identify, in broad terms, the issues in dispute in the case. This document would be prepared in draft by the prosecutor, then provided to defence counsel for comment, before being finally approved by the trial judge. We discuss this document further below.
- We recommend that trial judges be permitted to use a document called a 'Jury Guide' at the time of the summing up. The Jury Guide would set out a series of questions that would guide the jury to its verdict. The judge would draft the document and discuss it with counsel. When devising the questions, counsel and the judge would consider the matters which the prosecution must prove to establish each offence, but the legal principles would be translated into questions of fact about the issues in the case. As the law concerning the elements of each offence would be built into the questions, the jury would not have to deal with a body of information about abstract legal principles and work out how to apply that law to the facts of the case. The jury would not be required to answer the questions publicly. The jury would simply return a verdict of guilty or not guilty.

We have provided examples of Jury Guide type documents used in trials in New Zealand where this approach to instructing the jury has been widely adopted. We have also prepared an example of a Jury Guide based on an actual case in Australia which involved the law of complicity. This is set out in Appendix F. The written jury aide that was given to the jury in that case is also set out in Appendix F by way of comparison. We discuss the Jury Guide in Chapter 6.

THE OBLIGATION TO DIRECT ON MATTERS NOT RAISED BY COUNSEL

The common law requires the trial judge to direct the jury about any defences or alternative verdicts open on the evidence, even where defence counsel has made a tactical decision not to raise those issues as part of their case.² This is known as the '*Pemble*' obligation. It requires the trial judge to direct the jury about the law and the evidence that is relevant to a defence that counsel has not raised with the jury. We recommend some moderation of this obligation. The *Pemble* obligation is considered in Chapter 3 and in Chapter 5 we discuss our recommendation for statutory reform.

EVIDENTIARY DIRECTIONS

'Evidentiary' directions instruct the jury about the use of particular types of evidence. In order to illustrate how the proposed jury directions legislation would operate the commission considered four evidentiary directions which could be improved: consciousness of guilt; identification; delayed complaint and propensity. The problems with these directions are discussed in Chapter 3 and our recommendations about them are set out in Chapter 5.

There are difficulties concerning the complexity of evidentiary and substantive law directions in sexual offences trials. The commission recommends that the directions given in these trials be the subject of discrete inquiry and reform.

CONSCIOUSNESS OF GUILT

Consciousness of guilt evidence is evidence that the accused person did something after the commission of the offence from which the jury may be able to infer that it demonstrates awareness by the accused that he or she committed a crime. Juries have traditionally been warned not to jump to conclusions about this kind of evidence because there may be innocent explanations for the accused person's conduct.

1 *Longman v The Queen* (1989) 168 CLR 79, 86 (Brennan, Dawson and Toohey JJ).

2 *Pemble v R* (1971) 124 CLR 107.

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Before giving the warning, the judge must decide whether the evidence is capable of demonstrating a consciousness of guilt. This can be a difficult exercise, because it is often a subjective judgment about which people can disagree. In order to assist judges to deal with this task, the commission recommends the early identification of consciousness of guilt evidence by the prosecution in all cases. We also recommend that the evidence be referred to as post-offence conduct because this term is clearer and less emotive.

At present the judge is required to tell the jury about every item of post offence conduct which may evidence a consciousness of guilt. To simplify the warning, the commission recommends that the judge should be permitted to warn the jury in general terms about the dangers associated with this type of evidence.

IDENTIFICATION EVIDENCE

Eyewitness identification evidence is inherently unreliable because people have different powers of observation and human memory can be inaccurate. Juries are warned to be careful before accepting identification evidence. The trial judge is required to tell the jury about the particular factors in the case that may affect the reliability of any contested identification evidence.

While the current law concerning identification evidence is relatively clear, its application is sometimes difficult. At times judges direct juries about factors affecting identification evidence that are not present in the case, or fail to direct about factors that are present.

We use directions about identification evidence to illustrate how legislation could consolidate, clarify and rationalise the law concerning evidentiary directions.

The common law draws a distinction between three different kinds of evidence based on a witness's visual observation of a person or thing: 'identification', 'recognition' and 'similarity' evidence. Under the *Evidence Act 2008*, all three kinds of evidence will require a warning where the reliability of the evidence is disputed.

The commission recommends that the distinction between 'identification', 'recognition' and 'similarity' evidence be maintained. A warning should continue to be mandatory for 'identification' evidence where the reliability of that evidence is disputed. However, the judge should have a discretion not to give a warning for 'recognition' and 'similarity' evidence if there is a good reason not to do so.

We also recommend that the statute set out the essential elements of the warning and suggest what those elements should be. We recommend that the statute provide that the judge is only required to point to factors which affect the reliability of the identification evidence in the particular case.

DELAYED COMPLAINT

The directions required where there has been a delayed allegation of a sexual offence are governed by both common law and legislation. This gives rise to unnecessary complexity, which we consider in detail in Chapter 3.

The jury may require directions about the effect of delayed complaint because it may cause significant forensic disadvantage in the presentation of the defence case, or because the delay may cast doubt on the credibility of the complaint. The common law rules concerning these directions have been modified legislation. Both issues are dealt with by section 61 of the *Crimes Act 1958*, while forensic disadvantage is also governed by section 165B of the *Evidence Act 2008*.

The commission recommends that 165B of the *Evidence Act 2008* be incorporated in the proposed jury directions legislation. We recommend that trial judges should not be permitted or required to say anything to the jury about delay affecting the credibility of the complainant unless satisfied that it is necessary to do so to ensure a fair trial. In these circumstances, the judge should continue to direct the jury that there may be good reason why a person might hesitate or delay complaining about a sexual assault. The judge should also be empowered to correct statements made by counsel which are based on outdated stereotypes concerning victims of sexual assault.

PROPENSITY

Propensity evidence is evidence of discreditable conduct on the part of the accused on occasions other than those concerning the offences charged. It is admissible only in limited circumstances.

Most propensity evidence attracts a 'propensity warning'. This tells the jury that it must not reason that because the accused engaged in discreditable conduct on other occasions they are likely to have committed the offence charged. Research suggests that this warning is ineffective because it tells the jury not to reason in a way that is logical.

The commission expresses strong support for the warning devised by Professor Thomas Leach which acknowledges that propensity evidence can be relevant to establishing the truth of the allegations against the accused person but emphasises the principles that govern a fair trial and warns the jury against using the evidence unfairly.

When the *Evidence Act 2008* commences, it will still be possible for propensity evidence to be admitted in some cases on a 'limited use' basis. The issues surrounding the admissibility of propensity evidence are complex as is the possibility of substituting a 'Leach direction' for a 'limited use' direction. The commission recommends a review of jury directions in sexual offence cases. Propensity directions should be reviewed in that context.

ISSUE IDENTIFICATION

Disputed issues in a trial should be identified as early as possible. The early identification of the disputed issues makes it easier for the jury to understand the relevance of the evidence and easier for the judge to formulate appropriate directions.

There have been repeated attempts to promote early issue identification through legislation and court Practice Notes. However, it is still common for trials to commence without the disputed issues being clearly identified by counsel.

While the commission recommends that existing pre-trial procedures under the *Criminal Procedure Act 2008* and under Practice Notes which relate to issue identification should be maintained, we make a number of recommendations designed to promote early identification of contested issues.

As earlier noted, we recommend that the judge be permitted to give the jury a document called an 'Outline of Charges' prior to any evidence being heard. The Outline of Charges would identify the elements of the offences charged and the elements of those offences which are in dispute. It would provide the jury with a useful framework to understand the evidence.

The trial judge should also be permitted to give the jury a Jury Guide when summing up the case. The Jury Guide, as its name implies, contains a series of questions of fact designed to guide the jury to their verdict. We suggest that trial judges should be permitted, but not required, to use the Outline of Charges and the Jury Guide. We discuss issue identification in Chapter 6.

ASSISTANCE FROM COUNSEL

Counsel have a duty to assist the trial judge determine what directions to give the jury and to formulate the content of directions. Concerns were expressed to the commission that some counsel have not provided sufficient assistance in this regard. Retrials have been ordered because of erroneous directions in cases where counsel did not raise the error with the judge at trial.

The commission recommends that the jury directions legislation provide that counsel have the initial responsibility for seeking directions, and that the judge must give any direction requested by counsel unless there is a good reason not to do so. The legislation should provide that the fact that a direction was not sought or was opposed by counsel must be taken into account by the judge in determining whether a direction is necessary to ensure a fair trial.

The commission also recommends that leave be required to argue a direction-based ground of appeal in circumstances where counsel took no exception to the direction at trial. The application for leave to appeal should be able to be determined by a single judge of appeal on an occasion before any appeal hearing. These recommendations are discussed in Chapter 4.

Executive Summary

SKILLS TRAINING

Trial judges and legal practitioners will need training in the preparation and use of the Outline of Charges and the Jury Guide.

Additionally, we consider ways of enhancing the skill levels of criminal trial barristers. We recommend that the Victorian Bar Council consider establishing a specialist accreditation scheme for criminal trial counsel. We consider the training requirements for medical specialists by way of comparison.

We also recommend that the Attorney-General consider establishing a Public Defenders' Office as a way of developing skills among criminal trial counsel. These recommendations are discussed in Chapter 7.

TRAINING FOR JUDGES

Judicial training is an essential part of improving jury directions. We make recommendations about training for newly appointed judges and about ongoing training for judges on the subject of jury directions. This is discussed in Chapter 7.

Recommendations

1. The law concerning jury directions in criminal trials should be located in a single statute.
2. The legislation should be introduced over time and replace the common law, and it should contain revised versions of all existing Victorian statutory provisions (including relevant Evidence Act 2008 (Vic) provisions) concerning directions.
3. Section 165(5) of the Evidence Act 2008 (Vic), which saves the operation of the common law, should be repealed.
4. The legislation should permit development of a body of law by the courts in accordance with general principles set out in the statute when a particular direction that is necessary for a fair trial, or is otherwise appropriate, is not expressly dealt with by the legislation.
5. The legislation should contain general principles which guide the content of all directions. All directions should be:
 - clear
 - simple
 - brief
 - comprehensible
 - tailored to the circumstances of the particular case.
6. The legislation should clearly indicate those directions that are mandatory and those which are discretionary.
7. The trial judge must give a discretionary direction that has been requested by counsel for the accused unless satisfied that there is good reason not to do so.
8. The legislation should declare that the trial judge has an obligation to give the jury any direction that is necessary to ensure a fair trial.
9. The fact that a direction is not sought, or is opposed, by counsel for the accused must be taken into account by the trial judge when determining whether any direction or warning is necessary to ensure a fair trial.
10. In determining whether any direction is necessary to ensure a fair trial and whether there is good reason to refuse a request by counsel for the accused for a particular direction the trial judge may consider any of the following matters:
 - the content of addresses by counsel and/or by the accused, if unrepresented
 - the capacity of counsel to deal with the matter adequately
 - the submissions of counsel or the accused, if unrepresented
 - any questions or requests made by the jurors
 - the extent to which the issue is a matter of common sense which the jury as a whole may be presumed to appreciate
 - whether the topic will be sufficiently addressed by another direction
 - the rights of both the prosecution and the accused person to a fair trial.
11. The trial judge should have a discretionary power to determine the timing and frequency of the directions given to the jury.
12. The legislation should ultimately govern the content of all directions of a procedural nature such as:
 - burden and standard of proof
 - the role of the trial judge, the jury and of counsel
 - the requirement that the verdict be based solely on the evidence
 - the assessment of witnesses
 - unanimous verdicts

Recommendations

- those directions which are mandatory when the circumstances require (eg alternative verdicts, separate consideration, and perseverance)
 - Those directions which may be given when the circumstances require (eg majority verdicts)
 - Those directions which are of an administrative nature (eg jury empanelment, selecting a foreperson, trial procedure)
13. The essential elements of directions concerning the use of evidence should be set out in the legislation over time. Once the essential elements of a particular direction are dealt with by the legislation, any common law rule concerning that direction should be abolished. The essential elements of the following directions should be included in the initial legislation:
 - propensity reasoning
 - identification evidence
 - use of post-offence conduct.
 14. Until the legislation deals with a particular direction, or is declared complete, common law rules concerning that direction should continue to apply. If the legislation, once completed, does not refer to the essential elements of any direction the trial judge considers necessary to ensure a fair trial, the trial judge should have a discretionary power to determine the content of that direction guided by the general principles in the legislation.
 15. Directions not dealt with in this report should be reviewed with a view to their removal, or to their consolidation, simplification and inclusion in the new jury directions legislation.
 16. The Victorian Law Reform Commission should undertake this review.
 17. As part of the review of the offences in the *Crimes Act 1958 (Vic)* underway by the Department of Justice, the Attorney-General should review the substantive law of sexual offences in order to reduce in number, shorten and simplify the directions and warnings the trial judge must give to the jury in sex offence trials.
 18. In addressing outdated assumptions and prejudices concerning complainants in sexual offence trials, the approach should be to contradict inappropriate arguments, directions or comments being made by counsel and trial judges, rather than requiring positive statements on such topics to be made, in all cases, by way of directions from the trial judges.
 19. Parliamentary Counsel should consider the language in which a jury may be directed about the elements of a particular offence when any changes are made to the criminal law.
 20. It should not be possible to argue on appeal, without the leave of the Court of Appeal, that the trial judge made an error of law when giving or in failing to give a particular direction to the jury, unless the alleged error of law was drawn to the attention of the trial judge prior to verdict.
 21. The Court of Appeal should not grant leave to argue a ground of appeal in the circumstances referred to in Recommendation 20 unless it finds that there is a reasonable prospect that the ground, if made out, would satisfy it that there had been a substantial miscarriage of justice.
 22. The nature and extent of a trial judge's obligation to direct the jury about the elements of the offences, the facts in issue and the evidence so that it may properly consider its verdict should be set out in the legislation.
 23. The legislative statement of this obligation should contain the following principles:
 - a) The trial judge must direct the jury about the elements of any offences charged by the prosecution that are in dispute and may do so by identifying the findings of fact they must make with respect to each disputed element.
 - b) The trial judge must direct the jury about the elements of any defences raised by the accused person which must be negated by the prosecution or affirmatively proved by the accused person and may do so by identifying the findings of fact they must make with respect to each disputed element.

- c) The trial judge must direct the jury about all of the verdicts open to them on the evidence, unless there is good reason not to do so.
- d) The trial judge must refer the jury to the evidence which is relevant to the findings of fact they must make with respect to the contested elements of each offence.
- e) In referring the jury to relevant evidence the trial judge is not required to provide the jury with an oral restatement of all or any of that evidence, unless the judge determines, in the exercise of the judge's discretion, that it is necessary to do so in order to ensure a fair trial.
- f) In determining whether it is necessary to provide the jury with an oral summary of evidence, the trial judge may have regard to the following matters:
- the length of the trial
 - whether the jury will be provided with a written or electronic transcript or summary of the evidence
 - the complexity of the evidence
 - any special needs or disadvantages of the jury in understanding or recalling the evidence
 - the submissions and addresses of counsel
 - such other matters as the judge deems appropriate in the circumstances of the case
- g) The trial judge must direct the jury that they must find the accused not guilty if they cannot make any of the findings of fact referred to in Paragraph (a) beyond reasonable doubt.
- h) The trial judge is under no obligation to direct the jury about the elements of the offence (or any defence) other than to comply with these requirements.
- i) The trial judge must provide the jury with a summary of the way in which the prosecutor and the accused have put their respective cases.
24. The term post-offence conduct should be used to describe conduct which may amount to an implied admission of guilt by the accused and which is now referred to as conduct which may convey a 'consciousness of guilt'.
25. The legislation should require the prosecution to identify, prior to the commencement of addresses, any evidence of particular post-offence conduct of the accused upon which it seeks to rely as demonstrating an awareness of guilt on the part of the accused as to any offence. The judge must decide whether any item of evidence concerning post-offence conduct by the accused is capable of amounting to an implied admission of guilt of any offence before the prosecutor may address the jury about the conclusions it might draw from this evidence.
26. If the trial judge decides to give the jury a warning about the use of evidence concerning post-offence conduct by the accused, the trial judge should be permitted to provide the warning in general terms and should not be required to refer to each particular item of post-offence conduct which may amount to an implied admission of guilt by the accused person.
27. Any warning which a trial judge gives to a jury about the use of evidence concerning post-offence conduct by the accused will be sufficient if it contains reference to the following matters:
- People lie or engage in other apparently incriminating conduct for various reasons
 - The jury should not necessarily conclude that the accused person is guilty of the offence charged just because the jury find that he or she lied or engaged in some other apparently incriminating conduct.
28. Both section 116 and section 165(1)(b) of the *Evidence Act 2008* (Vic) should be repealed and a provision concerning identification evidence directions should be included in the new jury directions legislation.

Recommendations

29. In the jury directions legislation, 'identification evidence', 'recognition evidence' and 'similarity evidence' should be given distinct definitions. The definitions should extend to the identification of objects.
30. Where 'identification evidence' is admitted and the reliability of that evidence is disputed, the legislation should require the judge to warn the jury about the unreliability of the evidence.
31. Where 'recognition evidence' or 'similarity evidence' is admitted, the legislation should require the judge to warn the jury about the unreliability of the evidence upon the request of counsel for the accused, unless the judge is satisfied that there is good reason not to do so.
32. The warning must, in the case of 'identification evidence', and may, in the case of 'recognition evidence' or 'similarity evidence', direct the jury that there is a special need for caution before accepting the evidence and that:
 - The identification, recognition or similarity evidence depends on a witness receiving, recording and accurately recalling an impression of a person or object
 - A witness, or multiple witnesses, may honestly believe that their identification, recognition or similarity evidence is accurate when it is in fact mistaken
 - Innocent people have been convicted because honest witnesses were mistaken in their evidence concerning identification, recognition or similarity.
33. The judge is not required to use any particular form of words when giving a warning, but must inform the jury of any matter of significance bearing on the unreliability of the evidence in the circumstances of the case.
34. The legislation should provide that a trial judge is not obliged to direct the jury about any 'defence' to a count on the indictment, or about any alternative verdict, which counsel for the accused did not place before the jury in final address unless the trial judge is satisfied that:
 - the defence or alternative verdict is reasonably open on the evidence
 - the failure of defence counsel to address the matter was due to error or oversight by counsel and was not adopted for tactical reasons in the interest of the accused
 - the trial judge is satisfied that it is necessary to direct the jury about the matter in order to ensure a fair trial.
35. When determining whether it is necessary to direct the jury about any 'defence' or alternative verdict in the circumstances referred to in Recommendation 34, it shall be presumed, unless the judge is satisfied to the contrary, that a decision taken by counsel, for tactical reasons, not to advance a 'defence' or alternative verdict to the jury removes any obligation on the trial judge to direct the jury about that matter.
36. In addressing outdated assumptions and prejudices concerning complainants in sexual offence trials, the approach should be to contradict inappropriate arguments, directions or comments being made by counsel and trial judges, rather than requiring positive statements on such topics to be made, in all cases, by way of directions from the trial judges.
37. The issue of delay in complaint in criminal trials should be governed by a provision in the legislation, substantially adopting s.165B of the *Evidence Act 2008* (Vic), in lieu of s 61 of the *Crimes Act 1958* (Vic).
38. The legislation should contain a further provision which states that in any trial for an offence under Subdivision (8A), (8B) (8C) (8D) (8E) of Part 1 of the *Crimes Act 1958* (Vic), the issue of the effect of any delay in complaint, or absence of complaint, on the credibility of the complainant should be a matter for argument by counsel and for determination by the jury.
 - (i) Subject to subsection (ii), save for identifying the issue for the jury and the competing contentions of counsel,¹ the trial judge must not give a direction regarding the effect of delay in complaint, or absence of complaint, on the credibility of the complainant, unless satisfied it is necessary to do so in order to ensure a fair trial.

- (ii) If evidence is given, or a question is asked, or a comment is made that tends to suggest that the person against whom the offence is alleged to have been committed either delayed making or failed to make a complaint in respect of the offence, the judge must tell the jury that there may be good reasons why a victim of a sexual offence of that kind may delay making or fail to make a complaint in respect of the offence.

The legislation should prohibit the trial judge from telling the jury or suggesting in any way:

- ii. that complainants in sexual offence cases are regarded by the law as a class of unreliable witnesses;
 - ii. that on account of delay it would be dangerous or unsafe to find the accused guilty
39. As part of the process of ongoing review of jury directions, consideration should be given to providing for simplified directions on the issue of propensity. The legislation should contain guidance for the trial judge when warning a jury about propensity reasoning, adopting and suitably modifying the model suggested by Leach.
40. Legislation should provide that notwithstanding section 250 of the *Criminal Procedure Act 2009* (Vic) where, after summary inquiry at the conclusion of the trial, in the opinion of the trial judge:
- a. the trial was unnecessarily protracted; or
 - b. the task of the jury made unnecessarily or unreasonably burdensome
- by reason of the failure of counsel for the prosecution or defence or other legal practitioners to comply with the provisions of the *Criminal Procedure Act 2009* (Vic) or the relevant Practice Direction or Practice Notes, the trial judge may send a report to this effect to the Solicitor for Public Prosecution, the Managing Director of Victoria Legal Aid or such other body as the judge deems appropriate.
41. When addressing the jury about the issues that are expected to arise in a trial, the judge may provide the jury with a document known as an 'Outline of Charges' which identifies the elements of the offences charged in the indictment (including alternate offences) and which indicates the elements disputed by the accused.
42. If the trial judge decides to give the jury an 'Outline of Charges' the trial judge may direct the prosecutor to prepare a draft of that document and to attempt to settle the document with counsel for the accused before filing it with the court. Section 223 of the *Criminal Procedure Act 2009* (Vic) should be amended to expressly refer to this document and to provide the trial judge with an express power to direct counsel to prepare a draft of the document.
43. The trial judge should be expressly permitted to provide the jury with a document known as a 'Jury Guide', which contains a list of questions of fact designed to guide them towards their verdict. The jury must not be required to provide answers publicly to the questions in the document, but should be directed that they may use the 'Jury Guide' to assist them to reach a verdict.
44. If the trial judge decides to give the jury a 'Jury Guide' a draft of that document must be shown to the prosecutor and counsel for the accused prior to it being handed to the jury and counsel must assist the trial judge to finalise the questions of fact that will be included in that document.
45. The Victoria Bar Council should consider whether counsel who appear in criminal trials should be able to seek accreditation to conduct such trials.
46. The Victorian Bar Council should consider establishing an assessable skills training course for barristers who wish to obtain specialist accreditation to conduct criminal trials.
47. The Office of Public Prosecutor and Victorian Legal Aid should consider whether barristers who are accredited as specialists in criminal trials should receive a fee loading.
48. The Attorney-General should consider whether a Public Defender scheme should be established.

1. In compliance with *Alford v Magee* (1952) 85 CLR 437.

Recommendations

49. Because of the complexity of sexual offence trials, the Office of Public Prosecutor and Victorian Legal Aid should consider increasing the fees paid to counsel in these trials in order to ensure that suitable counsel are engaged.
50. Subject to the discretion of the head of jurisdiction, all newly appointed judges who will conduct criminal trials should be required to complete a skills training program concerning the law and practice of criminal trials.
51. The Judicial College of Victoria should provide judges with skills training courses designed to assist them to conduct criminal trials and, in particular, to formulate jury directions and warnings.
52. Ongoing refresher courses concerning the law and practice of criminal trials should be provided to judges who conduct criminal jury trials.

Chapter 1

Introduction

CONTENTS

- Scope of this reference
- What is not under review
- The context of the reference
- Our process

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 By our terms of reference, the commission was 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.
- 1.3 The Attorney-General 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.¹

WHAT IS NOT UNDER REVIEW

- 1.4 The terms of reference did not ask the commission to consider the issue of whether jurors understand the directions they receive from the trial judge. The Attorney-General has indicated that the commission may receive a further reference about jury directions.² The commission recognises, however, that juror comprehension of instructions is an important matter when examining the extent to which directions can be simplified or their number reduced.³
- 1.5 Judges are required to give juries directions about a range of matters, including the relevant content of the criminal law.⁴ They must explain the elements, or detail, of the offences and defences that arise in a particular case to the jury. The commission has not reviewed the content of these individual directions because the Department of Justice is currently reviewing the substantive criminal law of Victoria.⁵

THE CONTEXT OF THE REFERENCE

- 1.6 The present reference has taken place at the same time as a number of significant Victorian criminal justice reform projects and reviews of jury directions elsewhere. The relevant activity is summarised below.

RELATED LAW REFORM COMMISSION REFERENCES

- 1.1 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 jurors should receive additional help to assist them in their task.⁶ In late 2008, the New South Wales Law Reform Commission published its Consultation Paper on Jury Directions. The Queensland Law Reform Commission released its Issues Paper in March 2009.
- 1.2 In England and Wales, a working party has been convened to explore whether certain jury directions could be simplified or abandoned.⁷ It is not clear when the working group will report.
- 1.7 New Zealand has engaged in substantial reform of its criminal justice system over the past ten years. In 1999, the New Zealand Law Commission published a two-volume report on *Juries in Criminal Trials*. The report looked at juror's experiences of the criminal trial process and how jurors went about deciding cases. Empirically based, the report provides a wealth of valuable information. This report prompted a number of changes to the way criminal trials are conducted in New Zealand. These reforms include legislative changes, such as the *Evidence Act 2006* (NZ) which prescribes the content of some jury directions, and changes in practice, such as new ways of directing a jury about the real issues in a case. Where relevant to our work, these changes are discussed in more detail in later chapters.
- 1.8 The Australian Institute of Judicial Administration (AIJA) has long been active in the area of jury directions and continues to support research in the area.

CRIMES ACT REVIEW

- 1.9 The Department of Justice is currently undertaking a major review of the *Crimes Act 1958* (Vic) in response to the Attorney-General's Justice Statement. The purpose of the Crimes Act review is to consolidate and clarify the existing law, rather than to reconsider fundamental principles.⁸ 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 Act 2009* (Vic) was enacted earlier this year and will commence no later than 1 January 2011.

UNIFORM EVIDENCE LEGISLATION

- 1.10 In 2005, the Attorney-General asked the commission to provide advice 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.⁹
- 1.11 Victoria has now adopted the Uniform Evidence Act and the *Evidence Act 2008* (Vic) is due to commence no later than 1 January 2010. The interaction between that Act and our proposals is discussed in Chapters 4 and 5 of this report.

SEXUAL OFFENCES REFORMS

- 1.12 Between 2001 and 2004, the commission reviewed the law concerning sexual offences. The law in this area was changed in response to the commission's recommendations.¹⁰ Some of those reforms involved changes to jury directions about consent and delay in reporting sexual offences. In this report we offer some simpler means of implementing the policy which underpins the current law.

VICTORIAN CRIMINAL CHARGE BOOK

- 1.13 Since late 2005, the Judicial College of Victoria (JCV) has developed an online resource, known as the Criminal Charge Book, which 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 Michael Kelly when he was a County Court judge. The Criminal Charge Book is a valuable work in progress prepared by JCV research staff and overseen by an editorial committee comprised of senior judges.
- 1.14 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

- 1.15 In 2004, the Attorney-General issued a statement – known as the *Justice Statement* – outlining 'new directions for the Victorian Justice System'.¹¹ In October 2008 *Attorney-General's Justice Statement 2* was released. Effectiveness and fairness are two essential justice system values identified in those Statements which are relevant to the current reference.

VICTORIAN CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES

- 1.16 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 Charter¹² and common law¹³ right which has informed our recommendations.
- 1.17 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.¹⁴ While the number of successful appeals against conviction caused by error in jury directions is a matter of concern, the right to appeal against conviction cannot be jeopardedised.

- 1 The full terms of reference are set on page 5.
- 2 Letter from the Hon Rob Hulls MP, Attorney-General, to Professor Neil Rees, Chairperson, Victorian Law Reform Commission, 2 January 2008.
- 3 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.
- 4 The content, or substance, of the law is often referred to as the substantive law.
- 5 Attorney-General's Justice Statement 2 (October 2008), p 15.
- 6 The terms of reference for the NSW reference can be found at *Jury Directions in Criminal Trials*, New South Wales Law Reform Commission <http://www.lawlink.nsw.gov.au/lawlink/lrc/lrc.nsf/pages/LRC_cref116> at 29 August 2008. The Queensland terms of reference are similar.
- 7 Announced by Lord Phillips as part of his speech 'Trusting the Jury' (Speech delivered at the Criminal Bar Association Kalisher Lecture, London, 23 October 2007) <http://www.judiciary.gov.uk/docs/speeches/lcj_trusting_juries_231007.pdf> at 8 October 2008.
- 8 Department of Justice, *New Directions for the Victorian Justice System 2004–2014: Attorney-General's Justice Statement* (2004) 26.
- 9 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.
- 10 Victorian Law Reform Commission, *Sexual Offences: Law and Procedure, Final Report* (July 2004); *Sexual Offences: Implementation Report* (September 2006).
- 11 Department of Justice, *New Directions for the Victorian Justice System 2004–2014: Attorney-General's Justice Statement* (2004).
- 12 *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss24 and 25.
- 13 *Hinch v Attorney-General for the State of Victoria* (1987) 164 CLR 15, 58; *Dietrich v R* (1992) 109 ALR 385, 386.
- 14 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(4).

- 1.18 The commission sought specialist advice from Joanna Davidson, Special Counsel, Human Rights, the Victorian Government Solicitor's Office about the effect of the Charter on our recommendations. We discuss the impact of the Charter in Chapter 4.
- 1.19 The commission sought and was granted a three month extension to the reporting date for this reference to enable it to seek and review this advice.

OUR PROCESS

EXPERT CONSULTANT

- 1.20 The Honourable Geoffrey Eames QC has acted as a consultant to this reference. Mr Eames was a Justice of the Supreme Court of Victoria from 1992-2007. He was a member of the Victorian Court of Appeal from 2002 until his retirement in 2007. Since his retirement, 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 the law and practice of jury directions.¹⁵ He brought to the commission a wealth of experience as a criminal barrister, trial judge and member of an appellate court. The commission acknowledges Mr Eames' significant contribution to its work on this reference.

CONSULTATIONS

Consultative Committee

- 1.21 The commission established a Consultative Committee comprised of experienced judges and criminal lawyers to assist with the reference. The committee met on a number of occasions and was invited to comment on our proposals.

Initial consultation

- 1.22 After receiving this reference the commission consulted members of the criminal bar, judges from the County and Supreme Courts, Victoria Legal Aid, and the Office of Public Prosecutions. At those meetings the commission gathered background information about the matters under review and sought preliminary views about ways of improving the current law and practice.
- 1.23 We also met officers from the Criminal Policy Unit at the Department of Justice and staff from the JCV, which has responsibility for judicial education and for preparing the Criminal Charge Book. We met commissioners and research staff from the NSW Law Reform Commission, which is conducting a similar, but broader, reference.

Consultation Paper

- 1.24 In September 2008 the commission published a Consultation Paper which described relevant aspects of the law of jury directions in some detail and identified a number of reform proposals. Following publication of the Consultation Paper, the commission met with the Criminal Bar Association, the Law Institute of Victoria, Victoria Legal Aid, the Office of Public Prosecutions, Crown Prosecutors, the Chairman of the Victorian Bar and judges from County and Supreme Courts about the proposals in the paper.
- 1.25 To encourage further responses to our reform proposals the commission published an abridged version of the Consultation Paper, *Jury Directions: A Closer Look*, in late 2008. It contained targeted questions about specific issues.
- 1.26 In February 2009, the commission conducted a two day symposium comprising members of law reform commissions in New Zealand, Queensland, New South Wales, Tasmania and Victoria, members of the judiciary, and leading academic researchers working in the area of jury research to discuss common problems and solutions.

A SECOND JURIES REFERENCE

- 1.27 In his letter advising of this reference, the Attorney-General raised the possibility of asking the commission to do further work on jury directions with a focus upon particularly complex and difficult directions.

- 1.28 In this reference the commission has sought to identify problems in the law of jury directions and to provide systemic and long-term responses. There is scope for further work reforming the content of specific directions which have become unnecessarily complex.

THE STRUCTURE OF THIS REPORT

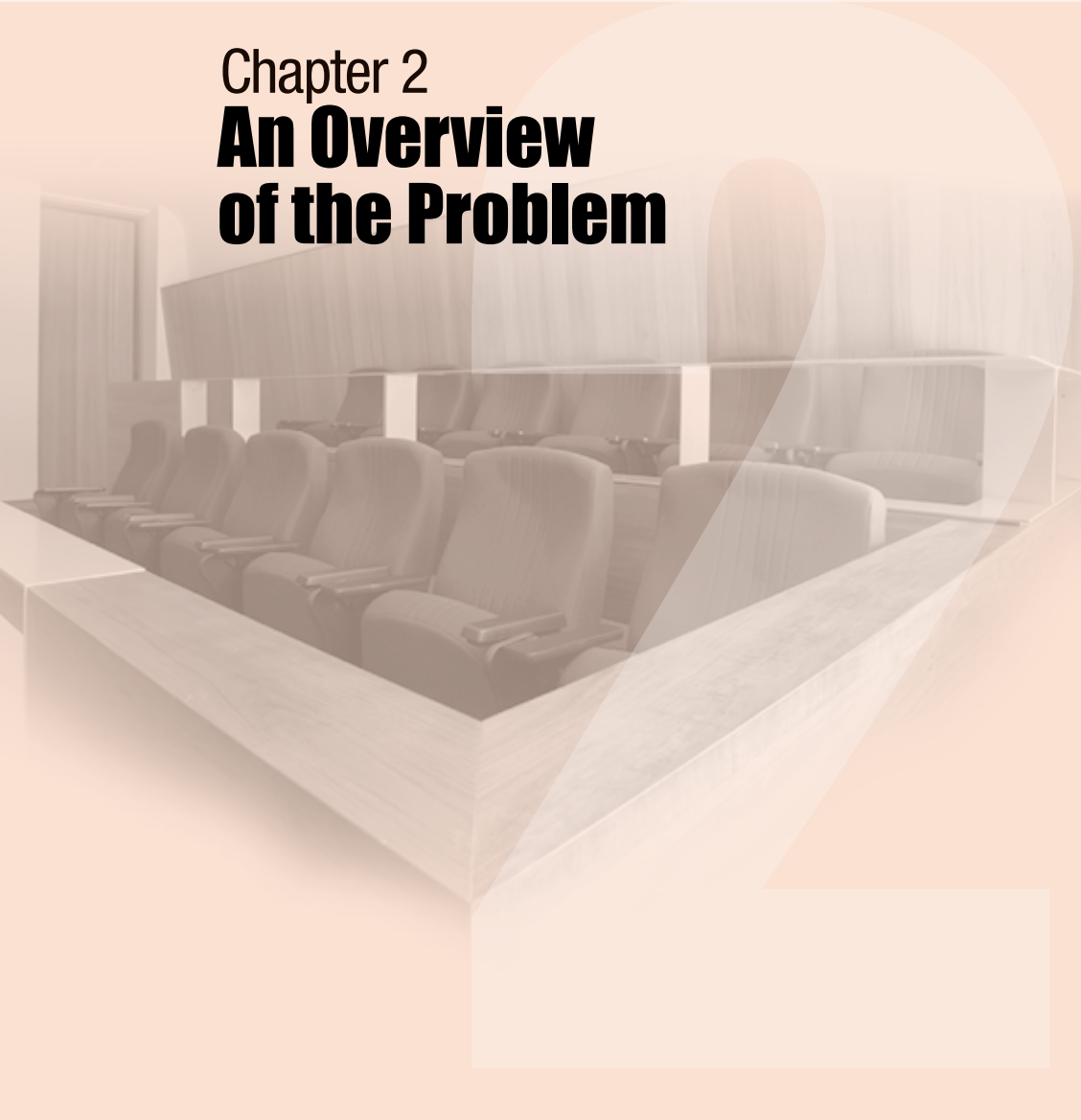
- 1.29 Chapter 2 contains a broad overview of the problems with the current law and practice concerning jury directions in Victoria. The chapter discusses the right to a fair trial, provides a brief history of jury directions and contains an overview of the problems with the current law on jury directions. This chapter aims to provide a context in which to understand some of the specific problems discussed in Chapter 3.
- 1.30 Chapter 3 provides a detailed description of particular problem areas. The chapter first discusses some of the factors that contribute to judicial errors concerning jury directions. We illustrate the difficulties that have arisen in the development and application of laws relating to jury directions in several areas discussed in the Consultation Paper:
- consciousness of guilt
 - identification evidence
 - sexual offences
 - the obligation to sum up a case
 - the obligation to direct on defences and issues not raised by counsel.
- 1.31 Chapter 4 contains an overview of the jury directions legislation proposed by the commission. We discuss the need for a comprehensive legislative response to the problems identified in Chapter 3. We look at the framework of the legislation, its key principles and mechanisms for progressive introduction and ongoing review. We also look at its interaction with existing legislation, in particular, *the Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Evidence Act 2008* (Vic).
- 1.32 Chapter 5 contains a description of how the content of particular directions and warnings should be determined in the legislation, and makes recommendations about the particular problem areas discussed in Chapter 3.
- 1.33 Chapter 6 recommends new ways of directing the jury about the issues in dispute in a trial. The chapter makes recommendations designed to promote early identification of the contested issues in a criminal trial. It describes the role of two new documents that may be given to the jury: the Outline of Charges and the Jury Guide.
- 1.34 Chapter 7 contains a description of the current educational requirements for counsel and judges and recommends steps which may assist with long-term development of skills.

15 See eg, 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); 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.

Chapter 1

Introduction





Chapter 2

An Overview of the Problem

CONTENTS

- Introduction
- Terminology: directions, warnings and comments
- The right to a fair trial
- A brief history of jury directions
- The current law of jury directions
- Problems with current law and practice

Overview of the Problem



INTRODUCTION

2.1 This chapter contains an outline of the law of jury directions in Victoria. It also includes a discussion of the right to a fair trial, which is the source of most of the law concerning jury directions. The chapter concludes with an overview of the current problems with the law of jury directions and its application in practice. Particular problems are considered in more detail in Chapter 3.

TERMINOLOGY: DIRECTIONS, WARNINGS AND COMMENTS

2.2 Jury directions may be placed in three broad categories:

- *Procedural directions* – these are directions about the conduct of the trial and criminal procedure, for example, 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 the offences, alternative offences and defences. Substantive directions are mandatory in all criminal trials.
- *Evidentiary directions* – these are directions about particular pieces of evidence. They typically fall into two sub-categories: warnings ‘about particular care that must be shown before accepting certain kinds of evidence’ and directions about the limited use of evidence, or ‘how they should not reason’.¹ Evidentiary directions are sometimes mandatory and sometimes discretionary.

WARNINGS

2.3 A warning is a direction to the jury telling it that it should be careful before accepting and relying on particular evidence, for example, positive identification evidence.²

‘LIMITED USE’ DIRECTIONS

2.4 A limited use direction tells the jury how it can and cannot use evidence of a particular kind where that evidence is capable of being used in more than one way. For example, evidence that an accused committed similar offences in the past against the same victim might persuade the jury that the accused had a tendency to commit the present offence. Such evidence might also place the relationship between the complainant and the accused person in a context which explains why they acted as they did in circumstances where, without the evidence of their relationship, those acts might be inexplicable. A limited use direction would tell the jury that they could not use the evidence in the first way, but that they could use it in the second way.³

DISTINCTION BETWEEN DIRECTIONS AND COMMENTS

2.5 Any instructions that the judge gives the jury about the law are binding.⁴ These instructions are usually called directions. Comments made by the judge about the facts are not binding because the jury decides questions of fact. Judges may comment on the facts, so long as it is made clear to the jury that it can accept or reject the comment.⁵

THE RIGHT TO A FAIR TRIAL

2.6 The right to a fair trial⁶ ‘permeates the common law’.⁷ The right to a fair hearing is one of the human rights recognised by the *Charter of Human Rights and Responsibilities Act 2006* (Vic).⁸ It is likely that the right to a fair trial is given some ‘constitutional protection’ by Chapter 3 of the *Australian Constitution*.⁹

2.7 The concept of fairness defies precise definition. It is not possible to ‘catalogue in the abstract the occurrences ... which ... may affect the trial to an extent that it can no longer properly be regarded as a fair one’.¹⁰ In some circumstances, a fair trial will require the exclusion of evidence which is potentially prejudicial or unreliable.¹¹ The law of evidence deals with this matter.

2.8 There are many directions which the trial judge must give to the jury in order to fulfil the fundamental task of ensuring a fair trial. These include directions about the burden and standard of proof, the functions of the judge and jury, the elements of the offences, and the

contested issues in the case. The judge must also give the jury a balanced description of the cases put by the parties.¹² In some circumstances, the judge must give the jury directions designed to overcome the potential prejudice or unreliability of particular items of evidence.¹³ The law of jury directions deals with all of these matters.

A BRIEF HISTORY OF JURY DIRECTIONS

THE EMERGENCE OF JURY DIRECTIONS

- 2.9 It is unclear when jury directions first emerged. The earliest jurors were chosen for their direct knowledge of the facts. The court had no evidence other than what was within the jurors' knowledge.¹⁴ Later, in addition to having direct knowledge of the facts, jurors heard evidence of witnesses.¹⁵ Jurors were allowed to play 'a more active role ... sometimes directly questioning witnesses ... and asking for further witnesses to be summoned'.¹⁶ Jurors were often left to 'decide for themselves the rules ... that would guide their decisions'.¹⁷
- 2.10 Towards the end of the 18th century, the adversarial system became entrenched and the freedoms previously enjoyed by juries to determine their own procedures were gradually curtailed.¹⁸ This trend continued throughout the 19th century as lawyers placed greater emphasis on predictable legal principles.¹⁹ Ultimately, around the late 18th and early 19th centuries, judges started giving juries directions.²⁰

THE EARLIEST DIRECTIONS

- 2.11 The corroboration rule may have been the first 'rule of evidence'. In the mid 18th century in England, where the only evidence against an accused was the uncorroborated evidence of an accomplice, there was a common law rule requiring the trial judge to direct the jury to acquit the accused.²¹ 'Corroboration' was generally understood to mean any evidence which supported the evidence of the witness in question and which was independent of that witness.²² The policy behind this rule was that an accomplice was not considered a credible witness because of the possible incentive they may have to give false evidence to exonerate themselves. Towards the late 18th century, this rule was replaced by a common law rule requiring a trial judge to warn the jury about the possibility that the witness may not be credible rather than to direct the jury to acquit.²³ Later, 'corroboration warnings' came to be required in cases involving evidence of other categories of witnesses, such as complainants in sexual offence cases.²⁴ Corroboration warnings are discussed further below.

- 1 *RPS v The Queen* (2000) 199 CLR 620 [41].
- 2 Identification evidence is discussed in detail in Chapter 3.
- 3 See, eg, Stephen Odgers, *Uniform Evidence Law* (8th ed, 2009) 452-3, discussing *Qualtieri v The Queen* (2006) 171 A Crim R 463, [80]-[81] (McLelland CJ), [119] (Howie J).
- 4 See *Joshua v R* [1955] AC 121; *R v Beeby* (1911) 6 Cr App R 138; *R v Frampton* (1917) 12 Cr App R 202.
- 5 *Mule v The Queen* (2005) 221 ALR 85; *R v Mathe* [2003] VSCA 165, [73] (Eames JA); *Arulthilakan v The Queen* (2003) 203 ALR 259, 264-5 (Gleeson CJ, Gummow, Hayne, Callinan and Hayne JJ), 271-2 (Kirby J); *RPS v The Queen* (2000) 199 CLR 620, 637-8 (Gaudron ACJ, Gummow, Kirby and Hayne JJ); *R v Boykovski and Atanasovski* (1991) 58 A Crim R 436; *R v Zorad* (1990) 19 NSWLR 91; *R v Sinclair* (1989) 44 A Crim R 449, 452 (Vincent J).
- 6 See The Hon J J Spigelman AC, 'The Truth Can Cost Too Much: The Principle of a Fair Trial' (2004) 78 *Australian Law Journal* 29, 30-1, where the author observes that the 'right' is more accurately described as the 'principle of a fair trial'.
- 7 *Ibid* 29.
- 8 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 24. See also s 25 regarding rights in criminal proceedings.
- 9 Spigelman, above n 6, 32.
- 10 *Jago v District Court (NSW)* (1989) 168 CLR 23, 57 (Deane J), cited in *Ibid* 33-4.
- 11 Spigelman, above n 6, 38-9.
- 12 *RPS v The Queen* (2000) 199 CLR 620 [41].
- 13 *Ibid* 40-1.
- 14 Sir Patrick Devlin, *The Judge* (1979), 117, cited in Law Reform Committee, Parliament of Victoria, *Jury Service in Victoria – Final Report, Volume 3* (1997) [1.28].
- 15 *Ibid*.
- 16 Sanjeev Anand, 'The Origins, Early History and Evolution of the English Criminal Trial Jury' (2005) 43 *Alberta Law Review* 407, 428.
- 17 Peter Tiersma and Mathew Curtis, 'Testing the Comprehensibility of Jury Instructions: California's Old and New Instructions on Circumstantial Evidence' (2008) 1 *Journal of Court Innovation* 231, 233.
- 18 Anand, above n 16, 428.
- 19 Tiersma and Curtis, above n 17, 234.

- 20 See generally, *ibid*; John Langbein, 'Shaping the Eighteenth Century Criminal Trial: The View from the Ryder Sources' (1983) 50 *University of Chicago Law Review* 1, 96-103; *R v Rosemeyer* [1985] VR 945, 960-6.
- 21 John Langbein, 'Shaping the Eighteenth Century Criminal Trial: The View from the Ryder Sources' (1983) 50 *University of Chicago Law Review* 1, 96-103.
- 22 See, eg, Graham Roberts, *Evidence: Proof and Practice* (1998) 590, discussing *R v Baskerville* [1916] 2 KB 658, 667.
- 23 Langbein, above n 21.
- 24 Andrew Ligertwood, *Australian Evidence* (4th ed, 2004) 197; *R v Rosemeyer* [1985] VR 945, 960-6.



THE AUSTRALIAN EXPERIENCE

- 2.12 In Australia, the law of jury directions was slow to develop. During the first three quarters of the 20th century, the High Court was disinclined to hear criminal appeals.²⁵ From about 1970 onwards, Australian appellate courts started to hear many more criminal appeals than they had previously. This has resulted in a voluminous body of law concerning jury directions.
- 2.13 Justice Michael Kirby has suggested several reasons for this change in approach:
- Changes to High Court personnel²⁶
 - More permanent intermediate appellate courts²⁷
 - Increased legal aid funding²⁸
 - Specialist appellate counsel²⁹
 - Changes to special leave provisions.³⁰

THE CURRENT LAW OF JURY DIRECTIONS

- 2.14 The law of jury directions is found in the common law, statutes and decisions of the courts concerning the meaning of legislative provisions. In some instances, particular directions are governed by both the common law and legislation.³¹ The following section contains a very broad overview of the current law of jury directions.

COMMON LAW

- 2.15 It is a fundamental principle of the common law that a trial judge must give all directions necessary in the circumstances of each particular case to avoid 'a perceptible risk of [a] miscarriage of justice'.³² Chief Justice Spigelman observes that '[t]his is a clear statement of the principle of a fair trial'.³³ He notes that it is not possible to list exhaustively the 'circumstances in which a direction ... may be required in order to ensure a fair trial'.³⁴ Over time, however, the common law has evolved so that some directions are mandatory in all criminal trials while others may be necessary depending on the circumstances of the case. We refer to some directions from both categories below.

Procedural directions

- 2.16 As discussed above, certain procedural directions such as those relating to the burden and standard of proof and the respective functions of judge and jury are mandatory in all criminal trials.³⁵

Substantive directions

- 2.17 Directions about the elements of the offences, alternative offences and defences are also mandatory in all criminal trials.³⁶

The obligation to sum up

- 2.18 The common law requires judges to direct the jury about so much of the law and the evidence that is necessary for them to decide the case. The content of this obligation was explained by the High Court in *Alford v Magee*.³⁷ The obligation to sum up is discussed in detail in Chapter 3.

The obligation to direct on matters not raised by counsel

- 2.19 The trial judge's common law obligation to ensure a fair trial requires the judge to direct the jury about any defences or alternative verdicts open on the evidence, even if those defences or alternative verdicts are not relied upon or have been expressly abandoned by the defence at the trial.³⁸ The extent of this obligation was explained by the High Court in *Pemble v R*.³⁹ The *Pemble* obligation is discussed in detail in Chapter 3.

Corroboration

- 2.20 As mentioned above, common law rules developed which required judges to give juries 'corroboration warnings' about witnesses belonging to particular categories. The 'corroboration

warning' required the judge to warn the jury about the danger of convicting the accused on the uncorroborated evidence of the witness in question and to assist the jury by identifying any evidence capable of constituting corroboration.⁴⁰ A corroboration warning came to be required when there was evidence of accomplices⁴¹, children⁴², victims of sexual assault⁴³ and unrecorded admissions to investigators.⁴⁴ These were considered to be 'cases where the evidence suffers from some intrinsic lack of reliability going beyond the mere credibility of a witness.'⁴⁵ Some of these common law rules have been abolished by statute.⁴⁶

- 2.21 Over time, corroboration warnings became too technical, burdening trial judges and resulting in many successful appeals.⁴⁷ Eventually, trial judges lost any discretion about whether to give a corroboration warning in certain cases.⁴⁸
- 2.22 Characterising entire categories of people as unreliable witnesses involved stereotyping which has been abandoned. In 1988, the High Court expressed the view that that 'those categories ought to be regarded as closed'.⁴⁹ As the High Court said later, '[r]elating unreliability to classes of persons, rather than to the circumstances of cases, involved stereotyping of a kind which is now out of favour'.⁵⁰ At common law, corroboration warnings are now required as a rule of practice in relation to the evidence of accomplices⁵¹ and unrecorded admissions to investigators.⁵² However, once in force, the *Evidence Act 2008* (Vic) will abolish the common law requirements to give corroboration warnings.⁵³

Consciousness of guilt

- 2.23 The common law requires detailed directions about evidence which discloses a consciousness of guilt. Consciousness of guilt directions are discussed in Chapter 3.

Identification evidence

- 2.24 Identification evidence is another area in which the common law requires warnings.⁵⁴ Identification evidence is also discussed in Chapter 3.

Sexual offences

- 2.25 Many common law directions were required in sexual offences cases. For example, where sexual offending was reported many years after the alleged events, the common law required a warning that it would be 'dangerous' to convict on the complainant's evidence alone without close scrutiny of that evidence.⁵⁵ This warning has been abolished by statute in Victoria.⁵⁶
- 2.26 Other common law directions which have developed in cases concerning sexual offences include 'propensity' directions, 'limited use' directions, and directions about recent complaint. These are discussed in detail in Chapter 3.

- 25 Justice Michael Kirby, 'Why has the High Court become more Involved in Criminal Appeals?' (2002) 23 *Australian Bar Review* 4, 7.
- 26 *Ibid.*, 13 and Justice Michael Kirby, 'Editorial: Turbulent Years of Change in Australia's Criminal Laws' (2001) 25 *Criminal Law Journal* 181, 181.
- 27 Kirby, above n 25 10.
- 28 *Ibid.* 14.
- 29 *Ibid.* 16. A practice has developed whereby appellate counsel subject jury directions to a minute syntactical analysis in the hope of finding error: see Geoff Eames, 'Towards a Better Direction – Better Communication with Jurors' (2003) 24 *Australian Bar Review* 35, 35.
- 30 Kirby, n 25, 9-10. Kirby notes that until 1984, the High Court was obliged to hear a large number of civil appeals that could be brought as of right, limiting its capacity to hear criminal appeals. In 1984, legislation was introduced which required special leave to be granted in virtually all cases before the Court could hear an appeal.
- 31 See, eg, 'overlapping statutory and common law directions' in Chapter 3.
- 32 *Longman v The Queen* (1989) 168 CLR 79, 86 (Brennan, Dawson and Toohey JJ). See also *Bromley v R* (1986) 161 CLR 315, 324-5 and *Carr v The Queen* (1988) 165 CLR 314, 330 (Brennan J) and 339 (Deane J).
- 33 Spigelman, above n 6, 41.
- 34 *Ibid.* 43.
- 35 See, eg, *RPS v The Queen* (2000) 199 CLR 620, 637 (see also 638).
- 36 *Ibid.* 637.
- 37 (1951) 85 CLR 437, 466.
- 38 *Pemble v The Queen* (1971) 124 CLR 107, 117-8 (Barwick CJ), 132-3 (Menzies J); *Murray v The Queen* (2002) 211 CLR 193, 201-2 (Gaudron J), 212-3 (Gummow and Hayne JJ), 221-3 (Kirby J), 236 (Callinan J); *Fingleton v The Queen* (2005) 227 CLR 166, 196-9 (McHugh J).
- 39 (1971) 124 CLR 107. More recent High Court cases have been *Gillard v The Queen* (2003) 219 CLR 1, 15 (Gleeson CJ and Callinan J), 27-30 (Kirby J), 39-40 (Hayne J); *Gilbert v The Queen* (2000) 201 CLR 414, 420-3 (Gleeson CJ and Gummow J), 423-4 (McHugh J); *CTM v The Queen* (2008) 247 ALR 1, 23, 28-30 (Kirby J).
- 40 Jeremy Gans and Andrew Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 342.
- 41 *Jenkins v The Queen* (2004) 211 ALR 116, 121-4 (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).
- 42 Spigelman, above n 6, 42.
- 43 *Ibid.*
- 44 *McKinney v The Queen* (1991) 171 CLR 468, 474-6 (Mason CJ, Deane, Gaudron and McHugh JJ). See also the dissenting opinions in the case: 482-5 (Brennan J), 488-92 (Dawson J), 496-8 (Toohey J).
- 45 *Carr v The Queen* (1988) 165 CLR 314, 319 cited in *Jenkins v R* (2004) 211 ALR 116, [25].
- 46 A full corroboration warning is now prohibited in Victoria in respect of evidence of complainants in sexual offence cases and evidence of children: *Crimes Act 1958* (Vic) s 61(1)(a)); *Evidence Act 1958* (Vic) s 23(2A); See also *Evidence Act 2008* (Vic) s 165A(1)(a)).
- 47 See, eg, Gans and Palmer, above n 40, 346.
- 48 See, eg, *R v Tate* [1908] 2 KB 680, 682-3.
- 49 *Jenkins v The Queen* (2004) 211 ALR 116, 121 (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ) discussing *Carr v The Queen* (1988) 165 CLR 314, 319 (Wilson and Dawson JJ).
- 50 *Jenkins v The Queen* (2004) 211 ALR 116, 121 (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).
- 51 *Jenkins v The Queen* (2004) 211 ALR 116, 121-4 (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).
- 52 *McKinney v The Queen* (1991) 171 CLR 468, 474-6 (Mason CJ, Deane, Gaudron and McHugh JJ); Judicial College of Victoria, *Victorian Criminal Charge Book* (2008) [3.4.2.5.1.1 – Corroboration Warnings – Bench Notes] <<http://www.justice.vic.gov.au/emanuals/CrimChargeBook/default.htm>> at 30 March 2009.
- 53 See *Evidence Act 2008* (Vic) s 164(3).
- 54 Spigelman, above n 6, 41-2.
- 55 *Longman v The Queen* (1989) 168 CLR 79.
- 56 *Crimes Act 1958* (Vic) s 61.



LEGISLATION

2.27 Since the 1980s there have been many legislative changes concerning the circumstances in which directions are to be given and their content. We refer to some of these below.

Criminal Procedure Act 2009 (Vic)

2.28 The *Criminal Procedure Act 2009* (Vic) confers wide powers on trial judges to give directions to juries.⁵⁷

2.29 Section 222 provides:

At any time during a trial, the trial judge may address the jury on—

(a) the issues that are expected to arise or have arisen in the trial;

(b) the relevance to the conduct of the trial of any admissions made, directions given or matters determined prior to the commencement of the trial;

(c) any other matter relevant to the jury in the performance of its functions and its understanding of the trial process, including giving a direction to the jury as to any issue of law, evidence or procedure.

2.30 Further, section 238 provides:

At the conclusion of the closing address of the prosecution, the closing address of the accused and any supplementary prosecution address, the trial judge must give directions to the jury so as to enable the jury to properly consider its verdict

Sexual offences

2.31 The law of sexual offences has been extensively reformed by statute. Judges are not permitted to give the jury a corroboration warning about evidence given by a person who is the alleged victim of a sexual assault. Legislation, which is discussed in more detail in Chapter 3, also regulates what a trial judge may say to a jury about the effect of delay in reporting an allegation of sexual assault.

Uniform evidence legislation

2.32 Once in force, the *Evidence Act 2008* (Vic) will require judges to give warnings about 'evidence of a kind that may be unreliable'. Section 165 characterises hearsay, admissions, identification evidence, evidence that may be affected by age, ill health or injury, and evidence of accomplices or prison informers as 'evidence of a kind that may be unreliable'. It also leaves open the possibility of new categories of unreliable evidence, or unreliability arising on the facts of particular cases.⁵⁸ The Act requires the trial judge to give the jury a warning, when requested by a party, that evidence of this nature 'may be unreliable and identifying the matters that may cause it to be unreliable', as well as a warning of 'the need for caution in determining whether to accept the evidence or give it weight'.⁵⁹ The judge need not give the warning if there are 'good reasons for not doing so'.⁶⁰

2.33 Section 165A of the Act prohibits any warning that children are unreliable as a class, but permits a warning if there are 'circumstances "particular to" a specific child witness which affect his or her reliability'.⁶¹ Section 165B of the Act further modifies what may be said to the jury about the effect of delay in prosecution.

2.34 These provisions are discussed in detail in Chapters 3 and 4.

PROBLEMS WITH THE CURRENT LAW AND PRACTICE

COMPLEXITY, VOLUME AND UNCERTAINTY

2.35 The law on jury directions has become complex, voluminous and uncertain within a relatively short period. The average duration of jury charges by Victorian judges thirty years ago was much shorter than today. The directions themselves were also generally far less complex.⁶² In a survey of Supreme Court and County Court judges, most judges felt that directions had become 'increasingly more complex, creating an 'over-intellectualisation' of criminal law'.⁶³ Many of the judges saw the complexity of the law as a 'major impediment to effective communication' with the jury.⁶⁴

2.36 It has become a difficult task for trial judges to remain aware of developments in the common law, changes to legislation, and the interaction between these two bodies of law. The sheer number of appellate court decisions creates a problem which is magnified by the fact that judges often deliver lengthy, separate judgments.

2.37 The High Court has the power to provide guidance about the language to use when giving particular common law directions.⁶⁵ Trial judges tend to follow that advice whenever it is given. There have been many instances, however, where the High Court has not given practical assistance about the content of particular directions. Two recent examples illustrate this point.

2.38 Trial judges have often had trouble directing juries about evidence of uncharged acts⁶⁶ committed by an accused against a complainant or other persons. The law relating to directions about uncharged acts and propensity reasoning has become particularly complex and voluminous.⁶⁷ The High Court decided a case concerning these issues in 2008. Instead of providing clear guidance to trial judges, the justices of the High Court delivered seven separate judgments, extending over 170 pages, which appear to have complicated rather than clarified the law.⁶⁸

2.39 The law of criminal complicity and, in particular the principle of extended common purpose, is unduly complex.⁶⁹ In a dissenting judgment in Clayton⁷⁰ Kirby J criticised the state of this body of law:

*This part of the common law is in a mess. It is difficult to understand. It is very hard to explain to juries. It involves a portion of the law made by judges. What the judges have expressed with imperfect results, they can re-express with greater justice and rationality in the light of experience and the submissions in this case. Ultimately, in expressing and applying the common law in Australia, that is the responsibility of this Court. It is a responsibility that we should be ready to shoulder in these proceedings.*⁷¹

2.40 Kirby J also observed that '[t]he unreasonable expectation placed upon Australian trial judges ([and] affirmed by appellate courts) to explain the idiosyncrasies of differential notions of secondary liability to a jury is something that should concern this Court'.⁷² The majority of the Court, however, concluded that the common law of criminal complicity was not overly complex and declined to follow Kirby J's suggestion to re-write the law. The NSW Law Reform Commission has also acknowledged 'the difficulties presented to trial judges in giving jury directions in the area of complicity'.⁷³

57 This Act has not yet commenced operation. Similar provisions are found in the *Crimes (Criminal Trials) Act 1999* (Vic) which will be repealed once the *Criminal Procedure Act 2009* (Vic) commences operation.

58 Spigelman CJ notes that in certain jurisdictions, the *Evidence Act* has been amended with respect to the classes of evidence that should be viewed as unreliable, and when warnings should be given because of specific features of a case: Spigelman, above n 6, 43.

59 *Evidence Act 2008* (Vic) s 165(2).

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

61 Spigelman, above n 6, 43.

62 See, eg, *R v Lowery and King* (No 2) [1972] VR 560; *R v Charlton* [1972] VR 758, 762-763.

63 Elizabeth Najdovski-Terziovski, Jonathan Clough and James R P Ogloff, 'In Your Own Words: A Survey of Judicial Attitudes to Jury Communication' (2008) 18 *Journal of Judicial Administration* 65, 80.

64 *Ibid.*

65 For example, on the *Black* direction to deadlocked juries or with *Zoneff* directions concerning lies which affect credibility

66 Uncharged acts are discussed in Chapter 3.

67 Directions on propensity evidence are discussed in detail in Chapter 3.

68 *HML v The Queen* (2008) 235 CLR 334; See, eg, in *R v Sadler* [2008] VSCA 198, [60], which concerned the issue of whether uncharged acts must always be proved beyond reasonable doubt. Nettle, Redlich and Dodds-Streeton JJA observed that 'the majority of judges in *HML* did not express any clear view' on this issue.

69 NSW Law Reform Commission, *Complicity*, Consultation Paper No 2 (2008) 3-4, 10, 20-32.

70 *Clayton v The Queen* (2006) 81 ALJR 439.

71 *Ibid* 447.

72 *Ibid* 460.

73 New South Wales Law Reform Commission, *Complicity*, Consultation Paper 2 (2008) [5.40] <http://www.lawlink.nsw.gov.au/lawlink/lrc/lrc.nsf/pages/LRC_cp02chp5> at 22 April 2009.



- 2.41 One of the strengths of the common law is that it develops incrementally by virtue of experience gained from the diversity of individual cases.⁷⁴ However, what Spigelman CJ has described as ‘the traditional common law method of induction’⁷⁵ has its disadvantages. In the first place, there may be uncertainty about the scope of a common law principle articulated by the courts. Secondly, the uncertainty will remain until the High Court has dealt with the matter, and may continue thereafter.⁷⁶ This means that it is not always clear to a trial judge whether a common law principle concerning a jury direction applies in a particular case. In order to deal with this problem and to reduce the risk of a successful appeal, some trial judges adopt a cautious approach by giving the jury a warning that may not be justified in the circumstances of the case. Unnecessary directions of this nature complicate the task of juries.

The Criminal Charge Book

- 2.42 The rapid common law and statutory developments in the field of jury directions led to the development of a Criminal Charge Book by the Judicial College of Victoria (JCV).⁷⁷ The JCV Charge Book is a superb resource which reflects the complexity, volume and uncertainty of the law of jury directions. The Charge Book committee⁷⁸ rightly places emphasis on legal accuracy of the model directions which is sometimes achieved at the cost of simplicity, brevity and comprehensibility of those directions.⁷⁹ Anecdotal evidence suggests that some trial judges, anxious not to create legal error, tend to deliver every Charge Book direction that might be relevant in a case, rather than streamline the number of directions given to the jury. For similar reasons, judges are reluctant to stray from the language used in the Charge Book’s model directions.

Appellate scrutiny

- 2.43 Appellate court scrutiny of the directions given to a jury by trial judges is intense. The complexity of the law, coupled with the growth of a specialist appellate bar, has encouraged intensive searches for error by very close examination of the transcript of a trial judge’s charge to the jury. As the data in Appendix B reveals, those searches have often been successful.
- 2.44 Many of the judges recently surveyed by Monash University researchers⁸⁰ were wary of simplifying their directions and using language other than that used in the Charge Book.⁸¹ Many of the judges said that they framed their directions with a view to avoiding appellate criticism rather than with the objective of providing the jurors with short, clear, comprehensible and relevant instructions.⁸² Few judges felt confident that they managed to ‘avoid legalese’.⁸³
- 2.45 In more than half of the successful appeals from the Supreme and County Courts between 2004 and 2006, the appeal ground upheld concerned an issue not raised at trial by the defence counsel.⁸⁴ This unusual state of affairs may be explained by the complexity, volume and uncertainty of the law of jury directions.

THE ROLE OF COUNSEL

- 2.46 During consultations, some trial judges told us that they received inadequate assistance from counsel. They complained that trials frequently commenced with counsel who had little familiarity with the facts in issue or appreciation of the issues concerning admissibility of evidence. They felt that despite legislative requirements about proper pre-trial identification of contested issues⁸⁵ it was common for issues to emerge during a trial which ought to have been anticipated by counsel at the outset. Some judges expressed concern that they received insufficient assistance from counsel about legal issues that arose during a trial.
- 2.47 Some judges complained that they often received insufficient assistance from counsel about the directions they should give the jury. Consequently, the judge had little opportunity for careful consideration of the directions to give, particularly in short trials of a few days duration. Further, the final addresses of some defence counsel were so deficient and brief that they imposed unreasonable burdens on the trial judge to identify the real issues in the case, to present the defence case to the jury, and to relate the relevant evidence to the issues in the defence case.

THE ROLE OF TRIAL JUDGES

2.48 While both prosecutors and defence counsel with whom we consulted accepted that some errors by counsel contributed to successful appeals, they also criticised the skill levels of some trial judges. Some barristers said that the lack of experience or expertise of some trial judges contributed to the number of errors in directions to juries.

SYSTEMIC PRESSURES

2.49 Some defence counsel told us of the pressures faced by barristers who appear regularly for legally aided clients. The modest fees paid for pre-trial preparation, uncertainty about whether a case would go to trial on the day it was listed, and late briefing practices, all make pre-trial preparation difficult. The commission was also informed about reluctance to accept both prosecution and defence briefs in sexual offence trials. Many reasons were advanced including the complexity of the law, the modest fees paid for very difficult work and the forensic difficulties often presented by these cases.

2.50 The Criminal Bar Association suggested that⁸⁶ the low rates of legal aid fees had caused the 'juniorisation' of the Bar, with an increasing number of inexperienced counsel appearing for the defence in criminal trials.

2.51 Lack of preparation for trial appears to be a particularly acute problem in the County Court. The sheer volume of criminal trials conducted in that Court creates its own pressures on judges and counsel. Sexual offence trials receive priority because they are required by statute to be given accelerated hearing dates.⁸⁷ Pre-trial management of sexual offence trials is careful and comprehensive. A trial judge is assigned well in advance of the trial date to manage pre-trial issues. Despite these steps, trials do commence with both counsel and judges who have had little time for preparation. This occurs because of listing practices designed to make maximum use of judge time. Inevitably, some people plead guilty shortly before their trial is due to commence. In order to respond to this eventuality, the Court lists a large number of 'reserve cases' each Monday. If a listed trial does not proceed because the accused pleads guilty, the reserve list ensures that a trial may proceed to hearing before every available judge. Sometimes counsel are briefed to appear at the last minute in trials of this nature.

2.52 This listing system means that despite pre-trial directions hearings, some trials are conducted by counsel and judges who are unfamiliar with the case because they have had no previous dealings with the matter.

74 Spigelman, above n 6, 29-30.

75 Ibid 29.

76 For example, the uncertainty of the decision in *Viro v The Queen* (1978) 141 CLR 88 on self-defence remained until the High Court revisited the question in *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645. More recently, the decision in *HML v The Queen* (2008) 235 CLR 334 left many questions unanswered as to the principles governing the evidence of uncharged acts.

77 The Judicial College of Victoria's Victorian Criminal Charge Book has taken the place of County Court Judge Michael Kelly's Criminal Charge Book. The JCV Charge Book has completely rewritten all charges, and has presented new explanatory material in the form of bench notes, extracts of legislation, lists of authorities, and checklists for juries (see Judicial College of Victoria, Victorian Criminal Charge Book (2008) <<http://www.judicialcollege.vic.edu.au/CA256DC1001D124B/page/Publications-Victorian+Criminal+Charge+Book?OpenDocument&1=38-Publications-&2=20-Victorian+Criminal+Charge+Book-&3=->> at 9 April 2009). The most recent version of *Victorian Criminal Charge Book* (2008) is free to the public, and can be accessed at <<http://www.justice.vic.gov.au/emanuals/CrimChargeBook/default.htm>> at 30 March 2009.

78 The Committee comprises experienced judges from the Supreme and County Courts, including two Court of Appeal judges.

79 Geoff Eames, 'Tackling the Complexity of Criminal Trial Directions: What Role for Appellate Courts?' (2007) 29 *Australian Bar Review* 161, 166.

80 See Najdovski-Terziovski, Clough and Ogloff, above n 63, 65.

81 Ibid 81-2.

82 Ibid 80.

83 Ibid.

84 Eames, above n 79, 162. Anecdotal evidence from appellate judges suggests that it is highly likely that similar results would have been produced had appeals in earlier years also been examined for this purpose.

85 See, eg, *Crimes (Criminal Trials) Act 1999* (Vic) ss 5-7.

86 Submission 8 (Criminal Bar Association of Victoria).

87 See *Evidence Act 1958* (Vic) s 41G(4), *Crimes (Criminal Trials) Act 1999* (Vic) ss 4(2)(aa), (a), and County Court Practice Note, *Sex Offences List: No PNCR 2-2008* (18 July 2008) County Court of Victoria <[http://www.countycourt.vic.gov.au/CA2570A600220F82/Lookup/Practice_Notes/\\$file/PNCR_2-2008_Sex_Offences_List.pdf](http://www.countycourt.vic.gov.au/CA2570A600220F82/Lookup/Practice_Notes/$file/PNCR_2-2008_Sex_Offences_List.pdf)> at 9 April 2009.



STAKEHOLDER VIEWS

- 2.53 Many submissions received by the commission expressed views about the current law and practice regarding jury directions. Some said that jury directions are too complex and long⁸⁸ or that some directions could be simplified.⁸⁹
- 2.54 Some supported the proposal that all directions and warnings should be set out in legislation.⁹⁰ Others did not support or opposed this proposal.⁹¹
- 2.55 One submission acknowledged that the courts have not been particularly successful in creating comprehensible directions but ultimately expressed the view that the courts should be left to develop the law on directions.⁹²
- 2.56 Another submission observed that there are many trials which are either not the subject of appeal, or which are unsuccessfully appealed, and that these are evidence of the criminal justice system working well.⁹³
- 2.57 One submission said that codification of directions in sexual offence cases is unnecessary because the JCV Charge Book is sufficient.⁹⁴ Others observed that the views expressed by trial judges about the complexity of the model directions in the charge book suggest that the charge book is not providing trial judges with as much assistance as they would like.⁹⁵
- 2.58 Many said that enhanced pre-trial issue identification⁹⁶ and better training for judges and or counsel⁹⁷ would improve jury directions. The view was also expressed that increased funding for Victoria Legal Aid would enhance jury directions.⁹⁸
- 2.59 We refer to submissions made about particular areas of the law and practice in relevant sections of the following chapters.

DATA

- 2.60 Data concerning convictions obtained at trials, appeals and retrials in Victoria are set out in Appendix B. Among other things, the data shows that between the financial years 2000/2001 and 2006/2007:
- 13 per cent of convictions at trial were overturned on appeal
 - Approximately 32 per cent of people convicted at trial appealed against conviction
 - 41 per cent of appeals against conviction were successful
 - Error in directions was a ground of appeal in approximately 52 per cent of successful appeals against conviction
 - the Court of Appeal ordered 137 retrials. 62 per cent of these retrials resulted in convictions, 8 per cent resulted in acquittals and 23 per cent resulted in a *nolle prosequi*⁹⁹ being entered.¹⁰⁰
- 2.61 As we have discussed, some observers attribute the incidence of successful appeals arising from errors in jury directions to a lack of criminal law experience of some trial judges. However, an examination of cases over several years does not support the contention that most successful appeals arise from trials conducted by inexperienced judges. On the contrary, many successful appeals flowed from mistakes in directions made by judges with significant criminal law experience. It appears that a primary cause of error lies in the complexity and uncertainty of the law concerning jury directions.

88 Submission 18 (County Court of Victoria).

89 Submissions 3 (Stephen Odgers SC); 4 (Patrick Tehan); and 16 (Judge M D Murphy).

90 Submissions 6 (Maria Abertos); and 18 (County Court of Victoria).

91 Submissions 3 (Stephen Odgers SC); 5 (Benjamin Linder); 8 (Criminal Bar Association of Victoria); 14 Law Council of Australia; 15 (Queensland Law Society).

92 Submission 3 (Stephen Odgers SC).

93 Submission 5 (Benjamin Lindner).

94 *Ibid.*

95 Submission 18 (County Court of Victoria).

96 Submissions 5 (Benjamin Lindner); 6 (Maria Abertos); 8 (Criminal Bar Association of Victoria); 11 (Mark Pedley and Daniel Gurvich); 16 (Judge M D Murphy); and 18 (County Court of Victoria).

97 Submissions 6 (Maria Abertos) and 7 (Victoria Legal Aid).

98 Submissions 5 (Benjamin Lindner); 8 (Criminal Bar Association of Victoria); and 14 Law Council of Australia

99 A *nolle prosequi* is the name given to a decision by the Director of Public Prosecutions not to proceed with a charge laid against a person.

100 The remaining 7% of retrials ordered by the Court of Appeal are pending.



Chapter 3

Problems with the Law of Jury Directions

CONTENTS

- Introduction
- Substantive directions
- The *Pemble* obligation
- Evidentiary directions
- Overlapping statutory and
common law directions

Problems with the Law of Jury Directions

INTRODUCTION

- 3.1 This chapter contains a description of some aspects of the law of jury directions which cause problems in practice and a discussion of the reasons for these problems. While there is no single cause of the difficulty trial judges have in identifying and giving appropriate directions in particular cases, the problem is of relatively recent origin. In this Chapter we consider some problem areas in detail. It is not intended, however, to be a definitive analysis of all significant contemporary issues in the law of jury directions.
- 3.2 In this Chapter we:
- provide an overview of recent developments in the common law of jury directions.
 - consider the trial judge's obligation to sum up the case to assist the jury to consider its verdict.
 - consider the trial judge's obligation to direct the jury about defences and verdicts that have not been raised by counsel for the defence but are reasonably open on the evidence.
 - examine two of the evidentiary directions that must be given by the trial judge when required by the circumstances of the case: consciousness of guilt evidence and identification evidence.
 - discuss the difficulties caused by overlap between the common law and statutory rules concerning jury directions. This problem has been particularly marked in the area of sexual offences.
- 3.3 While there are other problems with the law and practice of jury directions, we have chosen these areas because they illustrate different aspects of the challenge which confronts trial judges when seeking to frame jury directions which are comprehensible and helpful to the jury, yet legally accurate.

THE DEVELOPMENT OF COMMON LAW PRINCIPLE

- 3.4 As we indicated in Chapter 2, the source of much of the law of jury directions is the common law right to a fair trial. Although jury directions appear to have existed for at least two centuries, the majority of common law rules concerning evidentiary warnings are relatively new. A modern body of common law rules concerning evidentiary warnings has emerged over the past twenty-three years following the decision of the High Court in *Bromley v The Queen*¹ in 1986.² Many of the difficulties judges have in applying this body of law result from its lack of clarity, due, in part, to its recent creation.
- 3.5 It frequently takes a long time for clear common law rules to emerge because of the way in which this body of law develops. Chief Justice Spigelman of the NSW Supreme Court has explained the process:

We [common lawyers] proceed by deciding the facts of particular cases. This process may take a very long time before a principle emerges by a process of induction. The common law method has never been more perceptibly [sic] described than it was on a number of occasions by Oliver Wendell Holmes. In one essay he wrote:

"It is the merit of the common law that it decides the case first and determines the principle afterwards ... It is only after a series of determinations on the same subject matter, that it becomes necessary to 'reconcile the cases', as it is called, that is, by a true induction to state the principle which has until then been obscurely felt. And this statement is often modified more than once by new decisions before the abstracted general rule takes its final shape. A well settled legal doctrine embodies the work of many minds, and has been tested in form as well as substance by trained critics whose practical interest is to resist it at every step."

What is involved in this process is the development of legal principles on the basis of actual practical decision-making and dispute resolution over long periods of time in the course of dealing with real problems that arise in real factual situations.³

- 3.6 The post-Bromley Australian common law of evidentiary directions has had very little time to develop. Prior to Bromley, the trial judge was required to warn the jury about the evidence of only three categories of witness: accomplices, children giving evidence on oath and the alleged victims of sexual assaults.⁴ In addition, particular categories of evidence, such as visual identification,⁵ also attracted a warning, although the full effect and scope of a mandatory warning concerning identification evidence was not devised by the High Court until 1992.⁶
- 3.7 The observations by two High Court justices in *Bromley* about jury warnings generated a significant body of subsequent case law. In *Bromley*, the Crown led evidence from a witness who had a history of mental illness. On appeal, defence counsel argued that a corroboration warning should have been given in respect of the witness' evidence. Gibbs CJ held that where the evidence of a witness was potentially unreliable, but did not fall within one of the established categories requiring a corroboration warning, the jury should be made aware of the dangers of convicting on such evidence unless it was corroborated.⁷ The Chief Justice observed that '[t]here is nothing formal or technical about this rule'⁸ and he added that there was no particular language that must be used by the trial judge in giving the warning; the words used would depend on the circumstances of the case.
- 3.8 Brennan J held that the rule of law which required that a direction be given whenever a witness fell within one of the three recognised categories was predicated on the 'sharpened awareness'⁹ that the courts held, in contrast to jurors, about the dangers of acting on uncorroborated evidence of particular witnesses. Adopting the words of Mason J in *Kelleher*,¹⁰ Brennan J held that the reason for a common law rule requiring a warning in these circumstances:
- is to ensure that the jury is alive to the danger of convicting on the uncorroborated evidence of a class of witnesses whose testimony may, for reasons already indicated, be untruthful.*¹¹
- 3.9 According to Brennan J, the obligation to give a warning arose:
- when the danger in acting upon the evidence is real and substantial and when the conduct of the trial and evidence as to the witness's mental disorder are such that the jury may not have fully perceived or the jury's attention may have been diverted from the danger, a warning should be given.*¹²
- 3.10 Brennan J formulated the general principle which governed the need for a warning in very general terms:
- When a warning is needed to avoid a miscarriage of justice it must be given; when none is needed to avoid a miscarriage, none need be given. The possibility of a miscarriage of justice is both the occasion for the giving of a warning and the determinant of its content.*¹³
- 3.11 Since *Bromley*, the range of circumstances in which the jury must be given a warning about particular items of evidence has expanded greatly. That expansion has been accompanied by the degree of precision in the requirements concerning the content of a warning which appellate courts have imposed upon trial judges. The only overarching principle used by the High Court to link the various circumstances in which a warning is required has been the statement by Brennan J in *Bromley* about the 'possibility of a miscarriage of justice'.¹⁴
- 3.12 The size of the body of law that has emerged since *Bromley* is significant. The joint law reform commissions stated in their Uniform Evidence Law Report :
- The result has been to reinstate a near mandatory warning regime in relation to a number of categories of evidence, including: evidence of delayed complaint in sexual assault cases, unrecorded admissions to investigators, prosecution evidence given by prison informers, and identification evidence.*¹⁵

- 1 (1986) 161 CLR 315.
- 2 See the discussion in Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Act*, ALRC Report 102, NSWLRC Report 112, VLRC Final Report (2005) [18.26] – [18.27]. See also Jeremy Gans and Andrew Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 349 – 353.
- 3 Chief Justice James Spigelman, 'Our Common Law Heritage' (Speech delivered at the Joint Study Institute of Law Librarians, Sydney, 21 February 2004) <http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman_210204> at 27 April 2009.
- 4 Gans and Palmer, above n 2, 345.
- 5 *Kelleher v The Queen* (1974) 131 CLR 534, 550-551.
- 6 *Domican v The Queen* (1992) 173 CLR 555.
- 7 (1986) 161 CLR 315, 319.
- 8 *Ibid.*
- 9 *Ibid.* 324.
- 10 (1974) 131 CLR 534, 560.
- 11 (1986) 161 CLR 315, 323.
- 12 *Ibid.* 325.
- 13 *Ibid.*
- 14 (1989) 168 CLR 79, 87.
- 15 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Act*, above n 2, [18.27].

Problems with the Law of Jury Directions

- 3.13 Despite the passage of time since the High Court's decision in *Bromley*, the common law still lacks a coherent approach to jury directions about evidence. The directions required by the common law appear to have been formulated in isolated areas of concern, rather than as the result of the application of any guiding principles about the use of evidence. Further, the scope of the obligation to give particular directions is often uncertain and subject to qualification by numerous intermediate appellate court decisions which have sought to explain or develop the common law rules formulated by the High Court.
- 3.14 An illustration is provided by *Edwards v The Queen*¹⁶ which requires a warning to be given in respect of consciousness of guilt evidence (also known as post-offence conduct), which is a species of circumstantial evidence.¹⁷ No warning is required in respect of circumstantial evidence generally, however,¹⁸ even though such evidence may be just as incriminating and just as ambiguous.¹⁹ Moreover, *Edwards* requires the trial judge to expressly identify every piece of post-offence conduct so that the jury knows which evidence it may use to infer guilt.²⁰ Again, the express identification of particular items of evidence as belonging to a category of evidence is not required in relation to circumstantial evidence generally and was expressly rejected in the development of corroboration warnings,²¹ even though the requirement for corroboration was an essential component of warnings concerning the various categories of unreliable evidence.
- 3.15 In some instances, such as the area of identification evidence, the common law principles are relatively clear and well understood. The difficulty judges have with the identification direction usually arises in relating the warning to the facts of the case, rather than in identifying the relevant principles.
- 3.16 In the later sections of this Chapter, we illustrate the difficulties that have arisen in the development and application of laws concerning particular evidentiary warnings. In summary they are:
- In the case of consciousness of guilt directions, the principal problem relates to the ambiguous character of the evidence, combined with the inflexibility of the obligations imposed by the appellate courts.
 - In the case of identification evidence the application of the law to the facts of each case sometimes creates difficulties.
 - In the case of propensity directions, the difficulty lies in the terms of the warning, which is counterintuitive, and imposes intellectual burdens on the jury that are unreasonable. It is also an area where there is lack of clarity because of overlapping statutory and common law rules.

SUBSTANTIVE DIRECTIONS

THE OBLIGATION TO SUM UP

- 3.17 Trial judges are obliged by the common law to direct the jury about so much of the law and the evidence as is necessary for them to decide the case. The modern source of this common law obligation is the decision of the High Court in *Alford v Magee*²². The 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. If the case were a criminal case, and the charge were of larceny, and the only real issue were as to the asportavit, probably no judge would dream of instructing the jury on the general law of larceny. He would simply tell them that if the accused did a particular act, he was guilty of larceny, and that, if he did not do that particular act, he was not guilty of larceny²³.

- 3.18 The Victorian Court of Appeal referred to the trial judge's *Alford v Magee* obligation to direct the jury about the real issues in a case in at least nine decisions during 2007 and 2008.²⁴ Although the principle described in *Alford v Magee* is often said to include an obligation to summarise the evidence,²⁵ the High Court did not expressly deal with that matter in the case. While the duty to summarise the evidence appears to be much older, it has become incorporated within restatements of the *Alford v Magee* obligation.²⁶
- 3.19 The trial judge's obligation to sum up to the jury is now imposed by statute as well as by the common law. Section 238 of the *Criminal Procedure Act 2009* (Vic) provides that 'the trial judge must give directions to the jury so as to enable the jury to properly consider its verdict'. As the Act does not provide any guidance about the substance of that obligation, it is likely trial judges will continue to rely on *Alford v Magee* and subsequent cases in order to determine what directions they must give the jury in order to enable the jury to properly consider its verdict.

Contemporary Practice

3.20 Although the principle stated in *Alford v Magee* appears clear, difficulties sometimes arise in its application. In some instances convictions have been set aside and a new trial ordered because the Court of Appeal has found that the trial judge did not fulfil the obligation to direct the jury about so much of the law and the evidence as is necessary for them to decide the case.²⁷ The major difficulties appear to be:

- the means by which the trial judge informs the jury about the real issues in a case
- the means by which the trial judge informs the jury about as much of the law as they need to know in order to resolve the case
- the extent of the trial judge's obligation to provide the jury with a summary of the evidence.

3.21 The High Court provided no guidance in *Alford v Magee* about how a trial judge decides the real issues in the case and the extent to which the evidence must be summarised. Later cases have offered limited assistance. In *Gately v The Queen*²⁸, Kirby J said of 'the real issues' in the case:

*Such issues are defined by the charges laid by the prosecution, any defences that are relied on, the requirements of the law concerning such charges and defences and any evidence that may be relevant to the determination of those issues.*²⁹

3.22 In *R v Zilm*³⁰, Eames JA commented on the extent to which the evidence must be summarised:

*It must be said at once that there is no absolute rule, because what may be required by way of directions in order to ensure a fair trial may vary according to the circumstances of the case, with factors such as the length of the case, the complexity of the issues and the manner in which the case is conducted by the parties, among others, all being relevant to that question.*³¹

3.23 The absence of clear rules has bred a diversity of practice between judges about how they discharge this obligation. There are two broad approaches to charging, or summing-up to the jury, although individual judges will usually fall between the two 'poles'. Some judges prefer to direct the jury first about all of the law that is potentially relevant to the case (making very limited reference to the competing contentions of the parties) and then to go over the evidence in its entirety. Other judges identify only the elements in dispute and only summarise so much of the evidence as bears on those elements. Recently, some judges have provided the jury with written materials to assist in their summing up. It is also common for trial judges to provide the jury with an edited copy³² of the trial transcript, sometimes accompanied by a rudimentary index.

3.24 There is some current uncertainty about two overlapping matters associated with the judge's obligation to sum up to the jury. They are, first, the extent of the trial's judge obligation to go over the evidence and, secondly, the extent to which the trial judge may direct the jury in writing. There appears to be some tension between recent appellate court statements about the relevant common law requirements and the legislative policy found in the *Crimes (Criminal Trials) Act 1999* (Vic) which is reinforced in the *Criminal Procedure Act 2009* (Vic).

16 (1993) 178 CLR 193.

17 *R v Ciantar* (2006) 16 VR 26, 40 (Warren CJ, Chernov, Nettle, Neave and Redlich JJA); *R v Cavkic [No. 2]* [2009] VSCA 43 [70] (Vincent, Nettle JJA, Vickery AJA).

18 *Chamberlain v The Queen (No. 2)* (1983) 153 CLR 521 and *Shepherd v The Queen* (1990) 170 CLR 573 require a jury to be directed about what circumstantial evidence is, how it is used and what the relevant standard of proof is. Critically, however, they do not require the jury to be in any way 'warned' about the use of such evidence.

19 *R v Franklin* (2001) 3 VR 9, 50-1 (Ormiston JA).

20 (1993) 178 CLR 193, 210-1 (Deane, Dawson and Gaudron JJ).

21 *R v Rayner* [1998] 4 VR 818, 840 (Winneke P).

22 (1952) 85 CLR 437.

23 *Ibid* 465.

24 *R v Barrett* (2007) 16 VR 240; *R v Wei Tang* (2007) 16 VR 454; *R v Alexander* (2007) 174 A Crim R 297; *R v DD* (2007) 181 A Crim R 1; *R v Thompson* [2008] VSCA 144; *R v Bertrand* [2008] VSCA 182; *R v GJ* [2008] VSCA 271; *R v TC* [2008] VSCA 282.

25 *R v AJS* (2005) 12 VR 563, 577.

26 The duty to 'recapitulate ... the material points of that which hath been said' was stated to be one of 'the parts of a judge' by Sir Francis Bacon, who was Lord Chancellor of England in the late 16th and early 17th centuries. See Francis Bacon, 'Of Judicature' in Basil Montagu (ed.) *The Works of Francis Bacon, Lord Chancellor of England* (1825) vol 1, 179, 181.

27 *R v AJS* (2005) 12 VR 563, 577.

28 (2007) 232 CLR 208.

29 *Ibid* 219.

30 (2006) 14 VR 11.

31 *Ibid* 23.

32 By 'edited', we mean edited to remove any inadmissible evidence. See *R v Tichowitsch* [2006] QCA 569, [11].

Problems with the Law of Jury Directions

The obligation to go over the evidence

- 3.25 In order to ensure that the jury is reminded of all relevant evidence some trial judges provide the jury with a comprehensive summary of all of the evidence of every witness, addressing each witness in the order in which they gave evidence. That approach often adds days, and in some cases weeks, to a summing-up.³³ While, the Court of Appeal has repeatedly stated that such summaries are unnecessary,³⁴ there is uncertainty about what constitutes an adequate summary of the evidence. Some judges are more inclined to give much briefer summaries of the evidence and provide the jury with copies of the transcript of the testimony of each witness. The Victorian Court of Appeal has delivered three recent decisions concerning the obligation to go over the evidence.³⁵
- 3.26 In *R v Thompson*,³⁶ the Court of Appeal considered the extent to which, the traditional oral presentation of the summing up should be maintained, or should be modified by the provision of transcript and written material to the jury. Redlich JA stated that:
- The trial process is essentially an oral one. The provision of transcript or written directions cannot take the place of the oral directions which the law requires.*³⁷
- 3.27 Redlich JA gave two reasons for the emphasis upon oral directions. The first concerns the notion of open justice:
- The criminal trial proceeds upon an assumption that oral directions are an appropriate and effective means by which the jury's task is communicated to them. Oral directions are given and listened to by all of the jury in the presence of the judge and the parties in a public hearing. The parties are assured that all aspects of the jury's task have been explained to each member of the jury. The process provides transparency that would be absent if the jury were directed to act upon written instructions which they were to consider in the privacy of the jury room. Uncertainty would arise as to whether all jurors read all written material provided to them. The concept of justice being 'manifestly seen to be done' has contributed to the requirement that 'the whole direction must be by the judge in the full light of publicity'.*³⁸
- 3.28 The notion of open justice is of fundamental importance. The Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic) provides that a person charged with a criminal offence is entitled to 'a fair and public hearing'.³⁹ Interested members of the community, including representatives of the media, should know the directions which the judge gives to the jury in a criminal trial. As is the case with documents tendered in court, there are alternative means of ensuring transparency with respect to written instructions provided to jurors, other than by requiring the judge to give oral directions.
- 3.29 The second reason given by Redlich JA of the need for oral directions concerns the ability of the trial judge 'to observe the jury and make some assessment as to whether they have followed and comprehended particular directions'.⁴⁰ Redlich JA said:
- Oral directions enable the trial judge to observe the jury and make some assessment as to whether they have followed and comprehended particular directions. It is not uncommon for a trial judge to appreciate during the course of giving a more difficult direction or from observing the jury's reaction to it, that it requires further elucidation. For some jurors it may be the only way they can comprehend their instructions. I have in mind not only the literacy of jurors, which as Bleby J recently said, cannot be assumed, but the significant differences there are in the cognitive skills of individual jurors to absorb the written word. Nor should it be assumed that all jurors will necessarily be able to understand and remember more complex oral direction. Directions which are more complex can thus be reinforced by their repetition in written instructions, if the trial judge thinks fit. But clear and comprehensive oral directions are always essential.*⁴¹
- 3.30 Observing the physical reactions of a group of people is not a recognised means of determining whether they have understood oral instructions. In response to mounting research data, appellate courts have warned trial judges about the dangers of relying on their assessment of demeanour when determining the credibility of witnesses.⁴² Similar caution might be appropriate when judges seek to draw conclusions, from demeanour, about the extent to which jurors have understood the judge's instructions.

The use of transcript and other written materials

3.31 The extent to which the trial judge may direct the jury in writing and rely upon the transcript as a means of instructing the jury about the evidence in a case is not clear.

3.32 In *Thompson*, Redlich JA concluded that, '[o]rdinarily a failure to summarise the evidence in the course of a charge would mean that the resultant conviction could not stand'.⁴³ While Redlich JA referred to the fact that section 19 of the *Crimes (Criminal Trials) Act 1999* (Vic) permits the trial judge to give the jury a very broad range of written materials, he stressed that 'circumspection is called for in the provision to the jury of selective written material to ensure that it does not disturb the essential balance in the oral charge between prosecution and defence case'.⁴⁴ The views expressed by Redlich JA in *Thompson* were cited with approval by the Court of Appeal in *R v Gose*⁴⁵ and *R v Harman*.⁴⁶

3.33 Neave JA took a different view in *Thompson*. She said:

*I have doubts about the capacity of jurors to absorb lengthy and complex oral charges containing detailed summaries of evidence. It seems to me that the delivery of a short oral charge which directs the jury accurately on the law and provides a 'road map' of the relevant issues, combined with the provision of written material which summarises the evidence and relates it to those issues, might in some circumstances assist jury comprehension and lead to a fairer trial than a very lengthy oral charge.*⁴⁷

3.34 Neave JA referred to research conducted by the New Zealand Law Commission about juries in criminal trials.⁴⁸ After conducting extensive research with actual jurors about their role, the New Zealand Commission recommended that the jury be provided with a copy of the transcript, or judge's notes as they are called in that country, in each case.⁴⁹ This practice is now followed as a matter of course in New Zealand.⁵⁰

3.35 High Court Justice Virginia Bell, an experienced criminal trial judge, has voiced support for providing the jury with the transcript, thereby overcoming the need to provide lengthy summaries of the evidence.

The arguments in favour of the provision of transcripts seem to me to be compelling... [There] was a concern that the provision of transcript in some way perverted the 'orality' of the trial, and that the jurors would place too much weight on it. I really have difficulty grasping that. We do have a concern, rightly or wrongly, about jurors placing too much weight on things that they ought not, on prejudices and the like, but how you might place too much weight on the transcript of the evidence on which you are being invited to return your verdict, is a concept that is too elusive for me.

33 For example, in *R v Lam*, the 'Salt nightclub murders' trial, the summing up lasted 19 days. On appeal this case was known as *R v Lam & Others* [2008] VSCA 109.

34 *R v Osborn* [2007] VSCA 250, [23]. In that case, the Court even suggests that full summaries may 'overburden' the jury.

35 *R v Thompson* [2008] VSCA 144; *R v Gose* [2009] VSCA 66; *R v Harman* [2009] VSCA 78.

36 [2008] VSCA 144, [134].

37 *Ibid* [146].

38 *Thompson*, at [146], citing *R v Willmont* (1914) 10 Cr App R 173; *R v Kerr* [1951] VLR 239, at 243. In *Willmont* the judge's clerk received and answered jury questions without advising the court – a wholly irregular occurrence, the court of Criminal Appeal held, denying a public hearing to the accused; In *Kerr* the concerns about public justice were first, that the public gallery had been closed for several hours in the evening while the jury deliberated (the Court held that there were no proceedings to which the public had a claim to be admitted), and secondly, that the judge answered a jury question without first inviting the views of counsel (which the Court held in the circumstances did not amount to a miscarriage of justice).

39 *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 24(1).

40 [2008] VSCA 144, [147].

41 *Ibid*.

42 *Fox v Percy* (2003) 214 CLR 118 at [30]-[31] per Gleeson CJ, Gummow and Kirby JJ; *CSR Ltd v Della Maddalena* [2006] HCA 1 at 14 [46] per Kirby J; and see the body of research referred to by Samuels JA in *Trawl Industries of Australia Pty Ltd v Effem Foods Pty Ltd* (1992) 27 NSWLR 326 at 348, as noted by the High Court in *State Rail Authority of NSW v Earthline Constructions Pty Ltd* [1999] HCA 3; 160 ALR 588 at 617-8.

43 [2008] VSCA 144, [150].

44 *Ibid* [144].

45 [2009] VSCA 66, [42] – [45] (Vickery AJA, Nettle and Vincent JJA agreeing).

46 [2009] VSCA 78, [59] – [63] (Dodds-Streton JA, Kellam JA and Vickery AJA agreeing).

47 [2008] VSCA 144, [102].

48 *Ibid* [103].

49 Law Commission, *Juries in Criminal Trials*, Report 69 (February 2001), 134 [354].

50 William Young, 'Summing Up to Juries in Criminal Cases – What Jury Research Says About Current Rules and Practice' [2003] *Criminal Law Review* 665, 685.

Problems with the Law of Jury Directions

It is recognised that a component of [the summing-up] requires some reference to the evidence. It seems to me that if we sent the transcript out, that reference could be a very attenuated one. I would like to see, in due course, computers in jury rooms with software of the transcript-analyser variety, and the jury getting not only the hard copy but an electronic copy of the transcript.⁵¹

- 3.36 The commission believes that the law concerning the trial judge's obligation to sum-up to the jury should be clarified, especially because of the recent Court of Appeal decisions concerning the 'orality' of the trial. Trial judges should be permitted and encouraged to use modern means of communicating with jurors. They should not be left unsure about the extent to which they may use written directions, or refer the jury to the transcript of the evidence instead of reading lengthy extracts to them. In Chapter 5 the commission recommends that the content of the trial judge's statutory obligation to 'give directions to the jury so as to enable the jury to properly consider its verdict'⁵² should be set out in legislation.

THE PEMBLE OBLIGATION

- 3.37 The common law requires the trial judge to direct the jury about defences and verdicts that have not been raised by defence counsel during the trial but which are reasonably open on the evidence. The duty, which forms part of the trial judge's responsibility to ensure a fair trial, is often referred to as the *Pemble* obligation because it was described in the High Court case of that name.⁵³
- 3.38 The commission's terms of reference ask it to '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'. Although the failure of trial judges to comply with this obligation is not a particularly common ground of appeal,⁵⁴ its broad scope causes problems for trial judges because they must direct the jury about matters that defence counsel may have chosen not to address for tactical reasons.
- 3.39 The *Pemble* obligation arises in relation to both a defence and to an alternative verdict on a less serious offence that is 'included' in the charge of a more serious offence, even though these matters are not relied upon or are expressly abandoned by the defence at the trial.⁵⁵ The extent of the judge's duty to inform the jury about the possibility of an 'alternative' verdict of guilty of a lesser offence other than that charged when the issue has not been raised by the parties is somewhat uncertain.⁵⁶

THE SCOPE OF THE OBLIGATION IN PEMBLE

- 3.40 In *Pemble* the accused was convicted of murder at a trial in which defence counsel asked the jury to return a verdict of manslaughter and did not raise the possibility of an acquittal. The High Court held that despite the approach taken by defence counsel the trial judge should have directed the jury about the possibility of a verdict of not guilty because it was an outcome open to the jury on the evidence. Barwick CJ described the principle which the Court was applying:

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. This involves, in my opinion, an adequate direction both as to the law and the possible use of the relevant facts upon any matter upon which the jury could in the circumstances of the case upon the material before them find or base a verdict in whole or part.⁵⁷

- 3.41 The judge's obligation to ensure the accused has a fair trial arises despite the course the defence counsel takes in conducting the case.⁵⁸ In practice this means that the trial judge must advance arguments and relate evidence to defences⁵⁹ about which the jury may have heard nothing from either counsel during the trial. Sometimes, counsel may make a forensic decision not to raise a particular issue with the jury in order to gain a tactical advantage. For example, in a murder trial, the defence may not wish to raise the possibility of manslaughter in the hope that the jury will be inclined to opt for a complete acquittal, if no alternative verdict other than guilty or not guilty of murder is presented to them.⁶⁰ Alternatively, the defence may not wish to run a partial defence, such as defensive homicide, which may be inconsistent with a principal defence of accident or self-defence.⁶¹ In the latter case, the *Pemble* obligation would require the trial

judge to address the jury about the alternative partial defence even though defence counsel chose not to present the jury with any argument about that matter.

The early history and extension of the *Pemble* principle

- 3.42 It is important to consider the history behind the principle that any defence fairly raised on the evidence should be brought to the jury's attention.⁶² The rule developed in the context of the mandatory death penalty for murder convictions, and the possibility of the jury finding a verdict on the lesser charge of manslaughter, even where this was not raised by counsel.⁶³ In Victoria, *R v Longley*⁶⁴ extended the obligation beyond its application for the partial defence of provocation in murder cases to any criminal charge before the jury.⁶⁵
- 3.43 In *Pemble*, 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.⁶⁶ A majority of the High Court held that there had been a substantial miscarriage of justice because of the failure to direct the jury about the option of an acquittal. It is likely that defence counsel in *Pemble* made a tactical decision not to address the jury about an acquittal because he concluded that offering the jury the middle course of manslaughter was a wiser tactical option than risking a verdict of guilty of murder in response to rather weak acquittal argument.
- 3.44 The historical development of the *Pemble* obligation has meant that the law is clearest in homicide cases. If there is a 'viable' case for an alternative verdict of manslaughter on any reasonable view of the facts, the judge must direct the jury to consider it.⁶⁷ Generally, '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,⁶⁸ although some case law 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.⁶⁹
- 3.45 Decisions of the High Court,⁷⁰ and appeal courts in South Australia,⁷¹ Queensland,⁷² and Victoria,⁷³ have confirmed that the *Pemble* obligation is not confined to the murder/manslaughter context. In NSW, however,

- 51 Justice Virginia Bell, Conference Address, National Judicial College of Australia, Sydney, 10 November 2007 <<http://njca.anu.edu.au/Professional%20Development/programs%20by%20year/2007/Communic%20and%20the%20courts%20NOV/papers/Virginia%20Bell%20transcript.pdf>> at 27 April 2009.
- 52 *Criminal Procedure Act 2009* (Vic), s 238.
- 53 *Pemble v R* (1971) 124 CLR 107.
- 54 In the period between 2000-2007, 12 successful appeals from conviction arose from the *Pemble* obligation.
- 55 (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.
- 56 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 (s421, 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.
- 57 (1971) 124 CLR 107, 117-118.
- 58 *R v Thompson* [2008] VSCA 144.
- 59 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).
- 60 Davies describes this as a '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.
- 61 *Lee Chun-Chuen v R* [1963] AC 220, 233 where 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'.
- 62 *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; *R v Kane* (2001) 3 VR 542, 544 (Ormiston J).
- 63 *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.
- 64 [1962] VR 137.
- 65 *Ibid* 140.
- 66 Menzies J observed that this course was likely taken as counsel thought there was no chance of a complete acquittal: *Ibid*, 128-9.
- 67 *R v Williamson* (2000) 1 VR 58, 68. 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.
- 68 *R v Fackovec* [2007] VSCA 93, [19]; *R v Alexander* (2007) 174 A Crim R 297, 306; *R v Tran* [2007] VSCA 19, [40]; *R v Thompson* [2008] VSCA 144, [106].
- 69 *Zecevic v DPP* (1987) 162 CLR 645; *R v Kear* [1997] 2 VR 555, 565.
- 70 *CTM v The Queen* (2008) 247 ALR 1; *Fingleton v R* (2005) 227 CLR 166.
- 71 *Benbolt v R* (1993) 60 SASR 7.
- 72 *R v Rehavi* [1999] 2 Qd R 640, 644; *R v Chan* [2001] Qd R 662; *R v Willersdorf* [2001] QCA 183.
- 73 Recently, the Court of Appeal has upheld the judge's obligation to raise the issue of intoxication in a sexual offence case (*R v TC* [2008] VSCA 282, discussed later) and also a case involving the issue of self-defence to a charge of intentionally causing serious injury. The judge's obligation in the latter case was limited 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.

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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.⁷⁴

Current Approach by the High Court and Victorian Court of Appeal

- 3.46 A broad approach to the judge's *Pemble* obligation has recently been affirmed by the High Court in *CTM v The Queen*,⁷⁵ and by the Victorian Court of Appeal in *R v TC*,⁷⁶ both non-homicide cases. These cases illustrate how defence counsel's tactical decision not to run a particular defence can result in the trial judge being obliged to direct the jury about the law and evidence concerning a possible defence in the absence of any assistance from counsel about arguments in support of that defence.

CTM v The Queen

- 3.47 In *CTM*, the accused was convicted of having sexual intercourse with a girl aged between 14 and 16 years, when he was aged 17. The defence was conducted on the basis that no act of intercourse took place. In his interview with the police, the accused said that he had believed the girl was 16, because that is what she had told him. The complainant was not questioned about this assertion when she gave evidence at the trial, and the accused did not give evidence. Defence counsel informed the judge that he was not going to place the defence of an honest and reasonable, but mistaken, belief about the girl's age before the jury but requested the judge to do so. It appears that defence counsel made a forensic decision not to run this alternative defence because it was clearly inconsistent with the primary defence that there had been no act of sexual intercourse. The trial judge accepted counsel's submission that he was obliged to direct the jury about the alternative defence, but actually did so by reference to a statute that purported to deal with the matter rather than on the basis of the common law defence of mistake.⁷⁷
- 3.48 In the High Court counsel for the Crown argued that the judge had not been under an obligation to place the defence of mistake before the jury in any form because it was inconsistent with the defence advanced at the trial. A majority of the High Court concluded that there was no obligation to direct the jury about the defence of mistake because the issue had not been 'enlivened' by evidence at the trial.⁷⁸ The majority implicitly held, however, that when such a defence is raised by the evidence, defence counsel's decision not to run the defence for forensic reasons does not remove the trial judge's obligation to place the defence before the jury and refer them to the relevant evidence.
- 3.49 In a separate judgment, Kirby J confirmed that the *Pemble* principle is based on the trial judge's obligation 'to ensure a fair and accurate trial of the accused'. He stated that it was not too onerous 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.⁷⁹ 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.⁸⁰ He stated:

*The judge's duty transcends that of counsel. The judge represents the whole community and the law. And that is what Pemble holds.*⁸¹

R v TC

- 3.50 In the Victorian case of *TC*, the accused was convicted of a sexual offence involving a child. The Crown relied on evidence from the complainant and another child who witnessed the events, as well as supporting DNA evidence. There was evidence that the accused had been intoxicated at the time. He gave evidence that he had no memory of the events that night and had been in a 'dream-like state'.

3.51 The defence case was conducted on the basis that the act in question did not take place. After the judge raised the issue of intoxication with counsel it was agreed that the issue should be placed before the jury. Defence counsel did not address on the issue, however, leaving it to the judge to raise the defence. Counsel did not provide the trial judge with any assistance concerning the directions the jury should receive about the intoxication defence. The judge's intoxication directions were then successfully challenged on appeal because they failed to relate the relevant items of evidence sufficiently to the 'defence' of intoxication.

The role of *Pemble* within an adversarial trial

3.52 These two cases provide a clear example of the burden placed on a trial judge by the *Pemble* obligation because it requires the trial judge to instruct the jury about alternative defences that arise on the evidence, even when defence counsel has made a deliberate, tactical decision not to do so. It has been suggested that this broad obligation does not sit well with the respective roles of the trial judge and of counsel in an adversarial system of criminal justice⁸² where the client is usually bound by the tactical decisions made by counsel in conducting the case.⁸³ In other instances, an accused person is bound to accept the consequences of a tactical decision made by counsel. For example, section 399(5)(b) and (c) of the *Crimes Act 1958* (Vic), allows the prosecution to lead evidence of an accused's bad character if the defence case has been conducted in a particular way.

3.53 In *CTM*, Kirby J emphasised that the *Pemble* obligation forms part of the trial judge's obligation to ensure a fair trial:

*That decision acknowledges that an accused is entitled to have a defence put forward by counsel in the manner judged most likely to secure an acquittal. Often, for forensic reasons, this will involve a single or simple theory of the evidence. However, the decision also recognises that this does not relieve the trial judge of the obligation to explain to the jury any other bases upon which, in law, the accused may be entitled to acquittal upon the evidence adduced.*⁸⁴

3.54 Kirby J added that the rule constitutes 'recognition of the forensic privileges of defence counsel, and the distinct functions of judges, in criminal trials'.⁸⁵ He said that it was, 'a practical rule and one that acknowledges and accommodates the often difficult forensic choices that defence counsel face in conducting a criminal trial, especially before a jury'.⁸⁶

3.55 Other appellate court justices have expressed differing views about the extent to which the forensic decisions of counsel affect the judge's *Pemble* obligation. In *Fingleton v The Queen*,⁸⁷ McHugh J acknowledged that the tactical decision of counsel to avoid a particular defence placed the judge in a difficult position. However, after referring to *Pemble*, McHugh J observed that the 'proper administration of the criminal law requires nothing less', and that an accused's right to a fair trial cannot 'automatically depend' on the forensic choices made by their counsel.⁸⁸

3.56 Gleeson CJ, however, has highlighted the important role of the forensic choices of counsel in the context of the adversarial system which reflects values that 'respect both the autonomy of parties to the trial process and the impartiality of the judge and jury'.⁸⁹ In *Nudd v R*,⁹⁰ Gleeson CJ observed that the nature of adversarial litigation involves counsel exercising a wide discretion in deciding what issues to contest, which lines of argument to pursue and what evidence or witnesses they will use. Central to the functioning of this system is the general rule that parties are bound by their decisions when represented by competent counsel and that considerations of fairness often turn on these choices.⁹¹

3.57 There has also been support for this view in Victoria. In *R v Cardamone*,⁹² Neave JA suggested that the requirement for judges to direct about matters not requested by counsel seemed difficult to justify in the context of an adversarial system.⁹³ Recently, in *R v Luhan*,⁹⁴ the Court of Appeal unanimously rejected appeal grounds which were 'premised on a different trial having been conducted' than the one actually run by the defence at trial. The Court stated:

*Those who seek to challenge the result of a trial will be treated as bound by the manner in which the trial was conducted, and confined to the matters actually put in issue by them or by their counsel (except where a matter, though not raised, can reasonably be seen to have emerged as a real question from the evidence actually adduced at the trial).*⁹⁵

74 *R v Kanaan* (2005) 64 NSWLR 527, 554.

75 (2008) 247 ALR 1.

76 [2008] VSCA 282.

77 (2008) 247 ALR 1,22.

78 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.

79 (2008) 247 ALR 1, 23. Note that Kirby J was in dissent on several matters, including on the point of whether the defence had been sufficiently raised.

80 *CTM v The Queen* (2008) 247 ALR 1, 28-9 (Kirby J).

81 *Ibid* 23 (Kirby J).

82 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.

83 *TKWJ v The Queen* (2002) 76 ALJR 1579, [74]-[85].

84 *CTM v The Queen* [2008] 82 ALJR 978, 999 [112] (emphasis in original).

85 *Ibid* [113].

86 *Ibid* [115].

87 (2005) 227 CLR 166.

88 (2005) 227 CLR 166, 199 [84].

89 *Doggett v The Queen* (2001) 208 CLR 343, 346.

90 (2006) 225 ALR 161, 164.

91 *Ibid*.

92 (2007) 171 A Crim R 207.

93 *Ibid* 226 (Neave JA).

94 [2009] VSCA 30.

95 *Ibid* [37].

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- 3.58 A major problem with a strict approach to the *Pemble* obligation is that the trial judge may be required to direct the jury about a possible defence without the benefit of counsel's arguments on the issue.⁹⁶ As *TC* illustrates, the trial judge must direct the jury about the issues which defence counsel has raised, as well as defences which counsel may have deliberately avoided.⁹⁷ There is a risk that the jury may be confused or overloaded when they receive directions about topics not raised by counsel,⁹⁸ or may give undue weight to a defence because it was raised by the judge rather than defence counsel.
- 3.59 Although judges need not direct the jury about a matter which is 'unreal or fanciful', or which invites the jury to speculate, uncertainty remains about what will be sufficient evidence to 'enliven' an issue, and activate the obligation to direct the jury in relation to the matter, as the High Court's decision in *CTM* illustrates.⁹⁹
- 3.60 In practice, a tactical decision by defence counsel to leave it to the trial judge to direct the jury about an 'inconsistent' defence can be beneficial to the accused in several ways:
- The operation of the principle provides experienced, competent defence counsel with the opportunity to pose contradictory defences or versions of events, without having to explain to the jury the inconsistency of the defence position, or the failure of the accused to give evidence and explain the contradiction. It avoids embarrassment for the defence by not having to put a defence that is inconsistent with their primary defence.
 - If the judge alone raises the 'inconsistent' defence, the jury may give it additional weight. The accused may benefit from the jury thinking that this 'new hypothesis' has been raised by the judge as an issue which the prosecution has not disproved.¹⁰⁰
 - It allows defence counsel to say nothing about an issue, or to request the trial judge specifically to refrain from raising an alternative defence, and yet complain on appeal about the failure by the trial judge to raise the alternative defence. Even where the trial judge does put the alternative defence case to the jury, the accused has an opportunity to argue on appeal that the directions given at the trial about the alternative defence were inadequate.¹⁰¹
- 3.61 It is difficult to identify any real unfairness in an adversarial trial where an accused person makes an informed tactical decision to avoid putting an alternative defence before the jury, believing this will increase the chances of an acquittal. In some cases, particularly those involving sexual offences, societal pressures and stigma may mean that there is a reluctance to admit discreditable conduct. For this reason the accused may decide to advance a defence with little prospect of success, rather than raise a potentially more successful, but unacceptable, alternative. For example, in cases like *TC*, a denial that any sexual contact occurred with a five-year-old boy might have been socially and emotionally easier to advance than a defence that a sexual assault occurred when the offender was drunk. Whatever the motivation, the accused has a free choice in making such tactical decisions. It is difficult to see how a trial could become unfair if the trial judge does not direct the jury about a defence option which the accused has chosen not to pursue.
- 3.62 In the Consultation Paper, the commission queried whether the *Pemble* obligation should be maintained, particularly in cases where counsel has had adequate opportunity to consider and put alternative defences before the jury, or where the parties oppose giving the jury directions that could lead to an alternative verdict.
- 3.63 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. The introduction of alternative verdicts may operate to the disadvantage of the accused by depriving them of the 'all-or-nothing' chance of acquittal.¹⁰² Ormiston JA also warned of the possible risk of miscarriage of justice arising from the accused being convicted of an offence which was not raised by counsel, and which the accused may not have had a fair opportunity to contest, in circumstances where the jury is 'left at large' as to how they decide the issues in relation to a possible verdict (except where the judge raises them in a 'necessarily neutral manner').¹⁰³

3.64 In Chapter 5, the commission recommends that the *Pemble* obligation be modified by legislation in cases where the accused is represented. The trial judge should continue to be obliged to direct the jury about defences and alternative verdicts that defence counsel has mistakenly or inadvertently failed to raise with the jury. The law, however, should remove any obligation from the trial judge to direct the jury about defences or alternative verdicts that defence counsel has chosen not to place before the jury unless it is necessary to do so to ensure a fair trial. The law should provide that where the trial judge is satisfied that the failure of defence counsel to put a defence was not due to mistake or inadvertence by counsel, the judge is obliged to direct the jury about only those defences that counsel expressly identified and advanced before the jury and for which there is an evidential basis. In cases where the accused is unrepresented, the *Pemble* obligation should continue to apply.

EVIDENTIARY DIRECTIONS

- 3.65 The common law requires the trial judge to give the jury directions about particular types of evidence. In broad terms those directions deal with the care that the jury should exercise before accepting certain types of evidence and the limited use which the jury may make of some kinds of evidence. The 'limited use' directions sometimes involve instructions about how the jury must not reason when considering particular items of evidence.
- 3.66 The law in relation to evidentiary directions is sometimes complex. 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 intricate. These difficulties can create problems for judges in cases where there is a large amount of evidence and counsel do not give the judge adequate assistance to identify the directions which the jury should be given.

CONSCIOUSNESS OF GUILT

- 3.67 Consciousness of guilt evidence, increasingly called 'post offence conduct', is a form of circumstantial evidence. As with other circumstantial evidence, its probative force derives from the inferences that may be drawn from it and not from what the evidence itself demonstrates. Consciousness of guilt evidence is evidence of the conduct of an accused person after the offence in question was committed.
- 3.68 Evidence of post offence conduct, such as telling lies, flight from the scene of the crime and other 'guilty' behaviour, will be probative when that conduct is motivated by awareness on the part of the accused that he or she has committed a crime.
- 3.69 The difficulty with such evidence, however, is that inferences about mental states are notoriously uncertain. For this reason, juries have traditionally been warned by judges not to jump to conclusions about why an accused behaved in a certain way.¹⁰⁴ Consciousness of guilt evidence has attracted jury warnings since the 19th century.¹⁰⁵

The warning required by Edwards

- 3.70 Since the High Court decision in *Edwards v The Queen*¹⁰⁶ in 1993, such warnings have been mandatory. The rationale for the warning was given in that case by Brennan J who adopted the reasoning of Lord Devlin in the English case of *Broadhurst v The Queen*:

It is very important that a jury should be carefully directed upon the effect of a conclusion, if they reach it, that the accused is lying. There is a natural tendency for a jury to think that if an accused is lying, it must be because he is guilty, and accordingly to convict him without more ado. It is the duty of the judge to make it clear to them that this is not so. Save in one respect, a case in which an accused gives untruthful evidence is no different from one in which he gives no evidence at all. In either case the burden remains on the prosecution to prove the guilt of the accused.¹⁰⁷

96 Doran, above n 82, 880.

97 See Redlich JA's observations in *R v Tran* [2007] VSCA 19, [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.

98 *Wardrope v R* (1987) 29 A Crim R 198, 204 (Murphy J).

99 Doran, 'above n 82, 886; Murphy J stated in *Wardrope 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.

100 *Wardrope 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.

101 For example, it was successfully argued in *TC* that the judge failed to properly meet the *Alford v Magee* obligation to refer the jury to the evidence relevant to the determination of the issues.

102 Doran, 'above n 82, 888.

103 *R v Kane* (2001) 3 VR 542, 548.

104 John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (2nd ed, 1923) vol 1, § 273, citing *Webster's Trial* (1850) Bemis' Rep 486 (Shaw CJ).

105 Frederick Sackett, *Instructions and Requests From the Court to the Jury in Jury Trials* (1881).

106 *Edwards v The Queen* (1993) 178 CLR 193.

107 [1964] AC 441, 457.

Problems with the Law of Jury Directions

3.71 The majority decision in *Edwards* is the source of the current common law rule concerning consciousness of guilt directions. The High Court 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.¹⁰⁸

3.72 These requirements were explained and amplified by the Victorian Court of Appeal in *R v Ciantar*:

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 acts, 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.¹⁰⁹

Difficulties with the *Edwards* warning

3.73 The probative force of consciousness of guilt evidence depends on drawing an inductive inference about the motivation behind the conduct in question. The availability of an inductive inference is seldom straightforward. Such inferences are usually contextual. In particular, inferences about the motivation behind conduct are often influenced by a person's assessment of what they would do in the accused's place.¹¹⁰ For example, if a person considers that the ordinary response to an unjustified accusation of discreditable behaviour is loud disapproval, a failure to respond to such an allegation may be seen as giving rise to an inference of guilt. If a person believes, however, that unjustified allegations should not be dignified with a response, a failure to respond may be an appropriate course from which no adverse inference should be drawn.¹¹¹ These differences indicate how the availability of a consciousness of guilt inference from a particular piece of evidence is frequently a matter of debate. In *Edwards* itself, the High Court was divided over the availability of a consciousness of guilt inference in the circumstances of that case.¹¹²

3.74 The equivocal nature of the consciousness of guilt inference in any particular case causes problems because *Edwards* requires the trial judge to identify the evidence capable of giving rise to the inference at two points:

- In determining whether to give a warning; and
- When directing the jury about what particular post-offence conduct may be used to draw consciousness of guilt inferences.

- 3.75 When determining whether a warning is required concerning an individual item of evidence, the trial judge must determine whether the item is capable of being evidence of a consciousness of guilt.¹¹³ The task for the jury, once evidence is identified as being capable of exhibiting consciousness of guilt, is to determine whether they are satisfied beyond reasonable doubt that there is no innocent explanation for the conduct in question.¹¹⁴
- 3.76 The first step of determining whether the item is capable of being evidence of a consciousness of guilt requires the trial judge to consider whether there is an innocent explanation for an item of post-offence conduct which the jury could not reasonably exclude. In these circumstances, the item of evidence cannot be capable of supporting an inference of guilt and a consciousness of guilt warning is unnecessary. If, however, the innocent explanation for the conduct is one that the jury might accept or reject, the trial judge must give the jury a consciousness of guilt warning.
- 3.77 This analysis is subtle and reasonable people can differ about how to categorise an item of post-offence conduct. If the judge wrongly decides that an item of evidence does not require a consciousness of guilt warning, this would almost certainly constitute an error of law that would result in a successful appeal because the warning is essential when there is consciousness of guilt evidence. If, however, a consciousness of guilt warning is given when the evidence is not capable of supporting an inference of guilt, this also constitutes an error of law that is likely to result in a successful appeal.¹¹⁵
- 3.78 A number of appeals have succeeded on the ground that the trial judge made an error when deciding whether an item of post-offence conduct should have been the subject of a consciousness of guilt direction.¹¹⁶
- 3.79 Further complication is caused by the fact that there is an exception to the content of a consciousness of guilt warning. As earlier noted, consciousness of guilt evidence is one type of circumstantial evidence. There are many cases in which a consciousness of guilt direction is given even though the prosecution relies on other items of circumstantial evidence, thus necessitating a separate circumstantial evidence direction. Where lies or other post-offence conduct are proffered as evidence of consciousness of guilt as part of a circumstantial evidence case, it is not necessary that the jury be satisfied beyond reasonable doubt that any particular item of post offence conduct in itself bears the inference of guilt.¹¹⁷
- 3.80 Where there are no other items of circumstantial evidence, however, the practice among trial judges in Victoria is to direct the jury that they may rely upon a consciousness of guilt inference from an item of post offence conduct only if satisfied of this matter beyond reasonable doubt.¹¹⁸ This distinction exemplifies the inconsistency and uncertainty that has bedevilled the common law of jury directions.
- 3.81 The second area of difficulty with the consciousness of guilt warning arises when the trial judge considers the content of the direction. The common law requires the trial judge to identify every item of post-offence conduct from which a consciousness of guilt inference may be drawn. It is not uncommon for appellate court judges to disagree with the trial judge's characterisation of individual items of evidence. This requirement adds to the length of the judge's summing-up because the jury must be warned about the use of each individual piece of evidence. It is questionable whether the jury is assisted by multiple warnings about the use of consciousness of guilt evidence.

108 (1993) 178 CLR 193, 210-1 (Deane, Dawson and Gaudron JJ). Although *Edwards* dealt exclusively with the use that may be made of lies, it has subsequently been applied to other conduct potentially evidencing a consciousness of guilt: see, eg, *R v Renzella* [1997] 2 VR 88, 90.

109 *R v Ciantar* (2006) 16 VR 24, 51-2.

110 See Kevin Jon Heller, 'The Cognitive Psychology of Mens Rea' (2009) 99(2) *Journal of Criminal Law and Criminology* (forthcoming). Draft available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1155304> on 2 March 2009. Although Heller discusses the relevant concepts in terms of *mens rea*, it would appear equally applicable to other mental state inferences, for example those involved in consciousness of guilt reasoning.

111 See Charles Gamble, 'The Tacit Admission Rule: Unreliable and Unconstitutional – A Doctrine Ripe for Abandonment' (1979 – 1980) 14 *Georgia Law Review* 27. See also *R v MMJ* (2006) 161 A Crim R 501.

112 In *Edwards*, the accused allegedly lied about witnessing violence against the victim in a prison van. The prosecution sought to use this as evidence of a consciousness of guilt. The defence argued the lie was told out of fear of being considered a 'dog', ie, an informer. Deane, Dawson and Gaudron JJ felt that the lie should be permitted to go to the jury as evidence. McHugh J accepted the lie could be used as corroboration, but declined to consider the correctness of the test applied by Lord Lane in *R v Lucas* and adopted by the majority in *Edwards*. Brennan J held that the explanation offered for the lie was so inherently plausible that it should not be allowed to go to the jury as evidence of guilt.

113 *R v Cavkic, Athanasi and Clarke* [2009] VSCA 43 [87].

114 *Ibid* [96].

115 *R v Renzella* [1997] 2 VR 88, 91 (Winneke P, Charles and Callaway JJA).

116 Since the mid 1990s the Victorian Court of Appeal has heard at least 84 appeals which raised consciousness of guilt directions as an issue. The appellant succeeded in 28 of those cases.

117 *R v Cavkic, Athanasi and Clarke* [2009] VSCA 43, [88].

118 *R v Ciantar* (2006) 16 VR 26, 42 (Warren CJ, Chernov, Nettle, Neave and Redlich JJA).

Problems with the Law of Jury Directions

- 3.82 It is difficult to justify the requirement for specific reference to all items of consciousness of guilt evidence. A similar obligation in the law of corroboration, which would have required the trial judge to identify all items of evidence capable of amounting to corroboration, was rejected by the English,¹¹⁹ Victorian¹²⁰ and Queensland¹²¹ appellate courts more than 20 years before the High Court's decision in *Edwards* imposed this requirement in consciousness of guilt cases.¹²²
- 3.83 In Chapter 5 we make recommendations designed to overcome the difficulties associated with the consciousness of guilt warning. The Commission proposes that the trial judge's obligation to identify every item of consciousness of guilt evidence be removed. Further, it should be permissible for the trial judge to give the jury a warning in general terms about the danger of jumping to conclusions about the accused person because of some post-offence conduct that may be incriminating, but may also be quite innocent.

IDENTIFICATION EVIDENCE

- 3.84 The common law requires the trial judge to warn the jury that they should exercise caution when relying upon eyewitness identification evidence. While the common law rules are reasonably clear, they are sometimes difficult to apply. The *Evidence Act 2008* (Vic) (Evidence Act) also deals with directions about identification evidence. The overlap between common law and statutory rules may generate uncertainty, particularly because the Evidence Act contains provisions which appear to be contradictory.

The dangers of identification evidence

- 3.85 Over 70 years ago, Evatt and McTiernan JJ explained in *Craig v The King*¹²³ the process that occurs when a witness identifies the accused as the person who committed the crime in question:
- An honest witness who says, "the prisoner is the man who drove the car"... is really asserting: (1) that he observed the driver; (2) that the observation became impressed upon his mind; (3) that he still retained the original impression; (4) that such impression has not been affected, altered or replaced ... and (5) that the resemblance between the original impression, and the prisoner is sufficient to base a judgment not of resemblance but of identity.*¹²⁴
- 3.86 Many factors can affect a person's memory of an observation. Some of these are obvious: environmental factors, such as lighting or distance, and physical factors, such as brain damage or intoxication.¹²⁵ Other risks to the integrity of a person's memory are more subtle. Conversations with other witnesses, improper questioning, media coverage¹²⁶ and the 'displacement effect' may all contaminate a witness' memory.¹²⁷
- 3.87 Witnesses may honestly believe that their identification evidence is accurate. Such witnesses tend to be very convincing because they believe they are telling the truth. However, because of what Spigelman CJ has described as 'the plasticity of the human memory',¹²⁸ such witnesses may be mistaken.
- 3.88 Cognitive psychological evidence reinforces the need for a jury warning about identification evidence because it demonstrates that people have a tendency to overvalue testimonial evidence, particularly that of an eyewitness.¹²⁹ It is important that juries are warned not to accept identification evidence without scrutinising it carefully.
- 3.89 Courts have the power to deal with the dangers of identification evidence by excluding it¹³⁰ and by warning juries to be careful when using it.¹³¹ The common law has not permitted the use of expert evidence about the problems associated with identification evidence.¹³²

The law on identification evidence directions

The trigger for the directions

- 3.90 In the leading Australian case on identification evidence, *Domican v The Queen*, the High Court stated that 'where evidence as to identification represents any significant part of the proof of guilt of an offence, the judge must warn the jury as to the dangers of convicting on such evidence where its reliability is disputed'.¹³³ The High Court did not describe those 'dangers' in any detail.

- 3.91 There are two provisions in the Evidence Act which deal with identification evidence. Section 116 provides that a judge must warn the jury about the particular dangers of identification evidence that has been admitted. Section 165 states that a judge must warn the jury about the dangers associated with 'evidence of a kind that may be unreliable', including identification evidence, if requested by a party, unless there are 'good reasons' for not doing so.
- 3.92 Read literally, section 116 requires a judge to warn the jury about any identification evidence that has been admitted, even if the reliability of the evidence is not in dispute. This would be inconsistent with section 165 and *Domican* which only require a warning when the reliability of the evidence is challenged.
- 3.93 The High Court clarified this issue in *Dhanhoa v The Queen*¹³⁴ where it confirmed the approach in *Domican*. The Court decided that section 116 of the Uniform Evidence Act¹³⁵ requires the trial judge to direct the jury about the need for caution when dealing with identification evidence only when the reliability of that evidence is disputed.
- 3.94 Section 116 of the Uniform Evidence Act also deals with 'recognition evidence',¹³⁶ which the common law has historically distinguished from identification evidence proper.¹³⁷ Recognition evidence is essentially the same as identification evidence, except that the witness making the identification claims some prior knowledge of the person or thing identified. Depending on the circumstances, such evidence may be more reliable than identification by a stranger.¹³⁸ This evidence would appear to avoid the more subtle psychological dangers of stranger identification evidence, known as the displacement effect and the 'rogues' gallery' effect.¹³⁹
- 3.95 Another type of evidence covered by section 116 of the Uniform Evidence Act is 'similarity evidence'.¹⁴⁰ In such cases, the witness does not testify that the person or object seen is a particular person or object, but merely that the two people or things look alike. Again, the common law has not treated such evidence as requiring a warning.¹⁴¹

The content of the directions

- 3.96 Section 116 of the Uniform Evidence Act provides:

- (1) *If identification evidence has been admitted, the judge is to inform the jury;*
 - (a) that there is a special need for caution before accepting identification evidence; and
 - (b) of the reasons for that need for caution, both generally and in the circumstances of the case.

119 *R v Goddard* [1962] 3 All ER 582, 586 (Parker CJ, Streatfeild and Megaw LJ agreeing).

120 *R v Matthews and Ford* [1972] VR 3, 20 (Gowans J). This decision was reaffirmed by the Victorian Court of Appeal in 1998: *R v Rayner* [1998] 4 VR 818, 840.

121 *R v Walczuk* [1965] QWN 50.

122 Compare, however, *R v Small* (1994) 33 NSWLR 575, 593, where Hunt CJ at common law conceded that, although the law did not require the trial judge to exhaustively identify corroborative evidence, it was 'usually preferable for the trial judge to do so in a straightforward case'. If a judge does decide to identify corroborative evidence, however, they must do so correctly: *R v Conway* (2002) 209 CLR 203.

123 (1933) 49 CLR 429.

124 *Ibid* 446.

125 Ian Coyle, David Field and Glen Miller, 'The Blindness of the Eye-Witness' (2008) 82 *Australian Law Journal* 471.

126 *Ibid* 480.

127 *Alexander v The Queen* (1981) 145 CLR 395, 409-410. In that case, Stephen J described the displacement effect: 'having been shown a photograph, the witness' memory of it may be more clearly retained than the memory of the original sighting of the offender and may, accordingly, displace that original memory'.

128 Chief Justice James Spigelman, 'The Truth Can Cost Too Much: The Principle of a Fair Trial' (2004) 78 *Australian Law Journal* 29, 41.

129 See discussion in Kevin Jon Heller, 'The Cognitive Psychology of Circumstantial Evidence' (2006) 105 *Michigan Law Review* 241, 248.

130 As with all evidence, a trial judge has a discretion to exclude identification evidence from the jury's consideration if its probative value is outweighed by the prejudice, danger or unreliability associated with it. Section 137 of the *Evidence Act 2008* (Vic) expressly provides a statutory power to do so.

131 *R v Burchielli* [1981] VR 611; *R v Dickson* [1983] 1 VR 227.

132 Expert evidence about the dangers of identification has generally not been permitted by Australian courts. See, eg, *Smith v The Queen* (1990) 64 ALJR 588, 588F; *R v Smith* (2000) 116 A Crim R 1.

133 (1992) 173 CLR 555, 561 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

134 *Dhanhoa v R* (2003) 217 CLR 1, 9-10 (Gleeson CJ and Hayne J), 16 (McHugh and Gummow JJ).

135 The term Uniform Evidence Act refers to the following legislation which is largely the same: *Evidence Act 1995* (Cth), *Evidence Act 1995* (NSW), and *Evidence Act 2008* (Vic). While there are some variations between the statutes, the same section numbering and wording is generally used. Both the *Evidence Act 2001* (Tas) and the *Evidence Act 2004* (Norfolk Island) are similar.

136 The Dictionary in the *Evidence Act 2008* (Vic) defines 'identification evidence' as 'evidence that is ... an assertion by a person to the effect that a defendant was, or resembles ... a person who was ... present at or near a place where' the offence was committed. This definition includes 'recognition evidence'; See generally Stephen Odgers, *Uniform Evidence Law* (8th ed, 2009) 540, 543.

137 *R v Spero* (2006) 13 VR 225, 233-4 (Redlich AJA, Maxwell P and Buchanan JA agreeing).

138 *Ibid*.

139 *Trudgett v R* (2008) 70 NSWLR 696, 701 (Spigelman CJ).

140 The Dictionary in the *Evidence Act 2008* (Vic) defines 'identification evidence' as 'evidence that is ... an assertion by a person to the effect that a defendant was, or resembles ... a person who was ... present at or near a place where' the offence was committed (emphasis added); This would include 'similarity evidence'; See generally Odgers, above n 135, 543-544.

141 *R v Cavkic (No 2)* [2009] VSCA 43, [50]-[53] (Vincent and Nettle JJA and Vickery AJA).

Problems with the Law of Jury Directions

- 3.97 The requirement that the judge inform the jury of the reasons for the need for caution both generally and in the circumstances of the case is a general re-statement of the common law.¹⁴² The directions need not follow any particular formula, but must be cogent, effective and appropriate to the circumstances of the case.¹⁴³
- 3.98 The Judicial College of Victoria's Criminal Charge Book contains a detailed guide, based on the common law, which judges may follow when directing a jury about identification evidence. It provides a list of those factors that appellate courts have held as necessary to be highlighted to the jury in past identification cases.

General directions about the reasons for the need for caution

- 3.99 The Criminal Charge Book contains a number of general directions about identification evidence. These require the jury to be warned that identification evidence appears persuasive, but is potentially unreliable and should be treated with special care.
- 3.100 The general directions are relatively straightforward and easy to understand. However, the general directions must be appropriate to the circumstances of the case. Not all of them will be appropriate in every case.

The reasons for the need for caution in the circumstances of the case

- 3.101 The High Court has held that a general warning about identification evidence is insufficient. The judge must identify any matter of significance which may reasonably be regarded as undermining the reliability of the identification evidence in question.¹⁴⁴ The jury's attention should be drawn to any weaknesses in the identification evidence. The commission supports the need for an identification direction because the psychological research indicates that jurors have a marked tendency to overvalue this kind of evidence.¹⁴⁵
- 3.102 The Criminal Charge Book contains a list of factors which may be relevant when the judge directs the jury about the need for caution because of the particular circumstances of the case. These are:
- The circumstances of the identification
 - The nature of the relationship between the witness and the person identified
 - The nature of the identification process
 - Any other relevant factors.
- 3.103 The Charge Book also sets out a detailed list of factors which may be relevant to each of those matters. Not every consideration must be referred to in each case, but the directions must be adequate for the case in question.¹⁴⁶

The problem of application

- 3.104 The major problem with identification directions appears to be applying the law to the facts of a particular case. For a variety of reasons, trial judges sometimes direct the jury about factors that are not relevant, or fail to direct about factors that are relevant. Recent identification appeals have usually succeeded on the basis that the trial judge failed to identify factors that the Court of Appeal held should have been identified in the circumstances of the case.¹⁴⁷ Anecdotal evidence suggests that some trial judges have a tendency, as a matter of caution, to direct the jury about risk factors that are not present in the case before them in order to guard against the possibility of an appeal.
- 3.105 In Chapter 5 the commission recommends that the law concerning identification directions should be included in legislation which specifies the minimum content of the warning that the trial judge must give the jury about identification evidence. That legislation should also stipulate that the judge must inform the jury about matters of significance bearing upon the unreliability of the evidence in the circumstances of the case. The Charge Book will continue to be an extremely useful resource for trial judges when identifying factors that might affect the reliability of identification evidence in a particular case.

OVERLAPPING STATUTORY AND COMMON LAW DIRECTIONS

- 3.106 In this section we discuss some of the difficulties that arise when there are overlapping statutory and common law rules concerning the directions that a trial judge must give to the jury. This problem is particularly acute in the area of sexual offences.
- 3.107 Until quite recently, the courts were primarily responsible for developing the criminal law. While Parliament occasionally passed legislation which consolidated the common law offences or created a new offence, the detail of the criminal law was found in the common law. In addition, the law of evidence was almost entirely the product of the common law.
- 3.108 The common law usually develops slowly and sometimes fails to keep pace with changes in society. One example is the law of sexual offences. There is a great deal of modern scholarship which suggests that parts of the common law of sexual offences were based on inaccurate views about how people do, or should, respond when a criminal offence has occurred.¹⁴⁸
- 3.109 Because the common law did not evolve, Parliaments have amended the law concerning sexual offences, aspects of the law of evidence and some rules of criminal trial procedure over the past 25 years. Some of these changes sought to set aside preconceptions about the way victims and perpetrators of sexual assaults behave and to reflect changes in community attitudes to sexual interactions.
- 3.110 The procedural reforms were designed to reduce the trauma experienced by victims of sexual offences during criminal investigation and trial. Some of these reforms dealt with the process of giving evidence,¹⁴⁹ while others imposed strict timetables on the commencement of trials.¹⁵⁰
- 3.111 These changes, which have taken place reasonably quickly, are the product of legislation that is sometimes quite dense. In some areas the common law has been completely displaced by legislation, while in others there are overlapping common law and statutory rules. This overlap can create uncertainty about the content of the law and the wording of directions which the trial judge must give the jury.
- 3.112 The issue of consent is often the central issue in a sexual offences trial. Amendments to the *Crimes Act 1958* (Vic) (Crimes Act) since 1991 have sought to introduce a 'communicative model of consent', intended to protect the autonomy of people to decide whether to participate in an act of penetration.¹⁵¹ These provisions, which have been amended several times, require trial judges to give the jury directions to guide their evaluation of the evidence concerning the complainant's consent and the accused's awareness of that consent.¹⁵² The most recent amendments introduced a new alternate state of mind for rape and similar offences of 'inadvertence to consent'.¹⁵³
- 3.113 The various amendments to the substance of the law of sexual offences have often been interpreted by appeal courts.¹⁵⁴ Trial judges must be aware of how the appeal courts have interpreted these provisions in order to direct the jury about the elements of the offences. Trial judges must also deal with the fact that changes to the substance of the criminal law do not usually apply retrospectively. For this reason, a judge may be required to give the jury different directions about what is substantially the same offence if an accused person has been charged with a number of offences extending over a lengthy period. For example, the trial judge might be required to give the jury two quite different directions about the mental element of the crime, one wholly common law and the other partially statutory, when the accused is charged with a number of counts of rape which allegedly occurred at different times.
- 3.114 The Department of Justice is currently reviewing the Crimes Act and other legislation which contains criminal offences.¹⁵⁵ In Chapter 5 we make recommendations about steps which could be taken to simplify the trial judge's task when directing the jury about the law in sexual offences trials.

142 *Dominican v R* (1992) 173 CLR 555; *Festa v R* (2001) 208 CLR 593.

143 *Ibid.*

144 *Dominican v R* (1992) 173 CLR 555, 562.

145 Heller, 'The Cognitive Psychology of Circumstantial Evidence', above n 129.

146 *R v Burchielli* [1981] VR 611.

147 *R v Akgul* [2002] VSCA 222; *R v Abbouchi*; *R v Allouche* [2008] VSCA 171.

148 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 *Current Issues in Criminal Justice* 54.

149 See eg, *Crimes (Sexual Offences) Act 2006* and *Crimes (Sexual Offences) (Further Amendment) Act 2006* inserting *Evidence Act 1958* Division 3AA, which provided new procedures for dealing with children and vulnerable witnesses in sexual offence cases.

150 Changes were also made to the *Crimes (Criminal Trials) Act 1999* and *Crimes Act 1958*, for example, by the *Justice Legislation Amendment (Sex Offences Procedure) Act 2008*, to require that juries must be empanelled in cases involving children and cognitively impaired complainants within three months of committal unless in the 'interests of justice' to extend this (see *Crimes Act 1958* ss 359A(2AA) and (2AAB)). For details of the operation of the new procedural amendments, see County Court Practice Note PNCR 2-2008.

151 Victorian Law Reform Commission, *Sexual Offences – Law and Procedure*: Discussion Paper (2001) 58. A statutory definition of consent was introduced by *Crimes Act 1958* (Vic) s 36 (inserted by the *Crimes (Rape) Act 1991* (Vic) s 3), and mandatory jury directions on consent by s 37 (inserted by the *Crimes (Rape) Act 1991* (Vic) s 3, further amended by the *Crimes (Amendment) Act 1997* (Vic) s 4.

152 Section 37 was amended by *Crimes Amendment (Rape) Act 2007* (Vic), which also inserted a new s 37AA and s 37AAA.

153 *Crimes Amendment (Rape) Act 2007* (Vic) s 5(i), which implemented *Crimes Act 1958* (Vic) s 38(2)(a)(i), (ii).

154 *R v Yusuf* (2005) 11 VR 492; *R v Ev Costa* [1996] VSC 27 (Unreported, Victorian Court of Appeal, Phillips CJ, 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.

155 Department of Justice, *Attorney-General's Justice Statement* (2004) [3.2.2].

Problems with the Law of Jury Directions

OVERLAP IN EVIDENTIARY DIRECTIONS

3.115 We have chosen to consider two issues that arise in sexual offences trials because they feature in a number of successful appeals. They are:

- Delay in complaint and, particularly, the relationship between the *Kilby/Crofts* directions required by the common law and section 61 of the *Crimes Act 1958* (Vic); and
- Propensity reasoning and, particularly, the relationship between the common law rules concerning propensity directions and sections 95, 97 and 98 of the Uniform Evidence Act.

Kilby/Crofts and section 61 *Crimes Act 1958* (Vic)

3.116 For many years, the common law reflected assumptions that women and children were inherently unreliable witnesses.¹⁵⁶ In order to protect accused persons against unfair convictions and false allegations of rape, the common law required allegations of sexual offending to be 'corroborated', or confirmed, by some evidence other than the testimony of the victim. The effect of this blanket rule was to designate all victims of sexual offences unreliable witnesses. Legislation abolished the need for corroboration in the 1980s.¹⁵⁷

3.117 While the legislative changes of the 1980s prevented judges and lawyers from telling juries that all victims of sexual offences were potentially unreliable, they did not prevent assertions that a particular victim was unreliable. An accused was still able to rely on evidence showing a lack of complaint, or delay in complaint, about a sexual offence to undermine the credibility of the complainant. Historically, an allegation of rape was viewed with suspicion and presumed to be false if a woman did not tell someone about it immediately.¹⁵⁸ In *Kilby v R* in 1973, the High Court held that as a general rule judges should instruct juries that a complainant's failure to report a sexual assault at the earliest reasonable opportunity might cast doubt on the reliability of that evidence, and that they should take this into account when evaluating the credibility of the allegations.¹⁵⁹

3.118 In 1991, the law was amended in response to research which indicated that delay in reporting is common among people who have been sexually assaulted.¹⁶⁰ Judges were required by section 61 of the *Crimes Act* to give the jury two separate directions where delay in complaining about a sexual offence was raised in the course of evidence or in the addresses of counsel. The judge was required, first, to warn the jury that delay in complaining does not necessarily indicate that the allegation is false, and secondly, to inform the jury that there may be good reasons why a victim of a sexual assault may hesitate in complaining about it.¹⁶¹

3.119 Although section 61 of the *Crimes Act* sought to override the common law rule pronounced in *Kilby*,¹⁶² the High Court subsequently held in *Crofts v The Queen*¹⁶³ that section 61 did not overcome the need for the trial judge to give the jury a warning about the effect of delay on the credibility of a complainant in some circumstances. The majority¹⁶⁴ held that the mandatory directions about delay in section 61 of the *Crimes Act* were not intended to 'sterilise' sexual offence complainants from criticism, or convert them into an 'especially trustworthy class of witnesses'.¹⁶⁵ The Court held that the intention of the legislation was to restore the balance in jury instructions by correcting what had been standard practice of giving directions based on 'supposed "human experience" and the "experience of the courts"' concerning the behaviour of persons who had been the victims of sexual assault.¹⁶⁶ They stated that 'the overriding duty of the trial judge remains to ensure that the accused secures a fair trial'.¹⁶⁷

3.120 The High Court held that Parliament would have used much clearer language had it intended to prohibit all warnings by the trial judge about the effect of delay in reporting upon the credibility of the complainant (*Kilby* warnings). The Court decided that the duty to give a warning was qualified by the legislation. In the first place, it did not arise 'where the peculiar facts of the case and the conduct of the trial do not suggest the need for a warning to restore the balance of fairness'. Secondly, when the warning was given it could not undermine the purpose of section 61 of the *Crimes Act* by suggesting that all complainants in sexual assault cases are unreliable or that delay in making a complaint about an alleged sexual offence is invariably a sign that the complainant's evidence is false.¹⁶⁸

3.121 The High Court did not require a *Kilby* warning in every case where there had been delay in complaint.¹⁶⁹ It held that the trial judge retained a discretionary power to do so despite the reform legislation:

*Delay in complaining may not 'necessarily' indicate that an allegation is false. But in the particular circumstances of a case, the delay may be so long, so inexplicable, or so unexplained, that the jury could properly take it into account in concluding that, in the particular case, the allegation was false.*¹⁷⁰

3.122 The decision in *Crofts* produced uncertainty about when a *Kilby* warning was required.¹⁷¹ Many judges chose to give a *Kilby* warning in all cases where the issue of delay was raised because of fear that failure to do so might lead to a successful appeal.¹⁷²

3.123 In our Consultation Paper we referred to several concerns caused by the High Court's decision in *Crofts*:¹⁷³

- It requires the judge to give statutory and common law directions which appear to contradict each other and may confuse jurors;
- The near mandatory nature of the requirement to give the *Kilby* direction risks undermining the purpose of the legislative provisions which was to avoid misconceptions about the behaviour of victims of sexual abuse.
- The *Kilby* warning may be misleading, or operate unfairly, if there is no evidentiary basis for suggesting a nexus between delay and fabrication of the complaint.

3.124 Following *Crofts*, Parliament amended the Crimes Act again in an apparent attempt to reduce the number of instances in which a *Kilby* warning is required. Parliament repealed the provision requiring a direction that delayed complaint 'does not necessarily' indicate the falsity of the allegation.

3.125 Section 61 of the Crimes Act now acknowledges that there may be cases where the credibility of the complainant is affected by delay in making a complaint. In order to avoid that acknowledgment being used to justify a mandatory warning that the jury should consider that the credibility of the complainant may have been affected in all cases, the legislation describes the circumstances in which a warning may be given and its content.

3.126 First, the Act requires a direction that there may be good reasons why a victim might delay or hesitate to complain. Secondly, the Act prohibits judges from telling the jury that the complainant's credibility may be affected by delay in complaint unless first satisfied there is 'sufficient evidence' to justify such a warning.¹⁷⁴ The common law powers of a trial judge to give the

156 The position was summed up by Lord Hale in the 17th century, who stated that allegations of rape were 'easily to be made and hard to be proved, and harder to be defended by the party accused, tho' never so innocent': Sir Matthew Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown* (first American edition, 1847), vol 1, 634. This view was repeated as recently as 1974 by the High Court: *Kelleher v The Queen* (1974) 131 CLR 534, 543 (Barwick CJ).

157 *Crimes (Sexual Offences) Act 1980* (Vic) inserting *Crimes Act 1958* (Vic) s 62(3).

158 This was known as the 'hue and cry' rule: *R v Osborne* (1905) 1 KB 551, 559.

159 (1973) 129 CLR 460, 465.

160 *Crimes Act 1958* (Vic) s 61(1)(b). The NSW Parliament Standing Committee on Law and Justice found that delay 'bears no relation [to] the credibility of the complainant and ... is a typical feature of child sexual assault': Standing Committee on Law and Justice, Parliament of New South Wales, *Report on Child Sexual Assault Prosecutions* (2002) xv-xvi.

161 *Crimes Act 1958* (Vic) s 61(1)(b)(i) and (ii).

162 See NSW Parliamentary Standing Committee on Law and Justice, above n 160 [4.157]-[4.160] for discussion of the *Kilby* decision and reform responses in New South Wales

163 (1996) 186 CLR 427.

164 Toohey, Gaudron, Gummow and Kirby, JJ.

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

166 *Ibid*.

167 *Ibid*.

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

169 *Ibid* 472.

170 *Crofts v The Queen* (1996) 186 CLR 427, 448.

171 In a study of 24 jury charges between 2000-02 the commission found that some judges were giving a direction in terms of *Crofts* even in cases where there was no actual delay in complaint. The direction was often giving in the context of explaining the background and rationale of the rule of recent complaint. For eg, one judge explained that: 'absence or delay in making a complaint may also be used to suggest inconsistency of conduct. Of course these are common sense propositions to which you would apply your own view of the evidence in this case': Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [7.88].

172 As recently as last year, the Court of Appeal observed that 'as a general rule a trial judge should instruct a jury that, in evaluating the evidence of a woman who claims to have been raped, they can take into account that she made no complaint at the earliest opportunity'. The court held that 'early complaint or lack of it is a matter as to which a jury generally needs instruction': *R v Vella* [2008] VSCA 28 (Buchanan JA, Vincent and Kellam JJA agreeing) (conversely, no warning was considered necessary where the complainant had later withdrawn a complaint); In *R v WEB* (2003) 7 VR 200, [28] (Charles JA, agreeing Winneke ACJ, Eames JA) the *Kilby* warning given was inadequate. Although the jury was told it could take delay into account, the judge did not inform them that delay or failure to complain may cast doubt on the reliability of the complainant's evidence. In *R v MWL* [2002] VSCA 221, the Court commented that a direction framed in terms that the experience of the law confirms that complaints are not always made immediately after sexual assaults, had the potential to withdraw from the jury any issue of credibility flowing from delay in complaint; See Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Act*, above n 2, [18.157].

173 See discussion in VLRC *Jury Directions Consultation Paper* p. 31

174 Explanatory Memorandum, Crimes (Sexual Offences) (Further Amendment) Act 2006 (Vic) 2.

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jury a warning and to comment on the evidence 'in the interests of justice' have not been disturbed,¹⁷⁵ except that the judge must not comment on the reliability of a complainant's evidence 'if there is no reason to do so in a particular proceeding'.¹⁷⁶

- 3.127 It is questionable whether these changes have achieved their intended purpose of limiting the circumstances in which a *Kilby* warning may be given.¹⁷⁷
- 3.128 The Victorian response to *Crofts* in section 61 of the Crimes Act has not been included in the Evidence Act.¹⁷⁸ Section 165B of the Uniform Evidence Act, which deals with delay in complaint, is a response to the High Court decision in *Longman*,¹⁷⁹ that dealt with the need to direct the jury about the forensic difficulties an accused person may have experienced because of delayed complaint. *Crofts*, however, dealt with the impact of delayed complaint upon the credibility of the complainant.
- 3.129 Section 165B of the Uniform Evidence Act deals only with the forensic disadvantages that the accused may have suffered in defending the prosecution because of delayed complaint. The joint law reform commissions in their report on *Uniform Evidence Law* concluded that there was no foundation for the *Crofts* warning. They suggested that the matter was more appropriately addressed in a comprehensive review of jury directions than through amendment of the uniform evidence legislation.¹⁸⁰ Consequently, the Evidence Act preserves the common law rule because it does not attempt to deal with the decision in *Crofts*.
- 3.130 The ongoing complexity associated with the amendments to section 61 of the Crimes Act demonstrates the difficulties that sometimes arise when Parliament legislates to overcome the operation of a particular common law rule. The statutory removal of the corroboration requirements in sexual offences over twenty years ago produced a series of common law responses and statutory countermeasures. The existence of two separate, but overlapping, bodies of law now creates problems for trial judges and counsel. Frequent changes to the law also make it difficult to know which legal rules govern particular cases. Further, even when the statutory and common law rules are relatively stable, there may be uncertainty about how they interact. This complexity and uncertainty inevitably increases the chances of error.
- 3.131 Of the two common law issues raised by *Longman* and *Kilby* – the effect of delay in producing forensic disadvantage and the effect of delay on the credibility of the complainant – only the first has been addressed by the Evidence Act.¹⁸¹ It is necessary to determine whether section 61 of the Crimes Act, which addresses both issues, should be retained, amended or repealed because it cannot operate consistently with section 165B of the Evidence Act.
- 3.132 Section 165B of the Evidence Act provides that when the judge is satisfied that the accused has experienced significant forensic disadvantage because of delay in prosecuting a crime, the judge 'must inform the jury' of the nature of the disadvantage and of the need to take it into account when assessing the evidence.¹⁸² The question whether an accused person has suffered a forensic disadvantage because of delay in making a complaint seems to be a matter that the judge is better placed to assess than the jury.
- 3.133 Both the Crimes Act and the Evidence Act support this approach to the issue of determining whether the accused has suffered a forensic disadvantage because of delay in making a complaint. Both Acts provide that the judge must first consider any evidence about forensic disadvantage. If the judge decides after considering the evidence that the accused has suffered some forensic disadvantage because of delay, the judge must inform the jury of the nature of the disadvantage and direct them to take it into account when considering the evidence.
- 3.134 That part of section 61 of the Crimes Act which deals with warning the jury about the credibility of the complainant because of delay takes a similar approach to assessing the relevant evidence. It provides that the judge must first be satisfied there is sufficient evidence to suggest that the complainant's credibility is by affected by the delay in complaint before warning the jury that the complainant's credibility may be affected by that delay.
- 3.135 This provision raises the issue of the extent to which the judge should be involved in giving the jury directions about the credibility of the complainant.¹⁸³ It is the role of the jury to determine the facts of the case. Central to this task is assessing the credibility of witnesses and deciding whether to accept or reject their evidence.¹⁸⁴ Juries are well suited to the task of making

assessments about the credibility of witnesses which are 'subjective and indeterminate' because they bring the 'ordinary experiences of ordinary people' to their deliberations.¹⁸⁵ In most sexual offence cases, the issue of credibility is central. If the judge is required to determine whether there is sufficient evidence to justify a direction about the complainant's credibility because of delay in complaint, that question will be decided either on evidence heard in the absence of the jury for the purpose of making a ruling, or on the basis of evidence that has been heard by the jury as well as the judge, in which case the jury may have formed their own view about the credibility of the complainant. An incorrect ruling by the trial judge on this threshold question about the sufficiency of the evidence may lead to a successful appeal.

- 3.136 The commission believes that this issue should not be the subject of any directions or warnings by the trial judge, except to correct any statements by counsel that conflict with the evidence or with the principles in legislation designed to overcome stereotypical assumptions about delay in complaint.
- 3.137 The commission recommends in Chapter 5 that the law should expressly provide that the trial judge should not warn the jury that a delay in, or absence of, complaint may reflect on the credibility of the complainant unless satisfied that it is necessary to do so in order to ensure a fair trial. Such an approach also has the following advantages:
- It better acknowledges the adversarial nature of the criminal trial process and is more consistent with the roles of judge and jury;
 - Common law rules about directions providing for admission of evidence of a 'recent complaint' for the limited purpose of bolstering a complainant's credibility will no longer apply once the *Evidence Act 2008* commences operation.¹⁸⁶ It is consistent with the simplification of the law in this area to remove corresponding requirements to give a direction about the effect on credibility where there is a lack of recent complaint;
 - It overcomes the problem of juries having to understand and apply directions about delay which appear contradictory and which may suggest to the jury that the evidence of the complainant has no probative value.

COMPLEX PROPENSITY DIRECTIONS

- 3.138 Propensity evidence is any evidence which, if accepted, discloses discreditable or disreputable conduct and reflects badly on an accused person's character.¹⁸⁷ It includes evidence which discloses the commission of offences other than those with which the accused is charged, and may include conduct that occurred before or after the offence in question.¹⁸⁸ Many

175 *Crimes Act 1958* (Vic) s 61(1F)(2)-(3).

176 *Crimes Act 1958* (Vic) s 61(3). Note the provision requiring a mandatory warning that delay does not necessarily indicate an allegation is false was also removed, on the basis that it carried the implication that 'there is a reason to suspect that late complaints may be false': Victorian Law Reform Commission, *Sexual Offences: Law and Procedure*, Discussion Paper (2001) [8.121].

177 The provision followed recommendations that *Kilby/Crofts* warnings be restricted to circumstances where there is 'credible evidence' to justify the giving of a warning, and not in the absence of evidence suggesting the complainant's credibility was affected by delay: Victorian Law Reform Commission, *Sexual Offences – Law and Procedure: Final Report* (2004) 368, 383.

178 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Act*, above n 2, [18.169]-[18.173].

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

180 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Act*, above n 2, [18.172].

181 Section 165B.

182 *Crimes Act 1958* (Vic) s 61(1A) similarly provides that the judge must 'inform the jury of the nature of the forensic disadvantage suffered by the accused' and instruct them to take that into consideration.

183 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Act*, above n 2, [18.171].

184 *Cubillo v Commonwealth* (2000) 174 ALR 97; *Flint v Lowe* (1995) 22 MVR 1; *S v M* (1984) 36 SASR 316.

185 Charles Nesson, 'The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts' (1985) 98 *Harvard Law Review* 1357, 1365, cited in Jeremy Gans, 'Rape and the Golden Thread' (D Phil Thesis, University of New South Wales, 1998) 17.

186 See the High Court's decision on the parallel provisions of the *Evidence Act 1995* (NSW) in *Papakosmas v The Queen* (1999) 196 CLR 297.

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

188 *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].

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people expressed concern about propensity directions in consultations and submissions. The appeals data reveals that propensity directions were considered in a relatively large number of appeals.¹⁸⁹

- 3.139 In order to ensure that criminal trials are concerned with direct or circumstantial evidence about particular offences, rather than with the accused's character or propensity for criminal conduct, the common law developed rules concerning the admissibility and use of evidence about the accused's character.¹⁹⁰ The common law also requires the trial judge to give the jury instructions about the way in which they can and cannot use evidence of this nature.¹⁹¹

Commonly identified dangers of propensity evidence

- 3.140 Propensity evidence has been generally inadmissible at common law in order to avoid the risk the jury will reason that because the accused has acted unlawfully or disreputably on another occasion, he or she is the 'kind of person' who is likely to have committed the offences charged.¹⁹² There is an obvious concern that the jury will overestimate the probative value of the propensity evidence and underestimate its prejudicial effect by unfairly reasoning that because the accused shows a criminal 'propensity' he or she is guilty of the crime charged.¹⁹³ The prejudice which the accused may experience because of admitting such evidence includes:

- the jury may assume that past behaviour is an accurate way to predict how the accused will behave in the future¹⁹⁴
- 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 offence¹⁹⁵
- 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 innocence¹⁹⁶
- 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.¹⁹⁷

Circumstances in which propensity evidence may be admitted

- 3.141 In spite of the risks associated with propensity evidence, it may be highly probative evidence in sexual offence cases for a number of reasons.¹⁹⁸ Such evidence is seen to have '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. Propensity evidence has been admitted for several purposes, including:

- proving intent, disproving accident, or rebutting a defence¹⁹⁹
- proving the identity of the accused²⁰⁰
- disproving an innocent association, or proving a 'sinister' one²⁰¹
- proving the existence of a 'relationship' between accused and complainant²⁰²
- 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.²⁰³

The current Victorian law of propensity

- 3.142 The current law concerning the admission and use of propensity evidence in Victoria was discussed in detail in our Consultation Paper.²⁰⁴ The purpose of this section is to briefly summarise the Victorian approach.

The admission of propensity evidence

3.143 The admission of propensity evidence is currently governed by section 398A of the Crimes Act. The evidence must be relevant to a fact in issue in the trial, and the court must consider 'that in all the circumstances it is just to admit it despite any prejudicial effect it may have' on an accused.²⁰⁵ The courts have applied common law principles when interpreting this provision,²⁰⁶ balancing the probative value of the propensity evidence against its prejudicial effect in deciding whether it is 'just' to admit it.²⁰⁷

3.144 Evidence that may properly be characterised as propensity evidence has tended to be admitted in sexual offence cases on several bases:²⁰⁸

- As evidence which shows the accused has a particular, improper 'sexual interest' or 'attraction'²⁰⁹ towards the complainant, and a willingness to act on it;²¹⁰
- As evidence that the accused has a particular relationship with another person that is relevant in the case;
- As evidence which places the alleged offence in a 'true and realistic' context;
- As 'similar fact' evidence.

189 In the period 2000 to the first half of 2008, of a total of 560 appeals from conviction, approximately 62 raised issues relating to propensity directions. The number of appeals each year varies significantly within this period. There were 8 appeals involving propensity directions in the first half of 2008.

190 *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.

191 See below [3.145].

192 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'): United Kingdom (Law Commission), *Evidence of Bad Character in Criminal Proceedings*, Cmd 5257 (2001) [6.33].

193 The difficulty of measuring or balancing these two interdependent concepts has been acknowledged: see discussion in *Pfennig v The Queen* (1995) 182 CLR 461, 512, 528 (McHugh J); *BRS v The Queen* (1997) 191 CLR 275, 322.

194 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: see Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC Discussion Paper 69, NSWLRC Discussion Paper 47, VLR Discussion Paper (2005) 72-74. And see Lloyd-Bostock's mock jury study which showed that evidence of previous convictions can have a prejudicial effect: Sally Lloyd-Bostock, 'The Effects on Juries of Hearing About the Defendant's Previous Criminal Record: A Simulation Study' [2000] *Criminal Law Review* 734, 753.

195 *Pfennig v The Queen* (1995) 182 CLR 461, 512 (McHugh J); *Perry v The Queen* (1982) 150 CLR 580, 594 (Murphy J).

196 Jurors may also be 'less reluctant to convict an accused if they are informed of [past] misconduct ... because they feel ... the gravity of their decision is lessened or that there is some basis for punishment even if they are not convinced the accused committed the crime charged. (The regret matrix)': see, Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, above n 104, 74, see also 75.

197 See CR Williams and Sandra Daraganich, 'Admissibility of Propensity Evidence in Paedophilia Cases' (2006) 11 *Deakin Law Review* 1.

198 This appears to be supported by current psychological theories of character and behaviour and recidivism data, although caution must be applied in relying on such research: David Hamer, 'Probative but still prejudicial? Rethinking exclusion of propensity evidence in sexual offence cases' (Paper presented at the Jury Research and Practice Conference, Sydney, 11 December 2002) 6-7; Redlich JA, 'Propensity Evidence: HML v The Queen [2008] HCA 16' (Paper presented at the Criminal Bar Association, Melbourne, 23 May 2008).

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

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

201 *Harriman v The Queen* (1989) 167 CLR 590.

202 *Gipp v The Queen* (1998) 194 CLR 106. Doubts have been expressed about the use of descriptions such as 'relationship evidence': *HML v The Queen* (2008) 235 CLR 334, 383, 387-9 (Hayne J).

203 *BRS v The Queen* (1997) 191 CLR 275, 283-4 (Brennan CJ); *R v Buckley* (2004) 10 VR 215.

204 VLR, Directions to Juries, Consultation Paper, Chapter 3.

205 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, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, above n 2, 311-312.

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

207 *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 '[t]he legitimate interests of the Crown and of the community': Jonathan Clough, 'Section 398A of the Crimes Act 1958 (Vic): Pfennig Resurrected?' (2000) 24 *Criminal Law Journal* 8, 12-13, citing *Pfennig v The Queen* (1995) 182 CLR 461, 507 (Toohey J), 529 (McHugh J).

208 *R v Best* [1998] 4 VR 603, 606 (Callaway JA, Phillips CJ and Buchanan JA agreeing); *R v Tektonopoulos* (1999) 106 A Crim R 111, 116-8 (Winneke P). This discussion does not deal with evidence admitted as part of the 'res gestae': see *R v Mark* [2006] VSCA 251, [62] (Maxwell P); contrast with *R v FJB* [1999] 2 VR 425, 428-9 (Charles JA, Winneke P and Buchanan JA agreeing).

209 This was previously called evidence of 'guilty passion', however, this description has been held to be inappropriate to put before the jury: *R v Young* [1998] 1 VR 402; *R v BJC* (2005) 13 VR 407, 418 (Byrne AJA).

210 *R v BJC* (2005) 13 VR 407, 418 (Byrne AJA); Redlich JA, above n 198.

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- 3.145 The precise classification of propensity evidence which is not similar fact evidence is open to debate. The boundaries between the various categories are not clear. For example, it is not clear whether evidence of 'sexual interest' is a particular species of 'relationship evidence' or whether it is a discretely different type of propensity evidence. Both are forms of circumstantial evidence which are used to determine whether the charged conduct is likely to have occurred based on previous associations between the accused and another person, usually the complainant.²¹¹
- 3.146 General categories and shorthand terms such as 'relationship evidence' should be used with caution. The approach preferred in some appellate decisions has been to describe the evidence specifically according to the basis upon which it was admitted.²¹² We discuss the uses of such evidence in more detail below. The confusing state of the law in this area is a clear indication of the difficulties faced by judges, counsel and jurors in grappling with such evidence.

The current propensity warning

- 3.147 When propensity evidence is admitted, the common law requires the judge to direct the jury about how that evidence may or may not be used. In broad terms, the propensity warning has three components:²¹³
- A 'limited use' direction instructing the jury how they can lawfully use the 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.
 - A 'propensity warning' instructing the jury that if they are satisfied the accused has engaged in acts or conduct on other occasions (where those acts disclose unlawful or disreputable conduct) they must *not* reason therefore that the accused is the kind of person likely to have committed the charged acts.²¹⁴ It is not necessary that these specific words be used, provided the warning clearly explains the prohibited reasoning process.²¹⁵
 - A warning clearly instructing the jury they must convict the accused only on the evidence of the offence charged and must not substitute the evidence of propensity for evidence of the offending itself. This includes directing the jury that where they are only satisfied that some other conduct alleged has occurred, they cannot convict an accused unless satisfied beyond reasonable doubt that the facts constituting a charged offence occurred.²¹⁶

Permissible uses of propensity evidence

Evidence of improper 'sexual interest'

- 3.148 Evidence of other sexualised conduct, outside of the charged acts, may be used to show that the accused has a particular sexual attraction or interest in the complainant and has previously acted on it. The jury may reason that this makes it more likely that the accused acted in response to this attraction on the occasions charged.²¹⁷ In this way, the jury can use the evidence to support an inference that the accused is guilty through a process of 'probability reasoning'.²¹⁸ 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. This type of evidence often arises in cases where a child subjected to ongoing sexual abuse, or 'grooming' behaviour, finds it difficult to differentiate separate incidents.²¹⁹

Evidence of a relevant relationship

- 3.149 Evidence in sexual offence cases of the relationship between the accused and another person, usually the complainant, is often referred to as 'relationship evidence'. Relationship evidence need not be sexual in nature and is not confined to sexual offence cases.²²⁰ What is important is that the nature of the relationship says something about the probability of the crime charged occurring. For example, evidence of a violent relationship may be relevant in establishing an accused's intent or motive, or used to disprove a defence of accident or mistake by demonstrating that the accused's story lacks credibility.²²¹ Evidence of a harmonious relationship can demonstrate that the complainant's allegations lack credibility or are improbable.²²²

3.150 In sexual offence cases, evidence of the relationship between an accused and a complainant may be relevant because it shows the accused has a sexualised interest in the complainant. However, where the relevant relationship is a sexual one, the jury will usually require a direction about use of the relationship evidence as evidence of a sexual interest or attraction. For example, in *R v EF*,²²³ the trial judge admitted the child complainant's evidence that the accused regularly watched her in the shower on the basis that it showed the existence of a sexual relationship, making the complainant's account more believable and therefore probable. The Court of Appeal, however, doubted whether this was a 'wholly apt description of its probative value', and observed that the judge was on safer ground in also characterising the evidence as showing a 'guilty passion' of the accused toward the complainant. In sexual offence cases, 'sexual interest' and relationship evidence may overlap.

Context / background evidence

- 3.151 Context or background evidence is admitted even where it reveals some sort of unlawful or disreputable conduct, because if it were not admitted the alleged offending or some aspect of the evidence might seem implausible or incoherent. The evidence may help the jury 'assess and evaluate the other evidence in the case in a real and contextual setting'.²²⁴ This context or background information must be relevant to a fact in issue. Context evidence may be relevant in both sexual and non-sexual offence cases. In *McKay v Western Australia* for example, evidence was admitted of the accused's 'drug dealing' with the victim as it explained the motivation behind the attack on the victim.²²⁵
- 3.152 In sexual offence cases, context evidence may be relevant to the jury's assessment of the complainant's, or the accused's, conduct or state of mind, or explain allegations which might otherwise seem to have occurred 'out of the blue'. For example, the evidence may explain conduct by the complainant that is otherwise surprising or unlikely by showing a pattern of behaviour that explains an absence of complaint or resistance by a complainant.²²⁶
- 3.153 In *Sadler*,²²⁷ the jury was instructed that a history of verbal and violent abuse (in addition to other sexual conduct) could be used as context evidence. Only some of these acts by the accused were the subject of charges. Evidence of other 'uncharged acts' was admitted on the basis that it showed why the complainant was too fearful to leave the accused, who was possessive and controlling, in a case where consent to sexual conduct was in issue. The Court of Appeal accepted that the purpose of admitting the evidence was correctly confined to making the complainant's account of the charged acts intelligible, and to showing that the complainant was not describing isolated events.²²⁸
- 3.154 Such evidence may overlap with relationship evidence. Evidence of previous violent or sexual abuse may be part of the background to subsequent abuse, but it could also be viewed as evidence of the relationship between the parties. In either case, the function of the evidence is the same – to make the allegation on the present occasion more plausible – regardless of how the evidence is categorised.

Impermissible use of non-similar fact propensity evidence

- 3.155 What is impermissible, however, is the use of evidence, whether characterised as evidence of sexual interest, relationship or 'context', to decide that the accused is the type of person who is likely to commit offences of the kind charged. This impermissible use is known as *general propensity* reasoning. 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 a necessary and practical means of avoiding the risk of a miscarriage of justice.²²⁹ Consequently, when non-similar fact propensity evidence is admitted, the trial judge must direct the jury that they may use the evidence only for the limited purpose for which it is admitted and not to reason that the accused is guilty because he or she is the kind of person likely to have committed the offence charged.²³⁰

- 211 *R v Mills* (1985) 16 A Crim R 366.
- 212 See, eg, *R v DD* [2007] VSCA 317 (Neave JA) and cases cited at [64]-[66]; *Tully v R* (2006) 230 CLR 234, 276-77 (Callinan J); *HML v The Queen* (2008) 235 CLR 334, 388-9 (Hayne J).
- 213 *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, 415-21 (Byrne AJA).
- 214 *R v Grech* [1997] 2 VR 609, 614 (Callaway JA).
- 215 *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.
- 216 *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.
- 217 *R v BJC* (2005) 13 VR 407, 418 (Byrne AJA); Redlich JA, above n 198.
- 218 In Victoria, see: *R v BJC* (2005) 13 VR 407; *R v Pau* [2007] VSCA 239.
- 219 *R v BJC* (2005) 13 VR 407, 418 (Byrne AJA). Redlich JA, above n 198.
- 220 In *R v Sadler* [2008] VSCA 218 evidence of 'uncharged acts' involving the accused and complainant consisted of both sexual and non-sexual violent acts.
- 221 *Wilson v The Queen* (1970) 123 CLR 334, 337 (Barwick CJ); *HML v The Queen* (2008) 235 CLR 334, 479-80 (Crennan J).
- 222 *R v Anderson* (2000) 1 VR 1, [30].
- 223 [2008] VSCA 213.
- 224 *R v Vonarx* [1999] 3 VR 618.
- 225 [2007] WASCA 196, [52] (Miller JA, Buss JA and Le Miere AJA agreeing).
- 226 *R v Josifoski* [1997] 2 VR 68; *Gipp v R* (1998) 194 CLR 106, 113 (Gaudron J), 130-1 (McHugh and Hayne JJ dissenting); *KRM v R* (2001) 206 CLR 221, 230 (McHugh J).
- 227 [2008] VSCA 218.
- 228 *Ibid* [68]-[69].
- 229 (2006) 159 A Crim R 560, 583-5.
- 230 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.

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Similar fact evidence

- 3.156 'Similar fact evidence' has been 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.²³¹ This evidence may reveal facts which are 'strikingly similar' or share some unusual common feature, or some 'underlying unity',²³² system or pattern, with the conduct or events which are the subject of the charges.²³³ 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.
- 3.157 Similar fact evidence may be used by the jury to rely on the improbability of two or more independent events occurring in any way other than the prosecution case suggests they occurred. This may make it more probable that a fact in issue exists, or does not exist, from which the jury can infer that the accused is guilty of the acts charged.²³⁴ The jury must be given a limited use direction that the evidence can only be used to infer guilt through this process of 'probability reasoning'. The judge should usually instruct the jury about what inferences can be drawn using probability reasoning, which will depend on the basis upon which the evidence was admitted.
- 3.158 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.²³⁵

The problem with propensity directions

- 3.159 The major problem with propensity directions is that they are likely to be ineffective. Research has shown that jurors are significantly more likely to convict an accused in a trial where evidence of previous misconduct of a similar kind is admitted, whether or not a propensity direction is given.²³⁶
- 3.160 Propensity instructions may be ineffective for a number of reasons. Jurors may not be able to comprehend a warning that is confusing or conceptually complex. For example, the difference between specific propensity and general propensity is not always easy to explain or apply in practice. Another possibility supported by research is that jurors do understand the substance of the warning, but choose to ignore it because it tells them not to reason in a way which they consider logical.
- 3.161 Empirical and anecdotal evidence about the efficacy of directions limiting the use of propensity evidence has been considered in detail in the United Kingdom and New Zealand, where the law concerning the admissibility of such evidence has changed significantly.²³⁷ These jurisdictions have adopted approaches which accept that the jury may use evidence of the accused's other conduct for propensity purposes but they require the judge to explain the unfairness of propensity reasoning instead of giving complex 'limited use' directions.

A new scheme for propensity evidence: the *Evidence Act 2008*

- 3.162 The *Evidence Act 2008* provides a new statutory scheme for dealing with evidence of propensity. Section 398A of the Crimes Act will be replaced by provisions relating to 'tendency evidence' and 'coincidence evidence'. Section 97 of the Uniform Evidence Act simplifies the rules concerning the admissibility of propensity evidence by permitting evidence to prove a person has (or had) a tendency to act in a particular way, or to have a particular state of mind. In order to be admitted, however, such propensity evidence must have 'significant probative value' which substantially outweighs any prejudicial effect the evidence may have on the accused.²³⁸

3.163 These provisions have been in force in NSW for more than a decade. NSW decisions require the judge to direct the jury about the way in which evidence admitted under section 97 may be used.²³⁹ For example, the jury may find that evidence of other sexual conduct by the accused establishes a tendency of the accused to commit offences of the type charged against the complainant, thus making it more likely that the offences charged were in fact committed.²⁴⁰ Since the High Court's decision in *HML*, it appears that a NSW jury must be instructed that evidence of uncharged sexual acts must be proved beyond reasonable doubt if it is to be used for tendency reasoning.²⁴¹

3.164 Section 98 of the Uniform Evidence Act deals with 'similar fact' or 'coincidence' evidence. It allows evidence to be admitted which shows that two or more related events occurred in order to prove that a person did an act or had a particular state of mind, because of the improbability that these events were coincidental. Before such 'coincidence evidence' can be admitted it must satisfy the same admissibility tests as tendency evidence. Reasonable notice must be given of an intention to adduce tendency or coincidence evidence.²⁴²

Limited use directions under s 95

3.165 Section 95 of the Uniform Evidence Act provides that if evidence is not admitted under either of these provisions, it must not be used to establish tendency or coincidence even though it may have been admitted for some other purpose.²⁴³ Thus, the uniform evidence legislation continues to place limits on the way juries may use propensity evidence, and NSW decisions have required judges to give the jury common law warnings about engaging in impermissible propensity reasoning when section 95 applies.²⁴⁴ For example, if evidence admitted for other purposes reveals a criminal propensity of the accused, the judge must direct the jury that they can use the evidence only for that other purpose and cannot rely on it to prove criminal propensity.²⁴⁵

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

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

233 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 JA dissenting); *R v Josifoski* [1997] 2 VR 68, 83-4.

234 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.

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

236 For a discussion of this research see: New Zealand Law Commission, *Disclosure to Court of Defendants' Previous Convictions, Similar Offending, and Bad Character*, Report 103 (2008) 109-12, which concludes that considerable literature almost uniformly doubts whether jurors will comprehend and follow the direction to use prior convictions for the limited purpose of assessing the accused's credibility and not as proof of guilt. The NZLC refers to Professor Rupert Cross, who described the credibility/propensity distinction as 'enforced gibberish': 'The Problem of an Accused with a Record' (1969) 6 *Sydney Law Review* 173, 183 and American studies, such as Roselle L Wissler and Michael J Saks, 'On the inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt' (1985) 9 *Law and Human Behavior* 37, 47, where the authors stated:

On the basis of the available data, we conclude that the presentation of the defendant's criminal record does not affect the defendant's credibility, but does increase the likelihood of conviction, and that the judge's limiting instructions do not appear to correct that error. People's decision processes do not employ the prior-conviction evidence in the way the law wishes them to use it.

Also see Sally Lloyd-Bostock's mock jury study which showed that evidence of previous convictions can have a prejudicial effect. The results showed that in particular previous convictions involving sexual assaults against children produced the highest rate of guilty verdicts: Lloyd-Bostock, above n 194, 753.

237 See eg, *ibid.*

238 *Evidence Act 2008* (Vic) s 101.

239 See eg, *R v MM* (2000) 112 A Crim R 519; *Rodden v The Queen* [2008] NSWCCA 53, [47].

240 *R v AH* (1997) 42 NSWLR 702, 708-9 (Ireland J).

241 *DJV v R* [2008] NSWCCA 272.

242 *Evidence Act 2008* (Vic) ss 97(1)(a), 98(1)(b).

243 *Evidence Act 2008* (Vic) s 95 – an example is where such evidence is admitted to rebut evidence adduced to prove the good character of an accused (ss 94, 110).

244 *R v ATM* [2000] NSWCCA 475, [75] citing *R v Beserick* (1993) 30 NSWLR 510, 516.

245 *BRS v The Queen* (1997) 191 CLR 275.

Problems with the Law of Jury Directions

Relationship or context evidence outside the tendency/coincidence provisions

- 3.166 In some cases the prosecution may argue that the purpose of tendering evidence of other sexual conduct is limited to establishing the relationship between accused and complainant, or the context of the offending, and suggest that the jury should be given a warning that the evidence must not be used for any tendency or coincidence purpose. In some NSW cases evidence of other sexual conduct has been admitted outside of the tendency/coincidence provisions for these other purposes. In those cases the courts have required the jury to be given directions similar to those in relation to context evidence in Victoria. They must be told that:
- The evidence is confined to making the circumstances of the specific offences charged more intelligible or giving context to the charges; and
 - It cannot be used to establish the accused's tendency to commit offences of the type charged and, therefore cannot be used as an element in the chain of proof of the offences charged (propensity warning).²⁴⁶
- 3.167 Regardless of whether the evidence of other misconduct is admitted for a tendency/coincidence purpose, or for some other reason, the jury must be told that they cannot use evidence of other acts in substitution for proof of the acts charged, and they must not reason that merely because the accused committed one or more of the other acts, the accused committed the acts charged.²⁴⁷

The interaction of the *Evidence Act 2008* (Vic) and the common law

- 3.168 This discussion reveals the difficulties posed for judges by overlapping statutory and common law rules when directing the jury. The limited operation of the relevant provisions in the Evidence Act means that judges are still required to give the jury common law propensity directions.
- 3.169 The operation of section 97 of the Uniform Evidence Act is diluted by using section 95 to admit evidence of past discreditable conduct as 'context' or 'relationship' evidence, provided such evidence is accompanied by a limited use direction. As it is likely that such directions are ineffective, the effect of admitting 'context' evidence under section 95 may be no different to admitting tendency evidence under section 97. In the *Uniform Evidence Law* report, the joint commissions did consider requiring all evidence with a potential to give rise to propensity reasoning to be admitted under section 97 the Evidence Act, but rejected that approach on the basis that limited use directions could reduce the prejudice.²⁴⁸ It is open to question, however, whether jury directions can reduce the risk of prejudice arising from evidence giving rise to the risk of propensity reasoning.
- 3.170 The overall impact of the Uniform Evidence Act in the area of propensity evidence may be to add another layer of complexity to an already difficult area. While section 97 does clarify the use that may be made of certain kinds of propensity evidence, section 95 effectively preserves the most problematic aspects of the common law approach to propensity evidence and maintains the existence of an exceptionally complex 'limited use' jury direction.
- 3.171 In Chapter 5, we suggest that this issue be examined further when jury directions legislation is developed. We believe that there is considerable merit in the propensity warning advocated by Professor Thomas Leach which acknowledges the relevance of propensity evidence but warns against its unfair use.²⁴⁹

246 *R v Qualtieri* [2006] NSWCCA 95, [80]

247 *R v Lumden* [2003] NSWCCA 83, [54]; *R v Lewis* [2003] NSWCCA 180, [45].

248 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, above n 2, 390

249 Thomas Leach, "Propensity" Evidence and FRE 404: A Proposed Amended Rule with an Accompanying "Plain English" Jury Instruction '(2001) 68 *Tennessee Law Review* 825; 'How do Jurors React to "Propensity" Evidence? – A Report on a Survey' (2004) 27 *American Journal of Trial Advocacy* 559.



Chapter 4

A Legislative Response

CONTENTS

- Introduction
- The need for comprehensive legislation
- Interaction with the Charter of Human Rights and Responsibilities
- Interaction with the Evidence Act 2008
- Powers of appeal

INTRODUCTION

- 4.1 In this chapter, we discuss the need for a comprehensive legislative response to the problems identified in Chapter 3. The chapter contains an overview of the jury directions legislation proposed by the commission. We consider the framework of the legislation, its key principles and means by which it may be progressively introduced. We also examine how our reform proposals interact with existing legislation, in particular the *Charter of Human Rights and Responsibilities Act 2006* (Vic), the *Evidence Act 2008* (Vic) and the *Criminal Procedure Act 2009* (Vic).

THE NEED FOR COMPREHENSIVE LEGISLATION

- 4.2 The commission believes that comprehensive jury direction legislation is the best means of responding to the two major problems identified in Chapter 3: the inability of the common law to produce a workable body of law dealing with jury directions, and the complexity caused by the piecemeal introduction of statutory jury directions, particularly in the area of sexual offences.
- 4.3 When directing a jury, trial judges must apply legal rules drawn from the common law, statutes and decisions of the courts concerning the meaning of legislative provisions. That body of law is poorly organised, making it difficult to determine whether a direction is required in particular circumstances. The lack of any organising framework also means that it is difficult to rely upon first principles when seeking to determine the law. In addition, the content of the law of jury directions is sometimes exceedingly complex, which makes it difficult to apply.
- 4.4 The current state of the law is conducive of error. Trial judges often face problems when determining whether a particular direction is required and when devising the content of a direction. It is in no-one's interests for a trial to miscarry because an error was made in the directions which the judge is required by law to give the jury. A central aim of the criminal justice system must be fair trials conducted according to law which produce outcomes that are just and final.
- 4.5 Juries are an integral part of the criminal justice system recognised by the Australian Constitution.¹ Clear and lucid jury directions are an essential component of jury trials because jurors are lay people who come to the task of determining guilt or innocence with no pre-existing knowledge of the law or experience in evaluating evidence. The criminal justice system proceeds on the assumption that juries understand and follow the directions given to them by the trial judge. As McHugh J said in *Gilbert*:

The criminal trial on indictment proceeds on the assumption that jurors are true to their oath, that, in the quaint words of the ancient oath, they hearken to the evidence, and that they obey the trial judge's directions. On the assumption, which I regard as fundamental to the criminal jury trial, the common law countries have staked a great deal. If it was rejected or disregarded, no one — accused, trial judge or member of the public — could have any confidence in any verdict of a criminal jury or in the criminal justice system whenever it involves a jury trial. Put bluntly, unless we act on the assumption that criminal juries act on the evidence and in accordance with the directions of the trial judge, there is no point in having criminal jury trials.²

- 4.6 The current complexity of the law of jury directions means that it is not easy to make the assumption declared essential by McHugh J that juries always act in accordance with the directions of trial judges. Any on-going lack of confidence in the operation of jury trials would imperil the entire criminal justice system.

WHY IS THE LAW IN THIS STATE?

4.7 While there are many reasons why the law of jury directions has reached the stage where it is unnecessarily complex, three major reasons stand out:

1. The law of jury directions, like any body of common law rules, is the product of unsystematic judicial development. As discussed in Chapter 3 over time the common law has devised a number of highly particularised warnings drawn from the facts of those cases that come before appellate courts. The incremental development of the law in this way has produced a body of case law that is, in some areas, overly large and productive of technicality.
2. The common law has not yet developed any clear framework for the law of jury directions.

The law of jury directions flows from the common law obligation of courts to ensure that a person charged with a criminal offence has a fair trial. This is an important principle of generality that has defied attempts at organisation to assist with its practical application by trial judges.

3. The body of common law concerning a fair trial is forever evolving and is incapable of precise description.

In the absence of useful organising principles, trial judges must retain an encyclopaedic knowledge of the categories or circumstances in which the common law stipulates that a direction is required. As Spigelman CJ points out:

*There is no fixed catalogue of circumstances in which warnings are required... It is not possible to be exhaustive about the circumstances in which a direction or warning may be required in order to ensure a fair trial*³

The need for a direction, as well as its content, is determined by one overarching principle identified by Brennan J in *Bromley v The Queen*:

'[t]he possibility of a miscarriage of justice is both the occasion for the giving of a warning and the determinant of its content'.⁴

4.8 In some areas the law of jury directions has become even more complex because parliament has legislated to overcome shortcomings in the common law. At times, the courts have responded to legislative intervention by devising new and slightly different common law rules. It is often difficult for judges to identify and apply the legal rules that emerge from a body of entwined legislation and case law.⁵

4.9 While clear common law principles may emerge over time to guide the trial courts in the application of the law, there are no indications that this is likely to happen in the foreseeable future. Intermediate appellate courts are unable⁶ to reconsider the basic approach to particular problems and the High Court cannot develop common law rules until an appropriate case arises.⁷ At times individual High Court justices have sought to refine particular common law rules, often adding further complexity in the process.⁸

WHY A LEGISLATIVE RESPONSE?

4.10 Jury directions are a central part of any criminal trial. For this reason, the relevant law must be clear and capable of straightforward application to the facts of any given case. As the common law has been unable to achieve this goal, comprehensive legislation is necessary.

4.11 Useful parallels may be drawn with the law of evidence which has been recently reformed in Victoria and many other Australian jurisdictions.⁹ That body of law is primarily concerned with the admissibility of evidence, whereas the law of jury directions is concerned, in part, with the use of evidence. Traditionally, the law of evidence was drawn from the common law, augmented by statute and judicial decisions concerning the meaning of particular legislative provisions.

- 1 *Australian Constitution* s 80.
- 2 *Gilbert v The Queen* (2000) 201 CLR 414, 425
- 3 J Spigelman, 'The Truth Can Cost Too Much: The Principle of a Fair Trial' (2004) 78 *Australian Law Journal* 29, 41.
- 4 (1986) 161 CLR 315, 325.
- 5 An example has been the complex overlap of common law and statutory obligations in relation to directions in the area of sexual offences, discussed in chapter 3.
- 6 In *R v Chang* (2003) 7 VR 236, 238, Ormiston JA noted that '[a]n intermediate Court of Appeal (and trial judges) can do little else than to attempt to apply Edwards, as it has subsequently been interpreted in cases such as *Zoneff v R*.'
- 7 Since the initial decision of *Edwards v The Queen* (1993) 178 CLR 193, the High Court has considered the question of consciousness of guilt directions on only seven occasions, mostly only in passing. By contrast, the Victorian Court of Appeal has dealt with the issue in 84 cases since Edwards. In late 2008, the High Court refused special leave in the case of *Dickinson v R* [2008] HCATrans 203, which raised the question of the interaction between lesser included offences and consciousness of guilt. While acknowledging the case raised 'some questions of principle suitable for consideration by this Court', the High Court stated that *Dickinson* was not an appropriate vehicle for consideration of those questions and warned of the dangers 'in overrefining the requirements for judicial directions on issues such as consciousness of guilt.'
- 8 See, eg, *Dhanhoa v R* (2003) 217 CLR 1 where the High Court, in the words of Ormiston JA in *Chang* (2003) 7 VR 236, 238, considered the law of consciousness of guilt 'briefly...but in ways which evidenced three somewhat different approaches to the issue but without giving any new assistance of trial judges and lawyers.' See also *HML v R* (2008) 235 CLR 334 in which all seven High Court justices delivered individual judgments concerning the way in which evidence of 'uncharged acts' may be used (although Gummow J's judgment was only a concurrence). As a result, *HML* lacks a clear *ratio decidendi* as demonstrated by the Victorian Court of Appeal's discussion in *R v Sadler* [2008] VSCA 198, [59] – [67].
- 9 See *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW); *Evidence Act 2001* (Tas); *Evidence Act 2004* (Norfolk Island).

- 4.12 Concerns about the state of the law of evidence led the Victorian Parliament to adopt the Uniform Evidence Act in 2008.¹⁰ In his Second Reading Speech for the Evidence Bill 2008, the Attorney-General Rob Hulls said:

*The laws of evidence lie at the heart of the conduct of both criminal and civil court proceedings. Victoria has laboured under outdated and complex evidence laws which are poorly organised and difficult to locate and follow.*¹¹

- 4.13 Similar comments could be made about the law of jury directions. Legislation has the capacity to bring order, clarity and greater simplicity to this body of law. The Victorian Parliament sought the same ends when it passed the Uniform Evidence Act. The Attorney-General stated in his Second Reading speech:

*In reframing the law of evidence in Victoria, the bill imposes organisation on a miscellaneous collection of rules that have been developed on a case by case basis by the courts*¹²

- 4.14 Legislation also has the capacity to modernise this area of law by promoting contemporary ways of communicating with juries and by encouraging changes to practices that have been the source of complexity and delay.¹³

- 4.15 Legislation is far more easily refined and improved than the common law because it is not necessary to wait for an appropriate case to make its way to the High Court before the law can be changed. Prior to her appointment to the High Court, Justice Virginia Bell commented on the need for change in the way juries are directed and the means by which change might be achieved:

*Many of us who are engaged in the business of directing juries may feel, as I do, that we have let the law get into a state where we give excessive warnings to juries, and excessive judicial advice about how they should approach the task in the light of the peculiar experience of the court about these matters. I would like to see some change in that, but if that change comes then it is change that must come from the High Court, or as the result of legislative change.*¹⁴

- 4.16 Since the 1990s, the Victorian Parliament has engaged in some reform of the law of jury directions, particularly in the area of sexual offences. While these reforms have dealt with important matters of principle, some of them have tended to make sexual offence trials more difficult to conduct because of the complex directions which juries must be given.

Submissions about legislation or a code

- 4.17 In the Consultation Paper, the commission suggested that the law of jury directions be set out in one piece of legislation that could operate as a code.¹⁵ Submissions in response to the proposal about a code were generally negative. It appears that some respondents assumed that the proposed legislation would contain the detailed language of every direction that might be required in a criminal trial. We intended no such scheme.

- 4.18 The main point raised in opposition to the codification proposal was concern about flexibility. For example, Stephen Odgers SC wrote:

*I oppose [the proposal to codify jury directions]. Almost all warnings and directions currently required of trial judges have been developed by the courts. The involvement of the legislature has, in general, been reactive. The courts are confronted by the situations that have led to a recognition that some kind of warning or direction is required. New cases throw up new issues. The law in this area is in a constant state of change, not just because of legislative intervention but also because it is impossible to predict all the circumstances in which the need for a warning or direction emerges. Equally, over time, it becomes apparent that a warning or direction that has been regarded as necessary becomes less appropriate. The courts must be allowed to develop the law in this area subject, of course, to legislative action designed to modify that development.*¹⁶

4.19 Similarly, the Criminal Bar Association submitted that:

... it is not possible to provide what has been conveniently described as a “one-stop shop” for the giving of directions, and the content that they may contain. An important part of the need to give directions, and what is contained within those directions, is governed by the requirement for such degree of flexibility as is required by the individual circumstances of any one case. We submit that it is impossible to predict what directions may need to be given, and what should be contained within them, and thus to retain the required degree of flexibility. Further, as experiences with Parliament have shown in the past, once legislation or codification is in place, it takes much effort and expense to change what has been made into the force of law. By taking the steps proposed, the power of appellate courts to intervene and interpret is severely limited.

4.20 The Office of Public Prosecutions (OPP) submitted:

The OPP does not favour the creation of a code. Detailed legislation setting out all situations when a judge must direct a jury and detailing what the judge must say would potentially inhibit a trial judge’s ability to analyse the evidence and make a judgment as to what is appropriate in the circumstances of a particular case.¹⁷

4.21 The OPP said that the risks of excluding the common law were:

lack of flexibility and guidance, particularly in those ‘unforeseen cases.’ A code could not deal with ‘unforeseen cases’ therefore the only fallback is the common law.¹⁸

THE NEED FOR COMPREHENSIVE INTERVENTION

The commission’s view

- 4.22 The commission believes that parliament should deal with the law of jury directions in a comprehensive way by ousting the operation of common law rules and replacing them with legislation. While the statute should become the sole source of the law of jury directions, it need not be characterised as ‘a code’ because of the difficulties associated with the use of that term.¹⁹ As the joint law reform commissions observed in the Uniform Evidence Law report, ‘the jurisprudence regarding legal codes and codification reveals a complexity not easily amenable to such an attempt’.²⁰
- 4.23 The legislation should be the sole source of the law concerning jury directions for otherwise judges will be forced to contend with a complex patchwork of statutory and common law rules. However, the legislation should permit the courts to participate in the development of a new body of law. For example, the legislation should allow the courts to develop jury directions in circumstances not covered by the statute. When taking this step the courts should be guided by general principles set out in the legislation.
- 4.24 The commission proposes legislation that contains:
- general principles to assist trial judges in determining when a direction must be given
 - guidance about the minimum content of all common directions
 - progressive introduction of provisions which contain the minimum content of particular directions, commencing with directions known to cause problems
 - abrogation of any common law rules concerning a particular direction once it is dealt with in the legislation
 - a framework which permits trial and appellate courts to participate in the development of a new body of law concerning jury directions that is governed by principles set out in the legislation.
- 4.25 Because of the size of the task, it may not be possible to develop a statute which immediately governs all jury directions. The commission recommends that legislation be progressively introduced to deal with particular directions and that relevant common law rules should continue to apply until replaced by legislation.

10 The term Uniform Evidence Act refers to the following legislation which is largely the same: *Evidence Act 1995* (Cth), *Evidence Act 1995* (NSW), and *Evidence Act 2008* (Vic). While there are some variations between the statutes, the same section numbering and wording is generally used. Both the *Evidence Act 2001* (Tas) and the *Evidence Act 2004* (Norfolk Island) are similar.

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

12 *Ibid* 2633.

13 See eg the discussion in Chapter 6 concerning the proposed Jury Guide.

14 The Hon Justice Virginia Bell, ‘Communication with juries’ (Speech delivered at the National Judicial College of Australia Conference, Museum of Sydney, 10 November 2007) <<http://njca.anu.edu.au/Professional%20Development/programs%20by%20year/2007/Communic%20and%20the%20courts%20NOV/papers/Virginia%20Bell%20transcript.pdf>> at 29 April 2009.

15 Victorian Law Reform Commission, *Jury Directions Consultation Paper* p. 94-95.

16 Submission 3 (Stephen Odgers SC) 6-7.

17 Submission 17 (Office of Public Prosecutions) 4.

18 *Ibid*.

19 Pearce and Geddes, *Statutory Interpretation in Australia* (6th ed, 2006) 17 – 18, 272 – 277.

20 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Act*, ALRC Report 102, NSWLRC Report 112, VLRC Final Report (2005) 52.

A Legislative Response



- 4.26 As it is desirable that the law of jury directions be contained in a single statute, some of the provisions in the *Evidence Act 2008* (Vic) (Evidence Act) that deal with this topic should be transferred to the new jury directions legislation in due course. One particular provision, section 165(5), which permits the on-going operation of all common law rules, should be repealed. Because it is not possible to legislate for every circumstance in which a jury direction may be needed in order to ensure a fair trial, the courts should be permitted to develop directions in accordance with general principles set out in the legislation for use in unforeseen circumstances.

RECOMMENDATIONS:

1. The law concerning jury directions in criminal trials should be located in a single statute.
2. The legislation should be introduced over time and replace the common law, and it should contain revised versions of all existing Victorian statutory provisions (including relevant Evidence Act (2008) provisions) concerning directions.
3. Section 165(5) of the Evidence Act, which saves the operation of the common law, should be repealed.
4. The legislation should permit development of a body of law by the courts in accordance with general principles set out in the statute when a particular direction that is necessary for a fair trial, or is otherwise appropriate, is not expressly dealt with by the legislation.

GENERAL PRINCIPLES

- 4.27 Many current jury directions contain dense and complex language which may sometimes be unintelligible to lay persons. Juries are often given abstract instructions about legal principles that are not integrated with the facts of a case. Some trial judges give juries directions that may be overly long out of concern that a detailed direction is less likely to result in a successful appeal. The commission believes that new legislation should include general principles which encourage modern means of communicating with jurors. Directions should be clear, simple, brief, comprehensible and tailored to the circumstances of the particular case.
- 4.28 The legislation should direct trial judges to deliver jury directions that comply with these general principles. In addition, any new directions developed by the courts to deal with unforeseen circumstances should comply with these general principles.

RECOMMENDATION:

5. The legislation should contain general principles which guide the content of all directions. All directions should be:
 - clear
 - simple
 - brief
 - comprehensible
 - tailored to the circumstances of the particular case.

DETERMINING WHEN JURY DIRECTIONS ARE REQUIRED

- 4.29 At common law, a trial judge must give the jury all of the directions that are necessary in the circumstances of a case to avoid 'a perceptible risk of [a] miscarriage of justice'.²¹ Chief Justice Spigelman observes that '[t]his is a clear statement of the principle of a fair trial'.²² The commission supports this principle and believes that new jury directions legislation should clearly state that the trial judge has an obligation to give the jury any direction that is necessary to ensure a fair trial.
- 4.30 Because the body of law concerning a fair trial is continually evolving, however, the commission proposes that the legislation should provide the trial judge with clear guidance, wherever possible, about the circumstances in which a direction may be necessary and about the content of the direction. The legislation should clearly indicate those directions that are mandatory and those which are discretionary.

- 4.31 Counsel should be obliged to assist the trial judge to identify all of the directions required in a trial. Initial responsibility for seeking a discretionary direction should lie with counsel.
- 4.32 In the Consultation Paper, the commission suggested that, except where otherwise provided by law, no direction or warning about the use of evidence need be given 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. This suggestion differs from the approach in the Uniform Evidence Act which provides that the trial judge must warn the jury about the use of evidence characterised as ‘unreliable’ when requested by counsel, unless the judge is satisfied there are ‘good reasons’ for not doing so.²³ The commission suggested, however, that the trial judge should be required to give the jury any direction that is necessary to ensure a fair trial even when counsel did not seek a particular direction.

Views from submissions

- 4.33 The commission has modified its approach to this issue after considering responses to the Consultation Paper. Stephen Odgers SC criticised the suggestion that the trial judge should comply with a defence request for a direction only when satisfied that it was necessary in order to ensure a fair trial. He submitted that the trial judge should be required to give a direction when requested by defence counsel.
- 4.34 The County Court Law Reform Committee supported a presumption in favour of giving any discretionary direction sought by the defence, and the use of a fair trial test, when the trial judge is deciding whether to give a discretionary direction. The submission expressed the view that the proposed legislation would reduce the risk that the judge would overlook a direction which ought to be given in the interests of a fair trial.
- 4.35 There was general support for the suggestion that the trial judge should have a broad, discretionary power to determine the timing of directions.²⁴ The Criminal Bar Association and Benjamin Lindner stated:

*In long, complex trials involving multiple accused it is sensible and conducive to a fair trial, that a judge directs the jury early in the trial as to the importance of separate trials and the meaning of hearsay... Such directions should be repeated after counsel's addresses as part of the Charge. Thus, to ensure a fair trial, a judge might give a direction on certain matters of law and of evidence at convenient points in the trial to ensure fairness. In appropriate cases, a trial judge should give binding directions of law more than once; but always at the end with completeness.*²⁵

- 1.1 The OPP observed that the trial judge should be permitted, with counsel's consent, to delay charging the jury if warranted by the circumstances of the case.

The commission's view

- 4.36 The commission believes that the trial judge should be obliged to give a discretionary direction upon request by counsel for the accused unless the trial judge is satisfied there is good reason not to do so. The commission also recommends that the legislation should provide that the trial judge must give any direction or warning that is necessary to ensure a fair trial despite the failure of defence counsel to seek a direction. Whether a direction is sought or opposed by counsel is a matter that the trial judge should be permitted to consider when determining if a particular direction is necessary to ensure a fair trial.
- 4.37 The commission acknowledges on-going reliance upon the concept of a fair trial even though it has resisted precise definition at common law. While we accept that the concept is incapable of statutory definition, we recommend that the legislation contain a non-exhaustive list of matters which the trial judge is entitled to consider when determining whether a direction is necessary to ensure a fair trial, and whether good reasons exist for not giving a direction requested by counsel. That list should include the following matters:
- counsels' addresses to the jury
 - counsels' capacity to deal with the issue that is the subject of the direction
 - counsels' submissions
 - any questions or requests by jurors

21 *Longman v The Queen* (1989) 168 CLR 79, 86 (Brennan, Dawson and Toohey JJ). See also *Bromley v R* (1986) 161 CLR 315, 324-5 and *Carr v The Queen* (1988) 165 CLR 314, 330 (Brennan J) and 339 (Deane J).

22 Spigelman, above n 3, 41. Later in this chapter, we consider the right to a fair trial which 'permeates the common law' (Spigelman, 29) and finds expression in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 24; see also s 25 regarding rights in criminal proceedings.

23 *Evidence Act 2008* (Vic), s 165(3).

24 Submissions 5 (Benjamin Lindner); 8 (Criminal Bar Association of Victoria); 17 (Office of Public Prosecutions); and 16 (Judge M D Murphy).

25 Submission 8 (Criminal Bar Association of Victoria) 27; a similar statement is made in Submission 5 (Benjamin Lindner).



- the extent to which the subject of the direction is a matter of common sense which the jury may be presumed to appreciate. Examples include the fact that memory diminishes with time and that intoxication affects motor skills and cognitive ability.
- whether that matter can be sufficiently addressed by another direction
- the right of both the prosecution and the accused person to a fair trial.

4.38 The commission also recommends that the legislation should expressly permit the trial judge to determine the timing and frequency of the directions given to the jury.²⁶ This would allow the trial judge to ‘split’ the summing up to the jury: that is, to give some part of it before counsel’s final addresses and some part after those addresses in order to make the summing up as helpful and accessible as possible.²⁷

RECOMMENDATIONS:

6. The legislation should clearly indicate those directions that are mandatory and those which are discretionary.
7. The trial judge must give a discretionary direction that has been requested by counsel for the accused unless satisfied that there is good reason not to do so.
8. The legislation should declare that the trial judge has an obligation to give the jury any direction that is necessary to ensure a fair trial.
9. The fact that a direction is not sought, or is opposed, by counsel for the accused must be taken into account by the trial judge when determining whether any direction or warning is necessary to ensure a fair trial.
10. In determining whether any direction is necessary to ensure a fair trial and whether there is good reason to refuse a request by counsel for the accused for a particular direction the trial judge may consider any of the following matters:
 - the content of addresses by counsel and/or by the accused, if unrepresented
 - the capacity of counsel to deal with the matter adequately
 - the submissions of counsel or the accused, if unrepresented
 - any questions or requests made by the jurors
 - the extent to which the issue is a matter of common sense which the jury as a whole may be presumed to appreciate
 - whether the topic will be sufficiently addressed by another direction
 - the rights of both the prosecution and the accused person to a fair trial.
11. The trial judge should have a discretionary power to determine the timing and frequency of the directions given to the jury.

THE CONTENT OF JURY DIRECTIONS LEGISLATION

- 4.39 The commission suggests that the proposed legislation should ultimately govern the content of all directions given in criminal trials other than directions that deal with the substance of the criminal law.
- 4.40 The legislation should contain the essential content of the procedural directions which are mandatory in all criminal trials. These would include the respective roles of the judge and jury,²⁸ the onus and standard of proof,²⁹ the requirement that the verdict be based solely on evidence,³⁰ the assessment of witnesses,³¹ unanimous verdicts,³² and such other matters as have sometimes been known to lawyers as ‘the ineluctable directions’.³³
- 4.41 The legislation should also contain those directions which are mandatory only when required by the circumstances of a case. These would include ‘*separate consideration*’³⁴ and alternative verdicts.³⁵

- 4.42 Procedural directions of a discretionary nature should also be governed by legislation. These would include ‘perseverance’³⁶ and majority verdicts.³⁷
- 4.43 While the legislation should contain the essential content of these directions, trial judges should not be required to use the precise language from the statute. They should tailor their directions to the circumstances of the case before them in compliance with the general principles.
- 4.44 The legislation should also include the administrative directions that are given in all criminal trials, such as introductory remarks, jury empanelment, selecting a foreperson, trial procedure and providing documents to the jury.³⁸

RECOMMENDATION:

12. The legislation should ultimately govern the content of all directions of a procedural nature such as:
- burden and standard of proof
 - the role of the trial judge, the jury and of counsel
 - the requirement that the verdict be based solely on the evidence
 - the assessment of witnesses
 - unanimous verdicts
 - those directions which are mandatory when the circumstances require (e.g. alternative verdicts, separate consideration, and perseverance)
 - those directions which may be given when the circumstances require (e.g. majority verdicts)
 - those directions which are of an administrative nature (e.g. jury empanelment, selecting a foreperson, trial procedure).

- 4.45 The proposed legislation should also ultimately govern the essential content of all evidentiary directions given in criminal trials. Once an evidentiary direction is dealt with by the legislation, any common law rules concerning that direction should be abolished. We discuss the particular evidentiary directions which should be included in the initial legislation in Chapter 5.

RECOMMENDATION:

13. The essential elements of directions concerning the use of evidence should be set out in the legislation over time. Once the essential elements of a particular direction are dealt with by the legislation, any common law rule concerning that direction should be abolished. The essential elements of the following directions should be included in the initial legislation:
- propensity reasoning
 - identification evidence
 - use of post-offence conduct.

TRANSITIONAL ARRANGEMENTS

- 4.46 Although the commission recommends that legislation should eventually deal with all common jury directions, we have not included recommendations about the content of all of those directions because of the magnitude of the task. We have described how the proposed legislation would operate and provided examples of some directions which have been the source of appeals.
- 4.47 Because of the many problems with the current body of law, the commission believes that progressive introduction of new jury directions legislation may be desirable. In order to avoid gaps in the law, the legislation could provide that common law rules concerning a particular direction continue to apply until that direction is dealt with by the legislation. The initial legislation should deal with the most difficult directions.

- 27 This practice has been adopted in Arizona: See Judge (retired) Michael A. Yarnell, ‘The Arizona Jury: Past, Present and Future Reform’ (Speech delivered at University of Canberra School of Law, Canberra, 7 November 2005).
- 28 Richard Fox, *Victorian Criminal Procedure: State and Federal Law* (2005) 274. *RPS v the Queen* (2000) 199 CLR 620, *R v Sinclair* (1989) 44 A Crim R 449.
- 29 *Thomas v The Queen* (1960) 102 CLR 584; *La Fontaine v the Queen* (1976) 136 CLR 62; *Bartho v R* (1978) 19 ALR 418; *Van Leeuwen v R* (1981) 36 ALR 591; *R v Schonewille* [1998] 2 VR 625.
- 30 *Glennon v The Queen* (1992) 173 CLR 592.
- 31 *Cubillo v Commonwealth* (2000) 174 ALR 97.
- 32 *R v Rajakaruna* (2004) 8 VR 340.
- 33 See reference to this term in *R v PZG* [2007] VSCA 54 [21].
- 34 If two or more accused are tried together, the jury must consider the case against each accused separately: *R v Minuzzo and Williams* [1984] VR 417. Similarly, if the indictment contains multiple counts, the jury must consider each of the counts separately; *R v PMT* [2003] VSCA 200; *KRM v the Queen* (2001) 206 CLR 221; *R v TJB* [1998] 4 VR 621.
- 35 For eg, in murder trials, the judge must always direct the jury to consider the alternative verdict of manslaughter if a ‘viable’ case is available on the evidence; *R v Kanaan* (2005) 64 NSWLR 527; *Gillard v The Queen* (2003) 219 CLR 1.
- 36 If the jury is having difficulty reaching a verdict, it may be appropriate for the jury to be recalled and for the judge to give the jury a direction encouraging it to persevere: *Black v the Queen* (1993) 179 CLR 44; *R v Muto & Eastey* [1996] 1 VR 336. An alternative approach where the jury cannot reach agreement, implemented by the courts in Arizona and approved by the American Bar Association, is for the jury to identify to the court issues preventing agreement and receive short addresses on those issues from counsel. See Judge (retired) Michael A. Yarnell, above n 36.
- 37 If, after deliberating for at least 6 hours a jury is unable to agree on its verdict, or has not reached a unanimous verdict, the court may discharge the jury or, subject to certain exceptions, take a majority verdict: *Juries Act 2000* (Vic) s 46(2).
- 38 Judicial College of Victoria, *Victorian Criminal Charge Book* (2008) <www.justice.vic.gov.au/emanuals/CrimChargeBook/default.htm> at 29 April 2009.

A Legislative Response

- 4.48 In addition, the legislation should permit trial judges to develop new directions when required, provided the directions are consistent with the principles in the legislation.

RECOMMENDATION:

14. Until the legislation deals with a particular direction, or is declared complete, common law rules concerning that direction should continue to apply. If the legislation, once completed, does not refer to the essential elements of any direction the trial judge considers necessary to ensure a fair trial, the trial judge should have a discretionary power to determine the content of that direction guided by the general principles in the legislation.

ON-GOING REVIEW

- 4.49 The proposed legislation should ultimately contain the essential elements of all directions in common use. Due to time constraints, the commission has been unable to consider the essential elements of the content of all common directions in the course of this reference. The work undertaken by the commission to consolidate and simplify the content of jury directions should be continued in a subsequent reference.

RECOMMENDATIONS:

15. Directions not dealt with in this report should be reviewed with a view to their removal, or to their consolidation, simplification and inclusion in the new jury directions legislation.
16. The VLRC should undertake this review.

PREVENTING FURTHER COMPLEXITY

- 4.50 The actual content of the criminal law contributes to the complexity of jury directions. As we discuss in Chapter 6, the trial judge is required to direct the jury about the elements of the offences with which the accused person has been charged. That task is particularly difficult if the elements of those offences are not clear. In order to prevent a recurrence of many of the problems identified in this report, the commission recommends that a number of steps be taken in the future.
- 4.51 As we have noted, the Department of Justice is reviewing all of the offences in the Crimes Act. That review will include the law of sexual offences which has been reformed on a number of occasions in response to decisions by the courts and recommendations by the commission. The density of parts of the existing law of sexual offences makes it difficult to provide the jury with simple and clear directions. The commission believes that the Departmental review provides an opportunity to consider whether the substantive law of sexual offences could be simplified in order to make it easier for the trial judge to give the jury directions about the law that they must apply.
- 4.52 The current law requires the trial judge to give the jury a number of directions in many sexual offence cases. Some of these directions, which are complex, are designed to deal with outdated assumptions and prejudices in sexual offence trials.³⁹ The law in this area may be simplified if these directions are not required as a matter of course, but are given only in response to inappropriate arguments, directions and comments.
- 4.53 Finally, when drafting legislation that creates a criminal offence, Parliamentary Counsel should bear in mind the obligation of the trial judge to direct jurors about the elements of the offence and use language that will make that task as simple as possible.

RECOMMENDATION:

17. As part of the review of the offences in the Crimes Act, the Attorney General should review the substantive law of sexual offences in order to reduce in number, shorten and simplify the directions and warnings the trial judge must give to the jury in sex offence trials.

18. In addressing outdated assumptions and prejudices concerning complainants in sexual offence trials, the approach should be to contradict inappropriate arguments, directions or comments being made by counsel and trial judges, rather than requiring positive statements on such topics to be made, in all cases, by way of directions from the trial judges.
19. Parliamentary Counsel should consider the language in which a jury may be directed about the elements of a particular offence when any changes are made to the criminal law.

INTERACTION WITH THE *CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES 2006 (VIC)*

- 4.54 When considering whether to recommend any procedural, administrative and legislative changes to the directions that judges give to juries in criminal trials, the commission has been mindful of the rights set out in the Victorian *Charter of Human Rights and Responsibilities Act 2006 (Vic)* ('the Charter').
- 4.55 The Charter commenced full operation in January 2008. It contains a number of rights concerned with criminal proceedings.⁴⁰ The right to a fair hearing, which is also reflected in the common law, is a fundamental Charter right and informs the recommendations made by the commission.⁴¹ Specific aspects of the right to a fair hearing are set out in section 25(2) of the Charter which contains as a list of minimum guarantees for 'persons charged with a criminal offence'.
- 4.56 While the Charter right to a fair hearing has been considered in some cases, none has dealt with the issue of jury directions.⁴² The Charter permits consideration of relevant international and foreign case law when interpreting human rights. The International Covenant on Civil and Political rights (ICCPR)⁴³ forms the basis of many of the rights set out in the Part 2 of the Charter.⁴⁴ Bell J has held that properly ensuring the overriding duty of every judge 'to ensure the trial is fair', which is 'inherent in the rule of law and the judicial process', also requires ensuring that the rights specified in the ICCPR are promoted and respected.⁴⁵ Additionally, the right to a fair trial is likely to find some constitutional protection in Chapter 3 of the Commonwealth Constitution.⁴⁶
- 4.57 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.⁴⁷ The commission's final recommendations have been developed with the aim of ensuring that they are consistent with the fundamental rights to a fair trial and to appeal against a wrongful conviction. The commission sought advice from Joanna Davidson, Special Counsel, Human Rights, Victorian Government Solicitor's Office (VGSO), about the interaction between the Charter and the commission's recommendations.

RIGHT TO A FAIR HEARING

The common law notion of a fair trial

- 4.58 The Charter right of a person charged with a criminal offence to a fair hearing reinforces the common law right to a fair trial that is now 'ingrained in the Australian legal system'.⁴⁸ As Spigelman CJ has observed, the right to a fair trial or perhaps, more accurately, the 'right not to be tried unfairly',⁴⁹ permeates the common law.⁵⁰ The 'principle of a fair trial' derives from the inherent power of a court to control its own process, in particular to prevent abuse of process.⁵¹ In *Jago v District Court (NSW)*,⁵² Mason CJ found that this extended to a power to prevent unfairness generally:

*The question is... whether the court, whose function is to dispense justice with impartiality both to the parties and to the community which it serves, should permit its processes to be employed in a manner which gives rise to unfairness.*⁵³

- 39 See, eg, *Crimes Act 1958 (Vic)* ss 37, 37AAA, 37AA, 61. This complexity is illustrated by Appendix C which contains extracts from directions given to a jury in a sexual offences trial.
- 40 *Charter of Human Rights and Responsibilities Act 2006 (Vic)* ss24, 25.
- 41 *Hinch v Attorney-General for the State of Victoria* (1987) 164 CLR 15, 58; *Dietrich v The Queen* (1992) 109 ALR 385, 386.
- 42 *Kortel v Mirik and Mirik* [2008] VSC 103; *R v Benbrika & Ors (Ruling No 20)* (2008) 18 VR 410.
- 43 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
- 44 *Charter of Human Rights and Responsibilities Act 2006 (Vic)* s 32(2).
- 45 *Tomasevic v Travaglini* (2007) 17 VR 100 [139], [155]; also see *Ragg v Magistrates' Court of Victoria* (2008) 18 VR 300 [37]-[40].
- 46 Spigelman, above n 3, 32.
- 47 *Charter of Human Rights and Responsibilities Act 2006 (Vic)* s 25(4). The right to an appeal is also provided for under the *Human Rights Act 2004 (ACT)* s 22(4) and Protocol No. 7 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 117, opened for signature 22 November 1984 (entered into force 1 November 1988); 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 The Queen* (1992) 177 CLR 292, 326; *Sinanovic v R* (1998) 154 ALR 702, 705 (Kirby J); *Young v Registrar, Court of Appeal* (1993) 32 NSWLR 262, 290..
- 48 *Dietrich v The Queen* (1992) 177 CLR 292; *New South Wales v Canellis* (1994) 181 CLR 309, 328.
- 49 *Dietrich v The Queen* (1992) 177 CLR 292, 299 (Mason CJ, McHugh J).
- 50 Spigelman, above n 3, 29.
- 51 Spigelman, *ibid*, 30, uses the term 'principle' rather than 'right' to emphasise its nature as a standard of an inherently flexible character.
- 52 (1989) 168 CLR 23.
- 53 *Ibid* 28.

There is rarely any aspect of trial preparation or procedure which does not involve fair trial considerations. As Spigelman CJ has said, the principle of a fair trial informs the 'basic building blocks of adversary proceedings in our legal system'.⁵⁴ Given the complexity of the law, an error free or 'perfect trial' is probably unachievable.⁵⁵ Gaudron J has observed that

*A trial is not necessarily unfair because it is less than perfect, but it is unfair if it involves a risk of the accused being improperly convicted...*⁵⁶

4.59 The fairness of a trial must be assessed 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.⁵⁷

4.60 There has been no Australian judicial attempt to list exhaustively the attributes of a fair trial. Despite addressing the notion of a 'right to a fair trial' in a series of decisions, the High Court has avoided formulating the specific content of the fairness requirement:

*Clearly enough, the concept of a fair trial is one that is impossible, in advance, to formulate exhaustively or even comprehensively. Only a body of judicial decisions gives content to the content.*⁵⁸

4.61 In *Jago*, Deane J observed, that it was not possible to:

*catalogue in the abstract the occurrences outside or within the actual trial which will or may affect the overall trial to an extent that it can no longer properly be regarded as a fair one.*⁵⁹

4.62 Spigelman CJ has emphasised the importance of 'flexibility' to the fair trial principle because it is an evolving concept that adapts to changing circumstances. The assessment of the fairness of a trial is made on a 'case by case basis' involving a 'large content of essentially intuitive judgment'.⁶⁰ For example, a fair trial may require the exclusion of evidence which is potentially prejudicial or unreliable. In other circumstances, giving the jury directions about the use of evidence may alleviate sufficiently the potential prejudice or unreliability of that evidence.⁶¹

4.63 In *RPS v The Queen* the High Court set out the obligations of the trial judge in directing the jury:

*The fundamental task of a trial judge is, of course, to ensure a fair trial of the accused. That will require the judge to instruct the jury about so much of the law as they need to know in order to dispose of the issues in the case. No doubt that will require instructions about the elements of the offence, the burden and standard of proof and the respective functions of judge and jury. Subject to any applicable statutory provisions it will require the judge to identify the issues in the case and to relate the law to those issues. It will require the judge to put fairly before the jury the case which the accused makes. In some cases it will require the judge to warn the jury about how they should not reason or about particular care that must be shown before accepting certain kinds of evidence.*⁶²

The right to a fair hearing in s 24(1) of the Charter

4.64 Section 24(1) of the Charter provides that:

A person charged with a criminal offence...has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

4.65 While the right to a fair hearing includes the minimum guarantees set out in section 25 of the Charter, it has a broader scope. It includes requirements of competence, independence and impartiality. For example, when directing a jury, the judge must take care not to favour a party because this could effect the impartiality of the jury. A jury should be given sufficient directions to enable it to understand its task and therefore be a 'competent' court.⁶³ Case law from other jurisdictions confirms that 'subject to the usual safeguards and rules, a jury is a competent, independent and impartial body for the purpose of the trial of criminal charges'.⁶⁴

4.66 The term 'fair' refers to procedural fairness and the quality of the trial. The fundamental importance of procedural fairness, or due process, has been recognised throughout the history of the law in the UK,⁶⁵ in international human rights instruments,⁶⁶ and other common law and civil law jurisdictions.⁶⁷ There has been some opinion from the Human Rights Committee that various procedural guarantees exist to secure a fair trial, including the requirement of equality

of arms, rules of evidence, control of the proceedings by independent and impartial judges, deliberation and decision by neutral juries, and the system of appeals.⁶⁸

'Fairness' as a flexible and evolving concept

- 4.67 The inherent flexibility of the common law fair trial principle is equally significant in the context of the Charter right to a fair hearing. International jurisprudence on the right to a fair hearing supports making assessments of fairness in the context of a trial 'as a whole', as well as with regard to individual deficiencies in the trial process.⁶⁹
- 4.68 In particular, there is some recognition that the right to a fair trial may involve considerations of fairness to the prosecution.⁷⁰ In Canada, for example, it has been observed that the right to a fair hearing does not entitle an accused to the most favourable procedures that could possibly be imagined.⁷¹ As Spigelman CJ observes, the public interest in securing convictions of guilty persons, as well as vindication and protection of the rights of victims of criminal offences is well recognised.⁷²
- 4.69 What amounts to fairness will often require consideration and weighing of a number of factors, including the interests of the accused, the interests of the complainant, and the interests of the community in the proper administration of justice and in having criminal activity prosecuted. The VGSO advice to the commission observes that the procedure applied in order to achieve the appropriate balance will vary from case to case. However, there appear to be differing views about whether it is possible or desirable to attempt to balance and reconcile the interests of the accused, the prosecution and the community in this way.⁷³
- 4.70 The Charter right to a fair trial can be subject to limits which seek to achieve a legitimate aim and are proportionate to the ends sought.⁷⁴ While the overall fairness of the trial must not be compromised, its various elements may be subject to reasonable limitations.⁷⁵ The VGSO advice to the commission observes that the European and UK jurisprudence is consistent in holding that 'fairness must be considered in the context of the trial as a whole', rather than making this assessment based on a 'technical' approach.⁷⁶ The New Zealand Court of Appeal has also emphasised that the fairness of a trial cannot be considered by examining a jury direction in isolation from the rest of the trial. The impact of the direction on the fairness of the trial must be assessed in the context of the directions 'as a whole'.⁷⁷

- 54 Spigelman, above n 3, 35.
- 55 Brennan J has described the continual refinement of the concept of what is fair as 'the onward march to the unattainable end of perfect justice': *Jago v District Court (NSW)* (1989) 168 CLR 23, 54.
- 56 *Dietrich v The Queen* (1992) 177 CLR 292.
- 57 The same point has been made in other common law jurisdictions. In the US context, the Fourth Circuit Court of Appeals stated in *Sherman v State*, 89 F 3d 1134, 1139 (1986): '*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) where the accused was not entitled to 'the most favourable procedures that can possibly be imagined'; and the House of Lords decision in *Brown v Stott* [2001] 2 All ER 97, 119, where Lord Steyn observed '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'.
- 58 *Dietrich v The Queen* (1992) 177 CLR 292, 353 (Toohey J); see also 300 (Mason CJ, McHugh J); 328-9 (Deane J); 364 (Gaudron J).
- 59 *Jago v District Court (NSW)* (1989) 168 CLR 23, 57.
- 60 Ibid.
- 61 Spigelman, above n 3, 41.
- 62 *RPS v The Queen* (2000) 199 CLR 620, 637 [41] (Gaudron A-CJ, Gummow, Kirby and Hayne JJ) (references omitted).
- 63 Note that international law jurisprudence seems to focus on the requirement of 'competence' in the sense of jurisdictional competence of courts: *Castillo Petruzzi et al v Peru* [1999] Inter-Am Ct HR (ser C) No 52.
- 64 See *Holm v Sweden* (1994) 18 EHRR 79 93/53; *Pullar v United Kingdom* (1996) 22 EHRR 391 (under the *European Convention on Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, CETS 005 (entered into force 3 September 1953) art 6(1). These cases were referred to in *R v Fearnside* [2009] ACTCA 3 (Besanko J)
- 65 *Magna Carta* (1215) for eg, limited the powers of the Crown and its ministers in relation to arbitrary punishment, imprisonment, coercion and deprivation of liberty; see M Nowak, *United Nations Covenant on Civil and Political Rights: CCPR Commentary* (2005, 2nd revised edition), 305
- 66 *Universal Declaration of Human Rights*, GA Res 217A, 3rd Sess, 183rd plen mtg, UN Doc A/810 at 71 (1948) arts 10-11; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, GA Res 2200A (XXI), 21 UN GAOR Supp (No. 16) at 52 (entered into force 23 March 1976) (ICCPR) art 14.
- 67 The *United States Constitution* amend V prohibits depriving 'any person of life, liberty or property without due process of law'; the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11 (Canadian Charter) in s 7 secures the 'right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice'; the *Bill of Rights Act 1990* (NZ) s 27 provides for the right to 'the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations or interests protected or recognised by law'. Specific detailed provisions relating to procedural rights of criminal defendants are also provided for in each of these instruments: see Lord Lester of Herne Hill QC and David Pannick QC (eds), *Human Rights Law and Practice* (2nd ed, 2004) 204.
- 68 *Lloydell Richards v Jamaica*, Human Rights Committee, Communication No. 535/1993, UN Doc CCPR/C/59/D/535/1993 (31 March 1997) (Ando, dissenting) (the majority did not disagree with this outline of the elements of a fair criminal trial). See discussion in Sarah Joseph, Jenny Schulta and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd ed, 2005) 409.
- 69 Lester and Pannick, above n 67, 220-1.
- 70 Spigelman, above n 3, 44.
- 71 *R v Lyons* [1987] 2 SCR 309.
- 72 Spigelman, above n 3, 44.
- 73 See eg, Rt Hon Dame Sian Elias, 'Criminal Justice in the High Court', (Address on the Occasion of the Centenary of the High Court of Australia, 10 October 2003) cited in Spigelman, above n 3, 46.
- 74 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2) provides that a 'human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom'.
- 75 *Brown v Stott* (PC) [2003] 1 AC 681, 704.
- 76 Letter of advice from Joanna Davidson, Victorian Government Solicitors Office to Professor Neil Rees (12 February 2009) 21.
- 77 *The Queen v Shane Thomas Hoko* (Unreported, New Zealand Court of Appeal, 30 June 2003).



Key principles underlying the right to a fair hearing

- 4.71 Although it is not possible to provide a detailed list of the elements of a fair trial, some key principles emerge from the case law. Of particular importance in the context of the judge's obligation to give the jury directions are the principles concerning 'equality of arms' and the adversarial nature of judicial proceedings.

'Equality of arms'

- 4.72 The right to a fair hearing requires that each party to a proceeding must have a reasonable opportunity to present their case to the court under conditions that do not place them at a substantial disadvantage as against the opposing party. This principle of 'equality of arms' involves striking a fair balance between the parties.⁷⁸ The Human Rights Committee has stated that the right to equality before courts and tribunals also ensures equality of arms, such that the same procedural rights are to be provided to all parties unless distinctions are based on law and can be justified on objective and reasonable ground, not entailing actual disadvantage or other unfairness to the defendant.⁷⁹ Courts have considered that, in certain circumstances, public interest factors such as the protection of vulnerable witnesses, may justify exceptions to this rule. However, any exceptions must be strictly necessary, and any disadvantage posed to the defence must be adequately counterbalanced by adequate procedural safeguards to protect the rights of the accused.⁸⁰

Adversarial proceedings

- 4.73 The principle of adversarial proceedings has been described as 'an indispensable aspect of the fair trial principle' in criminal cases.⁸¹ It requires that both the prosecution and defence be given the opportunity to have knowledge of and challenge or comment on the arguments and evidence adduced by the other party.⁸²

Constitutional considerations

- 4.74 There are some constraints deriving from Chapter 3 of the Commonwealth Constitution upon State power to enact legislation that affects the operation of Victorian courts which exercise federal jurisdiction.⁸³ Spigelman CJ argues that certain aspects of the fair trial principle may have constitutional protection.⁸⁴ Several members of the High Court have stated that Chapter 3 of the Constitution limits the capacity of federal and state legislation to regulate the exercise of judicial power in a manner which is inconsistent with the 'essential character of a court', or with the 'nature of judicial power'.⁸⁵ Gaudron J has suggested that Chapter 3 judicial power must be exercised by a body which complies with the rules of natural justice, or procedural fairness.⁸⁶ Those rules include a right to a fair hearing.⁸⁷

- 4.75 Victorian legislation cannot direct the operations of a state court vested with federal jurisdiction in such an extreme way that it would be incompatible with the exercise of the judicial power of the Commonwealth by that court.⁸⁸ While the High Court has not yet characterised those 'essential characteristics' of the judicial process which may not be infringed by legislation, it has advanced the general proposition that

*legislation which purported to direct the courts as to the manner and outcome of the exercise of their jurisdiction would be apt impermissibly to impair the character of the courts as independent and impartial tribunals.*⁸⁹

- 4.76 However, the joint judgment in *Gypsy Jokers* acknowledged 'the impossibility of making an exhaustive statement of the minimum characteristics of such an independent and impartial tribunal'.⁹⁰ While there may be room for innovation and differences between courts, there are limits to the capacity of legislation to interfere with the 'basic character and methodologies of a court'.⁹¹ The High Court in *Forge* emphasised the courts' role in administering 'the common law system of adversarial trial'.⁹²
- 4.77 Statutory modifications to traditional means of conducting court proceedings will not necessarily violate the standards of independence and impartiality, or other standards necessary to meet the constitutional requirements.⁹³ For example, provisions which allow a court to dispense with procedural formalities or the rules of evidence in certain cases are not necessarily 'inimical to the exercise of the judicial power of the Commonwealth', if they do not exonerate the Court

from the application of substantive rules of law and are consistent with the rules of procedural fairness. The question will always be whether the provisions in the legislation can operate consistently with the courts' jurisdiction to ensure that the proceedings before them are fair.⁹⁴

THE COMMISSION'S RECOMMENDATIONS

4.78 The commission received advice from the VGSO in relation to the Charter implications of the following proposals:

- the introduction and contents of directions and warnings legislation
- early issue identification and the obligation in *Alford v Magee*
- limiting the scope of the *Pemble* obligation
- provisions relating to the appeal process.

Directions and warnings legislation

4.79 One of the commission's major recommendations involves the introduction of legislation which contains general principles concerning the nature and content of jury directions, identifies the circumstances in which directions should be given, and provides guidance about their content.⁹⁵ Any legislation concerning the conduct of a judge in criminal trial may affect the Charter right to a fair hearing.

Features and principles of the legislation

- 4.80 The aim of the proposed legislation is to replace existing common law rules concerning directions with legislation which clearly indicates when a direction is required and contains guidance about its content. The ultimate objective in taking this step is to improve the law of jury directions by encouraging judges to give directions that are clear, simple, brief, comprehensible and tailored to the circumstances of the particular case.
- 4.81 The overarching principle in the proposed legislation is that the trial judge is obliged to give the jury any direction that is necessary to ensure a fair trial. Counsel have a duty to assist the trial judge with the fair trial obligation, and initial responsibility for seeking directions lies with counsel. On request by counsel for a direction that is discretionary, the trial judge must give the direction unless satisfied there is good reason not to do so. The legislation contains several factors which the trial judge may consider when making this assessment. The fact that a direction is not sought, or is opposed, by counsel for the accused is a matter which the trial judge may take into account when determining whether any direction is necessary to ensure a fair trial.
- 4.82 This approach is consistent with the principles of equality of arms and adversarial proceedings, reaffirming the adversarial nature of the criminal trial,

78 *Jespers v Belgium* (1981) 27 DR 61 [54]; *Edwards v United Kingdom* (1992) 15 EHRR 417.

79 Human Rights Committee, General Comment No. 32, UN Doc CCPR/C/GC/32 (23 August 2007) [13].

80 *Eg, Attorney General's Reference (No 3 of 1999)* [2001] 2 AC 91, 118; *Montgomery v HM Advocate* [2003] 1 AC 641, 673; see Letter of advice from Joanna Davidson, Victorian Government Solicitors Office to Professor Neil Rees (12 February 2009) 4-5.

81 *John Campbell v Jamaica*, Human Rights Committee, Communication No 307/1988, UN Doc CCPR/C/47/D/307/1988 (12 May 1993) [6.4].

82 See eg *Anni Äärelä and Jouni Näkkäläjärvi v Finland*, Communication No 779/1997, UN Doc CCPR/C/73/D/779/1997 (4 February 1997) [7.4].

83 *Kable v DPP (NSW)* (1996) 189 CLR 51 ('*Kable*'), decided that *Australian Constitution* Ch III prohibits State legislation from imposing functions on courts that exercise federal jurisdiction to act 'in a manner which is inconsistent with traditional judicial process' and which may compromise the 'institutional impartiality' of a state court.

84 Spigelman, above n 3, 32.

85 *Eg, Chu Kheng Lim v Minister for Immigration, Local Government & Ethnic Affairs* (1992) 176 CLR 1, 27, 37, 55, 68 (Brennan, Deane, Dawson JJ).

86 See, eg, *Sue v Hill* (1999) 199 CLR 462, 515.

87 See, eg, *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 69 (Gleeson CJ and Hayne J).

88 *Kable* (1996) 138 ALR 577, 605, 608 (Toohey J), 612 (Gaudron J), 615, 622 (McHugh J), 644 (Gummow J); *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 252 ALR 471 [153] ('*K-Generation*').

89 *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* (2008) 234 CLR 532, 560 [39] (Gummow, Hayne, Heydon, Kiefel JJ) ('*Gypsy Jokers*').

90 *Gypsy Jokers* (2008) 234 CLR 532, 553 [10], referring to *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 163 [29]-[30] (McHugh, Gummow, Kirby, Hayne, Callinan, Heydon JJ).

91 *Gypsy Jokers* (2008) 234 CLR 532, 577 [103] (Kirby J)(diss).

92 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 76 [64] (Gummow, Hayne and Crennan JJ); see also *Gypsy Jokers* (2008) 234 CLR 532, 577 [162] (Crennan J).

93 *K-Generation* (2009) 252 ALR 471

94 *K-Generation* (2009) 252 ALR 471, [252](Kirby J)(diss).

95 As explained in Chapter 2, the term 'directions' includes warnings which judges are required by law to give juries about the care which they should take when assessing particular items of evidence or may not reason when dealing with the evidence.



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.⁹⁶ Counsel initially determine the issues in dispute, and the evidence 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.⁹⁷ The jury determines all questions of fact,⁹⁸ including the ultimate issue of guilt or innocence, as part of their role as ‘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.’⁹⁹

- 4.83 The proposed legislation is clearly not intended to derogate from the overriding judicial obligation to ensure a fair trial. Rather, the legislation is intended to emphasise and give content to the trial judge’s obligation. In this report the commission has stressed the need for comprehensive legislation to replace the common law in response to the problems outlined in Chapters 2 and 3.
- 4.84 Although the common law on jury directions has evolved to protect the right to a fair trial, the current approach is not necessarily the sole way of ensuring a fair hearing. The VGSO advice to the commission expresses the view that if the proposed legislation allows judges to fulfil their fair hearing obligation in a manner equal to or better than the common law rules that have developed, the legislation will be compatible with the fair hearing right in section 24 of the Charter.¹⁰⁰ The commission believes that the proposed legislation meets this test.

Guidance as to the content of directions

- 4.85 The commission also recommends that the legislation provide guidance about the content of directions. The VGSO advice observes that even though it is proposed that some of that content be drawn from the common law, it is permissible for legislative rules concerning the content of directions to differ from the common law.¹⁰¹ As noted earlier, the procedure applied to achieve the appropriate balance between competing interests, in ensuring the overall fairness of a trial, may vary.
- 4.86 In *New Zealand v Moloney*,¹⁰² the Federal Court considered during extradition proceedings whether the absence of the requirement in New Zealand to give a warning in the sort of terms required in *Longman* meant that a trial would be likely to be unfair in that country. The Court concluded that a warning in these terms was not ‘integral’ to a fair trial:
- ... Courts in NZ are aware of the difficulties that can confront accused people in such circumstances, and the need for judges to bring home these difficulties to juries. Courts of both countries have exactly the same object, which is a fair trial. They differ from our courts only as to how best to achieve that object, preferring to retain greater flexibility in the form in which any warnings are given.*¹⁰³
- 4.87 The VGSO advice observes that legislation which abrogates existing common law rules will not necessarily be incompatible with the Charter. Provided the overall fairness of a trial is not compromised, there can be reasonable limitations of the elements of the right to a fair hearing. For example, the *Evidence Act 2008* has replaced many strict common law rules about admission of evidence with a new and more flexible regime.
- 4.88 This view is consistent with the approach taken in relation to the right to a fair trial under the Canadian Charter. In *R v Corbett*,¹⁰⁴ Laforest J held that although the Canadian Charter constitutionalised the right of an accused to a fair trial before an impartial tribunal, ‘fairness’ implied ‘consideration also of the interests of the state as representing the public’.¹⁰⁵ It was also held that the ‘principles of fundamental justice operate to protect the integrity of the system itself, recognizing the legitimate interests not only of the accused but also of the accuser’.¹⁰⁶ The recognition and proper exercise of the discretion to exclude evidence when its prejudicial effect outweighed its probative value provided a process to ensure that the legitimate interests of both the public and the accused were taken into account.

- 4.89 The commission has made specific recommendations concerning the content of some directions, such as those dealing with consciousness of guilt and identification evidence. In making recommendations for reform, the commission has sought to achieve a fair balance between the general interest of the community and those of the accused compatible with the right to a fair hearing.
- 4.90 The VGSO advice observes that ‘particular care should be taken with respect to absolute or blanket rules’ when developing the proposed legislation. Judges should be given sufficient flexibility to depart from, or modify, prescribed directions when it is necessary to ensure a fair hearing.¹⁰⁷ The advice also emphasises the need for a direction to be ‘custom built’ for the case at hand in order to assist the jury understand their task.¹⁰⁸
- 4.91 For these and many other reasons, the commission has recommended that the legislation contain the essential elements of each direction, rather than prescriptive language found in model directions used elsewhere. Further, tailoring directions to the circumstances of the case is one of the general principles that should inform the content of all directions.

Early issue identification and the obligation to sum up

- 4.92 Some recommendations concern new procedures designed to promote early issue identification. The commission’s recommendations build on legislation and Practice Notes, which provide for issue identification and pre-trial narrowing of issues in an attempt to reduce the length and complexity of criminal trials.
- 4.93 The commission recommends legislation which permits the trial judge to provide the jury with documents known as the Outline of Charges and the Jury Guide immediately before the calling of evidence and immediately after the conclusion of final addresses. These documents, which are discussed in detail in Chapter 6, are designed to assist the jury to understand the issues in a case and to simplify the task which they must undertake when considering their verdict.
- 4.94 The requirements in the Criminal Procedure Act concerning pre-trial defence disclosure have been considered to ensure they are compatible with the Charter rights against self-incrimination, to be presumed innocent, and to a fair hearing.¹⁰⁹ The Statement of Compatibility refers to observations by the High Court that the common law right to a fair trial does not encompass a right not to disclose one’s defence.¹¹⁰ The Scrutiny of Acts and Regulations Committee of the Victorian Parliament has held that the circumstances warrant a balance being struck between an accused’s rights and efficient case management, and has considered that the provisions do not limit or abrogate the common law right that the prosecution prove each element of the offence.¹¹¹
- 4.95 The commission also recommends that the trial judge’s common law obligation to sum up a case to the jury be restated in legislative form. While trial judges would still be required to summarise the law and evidence, they would only be required to refer to those elements of the offence that are in dispute and the evidence that bears upon those elements. The proposed legislative restatement would also provide that the trial judge may limit the oral summary of the evidence if satisfied that do so would be in keeping with the fair trial obligation.
- 4.96 The advice to the commission observes that the right to a fair trial does not necessarily require the judge to summarise the evidence. The extent to which this will be necessary is influenced by the principle of ‘equality of arms’, which is particularly relevant where an accused person is unrepresented.
- 4.97 The new procedures recommended in Chapter 6 are designed to assist judges to fulfil the obligation to instruct the jury about the real issues in a case and to refer the jury to the evidence concerning the issues in dispute. The recommendations concerning the legislative restatement of the obligation to sum up are permissive. Trial judges will be able to exercise broad discretionary powers when fulfilling the *Alford v Magee* obligation.

- 96 This is as compared to the inquisitorial system, Mirjan Damaska, ‘Of Hearsay and its Analogues’ (1991-1992) 76 *Minnesota Law Review* 425, 428-430.
- 97 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.
- 98 In New Zealand, the entitlement of the accused to expect findings of fact to be left to the jury was held to be ‘essential to a fair trial’ for the purposes of the New Zealand *Bill of Rights Act 1990* (NZ); see *The Queen v Shane Thomas Hoko* (Unreported, New Zealand Court of Appeal, 30 June 2003) [34].
- 99 Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (2001) 7.
- 100 Letter of advice from Joanna Davidson, Victorian Government Solicitors Office to Professor Neil Rees (12 February 2009) 9.
- 101 *X v General Television Corp Pty Ltd* [2008] VSC 344, [29] (Vickery J) referring to *Dietrich v R* (1992) 109 ALR 385, 362 (Gaudron J); and see 429 (Toohey J); 387 (Mason CJ, McHugh J).
- 102 [2006] FCAFC 143 [244].
- 103 *Ibid* [222].
- 104 [1988] 1 SCR 670.
- 105 *Ibid* [165].
- 106 *Ibid*.
- 107 Letter of advice from Joanna Davidson, Victorian Government Solicitors Office to Professor Neil Rees (12 February 2009) 9.
- 108 *Ibid* 8.
- 109 The Statement of Compatibility for the *Criminal Procedure Bill 2008* explains that provisions which give the court the power to request (but not require) information (eg, the evidence that the accused intends to call, the issues in dispute and special requirements for witnesses) are ‘carefully structured not to interfere with the right to a fair hearing and to strike an appropriate balance’. Provisions which create an ‘information sharing regime’ requiring a prosecution opening and defence response are considered to be ‘important in narrowing the issues at trial to make sure that valuable court and jury resources are carefully used’, without abrogating the common-law right to put the prosecution to proof on each element of the offence; see Victoria, *Parliamentary Debates*, Legislative Assembly (4 December 2008) 4973-4 (Robert Hulls, Attorney-General).
- 110 *Hamilton v Oades* (1989) 166 CLR 486, 499.
- 111 Scrutiny of Acts and Regulations Committee, Parliament of Victoria, ‘Criminal Procedure Bill 2009’, *Alert Digest 1 of 2009* (February 2009) 10.



Limiting the scope of the *Pemble* obligation

- 4.98 The commission also proposes that the scope of what is known as the *Pemble* obligation be limited. The commission recommends that the trial judge should be required to direct the jury about only those defences or alternative verdicts which have been raised by counsel for the defence. The only exception to this principle would arise when the judge is satisfied that the failure of counsel to raise an issue was caused by oversight, rather than tactical decision, and it is necessary to direct the jury about a defence or alternative verdict in the interests of a fair trial. In cases where the accused was unrepresented, the *Pemble* obligation would continue to apply.
- 4.99 The Criminal Bar Association opposed this recommendation. They stated:
- Insofar as the principles in Pemble's case flow from the general duty to ensure an accused receives a fair trial, the Criminal Bar Association supports that principle and its common law consequences. Where a defence is reasonably open on the evidence, the judge has, as part of his duty to ensure a fair trial, an obligation to leave the defence to the jury... Unlike the judge's role in the trial, the prosecution and defence are fixed in adversary roles: the trial judge is best placed, among the three legal role-players, in a court to ensure a fair trial...the principle in Pemble's case should be retained and not watered down. In the discharge of an obligation to ensure a fair trial, all defences reasonably open should be left to a jury...To do otherwise is to compromise the principle of fairness by denying a jury the opportunity to consider a defence that is "reasonably open" on the evidence.*¹¹²
- 4.100 The VGSO advice comments that the current *Pemble* obligation is 'difficult to place within the right to a fair hearing'.¹¹³ In some cases, such as those where an accused is unrepresented or poorly represented, the obligation to give effect to the principles of equality of arms and of adversarial proceedings is a challenge. Where, however, the accused has had the opportunity to raise the defence but makes a strategic decision not to, neither the principle of equality of arms nor the principle of adversarial proceedings require the judge to raise it.
- 4.101 There can be no 'unfairness' in an adversarial context when an accused person makes an informed tactical decision to avoid putting an alternative defence before the jury because of a belief that this will increase the chances of an acquittal. In an adversarial system, counsel should have primary responsibility for identifying the way in which the defence puts its case. The VGSO advice expresses the view that it would be compatible with the fair hearing right to limit the operation of the *Pemble* obligation in cases where the accused has had a reasonable opportunity to raise a defence but chooses not to do so for strategic reasons.¹¹⁴

RIGHT TO AN APPEAL

- 4.102 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.¹¹⁵ The commission recommends an approach to the question of leave to appeal that seeks to provide an appropriate balance between making counsel responsible for the manner in which a case is conducted at trial and ensuring that the accused person receives a fair trial. We have recommended that the Court of Appeal should not permit a person convicted at trial to argue on appeal, without the leave of the Court, a ground involving an alleged error in the trial judge's directions unless that alleged error was drawn to the trial judge's attention prior to verdict. The Court of Appeal should not grant leave in these circumstances unless it finds that the ground, if made out, would satisfy it that there had been a substantial miscarriage of justice.
- 4.103 In *Nudd v R*,¹¹⁶ Gleeson CJ stated that where counsel has made a decision during a criminal trial that was objectively rational, the client should be bound by that decision because the process was objectively fair.¹¹⁷ The VGSO advice expressed the view that reasonable restrictions upon appeal rights may be consistent with the principle of adversarial proceedings if they do not infringe the principle of equality of arms, particularly with respect to unrepresented or poorly represented persons.¹¹⁸

- 4.104 The Statement of Compatibility to the Criminal Procedure Act considered the Charter implications of the provisions concerning appeal rights, particularly the requirement for leave to appeal to the Court of Appeal against both conviction and sentence. The Statement emphasises that this needs to be considered in context and will depend on the nature of the leave process and the practices and principles developed by the Court of Appeal in relation to leave hearings.¹¹⁹
- 4.105 Applications for leave to appeal against conviction are determined on the basis of a 'reasoned consideration of the merits of the appeal', such as the nature of the error of a ruling by the presiding judge or failure to instruct the jury properly.¹²⁰ The Human Rights Committee has observed that the right to an appeal must be given substance so it is an effective right of appeal or review.¹²¹ However, this does not equate to a right to a re-hearing of the trial itself.¹²² For example, it has been held that the admissibility of new evidence on appeal may be restricted where such evidence was in fact available at the original trial.¹²³
- 4.106 The Statement of Compatibility observes that this view of the Human Rights Committee about the nature of an effective right of appeal or review confirms that where leave to appeal is determined in a comprehensive manner then a system requiring leave to appeal can be consistent with a right to review.¹²⁴ The Statement concludes that the requirement to seek leave to appeal does not result in an appeals system that is incompatible with the Charter.
- 4.107 The commission does not believe that any of its recommendations about the law and practice of jury directions interfere impermissibly with any relevant Charter rights, most notably the right to a fair hearing and the right to appeal against a conviction.

INTERACTION WITH THE EVIDENCE ACT 2008

- 4.108 The introduction of the uniform evidence legislation adds to the body of the law concerning directions and warnings in Victoria. The *Evidence Act*, which makes the Uniform Evidence Act part of Victorian law, will commence operation no later than 1 January 2010.¹²⁵ The Act aims to impose some 'organisation on a miscellaneous collection of rules that have been developed on a case by case basis by the courts.'¹²⁶
- 4.109 While the *Evidence Act* is primarily concerned with the admissibility of evidence, it also deals with some evidentiary warnings. The commission believes that in order to promote ease of access, all statutory provisions concerning directions and warnings should be located in the proposed jury directions legislation. Consequently, all of the relevant provisions in the *Evidence Act* should be transferred to the new legislation. The commission believes that some of these provisions should be rewritten in the process and that one should be repealed.
- 4.110 The Act contains provisions concerning warnings about delay, and the evidence of children. Delay warnings have been discussed in Chapter 3. The commission's detailed recommendations in relation to these, and reconciliation of overlapping provisions in the Evidence Act and the Crimes Act, are outlined in Chapter 5. Warnings and other specific directions in relation to evidence of children are also covered by provisions in both the Evidence Act 2008, as well as the Evidence Act 1958.
- 4.111 The Act also contains provisions that deal with jury directions about identification evidence, and admission of propensity evidence. We discuss reform of these areas in Chapter 5.

WARNINGS UNDER THE EVIDENCE ACT 2008

- 4.112 The *Evidence Act 2008* abolishes mandatory requirements for common law corroboration warnings.¹²⁷ 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.¹²⁸ The ALRC interim report on evidence law was critical of the common law rules:

The present law is too rigid and technical. There is a strong case for saying that it does not adequately serve the rationale of minimising the risk of wrongful convictions. Warnings can be required when not necessary and avoided when they should be given in the circumstances of the particular case. In addition, warnings in their present form distract

112 Submission 8 (Criminal Bar Association of Victoria) 21-25.

113 Letter of advice from Joanna Davidson, Victorian Government Solicitors Office to Professor Neil Rees (12 February 2009)10.

114 Ibid.

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

116 (2006) 225 ALR 161.

117 Ibid 164-5.

118 Letter of advice from Joanna Davidson, Victorian Government Solicitors Office to Professor Neil Rees (12 February 2009) 10.

119 Victoria, *Parliamentary Debates*, Legislative Assembly (4 December 2008) 4973-4 (Robert Hulls, Attorney-General).

120 Ibid.

121 *Reid v Jamaica*, Human Rights Committee, Communication No 355/1989, UN Doc CCPR/C/51/D/355/1989 (20 July 1994).

122 *Perera v Australia*, Human Rights Committee, Communication No 536/1993, UN Doc CCPR/C/53/D/536/1993 (28 March 1995).

123 *HTB v Canada*, Human Rights Committee, Communication No 534/1993, UN Doc CCPR/C/49/D/534/1993 (3 November 1993).

124 See eg, *Lumley v Jamaica*, Human Rights Committee, Communication No 662/1995, UN Doc CCPR/C/65/D/662/1995 (30 April 1999).

125 *Evidence Act 2008* (Vic), s 2(3).

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

127 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: *R v NRC* [1999] 3 VR 537, 540. However, in *R v WEB* (2003) 7 VR 200, it was held that no warning based on special judicial knowledge or experience of the judge in relation to a child's evidence was necessary.

128 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; see *Robinson v R* (2006) 162 A Crim R 88, 95). In NSW, this provision has not prevented *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.

*attention from the issue of the reliability of the evidence in question. Finally, the directions to be given are so complex that they are likely to be ignored...What is required is a simpler regime, under which the trial judge must consider whether a direction appropriate to the circumstances should be given.*¹²⁹

- 4.113 Section 165 of the Evidence Act 2008 directs a trial judge to warn the jury about the dangers associated with 'evidence of a kind that may be unreliable' when requested by a party. Several broad categories of evidence, such as hearsay, identification evidence, and evidence where reliability may be affected by age, physical or mental health, injury are included within the description of 'evidence of a kind that may be unreliable'.¹³⁰ The judge is not obliged to give the jury a warning about this sort of evidence 'if there are good reasons for not doing so'.¹³¹
- 4.114 When giving a warning the judge is required to:
- warn the jury that the evidence may be unreliable, and*
 - inform the jury of the matters that may cause it to be unreliable, and*
 - warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.*
- 4.115 Section 165(4) provides that it is not necessary to use a particular form of words when giving the warning.
- 4.116 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.¹³² Section 165 makes the request of counsel the trigger for the warning, which must be given unless the judge is satisfied that there are good reasons for not doing so.¹³³

The effect of section 165(5)

- 4.117 Section 165(5) preserves the judge's powers to give common law warnings about particular types of evidence by providing that section 165 'does not affect any other power of the judge to give a warning to, or to inform, the jury'. This provision requires a trial judge to give evidentiary warnings required by the common law.¹³⁴

The commission's view

- 4.118 In the Consultation Paper, the commission considered whether section 165(5) should be repealed because the proposed jury directions legislation is intended to be the sole source of the law of jury directions.
- 4.119 The commission has concluded that section 165(5) should be repealed in order to overcome any risk of overlapping statutory and common law rules.

Warnings about delay in prosecution

- 4.120 The *Evidence Act 2008* also aims to limit the effect of *Longman*,¹³⁵ which requires a warning to be given about forensic disadvantage suffered by an accused where there has been a delay in reporting an offence. Section 165B concerns jury warnings about delay in the prosecution of offences. Section 61 of the Crimes Act also deals with warnings about delayed complaints. Section 165B of the Evidence Act should be located in the proposed jury directions legislation in due course. The commission has made recommendations regarding the matters dealt with in section 61 of the Crimes Act in Chapter 5.

Directions and warnings about evidence of children

- 4.121 Section 165A of the Evidence Act deals with warnings in relation to children's evidence.¹³⁶ Subsection 165A(1) provides that 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, and
- that it is dangerous to convict on the uncorroborated evidence of a witness who is a child.

4.122 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, may affect the reliability of that child's evidence. The judge 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.¹³⁷

Statutory reform regarding complaint evidence of children

4.123 In Victoria, earlier legislative reforms created special rules about the evidence of children in sexual offence cases.¹³⁸ This legislation was enacted in response to common law rules about evidence of complaint.

4.124 The *Evidence Act 2008* deals with some of the criticisms of these common law rules by addressing admissibility and use of evidence of a complainant's prior statements, or 'previous representations', through rules of general application, depending on how the evidence is relevant.¹³⁹ By dealing with the admission and use of 'complaint' evidence in this way, the *Evidence Act* avoids the need to give artificial common law directions which tell the jury to limit the use of such statements to supporting the complainant's credibility only, and not to use it as proof of the truth of the facts alleged in the statement.

4.125 The Evidence Act retains the judge's discretionary power to limit the use of the evidence. This may occur, for example, where the evidence of a prior representation may be of doubtful probative value, or where the ability to test its truth is limited.¹⁴⁰ Where no such limited use direction is sought, or given, the NSW Supreme Court has held that the evidence may be used for all relevant and admissible purposes.¹⁴¹ The High Court has held that despite the fact that the Uniform Evidence Act does not disturb the trial judge's discretionary power to give the jury a limited use direction, the power should not be used to reinstate the common law rules concerning recent complaint.¹⁴² It may be necessary for a judge, where evidence of a recent complaint may be used for a 'hearsay purpose',¹⁴³ to give the jury a warning under section 165 about the reliability of the evidence if requested by counsel.¹⁴⁴

129 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol I (1985) Report 26 560.

130 *Evidence Act* s 165(1).

131 *Evidence Act* s 165(3).

132 *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.

133 The same approach is taken in ss 165A and 165B.

134 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.

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

136 Section 165(1)(c) specifically includes 'age' as one of the reasons why the reliability of evidence might be affected. 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), (3).

137 *Evidence Act* s 165A(2).

138 See eg, *Crimes (Sexual Offences) Act 2006* inserting new Division 3AA to the *Evidence Act 1958* (Vic).

139 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, 694.

140 *Evidence Act* s 136. In *Roach v Page* (No 11) [2003] NSWSC 907, the judge found a limited use ruling was necessary where the opposing party was denied the opportunity of cross-examination about the evidence.

141 *R v Horton* (1998) 104 A Crim R 306, 312.

142 *Papakosmas v The Queen* (1999) 196 CLR 297.

143 That is, as evidence of the facts asserted.

144 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, 708. Some examples where the jury has been warned about the potential unreliability of the evidence include: where particular factors suggest the complaint has been fabricated (such as 'personal animosity' towards the defendant, or the timing or circumstances of the complaint) see *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.



- 4.126 When a child was sexually assaulted, the common law rule prohibiting hearsay evidence prevented someone, such as a parent or teacher, from giving evidence about the child's complaint if it was not admitted as recent complaint evidence. The law was amended in response to research which indicated that abused children rarely complain immediately.
- 4.127 The *Evidence Act 1958* was amended in 2006 to create a 'child specific' exception to the hearsay rule.¹⁴⁵ Section 41D allows the jury to use out of court statements by child complainants as proof of the truth of allegations as well as for credibility purposes. The judge must first be satisfied that the evidence is relevant to a fact in issue and is 'sufficiently probative' with regard to the nature and content of the representation and the circumstances in which it was made.
- 4.128 These provisions are intended to operate 'in conjunction with' the *Evidence Act 2008*, and to extend the admissibility of children's hearsay evidence beyond the circumstances permitted by that Act when the child is available for cross-examination. However, there is a mandatory requirement in section 41D that, where the earlier representation is used to prove the truth of the facts alleged, the judge must give a warning about the unreliable nature of such 'hearsay' evidence.¹⁴⁶

Views from consultations and submissions

- 4.129 In submissions and consultations, there was significant support for the fact that the Uniform Evidence Act abandons the distinction between admissibility as to credit and as to fact when dealing with recent complaint evidence. There was also criticism of the common law rules and terminology.¹⁴⁷ One submission observed, however, that the changes to the law regarding the use of complaint evidence have not 'easily been taken on board by trial judges', and that some trial judges and lawyers had difficulties in coming to terms with the concept of complaint evidence being used to prove the truth of the facts alleged in the complaint.¹⁴⁸
- 4.130 The commission notes that specific criticisms were raised about the inflexibility of section 41D of the *Evidence Act 1958* which appears to require a mandatory warning about unreliability, if evidence of a child's previous representation is used to prove the truth of that statement, even when the child is available to give evidence.¹⁴⁹ In 2008, the provision was amended to provide that the warning in section 41D is required only when the evidence of previous representations is admitted to prove the truth of the facts alleged (rather than if it is used only to support the credibility of the witness). It appears, however, that this amendment will continue to require a warning in cases where a child is available to give evidence.

The commission's views

- 4.131 The commission has not made any recommendations about limited use directions as the *Evidence Act 2008* will largely remove the need for the jury to be given directions concerning the limited use of complaint evidence.
- 4.132 The commission recommends that section 165A of the Evidence Act 2008, along with all other provisions in that Act concerning jury directions, be located within the proposed new legislation so that there is one source of law of jury directions.
- 4.133 The provisions in section 41D of the *Evidence Act 1958* concerning directions about 'hearsay' evidence of children are linked with complex procedural issues about arrangements for giving this evidence. These matters may be best dealt with together in the same piece of legislation. The Implementation Report for the uniform evidence legislation in Victoria recommended that section 41D be moved into an amended Crimes Act.¹⁵⁰ Concerns about the mandatory warning concerning the reliability of this evidence could be considered as part of the overall review of these provisions.

OTHER WARNINGS AFFECTED BY THE EVIDENCE ACT 2008

- 4.134 In Chapter 3 we considered the identification evidence directions governed by sections 116 and 165 of the Evidence Act 2008. The commission believes that these directions can be improved and should be included in the new jury directions legislation. The commission's recommendations are discussed in detail in Chapter 5.

4.135 In Chapter 3 we also considered the operation of the tendency and coincidence evidence provisions in the Evidence Act 2008 and their interaction with section 95 which preserves the need to give some limited use directions. The effect of section 95 is that evidence admitted solely to establish 'context' or 'relationship' in a sexual offence case requires a limited use direction whenever there is a danger that the jury may use that evidence to engage in propensity reasoning. Whether that situation should continue is a complex matter. These provisions are discussed in Chapter 5 where we suggest that further consideration be given to their ongoing utility.

POWERS ON APPEAL

4.136 Defence counsel have a duty to the court and to their clients to take exception to any direction (or lack of direction) that they perceive to be unjust or erroneous.¹⁵¹ The failure to take such an exception is cogent evidence that defence counsel perceived no such injustice or error.¹⁵²

4.137 Accordingly, when an appellant contends that a direction should have been given, and defence counsel took no exception at the trial, the failure to take exception is a significant factor that the Court of Appeal will take into account in determining whether there was a substantial miscarriage of justice.¹⁵³ The fact that defence counsel perceived no error at the time does not necessarily mean that the direction did not result in a substantial miscarriage of justice, but it is a significant factor which bears on the determination of that issue.¹⁵⁴

4.138 In more than 50% of successful applications for leave to appeal against conviction in Victoria between 2004 and 2006, the successful grounds of appeal concerned issues that had not been raised at trial by defence counsel.¹⁵⁵ Many of these errors could have been dealt with by the trial judge had they been raised at the trial. The Victorian Director of Public Prosecutions Jeremy Rapke QC has observed that 'the number of retrials that run not only drains resources but also creates enormous burdens for victims and witnesses and accused persons – not to mention the courts.'¹⁵⁶

4.139 The current legislation governing appeals does not restrict convicted persons from raising points of law on appeal that were not raised, and could have been raised, at the trial.¹⁵⁷ This will also be the case under the *Criminal Procedure Act 2009* (Vic). By way of contrast, rule 4 of the NSW *Criminal Appeal Rules* requires leave to raise an appeal ground concerning a direction about which no exception was taken at trial.

4.140 The commission advanced the following proposals in its Consultation Paper:

- 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.
- 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.

4.141 In its Consultation Paper, the commission also posed the question 'in what circumstances, if any, should it be possible to depart from this general rule?'

4.142 Subsequently, in its paper 'Jury Directions – a closer look', the commission posed the following questions:

- Should counsel's failure to seek a discretionary direction create a rebuttable presumption that the direction was unnecessary?
- Should it be necessary for the appellant to demonstrate denial of a fair trial (or substantial miscarriage of justice) before allowing an appeal on the basis that a particular direction not sought at trial ought to have been given?
- Should leave be required to raise a direction-based ground of appeal when the matter was not raised at trial?

145 *Crimes (Sexual Offences) Act 2006* (Vic).

146 *Evidence Act 1958* (Vic) s 41D.

147 Sex Offences Roundtable, Submissions 3 (Stephen Odgers SC); 4 (Patrick Tehan); 9 (John Willis).

148 Submission 4 (Patrick Tehan) [4].

149 Sex Offences Roundtable, Submissions 4 (Patrick Tehan); 9 (John Willis).

150 See Victorian Law Reform Commission, *Implementing the Uniform Evidence Act: Report* (2006) 66 (although, at the time of that report, s 41D was yet to be enacted as part of the *Crimes (Sexual Offences) Bill 2005*).

151 *R v Clarke and Johnstone* [1986] VR 643, 662; *R v Wright* [1999] 3 VR 355, 357; *R v Tripodina and Morabito* (1988) 35 A Crim R 183, 191; *R v Calides* (1983) 34 SASR 355, 359.

152 *R v Clarke and Johnstone* [1986] VR 643, 662; *R v Wright* [1999] 3 VR 355, 357; *R v Tripodina and Morabito* (1988) 35 A Crim R 183, 191; *R v Calides* (1983) 34 SASR 355, 359.

153 *R v Clarke and Johnstone* [1986] VR 643, 661-662; *R v Anderson* [1996] 2 VR 663, 670.

154 See, eg, *R v Anderson* [1996] 2 VR 663, 670.

155 Justice Geoffrey Eames, 'Tackling the Complexity of Criminal Trial Directions: What Role for Appellate courts?' (2007) 29 *Australian Bar Review* 161, 162.

156 Jeremy Rapke QC, Director of Public Prosecutions, '25th Anniversary Speech' (Speech delivered at 25th Anniversary Dinner, Parliament House, Melbourne, 27 October 2008) 4-5 <http://www.opp.vic.gov.au/wps/wcm/connect/Office+Of+Public+Prosecutions/resources/file/eb493844164f1f3/25th_Anniversary_Speech_delivered_by_DPP-27Oct08.pdf> at 29 April 2009.

157 *Crimes Act 1958* (Vic) ss 567(c) and 568.



- 4.143 Many people expressed views about these questions. Some emphasised that an erroneous direction can result in a substantial miscarriage of justice even though counsel took no exception to it.¹⁵⁸ Some observed that an accused should not be bound by decisions of their counsel because some defence lawyers are incompetent, and that even competent defence lawyers can miss important issues.¹⁵⁹
- 4.144 The commission acknowledges that a direction (or a failure to give a direction) may occasion a substantial miscarriage of justice even though counsel took no exception to it. At the same time, the commission takes the view that it is in the interests of victims, accused persons, the courts and the community as a whole that retrials be avoided. We reiterate the view expressed by Phillips CJ and Charles JA 10 years ago:
- [i]t is time to affirm with emphasis that it is the obligation of counsel at the trial (for the prosecution as well as the defence) to take objection to matters which are prejudicial to the fair trial of the accused and that the failure to take exception presents a serious obstacle to the raising of such matters on appeal.¹⁶⁰*
- 4.145 The commission recommends that leave be required to argue a ground of appeal that the trial judge made an error of law when giving or in failing to give a particular direction in circumstances when the alleged error of law was not drawn to the attention of the judge prior to verdict. An application for leave to argue such a ground should be made before a single judge of appeal on an occasion before any actual appeal hearing.
- 4.146 The applicant for leave should be required to satisfy the judge that there is a reasonable prospect that the ground, if made out, would satisfy the Court of Appeal that there was a substantial miscarriage of justice. This approach is consistent with the approach for applications for leave to appeal against sentence under s 280(2) of the *Criminal Procedure Act 2009* (Vic), which provides that ‘an application for leave to appeal...may be refused if there is no reasonable prospect that the Court of Appeal would impose a less severe sentence than the sentence first imposed.’
- 4.147 The term ‘substantial miscarriage of justice’ should be used rather than the phrase ‘a denial of a fair trial’ because that is the language used in the conviction appeal provisions of the *Criminal Procedure Act 2009* (Vic).¹⁶¹ The commission believes this approach strikes an appropriate balance between acknowledging that an erroneous direction may cause a substantial miscarriage of justice despite no exception having been taken to it, and emphasising the obligation of trial counsel to take exception to incorrect directions.

RECOMMENDATIONS:

20. It should not be possible to argue on appeal, without the leave of the Court of Appeal, that the trial judge made an error of law when giving or in failing to give a particular direction to the jury, unless the alleged error of law was drawn to the attention of the trial judge prior to verdict.
21. The Court of Appeal should not grant leave to argue a ground of appeal in the circumstances referred to in recommendation 20 unless it finds that there is a reasonable prospect that the ground, if made out, would satisfy it that there had been a substantial miscarriage of justice.

¹⁵⁸ Submissions 3 (Stephen Odgers SC) 2; 8 (Criminal Bar Association of Victoria) 12; 14 (Law Council of Australia) [17].

¹⁵⁹ Submissions 3 (Stephen Odgers SC) 2; 14 (Law Council of Australia) [17].

¹⁶⁰ *R v Wright* [1999] 3 VR 355, 356.

¹⁶¹ *Criminal Procedure Act 2009* (Vic) ss 276(1)(b), 276(1)(c), 277(1)(a).

Chapter 5

The Contents of the Legislation

CONTENTS

- Introduction
- The obligation to sum up
- Specific evidentiary directions
- Delayed complaint

The Contents of the Legislation



INTRODUCTION

- 5.1 In this chapter, the commission makes recommendations about some of the contents of the jury directions legislation discussed in Chapter 4. We provide examples of the way in which the proposed legislation could deal with some matters currently governed by common law rules. The chapter does not deal with all of the matters that should be included in the comprehensive jury directions legislation proposed by the commission.
- 5.2 In the first part of the chapter we deal with the trial judge's obligation to sum up a case to the jury. We then consider changes to evidentiary directions. We have chosen consciousness of guilt (or post-offence conduct) and identification directions as examples of the reforms proposed by the commission. We also recommend legislative changes to the *Pemble* obligation. The chapter then deals with delayed complaint and propensity directions.

THE OBLIGATION TO SUM UP

THE ISSUE

- 5.3 In its terms of reference the commission was asked to 'clarify the extent to which the judge need summarise the evidence for the jury'.¹ The obligation to summarise the evidence forms part of the trial judge's common law duty to sum up the case to the jury so that they are aware of the real issues which they must decide in order to reach a verdict. In practice, the requirement that the trial judge sum up a case to the jury is often referred to as the *Alford v Magee*² obligation because the High Court explained the operation of the relevant common law rule in that case.
- 5.4 As we discussed in Chapter 3, *Alford v Magee* requires a trial judge to direct the jury about as much of the law as is 'necessary ... to guide them to a decision on the real issue or issues in the case'.³ The High Court pointed out that the trial judge must identify the 'real issues' in a case and tell the jury about those real issues 'in light of the law'.⁴ Later cases have indicated that the trial judge is required to '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'.⁵
- 5.5 There is on-going uncertainty about the extent to which the common law requires the trial judge to repeat, summarise, or refer the jury to the evidence in a case. It appears that some judges provide the jury with very long and detailed restatements of the evidence in order to ensure that an appellate court will conclude that enough was said about the facts of the case. Trial judges are at little risk of causing an appealable error of law by providing juries with evidence summaries that are too detailed or overly long. Exhaustive summaries, or restatements, of the evidence are unlikely, however, to assist juries in their fundamental task of deciding the real issues in a case in order to reach a verdict that is fair and just.

The *Criminal Procedure Act 2009*

- 5.6 As noted in Chapter 3, the trial judge's common law obligation to sum up a case to the jury has been restated in section 238 of the *Criminal Procedure Act 2009* (Vic) which will commence operation shortly. That section states:

At the conclusion of the closing address of the prosecution, the closing address of the accused and any supplementary prosecution address, the trial judge must give directions to the jury so as to enable the jury to properly consider its verdict.

- 5.7 Because the *Criminal Procedure Act 2009* (Vic) says nothing about the actual content of the trial judge's obligation to sum up a case to the jury, the common law rules drawn from *Alford v Magee* and subsequent cases will continue to apply unless replaced by legislation.

COMMISSION PROPOSALS

Submissions on the legislative restatement of the obligation

- 5.8 Submissions were divided about the proposal advanced in the Consultation Paper that the content of the *Alford v Magee* obligation be included in legislation. One submission suggested that there was no real need to clarify the obligation and that the draft principles contained in

the Consultation Paper were unhelpful.⁶ Another was supportive and even suggested the judges who abided by the principles should be protected on appeal.⁷

5.9 The submission of Victoria Legal Aid criticised the proposal on the basis that it would require the trial judge to determine the issues in the case. That criticism overlooks the fact that the High Court stated nearly 60 years ago that the trial judge must decide what are the real issues in a case⁸ and that it has confirmed this common law rule on a number of subsequent occasions.⁹

5.10 The Criminal Bar Association acknowledged that some judges give summaries of the evidence that extend beyond what is required by the relevant common law rule:

*If a judge only summarizes 'all the evidence' to ensure they do not fall foul of Alford v Magee, then that is a misapprehension of the judicial duty.*¹⁰

5.11 At the same time, it is clear that some judges feel obliged to deal with matters that they consider irrelevant in order to avoid appeals. One County Court judge stated:

*... in a recent case I was forced to direct the jury in relation to the fourth element of a count of rape, namely "awareness of consent" when there was no material evidence relevant to that issue. The accused alleged consent and that was the beginning and the end of the defence in the trial.*¹¹

5.12 The Law Reform Committee of the County Court suggested that 'care needs to be taken to ensure the reformulated requirement does not impose equally onerous requirements to those which currently exist, or are believed to exist'.¹² The Committee also said that 'consideration should be given to ascertaining the most effective way of reminding the jury of the evidence'.

The commission's view

Restating the obligation

5.13 The commission believes that it is desirable to include the content of a trial judge's obligation to sum up a case to the jury in legislation in order to clarify what judges are required to do and to indicate the means by which they may direct the jury. Trial judges should be permitted and encouraged to use modern means of communicating with jurors. They should not be unsure about the extent to which they may use written directions or rely upon the transcript as a means of referring the jury to relevant parts of the evidence.

5.14 The legislation should contain a set of propositions, or principles, which describe in general terms the directions which a trial judge must give to the jury to enable it to properly consider its verdict. As the original common law rule explained by the High Court in *Alford v Magee* has enjoyed widespread support, it should guide the content of any legislative principles.

RECOMMENDATIONS:

22. The nature and extent of a trial judge's obligation to direct the jury about the elements of the offences, the facts in issue and the evidence so that it may properly consider its verdict should be set out in the legislation.

23. The legislative statement of this obligation should contain the following principles:

- a) The trial judge must direct the jury about the elements of any offences charged by the prosecution that are in dispute and may do so by identifying the findings of fact they must make with respect to each disputed element.
- b) The trial judge must direct the jury about the elements of any defences raised by the accused person which must be negated by the prosecution or affirmatively proved by the accused person and may do so by identifying the findings of fact they must make with respect to each disputed element.
- c) The trial judge must direct the jury about all of the verdicts open to them on the evidence, unless there is good reason not to do so.

1. See Terms of Reference.

2. (1952) 85 CLR 437.

3. *Ibid* 466.

4. *Ibid*. The High Court has reiterated its support for this approach on a number of subsequent occasions: see, e.g. *HML v the Queen*; *SB v the Queen*; *OAE v the Queen* (2008) 235 CLR 334; *DeGruchy v the Queen* (2002) 211 CLR 85; and *Holland v the Queen* (1993) 117 ALR 193.

5 *R v AJS* [2005] VSCA 288 [55].

6 Submission 3 (Stephen J Odgers SC).

7 Submission 17 (Office of Public Prosecutions).

8 *Alford v Magee* (1952) 85 CLR 437 at 466.

9 See eg *Azzopardi v The Queen* (2001) 205 CLR 50, 69 [49], *Tully v The Queen* (2006) 230 CLR 234, 256 [75].

10 Submission 8 (Criminal Bar Association of Victoria).

11 Submission 16 (Judge M D Murphy).

12 Submission 18 (County Court of Victoria).



- d) The trial judge must refer the jury to the evidence which is relevant to the findings of fact they must make with respect to the contested elements of each offence.
- e) In referring the jury to relevant evidence the trial judge is not required to provide the jury with an oral restatement of all or any of that evidence, unless the judge determines, in the exercise of the judge's discretion, that it is necessary to do so in order to ensure a fair trial.
- f) In determining whether it is necessary to provide the jury with an oral summary of evidence, the trial judge may have regard to the following matters:
 - the length of the trial;
 - whether the jury will be provided with a written or electronic transcript or summary of the evidence;
 - the complexity of the evidence;
 - any special needs or disadvantages of the jury in understanding or recalling the evidence;
 - the submissions and addresses of counsel;
 - such other matters as the judge deems appropriate in the circumstances of the case.
- g) The trial judge must direct the jury that they must find the accused not guilty if they cannot make any of the findings of fact referred to in paragraph (a) beyond reasonable doubt.
- h) The trial judge is under no obligation to direct the jury about the elements of the offence (or any defence) other than to comply with these requirements.
- i) The trial judge must provide the jury with a summary of the way in which the prosecutor and the accused have put their respective cases

THE OBLIGATION TO SUM UP: THE USE OF WRITTEN MATERIALS

- 5.15 In the Consultation Paper, the commission suggested that it might be possible to fulfil the *Alford v Magee* obligation by using written materials as well as giving oral directions.
- 5.16 In Chapter 6 the commission recommends the discretionary use of a document called the 'Jury Guide' which would identify the questions of fact that a jury must decide in order to reach a verdict. Examples of this document are set out in Appendices E and F and its use is explained in detail in Chapter 6.
- 5.17 The Jury Guide could be used to provide a framework for the trial judge's summing up to the jury¹³. The jury could be directed about the relevant law and evidence as the judge deals with each question in the Jury Guide. For example, if a question in the Jury Guide asked whether the jury was satisfied that the acts of the accused caused the death of the victim, the judge could direct the jury about causation in criminal law and refer them to the relevant evidence at this time. By this means, the trial judge could weave the facts and the law together in a way that makes it easier for jurors to comprehend their instructions.
- 5.18 The commission believes that trial judges should be encouraged to provide juries with copies of the transcript of the evidence. Justice Virginia Bell of the High Court has endorsed this practice which is becoming more widespread.¹⁴ When the jury has a copy of the transcript the time taken to remind the jury of the evidence can be reduced. The trial judge can refer the jury to the evidence which is relevant to an issue they must decide by giving a brief oral summary of that evidence and referring them to the appropriate parts of the transcript for a more detailed account of the evidence.

Submissions on the fulfilment of the obligation

5.19 Few submissions considered whether it should be possible to fulfil the obligation to sum up using both written and oral materials. Victoria Legal Aid (VLA) raised a number of concerns which in summary are:

- Some people process information aurally rather than in writing;
- It may disadvantage people who do not possess strong English reading skills;
- There is a danger that a focus on the transcript may distort the jury's decision making process;
- An oral charge is the only way to make sure that the information is delivered to the whole jury; and
- The charge is an important public statement because it is the judge's summary, given in open court, of the evidence in the case and the issues which the jury must decide.

5.20 In view of the importance of the commission's recommendations which encourage, but do not mandate, greater use of written materials when a judge is directing a jury, each of these concerns should be considered. Our recommendations about the use of written materials are clearly consistent with the legislative policy concerning jury documents found in both the *Crimes (Criminal Trials) Act 1999 (Vic)*¹⁵ and the *Criminal Procedure Act 2009 (Vic)*.¹⁶

5.21 While there is little reason to question the first point made by VLA that some people process information aurally rather than in writing, the obverse is also true. Some people find it easier to process written rather than oral information. Trial judges should be encouraged to provide the jury with a combination of written and oral information.

5.22 The second point made by VLA concerns reading skills. Research indicates that a significant proportion of modern jurors are highly educated.¹⁷ The majority of modern jurors have completed secondary school and more than 25 per cent have a university degree. It is reasonable to conclude from this information that most jurors have sound reading skills. In addition, the jury is usually given only one copy of the transcript. It is highly likely that one juror will read aloud from the transcript when another juror wishes to be reminded of the evidence. A juror with limited reading skills would be at no greater disadvantage than any other juror in being reminded of the evidence by reference to the transcript. A strength of the jury system is that it involves the combined knowledge and understanding of twelve people¹⁸.

5.23 The third point made by VLA concerns the risk that use of the transcript may distort the jury's decision making process. It is unclear how the transcript would do so. In *Cooper v Western Australia*,¹⁹ the Western Australian Court of Appeal rejected such an argument. In that case it was argued that re-reading graphic evidence about a sex attack from the transcript might have prejudiced the jury. As the Court of Appeal stated, however, '[t]he transcript is nothing more than an accurate record of the complainant's evidence'.²⁰

13 For a detailed discussion of the proposed function of the Jury Guide, see chapter 6.

14 Justice Virginia Bell, Conference Address, National Judicial College of Australia, Sydney, 10 November 2007 <<http://njca.anu.edu.au/Professional%20Development/programs%20by%20year/2007/Communic%20and%20the%20courts%20NOV/papers/Virginia%20Bell%20transcript.pdf>> at 27 April 2009.

15 *Crimes (Criminal Trials) Act 1999 (Vic)*, s19.

16 *Criminal Procedure Act 2009 (Vic)*, s 223.

17 In a 2007 report to the Criminology Research Council it was found that empanelled jurors in Victoria, South Australia and New South Wales comprised 26.1% with university degree, 15% with diploma or equivalent and 14.5% with trade certificate or equivalent: Jane Goodman-Delahunty et al, *Practices, Policies and Procedures that influence Juror Satisfaction in Australia: Report to the Criminology Research Council (2007)* 129-130. The Department of Justice Victoria, *Survey of Victorian Jurors Report, (1998)* 58 reported 39.5% of 1385 members of Victorian jury panels had tertiary qualifications. A 2008 survey of 896 members of jury panels disclosed that 27% had a tertiary or University degree, and 22.5% had post graduate qualifications: Office of Juries Commissioner, 2008, See also Geoff Eames, 'Towards a Better Direction – Better Communication with Jurors' (2003) 24 *Australian Bar Review* 35, 42.

18 As noted in Geoff Eames, 'Towards a Better Direction – Better Communication with Jurors' (2003) 24 *Australian Bar Review* 35, 40, the Law Reform Committee of the Victorian Parliament in its 1997 Final Report into Jury Service, noted research in Australia, England and the United States which confirmed that the group decision-making process of jury deliberation played an important role in removing or reducing the degree to which individual jurors were confused about the evidence.

19 [2009] WASCA 37.

20 Ibid [22].



- 5.24 Partial or selective access to the transcript might distort the decision making process by presenting a biased account of the evidence. Many of the cases in which caution has been expressed about the transcript, or the use of recordings, have arisen where a single piece of evidence is given to the jury.²¹ It is difficult to see how a complete and properly edited transcript²² could distort a jury's decision making process.²³ As Justice Virginia Bell has pointed out, how a juror 'might place too much weight on the transcript of the evidence on which you are being invited to return your verdict is a concept that is too elusive for me'.²⁴
- 5.25 New Zealand researchers have made a similar point. In their jury research conducted for the New Zealand Law Commission, Young, Cameron and Tinsely reported that jurors sought access to the transcript, or what is referred to in New Zealand as 'the judge's notes of evidence':
- The jurors in the Research [sic] expressed a strong wish to receive a copy of the judge's notes (see Findings, 3.9(1)). At present they do not receive a copy because it is believed that:*
- *jurors will become too absorbed in poring over the judge's notes and be distracted from issues of credibility and demeanour; and*
 - *jurors will get sidetracked into details and deliberations will be prolonged as a result.*
- The Research suggests that these concerns are unfounded. Many juries already spend a lot of time trying to agree on a version of the evidence from the notes they have collectively taken, and search their own notes or the notes of others when they cannot recall a section of the evidence critical to the discussions. They also frequently need to have portions of the evidence read back to them. There is little reason to believe that they would pay much more attention to the judge's notes than they currently do to their own notes, and every reason to believe that the provision of a copy of the judge's notes, by eliminating the current sometimes lengthy arguments about what evidence has actually been given, would not only enable discussions to become more focused, but also reduce deliberation time. It is to be expected that jurors are becoming computer literate and could use a search facility in the jury room.²⁵*
- 5.26 In *Butera v DPP (Vic)*, Mason CJ, Brennan and Deane JJ advanced another argument against the provision of transcript:
- By generally restricting the jury to consideration of testimonial evidence in its oral form, it is thought that the jury's discussion of the case in the jury room will be more open, the exchange of views among jurors will be easier, and the legitimate merging of opinions will more easily occur than if the evidence were given in writing or the jurors were each armed with a written transcript of the evidence. And there are, of course, logistical and financial obstacles to the provision of general transcripts for each juror.²⁶*
- 5.27 The 'logistical and financial obstacles' which prevented the provision of transcript in 1987 have largely fallen away. It is questionable whether the 'process' benefits of relying on recollection occur or, if they do, whether they assist the jury to reach a fair and just verdict. Jury research suggests that juries adopt a variety of decision making processes. Vidmar and Hans identify two approaches: 'verdict-driven' and 'evidence-driven'. In the former:
- Some jurors start by taking a formal vote, either through a show of hands or a secret ballot. In [the verdict driven approach] ..., jurors then align themselves with those who are on the same side and talk about the evidence that supports the verdict favoured by their faction. In verdict-driven deliberation, polling tends to be frequent.*
- In contrast, in an "evidence-driven" deliberation, jurors tend to embark on a general discussion of the testimony, the facts and their meaning. Rather than offer only the facts supportive of their preferred verdict, jurors tend to talk about all of the evidence as they collectively aim to develop a common story of the events.²⁷*
- 5.28 The fourth point made by VLA concerns comprehension of the judge's summing up. It is highly unlikely that jurors have better recall of the evidence by receiving a lengthy oral summary of evidence rather than being reminded by the judge in general terms of the evidence relevant to each disputed issue and being referred to relevant passages in the transcript. In practice it is

common for jurors who do not have access to the transcript to ask to be reminded of evidence, even though they were given a comprehensive oral summary of the evidence by the judge. As the Queensland Court of Appeal said in a recent case:

*Having a judge (or associate) read to the jury ..., hours of evidence from the transcript is hardly the best way of allowing the jury to evaluate that material. Such a lengthy recitation of evidence is often mind-numbing and hardly the best way of ensuring that the jury properly considers and evaluates the relevant evidence.*²⁸

5.29 The final point made by VLA concerns the public nature of the judge's summing up to the jury. As we pointed out in Chapter 3, the notion of open justice is of fundamental importance. The Victorian *Charter of Human Rights and Responsibilities Act* provides that a person charged with a criminal offence is entitled to 'a fair and public hearing'.²⁹ Interested members of the community, including representatives of the media, should be able to know the directions which the judge gives to the jury in a criminal trial. There are, however, acceptable modern means of obtaining this awareness other than by requiring the judge to give oral directions.

SPECIFIC EVIDENTIARY DIRECTIONS

AN OVERVIEW OF APPROACHES TO DIRECTIONS

5.30 There are various means by which the content of evidentiary directions could be dealt with in legislation. In the Consultation Paper, we identified three ways of dealing with the content of particular directions:

- Model directions – these are detailed statements of the kind seen in the Judicial College of Victoria's Charge Book which can be varied to suit the facts of a particular case.
- Essential elements – these are concise statements of the essential elements of a particular direction sometimes presented in the form of 'bullet points'. Examples of this approach to directions are found in the *Evidence Act 2006* (NZ). While the law prescribes the minimum content of a particular direction, the trial judge is usually not bound to use specific language and may choose the wording of the direction according to the circumstances of the trial.
- Pattern directions – Pattern directions, which are used in the United States, are prescriptive in form and content. The trial judge is required to read a prescribed statement of the law on a particular topic and leave it to the jury to apply it to the evidence. For obvious reasons, successful appeals about the content of pattern directions are rare.

SUBMISSIONS

5.31 All submissions agreed that the major issue when dealing with the contents of directions was flexibility. For example, in explaining their tentative support for model directions, the Criminal Bar Association stated:

*The advantage of adopting this course would be that it retains the necessary degree of flexibility so that in accordance with paragraph 7.25 [of the Consultation Paper] the "directions" should be drafted so that they are capable of being adapted to the needs to particular cases.*³⁰

5.32 The comments of the Office of Public Prosecutions were similar:

*It would be inappropriate for the legislation to go into detail and prescribe the exact wording required as what should be said depends on the circumstances of the particular case.*³¹

- 21 For example, the recent High Court case of *Gately v the Queen* (2007) 232 CLR 208 concerned a videotape of a complainant's evidence in chief in a sexual offence case. There the Court was concerned with the risk that repeated replaying of a videotape of a complainant's evidence in chief might cause the jury to overvalue that evidence. See also *Driscoll v the Queen* (1977) 137 CLR 517 and *Butera v DPP (Vic)* 164 CLR 180.
- 22 That is, a transcript from which all inadmissible material has been removed.
- 23 See *R v Tichowitsch* (2007) 2 Qd R 462 [11], where Williams JA (Keane JA and Philippides J agreeing) commented, 'In the present case the jury was given all of the transcript (edited so that only admissible evidence was included) and in consequence it could not be said that there was any imbalance.'
- 24 Justice Virginia Bell, Conference Address, National Judicial College of Australia, Sydney, 10 November 2007. <<http://njca.anu.edu.au/Professional%20Development/programs%20by%20year/2007/Communic%20and%20the%20courts%20NOV/papers/Virginia%20Bell%20transcript.pdf>> at 27 April 2009.
- 25 New Zealand Law Commission, *Juries in Criminal Trials – Part Two: A Summary of the Research Findings*, Preliminary Paper 37 Vol. 1 (1999) [87]–[88]. The phrase 'judge's notes' appears to mean 'transcript' in New Zealand. At [86], the Paper states that '[t]he judge's notes – the typed record of all the evidence – is not given to the jury'.
- 26 (1987) 164 CLR 180, 189 – 190.
- 27 Neil Vidmar and Valerie P Hans, *American Juries: The Verdict* (2007) 143.
- 28 *R v Tichowitsch* (2007) 2 Qd R 462, [13].
- 29 Charter of Human Rights and Responsibilities Act 2006 (Vic), s 24(1).
- 30 Submission 8 (Criminal Bar Association of Victoria).
- 31 Submission 17 (Office of Public Prosecutions).



THE COMMISSION'S VIEW

- 5.33 The commission believes that an appropriate balance must be struck between flexibility and guidance for trial judges. This balance is best achieved by legislation which contains the essential elements of any evidentiary directions that may be required in a case. While the essential elements approach will provide trial judges with guidance about the content of particular directions, it also gives judges the flexibility to tailor directions to the circumstances of the particular case.
- 5.34 Pattern directions are inflexible means of minimising error rather than assisting juries with the task of understanding the evidence and using it fairly. While the commission recognises the value which many judges gain from detailed model directions, it is neither workable nor desirable to include detailed model directions in legislation. There is a danger that model legislative directions would be quoted verbatim in order to reduce the risk of any appealable error.
- 5.35 If the proposed jury directions legislation contains the essential elements of particular directions, the JCV could continue to publish model directions for trial judges to use as guides or precedents to be adapted to the circumstances of a particular case.

CONSCIOUSNESS OF GUILT

- 5.36 As discussed in Chapter 3, directions concerning the use of evidence which may indicate a consciousness of guilt on the part of an accused person have been the source of many recent appeals. The term 'consciousness of guilt' is used to refer to circumstantial evidence from which a jury may infer that the accused committed the crime in question. It includes conduct by the accused such as lying, fleeing or concealing an important object that may be associated with a crime.
- 5.37 In this report and the Consultation Paper we refer to 'consciousness of guilt evidence' because this is the term most frequently used to describe evidence of the type under consideration. Over the course of the reference it became clear that many people felt the term 'post offence conduct' should be used because it is a more modern and less emotive description of this evidence.
- 5.38 The term 'post-offence conduct' which is used in some judgments of the Victorian courts is preferable to consciousness of guilt evidence and should be adopted.

RECOMMENDATION:

24. The term post-offence conduct should be used to describe conduct which may amount to an implied admission of guilt by the accused and which is now referred to as conduct which may convey a 'consciousness of guilt'.

Enhanced identification of consciousness of guilt evidence

- 5.39 As discussed in Chapter 3, the common law requires the trial judge to give the jury a direction about the use of consciousness of guilt evidence when either:
- the prosecution relies on consciousness of guilt evidence; or
 - the evidence creates a risk of consciousness of guilt reasoning, regardless of the intention of the party that led the evidence.

- 5.40 Questions arise about the time at which the prosecution must give notice that it seeks to rely upon consciousness of guilt evidence. In three recent cases, the Court of Appeal found error when the prosecutor made consciousness of guilt arguments in the closing address without having given the trial judge or defence counsel any notice of an intention to do so.³² This prosecution practice should be discouraged for several reasons:
- It gives both defence counsel and the trial judge little opportunity to consider whether the evidence is capable of being used for consciousness of guilt reasoning.
 - If the judge rules that the evidence is not capable of being used in the way argued by the prosecutor, the idea of consciousness of guilt reasoning may still be in the mind of some jurors.
 - It is difficult for defence counsel to adequately respond to the argument in their closing address.
 - The judge has little opportunity to prepare a proper direction.
- 5.41 In their submission, the Criminal Bar Association argued that this problem could be overcome by enforcing the obligation on the prosecution to identify the relevant evidence and explain the consciousness of guilt reasoning at a much earlier stage.
- 5.42 The commission believes it is highly desirable that the prosecution identify all of the post-offence conduct evidence on which they seek to rely and explain why a particular item of evidence may give rise to an inference of guilt at the earliest possible stage. Supreme Court Practice Direction No. 1 of 2004 already requires disclosure of this kind.³³ The commission recommends that this requirement be extended to all jury trials and included in legislation.

RECOMMENDATION:

25. The legislation should require the prosecution to identify, prior to the commencement of addresses, any evidence of particular post-offence conduct of the accused upon which it seeks to rely as demonstrating an awareness of guilt on the part of the accused as to any offence.
- The judge must decide whether any item of evidence concerning post-offence conduct by the accused is capable of amounting to an implied admission of guilt of any offence before the prosecutor may address the jury about the conclusions it might draw from this evidence.

A new post-offence conduct direction

- 5.43 The most significant practical difficulty posed by the common law rules concerning consciousness of guilt directions is the threshold issue of identifying the items of evidence which warrant a jury warning. The content of that warning is also in need of reform.
- 5.44 At present the trial judge is required to consider whether any evidence of post-offence conduct may give rise to an inference of guilt even when the prosecutor does not ask the jury to use the evidence in this way. The trial judge's task is described in detail in Chapter 3. The trial judge will commit an error of law if he or she wrongly concludes that an item of evidence does not require a consciousness of guilt warning or wrongly gives a consciousness of guilt warning when it is not required. As reasonable people can differ about the threshold issue of the need for a consciousness of guilt warning, it has been a fertile ground of appeal.
- 5.45 In the Consultation Paper the commission identified a range of reform options which removed the requirement to identify every piece of evidence which may give rise to an inference of guilt and which simplified the content of the warning.

Submissions

- 5.46 The proposal to remove the need to identify specific items was supported by Stephen Odgers SC. He stated:

I would be happy for the obligation to identify the specific evidence concerned to be removed – it would be sufficient for the principle to be explained to the jury, using an item of prosecution evidence as an example.³⁴

32 *R v Redmond and Anor* [2006] VSCA 75; *R v Zilm* (2006) 14 VR 11; and *R v Howard* (2005) 156 A Crim R 343. In *R v Calway* (2005) 157 A Crim R 322, the Court of Appeal described the prosecutor's decision to raise a consciousness of guilt argument just before final addresses as 'less than ideal', but stated that it did not follow that there had been a substantial miscarriage of justice: [91], [98].

33 (2003) 8 VR 475.

34 Submission 3 (Stephen Odgers SC).



- 5.47 Other submissions supported the Canadian approach identified in the Consultation Paper. That approach does not require the identification of particular items of consciousness of guilt evidence.³⁵ As a submission from Daniel Gurvich and Mark Pedley noted, consciousness of guilt is supposed to be a matter of common sense. If so, it is unclear why it is necessary to identify for the jury those items of evidence which the judge believes capable of supporting the inference.
- 5.48 Victoria Legal Aid suggested that changes in the area of consciousness of guilt were unnecessary as 'the process of working through this issue is essentially complete' and consciousness of guilt was less likely to be an issue in future appeals.³⁶ The Criminal Bar Association also opposed the suggestion that there be any changes to the requirement that the trial judge identify every item of evidence that requires a consciousness of guilt warning.

Commission view

- 5.49 The purpose of the jury direction concerning consciousness of guilt evidence is simple and important: it warns jurors not to jump to conclusions about whether the accused committed the offence in question by relying upon evidence of that person's conduct, which may look suspicious, at some time after the offence was committed. The commission accepts that it is fair to give a warning of this nature when there is an appreciable risk that the jury may use evidence of post-offence conduct when reaching their verdict. The question of whether it is fair to give a warning should be determined by the trial judge on a case by case basis.
- 5.50 Lengthy identification of the individual items of evidence which may be used to draw a consciousness of guilt inference is unlikely to advance the purpose of warning the jury not to jump to conclusions. This step may detract from the impact of any warning because it may cause the jury to pay too much attention to the individual items of evidence. The commission believes that the trial judge should not be required to identify every piece of consciousness of guilt evidence. The trial judge should have a discretionary power to give the jury a general warning about the use of evidence of post-offence conduct when necessary to secure a fair trial.
- 5.51 The content of the warning should be simplified. The proposed jury directions legislation should contain the essential elements of a new warning that draws the jury's attention to the potential risks of this type of evidence and emphasises that there may be explanations for the post-offence conduct other than guilt. A warning of this nature would enable the jury to decide for themselves whether any particular piece of evidence was capable of being an implied admission of guilt, while cautioning them about the risk of too readily drawing the inference.

RECOMMENDATIONS:

26. If the trial judge decides to give the jury a warning about the use of evidence concerning post-offence conduct by the accused, the trial judge should be permitted to provide the warning in general terms and should not be required to refer to each particular item of post-offence conduct which may amount to an implied admission of guilt by the accused person.
27. Any warning which a trial judge gives to a jury about the use of evidence concerning post-offence conduct by the accused will be sufficient if it contains reference to the following matters:
- People lie or engage in other apparently incriminating conduct for various reasons
 - The jury should not necessarily conclude that the accused person is guilty of the offence charged just because the jury find that he or she lied or engaged in some other apparently incriminating conduct

IDENTIFICATION EVIDENCE

- 5.52 As discussed in Chapter 3, while the law concerning directions about identification evidence is not particularly complex, greater clarity would be achieved by indicating the circumstances in which a direction is required and by including the essential elements of the direction in the proposed jury directions legislation.

- 5.53 At present identification evidence directions are governed by the common law. When the *Evidence Act 2008* (Vic) commences operation, trial judges will need to consider both statute and the common law when devising identification directions. The relevant Evidence Act provisions, which we discussed in detail in Chapter 3, should be repealed and a provision concerning identification directions included in the new jury directions legislation.

RECOMMENDATION:

28. Both section 116 and section 165(1)(b) of the *Evidence Act 2008* (Vic) should be repealed and a provision concerning identification evidence directions should be included in the new jury directions legislation.

The content of identification evidence directions

- 5.54 The common law draws a distinction between three different kinds of evidence based on a witness's visual observation of a person or thing: identification, recognition and similarity evidence. Under the *Evidence Act*, all three kinds of evidence require an identification warning.³⁷
- 5.55 The commission believes that it is appropriate to maintain the distinction between these three types of evidence but to introduce different requirements about the circumstances in which a warning must be given.

RECOMMENDATION:

29. In the jury directions legislation, 'identification evidence', 'recognition evidence' and 'similarity evidence' should be given distinct definitions. The definitions should extend to the identification of objects.

Mandatory warnings for identification evidence

- 5.56 The commission believes that the dangers of identification evidence are sufficiently well established that a direction should be mandatory when identification evidence is disputed.³⁸

RECOMMENDATION:

30. Where 'identification evidence' is admitted and the reliability of that evidence is disputed, the legislation should require the judge to warn the jury about the unreliability of the evidence.

Discretionary warnings for recognition and similarity evidence

- 5.57 As discussed in Chapter 3, the dangers of identification evidence will not always be present in the case of recognition and similarity evidence. Recognition evidence may be very reliable. In *R v Spero*³⁹ for example, the victim who identified the accused had known him for 25 years. In addition, the victim observed the accused for 20 minutes during the assault. In these circumstances, the Court of Appeal ruled that a *Dominican* warning was unnecessary. Recognition evidence would also appear to avoid the more subtle psychological dangers of stranger identification evidence, known as the displacement effect and the rogues' gallery effect.⁴⁰
- 5.58 There will be cases where the jury will appreciate the limitations of similarity evidence without the need for a warning. For example, in *R v Cavkic [No. 2]*,⁴¹ the evidence was of similarity between two inanimate objects. The shortcomings in the evidence were addressed by counsel in closing addresses and by the judge in summing up. In these circumstances, the Court of Appeal ruled that a warning was not required.
- 5.59 Accordingly, the commission considers that a warning should be given about recognition or similarity evidence when requested by counsel for the accused, unless the judge is satisfied that there is a good reason not to do so. An example of a good reason for the trial judge not to give a warning about similarity evidence would be when the judge concluded that the jury would appreciate the limitations of the evidence without a warning.

35 Submissions 4 (Patrick Tehan QC) and 11 (Mark Pedley and Daniel Gurrich).

36 Submission 7 (Victoria Legal Aid).

37 The judge is required to give a warning when 'identification evidence' is admitted and the reliability of that evidence is disputed; *Evidence Act 2008* (Vic) s 116; *Dhanhoa v R* (2003) 217 CLR 1, 9-10 (Gleeson CJ and Hayne J), 16 (McHugh and Gummow JJ). The Dictionary in the *Evidence Act 2008* (Vic) defines 'identification evidence' as 'evidence that is ... an assertion by a person to the effect that a defendant was, or resembles ... a person who was ... present at or near a place where' the offence was committed. This definition includes identification, recognition and similarity evidence; See generally Stephen Odgers, Uniform Evidence Law (8th ed, 2009) 540- 544. Thus, if identification, recognition or similarity evidence is admitted, and the reliability of that evidence is disputed, a warning will be required.

38 See *Alexander v R* (1981) 145 CLR 395, 426 (Mason J); *R v Burchielli* [1981] VR 611; *Dominican v R* (1992) 173 CLR 555; *Festa v R* (2001) 208 CLR 593. Chief Justice James Spigelman, 'The Truth Can Cost Too Much: The Principle of a Fair Trial' (2004) 78 *Australian Law Journal* 29, 41; Kevin Jon Heller, 'The Cognitive Psychology of Circumstantial Evidence' (2006) 105 *Michigan Law Review* 241, 248.

39 [2006] VSCA 58, [3] (Redlich JA).

40 *Trudgett v R* (2008) 70 NSWLR 696, 701 (Spigelman CJ).

41 [2009] VSCA 43, [51].



RECOMMENDATION:

31. Where 'recognition evidence' or 'similarity evidence' is admitted, the legislation should require the judge to warn the jury about the unreliability of the evidence upon the request of counsel for the accused, unless the judge is satisfied that there is good reason not to do so.

Content of identification warnings

- 5.60 As discussed in Chapter 3, the common law requires the trial judge to warn the jury of the general need for caution before accepting identification evidence, and about any matter of significance which undermines the reliability of the identification evidence in question.⁴² The warning need not follow any particular formula and must be tailored to the circumstances of the case.⁴³
- 5.61 The content of the general warning is well-understood. We have reduced it to three points:
- Identification evidence depends on a witness receiving, recording and accurately recalling an impression of a person or object
 - A witness, or multiple witnesses, may honestly believe that their identification, recognition or similarity evidence is accurate when it is fact mistaken
 - Innocent people have been convicted because honest witnesses were mistaken in their identification evidence.⁴⁴
- 5.62 A warning about 'identification' evidence should refer to these three points, given the well-established dangers of that type of evidence. It should not always be necessary, however, to refer to all three points in every case involving recognition or similarity evidence. Any warning about evidence of that nature must be tailored to the circumstances of the case.
- 5.63 The commission believes that it should continue to be mandatory for the judge to identify to the jury any matter of significance which may affect the reliability of the evidence in question, whether it be identification, recognition, or similarity evidence.

RECOMMENDATIONS:

32. The warning must, in the case of 'identification evidence', and may, in the case of 'recognition evidence' or 'similarity evidence', direct the jury that there is a special need for caution before accepting the evidence and that:
- The identification, recognition or similarity evidence depends on a witness receiving, recording and accurately recalling an impression of a person or object
 - A witness, or multiple witnesses, may honestly believe that their identification, recognition or similarity evidence is accurate when it is in fact mistaken
 - Innocent people have been convicted because honest witnesses were mistaken in their evidence concerning identification, recognition or similarity.
33. The judge is not required to use any particular form of words when giving a warning, but must inform the jury of any matter of significance bearing on the unreliability of the evidence in the circumstances of the case.

THE PEMBLE OBLIGATION

- 5.64 As discussed in Chapter 3, the common law requires the trial judge to direct the jury about 'defences'⁴⁵ and verdicts that have not been raised by defence counsel during the trial but which are reasonably open on the evidence. The duty, which forms part of the trial judge's responsibility to ensure a fair trial, is usually referred to as the *Pemble* obligation because it was described in the High Court case of that name.⁴⁶

- 5.65 The commission's terms of reference ask it to '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'. Although the failure of trial judges to comply with this obligation is not a particularly common ground of appeal,⁴⁷ its broad scope causes problems for trial judges because they must direct the jury about matters that defence counsel may have chosen not to address for tactical reasons.
- 5.66 The *Pemble* obligation arises in relation to both a defence and to an alternative verdict on a less serious offence that is 'included' in the charge of a more serious offence, even though these matters are not relied upon or are expressly abandoned by the defence at the trial.⁴⁸ The extent of the judge's duty to inform the jury about the possibility of an 'alternative' verdict of guilty of a lesser offence other than that charged when the issue has not been raised by the parties is somewhat uncertain.⁴⁹
- 5.67 In our Consultation Paper, the commission suggested that when defence counsel chose not to rely upon a particular defence, or to raise the possibility that the jury may find the accused guilty of a lesser offence, the trial judge should not be required to address the jury about these matters unless it was necessary to do so to ensure a fair trial.

Submissions

- 5.68 The Criminal Bar Association, Stephen Odgers SC, the Law Council of Australia and the Queensland Law Society opposed changes to this common law rule.⁵⁰ The Office of Public Prosecutions, Judge M D Murphy of the County Court and the Law Reform Committee of the County Court favoured changes to the common law obligation.⁵¹
- 5.69 People hold different views about the extent to which the trial judge should be required to direct the jury about matters that may be inconsistent with an accused person's primary defence but may cause the jury to acquit the accused or return a verdict of a lesser offence if the primary defence is not accepted. The current common law rule requires the trial judge to advance alternative hypotheses consistent with the innocence of the accused (or the guilt of a lesser crime) which defence counsel is not prepared to advance for fear of undermining the primary argument. The trial judge, who is not familiar with all of the evidence available to counsel and who is unaware of the accused person's instructions to counsel, is required to instruct the jury that they may make findings beneficial to the accused about issues which defence counsel did not raise with the jury.
- 5.70 The opposing positions are clear. The current rule provides the accused with every opportunity to secure an acquittal by obliging the trial judge to direct the jury about matters that counsel has chosen not to raise with them. Change to the *Pemble* obligation would require defence counsel to present their case as they see fit and to choose whether to advance or discard inconsistent defence arguments.

The commission's view

- 5.71 A fair trial is one that is fair to both the defence and the prosecution. A rule which requires the trial judge to advance an argument, with the apparent weight of judicial office, that the defence has not raised and to which the prosecution has not had an opportunity to respond does not appear to be even handed.
- 5.72 As Lasry J said in a speech last year:

*A fair trial does not mean a verdict of not guilty. Fairness simply deals with the basic concepts of requiring the prosecution to prove its case beyond reasonable doubt and giving the accused a fair opportunity to test that case and be heard in his or her defence.*⁵²

42 *Domican v R* (1992) 173 CLR 555, 562.

43 *R v Burchielli* [1981] VR 611; *Domican v R* (1992) 173 CLR 555; *Festa v R* (2001) 208 CLR 593; *R v Campbell* [2007] VSCA 189.

44 See, eg, *R v Burchielli* [1981] VR 611; *R v Dickson* [1983] 1 VR 227; *Domican v R* (1992) 173 CLR 555; *Festa v R* (2001) 208 CLR 593; *R v Campbell* [2007] VSCA 189; Judicial College of Victoria, *Victorian Criminal Charge Book* (2008) <<http://www.justice.vic.gov.au/emanuals/CrimChargeBook/default.htm>> at 6 May 2009.

45 This term includes not only positive defences to a particular offence, such as self-defence, but defence arguments that the prosecution has failed to prove an element of an offence, such as the mental element in murder.

46 *Pemble v R* (1971) 124 CLR 107.

47 In the period between 2000-2007, 12 successful appeals to the Victorian Court of Appeal from conviction involved the *Pemble* obligation.

48 *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.

49 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 (s 421, 6(2), 10(3)); negligently causing serious injury or culpable driving causing death (s 422A); offences alleging wounding or causing grievous bodily harm (s 423); conduct endangering life (including unlawfully and maliciously administering poison) (s 424); rape (s 425(1)); incest or sexual penetration of a child under 16 (s 425(3)); destroying or damaging property (s 427(1)); arson causing death (s 427(2)); unauthorised modification of data to cause impairment (s 428); unauthorised impairment of electronic communication (s 429); riot-related charges (s 435); infanticide (s 10(3)); child destruction (s 10(4)); abortion (s 10(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.

50 Submissions 3 (Stephen Odgers SC); 8 (Criminal Bar Association of Victoria); 14 (Law Council of Australia); and 15 (Queensland Law Society).

51 Submissions 16 (Judge M D Murphy); 17 (Office of Public Prosecutions); and 18 (County Court of Victoria).

52 Justice Lex Lasry, 'Criminal Defence Lawyers: Unwitting Human Rights Defenders' (Chancellor's Human Rights Lecture, University Of Melbourne, 25 November 2008). <<http://www.supremecourt.vic.gov.au/wps/wcm/connect/Supreme+Court/Home/Library/SUPREME++Speech++Criminal+Defence+Lawyers%3A+Uniting+Human+Rights+Defenders+%28PDF%29>>, 24 April 2009.



- 5.73 Defence counsel are able to put forward alternative arguments for an acquittal or conviction of a lesser offence. It requires a tactical decision which they are well placed to make. Defence counsel regularly make tactical decisions which may affect the outcome of a trial. Examples are the decision to lead good character evidence or to call the accused person to give evidence. In these circumstances the accused person must accept the consequences of a tactical decision made by competent counsel. The position should be the same when counsel chooses whether to address the jury about an alternative defence or conviction of a lesser offence.
- 5.74 The issue of lesser included offences is complicated by the number of prescribed statutory alternatives. As Associate Professor John Willis pointed out, this adds to the difficulty in charging a jury and undermines the adversarial approach in which the contested issues are largely defined by the parties.⁵³ Where lesser included offences are not prescribed by statute, the commission believes that prosecution and defence counsel should endeavour to identify those alternative offences they wish to have put to the jury as early as possible.
- 5.75 The commission recommends that the *Pemble* obligation be included in legislation and modified in cases where the accused is represented. The trial judge should continue to be obliged to direct the jury about defences and alternative verdicts that defence counsel has mistakenly or inadvertently failed to raise with the jury. The law, however, should remove any obligation from the trial judge to direct the jury about defences or alternative verdicts that defence counsel has chosen not to place before the jury. The legislation should provide that where the trial judge is satisfied that the failure of defence counsel to put a defence was not due to mistake or inadvertence by counsel, the judge is obliged to direct the jury about only those defences that counsel expressly identified and advanced before the jury and for which there is an evidential basis. In cases where the accused is unrepresented, the *Pemble* obligation should continue to apply.

RECOMMENDATIONS:

34. The legislation should provide that a trial judge is not obliged to direct the jury about any 'defence' to a count on the indictment, or about any alternative verdict, which counsel for the accused did not place before the jury in final address unless the trial judge is satisfied that:
- the defence or alternative verdict is reasonably open on the evidence; and
 - the failure of defence counsel to address the matter was due to error or oversight by counsel and was not adopted for tactical reasons in the interest of the accused; and
 - the trial judge is satisfied that it is necessary to direct the jury about the matter in order to ensure a fair trial.
35. When determining whether it is necessary to direct the jury about any 'defence' or alternative verdict in the circumstances referred to in recommendation 34, it shall be presumed, unless the judge is satisfied to the contrary, that a decision taken by counsel, for tactical reasons, not to advance a 'defence' or alternative verdict to the jury removes any obligation on the trial judge to direct the jury about that matter.

DELAYED COMPLAINT

DELAY AND CREDIBILITY - THE NEED FOR REFORM

- 5.76 In Chapter 3 we discussed some of the problems caused by overlapping statutory and common law rules concerning the directions that a judge must give to the jury. In this chapter we make recommendations about resolving some of these problems.

- 5.77 The directions that a trial judge is required to give a jury in a sexual offences trial about delay in reporting the offence are governed by both common law and statutory rules which were described at length in Chapter 3. In some instances it may be argued that delay affects the credibility of the complainant,⁵⁴ while in others it may be argued that delay in complaint causes the accused person to suffer forensic disadvantage because of the passage of time since the alleged offence.⁵⁵
- 5.78 Trial judges are required by overlapping statutory and common law rules to direct the jury, in some circumstances, about the effect of delay in reporting the offence upon the credibility of the complainant. In some instances the jury must be told that, on the one hand there may be ‘good reasons’ why a sexual offence complainant delayed telling someone about the offence,⁵⁶ while on the other hand the particular complainant’s credibility may be affected by the delay in reporting the incident.⁵⁷
- 5.79 Because of the uncertainty surrounding the circumstances in which the trial judge should give the jury a common law warning about delayed complaint, it appears that some judges give the direction in every case where there is a delayed complaint in order to avoid the risk of error. This practice seems contrary to the legislative policy that a delayed complaint direction should be given only when there is sufficient evidence to justify it in the circumstances of a particular case.⁵⁸

VIEWS FROM SUBMISSIONS

- 5.80 In the Consultation Paper, the commission asked whether warnings about the effect of delay on the credibility of complainants were still necessary in sexual offence cases.
- 5.81 Stephen Odgers SC⁵⁹ rejected the criticisms of common law warnings in the Consultation Paper, and suggested that there should be no confusion for a jury in understanding that delay in complaint is relevant to the credibility of the complainant, while bearing in mind that it does not necessarily mean the complaint is false, and recognising there may be good reasons for delay. He described the direction as ‘balanced’ and consistent with the common sense of jurors. Odgers also argued it would be ‘quite wrong’ to give only the statutorily mandated warning which effectively ‘directed the jury to simply ignore the fact of delay’.⁶⁰
- 5.82 In consultations with judges, the view was expressed that it may not be necessary for the law to prescribe the language to use in directions about delayed complaint. The view was also expressed that juries may be confused by what appear to be contradictory messages in the common law and statutory directions. The common law direction suggests that the honesty and credit of the complainant may be affected by the delay in complaint, whereas the statutory direction suggests that there may be good reason for the delay.
- 5.83 Associate Professor John Willis⁶¹ suggested that the ‘good reasons for delay’ statutory direction encouraged the jury to speculate. He doubted that many people would still hold stereotypical views that a failure to complain immediately inevitably casts doubt on the truth of a complainant’s evidence. He observed that the jury will want to know why there is a delay in complaint. The prosecutor could lead evidence if a good reason for delay exists, while also making the point that there are many situations in which a victim might not choose to complain immediately. The mandatory statutory direction risked distracting the jury and diverting it from its task of assessing the evidence.
- 5.84 When it was originally recommended that mandatory directions about ‘good reasons for delay’ be introduced, there was opposition on the ground that matters of delayed complaint should be left for the prosecution and defence to deal with through evidence and addresses. The jury would be able to use such evidence as it saw fit in the light of other evidence in the case.⁶² During consultations some people reiterated these views and suggested that matters of delayed complaint should be left to the jury, assisted only by counsel’s argument.
- 5.85 Some judges believed they should retain the power to correct errors and to comment on arguments, still sometimes made by counsel, which relied on myths about the behaviour of complainants. They observed that there are still misapprehensions and prejudices in the community about scenarios in which people offend and are offended against, and that the extent to which jurors are educated about such matters varied. There was some support for

53 Submission 9 (Associate Professor John Willis).

54 *Kilby v R* (1973) 129 CLR 460, 465; *Crofts v The Queen* (1996) 186 CLR 427, 448; *Crimes Act 1958* (Vic) s 61.

55 *Longman v The Queen* (1989) 168 CLR 79; *Evidence Act 2008* (Vic) s 165B.

56 *Crimes Act 1958* (Vic) s 61(1)(b)(i).

57 *Kilby v R* (1973) 129 CLR 460, 465; *Crofts v The Queen* (1996) 186 CLR 427, 448.

58 *Crimes Act 1958* (Vic) s 61(1)(b)(ii).

59 Submission 3 (Stephen Odgers SC).

60 *Ibid.*

61 Submission 9 (Associate Professor John Willis).

62 Law Reform Commission of Victoria, *Rape and Allied Offences: Procedure and Evidence*, Report 13 (1988) 47-8.



guiding statements within legislation to inform judges, counsel and juries about accepted current knowledge on such matters.⁶³ The County Court Law Reform Committee supported a general approach which reduces the 'prescriptive nature of the current requirements', with a focus on requiring the trial judge to rebut or contradict inappropriate comments or arguments in relation to distress, delay, complaint and other sexual activity.⁶⁴

THE COMMISSION'S VIEW

- 5.86 The commission believes that the credibility of sexual offence complainants should not be determined by stereotypical assumptions based on the timing of the complaint.⁶⁵ Delay does not reflect upon the truth of every complaint. In a particular case, however, a jury might believe that delay damages the credibility of the complainant's evidence. The trial judge should have a discretionary power to give the jury a direction about delayed complaint when the judge considers it necessary to ensure a fair trial.⁶⁶
- 5.87 Common law rules about directions providing for admission of evidence of a 'recent complaint' for the limited purpose of bolstering a complainant's credibility will no longer apply once the *Evidence Act 2008* commences operation.⁶⁷ The jury will be entitled to use evidence of delay as relevant to guilt and not merely as a matter relevant to the complainant's credibility.⁶⁸ It is consistent with the simplification of the law in this area to remove the obligation to give a direction about the effect on credibility where there is a lack of recent complaint. The jury should be entitled to consider delay or the absence of delay when determining whether the Crown has proved its case.
- 5.88 As discussed in Chapter 3, the question whether an accused has suffered a forensic disadvantage in defending himself because of a delay may be a matter that a judge is better placed to assess than a jury. On the other hand, it is doubtful whether a threshold assessment about 'sufficient evidence' by the judge on the question of credibility, as section 61 of the Crimes Act currently provides, can be justified when it is the task of the jury to assess the credibility of witnesses and decide whether they accept or reject their evidence.⁶⁹
- 5.89 The differences between the potential consequences of delay in complaint - credibility of the complainant and forensic disadvantage to the accused - require the trial judge to have a different role. Requiring the judge to first be satisfied that there is 'sufficient evidence' about the effect of delay on the complainant's credibility, before the jury can be invited to consider the issue, risks usurping the role of the jury to decide issues concerning the truthfulness of witnesses.
- 5.90 In NSW it has been argued that although there will be individual cases in which a false complaint is accompanied by delay in complaining, this is an issue to be argued at trial 'rather than the subject of a judicial warning'.⁷⁰ According to this view, the case for giving any warning about the complainant's lack of credibility because of delay appears weak.⁷¹
- 5.91 Queensland has introduced a statutory provision which limits judicial directions about delay:
- 5.92 the judge must not warn or suggest in any way to the jury that the law regards the complainant's evidence to be more reliable or less reliable only because of the length of time before the complainant made a preliminary complaint or other complaint.⁷²
- 5.93 There are few decisions concerning the operation of this provision. It appears, however, that although it has been interpreted as limiting the judge's power to give warnings about delayed complaint, it does not prevent defence counsel from using the fact of delayed complaint to undermine the credibility of the complainant's account in cross-examination or when addressing the jury.⁷³ Although the prosecution is able to respond, the complainant may not have in fact complained to anyone, or given any explanation for the delay. The Tasmanian Law Reform Institute (TLRI) observes that, in such cases, the provision may not allow a trial judge to give directions to correct any false statements or misconceptions about the implications of delayed complaint upon the trustworthiness of the complainant's account.⁷⁴ The commission does not support change along the lines of the Queensland provision because of the risk of the possible unintended restrictions, identified by the TLRI, upon the trial judge's power to correct counsel's statements.

- 5.94 The commission believes that the trial judge should not be obliged to give the jury directions about delayed complaint but should have a discretionary power to give appropriate directions to correct statements by counsel that conflict with the evidence or are based upon stereotypical assumptions about reporting of sexual offences.

DELAY AND FORENSIC DISADVANTAGE – THE APPROACH OF THE EVIDENCE ACT 2008

- 5.95 Trial judges are required by overlapping statutory and common law rules to direct the jury, in some cases, about the forensic disadvantage that an accused person may have experienced because of delay in reporting the offence. The common law rules, which are drawn from the case of *Longman*,⁷⁵ have been modified by section 61 of the Crimes Act. When it commences operation, Section 165B of the Evidence Act will displace the operation of those parts of section 61 which affect *Longman* warnings.
- 5.96 The issues raised by *Longman* continue to be a source of difficulty for trial judges and they feature in appeals against conviction.⁷⁶ In the Consultation Paper we considered whether section 165B of the Evidence Act provides a satisfactory approach to giving such warnings, and whether they continue to be necessary.

Views from consultations and submissions

- 5.97 Some people support abolishing *Longman* warnings and leaving it to counsel to run arguments and present evidence about the unfairness caused by a long delay in complaining about an offence. Associate Professor John Willis expressed concern about the complexity of the statutory provisions. He suggested that it was an unfair burden to require the accused to identify a significant forensic disadvantage caused by the delay when the accused may not know the nature of that disadvantage.
- 5.98 Stephen Odgers SC suggested that section 165B of the Uniform Evidence Act provided a satisfactory approach to *Longman* warnings. He observed that the *Longman* warning was formulated when the High Court was being asked to permanently stay trials for offences which allegedly occurred many years beforehand. *Longman* warnings were designed to reduce the danger of unfairness to the accused in these cases. He warned that ‘watering down’ such warnings through legislation could result in courts being more willing to exclude evidence or stay trials permanently.

The commission’s view

- 5.99 The law concerning *Longman* warnings was debated during the recent review of evidence law. Section 165B of the Evidence Act 2008 was enacted following this extensive process of consultation and negotiation, and seeks to provide a standard approach across uniform evidence jurisdictions.⁷⁷ Section 165B provides that the judge must be satisfied that the accused has suffered forensic disadvantage because of the delay before giving the jury a warning. The judge is probably better placed than the jury to make this threshold assessment. If the judge makes this determination he or she must inform the jury of the nature of the disadvantage and instruct them to take it into account when considering their verdict.
- 5.100 Section 165B of the Evidence Act is activated by a request from counsel for a warning. The trial judge has a discretionary power to refuse to give a warning which has been requested when satisfied that ‘there are good reasons for not doing so’. This approach is consistent with our recommendations concerning all directions other than those which are mandatory.
- 5.101 The commission believes that directions concerning the forensic disadvantage that an accused person may have suffered because of delay in prosecution are appropriately dealt with by section 165B of the Evidence Act 2008. In keeping with our proposal that all directions be dealt with in one statute, we recommend that section 165B be included in the proposed jury directions legislation.

- 63 Another approach to correcting misapprehensions is to allow admission of expert evidence about sexual assault. *Evidence Act 1958* (Vic) s 37E allows evidence of ‘specialised knowledge’ about the nature of sexual offences or factors affecting the behaviour of a victim, including the reasons that may contribute to a delay in reporting. However, during informal consultations the commission was told that such evidence is rarely, if ever, led in trials.
- 64 Submission 18 (County Court of Victoria).
- 65 See, eg, *M v The Queen* (1994) 181 CLR 487, 514-5 (Gaudron J); *Jones v The Queen* (1997) 191 CLR 439, 463-4 (Kirby J).
- 66 Penney Lewis, ‘Delayed Complaints in Childhood Sexual Abuse Prosecutions – A Comparative Evaluation of Admissibility Determinations and Judicial Warnings’ (2006) 10 *The International Journal of Evidence & Proof* 104, 126.
- 67 See the High Court’s decision on the parallel provisions of the Evidence Act 1995 (NSW) in *Papakosmas v The Queen* (1999) 196 CLR 297.
- 68 See further in Chapter 4.
- 69 *Cubillo v Commonwealth* (No 2) (2000) 174 ALR 97; *Flint v Lowe* (1995) 22 MVR 1; *S v M* (1984) 36 SASR 316.
- 70 Standing Committee on Law and Justice [NSW], *Report on Child Sexual Assault Prosecutions* (2002) [4.173]-[4.176], Recommendation 22.
- 71 Penney Lewis, above n 66, 127.
- 72 *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4A(4) which applies to trials starting/continuing after 5 January 2004 (regardless of the date of offence or complaint).
- 73 *R v Puti* [2005] QCA 201; *R v CW* [2004] QCA 452; but note *R v BAZ* [2005] QCA 420 where it was held the jury should have been instructed they could use evidence of false complaints as destructive of complainant’s credibility.
- 74 Tasmania Law Reform Institute, *Warnings in Sexual Offences Cases Relating to Delay in Complaint*, Final Report 8 (2006) 31-32.
- 75 *Longman v The Queen* (1989) 168 CLR 79.
- 76 See, eg, most recently: *R v Garbutt* [2008] VSCA 170; *R v RW* [2008] VSCA 79; *R v Taylor* (No 2) [2008] VSCA 57.
- 77 See *Evidence Amendment Bill Act* (NSW) which commenced on 1 January 2009, amending *Evidence Act 1995* (NSW) s 165B, and repealing the earlier delayed complaint warning provisions in *Criminal Procedure Act 1986* (NSW) s 294(3)-(5). Tasmania is yet to table amending legislation in Parliament to incorporate equivalent provisions into the *Evidence Act 2001* (Tas).



RECOMMENDATIONS:

36. In addressing outdated assumptions and prejudices concerning complainants in sexual offence trials, the approach should be to contradict inappropriate arguments, directions or comments being made by counsel and trial judges, rather than requiring positive statements on such topics to be made, in all cases, by way of directions from the trial judges.
37. The issue of delay in complaint in criminal trials should be governed by a provision in the legislation, substantially adopting s 165B of the Evidence Act 2008, in lieu of s 61 of the Crimes Act 1958.
38. The legislation should contain a further provision which states that in any trial for an offence under Subdivision (8A), (8B) (8C) (8D) (8E) of Part 1 of the Crimes Act 1958, the issue of the effect of any delay in complaint, or absence of complaint, on the credibility of the complainant should be a matter for argument by counsel and for determination by the jury.
 - i) Subject to subsection (ii), save for identifying the issue for the jury and the competing contentions of counsel,⁷⁸ the trial judge must not give a direction regarding the effect of delay in complaint, or absence of complaint, on the credibility of the complainant, unless satisfied it is necessary to do so in order to ensure a fair trial.
 - ii) If evidence is given, or a question is asked, or a comment is made that tends to suggest that the person against whom the offence is alleged to have been committed either delayed making or failed to make a complaint in respect of the offence, the judge must tell the jury that there may be good reasons why a victim of a sexual offence of that kind may delay making or fail to make a complaint in respect of the offence.

The legislation should prohibit the trial judge from telling the jury or suggesting in any way:

- i) that complainants in sexual offence cases are regarded by the law as a class of unreliable witnesses;
- ii) that on account of delay it would be dangerous or unsafe to find the accused guilty

PROPENSITY EVIDENCE

- 5.102 In Chapter 3 we discussed the problems associated with common law directions about propensity evidence. The problems in this area will continue once the Evidence Act 2008 commences operation because propensity directions will still be required. In this chapter we identify a proposal for reforming propensity directions but we have not made any final recommendations because further consultation is necessary.
- 5.103 Propensity evidence is any evidence which, if accepted, discloses discreditable conduct and reflects badly on an accused person's character. While propensity evidence is generally inadmissible at common law and under the Uniform Evidence Act, there are exceptions which we have described in Chapter 3. In order to avoid the risk that a jury will reason that the accused person committed the offence in question because of a propensity to engage in discreditable conduct, the common law requires the trial judge to give the jury a propensity warning in many circumstances. Warnings of this nature will still be required once the Evidence Act 2008 commences operation.

- 5.104 In broad terms, there are three types of propensity directions:⁷⁹
- A 'limited use' direction instructing the jury how they can use the evidence.
 - A 'propensity warning' instructing the jury they must not reason that because the accused has engaged in conduct on other occasions (which discloses discreditable or disreputable character or conduct), the accused is therefore the kind of person likely to have committed the offences in question.⁸⁰
 - A warning instructing the jury they must convict the accused only on the evidence of the offence charged, and must not substitute the evidence of propensity for evidence of the offending itself.⁸¹
- 5.105 The distinctions between permissible and impermissible use of propensity evidence are difficult. As we discussed in Chapter 3, evidence of other sexual conduct (previously referred to as evidence of 'uncharged acts') of the accused that may properly be characterised as propensity evidence is often admitted in sexual offence cases. That evidence may be admitted on several bases. While the boundaries between these bases are often not clear, they have generally included:⁸²
- Evidence which shows the accused has a particular, improper 'sexual interest' or 'attraction' towards the complainant, and a willingness to act on it⁸³
 - Evidence that the accused has a particular relationship with another person that is relevant in the case
 - Evidence which places the alleged offence in a 'true and realistic' context
 - 'Similar fact' evidence.
- 5.106 In Chapter 3 we discussed the new statutory regime for the admission of propensity evidence in the Evidence Act 2008. It is unlikely that this legislation will solve the problems associated with propensity directions because of the way it deals with the admission of propensity evidence.
- 5.107 Section 97 of the Evidence Act 2008 allows the admission of evidence to prove a person has (or had) a 'tendency' (or propensity) to act in a particular way, or to have a particular state of mind. Evidence of uncharged sexual conduct may be admissible under section 97 to demonstrate that the accused had a tendency to act on a sexual interest towards a complainant. Section 98 allows admission of 'coincidence' evidence of 'two or more events' ('similar fact' evidence), to prove that a person did an act, or had a particular state of mind, because of the improbability that these events were coincidental. Before evidence may be admitted under either provision it must also satisfy an 'interests of justice' balancing test set out in section 101 of the Act in which both the probity of the evidence and potential prejudice to the accused are considered.
- 5.108 Section 95 of the Evidence Act 2008 provides, however, that if evidence is inadmissible under sections 97 and 98 it must not be used to establish tendency or coincidence, even though it may be relevant and admitted for 'another purpose'. That other purpose may be to establish background, relationship or context.⁸⁴ Consequently, section 95 will continue to allow the admission of evidence which demonstrates that the accused person has propensity to act in a particular way but which cannot be used by the jury for propensity reasoning because of the limited basis upon which the evidence was admitted. Trial judges will be required to give the jury 'limited use' propensity directions in these circumstances.

78 In compliance with *Alford v Magee* (1952) 85 CLR 437.

79 *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, 415-21 (Byrne AJA).

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

81 *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.

82 *R v Best* [1998] 4 VR 603, 606; *R v Tektonopoulos* (1999) 106 A Crim R 111, 116-8 (Winneke P).

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

84 *R v Colby* [1999] NSWCCA 261, [132] (Mason P); an example is where such evidence is admitted to rebut evidence adduced to prove the good character of an accused (ss 94, 110).



The limitations of the current propensity warning

- 5.109 The NZ Law Commission has considered the results of research concerning the effect of propensity directions.⁸⁵ The commission observed that there is no reason to doubt that juries will usually follow directions which reflect common sense and which can be easily understood. However, it concluded that it is 'unwise to assume' jurors can apply directions, such as 'limited use' propensity directions, when there is evidence that seems relevant to wider purposes and which requires jurors to set aside feelings about other conduct of the accused they may find 'repugnant'.⁸⁶
- 5.110 Professor Adrian Zuckerman has also analysed the limitations of limited use propensity directions. He argues that these directions do no more than create a conflict between the legal standards according to which propensity evidence may be admitted and the 'normal standards' familiar to the jury. He observes that 'juries are unlikely to defer to a legal standard which they do not understand in preference to a moral one which they do'.⁸⁷
- 5.111 Zuckerman suggests that directions should aim to help the jury understand and appreciate the risk posed by propensity evidence by appealing directly to the jury's own sense of justice.⁸⁸ He argues that propensity evidence poses a threat to two central principles of the criminal justice system: that the accused only stands trial in respect of the offence charged and that guilt must be proved beyond reasonable doubt. Zuckerman argues that the only way juries will resist the temptation to convict an accused person when there is evidence of criminal propensity is if the trial judge explains these central principles of the criminal justice system and urges the jury to uphold them.⁸⁹

THE COMMISSION'S PROPOSALS

- 5.112 In the Consultation Paper the commission suggested that consideration be given to reform of the propensity warning adopting the approach proposed by US academic lawyer, Professor Thomas Leach.⁹⁰ The instruction which Leach suggests, set out in Appendix D of the Consultation Paper, draws on an approach to propensity evidence which is consistent with its character as a form of circumstantial evidence and uses 'common sense experience' to deal with concerns about this type of evidence. The Leach approach accepts the relevance of propensity evidence but warns against its unfair use. This approach:
- Acknowledges that evidence of other misconduct can be relevant to whether the accused committed the charged act (but is not conclusive)
 - Trusts juries to understand that this evidence should be assessed in the context of other evidence
 - Highlights the unfairness of punishing the accused for earlier conduct and the danger that propensity reasoning poses to the presumption of innocence.

VIEWS FROM SUBMISSIONS

- 5.113 There was strong support for simplification of the law concerning propensity directions.⁹¹ There was widespread agreement that the jury is more likely to follow instructions which reflect common sense and to use the evidence in the way instructed if the trial judge appeals to their sense of fairness.⁹² Victorian Legal Aid observed that the uncertainty around propensity made it an area appropriate for legislative intervention. The submission emphasised the importance of safeguarding the rights of the accused by making a distinction between 'true evidence' and evidence of mere propensity or bad character and by warning juries not to jump to conclusions.⁹³
- 5.114 There was also strong support for the approach suggested by Leach.⁹⁴ While Stephen Odgers SC⁹⁵ suggested that the Uniform Evidence Act clarifies some of the current confusion at common law about the admission of propensity evidence, he observed that confusion still exists about proper directions concerning the use of this evidence. The Office of Public Prosecutions suggested that attempts to simplify the law should wait until the effects of the changes to the law by the *Evidence Act* were better understood in Victoria.

THE COMMISSION'S VIEW

- 5.115 The commission believes that limited use propensity warnings do not help juries. The propensity warning should be simplified by focussing upon fairness and the weight to be given to the evidence in question. The direction should include an explanation that although the jury may engage in propensity reasoning, it would be unfair to find the accused guilty on that basis alone because of the risk that this approach would undermine fundamental principles of the criminal justice system.
- 5.116 Because of the highly prejudicial nature of propensity evidence, a warning should be mandatory whenever such evidence is admitted, subject to one exception. In certain circumstances defence counsel may consider it in their client's best interests not to have a warning because it would draw the jury's attention to evidence of propensity⁹⁶ and may be prejudicial to an accused person.⁹⁷ For this reason, the commission suggests an exception be made to the otherwise mandatory obligation where defence counsel requests the trial judge not to give a propensity warning. However, this should still be subject to the trial judge's overriding obligation to give the warning if satisfied that it is necessary in order to ensure a fair trial.

Problems with implementation of simplified propensity warning

- 5.117 Before any changes are made to propensity warnings it is desirable to reconsider the approach to the admissibility and use of propensity evidence in the Uniform Evidence Act. NSW decisions have interpreted the Act as requiring strict directions against the use of propensity reasoning when tendency evidence has been admitted other than in accordance with sections 97 and 98.⁹⁸ The commission believes that the provisions in the Uniform Evidence Act concerning the admissibility of tendency evidence should be reconsidered before any changes are made to the content of propensity directions. All of the Uniform Evidence Act jurisdictions will need to participate in any review of the admissibility provisions.

RECOMMENDATION:

39. As part of the process of ongoing review of jury directions, consideration should be given to providing for simplified directions on the issue of propensity. The legislation should contain guidance for the trial judge when warning a jury about propensity reasoning, adopting and suitably modifying the model suggested by Leach.

85 See, eg, the studies considered in detail in the New Zealand Law Commission, *Disclosure to Court of Defendants' Previous Convictions, Similar Offending and Bad Character*, Report 103 (2008) 108-11; United Kingdom Law Commission, *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant*, Consultation Paper LCCP141 (1996) 105-106 see the summary in Appendix C in particular: the London School of Economics Study (suggesting that a direction to disregard a previous conviction 'averts' prejudicial effect): WR Cornish and AP Sealy, 'Juries and the Rules of Evidence' [1973] *Criminal Law Review* 208; AP Sealy and WR Cornish, 'Jurors and Their Verdicts' (1973) 36 *Modern Law Review* 496. More recently: New Zealand Law Commission, *Juries in Criminal Trials – Part Two; A Summary of the Research Findings*, Preliminary Paper 37 Vol. 2 (1999). The commissions also considered relevant literature: William Young, 'Summing Up to Juries in Criminal Cases – What Jury Research Says about Current Rules

and Practice' (2003) *Criminal Law Review* 665; Mike Redmayne, 'The Relevance of Bad Character' (2002) 61 *Cambridge Law Journal* 684 (using recidivism statistics to show that the probative value of prior conviction evidence to be much higher than indicated by the Oxford Study); Sally Lloyd-Bostock, 'The Effects on Juries of Hearing about a Defendant's Previous Criminal Record: A Simulation Study' (2000) *Criminal Law Review* 734; Professor Rupert Cross, who described the credibility/propensity distinction as 'enforced gibberish': Rupert Cross, 'The Problem of an Accused with a Record' (1969) 6 *Sydney Law Review* 173, 383; and American studies, such as Roselle L. Wissler and Michael J. Saks, 'On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt' (1985) 9 *Law and Human Behavior* 37.

86 New Zealand Law Commission, *Disclosure to Court of Defendants' Previous Convictions, Similar Offending and Bad Character*, Report 103 (2008) 112.

87 Adrian Zuckerman, 'Similar Fact Evidence – The Unobservable Rule' (1987) 104 *Law Quarterly Review* 187, 209-210.

88 Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (2004) 532.

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

90 Thomas Leach, "'Propensity' Evidence and FRE 404: A Proposed Amended Rule with an Accompanying 'Plain English' Jury Instruction" (2001) 68 *Tennessee Law Review* 825; 'How do Jurors React to "Propensity" Evidence? – A Report on a Survey' (2004) 27 *American Journal of Trial Advocacy* 559.

91 See, eg, submissions 3 (Stephen Odgers SC); 4 (Patrick Tehan QC); 7 (Victoria Legal Aid); 16 (Judge M D Murphy); 18 (County Court of Victoria).

92 Sex Offences Roundtable.

93 Submission 7 (Victoria Legal Aid).

94 See, eg, submissions 4 (Patrick Tehan QC); 16 (Judge M D Murphy); and 18 (County Court of Victoria).

95 Submission 3 (Stephen Odgers SC).

96 *R v T* (1996) 86 A Crim R 293, 299 (Southwell AJA, Callaway JA and Smith AJA agreeing).

97 *KRM v The Queen* (2001) 206 CLR 221, 234 (McHugh J).

98 *R v Beserick* (1993) 30 NSWLR 510, 16; *Qualtieri v R* [2006] NSWCCA 95. A direction against use for coincidence reasoning may equally be required where the evidence is not admitted under *Evidence Act 2008* (Vic) ss 98 and 101.

Chapter 5

The Contents of the Legislation





Chapter 6

Issue Identification: Assisting the Jury

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INTRODUCTION

- 6.1 In our criminal justice system, a jury comprised of people without any legal training determines whether an accused person is guilty of the offences charged. For this reason and many others, it is important that the trial be conducted in a manner that can be understood by ordinary members of the community. Both the evidence and the contested issues should be presented to the jury as clearly as possible so that they are well placed to deliver a verdict that is fair and just.¹
- 6.2 The many benefits of early and accurate identification of the contested issues in a criminal trial are obvious.² First, it is not possible for the trial judge to make sensible rulings about the relevance and admissibility of challenged items of evidence without reference to the issues in dispute. Secondly, the jury's task of resolving the issues in dispute is made easier if the contested issues are clearly identified as early as possible so that the jury is aware of the relevance of the evidence. Thirdly, early identification of the contested issues assists the trial judge to prepare the directions that must be given to the jury about the real issues in the case.
- 6.3 The jury should receive guidance about the issues that are in dispute from the start of the trial, although those issues may be narrowed and refined as the trial proceeds. Jurors should not have to wait until the end of the trial, as sometimes happens, to fully understand the relevance of the evidence they have heard.
- 6.4 There has been a long history in Victoria of attempts to promote early issue identification by legislation and court practice notes. It appears that those attempts have not eradicated the problem, as it is still commonplace for trials to commence without the issues being clearly and accurately identified by counsel. Those attempts continue, however. New legislation passed in early 2009 has a division devoted to a judge's powers to assist the jury to understand the issues they must decide.³
- 6.5 In this chapter we consider legislative and other attempts to promote early identification of the contested issues in a trial. We also make recommendations about the introduction of two practices followed elsewhere which are designed to promote early issue identification and assist both the judge and the jury to identify the issues which the jury must determine in order to reach its verdict. Trial judges should be permitted and encouraged to use documents which we have called an 'Outline of Charges' and a 'Jury Guide'.

STEPS TO PROMOTE EARLY ISSUE IDENTIFICATION**LEGISLATION**

- 6.6 The first Victorian legislative attempt to impose pre-trial obligations on legal practitioners to identify or narrow the issues in criminal trials was the *Crimes (Criminal Trials) Act 1993* (Vic).⁴ That Act introduced procedures for determining some contested issues of fact and law before the start of the trial. It also required the delivery of documents similar to pleadings: a prosecution case statement and a defence response.
- 6.7 The Act provided an optional statutory right for defence counsel to make an opening address 'to indicate briefly the facts and inferences with which issue is taken' and 'to outline the issues in the trial'.⁵ Additionally, the trial judge was obliged to address the jury, after opening addresses of counsel, about 'the issues in the trial'⁶ among other things. The Act also specified a range of documents that the trial judge was entitled to place before the jury, including the transcript of evidence, the 'pleadings' documents, copies of the judge's address and summing-up, and 'any other document that the presiding judge thinks fit'.⁷
- 6.8 While the 1993 Act did not permit waiver of the obligations imposed on counsel or the judge, it appears that many of the provisions in the Act were not followed, probably because few judges or practitioners were convinced that the pre-trial processes had merit. There was very little consultation with the judiciary or the profession prior to the passage of the Act.
- 6.9 In 1999, a second attempt was made to legislate for pre-trial identification of contested issues. The *Crimes (Criminal Trials) Act 1999* (CCTA) imposed an obligation on the prosecution to identify 'the acts, facts, matters and circumstances being relied on to support a finding of guilt',⁸ and an obligation on the accused to respond, by identifying which of those matters the

defence takes issue with 'and the basis on which issue is taken'.⁹ The CCTA will be repealed¹⁰ and its relevant provisions re-located in the *Criminal Procedure Act 2009* (Vic) (the CPA)¹¹ when the CPA commences operation shortly.

- 6.10 The CCTA removed the mandatory requirement in the 1993 Act that the trial judge give an opening address to the jury about the issues in the case, instead making that address optional.¹² On the other hand, the CCTA made an opening address by defence counsel mandatory,¹³ when it had been optional under the 1993 Act. It appears that there has not been universal compliance with the CCTA because few, if any, judges compel defence counsel to make an opening address.
- 6.11 The reluctance of trial judges to enforce the provisions of the CCTA has been facilitated by a provision that allows judges to waive the requirements of the Act concerning pleadings documents.¹⁴ Until recent years, the judges in charge of the list of Supreme Court cases invariably made such waiver orders.¹⁵
- 6.12 The CCTA contains various sanctions directed to both accused persons and their lawyers for non-compliance with its provisions. These sanctions include referral of a complaint against a practitioner to the Legal Services Commissioner, confining the defence case to the issues raised in the defence response, and permitting adverse comment to the jury about non-compliance with the Act.¹⁶ It appears that these sanctions are rarely, if ever, used.
- 6.13 It is highly likely that trial judges have been loath to penalise accused persons for the failure of their legal practitioners to comply with procedural provisions. Trial judges have also been loath to penalise counsel, perhaps because they are sometimes briefed late and because of the relatively low legal aid fees paid for pre-trial preparation and attendance at directions hearings.

PRACTICE NOTES AND PROCEDURES

- 6.14 In 1995, the Supreme Court introduced a practice, known as *Pegasus* hearings, designed to promote the proper preparation of criminal trials and the efficient use of court time. The then Chief Justice or his delegate, and not the trial judge, conducted these directions hearings. This process, which was refined over time, emphasised the identification of issues that could be determined by the trial judge before the jury were empanelled. These hearings were said to have often clarified the real issues in the case and saved much witness time.¹⁷
- 6.15 Both the Supreme Court and the County Court have established regimes by way of Practice Notes, in addition to the CCTA, for pre-trial preparation and issue identification.
- 6.16 The Judge in charge of the Sexual Offences List manages sex offences trials in the County Court. Since 2005 the list has been governed by detailed Practice Notes, the most recent of which runs to 44 paragraphs and provides a comprehensive regime for directions hearings and for timely identification of issues which should be resolved before or during the trial.¹⁸ The Practice Note also addresses the many special procedures, such as those concerning pre-recorded evidence, that accompany sexual offence trials. The Practice Note imposes a continuing obligation on counsel to identify 'the likely issues'¹⁹ and, in particular, requires early warning of issues such as those concerning delayed complaint, uncharged acts and propensity, which have often been associated with erroneous jury directions.
- 6.17 Supreme Court Practice Note No 1 of 2004 provides for a final directions hearing to take place before a judge (where possible, the trial judge) approximately a week before the trial date. It requires prosecution and defence counsel to confer before the directions hearing and to provide a range of information, including identification of issues that can be resolved before the jury is empanelled. Both counsel are required to provide 'an outline of issues for provision to the jury'. Prosecution counsel is also required to provide an outline of items of consciousness of guilt evidence that will be relied on by the Crown, and an outline of the bases of criminal responsibility that will be alleged where the accused is claimed to be one of a number of joint offenders.

- 1 See *Kingswell v The Queen* (1985) 159 CLR 264, [51]-[52].
- 2 This point has been acknowledged in previous studies of criminal trials and in submissions to the Commission: See New Zealand Law Commission, *Juries in Criminal Trials*, Report 69 (2001) 117; and submissions 5 (Benjamin Lindner); 18 (County Court of Victoria).
- 3 *Criminal Procedure Act 2009* (Vic) pt 5.7 div 3.
- 4 There had been earlier attempts, by way of statutory rules. See, eg, *County Court Miscellaneous Rules 1989* (Vic).
- 5 *Crimes (Criminal Trials Act) 1993* (Vic) s 13(2).
- 6 *Crimes (Criminal Trials Act) 1993* (Vic) s 14.
- 7 *Crimes (Criminal Trials Act) 1993* (Vic) s 14.
- 8 *Crimes (Criminal Trials) Act 1999* (Vic) s 6(2)(b).
- 9 *Crimes (Criminal Trials) Act 1999* (Vic) s 7(2).
- 10 *Criminal Procedure Act 2009* (Vic) s 368.
- 11 *Criminal Procedure Act 2009* (Vic) ss 182, 183.
- 12 *Crimes (Criminal Trials) Act 1999* (Vic) s 14.
- 13 *Crimes (Criminal Trials) Act 1999* (Vic) s 13.
- 14 *Crimes (Criminal Trials) Act 1999* (Vic) s 6.
- 15 *Crimes (Criminal Trials) Act 1999* (Vic) ss 6, 7.
- 16 *Crimes (Criminal Trials) Act 1999* (Vic) ss 8, 28 and 13(2).
- 17 Supreme Court of Victoria, *Annual Report* (1998) 11.
- 18 County Court Practice Note, *Sex Offences List: No PNCR 2-2008* (18 July 2008) County Court of Victoria <[http://www.countycourt.vic.gov.au/CA2570A600220F82/lookup/Practice_Notes/\\$file/PNCR_2-2008_Sex_Offences_List.pdf](http://www.countycourt.vic.gov.au/CA2570A600220F82/lookup/Practice_Notes/$file/PNCR_2-2008_Sex_Offences_List.pdf)> at 9 April 2009.
- 19 *Ibid.*

- 6.18 In addition, Supreme Court Practice Note No 5 of 2006²⁰ provides a detailed regime for a directions hearing conducted pursuant to section 5 of the CCTA, and which is to be held within fourteen days of committal for trial. Counsel who appeared at the committal are required to attend the section 5 hearing and to advise the court about a range of topics, including ‘the anticipated issues at the trial’.
- 6.19 The Practice Note regimes in both courts, although drafted without apparent reference to the terms of each other,²¹ promote pre-trial identification of issues, and giving advance notice of some of the evidentiary warnings that the judge may be required to provide to the jury. The identification of the contested issues by this process, however, tends to be at a level of generality that may not be of much assistance to juries. For example, the County Court practice direction which requires defence counsel to advise ‘what the likely issues in the trial will be’, is subject to a footnote which states:
- This could be whether the defence is likely to be belief in age/consent or the event did not happen, or identity. Other issues which could be raised for notice early are severance, propensity evidence, uncharged acts, admissibility of purported confessions in “pre-text conversations” or Record of Interview, or the holding of a voir dire on expert evidence including DNA, or Basha enquiries.²²*
- 6.20 Broad identification of the likely defences may be of some assistance to the prosecutor in narrowing the issues and evidence in the trial, but if the defence response is not prepared by counsel who appears at trial, it may be of little value. Even when trial counsel settles the document, a general response does not help identify the critical questions of fact that the jury must answer to reach their verdict. It appears that, in most cases, the defences identified by counsel in response to the Supreme Court Practice Note are no less general in character than those provided in the County Court.

MEANS OF IMPROVING ISSUES IDENTIFICATION

NOTICE TO BRIEFING AUTHORITIES

- 6.21 The complexity of the criminal law, especially when coupled with the pressures under which legal practitioners and trial judges work, makes it almost inevitable that errors will occur in some criminal trials. Early identification of the contested issues, however, should reduce some of those pressures and the number of errors that occur in the way trials are conducted.
- 6.22 While there are practical considerations which impair the effectiveness of the existing legislative regime, it is useful and should be maintained. Similarly, the Practice Notes in both the Supreme and County Courts assist in encouraging timely and efficient pre-trial preparation, and the identification and narrowing of the issues at trial.
- 6.23 The commission believes that a non-coercive approach should usually be emphasised when encouraging pre-trial preparation and issues identification by counsel, especially because relatively inexperienced counsel often conduct the most difficult trials, such as those involving sexual offences.
- 6.24 There appears to be a growing recognition among legal practitioners that the pre-trial regimes for early issue identification and the narrowing of contested issues enhance the prospects of a fair trial. It also appears to be widely accepted that counsel have a duty to assist the court in conducting a trial that is both fair and efficient. That duty should be emphasised by legislation which permits a practical response when conduct of counsel does not assist the judge to conduct a trial that is fair and efficient.
- 6.25 The commission believes that where failure by counsel to comply with the provisions of the CCTA or relevant Practice Notes has caused unnecessary inconvenience to the jury or unnecessarily prolongs the trial, the trial judge should be expressly permitted to advise the Managing Director of Victoria Legal Aid and the Solicitor for Public Prosecutions about this conduct. This power would be in addition to section 250 of the *Criminal Procedure Act 2009*, which permits a judge to complain to the Legal Services Commissioner about failure by a legal practitioner to comply with various provisions of that Act.

- 6.26 A judge should not send a report of this nature to the Managing Director of Victoria Legal Aid or the Solicitor for Public Prosecutions without first warning the practitioner that it is under consideration. Legal practitioners are clearly entitled to procedural fairness when a report is contemplated. A report should be a step of last resort. It would be a matter for the Managing Director of Victoria Legal Aid and the Solicitor for Public Prosecutions, who both expend public monies when briefing counsel, to determine what action, if any, to take in response to a report from a trial judge.

RECOMMENDATION:

40. Legislation should provide that notwithstanding section 250 of the Criminal Procedure Act where, after summary inquiry at the conclusion of the trial, in the opinion of the trial judge:
- (a) the trial was unnecessarily protracted; or
 - (b) the task of the jury made unnecessarily or unreasonably burdensome
- by reason of the failure of counsel for the prosecution or defence or other legal practitioners to comply with the provisions of the Criminal Procedure Act or the relevant Practice Direction or Practice Notes, the trial judge may send a report to this effect to the Solicitor for Public Prosecution, the Managing Director of Victoria Legal Aid or such other body as the judge deems appropriate.

NEW WAYS OF PROMOTING ISSUE IDENTIFICATION

- 6.27 The commission believes that issue identification would be enhanced by expressly permitting and encouraging two practices, followed elsewhere, which are designed to promote early identification of contested issues and to assist the judge and the jury to identify those issues which the jury must determine to reach its verdict. These new procedures would occur immediately before the calling of any evidence and immediately after the conclusion of final addresses.
- 6.28 The commission believes that trial judges should have a discretionary power to use these new processes. Some judges are already following similar practices. It is highly likely that these processes will evolve over time as many judges develop procedures designed to assist the jury, first, to follow the evidence by identifying the issues in a trial and, secondly, to reach a verdict that is fair and just by clearly explaining the questions of fact they must decide. While existing law allows these new processes,²³ the commission believes that an effective means of encouraging their use would be to include provisions in the new CPA which expressly permitted their use. Trial judges who wish to maintain their current practices when conducting a jury trial should be permitted to do so for the time being.
- 6.29 The new processes involve giving the jury two documents:
- a) **The Outline of Charges:** a document provided to the jury before any evidence is led in the trial.
 - b) **The Jury Guide:** a document given to the jury after evidence and addresses by counsel have concluded.

THE OUTLINE OF CHARGES

- 6.30 The aim of this document, which should be given to the jury before any evidence is led, is to identify the elements of the offences with which the accused person is charged and to indicate which of those elements are disputed. The commission acknowledges that the disputed elements may change during the trial and that the accused person should not be bound by the content of the document. The Outline of Charges would provide the jury with a structure that would assist it to follow the evidence. It would provide counsel with a reference point that would enable them to assist the judge to conduct a trial that is fair and efficient. The document would also provide the judge with advance notice of the contested issues. This would assist the judge to prepare directions for the jury later in the trial.

- 20 Supreme Court of Victoria, *Practice Note No 5 of 2006: Criminal Division: Case Management by Section 5 Hearings* (2006) <http://www.supremecourt.vic.gov.au/wps/wcm/connect/Supreme+Court/resources/file/ebcbcf078f9052f/PracticeNote-No5-2006_CriminalCaseManagement.pdf> at 22 April 2009.
- 21 There are apparent discrepancies. For example, the Criminal Bar Association expressed strong support for the requirement in the Supreme Court Practice Note that the prosecution identify items of consciousness of guilt on which it proposed to rely at trial, and recommended that a similar requirement apply in the County Court: Submission 8 (Criminal Bar Association of Victoria).
- 22 County Court Practice Note, *Sex Offences List: No PNCR 2-2008* (18 July 2008) County Court of Victoria [18.2.1] <[http://www.countycourt.vic.gov.au/CA2570A600220F82/Lookup/Practice_Notes/\\$file/PNCR_2-2008_Sex_Offences_List.pdf](http://www.countycourt.vic.gov.au/CA2570A600220F82/Lookup/Practice_Notes/$file/PNCR_2-2008_Sex_Offences_List.pdf)> at 9 April 2009.
- 23 These procedures are clearly permitted by the *Crimes (Criminal Trials) Act 1999* (Vic) s 19(1)(l) and probably by the courts' inherent power to determine their own procedures.

6.31 A document of this nature is used in the Northern Territory.²⁴ Jurors in every Supreme Court criminal trial are provided with a document, known as an 'Aide-memoire', which is prepared by the trial judge. Counsel are provided with a draft of the document before it is given to the jury and have the opportunity to make comments about its content. That document sets out the elements of each offence on the indictment and of each alternative offence which the jury may be invited to consider. The document also contains any relevant statutory definitions of key terms.

6.32 In the Northern Territory the document is given to the jury when the judge commences the summing-up, although it is prepared earlier. It appears that Northern Territory trial judges have found the document to be of considerable assistance when identifying relevant issues to the jury. Examples of the Northern Territory *Aide-memoire* are in **Appendix D**.

6.33 The commission believes that Victorian trial judges should be encouraged and expressly permitted to give juries a document of this nature. We suggest that it be called 'The Outline of Charges'. We recommend that there be some changes to the way in which the *Aide-memoire* is prepared and used in the Northern Territory.

6.34 First, the commission proposes that the prosecutor should prepare a draft Outline of Charges in consultation with defence counsel. This draft should be settled by the trial judge who would also resolve any disputes between counsel about its content. The commission sought responses to this proposal from interested parties.

6.35 The County Court Law Reform Committee supports the production of jury aides, such as the Outline of Charges:

The experience of the County Court in the use of the Crimes (Criminal Trials) Act to attempt to identify the real issues in a trial before its commencement has been patchy. This is so despite its consistent use of the Act in its pre trial procedures, both in its less intensive case management of routine trials and its intensive, individual case management of sexual offence trials, and problem and long trials. The main reasons for the lack of early issue identification are late briefing of trial counsel on both sides, and a lack of incentive for counsel to co-operate in such an exercise. There is a concern, based on experience, that a requirement that counsel produce a [Outline of Charges] will be too often honoured in the breach.

6.36 In his submission to the commission on behalf of the Office of Public Prosecutions, Mr Bruce Gardner, Directorate Manager, Policy and Advice Directorate, stated:

The OPP would not agree to providing a document at the commencement of a trial that would ultimately be used for the purpose of the trial judge's charge. The jury is commonly provided with a presentment at the commencement of a trial and may also be provided with a basic document that outlines what the issues and evidence in a case may be. Such a document should be distinguished from a document outlining what the judge should say in his charge – such a document should only be settled by the judge after the evidence has been heard and the trial judge has consulted with counsel.

As discussed above, such a [Aide memoire/Outline of Charges] should be settled by the trial judge after consultation with trial counsel.

6.37 In his submission on behalf of the Criminal Bar Association, Benjamin Lindner said:

A document setting out the elements of an offence is unobjectionable, in my opinion. As to the issues in dispute, they should be argued out in the final addresses and summed up in the charge. The document outlining the elements might be of assistance for a jury to locate the issues in dispute, relative to an element of the offence, but ought not be included in the document itself. Juries tend to make a note of any matter they deem important.

6.38 Stephen J Odgers SC said of the proposal for an Outline of Charges:

I strongly support use of written directions. However, I do not agree with any proposal to require drafting of such a document at the beginning of the trial. What should be contained in the written directions may not be clear until the end of the trial. I oppose

an obligation on counsel to draft it (although competent counsel will no doubt take the opportunity to provide a draft to the judge). A judge should be able to ask for, but not compel, assistance from counsel.

- 6.39 The commission believes that it is reasonable and appropriate for the prosecutor to take initial responsibility for preparing a draft Outline of Charges. The prosecutor is now obliged to prepare a prosecution opening document well in advance of the trial date.²⁵ When preparing this document the prosecutor must carefully consider how the Crown puts its case, by identifying the elements of the offences that must be proved and deciding what alternative verdicts are open. The proposed Outline of Charges is a document which contains nothing more than a summary of those matters and an indication from the defence about those elements which are disputed.
- 6.40 It is highly likely that a bank of precedent Outline of Charges documents would develop in a very short time, as has been the case with the Northern Territory *Aide-memoire*. If the need arose, the Judicial College of Victoria would be well placed to develop and publish precedent Outlines of Charges in the Jury Charge Book.
- 6.41 The second difference between the proposed Outline of Charges in Victoria and the Northern Territory *Aide-memoire* is that the commission believes that the Outline of Charges should be given to the jury by the trial judge at the commencement of the trial, immediately after opening addresses by counsel. In the Northern Territory, the *Aide-memoire* is given to the jury at the conclusion of evidence and the addresses of counsel.
- 6.42 Research studies have clearly demonstrated the case for providing early assistance to the jury.²⁶ Where trial judges have given juries directions on the law early in the trial, jurors have found it very helpful.²⁷ Research indicates that jurors are constantly interpreting what they hear, and need clear frameworks to do so effectively. Directions at an early stage in a trial can help provide that framework.²⁸ As one writer observed, giving directions at the end of the trial is akin to learning the rules at the end of the game.²⁹
- 6.43 The Outline of Charges is a means of implementing a policy that has already received legislative support. Section 14 of the CCTA provides that the judge may address the jury at any time about the issues that have arisen, or are expected to arise in a trial. Section 19 of the CCTA permits the trial judge to give the jury a very broad range of documents 'for the purpose of helping the jury to understand the issues or the evidence'.³⁰ While the Outline of Charges is clearly permitted by section 19(1)(l) of the CCTA, which allows the judge to give the jury 'any other document that the trial judge thinks fit', the commission believes that the law should expressly refer to this document in order to encourage its use.
- 6.44 The commission believes that the process of preparing an Outline of Charges will contribute to the fairness and efficiency of criminal trials. It is highly likely that both the prosecutor and defence counsel would carefully consider the content of the document, because it will inform the jury of the elements of the offences that will be disputed, the defences that will be advanced, and the alternative verdicts that might be sought from the jury. That analysis should be conducted and formalised prior to the commencement of the trial. Discussion about the content of this document should encourage counsel to identify the real issues in a case before the trial is underway.
- 6.45 The commission believes that the accused should not be bound by an indication in the Outline of Charges that a particular element of an offence is, or is not, in dispute. If the document is used, the trial judge should clearly inform the jury when the Outline of Charges is handed to them that the elements in dispute may change throughout the trial.

24 Similar documents are used on an informal basis elsewhere. A Survey of 185 Australian and New Zealand Judges conducted in 2004-2005 reported that many judges provided the jury with a written document setting out the elements of the offences. The results were as follows: NSW 78.3%; Qld 34.3%; SA 55%; Tas 75%; Vic 47.4%; WA 43.8%; NZ 65.3%. Australian Institute of Judicial Administration, *The Jury Project: Stage 1 – A Survey of Australian and New Zealand Judges* (2006) 30.

25 *Crimes (Criminal Trials) Act 1999* (Vic) s 6.

26 William Young, 'Summing Up to Juries in Criminal Cases – What Jury Research Says about Current Rules and Practice' (2003) *Criminal Law Review* 665; Neil Cohen and Daniel Cohen, 'Jury Reform in Tennessee' (2003) 34 *University of Memphis Law Review* 1; Bethany K Dumas, 'Symposium: Communicating with Juries' (2000) 67 *Tennessee Law Review* 701; William Erickson, 'Criminal Jury Instructions' (1993) *University of Illinois Law Review* 285; John P Cronan 'Is Any of this Making Sense?' (2002) 39 *American Criminal Law Review* 1187; New Zealand Law Commission, *Juries in Criminal Trials*, Report 69 (2001) 117.

27 New Zealand Law Commission, *Juries in Criminal Trials*, Report No 69 (2001) 116.

28 *Ibid.*

29 Bethany K Dumas, 'Symposium: Communicating with Juries' (2000) 67 *Tennessee Law Review* 701, 737.

30 This section has been reproduced in *Criminal Procedure Act 2009* (Vic) s 223.

RECOMMENDATIONS:

41. When addressing the jury about the issues that are expected to arise in a trial, the judge may provide the jury with a document known as an Outline of Charges which identifies the elements of the offences charged in the indictment (including alternate offences) and which indicates the elements disputed by the accused.
42. If the trial judge decides to give the jury an Outline of Charges the trial judge may direct the prosecutor to prepare a draft of that document and to attempt to settle the document with counsel for the accused before filing it with the court. Section 223 of the Criminal Procedure Act should be amended to expressly refer to this document and to provide the trial judge with an express power to direct counsel to prepare a draft of the document.

THE JURY GUIDE

- 6.46 Many trial judges throughout Australia and New Zealand give juries documents that aim to assist them to reach their verdict. These documents are variously called 'decision-trees', 'flow charts' or 'jury checklists'.³¹ They are designed to guide jurors in their deliberations by identifying the issues they must decide, and by indicating when and which alternative verdicts might need to be considered.
- 6.47 A research project for the Australian Institute of Judicial Administration which surveyed 185 trial judges from all jurisdictions in Australia and New Zealand in 2004/2005 reported quite significant use of 'flow charts, decision trees or lists of questions' when charging juries. Interestingly, Victorian judges reported the lowest usage of documents of this nature.³²
- 6.48 The commission believes that trial judges should be encouraged and expressly permitted to give the jury a document known as a Jury Guide which draws upon and develops the documents already in use. The primary objective of that document would be to assist the jury to reach a verdict that is fair and just by clearly explaining to them the questions of fact they must decide. While judges should be expressly permitted to give the jury this document, its use should not be mandatory.
- 6.49 Many Victorian trial judges deliver their charge or summing-up to the jury by following a structure that has been used for generations. It involves providing the jury with a detailed outline of the relevant law, often drawn from a resource known as a charge book, followed by a detailed summary of the relevant evidence. The jurors themselves must integrate the judge's separate instructions about the law and the evidence.
- 6.50 For many years judges relied on what was known as Judge Kelly's Charge Book to prepare their instructions about the law. More recently, most judges refer to the Jury Charge Book prepared by the Judicial College of Victoria (JCV) when preparing their charge (or summing-up) to the jury.
- 6.51 The JCV Charge Book is a brilliant resource tool, written by lawyers for lawyers, which is designed to ensure that a judge's directions to the jury about the law are accurate. The JCV Charge Book, which is freely accessible on the internet, contains a series of model directions about the elements of offences and warnings about the use of various types of evidence.³³ Although the authors seek to use plain English, the dictates of legal accuracy mean that many of the model directions are long and complex.
- 6.52 The standard jury summing-up deals first with what were once called the 'ineluctable directions' and which are given in all cases. These include directions about the onus of proof, the burden of proof, the roles of the judge and the jury, and the use of evidence. These directions are usually followed by an explanation of the elements of the offences in question. The elements are described in detail, often using the language in the JCV charge book. The judge identifies the elements of the offences that are in dispute and refers the jury to the competing positions of the parties as well as to the evidence relevant to those issues. The judge then directs the jury about any evidence that may require a special warning about its reliability or use. Finally, the judge summarises the evidence and the addresses of counsel for the jury.

- 6.53 The jury receives very comprehensive and complex directions about the law when this standard approach to the content of the summing-up is used. The extent of the directions about the law is well illustrated by the summing-up in a sexual offence case in Appendix C.³⁴ The commission believes that jurors face an extraordinary task when asked to absorb and apply such a complex body of law. We should seek new ways of instructing juries about their task which are designed to make it easier for them to deliver a verdict that is fair and just.
- 6.54 The Jury Guide recommended by the commission seeks to achieve this goal. It involves very little instruction about the law in isolation. The Jury Guide contains a series of questions of fact which guide the jury to a verdict of guilty or not guilty in relation to each offence. The law that is relevant to these determinations shapes the questions posed for the jury. While the answers to the questions will lead the jury to its verdict, those answers should not be publicly disclosed. The jury should continue to provide nothing more in open court than a verdict to each charge.
- 6.55 The questions in the Jury Guide provide a logical process by which the jurors might consider the factual issues relating to each offence. By this means the jury will decide whether the evidence has met the legal requirements for proof of each offence. The commission believes that the trial judge should produce the first draft of the Jury Guide. It should be refined during the course of the trial with the assistance of counsel and then given to the jury by the trial judge during the summing-up.
- 6.56 Juror comprehension of the relevance and importance of the trial judge's instructions should be enhanced by providing them with a series of questions to answer. Important directions could be delivered in the context of relevant questions in the Jury Guide. For example, the jury could be given a direction about standard of proof when presented with the first question which asked whether they were satisfied about something beyond reasonable doubt.
- 6.57 The judge should refer the jury to the evidence relevant to each question in the Jury Guide, and to the competing arguments of counsel. Jurors would receive directions about the use of evidence or the testimony of particular witnesses in the context of the judge's reference to the evidence concerning each question. For example, directions about treating identification evidence with care could be given in the context of a question which required the jury to determine the contested issue of whether they were satisfied beyond reasonable doubt that it was the accused person, and not someone else, who performed a particular act. Directions about matters ranging from evidence of good or bad character to propensity evidence would be given when relevant to the evidence for the jury to consider in answering a particular question. By following this process, the jury would receive instructions about the law only when it was relevant to a question of fact in the Jury Guide.
- 6.58 This approach to directing the jury builds upon work undertaken by the JCV in the Charge Book. In many of its chapters concerning individual offences, the Charge Book contains a 'Jury Checklist' which includes questions of the kind which the jury might be asked to consider when determining whether the offence has been proved. These questions, which are intended to be used in addition to the standard summing-up, are written in general terms. They must be modified before being applied to the facts of individual cases. The Jury Guide develops this approach by identifying and supplying the jury with the precise questions they must answer to reach a verdict.
- 6.59 Some trial judges may be concerned about adopting the Jury Guide because it is marked change from the standard approach to summing up a case to the jury. For this reason, the commission believes that trial judges should be expressly permitted and encouraged to use the Jury Guide, rather than required to do so. The commission believes, however, that the Jury Guide is likely to reduce the number of errors in directions to jurors. It will also greatly assist the jury to understand and apply the trial judge's instructions. Over time it may become the standard approach to summing-up to the jury.
- 6.60 Judges who currently follow the language of the JCV Charge Book closely when directing the jury about the law, and who also provide a comprehensive oral summary of evidence, may feel that whatever difficulties the jury experiences in following their instructions, the prospects of the directions being criticised on appeal are low. A permissive approach to the use of a Jury Guide should deal with the concerns of those judges who are reluctant to adopt a new approach to

31 Some judges in Queensland utilise 'flowcharts and sequential lists of questions': Queensland Law Reform Commission, *A Review of Jury Directions*, Working Paper 66 (2009) [9.92]-[9.96].

32 Elizabeth Najdovski-Terziovski, Jonathan Clough and James R P Ogloff, 'In Your Own Words: A Survey of Judicial Attitudes to Jury Communication' (2008) 18 *Journal of Judicial Administration* 65, 30 (see Table 5: 'Summing Up and Charging the Jury'). The respective percentages (rounded out) of surveyed judges who used such aides were NSW, 22%; Qld 26%; SA 30%; Tas 75%; Vic 13%; WA 50%; NZ 41%.

33 Judicial College of Victoria, *Victorian Criminal Charge Book* (2008) <<http://www.justice.vic.gov.au/emanuals/CrimChargeBook/default.htm>> at 30 March 2009.

34 This Appendix contains only *some* of the directions about matters of law given to the jury in that case.

summing-up to the jury until they have received appropriate training and until the Court of Appeal indicates strong support for the measure. A permissive approach should also encourage further innovation by those judges who are already using documents designed to guide jurors in their deliberations by identifying the issues they must decide.

RECOMMENDATIONS:

43. The trial judge should be expressly permitted to provide the jury with a document known as a Jury Guide, which contains a list of questions of fact designed to guide them towards their verdict. The jury must not be required to provide answers publicly to the questions in the document, but should be directed that they may use the Jury Guide to assist them to reach a verdict.
44. If the trial judge decides to give the jury a Jury Guide, a draft of that document must be shown to the prosecutor and counsel for the accused prior to it being handed to the jury and counsel must assist the trial judge to finalise the questions of fact that will be included in that document.

DOES THE JURY GUIDE APPROACH DISTORT THE ROLE OF THE JURY?

- 6.61 The Jury Guide is consistent with the longstanding common law principle concerning the obligations of the judge and the jury in a criminal trial. The High Court explained the operation of this principle in *Alford v Magee*:

[I]t 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 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.³⁵

- 6.62 Even though that principle has been consistently re-stated by the High Court for nearly sixty years, trial judges continue to give directions and warnings to jurors that amount to exceptionally complex lectures about issues of law that even experienced lawyers would have difficulty recalling and applying to the facts of a case. It appears that many directions of this nature are given because of fear that appellate courts will find error were the judge to do otherwise. Modern jury directions have strayed a long way from the objective of assisting jurors by telling them about only as much of the law as necessary to reach a fair and just verdict in the case.

- 6.63 Recent statements by the High Court and the Victorian Court of Appeal encourage an approach to jury directions which is practical and succinct. In *R v Chai*,³⁶ the High Court held that two matters should be borne in mind when considering an attack on a judge's charge:

First, it is not the function of a trial judge to expound to the jury principles of law going beyond those which the jurors need to understand to resolve the issues that arise for decision in the case. Secondly, the law should be explained to the jury in a manner which relates it to the facts of the particular case and the issues to be decided.³⁷ The judge's task was not to compose an essay on the topic of accessory liability for manslaughter. It was to explain to the jurors so much of the law as they needed to know in order to decide the issues that arose from the charges, the evidence, the case for the prosecution and the defence case. It would, therefore, be wrong to take the oral or written directions given at this trial as providing a model to be used in another trial.

- 6.64 The Jury Guide approach to a summing up relates the relevant law to the facts of the particular case and to the issues to be decided.

6.65 The Victorian Court of Appeal recently described the trial judge's obligation when summing up:

Axiomatically, it is the responsibility of the trial judge in every jury trial:

- (a) *to decide what are the real issues in the case;*
- (b) *to direct the jury on only so much of the law as is necessary to enable the jury to resolve those issues;*
- (c) *to tell the jury, in the light of the law, what those issues are;*
- (d) *to explain to the jury how the law applies to the facts of the case; and*
- (e) *to summarise only so much of the evidence as is relevant to the facts in issue, and to do so by reference to the issues in the case.*³⁵

6.66 The Jury Guide approach to a summing up enables the trial judge to fulfil this responsibility by providing the jury with a series of questions which integrate all of these tasks.

SIMILAR DEVELOPMENTS IN OTHER JURISDICTIONS

NEW ZEALAND

6.67 The Jury Guide approach to issue identification operates in New Zealand with the support and encouragement of the Court of Appeal.³⁹ New Zealand juries are provided with a document, usually referred to as a question trail, which reduces the issues in a case to a series of fact-based questions. The President of the Court of Appeal and another member of that Court train New Zealand judges in the preparation and use of this document.⁴⁰

6.68 The editor of the New Zealand Jury Trial Bench Book, Justice Simon France, has said that as a consequence of this new approach the Bench Book "has moved from containing verbatim model directions to a discussion of the purpose and needed content of the particular direction".⁴¹

6.69 This change to summing up practices has occurred without the need for express legislative support in New Zealand. The approach has received strong endorsement, however, from the New Zealand Court of Appeal.⁴² In *R v Taylor*,⁴³ the Court acknowledged the origins of the approach:

The appropriateness of a Judge summing up on the facts as well as the law as set out by Lord Devlin in Trial by Jury (1966) at 115, as follows:

All the material which gets into the ring that is kept by the rules of evidence is not of course of equal value, and it is the task of counsel and then of the judge to select and arrange. In discharging this task counsel can be helpful but not disinterested and the jury must look chiefly to the judge for direction on the facts as well as the law. It is his duty to remind them of the evidence, marshal the facts and provide them, so to speak with the agenda for their discussions. By this process there emerges at the end of the case one or more broad questions – jury questions – which have to be decided in the light of common sense.

6.70 In *R v Dixon*,⁴⁴ the Court illustrated its approach:

Potter J had given the jury an elements sheet. We applaud that: elements sheets or question trails are of significant benefit to juries in cases such as this, with multiple charges and difficult issues arising from the defences being run. When it came to insanity, however, all the judge did was reproduce s 23 of the Crimes Act. To give the jury the unvarnished section would be unfortunately likely to lead them into error as to the correct focus of their inquiry. It would have been preferable had the judge posed the question in the simple terms we have expressed above, namely: Did Mr Dixon, because of the disease of his mind, not know that what he was doing was morally wrong?

6.71 These New Zealand reforms are part of a much broader reform agenda, which commenced with landmark jury research performed by the Law Commission of New Zealand. The Commission conducted extensive interviews with jurors who had sat in trials. The research demonstrated that jurors benefited greatly from early identification of issues and from the

35 (1952) 85 CLR 437, 466.

36 (2002) 187 ALR 436, 441. In *Chai*, the trial judge supplemented the oral direction with a written jury aide setting out the elements of the offences. The written document was approved as accurate.

37 *Alford v Magee* (1952) 85 CLR 437, as cited in *R v Chai* (2002) 187 ALR 436, 441.

38 *R v RJS* (2005) 12 VR 563, 577.

39 Jury Directions Symposium, Melbourne, 5-6 February 2009. The approach of providing jurors with issues-based questions of fact rather than "providing the jury an education in various fields of law" has long been the approach adopted in civil jury trials in Kentucky, and was subject to detailed analysis by Charles M Cork III, 'A Better Orientation for Jury Instructions' (2002) 54 *Mercer Law Review* 1, 29.

40 Jury Directions Symposium, Melbourne, 5-6 February 2009. Appendix E contains examples of the documents used in New Zealand.

41 The Honourable Justice Simon France, 'Jury Changes in New Zealand' (Paper presented at the Jury Directions Symposium held by the Victorian Law Reform Commission, Melbourne, 5-6 February 2009). This section draws extensively from that paper and from presentations made by the Hon Justice Robert Chambers, Court of Appeal New Zealand and Professor Warren Young, Law Commission of New Zealand.

42 *R v Dixon* [2007] NZCA 398, [34], [41]; *R v Wade* CA237/05 (8 December 2005), [28]; *R v Peters and Southon* CA430/05 (22 March 2006), [18]; *R v Campbell* [2007] NZCA 121, [18]; *R v Whipp* [2007] NZCA 341, [24]; *R v O'Connor* CA475/04 (7 March 2005), [41]; *R v Tukaki* CA360/05 (14 June 2006), [12]; *R v Phan* [2008] NZCA 310, [27], [34].

43 (2005) 21 CRNZ 1035, [128]-[129].

44 [2007] NZCA 398, [41].

production of documents that explained and simplified their task.⁴⁵ The reforms concerning jury directions complemented extensive statutory reform introduced by the *Evidence Act 2006* (NZ). Many of those reforms are similar to the approach taken by the Victorian *Evidence Act 2008*.

- 6.72 Juries in New Zealand receive much more assistance than Victorian juries at the commencement of trials as well as at the time of summing up. New Zealand judges surveyed in 2004–2005 reported that it was common practice for Crown counsel to provide a jury booklet which contained a copy of the indictment, a list of witnesses (with a brief description of their role), plain English definitions of the charges and non-contentious documentary material.⁴⁶ New Zealand judges more readily permitted the prosecutor to present the jury with a document setting out the elements of the offences than was the case in Australia: 84 per cent of surveyed New Zealand judges said they would permit that, compared with only 9 per cent of Australian judges.⁴⁷

ENGLISH PROPOSALS TO IMPROVE ISSUE IDENTIFICATION

- 6.73 In 2001, Lord Justice Auld published a *Review of the Criminal Courts of England and Wales* which suggested reforms similar to the Outline of Charges and the Jury Guide recommended by the commission.⁴⁸

- 6.74 Auld JA's assessment of the criminal law as a whole in England and Wales resembles the commission's conclusion about the law of jury directions in Victoria:

The criminal law as a whole suffers from centuries of haphazard statutory and common law accretion, a process that has accelerated dramatically in recent years. It is immensely complicated for lawyers and laymen alike, and urgently in need of codification".⁴⁹

- 6.75 Auld LJ made a number of recommendations about the assistance that should be given to juries at the start of a trial:

235. *In all cases tried by a judge and jury:*

235.1 *each juror should be provided at the start of the trial with a copy of the charge or charges;*

235.2 *the judge at the start of the trial should address the jury, introducing them generally to their task as jurors and giving them an objective outline of the case and the questions they are there to decide;*

235.3 *the judge should supplement his opening address with, and provide a copy to each jurors of, a written case and issues summary prepared by the parties' advocates and approved by him;*

235.4. *The judge, in the course of his introductory address, and the case and issues summary, should identify:*

- *the nature of the charges;*
- *as part of a brief narrative, the evidence agreed, reflecting the admissions of either side at the appropriate point in the story;*
- *also as part of the narrative, the matters of fact in issue; and*
- *with no, or minimal, reference to the law, a list of likely questions for their decision.*

236. *If and to the extent that the issues narrow or widen in the course of the trial, the case and issues summary should be amended and fresh copies provided to the judge and jury.⁵⁰*

- 6.76 In addition, Auld LJ considered what should happen later in the trial and recommended that before final addresses commenced the trial judge and counsel should review the case and issues summary and amend it if necessary.⁵¹ He also recommended the judge use the case and issues summary and other written or visual aid documents to complement the oral summing up to the jury.⁵² His comments about the state of the law of jury directions are just as applicable to Victoria as they were to England and Wales:

As to directions of law, the present system is to burden the jury with often highly technical and detailed propositions of law – lots of them. Many are prolix and complicated, often subject to qualifications and in some instances barely comprehensible to criminal practitioners never mind those who may never have heard them before. They have become worse in all of these respects over recent years, in part as a piecemeal response to rulings of the Court of Appeal refining and qualifying the law on which the earlier forms of direction were based. ... Many judges and practitioners accept the system because that is how they have always known it, though they recognise it has become vastly more complicated for them and the jury than it was. For many others the process is, frankly, an embarrassment in its complexity and in its unreality as an aid to jurors in returning a just verdict.⁵³

6.77 Auld LJ's response to this state of affairs is similar to the commission's recommendations concerning a Jury Guide:

I believe that simplification of the way in which judges direct and sum up to juries is essential for the future well-being of our system of trial by judge and jury. I recognise, however, that the task of extricating us from our present tradition would be formidable ... What is needed is a fundamental ... and practical review of the structure and necessary content of a summing-up with a view to shedding rather than incorporating the law and to framing simple factual questions that take it into account.⁵⁴

6.78 Auld LJ made the following recommendations about how the trial judge should sum up the case to the jury:

247. *So far as possible, the judge should not direct the jury on the law, save by implication in the questions of fact that he puts to them for decision.*

248. *The judge should continue to remind the jury of the issues and, save in the most simple cases, the evidence relevant to them, and should always give the jury an adequate account of the defence; but he should do it in [a] more summary form than is now common.*

249. *The judge should devise and put to the jury a series of written factual questions, the answers to which could logically lead only to a verdict of guilty or not guilty; the questions should correspond with those in the updated case and issues summary, supplemented as necessary in a separate written list prepared for the purpose; and each question should be tailored to the law as the judge knows it to be and to the issues and evidence in the case.*

250. *The judge, where he considers it appropriate, should be permitted to require a jury to answer publicly each of his questions and to declare a verdict in accordance with those answers.⁵⁵*

6.79 These proposals were not adopted. However, although the cases and issues summary document was not formally implemented in England and Wales, the practice of providing an issues document, especially in serious or complex cases, is widely followed in practice, with judges producing their own style of *Aide-memoire* documents, both at the start of the trial and accompanying the final summing up.⁵⁶ The more general proposals of Auld LJ that jurors be provided with jury aides, and that the issues in the case be narrowed to a series of factual propositions, received widespread general support at the time the report was published.⁵⁷

6.80 The Lord Chief Justice of England and Wales, in a speech delivered in late 2007, referred to judges being 'familiar with seeing the jurors' eyes glaze over as they give a series of directions the object and effect of which is not to simplify the jurors' task, but to render the summing-up proof against an appeal on the ground of misdirection'.⁵⁸ This comment could have been made about Victorian judges and juries. Lord Phillips went on to say the time may have come to reconsider the proposals made by Sir Robin Auld.⁵⁹

45 New Zealand Law Commission, *Juries in Criminal Trials*, Report No 69 (2001) 116.

46 Australian Institute of Judicial Administration, above n 32, 24.

47 *Ibid* 23 (See particularly Table 3: 'Crown and Defence Opening').

48 Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (2001). The report is available at <<http://www.criminal-courts-review.org.uk/>> at 23 April 2009.

49 *Ibid* 18.

50 *Ibid* 58 (Chapter 2: 'Summary and Recommendations') (emphasis omitted).

51 *Ibid* 529-31 (Recommendation 242).

52 *Ibid* 532-8.

53 *Ibid* 534.

54 *Ibid* 535.

55 *Ibid* 60 (Recommendations 247-50). See also 532-538.

56 Email from Sir Robin Auld to Geoff Eames, March 2009.

57 Even the group "Justice", a major critic of some of the recommendations, supported the approach of posing "pre-agreed questions to juries", as providing "a useful framework for jury deliberations". Justice opposed the proposition that the verdict be required to "follow as a matter of formal logic from the answers given to those questions", or that the jury could be required to answer the questions publicly: JUSTICE, *JUSTICE's Response to the Auld Review* (2002) 18-19 <<http://www.justice.org.uk/images/pdfs/Auld.pdf>> at 23 April 2009.

58 Lord Phillips, 'Trusting the Jury' (Speech delivered at the Criminal Bar Association Kalisher Lecture, London, 23 October 2007) 15. The speech can be accessed at <http://www.judiciary.gov.uk/docs/speeches/lcj_trusting_juries_231007.pdf> at 23 April 2009.

59 *Ibid*.

APPLYING THE JURY GUIDE TO A COMPLEX CASE

- 6.81 In order to determine whether it is feasible for trial judges to use a Jury Guide on a regular basis the commission decided to prepare a document for use in a complex case. We chose the recent and well known case, *Clayton v The Queen*.⁶⁰ The Jury Guide approach is certainly consistent with the statement of principle made by the High Court in that case about ensuring that the trial judge identifies the issues of fact which the jury must decide in order to reach a verdict.⁶¹
- 6.82 In *Clayton*, three accused stood trial for murder of one person and, on a separate count, of intentionally causing serious injury to another person. The case raised complex issues concerning complicity, self-defence, murder and manslaughter. The trial ran for 46 days. The judge's summing up occupied several days, and written jury aides supplemented the oral charge.⁶² The trial judge, Smith J, provided the jury with a document which posed sequential questions, but in a format consistent with the traditional approach of explaining the law to the jury then asking the jurors whether each element of the relevant offence had been proved.
- 6.83 In this case it was not disputed that the three accused had attended a house after an earlier altercation. They were each armed with weapons, being metal or wooden poles and a large carving knife. An initial assault on a female resident led to the serious injury count. A male occupant was severely beaten with poles and stabbed a number of times, one stab wound being fatal. The accused alleged that the victim had been armed with a knife and that they had acted in self-defence. All three accused were convicted of murder.
- 6.84 The prosecution claimed that each accused person was complicit in murder in one or more of three ways. First, by application of the principles of aiding and abetting. Secondly, by virtue of entering a joint enterprise agreement to cause really serious injury to the victim. Thirdly, by virtue of the principle of extended common purpose that is, having each agreed to assault the victim and having reasonably foreseen that death or really serious injury might be caused by one of them when not acting in self-defence.
- 6.85 In addition to lengthy and comprehensive directions about the elements of murder, manslaughter, and self-defence, the trial judge gave the jury very detailed oral instructions about the law concerning each of the three alternative bases of complicity. These instructions are set out in **Appendix F1**. The Court of Appeal subsequently affirmed the correctness of those directions.⁶³
- 6.86 The trial judge's oral directions about complicity were supplemented by written jury aides. The jury aides for murder and manslaughter are set out in **Appendix F2**.⁶⁴ In those written jury aides the trial judge explained the legal bases for the different approaches to complicity, spelling out what the Crown had to prove in each instance in order to prove its case beyond reasonable doubt.
- 6.87 A majority of the High Court disagreed with the approach taken by the trial judge in constructing the directions by reference to the various alternative bases for complicity relied upon by the prosecution. The majority said, when discussing the principle explained in *Alford v Magee*:
- [23] *It may greatly be doubted that it was essential to identify the issues which the jury had to consider according to a pattern determined only by the legal principles upon which the prosecution relied. The written directions took that shape, but the oral directions focused more immediately upon the factual questions that arose.*
- [24] *The real issues in the case which the jury had to decide were issues of fact. It was for the trial judge to determine what those real issues were and to instruct the jury about only so much of the law as must guide them to a decision on those issues. It may have been possible to instruct the jury in a way that avoided repetition of what, in the end, were relatively few issues for their consideration.*
- [25] *The case against each applicant had to be considered separately. The injuries suffered by the deceased were consistent only with a prolonged assault upon him. There seemed little doubt that one of the applicants had inflicted the fatal wound. Because the prosecution did not contend that the evidence revealed who had struck the fatal blow, the principal issues in each case centred upon:*

- (a) *what did the applicant agree was to happen when they went to Ms Rodwell's house?*
- (b) *what did that applicant foresee was possible? and*
- (c) *what did that applicant do at the house, if anything, to aid and abet whoever it was who had fatally assaulted the deceased?*

[26] *If, as the prosecution contended was the case in respect of each applicant, the particular applicant under consideration was shown, beyond reasonable doubt, to have agreed with one or both of the other applicants to cause really serious injury to the deceased, a verdict of guilty of murder had to be returned. If the prosecution demonstrated beyond reasonable doubt that the applicant under consideration was party to an agreement with one or other of the applicants to assault the deceased to some lesser degree, and foresaw the possibility that death or really serious injury might intentionally be inflicted on the deceased in the course of that assault (otherwise than in self-defence), again, a verdict of murder had to be returned. In this latter respect, if persuaded beyond reasonable doubt that the applicant concerned went to the premises armed, or knowing that others were going armed, it would be open to the jury to infer that that applicant foresaw the possibility of assault with the requisite intent, but such an inference was not inevitable.*

[27] *Finally, if the jury were persuaded beyond reasonable doubt that the applicant under consideration detained Ms Rodwell, knowing that Mr Borg was being assaulted with intent to kill or cause really serious injury, and that the applicant in question detained her to help or encourage the making of that assault, a verdict of murder had to be returned.*

[28] *There was a great deal of evidence that bore on these issues. Several different accounts had been given of what had happened before and during the fatal assault on Mr Borg, by the applicants when interviewed by police, by witnesses to what was said and done before the applicants arrived at Ms Rodwell's house, and by Ms Rodwell herself. And it was necessary for the judge to tell the jury what evidence was admissible against each applicant. But the issues (as distinct from the evidence) were relatively simple. What did the applicant agree was to happen; what did that applicant foresee might happen; what did that applicant do at the house?*

[29] *Applying the principles of extended common purpose did not require the over-elaboration or over-complication of the issues in this case. And the applicants offered no example of a case where it would.*⁶⁵

- 6.88 Although the High Court thought it unnecessary for the judge to have addressed the jury about the law involving all bases of complicity, we have tested the potential application of a Jury Guide to the issues in *Clayton* by posing questions of fact that invite consideration of all bases of complicity. **Appendix F3** contains a Jury Guide that might have been of use in this case. For demonstration purposes, we have also assumed that the Crown might have argued that the evidence established which one of the offenders caused the fatal injury, although the Crown did not, in fact, seek to prove that in the trial.
- 6.89 The Jury Guide does not discuss the law of complicity, whereas the trial judge's document does provide instruction about those principles, and then invites the jury to apply those principles to the facts of the case. If the Jury Guide correctly embeds the law in the questions posed, it is not necessary to refer the jury to any principles of law in the abstract.
- 6.90 The Jury Guide in **Appendix F3** is a relatively simple document which addresses each of the alternative bases of complicity for murder or manslaughter. With the assistance of counsel, this document may have been further refined and simplified. Experience in New Zealand has been that useful refinement invariably occurs when counsel have the opportunity to consider a draft question trail, as they are called in that country.⁶⁶
- 6.91 If the Jury Guide approach could be readily employed in a case with the many complications of *Clayton*, there is no reason why it could not be employed in any case.

60 (2006) 81 ALJR 439.

61 *Ibid* 444 (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ).

62 *R v Hartwick* [2005] VSCA 264, [26]. The order of names of the accused, and therefore the case name, changed from Hartwick to Clayton for the High Court hearing.

63 *R v Hartwick* [2005] VSCA 264.

64 Save for an omission of one matter (the error of which was overcome as it was correctly referred to in the oral directions), the Court of Appeal also approved the written jury aides.

65 *Clayton v The Queen* (2006) 81 ALJR 439, 444-5 (citations omitted, emphasis added). In his dissenting judgment, Kirby J disagreed with the majority as to the simplicity of the issues, and as to whether the judge should have ignored the way in which the prosecution had put the case, when he charged the jury (see 460-1, 464).

66 Jury Directions Symposium, Melbourne, 5-6 February 2009.

CONCLUSION

- 6.92 Both the Outline of Charges and the Jury Guide have the capacity to improve issue identification. They are likely to reduce the length of trials and to reduce errors relating to jury directions and warnings. Judges will require training in the new approach, which is a modern way of implementing the principle explained in *Alford v Magee* about the trial judge's responsibilities when summing-up to the jury. In the following chapter we consider skills training for both trial judges and counsel.



Chapter 7

Professional Development and Skills Training

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Introduction
Educational Requirements for
the Medical Profession
Specialist Accreditation
Public Defenders
Payment of Counsel
Judicial Education

Professional Development and Skills Training

INTRODUCTION

- 7.1 In this chapter we make a number of 'administrative'¹ recommendations concerning professional development and skills training for trial judges and barristers which are designed to improve the directions given to juries in criminal trials.
- 7.2 Trial judges and barristers who appear in criminal trials must have an extensive knowledge of the law and highly developed legal skills because:
- the issues at stake in any criminal trial are of great significance for the accused, victims of crime and the broader community
 - the law to be applied is generally complex and dynamic
 - the facts in dispute are often complicated
 - questions about the admissibility of evidence and the application of the law frequently arise in circumstances where there is little time for reflection.
- 7.3 The body of law that Victorian judges and counsel must apply in criminal trials is changing markedly. In 2008, Parliament passed legislation reforming the law of evidence² and in early 2009 new criminal procedure laws were enacted.³ Both statutes will change some aspects of criminal trials.
- 7.4 The law dealing with criminal offences and criminal investigation is also under review and new legislation is expected shortly.⁴ In this report the commission recommends new legislation dealing with jury directions in criminal trials. The importance of these changes, and their impact upon judges and criminal lawyers, cannot be underestimated. Over the next few years criminal trial judges and barristers will be required to learn the content of this new legislation and how to apply it to the circumstances of particular cases.
- 7.5 In the commission's Consultation Paper, we raised the issue of skills development and training for trial judges and counsel.⁵ During consultations, various members of the profession expressed concern that some barristers are appearing in criminal cases for which they do not have the necessary experience or expertise.⁶ On earlier occasions concerns have been expressed that some trial judges lack the requisite experience, skills or knowledge to conduct complex criminal trials, such as sexual offences trials.⁷
- 7.6 While it is not possible to measure whether these concerns are correct, the commission believes that enhanced skills training for trial counsel and judicial officers is an important response to the problems associated with the complexity of jury directions identified in this report.

SKILLS TRAINING FOR BARRISTERS AND JUDGES

- 7.7 Given the importance of the task, judges must have professional development opportunities which enable them to be properly trained to conduct criminal trials. Directing the jury is one of a trial judge's most difficult functions. Similarly, if trial counsel are to conduct trials competently, they must also be provided with appropriate training and professional development opportunities.
- 7.8 In this chapter we consider the current educational requirements for admission to practice as a barrister in Victoria, as well as the continuing professional development opportunities which exist for Victorian barristers. The chapter also considers the training requirements for admission to practice as a barrister in NSW, and in England and Wales. The current educational and post-registration requirements of some medical specialists are considered by way of comparison.
- 7.9 This chapter also examines Victoria's specialist accreditation scheme for solicitors and questions whether a similar scheme would be desirable for barristers who appear in criminal trials. Specialist accreditation schemes for lawyers in the United States and the United Kingdom are also considered.
- 7.10 In addition, the commission considers the merits of establishing a Public Defender scheme in Victoria. Such a scheme may encourage the development of high-level skills among a select group of defence barristers and provide a resource for educating later generations of criminal trial lawyers.

- 7.11 Finally, the commission examines the current professional development opportunities for Victorian judicial officers and suggests the introduction of additional courses.

EDUCATIONAL REQUIREMENTS TO BECOME A BARRISTER

- 7.12 All practising lawyers, whether they work as barristers or solicitors, must be admitted to legal practice by the Supreme Court of Victoria and hold a valid practising certificate.⁸ While practising certificates require annual renewal, admission to practice is for life.⁹
- 7.13 Interstate lawyers are also eligible to practice in Victoria under the mutual recognition scheme which promotes freedom of movement of goods and services among the states and territories.¹⁰ Lawyers from interstate must apply to have their name entered on Victoria's Roll of Legal Practitioners and obtain a Victorian practising certificate. These lawyers are not required to pass any examinations about Victorian law or procedure.

ADMISSION TO THE SUPREME COURT OF VICTORIA

- 7.14 The *Legal Profession Act 2004* (LPA) provides the regulatory framework for legal practice in Victoria. The LPA sets out the requirements for both admission to practice, and for the granting and renewal of practising certificates. A review of legal education in July 2006 resulted in some significant changes to admission to practice which we describe below.¹¹
- 7.15 Applicants for admission to practice must satisfy the Board of Examiners that they have complied with the *Legal Profession (Admission) Rules 2008*.¹² To comply with the Admission Rules, an applicant must:¹³
- be eligible for admission to practice
 - be a fit and proper person to be admitted to the legal profession
 - take an oath of office.

Eligibility

- 7.16 To be eligible for admission to practice an applicant must have completed a law degree at an approved academic institution¹⁴ and have participated in approved practical legal training. Approved practical legal training is training provided by either an approved Practical Legal Training provider, or training through Supervised Workplace Training (SWT).¹⁵
- 7.17 Supervised Workplace Training replaces the old system known as 'articles of clerkship'. Trainees now must complete several core competency modules called the 'Competency Standards for Entry Level Lawyers'. The Competency Standards require trainees to acquire skills and competence in ten areas: eight compulsory and two selected by their employer. Graduates must acquire competency in the compulsory areas of 'Skills',¹⁶ 'Practice Areas'¹⁷ and 'Values'.¹⁸ Training for the

- 1 The terms of reference ask the commission 'to recommend any procedural, administrative and legislative changes that may simplify, shorten or otherwise improve the ... directions...given to juries in criminal trials'.
- 2 *Evidence Act 2008* (Vic).
- 3 *Criminal Procedure Act 2009* (Vic).
- 4 Department of Justice (Victoria), *Attorney-General's Justice Statement 2* (2008) <http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/ebe9c548ed52a69/JusticeStatement2_Full.pdf> at 23 April 2009.
- 5 Victorian Law Reform Commission, *Jury Directions: Consultation Paper* Consultation Paper 6 (2008).
- 6 See, eg, *ibid* [7.77]-[7.78]; and Geoff Strong, 'Ex-judge Asserts Failure of Justice', *The Age* (Melbourne), 10 October 2008, 5; See, also, Consultation 1 (Law Institute of Victoria), Consultation 6 (Office of Public Prosecutions).
- 7 Victorian Law Reform Commission, *Sex Offences: Final Report* (2003) 165. For a discussion of some of the difficulties faced by trial judges in sexual assault cases; See, eg, Victorian Law Reform Commission, *Jury Directions: Consultation Paper* Consultation Paper 6 (2008) [3.1]-[3.4].
- 8 *Legal Profession Act 2004* (Vic) ss 2.2.2, 2.3.4, 2.3.6.
- 9 Admission for life is subject to remaining a fit and proper person. A finding of unsatisfactory professional conduct or professional misconduct may result in an order that the Supreme Court remove the name of the offending practitioner from the local roll and that the practitioner's practising certificate be suspended for a specified period or cancelled. See *Legal Profession Act 2004* (Vic) s 4.4.17. The Legal Service's Board has the key responsibility of issuing, renewing, suspending and cancelling practising certificates. See, eg, Legal Services Board, *About the Board* (2008) Legal Services Board <<http://lsb.vic.gov.au/AboutTheBoard.htm>> at 14 January 2008.
- 10 *Mutual Recognition Act 1992* (Cth) s 3 and *Mutual Recognition (Victoria) Act 1998* (Vic) s 1.
- 11 Legal and Equity Division, Department of Justice, *Review of Legal Education Report: Pre-Admission and Continuing Legal Education* (2006).

- 12 These rules are made pursuant to the *Legal Profession Act 2004* (Vic). They commenced operation on 1 July 2008.
- 13 *Legal Profession Act 2004* (Vic) s 2.3.6.
- 14 Approved academic institutions currently include: The University of Melbourne; Monash University; La Trobe University; Deakin University; Victoria University and the Royal Melbourne Institute of Technology: *Legal Profession (Admission) Rules 2008* (Vic) r 3.01. Bachelor of Laws courses must include the following compulsory subjects: Criminal law and Procedure, Torts, Contracts, Property (real and personal), Equity (including trusts), Administrative law, Federal and state constitutional law, Civil procedure, Evidence, Professional conduct (including basic trust accounting) and Company law: *Legal Profession (Admission) Rules 2008* (Vic) sch 2.
- 15 *Legal Profession (Admission) Rules 2008* (Vic) r 3.01 1(a)(i).
- 16 The compulsory area of 'skills' includes: lawyer's skills, problem solving, work management and business skills and trust and office accounting: *Legal Profession (Admission) Rules 2008* (Vic) sch 3.

Professional Development and Skills Training

Competency Standards can be taken either internally (through the trainee's SWT) or externally through an accredited Practical Legal Training provider.¹⁹ There is no suggestion that these pre-admission educational requirements equip people with the knowledge and skills that are necessary to appear as counsel in a criminal trial. The Review of Legal Education Report notes that the overall objective of pre-admission training is to ensure that an applicant for admission to the legal profession has 'the knowledge, skills and professional values required for competent legal practice as an *entry level lawyer*'.²⁰

Fit and proper person

- 7.18 Applicants must provide a Police Record Check and an Academic Conduct Report from their University and Practical Legal Training Provider. Applicants must also provide full and frank disclosure of any unfavourable past conduct and satisfy the admitting authorities that they are of good character and reputation.²¹

PRACTISING CERTIFICATES AND THE BAR READERS' COURSE

- 7.19 After a lawyer has been admitted to practice, he or she must obtain a practising certificate from either the Law Institute of Victoria (if intending to practice as a solicitor) or the Victorian Bar Council (if intending to practice solely as a barrister) in order to practise law.²²
- 7.20 As we are primarily concerned with skills training for criminal trial counsel, we have focused on the educational requirements for barristers.

Practising certificates

- 7.21 The Victorian Bar issues practising certificates to legal practitioners who intend to practise solely as barristers.²³ The Bar also oversees compliance with practising requirements and administers the mandatory continuing professional development scheme for practising barristers.²⁴
- 7.22 To be issued a practising certificate an applicant must:²⁵
- be admitted to practice in Victoria
 - undertake a period of nine months 'reading' in the chambers of a junior member of the Bar²⁶
 - complete the Bar's practical training ('Bar Readers' Course') within three months of the reading period
 - sign the Bar roll of Counsel after three months.
- 7.23 Applicants are also required to divulge any matters which tend to show that the applicant is not of 'sound mind' as well as disclose any evidence which indicates that the applicant is 'not of good character or not a suitable person to become a member of the Victorian Bar'.²⁷

'Reading' and the Bar Readers' Course

- 7.24 The Bar Readers' Course is a form of compulsory post-admission training for barristers administered and regulated by the Bar Council.²⁸ The course must be completed within three months of commencing to read at the Bar. It is a course of ten weeks duration (full time), and currently costs \$3,771. Instruction is provided by members of the Bar.
- 7.25 The course is compulsory post-admission training because a reader cannot engage in any legal work (otherwise than in connection with his or her reading) until his or her name is entered on the Bar roll. The Reader's name can only be entered on the Bar roll after the completion of the Readers' Course. Once a Reader signs the Bar Roll, he or she can accept briefs and appear in court on behalf of clients.²⁹
- 7.26 The focus of the Bar Readers' course is on teaching advocacy skills, rather than testing specific legal knowledge and assessing the skill of applying that knowledge in particular cases. Readers 'learn by performance', participating in simulated court scenarios and workshops, with an emphasis on analysis and performance, followed by critique and instruction.³⁰ The Bar considers the course to be a practical one which encourages Readers to approach legal issues with analytical, individual and creative minds.³¹

7.27 The Bar Readers' course is an 'entry-level' training program for people commencing a career as a barrister rather than one designed to equip a person with the skills that are necessary to appear in a criminal trial.³² In the past, the assumption seems to have been made that a barrister who wishes to appear in criminal trials may acquire the necessary skills over time by practice in the lower courts and by informal instruction from experienced trial counsel. It may be time to re-visit this assumption because some of the former means of acquiring the skills necessary to appear as counsel in a criminal trial, such as working as a paid junior to senior counsel, are no longer prevalent.

Demise of 'two counsel rule'

- 7.28 In 1992, the Vic Bar amended its *Re-Statement of Basic Rulings on Professional Conduct and Practice* to allow Queen's Counsel to accept instructions in any matter without a junior counsel.³³
- 7.29 The two-counsel rule permitted junior counsel to gain experience by participating in trials under the guidance of senior barristers. Clients wishing to engage senior barristers were also required to engage a junior barrister at a fee two-thirds of that paid to senior counsel.³⁴
- 7.30 Although the amendment to the 'two counsel rule' still enables senior counsel to refuse instructions without a junior 'in the interests of the client', it is no longer usual practice to brief junior counsel whenever senior counsel is briefed.
- 7.31 Former Justice of the High Court Michael Kirby has suggested that the two counsel rule came to an end because there was a perception that the personal interests of the junior and senior Bar were being placed before any advantage to the public.³⁵
- 7.32 The Department of Justice's *Review of Legal Education Report* in 2006 was critical of the Bar Readers' course because there is no formal assessment of readers' skills and competencies:³⁶
- Our only recommendation in relation to the Bar Readers' Course is that we believe that participants' performance of key practical exercises should be formally assessed. In its present form, there is no answer to the question: "What happens if a new barrister's advocacy exercises are below acceptable standard?"*
- 7.33 While the Report suggested that the Readers' Course Committee was 'considering an appropriate form of assessment of basic competence in advocacy and ethics', the commission is unaware of any formal assessment having been introduced.
- 7.34 One well-placed commentator, retired Supreme Court judge, Professor George Hampel, has suggested the introduction of formal training in advocacy, clearly a core skill for most barristers:

- 19 With the exception of Ethics and Professional Responsibility which must be provided by an external provider.
- 20 Legal and Equity Division, Department of Justice, above n 10, 31.
- 21 *Board of Examiners* (2008) Supreme Court of Victoria <<http://www.supremecourt.vic.gov.au/wps/wcm/connect/Supreme+Court/Home/Board+of+Examiners/>> at 26 November 2008.
- 22 While legal practice in Victoria is largely regulated by the Legal Services Board (LSB), it has delegated the function of granting, renewing, suspending and cancelling practising certificates to the Law Institute of Victoria and the Victorian Bar. The LSB maintains the register of practitioners.
- 23 To apply to become a member of the Bar a person must first be admitted to legal practice under the *Legal Profession Act 2004* (Vic) as stated in the *Application (Amendment) Regulations 2006* (Vic) reg 5(1). In addition, by applying to sign the Roll of Counsel, applicants must undertake that they will not practice otherwise than exclusively as counsel and surrender any practising certificates issued by other professional associations (such as the LIV): *Victorian Bar Application Regulations 2005* (Vic).
- 24 The mandatory professional development scheme is discussed further at paragraphs 42 to 45.
- 25 The Victorian Bar, *Coming to the Bar* (2008) <<http://www.vicbar.com.au/e.3.asp>> at 27 November 2008.
- 26 A junior member of the Bar must have been a member of the Bar for no less than 10 years and cannot be a Queen's Counsel or Senior Counsel.
- 27 This may include any criminal proceedings against them, details of any disqualifications from managing or being involved in a body corporate, details of any insolvency and details of any complaints to professional bodies or associations against them; See The Victorian Bar, *The Victorian Bar Application Form* (2008) <<http://vicbar.com.au/documents/ApplictoSigntheRollofCounselJune2005revised14Jan08.pdf>> at 24 April 2009.
- 28 The Readers' Course and other aspects of reading at the Bar are governed by *Reading Regulations* made by the Victorian Bar Council; See The Victorian Bar, *Reading Regulations* (2007) <<http://www.vicbar.com.au/e.3.asp>> at 27 November 2008.
- 29 Once a Reader signs the Bar Roll, he or she must also comply with all mandatory continuing professional development requirements.
- 30 Victorian Bar, above n 24.

31 *Ibid.*

32 The documents which describe the course refer to acquiring 'the basic skills required of a barrister'; See, eg, The Victorian Bar, *Objectives of the Bar Readers' Course 2* <<http://www.vicbar.com.au/documents/ObjectivesoftheReadersCourse.pdf>> at 8 May 2009.

33 'Product Liability Reform' (1992) *Law Institute Journal* 366, 366.

34 The Hon Justice Michael Kirby, 'For Today's Law Students – The Profession You are Entering' (Speech delivered at the Murdoch Student Law Society Annual Address, Perth, 22 October 1997) <http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_murdoch.htm> at 24 April 2009.

35 The Hon Justice Michael Kirby, above n 33.

36 Legal and Equity Division, Department of Justice, above n 10, 84.

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*The old argument that it is not possible to assess levels of advocacy skills no longer holds. The legal profession cannot remain the only profession which does not require its specialists, that is advocates, whether they are barristers or solicitors, to be trained and qualified in advocacy skills.*³⁷

- 7.35 In 2005, the Australian Bar Association created the Advocacy Training Council. One of the functions and responsibilities of the Council is to consult with its constituent bodies with a view to establishing a system for the assessment of advocacy skills.³⁸

Admission to the Bar in other jurisdictions

- 7.36 By way of contrast, we have outlined the path to becoming a barrister in NSW, and in England and Wales.

New South Wales

- 7.37 Lawyers in NSW must complete four stages to practise as barristers at the NSW Bar:

- three exams – each of which requires a result of at least 75% to pass³⁹
- a four week Bar practice course and assessment in a wide range of advocacy tasks (for example, successfully conducting an opening address, examination in chief and cross examination)⁴⁰
- 11 months 'apprenticeship' with one or two tutors
- Additional legal education (over and above the annual CPD required of all practitioners) including further compulsory training in advocacy workshops.⁴¹

Many practitioners re-sit at least one of the exams and the pass rate sits at just under 85% for each exam.⁴²

- 7.38 The President of the Australian Bar Association, Tom Bathurst QC, recently said: 'The NSW Bar Association... has a particularly stringent compulsory training and assessment program for aspiring barristers'.⁴³ He is also reported as saying that the Australian Bar Association is establishing a national standard for advocacy training informed by the approach taken in NSW.⁴⁴

England and Wales

- 7.39 There are three stages to becoming a barrister in England and Wales:⁴⁵

- academic
- vocational
- pupillage.

The academic stage consists of successful completion of an undergraduate law degree.

- 7.40 At the vocational stage, trainees must complete the Bar Vocational Course (BVC).⁴⁶ Students must be admitted to an Inn of Court to be eligible to begin the BVC.⁴⁷ This course, which is full-time for a period of one year, is quite different to the Victorian Bar Readers course. The Bar Vocational Course aims to ensure that 'students intending to become barristers acquire the skills, knowledge of procedure and evidence, attitudes and competence to prepare them... for the more specialised training in the twelve months of pupillage'.⁴⁸

- 7.41 The content of the BVC includes both 'skills' and 'knowledge' based training.

- 7.42 Skills training is given in:⁴⁹

- case work skills
- legal research
- general written skills
- opinion-writing (that is, giving written advice)
- interpersonal skills

- conference skills (interviewing clients)
 - negotiation
 - advocacy (court or tribunal appearances).
- 7.43 'Knowledge' training consists of:⁵⁰
- civil litigation & remedies
 - criminal litigation & sentencing
 - evidence
 - professional ethics
 - two optional subjects, selected from a choice of at least six.
- 7.44 Particular institutions are 'validated' by the Bar Standards Board to teach the BVC. Training across all institutions must meet particular uniform standards set by the Bar Standards Board.
- 7.45 The course must be designed and delivered in a way that will enable it to be recognised, as a minimum, as a postgraduate certificate according to the QAA Framework for Higher Education Qualifications.⁵¹ This means that at least a third of the course must be QAA Level HE4, which is described as masters degree level.⁵²
- 7.46 Course standards set by the Board outline the key assessment and examination requirements:⁵³
- knowledge areas are assessed by way of either a closed book exam, multiple choice test or short answer examination of at least three hours duration held under invigilated conditions
 - Advocacy is assessed by one combined written/oral examination and two oral examinations
 - Opinion writing and drafting is assessed by way of two written examinations
 - Conference skills/negotiation are assessed by two oral examinations.
- 7.47 Students are also required to complete twelve 'qualifying units' at the vocational stage. These are educational and collegiate activities arranged by or on behalf of the Inns. 'Qualifying units', formerly known as 'dining sessions', traditionally focused on dining with senior practitioners and were said to provide networking opportunities and to promote the sharing of best practice. Qualifying units now typically involve speakers and training workshops.⁵⁴
- 7.48 Pupillage is the third and final stage of qualification at the Bar. Pupillage is practical training under the supervision of an experienced barrister and takes one year to complete. The first six months is non-practising in which the pupil 'shadows' their supervisor. In the second half of the year, the pupil undertakes legal work with their supervisor's permission.⁵⁵

- 37 Prof the Hon George Hampel, *Why Should Solicitors Train as Litigators and Advocates?* (2009) Australian Advocacy Institute <<http://www.advocacy.com.au/aaimenu.htm>> at 20 January 2009.
- 38 The Australian Bar Association, *Advocacy Training Council* (2008) <http://www.austbar.asn.au/index.php?option=com_content&task=view&id=43&Itemid=53> at 29 January 2009.
- 39 The three examinations are on 'Ethics for Barristers', 'Aspects of Evidence' and 'Practice and Procedure for Barristers'. See, eg, Kellie Harpley *Rising to the Bar* (2005) *Lawyer's Weekly* <http://www.lawyersweekly.com.au/articles/Rising-to-the-bar_z66433.htm> at 14 January 2008.
- 40 Tom Bathurst, 'Bar Association Improving Training for Barristers' *The Australian* (Sydney) 17 October 2008, 30.
- 41 *Ibid.*
- 42 Kellie Harpley, *Rising to the Bar* (2005) *Lawyer's Weekly* <http://www.lawyersweekly.com.au/articles/Rising-to-the-bar_z66433.htm> at 14 January 2008.
- 43 Bathurst, above n 39.
- 44 *Ibid.* The Australian Bar Association also hopes to establish national advocacy standards and consistent assessment criteria.
- 45 Bar Council, *How to Become a Barrister* (2009) <<http://www.barcouncil.org.uk/trainingandeducation/howtobecomeabarrister/>> at 20 January 2009
- 46 Bar Standards Board, *Vocational Stage* (2009) <<http://www.barstandardsboard.org.uk/Educationandtraining/aboutthebvc/>> at 20 January 2009.
- 47 Bar Standards Board, *Joining an Inn* (2009) <<http://www.barstandardsboard.org.uk/Educationandtraining/aboutthebvc/joininganinn/>> at 24 April 2009.
- 48 Bar Standards Board, above n 45.
- 49 *Ibid.*
- 50 *Ibid.*
- 51 Bar Standards Board, *Bar Vocational Course: Course Specifications Requirements and Guidance* (revised ed, 2008) 6
- 52 *Ibid.*, 6, 45.
- 53 *Ibid.*, 14-18.
- 54 Bar Standards Board, above n 46.
- 55 Bar Standards Board, *Pupillage* (2009) <<http://www.barstandardsboard.org.uk/Educationandtraining/whatispupillage/>> at 21 January 2009.

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CONTINUING PROFESSIONAL DEVELOPMENT FOR VICTORIAN BARRISTERS

- 7.49 Once a barrister or solicitor is admitted to practice in Victoria and obtains a practising certificate, he or she is not required to undergo any further skills training or competency based examinations throughout his or her career.
- 7.50 Barristers and solicitors are required to comply with the continuing professional development (CPD) schemes overseen by the LIV and the Bar. CPD for barristers is regulated and administered by the Bar and is essentially the same as the scheme administered by the LIV. The CPD programs do not involve any formal assessment.⁵⁶
- 7.51 The Bar's CPD scheme requires barristers to earn at least 10 CLE 'points' each year, four of which must be in the areas of ethics and professional responsibility, professional skills, substantive law and practice management/business skills.⁵⁷ The Bar randomly audits CPD activities to ensure that points are correctly calculated and claimed in the declarations made by barristers at the time of renewing their practising certificate.
- 7.52 CPD activity must:⁵⁸
- be of significant intellectual or practical content and must deal primarily with matters related to the practitioner's practice of law
 - be conducted by persons who are qualified by practical or academic experience in the subject covered
 - seek to extend the practitioner's knowledge and skills in areas that are relevant to the practitioner's practice needs.
- 7.53 Barristers can gain CPD points by doing the following:⁵⁹
- attending a seminar, workshop, lecture or conference: 1 CPD point gained per hour
 - instructing or teaching in the Bar Readers' course or another CPD program: 3 points gained per hour
 - membership of a committee/taskforce: 1 CPD point gained every two hours attending a meeting.

EDUCATIONAL REQUIREMENTS FOR THE MEDICAL PROFESSION

- 7.54 The commission has considered the educational requirements for medical practitioners to compare how another profession regulates professional accreditation and continuing professional development.
- 7.55 There are a number of educational and continuing professional development requirements for medical practitioners. These requirements differ depending on whether a medical practitioner wishes to specialise in a particular branch of medicine.
- 7.56 In summary, the training requirements for medical practitioners are:
- a five or six year undergraduate medical degree or a four year postgraduate medical degree
 - a one year supervised hospital internship to obtain general registration with the Medical Board of Victoria
 - a further one or two years pre-vocational hospital training
 - between three and seven further years vocational training and education through a specialist college to obtain a specialisation and fellowship of a specialist college.

MEDICAL DEGREE

- 7.57 All medical practitioners must graduate from a university medical course accredited by the Australian Medical Council (AMC).⁶⁰ These courses are undergraduate degrees of five or six years' duration, or postgraduate degrees of four years.⁶¹

- 7.58 Once a person graduates with an accredited medical degree, they may apply to the Medical Practitioners Board of Victoria (MPBV) for provisional registration to allow them to undertake a hospital internship.⁶² All graduates must complete a year long hospital internship (also known as postgraduate year one or PGY1) to be eligible for what is known as general registration.⁶³

HOSPITAL INTERNSHIP

- 7.59 PGY1 must be completed in a hospital position accredited by the Postgraduate Medical Council of Victoria (PMCV).⁶⁴ PGY1 involves at least 48 weeks of supervised and satisfactory clinical experience in a range of core areas.⁶⁵ It is broadly comparable to the Supervised Work Place Training undertaken by first year law graduates.
- 7.60 In Victoria, the accreditation process administered by the PMCV ensures that the training PGY1 doctors receive is consistent across all hospitals.⁶⁶ The Confederation of Postgraduate Medical Education Councils has developed an Australian Curriculum Framework for Junior Doctors (the 'framework') which outlines the knowledge, skills and behaviours required of PGY1 doctors.⁶⁷
- 7.61 While there is no formal assessment mechanism outlined in the framework, there is an expectation that formal assessment be implemented so that PGY1 doctors have feedback on their progress.⁶⁸
- 7.62 Satisfactory completion of the hospital internship allows a doctor to apply for general registration with the Medical Board of Victoria.⁶⁹ General registration expires annually⁷⁰ and is renewable on application. On application for renewal, the Medical Board of Victoria may require medical practitioners to provide, among other things, information about any continuing professional development undertaken during the previous registration period.⁷¹
- 7.63 Although registered as a medical practitioner, a medical practitioner with general registration is not able to enter private practice under the Medicare system. The *Health Insurance Act 1973* (Cth) provides that to practice medicine under Medicare, medical practitioners must complete a program of vocational medical training and achieve a fellowship of a medical college.⁷²

PRE-VOCATIONAL HOSPITAL TRAINING

- 7.64 After general registration, most medical practitioners spend a further one or two years in the public hospital system gaining more clinical experience.⁷³ These years are referred to as postgraduate years two and three (or PGY2/3). The PMVC sets standards for PGY2/3⁷⁴ which they implement through 'accreditation visits' to hospitals.⁷⁵

56 Legal and Equity Division, Department of Justice, above n 10, 94.

57 *Victorian Bar Continuing Professional Development Rules 2008* (Vic) rr 8 and 9.

58 *Victorian Bar Continuing Professional Development Rules 2008* (Vic) r 3.

59 *Victorian Bar Continuing Professional Development Rules 2008* (Vic) r 3(d).

60 The AMC only approve programs which meet strict accreditation standards. See Australian Medical Council, *Assessing Basic Medical Training* (2008) <<http://www.amc.org.au/index.php/accreditation-aamp-recognition-mainmenu-188/medical-schools-mainmenu-194>> at 19 December 2008. The AMC is an independent, national standards body overseeing the training and accreditation provided by the various State and Territory medical colleges. The AMC ensure that standards of education, training and assessment promote and protect the health of the Australian community.

61 Medical Training Review Panel, Department of Health and Ageing, *Medical Training Review Panel: Eleventh Report* (2008) 2.

62 Medical Practitioners Board of Victoria and the Postgraduate Medical Council of Victoria, *A Guide for Interns in Victoria* (2007) Postgraduate Medical Council of Victoria <www.pmcv.com.au> at 6 January 2009. See also *Health Professions Registration Act 2005* (Vic) s 9.

63 *Health Professions Registration Act 2005* (Vic) s 5.

64 Medical Practitioners Board of Victoria and the Postgraduate Medical Council of Victoria, *A Guide for Interns in Victoria* (2007) Postgraduate Medical Council of Victoria <www.pmcv.com.au> at 6 January 2009.

65 These include at least ten weeks in general medicine, ten weeks in surgery and eight weeks in emergency medicine. See, eg, Medical Practitioners Board of Victoria and the Postgraduate Medical Council of Victoria, above n 63.

66 Michael J R Edmonds and David S Everett, 'Prevocational Medical Education at the Coalface: Report from the 2006 National Junior Medical Officer and Director of Clinical Training/Registrar Forums' (2007) 186 (7 Suppl) *Medical Journal of Australia* S20-S21.

67 Confederation of Postgraduate Medical Education Councils, *Australian Curriculum Framework for Junior Doctors* (2008) <www.curriculum.cpmec.org.au> at 6 January 2008.

68 *Ibid.*

69 *Health Professions Registration Act 2005* (Vic) s 6(1).

70 *Health Professions Registration Act 2005* (Vic) s 17.

71 *Health Professions Registration Act 2005* (Vic) s 18(3).

72 Medical Training Review Panel, Department of Health and Ageing, above n 60, 10.

73 *Ibid.*

74 *Accreditation and Standards: Accreditation Subcommittee* (2003) Postgraduate Medical Council of Victoria <<http://www.pmcv.com.au/accreditation/subcommittee/terms.cfm>> at 24 April 2009.

75 *Accreditation and Standards: Hospital Accreditation Visits* (2003) Postgraduate Medical Council of Victoria <<http://www.pmcv.com.au/accreditation/hospitalvisits/processsummary.cfm>> at 24 April 2009.

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7.65 Some medical practitioners do not complete vocational training after PGY2/3. Instead, medical practitioners who wish to work in non-vocational career roles stay in hospital settings as Career Medical Officers.⁷⁶ A number of Career Medical Officers are still required to undergo additional postgraduate training. For example, medical officers working in an emergency department might be required to complete an Early Management of Severe Trauma qualification.⁷⁷

VOCATIONAL REGISTRAR

7.66 Many medical practitioners who have completed PGY2/3 seek entry into specialist training programs.⁷⁸ To practice in a specialist area, such as psychiatry or surgery, medical practitioners must undergo further training and education conducted by specialist colleges.⁷⁹ A vocational registrar is a registered medical practitioner enrolled in a vocational training programme approved by the relevant specialist college. While each college has its own training program which vary in duration and structure, most specialist training programs take between three and seven years to complete.⁸⁰

7.67 Once medical practitioners finish their training as a vocational registrar and meet the requirements of the relevant specialist college, they are awarded fellowship of the college and are entitled to practice as specialists. Recognised specialists are entitled to an unrestricted Medicare provider number which allows them to practise in their chosen field throughout Australia.⁸¹

EXAMPLES OF VOCATIONAL REGISTRAR TRAINING

7.68 We have considered the training and continuing professional development requirements for three medical specialisations: surgery, obstetrics and gynaecology, and psychiatry.

7.69 To become a specialist in the areas of surgery, obstetrics and gynaecology, or psychiatry, medical practitioners must participate in additional training of no less than five years after completing PGY1.

7.70 Once accepted into a specialist training program, medical practitioners must pass exams which quite a few people fail. Of the 3,648 vocational registrars who sat a college final examination in 2006, only 73.1% passed. Thus, nearly 27% of vocational registrars failed their final exams after a minimum of five years specialist training.⁸²

Surgeons

7.71 The Royal Australasian College of Surgeons (RACS) trains surgeons through their Surgical Education and Training programme (SET).⁸³ Progressing through the SET programme toward Fellowship is a long process. There is a minimum of two to four years of basic training plus additional training for sub-specialties.⁸⁴ For example, fellowship in Cardiothoracic Surgery can take up to six years: two years of in-hospital training (including various clinical competency based assessments, examinations and research requirements) plus four years of clinical placement in Cardiothoracic Surgery.⁸⁵

Obstetricians and Gynaecologists

7.72 The Royal Australian and New Zealand College of Obstetricians and Gynaecologists (RANZCOG) trains and accredits doctors in the specialities of obstetrics and gynaecology after a doctor has completed at least two years of prevocational general hospital training.⁸⁶ Specialist training involves six years of postgraduate hospital-based training and assessment.

7.73 Certification in one of five subspecialty areas⁸⁷ requires a further three years of training.⁸⁸ Therefore, to become a Fellow in a gynaecological or obstetrics sub-speciality, a medical practitioner must complete a total of nine years additional study after graduating with their primary medical degree.

Psychiatrists

- 7.74 The Royal Australian and New Zealand College of Psychiatrists (RANZCP) is responsible for training, examining and awarding specialist qualifications in the field of psychiatry. The College's program for post-graduate training in psychiatry takes a minimum of five years after PGY2, during which doctors work under supervision, participate in rigorous examinations and have competency tests.⁸⁹

Continuing professional development for medical specialists

- 7.75 CPD programs for medical specialists differ depending on the area of speciality.

Surgeons

- 7.76 All surgeons in active practice must participate in a CPD program.⁹⁰ While CPD requirements differ, for example, between clinical consultants and hospital based surgeons, all surgeons are required to accrue at least 210 CPD points in 'maintenance of knowledge and skills' over three years. These points are accrued by attending scientific meetings (1 point per hour) and through other activities such as patient feedback surveys (40 points), peer review (20 points) and educational courses (1 point per hour).⁹¹

Obstetrics and gynaecology

- 7.77 Fellows must obtain 150 CPD points over three years. CPD activities include practice review and clinical risk management (1 point per hour), educator activities (between 1 and 7 points per hour), meeting attendances (1 point per hour) and self-education activities (1 point per hour).⁹²

Psychiatrists

- 7.78 The RANZCP has an expectation that their fellows complete 50 hours of CPD every year.

SPECIALIST ACCREDITATION

- 7.79 In the commission's consultation paper, we asked whether it might be desirable to introduce a specialist accreditation scheme for barristers who appear in criminal trials.⁹³ Such a scheme would allow a barrister to apply for accreditation as a criminal trial specialist after meeting eligibility criteria and successfully completing competency examinations and exercises. Specialist accreditation schemes are a means of raising practice standards.
- 7.80 The practice of law has become increasingly specialised.⁹⁴ Twenty years ago the solicitors' branch of the Victorian legal profession responded to this trend with a scheme for specialist accreditation.⁹⁵ The eligibility and testing criteria for specialist accreditation have been designed to ensure that solicitors meet published competency standards geared to particular areas of law.

76 Medical Training Review Panel, Department of Health and Ageing, above n 60, 25.

77 Ibid 25.

78 Ibid 10.

79 Such as The Australian & New Zealand College of Anaesthetists; The Australasian College for Emergency Medicine; Royal Australasian College of Physicians; The Australasian College of Dermatologists; The Royal Australian College of General Practitioners; The Royal Australian and New Zealand College of Obstetricians and Gynaecologists; The Royal Australian College of Ophthalmologists; The Royal College of Pathologists of Australasia; The Royal Australian and New Zealand College of Psychiatrists; The Royal Australian and New Zealand College of Radiologists; The Royal Australasian College of Surgeons.

80 Medical Training Review Panel, Department of Health and Ageing, above n 60, 10.

81 Ibid.

82 Ibid 77.

83 Royal Australasian College of Surgeons, *Training* (2008) <<http://www.surgeons.org/Content/NavigationMenu/EducationandTraining/Training/default.htm>> at 12 November 2008.

84 Medical Training Review Panel, Department of Health and Ageing, *Medical Training Review Panel: Tenth Report* (2007) 109.

85 Royal Australasian College of Surgeons, *Becoming a Surgeon* <http://www.surgeons.org/AM/Template.cfm?Section=So_you_want_to_be_a_Surgeon_&Template=/CM/HTMLDisplay.cfm&ContentID=21813> at 19 January 2008.

86 Royal Australian and New Zealand College of Obstetricians and Gynaecologists, *The College* (2008) <<http://www.ranzcog.edu.au/>> at 20 November 2008.

87 The five subspecialty areas are Gynaecological Oncology, Maternal Fetal Medicine, Obstetrical and Gynaecological Ultrasound, Reproductive Endocrinology and Infertility and Urogynaecology, see Royal Australian College of Obstetricians and Gynaecologists <<http://www.ranzcog.edu.au/trainees/subspecialty-trainees.shtml>> at 24 April 2009.

88 Royal Australian and New Zealand College of Obstetricians and Gynaecologists, *Training with RANZCOG* (2009) Royal Australian and New Zealand College of Obstetricians and Gynaecologists <<http://www.ranzcog.edu.au/trainees>> at 7 January 2009.

89 Royal Australian and New Zealand College of Psychiatrists, *How Psychiatrists Train* (2008) <<http://www.ranzcp.org/about-us/becoming-a-psychiatrist.html>> at 20 November 2008.

90 Those who do not participate are followed up by the Professional Development and Standards Board of the College. After three warnings, fellows are personally addressed regarding the matter by the College President. For more information, see, eg, The Royal Australasian College of Surgeons, *The Royal Australasian College of Surgeons' Submission to the Australian Medical Council for Accreditation of the College Education and Training and Professional Development Programs 2007* (2007) <http://www.surgeons.org/Content/NavigationMenu/EducationandTraining/Training/2007_12_10_AMCReporttoRACS07.pdf> at 8 May 2009.

91 Royal Australian College of Surgeons, *Continuing Professional Development Program Information Manual* (2006) 4, 23.

92 Royal Australian and New Zealand College of Obstetricians and Gynaecologists, *Activities in the RANZCOG Continuing Professional Development Program* (2008) <<http://www.ranzcog.edu.au/fellows/pdfs/PointsAllocationPage.pdf>> at 24 April 2009.

93 See Victorian Law Reform Commission, *Jury Directions: Consultation Paper* Consultation Paper 6 (2008) [7.77]-[7.79].

94 Legal Practitioners' Liability Committee, 'Resist Work Outside Expertise' (2008) 82 (07) *Law Institute Journal* 86; See, also, Justice Keith Mason, *Specialist Accreditation: Graduation 2005* (2005) Supreme Court of New South Wales <http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_mason081105> at 5 November 2008.

95 Approximately 6% of solicitors are accredited specialists in Victoria (approximately 770 solicitors out of 12,530 practising solicitors); Law Institute of Victoria, *Annual Report 2007-08* (2008) <www.liv.asn.au> at 5 November 2008. See, also, 'Specialist Accreditation Moves National' (2008) 82 (07) *Law Institute Journal* 19, 19.

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7.81 Specialist accreditation has become an important 'selling point' for individual solicitors and law firms. There is a perception that specialists possess superior knowledge and skills in their area of expertise which results in an increased level of service to clients. The former President of the NSW Court of Appeal, Justice Keith Mason, recently stated in an address to accredited specialists: 'Clients want it. Judges need it. Your own capacity to function competently demands it'.⁹⁶

7.82 Similar views are held in other jurisdictions. The American Bar Association has stated:

*Lawyer Specialty Certification benefits lawyers, consumers of legal services and the legal profession. Expanded choices in the area of lawyer specialty certification programs will increase access to legal services by identifying specialized expertise needed by consumers, will improve competence of lawyers by recognizing professional achievement, and will provide lawyers with a credible way of making their expertise known to other lawyers.*⁹⁷

EXAMINATION OF EXISTING SPECIALIST ACCREDITATION SCHEMES

Victoria

7.83 An accredited specialist in Victoria is a solicitor recognised by the LIV as having particular expertise in a specific area of legal practice. The specialist accreditation scheme that was introduced in 1989 was the first of its kind in Australia and is now offered in thirteen areas of law, including criminal law.⁹⁸

7.84 Only practitioners who complete an LIV Accredited Specialisation course of assessment can call themselves an accredited specialist. The LIV states that only the 'best lawyers in their field of expertise' become accredited specialists because of the stringent eligibility and examination requirements.⁹⁹ It appears that approximately 65% of candidates pass the specialist accreditation assessment exercises each year.¹⁰⁰

Eligibility

7.85 Eligibility is the first 'hurdle' for solicitors who wish to become accredited specialists. It guarantees a minimum level of practical experience before a solicitor can apply to become a specialist.¹⁰¹ Practitioners must have practised for five years full time (or equivalent) and had a substantial involvement (at least 25% of their practice) in a specialist area. This experience must have been in the three years prior to applying for specialist accreditation.

7.86 Applicants must provide personal references from other legal professionals. In addition, applicants must not have had any findings of misconduct or unsatisfactory conduct made against them, or have engaged in any conduct which is likely to bring the Scheme into disrepute.

7.87 The cost of accreditation includes a \$1000 application fee, plus an additional annual fee of \$385 to maintain accreditation. These costs are usually met by the individual practitioner, with the exception of VLA lawyers.¹⁰²

7.88 Eligible applicants are informed of the areas in which they will be assessed and of the method and timing of assessment.¹⁰³ They are not, however, provided with any materials, and it is up to the individual applicants to determine what matters, if any, to study.

Assessment

7.89 Candidates must demonstrate a high level of knowledge and have the capacity to apply that knowledge in practice. Applicants must pass a number of assessments including:

- a formal written examination
- simulated interviews
- application tasks (which test the application of skills in a particular area).

7.90 An Advisory Committee comprising senior solicitors, academics and barristers marks these assessments.

Continuing professional development

7.91 Accredited specialists must complete 12 hours of continuing professional development each year to maintain their accreditation, eight of which must in the area of specialisation.¹⁰⁴ Accreditation lasts for a period of three years after which a person must apply to the Specialisation Board for re-accreditation. Re-accreditation is conditional upon a continued minimum 25% involvement in the area of practice and compliance with the continuing professional development requirements.¹⁰⁵

Specialist accreditations schemes in other jurisdictions

United States

7.92 In the United States there are a range of specialist certification programs run by state-sponsored organisations (state supreme courts or state bar associations)¹⁰⁶ as well as national programs sponsored by private legal speciality groups.¹⁰⁷ The American Bar Association (ABA) or the appropriate state regulatory authorities must accredit the national programs established by private legal speciality groups.¹⁰⁸

7.93 While these certification programs arose out of a need for regulation of advertising by lawyers, the ABA has stated that certification is now an accepted measure of professionalism and recognition of commitment to a particular area of practice.¹⁰⁹ Criminal law and criminal trial advocacy is the second most common area for specialist accreditation.¹¹⁰

7.94 As with Australian specialisation, these certification programs are voluntary. The programs certify a specialist as a 'lawyer who devotes a substantial portion of his or her practice to a speciality and has been recognised by a certifying organization as having an enhanced level of experience, skill and expertise in that speciality'.¹¹¹

7.95 Accreditation is typically gained if an applicant:¹¹²

- is admitted to practice and is in good standing in one or more jurisdictions
- can provide evidence of substantial involvement in the area of speciality with at least 25% of practice time devoted to practice areas
- has demonstrated participation in certain activities
- can provide favourable peer references from lawyers and judges
- has passed a written examination in substantive and procedural law and ethics in the speciality area
- can demonstrate a minimum amount of CLE in the speciality area.

96 Justice Keith Mason, *Specialist Accreditation: Graduation 2005* (2005) Supreme Court of New South Wales <http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_mason081105> at 5 November 2008.

97 The ABA Standing Committee on Specialization, *A Concise Guide to Lawyer Speciality Certification* (2008) American Bar Association <<http://www.abanet.org/legalservices/specialization/>> at 7 November 2008.

98 Business law, commercial litigation, commercial tenancy law, environment and planning law, family law, immigration law, tax law, mediation, personal injury law, property law, wills and estates and workplace relations.

99 Law Institute of Victoria, *Accredited Specialists Directory* (2007) <<http://members.liv.asn.au/livweb/Specialists.aspx>> at 24 April 2009.

100 Law Institute Victoria, *Annual Report 2007-08* (2008) <www.liv.asn.au> at 5 November 2008. See, also, 'Young & Expert' (2005) 79 (04) *Law Institute Journal* 24.

101 Andrew Gonczy, et al, 'Performance based assessment and the NSW Law Society Specialist Accreditation Program' (1994) 12 (2) *Journal of Professional Legal Education* 135,137.

102 Consultation 3 (Julie McCormack, Law Institute Victoria).

103 Law Institute of Victoria, *Specialisation Scheme Rules* (2006) 10 <<http://www.cpd.liv.asn.au/pdf/specialists/2008SpecialisationSchemeRules.pdf>> at 24 April 2009.

104 These CPD points also satisfy the general practitioner CPD scheme administered by the LIV. The specialist can use the remaining four CPD points to complete the core CPD areas of ethics, professional skills, substantive law and practice management and business skills.

105 Law Institute of Victoria, *Why Become an Accredited Specialist?* <<http://www.cpd.liv.asn.au/categories.asp?clD=66>> at 24 April 2009.

106 State sponsored certification plans offer certification of specialists directly in various fields of law to lawyers licensed in their state. State sponsored programs exist in Arizona, California, Connecticut, Florida, Idaho, Indiana, Louisiana, Minnesota, New Jersey, New Mexico, North Carolina, Ohio, South Carolina, Tennessee, Texas.

107 These organisations include the American Board of Certification, American Board of Professional Liability Attorneys, National Association of Counsel for Children, National Association of Estate Planners and Councils Estate Law Specialist Board Inc, National Board of Legal Speciality Certification, National College for DUI Defense Inc., National Elder Law Foundation.

108 The ABA Standing Committee on Specialization, *A Concise Guide to Lawyer Speciality Certification* (2008) American Bar Association <<http://www.abanet.org/legalservices/specialization/>> at 7 November 2008.

109 Ibid.

110 Ibid.

111 Ibid.

112 Standing Committee on Specialization, *Your Lawyer and Specialist Certification* (2006) American Bar Association <<http://www.abanet.org/legalservices/specialization/your.html>> at 24 April 2009.

Professional Development and Skills Training

United Kingdom

- 7.96 In the UK, the Solicitors Regulation Authority (SRA) has developed a professional accreditation scheme. Each speciality area has its own eligibility criteria.¹¹³ Like Australia and the United States, membership of the accreditation scheme is voluntary.
- 7.97 The specialisation scheme in the UK is quite popular, with more than 16% (approximately 16,000) of solicitors belonging to an accreditation scheme.¹¹⁴

RELEVANCE OF SPECIALIST ACCREDITATION FOR TRIAL COUNSEL

- 7.98 Given the significance and difficulty of the task of appearing as counsel in a criminal trial and the apparent success of the specialist accreditation scheme for solicitors, the Victorian Bar Council may wish to consider whether there should be a similar scheme for criminal trial counsel. Accreditation in criminal trial advocacy would be an effective way of promoting high standards and of discouraging people from briefing counsel to appear in cases which may be beyond their capabilities. A step of this magnitude would need to be supported, devised and implemented by the leaders of the Bar in order to succeed.

RECOMMENDATION:

45. The Victoria Bar Council should consider whether counsel who appear in criminal trials should be able to seek accreditation to conduct such trials.
- 7.99 While accreditation in legal speciality areas is a recent phenomenon, it seems likely that specialisation is the 'way of the future'.¹¹⁵ Clients are attracted to practitioners who are accredited specialists because it offers some assurance that their legal representative is 'especially competent' in that area of legal practice.¹¹⁶ Maggie Ramsay, executive officer of the NSW specialist accreditation scheme states: 'it is important that the public knows that if they have a particularly complex or unusual problem, they can expect a certain level of expertise from accredited specialists'.¹¹⁷
- 7.100 In Victoria, the division of the legal profession between solicitors and barristers creates a system of 'de facto specialisation' for barristers in court advocacy. It is uncontroversial to suggest that barristers are regarded by the profession and public alike first, as specialists in advocacy, and secondly, often as specialists in particular areas of law, such as criminal law.¹¹⁸ In fact, the Bar states that it has continued to grow as an institution in response to the growing demand for *specialist*, independent and professional advice.¹¹⁹
- 7.101 Unlike the specialisation schemes existing for solicitors, barristers are not currently required to meet practice eligibility criteria or pass accreditation examinations in order to represent themselves to the public as specialists in criminal law or any other branch of legal practice.¹²⁰ Specialist accreditation for barristers is a way of increasing practitioner competence in a particularly difficult area of legal practice.¹²¹
- 7.102 The training needs of barristers are receiving attention from commentators:
- There is growing awareness among barristers around the common law world that having a law degree and a wig and gown is not all you need to practise as a barrister. Bar associations have an obligation to ensure that professional standards are upheld.*¹²²
- 7.103 The Victorian Bar Council has experience in providing training and accreditation. It ran a successful scheme for accreditation of barristers as advanced mediators from 2006–2008, prior to the establishment of a national scheme.¹²³ The Bar's mediation accreditation scheme was introduced to ensure that barristers specialising in mediation had appropriate levels of skill and experience.¹²⁴
- 7.104 To become accredited advanced mediators barristers had to demonstrate relevant recent experience in mediation as well as evidence of continuing legal education in the preceding two years. The Bar represented their accredited mediators as practitioners who had undergone special training to receive their accreditation and advertised the fact that only barristers with the requisite skills and experience were selected to apply for the scheme.¹²⁵

- 7.105 While the content of any specialist scheme is a matter for the Victorian Bar Council, such a scheme should be rigorous. All barristers should be eligible to enrol regardless of years spent at the Bar. It is difficult to identify reasons why a specialist accreditation scheme for barristers should require a set number of years of practice or percentage of practice experience in criminal law as currently operates in the solicitors' scheme. Proven expertise demonstrated by passing an assessable skills training course may be the best measure of quality. Any new scheme should not require all barristers currently undertaking criminal trial work to become accredited specialists. A voluntary specialist accreditation scheme could be introduced as it has been for Victorian solicitors.

RECOMMENDATION:

46. The Victorian Bar Council should consider establishing an assessable skills training course for barristers who wish to obtain specialist accreditation to conduct criminal trials.

- 7.106 It is strongly arguable that barristers who obtain specialist accreditation in criminal trial advocacy should be entitled to receive additional fees when undertaking publicly funded trial work, just as medical specialists receive higher Medicare fees than other medical practitioners.

- 7.107 In late 2008, the Victorian Bar released a report it had commissioned by PriceWaterhouseCoopers, called Review of Fees Paid by Victoria Legal Aid to Barristers in Criminal Cases. The Report argued that the fees paid by Victoria Legal Aid (VLA) to barristers were far below the market value of the work they were providing. It was suggested that VLA fees placed barristers under time and income pressure which was ultimately detrimental to the quality of representation:

If this situation continues there is a potential increase in the incentive for barristers to take on multiple briefs in a day or to have insufficient time to prepare for cases. As a result the quality of the representation they provide will ultimately suffer. The impact of overstretched, inexperienced or under prepared barristers inflicts a significant social cost by decreasing the efficiency and effectiveness of the court system. Many criminal cases require a high level of specialisation, experience and commitment and thus a public defence system needs to be able to attract and retain the appropriately skilled barristers to perform this work. Without this the result is an inefficient allocation of resources and sub-optimal justice outcomes that do not align with the principles of a fair and high quality justice system.¹²⁶

- 7.108 If the Bar introduces specialist accreditation for criminal trial barristers, those barristers who are able to demonstrate their skills and ability in criminal trial advocacy will have their skills formally recognised. The commission believes that both the Office of Public Prosecutions and Victoria Legal Aid should consider whether counsel who have achieved specialist accreditation should receive a fee loading in recognition of their proven expertise.

RECOMMENDATION:

47. The OPP and VLA should consider whether barristers who are accredited as specialists in criminal trials should receive a fee loading.

PUBLIC DEFENDERS

- 7.109 As part of its consideration of skills training and professional development for criminal trial counsel, the commission has considered the public defender schemes which operate in other parts of Australia.
- 7.110 Public Defenders are barristers employed by the state to provide legal services to people charged with serious criminal offences who have been granted legal aid. They are the defence equivalent of Crown Prosecutors who are barristers employed by the state to act for the prosecution in criminal cases. Public Defender schemes have been operating successfully in New South Wales since 1941 and in Queensland since 1916.

113 See, Solicitors Regulation Authority, *Accreditation Schemes* (2008) Solicitors Regulation Authority <<http://www.sra.org.uk/solicitors/accreditation.page> at 19 November 2008> at 11 November 2008.

114 Solicitors Regulation Authority *Accreditation Schemes* (2009) <www.sra.org.uk/solicitors/accreditation.page> at 21 January 2009.

115 Joe Pinder, 'Specialist Accreditation—The Competitive and Professional Edge' (2005) *Proctor* 30.

116 Ibid.

117 Kellie Harpley, 'The Making of a Specialist' (2005) *Lawyers Weekly* <www.lawyersweekly.com.au/articles/The-making-of-a-specialist_z66928.htm> at 28 January 2009.

118 Inge Lauw, 'Specialisation, Accreditation and the Legal Profession in Australia and Canada' (1994) 1(2) *Murdoch University Electronic Journal of Law* <<http://www.murdoch.edu.au/elaw/issues/v1n2/lauw12.html>> at 24 April 2009.

119 Garrie Moloney (ed) *One Profession, Two Branches* (2001) The Victorian Bar <http://www.vicbar.com.au/pdf/oneprof_twobranches.pdf> at 20 November 2008.

120 Barristers can list their areas of practice on the VicBar website – these blurbs are written by the barrister themselves. Without a specialist accreditation scheme, there is no way of ascertaining minimum competency standards.

121 Inge Lauw, 'Specialisation, Accreditation and the Legal Profession in Australia and Canada' (1994) 1(2) *Murdoch University Electronic Journal of Law* <<http://www.murdoch.edu.au/elaw/issues/v1n2/lauw12.html>> at 24 April 2009.

122 Marcus Priest, 'Raising the Bar' (January 2008) *AFR Magazine* 58, 60 <http://www.austbar.asn.au/images/stories/PDFs/raising_bar.pdf> at 24 April 2009.

123 National Mediator Accreditation System. For more information, see National Alternative Dispute Resolution Advisory Council, *National Mediator Accreditation System* (2007) <http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/WhatIsADR_NationalMediatorAccreditationSystem_NationalMediatorAccreditationSystem> at 24 April 2009.

124 Elizabeth Brophy, *Victorian Bar Takes the Lead in Accreditation of Mediators* (2009) The Victorian Bar <<http://www.vicbar.com.au/webdata/VicBarNewsFiles/Bar%20Takes%20the%20Lead%20in%20Accreditation%20of%20Mediators.pdf>> at 19 January 2009.

125 The Victorian Bar, *About the Bar – Mediation* (2008) <<http://www.vicbar.com.au/b.8.1.asp> at 19 November 2008> at 11 November 2009.

126 PricewaterhouseCoopers, *Review of Fees Paid by Victoria Legal Aid to Barristers in Criminal Cases* (2008) The Victorian Bar <<http://www.vicbar.com.au/webdata/generalfiles/PriceWaterhouseCoopers.pdf>> at 7 May 2009.

Professional Development and Skills Training



NEW SOUTH WALES

- 7.111 In NSW, Public Defenders are appointed under the *Public Defenders Act 1995* (NSW). They are barristers and members of the New South Wales Bar Association. They all practice out of the same chambers. The head of their chambers is the Senior Public Defender, currently Mark Ierace SC. There are 25 Public Defenders in NSW at present.
- 7.112 NSW Public Defenders represent people charged with serious criminal offences who have been granted legal aid.¹²⁷ Once a person has been granted legal aid, a Public Defender can be briefed to advise or appear in a matter through the Legal Aid Commission, the Aboriginal Legal Services, a private solicitor or a community legal group.¹²⁸ Public Defenders principally appear and advise in serious criminal matters at the trial and appellate level, but can also appear and advise in relation to prerogative writ work in the Supreme Court, bail applications and quasi-criminal procedures such as parole hearings and hearings before the Mental Health Review Tribunal.¹²⁹
- 7.113 The Senior Public Defender is accountable to the Attorney General through the provision of quarterly reports.¹³⁰ Public Defenders are accountable to the Senior Public Defender.¹³¹ As barristers, Public Defenders are bound by the Bar Rules and are subject to the same professional regulation as other barristers.¹³²

QUEENSLAND

- 7.114 The Legal Aid Commission of Queensland employs criminal barristers on a full-time basis who represent people charged with criminal offences in all jurisdictions in Queensland. They currently employ 15 criminal barristers.

VICTORIA

- 7.115 Victoria Legal Aid currently employs legal practitioners who appear as advocates in criminal proceedings. These advocates are in-house counsel who may not necessarily be barristers.

THE ROLE OF PUBLIC DEFENDERS

- 7.116 Public Defenders are seen as an integral part of the criminal justice systems in NSW and Queensland. There is a widely held view that they enhance the criminal justice system by providing highly competent and experienced criminal counsel to people granted legal aid.¹³³
- 7.117 The Public Defenders in NSW comprise one of the leading chambers of criminal defence barristers in Sydney.¹³⁴ Many Public Defenders have become judges. Current judges who were Public Defenders include Justice Virginia Bell of the High Court of Australia, four justices of the Supreme Court of NSW, one justice of the Supreme Court of the ACT and eleven NSW District Court judges. Many past judges in NSW were also Public Defenders.
- 7.118 In NSW, Public Defenders are heavily involved in continuing professional development for criminal lawyers. They host an annual criminal law conference for criminal law practitioners and are highly sought after to speak at seminars and conferences run by the Legal Aid Commission, Aboriginal Legal Service, Young Lawyers, the NSW Bar Association, College of Law and other tertiary institutions. They provide tutors for readers at the NSW Bar, instructors for the Bar Association Readers course and tutors for the Australian Advocacy Institute. In the financial year 2007 to 2008, the NSW Public Defenders spoke at 40 conferences, talks, seminars and similar events.¹³⁵
- 7.119 The NSW Public Defenders make a significant contribution to the law and to the legal profession in NSW. Public Defenders are members of numerous committees which aim to improve the administration of the criminal justice system in NSW.¹³⁶ They provide advice to the Attorney General and others on law reform.¹³⁷ They also provide telephone and brief written advice to any solicitor or member of the bar about the practice of criminal law.¹³⁸

BENEFITS OF PUBLIC DEFENDER SCHEMES

- 7.120 The long-term quality of the criminal justice system may be enhanced by the introduction of a Public Defender scheme. The existing Public Defender schemes in NSW and Queensland encourage the development of high-level skills among a select group of criminal defence barristers and provide a resource for educating later generations of criminal trial lawyers.
- 7.121 The commission has not sought to assess the costs of a Public Defender scheme and to calculate whether Public Defenders are a more efficient means of providing legal aid services to people charged with serious criminal offences than the current practice of briefing members of the private Bar. These are assessments best made by VLA and the Attorney-General.
- 7.122 Public Defenders have an incentive to resolve or streamline cases so that their resources are used efficiently, and they can vigorously defend accused persons when required by the interests of justice. The NSW Public Defenders observe that anecdotal evidence suggests that the involvement of Public Defenders in lengthy and complex trials saves the State of NSW considerable expenditure.¹³⁹
- 7.123 The commission believes that the Attorney-General should consider whether Victoria may benefit from the introduction of a Public Defender scheme.

RECOMMENDATION:

48. The Attorney-General should consider whether a Public Defender scheme should be established.

PAYMENT OF COUNSEL

- 7.124 During consultations, the commission was informed that some barristers were reluctant to accept briefs from the OPP and VLA in sexual offence trials. It was suggested that this was due, in part, to the fees paid in these cases which were said to be too low, bearing in mind the complexity of the law and the forensic difficulties which often arise. It is important that high quality, experienced barristers appear in these cases. The commission recommends that the appropriate agencies review their brief fees in sexual offences trials and consider whether they should be increased.

RECOMMENDATION:

49. Because of the complexity of sexual offence trials, the OPP and VLA should consider increasing the fees paid to counsel in these trials in order to ensure that suitable counsel are engaged.

JUDICIAL EDUCATION

RECOGNITION OF THE NEED FOR ONGOING EDUCATION AND PROFESSIONAL DEVELOPMENT

- 7.125 Judges have complex and challenging jobs which are becoming increasingly more difficult. The current challenges include:¹⁴⁰
- rapid changes and increased complexity in the law¹⁴¹
 - increasingly heavy workloads¹⁴²
 - changing expectations of the judiciary¹⁴³
 - rapidly changing society and technology.¹⁴⁴
- 7.126 The Judicial College of Victoria, the primary body responsible for assisting judges with their professional development, states:¹⁴⁵

The judicial role is inherently complex requiring the application of often esoteric technical concepts, sophisticated bench skills and an appreciation of the surrounding context in delivering justice.

- 127 *Public Defenders Act 1995* (NSW) s 10.
- 128 Public Defenders Office New South Wales, *About Us: The Role of Public Defenders* (2009) <http://www.lawlink.nsw.gov.au/lawlink/pdo/ll_pdo.nsf/pages/PDO_aboutus> at 24 April 2009.
- 129 *Public Defenders Act 1995* (NSW) s 10.
- 130 Public Defenders Office New South Wales, *Annual Review 2006-2007* (2007) 7.
- 131 *Public Defenders Act 1995* (NSW) s 6.
- 132 Public Defenders Office New South Wales, *Annual Review 2007-2008* (2008) 4.
- 133 See, eg, Public Defenders Office New South Wales, *Annual Review 2006-2007* (2006) 4. (2007) 5; Mary Rose Liverani, 'Public Defenders: Keeping the Law in Order' (1996) *Law Society Journal* 33.
- 134 Public Defenders Office New South Wales, above n 131, 9.
- 135 *Ibid*, 12.
- 136 *Ibid*, 6.
- 137 *Ibid*, 10.
- 138 *Ibid*.
- 139 Public Defenders Office New South Wales, *Public Defenders Business Plan* (2007) <www.agd.nsw.gov.au/lawlink/pdo/ll_pdo.nsf/wwPrint1/PDO_businessplan0708> at 30 January 2009.
- 140 Christopher Roper, *A National Standard for Professional Development for Australian Judicial Officers* (2006) 4.
- 141 These rapid changes include significant changes to substantive law. For example, the JCV will be giving a workshop in 2009 on the new Criminal Procedure Act.
- 142 The JCV acknowledges that criminal trials are becoming more complex and lengthy. They provide a workshop: 'The Judge's Role in Managing a Criminal Trial'.
- 143 Judges now need to 'manage' their judicial practice and manage a variety of relationships, juggle competing priorities and organise effectively, engage and motivate both judicial and non-judicial staff, deal with change and maintain personal well-being.
- 144 For instance, the Judicial College of Victoria now gives courses on Cyber Space and Cyber Crime: Managing cases where Facebook and MySpace arise.
- 145 Judicial College of Victoria, *Judicial Education Policy: Integrating Three Dimensions* <[http://www.judicialcollege.vic.edu.au/CA256902000FE154/Lookup/JCV_PDFs/\\$file/ApprovedIntegratedEducationPolicy.pdf](http://www.judicialcollege.vic.edu.au/CA256902000FE154/Lookup/JCV_PDFs/$file/ApprovedIntegratedEducationPolicy.pdf)> at 24 April 2009.

Professional Development and Skills Training



7.127 It takes time to develop and maintain the knowledge and skills required of a judge.¹⁴⁶ Because of rapid developments in the law and changes to the entire community, even the most competent judges need access to educational resources. It is no longer controversial to suggest that judges require ongoing education and professional development.¹⁴⁷ Early resistance to judicial education appears to have disappeared¹⁴⁸ and professional development programs are now accepted and valued by judicial officers.¹⁴⁹

7.128 Former High Court Chief Justice Murray Gleeson has said:

*Judicial education is no longer seen as requiring justification. We are past the stage of arguing about whether there should be formal arrangements for orientation and instruction of newly-appointed judges and magistrates, and for their continuing education. Of course there should.*¹⁵⁰

7.129 All judges are likely to be assisted by training that deals with the application of new laws. While most members of the judiciary are appointed from the practising profession, the increasing specialisation of legal practice means that the breadth of experience of trial level judges may be more limited than it has been in the past:

How many modern barristers, before being appointed to a trial court of general jurisdiction...will have appeared in anything like the full range of matters that come before the court? Many barristers find, upon judicial appointment, that much of the work they are required to do is outside their range of experience...

*A specialist in personal injury cases at the bar...will be listed routinely to sit on major criminal trials, perhaps without recent criminal trial experience.*¹⁵¹

Judicial education legislation

7.130 Judicial education has become a priority in the past decade. The Judicial College of Victoria (JCV) was established in 2001. In 2007, judicial education was given further emphasis by the *Courts Legislation Amendment (Judicial Education and Other Matters) Act 2007* (Vic) which makes the head of each jurisdiction responsible for directing professional development within their court.¹⁵²

7.131 The Act provides for the professional development, training and continuing education needs of all judicial officers by vesting responsibility for continuing education and training in the Chief Justice (Supreme Court), Chief Judge (County Court) and Chief Magistrate (Magistrates' Court).¹⁵³ The jurisdictional head can direct a judicial officer to participate in any specified professional development, training or continuing education activity they deem necessary.¹⁵⁴ It was clearly intended that the Judicial College of Victoria (JCV) would continue to be the primary provider of professional development, education and training activities to the judiciary.¹⁵⁵

Judicial College Victoria

7.132 The Judicial College of Victoria was established by the *Judicial College of Victoria Act 2001* (Vic).¹⁵⁶ Its major function is to assist with the professional development of judicial officers.¹⁵⁷ The JCV aims to keep judicial officers in touch with the community, aware of social issues, in tune with new technology and up-to-date with the latest developments in law.¹⁵⁸

7.133 The key functions of the JCV include:¹⁵⁹

- assisting with the professional development of judicial officers
- providing continuing education and training to judicial officers
- producing relevant publications
- providing professional development services, continuing judicial education and training services.

National Standard for Professional Development for Judicial Officers and Curriculum for Australian Judicial Officers

7.134 There have also been national developments concerning professional development for judges. The National Judicial College of Australia (NJCA) has developed a National Standard for Professional Development for Judicial Officers which sets a benchmark for judicial education across Australia.¹⁶⁰ The Standard has been endorsed by the Council of Chief Justices of

Australia, Chief Judges, Chief Magistrates, the Judicial Conference of Australia, the Association of Australian Magistrates, the Australian Institute of Judicial Administration and the various state judicial education bodies.¹⁶¹ In addition, the NJCA has developed a national curriculum complementary to the Standard.¹⁶²

- 7.135 The national Standard aims to improve awareness of the need for professional development for judicial officers. The Standard provides a benchmark against which current professional development schemes can be measured in order to analyse their adequacy and effectiveness. The Standard provides guidance for both Heads of Jurisdictions and the government when developing judicial education programmes and allocating funding.

THE JCV CONTINUING PROFESSIONAL DEVELOPMENT SCHEME

- 7.136 The JCV's Continuing Professional Development (CPD) Scheme provides judicial officers with the opportunity to participate in 10 hours of CPD each year.¹⁶³ The CPD scheme imposes a set of mutual obligations on the government to provide sufficient resources to enable judicial officers to take advantage of the scheme, and on judicial officers to participate in professional development activities.¹⁶⁴ Participation in the scheme is 'both an entitlement and an expectation' for judicial officers.¹⁶⁵

- 7.137 Judicial officers are expected to participate in 10 hours of CPD each year which must:¹⁶⁶

- have significant intellectual or practical content that supports judicial practice
- be conducted by suitably qualified persons in the areas relevant to judicial practice
- extend the judicial officer's knowledge and skills in areas relevant to judicial practice.

- 7.138 The JCV has identified five curriculum categories as core areas for judicial education and professional development. They are: induction and orientation, social context, skills development, substantive law and practice, management and leadership.¹⁶⁷

THE JCV INDUCTION FRAMEWORK FOR NEWLY APPOINTED JUDGES

- 7.139 The JCV is obliged to give 'specific attention to the training of newly appointed judicial officers'.¹⁶⁸ It has established a two-year induction framework for newly appointed judicial officers, designed to 'ease the transition' to the Bench, which has three components:

- internal induction processes (immediate upon appointment). This is induction conducted by each jurisdiction. It also includes online legal research training
- orientation programs (within six to twelve months of appointment)

146 National Judicial College of Australia, *Judicial Education in Australia* (2007) <<http://njca.anu.edu.au/Publications/Documents/Judicial%20Education%20in%20Australia%202007.pdf>> at 7 May 2009.

147 See, eg Roper, above n 139.

148 Murray Gleeson, 'Judicial Selection and Training: Two Sides of the One Coin' (2003) 77 *Australian Law Journal* 591, 596.

149 Roper, above n 139, 20.

150 Murray Gleeson, 'The Future of Judicial Education' (1999) 11(1) *Judicial Officers' Bulletin* 1.

151 Gleeson, above n 147, 594.

152 Victoria, *Parliamentary Debates*, Legislative Assembly, 23 May 2007, 1598 (Rob Hulls, Attorney-General). The scheme also applies to judicial officers of the Victorian Civil and Administrative Tribunal.

153 *Courts Legislation Amendment (Judicial Education and Other Matters) Act 2007* (Vic) s 1(a). The Attorney-General Rob Hulls stated in the second reading speech that the Bill gave effect to the 2006 election policy commitment, contained in Access to Justice, of introducing ongoing education for the judiciary. See Victoria, *Parliamentary Debates*, Legislative Assembly, 23 May 2007, 1598 (Rob Hulls, Attorney-General). These powers have been replicated in the relevant Court Rules: *Supreme Court Act 1986* (Vic) s 28A, *County Court Act 1958* (Vic) s 17AAA, *Magistrates' Court Act 1989* (Vic) s 13B.

154 *Courts Legislation Amendment (Judicial Education and Other Matters) Act 2007* (Vic) s 3(3).

155 Victoria, *Parliamentary Debates*, Legislative Assembly, 23 May 2007, 1598 (Rob Hulls, Attorney-General).

156 The JCV has been operating since only 2003.

157 *Judicial College of Victoria Act 2001* (Vic) s 1.

158 Department of Justice, *Judicial Education* <<http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/Courts/The+Court+System/Judicial+Education/>> at 5 December 2008.

Judicial College of Victoria Act 2001 (Vic) s 5(b).

159 *Judicial College of Victoria Act 2001* (Vic) s 5.

160 See Roper, above n 139.

161 Ibid.

162 Christopher Roper, *A Curriculum for Professional Development for Judicial Officers* (2007) National Judicial College of Australia 61 <<http://njca.anu.edu.au/Projects/Curriculum/National%20Curriculum%20final.doc>> at 7 May 2009.

163 That is the government have provided them with enough funding to cover 10 hours per judge per year. See fact sheet from JCV website 'Building on the College's successes to date, the government has provided the College with funding to develop and deliver a continuing professional development scheme that will provide each Victorian judicial officer with the opportunity to participate in at least ten hours of professional development each year'.

164 Judicial College of Victoria, *Continuing Professional Development (CPD) Scheme Protocols* (2008) <[http://www.judicialcollege.vic.edu.au/CA256902000FE154/Lookup/JCV_PDFs/\\$file/LtrAllJOs_CPDProt_JudEdAct2007_2ndSpeechExt.pdf](http://www.judicialcollege.vic.edu.au/CA256902000FE154/Lookup/JCV_PDFs/$file/LtrAllJOs_CPDProt_JudEdAct2007_2ndSpeechExt.pdf)> at 7 May 2009.

165 Ibid.

166 It appears that the JCV keeps records relating to CPD participation and a confidential report is provided to each Head of Jurisdiction detailing CPD participation by the judicial officers in that jurisdiction; Judicial College of Victoria, above n 163.

167 Judicial College of Victoria, above n 163.

Professional Development and Skills Training

- College cross-jurisdiction activities (within two years of appointment). This covers core judicial skills and knowledge (skills development, social context, substantive law and practice).¹⁶⁹

ADDITIONAL INDUCTION AND TRAINING FOR NEW JUDGES

- 7.140 While acknowledging the benefits of the existing induction framework for new judicial officers, the commission believes there should be a skills training program for newly appointed judges who will preside in criminal trials.
- 7.141 In the United Kingdom, newly appointed judges cannot sit in certain jurisdictions unless they have completed a 'gatekeeper' course, for example, in serious sex offences.¹⁷⁰ The commission considers it desirable that a similar scheme be introduced in Victoria. Newly appointed judges should not be required to sit in criminal trials until they have satisfactorily completed an appropriate JCV training course in criminal law, unless the head of jurisdiction is satisfied that completion of the course is unnecessary because of prior experience.

RECOMMENDATION:

50. Subject to the discretion of the head of jurisdiction, all newly appointed judges who will conduct criminal trials should be required to complete a skills training program concerning the law and practice of criminal trials.

ONGOING TRAINING IN CRIMINAL LAW

- 7.142 Former Chief Justice of Australia Murray Gleeson has suggested that 'the context in which judges operate is changing in ways that call for an educational response'.¹⁷¹ One response to the complexity of the body of law considered in this report is judicial education. There is, however, no JCV training program concerning the preparation of jury directions in criminal trials.
- 7.143 The commission believes that the JCV should devise a jury directions training program. The Jury Guide, which is discussed at length in Chapter 6, involves a significant change to the way in which judge's have traditionally summed up a case to the jury. Judges who wish to use a Jury Guide should receive appropriate training.

RECOMMENDATION:

51. The Judicial College of Victoria should provide judges with skills training courses designed to assist them to conduct criminal trials and, in particular, to formulate jury directions and warnings.

- 7.144 The National Judicial College of Australia has acknowledged the importance of continuing education for judges, even those who have significant trial experience.¹⁷²

Judicial officers tend to occupy judicial office for fairly lengthy periods. The fact that judicial officers hold office for substantial periods of time means that they are likely to benefit from programs of ongoing professional development. In addition it takes time to develop fully the skills required of a judicial officer, and it is in the public interest that those who have fully developed those skills put them to the public benefit for as long as possible. Thus, members of the Australian judiciary can benefit from programs of professional development that focus on their legal skills, their practical judicial skills, and their approach to their work and which help them to maintain fitness and enthusiasm for the work

- 7.145 The commission recommends that ongoing training in criminal law and the conduct of criminal jury trials be provided to all judges who conduct criminal trials.

RECOMMENDATION:

52. Ongoing refresher courses concerning the law and practice of criminal trials should be provided to judges who conduct criminal jury trials

165 Ibid.

166 It appears that the JCV keep records relating to CPD participation and a confidential report is provided to each Head of Jurisdiction detailing CPD participation by the judicial officers in that jurisdiction; Judicial College of Victoria, above n 163.

167 Judicial College of Victoria, above n 163.

168 *Judicial College of Victoria Act 2001* (Vic) s 5(b).

169 Judicial College of Victoria, *Two Year Induction Framework for New Appointees* <[170 Judicial Studies Board, *Annual Report 2007-2008* \(2008\) 15 <\[http://www.jsboard.co.uk/downloads/annual_report_2008_web.pdf\]\(http://www.jsboard.co.uk/downloads/annual_report_2008_web.pdf\)> at 7 May 2009.](http://www.judicialcollege.vic.edu.au/CA256DC1001D124B/page/Education-Two+year+induction+framework?OpenDocument&1=35-Education~&2=40-Two+year+induction+framework~&3=> at 8 May 2009.</p>
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171 Gleeson, above n 147, 594.

172 National Judicial College of Australia, *Judicial Education in Australia* (2007) 2.

Appendices

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- Appendix A: Consultative Committee, Submissions, Symposium Attendees
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- Appendix F: *R v Clayton, Hartwick and Hartwick* - Extract from original trial directions and jury aide documents of J Smith and example jury guide

Appendix A CONSULTATIVE COMMITTEE, SUBMISSIONS, SYMPOSIUM ATTENDEES

CONSULTATIVE COMMITTEE

Gavin Silbert SC, Senior Crown Prosecutor, Office of Public Prosecutions
 Her Honour Judge Sexton, Judge, County Court
 His Honour Judge Hicks, Judge, County Court
 His Honour Judge Punshon, Judge, County Court
 His Honour Judge Taft, Judge, County Court
 Michael Croucher, Barrister, Crockett Chambers
 Michael O'Connell, Barrister, Crockett Chambers
 Peter Morrissey, Barrister, Joan Rosanove Chambers
 Professor James Ogloff, Professor of Clinical Forensic Psychology, Monash University
 The Honourable Justice Coghlan Trial Judge, Supreme Court
 The Honourable Justice Redlich, Supreme Court, Court of Appeal Judge

SUBMISSIONS

NO	SUBMITTER / ORGANISATION	DATE RECEIVED
1	Dr Val Clarke	28 March 2008
2	Ms Sandra Burke	28 March 2008
3	Mr Stephen J. Odgers SC	18 November 2008
4	Mr Patrick Tehan QC	26 November 2008
5	Mr Benjamin Lindner	30 November 2008
6	Ms Maria Abertos	30 November 2008
7	Victoria Legal Aid	10 December 2008
8	Criminal Bar Association of Victoria	16 December 2008
9	Associate Professor John Willis	16 December 2008
10	Judicial College of Victoria	16 December 2008
11	Mark Pedley and Daniel Gurvich	23 December 2008
12	Ms Sandra Burke	30 January 2009
13	Mr Marcus Taylor	30 January 2009
14	Law Council of Australia	30 January 2009
15	Queensland Law Society	02 February 2009
16	Judge M.D Murphy	06 February 2009
17	Office of Public Prosecutions	13 February 2009
18	County Court Law Reform Committee	13 March 2009

SYMPOSIUM ATTENDEES

ATTENDEE	ORGANISATION
The Hon James Wood QC	Chairperson, New South Wales Law Reform Commission
Joseph Waugh	Legal Officer, New South Wales Law Reform Commission
Professor Jill Hunter	Faculty of Law, University of New South Wales; Consultant, New South Wales Law Reform Commission
The Hon Justice Roslyn Atkinson	Chairperson, Queensland Law Reform Commission
John Bond SC	Part time member, Queensland Law Reform Commission
Rebecca Treston	Part time member, Queensland Law Reform Commission
Ian Davis	Full time member, Queensland Law Reform Commission
Dr Warren Young	Deputy President, New Zealand Law Commission
Dr Blake McKimie	School of Psychology, University of Queensland
Professor James Ogloff	Professor of Clinical Forensic Psychology and Director of the Centre for Forensic Behavioural Science, Monash University; Director of Psychological Services, Victorian Institute of Forensic Mental Health
Dr Jonathan Clough	Associate Professor Faculty of Law, Monash University
Justice Robert Chambers	New Zealand Court of Appeal
Justice Simon France	New Zealand High Court
Dr Rebecca Bradfield	Senior Researcher, Tasmania Law Reform Institute
Prof Neil Rees	Chairperson, Victorian Law Reform Commission
Geoff Eames QC	Consultant, Victorian Law Reform Commission
Padma Raman	CEO, Victorian Law Reform Commission
Rupert Watters	Research & Policy Officer, Victorian Law Reform Commission
Tanaya Roy	Research & Policy Officer, Victorian Law Reform Commission
Jennifer Powell	Research & Policy Officer, Victorian Law Reform Commission
Matthew Andison	Research & Policy Officer, Victorian Law Reform Commission
Judge Felicity Hampel	Commissioner, Victorian Law Reform Commission
Hugh de Kretser	Commissioner, Victorian Law Reform Commission
Magistrate Mandy Chambers	Commissioner, Victorian Law Reform Commission

Appendix B STATISTICS

This appendix contains data collected by the commission concerning appeals against conviction at trial in Victoria since 2000.

As there is no comparable data from other Australian jurisdictions, the commission has been unable to contrast the outcome of cases in Victorian courts with the outcomes in other states and territories.

SOURCES

In preparing this information, the commission drew upon a number of sources. The data covers the periods FY 2000/2001 to 2006/2007.¹

Data about the number of criminal trials conducted in the County and Supreme Courts each financial year was obtained from those courts, as was data about the number of convictions at trial.

Data about the number of appeals heard by the Court of Appeal was derived from Supreme Court Annual Reports,² internal Court of Appeal listings³ and published judgments on the Australian Legal Information Institute (AustLII) website.⁴

Data about the outcomes of retrials was obtained from the Office of Public Prosecutions, the Commonwealth Director of Public Prosecutions and from judges and practitioners involved in particular cases when this step was necessary to clarify the outcome.

METHODOLOGY

During the period under examination, we considered only appeals against conviction,⁵ as appeals against sentence alone do not raise any issues about jury directions.

The appeals in question were reviewed to identify the year in which the accused was originally sentenced,⁶ the issues raised on appeal and the outcome of the appeal. When the Court of Appeal ordered a retrial, the results of that retrial were obtained from the relevant sources.

Dr. Stuart Ross, Senior Researcher & Director, Melbourne Centre for Criminological Research and Evaluation at the University of Melbourne reviewed the material in this appendix for methodological validity.

ISSUES AND LIMITATIONS

The time taken for a case to make its way through the criminal justice system raises two related issues concerning the presentation of data. First, appeals against conviction at trial are invariably heard and determined by the Court of Appeal some considerable time after the conviction at trial. In many instances, the appeal will not be heard and determined in the same year as the one in which the conviction was recorded. In order to deal with this issue we have presented the data concerning appeals and their outcome based upon the year in which a person was originally sentenced following conviction at trial.

Secondly, the time taken for cases to make their way through the system means that the data for the final year surveyed, 2006/2007, is not complete as there are appeals pending for people who were convicted at trial during this year.

Due to time and resource constraints, we have been unable to identify the precise reasons why appeals against conviction succeeded.⁷ We have identified grounds argued in appeals and the outcome of those appeals. The fact that an issue was raised in a successful appeal does not necessarily mean that the appeal succeeded on that ground.

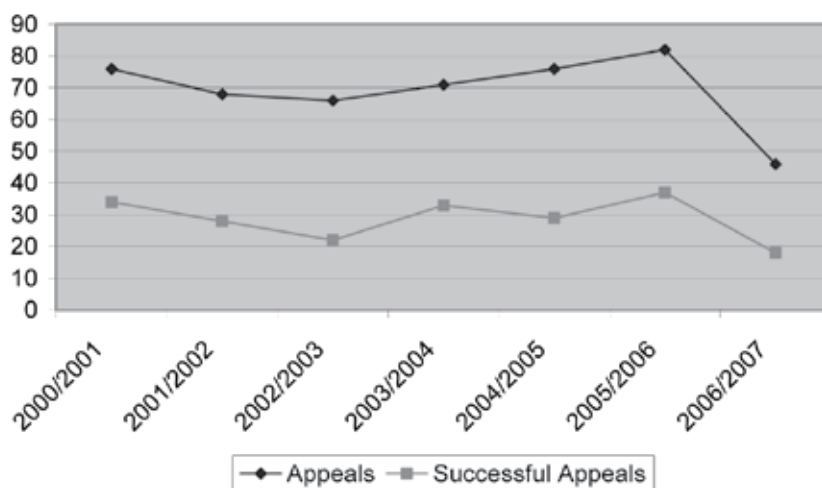
DATA ON TRIALS AND APPEALS

For the period 2000 / 2001–2006 / 2007:

- 2865 people were tried in the County and Supreme Courts
- 1520 (53%) of those people were convicted
- 486 (32%) of the people who were convicted appealed to the Court of Appeal against that conviction
- 201 (41%) of the people who appealed against conviction were successful
- During this period, approximately 13% of people convicted at trial had the conviction set aside on appeal.

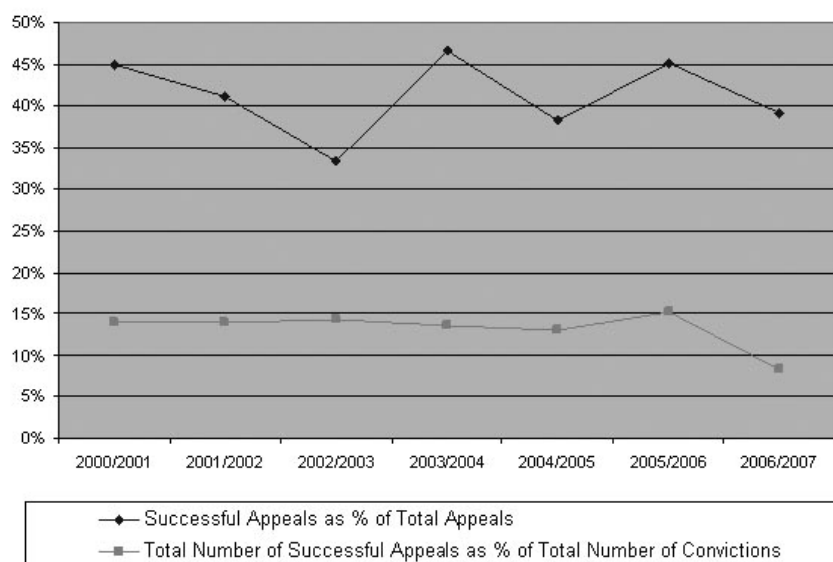
The rate of appeals and rate of success in those appeals remained reasonably constant over the seven years examined by the commission.

YEAR	00/01	01/02	02/03	03/04	04/05	05/06	06/07
Trials	410	366	306	459	454	469	401
Convictions	245	201	153	243	221	242	215
Appeals	76	68	66	71	76	82	46 ⁸
Successful Appeals	34	28	22	33	29	37	18
Appeals as % of Convictions	31%	34%	43%	29%	34%	34%	21%
Successful Appeals as % of Appeals	45%	41%	33%	46%	38%	45%	39%
Successful Appeals as % of Contested Trials	14%	14%	14%	14%	13%	15%	8%



- 1 The Supreme Court and the County Court collect and publish data on a financial year basis.
- 2 Available at <www.supremecourt.vic.gov.au> on 5 May 2009. Until 2003/2004, Supreme Court Annual Reports were published on a calendar year basis. We have adjusted the data for that period by assigning 50% of cases to each financial year covered by the calendar year. Although this method is arbitrary, it appears to us to be the only practical way to reorganise the data in the absence of further information about when the appeals actually occurred.
- 3 We express our thanks to the Acting Registrar of the Court of Appeal, Supreme Court of Victoria for her assistance.
- 4 <http://www.austlii.edu.au> on 5 May 2009.
- 5 Many conviction appeals also involve an appeal against sentence.
- 6 Date of sentencing is used as a proxy for date of conviction because data concerning the date of conviction was not easily accessible. In most cases there is only a short interval between the date of conviction and the date of sentencing.
- 7 This step would have involved expert evaluation of all of the judgments in each successful appeal.
- 8 For the reasons discussed above at 1.11, the appeal figures (and other figures based on them) for 2006/2007 are incomplete as there are appeals pending from people who were convicted at trial during this year.

Appendix B STATISTICS



For unknown reasons, the number of trials was lower in 2002/2003 than for other years in the period surveyed. Although the number of appeals was almost the same as the previous year, the reduction in the number of overall trials meant that there was a corresponding rise in the number of appeals as a percentage of overall convictions. Interestingly, the rate of successful appeals for 2002/2003 was similar to that for other years in the period 2000/2001–2005/2006.

THE SIGNIFICANCE OF JURY DIRECTIONS IN SUCCESSFUL APPEALS

For the reasons discussed at 1.12, we have been unable to present data about the number of cases in which an error in a trial judge's directions to the jury caused a conviction to be overturned on appeal. Error in jury directions was a ground of appeal in a significant number of appeals against conviction at trial. In 253 of the 486 appeals (52%) to the Court of Appeal during the period under consideration, error in the trial judge's directions to the jury was a ground of appeal

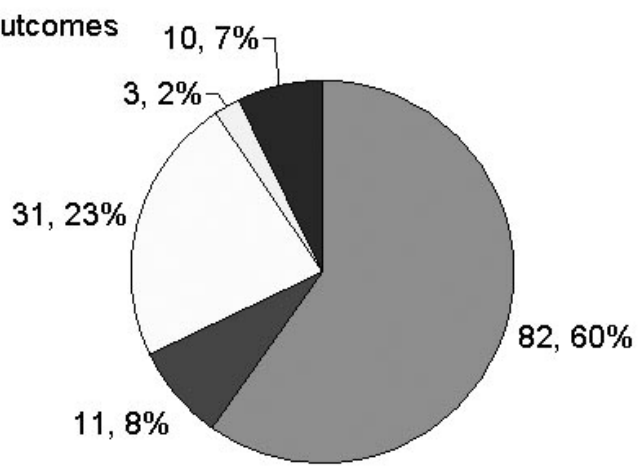
OUTCOME OF APPEALS AND RETRIALS

During the period 2000/2001–2006/2007, the Court of Appeal ordered 137 retrials in cases where the conviction was set aside. The outcomes in those were as follows:

- 85 people (62%) were reconvicted: 82 people were convicted at a retrial and 3 people pleaded guilty before the retrial
- 11 people (8%) were acquitted at a retrial
- 31 people (23%) were not retried because the Director of Public Prosecutions filed a *nolle prosequi*⁹
- 10 people (7%) are awaiting retrial.

9 A decision by the prosecuting authorities not to proceed with a criminal trial.

Retrial Outcomes



■ Convicted ■ Acquitted □ Nolle'd □ Plead'd Guilty ■ Pending

Appendix C 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*¹ 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.²

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.

1 (1951-2) 85 CLR 437.

2 The jury was empanelled on the second day of the trial. The jury reached a verdict after 4 hours on the last day, following the charge which ran over 2 days.

Appendix C EXAMPLE JURY CHARGE IN A SEXUAL OFFENCE CASE

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.

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's 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

Appendix C EXAMPLE JURY CHARGE IN A SEXUAL OFFENCE CASE

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.

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.

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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. 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.

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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's 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

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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 made 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.

Count 3

I want to say something very briefly again about the evidence of 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 your 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 D EXAMPLES OF OUTLINE OF CHARGES

These examples are based on 'aide memoire' documents provided to juries in criminal trials from the Northern Territory, setting out the elements of each offence (and alternative offences) under Northern Territory law, and highlighting the matters in dispute. Names of accused and witnesses have been changed.

EXAMPLE 1

- 1 The Indictment contains one charge that the accused had sexual intercourse with "AB" on 9 August 2007 at XXXXXXXX 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.]

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 MURDER¹

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.

1 Once again, this outline is based on an 'aide memoire' document applying Northern Territory law.

Appendix D EXAMPLES OF OUTLINE OF CHARGES

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.

Appendix E EXAMPLES OF JURY QUESTION TRAIL USED IN NEW ZEALAND

This document is a teaching tool prepared by Justice Robert Chambers of the New Zealand Court of Appeal who has kindly given permission for it to be reproduced. The 'fact situation' is background information for teaching purposes. The jury would be given only the shaded material under the heading 'Question Trail'

FACT SITUATION

- [1] John Doe has been charged with:
- Aggravated robbery;
 - Kidnapping;
 - Indecent Assault.
- [2] He has pleaded not guilty to all charges. A judge has declined an application for severance of the charges.

THE CROWN CASE

- [3] The Crown case is that, on 3 February this year, the ANZ Bank in Mount Wellington was robbed. The men who entered the bank were Bill Brown and Mark Menzies. Brown was armed with a sawn-off shotgun. The men, after they threatened the bank teller, were given bags of money which they stuffed into two duffel bags. They then ran out of the bank and got into a Camry car parked outside. The Crown case is that John Doe was driving that car. Doe drove away towards St Johns.
- [4] When they reached College Road, Doe dropped Brown and Menzies off at a friend's house. They took the duffel bags and the money. Doe drove off. As he was driving along St Heliers Bay Road, he saw a girl he vaguely knew, who had her thumb out to hitch a ride. The girl was Samantha Evans. Doe pulled over and said hello to Evans and asked where she wanted to go. She said, "St Heliers Beach". She said she was going to meet some girlfriends there.
- [5] He told her to hop in and they sped off. After a short time, Doe changed course and, instead of heading for St Heliers Beach, turned instead towards Glen Innes. Evans asked him where they were going, but Doe didn't answer. She then noticed he had locked the car doors. As well, he started speeding. Evans asked to be let out of the car, but again Doe said nothing. As they approached a set of lights which were red, Evans tried to open her door, but Doe sped through the lights.
- [6] Eventually they reached Wimbledon Reserve in Glen Innes. The park was deserted. He parked in a secluded part. Doe then began to feel Evans's breasts, under her t-shirt but over her bra. Evans thought she was going to be raped. She realised she had to get herself out of the car. She suggested they would be more comfortable out on the grass. He unlocked the door, and Evans took her chance and fled. Doe chased her for a bit, but was unfit and soon gave up. Evans hid in a neighbouring property until the coast was clear. She then went into the house and phoned the police.
- [7] The police later came calling on Doe. He declined to make a statement. He was charged with kidnapping and indecent assault.
- [8] Later, the police tracked down Brown and Menzies as the bank robbers. They entered early pleas of guilty and were convicted. Brown indicated he was prepared to give evidence as to who the driver of the getaway car was. He said it was Doe. He said he had discussed the bank job with Doe prior to doing it and that Doe had agreed to be the driver of the getaway car. Brown has given evidence for the Crown to this effect.
- [9] At trial, the Crown also called an eye-witness to the robbery get-away. Her description of the driver closely matches Doe. But the eye-witness was not able to pick Doe in a photo montage.
- [10] Evans, under cross-examination, strenuously denied that she had touched Doe in any way. She said she had made it clear she wanted to get out of the car. She had not consented to Doe touching her breasts.

Appendix E EXAMPLES OF JURY QUESTION TRAIL USED IN NEW ZEALAND

THE DEFENCE CASE

- [11] Doe gave evidence. He denied being the driver of the getaway car. He said he had been that day at a friend's house in College Road, St Johns. Brown and Menzies had come in and they had all had a cup of coffee. They did not say where they had been and Doe did not ask. Doe then asked if he could borrow their car to go for a drive to the shops. They said, "Sweet as."
- [12] He took off in the Camry. As he was driving along St Heliers Bay Road, he saw Samantha Evans, whom he knew well. They had been at parties together and had got on well. He saw she was hitching a lift. He pulled over and asked her where she wanted to go. She said, "Wherever." He drove off with her. She then started to come on to him and reached over and started stroking his penis over his trousers. He asked her whether she would like to go somewhere private and she said, "Mmm." So he took her to a park in Glen Innes. They parked and started kissing. Evans continued to rub his penis over his trousers. He reached in, under her t-shirt and touched her breasts.
- [13] Evans then said she wasn't "on the pill" and didn't want sex. He was annoyed with her, because he felt she had led him on. He told her to get out of the car, which she did. He then drove off.
- [14] In answer to questions asked in cross-examination, he denied locking the doors in the car. He said that, even if he had, that would not have prevented Evans getting out the passenger door, as the child-locks worked only with the back doors. He denied speeding or travelling through red lights.
- [15] The defence have challenged Brown's veracity. They cross-examined him on his prior convictions, which are many. The defence also contend the bank eye-witness was mistaken. They point to her inability to identify Doe in the photo montage.

QUESTION TRAIL

COUNT 1 – AGGRAVATED ROBBERY

Note: On all issues, the burden of proof beyond reasonable doubt lies on the Crown

Not in dispute: Mr Brown committed an aggravated robbery of the ANZ Bank on 3 February 2008.

- 1.1 Are you sure¹ that Mr Doe was the driver of the car into which Messrs Brown and Menzies got after robbing the bank?
- If "yes", go to question 1.2.
- If "no", find Mr Doe "not guilty" on this count and go to count 2.
- 1.2 Are you sure that, prior to the robbery, Mr Doe knew that Mr Brown intended to rob the ANZ Bank and to threaten violence, if necessary, to ensure the success of the operation?
- If "yes", go to question 1.3.
- If "no", find Mr Doe "not guilty" on this count and go to count 3.
- 1.3 Are you sure that, prior to the robbery, Mr Doe had agreed to assist by driving the get-away car?
- If "yes", find Mr Doe "guilty" on this count and go to count 2.
- If "no", find Mr Doe "not guilty" on this count and go to count 2.

COUNT 2 – KIDNAPPING

Note: On all issues, the burden of proof beyond reasonable doubt lies on the Crown

2.1 Are you sure that Mr Doe:

- a) took Ms Evans to a place different from the place she had told him she wanted to go to; and/or
- b) locked the doors of the car while driving; and/or
- c) drove at speed and failed to stop traffic lights so as to prevent Ms Evans leaving the car?

If “yes”, go to question 2.2.

If “no”, find Mr Doe “not guilty” on this count and go to count 3.

2.2 Are you sure that Ms Evans did not consent to being in the car as Mr Doe drove to Wimbledon Reserve?

If “yes”, go to question 2.3.

If “no”, find Mr Doe “not guilty” on this count and go to count 3.

2.3 Are you sure that Mr Doe knew Ms Evans was not consenting to remaining in the car as he drove to Wimbledon Reserve?

If “yes”, go to question 2.4.

If “no”, find Mr Doe “not guilty” on this count and go to count 4.

2.4 Are you sure that Mr Doe intended to keep Ms Evans in the car without her consent?

If “yes”, find Mr Doe “guilty” on this count and go to count 3.

If “no”, find Mr Doe “not guilty” on this count and go to count 3.

COUNT 3 – INDECENT ASSAULT

Note: On all issues, the burden of proof beyond reasonable doubt lies on the Crown

Not in dispute: Mr Doe touched Ms Evans on her breasts, over her bra and under her t-shirt.

3.1 Are you sure that Ms Evans did not consent to Mr Doe touching her breasts?

If “yes”, go to question 3.2.

If “no”, find Mr Doe “not guilty” on this count and STOP.

3.2 Are you sure that Mr Doe, when he was touching Ms Evans’s breasts, knew she was not consenting to it?

If “yes”, go to question 3.3.

If “no”, find Mr Doe “not guilty” on this count and STOP.

3.3 Are you sure that, in the circumstances, right-thinking people would regard this act as indecent?

If “yes”, find Mr Doe “guilty” on this count and STOP.

If “no”, find Mr Doe “not guilty” on this count and STOP.

1 The phrase ‘beyond reasonable doubt’ has received appellate definition in New Zealand.

Appendix F *R v CLAYTON, HARTWICK AND HARTWICK*¹—EXTRACT FROM ORIGINAL TRIAL DIRECTIONS AND JURY AIDE DOCUMENTS OF SMITH J AND EXAMPLE JURY GUIDE

In Chapter 6 we recommended that as part of the summing up, trial judges be permitted to use a document called a “Jury Guide”. This document would comprise a series of questions that set out for the jury the disputed questions of fact that will assist them to reach their verdict.

*To illustrate how the Jury Guide might be applied we have used the case of *R v Clayton, Hartwick and Hartwick*,¹ a murder trial that ran for 46 days and raised many complex issues, in particular, the law of criminal complicity.*

The trial judge, the Honourable Justice Tim Smith, delivered an oral summing up to the jury, in traditional terms, explaining the relevant law, and also provided the jury with written Jury Aides, designed to assist the jury in reaching their verdicts as to murder and manslaughter by applying the law to the facts of the case.

The extracts from the oral summing up by Smith J and the written jury aides which accompanied that summing up, are provided with the permission of his Honour.

In the following appendices we compare the traditional approach to a summing up, as adopted by Smith J, to the approach which might have been adopted using the Jury Guide approach. In identifying for jurors the relevant issues, the traditional approach places much emphasis on instructing jurors as to the law. Although some instruction of jurors as to the law will remain necessary and legal directions and warnings will remain necessary, the Jury Guide places emphasis on identifying factual questions for the jury rather than providing dissertations on the law.

Appendix F1 *is an extract from the oral summing up of the trial judge, in which he directed the jury as to the law of criminal complicity.*

Appendix F2 *contains the written jury aides which Smith J provided to the jury immediately after delivering the oral directions set out in F1. The judge then took the jury through the terms of the written jury aides.*

Appendix F3 *is our suggested alternative approach, one that might have been adopted by a trial judge employing a Jury Guide in this case. As we explain in our footnotes to the Jury Guide, the questions in the Jury Guide would be accompanied by such evidentiary and other directions as were relevant to each question.*

APPENDIX F1: EXTRACT FROM SUMMING UP OF SMITH J

The trial judge adopted the traditional approach by commencing his 261 page summing up with directions on such matters as the burden and standard of proof, the roles of judge, jury and counsel, the need to consider the case against each accused separately, inferential reasoning and similar procedural matters. He then directed the jury on the elements in law of the offences of murder and manslaughter, and the law of self-defence, and summarised the respective contentions put by the Crown and defence. His Honour also gave directions as to the use that could and could not be made of evidence in the case.

After dealing with these and other matters of law his Honour turned to the difficult issue of criminal complicity.

SMITH J:

“Now, complicity. As I have indicated, what I want to do here is to talk about general principles and then apply those general principles to the case with the document that I have foreshadowed for you.

The Crown relies upon three ways to establish complicity. The first is, it seeks to prove an agreed understanding or arrangement to kill or cause really serious injury to Steven Borg.

Now, the law is that, when two or more people reach an understanding or arrangement which amounts to an agreement between them to commit a crime, and if, in accordance with that continuing understanding or arrangement, one of them does all things necessary to commit the crime, they are all equally guilty of the crime, irrespective of the part that any one played in it.

Now, the law is that the agreement need not have been spelt out expressly between the parties. In law, such an agreement can be inferred from all the circumstances. It might be the result of a carefully worked out plan or it might have been entered into without a single word spoken or on the spur of the moment. Because the circumstances in which two or more people participate in the

commission of a crime may themselves establish an unspoken understanding or arrangement between them amounting to an agreement formed between them either shortly before, or then and there, to commit the crime.

It follows that such an agreed understanding or arrangement need not have been reached at any particular time before the crime was committed, but it must be in existence when the crime was committed if complicity in the crime is to be established.

It must also be said, I think, that your mere presence at the scene of the crime being committed by another does not make you necessarily a party to the agreement to commit the crime, even if you intend that some other crime be committed. But if your presence there is by agreement for the purpose of helping the other to commit the agreed crime, even though it may turn out that your help is not needed, you are also guilty of the crime.

I emphasise again that the agreement must still be on foot at the time the crime in question is committed.

Now, let me give you a standard example used to explain all those concepts. I think examples are usually a big help.

Imagine you have three men driving a car down a street. They notice a house with a lot of newspapers at the front gate, unopened, lying there in their plastic rolls. The car pulls up and, without a word being spoken, two get out, one stays in the car behind the driving wheel with the engine running. The other two go to the front door. One breaks the glass on the outside of the door, unlatches the door and throws it open. The third goes inside and collects the valuables and comes out. In the meantime, the man who opened the door goes back to the car, gets back into his seat and never enters the house.

Now, only one of them breaks into the house, that is, the man who broke the glass panel and put his hand inside. Only one of them entered the house and stole anything by picking up the valuables. And one of them did neither. He sat out in the car with the engine running. But, in that situation, if the jury trying such a case was satisfied that, by their actions, all three had reached an agreement or an understanding, an arrangement, an arrangement or understanding which amounted to an agreement between them to commit the crime of break, enter and steal, each of them is criminally responsible for that crime although each of the acts, the acts of breaking, the acts of entering and stealing, were committed by other people.

All three are guilty of break, enter and steal. Complicity in that crime is established.

So, that is the first way in which the Crown puts to you, that is, that there was an agreed understanding or arrangement to kill or cause really serious injury to Steven Borg which existed at the time he was stabbed.

But the Crown advances a second way in which it says you should be satisfied complicity is established. You will appreciate that it sometimes happens that one or more people involved in an agreed joint criminal enterprise, if I can call it that, do something more than the crime originally agreed upon, and what is the situation then? Well, let me give you this example.

Supposing you have two people who agree to go on to a property and engage in some fishing in a private dam without permission and steal the fish from it. Suppose, while they are fishing, the owner comes along and complains about it. And one of the two thieves kills the owner with a fish knife. Now, plainly, both of them, if they have stolen some fish at that point, are guilty of stealing fish, even though only one of them might have been doing the fishing, but that was their arrangement or understanding, to go there and steal some fish.

What about murder? Let us assume that the one who stabbed the owner is guilty of murder. What about the other one? Is the other one guilty of murder?

Now, it will not surprise you to know that there are probably two ways that question could be answered, but we only need to worry about one of them, and that is the one I will deal with. That is this: Assuming that the stabbing was outside anything that had been contemplated as necessary to carry out their agreement and so was outside it, the other stealer of the fish will nonetheless be guilty of murder if he or she foresaw the possibility of that crime being committed in carrying out the theft of the fish.

1 *Clayton v The Queen* [2006] HCA 58; *R v Hartwick & Ors* [2005] VSCA 264 (the title of proceedings changed in the High Court)

Appendix F *R V CLAYTON, HARTWICK AND HARTWICK*—EXTRACT FROM ORIGINAL TRIAL DIRECTIONS AND JURY AIDE DOCUMENTS OF SMITH J AND EXAMPLE JURY GUIDE

Thus the law is that a person who enters into an agreed understanding or arrangement with another to commit a crime is also liable for any other crime committed while carrying out that joint criminal enterprise where that person foresaw that that crime might be committed in carrying out that joint criminal enterprise.

Can I emphasise again that, for these principles to apply, the joint criminal enterprise must still be operating when the crime is committed, and they do not apply to a person who may have withdrawn from that enterprise before the commission of the crime.

Now, you will recall that the Crown also relies on a third way which, in law, can result in a person being found guilty of a crime without personally committing it, and that is, the relying on the principles of aiding and abetting.

Now, this arises in the situation where the Crown in a case has not established that there was any prior understanding or arrangement that the crime in question be committed.

But, in that situation, a person will be guilty of a crime committed if present when it was committed and what we call aiding and abetting the commission of that crime. That means doing one or other of three things with the knowledge of the facts which occurred which made what was done a crime, whether or not the accused realised that what was being done was a crime. In other words, you do not have to worry about the accused's legal knowledge. The question is, was it made with knowledge of the facts which made what was done a crime?

Now, there are three broad ways in which you can aid and abet if you are present and you are aware of those facts which constitute the crime. Firstly, if you intentionally help the perpetrator of the crime to commit the crime. That is the first one, intentionally helping the commission of the crime. Secondly, intentionally encouraging the perpetrator by your words or by your presence and behaviour to commit the crime. Or – and this is the third way – intentionally conveying to the person who commits the crime, by words or by your presence and behaviour, that you assent to and concur in his or her commission of that crime.

Now, as to presence alone, I emphasise, it is not enough that the presence of the accused in question in fact encouraged the person who committed the crime, or may have given that person the impression of assent or concurrence. It must be proved that the accused intended to give encouragement or intended to assent or concur.

At this point I want to give you a document. Do we have twelve copies for the jury and one for me?

Now, I just want to hand you the document dealing with murder and manslaughter at this stage, not the other one.

Now, at first glance, that is going to look a bit daunting, I think. But, let me try to explain to you the structure of it and mention to you that, as you come to conclusions about the facts in this case in your deliberations, so some parts of the document may cease to be parts you need to consider. But that will depend on how you go, I suppose."

APPENDIX F2: JURY AIDES PROVIDED BY SMITH J

Having completed his oral directions on criminal complicity, his Honour then handed to the jury written jury aides. We reproduce two of the jury aides, those dealing with the offences of murder and manslaughter. His Honour took the jury through the written documents, explaining certain matters as he did so, for example, what was meant in law by "foresight".

COUNT 1 – MURDER

To prove murder by complicity the Crown has to prove one of the following three alternatives.

1. Understanding or arrangement to kill

That the fatal stabbing was done pursuant to an agreed understanding or arrangement between the "stabber" and the accused you are considering to kill or cause serious injury to the Deceased.

To that end you must be satisfied beyond reasonable doubt of each of the following-

- (a) An accused fatally stabbed the Deceased and in doing so:
- Intended to kill/cause really serious injury at the time of the stabbing
 - Acted consciously, voluntarily and deliberately
 - Did not act in self defence (the elements of murder)
- (b) That the stabbing was pursuant to an agreed understanding or arrangement between the "stabber" and the Accused you are considering that the Deceased be killed or seriously injured.

2. Understanding or arrangement to assault

That the fatal stabbing was done pursuant to an agreed understanding or arrangement between the "stabber" and the Accused you are considering to assault the Deceased with a weapon or weapons.

To that end you must be satisfied beyond reasonable doubt of each of the following-

- (a) An accused fatally stabbed the Deceased and in doing so:
- Intended to kill/cause really serious injury at the time of the stabbing
 - Acted consciously, voluntarily and deliberately
 - Did not act in self defence
- (b) That the stabbing was done pursuant to:
- An agreed understanding or arrangement between the Accused you are considering and the "stabber" that the deceased be assaulted with a weapon or weapons, and
 - The Accused you are considering foresaw as a possibility in the carrying out of the agreed understanding or arrangement that death or really serious injury would occur by a conscious, voluntary and deliberate act of one of them not done in self-defence.

3. Aiding and abetting

That the Accused you are considering aided and abetted the "stabber" (he/she not being a party to a prior understanding or arrangement).

- (a) An accused fatally stabbed the Deceased and in doing so:
- Intended to kill/cause really serious injury at the time of the stabbing
 - Acted consciously, voluntarily and deliberately
 - Did not act in self defence

Appendix F *R V CLAYTON, HARTWICK AND HARTWICK*¹—EXTRACT FROM ORIGINAL TRIAL DIRECTIONS AND JURY AIDE DOCUMENTS OF SMITH J AND EXAMPLE JURY GUIDE

- (b) The Accused you are considering was
- Present when the fatal stabbing occurred
 - Aware that the deceased was being consciously, voluntarily and deliberately assaulted with intent to kill or cause really serious injury and not in self-defence
 - Intentionally helped the stabber to commit the crime, or
 - Intentionally encouraged him/her by words or presence and behaviour, or
 - Intentionally conveyed to him/her assent to or concurrence in the commission of the crime.

As to the particular Accused you are considering if you are satisfied beyond reasonable doubt that the Crown has proved one of the above three alternatives, that Accused is guilty of murder.

As to the particular accused you are considering, if the Crown has not proved beyond reasonable doubt that

- A. any accused fatally stabbed Borg, the accused under consideration should be acquitted on Count 1.
- B. the “stabber” intended to kill or cause really serious injury at the time of the stabbing but has not proved the other elements of murder (set out in sub-para (a) of paras 1, 2 and 3), the accused under consideration should be acquitted of murder but you will need to consider the charge of manslaughter.
- C. any one of the other elements of the murder set out in sub-para (a) to the above paragraphs. That should be acquitted on Count 1.
- D. that the Accused was complicit in the murder in any of the three ways referred to in sub-para (b) of the paras 1, 2 and 3 that Accused should be acquitted of murder but you will need to consider the charge of manslaughter.

COUNT 1 – MANSLAUGHTER

As to any Accused, you have found not guilty of murder but have not acquitted in court you will have to consider manslaughter.

To prove manslaughter by complicity The Crown must also prove beyond reasonable doubt one of the following two alternatives -

1. Understanding or arrangement to assault. The Crown must prove beyond reasonable doubt each of the following:
 - (a) An accused murdered the Deceased or
He/she killed the Deceased in circumstances amounting to manslaughter by fatally stabbing the Deceased
The elements of manslaughter to be proved by The Crown beyond reasonable doubt are:
 - The “stabber” caused the death of the Deceased
 - The fatal act was dangerous and unlawful,
 - The act was unconscious, voluntary and deliberate, and
 - It was not done in self defence.
 - At the time of the stabbing the Accused under consideration was party to an agreed understanding or arrangement with the “stabber” to assault the Deceased with a weapon or weapons in such a way as to cause more than trivial injury but less than really serious injury
 - The stabbing occurred in the course of carrying out that agreed understanding or arrangement.
2. Aiding and abetting. If he/she aided and abetted the assault (he/she not being a party to a prior understanding or arrangement).

The Crown would have to prove beyond reasonable doubt each of the following:

- (a) An accused
- Fatally stabbed the Deceased
 - The fatal act was dangerous and unlawful
 - The act was unconscious, voluntary and deliberate, and
 - It was not done in self defence.
- (b) The Accused you were considering was
- Present when the fatal stabbing occurred
 - Aware that the Deceased was being consciously, voluntarily and deliberately assaulted with a weapon and not in self-defence
 - Intentionally helped the stabber to commit the crime, or
 - Intentionally encouraged him/her by words or presence and behaviour, or
 - Intentionally conveyed to him/her assent to or concurrence in the commission of the crime.

In considering the case against each accused, if the Crown has proved beyond reasonable doubt either of the above two alternatives, that accused is guilty of manslaughter.

In considering the case against each accused, if you are not satisfied beyond reasonable doubt that the Crown has proved:

- A. any of the elements of manslaughter set out in para 1, that accused should be acquitted of manslaughter and therefore acquitted on Count 1.
- B. that the accused was complicit in the manslaughter in either of the two ways referred to in paras 1 and above, then that accused should be acquitted of manslaughter and accordingly acquitted on Count 1.

Appendix F *R V CLAYTON, HARTWICK AND HARTWICK*¹—EXTRACT FROM ORIGINAL TRIAL DIRECTIONS AND JURY AIDE DOCUMENTS OF SMITH J AND EXAMPLE JURY GUIDE

APPENDIX F3: THE JURY GUIDE

As may be seen, the jury aide documents and oral summing up delivered by Smith J concerning the elements of the offences of murder and manslaughter adopted the traditional approach of explaining the law to the jury then directing them to decide whether the evidence established that the prosecution had proved the relevant elements of any offence.

The approach we propose, with the Jury Guide, would make very limited reference to the elements in law of the offences, and would concentrate on identifying the issues of fact, and the findings of fact, that counsel and the judge had agreed would determine whether the prosecution had proved its case as to any offence. It is likely that discussion between counsel and the trial judge as to the appropriate questions of fact, and the terms of the Jury Guide, would have commenced early in the trial and substantially concluded before the commencement of final addresses.

In the course of addressing each of the questions in the Jury Guide, the trial judge would give the jury relevant directions as to the use of evidence, or on such other matters requiring direction, as arose in the context of the evidence concerning that question. We have sought to illustrate to readers how that might be done, by juxtaposing some comments in endnotes to the Jury Guide. These comments would not, of course, have appeared in the Jury Guide handed to the jurors.

Given that there were three accused in this case, it was probably more convenient (as Smith J no doubt concluded) that many of the so called ineluctable directions (such as the burden and standard of proof) were given at the commencement of the summing up, rather than in the course of dealing with the questions in the Jury Guide. The opportunity to remind the jury of those directions could, however, be taken in the context of the questions.

We propose that the Jury Guide would first identify those matters on which there was no disagreement between the parties.

We suggest that before setting out the jury questions (which they would not answer publicly, but would merely use as a guide to their decision) the jury be given an overview of how the Crown case was put. In doing so, it would not be necessary to give the jury directions as to the elements of the offences; those elements would be embedded in the questions posed in the Jury Guide.

JURY GUIDE

COUNT 1 - MURDER

Facts not in Dispute:

It is not disputed that:

- Steven Borg died as a result of injury or injuries caused by one or more of the people who arrived at the house of Steven Borg.
- Each Accused was one of the persons who arrived at the house in company with others.

How the prosecution puts its case

The Prosecution case is that Celia Clayton, John Hartwick and Lisa Hartwick are each guilty of murder in any one of **four alternative ways**, either²:

- (a) because he or she **personally did an act** that caused or contributed to the death of Steven Borg, and did so with an intention to kill or cause really serious injury to Steven Borg, and when he or she was not acting in self-defence³,

OR

- (b) because he or she **assisted someone else** to inflict the injuries that killed Steven Borg, knowing that the assault was being done by that person or persons with intention to kill or cause really serious injury to Steven Borg, and when not acting in self-defence,

OR

- (c) because he or she **agreed** with those who inflicted the injuries **to kill or cause really serious injury** to Steven Borg, when not acting in self-defence

OR

- (d) because he or she **agreed** with those who inflicted the injuries to assault Steven Borg **to a lesser degree than to cause death or really serious injury**, but he or she foresaw the possibility that death or really serious injury might be intentionally inflicted, by someone not acting in self-defence.

2 Note that the alternative form of complicity dealt with in (b) is the principle of aiding and abetting; (c) is acting in concert/common purpose; (d) is extended common purpose. There is no reason why these legal terms should be used with the jury and, thus, the document given to the jury would not do so.

3 It may be that the Crown could not attribute a fatal blow or stab wound to any one of the accused. We have, however, assumed that there was some evidence which might allow a finding by the jury on this basis.

Appendix F

*R V CLAYTON, HARTWICK AND HARTWICK—EXTRACT
FROM ORIGINAL TRIAL DIRECTIONS AND JURY AIDE
DOCUMENTS OF SMITH J AND EXAMPLE JURY GUIDE*

QUESTIONS FOR JURY TO CONSIDER FOR MURDER

FIRST ALTERNATIVE FOR MURDER

As to each accused person, in turn:

1. Are you satisfied beyond reasonable doubt that:
 - (a) The death of Steven Borg was caused or contributed to by an injury or injuries personally inflicted by that Accused?

AND

- (b) That that Accused intended⁴ to cause death or really serious injury to Steven Borg when he or she inflicted the injury that caused or contributed to death?

AND

- (c) That the Accused in question was not acting in self-defence when he or she inflicted the injury that caused or contributed to death?⁵

As to each Accused, in turn:

- **If YES, to all of (a) (b) and (c)**, verdict is "Guilty of Murder" (**AND STOP**, because no further verdict needs to be considered for that accused as to Count 1).
- **If NO, to any one of (a) (b) or (c)**, go on to consider the second alternative for murder for that accused.

SECOND ALTERNATIVE FOR MURDER

2. As to each of the Accused, in turn, for whom a verdict of guilty of murder has not been agreed by the jury, under alternative 1:

Are you satisfied beyond reasonable doubt that:

- (a) That Accused helped or encouraged the person or persons who inflicted the injuries that caused or contributed to Steven Borg's death?

AND

- (b) That he or she did so knowing that Steven Borg was being assaulted with the intention to kill or cause him really serious injury?

AND

- (c) He or she did so knowing that the person or persons who inflicted the injuries that caused or contributed to death were not acting in self-defence?⁶
 - **If YES to all of (a), (b) and (c)**, Verdict is "Guilty of Murder" as to that accused (**AND STOP**, because no further verdict needs to be considered for that accused as to Count 1)
 - **If NO, to any one of (a), (b) or (c)** go to consider the third alternative for murder

THIRD ALTERNATIVE FOR MURDER

3. As to each Accused, in turn, whom the jury has not found to be guilty of murder under alternatives 1 or 2:

Are you satisfied beyond reasonable doubt that:

- (a) That Accused was present when the injuries were inflicted that caused or contributed to the death?

AND

- (b) He or she had agreed⁷ with one or more of the people who inflicted the injuries that caused or contributed to the death of Steven Borg, to kill or cause really serious injury to Steven Borg?

AND

- (c) the person or persons who inflicted the injuries that caused or contributed to death were not acting in self-defence?
- **If YES, to all of (a), (b) and (c)**, Verdict is "Guilty of Murder" (**AND STOP**, because no further verdict needs to be considered for that accused as to Count 1)
 - **If NO, to any one of (a), (b) or (c)**, go on to consider the fourth alternative for murder

FOURTH ALTERNATIVE FOR MURDER

4. As to any Accused, in turn, whom the jury has not found to be guilty of murder under alternatives 1, 2 or 3:

Are you satisfied beyond reasonable doubt that:

- (a) That Accused had agreed with one or more of those who inflicted the injuries that caused or contributed to death, to cause more than trivial injury to Steven Borg, but of less severity than to cause death or really serious injury?

AND

- (b) That Accused foresaw the possibility⁸ that one or other of the people with whom the accused had agreed to cause less than really serious injury, might in fact assault Steven Borg, with the intention of killing Steven Borg or causing him really serious injury, and might do so when not acting in self-defence?

AND

- (c) Steven Borg died as a result of injury or injuries inflicted by one or more of the persons who were in agreement with that accused to cause less than really serious injury, and the fatal injuries were inflicted with the intention to kill or cause really serious injury to Steven Borg?

AND

- (d) That the person or persons who inflicted the injury or injuries that caused or contributed to the death of Steven Borg were not acting in self-defence?
- **If YES to all of (a)(b) (c) and (d)**, Verdict is "Guilty of Murder" (**AND STOP**, because no further verdict needs to be considered for that accused as to Count 1)
 - **If NO, as to any one of (a) (b) (c) or (d)**, Go on to consider Manslaughter for that Accused.

- 4 In addressing this question, the jury would be referred by the judge to the evidence and submissions as to whether the accused in question had performed the fatal act, and did so with murderous intent.
- A direction, or reminder, might also be required at this point as to the drawing of inferences. It is not clear from the judgments whether "accident" was seriously in issue.
- If it was in issue whether the fatal blow was struck accidentally, then a suitable question would need to be framed, coupled with a direction as to what constitutes accident (conscious, voluntary and deliberate act).
- 5 A direction or reminder of the law concerning "self-defence" would be appropriate at this point, and the jury should be referred to the evidence and submissions relevant to the issue of self-defence for the accused in question.
- 6 The jury would be referred to the evidence and submissions relevant to these issues for each accused.
- 7 A direction or reminder would be appropriate here as to how an "agreement" or understanding might be entered without there being express language of agreement. If an issue had arisen whether an accused had withdrawn from the agreement, then a question would need to be framed to invite the jury to consider that issue. There was no such issue in this case. Once again, the jury would be referred to the evidence and submission relevant to this alternative basis for murder
- 8 In *R v Hartwick & Ors* [2005] VSCA 264, [22], the Court of Appeal noted that the trial judge gave the jury "a clear and helpful hypothetical example" to illustrate foreseeability of an action by another conducted with the relevant intention for murder. This would be an appropriate place in the summing-up in which to give such assistance to the jury.

Appendix F *R V CLAYTON, HARTWICK AND HARTWICK*—EXTRACT FROM ORIGINAL TRIAL DIRECTIONS AND JURY AIDE DOCUMENTS OF SMITH J AND EXAMPLE JURY GUIDE

ALTERNATIVE VERDICT: MANSLAUGHTER

As to each Accused whom the jury has not found to be guilty of Murder under alternatives 1 to 4, you must consider whether he or she is guilty of manslaughter.⁹

The prosecution says that as to each Accused, if he or she is not guilty of murder he or she is guilty of manslaughter in **one of two ways**.

That Steven Borg's death occurred in circumstances where, when the attackers were not acting in self-defence, either:

- (a) The Accused had **agreed** with those who inflicted the fatal injuries that, without them acting in self-defence, Steven Borg would be assaulted to an extent causing **more than trivial injuries and less than really serious injury**.

OR

- (b) The Accused had **not agreed** in advance to this, **but** he or she **was present and helped or encouraged** those who attacked Steven Borg, when not acting in self-defence, to assault him to an extent causing more than trivial, and less than really serious injury.

QUESTIONS FOR JURY TO CONSIDER FOR MANSLAUGHTER

If the jury is not satisfied beyond reasonable doubt that a verdict of Guilty of Murder should be delivered by the jury for an accused person then, as to each such accused:

FIRST ALTERNATIVE FOR MANSLAUGHTER

1. Are you satisfied beyond reasonable doubt that:

- (a) That Accused reached an understanding or arrangement, amounting to an agreement, with those whose actions caused the death of Steven Borg, to assault Steven Borg, not to the extent to kill or cause really serious injury to Steven Borg, but to an extent less than causing really serious injury?

AND

- (b) That in the course of carrying out that agreement, the act or acts were done, by those with whom the agreement was reached, that caused the death of Steven Borg.

AND

- (c) That those acts were unlawful and dangerous,

AND

- (d) Those acts were not done when acting in self-defence
 - **If YES to all of (a) to (d)**, then Verdict is Guilty of manslaughter (**AND STOP**, because no further verdict needs to be considered for that accused as to Count 1)
 - **If NO, to any one of (a),(b),(c) or (d)**, then go to the second alternative for manslaughter.

SECOND ALTERNATIVE FOR MANSLAUGHTER

2. Are you satisfied beyond reasonable doubt that when the fatal act or acts were done:

(a) That Accused was present;

AND

(b) Although not foreseeing the possibility that death or really serious injury would occur, that Accused was aware that Steven Borg was being consciously, voluntarily and deliberately¹⁰ assaulted by a person or persons who were not acting in self-defence;

AND

(c) That Accused intentionally encouraged the assault by the person or persons, by the Accused's words or actions, or by his or her presence and behaviour, or by letting the person or persons know that the Accused agreed with what they were doing?

- ***If YES, to all of (a), (b) and (c)*** above, then verdict is "Guilty of Manslaughter"
- ***If No, to any one of (a), (b) or (c)*** then verdict is "Not Guilty of Manslaughter".

9 There was another count facing each accused, of intentionally causing serious injury to another person, but that is not dealt with in this illustration.

10 The judge should give a direction on the legal meaning of these words

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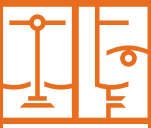
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Victorian
Law Reform
Commission

GPO Box 4637
Melbourne Victoria 3001 Australia
DX 144 Melbourne, Vic

Level 3, 333 Queen Street,
Melbourne Victoria 3000 Australia

Telephone +61 3 8619 8619
Facsimile +61 3 8619 8600
1300 666 555 (within Victoria)
TTY 1300 666 557
law.reform@lawreform.vic.gov.au
www.lawreform.vic.gov.au

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