Queensland
Law Reform Commission

A Review of Jury Directions

Discussion Paper

WP No 67
September 2009

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COMMENTS AND SUBMISSIONS

You are invited to make comments and submissions on the issues and questions in this Issues / Discussion Paper.

Written comments and submissions should be sent to:

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Queensland Law Reform Commission
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An appointment to make an oral submission may be made by telephoning:
(07) 3247 4544

Closing date: 31 October 2009

It would be helpful if comments and submissions addressed specific issues or questions in the Discussion Paper.

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Previous Queensland Law Reform Commission publications in this reference:

A Review of Jury Directions, Issues Paper, WP 66 (March 2009).

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Chapter 1

Introduction

INTRODUCTION

1.1 This Discussion Paper is the second publication in the Queensland Law Reform Commission's enquiry into jury directions in criminal trials, which will culminate in its report to the Attorney-General at the end of 2009.

1.2 The Commission published its Issues Paper in this review — Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 — on 27 March 2009.

THIS REVIEW

1.3 On 7 April 2008, the Attorney-General and Minister for Justice and Minister Assisting the Premier in Western Queensland referred to the Commission a review of the directions, warnings and summing up given by a judge to jurors in criminal trials in Queensland.

1.4 The original Terms of Reference were amended by the Attorney-General and Minster for Industrial Relations by deleting from paragraph (a) on the first page of the Terms of Reference the requirement to obtain information about the nature of the split for hung juries, and the reasons for dissent in hung juries.[1]

1 Letter from the Attorney-General, the Hon Cameron Dick, to the Hon Justice Roslyn Atkinson, Chairperson of the Queensland Law Reform Commission, 5 May 2009.

1.5 The amended Terms of Reference are set out in full in Appendix A to this Paper.

BACKGROUND TO THE REVIEW

1.6 In 2004, the Attorneys-General of Australia, New South Wales and Victoria referred to the law reform commissions in each of their jurisdictions a review of the Uniform Evidence Act.[2] In the federal jurisdiction and in New South Wales, this was a review of the operation of the Act in those jurisdictions in the ten years since its introduction. In Victoria, it was designed to facilitate the introduction of the Act into that State.[3] The Commissions reported jointly in December 2005.[4]

1.7 Chapter 18 of the Commissions' joint report deals with comments, warnings and directions to the jury. The Commissions recommended that:

> **Recommendation 18–1** The Standing Committee of Attorneys-General should initiate an inquiry into the operation of the jury system, including such matters as eligibility, empanelment, warnings and directions to juries.

1.8 This recommendation has been adopted to some extent by the Standing Committee of Attorneys-General ('SCAG'). In its Annual Report for 2006–07, the Committee noted, amongst other 'significant decisions':

> Consideration of the feasibility of a review of jury directions and warnings, including areas for improved consistency, by reference to one or several law reform commissions — a reference was subsequently given to the NSW Law Reform Commission.[5]

SCOPE OF THIS REVIEW

Issues covered by this enquiry

1.9 The Terms of Reference for this enquiry direct the Commission to have particular regard to:

- whether any directions or warnings can be simplified or abolished;

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2 The expression 'Uniform Evidence Act' refers to the *Evidence Act 1995* (Cth) and the *Evidence Act 1995* (NSW), which is in essentially identical terms. While the *Evidence Act 1995* (Cth) applies to all proceedings in a federal court and, to the extent of certain miscellaneous provisions such as those dealing with proof of Commonwealth documents, to proceedings in all Australian courts, State evidence laws apply in State courts exercising federal jurisdiction: *Evidence Act 1995* (Cth) ss 4(1), 5; *Judiciary Act 1903* (Cth) s 79.

3 The Uniform Evidence Law as enacted in the *Evidence Act 2008* (Vic) will commence operation by 1 January 2010.

4 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC Report No 102, NSWLRC Report No 112, VLRC Final Report (2005).

5 Standing Committee of Attorneys-General, *Annual Report 2006–07*, <http://www.scag.gov.au/lawlink/scag/ll_scag.nsf/vwFiles/Annual_Report_06-07.doc/$file/Annual_Report_06-07.doc> at 1 September 2009.

- whether judges should be required to warn or direct juries in relation to matters that are not raised by counsel during the trial;
- the extent to which judges need to summarise the evidence for the jury;
- possible solutions to any problems relating to jury directions and warnings, including whether other assistance should be provided to jurors to supplement the oral summing up; and
- recent developments and research in other Australian and overseas jurisdictions.

1.10 In undertaking this enquiry, the Commission is to work, where possible and appropriate, with other law reform commissions, and to consult stakeholders.

1.11 Without limiting the scope of this enquiry, the Terms of Reference require the Commission to review jury directions in detail from two perspectives:

- the legal content of jury directions, and their length and complexity; and
- the language used in delivering directions to the jury.

1.12 However, it is also clear that the Terms of Reference require a broader consideration of the way in which criminal cases are presented to juries, and the methods that are, or might be, used to provide juries with the information, advice and guidance they need to arrive at their verdicts.

Issues excluded from this enquiry

1.13 There are many aspects of the use and operation of juries in Queensland that are not covered by this enquiry.

1.14 One notable area that is excluded is the range of issues concerning jury selection, which are covered in the Commission's reference in that area pursuant to separate Terms of Reference issued by the Attorney-General on 7 April 2008.[6]

1.15 Other areas not covered by this reference, but which have been raised in the public media from time to time, include: the size of juries, the use of reserve jurors, the role of juries in sentencing,[7] access by jurors to the media (including the internet) during trials, and juror misconduct. Neither is the Commission asked to review the range of criminal (or civil) cases in which juries are used.

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6 See [1.30] below.

7 The New South Wales Law Reform Commission published a report on the role of juries in sentencing in August 2007. The principal recommendation in that report was that juries not be involved in the sentencing process to any greater extent than they are at present: New South Wales Law Reform Commission, *Role of juries in sentencing*, Report 118 (2007), Recommendation 1.

1.16 Finally, the central role of juries in the Queensland criminal justice system is not in question. That critical role is expressly acknowledged in the Terms of Reference.

Research involving jurors

1.17 In undertaking this reference, the Commission is to have particular regard to various matters that would entail it conducting, or commissioning, research into jury decision-making:

- the views and opinions of jurors about the number and complexity of the directions, warnings and comments given to them by judges, and the timing, manner and approach adopted by judges in their summing up to juries;
- jurors' ability to comprehend and apply the judges' instructions; and
- jurors' information needs.

1.18 In June 2009, the Commission contracted with the School of Psychology at the University of Queensland to conduct empirical research into jurors' information needs and jurors' comprehension and application of jury directions. The University of Queensland is due to provide the results of that research to the Commission by 30 September 2009.

1.19 This research project is discussed in more detail in chapter 9 of this Paper.

OTHER LAW REFORM PROJECTS

Current projects

1.20 The joint Law Reform Commissions' recommendation that there be a general enquiry into the operation of the jury system[8] has not yet been adopted in full by SCAG. However, a number of law reform projects on various aspects of the jury system are currently underway in other States of Australia.

1.21 The Terms of Reference for this enquiry refer expressly to reviews currently or recently undertaken by the New South Wales Law Reform Commission ('NSWLRC') and the Victorian Law Reform Commission ('VLRC'). These reviews also cover directions, warnings and charges given to juries in criminal trials in those States. The Terms of Reference also refer to a project being undertaken by the Australian Institute of Judicial Administration. That project has since been incorporated into the VLRC's reference.

8 See [1.7] above.

Victoria

1.22 The Terms of Reference in the VLRC's enquiry were in somewhat different terms from those in this Commission's enquiry:

> 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.[9]

1.23 These Terms of Reference focus on the content and legal effect of jury directions and do not seek to extend that enquiry into the psycho-linguistic aspects of jury decision-making processes.[10]

1.24 The VLRC published its Consultation Paper on jury directions in September 2008,[11] and sought submissions in response to it by 30 November 2008; this deadline was later extended to 30 January 2009.[12] The VLRC also published a short

9 Victorian Law Reform Commission, 'Jury Directions — Terms of Reference', <http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/Home/Completed+Projects/Jury+Directions/LAWREFORM+-+Jury+Directions+-+Terms+of+Reference> at 1 September 2009.

10 But see Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [1.11] n 9; Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [1.27]–[1.28].

11 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008).

12 Victorian Law Reform Commission, 'Jury Directions submission deadline extended', <http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/Home/Newsroom/LAWREFORM+-+Jury+Directions+submission+deadline+extended> at 1 September 2009.

background paper that summarised the key proposals that were advanced in its Consultation Paper.[13]

1.25 The VLRC reported to the Attorney-General of Victoria on 1 June 2009.[14] That Final Report was tabled on 29 July 2009 and contains 52 recommendations based on the primary recommendation that a new comprehensive statute be enacted to progressively cover this area of law. The Report and its recommendations are discussed throughout this Paper.

New South Wales

1.26 The Terms of Reference issued to the NSWLRC on 16 February 2007 were in these terms:

> Pursuant to section 10 of the *Law Reform Commission Act 1967*, the Law Reform Commission is to inquire into and report on directions and warnings given by a judge to a jury in a criminal trial.
>
> In undertaking this inquiry the Commission should have regard to:
>
> - the increasing number and complexity of the directions, warnings and comments required to be given by a judge to a jury;
> - the timing, manner and methodology adopted by judges in summing up to juries (including the use of model or pattern instructions);
> - the ability of jurors to comprehend and apply the instructions given to them by a judge;
> - whether other assistance should be provided to jurors to supplement the oral summing up;
> - any other related matter.[15]

1.27 The NSWLRC published its Consultation Paper in December 2008.[16] This Consultation Paper sought submissions by 13 March 2009. This was preceded by the separate publication of the results of related research conducted by the NSW Bureau of Crime Statistics and Research.[17]

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13 Victorian Law Reform Commission, *Jury Directions — a closer look*, Background Paper (2008). Both Papers are available on the VLRC's website: <http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/Home/Completed+Projects/Jury+Directions/> at 1 September 2009.

14 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009). The VLRC had originally been required to report by 1 March 2009. The Final Report is also available from the VLRC's website: <http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/Home/Completed+Projects/Jury+Directions/LAWREFORM+-+Jury+Directions+-+Final+Report> at 1 September 2009.

15 New South Wales Law Reform Commission, 'Jury directions in criminal trials', <http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_cref116> at 1 September 2009.

16 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008).

17 NSW Bureau of Crime Statistics and Research (L Trimboli) 'Juror understanding of judicial instructions in criminal trials' *Crime and Justice Bulletin* No 199 (2008).

1.28 The Judicial Commission of NSW is currently undertaking a survey of conviction appeals for the period 2001–2007. Its report is expected to be published in late 2009.[18]

1.29 In March 2009, the Trial Efficiency Working Group of the Criminal Law Review Division of the Attorney General's Department of NSW published its report.[19] Many of its recommendations bear on the issues in the Commission's enquiry. In recognising the importance of continuing research into, and reform of the law, concerning juries, the Working Group made these recommendations, among others:

> 1. Material provided to the jury and communications with the jury by the Sheriff's Office should be a standing item on the Jury Taskforce agenda. The Taskforce should annually audit and review material provided to jurors with a view to ensuring that the information is accessible, relevant and current.
>
> …
>
> 3. Conduct periodic surveys of juries (by the Bureau of Crime Statistics and Research at 2 yearly intervals) to ascertain their needs and identify shortcomings that impede their understanding of the trial process.[20]

Jury Selection Reference

1.30 On 7 April 2008, the Attorney-General of Queensland also issued Terms of Reference to this Commission in a separate reference concerning the selection of jurors in Queensland.

1.31 The jury selection reference will be covered in a separate consultation paper and, in due course, by a separate report. The Commission is to report in that reference by 31 December 2010, one year after its report in the current jury directions reference.

METHODOLOGY OF THIS REVIEW

The Issues Paper

1.32 On 27 March 2009, the Commission released its Issues Paper in this review: *A Review of Jury Directions*.[21] The purpose of the Issues Paper was to outline the function of jury directions and the problems that are perceived to have arisen in relation to them — and to pose some preliminary questions to assist the Commission in its consultation process and in formulating possible proposals for reform.

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18 Judicial Commission of New South Wales, *Annual Report 2007–08*, 26; <http://www.judcom.nsw.gov.au/about-the-commission/annual-reports/> at 1 September 2009. See also New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [1.36] n 60.

19 Trial Efficiency Working Group, Criminal Law Review Division, Attorney General's Department of NSW, *Report of the Trial Efficiency Working Group* (2009).

20 Ibid, 12–3.

21 Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009).

1.33 Copies of the Issues Paper were distributed to judges of the Supreme Court and District Court, key professional bodies such as the Queensland Law Society, the Bar Association of Queensland, the Law Council of Australia and Legal Aid Queensland, as well as other law reform bodies and interested organisations and individuals. An advertisement was placed in the *Courier-Mail* on 4 April 2009 calling for submissions. Media releases were issued to the print and electronic media on 8 and 11 May 2009, and the Full-time Member of the Commission conducted an interview on 612 ABC Radio on 12 May 2009.

Submissions and consultations

1.34 The Commission called for submissions in response to the Issues Paper by 31 May 2009. To date, the Commission has received responses from 17 individuals and organisations, who are listed in Appendix B. They include:

- submissions from, or consultations with, two judges of the Supreme Court and two judges of the District Court;
- a joint submission from the Queensland Law Society and the Bar Association of Queensland, supported by a submission from the Law Council of Australia;[22]
- a consultation with the Office of the Director of Public Prosecutions;
- submissions from the South West Brisbane Community Legal Centre, the Brisbane Office of the Commonwealth Director of Public Prosecutions and Legal Aid Queensland; and
- submissions from, or telephone consultations with, six members of the public, a number of whom responded either to the advertisement placed by the Commission in the *Courier-Mail* on 4 April 2009 or the radio interview conducted on ABC Radio by the Commission's Full-time Member on 12 May 2009. Four of these respondents were former jurors and one had recently been a defendant in a jury trial (and re-trial).

1.35 A number of these responses also dealt with issues that are covered by the Commission's current review of jury selection processes[23] and will be considered in the course of that review.[24]

1.36 The Commission has also considered the submissions received by the Victorian Law Reform Commission ('VLRC') in response to its Consultation Paper on jury directions published in September 2008.[25] Eighteen submissions were post-

22 The Law Council of Australia provided a short submission endorsing the views expressed in the joint submission of the Queensland Law Society and the Bar Association of Queensland, and reiterating the views that it expressed in its own submission dated 30 January 2009 to the Victorian Law Reform Commission in response to that Commission's Consultation Paper published in September 2008.

23 See [1.30] above.

24 See Submissions 1, 2, 5 and 12.

25 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008).

ed on the VLRC's website.[26] Although the central thrust of the VLRC's report may diverge from this Commission's eventual recommendations, it is clearly relevant to consider the VLRC's work.[27] Moreover, the joint submission in response to this Commission's Issues Paper from the Queensland Law Society and the Bar Association of Queensland[28] focussed on the VLRC's proposals in relation to a statute or code dealing with jury directions and warnings, and expressly adopted the submission to the VLRC made by Stephen Odgers SC.[29] The Law Council of Australia agreed with the joint submission, and also referred to its own submission to the VLRC, which in turn acknowledged the submission to the VLRC made by the Criminal Bar Association of Victoria.[30]

1.37 However, the submissions to the VLRC must be read with some care as the position in Queensland is different in material respects from that in Victoria, as is apparent from the VLRC's description of the law and practice in Victoria and from a review of the proposals in the VLRC's Consultation Paper and the recommendations in its Final Report.

1.38 One significant difference is that trial judges in Queensland generally take much less time to sum up than do trial judges in Victoria in relation to trials of comparable length. The key aspect that appears to vary is the length of the judge's summary of the evidence, which is on average much longer in Victoria (and two other Australian States) than in Queensland. The statistics that demonstrate this are set out in [3.23] of the Issues Paper.[31] Other statistics show that the rate of appeals lodged, and the rate of appeals upheld, on the basis of error in the judge's directions to the jury are again much higher in Victoria than in Queensland.[32] It is open to speculate whether the two sets of observations are connected.

1.39 Another major difference is that Queensland has not adopted the Uniform Evidence Law, which has meant that unilateral reform of the *Evidence Act 1997* (Qld) has been possible, notably (with regard to the subject matter of this review) in relation to the admission of evidence from children and other vulnerable witnesses, based on the Commission's report on that subject.[33]

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26 See Victorian Law Reform Commission, Jury Directions — Submissions, <http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/Home/Completed+Projects/Jury+Directions/LAWREFORM+-+Jury+Directions+-+Submissions> at 1 September 2009. Submissions in response to the Consultation Paper on jury directions published by the New South Wales Law Reform Commission in December 2008 are not available on its website or otherwise published by it.

27 The Terms of Reference also expressly direct this Commission to 'have regard' to the work being done by the VLRC and the New South Wales Law Reform Commission: see Appendix A to this Paper.

28 Submission 13.

29 Stephen Odgers SC, Submission to the Victorian Law Reform Commission, 12 November 2008.

30 Submission 14; Law Council of Australia, Submission to the Victorian Law Reform Commission, 30 January 2009; Criminal Bar Association of Victoria, Submission to the Victorian Law Reform Commission, 15 December 2008.

31 Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [3.23]. See also [5.13] below.

32 See Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) ch 5, especially [5.53]–[5.56].

33 Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children, Parts 1 and 2*, Report No 55 (2000). See *Evidence Act 1977* (Qld) ss 21A–21AX, and in particular s 21AW, which deals specifically with the directions that must be given to a jury if evidence is taken under those provisions. This was discussed in the Issues Paper at [4.121]–[4.128].

This Discussion Paper

1.40 This Discussion Paper has two principal purposes:

- to set out the nature and content of the submissions received by the Commission to date; and
- to outline some proposals and options for reform which are under consideration by the Commission, with a view to generating further submissions in relation to these proposals in particular and the areas of law under review generally.

1.41 A number of the submissions received by this Commission in response to its Issues Paper were limited to the question of whether comprehensive statutory intervention (or codification) in relation to jury directions is necessary or desirable in Queensland. However, the desirability of, and opportunity for, reform of directions, warnings and the summing up is not limited to this question but requires consideration of some specific directions that are particularly problematic, as well as the timing and means of delivery of directions to the jury. This Discussion Paper sets out a number of proposals and options for reform in relation to these matters. These reflect the current, provisional views of the Commission, in respect of which it seeks further submissions.

1.42 This Discussion Paper refers to, but does not repeat, much of the background commentary found in the Commission's Issues Paper.[34] Consequently, this Paper should be read in conjunction with the Issues Paper, copies of which can be obtained free of charge from the Commission and can be downloaded from the Commission's website.[35]

1.43 Chapters 2 to 5 of the Discussion Paper consider the principal thrusts of the Commission's proposed approach to reform of jury directions:

- Chapter 2 discusses three key bases of reform to jury directions in Queensland: that all reform in this area is predicated upon the need to ensure that the parties receive a fair trial; that codification of the law in this area is not appropriate in Queensland; and that the drafting of jury directions in Queensland should continue to be based on the Queensland Benchbook.
- Chapter 3 of the Paper focuses on reforms directed to the pre-trial identification of issues that (among other matters) will also identify the questions that will need to be put to the jury, and examines various options for improving the timing and means of delivery of directions and other information to juries during trials.
- Chapter 4 considers methods of giving information to juries by means of written materials and aids.

34 Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009).

35 <http://www.qlrc.qld.gov.au>.

- Chapter 5 discusses possible reforms in relation to the trial judge's, and the parties', obligations with respect to jury directions given in the summing up and at other times during a trial.

1.44 Chapters 6 to 8 of the Discussion Paper consider a range of specific directions in relation to which reform should be considered:

- Chapter 6 discusses directions about the limited use of evidence.
- Chapter 7 discusses directions in sexual offence cases and in relation to unreliable witnesses.
- Chapter 8 discusses a number of other directions such as those on the standard of proof and in relation to some particular defences.

1.45 Where relevant, each of chapters 2 to 8 of the Paper discuss the various submissions received in response to the Commission's Issues Paper as well as submissions made in response to the Consultation Paper published by the VLRC in September 2008.[36] Those chapters also set out a number of proposals or options for reform on which the Commission seeks further submissions.

1.46 Finally, chapter 9 briefly outlines the current status of the research project being conducted by the University of Queensland as part of the Commission's inquiry.[37]

1.47 There are two Appendices to this Paper:

- Appendix A sets out the Terms of Reference for this review; and
- Appendix B lists the people and organisations who responded to the Issues Paper.

Further submissions and consultations

1.48 The Commission invites further submissions in relation to this enquiry. Although the Commission encourages any submission to respond to the various specific proposals or options for reform set out in this Paper, that is by no means essential, and the Commission welcomes all contributions from members of the public, interested professional bodies and other stakeholders.

1.49 Submissions may be in any format and may respond to some, or all, of the issues raised in this Paper or the Issues Paper, or any other issue relevant to the Terms of Reference that might not have been covered in either Paper.

1.50 Details on how to make a submission are set out at the front of this Paper.

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36 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008).

37 See [1.17]–[1.19] above.

1.51 The closing date for submissions in response to this Paper is **31 October 2009**.

1.52 All submissions will be taken into consideration when the Commission formulates its final recommendations. At the end of this enquiry, the Commission will publish its recommendations in its final Report, which will be delivered to the Attorney-General for tabling in Parliament.

1.53 In addition, the Commission will be seeking to hold consultations as widely as possible in the timeframe open to it, and invites all interested people and organisations to contact it to discuss the issues that concern them or to arrange a face-to-face consultation.

1.54 At all times during its consultations, and in relation to all submissions received by it, the Commission will be mindful of, and comply with, all restrictions on the publication of jury information. All submissions received by the Commission will be dealt with in accordance with the Commission's confidentiality and privacy policy set out at the beginning of this Paper.

1.55 The Commission is to provide its Report to the Attorney-General by 31 December 2009.

Chapter 2

A Strategy for Reforming Jury Directions

INTRODUCTION

2.1 This chapter focuses on three key elements of the Commission's overall reform strategy that underpin its more specific reform proposals in later chapters of this Paper:

- The fundamental objective of jury directions, and many other aspects of criminal trial procedure, is to ensure that the defendant receives a fair trial. The concept of a fair trial, and what it means in practice, need to be considered as critical elements of any review of jury directions.

- The possibility of a codification of the disparate law and practice in the area of jury directions has been a contentious topic in Australia, due largely to the recommendations of the Victorian Law Reform Commission ('VLRC') that a jury directions statute be introduced in that State, in effect to codify the relevant common law and existing statutory provisions.38 Although this Commission proposes certain specific statutory reforms in Queensland, it is satisfied that a codification of the nature proposed in Victoria is not warranted in this State.

- Some of the specific reform proposals set out in later chapters of this Paper are based on, and rely on the continued use of, the Queensland Benchbook. Its role is considered in general terms in this chapter, and particular portions of it are considered in greater detail later in this

38 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009).

Paper. One of the Commission's bases of reform in this area is to apply what already works well in Queensland, and to seek to improve on it and use it as the foundation for more directed reform in particular areas.

THE OBLIGATION TO ENSURE A FAIR TRIAL

2.2 One recurrent theme in any discussion of the criminal justice system is the need to ensure, so far as practicable, that the defendant receives a fair trial.[39] Statements of the obligation to provide a fair trial can be found in international conventions to which Australia is a party, throughout the common law and in relevant statutes. One example is the statement of the High Court in *RPS v R*:

> The fundamental task of a trial judge is, of course, to ensure a fair trial of the accused.[40]

2.3 It has also been argued that a constitutional basis for the right to a fair trial can be found in Chapter III of the Australian *Constitution*, at least in relation to trials for offences against the laws of the Commonwealth.[41]

2.4 Ensuring that the defendant receives a fair trial may be seen as the ultimate obligation of a trial judge in presiding over a trial, whether or not the judge is the trier of fact, and as the primary objective of all jury directions and warnings. The trial judge's obligation in this regard can be seen in statute and in the common law as an over-riding duty that can negate the operation of a more specific duty and is ultimately the standard against which the exercise of procedural discretions may be measured. However, the status of any such over-riding duty is unclear. For example, it is not yet certain to what extent sections 24(1) and 32(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) might prevail over any attempt to codify the law of jury directions and warnings in Victoria.[42] If a duty to ensure a fair trial, whether under statute or at common law, will prevail over any other statement of a trial judge's obligations to instruct a jury, it may be futile to seek to codify the law in this area.

2.5 One statement of the characteristics of a criminal justice system that seeks to ensure a fair trial for defendants is found in Article 14 of the International Covenant on Civil and Political Rights, to which Australia is a party:[43]

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39 See, for example, Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [4.54]–[4.107].

40 (2000) 199 CLR 620, 637; [2000] HCA 3 [41] (Gaudron ACJ, Gummow, Kirby and Hayne JJ).

41 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [4.74]–[4.77].

42 See Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [4.54]–[4.78]. See also [2.16] below in relation to section 24(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). Section 32(1) of that Act reads:

> **32. Interpretation**
>
> (1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

43 See n 52 below.

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

   (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

   (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

   (c) to be tried without undue delay;

   (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

   (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

   (f) to have the free assistance of an interpreter if he cannot understand or speak the language used in court;

   (g) not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

> 7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

2.6 Not surprisingly, jury directions and other matters of procedural detail are not covered in an instrument of broad application such as this Covenant. It has also been accepted that no single approach to ensuring a fair trial denies the fairness of different systems with the same overall objective.[44]

2.7 The characteristics of a fair trial include matters that go far beyond the scope of this review. Moreover, it is probably impossible to define what constitutes a fair trial, and probably futile to seek to do so, in any comprehensive fashion, even in the limited context of jury directions. The High Court has declined to do so, albeit in a different context:

> *Right to a fair trial*
>
> 7. The right of an accused to receive a fair trial according to law is a fundamental element of our criminal justice system.[45] As Deane J correctly pointed out in *Jago v. District Court (NSW)*,[46] the accused's right to a fair trial is more accurately expressed in negative terms as a right not to be tried unfairly or as an immunity against conviction otherwise than after a fair trial, for no person can enforce a right to be tried by the State; however, it is convenient, and not unduly misleading, to refer to an accused's positive right to a fair trial. The right is manifested in rules of law and of practice designed to regulate the course of the trial.[47] However, the inherent jurisdiction of courts extends to a power to stay proceedings in order 'to prevent an abuse of process or the prosecution of a criminal proceeding ... which will result in a trial which is unfair'.[48]
>
> 8. There has been no judicial attempt to list exhaustively the attributes of a fair trial. That is because, in the ordinary course of the criminal appellate process, an appellate court is generally called upon to determine, as here, whether something that was done or said in the course of the trial, or less usually before trial,[49] resulted in the accused being deprived of a fair trial and led to a miscarriage of justice. However, various international instruments and express declarations of rights in other countries have attempted to define, albeit broadly, some of the attributes of a fair trial. Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms … enshrines such basic minimum rights of an accused as the right to have adequate time and facilities for the preparation of his or her defence[50] and the right to the free assistance of an

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44 See *New Zealand v Moloney* [2006] FCAFC 143; Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [4.86], discussing criminal trial processes in New Zealand, where a Longman direction is not given.

45 *Jago v. District Court (NSW)* [1989] HCA 46; (1989) 168 CLR 23, per Mason CJ at p 29; Deane J at p 56; Toohey J at p 72; Gaudron J at p 75).

46 Ibid, at pp 56–57.

47 *Bunning v. Cross* [1978] HCA 22; (1978) 141 CLR 54; *Reg. v. Sang* [1979] UKHL 3; (1980) AC 402, both referred to in *Jago* (1989) 168 CLR, at p 29.

48 *Barton v. The Queen* [1980] HCA 48; (1980) 147 CLR 75, at pp 95–96; *Williams v. Spautz* [1992] HCA 34; (1992) 66 ALJR 585; 107 ALR 635.

49 *Reg. v. Glennon* [1992] HCA 16; (1992) 173 CLR 592.

50 Art 6(3)(b).

> interpreter when required.[51] Article 14 of the International Covenant on Civil and Political Rights ('the ICCPR'), to which instrument Australia is a party,[52] contains similar minimum rights, as does s.11 of the Canadian Charter of Rights and Freedoms.[53] Similar rights have been discerned in the 'due process' clauses of the Fifth and Fourteenth Amendments to the United States Constitution.[54] (notes as in original)

2.8 The reference by Mason CJ and McHugh J to the inherent power of the courts to prevent an unfair trial in paragraph [7] of *Dietrich v The Queen* cited above suggests that this is a paramount obligation that will prevail in the event of any conflict over other, more specific rules of procedure.

2.9 In the same case, Brennan J noted that fairness is measured against legal rules rather than broader, community standards of fairness, in which case it may be said that a fair trial is one that is procedurally fair:

> 15. The procedure of the criminal courts is designed to produce as fair a trial as practicable in the circumstances of each case. … But the rhetoric that a trial must be fair before a conviction can properly be recorded is true only to the extent that unfairness leads to a miscarriage of justice. The legal question then is not whether a trial has been unfair according to community values but whether it is unfair in the sense that it has not taken place according to law.[55]

2.10 Stephen Odgers SC may have had observations such as these in mind when making the following comments in his submission in response to the VLRC's Consultation Paper:

> The Consultation Paper gives a great deal of importance to the concept of a 'fair trial'. For example, it is contended that some directions need only be given if necessary to ensure a fair trial. Appellate courts are to be directed to focus on the question of whether there was a fair trial. However, the content of this concept is hardly self-evident. The courts have given content to the concept over the years but have resisted any comprehensive definition. A variety of considerations inform the concept, including the adversarial paradigm, 'accusatorial' limitations on that paradigm, and a concern to minimize the risk of conviction of innocent persons. It is a useful concept in some contexts (for example, in deciding whether an error at trial was so fundamental that an appeal should be allowed even if there was no real danger that an innocent person was wrongly convicted).[56]

2.11 An allied, but no less important, concept is the requirement that a fair trial be seen to take place. On appeal, it might be necessary to quash a conviction and order a re-trial where there has been such a pronounced shortcoming in the proce-

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51 Art 6(3)(e).

52 Australia signed the ICCPR on 18 December 1972 and ratified it on 13 August 1980.

53 Pt 1 of the *Constitution Act 1982*, enacted by the *Canada Act 1982* (UK).

54 *Dietrich v The Queen* (1992) 177 CLR 292, 299–300, [1992] HCA 57 [7]–[8] (Mason CJ, McHugh J).

55 *Dietrich v The Queen* (1992) 177 CLR 292, 325, [1992] HCA 57 [15] (Brennan J). A statement such as that by Brennan J that describes a fair trial as one that is as fair 'as practicable in the circumstances of each case' acknowledges that a fair trial is not necessarily a perfect trial: see [2.12] below.

56 Stephen Odgers SC, Submission to the Victorian Law Reform Commission, 12 November 2008, 2–3

dure of the trial that its outcome must be set aside irrespective of the actual risk that a miscarriage of justice has occurred.

2.12 By the same token, some minor procedural errors will not result in any real apprehension of a miscarriage of justice or the denial to the defendant of any real prospect of acquittal. A fair trial does not have to be a perfect trial:

> A fair trial according to law does not mean a perfect trial, free from possible detriment or disadvantage of any kind or degree to the accused … It may result from the laws of evidence and be, for example, the danger that, despite an impeccable charge on the limited use to be made of certain evidence for the prosecution, the jury will make a further and impermissible use of it; the law treats the judge's warning as meeting the danger, but can one be certain that no juror has ever failed to heed the warning?[57]

2.13 In making that statement, Brooking J in the Appeal Division of the Supreme Court of Victoria relied on the following passage of Brennan J in *Jago v District Court (NSW)*:

> 27. By the flexible use of the power to control procedure and by the giving of forthright directions to a jury, a judge can eliminate or virtually eliminate unfairness. The judge's responsibilities are heavy but they are not discharged by abdication of the court's duty to try the case. If it be said that judicial measures cannot always secure perfect justice to an accused, we should ask whether the ideal of perfect justice has not sounded in rhetoric rather than in law and whether the legal right of an accused, truly stated, is a right to a trial as fair as the courts can make it. Were it otherwise, trials would be prevented and convictions would be set aside when circumstances outside judicial control impair absolute fairness.[58]

2.14 Later in the same case, Brennan J described the objective of 'perfect justice' as an 'unattainable end',[59] and Mason CJ noted that in 'the safeguarding of the interest of the accused … the touchstone in every case is fairness.'[60]

2.15 As minor procedural imperfections may not result in any real risk of a miscarriage of justice, criminal procedure statutes often contain provisos that allow an appellate court to dismiss an appeal against conviction even though satisfied that there was some, though minor, error in the conduct of the trial. In Queensland, such a proviso is found in section 668E(1A) of the Criminal Code (Qld):

> (1) The Court on any such appeal against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or can not be supported having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any

57 *Jarvie v Magistrates' Court of Victoria* [1995] 1 VR 84, 91–92 (Brooking J). Brooking J's remarks about the improper use by jurors of evidence admitted for limited purposes only echoes concerns discussed in chapter 6 of this Paper.

58 *Jago v District Court (NSW)* (1989) 168 CLR 23, 49; [1989] HCA 46 [27] (Brennan J). Brooking J also cited Brennan J in *R v Glennon* (1992) 173 CLR 592, 614–7 and in *Dietrich v The Queen* (1992) 177 CLR 292, 325.

59 *Jago v District Court (NSW)* (1989) 168 CLR 23, 54; [1989] HCA 46 [34] (Brennan J).

60 *Jago v District Court (NSW)* (1989) 168 CLR 23, 33; [1989] HCA 46 [19] (Mason CJ). See also *Wagner* (1993) 66 A Crim R 583, 595 (Mulligan J, Court of Criminal Appeal, South Australia).

> ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal.
>
> (1A) However, the Court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

2.16 In Victoria, the *Charter of Human Rights and Responsibilities Act 2006* (Vic) emphasises the public nature of a fair trial:

> **24 Fair hearing**
>
> (1) A person charged with a criminal offence or a party to a civil proceeding 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.

2.17 One fundamental aspect of a fair criminal trial is procedural flexibility to allow the trial to be conducted in a way that best preserves the interests of justice, tailored to meet the circumstances of each trial. This was a major concern of some respondents to both this Commission and the VLRC, and is a primary aspect of a number of this Commission's specific reform proposals. Flexibility was also incorporated by the VLRC into the general principles that it recommended should guide the content of all jury directions.[61]

Submissions

2.18 A number of submissions in response to both this Commission's Issues Paper and the VLRC's Consultation Paper emphasised the need for the substantive law and practice to remain flexible 'to meet the needs of each individual case, always maintaining an accused person's right to a fair trial according to law.'[62]

2.19 In the words of one respondent to the VLRC's Consultation Paper:

> The starting point must be … to ensure that [the defendant] gets a fair trial.[63]

2.20 The Criminal Bar Association of Victoria and one of its members, Benjamin Lindner, stressed that the desire for simplicity was subject to the higher duty of ensuring a fair trial:

> Generally, the shorter and more concise a direction of law, the better. It is accepted that such a direction is more likely to be easier to devise and more likely to be well understood by a jury. It is a worthwhile goal in all discussions about jury directions. But brevity should not usurp fairness to an accused; any difficulty in crafting a direction should not be solved by tipping the scales of justice, or simply relegating the task to a too hard basket.
>
> …

61 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009), Recommendation 11, [4.38].

62 The Hon Justice M McMurdo, Submission 8; See also South West Brisbane Community Legal Centre, Submission 11.

63 Associate Professor John Willis, Submission to the Victorian Law Reform Commission, 16 December 2008, 5.

> Simplicity, conciseness, brevity and comprehensibility are all laudable goals in devising directions. But all these goals must be secondary to that of ensuring a fair trial. Once that principle is diluted or compromised, the risks of an unfair trial increase. … Any changes to directions aimed to simplify them are supported — but not at the expense of fairness.
>
> …
>
> … the notion of 'fairness' that underpins so much of the directions required should not be diluted as the challenges of the law become more complex. On the contrary, it should be guarded even more vigilantly.[64]

VLRC's recommendations

2.21 In the context of a proposed comprehensive statutory scheme intended in due course to oust the common law concerning jury directions, the VLRC still gave primacy to the trial judge's duty to ensure a fair trial in Recommendations 8 to 10 (and elsewhere throughout its recommendations) in its recent Final Report on jury directions:

> 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.[65]

64 Benjamin Lindner (Criminal Bar Association), Submission to Victorian Law Reform Commission, 30 November 2008. See also Criminal Bar Association of Victoria, Submission to the Victorian Law Reform Commission, 15 December 2008, 19–21, 25–26.

NO CODIFICATION

2.22 As is apparent from the discussion in the Commission's Issues Paper, a number of difficulties with the current system of jury directions have been identified.[66] One of the questions raised for consideration in the Issues Paper was the extent to which any such difficulties should be addressed by codification.[67]

2.23 This issue is dealt with separately and before a consideration of other matters in this Paper because of the particular attention it received in a number of the submissions made in response to both this Commission's Issues Paper and the VLRC's Consultation Paper, almost to the exclusion of any consideration of the numerous particular problems discussed in the Issues Paper.

VLRC's key proposals

2.24 The prospect of reform of jury directions by way of comprehensive statutory intervention, and whether this should involve codification of this area of the law, was a key aspect of the VLRC's Consultation Paper.[68] The VLRC's major proposals were as follows:

- Proposal 1: All of the circumstances in which the trial judge is required or required not to direct the jury should be set out in legislation.[69]
- Proposal 2: The content of some of the directions that the trial judge is required to give to the jury should be set out in legislation.[70] (The VLRC did not suggest that all of the directions that a trial judge would, or might, be required to give should be set out in a standardised form: this was suggested for a small number of directions only. The methods by which this might be achieved included model directions, outlines of directions, and simplified generic or 'all-purpose' directions.[71])

65 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) 13, [4.36]–[4.38]. The VLRC recommended one significant qualification to what would otherwise be a range of decisions entirely within the judge's discretion: a request by the defendant for a discretionary direction would oblige the judge to give that direction in the absence of good reason not to. Recommendation 7 reads: '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.'

66 See Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) ch 6, 7, 8.

67 In this chapter, the Commission uses the term 'codification' to cover comprehensive statutory intervention such as that recommended by the VLRC even if any such regime would not necessarily amount to codification strictly speaking.

68 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008); see especially [7.10]–[7.53]. The VLRC's proposals for statutory intervention were discussed in Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [8.37]–[8.48].

69 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [7.10].

70 Ibid [7.23].

71 Ibid [7.24]–[7.27].

- Proposal 3: The principles concerning the trial judge's obligation to direct the jury about the real issues in a case should be included in legislation.[72]

2.25 The VLRC's suggestion of codification generated very mixed and strongly worded responses to the VLRC, which are outlined below.

QLRC's Issues Paper

2.26 In chapter 8 of the Issues Paper, this Commission discussed the VLRC's proposals and asked whether it was necessary or desirable to consider codification in Queensland in the area of jury directions, whether in the form of the scheme suggested by the VLRC in its Consultation Paper or in some other form.[73] The Commission sought submissions on the following questions:

> 8-6 Is it necessary or desirable to find mechanisms to preserve or reinforce the trial judge's discretion in relation to jury directions?
>
> 8-7 If so, what form might those mechanisms take?
>
> 8-8 Would it be necessary or desirable to do so by way of statute?
>
> 8-9 Would the statutory changes proposed by the Victorian Law Reform Commission, or some similar scheme, be necessary or desirable in Queensland?[74]

Submissions

2.27 A number of the submissions made to the Commission's Issues Paper specifically endorsed or adopted submissions made to the VLRC's Consultation Paper. As a consequence, the summary of submissions that follows includes discussion of submissions made to the VLRC where relevant. As noted in chapter 1 of this Paper, the Victorian submissions must be read cautiously given that the position in Victoria differs substantially from that in Queensland in some respects.[75]

Submissions against statutory intervention

2.28 All of the submissions on this question made in response to the Commission's Issues Paper opposed statutory intervention in Queensland of the kind proposed in the VLRC's Consultation Paper. As the VLRC noted in its Final Report, the main objection to the proposed statute was the apprehension of a lack of flexibility.[76]

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72 Ibid [7.45].

73 Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [8.37]–[8.53], and Issues for Consideration 8-6 to 8-9.

74 Ibid 105, 170, 174.

75 See [1.36]–[1.39] above.

76 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [4.18].

2.29 The Queensland Law Society and the Bar Association of Queensland made a joint submission to the Commission's Issues Paper.[77] The thrust of their submission was to argue against the introduction of any statutory scheme in Queensland, irrespective of what might happen in Victoria:

> In particular we wish to respond to a proposal that directions given to juries in criminal trials should be reformulated and enshrined in legislation. Such a proposal has been put forward by the Victorian Law Reform Commission in the paper entitled 'Jury Directions — A Closer Look'.[78] In that paper the central reform proposal was that the law governing the directions and warnings that a trial judge has to give to a jury in a criminal trial should be codified in one piece of legislation. This is a radical proposal, and one which we consider to be dangerous and unnecessary.[79] (note added)

2.30 In any event, in their view, the common law's ability to develop in response to legal problems provided their preferred avenue of reform:

> It is accepted that it is an onerous task for a trial judge to discharge his or her duty in adequately summing up a criminal case to a jury. The types of directions and warnings that are given to juries in Queensland are discussed in Chapter 3 of the QLRC Working Paper No. 66. A large body of case law has been developed in Australia concerning a judge's summing up to a jury, in particular specific directions and warnings in specific cases. This will no doubt continue to be the case, as new types of offences are created by State and Commonwealth legislatures, and statutory changes are made to the rules of evidence and procedure. It is difficult to see how a piece of legislation or a code can keep up with these changes to the law. One of the great advantages of the common law system we inherited from England was that it was quickly able to respond to legal problems and to develop the law accordingly. That is not to deny of course that there have been numerous instances where legislative intervention has been required to remedy injustices that could not be adequately dealt with by the courts.
>
> …
>
> It is the experience of the Bar Association and the Law Society that judges in Queensland diligently endeavour to discharge their functions in adequately summing up the case to a jury, by providing all appropriate directions. If there is a failure to give an appropriate direction, or there is a misdirection, there is adequate appellate review by the Court of Appeal, and in some cases, the High Court of Australia. In this regard we consider the current system works particularly well, and there is simply no need to change a system that is working well.
>
> However, this is not to say that the current way in which juries are instructed by trial judges cannot be improved. In particular, an examination of whether juries are receiving the best possible assistance from the trial judge concerning the law and how it applies to a particular set of facts should be undertaken. It is understood that some research has been done on this in other States, and

77 This joint submission was endorsed by Legal Aid Queensland, who commented that 'codifying jury directions into one piece of legislation is neither necessary nor desirable': Submission 16, 1.

78 This background paper was published by the VLRC in December 2008 as a summary of its Consultation Paper: see Victorian Law Reform Commission, *Jury Directions — a closer look*, Background Paper (2009).

79 Queensland Law Society and Bar Association of Queensland, Submission 13, 1.

utilisation could be made of s.70(9) *Jury Act 1995* (Q) for research on this issue.[80]

2.31 The Queensland Law Society and the Bar Association of Queensland enumerated six bases of their objection to the introduction of any statutory scheme:

1. The legislation of jury directions will do nothing to limit developments in the courts of other directions that should be given in particular cases. It is noted in the Victorian proposal that it is stated that 'Apart from a small identified class of mandatory directions, all directions ought to be discretionary.' Mandatory directions would include standard procedural directions concerning the burden and standard of proof, and directions about the elements of the offences charged and any defences raised. It is also suggested that some evidentiary directions should also be mandatory, 'if the risks associated with that kind of evidence justify a ruling in every case'. It is difficult to see what this approach would achieve. There are already in existence in Queensland a number of mandatory directions that have to be given to a jury, including those as to the onus and standard of proof, the elements of the offence etc. Whether any further directions should be given clearly depends on the facts in any given case, and it is simply impossible for legislation to cover all the variable factual circumstances that come before the courts.

2. A critical question arises as to who is going to draft the directions that will become legislation. Who will determine which directions become mandatory under the statute? There will no doubt be differences of opinion between the legal profession, the Commonwealth and State DPP offices and the courts about which directions should be included in the legislation. What ability is there for a jury direction to be added later, other than by legislative amendment? Will the legislation supplement the existing case law or be a complete codification? It is respectfully submitted that the legislative process is a cumbersome way of dealing with the subject matter that has long been adequately supervised by the court system.

3. There is no compelling reason why Queensland needs to alter its current system. Whatever the situation may be in Victoria, misdirections by judges in Queensland or the failure to give directions do not seem to be a particular problem. These cases do occur from time to time, however they are more than adequately managed by the appellate courts.

4. Queensland has had the benefit for some years of the Supreme Court and District Court Bench Book. … It was prepared by a bench book committee … That committee revised directions that had previously been compiled, and kept up to date with High Court and Court of Appeal decisions in criminal law matters. Accordingly, the committee was able when necessary to meet quickly and revise the existing directions if some error was found with those, or the law on which they were based was changed. The advantage of this system was that such a committee can meet very quickly. The process required to amend a piece of legislation is necessarily more time consuming and cumbersome. While strict adherence to

80 Queensland Law Society and Bar Association of Queensland, Submission 13, 1–3. Research is, of course, being done in Queensland: see [1.17]–[1.19] above and chapter 9 of this Paper; see also Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [1.14]–[1.20]. Similarly, Legal Aid Queensland, which endorsed the joint submission of the Queensland Law Society and the Bar Association of Queensland, commented that: 'such reform is best left to the appellate courts to guide, in context': Submission 16, 3.

> the suggested directions in the Bench Book is not necessary, as the Court of Appeal has stated on a number of occasions, the Bench Book has been revealed to be a useful and beneficial development. It is the experience of both the Bar Association and the Law Society that the Bench Book has been a useful and worthwhile innovation. It is of course open for any member of the profession to make a suggested change to a direction, or to suggest a completely new direction, for consideration by the Bench Book committee.
>
> 5. Legislative enshrinement of mandatory directions may well lead to a large number of appeals about the terms in which a judge had addressed a jury, whether or not the judge was actually trying to follow, or to amend, the mandated directions. It is unlikely that directions less easy to amend, and prone to provoke appeals, would be any improvement on the present system.
>
> 6. Appeals regarding jury directions largely concern a misdirection, or a failure to give a particular direction. It is difficult to see how legislative enactment of directions is going to fix this. If the law currently requires a particular direction to be given in a particular case, and a judge fails to do so, then it is unlikely that legislation is going to make any difference.[81]

2.32 The Queensland Law Society and Bar Association of Queensland expressly adopted the comments made by Stephen Odgers SC of the New South Wales Bar in his submission to the VLRC, which, in their words, discussed 'with considerable persuasion the defects in the proposal to legislate jury directions.'[82]

2.33 Their joint submission also closely reflects the submission made by the Queensland Law Society in response to the VLRC's Consultation Paper,[83] in which it endorsed the submission made by the Law Council of Australia to the VLRC:[84]

> The Society wishes to strongly advocate against codification of the law of jury warnings and directions. Judicial warnings and directions are given in a bid to ensure an accused receives a fair trial. Miscarriages of justice will not be avoided by fixing the law in this regard.[85]

2.34 The position adopted in the joint submission was, in turn, endorsed by the Law Council of Australia in its submission in response to this Commission's Issues Paper:

> The Law Council agrees with the position adopted in the Joint Submission [of the Queensland Law Society and the Bar Association of Queensland] and is generally opposed to any proposal to codify jury directions into legislation.
>
> …

81 Queensland Law Society and Bar Association of Queensland, Submission 13, 2–3.

82 Queensland Law Society and Bar Association of Queensland, Submission 13. Odgers' submission is considered in detail at various places in this chapter and later in this Paper.

83 Queensland Law Society, Submission to the Victorian Law Reform Commission, 30 January 2009.

84 Law Council of Australia, Submission to the Victorian Law Reform Commission, 30 January 2009.

85 Queensland Law Society, Submission to the Victorian Law Reform Commission, 30 January 2009. In this comment, 'fixing' presumably means 'putting into a static form' rather than 'reforming'.

> Trial judges should be able to draw upon the warnings and directions that have been developed over time by the courts in response to particular cases. The consolidated content of these warnings and directions is in a constant state of flux because it is impossible to predict all the circumstances in which the need for a warning or direction emerges. For this reason, the Law Council submits that the legislature should not attempt to codify the law in respect of jury warnings and directions or attempt to reduce the law to one piece of legislation.
>
> The Law Council also shares the view expressed in the Joint Submission that consideration should be given to alternative mechanisms which may operate to improve consistency and clarity of jury directions and lead to an enhanced jury engagement. Such mechanisms include improved judicial education, improved training of prosecutors, higher levels of legal aid funding to ensure the quality of defence representation, and use of appropriate expertise to improve the effectiveness of jury directions.[86]

2.35 The position adopted in the joint submission was also endorsed by Legal Aid Queensland, who was specifically concerned about a rigidity in a codified scheme that would prevent adaptation of jury directions to fit the circumstances of individual cases:

> Formulaic directions could also create injustices, as we cannot see that it would be possible to cater, through legislation, for all of the factual situations and events that occur during trials. A 'one size fits all' approach might in fact lead to more appeals and expense, and ongoing need for amendment of the relevant directions, and problems relating to retrospectivity and other completed trials etc.[87]

2.36 A District Court judge responding to the Commission's Issues Paper was also opposed to the introduction of a mandatory regime for the reasons set out in [8.48] of the Issues Paper,[88] which reads:

> 8.48 There is a concern that section 32(1) [of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)] — or any principle that there is an overriding right to a fair trial that may, in appropriate circumstances, prevail over any other law in relation to trial procedure generally (and jury directions in particular) — might simply permit appellate courts to re-introduce a regime of detailed, lengthy and more or less mandatory directions irrespective of the purpose and provisions of this proposed Act.[89]

2.37 In other words, the existence of an over-arching right to a fair trial, for example, might simply mean that any attempt to oust the common law in this area and to replace it with a statutory scheme (whether or not a code) may simply leave it open to the courts to modify that scheme, and re-introduce the complexity that the scheme would seek to remove, by reference to that right, and so create exceptions,

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86 Law Council of Australia, Submission 14, 1–2.

87 Submission 16, 3.

88 Submission 6.

89 Section 32(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) reads:

> So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

imply general or over-riding rules of application or find fault or omissions in particular directions in particular cases, much as happens at present.[90]

2.38 The Brisbane Office of the Commonwealth Director of Public Prosecutions submitted that:

> It is essential that trial judges have a wide discretion in relation to jury directions.
>
> …
>
> It would not be desirable to preserve or reinforce a trial judge's discretion by statute. The current law allows the judge a wide discretion in relation to the conduct of the trial eg *R v Tichowitsch* [2007] Qd R 262 at paragraph [2].[91]
>
> …
>
> The statutory changes proposed [by the VLRC] or some similar scheme would not be necessary or desirable in the light of the wide discretion of a trial judge to control the conduct of the trial which already exists.[92] (note added)

2.39 Some submissions in response to the VLRC's Consultation Paper also opposed the introduction of a statutory scheme along the lines of that proposed by the VLRC, particularly if the trial judge were to continue to retain a wide discretion in relation to jury directions.

2.40 Judge MD Murphy of the County Court of Victoria expressed concern for the need to retain the flexibility of the common law:

> I am not a strong supporter of jury directions legislation. The danger with legislation is that it will create a whole new raft of appeals as it is interpreted. Further, the current system where there is effectively an iterative process between the trial courts and the Court of Appeal, leavened by learning from other jurisdictions, is such that there is a danger that should there be a comprehensive code of jury directions it will not be able to respond in a flexible manner as under the current system.
>
> …
>
> I regard the introduction of a code as possibly creating inflexibility. In my view, if such a code is implemented then there ought to be a mechanism for its continuous review and amendment. I fear that with the crowded legislative agenda there is a danger that a code will be unable to respond to any inadequacies identified. I would propose an alternative mechanism that allows for any codi-

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90 The concept of a 'fair trial' is discussed at [2.2]–[2.21] above.

91 That paragraph reads:

> One of the grounds of appeal was that the trial judge erred in providing the jury with a transcript of the evidence at trial. It was submitted that he had no power to do that. In my view that submission cannot be sustained. There is no legislative provision preventing a judge from giving the jury a transcript of evidence, ***and the trial judge is in control of procedure during the trial***. It must however be recognised that to date juries in Queensland have not usually been given copies of the transcript of evidence. (Williams JA) (emphasis added)

92 Brisbane Office of the Commonwealth Director of Public Prosecutions, Submission 9, 4, 6. See also the submissions made by the Brisbane Office of the Commonwealth Director of Public Prosecutions in relation to written directions and similar techniques discussed at [4.29] below.

> fied directions to be amended. One such mechanism could be that the directions be akin to Rules of Court such that the judges would be in a position to modify the appropriate directions, subject to legislative disallowance.[93]

2.41 The submission by Stephen Odgers SC, which was endorsed by the Queensland Law Society and the Bar Association of Queensland in their joint submission to this Commission's Issues Paper,[94] opposed the VLRC's Proposals 1, 2 and 3:[95]

> Proposal 1. I oppose this proposal. 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.
>
> …
>
> Proposal 2. I do not support legislative attempts to simplify the content of directions required to be given by trial judges. I accept that the courts have not proved particularly successful in crafting comprehensible directions. Having said that, I am skeptical that legislative formulations will prove satisfactory, given the variety of situations in which directions will be required. It would be better if more resources were directed to the highest levels of the courts to improve the comprehensibility of directions. Bench book standard directions should be formulated with the assistance of experts in communication and mock jury research. More should be done in that context to assist trial judges to adapt standard directions to particular cases.
>
> Proposal 3. I see no need to put the '*Alford v Magee*' principle in legislation. …
>
> Question (7.52).[96] The [Uniform Evidence Law] provisions should be left alone. They are a reasonable approach to a difficult area. They are far preferable to the proposals advanced in this Paper. On the other hand, I do not oppose a provision that allows a judge not to summarise evidence.[97] (note added)

2.42 The Criminal Bar Association of Victoria also opposed statutory reform:

> The Criminal Bar Association does not favour either of these proposals[98] on the basis 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

93 Judge MD Murphy, Submission to the Victorian Law Reform Commission, 5 February 2009, 2–3.

94 See [2.32] above.

95 These Proposals are set out in [2.24] above.

96 The question at [7.52] of the VLRC's Consultation Paper reads:

> How should consistency between new directions and warnings legislation and the Uniform Evidence Act be maintained?

97 Stephen Odgers SC, Submission to the Victorian Law Reform Commission, 12 November 2008, 7–8.

98 Ie, the introduction of a statute or a code: see Proposals 1 and 2 set out in [2.24] above.

> 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.
>
> In arguing that the ability of the appellate courts to interpret should not be disturbed, we are mindful that the Consultation Paper is critical of the approach of various appellate courts in their interpretation of jury directions and warnings, and the impact of what has been described as the development of 'the appellate Bar'. If there is force in those views, then it seems to this Association that the answer may lie in appellate courts speaking with a cohesive singular voice; producing judgements that stand for clear singular principles; and acting with firmness. Leadership in this area must surely begin 'from the top'. At the same time, educational processes can and should be put in place to better inform the judiciary and legal practitioners about the need to strive for leadership, focus, and clarity.[99] (note added)

2.43 This position was supported by the Law Council of Australia in its submission to the VLRC:

> 13. To a very large extent, the warnings and directions currently required of trial judges have been developed by the courts in response to particular cases. As the Criminal Bar Association of Victoria stated in their submission, '... it is not possible to provide...a "one-stop shop" for the giving of directions, and the content 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 case.' The law in this area is in a constant state of change because it is impossible to predict all the circumstances in which the need for a warning or direction emerges. For this reason, the legislature should not attempt to codify the law in respect of jury warnings and directions or attempt to reduce the law to one piece of legislation.[100] (note omitted)

2.44 Similarly, Bernard Lindner, a member of the Criminal Bar Association of Victoria, submitted to the VLRC that:

> While there can always be improvements made to a system of criminal justice, in my submission it is important not to replace a system of well articulated principles with a new regime (such as Jury Directions Legislation) which will be liable to create a new and lively jurisprudence — ie. to merely change the nature of appeals, and not to reduce their numbers or success ratio.
>
> …
>
> In my submission, the answer to perceived overcomplexity in jury directions does not lie in the introduction of new legislation, be it an Act or a Code. Rather, an increase in the role of the Judicial College, a specialisation of judicial roles

99 Criminal Bar Association of Victoria, Submission to the Victorian Law Reform Commission, 15 December 2008, 10–11.

100 Law Council of Australia, Submission to the Victorian Law Reform Commission, 30 January 2009, 4–5.

> (ie: judges specialising in criminal trials), an increase in the resources of the Supreme and County Courts, and an increase in the funding of both prosecuting and defence would better address the problems isolated by this Consultation Paper.[101]

Submissions in support of statutory intervention

2.45 None of the submissions made to this Commission expressed support for statutory intervention in Queensland. However, some submissions in response to the VLRC's Consultation Paper supported strong statutory intervention, even codification, in that State. For example, Patrick Tehan QC submitted that:

> I think the time has now come for some form of codification and simplification of directions in sexual offence trials. I think this will tend to lessen the burden on trial judges and will also assist in overcoming the complexity identified by the [VLRC] with having statutory and common law directions.[102]

2.46 This was echoed by a solicitor:

> All of the circumstances in which a trial judge is, or is not required to direct the jury should be set out in legislation. This legislation should ideally be in the form of a code (encompassing a complete statement of the law) setting out specific guidance in the form of model directions (expressed in plain English) as to the content of the warnings. These model directions whenever possible should be accompanied by explanations which tell the jury why they are being instructed to reason, or not to reason in a particular way.
>
> …
>
> The adoption of a code would have the effect of displacing all other law and ousting the existing common law and any statutory rules that currently apply. This would provide greater clarity and cohesion and no longer require judges to reconcile statutory provisions with common law rules.
>
> Ideally, judicial discretion should come in the form of the timing of directions and less so in the content of the directions (which would be expressly covered, so far as it is practical to do so by the code). The Trial Judge should be given greater flexibility in determining at what stage of a trial the warnings and directions should be given.[103]

2.47 The Law Reform Committee of the County Court of Victoria supported statutory intervention in the form of codification:

> A code in the form proposed, and the tests for giving discretionary direction are supported. A code provides more prospect of a fresh start than grafting yet another set of legislative changes onto the existing common law framework. If the High Court and Court of Appeal continue to develop the common law in relation to jury directions in the manner they have in recent years, there is an appreciable risk a non code approach will fail to achieve the aims of simplifying directions, reducing the length of charges and giving more discretion to trial

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101 Bernard Lindner (Criminal Bar Association), Submission to the Victorian Law Reform Commission, 30 November 2008.

102 Patrick Tehan QC, Submission to the Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) 26 November 2008 [3].

103 Maria Abertos, Submission to the Victorian Law Reform Commission, 29 November 2008 [8]–[9].

> judges in determining what evidentiary directions are necessary in a particular case. However, such provisions need to be clear, less complex than at present, and provide sufficient flexibility to adapt to changing circumstances. A code also reduces the risk the judge or trial counsel will overlook a direction which ought be given in the interests of a fair trial. The fair trial test, and presumption in favour of giving any discretionary direction sought by the defence are supported. So is the replacement of prescribed forms of words with guiding principles.[104]

2.48 The Law Reform Committee noted that such radical change would come at a cost, but a cost that should be met:

> Change of this magnitude requires a lead time for education and training for judges and practitioners, and allowance for greater time to prepare charges. Trials are themselves likely initially to take longer, and delays for jurors to increase. List judges and registry staff will have an added workload as additional case management directed to supporting early issue identification will be required. There will also be a need to monitor and evaluate the proposed reforms.
>
> None of this is a reason for resisting reform. If such reform is to promote fair trials, which are heard in a timely fashion, there is a clear need to prepare for such change rather than react to it. That means amongst other things, appointment of additional judges, court and registry staff. It also means allowing further time (and therefore funding for) for preparation of trials by judges, and counsel.[105]

2.49 The VLRC proposed that the introduction of a code would be accompanied by the establishment of a permanent supervisory body. This was also supported by the Law Reform Committee:

> **The [VLRC] proposes:**
> - The establishment of a body to review the operation of the code and the formulation of directions
>
> **…**
>
> **Response**
> A permanent body, comprising appellate and trial judges, practitioners, and academics to review the operation of the code is supported. Whilst the Court of Appeal fulfils a vital function in reviewing individual charges, it has limited opportunity power or capacity to inform itself about the overall operation of the code, or to recommend or bring about any further reform on anything but a case by case basis.[106]

2.50 However, the Victorian Office of Public Prosecutions ('OPP') did not regard any such oversight body as desirable or necessary: the 'Judicial College of Victoria is ideally placed to oversee any implementation and development.'[107]

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104 Law Reform Committee of the County Court of Victoria, Submission to the Victorian Law Reform Commission, 13 March 2009, 3–4.

105 Ibid 4.

106 Ibid 7.

107 Office of Public Prosecutions, Submission to the Victorian Law Reform Commission, 12 February 2009, 7.

2.51 The OPP did, however, support legislative reform of the process, but not the substance, of jury directions:

> The OPP can see the benefits to legislating the *process* of jury direction to provide guidance to judges however it is important to appreciate the difference between the *process* and *substance* of jury directions. Legislation that sets out basic guidelines as to when a direction ought to be given largely declaratory of the common law may be of assistance. 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.
>
> …
>
> 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.
>
> … A code could not deal with 'unforeseen cases' therefore the only fallback is the common law.[108] (emphasis in original)

2.52 Nor, in the OPP's opinion, should any new legislation specify the factors to be considered by a trial judge when deciding whether to exercise a discretionary power to give a jury directions.[109]

2.53 The OPP argued that, if some statutory reform were introduced, most directions should be discretionary: 'most directions are only required when the circumstances and an analysis of the evidence in a particular case call for such a direction.'[110] However:

> The OPP would not be opposed to making some directions mandatory, but these should be limited to directions that are common to all trials and do not require an analysis of the evidence in the particular case. For instance the onus and standard of proof and the use of inferences, the presumption of innocence and the role of judge and jury.
>
> …
>
> A general checklist would be the most suitable model.[111]

2.54 In a similar tone to the last of these comments from the OPP, Judge MD Murphy of the County Court of Victoria made this submission to the VLRC:

> Clearly, there is a strong pressure on trial judges in order to avoid successful appeals to give directions that might otherwise not be appropriate. It may be that the need for a code may be obviated by … legislative support for making most directions discretionary.[112]

108 Ibid 3–4.

109 Ibid 6.

110 Ibid.

111 Ibid 6, 13.

112 Judge MD Murphy, Submission to the Victorian Law Reform Commission, 5 February 2009, 3.

2.55 Associate Professor John Willis accepted that some statutory intervention was probably necessary, though stressed that this should not be prescriptive:

> 1. It is probably necessary to have some of these matters put into statute to overcome the effects of previous court decisions.
>
> 2. It is crucial to preserve judicial discretion in this area.
>
> (a) The performance of legislators in this and related areas had been of late, at best, unhelpful (see s. 36B, s 37, s 37AAA, s 37AA & s 61 *Crimes Act* [*1958* (Vic)]).
>
> (b) The innumerable circumstances that can arise in trial situations make prescription most undesirable.
>
> …
>
> Model directions should not be set out in legislation.
>
> This is a recipe for rigidity and inflexibility. There are already model directions which are used — on occasion not very well.
>
> The 'cut and paste' approach to jury directions is often not the best means of assisting a jury in a specific case.
>
> …
>
> To the extent that this will require legislation, it is likely to be a difficult, sensitive and possibly protracted exercise.[113]

2.56 In a somewhat more neutral tone, Victoria Legal Aid supported 'the consolidation of legislation to reform the currently fragmented system'. However, they did not support codification:

> If directions are legislated, it should not be a code which prescribes what directions can and cannot be given.[114]

2.57 The Criminal Bar Association of Victoria supported 'in broad terms' the proposal that some of the directions that a trial judge is required to give could be set out in legislation.

> The advantage of adopting this course would be that it retains the necessary degree of flexibility so that in accordance with paragraph 7.25,[115] the 'directions' should be drafted so that they are capable of being adapted to the needs to [*sic*] particular cases. In the interests of simplicity, the Criminal Bar Association would not object to legislation containing a shorter and simpler approved direc-

113 Associate Professor John Willis, Submission to the Victorian Law Reform Commission, 16 December 2008, 14–15.

114 Victoria Legal Aid, Submission to the Victorian Law Reform Commission, 9 December 2008.

115 Paragraph [7.25] of the VLRC's Consultation Paper reads:

> 7.25 Model directions or suggested forms of words, on the relevant areas of law could be included in the legislation. Those directions should be drafted so that they are capable of being adapted to the needs of particular cases. The model directions already completed by the Judicial College of Victoria (JCV) in their online Criminal Charge book provide a very useful starting point.

tions and schedule. Further, another advantage of some directions being so formulated, this allows for the flexibility of interpretations in the course of appellate intervention.

An advantage of adopting Option A — Model Directions — is that according to paragraph 7.27[116]a direction which has been approved by the Judicial College of Victoria is to be accepted as a legally correct direction until such time as the Court of Appeal declared that that direction was incorrect. A significant advantage of an approved model direction formulated by the Judicial College of Victoria is that it would be likely formulated by a broad range of judicial officers and consultative persons with the last say, rather than giving that responsibility to politicians.[117] (notes added)

VLRC's recommendations

2.58 The VLRC's Final Report on jury directions made the following recommendations concerning the enactment of a comprehensive statute covering jury directions and warnings, substantially in line with the proposals in its Consultation Paper. In its view, the law of jury directions has reached a state where only a legislative response can resolve the difficulties:[118]

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. …

2. The common law has not yet developed any clear framework for the law of jury directions. …

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. …

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 diffi-

116 Paragraph [7.27] of the VLRC's Consultation Paper reads:

7.27 Alternatively, the legislation could provide that unless the Court of Appeal determines otherwise, a direction approved by the JCV is a legally correct direction and that substantial conformity with the terms of such a direction shall be regarded as meeting the legal requirements for a direction on that topic. If the Court of Appeal declared that a JCV direction was incorrect, the Court could be required to formulate the correct direction.

117 Criminal Bar Association of Victoria, Submission to the Victorian Law Reform Commission, 15 December 2008, 12–13.

118 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [4.7]–[4.9].

> cult for judges to identify and apply the legal rules that emerge from a body of entwined legislation and case law.[119]
>
> 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 unable[120] to reconsider the basic approach to particular problems and the High Court cannot develop common law rules until an appropriate case arises.[121] At times individual High Court justices have sought to refine particular common law rules, often adding further complexity in the process.[122] (notes in original)

2.59 The VLRC drew a parallel between the rationalisation of the law of evidence in the Uniform Evidence Law and its recommended jury directions statute.[123] The VLRC also noted that piecemeal statutory intervention may only complicate the law.[124] However, the advantages of comprehensive legislative intervention are greater, in the VLRC's view:[125]

> 4.13. … 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. …
>
> 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.
>
> 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:

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119 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 [of the VLRC's Final Report].

120 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*.'

121 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] HCA 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.'

122 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].

123 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [4.11]–[4.13].

124 Ibid [4.8], [4.16].

125 Ibid [4.13]–[4.15].

> 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.[126] (note in original)

2.60 The VLRC's key recommendations are:

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.[127]

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.

…

12. The legislation should ultimately govern the content of all directions of a procedural nature such as:

    - burden and standard of proof

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126 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%20-Development/programs%20by%20year/2007/Communic%20and%20the%20courts%20NOV/papers/Virginia%20Bell%20transcript.pdf> at 29 April 2009.

127 This issue is discussed in more detail in chapters 6 and 7 of this Paper: see [6.118]–[6.126], [7.50]–[7.52] and [7.64] below.

- 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 (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.[128] (note added)

2.61 One interesting refinement in this recommendation over the VLRC's earlier proposals is the recommendation that the statute will progressively supplant the common law to provide a transitional period, and perhaps quite a long one, while the more complex aspects of the legislation are prepared and enacted.

QLRC's provisional views

2.62 A number of the submissions extracted in this chapter seem to be premised on the basis that the VLRC was suggesting that the content of all or many (rather than just a few) of the directions and warnings to be given to juries should be set out in detail in new legislation. The Commission does not understand the VLRC's

128 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009), 13–14, [4.22]–[4.48].

proposals to be as sweeping as intimated by some of the responses to them, and the VLRC confirmed as much in its Final Report.[129]

2.63 Moreover, it is difficult to adopt wholeheartedly the enthusiasm for the common law and its asserted ability to correct itself, as espoused by the Queensland Law Society and Bar Association of Queensland[130] and Judge Murphy,[131] for example. Many of the present difficulties in relation to jury directions (as noted by many commentators and researchers)[132] are founded on the lack of clarity in the common law enunciated by appellate courts, and on the fortuity of 'corrections' to the common law, which rely on the right case coming before a court of sufficient seniority, which may often be determined by the parties and witnesses, and their will and ability to persist. It might well be seen that the current problems are created in part by the inability of the common law to respond quickly and systematically.[133]

2.64 Nonetheless, on balance the Commission is not convinced that this is an area of law in which comprehensive and detailed legislation and regulations are likely to prove beneficial in the long run in Queensland. The Commission is satisfied that the problems surrounding the content and delivery of jury directions and warnings are significant enough to warrant active steps to reform them but that this should be done through a series of other approaches outlined later in this Paper rather than by codification.

2.65 The Commission is satisfied that the final decision as to which directions should be given in any particular case, and the precise formulation of them, should (indeed, must) remain with the trial judge. That task will be made easier in many instances by discussion with the parties, and in other instances by reliance on more or less standardised wordings found in the Queensland Benchbook as updated from time to time. The Commission is also satisfied that the content, timing and need for particular jury directions and warnings will (indeed, must) change to meet changes in the law, changes in criminal trial procedure and developments in the understanding of how juries handle judicial statements and other information presented to them (including the evidence).[134]

2.66 However, an acceptance of this fundamental responsibility on the part of the trial judge should not blind commentators to the fact that jurors have considerable difficulty in handling directions on the law, and complex warnings about the artificial ways in which they may have to deal with certain problematic evidence. Accepting that judges, advocates and jurors all need assistance in this regard, the Commission does not feel that Parliament is best placed to provide that guidance in the form of a code.

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129 Ibid [4.17].

130 See [2.30] above.

131 See [2.40] above.

132 Odgers' submission in response to Proposal 2 of the VLRC, for example, appears to acknowledge the role of appellate courts in complicating jury directions: see [2.41] above.

133 See [2.41] above. See also the comments of the Criminal Bar Association of Victoria in [2.42] above; the comments of the Law Reform Committee of the County Court of Victoria in [2.47] above.

134 These issues are considered in greater detail in chapters 3 and 4 of this Paper.

2.67 The Commission is also concerned that significant statutory intervention in this area might lead to a rigidity that should be avoided.

2.68 In the Commission's view, a code or other statute dealing with jury directions and warnings will not solve the problems associated with complex provisions in the substantive criminal law, such the provisions in the Criminal Code (Qld) relating to the identification of parties to an offence, self-defence and provocation.[135]

2.69 A code or other statute cannot deal with other key areas of reform such as the use of integrated directions, written aids and other matters of detailed procedural innovation. The Commission's proposals set out in later chapters of this Paper suggest some specific reforms, only some of which would result in statutory intervention, which seek to confront the problems, both legal and psychological, in the ways in which juries receive and process judicial directions and warnings.

2.70 Moreover, the Commission is not convinced that the position in Queensland, whatever the position may be elsewhere, is so bad that the current law needs to be swept out and started afresh. The present circumstances in Queensland suggest to this Commission that a series of specific reforms is preferable, directed at amendments to the statutes and rules governing criminal trial procedure. In coming to that provisional conclusion, the Commission is aware that attempts at reform through non-legislative means may be much harder to implement, whatever the view of Parliament, as they rely much more heavily on a co-operative approach on the part of the various institutions and bodies involved.

2-1 There is no demonstrated need in Queensland for a single, comprehensive statutory scheme covering the content of jury directions and warnings or the circumstances in which they must or ought to be given.

THE QUEENSLAND BENCHBOOK

2.71 The content and purpose of the *Supreme and District Court Benchbook* was considered in detail in chapter 4 of this Commission's Issues Paper.[136] The Benchbook, which contains some 188 model or suggested directions, is prepared and regularly updated by a committee of Supreme and District Court Judges in Queensland and published on the Courts' website.[137] Its purpose and function is explained in the Foreword:

> The Benchbook is intended to provide guidance, not to establish any inflexible or mandatory regime. It should assist the Judge to devise at trial a summing up appropriate to the particular case, while reminding of the necessary framework and matters which must be covered. Referring to the Benchbook should not

135 Criminal Code (Qld) ss 7, 8, 271, 272 and 304, discussed in chapter 8 of this Paper.

136 Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009), especially at [4.11]–[4.23], and throughout chapter 4 and later chapters of that Paper.

137 Queensland Courts, *Supreme and District Court Benchbook* <http://www.courts.qld.gov.au/2265.htm>.

> only lessen the prospect of error, but also streamline summings up, better informing juries and generally promoting the interests of justice.[138]

2.72 Judges adapt each relevant model direction to suit the facts and circumstances of the case before them. The model directions typically indicate places where the trial judge can insert, for example, a summary of the relevant evidence or other details that will relate the outline of law contained in the model direction to the evidence before the jury.

2.73 While the Benchbook is not intended to create an 'inflexible or mandatory regime',[139] in some areas judges are actively discouraged from straying from it.[140] There have been a number of cases where a divergence from the Benchbook has resulted in a successful appeal by the defendant.[141]

Submissions

2.74 Some of the respondents to the Commission's Issues Paper commented on the Queensland Benchbook.

2.75 In opposing codification, the joint submission from the Queensland Law Society and the Bar Association of Queensland commented on the advantages of the Queensland Benchbook:

> Queensland has had the benefit for some years of the Supreme Court and District Court Bench Book. … It was prepared by a bench book committee that was chaired by Jerrard JA, Philippides J, Shanahan DCJ and Dick DCJ. That committee revised directions that had previously been compiled, and kept up to date with High Court and Court of Appeal decisions in criminal law matters. Accordingly, the committee was able when necessary to meet quickly and revise the existing directions if some error was found with those, or the law on which they were based was changed. The advantage of this system was that such a committee can meet very quickly. The process required to amend a piece of legislation is necessarily more time consuming and cumbersome. While strict adherence to the suggested directions in the Bench Book is not necessary, as the Court of Appeal has stated on a number of occasions, the Bench Book has been revealed to be a useful and beneficial development. It is the experience of both the Bar Association and the Law Society that the Bench Book has been a useful and worthwhile innovation. It is of course open for any member of the profession to make a suggested change to a direction, or to suggest a completely new direction, for consideration by the Bench Book committee.[142]

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138 Queensland Courts, *Supreme and District Court Benchbook*, 'Foreword' [2] <http://www.courts.qld.gov.au/2265.htm> at 1 September 2009.

139 Ibid.

140 See, for example, *R v De Silva* (2007) 176 A Crim R 238 [21] (Jerrard JA); *R v Mason* [2006] QCA 125 [27] (McMurdo P); *R v Armstrong* [2006] QCA 158 [34] (McMurdo P); and *R v Stuart* [2005] QCA 138 [20].

141 See, for example, *R v RH* [2005] 1 Qd R 180 [24] (Jerrard JA); *R v CU* [2004] QCA 363, 8 (de Jersey CJ).

142 Queensland Law Society and Bar Association of Queensland, Submission 13, 19 June 2009, 2. This submission was specifically endorsed by Legal Aid Queensland: Submission 16, 3.

2.76 One judge felt that the directions in the Benchbook are not in plain English, but that trial judges 'have little choice if they do not wish to create appellable points'.[143]

2.77 The South West Brisbane Community Legal Centre suggested that, given the risk of trial judges' creating unnecessary appeal points by diverging from the Benchbook, 'desirable simplification may be best achieved by a more frequent review of the Benchbook itself.'[144]

2.78 The Commission is aware that the Benchbook is reviewed continually and formally updated from time to time to reflect changes in the law. The online version of the Benchbook includes lists of recent revisions.[145]

2.79 The Commission also notes that, of course, the authors of the Benchbook are themselves bound by the law that governs the content and use of directions no less than any other judge, though they do have the power in some cases to streamline the wording adopted as a 'standard' when the law and drafting techniques permit.

2.80 Another respondent suggested that the Queensland Benchbook should also contain model directions in relation to specific defences that arise under the Commonwealth Criminal Code:

> For example, model direction … 76 relates to mistake of fact. A separate model direction for mistake of fact under the Commonwealth Code could be added. There are many other examples of model directions that have analogues under the Commonwealth Code. In addition to defences, there are other provisions of the Commonwealth Code that could be the subject of model directions such as parties to offences ([model direction] 71 and Commonwealth Code s 11.2).[146]

2.81 Some of the submissions made to the VRLC's Consultation Paper also generally supported the preparation and use of benchbooks:

> [Victoria Legal Aid] supports the production of a Benchbook [in Victoria] by the Judicial College that includes specific reference to jury directions.[147]

2.82 A judge of the County Court of Victoria also specifically supported the Queensland Benchbook.[148]

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143 Submission 6.

144 Submission 11.

145 Queensland Courts, *Supreme and District Court Benchbook*, [1], [2], [2A], [2B], [2C], <http://www.courts.qld.gov.au/2265.htm> at 1 September 2009.

146 Brisbane Office of the Commonwealth Director of Public Prosecutions, Submission 9. This submission goes on to comment in some detail about the model direction in Chapter 104 of the Benchbook in relation to defrauding the Commonwealth.

147 Victoria Legal Aid, Submission to the Victorian Law Reform Commission, 9 December 2008. See also the submission by Bernard Lindner, a member of the Criminal Bar Association, in response to the VLRC's Consultation Paper, in which he applauds the work of the Judicial College of Victoria in preparing model directions in its Criminal Charge Book.

148 Judge MD Murphy, Submission to the Victorian Law Reform Commission, 5 February 2009, 1. Judge Murphy is also a supporter of the model charges used in the USA, in particular those of the Seventh Circuit in Chicago, as they are 'a model of economy': ibid.

2.83 One of the options proposed by the VLRC was the inclusion of model directions in its suggested legislative code:[149]

> Proposal 2
>
> The content of some of the directions that the trial judge is required to give to the jury should be set out in legislation.
>
> …
>
> Option A — Model directions
>
> 7.25 Model directions or suggested forms of words, on the relevant areas of law could be included in the legislation. Those directions should be drafted so that they are capable of being adapted to the needs of particular cases. The model directions already completed by the Judicial College of Victoria (JCV) in their online Criminal Charge book provide a very useful starting point.
>
> 7.26 In those instances where an existing JCV model direction is overly long and complex because of an existing common law rule, the legislation could contain a shorter and simpler approved direction in a schedule. …
>
> 7.27 Alternatively, the legislation could provide that unless the Court of Appeal determines otherwise, a direction approved by the JCV is a legally correct direction and that substantial conformity with the terms of such a direction shall be regarded as meeting the legal requirements for a direction on that topic. If the Court of Appeal declared that a JCV direction was incorrect, the Court could be required to formulate the correct direction.[150] (note omitted)

2.84 A few of the respondents to the VLRC's Consultation Paper specifically commented on this aspect of the VLRC's proposal. Stephen Odgers SC, who opposed the introduction of a code, expressed a preference for model directions set out in a Benchbook:

> Proposal 2. I do not support legislative attempts to simplify the content of directions required to be given by trial judges. I accept that the courts have not proved particularly successful in crafting comprehensible directions. Having said that, I am skeptical that legislative formulations will prove satisfactory, given the variety of situations in which directions will be required. It would be better if more resources were directed to the highest levels of the courts to improve the comprehensibility of directions. Bench book standard directions should be formulated with the assistance of experts in communication and mock jury research. More should be done in that context to assist trial judges to adapt standard directions to particular cases.[151]

149 The introduction of a statutory scheme such as the one proposed by the VLRC is discussed at [2.22]–[2.70] above.

150 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) Proposal 2, [7.25]–[7.27].

151 Stephen Odgers SC, Submission to the Victorian Law Reform Commission, 12 November 2008, 7.

2.85 This submission was specifically endorsed by the Queensland Law Society and the Bar Association of Queensland in their joint submission to this Commission's Issues Paper.[152]

2.86 Associate Professor John Willis, while supportive of limited statutory intervention, also submitted to the VLRC that model directions should not be drafted in legislation:

> Model directions should not be set out in legislation.
>
> This is a recipe for rigidity and inflexibility. There are already model directions which are used — on occasion not very well.
>
> The 'cut and paste' approach to jury directions is often not the best means of assisting a jury in a specific case.[153]

2.87 The Criminal Bar Association of Victoria, however, supported the possibility of including some 'shorter and simpler approved directions', drafted by the Judicial College of Victoria, in a legislative schedule:

> An advantage of adopting Option A — Model Directions — is that according to paragraph 7.27[154] a direction which has been approved by the Judicial College of Victoria is to be accepted as a legally correct direction until such time as the Court of Appeal declared that that direction was incorrect. A significant advantage of an approved model direction formulated by the Judicial College of Victoria is that it would be likely formulated by a broad range of judicial officers and consultative persons with the last say, rather than giving that responsibility to politicians.[155] (note added)

QLRC's provisional views

2.88 The Commission sees the Queensland Benchbook as a strength of the criminal justice system in this State which should be built upon. It is a principal element of the Commission's reform proposals. Although later in this Paper the Commission makes some proposals directed at revision of some specific model directions in the Benchbook and in relation to an overall approach that might be taken in drafting the Benchbook's model directions generally, the Commission's proposals in many cases assume and accept that the Benchbook will continue to be refined and relied on by judges and practitioners.

152 Also see [2.75] above.

153 Associate Professor John Willis, Submission to the Victorian Law Reform Commission, 16 December 2008, 15.

154 See [2.83] above.

155 Criminal Bar Association of Victoria, Submission to the Victorian Law Reform Commission, 15 December 2008, 12–13.

Chapter 3

Reforming Jury Directions: Engaging the Jury

INTRODUCTION

3.1 As part of this review, the Commission is charged with considering whether any procedural or administrative changes may improve the current system of jury directions. The Commission is asked to have particular regard, among other things, to:

> (e) possible solutions to identified problems relating to jury directions and warnings, including whether other assistance should be provided to jurors to supplement the oral summing up;[156]

156 See the Terms of Reference set out in Appendix A to this Paper.

3.2 Later chapters in this Paper consider possible legislative and other reforms largely with respect to the legal content of jury directions. In contrast, this chapter and chapter 4 consider the manner in which jury directions (and other information) are delivered during criminal trials. It canvasses submissions on these matters made to this Commission's Issues Paper,[157] as well as those received by the Victorian Law Reform Commission ('VLRC') in response to its Consultation Paper on jury directions.[158]

3.3 There are several sections in this chapter that bring together related areas of concern about the style and manner of presentation of jury directions:

- The overall presentation of any criminal trial to a jury depends in part on a clear identification of the issues that the jury must decide, and then a clear statement of those issues to the jury in the summing up. The identification of issues in criminal trials can be the subject of pre-trial directions hearings. However, the Commission is concerned that pre-trial directions are under-used and a strengthening of pre-trial issue identification obligations of both the prosecution and the defendant is warranted in the context of this review so that the jury is presented with the evidence and the issues as clearly as possible. The Commission expects that there would also be ancillary benefits in this approach in terms of efficiencies in the running of criminal trials generally.

- A key problem with jury directions in their current form is their complexity as a result of the number of directions and warnings that must be given, the content of the legal concepts covered by them, and the ways in which those concepts are expressed. This chapter considers a re-working of the structure of a summing up to combine directions on the law that must be considered by a jury and the questions of fact that a jury must answer in coming to its verdict into what the Commission has described as 'integrated directions'.

- Issues relating to the timing of directions and other preliminary information to be given to juries were raised in the Issues Paper and in submissions, and are covered in this chapter.

- The role of the Queensland Benchbook and the place of professional training for judges and advocates are also considered towards the end of this chapter.

ISSUES FOR CONSIDERATION

3.4 Various methods by which juries may be assisted in deliberating and reaching their verdicts were considered in chapter 9 of the Issues Paper, particularly in relation to the provision to juries of various sorts of written assistance, such as writ-

157 Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009).

158 The details of the submissions received by the Commission in response to its Issues Paper are outlined in chapter 1 of this Paper: see [1.34] above.

ten directions, decision-trees and transcripts of evidence.[159] The Commission identified six broad issues for consideration:

> 9-1 What procedural or other reforms might be introduced to allow for a better exploration of the real issues in a criminal trial in advance of the trial or before the jury is empanelled or starts to hear the evidence?
>
> 9-2 What, if any, advantage is there to a jury in maintaining the current practice of summarising the evidence, and what, if any, advantage might be gained by reducing these summaries and replacing them, at least in part, by the provision of a transcript of the evidence, or other written aids, to juries?
>
> 9-3 What other techniques might be used to assist juries in their understanding of the evidence and the law, and in their deliberations?
>
> 9-4 Should any such techniques be mandated in statute, regulations, court rules, practice notes or in other way? If so, how?
>
> 9-5 If any such formal rules are to be promulgated, should they include any express statement about the trial judge's discretion about the application of any of these techniques in any given criminal trial? If so, what should that statement say?
>
> 9-6 Should any such techniques be the subject of mandatory or optional professional development for criminal trial lawyers (counsel and solicitors), judges or other judicial officers?[160]

COMPLEXITY AND COMPREHENSIBILITY OF JURY DIRECTIONS

3.5 It has been pointed out that the summing up should be, but is not always, clear and comprehensible.[161] To properly assist the jury, the summing up must be both correct and understandable:

> The task of directing jurors in a manner which is 'clearly right' is, to say the least, a difficult one. The judge must explain often complex legal principles to jurors who have little, if any, knowledge of the law. However, if it is difficult for judges, we should also spare a thought for jurors, who must decide the accused's guilt on the basis of oral directions which may take two hours or two days.[162] (notes omitted)

3.6 Indeed, the mere fact that a summing up is 'unduly lengthy and confusing' might be a basis for appeal:

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159 Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009).

160 Ibid 206.

161 See, for example, Hon J Wood, 'Jury Directions' (2007) 16 *Journal of Judicial Administration* 151; Hon G Eames, 'Towards a better direction — Better communication with jurors' (2003) 24 *Australian Bar Review*, 35. See also, *R v Adomako* [1995] 1 AC 171, 189 (Lord Mackay of Clashfern LC); *R v Landy* [1981] 1 All ER 1172, 1183 (Lawton LJ); *Zoneff v The Queen* (2000) 200 CLR 234 [65], [68] (Kirby J); *Ahern v The Queen* (1988) 165 CLR 87, 103; *R v Flesch* (1986) 7 NSWLR 554.

162 J Clough, 'The role of judges in assisting jury comprehension' (2004) 14 *Journal of Judicial Administration* 16, 16.

> Having scrutinised the record, [counsel for one of the appellants] submitted that, omitting the discussions with counsel about the issues involved, summing up had occupied in all some nine hours spread over four days. In itself, the time taken in giving directions to the jury is rarely a sufficient basis for setting aside a conviction; but the summing up in the present case is fairly open to some criticism on the ground of its being confusing.[163]

3.7 The Introduction to the Queensland Benchbook sets out the objectives of clear and comprehensible jury directions to be adapted from the models in the Benchbook to meet the demands of each trial:[164]

Introduction

> The particular form and style of a summing-up, provided it contains what must on any view be certain essential elements, must depend not only upon the particular features of the particular case, but also on the judge's view as to the form and style which will be fair, reasonable and helpful.[165]
>
> These notes are not intended as an elaborate specification to be adopted religiously on every occasion. A summing-up, if to be helpful to the jury, should be tailored to fit the facts of the particular case, and not merely taken ready-made 'off the peg'.[166]
>
> The function of a summing-up is not to give the jury a general dissertation on some aspect of the criminal law, but to tell them what are the issues of fact on which they must make up their minds in order to determine whether the defendant is proven guilty of a particular offence.[167]
>
> A summing-up should be clear, concise and intelligible. If overloaded with detail, whether of fact or law, and following no obvious plan, it will not have the attributes it should display.[168]
>
> The object of the summing-up is to help the jury. A jury is not helped by a colourless reading out of evidence. The judge is more than a mere referee, who takes no part in the trial save to intervene when a rule of procedure or evidence is breached. The judge and the jury try a case together. It is the judge's duty to give the jury the benefit of the judge's knowledge of the law and to advise them

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163 See, for example, *R v Martin, Klinge & Sambo* [2002] QCA 443 [10] (McPherson JA, Helman and Philippides JJ agreeing).

164 Queensland Courts, *Supreme and District Court Benchbook*, 'Introduction' [4] <http://www.courts.qld.gov.au/2265.htm> at 1 September 2009.

165 *McGreevy* [1973] 1 WLR 276, 281.

166 *Nembhard* (1982) 74 Cr App R 144, 148. In *Holland* (1993) 117 ALR 193, 200 the High Court approved a statement in *Lawrence* [1982] AC 510, 519 that 'a direction to a jury should be custom built to make the jury understand their task in relation to a particular case'; cf. *Mogg* (2000) 112 A Crim R 417 [50]–[52], [70]–[74]; and *Hytch* (2000) 114 A Crim R 573 [10]: 'A trial judge ordinarily has an obligation to sum up the respective cases of both the prosecution and the defence [*RNS* [1999] NSWCCA 122] and to remind the jury in the course of identifying the issues before them of the arguments of counsel [*RPS* (2000) 199 CLR 620].'

167 *Mowatt* [1968] 1 QB 421, 426. In *Holland,* the High Court approved a statement from *Lawrence* that 'the purpose of a direction to a jury is not best achieved by a disquisition on jurisprudence or philosophy or a universally applicable circular tour round the area of law affected by the case.' See also *Adams*, *ex parte A-G* [1998] QCA 64; and *Mogg* [71]–[72]: 'A trial judge's duty…will rarely if ever be discharged by presenting in effect an abstract lecture upon legal principles followed by a summary of the evidence. It is of little use to explain the law to the jury in general terms and then leave it to them to apply to the case… the law should be given to the jury with an explanation of how it applied to the facts …'. Cf *Chai* (2002) 76 ALJR 628,632 [18].

168 *Landy, White and Kaye* [1981] 1 WLR 355, 367; and *Flesch* (1987) 7 NSWLR 554, particularly, 558, where Street CJ stated 'a summing up should be as succinct as possible in order not to confuse the jury'.

> in the light of the judge's experience as to the significance of the evidence.[169] (notes as in original)

3.8 As the Terms of Reference for this enquiry go beyond jury directions and ask the Commission to look at juries' information needs more broadly, it may be seen that the scope of this enquiry is broad enough to cover the ways in which all information given to a jury during a criminal trial — including both the evidence and information as to the law — is presented. The rules of evidence are clearly outside the scope of this enquiry, but the Commission is directed to consider how information given to the jury can be presented in the most useful way ***from the jurors' point of view.***

3.9 The difficulties that jurors have in comprehending and processing directions from the judge were considered in some detail in the Issues Paper.[170] These fall into two broad areas. The first encompasses difficulties associated with the complexity of the law and the manner of expression employed in directions. The second broad area covers problems associated with the way in which juries comprehend, handle and apply directions. The empirical research surveyed in chapter 7 of the Issues Paper suggests that, while jurors are diligent in their tasks, they do encounter difficulties in comprehending and applying the law and the various directions and warnings given to them. This question will also be explored in the jury research project conducted by the University of Queensland for the Commission as part of this enquiry.[171]

3.10 It has also been pointed out by the Trial Efficiency Working Group of the NSW Attorney General's Department that juries' poor comprehension of the issues at trial leads to inefficiencies in the conduct of criminal trials.[172]

> … a primary objective of both parties in a criminal trial should be the conduct of proceedings so as to best facilitate concentration, comprehension and decision-making on the part of the jury. The [Trial Efficiency Working] Group does not consider this to be a departure from its mandate to consider issues related to trial efficiency, for two reasons. First, many of the issues which affect the jury experience are inextricably tied to those that contribute to lengthy trials. Secondly, there are situations where a trial results in a hung jury due to the jury's inability to comprehend complex evidence, or, as was widely reported in recent months, a trial being aborted due to jurors who were distracted while being subjected to voluminous and unfocused evidence.
>
> …
>
> A recent study conducted by the New Zealand Law Commission found that, in general, the problems which individual jurors found in comprehending and absorbing evidence during the trial were attributable to the way in which

169 *Sparrow* [1973] 1 WLR 488, 495. In *Holland,* the High Court approved a statement from *Lawrence* that 'a direction is seldom improved and may be considerably damaged by copious recitations from the total content of a judge's note book'.

170 Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009). See in particular ch 6, 7 and 8.

171 The research project is discussed in chapter 9 of this Paper.

172 Trial Efficiency Working Group, Criminal Law Review Division, Attorney General's Department of NSW, *Report of the Trial Efficiency Working Group* (2009) 58, 67–70.

> evidence was presented to them rather than any personal incapacity.[173] In particular, it was noted that few jurors had experience in assimilating a large quantity of factual information delivered orally, and that the emphasis on oral evidence was arguably at odds with modern forms of communication and learning.[174] Jurors also noted problems with recall, reporting that they confused witnesses and complainants' accounts, mistook names, dates or times, and sometimes had difficulty in recollecting what evidence related to which charge. These problems were more pronounced where the evidence was confused or contradictory, where the sequence of events was unclear, and when there were multiple complainants and charges.[175]
>
> On multiple charge trials, the New Zealand Law Commission noted that while to some degree the difficulties encountered in assessing evidence could be attributed to the personal limitations of individual jurors, the impact of the way in which the cases were conducted was at least as significant, with too many charges being brought, insufficient effort being made to distinguish the various charges to the jury, and the presentation of the evidence in a manner which did not link sufficiently with the charge to which it related.[176]
>
> …
>
> The trial experience and comprehension of the evidence by jurors would be further enhanced by confining the issues in dispute. There is a continuing need to identify legal issues, including challenges to the admissibility of evidence, in advance of the trial so that they can be resolved before a jury is empanelled. The jury may then hear the evidence without interruptions. It is also important that technical difficulties in the presentation of electronic evidence be managed so as to allow the efficient presentation of such material to the jury.
>
> … it is important that jurors are placed in the best position possible to assess the evidence they hear. …[177] (notes in original)

Submissions

3.11 A number of submissions responding to the Commission's Issues Paper, as well as some of those made to the VLRC's Consultation Paper, made some general comments on the reform of jury directions given in the summing up. Almost all of the respondents to the Issues Paper endorsed some changes to the content, style and manner of delivery of jury directions, though with different emphases.

3.12 The 'essential' need to preserve for trial judges a wide discretion in relation to jury directions was also noted.[178] For example, the Brisbane Office of the Commonwealth Director of Public Prosecutions submitted that the 'trial judge's

173 NZ Law Commission, *Juries in Criminal Trials: Part Two, Volume 2*, (1999) Preliminary Paper 37, para 3.2.

174 Ibid, para 3.3.

175 Ibid, para 3.5.

176 Ibid, para 3.13.

177 Trial Efficiency Working Group, Criminal Law Review Division, Attorney General's Department of NSW, *Report of the Trial Efficiency Working Group* (2009) 67–9.

178 Brisbane Office of the Commonwealth Director of Public Prosecutions, Submission 9, 4; Law Council of Australia, Submission 14.

discretion about the application of any technique [of presenting directions] should be preserved.'[179]

3.13 In its submission to the VLRC's Consultation Paper, the Law Reform Committee of the County Court of Victoria enunciated some principles which it felt should guide any reform of the law relating to jury directions:

> Any changes to jury directions must:
>
> - Respect the right to a fair trial. A fair trial is one which is conducted according to law. A trial must not only be fair to the accused but also to the prosecution.
> - Promote certainty about the content of a charge, and of particular directions.
> - Facilitate the conduct of the trial on the issues as identified by the parties at trial.
> - Encourage the raising of arguments about directions and their content at trial, so as to reduce the number of appeals allowed on points not taken at trial.
> - Ensure accused persons are able to avail themselves of all defences properly open on the facts or the law, if they choose to rely on them.
> - Result in simplified, comprehensible directions, and shorter charges.
> - Set realistic goals having regard to the volume of cases pending before the Court.[180]

3.14 There was some significant support in submissions in response to this Commission's Issues Paper for the proposition that jury directions have become too complex.[181] The Queensland Law Society and the Bar Association of Queensland in their joint submission said that:

> It is accepted that some jury directions can be complex … One of the principal reasons for complex directions is the enactment of complex laws.[182]

3.15 However, in their view this was not an insuperable problem as 'it is our experience that juries by and large are adequately able to deal with complicated cases and to apply the relevant law to complicated facts.'[183]

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179 Brisbane Office of the Commonwealth Director of Public Prosecutions, Submission 9, 6. See also Queensland Law Society, Submission to Victorian Law Reform Commission, 30 January 2009. However, Victoria Legal Aid expressed some concern that leaving matters to the trial judge's discretion could lead to inconsistencies among judges, 'with judges being required to make value judgments about the evidence': Victoria Legal Aid, Submission to the Victorian Law Reform Commission, 9 December 2008. A trial judge will face many such decisions during the course of any criminal trial.

180 Law Reform Committee of the County Court of Victoria, Submission to the Victorian Law Reform Commission, 13 March 2009, 3.

181 Submissions 6, 7 and 8.

182 Queensland Law Society and Bar Association of Queensland, Submission 13, 1.

183 Ibid.

3.16 The Office of the Director of Public Prosecutions ('ODPP') expressed some concern that trial judges were either compelled by law or by their own concerns about an appellate court's view of their directions to give directions that kept alive 'fanciful' defences.

3.17 This was an area, in the view of the ODPP, where an over-abundance of caution often proved counter-productive or 'harmful', with the possible outcome over time of too many false acquittals. Giving too many directions and warnings meant that they tend to lose their effectiveness: courts should be given back their gatekeeper role to keep the fanciful out of trials.[184] The one-sided nature of appeals (ie, that they are practically speaking only ever taken by convicted defendants) means that long, confusing or excessive directions and warnings in cases that resulted in acquittals never came up for review on appeal.[185]

3.18 The ODPP suggested that trial judges' problems are compounded by the poor definition of the circumstances which trigger the application of some warnings — the objective of a trial judge ought to be to 'clarify and cull' the issues to be left to the jury and therefore the directions that must also be given to them.[186]

3.19 Some former jurors who responded to the Issues Paper echoed concerns about the complexity of jury directions and their counter-productive effects:

> The first case in which I was selected was the rape or attempted rape trial. A three day trial involving detailed evidence from … conflicting [witnesses]. There were several occasions on which the Judge intervened to give the jury directions on issues that were presented during the evidence. Most of these directions were for the jury to ignore the evidence presented.
>
> … during in-house discussions it became very obvious that some panel members could find very little distinction between facts that were presented, opinions that were expressed and even indulged in arguments re the probable reasons why the Judge had arrived at his/her directives. These discussions occurred even though the Judge had ordered these matters to be ignored. My disappointment was that these discussions continued at length and there was no attempt by the foreman to direct panel members to cease discussing these matters. ***It appeared that the Judge in issuing the directive actually ensured that the matter was flagged for further discussion in the isolation of the jury room.*** These discussions can very quickly deteriorate into lay-man's opinions on why the original directions were issued, a potentially dangerous and influencing situation lacking proper control.[187] (emphasis in original)

3.20 The concern that a judge's direction to discount certain evidence would simply produce the opposite effect in the minds of the jurors was also expressed by a Supreme Court judge. That judge noted that warnings about accomplice evidence, for example, require trial judges to identify for the jury all the potentially corrobora-

184 Submission 15.

185 Ibid.

186 Ibid.

187 Submission 2.

tive evidence. By the time this is done, it was submitted, the warning itself has lost its force.[188]

3.21 A former juror said in her submission to this Commission that the directions contained 'a lot of judge's jargon' that was hard to understand, and were part of a 'lengthy speech' that was 'difficult to digest'. In another trial on which she sat, the judge 'mumbled' and 'rambled a lot' in 'muffled tones'. This judge failed to give a strong, clear message, which the respondent described as a 'question of presentation'.[189]

3.22 Allied to the difficulties faced by trial judges in the face of the growing complexity and proliferation of jury directions was what one Supreme Court judge described as the 'emasculation' of the proviso in section 668E(1A) of the Criminal Code (Qld), which meant that imperfection in the summing up was now more likely to result in a re-trial.[190] The wording of the sub-section was not the problem, in the eyes of this respondent, but, in this judge's view, it must be given effect, in which case 'many of these problems will disappear'. This judge submitted that, in combination, the result of High Court and intermediate appellate court decisions was that it was harder to give an error-free summing up, and appellate courts were less tolerant of imperfections. The push towards legally correct summings up has come at the expense of juror understanding.[191]

3.23 This respondent also considered that a related issue is the non-financial cost of re-trials (such as the emotional strain on victims and witnesses), which is rarely discussed by appellate courts but is one of the main reasons that re-trials do not proceed.[192]

3.24 Responding to the VLRC's Consultation Paper, the Victorian Office of Public Prosecutions commented that it is 'important that directions be simplified in order to minimise error and to increase the capacity of jurors to understand them.'[193]

3.25 Other submissions in response to the VLRC's Consultation Paper also acknowledged the increasing complexity of jury directions; for example, Stephen Odgers SC submitted that:

> The Consultation Paper recognizes that the tribunal of fact, the jury, is made up of ordinary people who may find judicial directions incomprehensible. That may be accepted. However, the solution is not to abandon the obligation on judges

188 Submission 7. Directions about limited-use evidence and unreliable evidence (including accomplice evidence) are discussed in chapters 6 and 7 respectively of this Paper.

189 Submission 3.

190 Submission 7. Section 668E(1A) reads:

> However, the Court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

191 Submission 7. This point of view was echoed by the Office of the Director of Public Prosecutions: Submission 15.

192 Submission 7. See Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [5.60]–[5.63].

193 Office of Public Prosecutions, Submission to the Victorian Law Reform Commission, 12 February 2009, 6. However, the OPP opposed the codification of the content (or substance) of any jury directions: see ibid, 3; see [2.51] above.

> to give warnings and directions. It is to improve the quality of the communication. I support making directions as comprehensible as possible to jurors.[194]

3.26 In its submission to the VLRC, the Queensland Law Society opposed the simplification of directions and warnings without a more sophisticated approach to the problems associated with them:

> Further, the Society does not support the proposed simplification of the content of the warnings and directions required to be given by trial judges. While it is acknowledged that there is a large degree of concern as to the difficulty jurors experience in understanding judicial directions, simplification of those directions is not an appropriate solution.
>
> The legitimacy of a jury's decision rests upon its members being provided with, and taking into account the same legal principles that a judge alone would consider in making the decision. Merely simplifying the instructions provided to jurors will not solve the fundamental problem, that relevant legal principles are not currently being satisfactorily communicated to juries. The Society is of the opinion that, ultimately, improvements in the comprehensibility of warnings and directions can only be achieved through further research in to jurors interpretation of directions and how best to effectively provide such directions, not through simplification of the instructions given.[195]

3.27 Most respondents who considered these issues advocated greater flexibility and a more modern approach to the timing of jury directions and the means by which they are delivered. One respondent to the VLRC's Consultation Paper also commented that:

> There is scope for considerable improvement in this area without the need for legislation. There could be a greater focus on such matters as: the language used, timing of directions, the length of directions, breaks for jurors during directions etc.[196]

QLRC's provisional views

3.28 Although these various observations inform a number of the reform proposals made in this Paper, they do not of themselves lead the Commission to make any proposal in relation to the specific wording of any particular jury directions and warnings.[197] However, the Commission's proposals in relation to the early identification of issues are intended to provide a solid framework on which to base its other proposals which, together, will address a number of the problems that have been identified with jury directions and warnings.

3.29 The principal objectives of clarity, brevity and accuracy are noted by the Law Reform Committee of the County Court of Victoria,[198] in the Introduction to the

194 Stephen Odgers SC, Submission to the Victorian Law Reform Commission, 12 November 2008.

195 Queensland Law Society, Submission to the Victorian Law Reform Commission, 30 January 2009. This submission was endorsed by Legal Aid Queensland: Submission 16, 1, 3, 5.

196 Associate Professor John Willis, Submission to the Victorian Law Reform Commission, 16 December 2008, 15. Some of these issues are considered later in this chapter: see [3.148]–[3.166].

197 Some jury directions and warnings are considered in detail in chapters 6, 7 and 8 of this Paper and some redrafting proposals are made there in the light of particular issues that affect these directions and warnings.

198 See [3.13] above.

Queensland Benchbook[199] and by many other commentators. They do not need to be reiterated in any formal proposal by the Commission, especially if the Commission's proposals about a pre-trial issue identification regime and other procedural matters are implemented.

DEFINING THE ISSUES AND THE QUESTIONS FOR THE JURY

3.30 As will be seen from the following sections of this chapter and chapter 4, a number of the Commission's proposals are linked, and are predicated upon a series of related changes to criminal trial procedure and the way in which the judge's summing up is presented. The combined purpose and effect of this approach is to provide juries with a 'framework for deliberation'[200] by:

- clarifying ***before the trial itself*** so far as is practicable and consistent with a defendant's right to a fair trial the issues that are likely to be left to the jury to resolve, which in turn may involve the pre-trial determination of issues such as the admissibility of evidence;
- re-structuring the summing up to present the questions that the jury must answer in order to reach its verdict in an integrated and comprehensible way that avoids the need for lengthy and abstract statements of the law by embedding the legal issues in questions of fact — which will be facilitated by the pre-trial identification of issues; and
- requiring of the parties, and of counsel in particular, a greater and earlier participation in the determination and resolution of issues, and of the directions that each wishes the judge to give the jury.

PRE-TRIAL RULINGS AND DISCLOSURE

3.31 Pre-trial disclosure as a means of identifying key issues in the trial and formulating early directions or addresses to the jury was discussed at [8.3]–[8.12] of the Issues Paper.

3.32 A clear, pre-trial identification of the evidentiary and factual issues likely to arise in the trial could assist jurors to understand the general context of the evidence and navigate it better as the trial progresses and could assist the judge in considering what directions and warnings may be necessary.

Pre-trial disclosure in Queensland

3.33 Section 590AA of the Criminal Code (Qld) and the *Criminal Practice Rules 1999* (Qld) already provide an opportunity for pre-trial directions hearings.[201] These

199 See [3.7] above.

200 See New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [4.3]–[4.5].

201 Criminal Code (Qld) s 590AA; *Criminal Practice Rules 1999* (Qld) ch 9.

provisions are, however, purely permissive and do not compel any pre-trial directions hearings to be held as a matter of course. Section 590AA reads:

> **590AA Pre-trial directions and rulings**
>
> (1) If the Crown has presented an indictment before a court against a person, a party may apply for a direction or ruling, or a judge of the court may on his or her initiative direct the parties to attend before the court for directions or rulings, as to the conduct of the trial or any pre-trial hearing.
>
> (2) Without limiting subsection (1) a direction or ruling may be given in relation to—
>
> (a) the quashing or staying of the indictment; or
>
> (b) the joinder of accused or joinder of charges; or
>
> (ba) the disclosure of a thing under chapter division 3;[202] or
>
> (c) the provision of a statement, report, proof of evidence or other information; or
>
> (d) noting of admissions and issues the parties agree are relevant to the trial or sentence; or
>
> (da) an application for trial by a judge sitting without a jury; or
>
> (e) deciding questions of law including the admissibility of evidence and any step that must be taken if any evidence is not to be admitted; or
>
> (f) ascertaining whether a defence of insanity or diminished responsibility or any other question of a psychiatric nature is to be raised; or
>
> (g) the psychiatric or other medical examination of the accused; or
>
> (h) the exchange of medical, psychiatric and other expert reports; or
>
> (i) the reference of the accused to the Mental Health Court; or
>
> (j) the date of trial and directing that a date for trial is not to be fixed until it is known whether the accused proposes to rely on a defence of insanity or diminished responsibility or any other question of a psychiatric nature; or
>
> (k) the return of subpoenas; or
>
> (l) the *Evidence Act 1977*, part 2, division 4A or 6;[203] or
>
> (m) encouraging the parties to narrow the issues and any other administrative arrangement to assist the speedy disposition of the trial.

202 Criminal Code (Qld) ch 62 div 3 deals with disclosure by the prosecution.

203 *Evidence Act 1977* (Qld) pt 2 div 4A and 6 deal with evidence of affected children and cross-examination of protected witnesses, respectively.

> (3) A direction or ruling is binding unless the judge presiding at the trial or pre-trial hearing, for special reason, gives leave to reopen the direction or ruling.
>
> (4) A direction or ruling must not be subject to interlocutory appeal but may be raised as a ground of appeal against conviction or sentence. (notes added)

3.34 The relevant provisions in the *Criminal Practice Rules 1999* (Qld), especially Rule 42, are quite brief and simply set out some procedural aspects of pre-trial directions hearings under section 590AA.[204]

3.35 There are also some specific areas in which pre-trial disclosure by the parties is made mandatory by the Criminal Code (Qld). A breach of these obligations may mean that the defaulting party cannot lead the evidence that should have been the subject of notification without the leave of the court. The need to ensure a fair trial may mean that a court will relatively often grant a defendant that leave.

3.36 The salient provisions relating to the prosecution's duties of pre-trial disclosure include these:[205]

- It is a 'fundamental obligation of the prosecution to ensure criminal proceedings are conducted fairly with the single aim of determining and establishing truth.' Consequently, the prosecution is under an on-going obligation to give a defendant full and early disclosure of all evidence on which it proposes to rely and of all things that it possesses that

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204 The relevant rules are Rules 41 and 42, which read:

> **Chapter 9 Pre-trial directions and rulings**
>
> **41 Application of ch 9**
>
> This chapter applies if the Crown presents an indictment before a court against a person and a party to the trial (the *party*) wants the court to give a direction or ruling about the conduct of the trial under the Code, section 590AA.
>
> **42 Application for direction or ruling**
>
> (1) The party must apply to the court for the direction or ruling.
>
> (2) The application must state—
>
> (a) the nature of the direction or ruling sought; and
>
> (b) whether a witness or anyone else is required to attend the hearing of the application.
>
> (3) The party must serve a copy of the application on each other party at least 2 clear days before the day on which the application is to be heard (the *hearing day*).
>
> (4) However, if the parties agree, the application may be served later than 2 clear days before the hearing day.
>
> (5) Subrule (4) does not apply if the direction or ruling sought is about 1 or more of the following—
>
> (a) quashing or staying the indictment;
>
> (b) joining accused persons or charges;
>
> (c) deciding questions of law, including the admissibility of evidence and steps to be taken if evidence is inadmissible;
>
> (d) the psychiatric or other medical examination of the accused person;
>
> (e) referring the accused person to the Mental Health Tribunal.

205 There are other more specific obligations in relation to sensitive evidence, the viewing of evidence, evidence of an 'affected child', the copying of evidence and so on in Criminal Code (Qld) ss 590AD to 590AX.

would tend to assist the defendant's case (unless such disclosure would be unlawful or contrary to the public interest).[206]

- The prosecution must give the following material to a defendant at least 14 days before a committal hearing within 28 days after the indictment has been presented:[207]
  - a copy of the bench charge sheet, complaint or indictment containing the charge against the defendant;
  - a copy of the defendant's criminal history;
  - a copy of any statement of the defendant;
  - a copy of any statement of any proposed witness for the prosecution; or (if there is no statement) a written notice naming the witness;
  - a copy of any report of any test or forensic procedure relevant to the proceeding and a written notice describing any test or forensic procedure (including one that is not yet completed) on which the prosecution intends to rely at the proceeding; and
  - a written notice describing any original evidence or other thing on which the prosecution intends to rely at the proceeding.[208]
- If requested by the defendant, the prosecution must disclose:
  - anything that may be adverse to the reliability or credibility of any proposed witness for the prosecution or that may tend to raise an issue about the competence of such a witness; and
  - a copy of any witness statement or other thing that is relevant to the proceedings but which the prosecution does not intend to rely on at the trial.[209]

3.37 Defendants in Queensland are required to give notice of three aspects of their defences in advance of the trial as specified by sections 590A, 590B and 590C of the Criminal Code (Qld): particulars of alibi evidence, expert evidence, and evidence of a representation under section 93B of the *Evidence Act 1977* (Qld) (which relates to hearsay evidence of statements by people who are dead or mentally or physically incapable of giving the evidence).[210]

206 Criminal Code (Qld) ss 590AB, 590AL.

207 Criminal Code (Qld) s 590AI(2).

208 Criminal Code (Qld) s 590AH.

209 Criminal Code (Qld) s 590AJ.

210 See also *Mental Health Act 2000* (Qld) s 265 in relation to the disclosure of psychiatric reports.

Other jurisdictions

3.38 Pre-trial disclosure obligations by the prosecution are common, of long standing and, given that the burden of proof and open disclosure always falls on the prosecution in common law jurisdictions, not controversial. Pre-trial disclosure obligations falling on a defendant are of more recent origin and are more controversial. However, they are found in a number of other Australian jurisdictions and in some comparable overseas jurisdictions.[211] They can also be found in the United States notwithstanding the protection against self-incrimination in the Fifth Amendment to the United States *Constitution*.[212]

New South Wales

3.39 The Supreme and District Courts of New South Wales are empowered to give directions for pre-trial disclosure by both the prosecution and the defendant on a case-by-case basis under the *Criminal Procedure Act 1986* (NSW).[213] Such disclosure may be given only in relation to 'complex' trials at which the defendant will be represented.[214]

3.40 The court may waive any of the pre-trial disclosure requirements otherwise provided for by the Act[215] and there is no set timetable for the completion of any disclosure that may be ordered.[216] The disclosure requirements (if ordered) are ongoing until the conclusion of the case.[217]

3.41 Subject to those qualifications, pre-trial disclosure involves an exchange by the parties of three sets of material: the case for the prosecution, the defence response, and the prosecution response to the defence response.

3.42 The notice of the case for the prosecution is to contain the following:

(a) a copy of the indictment,

(b) an outline of the prosecution case,

(c) copies of statements of witnesses proposed to be called at the trial by the prosecutor,

(d) copies of any documents or other exhibits proposed to be tendered at the trial by the prosecutor,

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211 The Australian jurisdictions not discussed below generally have few, if any, pre-trial disclosure obligations on the part of the defendant other than the disclosure of reliance on an alibi: see Kevin Dawkins, 'Defence Disclosure in Criminal Cases' [2001] *New Zealand Law Review* 35, 55–6.

212 See Trial Efficiency Working Group, Criminal Law Review Division, Attorney General's Department of NSW, *Report of the Trial Efficiency Working Group* (2009) 50–1; Kevin Dawkins, 'Defence Disclosure in Criminal Cases' [2001] *New Zealand Law Review* 35, 39, 57–8. But note Geoff Flatman QC and Mirko Bagaric, 'Accused Disclosure—Measured Response or Abrogation of the Presumption of Innocence?' (1999) 23 *Criminal Law Journal* 327, 332, n 30.

213 *Criminal Procedure Act 1986* (NSW) s 134.

214 *Criminal Procedure Act 1986* (NSW) s 136. Whether a trial is complex depends on the likely length of the trial, the nature of the evidence to be adduced and the legal issues likely to arise at it: s 136(2).

215 *Criminal Procedure Act 1986* (NSW) s 142.

216 See *Criminal Procedure Act 1986* (NSW) s 137(2).

217 *Criminal Procedure Act 1986* (NSW) s 141.

(e) if any expert witnesses are proposed to be called at the trial by the prosecutor, copies of any reports by them that are relevant to the case,

(f) a copy of any information in the possession of the prosecutor that is relevant to the reliability or credibility of a prosecution witness,

(g) a copy of any information, document or other thing provided by police officers to the prosecutor, or otherwise in the possession of the prosecutor, that may be relevant to the case of the prosecutor or the accused person, and that has not otherwise been disclosed to the accused person,

(h) a copy of any information, document or other thing in the possession of the prosecutor that is adverse to the credit or credibility of the accused person.[218]

3.43 The notice of the defence response may be quite lengthy and goes well beyond what is required in other jurisdictions. It is to contain the following:

1. …

(a) notice as to whether the accused person proposes to adduce evidence at the trial of any of the following contentions:

(i) insanity,

(ii) self-defence,

(iii) provocation,

(iv) accident,

(v) duress,

(vi) claim of right,

(vii) automatism,

(viii) intoxication,

(b) if any expert witnesses are proposed to be called at the trial by the accused person, copies of any reports by them proposed to be relied on by the accused person,

(c) the names and addresses of any character witnesses who are proposed to be called at the trial by the accused person (but only if the prosecution has given an undertaking that any such witness will not be interviewed before the trial by police officers or the prosecutor in connection with the proceedings without the leave of the court),

(d) the accused person's response to the particulars raised in the notice of the case for the prosecution (as provided for by subsection (2)).

218 *Criminal Procedure Act 1986* (NSW) s 138.

(2) …

(a) if the prosecutor disclosed an intention to adduce expert evidence at the trial, notice as to whether the accused person disputes any of the expert evidence and which evidence is disputed,

(b) if the prosecutor disclosed an intention to adduce evidence at the trial that has been obtained by means of surveillance, notice as to whether the accused person proposes to require the prosecutor to call any witnesses to corroborate that evidence and, if so, which witnesses will be required,

(c) notice as to whether the accused person proposes to raise any issue with respect to the continuity of custody of any proposed exhibit disclosed by the prosecutor,

(d) if the prosecutor disclosed an intention to tender at the trial any transcript, notice as to whether the accused person accepts the transcript as accurate and, if not, in what respect the transcript is disputed,

(e) notice as to whether the accused person proposes to dispute the accuracy or admissibility of any proposed documentary evidence or other exhibit disclosed by the prosecutor,

(f) notice as to whether the accused person proposes to dispute the admissibility of any other proposed evidence disclosed by the prosecutor and the basis for the objection,

(g) notice of any significant issue the accused person proposes to raise regarding the form of the indictment, severability of the charges or separate trials for the charges.[219]

3.44 The notice of the prosecution response to the defence response is to contain the following:

(a) if the accused person has disclosed an intention to adduce expert evidence at the trial, notice as to whether the prosecutor disputes any of the expert evidence and, if so, in what respect,

(b) if the accused person has disclosed an intention to tender any exhibit at the trial, notice as to whether the prosecutor proposes to raise any issue with respect to the continuity of custody of the exhibit,

(c) if the accused person has disclosed an intention to tender any documentary evidence or other exhibit at the trial, notice as to whether the prosecutor proposes to dispute the accuracy or admissibility of the documentary evidence or other exhibit,

(d) notice as to whether the prosecutor proposes to dispute the admissibility of any other proposed evidence disclosed by the accused person, and the basis for the objection,

219 *Criminal Procedure Act 1986* (NSW) s 139.

(e) a copy of any information, document or other thing in the possession of the prosecutor, not already disclosed to the accused person, that might reasonably be expected to assist the case for the defence,

(f) a copy of any information, document or other thing that has not already been disclosed to the accused person and that is required to be contained in the notice of the case for the prosecution.[220]

3.45 The purpose of these provisions is said in the legislation to be 'to reduce delays in complex criminal trials',[221] and they are clearly directed to a purpose which, though not entirely consistent with the thrust of the Commission's Terms of Reference, is not inconsistent either. However, it is clear that the legislation contemplates that this regime will not necessarily apply in cases that are not 'complex' and in any event may be modified by the court to meet the demands of each case.

3.46 The NSW scheme came into effect in 2001, and was reviewed in 2004 by the Legislative Council's Standing Committee on Law and Justice.[222] In those three years, pre-trial disclosure orders had been made in only six Supreme Court matters and in two in the District Court. One of the reasons for such scant implementation was said to be the 'gateway provision' that required the matter to be 'complex'.[223] Although it was virtually impossible to draw any conclusions from the data, the review determined that 'the policy objectives of the Act were valid and that the terms of the Act were appropriate for securing those objectives.'[224] The Director of Public Prosecutions submitted to the review that the consequent changes within the DPP's office were working well and that the arraignment guilty plea rate had risen from 16% to 36% across the State.[225] The *Criminal Procedure Act 1986* (NSW) was amended in 2007 on the basis of the Standing Committee's recommendations.

3.47 The Trial Efficiency Working Group of the Criminal Law Review Division of the Attorney General's Department of NSW has suggested that without further amendment the NSW provisions are likely to remain under-used.[226]

South Australia

3.48 A regime of pre-trial disclosure operates in South Australia though it, too, is discretionary.[227]

3.49 The Director of Public Prosecutions may apply to the court for authorisation to serve on the defendant a notice to admit specified facts.[228] Although the privilege

220 *Criminal Procedure Act 1986* (NSW) s 140.

221 *Criminal Procedure Act 1986* (NSW) s 134.

222 Trial Efficiency Working Group, Criminal Law Review Division, Attorney General's Department of NSW, *Report of the Trial Efficiency Working Group* (2009) 28–30.

223 See *Criminal Procedure Act 1986* (NSW) s 134; and [3.39] above

224 Trial Efficiency Working Group, Criminal Law Review Division, Attorney General's Department of NSW, *Report of the Trial Efficiency Working Group* (2009) 30.

225 Ibid.

226 Ibid 77.

227 See ibid 35–6.

228 *Criminal Law Consolidation Act 1935* (SA) s 285BA.

against self-incrimination is expressly preserved under the legislation, there is significant pressure on defendants to make all reasonable admissions or have any unreasonable refusal taken into consideration on sentencing. The key provisions of section 285BA of the *Criminal Law Consolidation Act 1935* (SA) in this regard are these:

> (3) The notice must contain a warning, in the prescribed form, to the effect that, if the defendant is convicted, the court is required to take an unreasonable failure to make an admission in response to the notice into account in fixing sentence.
>
> (4) This section does not abrogate the privilege against self-incrimination and a refusal to make an admission on the ground that the admission would tend to incriminate the defendant of an offence is not to be made the subject of comment to a jury.
>
> (5) An order under this section may only be made at a directions hearing at which the defendant is represented by a legal practitioner unless the court is satisfied that—
>
> (a) the defendant has voluntarily chosen to be unrepresented; or
>
> (b) the defendant is unrepresented for reasons attributable to the defendant's own fault.
>
> (6) If a defendant unreasonably fails to make an admission in response to a notice under this section, and the defendant is convicted, the court should take the failure into account in fixing sentence.
>
> (7) Without limiting subsection (6), a defendant unreasonably fails to make an admission if the defendant—
>
> (a) claims privilege against self-incrimination as a reason for not making the admission; and
>
> (b) thus puts the prosecution to proof of facts that are not seriously contested at the trial.

3.50 If the prosecution has discharged its obligations of disclosure, it may by notice authorised by the court require defendants to disclose the nature of certain specific forms of evidence or defences on which they intend to rely:

> (a) evidence tending to establish that the defendant was mentally incompetent to commit the alleged offence or is mentally unfit to stand trial;
>
> (b) evidence tending to establish that the defendant acted for a defensive purpose;
>
> (c) evidence of provocation;
>
> (d) evidence of automatism;
>
> (e) evidence tending to establish that the circumstances of the alleged offence occurred by accident;

(f) evidence of necessity or duress;

(g) evidence tending to establish a claim of right;

(h) evidence of intoxication.[229]

3.51 Non-compliance by a defendant with a requirement of such a notice does not render any evidence covered by it inadmissible but the prosecutor or the judge (or both) may comment on the non-compliance to the jury.[230] There is no restriction in the legislation of the nature of any such comment.

3.52 A defendant may be called on to consent to dispense with the calling of prosecution witnesses who would be called solely to establish the admissibility of certain forms of evidence:

> A court before which a defendant is to be tried on information may require the defence to notify the Director of Public Prosecutions in writing whether it consents to dispensing with the calling of prosecution witnesses proposed to be called to establish the admissibility of specified intended evidence of any of the following kinds:
>
> (a) documentary, audio, visual, or audiovisual evidence of surveillance or interview;
>
> (b) other documentary, audio, visual or audiovisual evidence;
>
> (c) exhibits.[231]

3.53 Again, there is real pressure on defendants to respond reasonably to this notice: if defendants fail to comply, their consent to the tender of the relevant evidence for purposes specified in the notice will be conclusively presumed.[232]

3.54 Defendants also have a mandatory obligation to inform the Director of Public Prosecutions of their intention to introduce certain expert evidence by the first directions hearing in relation to any trial or otherwise as soon as practicable after it becomes available.[233] As in Queensland, the fact that this requirement is triggered by the defendant's intention might be cynically relied on to delay giving any such notice until the prosecution case has been closed at the trial itself, when the defendant may assert that no intention was conclusively formed until the whole of the prosecution evidence was led.[234]

3.55 Defendants may also be required to submit to an examination by an independent psychiatric expert if the defendant proposes to introduce expert psychiatric evidence or other expert medical evidence relevant to the defendant's mental state or medical condition at the time of an alleged offence.[235] A failure to comply may

229 *Criminal Law Consolidation Act 1935* (SA) s 285BB.

230 *Criminal Law Consolidation Act 1935* (SA) s 285BB(3).

231 *Criminal Law Consolidation Act 1935* (SA) s 285BB(4).

232 *Criminal Law Consolidation Act 1935* (SA) s 285BB(5).

233 *Criminal Law Consolidation Act 1935* (SA) s 285BC.

234 See Submission 7 at [3.101] below.

235 *Criminal Law Consolidation Act 1935* (SA) s 285BC(4).

result in the evidence not being admitted and on comment being made to the jury.[236]

3.56 A legal practitioner who has advised a defendant not to comply with section 285BC of the *Criminal Law Consolidation Act 1935* (SA), or who has expressly agreed to the defendant's non-compliance, may be reported to the appropriate professional disciplinary authority.[237]

Victoria

3.57 The new Victorian legislation is the most recent and appears to be the most sweeping of the various pre-trial procedural statutes in Australia. A regime of compulsory pre-trial disclosure and related steps was first enacted in Australia in Victoria in 1993,[238] and then again in the *Crimes (Criminal Trials) Act 1999* (Vic). That Act is to be repealed when the *Criminal Procedure Act 2009* (Vic) comes into effect on a date yet to be proclaimed. However, the relevant provisions of the 1999 Act have been re-enacted and expanded in the new legislation.[239]

3.58 The provisions governing pre-trial procedures are covered at length in Part 5.5 (ie, sections 179 to 206) of the *Criminal Procedure Act 2009* (Vic).

3.59 The court may at any time (other than during a trial) conduct one or more directions hearings.[240] At any such hearing, the court may 'make or vary any direction or order, or require a party to do anything that the court considers necessary, for the fair and efficient conduct of the proceeding.'[241] This may include orders that:

- require defendants to advise whether they are legally represented and have funding for continued legal representation up to and including the trial;
- require the parties to notify the court of any pre-trial issues that they intend to raise or of issues of law or fact that they may apply to have determined before the trial;
- require the parties to provide an estimate of the length of the trial;

236 *Criminal Law Consolidation Act 1935* (SA) s 285BC(5).

237 *Criminal Law Consolidation Act 1935* (SA) s 285BC(8)–(9).

238 The failure of this Act in practice was noted in Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [6.8]; Ray Gibson, 'The *Crimes (Criminal Trials) Act 1999* — a radical change' *Law Institute Journal,* October 1999, 50, 51; Trial Efficiency Working Group, Criminal Law Review Division, Attorney General's Department of NSW, *Report of the Trial Efficiency Working Group* (2009) 23; Kevin Dawkins, 'Defence Disclosure in Criminal Cases' [2001] *New Zealand Law Review* 35, 48–9, where it is noted that 'the Act was met by "a general culture of combat rather than co-operation", and most trials proceeded as though it never existed.'

239 The Victorian legislation is discussed by the VLRC in its recent Final Report on jury directions: Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [6.6]–[6.22].

240 *Criminal Procedure Act 2009* (Vic) s 179.

241 *Criminal Procedure Act 2009* (Vic) s 181(1).

- require the parties to disclose the estimated number and the availability of witnesses (other than the defendant) and any relevant requirements of witnesses and interpreters;

- order a party to make, file or serve any written or oral material required by the court for the purposes of the proceeding;

- order the prosecution to serve on the defendant a copy of any material on which it intends to rely at the trial; and

- determine any objection relating to the disclosure of information or material by the prosecution.[242]

3.60 Unless otherwise directed by the court, the Director of Public Prosecutions must serve on the defendant 28 days before the trial:[243]

- a summary of the prosecution opening, which must outline the manner in which the prosecution will put the case against the accused and the acts, facts, matters and circumstances being relied on to support a finding of guilt;[244] and

- a notice of pre-trial admissions, which must identify the statements of the witnesses whose evidence, in the opinion of the DPP, ought to be admitted as evidence without further proof, including evidence that is directed solely to formal matters (including continuity, a person's age or proving the accuracy of a plan, or that photographs were taken in a certain manner or at a certain time).[245]

3.61 The defendant's response must be served 14 days before the trial is listed to start.[246] It must contain:

- a response to the summary of the prosecution opening, which must identify the acts, facts, matters and circumstances with which issue is taken and the basis on which issue is taken;[247] and

- a response to the notice of pre-trial admissions, which must indicate what evidence set out in the notice of pre-trial admissions is agreed to be admitted as evidence without further proof and what evidence is in issue and, if issue is taken, the basis on which issue is taken.[248]

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242 *Criminal Procedure Act 2009* (Vic) s 181(2).

243 *Criminal Procedure Act 2009* (Vic) s 182(1).

244 *Criminal Procedure Act 2009* (Vic) s 182(2).

245 *Criminal Procedure Act 2009* (Vic) s 182(3).

246 *Criminal Procedure Act 2009* (Vic) s 183(1).

247 *Criminal Procedure Act 2009* (Vic) s 183(2). The requirement that a defendant file a point-by-point response to the prosecution's disclosure has been criticised as 'not only undercutting the principle that a defendant ought not to be compelled to assist his own prosecution but as ignoring the practical reality that in many cases defence lawyers will have not been fully instructed, if at all, at any early stage of the proceedings': Kevin Dawkins, 'Defence Disclosure in Criminal Cases' [2001] *New Zealand Law Review* 35, 50–1.

248 *Criminal Procedure Act 2009* (Vic) s 183(3).

3.62 Nonetheless, defendants are not required to identify any witness (other than an expert) that they intend to call, nor to state whether they will give evidence.[249] However, defendants have certain specific obligations of disclosure:

- Defendants must notify the prosecution of an intention to call expert evidence at least 14 days before the trial and serve a copy of the expert witness's statement.[250]

- Defendants may not (without leave of the court) at trial lead any evidence either personally or from any other witness in support of an alibi unless their intention to do so has been notified to the prosecution.[251] The notice to the prosecution must contain particulars of the alibi and the names and addresses of any witnesses to the alibi.[252] The court must not refuse leave to lead this evidence, however, if the defendant was not informed of these requirements.[253] The prosecution may apply for an adjournment as a result of this notification, which must be granted unless this would 'prejudice the proper presentation' of the defendant's case.[254]

3.63 The prosecution's obligations of disclosure are on-going.[255] The prosecution must also notify the defendant of its intention to call witnesses to lead evidence not otherwise in the depositions served and to give the defendant copies of the proposed additional evidence.[256]

3.64 If either party intends to depart substantially at the trial from a matter set out in any of the documents served by that party, it must inform the court and the other party before the trial, though it need not inform that other party of the details of the proposed departure unless ordered by the court.[257]

3.65 In particular, at a pre-trial directions hearing the court may decide any issue of law, fact or procedure that arises or is anticipated to arise at the trial, including any issue of the admissibility of any evidence.[258] Any party seeking any such order must first notify the other party at least 14 days before the trial is listed to start in order to find out whether that issue will be disputed or the order opposed.[259] One

249 *Criminal Procedure Act 2009* (Vic) s 183(4).

250 *Criminal Procedure Act 2009* (Vic) s 189.

251 *Criminal Procedure Act 2009* (Vic) s 190.

252 *Criminal Procedure Act 2009* (Vic) s 190(4). It is a criminal offence for any police officer or person acting for the prosecution to communicate directly or indirectly with a witness named in this notice: *Criminal Procedure Act 2009* (Vic) s 191.

253 *Criminal Procedure Act 2009* (Vic) s 190(7).

254 *Criminal Procedure Act 2009* (Vic) s 190(8).

255 *Criminal Procedure Act 2009* (Vic) s 185.

256 *Criminal Procedure Act 2009* (Vic) s 188.

257 *Criminal Procedure Act 2009* (Vic) s 184.

258 *Criminal Procedure Act 2009* (Vic) s 199.

259 *Criminal Procedure Act 2009* (Vic) s 200(1).

such issue may be the defendant's application that certain prosecution evidence be excluded.[260]

3.66 The judge determining any such pre-trial issue need not be the trial judge,[261] but that judge's rulings will be binding on the trial judge unless the trial judge considers 'that it would not be in the interests of justice for the order or other decision to be binding.'[262]

3.67 The documents that the parties are required to file and serve before the trial in principle limit the issues and evidence that each may raise at the trial.

3.68 In their opening addresses,[263] both parties are restricted to the matters set out in the documents that they served on the other party under the pre-trial disclosure regime.[264] The parties are free to depart from those documents only if the trial judge considers that there are 'exceptional circumstances'. A change of legal representative does not constitute exceptional circumstances.[265]

3.69 The parties may introduce evidence at the trial which was not disclosed in the pre-trial exchange of material with the leave of the trial judge.[266] If the defendant gives evidence which could not have been foreseen by the prosecution having regard to the defendant's pre-trial notices, the trial judge may allow the prosecutor to call evidence in reply.[267]

3.70 With severe limits, a breach by one party of its pre-trial disclosure and notification obligations, or a departure from that material by the introduction of different evidence at the trial, may be the subject of comment to the jury by the judge or another party.[268] Comment may only be made with the leave of the trial judge, and only if the comment is relevant and 'not likely to produce a miscarriage of justice'.[269] In any event, no comment by the judge or a party may suggest that any inference of guilt may be drawn from the other party's breach except 'in those circumstances in which an inference of guilt might be drawn from a lie' told by the defendant or from a failure by the defendant to call evidence from a particular witness.[270] No comment may suggest that a breach may be taken into account in considering the probative value of the prosecution evidence except where the defendant's failure to give or lead evidence might be taken into account for that purpose.[271]

260 *Criminal Procedure Act 2009* (Vic) s 202.

261 *Criminal Procedure Act 2009* (Vic) s 203.

262 *Criminal Procedure Act 2009* (Vic) s 204.

263 See [3.154] below.

264 *Criminal Procedure Act 2002* (Vic) ss 224, 225. See [3.60]–[3.61] above.

265 *Criminal Procedure Act 2002* (Vic) ss 224, 225.

266 *Criminal Procedure Act 2009* (Vic) s 233(1).

267 *Criminal Procedure Act 2009* (Vic) s 233(2).

268 *Criminal Procedure Act 2009* (Vic) s 237(1).

269 *Criminal Procedure Act 2009* (Vic) s 237(2).

270 *Criminal Procedure Act 2009* (Vic) s 237(3)(a), (b)(i).

271 *Criminal Procedure Act 2009* (Vic) s 237(b)(ii).

3.71 However, it appears that the adverse comment provisions that currently exist in the *Crimes (Criminal Trials) Act 1999* (Vic) have not been routinely used for two reasons. The first is said to be the high rate of compliance; the second is that the judiciary considers the provisions to be 'problematic' as '[s]ubstantial difficulties arise in framing an adverse comment in a manner that does not distract the jury from a proper consideration of the evidence.'[272]

Western Australia

3.72 A defendant in Western Australia is subject to a series of on-going[273] pre-trial disclosure obligations, some of which can be waived or modified by the court.

3.73 Within a prescribed period before the trial, defendants must give written notice of their intention to give or lead alibi evidence, the details of the nature of that evidence and the name of each witness that the defendant intends to call with information sufficient to enable that person to be located.[274]

3.74 The obligation to disclose alibi evidence cannot be waived or modified by the court.[275]

3.75 Other similar obligations on the part of the defendant that may be waived or modified by the court[276] include disclosure of expert evidence, written notice of the factual elements of the offence that the defendant may contend cannot be proved, and written notice of any objection by the defendant to any document, or the evidence of any witness, that the prosecution intends to adduce at the trial.[277]

3.76 A failure by either party to comply with its disclosure obligations may result in adjournment of the trial, the discharge of the jury[278] and adverse comment to the jury by the judge, defendant or prosecutor.[279]

New Zealand

3.77 The *Criminal Disclosure Act 2008* (NZ) came into effect on 29 June 2009. As can be seen from its title, it is a single piece of legislation concerned with pre-trial disclosure in criminal trials with a stated purpose to 'promote fair, effective, and efficient disclosure of relevant information between the prosecution and the defence, and by non-parties, for the purposes of criminal proceedings.'[280] Section 3(2) of the Act contains a general overview of the disclosure regime in diagrammatic form, reproduced in Figures 1 and 2 below.

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272 Trial Efficiency Working Group, Criminal Law Review Division, Attorney General's Department of NSW, *Report of the Trial Efficiency Working Group* (2009) 34.

273 *Criminal Procedure Act 2004* (WA) s 96(4). See also Trial Efficiency Working Group, Criminal Law Review Division, Attorney General's Department of NSW, *Report of the Trial Efficiency Working Group* (2009) 37–9.

274 *Criminal Procedure Act 2004* (WA) s 96(3).

275 *Criminal Procedure Act 2004* (WA) s 96(2).

276 See *Criminal Procedure Act 2004* (WA) s 138.

277 *Criminal Procedure Act 2004* (WA) s 96(3)(b), (c) and (d).

278 *Criminal Procedure Act 2004* (WA) s 97(2), (3).

279 *Criminal Procedure Act 2004* (WA) s 97(4).

280 *Criminal Disclosure Act 2008* (NZ) s 3(1).

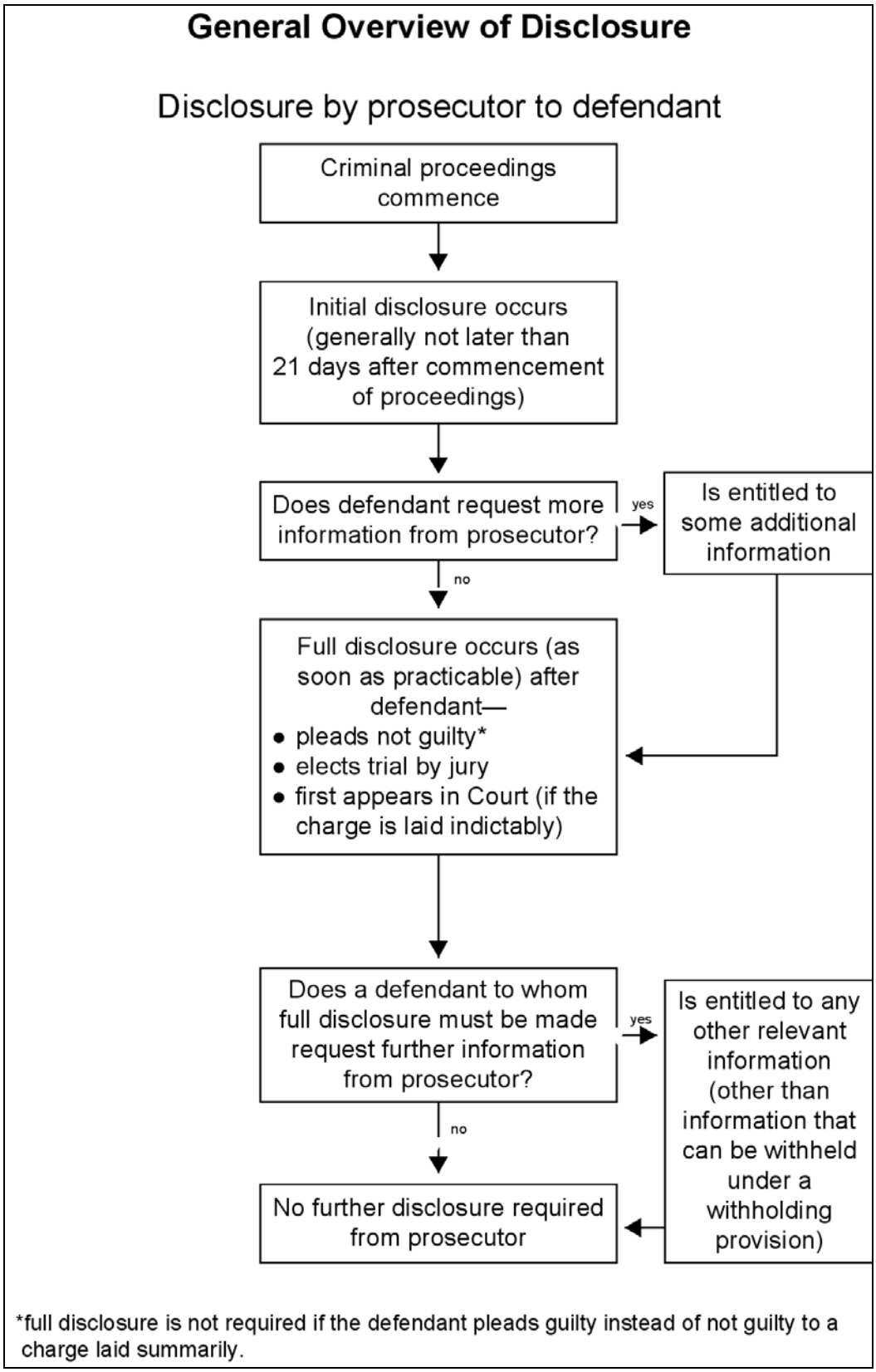
General Overview of Disclosure
Disclosure by prosecutor to defendant
Criminal proceedings commence
Initial disclosure occurs (generally not later than 21 days after commencement of proceedings)
Does defendant request more information from prosecutor?
yes
Is entitled to some additional information
no
Full disclosure occurs (as soon as practicable) after defendant—
• pleads not guilty*
• elects trial by jury
• first appears in Court (if the charge is laid indictably)
Does a defendant to whom full disclosure must be made request further information from prosecutor?
yes
Is entitled to any other relevant information (other than information that can be withheld under a withholding provision)
no
No further disclosure required from prosecutor
*full disclosure is not required if the defendant pleads guilty instead of not guilty to a charge laid summarily.

Figure 1

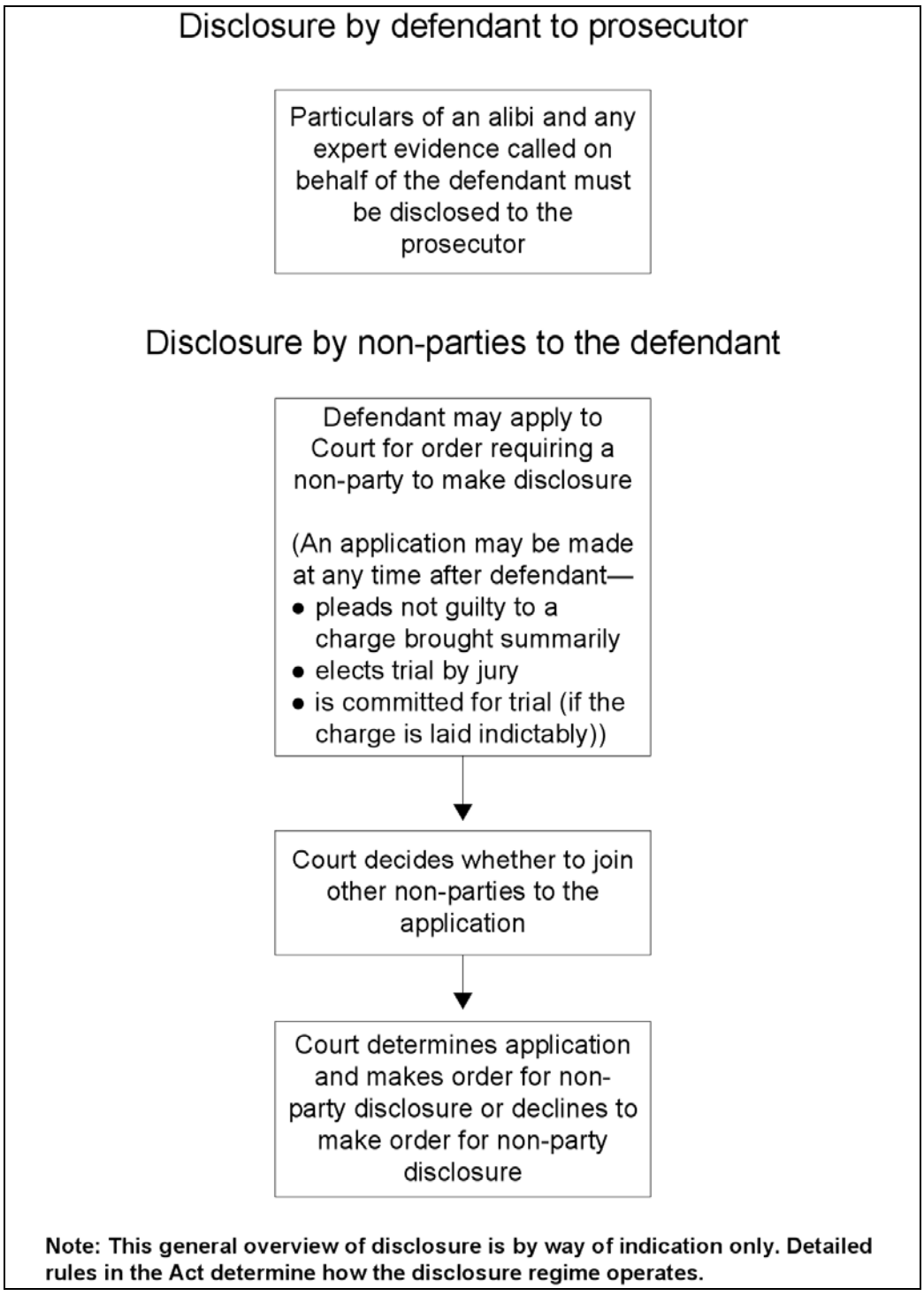
Disclosure by defendant to prosecutor
Particulars of an alibi and any expert evidence called on behalf of the defendant must be disclosed to the prosecutor
Disclosure by non-parties to the defendant
Defendant may apply to Court for order requiring a non-party to make disclosure
(An application may be made at any time after defendant—
• pleads not guilty to a charge brought summarily
• elects trial by jury
• is committed for trial (if the charge is laid indictably))
Court decides whether to join other non-parties to the application
Court determines application and makes order for non-party disclosure or declines to make order for non-party disclosure
Note: This general overview of disclosure is by way of indication only. Detailed rules in the Act determine how the disclosure regime operates.

Figure 2

3.78 The defendant's principal obligations of disclosure are found in sections 22 and 23 of the Act. Under section 20, the defendant must be given written notice of these requirements by the court.

3.79 Section 22 requires defendants to give written notice of the particulars of any alibi on which they intend to rely. This notice must include the names and addresses of any witnesses to be called by the defendant for this purpose. Section 23 requires defendants to disclose to the prosecutor any brief of evidence or report to be given by any expert witness, or a summary of that brief or the conclusions of any such report.

3.80 The court has powers to set a timetable for compliance with the parties' various disclosure obligations.[281] Failure to comply may result in further directions or, if the court is satisfied that there was no reasonable explanation for the failure, the court may deal with the failure as a contempt of court.[282]

3.81 If the court is satisfied that at the trial a party has sought to lead evidence that should have been disclosed but was not, it may exclude the evidence, adjourn the trial with or without requiring the evidence to be disclosed, or admit the evidence if 'it is in the interests of justice to do so.'[283] However, the court must not order the exclusion of evidence sought to be adduced by the defendant (whether of an alibi, as expert evidence, or otherwise) if it appears that the defendant was not given notice in accordance with the Act of its requirements but must adjourn the hearing if the prosecution requests an adjournment.[284]

England and Wales[285]

3.82 The relevant provisions in England and Wales are contained in the *Criminal Procedure and Investigations Act 1996* (Eng).[286] Prior to this coming into effect, the defendant's obligations of disclosure where confined to the familiar areas of alibi and expert evidence (although more elaborate disclosure could be ordered in complex fraud cases).[287]

3.83 The scheme of pre-trial disclosure in this Act has been described as a triumph of 'arguments based on efficiency and convenience' over principle, and as 'radically' shifting the 'axis of pre-trial disclosure by reducing the obligations on the prosecution and increasing those on the defence'.[288] The prosecution's obligations

281 *Criminal Disclosure Act 2008* (NZ) s 32(1).

282 *Criminal Disclosure Act 2008* (NZ) s 32(3).

283 *Criminal Disclosure Act 2008* (NZ) s 34(2).

284 *Criminal Disclosure Act 2008* (NZ) s 34(3).

285 The 'distinctive and well-established' scheme of defence disclosure in Scotland is described briefly in Kevin Dawkins, 'Defence Disclosure in Criminal Cases' [2001] *New Zealand Law Review* 35, 58.

286 See Kevin Dawkins, 'Defence Disclosure in Criminal Cases' [2001] *New Zealand Law Review* 35, 43, 46–8; Trial Efficiency Working Group, Criminal Law Review Division, Attorney General's Department of NSW, *Report of the Trial Efficiency Working Group* (2009) 39–50.

287 Kevin Dawkins, 'Defence Disclosure in Criminal Cases' [2001] *New Zealand Law Review* 35, 43.

288 Ibid, 35, 43, 46–8.

previously based on the common law were codified in this Act with the effect that they were in fact narrowed.[289]

3.84 The regime comes into effect after committal. After primary disclosure by the prosecution of any material that has not previously been disclosed or which might undermine the prosecution case,[290] defendants in indictable cases only are required to give their defence statements to the court and prosecution within 14 days of receiving the prosecution's primary disclosure (or statement that there is nothing further to disclose).[291] Under section 6A:

> (1) … a defence statement is a written statement—
>
> (a) setting out the nature of the accused's defence, including any particular defences on which he intends to rely,
>
> (b) indicating the matters of fact on which he takes issue with the prosecution,
>
> (c) setting out, in the case of each such matter, why he takes issue with the prosecution,
>
> (ca) setting out particulars of the matters of fact on which he intends to rely for the purposes of his defence, and
>
> (d) indicating any point of law (including any point as to the admissibility of evidence or an abuse of process) which he wishes to take, and any authority on which he intends to rely for that purpose.
>
> (2) A defence statement that discloses an alibi must give particulars of it, including—
>
> (a) the name, address and date of birth of any witness the accused believes is able to give evidence in support of the alibi, or as many of those details as are known to the accused when the statement is given;
>
> (b) any information in the accused's possession which might be of material assistance in identifying or finding any such witness in whose case any of the details mentioned in paragraph (a) are not known to the accused when the statement is given.

3.85 The prosecution remains under an on-going obligation of disclosure.[292]

3.86 The consequences of a failure to comply can be severe: the court or any other party may make such comment as appears appropriate and the court and jury may draw such inference as appear proper in deciding whether the defendant is guilty of the offence concerned.[293] In other words, the defendant's conduct (or that

289 Trial Efficiency Working Group, Criminal Law Review Division, Attorney General's Department of NSW, *Report of the Trial Efficiency Working Group* (2009) 41.

290 *Criminal Procedure and Investigations Act 1996* (Eng) s 3(1)(a).

291 *Criminal Procedure and Investigations Act 1996* (Eng) s 5; Kevin Dawkins, 'Defence Disclosure in Criminal Cases' [2001] *New Zealand Law Review* 35, 45.

292 *Criminal Procedure and Investigations Act 1996* (Eng) s 7A.

293 *Criminal Procedure and Investigations Act 1996* (Eng) s 11(5).

of the prosecution or a co-defendant) may be taken into account by a jury in assessing the defendant's guilt. However, a defendant cannot be convicted solely on the basis of such an inference.[294] Conduct which can trigger these consequences includes failing to disclose, late disclosure, setting out inconsistent statements in the defence statement, and advancing a defence at the trial that has not been disclosed.[295]

3.87 This is apparently the only jurisdiction in relation to which the Commission has information that goes this far. Others make it clear that no comment can be made to a jury that intimates that it can draw any inference about guilt from the defendant's compliance with pre-trial disclosure requirements.[296] The legislation in some other jurisdictions is silent on this question.[297] However, the duty to ensure a fair trial might in other circumstances require a judge to limit the extent of such comment if it purported to suggest that the defendant's guilt could be inferred from non-compliance. Comment on the conduct of unrepresented defendants may need to considered with particular care. However, the judge's leave is no longer required before comment can be made in England and Wales.

3.88 The Act also provides for preparatory hearings where 'it appears to a judge of the Crown Court that an indictment reveals a case of such complexity, a case of such seriousness or a case whose trial is likely to be of such length, that substantial benefits are likely to accrue from a hearing … before the time when the jury are sworn'.[298] A preparatory hearing may be ordered on the motion of either party or the court itself.[299] The purposes of preparatory hearings are those of:

> (a) identifying issues which are likely to be material to the determinations and findings which are likely to be required during the trial,
>
> (b) if there is to be a jury, assisting their comprehension of those issues and expediting the proceedings before them,
>
> (c) determining an application to which section 45 of the *Criminal Justice Act 2003* applies,
>
> (d) assisting the judge's management of the trial,
>
> (e) considering questions as to the severance or joinder of charges.[300]

3.89 The second of these is of clear relevance to this enquiry.

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294 *Criminal Procedure and Investigations Act 1996* (Eng) s 11(10).

295 *Criminal Procedure and Investigations Act 1996* (Eng) s 11(2)–(4); Kevin Dawkins, 'Defence Disclosure in Criminal Cases' [2001] *New Zealand Law Review* 35, 46.

296 *Criminal Procedure Act 1986* (NSW) s 148(4); *Criminal Procedure Act 2009* (Vic) s 237(3)(a), (b)(i).

297 See *Criminal Law Consolidation Act 1935* (SA) s 285BB(3); *Criminal Procedure Act 2004* (WA) s 97(4).

298 *Criminal Procedure and Investigations Act 1996* (Eng) s 29(1). A preparatory hearing must be ordered in every case where at least one of the offences charged by the indictment against at least one of the persons charged is an offence carrying a maximum of at least 10 years' imprisonment; and it appears to the judge that evidence on the indictment reveals that conduct in respect of which that offence is charged had a terrorist connection: s 29(1C).

299 *Criminal Procedure and Investigations Act 1996* (Eng) s 29(4).

300 *Criminal Procedure and Investigations Act 1996* (Eng) s 29(2).

3.90 The judge's powers at a preparatory hearing include ordering the prosecutor:

- to give the court and the defendant a written case statement setting out the principal facts of the case for the prosecution, the witnesses who will speak to those facts, any exhibits relevant to those facts, any proposition of law on which the prosecutor proposes to rely, and the consequences that appear to flow from any of these matters;

- to prepare the prosecution evidence and any explanatory material in such a form as appears to the judge to be likely to aid comprehension ***by a jury*** and to give it in that form to the court and to the each defendant;

- and to give the court and the defendant written notice of documents the truth of the contents of which ought in the prosecutor's view to be admitted and of any other matters which in his or her view ought to be agreed.[301]

3.91 Where this is done, defendants may be ordered to:

- give the court and the prosecutor written notice of any objections that they have to the prosecutor's case statement;

- provide a written statement setting out the extent to which they agree with the prosecutor as to documents and other matters in relation to which notice has been given, and the reason for any disagreement.[302]

3.92 The defendant must be warned by the judge of the possible consequences of failing to comply with such an order.[303] Those consequences include that the judge or (with the leave of the judge) any other party may make such comment as appears to be appropriate — and the jury (or, in the case of a trial without a jury, the judge) may draw such inference as appears proper.[304] In doing any such thing, and in deciding whether to do it, the judge shall have regard to the extent of the departure or failure, and whether there is any justification for it.[305] Except in those circumstances, no part of any statement given by the defendant, or any other information relating to the defence case, may be disclosed without the consent of the defendant at any stage in the trial after the jury has been sworn.[306]

3.93 The operation of the *Criminal Procedure and Investigations Act 1996* (Eng) was evaluated in 2001 by the Home Office:

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301 *Criminal Procedure and Investigations Act 1996* (Eng) s 31(4), (5).

302 *Criminal Procedure and Investigations Act 1996* (Eng) s 31(6), (7).

303 *Criminal Procedure and Investigations Act 1996* (Eng) s 31(8).

304 *Criminal Procedure and Investigations Act 1996* (Eng) s 34(2).

305 *Criminal Procedure and Investigations Act 1996* (Eng) s 34(3).

306 *Criminal Procedure and Investigations Act 1996* (Eng) s 34(4).

The report found a general dissatisfaction with the operation of the disclosure scheme amongst the majority of barristers, solicitors and judges. Most of the dissatisfaction related to factors such as administration, bad practice, and mistrust between the parties. This suggested problems with the implementation and management of the disclosure provisions, rather than inherent problems with the provisions themselves. The report found that, anecdotally, the average length of trials in the Crown Court had not fallen as hoped.

Some of the key problems identified by the report were:

- competence and or inclination of police to discharge their disclosure obligations;
- inadequacy of defence case statements; and
- judicial attitudes.

The report also indicated that in some areas, practice had moved away from the [Act] and the pre-existing common law scheme was being applied.

Prosecution disclosure

Eighty-two percent of judges thought it was unrealistic to expect police officers to identify material which undermined the prosecution case, and there were concerns that the only person with the knowledge and skill to understand what should be disclosed was the prosecution counsel, and that provision should be made to remunerate them for this work.

There were also concerns that non-sensitive material which should have been disclosed to the defence was being withheld by the prosecution.

Defence disclosure

At the time the provisions were enacted, there was widespread opposition to defence disclosure and the idea that prosecution disclosure should be linked to a statement about the nature of the defence. According to the report, this has been manifested in an unwillingness of the defence to submit meaningful defence case statements and judicial reluctance to deny defence applications for unused prosecution material; defence statements often contained little of substance about how the prosecution evidence would be challenged at trial.

In the view of the writers of the Home Office report, of the matters prosecuted on indictment, 52% of the defence case statements reviewed contained either a bare denial of guilt, or did not meet the requirements of the [Act].

There also appeared to be little incentive for the defence to act otherwise. Many judges appeared to be as uneasy about the [Act] as the defence and were reluctant to resist defence disclosure requests, regardless of the quality of the defence case statements.

Unsurprisingly, most respondents thought that the defence case statements had not narrowed the issues at trial. The responses received from judges indicated that no judge found defence case statements useful. There were also concerns expressed by disclosure officers that it was impossible to fulfil their secondary disclosure obligations when provided with a defence statement which was without substance.

> Judicial attitudes
> While 59% of judges said that they would order a non-compliant defence statement to be amended, only 4% of prosecution and defence practitioners thought that most judges did so. It would seem that although judges complain that defence case statements are without substance, they do not enforce compliance with the requirements of the [Act].
>
> As mentioned above, judges appeared reluctant to resist defence disclosure requests regardless of the inadequacy of the defence case statements. The report noted that it was hard to see how any legislation could operate effectively if there was judicial reluctance to enforce its provisions.[307]

3.94 The Act was amended in 2003. These changes, among other matters:

- provided for a single objective test for the disclosure by the prosecution of any material that might reasonably be considered capable of either undermining the case for the prosecution against the defendant or assisting the defendant's case;
- expanded the scope of the defendant's mandatory disclosure by imposing greater specificity on the content of the defence statement, including the nature of the defence (including all particular defences that will be relied on), particulars of all matters of the fact with which the defendant takes issue, the names, addresses and dates of birth of all defence witnesses other than the defendant, details of experts retained by the defendant even where their reports are not relied on; and
- most significantly, removed the requirement in many cases that the prosecution seek leave of the court before commenting on a fault in the defendant's disclosure.[308]

3.95 The Act was amended again in 2008 to require defendants to set out the particulars of the matters of fact on which they intend to rely for the purposes of their defences, in addition to all the other details that they are required to disclose.[309]

Canada

3.96 Canadian pre-trial disclosure obligations for defendants are limited to advance notice of expert testimony to be introduced at trial. Although details of the defendant's proposed expert witnesses must be disclosed, their reports do not have to be disclosed until the end of the prosecution case at the trial. As this is the defendant's only obligation, sanctions are limited: the court must adjourn the trial to allow the prosecution to prepare for cross-examination of the expert witness and

307 Trial Efficiency Working Group, Criminal Law Review Division, Attorney General's Department of NSW, *Report of the Trial Efficiency Working Group* (2009) 45–7.

308 Ibid 47–9.

309 See Ibid 50.

allow the prosecution to call or re-call any witnesses to testify on matters relating to the expert's evidence.[310]

Submissions

3.97 In its Issues Paper, the Commission specifically sought submissions on the extent to which an early exploration of the issues for the trial might usefully be expanded.[311]

3.98 The VLRC also discussed the benefits of early issue identification in its Consultation Paper:[312] the VLRC proposed that the jury be given an agreed statement of the elements of the offence and matters in dispute at the commencement of the trial.[313]

3.99 Only two of the respondents to the Commission's Issues Paper addressed this issue.

3.100 The greater use of pre-trial directions was endorsed by a judge of the District Court of Queensland.[314]

3.101 A Supreme Court judge submitted that there was merit in considering a regime of greater pre-trial disclosure on the part of defendants, though the judge appreciated that this was unlikely to be popular with the legal profession.[315] The judge noted that pre-trial disclosure was already required in relation to alibis and expert evidence.[316] However, the judge pointed out that the requirement for defendants to give notice of their proposed expert evidence is triggered when they form the intention to adduce that evidence, and that some defence counsel, cynically or otherwise, postponed giving that notice until very late, even during the trial, on the basis that the defendant had not yet made the decision to call that evidence.[317]

3.102 The greater use of pre-trial interlocutory processes was endorsed in submissions to the VLRC:

> Early identification of legal issues will assist the trial Judge in both the running and the directions to be given in a trial.
>
> • Presently, the problem is that, prior to the trial, whilst issues are sometimes identified that is not always the case and where those issues are identified they are not usually argued or determined. Ideally, the best way to overcome this problem is for jury directions issues to be argued before

310 *Criminal Code*, RS C 1985, c 46, s 657.3(3)–(7), inserted by *Criminal Law Amendment Act, 2001* (2002, c 13). See Kevin Dawkins, 'Defence Disclosure in Criminal Cases' [2001] *New Zealand Law Review* 35, 56–7; Trial Efficiency Working Group, Criminal Law Review Division, Attorney General's Department of NSW, *Report of the Trial Efficiency Working Group* (2009) 51–2.

311 Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [8.12].

312 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) ch 6.

313 Ibid Proposal 4. See [3.107]–[3.108] below.

314 Submission 6.

315 Submission 7.

316 See Criminal Code (Qld) ss 590A, 590B respectively.

317 Submission 7.

the trial Judge. This requires a Judge to be assigned to a case at a much earlier stage.

- A list of topics relevant (or potentially relevant) to jury directions should be provided to the trial judge at an early stage by the parties. We think this helps to crystallise the issues for the parties and the judge. It also serves to shorten the time that the jury is left waiting later on. A reference to the leading authorities and relevant deposition page references would assist. This document might then assist in the formation of the 'Aide Memoire' referred to in par. 7.56 of the Consultation Paper.[318] We agree that an 'Aide Memoire' would assist in the identification of issues and should cover the elements of the offence and indicate the matters that are in dispute or alternatively those matters that aren't in dispute.

- Subsection 12(2) of the *Crimes (Criminal Trials) Act 1999* [(Vic)] provides that any rulings made by a judge at a directions hearing may bind a different judge at trial. When viewed in combination with ss.5(5), these provisions could encompass jury directions issues. It is less than ideal that different judges determine different issues, but the legislation permits it, and it may suit all parties in some instances.[319] (note added)

3.103 Bernard Lindner, a member of the Criminal Bar Association, said this on the question of pre-trial procedures discussed in the VLRC's Consultation Paper:

> I agree with the proposition, at para 6.6 [of the VLRC's Consultation Paper],[320] that to minimize the risk of error, it is preferable to identify relevant issues as early in the trial process as possible. Many issues of law can be anticipated. But criminal trials are not static events; they are often 'organic'. They grow. The quantum of evidence often changes — some matters may be excluded. It is not unusual for the prosecution to call additional evidence, after a Notice of Additional Evidence has been given. That may have any number of consequences — for directions, for warnings etc. Important decisions are constantly being made by both prosecution and defence both at the pre-trial stage and during a trial. At the pre-trial stage, as far as defence preparation is concerned, there is a pitiable fee paid to counsel. Case conferences and Directions hearings are poorly funded. If this stage of the criminal justice process is to be given greater priority (and I agree that it should), it is imperative to inject proper resources at it to enable the defence to properly devote the time and effort required. Without a considerable increase in 'front-end' funding of criminal trials, a less than optimal system will continue.[321] (note added)

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318 This paragraph is set out in [4.17] below.

319 Daniel Gurvich and Mark Pedley, Submission to the Victorian Law Reform Commission, 23 December 2008. The use of materials such as the Aide Memoire referred to in this submission is discussed in chapter 4 of this Paper.

320 Paragraph [6.6] of the VLRC's Consultation Paper reads:

> In order to minimise the risk of error, it is preferable to identify relevant issues as early in the trial process as possible. In the absence of pre-trial issue identification, the judge must respond to the legal issues as they arise during the course of the trial or rely upon trial counsel to request warnings and directions where appropriate. While an early understanding of the legal issues will not necessarily prevent errors occurring, preliminary consultations confirmed that a process that requires judges to respond to legal issues 'on the run' increases the risk of errors, particularly in complex trials. (note omitted)

321 Bernard Lindner (Criminal Bar Association), Submission to the Victorian Law Reform Commission, 30 November 2008.

3.104 In a similar vein, Judge MD Murphy of the County Court submitted:

> I am of the view that the issues ought to be at least identified at the time of the opening addresses. I would not necessarily oblige Counsel to provide the issues in writing.[322]

3.105 The greater use of pre-trial interlocutory proceedings was also endorsed by the Law Reform Committee of the County Court of Victoria:

> **The [VLRC] proposes** the production of a jury guide, prepared by the parties, and settled by the trial judge. It should be prepared at the start of the trial, and revised, if necessary in the course of the trial. Its purpose is to set out the elements of the offences and identify the issues in the trial.
>
> **Response.**
> The provision of a jury guide is supported. The efficacy of a proposal that it be prepared by counsel in advance depends on the early preparation of trial counsel, their co operation, and their ability or preparedness to identify what is in issue in the trial. The experience of the County Court in the use of the Criminal Trials Act to attempt to identify in advance 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 jury guide setting out the elements and the issues will be too often honoured in the breach. Any proposal to delay the commencement of the trial until the guide has been prepared will only add to the length of trials, and further increase in the backlog of trial. In addition, it cuts across the provision of date certainty for the giving of evidence by complainants in sexual offence trials.
>
> It is recognised these may be problems more likely to be encountered in the County Court, than in the Supreme Court. The County Court is the major trial court. It deals with the vast majority of jury trials in the State, has experienced a considerable increase in trials in recent years, and its listing practices are more aggressive, in order to keep delay to a minimum. In the Supreme Court, the combination of the smaller caseload, the nature of the trials and the greater resources available to prosecution and defence for preparing and running such trials encourage more effective early issue identification.
>
> Despite these reservations, there is support for the provision of a jury guide setting out the elements and the issues and support for any proposal which is more successful than the existing processes of the court in forcing early briefing and early preparation and cooperative communication between counsel before trial.
>
> The listing processes in the County Court, whilst keeping delay to a minimum, mean that trial judges often have little time to prepare a trial (or even read the file) before it is due to start. Preparation of a series of standardised documents in template form, setting out the elements, and making provision for the inser-

322 Judge MD Murphy, Submission to the Victorian Law Reform Commission, 5 February 2009, 6.

> tion of the matters in issue would assist judges, and would also assist counsel in complying with what is required.[323]

3.106 Other similar procedural changes might also enhance jury comprehension, in the view of the Law Reform Committee:

> **The [VLRC] proposes**, in addition to the provision of the jury guide, making specific provision permitting the adjourning of the trial after addresses and before delivery of the charge. It also suggests giving consideration to splitting the charge.
>
> **Response**
> Although it is open at present to delay delivery of the charge after addresses, a legislative provision to that effect may assist in changing practices and expectations about the timing of the charge. It is unclear whether splitting the charge would shorten it, or assist the judge in better understanding the issues or discretionary directions before delivery of the charge. Splitting may cut across the reformulated Alford v Magee requirement. Early identification of the real issues in the trial, and of what discretionary directions are required to be given in the interests of a fair trial can be better achieved through discussions between the trial judge and counsel before and during the trial. A more effective means of ensuring all issues are identified and all directions are sought before addresses is to require the judge after the close of the evidence and before addresses to ensure that the issues are defined and all directions sought by the parties, or considered by the judge as necessary are raised, and ruled on.[324]

VLRC's recommendations

3.107 The VLRC strongly advocated the development ***and enforcement*** of procedural rules that sought, among other matters, to identify so far as possible before the trial (and certainly before the jury is empanelled) the real issues in dispute and, therefore, the matters that the jury is likely to have to decide in order to arrive at a verdict. This in turn assists the judges and the parties in assessing what directions might or will need to be given, and what other material might usefully be placed before the jury other than the evidence itself. A note of frustration was sounded as the VLRC also catalogued the history of failure to comply with and enforce the various similar rules that had been introduced from time to time in Victoria since 1993.[325]

3.108 Indeed, this sense of frustration appears to have been a goad to the VLRC, which went so far as to recommend that a failure by legal practitioners to observe the rules relating to criminal trial procedure which resulted in the lengthening of the trial or the exacerbation of the jury's tasks should result in appropriate cases in professional censure or disciplinary action:

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323 Law Reform Committee of the County Court of Victoria, Submission to the Victorian Law Reform Commission, 13 March 2009, 5–6.

324 Ibid 7.

325 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [6.6]–[6.26].

40. Legislation should provide that notwithstanding section 250 of the *Criminal Procedure Act 2009* (Vic)[326] 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.[327]

Review of the civil and criminal justice system in Queensland

3.109 In December 2008, the Hon Martin Moynihan AO QC, former Judge Administrator of the Supreme Court of Queensland, reported to the Attorney-General on his review of the civil and criminal justice system in Queensland.[328] The Terms of Reference for the review required Mr Moynihan to report on:

> Whether there should be a formal system supported by legislation and/or practice direction to facilitate:
>
> - Early identifying and encouragement of pleas of guilty.
> - Identifying points to be determined by pre-trial rulings.
> - Narrowing issues to be determined by the jury.
> - Facilitating the conduct of the trial.[329]

3.110 His principal recommendation was that there be a 'comprehensive overhaul of all criminal justice procedure legislation and rules to consolidate, modernise and streamline criminal justice procedure in Queensland.[330]

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326 Section 250 of the *Criminal Procedure Act 2009* (Vic) reads:

> **250. Complaints about legal practitioners**
>
> If a court considers that a legal practitioner for a party has failed to comply with—
>
> (a) a requirement of Part 5.5 or an order made under Part 5.5, including an order or requirement under section 181; or
>
> (b) an order under section 352 or 358—
>
> the court may make a complaint about the legal practitioner's conduct to the Legal Services Commissioner under Chapter 4 of the Legal Profession Act 2004.

327 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) 17, [6.6]–[6.26].

328 The Hon Martin Moynihan AO QC, *Review of the civil and criminal justice system in Queensland*, Report (2008).

329 Ibid Appendix 1.

330 Ibid Rec 1, 5, ch 4. Mr Moynihan discusses a pre-trial disclosure regime in chapter 5 of his Report but his recommendations in this regard are primarily directed to disclosure up to the time of a committal hearing.

3.111 Chapter 5 of his Report deals with pre-trial disclosure in criminal matters and considers Chapter 62 Division 3 (ie, sections 590AB to 590AX) of the Criminal Code (Qld) in some detail. These provisions deal with disclosure by the prosecution. The Report also deals, though without much discussion, with disclosure by the defendant.[331] The Report focuses on the committal stage of criminal proceedings and disclosure by the prosecution up to the point of the committal hearing. However, some of the Report's recommendations do impact on the defendant's obligations by providing the prosecution with a procedure by which it can complain to the court of any non-compliance by a defendant.[332]

3.112 Mr Moynihan's review and recommendation have a far greater scope than the Commission's review of jury directions. However, the Commission's proposals are, so far as they cover issues dealt with by his Report, consistent with Mr Moynihan's recommendations. If his recommendations about a comprehensive overhaul of criminal justice procedure are implemented, the Commission's more specific recommendations about jury directions could be included in that reform process, and will be affected by the implementation of his suggested reforms of committal procedures.

NSW Trial Efficiency Working Group Report

3.113 In March 2009, the Trial Efficiency Working Group of the Criminal Law Review Division of the Attorney-General's Department of NSW issued its report which focussed in large measure on the identification of issues at trial.[333] The Working Group concluded that:

> Recent studies have indicated that criminal trials are not always conducted to best facilitate the understanding of jurors. It is the view of the Working Group that steps should be taken to enhance the comprehension of jurors. It is anticipated that improvements in jury comprehension will follow from other recommendations made in this Report in relation to the pre-trial identification of issues, the way technology is used, and the conduct of counsel.
>
> …
>
> The Working Group proposes that all parties to a criminal trial take responsibility for the early identification of issues. This will require a significant cultural change from the legal profession. The parties will be required to give early notice of information such as the list of witnesses to be called at trial; the identity of the counsel briefed to appear on behalf of the Crown/accused; whether the Crown intends to adduce evidence in the form of a summary; and whether the defence objects to the presentation of evidence in this way. Fundamental to the Working Group's recommendation is a mechanism to identify the issues to be tried. The court, either on its own initiative or on application from a party, should be able to impose an intensive case management regime where this is considered necessary. This may require the parties to engage in a pre-trial case conference and/or revised form of the existing pre-trial disclosure provi-

331 See, for example, The Hon Martin Moynihan AO QC, *Review of the civil and criminal justice system in Queensland*, Report (2008) 89.

332 See Ibid 99–103.

333 Trial Efficiency Working Group, Criminal Law Review Division, Attorney General's Department of NSW, *Report of the Trial Efficiency Working Group* (2009).

sions. This will be directed at the identification of issues and effective presentation of the evidence.[334]

3.114 Its more specific recommendations included the following:

> 7. Amend the *Criminal Procedure Act 1986* to provide for three tiers of case management:
>
> - o compulsory prosecution and defence disclosure of specified matters in all criminal trials;
> - o the establishment of a system of pre-trial case conferences which may take place on the application of the parties or by initiation of the court; and
> - o intensive pre-trial case management on the application of the parties or by initiation of the court.
>
> Statutory powers should be conferred on the courts to make directions concerning the conduct and management of the trial.
>
> 8. Statutory power to be conferred on the courts to require the parties in all criminal trials to identify the issues for determination in the trial.

3.115 Although the focus of the Working Group was on the efficient management and disposition of criminal trials, many of its observations relate to, and its recommendations would affect, the way in which information is presented to the jury:

> Identification of the issues
> Working Group members agreed that insufficient efforts were being made by trial counsel to narrow the issues for trial before empanelment of the jury. This could have a number of flow-on effects, including the presentation of unimportant or uncontested evidence, difficulties for the jury in understanding the issue to which a piece of evidence was relevant, and an inability of the judge to curtail irrelevant lines of questioning or argument.
>
> Presentation of evidence
> Working Group members considered that in some cases, the prosecution had a tendency to 'over prove' matters by calling repetitive evidence, or calling non-contentious witnesses. This problem is tied to the identification of the issues, and may share a common solution.
>
> …
>
> The inefficiencies that can arise from the failure to identify the issues to be determined at trial are obvious, including an increased likelihood that evidence of little or no ultimate relevance will be called. A less obvious, but equally important effect of the failure to narrow the issues is the impact on the ability of the judge to manage the trial. It has already been mentioned that a significant inefficiency of the criminal justice system is the lack of adequate legislative authority enabling judges to curtail irrelevant cross-examination or repetitive legal argument. However, even if such authority were to be introduced, it would be impossible for judges to exercise that authority if the relevant issues have not been identified before the trial.

334 Ibid 6–7.

> Related to the failure of parties to define the issues at trial is the calling of non-contentious witnesses. The Commonwealth DPP … identified the calling of non-contentious witnesses as a significant contributor to trial inefficiency. These witnesses include those who are being relied upon to support surveillance evidence or to establish the continuity of evidence. This concern was shared by the Working Group which also expressed the view that the prosecution sometimes 'over proved' cases by calling repetitive evidence or evidence of very marginal importance. To some degree this is attributable to the increasing size of police briefs, which in turn reflects the increasing complexity of forensic and other evidence. This increasing complexity only heightens the need for careful management of the trial process given its impact on the length of trials and on the trial experiences of jurors. [335]

3.116 The Working Group ultimately proposed a three-tiered approach to reform of criminal trial procedure.

3.117 The first step is the pre-trial exchange of information.[336] When the prosecution files the indictment, it should also file and serve a disclosure document that:

- meets the requirements of section 138 of the *Criminal Procedure Act 1986* (NSW), which are currently imposed only where there has been an order for pre-trial disclosure;
- identifies the prosecutor to appear at the trial (in order to encourage the early briefing of counsel); and
- indicates whether the prosecution intends to lead evidence in summary form[337] in order to encourage an early consideration of the way in which the prosecution will present its evidence at the trial.

3.118 The defendant would be required to file and serve a defence response within 28 days that would:

- identify the legal representative proposed to appear at the trial;
- specify which witnesses will be required for cross-examination at the trial;
- notify of any consent by the defendant to the admission into evidence of witness statements or documentary summaries; and
- comply with the current requirements for notice of alibi and the defendant's intention to lead evidence of substantial mental impairment.

3.119 The matter will then be listed before the court.

> Estimates of likely trial length will be given and, in most cases, a date for the beginning of the trial set if this has not already occurred. Both parties will be required to confirm that the compulsory disclosure has occurred and, in most

335 Ibid 18, 75.

336 See ibid 79–81.

337 Under *Evidence Act 1995* (NSW) s 50.

> cases, no additional pre-trial case management will be required. Even if the compulsory disclosure has not occurred, the court may proceed to trial without further management.
>
> Alternatively, non-compliance with the compulsory disclosure requirements, or a view that further disclosure is required in the particular circumstances, may lead the court to conclude that a higher level of court-ordered case management is required.
>
> The aim of each of the procedures is to ensure that the parties and the court are fully cognisant of the facts and legal issues by the time the jury is empanelled. This is considered critical if trials are to run efficiently. It is important therefore that judges in all criminal trials, at the commencement of the trial, be given a statutory power to ensure that the parties have identified the issues in dispute.[338]

3.120 The second tier proposed by the Working Group is higher-level case management.[339] Either on its own motion or that of a party, the court could order either a pre-trial conference or an amended version of the pre-trial disclosure scheme set out in the legislation, which is the third tier.

3.121 The latter option is intended to circumvent the problems associated with the high threshold of 'complexity' required before the mandatory statutory scheme is enlivened. The Working Group envisages that it would apply after a failure to comply with the compulsory scheme, after a failed pre-trial conference or in any case where the issues require more intensive court intervention.[340] Nothing could be ordered that would go beyond the compulsory scheme, which would therefore represent a high-water mark in relation to the scope of disclosure.

3.122 The Working Group does not propose imposing 'an obligation on the defence to disclose its case, although in many instances disclosure of those aspects of the prosecution case that are disputed will indirectly reveal the defence case.'[341] However, its report specifically noted some disquiet among members of the Taskforce on this issue:

> Some members of the Taskforce consider that imposition of an explicit obligation on the defence to disclose the defence case conflicts with the fundamental accusatorial system of criminal procedure in this country: *RPS v The Queen* [2000] HCA 3; (2000) 199 CLR 620 at [22]–[28]; *Azzopardi v R* [2001] HCA 25; (2001) 205 CLR 50 at [34]; *Dyers v R* [2002] HCA 45; (2002) 210 CLR 285 at [9]–[10], [52], [191]; *MWJ v R* [2005] HCA 74; (2005) 80 ALJR 329 at [41].[342]

338 Trial Efficiency Working Group, Criminal Law Review Division, Attorney General's Department of NSW, *Report of the Trial Efficiency Working Group* (2009) 81.

339 Ibid 81–6.

340 Ibid 82–3.

341 Ibid 84.

342 Ibid n 132.

3.123 The Working Group also recommended that:

- the rule under section 130A of the *Criminal Procedure Act 1986* (NSW) that one judge's pre-trial rulings in sexual offence cases are binding on the trial judge be extended to all criminal cases;[343] and
- section 50 of the *Evidence Act 1995* (NSW) be amended to permit a party to adduce a summary document of the evidence of a witness where the admission of that summary would not result in unfair prejudice to any party in the proceedings.[344]

3.124 The Working Group's reform proposals also cover sanctions for non-compliance.[345] The Working Group noted the apparent reluctance of the judiciary in Victoria and England and Wales to permit adverse comments to be made to a jury about defendants' non-compliance with their disclosure obligations, and rejected the use of such comment as a sanction for a failure to comply.[346] It also rejected a statutory prohibition on the admission of prosecution evidence outside the time permitted for prosecution discourse.[347] The Commission can foresee, however, that concerns about defendants' failure to make proper pre-trial disclosure could well arise.

QLRC's proposals for reform

3.125 Defendants in criminal trials have the benefit of important principles restricting the extent to which aspects of their defence have to be disclosed. Those principles include the burden of proving the charges, which always falls on the prosecution, the right to silence and the defendant's right not to be compelled to give self-incriminating evidence.[348]

3.126 However, defendants' general rights to a fair trial and their more specific rights not to give evidence free from adverse comment and the privilege from self-incrimination do not grant them an absolute privilege from active participation in the clear statement and resolution of the issues that a trial raises. The defendant's duties under sections 590A, 590B and 590C of the Criminal Code (Qld), and similar provisions in many comparable jurisdictions, illustrate that a defendant can be legitimately and fairly required to participate actively in the management of the trial. The adversarial nature of criminal trials should not be cited as a reason to ignore the benefits to all concerned of an efficient criminal justice system. As the Hon Martin Moynihan AO QC observed:

> The point is that the adversarial cast of mind 'A man will not know of what metal a bell is made if it has not been well beaten so the law shall be well known by

343 Ibid 84–5.

344 Ibid 86.

345 See Ibid 87–8.

346 Ibid 88.

347 Ibid.

348 See, for example, *Azzopardi v The Queen* (2001) 205 CLR 50, [34] (Gaudron, Gummow, Kirby and Hayne JJ); *RPS v The Queen* (2000) 199 CLR 620, [101] (Callinan J). Also see Kevin Dawkins, 'Defence Disclosure in Criminal Cases' [2001] *New Zealand Law Review* 35, 38; The Hon Martin Moynihan AO QC, *Review of the civil and criminal justice system in Queensland,* Report (2008) 27–8.

> good disputation'[349] shapes the attitude of the protagonists: prosecution against the defence, defence attitude towards police and police towards the defence. This culture can blind the protagonists to finding common ground to dispose of a case expeditiously with the minimum necessary commitment of resources without compromising the conduct of the defence.[350] (note in original)

3.127 Conflicting views have been expressed about the legitimacy of imposing any pre-trial obligations on defendants that may in any way be seen as restricting their privileges to withhold any details of their defences until after the conclusion of the prosecution case. Criticisms of these regimes have been based on assertions said to be founded on the presumption of innocence and the requirement that the prosecution prove its case beyond reasonable doubt.[351] Others suggest that this is mere cant without a concrete foundation on a real, rather than a feared, infringement of defendants' rights.[352]

3.128 The most frequently cited criticism of regimes which require defendants to participate in issue identification before trial is that they offend against the defendants' right to silence and their asserted right never to be compelled to participate in a process that may facilitate a conviction.[353] However, the Commission notes that the rights set out, for example, in Article 14 of the International Covenant on Civil and Political Rights[354] include a right 'not to be compelled to testify against himself or to confess guilt.'[355] This does not of itself assert a right not to participate in the criminal trial process. For example, defendants are compelled to attend court for trial and ancillary court hearings by the requirements of bail or remand detention, and to plead in answer to the charges.

3.129 A more subtle argument is that compulsory disclosure of any sort by a defendant, though not disturbing the onus or standard of proof, nonetheless makes it easier for the prosecution to discharge its obligations and obtain a conviction.[356]

3.130 A number of counter-arguments have been raised against this contention:

- The right not to be forced to incriminate oneself cannot be said to be absolute or unquestionable.[357]

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349 Hankford J, Lord Chief Justice of England and Wales 1413–1424.

350 The Hon Martin Moynihan AO QC, *Review of the civil and criminal justice system in Queensland*, Report (2008) 31.

351 See Geoff Flatman QC and Mirko Bagaric, 'Accused Disclosure—Measured Response or Abrogation of the Presumption of Innocence?' (1999) 23 *Criminal Law Journal* 327, 327, writing in relation to the *Crimes (Criminal Trials) Act 1999* (Vic); Greg Martin, 'Defence disclosure: should it be accompanied by legal aid reform?' (2004) 31(10) *Brief* 14.

352 See Geoff Flatman QC and Mirko Bagaric, 'Accused Disclosure—Measured Response or Abrogation of the Presumption of Innocence?' (1999) 23 *Criminal Law Journal* 327, 327.

353 See Geoff Flatman QC and Mirko Bagaric, 'Accused Disclosure—Measured Response or Abrogation of the Presumption of Innocence?' (1999) 23 *Criminal Law Journal* 327, 329–330.

354 See [2.5] above.

355 Article 14(3)(g).

356 Kevin Dawkins, 'Defence Disclosure in Criminal Cases' [2001] *New Zealand Law Review* 35, 38–9.

357 Geoff Flatman QC and Mirko Bagaric, 'Accused Disclosure—Measured Response or Abrogation of the Presumption of Innocence?' (1999) 23 *Criminal Law Journal* 327, 300; Greg Martin, 'Defence disclosure: should it be accompanied by legal aid reform?' (2004) 31(10) *Brief* 14, 15.

- At some point, all defendants will be required to answer the charges and the evidence against them. Fair pre-trial disclosure only brings this forward to a time after the defendants have already been committed for trial (at which point a magistrate found that they had a case to answer) and to a time only relatively shortly before the trial itself, albeit a time before the evidence against the defendant has been heard at the trial.[358]

- Pre-trial disclosure of any sort does nothing to detract from the prosecution's burden of proof at trial and the presumption of innocence.[359]

- Defendants are not required to disclose their defences (other than alibis) or the evidence on which they are based (other than expert evidence and statements under section 93B of the *Evidence Act 1977* (Qld)). They may, however, be compelled to indicate which issues in the trial are seriously in dispute and which are admitted, and which certain formal procedural requirements can be dispensed with.

- The jury will know nothing of the pre-trial disclosure material (or any breach by any party of its obligations) until that material is admitted into evidence or a breach becomes the subject of comment before the jury, if permitted by the court.

- Moreover, if the prosecution is bound by its own pre-trial disclosure, the risk of a defendant being ambushed by a hastily strapped-up prosecution case can be carefully guarded against by the court.[360]

3.131 The various advantages of the early identification of the real issues in dispute are said to include the following:

- Trial judges are in a better position to control the admission of evidence if they better understand the nature of the parties' cases and contentions.[361]

- Fewer witnesses will need to be called to give purely formal, non-contentious evidence.[362]

- The earlier that defendants are forced to come to grips with, and formally articulate, any aspect of their defences will reduce the number of defendants going to trial with untenable defences.[363]

358 Geoff Flatman QC and Mirko Bagaric, 'Accused Disclosure—Measured Response or Abrogation of the Presumption of Innocence?' (1999) 23 *Criminal Law Journal* 327, 330.

359 Ibid 330–1.

360 See ibid 331–2 in relation to the risk of hastily manufactured prosecution evidence.

361 Ibid 334.

362 Ibid.

363 Ibid.

3.132 To these can be added:

- the fact that early issue identification will make it easier for the trial judge to prepare a jury guide, or similar documents or oral directions, which in turn will make it easier for the jury to understand the issues in the trial; and

- a better balance in the presentation of the early stages of a trial, and the advantage for defendants, in that the jury will be considering the various defences from early in the trial when, under the present system, they hear only the prosecution case (apart from the cross-examination of prosecution witnesses).

3.133 The asserted risk of defence by ambush, where a prosecutor is wrong-footed by a defence raised at the trial that was otherwise unpredictable, has not been supported by research.[364] There are many good reasons why any defendant with a good defence supported by evidence might seek to make the nature of that defence and evidence known to the police, prosecutor or before the committal magistrate to stop the prosecution long before trial. In any event, the prosecution's remedy of applying for an adjournment of the trial to seek evidence in rebuttal is highly unattractive.

3.134 Another area in which pre-trial disclosure regimes may be seen to offend long-standing principle emerges in relation to the penalties for non-compliance, or the incentives for compliance. As can be seen from the summary of relevant provisions from various jurisdictions,[365] sanctions and incentives vary from the exclusion of evidence, costs against a party or practitioner, the consideration of compliance or non-compliance on sentencing, and adverse comment to the jury including (in some cases) comment about inferences of a defendant's guilt.

3.135 One risk of institutionalising any scheme of case management such as is proposed in this chapter is said to be that it could give rise to:

> waves of interlocutory applications to settle disputes about the sufficiency of disclosure, to extend the time limits for disclosure, to challenge prosecution non-disclosure of sensitive material, and to determine what consequences should follow from defence non-compliance with disclosure requirements.[366]

3.136 The Commission's view is that the presentation of directions, warnings and all other information to the jury (including the evidence) will be improved by the early identification — wherever possible, before the trial itself — of all contentious issues of law and fact, and of the issues that the jury is likely to be asked to determine. Some of these matters cannot necessarily be resolved or even fully outlined before trial, especially where it would involve defendants disclosing whether they intend to give evidence either personally or (unless specifically required by statute) from other witnesses on any specified issue or generally.

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364 Kevin Dawkins, 'Defence Disclosure in Criminal Cases' [2001] *New Zealand Law Review* 35, 39–40.

365 See [3.38]–[3.96] above. See also Kevin Dawkins, 'Defence Disclosure in Criminal Cases' [2001] *New Zealand Law Review* 35, 39.

366 Kevin Dawkins, 'Defence Disclosure in Criminal Cases' [2001] *New Zealand Law Review* 35, 41.

3.137 To that end, the Commission proposes a strengthened regime of pre-trial disclosure in Queensland. There are already significant obligations on the prosecution, so the main changes will fall on defendants, but the regime that the Commission proposes is more limited than in some other jurisdictions.

3.138 It is clear that the courts must retain final control over the implementation of any of these procedures in each case to which the regime applies to ensure flexibility, fairness and that unnecessary steps can be dispensed with. The Trial Efficiency Working Group of the Criminal Law Review Division of the Attorney General's Department of NSW noted that:

> It is not the intention of the Working Group that the implementation of its recommendations result in excessive and unnecessary pre-trial management of routine, and generally short, criminal trials. There should be sufficient flexibility in the use by trial judges of some, or all, of the proposed and existing pre-trial management tools to cater for every trial within the spectrum. It would be counter-productive to institute a pre-trial management regime that significantly increased demand on judicial resources and/or contributed to delay between committal and trial. There is no reason to suppose that the more straightforward trial management tools, such as the identification of the issues in dispute and directions allowing for the presentation of evidence in summary form, cannot be employed on the morning of the first day of trial. Of course, in more lengthy and complex matters, it may be appropriate to devote judicial resources to pre-trial hearings so that the jury's time is more efficiently utilised.[367]

3.139 The Commission considers that a strengthened regime of pre-trial issue identification should be instituted, and seeks further submissions on the details of such a regime.

3.140 The Commission's tentative view is that the Criminal Code (Qld) should be amended to establish a mandatory pre-trial disclosure regime that should have the following features:

- The regime of pre-trial disclosure should apply to all parties in any trial for an indictable offence, and should provide for a timetable for the completion of pre-trial interlocutory steps, subject to any other order of the court.

- In other criminal cases, the court should retain the power to hold pre-trial directions hearings on its own motion or the motion of any party. The court should have the power at any such pre-trial directions hearing to make directions in similar terms to the compulsory pre-trial disclosure regime for trial on indictable offences.

- The prosecution should have the initial obligations to provide disclosure of the material that it is already required to disclose under sections 590AA to 590AX of the Criminal Code (Qld). Any other disclosure obligations, such as a statement of the facts, matters and circumstan-

367 Trial Efficiency Working Group, Criminal Law Review Division, Attorney General's Department of NSW, *Report of the Trial Efficiency Working Group* (2009) 16.

ces relied by the prosecution, ought to be given statutory effect in this regime.

- The prosecution's obligations of disclosure of all information that is in any way material to the case should be on-going until the end of the trial.

- The prosecution should have the right to serve on each defendant a notice requiring the defendant to admit certain facts that the prosecution considers are not or cannot be properly in dispute, and requiring the defendant to waive the requirement that certain witnesses be called for the sole purpose of proving formal matters not in dispute.

- The pre-trial disclosure regime should require defendants to disclose the general nature of their defences, which issues or facts asserted by the prosecution are in dispute, and which witnesses to be called by the prosecution for the sole purpose of proving formal matters can be dispensed with.

- The pre-trial disclosure regime under the Criminal Code (Qld) should never require defendants to state whether they intend to give evidence themselves or to lead evidence, or to identify any witnesses whom they intend to call, except to the extent that this is currently required by sections 590A, 590B and 590C of the Criminal Code (Qld), which should be retained.

- Both parties should have an opportunity before the trial to apply to the court for orders in relation to any shortcomings in another party's disclosure.

- No comment may be made by any party in the presence of the jury about any other party's failure to comply with its obligations of pre-trial disclosure without the leave of the trial judge.[368]

- No comment may be made by the trial judge or any party in the presence of the jury that suggests that the failure by any defendants to comply with their obligations of pre-trial disclosure can lead to any inference about the guilt of that defendant on any charge before than jury. Comment may be made on other matters such as that party's credit.

- The conduct of all parties in relation to pre-trial disclosure and otherwise during the preparation for and the hearing of the trial can be taken into account on appeal, including any consideration of the application of the provision in section 668E(1A) of the Criminal Code (Qld).

368 The issues covered in paragraphs (i), (j) and (k) are also considered in [3.143] below in relation to the consequences of non-compliance.

- In exceptional circumstances, the court should have the power to waive or modify any of the requirements of the pre-trial case management procedure to meet the needs and circumstances of any particular case.

3.141 This regime should be compulsory for both the prosecution and defendants, though the Commission recognises that in practice this may represent little change for prosecutors but a significant change in approach for defendants and their lawyers. However, the Commission strongly advocates that this regime should be mandatory — though the courts should retain a proper discretion to moderate or waive the precise requirements to meet the demands of any particular case — for at least two reasons:

- to reflect the importance of proper pre-trial case management; and

- to reflect that the point of departure is that proper disclosure should be given in all cases and that any moderation or waiver by the courts should be exceptional and take into account unrepresented defendants and, for example, the straight forward nature of a particular case that does not warrant a full array of pre-trial disclosure.

3.142 Any such regime will only succeed if the consequences of a failure to comply with it are sufficient to force changes in practice and attitude. They must not be so stringent as to lead to unfair trials, though this should not mean that defendants cannot be compelled to participate constructively in the preparation for trial.

3.143 A range of sanctions have been used in other jurisdictions. With these in mind, the consequences of non-compliance with a pre-trial disclosure scheme introduced in Queensland could include:

- comment by a party to the jury about another party's non-compliance:

  - either with or without the need to obtain the leave of the trial judge; and

  - either with or without statutory limitations on a party's ability to comment on any inferences about a defendant's guilt that might arise from his or her non-compliance;

- comment by the trial judge to the jury about a party's non-compliance (including any comment that may be required following a comment by a party);

- the denial of the right to lead evidence that goes to a matter that ought to have been disclosed, or the denial of that right without the leave of the trial judge;

- a requirement that the court take a defendant's compliance or non-compliance into account when determining the sentence if the defendant is convicted;

- a requirement that an appellate court take the parties' compliance or non-compliance into account when determining an appeal, including its consideration of the application of the proviso in section 668E(1A) of the Criminal Code (Qld);

- the referral of any non-compliance by a legal practitioner to the relevant professional disciplinary bodies; or

- the court's right to impose sanctions directly against any legal practitioner who advises or acquiesces in any non-compliance.

3.144 One other possible, albeit non-legislative, consequence, is that a party's case may be regarded as weaker by a jury if it is seen to differ from the one advanced at the start of a trial (unless clearly based on unexpected developments during the trial itself).

3.145 The Commission seeks further submissions on the range of consequences that should be included in any such scheme in Queensland and whether any of those listed in [3.143] above should be excluded from the proposed regime.

3.146 The Commission also appreciates that there are implications of the implementation of some of these proposals in relation to the costs of preparing matters for trial, and the resources available to do so. These are considered below.[369]

3.147 The changes proposed by the Commission should be inserted in Chapter 62 of the Criminal Code (Qld), which already includes provisions covering directions and rulings before trial (Division 2, section 590AA), disclosure by the prosecution (Division 3, sections 590AB to 590AX) and disclosure by the defendant (Division 4, sections 590A to 590C).

3-1 Chapter 62 of the Criminal Code (Qld) should be amended to include a pre-trial disclosure regime that has the following features:

(a) The regime of pre-trial disclosure should apply to all parties in any trial for an indictable offence, and should provide for a timetable for the completion of pre-trial interlocutory steps, subject to any other order of the court.

(b) In other criminal cases, the court should retain the power to hold pre-trial directions hearings on its own motion or the motion of any party. The court should have the power at any such pre-trial directions hearing to make directions in similar terms to the compulsory pre-trial disclosure regime for trial on indictable offences.

369 See [3.191]–[3.197].

(c) The prosecution should have the initial obligations to provide disclosure of the material that it is already required to disclose under sections 590AA to 590AX of the Criminal Code (Qld). Any other disclosure obligations, such as a statement of the facts, matters and circumstances relied by the prosecution, ought to be given statutory effect in this regime.

(d) The prosecution's obligations of disclosure of all information that is in any way material to the case should be on-going until the end of the trial.

(e) The prosecution should have the right to serve on each defendant a notice requiring the defendant to admit certain facts that the prosecution considers are not or cannot be properly in dispute, and requiring the defendant to waive the requirement that certain witnesses be called for the sole purpose of proving formal matters not in dispute.

(f) The pre-trial disclosure regime should require defendants to disclose the general nature of their defences, which issues or facts asserted by the prosecution are in dispute, and which witnesses to be called by the prosecution for the sole purpose of proving formal matters can be dispensed with.

(g) The pre-trial disclosure regime under the Criminal Code (Qld) should never require defendants to state whether they intend to give evidence themselves or to lead evidence, or to identify any witnesses whom they intend to call, except to the extent that this is currently required by sections 590A, 590B and 590C of the Criminal Code (Qld), which should be retained.

(h) Both parties should have an opportunity before the trial to apply to the court for orders in relation to any shortcomings in another party's disclosure.

(i) No comment may be made by any party in the presence of the jury about any other party's failure to comply with its obligations of pre-trial disclosure without the leave of the trial judge.

(j) No comment may be made by the trial judge or any party in the presence of the jury that suggests that the failure by any defendants to comply with their obligations of pre-trial disclosure can lead to any inference about the guilt of that defendant on any charge before than jury. Comment may be made on other matters such as that party's credit.

(k) The conduct of all parties in relation to pre-trial disclosure and otherwise during the preparation for and the hearing of the trial can be taken into account on appeal, including any consideration of the application of the provision in section 668E(1A) of the Criminal Code (Qld).

(l) In exceptional circumstances, the court should have the power to waive or modify any of the requirements of the pre-trial case management procedure to meet the needs and circumstances of any particular case.

3-2 The consequences of non-compliance with the proposed pre-trial disclosure regime should include the following (unless there is good reason to exclude one or more of them):

(a) comment by a party to the jury about another party's non-compliance:

(i) either with or without the need to obtain the leave of the trial judge; and

(ii) either with or without statutory limitations on a party's ability to comment on any inferences about a defendant's guilt that might arise from his or her non-compliance;

(b) comment by the trial judge to the jury about a party's non-compliance (including any comment that may be required following a comment by a party);

(c) the denial of the right to lead evidence that goes to a matter that ought to have been disclosed, or the denial of that right without the leave of the trial judge;

(d) a requirement that the court take a defendant's compliance or non-compliance into account when determining the sentence if the defendant is convicted;

(e) a requirement that an appellate court take the parties' compliance or non-compliance into account when determining an appeal, including its consideration of the application of the proviso in section 668E(1A) of the Criminal Code (Qld);

(f) the referral of any non-compliance by a legal practitioner to the relevant professional disciplinary bodies; or

(g) the court's right to impose sanctions directly against any legal practitioner who advises or acquiesces in any non-compliance.

OPENING STATEMENTS AND SPLIT SUMMINGS UP

3.148 The use of opening directions by the judge, and of opening statements by the parties, was discussed in the Issues Paper at [9.52]–[9.59] and [9.66]–[9.69].[370] Evidence indicates that jurors' understanding and recall may be assisted if they receive instruction about the fundamental issues in the case at the beginning of the trial.[371] It has been suggested that, particularly in complex cases, juries may benefit from more detailed opening statements from the judge and from counsel that address aspects of the law and evidence that are likely to arise in the trial.

3.149 It has also been suggested that an early statement by a defendant of a good defence may well be to the defendant's advantage.[372]

3.150 In its Consultation Paper on jury directions, the NSW Law Reform Commission noted arguments both for and against the practice of a trial judge giving the jury an opening outline of the issues:

> **Arguments for**
>
> 9.93 The first argument in support of giving directions on substantive law to the jury both before and after the presentation of evidence is that it may improve jurors' recall and comprehension. Some studies have found that multiple exposure to the law enables jurors to understand the legal directions and to apply them better to the evidence.
>
> 9.94 Secondly, giving jurors the key legal directions during the opening remarks would give them a legal framework and a context for the evidence at the start of the trial. This has been shown to enable jurors to evaluate the evidence more effectively as it is being presented. In other words, it may assist jurors to fit the various pieces of evidence being presented into a coherent story that makes sense to them. It may also prevent jurors from relying solely on pre-existing and inaccurate beliefs about the law or on personal biases that might be triggered by the nature of the case or the characteristics of the defendant.
>
> 9.95 Finally, the enhancement in their ability to evaluate the evidence as a result of the preliminary directions on substantive law increases jurors' satisfaction in the trial process.
>
> 9.96 Justice McClellan has recently spoken about the benefits of identifying the issues early in the trial:
>
> > one source of significant time wasting in some trials is a failure to isolate the issues requiring determination before the trial commences. They are sometimes not identified until final address. This has two consequences. The jurors lose track of the evidence, having no means of appreciating its significance and the issues to which it relates. The trial itself is inefficient. Without knowing the issues the trial judge can exert little influence over

370 See also New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [9.90]–[9.99].

371 Eg, RK Cush & J Goodman-Delahunty, 'The influence of Limiting Instructions on Processing and Judgments of Emotionally Evocative Evidence' (2006) 13 *Psychiatry, Psychology and Law* 110, 110 and the sources cited there.

372 Geoff Flatman QC and Mirko Bagaric, 'Accused Disclosure—Measured Response or Abrogation of the Presumption of Innocence?' (1999) 23 *Criminal Law Journal* 327, 334.

> the advocates to confine the evidence and discipline the questioning of witnesses.
>
> **Arguments against**
>
> 9.97 There are, however, several arguments against giving jury directions on substantive law prior to the presentation of evidence. First, some judges fear that this might overload jurors with too much information at the beginning of the trial.
>
> 9.98 Secondly, giving the jury a legal framework at the start of the trial may encourage individual jurors to view the trial from a single perspective. It is argued that there is a danger that jurors may reach a verdict before the jury deliberations (or even before all the evidence has been presented) without regard to the variety of views that the other jurors bring to the jury room.
>
> 9.99 Finally, it is impractical to give directions at the beginning of the trial because the trial judge, in many cases, may not know which issues will arise, and thus what directions to give. The nature of the prosecution case and the defence or defences that the defence team is intending to use will usually be unclear to the judge at the start of the trial. This raises the importance of the next issue, which might be regarded as a key step in modernising jury trials.[373]

3.151 The NSWLRC noted that preliminary statements by the judge would require some degree of pre-trial disclosure by the parties, including the defendant.[374]

Other jurisdictions

South Australia

3.152 In South Australia at the end of the prosecutor's opening address a defendant is invited to address the court to outline the issues in contention between the prosecution and defence. The defendant is free to decline that invitation. The invitation and response are to be done in the absence of the jury and may not be commented on to the jury.[375]

Victoria

3.153 In Victoria, the judge may address the jury at any time 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.[376]

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373 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [9.93]–[9.99].

374 See ibid [9.100]–[9.103].

375 *Criminal Law Consolidation Act 1935* (SA) s 288A.

376 *Criminal Procedure Act 2009* (Vic) s 222.

3.154 The prosecutor in that State must give an opening address to the jury before any evidence is given,[377] and the defendant is obliged to respond in all jury trials if represented, and may do so if not represented.[378] Defendants may also make an opening address before they call any evidence if they intend to give or call any evidence.[379]

Western Australia

3.155 In Western Australia defendants are entitled to give an opening address about their case, irrespective of whether they intend to call evidence.[380] This may be done either immediately after the prosecutor's opening address or, if the defendant intends to lead any evidence, immediately after the close of the prosecution case.[381]

Submissions

3.156 As noted by Associate Professor John Willis of La Trobe University in his submission to the VLRC:

> *The importance of early directions*
> There is evidence, and it would appear to conform with common sense, that jurors should be given certain information early in a trial.
>
> The prosecution opening does some of this but there is an important role for the judge especially in informing the jury of the elements of the offences with which the defendant has been charged. In this way, the jury is given some idea of what they should be looking for as the case unfolds.
>
> *Ongoing directions*
> Revision and reinforcement should, at least for certain directions, be a real consideration. For example, it maybe useful for the judge to review at the start of the day, the elements of the offences with which the defendant has been charged. It is not uncommon for a jury to be asked to decide the guilt of one or more defendants on a number of offences.
>
> …
>
> They have to understand the elements of each of the offences and then be able to apply the evidence (as they interpret it) to the law. In addition, they have to apply only so much of the evidence as is relevant and admissible in respect of each defendant. As a teacher of law students for many years, I can say with confidence that it would be quite optimistic (unrealistic) to expect law students, having been given brief oral instructions, to understand the relevant elements of these various offences and then apply the evidence to those legal elements.[382]

377 *Criminal Procedure Act 2009* (Vic) s 224.

378 *Criminal Procedure Act 2009* (Vic) s 225.

379 *Criminal Procedure Act 2009* (Vic) s 231.

380 *Criminal Procedure Act 2004* (WA) s 143(2).

381 *Criminal Procedure Act 2004* (WA) s 143(3).

382 Associate Professor John Willis, Submission to the Victorian Law Reform Commission, 16 December 2008, 4–5.

3.157 Several respondents to the Commission's Issues Paper specifically commented on this issue. Both judges of the District Court who responded to the Issues Paper supported the use of opening addresses from defence counsel as well as the prosecution: 'These ought to be encouraged, if not mandated.'[383]

3.158 Some submissions argued that giving information to the jury at the start of the trial would be beneficial:

> It may be helpful if trial judges addressed jurors at the beginning of the case to outline potential issues that may arise during the trial. For example, the trial judge could outline to the jury the elements of the offence and legal issues they will be required to consider. This may help the jury put the evidence in context as it is presented during the trial. As is noted in paragraph 8.24 of the [Issues Paper][384] in the context of discussion of the efficacy of limited use directions, jurors are best equipped to deal with concepts such as this when they receive some guidance in advance. This may also be applicable to an understanding of issues likely to arise in the case as a whole, in particular the elements of the offence. An understanding of the elements of each offence in the indictment may help the jury to focus on the evidence in relation to each of these when the evidence is given. It would be important that the directions were focused and short so there was no undue delay in the commencement of the trial however it may overall aid juror comprehension of the evidence.[385] (note added)

3.159 Legal Aid Queensland adopted a more cautious approach:

> On the timing of the directions, we are doubtful as to whether detailed directions about the law can meaningfully be given at the commencement of all trials. … as the trial and evidence unfolds the real issues will emerge and assume their appropriate degree of relative importance, bringing clarity to the trial judge's task of identifying those issues the jury in a summing up, and relating the relevant evidence to the relevant law. We suspect that in many cases, particularly complex trials, it would be more confusing for juries to receive detailed directions about the law which may be of possible application to the case, in the absence of having heard any evidence or having seen any of the witnesses.
>
> However, we accept there are some benefits in giving juries certain directions at the beginning of a trial. There are some directions, such as those involving what is evidence; the drawing of inferences; the onus and standard of proof; and, in some simpler cases, the law relating to the charge itself, which could helpfully be given at the start of the trial. Many judges give such directions now, and the Bench Book, in section 5B, deals with some of these directions.[386]

383 Submission 6. See also Submission 10.

384 Paragraph [8.24] of the Issues Paper reads:

> 8.24 This research seems to squarely raise real doubts about the efficacy of limited-use directions: once evidence has been admitted, it will be used for all purposes that a jury considers appropriate. However, it also seems that jurors are best equipped to deal with instructions on how they are to apply evidence if they have some guidance in advance as to the context in which that evidence is led.

385 Brisbane Office of the Commonwealth Director of Public Prosecutions, Submission 9.

386 Submission 16, 6.

3.160 The Office of the Director of Public Prosecutions expressed some reservations about more frequent opening statements by defence counsel as they tended to become opportunities for advocacy rather than a statement of the issues.[387]

3.161 In response to the VLRC's Consultation Paper, the Criminal Bar Association of Victoria and Benjamin Lindner, one of its members, supported a more flexible approach to the timing of directions to meet the exigencies of the case in hand:

> **Submission:**
> Directions of law may be given at any time in a trial. We do not oppose directions being given when convenient rather than being restricted to after final addresses of counsel. Particularly in long, complex trials involving multiple accused (eg a trial of 12 accused charged with all being members of a terrorist organisation) 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. In other words, 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. Thus, in appropriate cases, a trial judge should give binding directions of law more than once; but always at the end with completeness. In our submission, completeness of directions, with the authority of the judge's office, requires that the facts be related to the issues in dispute as required by *Alford v Magee*.[388]

3.162 Judge Murphy of the County Court of Victoria argued that splitting the judge's charge may have its advantages:

> I am a supporter of a proposal to allow the charge to be split. In relation to the issues in dispute this may allow the trial judge to identify the elements of the relevant offence at the commencement of the trial, give appropriate directions as to those elements, and then the trial can proceed where the jury know right from the beginning what are the issues in dispute.
>
> …
>
> I am of the view that there is much duplication in addresses by Counsel. At the moment I give preliminary directions to the jury as to the onus of proof, the role of the judge, the burden of proof, and evidence being the witnesses' answers. Generally, counsel for the prosecution repeat the bulk of those directions in their opening addresses. Counsel for the defence often repeat significant amounts in their closing address. Counsel for the prosecution may also do the same thing. This may be a technique of advocacy but it is effectively a lazy technique of advocacy. A further argument, in favour of allowing or a charge to be split, is that often Counsel will premise any comment about the content of the law with the comment that it is subject to anything that the trial judge might say as, for example, to the elements of the offence. In my view it would be better if a trial judge was in a position to identify the elements of the offence, or as part of a direction, endorse the elements of the offence that have been articulated by Crown Counsel in opening, or even provided in writing at that stage, so that the jury is not forever in a position waiting for the ultimate direction as to the content of the law from the trial judge in his/her final charge. Splitting the

387 Submission 15.

388 Benjamin Lindner (Criminal Bar Association), Submission to Victorian Law Reform Commission, 30 November 2008; Criminal Bar Association of Victoria, Submission to the Victorian Law Reform Commission, 15 December 2008, 27.

> charge would also mean that the trial judge would be in a position to encapsulate or make reference to the evidence comments that Counsel have made in their closing addresses. I am of the view that this would also expedite the running of the trial.[389]

3.163 The Victorian Office of Public Prosecutions supported proposals that the timing of a trial judge's charge could be varied or split if, in the circumstances of the particular trial, doing so would assist the presentation of the charge and enhance the jury's comprehension of the evidence.[390]

VLRC's recommendations

3.164 Although the VLRC recommended that in due course the content of jury directions would be set out in its proposed jury directions statute, it nonetheless recognised that much of the presentation of jury directions, including when and how they should be given, must remain in the hands of the trial judge:

> 11. The trial judge should have a discretionary power to determine the timing and frequency of the directions given to the jury.[391]

3.165 This Commission would not dispute that, but there would appear to be no need to formally state that discretionary power in the absence of a statute covering the field such as that recommended by the VLRC.

QLRC's proposals for reform

3.166 The law at present permits the judge and both parties to make opening statements. The judge's opening remarks to the jury include some more or less standardised statements about the respective roles of the jury and judge, the burden and standard of proof, and other matters that relate to the way in which the jurors should carry out their duties. A set of model opening remarks is set out in Chapter 5B of the Queensland Benchbook.[392]

3.167 The prosecution will always make some opening that will introduce the jury to some aspects of the issues in the case and the evidence that it will seek to lead and the conclusions that it will ask the jury to reach.

3.168 The Commission understands that the defendant, or defence counsel, make opening statements less frequently, and very rarely go into any detail.

3.169 The duties of all three major participants in the conduct of the trial, and the legal and tactical positions of the parties, are of course quite different from each other, which accounts in large measure for the differences in approach taken by

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389 Judge MD Murphy, Submission to the Victorian Law Reform Commission, 5 February 2009, 6–7.

390 Office of Public Prosecutions, Submission to the Victorian Law Reform Commission, 12 February 2009, 19–20.

391 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) 13, 72.

392 Queensland Courts, *Supreme and District Court Benchbook*, 'Trial Procedure' [5B] <http://www.courts.qld.gov.au/2265.htm> at 1 September 2009. These directions are set out in Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [4.26].

each in their opening statements, both in terms of content and detail and, in the case of the defendant, whether to make such a statement at all.

3.170 However, from the jurors' point of view, the more information that they have at any early stage of the trial, the more likely that they will be able to understand the evidence as it is led, the way in which the testimony of different witnesses will relate to each other, and the better they will understand it and its relationship to the law. The parties and their lawyers should have a very good understanding at the start of a trial how the evidence is likely to emerge, and where the areas of doubt and conflict are likely to arise, especially if a regime of mandatory pre-trial disclosure such as that proposed by the Commission is introduced. The judge may have some understanding of these matters from pre-trial proceedings but will at least have the professional experience and training to suspend drawing conclusions until the evidence is complete. Juries come to each trial completely fresh and without any professional training in following evidence as it is presented in a manner that is dictated by legal procedural rules rather than the chronological order of events.

3.171 Evidence in criminal trials can only be presented witness by witness, and this may prevent it emerging in a strictly coherent chronological or logical fashion for a jury hearing it for the first time. Jurors with some preliminary indication of the overall structure of the issues and the evidence at the outset can only be assisted in understanding both the content and context of the evidence as it is presented. It will help them better to avoid making conclusions at an early stage if they know that other witnesses will follow who will deal with the same matters. It may well assist a defendant to let the jury know at an early stage what evidence it may rely on or issues it may raise so that the jurors can bear these in mind when hearing the prosecution evidence and not form premature conclusions, consciously or otherwise, until the later evidence that it has been told will be given is in fact led.

3.172 Naturally, all opening statements that touch on the evidence and issues cannot go into great detail, especially where it relates to evidence where witnesses are known or suspected to be in conflict or evidence is of doubtful admissibility. And current practice accepts that defendants (unless otherwise required by statute)[393] are entitled to reserve giving details of their defences or evidence until their case progresses. But even they may well find it tactically advantageous in some cases to alert the jury either at the start of their case, or even at the start of the trial, to the particular issues that they will be asking the jury to focus on in their deliberations.

3.173 Part of the opening processes of any trial should include a statement to the jury, in whatever form may be convenient in the context of each case, of the principal issues that they will need to determine and any major issues (such as elements of offences or defences) that are not in dispute.

3.174 In the Commission's view, the defendant should participate in this opening process, and the Criminal Code (Qld) should be amended to make this mandatory. The content of the opening statements by both parties should remain a matter for them. Defendants might well be expected to be more circumspect in their openings and should not be required, or expected, to indicate whether they will be testifying

393 Criminal Code (Qld) ss 590A, 590B, 590C.

nor the details of any witnesses that they propose calling where these matters have not already been disclosed in the parties' pre-trial exchange of information. So, for example, in cases where defendants have already given notice of their intention to call alibi or expert evidence, there is no reason in principle why those matters could not be raised by the defence in its opening.

3-3 The Criminal Code (Qld) should be amended to make the use of opening statements by both parties, including the defendant, in order to clarify in advance (so far as practicable) the factual and legal issues for the jury, mandatory.

3-4 In particular, the jury should be informed as early as is practicable, of the issues that it will have to decide, the issues that have been admitted or are otherwise not in dispute, and the overall context in which these issues arise.

INTEGRATED DIRECTIONS

3.175 The possible use of structured question paths and 'integrated directions' was discussed in the Issues Paper at [9.92]–[9.105]. Structured question paths, ideally presented (where warranted by the issues in the case) either as sequential lists of questions or in the form of a flowchart, collapse the relevant legal issues into a number of factual questions that guide the jury to its verdict. The following example is set out in Chapter 146 of the Queensland Benchbook:

1. Did A kill B?
   a. If 'no' to question 1, A is not guilty of any offence;
   b. If 'yes' to question 1, go to question 2.

2. Has the prosecution proved that A was not acting in self-defence?
   a. If 'no' to question 2, A is not guilty of any offence;
   b. If 'yes' to question 2, go to question 3.

3. When he killed B, did A intend to kill him or cause him grievous bodily harm?
   a. If 'no' to question 3, A is not guilty of murder but guilty of manslaughter;
   b. If 'yes' to question 3, go to question 4.

4. Has the prosecution proved that A was not provoked by B?
   a. If 'no' to question 4, A is not guilty of murder but guilty of manslaughter.
   b. If 'yes' to question 4, go to question 5.

5. Has A provided (on the balance of probabilities) a defence of diminished responsibility?
   a. If 'no' to question 5, A is guilty of murder;

b. If 'yes' to question 5, A is guilty of manslaughter.[394] (emphasis in original)

3.176 The use of structured factual questions as a framework for a jury is not new, as is demonstrated by another example from Queensland cited with approval by the High Court in *Stuart v The Queen*.[395] The trial judge, Lucas J, summed up to the jury in these words:

> Turning from that to Stuart's case, and remember that there are two possible approaches to Stuart's case — what I have called the counselling approach, that is the proposition that Stuart and Finch made a plan to light a fire, that is to commit the offence of arson, that in pursuance of that plan Finch lit the fire — that is, in law Stuart is held to have procured the commission of that offence and is punishable as a principal offender — and the further proposition that the offence constituted by the causing of the death of Jennifer Davie was a probable consequence of Finch carrying out the plan to commit arson which they had evolved between them — to put it technically, a probable consequence of carrying out Stuart's counsel — these are the questions which arise, and in considering them I must again warn you that you may only consider evidence admissible in the case of Stuart. The first four questions are the same as those in Finch's case —
>
> (1) Did Finch light the fire?
>
> I put them in a different order —
>
> (2) Did Stuart counsel Finch to light the fire, in the sense which I have tried to explain it to you?
>
> (3) Did the fire cause the death of Jennifer Davie?
>
> (4) Did Finch light the fire in the prosecution of the unlawful purpose of extortion carried on in conjunction with Stuart?
>
> (5) Was Finch's act in lighting the fire an act of such a nature as to be likely to endanger human life?
>
> (6) Was the offence constituted by the unlawful killing of Jennifer Davie a probable consequence of carrying out Stuart's counsel?
>
> Those are the six questions, gentlemen, and if you answer all six of them 'Yes', then it would be your duty to bring in a verdict of guilty of murder against Stuart. If you answer all questions 'Yes' except the question relating to Finch's lighting of the fire in the prosecution of the unlawful purpose of extortion, or the question as to the nature of Finch's act, whether it was an act of such a nature as to be likely to endanger human life, if you give a negative answer to one of those questions, or both, but only one is necessary to reduce it to manslaughter, and if you answer all the other questions in the affirmative, then your verdict in Stuart's case would be guilty of manslaughter. Any other combination of answers would result in a verdict of not guilty in Stuart's case.

394 Queensland Courts, *Supreme and District Cour*t Benchbook, 'Manslaughter: Code s 303' [146] <http://www.courts.qld.gov.au/2265.htm> at 1 September 2009.

395 (1974) 134 CLR 426; [1974] HCA 54.

> The other possible way to look at Stuart's case is what I have called the common intention approach, that the offence constituted by the unlawful killing of Jennifer Davie was committed in the course of the prosecution of an unlawful purpose as to which Finch and Stuart had formed a common intention to prosecute it in conjunction with one another and was a probable consequence of the prosecution of such purpose. Under this approach — and again you may only look at evidence admissible against Stuart — there are again six questions arising, including all the questions which arise in the case of Finch and in the case of Stuart under the other approach.
>
> The first question, I suggest, is: did Stuart and Finch form a common intention to prosecute the unlawful purpose of extortion in conjunction with one another? That is the first question. The second question is: did Finch light the fire? The third question is: did the fire cause the death of Jennifer Davie? The fourth question is: did Finch light the fire in the prosecution of the unlawful purpose? The fifth question is: was the offence constituted by the unlawful killing of Jennifer Davie a probable consequence of the prosecution of the unlawful purpose? The sixth question is: was Finch's act in lighting the fire an act of such a nature as to be likely to endanger human life? Gentlemen, if you answer all six questions 'Yes', your verdict in Stuart's case should be guilty of murder. If you answer them all 'Yes' except the question of the nature of Finch's act in lighting the fire — that is, whether it was an act which was likely to endanger human life — if that is the only question which you answer 'No', then your verdict should be guilty of manslaughter in Stuart's case. Any other combination of answers to the questions will result in a verdict of not guilty in Stuart's case.[396]

3.177 McTiernan J considered that this summing up was 'entirely correct' and that the trial judge was 'under no misapprehension as to the facts of the case as they affected Stuart or Finch and that he correctly applied the criteria of liability in the sections of the Code'.[397] Menzies J agreed, and went further:

> … in finally leaving the matter to the jury the learned trial judge adopted what I regard as a course which could not have been bettered to ensure that, after a difficult trial of two accused extending over thirty-two days during which evidence was given which occupies some 1700 pages of transcript, the jury in its difficult task of fact-finding, was not encumbered by any concern about the intricate legal problems which it fell to his Honour himself to decide in formulating his charge.[398]

3.178 Gibbs J, delivering the principal judgment of the Court, described the summing up as 'notable for its care and clarity'.[399]

3.179 'Integrated directions' refer to a summing up that combines the summary of (or references to) the evidence with the relevant directions on the law and an outline of the questions that the jury must answer into a single logical unit. This can be contrasted with a more conventional summing up structured as separate blocks of instruction each with different purposes. In a summing up using integrated directions, the instructions to the jury largely or completely avoid explicit references to the detail of the law by framing the questions for the jury to answer in such a way

396 (1974) 134 CLR 426, 430–2; [1974] HCA 54 [4].

397 (1974) 134 CLR 426, 432; [1974] HCA 54 [5] (McTiernan J).

398 (1974) 134 CLR 426, 433; [1974] HCA 54 [2] (Menzies J).

399 (1974) 134 CLR 426, 435; [1974] HCA 54 [3] (Gibbs J, Mason J agreeing).

that the law is embedded in them; although these questions answer the legal issues in the case, they are framed as questions of fact. In effect, the law is subsumed in these directions without the need for overt statement — the law (for example, the elements of the offences and defences) — dictate the form of the questions of fact that the jury must answer.

3.180 Directions of this sort are 'integrated' in that they do not lecture the jury with blocks of information about the law, whether that is about the substantive law of the charges and defences involved in the case or procedural law that governs the way in which they may or may not use certain evidence. Those instructions are inserted into the 'narrative' of the directions when they arise for consideration in the flow of issues discussed in the summing up.

3.181 An example of an integrated direction follows. It was given by Justice Robert Chambers of the New Zealand Court of Appeal to the Commission and other participants at a Symposium hosted by the Victorian Law Reform Commission in February 2009. Given its utility to this discussion, it is set out in full here.[400] The material given to the jury starts at "QUESTIONS FOR THE JURY".

> **Fact Situation**
>
> [1] John Smith has been charged with:
>
> a) aggravated robbery;
>
> b) kidnapping; and
>
> c) 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 Smith was driving that car. Smith drove away towards St Johns.
>
> [4] When they reached College Road, Smith dropped Brown and Menzies off at a friend's house. They took the duffel bags and the money. Smith 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. Smith 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.

400 It is also set out, with minor changes only, in Appendix E to the VLRC's recent Final Report: Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) Appendix E, 169–171.

[5] He told her to hop in and they sped off. After a short time, Smith changed course and, instead of heading for St Heliers Beach, turned instead towards Glen Innes. Evans asked him where they were going, but Smith 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 Smith said nothing. As they approached a set of lights which were red, Evans tried to open her door, but Smith sped through the lights.

[6] Eventually they reached Wimbledon Reserve in Glen Innes. The park was deserted. He parked in a secluded part. Smith 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. Smith 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 Smith. 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 Smith. He said he had discussed the bank job with Smith prior to doing it and that Smith 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 Smith. But the eye-witness was not able to pick Smith in a photo montage.

[10] Evans, under cross-examination, strenuously denied that she had touched Smith in any way. She said she had made it clear she wanted to get out of the car. She had not consented to Smith touching her breasts.

The defence case

[11] Smith 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 Smith did not ask. Smith 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 Smith in the photo montage.

QUESTIONS FOR THE JURY

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 satisfied beyond reasonable doubt[401] that Mr Smith 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 Smith 'not guilty' on this count and go to count 2.

1.2 Are you satisfied beyond reasonable doubt that, prior to the robbery, Mr Smith 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 Smith 'not guilty' on this count and go to count 3.

1.3 Are you satisfied beyond reasonable doubt that, prior to the robbery, Mr Smith had agreed to assist by driving the get-away car?

If 'yes', find Mr Smith 'guilty' on this count and go to count 2.

If 'no', find Mr Smith 'not guilty' on this count and go to count 2.

401 The original example used by Justice Chambers used the expression 'Are you sure', which has received the approval of the New Zealand Court of Appeal: see [8.7], [8.9] below.

COUNT 2 — KIDNAPPING

***Note**: On all issues, the burden of proof beyond reasonable doubt lies on the Crown*

2.1 Are you satisfied beyond reasonable doubt that Mr Smith:

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.[402]

If 'no', find Mr Smith 'not guilty' on this count and go to count 3.

2.2 Are you satisfied beyond reasonable doubt that Ms Evans did not consent to being in the car as Mr Smith drove to Wimbledon Reserve?

If 'yes', go to question 2.3.

If 'no', find Mr Smith 'not guilty' on this count and go to count 3.

2.3 Are you satisfied beyond reasonable doubt that Mr Smith 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 Smith 'not guilty' on this count and go to count 4.

2.4 Are you satisfied beyond reasonable doubt that Mr Smith intended to keep Ms Evans in the car without her consent?

If 'yes', find Mr Smith 'guilty' on this count and go to count 3.

If 'no', find Mr Smith '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 Smith touched Ms Evans on her breasts, over her bra and under her t-shirt.

3.1 Are you satisfied beyond reasonable doubt that Ms Evans did not consent to Mr Smith touching her breasts?

If 'yes', go to question 3.2.

402 This question might be improved by specifying whether the jury has to find all three elements proved beyond reasonable doubt or just any one (or more) of them.

If 'no', find Mr Smith 'not guilty' on this count and STOP.

3.2 Are you satisfied beyond reasonable doubt that Mr Smith, 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 Smith 'not guilty' on this count and STOP.

3.3 Are you satisfied beyond reasonable doubt that, in the circumstances, right-thinking people would regard this act as indecent?

If 'yes', find Mr Smith 'guilty' on this count and STOP.

If 'no', find Mr Smith 'not guilty' on this count and STOP.

Submissions

3.182 The idea of directing juries to answer questions or return a verdict based on factual questions rather than questions of law found support in a submission from an individual who had participated in two trials as a defendant,[403] and from a District Court judge:[404]

> The real issues should … be put to the jury, in the form of questions for them to decide. That process is discussed in the Issues Paper at pages 196–197.[405] That is, the law should be subsumed into the questions, which are framed as questions of fact. That avoids the pointless exercise of reading out sections of the Criminal Code, particularly the provisions about self defence and provocation, which are impossible to understand. Judges should also avoid giving lectures about the law. There is only a need to say something in a very general way about such defences, so that the jury have some understanding of the law, which leads to the questions before them.
>
> Judges should avoid even mentioning the expression 'elements of the offence'. Those elements should be sorted into those which are not in dispute, and those which are in issue. Once in issue, they form the basis of the questions to be put to the jury.
>
> As the Issues Paper says at para 9.95:
>
> > '… the questions are purely factual. They do not ask the jury to make any decision as to the law, or even to apply it to the facts; the relevant law concerning [the offence charged] has been embedded in the questions prepared by the trial judge.'
>
> I commend that approach. Some judges explain it to the jury by the use of decision trees. I am not sure which technique is easier for the jury — but I suspect that the use of questions in plain English is more easily understood.[406]

403 Submission 4.

404 Submission 10.

405 That is, the discussion of structured question paths at [9.92]–[9.96] of the Issues Paper.

406 Submission 10.

QLRC's provisional views

3.183 As a general approach to some of the difficulties surrounding jury directions and warnings, the Commission is attracted to solutions that result in changes in the ways in which directions and warnings, especially those in the summing up, are presented to juries that seek to direct jurors' attention to their key role of resolving questions of fact and, from the answers to those questions, answering the key question whether the defendant is guilty as charged.

3.184 The final arbiters of guilt in our criminal justice system are jurors who are not schooled as lawyers; indeed, practising lawyers are positively excluded from jury service.[407] There is no reasonable basis to expect jurors to be able to absorb the detail and subtlety of the substantive and procedural criminal law while sitting in uncomfortable and unfamiliar surroundings listening to a potted lecture on the law from the judge. Research suggests that in fact jurors have difficulty accurately re-stating key points of the law raised in trials that they have just sat on.[408] It follows that directions that simply expound the law may well leave jurors mystified and confused.

3.185 If it is accepted that jurors are, on the other hand, adept at examining the evidence and coming to reliable factual conclusions, then the focus of jury directions, and the summing up as a whole, should be on the factual conclusions that the jury must reach, and how they use their answers to those questions to determine if the defendant is guilty or not.

3.186 This is not to say that all reference to the law should be shunned; in many cases it cannot be avoided. In any event, jurors appreciate that they are in a court of law and would expect to hear about the law. Moreover, many jurors are able, or better able, to absorb it, understand its effect (if perhaps not the detail of its content) and apply it when it is explained ***in context***.

3.187 The Commission, therefore, is strongly attracted to a revision of jury directions and warnings into an overall structure of a summing up that seeks to relate the law and evidence in a natural way where the context of the evidence to which the judge is referring is connected with both the questions of fact that the jury must determine, and the constraints placed on them as to the way in which they may or may not apply certain evidence.[409] These integrated directions should be supplemented wherever appropriate by written guides to the law, directions and questions to be answered.[410]

3.188 If implemented, these proposals would not result in any statutory reform, nor formal reform of the rules of practice governing criminal trials. However, the Com-

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407 *Jury Act 1995* (Qld) s 4(3)(d), (e), (f). The Commission also has current a review on jury selection, which will involve the publication of a separate consultation paper in 2010.

408 See Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) ch 7; especially [7.52]–[7.53]; and James RP Ogloff and V Gordon Rose, 'The Comprehension of Judicial Instructions' in Neil Brewer & Kipling D Williams (eds) *Psychology and Law: an Empirical Perspective* (2005) 411–16.

409 See the discussion in chapter 6 of this Paper about directions on the use of evidence admitted only for particular limited purposes.

410 See the discussion about these supplementary aids in chapter 4 of this Paper.

mission appreciates that it would involve a considerable amount of work, primarily on the part of trial judges but also by criminal trial advocates, as these reforms represent changes in practice and in the overall approach to informing the jury by all professional participants in criminal trials. It would involve judges re-considering the ways in which they individually have directed juries and the way in which model directions in the Queensland Benchbook are drafted. Advocates are also involved in the reform as because they too should review the way in which they approach informing the jury (though, of course, their professional objectives and constraints are different from those of trial judges) and because their attitudes to jury instruction will influence the approach that judges may take, both at trial and on appeal.

3.189 The Commission also appreciates that some trial judges (and advocates) are alert to the difficulties in providing instructions and guidance to juries that are sound at law and comprehensible and useful to non-lawyers, and actively review the ways in which they present directions and other information to juries. For those people, any proposal along the lines suggested by the Commission ought, therefore, be little more than a specific suggestion about how such review might constructively continue.

3.190 For these reasons, the Commission's preferred reform strategy involves the court and the parties working together to identify before the trial the real issues — legal, factual and evidentiary — that are likely to arise at the trial so that the evidence, the opening statements by the judges and those by the prosecution and the defence, the parties' closing addresses, the judge's summing up and all other information given to the jury is directed to giving the jury the clearest possible instruction as to the factual questions that it must answer in order to return its verdict.

3-5 A summing up to a jury should culminate in a series of factual questions put to the jury which it must determine in order to reach its verdict based on and in which are embedded the legal issues in the case (such as the elements of the offence and any specific defences).

3-6 Jury directions and warnings should be re-worked into an integrated summing up that avoids long statements of the law and relates the evidence (and the limits to which some of it may be used by the jury) directly to the questions of fact which the jury must determine in order to reach its verdict.

3-7 These integrated directions should be supplemented wherever appropriate by written guides to the law, directions and questions to be answered by the jury.

PRACTICAL IMPLICATIONS OF REFORM

3.191 However, that strategy will only succeed in the long run with leadership from the judges and co-operation from the legal profession. It has been noted in many

places that a scheme of pre-trial disclosure or case management generally will succeed only if enforced by the judiciary and complied with by the legal profession generally.[411]

3.192 The Commission recognises that the emphasis on pre-trial issue identification that the Commission proposes will have some impact on the way in which criminal cases are prepared, more so for defendants and their lawyers than for the prosecutors as they are already subject to extensive pre-trial disclosure obligations. This has been the case when amendments of this nature have been introduced in the past.[412]

3.193 As a matter of principle, however, the Commission sees that in many respects these new obligations should do no more than bring forward trial preparation that would have to be done in any event. The mere fact that it is being done earlier should not of itself lead to any appreciable increase in costs for defendants or Legal Aid Queensland. Even so, the Commission anticipates that there would be offsetting benefits with the earlier identification of untenable prosecutions and defences, more pleas of guilty or *nolle prosequi*, and a reduction in the number and length of trials.

3.194 However, the Commission's proposals would require defendants in particular to document matters that are not currently reduced to writing in many trials, and that may entail some increase in work for legal representatives, at least until the new procedures became routine. This may be seen by some as an erosion of the oral tradition of the criminal trial. However, this may be countered by the observation that the need for oral presentation is much less urgent in days of near-universal literacy and in a society where many people are used to receiving and processing information in written rather than oral form.[413]

3.195 The Commission does not have any information at present as to how the proposed reforms might impact upon Legal Aid Queensland or the Office of the Director of Public Prosecutions, in relation to file management and funding, apart from any other issues. However, it has been argued that the introduction of a significant increase in the formal pre-trial obligations of defendants without a commensurate adjustment to legal aid funding represents an erosion of defendants' rights in practice even if not in principle, and that 'real injustice' might result if statutory sanctions are imposed on defendants whose resources do not stretch to full compliance with a compulsory longer and earlier pre-trial preparation regime.[414] However, the Commission considers that the early identification of the issues both before the trial ***and before the jury*** will not impact adversely on the fairness of the

411 See Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [6.4], [6.8], [6.11]–[6.13], [6.21]–[6.25]; Kevin Dawkins, 'Defence Disclosure in Criminal Cases' [2001] *New Zealand Law Review* 35, 41; Trial Efficiency Working Group, Criminal Law Review Division, Attorney General's Department of NSW, *Report of the Trial Efficiency Working Group* (2009) 7; Ray Gibson, 'The *Crimes (Criminal Trials) Act 1999* — a radical change' *Law Institute Journal,* October 1999, 50, 53.

412 See, for example, Ray Gibson, 'The *Crimes (Criminal Trials) Act 1999* — a radical change' *Law Institute Journal,* October 1999, 50, 51–2.

413 See Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [9.9]. See also Ray Gibson, 'The *Crimes (Criminal Trials) Act 1999* — a radical change' *Law Institute Journal,* October 1999, 50, 51.

414 Greg Martin, 'Defence disclosure: should it be accompanied by legal aid reform?' (2004) 31(10) *Brief* 14, 15–16 in relation to amendments to the pre-trial disclosure regime in Western Australia.

trial and will help the jury examine the evidence and arguments of both sides more effectively, and thus enhance the fairness of the trial.

3.196 The Trial Efficiency Working Group of the Criminal Law Review Division of the Attorney General's Department of NSW recommended that judges 'should be encouraged to refer breaches of the Bar Rules by counsel appearing before them to the NSW Bar Association'.[415] The VLRC also made a strongly worded recommendation about the referral of defaulting legal practitioners to their respective professional disciplinary authorities.[416]

3.197 The Commission is not inclined to make any specific recommendation along these lines. The proposed pre-trial disclosure regime would be a series of court rules and orders like any other interlocutory orders given by the courts, and breaches of them should not be treated any differently. Any breach caused, advised, or acquiesced in, by any legal practitioner should (as now) be the subject, if appropriate in the view of the trial judge, of referral to the appropriate professional disciplinary authority.

Professional training and accreditation

3.198 Recent research on Victorian judicial practices in communicating with juries suggested there may be a need for improved judicial training and education:

> it seems that many judges, rather than holding a firm view for or against certain practices, were equivocal by virtue of their unfamiliarity with the practices. Such responses suggest that a more intensive training and education regime is required, which will enable judges to not only become aware of the practices being implemented by their peers, but also to develop their own practices within a framework of judicial best practice.[417]

3.199 Various techniques to improve juries' comprehension of the law and evidence and to assist them in their tasks — such as the provision of written materials and aids — are adopted from time to time by judges in Queensland but on a largely ad hoc basis.[418] In this context, the Commission raised the following issue for consideration in Chapter 9 of its Issues Paper:

> 9-6 Should any such techniques be the subject of mandatory or optional professional development for criminal trial lawyers (counsel and solicitors), judges or other judicial officers?[419]

3.200 The VLRC also posed some questions for consideration in relation to judicial training and support in its Consultation Paper:

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415 Trial Efficiency Working Group, Criminal Law Review Division, Attorney General's Department of NSW, *Report of the Trial Efficiency Working Group* (2009) 13.

416 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) 17, 115.

417 E Najdovski-Terziovski, J Clough and RP Ogloff, 'In your own words: A survey of judicial attitudes to jury communication' (2008) 18 *Journal of Judicial Administration* 65, 84.

418 See Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) ch 9. These techniques are discussed in Chapter 4 of this Paper.

419 Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) Issue for consideration [9-6].

> 7.75 Much has been done over the past few years to assist trial judges by providing information and training. New trial judges have the opportunity to attend many training programs organised by the JCV about different aspects of their role. The college has also recently announced a new continuing professional development program that will include training in relation to communication skills and pre-trial preparation.
>
> 7.76 Many judges have been appointed without prior criminal trial experience. As has been demonstrated in all jurisdictions over many decades, the competence of a judge to conduct a criminal trial is not determined by prior criminal law experience. Nonetheless, the complexity of modern criminal trials suggests that judges without prior trial experience would benefit from training, as would all new judges. Even long-serving judges would benefit from continuing training with respect to criminal trials. A particular area of training that would be desirable is with respect to the requirements of *Alford v Magee*.[420] Those requirements are at the heart of the function of a criminal trial judge, and yet, as we understand it, the task set by the High Court has not been subject to concentrated judicial training in any jurisdiction in Australia.
>
> Questions:
>
> Would Judicial College of Victoria seminars on the formulation of directions and warnings be an effective way of building judicial skills in this area?
>
> Would a training video of experienced trial judges conducting trials be a useful tool to assist trial judges to prepare their own charges?[421] (note omitted)

3.201 The VLRC also asked whether a specialist accreditation scheme for barristers appearing in criminal trials would be desirable and whether consideration should be given to the introduction of a Public Defender scheme in Victoria.[422]

3.202 In March 2009, the Trial Efficiency Working Group of the Criminal Law Review Division of the Attorney General's Department of NSW recommended:

> 6. That Legal Aid NSW—
>
> a. Create a panel of solicitors for District Court (general crime panel) and Supreme Court (serious crime panel) work and that all practitioners undertaking legally aided work be bound by and subject to audit against minimum practice standards for the conduct of work in those jurisdictions.
>
> b. Consider, in consultation with the NSW Bar Association and Law Society of NSW, the creation of a panel of barristers to be briefed in District Court and Supreme Court trials of the kind that currently exists for Court of Criminal Appeal and High Court matters.
>
> …

420 See [5.3]–[5.9].

421 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [7.75]–[7.76].

422 Ibid [7.77]–[7.81].

11. Briefing of Crown Prosecutors, Public Defenders and trial advocates sufficiently in advance of the trial date to allow for participation by that counsel/advocate in pre-trial management proceedings.

Submissions

3.203 Two respondents to the Commission's Issues paper commented on this issue. The Brisbane Office of the Commonwealth Director of Public Prosecutions submitted that the provision of training 'in relation to use of techniques to assist the jury would be of benefit'.[423] Legal Aid Queensland submitted that '[o]bviously … the level of related continuing legal education provided to and accessed by judges and lawyers involved in criminal trials, is critical.'[424]

3.204 A number of respondents to the VLRC's Consultation Paper, however, commented on the need for judicial support. Training, of both counsel and judges, received support in some of those submissions, but was thought to be unnecessary by others.

3.205 One respondent to the VLRC's Consultation Paper said this:

> Just like legal practitioners and members of the bar in New South Wales are obliged each year to undertake mandatory continuing legal education, judicial officers would benefit from completing a mandatory training course with respect to criminal trials. This program could be offered through the Judicial College of Victoria with the use of training videos being helpful in assisting trial judges in preparing their own charges.[425]

3.206 Victoria Legal Aid made this submission to the VLRC:

> [Victoria Legal Aid] supports proposals that assist judicial officers in the performance of their function … [Victoria Legal Aid] recognises the valued role of the Judicial College of Victoria in providing a high standard of training for judicial officers. It is clear from the high uptake and attendance of their course by judicial officers that there is a strong commitment to ongoing training and information.[426]

3.207 The Law Reform Committee of the County Court of Victoria supported professional training for both advocates and judges, and specialist accreditation for advocates:

> **The commission proposes:**
>
> …

423 Brisbane Office of the Commonwealth Director of Public Prosecutions, Submission 9, 29 May 2009, 6.

424 Submission 16, 3

425 Maria Abertos, Submission to the Victorian Law Reform Commission, 29 November 2008 [13]; see also Patrick Tehan QC, Submission to the Victorian Law Reform Commission, 26 November 2008 [7].

426 Victoria Legal Aid, Submission to the Victorian Law Reform Commission, 9 December 2008. See also Law Council of Australia, Submission to the Victorian Law Reform Commission, 30 January 2009 [18]; Law Reform Committee of the County Court of Victoria, Submission to the Victorian Law Reform Commission, 13 March 2009, 4; Bernard Lindner (Criminal Bar Association), Submission to the Victorian Law Reform Commission, 30 November 2008.

- Specialist accreditation for criminal trial counsel receiving crown and legal aid briefs
- Consideration of the establishment of a public defender scheme
- Judicial training in the preparation and delivery of charges, and refresher and induction training in criminal law

Response

…

Specialist accreditation of trial counsel is welcomed and encouraged. Careful consideration needs to be given to the criteria for achieving specialist accreditation, and the process for accreditation. Experience as a criminal trial lawyer is not of itself necessarily a determinant of skill or competence. In addition to demonstrating up to date knowledge of criminal law, evidence and procedure, advocacy skills should be assessed and there should also be training in cultural awareness, and in matters relevant to questioning children cognitively impaired and other vulnerable witnesses.

…

The high rate of successful appeals, and the lack of correlation between the inexperience of the judge and successful appeal suggests that trial judges would benefit from more assistance in the preparation and delivery of charges which an appeal court will find to be adequate, free of error or not to have resulted in an unfair trial. The criticisms made by trial judges of complexity and length of the model directions in the charge book suggest that in its current form it is not providing as much assistance to trial judges as they would like. In our view emphasis should be placed upon assistance in the preparation of jury directions, and of written material to provide to juries. Although it should be expected that anyone appointed as a judge of a trial court would be a competent lawyer, the complexity of the law, the volume of appellate decisions and legislative change affecting criminal trials had increased, and with great rapidity in recent years. It is unreasonable to expect any new appointee, even one experienced in the criminal law, to be able to navigate the complexity of a modern trial (say, for example a sex offence trial) without assistance. Specialist training is desirable, not only upon appointment, but throughout a judicial career.[427]

3.208 Specialist accreditation for advocates was 'not opposed' by the Victorian Office of Public Prosecutions; nor was further training for judges.[428]

3.209 Although in a somewhat different context, the Criminal Bar Association of Victoria also commented about the need for more 'educational processes':

> We submit that much could be achieved by an educational and collaborative approach to the issues described in [the VLRC's Consultation Paper].[429]

427 Law Reform Committee of the County Court of Victoria, Submission to the Victorian Law Reform Commission, 13 March 2009, 7–8.

428 Office of Public Prosecutions, Submission to the Victorian Law Reform Commission, 12 February 2009, 21, 22–23.

429 Criminal Bar Association of Victoria, Submission to the Victorian Law Reform Commission, 15 December 2008, 11.

3.210 On the other hand, Judge Murphy of the County Court of Victoria felt that specialist accreditation for advocates was not necessary, and that adequate assistance was available to trial judges, rendering it unnecessary 'to mandate any form of training before allowing judges to preside over criminal trials'.[430]

VLRC's recommendations

3.211 The VLRC made some extensive and detailed recommendations for judicial training, and training and specialist accreditation for advocates in chapter 7 of its recent Final Report on jury directions:

> 45. The Victorian 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.
>
> …
>
> 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.[431]

3.212 In coming to its recommendations, the VLRC considered the requirements for admission to practice for barristers in Victoria and compared that with the more stringent requirements in New South Wales and England and Wales, and also looked at the continuing professional developments requirements in Victoria as well as professional accreditation schemes for solicitors in Victoria and the United King-

430 Judge MD Murphy, Submission to the Victorian Law Reform Commission, 5 February 2009, 8.

431 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) 17–18, ch 7. Recommendation 48 advocated that 'The Attorney-General should consider whether a Public Defender scheme should be established.' In Queensland, such a scheme is already provided by Legal Aid Queensland: see Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [7.109]–[7.123].

dom, and for attorneys in the United States.[432] The VLRC compared these with the educational and accreditation requirements imposed on medical practitioners.[433]

3.213 The absence of any comparable arrangements for counsel in Victoria (or elsewhere) — apart from the formal appointment of senior counsel — is notable.

3.214 There is no body in Queensland equivalent to the Judicial College of Victoria or the national Judicial College of Australia, though that is not to say that the judges and magistrates of Queensland do not take the maintenance and development of their own professional standards seriously. The VLRC advocated strongly for formal and on-going judicial professional training:

> 7.127 It takes time to develop and maintain the knowledge and skills required of a judge.[434] 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.[435] Early resistance to judicial education appears to have disappeared[436] and professional development programs are now accepted and valued by judicial officers.[437]
>
> 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.[438]
>
> 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

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432 The Queensland Law Society also runs a specialist accreditation scheme for solicitors. In 2009, this was available in six areas of legal practice: Family Law, Personal Injuries Law, Property Law, Succession Law, Mediation Law and Taxation Law: <http://www.qls.com.au/content/lwp/wcm/connect/QLS/Professional+Development/Specialist+Accreditation/> at 1 September 2009.

433 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) ch 7.

434 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.

435 See, eg [Christopher] Roper, [*A National Standard for Professional Development for Australian Judicial Officers* (2006) 4].

436 Murray Gleeson, 'Judicial Selection and Training: Two Sides of the One Coin' (2003) 77 *Australian Law Journal* 591, 596.

437 [Christopher] Roper, [*A National Standard for Professional Development for Australian Judicial Officers* (2006) 4.], 20.

438 Murray Gleeson, 'The Future of Judicial Education' (1999) 11(1) *Judicial Officers' Bulletin* 1.

> personal injury cases at the bar … will be listed routinely to sit on major criminal trials, perhaps without recent criminal trial experience.[439] (notes as in original)

3.215 Jury directions would form only one of many aspects of professional training for judges. Though magistrates do not preside over jury trials, there is no doubt that they too could benefit significantly from formalised professional training, including induction programs (which were specifically noted by the VLRC).[440]

QLRC's provisional views

3.216 Although the Commission does not make any formal proposal for reform, it is strongly of the view that on-going professional training for judges and advocates practising in criminal law should be encouraged. That training should include education about juries and the ways in which they receive, process and apply the information that they are given during criminal trials, including particular directions and warnings.

439 [Murray] Gleeson, ['Judicial Selection and Training: Two Sides of the One Coin' (2003) 77 *Australian Law Journal* 591], 594.

440 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [7.139]–[7.141].

Chapter 4

Assisting the Jury

INTRODUCTION

4.1 The Terms of Reference require the Commission to consider the information needs of jurors on a broader footing than a review of the trial judge's formal directions and warnings. This chapter considers various techniques, some of which are already in use, which assist both the judge and the parties presenting the evidence and the issues to juries.

4.2 The use of written directions and other similar materials and aids has been widely canvassed in contemporary literature about juries. This chapter considers issues such as the use by the jury of the transcript of evidence, and contemporary forms of presentation such as PowerPoint, decision flowcharts and tree diagrams, and the presentation of information about the law in similar graphic styles.

4.3 Juries are conventionally passive participants in trials. Although the Commission is not advocating an expanded role for juries as active participants, this chapter looks at means by which their passivity can by tempered through note-taking and questions.

WRITTEN MATERIALS AND OTHER AIDS

4.4 The provision to juries of written materials, such as written directions, outlines of evidence, and glossaries of legal or other technical terms, was considered at [9.9]–[9.20] of the Issues Paper.[441] Criminal trials have historically been dominated by oral presentation, although many trials now involve substantial written evidence and juries are often provided with one or more documents, in addition to items admitted into evidence, to assist their understanding. Research by the Australian Institute of Judicial Administration suggests, however, that Queensland judges supplement their oral summings up with written directions and other aids less frequently than their counterparts in some other States.[442]

4.5 In Queensland, there is no statutory or similar prohibition on the giving of written materials to the jury, but neither is it expressly permitted or required. In contrast, this use of this material is specifically authorised in Victoria by section 223 of the *Criminal Procedure Act 2009* (Vic), which re-enacts and slightly expands section 19 of *Crimes (Criminal Trials) Act 1999* (Vic):

> **223 Jury documents**
>
> (1) For the purpose of helping the jury to understand the issues or the evidence, the trial judge may order, at any time during the trial, that copies of any of the following are to be given to the jury in any form that the trial judge considers appropriate—
>
> (a) the indictment;
>
> (b) the summary of the prosecution opening;
>
> (c) the response of the accused to the summary of the prosecution opening and the response of the accused to the notice of pre-trial admissions of the prosecution;
>
> (d) any document admitted as evidence;
>
> (e) any statement of facts;
>
> (f) the opening and closing addresses of the prosecution and the accused;[443]
>
> (g) any address of the trial judge to the jury under section 222;
>
> (h) any schedules, chronologies, charts, diagrams, summaries or other explanatory material;
>
> Note See sections 29(4) and 50 of the *Evidence Act 2008*.[444]

441 See also New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [6.25]–[6.53].

442 Australian Institute of Judicial Administration (James RP Ogloff, Jonathan Clough, Jane Goodman-Delahunty & Warren Young), *The Jury Project: Stage 1 — A Survey of Australian and New Zealand Judges* (2006). The results of that survey are set out at Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [9.18].

443 See [3.148]–[3.174] above.

> (i) transcripts of evidence or audio or audiovisual recordings of evidence;
>
> (j) transcripts of any audio or audiovisual recordings;
>
> (k) the trial judge's directions to the jury under section 238;
>
> (l) any other document that the trial judge considers appropriate.
>
> (2) The trial judge may specify in an order under subsection (1) when any material is to be given to the jury. (notes added)

Submissions

4.6 There was generally a great deal of support in submissions to this Commission (and to the VLRC) for the provision to juries of a variety of written material and similar aids,[445] and for the proposition that a purely oral summing-up was 'ineffective and out of kilter with our modern society.'[446] One Queensland District Court judge commented:

> In substance, the time has really come to recognise that the tradition of the oral trial has been overtaken by technology and the increasing literacy and education of jurors.[447]

4.7 Some of this material could be given to juries at the start of the trial: a note about basic principles and a checklist of things that they ought to bear in mind such as the concepts of the burden and standard of proof:

> An effort should be made to give directions as early as possible.[448]

4.8 A judge of the District Court of Queensland noted that:

> Queensland judges are increasingly giving written directions to juries. Practices vary. …
>
> It is most useful to give the jury written directions about the key aspects of the trial. …
>
> Such a summary has several advantages. Preparing it concentrates the judge's mind on the relevant issues. It is an agenda for discussion with counsel. Writing down the issues reduces the chance of the judge explaining them inaccurately to the jury. They give the jury a written statement, which should allow for clear

444 Section 29(4) of the *Evidence Act 2008* (Vic) provides that evidence may be given in the form of charts, summaries or other explanatory material if it appears to the court that the material would be likely to aid its comprehension of other evidence that has been given or is to be given. Section 50 of that Act deals with proof of voluminous or complex documents.

445 Submission 6; Submission 10; South West Brisbane Community Legal Centre, Submission 11; Marcus Taylor, Submission to the Victorian Law Reform Commission, 30 January 2009, Judge MD Murphy, Submission to the Victorian Law Reform Commission, 5 February 2009, 1.

446 Submission 6; Submission 10; South West Brisbane Community Legal Centre, Submission 11. See also Judge MD Murphy, Submission to the Victorian Law Reform Commission, 5 February 2009, 1.

447 Submission 10.

448 Ibid.

> understanding, and less misunderstanding about the issues they have to keep in mind and the decisions they have to make.[449]

4.9 One respondent to this Commission, who had recently been a defendant acquitted at a re-trial, was concerned that the only written information the jurors in his re-trial had at their disposal was their own notes. He regarded it as 'vital' that juries receive written, visual or graphical assistance. This could include a glossary of terms such as 'uncorroborated' and especially 'beyond reasonable doubt', with clear examples.[450]

4.10 Various respondents to the Commission's Issues Paper specifically supported the provision of the following written materials to juries:

- a copy of the indictment;[451]
- a copy of the elements of the offence or offences charged;[452]
- a copy of the elements or the 'law governing' some defences such as provocation and self-defence;[453]
- an agreed schedule of expert evidence;[454]
- any re-direction or reminder about the content of any evidence (rather than it being read out to the jury);[455]and
- a glossary of terms.[456]

4.11 The use of other forms of presenting information, such as visual aids, also received support.[457]

4.12 One submission noted that the adoption of written aids and the use of modern systems of communication is allied to an awareness of the limitations of human attention spans, and argued that consideration should be given to giving juries appropriate breaks rather than expecting them to be able to concentrate fully on extended periods of instruction, especially if delivered only orally.[458]

4.13 The use of decision trees is one possible technique that was considered by the Brisbane office of the Commonwealth Director of Public Prosecutions:

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449 Ibid.

450 Submission 4. The difficulties associated with defining 'beyond reasonable doubt' were discussed in some detail in the Issues Paper at [7.55]–[7.63], and the submissions in response to those issues are discussed at [8.3]–[8.21] below.

451 Submission 6; Submission 10.

452 Submission 6; Submission 10.

453 Submission 6.

454 Ibid.

455 Ibid.

456 Submission 4. See [4.8] above.

457 South West Brisbane Community Legal Centre, Submission 11.

458 Ibid.

> Decision trees may also be useful in difficult cases where there are complex legal issues. It is important that decision trees are settled after discussion with Counsel and are compliant with the law. A decision tree should be accompanied by appropriate direction by the trial judge. For example, a decision tree in a complex case may have many steps. Because of the way the trial has been conducted and issues have developed, some of these steps may not be of particular significance. Reducing the steps to writing may, however, lend it more significance than it actually should have in the circumstances of the trial. The decision tree would therefore need to be accompanied by careful and deliberate direction about the significance of each step. This was observed in a recent Supreme Court trial involving Commonwealth charges where decision trees were used. There, the trial judge carefully directed the jury about the particular issues in the trial and noted that certain steps in the decision tree, although legal requirements, were not matters that should necessarily unduly concern the jury.
>
> …
>
> In this Office's experience, Judges are quite willing to provide written directions in consultation with counsel where there are complex factual and legal issues to be determined. In our view, it is not necessary to legislate to make written directions compulsory in criminal trials as some trials, by nature of their simplicity, do not call for written directions.
>
> Model step directions, tables and decision trees are useful, particularly in circumstantial cases or where alternative verdicts are available. In our view, it is not desirable to legislate to confirm the power of Judges to use such deliberation aids. Judges should use such aids when appropriate and in consultation with counsel.[459]

4.14 One Supreme Court judge noted that, while there may be some benefits in the use of flow charts or tree diagrams, they could be exploited by defendants (especially in more complex cases) who over-emphasised the need for each step to be satisfied (beyond reasonable doubt, where appropriate) before a verdict of guilty could be reached.[460]

4.15 Although not opposing the use of written materials generally, the Office of the Director of Public Prosecutions expressed some reservation about the use of decision trees or other materials that directed the jury's attention to structured decision-making in a particular order as they tended to force that order upon the jurors when their own inclination might be to tackle the issues in a different order.[461]

4.16 Legal Aid Queensland was concerned that the use of these materials was not as straight forward as might first be thought, and submitted that they should be used with some circumspection:

> We do not oppose in principle measures that might supplement oral directions and which are designed to give greater assistance to juries.

459 Brisbane Office of the Commonwealth Director of Public Prosecutions, Submission 9, 5–6.

460 Submission 7.

461 Submission 15.

> However, suggested 'aids' such as chronologies, statements of the relevant issues and flowcharts would obviously require preparation, consultation and perhaps agreement (probably after argument) between the prosecution and defence, or even a ruling.
>
> Given that the defence, quite properly, is usually not required to disclose much of its case until trial, measures such as agreed statements of the relevant issues, in a form that might be able to be put before the jury, could only be prepared as the trial unfolds. Different issues will emerge as a lengthy trial progresses — evidence will change under cross-examination and the emphasis on certain evidence will vary. The trial process is a dynamic one.
>
> In practice, such measures could well extend the length and cost of trials.
>
> Additionally, whatever documents a jury has will create discussion, and possibly argument and debate. Where the documents are exhibits, that is appropriate because the jury are thereby deliberating on the evidence. The danger with schedules or lists of facts, agreed or otherwise, is that the jury argues and debates them instead of the evidence.
>
> Moreover, such proposals assume jurors would prefer to read something rather than listen to an explanation. That assumption might apply to lawyers who read things for a living but might not apply to others, whose tradition is to speak, listen and discuss.
>
> It may well be that any benefits of such measures would be outweighed by these sorts of consequences.[462]

4.17 In its Consultation Paper, the VLRC proposed the use of written assistance for juries in the form of the aide mémoire used in the Northern Territory. The VLRC's Proposal 4 reads:

> 7.56 Instead, we propose that available resources be directed towards the preparation of a document called an 'Aide Memoire' that would contain an agreed statement of the elements of the offences, including any alternative offences. That document should be prepared before the jury is empanelled. This document would be provided to the jury at the beginning of the trial and could form the basis of the judge's charge to the jury and assist in the preparation of specific directions and warnings.
>
> **PROPOSAL 4**
> A document known as an 'Aide Memoire' should be introduced to assist in the identification of issues.
>
> 7.57 The idea of the 'Aide Memoire' is based upon the document of the same name currently used in criminal trials in the Northern Territory. In the Northern Territory, the aide memoire sets out the elements of each offence (and alternative offences) and highlights the matters that are in dispute. This document, which is given to the jury when the judge delivers his or her final charge, is drafted by the trial judge and usually settled with counsel prior to the empanelment of the jury. …

462 Submission 16, 6–7.

> 7.58 We propose that a document of this nature be given to juries at the commencement of each trial. Like the Northern Territory Aide Memoire, the document would set out the elements of each offence and it would indicate the matters that are in dispute. Although the Northern Territory model is confined to identifying areas of dispute about the elements of the offences (which can be done simply by highlighting the disputed elements in the text), the use of such a document provides an opportunity to identify subsidiary issues that are also in dispute. Whether or not such subsidiary issues were set out in the document when it was first provided to the jury, or at all, would be a matter for the trial judge to consider.[463] (notes omitted)

4.18 This proposal found some support in submissions to that Commission. Associate Professor John Willis submitted to the VLRC that:

> Clearly juries should be given as much assistance as possible. This will generally include written information to which they can refer at will. Such written information should generally include the elements of each of the offences before them.[464]

4.19 In the context of the early identification of the real issues in a trial, one respondent to the VLRC said this:

> Furthermore, the obligation on trial judges to direct the jury about the real issues in a case should be included in the code by way of an outline. The example of how the principle may be stated in statutory terms as drafted in the Consultation Paper is ideal. The preparation of an Aide Memoire … would make identification of the real issues easier. The judge would then need to make a summation of that evidence relevant to the findings of fact the jury must make when determining those real issues.
>
> The Aide Memoire (as modelled on the Northern Territory example) should be introduced to assist in the identification of issues and be provided to juries at the commencement of each trial. Its preparation should be the task of Counsel and be settled by the judge prior to the empanelment of the jury.
>
> The document would help in the identification of the issues early on and would assist the trial judge when formulating directions and warnings to the jury.[465]

4.20 Not all respondents supported providing such a document to the jury, however:

> The OPP [Victorian Office of Public Prosecutions] 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 that the issues and evidence in a case may be. Such a document should be distinguished from a document outlining what the

463 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [7.56]–[7.58].

464 Associate Professor John Willis, Submission to the Victorian Law Reform Commission, 16 December 2008, 5.

465 Maria Abertos, Submission to the Victorian Law Reform Commission, 29 November 2008 [10]–[11]. See also Daniel Gurvich and Mark Pedley, Submission to the Victorian Law Reform Commission, 23 December 2008 quoted at [3.102] above; Bernard Lindner (Criminal Bar Association), Submission to the Victorian Law Reform Commission, 30 November 2008, in which the provision of an aide mémoire was described as 'unobjectionable'.

> 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.[466]

4.21 But with that distinction in mind, the OPP was prepared to assist with the provision of material to assist juries understanding the issues of cases:

> The Aide Memoire (with the qualifications outlined above) would be one means to do this however depending on the complexity of the case handouts, flow-charts and utilising technology (for instance PowerPoint presentations) may also be beneficial in assisting comprehension.[467]

4.22 Stephen Odgers SC made this submission to the VLRC:

> 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.[468]

TRANSCRIPT OF EVIDENCE

4.23 The question of whether a jury should be provided with a copy of the transcript of evidence was considered in this Commission's Issues Paper at [9.25]–[9.49].

4.24 The provision of a copy of the transcript to the jury is a matter for the trial judge's discretion.[469] The usual practice in Queensland is for judges to read to the jury any part of the evidence that it wishes to be reminded about, rather than give them a copy of the relevant part of the transcript. In contrast, transcripts of evidence are commonly given to juries in New Zealand;[470] a practice that appears to have had a significant effect on shortening the time of jury charges (summings up) by allowing summaries of the evidence to be replaced by simple references to the relevant witnesses or parts of the transcript itself.

4.25 The recent case of *Bropho v Western Australia*[471] is an example where the trier of fact, in order to comply with the direction to 'scrutinise with great care' the evidence of a particular witness, re-read that witness's evidence from the transcript in order to be satisfied of the extent to which it should be relied on. That case was tried by a judge alone, who would have been accustomed to ready access to the

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466 Office of Public Prosecutions, Submission to the Victorian Law Reform Commission, 12 February 2009, 16.

467 Ibid 25.

468 Stephen Odgers SC, Submission to the Victorian Law Reform Commission, 12 November 2008, 8. Odgers' submission was expressly endorsed by the Queensland Law Society and Bar Association of Queensland in their joint submission to this Commission: Queensland Law Society and Bar Association of Queensland, Submission 13.

469 *R v Tichowitsch* [2006] QCA 569; *R v Le* [2007] QCA 259.

470 See, eg, *R v Haines* [2002] 3 NZLR 13 [28]–[29] (McGrath J).

471 *Bropho v Western Australia (No 2)* [2009] WASCA 94. This case is discussed at [7.19–[7.21] below.

transcript. However, it is interesting to consider what a jury would have been able to rely on in the same circumstances if it were denied the transcript.

4.26 Some commentators have expressed concern about a perceived risk of undue weight being given to the transcript rather than to the evidence itself (ie, the words spoken) and to those parts of the evidence for which a transcript (or, for example, a video-recording) is provided to the jury. The Commission does not share this concern, particularly if the transcript is provided only at the end of the trial.

4.27 There are also some technical and practical hurdles to be overcome in the provision of transcripts. For example, preparation of an appropriately corrected and edited transcript may take some time and effort. The Commission acknowledges that these difficulties are more likely to be overcome in metropolitan areas than in smaller regional courts.

4.28 The Trial Efficiency Working Group of the Criminal Law Review Division of the Attorney General's Department of NSW noted in its report issued in March 2009 that:

> … some judges do not permit juries copies (edited or otherwise) of transcripts of the trial. Similarly, there was a concern that some juries were not being granted access to the exhibits until the end of the trial when they were sent away to deliberate.
>
> The Working Group acknowledges that if this practice exists, it is not across the board and that most judges allow juries access to a transcript of the proceedings, where appropriate to do so. The majority of courts also permit jurors access to the exhibits soon after they are tendered.
>
> It is not the intention of the Working Group to fetter the discretion of a judge to run his or her court as they see fit, however it is important that jurors are placed in the best position possible to assess the evidence they hear. Providing a jury with a transcript, where one is available, is a way of ensuring that the evidence is recounted accurately in the jury room rather than recalled from memory. Likewise, the contemporaneous examination of an exhibit will give a jury a much greater appreciation for the evidence and ensure that the relevance of the exhibit is better comprehended.[472]

Submissions

4.29 The provision of the transcript of evidence to the jury received some support from respondents. For example, the Brisbane Office of the Commonwealth Director of Public Prosecutions made this submission in support, though with some qualifications:

> The transcript should be made available to jurors. The jury should be given only one copy of the transcript. In appropriate cases where there are many days of evidence, the jury could be given a copy of the transcript in electronic form that is searchable. Care would need to be exercised to ensure that the jury was not

472 Trial Efficiency Working Group, Criminal Law Review Division, Attorney General's Department of NSW, *Report of the Trial Efficiency Working Group* (2009) 69.

> given access to parts of the trial transcript relating to matters arising in the absence of the jury (e.g. legal arguments, voir dire evidence, etc.) Although in *R v Tichowitsch* [2007] 2 Qd R 262 the Queensland Court of Appeal noted that it is clear that a trial judge does have discretion to provide a jury with a transcript of evidence, it may be appropriate for that the trial judge's discretion in this regard be confirmed by legislation similar to that in section 55C of the *Jury Act 1977* (NSW). Any transcript provided would of course have to be a corrected copy. Although it would only rarely arise in a trial for a Commonwealth offence, transcripts of any evidence given extra-curially would also need to be provided e.g. transcripts of evidence of an 'affected child' pre-recorded pursuant to [section] 21AM of the *Evidence Act 1977* (Qld). It would be inconsistent to allow a jury access to a transcript of the parts of the evidence given in the court room and not access to parts of the transcript of the evidence not given in the court room. Allowing access to a transcript of extra-curial evidence such as the pre-recorded evidence of an 'affected child' may be contrary to the decision in *Gately v The Queen* (2007) 232 CLR 208 and there may, therefore, need to be some legislative amendment to facilitate this.
>
> … There will also be other trials where the provision of the transcript is not useful or appropriate.[473]

4.30 One respondent who had participated in two trials as a defendant said that it was 'essential' that the jury receive a copy of the transcript of evidence.[474]

4.31 On the other hand, some respondents were more equivocal: one District Court judge had 'mixed views about providing a full transcript of evidence' as it may 'distract the jury'.[475] Another judge felt that the jury 'should routinely be given transcripts of the evidence. (Present technology means that editing can be done quickly).'[476]

> Every effort should be made to give the jurors as much help as possible. That means that they should usually have transcripts, which they can take into the jury room, rather than having to rely on their memories of oral evidence sometimes given days before. Such an approach would get rid of the present uncertainties about the use of transcripts of police interviews, and when the jury have to hand them back, rather than take them into the jury room, including during deliberations.[477]

4.32 In a similar vein, a Supreme Court judge submitted that there seems to be no reason why juries could not be played the video-recordings of witness interviews made more or less contemporaneously with the alleged crime, rather than having to rely on oral testimony from witnesses given years later. There would have to be some editing on occasion, but this is already done in relation to confession evidence.[478]

473 Brisbane Office of the Commonwealth Director of Public Prosecutions, Submission 9, 5–6.

474 Submission 4.

475 Submission 6.

476 Submission 10.

477 Ibid.

478 Submission 7.

4.33 The VLRC also sought submissions on this issue in its Consultation Paper.[479] One of the respondents to that Paper felt that the provision of transcript was no substitute for a summing up:

> **Should the '*Alford v Magee*' requirement to summarise evidence be achieved in appropriate cases by providing a transcript and transcript references rather than oral summaries?** — No, that would tend to lead to juries poring over transcript, lengthening deliberations. Further, it would not be an adequate substitute for the judge's task of relating the issues to the facts in a case to the law. To provide transcript references would not assist in applying the evidence to the law.[480]

USE OF TECHNOLOGY

4.34 Several commentators have noted that the oral tradition of criminal trials is incompatible with the modern reality that a great deal of the information that we all process is in writing of one form or another, and increasingly in electronic format:[481]

> It is the change in the media of communication — both in the outlets of broadcasting and in the Internet — which may have penetrated most deeply the cognitive processes of the generation of young citizens now coming to jury service. The change effects an alteration in the way in which those potential jurors commonly receive, and expect to receive, information and the way they themselves communicate with others and expect others to communicate with them.[482]

4.35 Some Australian judges have themselves noted that visual aids such as PowerPoint displays enhance their communication with juries.[483] The NSW Law Reform Commission has reported the comments of one judge in Western Australia who uses PowerPoint without 'any major changes to the oral presentation of the summing up':

> She believes this method of presentation helps focus jurors' attention on the main points of the summing-up and improves their comprehension of the legal directions. She reports that both prosecutors and defence counsel have been supportive of this technique. Further, the Court of Appeal of WA has noted the use of PowerPoint in the summing-up and has not objected to this practice.[484] (note in original)

4.36 In anticipation of the increasing use of technological aids in jury trials, in March 2009 the Trial Efficiency Working Group of the Criminal Law Review Division of the Attorney General's Department of NSW recommended that:

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479 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) 99.

480 Bernard Lindner (Criminal Bar Association), Submission to the Victorian Law Reform Commission, 30 November 2008.

481 See, for example, Australian Institute of Judicial Administration (James RP Ogloff, Jonathan Clough, Jane Goodman-Delahunty & Warren Young), *The Jury Project: Stage 1 — A Survey of Australian and New Zealand Judges* (2006) 5. See also New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [10.26]–[10.35].

482 Hon Michael Kirby AC, 'Speaking to the modern jury — New challenges for judges & advocates' (Paper presented at the Worldwide Advocacy Conference, London, 2 July 1998).

483 Australian Institute of Judicial Administration (James RP Ogloff, Jonathan Clough, Jane Goodman-Delahunty & Warren Young), *The Jury Project: Stage 1 — A Survey of Australian and New Zealand Judges* (2006) 5.

484 See *Dawson v The Queen* [2001] WASCA 2; *Nguyen v R* [2005] WASCA 22.

12. Attorney General's Department to convene meetings of relevant agencies, including the Police and the DPPs at appropriate intervals to identify likely future technological requirements for trials to facilitate planning of funding and equipment.

13. Attorney General's Department to conduct an audit of technology and technological capacity for all criminal trial courtrooms. This information should be available to NSW courts and online to all court users.

14. Practice notes should require the parties to proceedings to submit for approval to the court, advice of the technological requirements (both hardware and software) for the trial. The submission should be made no later than 20 working days before a trial is to commence. The list of hardware and software should indicate who is to provide it (e.g. in terrorism matters the equipment is supplied by the Commonwealth).

15. The position descriptions of court officers should be reviewed to ensure that the operation of courtroom technology is a required competency.

16. Court officers should be given ongoing training to ensure that they can meet the technology requirements of their role.

17. A single standard procedure should be developed for all NSW courts to require technology to be tested in location within 2 working days of a hearing.

4.37 The Working Group also noted that:

> The absence of aids to increase jury understanding, such as chronologies and summaries of evidence was identified as a problem in the presentation of evidence. This is particularly so in cases involving a large volume of listening device and/or surveillance evidence, where the only contentious issue is the inferences to be drawn from that evidence in combination with other evidence. The Working Group was of the view that such aids could greatly enhance the jury's comprehension of complex or voluminous evidence. However, these aids are seldom used, probably because of the reluctance of the parties to a criminal proceeding to agree to the presentation of evidence in such a fashion or due to gaps in the relevant provisions of the *Evidence Act 1995*.
>
> …
>
> Improving the trial experience for jurors will require the use, where appropriate, of aids to understanding such as chronologies or summaries bringing together voluminous evidence. The jury's comprehension of complex evidence can present significant problems. Many criminal trials, such as major drug trials, are now complex, and advances in technology have resulted in more sophisticated forensic evidence. It can be difficult for juries to easily comprehend and absorb some of the evidence. This issue must be given further consideration. [485]

Submissions

4.38 The use of computerised information aids such as PowerPoint received some qualified support from one respondent:

485 Trial Efficiency Working Group, Criminal Law Review Division, Attorney General's Department of NSW, *Report of the Trial Efficiency Working Group* (2009) 18, 67.

> Electronic aids such as PowerPoint might assist juries in their understanding of the evidence and the law in their deliberations. PowerPoint may be useful for some of the standard parts of the judge's directions. PowerPoint may not always be an option for trial Counsel given the time constraints which usually operate in preparing addresses during trials. Therefore, time may sometimes be an issue. PowerPoint must be used carefully. As a general observation, sometimes a user of PowerPoint may include too much information in each slide and the visual presentation may become a distraction. A preferable technique may be to confine the PowerPoint slide to concise propositions and to then speak to each proposition.
>
> …
>
> The use of PowerPoint presentations or decision trees may be suitable in some cases but not in others. The mandating of techniques may be too prescriptive and insufficiently flexible for the wide variety of issues that may potentially arise in a criminal trial.[486]

4.39 The Office of the Director of Public Prosecutions did not favour the use of PowerPoint for directions and addresses: in its view, presentations of this sort are no more effective than written lists and similar documents, but could lead to an escalation in efforts to impress juries with visual effects.[487]

VLRC's recommendations

4.40 The VLRC recommended the use of two principal documents to be given to juries by trial judges during criminal trials, both optional, extending its earlier proposals in relation to an aide mémoire:

> 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

486 Brisbane Office of the Commonwealth Director of Public Prosecutions, Submission 9.

487 Submission 15.

> 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.[488]

4.41 As can be seen from the VLRC's Recommendation 42, these recommendations are to supplement provisions in the new *Criminal Procedure Act 2009* (Vic) which expressly permit a wide range of written materials that the judge may direct be given to the jury under section 223.[489]

4.42 The Outline of Charges is to be given to the jury before any evidence is led to introduce them to the elements of each offence charged (and alternative charges), identifying which of them are disputed by the defendant and therefore have to be determined by the jury.[490] The VLRC acknowledged that the elements in dispute can change during a trial and that a defendant should not be bound by this document; it would be a 'reference point' to help the judge to conduct a fair and efficient trial.[491] The jury should be told that the issues as set out in this document could change during the trial.[492]

4.43 The VLRC considered it reasonable to require the prosecutor to prepare the first draft of the Outline of Charges as the Victorian rules of procedure already require the prosecutor to prepare an opening document well in advance of the trial. Furthermore, the VLRC is confident that over time a bank of precedent Outlines would be developed.[493]

4.44 The Jury Guide would be a distillation of the decision trees, flow charts or jury checklists that are variously used in Australian courts to assist jurors in understanding the decisions that they must make in reaching their verdicts.[494] The VLRC notes that reliance on the on-line Criminal Charge Book of the Judicial College of Victoria, though a 'brilliant resource tool',[495] can nonetheless present the jury with the 'extraordinary task' of absorbing and applying a complex statement of the law.[496]

4.45 Over concerns that the Jury Guide might in some way distort the role of the jury and the duties of the judge, the VLRC concluded that it would in fact assist judges to discharge their responsibilities as well as assisting the jury.[497] The VLRC also noted the considerable support for this approach in England and Wales, and in

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488 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) 17, 118, 120.

489 Section 223 is set out in [4.5] above.

490 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [6.29]–[6.45].

491 Ibid [6.30]. The Outline of Charges would have some similarities to, but also some differences from, the Aide Mémoire used in the Northern Territory: ibid [6.32]; Appendix D. One difference is that the Outline of Evidence would be given to the jury at the end of opening statements, not at the end of the closing addresses as in the Northern Territory: ibid [6.41].

492 Ibid [6.45].

493 Ibid [6.39]–[6.40].

494 Ibid [6.46]–[6.60].

495 Ibid [6.51].

496 Ibid [6.53].

497 Ibid [6.61]–[6.66].

particular in New Zealand.[498] The VLRC endorsed the approach of the New Zealand Court of Appeal in *R v Dixon*:

> 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?[499]

QLRC's proposals for reform

4.46 So far as the Commission is aware, there are no formal barriers in the form of rules of court or statements of appellate courts that prevent the use of written and other supplementary aids, though there are many statements advocating caution and a conservative approach in using them.[500] However, the Commission notes that in Victoria, for example, the distribution to the jury of certain written materials is expressly permitted under section 223 of the *Criminal Procedure Act 2009* (Vic).[501]

4.47 It was argued by the Brisbane Office of the Commonwealth Director of Public Prosecutions that:

> it is not desirable to legislate to confirm the power of Judges to use such deliberation aids. Judges should use such aids when appropriate and in consultation with counsel.[502]

4.48 However, strong reform measures, such as legislation, are sometimes necessary to overcome entrenched practices and reluctance to innovate. Legislation which confirms a power that trial judges already have should not create any concerns or problems.

4.49 In the Commission's view, a useful starting point is to ask what the trial judge would expect to receive by way of written assistance if he or she were trying the case without a jury. It is unsustainable in principle to argue that the point of departure is that juries should sit and listen mute until they retire to deliberate.

4.50 If trial judges would expect to receive transcript on a regular basis in order to refresh their recollection of evidence or to scrutinise particular portions of it with great care, as the law would require them to do from time to time, why should a jury not receive the same benefit? If a judge would receive chronologies, lists of dramatis personæ and similar summaries and notes, why should the jury not receive them as well? In cases involving extensive documentary evidence, why should jurors not receive bundles of documents as and when evidence is admitted that they can

498 Ibid [6.67]–[6.80].

499 [2007] NZCA 398 [41].

500 Eg, Submissions 7, 9, 15, 16.

501 Section 223 is set out in [4.5] above.

502 Brisbane Office of the Commonwealth Director of Public Prosecutions, Submission 9.

follow as evidence is led or addresses are made, and that they can consult during deliberations?

4.51 Alternatively, it may be more useful, at least during the presentation of evidence, for documents to be displayed on large screens so that jurors can be directed to the particular parts of documents or other exhibits as witnesses are speaking about them or as the parties are addressing the jury about that evidence.

4.52 The circumstances in a criminal trial that would warrant the use, or the decision not to use, any of the techniques discussed in this Paper or the Issues Paper must be a matter for the trial judge to determine in the light of the demands of each case, in consultation with counsel or the parties as appropriate. The Commission is satisfied that there should be no inhibition to the use of these techniques, and that there should be open-minded consideration of them by all professional participants in criminal trials. If, for example, a chronology proposed by one party is not agreed to by the other, it could nonetheless be used as the basis of addresses and described to the jury as disputed, with a clear indication of those portions which are agreed and which are disputed, and of the factual issues that remain for the jury to resolve.

4.53 The Commission's provisional view is that a provision similar to section 223 of the *Criminal Procedure Act 2009* (Vic)[503] should be enacted in Queensland. It is permissive only and leaves it up to the judge what, if any, of this material may be given to the jury in any particular case, and when. The Commission sees no need to restrict the number of copies of any such material, including the transcript of evidence, that may be given to the jury. Practical concerns may dictate a lower number if the material is lengthy or hard to reproduce, but in any event this is a matter of detail that should be left to the trial judge.

4.54 The value of inserting such a provision lies in directing the attention of both judges and advocates to the options that they have in presenting information to juries, and in underscoring the idea that these techniques should be actively and routinely considered, and not regarded as exceptional.

4.55 The VLRC recommended the development and use of two specific documents: the Outline of Charges and the Jury Guide, and that section 223 of the *Criminal Procedure Act 2009* (Vic) be amended to include them in the list of documents in that section.[504] They would presumably be caught by the catch-all provision in section 223(1)(l) in any event. The Commission agrees with this recommendation and its proposed version of section 223 is expanded accordingly without giving these documents any particular title.

4.56 The Commission also considers that the proposed provisions should state that a document similar to the Outline of Charges recommended by the VLRC should as a matter of course be given to the jury at the start of the trial, unless the trial judge considers that there are good reasons why this should not happen. This

503 Section 233 is set out at [4.414.5] above.

504 See [4.40]–[4.44] above.

would be facilitated by the Commission's proposed regime of pre-trial disclosure and issue identification.

4.57 The Brisbane Office of the Commonwealth Director of Public Prosecutions expressed some concern that providing the jury with a copy of a recording of evidence taken outside the court (such as a statement by a child) might not comply with the High Court's decision in *Gately v The Queen*[505] and that express legislative amendment would be required to overcome this.[506] The Commission considers that this concern would be accommodated by the proposed provision.

4.58 The Commission suggests that this provision would be best located in Division 11 of Chapter 62 of the Criminal Code (Qld) (ie, sections 618 to 625), which otherwise deals with certain procedural aspects of the trial of issues.

4-1 The Criminal Code (Qld) should be amended by the insertion of provisions to the following effect:

(1) For the purpose of helping the jury to understand the issues or the evidence, the trial judge may order, at any time during the trial, that copies of any of the following are to be given to the jury in any form that the trial judge considers appropriate:

(a) the indictment;

(b) any document setting out the elements of each offence charged and any alternative offences;

(c) the summary of the prosecution opening;

(d) the defendant's response of the accused to the summary of the prosecution opening and the defendant's response to any notice of pre-trial admissions of the prosecution;

(e) any document admitted as evidence;

(f) any statement of facts;

(g) the opening and closing addresses of the prosecution and the defendant;

(h) any address of the judge to the jury;

(i) any schedules, chronologies, charts, diagrams, summaries or other explanatory material;

505 (2007) 232 CLR 208

506 See [4.29] above.

(j) transcripts of evidence or audio or audiovisual recordings of evidence;

(k) transcripts of any audio or audiovisual recordings;

(l) the judge's directions to the jury;

(m) any document setting out decision trees, flowcharts or checklists of questions for consideration by the jury; and

(n) any other document that the judge considers appropriate.

(2) The trial judge may specify when and in what format any such material is to be given to the jury.

(3) At the start of the trial the jury should be provided with written material, unless the trial judge considers that there are good reasons why this should not happen, that covers matters such as:

(a) the burden and standard of proof;

(b) the role of the judge and jury; and

(c) the elements of each offence charged (and any alternative charge) and each defence.

MORE ACTIVE PARTICIPATION BY JURIES

QUESTIONS FROM THE JURY

4.59 In the Issues Paper, the Commission noted that jurors sometimes felt a sense of frustration at not being able to participate in the forensic process, and reported that they were discouraged from asking questions or unsure how to do so if they wanted to.[507] The Commission sought submissions on whether it may be advantageous to expand or otherwise modify a jury's right to ask questions.[508]

Submissions

4.60 One respondent to the Commission's Issues Paper who had sat on three juries in one jury service period said that he was 'impressed' with participating by asking questions which, as speaker, other jurors had requested him to put to the

507 See Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [3.34]–[3.39], [9.73]–[9.83]. See also New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [10.44]–[10.51].

508 See Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [9.75].

judge: 'It made decision making easier', particularly as the 'average punter is not equipped to deal with many issues'.[509]

4.61 A District Court judge submitted that the Queensland Benchbook's reticence to inform jurors about their rights to put questions to witnesses, 'based on a conservative Victorian practice outlined in *R v Lo Presti*', should be altered along the following lines:

> 'You have a right to ask questions of a witness, through the judge. We must be careful not to go outside the issues raised by counsel. They know a lot about the case, and the facts, and what the real issues are. We can usually rely on them to ask the witnesses the questions that matter.
>
> But, when evidence is given, you might want to understand better some detail, or have a witness make clear something that you haven't fully understood, or ask something more about an issue that has been raised.'
>
> (Then go on with the present direction, except that the requirement for questions in writing is not usually necessary. A raised hand from a jury member should be enough, in most cases.)[510]

4.62 On the other had, a Supreme Court judge did not agree with 'measures that encourage jurors to think that their role is an investigative one'.[511]

QLRC's proposals for reform

4.63 Jurors do not have a role in the investigation of any criminal offence or in the presentation of the prosecution or defence at any criminal trial, and neither should they. However, they have the considerable burden in each case of determining whether the defendant is guilty or not. To discharge that duty, jurors should be informed as well as the evidence and powers of the judge and counsel permit. Jurors should also feel that they have all the relevant and admissible evidence, and that they fully understand both the evidence and the issues that they must determine, both in terms of the facts that they must resolve and the verdicts that they must reach.

4.64 It cannot be advantageous to the juries, or to the integrity of the criminal justice system as a whole, if any jury feels at a loss in relation to the evidence or their tasks.

4.65 A frustrated jury is more likely to seek to find out information about the case or the defendant than one that is satisfied that it has, or will in due course be given, all the information that it needs.[512] Given the ease with which jurors can make their own enquiries of the circumstances of cases that they are trying, every reasonable effort should be made to seek to ensure that they are not motivated to do so by a feeling of frustration with the trial itself.

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509 Submission 1.

510 Submission 10.

511 Submission 7.

512 See Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [9.76]–[9.77].

4.66 Therefore, juries should continue to be informed of their right to voice their concerns, through their speaker or the bailiff as appropriate, so that their concerns about the evidence, the law, the procedure or their own tasks are ventilated and resolved. Jurors are allowed to seek to put questions to witnesses (albeit through the judge), and to put questions to the judge. This should not be hidden from them. Although it should certainly be explained that there may be good reason why a particular question cannot be put to a witness given the laws of evidence, or because the jury's query will be covered by a later witness or will be covered in addresses rather than by evidence, that is no reason to shrink from the reality that jurors have a right to ask questions, or at least to seek to do so, and that freely acknowledging this to juries (which is not the same as encouraging them to do so) may give juries some reassurance that they can seek to clarify their uncertainties rather than simply debating these issues amongst themselves without guidance or, worse still, not discussing them at all.

4.67 Although juries should not take a significant role in asking questions of witnesses, they should be openly informed of their right to do so through the trial judge.

4.68 The Commission's view is that juries should be informed of their rights to ask questions at the beginning of the trial, and that the model opening statement by the judge set out in Chapter 5B of the Queensland Benchbook should be amended accordingly. Useful statements of these rights appear in Chapters 15 and 24 of the Queensland Benchbook and can be used in amending Chapter 5B.

4.69 However, the statement based on *Lo Presti*[513] that these directions should only be given if the issue has been raised by the jury should be deleted.

4.70 The Commission does not suggest that the current restrictions on jurors' questions — that they must be made to the judge, even if they are in fact questions directed to a witness — be amended. The Commission is satisfied that these restrictions should remain and that jurors should not be granted more liberal rights to ask questions directly of witnesses or parties.

4-2 The Queensland Supreme and District Court Benchbook should be amended by:

(a) amending the model opening remarks by the judge in Chapter 5B to inform jurors of their right to ask questions of the judge through the bailiff or their speaker similar to the model directions in Chapters 15 and 24 of the Benchbook; and

(b) removing the reservation about informing juries of their right to ask questions based on *Lo Presti* [1992] VR 696.

513 [1992] VR 696.

NOTE-TAKING BY JURORS

4.71 Jurors are free to take their own notes during trials and they are instructed that they may do so during orientation and during the judge's directions at the start of the trial.[514] Although a large number of jurors (93%) report sitting on juries where notes were taken, the number of jurors who take notes would appear to be much smaller.[515] Along with the right to ask questions, jurors' ability to take notes may not only aid comprehension and recall but may be an important means of encouraging active, rather than passive, participation in the trial.[516]

4.72 Although the benefits of note-taking have been noted by the courts and note-taking judicially encouraged,[517] some issues have been identified in research, although other research suggests that some of these concerns are unfounded:

- jurors might give undue weight to their notes, which may be inaccurate and incomplete, even over transcript;
- jurors with few or no notes tended to defer to those who had taken extensive notes, who might exert more influence during deliberations than those who have not;
- jurors may be distracted from observing the demeanour of witnesses;
- many jurors interpreted the caution from the judge that they should be careful to listen to and observe witnesses as meaning that they should avoid taking notes as far as possible; and
- some jurors reported that inconsistencies between their notes became a source of disagreement during deliberations.[518]

Submissions

4.73 A number of former jurors who responded to the Commission's Issues Paper relied on their notes and were concerned by the fact that most of their fellow jurors did not take notes during the trials in which he served.

> As a juror I was somewhat disturbed by the fact that at this hearing [the first trial] I was the only person on the panel who took notes during the three days of evidence. I was left wondering whether it was a reflection on my lack of confidence in my memory retention, or the remaining panel members probability of

514 See Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [2.42], [4.26], [9.21]–[9.24]; New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [10.4]–[10.11].

515 Australian Institute of Criminology, *Practices, policies and procedures that influence juror satisfaction in Australia*, Research and Public Policy Paper No 87 (2007) 140. See also Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [9.24].

516 See, eg, JK Robbennolt, JL Groscup and S Penrod, 'Evaluating and assisting jury competence in civil cases' in IB Weiner and AK Hess, *The Handbook of Forensic Psychology* (2005, 3rd ed) 402 <http://books.google.com.au/books?id=7Eu7smWHX3YC&printsec=frontcover> at 1 September 2009.

517 See New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [10.6]–[10.7].

518 Ibid [10.8]–10.11].

> outstanding retention capabilities. With the benefit of hindsight my note taking was by far the more accurate recall.
>
> …
>
> The third trial … was a lengthy trial, this time I was encouraged by the fact that two other jury members were taking notes.
>
> The evidence was taken over three days …
>
> … during discussions on the [initial] straw poll it became obvious that because the police evidence had occurred early in the [third] trial some members of the panel had difficulty recollecting their early evidence. Fortunately the note takers were able to refresh some of the issues which were of concern …[519]

4.74 Another respondent, who took notes during the trials on which she sat, queried how jurors could remember the details of the evidence if they didn't take notes.[520]

QLRC's provisional views

4.75 Currently, jurors in Queensland are told during the orientation session before being empanelled that they may take notes, and they are given notebooks which are retained and destroyed by the court when the jury is discharged.

4.76 Again, a starting point may well be a consideration of what judges do in cases that they are trying without a jury. They take notes. They also receive copies of the transcript and other forms of written assistance such as outlines of submissions and so on. In some instances, note-taking will not be necessary in light of the nature of that written assistance, or will supplement it with the judge's comments about the evidence or the witness noted while the evidence or address is given for later reference when it comes time to write a judgment.

4.77 Noting the only difference that juries do not have to write their reasons for judgment, juries are in essentially the same position.

4.78 The Commission's concern is simply that there be no formal inhibition on jurors' rights to take notes, and that they should be encouraged to do so if they want. Again, comments by judges or counsel in advance of particular evidence or particular directions or warnings may well alert some jurors that they should be paying particular attention and making notes of what is being said or done.

4.79 But jurors' note-taking practices will vary considerably, as was noted by the former jurors who made submissions to the Commission. Note-taking is a skill that different jurors possess to varying degrees. Some will take notes of much that is said; some will note only matters (such as the physical appearance of witnesses) that may help them recall the evidence later; others will take no notes at all. Written material given to jurors to refer to at various times during the trial may reduce the need for some note-taking. Apart from making the facilities for note-taking available

519 Submission 2.

520 Submission 3.

(and for notes to be destroyed at the end of the trial) courts can do little other than to remind jurors that these facilities exist. The rest is a matter for the jurors themselves.

4.80 The Commission makes no formal proposal for reform in this area.

SELECTING A SPEAKER

4.81 The issues associated with the timing of the selection of a jury speaker were discussed in the Issues Paper at [9.114]–[9.122]. The orientation material provided to jurors provides some, but limited, guidance about the selection of a jury speaker and the jury speaker's role.[521] The Commission sought submissions on whether any further guidance might usefully be given to the jurors and whether juries might be assisted by delaying the selection of their speakers.[522]

4.82 Rule 48 of the *Criminal Practice Rules 1999* (Qld) provides that the proper officer, in practice usually the judge's Associate, use the following words, or words otherwise complying with section 51 of the *Jury Act 1995* (Qld),[523] when giving the defendant into the charge of the jury at the start of the trial:

> Members of the jury, AB (and CD) is/are charged that on [state date] at [state place] he/she/they [state the offence charged in the words of the indictment or by stating the heading of the schedule form for the offence].
>
> To this charge he/she/they say that he/she/they is/are not guilty.
>
> You are the jurors appointed according to law to say whether he/she/they is/are guilty or not guilty of the charge.
>
> It is your duty to pay attention to the evidence and say whether he/she/they is/are guilty or not guilty.
>
> Members of the jury, as early as is convenient, you must choose a person to speak on your behalf. You may change the speaker during the trial and any of you is free to speak.

Submissions

4.83 A number of former jurors who responded to the Commission's Issues Paper expressed concerns about the lack of any real guidance given to them about the role and responsibilities of the speaker and what qualities should be sought in

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521 See Queensland Courts, *Juror's Handbook* (2008) 14; Queensland Courts, *Guide to Jury Deliberations* (2008) 14–15.

522 Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [9.122].

523 *Jury Act 1995* (Qld) s 51 provides:

> **51 Jury to be informed of charge in criminal trial**
>
> When the jury for a criminal trial has been sworn, the judge must ensure the jury is informed—
>
> (a) in appropriate detail, of the charge contained in the indictment; and
>
> (b) of the jury's duty on the trial.

that person. One juror was concerned about the lack of definition of the speaker's responsibilities:

> The first adjournment [in a three-day trial] saw the election of a jury foreman, on all three trials I participated in this position was awarded to the first person who claimed to have done jury service previously, to a first timer this seemed to be a reasonable method of selection but … hindsight proved this system of selection can introduce its own problems.
>
> …
>
> The foreman role can be a very determining and yet not necessarily accurate role during jury deliberations.
>
> …
>
> In the practical situation 'our foreman' displayed less fear of his final confrontation with the good Lord than to put a question or request for clarification for the jurors to the judge. The greatest contribution to jury room discussions by our 'volunteer' was concerning lunch selections … and frequent warnings throughout the jury room discussions 'that a decision must be reached otherwise the jury would be detained overnight. A threat or promise that seemed to weight the decision process remarkably.[524]

4.84 Another respondent was concerned that the election of the speaker in the juries on which she sat was 'ad hoc' and that a volunteer was chosen regardless of that person's skills or ability (or perhaps willingness) to properly direct jury deliberations or otherwise take a leadership role. She suggested that there should be some sort of training for the speaker.[525]

4.85 It would seem from these responses that the jurors in question were unaware of their power to change speaker; at least they did not refer to it in their responses if they were aware of it.

4.86 A District Court judge also suggested that haste in choosing a speaker was counter-productive:

> If the Juror's Handbook says that choosing a speaker usually happens during the first break after empanelling, then that suggestion should be changed. It is better that jurors get to know each other before making that choice. A hasty choice is more likely to lead to the selection of an inappropriate speaker.
>
> Rather, the jury should be told that there is no hurry to choose a speaker, particularly in straightforward trials, where it is often the case that the only communication from the speaker will be the delivery of the verdict.[526]

524 Submission 2.

525 Submission 3.

526 Submission 10.

QLRC's proposals for reform

4.87 The concerns in this area are that jurors may feel under pressure to select a speaker too soon, especially in longer trials where they may well have the time to get to know each other better before any of the speaker's obligations arise and before the speaker's duties are fully appreciated by the jurors. An allied concern is that jurors are unaware, forget or are too reticent to change a speaker who turns out to be an inappropriate choice for any reason.

4.88 It is, of course, difficult to be specific about the best choice of a speaker, and impossible for anyone other than the jurors to advise them on the best choice of a speaker on any jury once it has been empanelled. Only the jurors themselves can do that.

4.89 Accordingly, with one qualification the Commission is not satisfied that any formal or informal reform in this area is warranted.

4.90 The Commission does note, however, that the last paragraph of the wording to be spoken by the proper officer as set out in rule 48(1) of the *Criminal Practice Rules 1999* (Qld) may be seen to put pressure on a jury too soon, even if the right to change speaker is also expressed. In any event, this statement seems out of place when the defendant is being formally put in to the charge of the jury. The choice of speaker is an administrative matter for the jurors to deal with in their own time and has no part in this formal part of the proceedings. The Commission proposes that the last paragraph of this wording be deleted.

4-3 Rule 48(1) of the *Criminal Practice Rules 1999* (Qld) should be amended by deleting the last paragraph of the wording set out in that Rule to be spoken by the proper officer.

Chapter 5

Reforming Jury Directions: The Duties of a Trial Judge

INTRODUCTION

5.1 Many of the difficulties associated with jury directions were outlined in the Commission's Issues Paper. The Commission asked a number of questions for consideration in relation to these difficulties, and possible means of improvement, relating to specific directions and types of directions,[527] but also considered concerns about jury directions, and the summing up, as a whole.

5.2 The majority of jury directions are given as part of the judge's summing up. As a result, many of the general and systemic concerns about jury directions relate to the purpose and certain key elements of the summing up. This is the main focus of this chapter. Issues relating to the content of specific directions are examined in chapters 6 to 8 of this Paper.

DUTY TO RELATE THE EVIDENCE TO THE LAW — *ALFORD V MAGEE*

5.3 There is a clear duty at common law for the trial judge to sum up the case and, in doing so, to relate the evidence in a trial to the legal and factual issues that the jury must resolve. This rule was stated by the High Court in *Alford v Magee*:

527 Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009), 105, 170, 174. See [6.2] below.

> And 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 larceny. … looking at the matter from a practical point of view, the real issues will generally narrow themselves down to an area readily dealt with in accordance with Sir Leo Cussen's great guiding rule.[528] (emphasis added)

5.4 The objective of the summing up was also considered by the High Court in *RPS v R*:

> 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.[529] (notes omitted)

5.5 In Queensland, the trial judge's duty is set out in section 620 of the Criminal Code (Qld):

> **620 Summing up**
>
> (1) After the evidence is concluded and the counsel or the accused person or persons, as the case may be, have addressed the jury, it is the duty of the court to instruct the jury as to the law applicable to the case, with such observations upon the evidence as the court thinks fit to make.[530]

5.6 The position in Queensland was summarised by Thomas JA this way:

> The consensus of longstanding authority is that the duty to sum up is best discharged by referring to the facts that the jury may find with an indication of the consequences that the law requires on the footing that this or that view of the

528 (1952) 85 CLR 437, 466; [1952] HCA 3 [28].

529 (2000) 199 CLR 620, 637; [2000] HCA 3 [41]–[42] (Gaudron ACJ, Gummow, Kirby and Hayne JJ).

530 See also Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [2.63]–[2.66].

> evidence is taken.[531] I do not understand the statements of Gaudron ACJ, Gummow, Kirby and Hayne JJ in *RPS v The Queen,*[532] which encourage reticence in making comments on the facts, to be contrary to that view.[533] (notes as in original)

Submissions

5.7 The Issues Paper did not specifically raise this as an issue for consideration and none of the respondents to the Issues Paper addressed it. However, it was discussed in the VLRC's Consultation Paper.[534]

5.8 The trial judge's role in this regard was strongly supported by Victoria Legal Aid[535] and the Criminal Bar Association of Victoria in their submissions to the VLRC's Consultation Paper. The Criminal Bar Association of Victoria commented that:

> In our submission, completeness of directions, with the authority of the judge's office, requires that the facts be related to the issues in dispute as required by *Alford v Magee*.[536]

QLRC's provisional views

5.9 The Commission is not aware of any proposal to reform the judge's duty to relate the law to the evidence as part of the summing up to the jury; calls for reform in this area centre around the obligation, or perceived obligation, to provide extensive reviews of the evidence rather than relatively brief summaries of, or simply references to, it. This is discussed below. Accordingly, the Commission makes no proposal in relation to any reform of the principle in *Alford v Magee* or to section 620 of the Criminal Code (Qld).

JUDGES' SUMMARIES OF EVIDENCE

5.10 Closely related to — but distinct from — the trial judge's duty to relate the legal and factual issues that must be resolved by the jury to the evidence is the extent to which it is desirable or useful for a trial judge to summarise the evidence as part of the summing up. This issue was discussed in chapter 9 of the Issues Paper.[537]

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531 *Alford v Magee* (1952) 85 CLR 437, 466; *R v Jellard* [1970] VR 902; *Nembhard v R* (1982) 74 Cr App R 144, 148; *Holland v R* [1993] HCA 43; (1993) 117 ALR 193, 200–201.

532 [2000] HCA 3; (2000) 74 ALJR 449 paras 41–43.

533 *Mogg* (2000) 112 A Crim R 417, [73]. See also Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [3.11]–[3.15].

534 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [5.39]–[5.75].

535 See Victoria Legal Aid, Submission to the Victorian Law Reform Commission, 9 December 2008 [2.9].

536 Criminal Bar Association of Victoria, Submission to the Victorian Law Reform Commission, 15 December 2008, 27.

537 Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [9.84]–[9.91].

5.11 There is a concern that long summaries of the evidence may be given without necessarily relating the evidence to the legal and factual issues in the case, and that lengthy rehearsals of the evidence (which in many cases would have also been reviewed by the parties in their addresses) are unnecessary, boring and counter-productive. This has generated discussion of the extent to which, and the level of detail in which, a trial judge ought to summarise the evidence and whether it is sufficient in some cases for the trial judge simply to refer to the relevant evidence — perhaps by reference to the transcript of evidence or other material — and leave juries to review it during their deliberations.[538]

5.12 No summary of the evidence is required by section 620 of the Criminal Code (Qld) beyond 'such observations on the evidence as the court thinks fit to make'. In its introduction, the Queensland Supreme and District Court Benchbook makes the following statement based on *R v Sparrow*:

> The object of the summing-up is to help the jury. A jury is not helped by a colourless reading out of evidence. The judge is more than a mere referee, who takes no part in the trial save to intervene when a rule of procedure or evidence is breached. The judge and the jury try a case together. It is the judge's duty to give the jury the benefit of the judge's knowledge of the law and to advise them in the light of the judge's experience as to the significance of the evidence.[539]

5.13 This is one area where there appears to be a significant divergence in practice between Queensland and some other States, notably Victoria. Research by the Australian Institute of Judicial Administration has shown that the average length of summings up in criminal trials in the various Australian States (as estimated by judges) varies considerably. Summings up (or charges) in three States (New South Wales, Tasmania and Victoria) took on average considerably longer than in the other three (including Queensland).[540] Summings up in the 'long' States took 70% longer on average than in the 'short' States over a range of trials varying in length from five to 20 days. This may well account for some of the differences in approach in submissions to the Queensland and Victorian Law Reform Commissions, and may well influence differences in reform proposals in these two States. One judge of the District Court of Queensland submitted to this Commission that 'the Victorian practice [of recounting the evidence], which has resulted in extraordinarily long charges, should be avoided at all costs'.[541]

Submissions

5.14 In chapter 9 of the Issues Paper, the Commission raised the following question for consideration:

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538 The issue of the provision of the transcript of evidence to juries is considered at [4.23]–[4.33], [4.46]–[4.58] above.

539 [1973] 1 WLR 488, 495. See Queensland Courts, *Supreme and District Court Benchbook*, 'Introduction' [4.2] <http://www.courts.qld.gov.au/2265.htm> at 2 September 2009.

540 Australian Institute of Judicial Administration (James RP Ogloff, Jonathan Clough, Jane Goodman-Delahunty and Warren Young), *The Jury Project: Stage 1 — A Survey of Australian and New Zealand Judges* (2006) 26–28. See Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [3.22]–[3.25].

541 Submission 10.

> 9-2 What, if any, advantage is there to a jury in maintaining the current practice of summarising the evidence …?[542]

5.15 Several respondents to the Issues Paper commented on the judge's role in summarising the evidence.

5.16 A District Court judge considered that a trial judge ought not be obliged to summarise the evidence: as was pointed out in the Issues Paper, this has already been done by the parties' counsel in their closing addresses.[543]

5.17 One respondent, who had participated in two trials as a defendant, disagreed with the proposition that a judge should sum up the evidence as this could be the source of some confusion and was a waste of time.[544]

5.18 In contrast, the South West Brisbane Community Legal Centre submitted that:

> [J]udges need to summarise, in some detail, all relevant evidence applicable to the fair and proper resolution of the controversial element.
>
> Indeed, this submission goes so far as to suggest that omission of any relevant evidence on the controversial element, actually constitute error, unless there is a good reason for the omission, such as potential prejudice.[545]

5.19 In the opinion of a Supreme Court judge responding to the Issues Paper, the exercise of the trial judge's discretion to summarise or otherwise review the evidence should be assessed at the point immediately before the summing up starts; that is, after the addresses by the parties. The extent to which, and the competence with which, the parties have reviewed the evidence were factors that would influence the trial judge in determining to what depth the judge's summary of the evidence should go. On appeal, the parties' addresses should also be taken into account in considering the adequacy of the trial judge's review of the evidence.[546]

5.20 In its Consultation Paper, the VLRC suggested that the issue could be clarified by a legislative provision to the effect that, while the judge must 'briefly summarise the evidence that is relevant to the findings of fact' the jury must make on the real issues in the case, the judge otherwise has 'no other obligation to summarise the evidence'.[547] Several of the respondents to the VLRC's Consultation Paper

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542 Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) 206. This question was posed as part of the consideration of whether juries should be provided with transcripts of evidence and other written aids. Those matters are considered in chapter 4 of this Paper.

543 Submission 6. The Commission anticipates that any trial judge who felt that the parties' addresses did not adequately cover the evidence would fill in any such gap or oversight during the summing up. See Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [3.11]–[3.25]. See also *King v The Queen* [2008] NSWCCA 101 [82] (Mason P): 'The failure to remind a jury of an aspect of the factual arguments relied upon by the defence may not necessarily entail miscarriage, particularly if closing addresses would be fresh in the minds of the jurors and if no redirection was sought.'

544 Submission 4.

545 Submission 11.

546 Submission 7.

547 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [7.46], 101.

made submissions on this issue.[548] It must be borne in mind that research has shown that on average a trial judge in Victoria spends much longer on the charge to the jury than a judge in Queensland does in the summing up.[549] This is one main area of distinction between the current position in these two States. In his submission to the VLRC, Judge MD Murphy also observed that it 'appears that trials in [Victoria] go for longer, on average, than those in either Queensland or New South Wales.'[550]

VLRC's recommendations

5.21 The VLRC took the view that the judge's obligation to direct the jury on the elements of the offences and defences, and on the evidence should be enunciated clearly in its recommended jury directions statute:

> 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 negatived 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.

548 See Patrick Tehan QC, Submission to the Victorian Law Reform Commission, 26 November 2008 [7]; Judge MD Murphy, Submission to the Victorian Law Reform Commission, 5 February 2009, 5; Victoria Legal Aid, Submission to the Victorian Law Reform Commission, 9 December 2008; Law Reform Committee of the County Court of Victoria, Submission to the Victorian Law Reform Commission, 13 March 2009, 4; Office of Public Prosecutions, Submission to the Victorian Law Reform Commission, 12 February 2009, 15; Stephen Odgers SC, Submission to the Victorian Law Reform Commission, 12 November 2008, 8.

549 See Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [3.22]–[3.25]. See [5.13] above.

550 Judge MD Murphy, Submission to the Victorian Law Reform Commission, 5 February 2009, 6.

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.[551]

QLRC's provisional views

5.22 There is no suggestion in any of the submissions or arising from the Commission's research that the trial judge's duty to summarise the evidence should be amended as a matter of principle, or that in practice judges in Queensland do not discharge that duty appropriately.

5.23 The Commission is satisfied that no reform of the trial judge's duty to summarise the evidence set out in section 620 of the Criminal Code (Qld) is warranted.

5.24 However, the implementation of the Commission's proposals about the use of integrated directions would assist trial judges in discharging their obligation under section 620 of the Criminal Code (Qld), and juries in understanding and applying the judge's directions, by creating a structure for a summing up that better relates evidence to the law and the factual decisions that a jury must make, and that would tend to reduce, or at least break up, lengthy narratives of the evidence.

551 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) 14–15, [5.1]–[5.14].

MATTERS NOT RAISED BY THE PARTIES — *PEMBLE'S CASE*

5.25 The rule in *Pemble v The Queen*[552] requires trial judges to direct the jury on any defence that arises on the evidence, irrespective of whether that defence has been expressly advanced or embraced by the defendant. This is part of the judge's duty to 'be astute to secure for the accused a fair trial according to law' no matter what course defence counsel may adopt at the trial.[553]

> 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 in part.[554]

5.26 However, the rule does not mean that a judge must put every possible alternative defence or charge to the jury:

> A trial judge's duty to ensure a fair trial does not mean that the lesser charge must be left to a jury in every case. It is a question of what justice to the accused requires. Putting the lesser charge to a jury might jeopardise the accused's chance of a complete acquittal in some cases.
>
> … The fact that the [defendant's] counsel did not seek to have the lesser charge put to the jury confirms that a forensic advantage was sought by its omission.[555] (notes omitted)

Submissions

5.27 Although the Commission's Issues Paper did not pose any specific questions for consideration in relation to the rule in *Pemble's Case*, a Supreme Court judge responding to the Issues Paper commented on it.

5.28 This respondent argued that the requirement that judges direct the jury on all defences open to the defendant, even if not raised by the defendant during the trial, was a distortion of the original basis of the rule in *Pemble's Case*. The judge submitted that manslaughter was a verdict that a judge always had to leave to the jury in murder trials, largely because murder was a capital offence. It had been extended beyond this narrow basis with 'silly' results: a judge might have to direct a jury on both self-defence and accident when, on the facts, they were inconsistent or even mutually exclusive. When giving such a direction, a judge had to be careful not to express criticism of defence counsel, leaving the jury with a series of different directions that were hard to reconcile.[556]

552 (1971) 124 CLR 107; 45 ALJR 333.

553 (1971) 124 CLR 107, 117 (Barwick CJ). See Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [6.32]–[6.37].

554 *Pemble v The Queen* (1971) 124 CLR 107, 117–8 (Barwick CJ).

555 *R v Keenan* (2009) 83 ALJR 243, [2009] HCA 1 [138]–[139] (Kiefel J; Hayne, Heydon and Crennan JJ agreeing).

556 Submission 7.

5.29 Legal Aid Queensland submitted, however, that no reform in this area is warranted as the current law 'reflects the judge's primary duty to ensure the accused receives a fair trial at law'.[557]

5.30 However, the Office of the Director of Public Prosecutions submitted that it was 'bizarre' to leave inconsistent defences to a jury.[558]

5.31 The VLRC's Consultation Paper also discussed the rule in *Pemble's Case*;[559] the VLRC made the following proposal:

> **Proposal 6**
> The Directions and Warnings Act could limit the effect of *Pemble* by the inclusion of a provision to the following effect:
>
> > The trial judge is not required to direct the jury about defences or alternative versions of the facts not put to the jury by counsel,
> >
> > unless
> >
> > The trial judge is of the opinion that the failure to do so may lead to an unfair trial, for example, where the trial judge is of the opinion that failure to put an alternative defence was not the result of a tactical decision made by counsel, rather an error or accidental omission.
>
> The legislation could also provide that before granting leave to appeal, the Court of Appeal must be persuaded by the appellant that defence counsel's failure to raise a particular defence resulted in a denial of a fair trial.[560]

5.32 The VLRC continued:

> The legislation could also explicitly direct the Court of Appeal that neither a miscarriage of justice nor a denial of a right to a fair trial occur when it is not persuaded by the appellant that defence counsel's failure to raise a particular defence was other than for tactical reasons, including that the defence is inconsistent with defences that they did raise.[561]

5.33 A number of respondents to the VLRC's Consultation Paper commented on this proposal, many of whom disagreed with the suggestion for reform of the rule.

5.34 Stephen Odgers SC opposed the VLRC's proposal:

> Question (7.19). I oppose the radical suggestions for limiting warnings and directions by requiring a defence request and a judicial assessment that 'the direction is necessary to ensure a fair trial'. I have explained my position about a rigid adversarial position and a 'fair trial' perspective.[562] I would add here that, if a warning or direction is asked for by the defence, it is quite wrong to provide that it need not be given unless the trial judge 'is satisfied that the direction is

557 Submission 16, 3.

558 Submission 15.

559 See Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) ch 5, [7.72]–[7.73].

560 Ibid [7.73].

561 Ibid.

562 See [5.72] below.

> necessary to ensure a fair trial'. I see no reason why the traditional limits on appellate review of discretion should apply here. In most cases the judge is in no better position than the appeal court to assess the need for the direction, so that preferencing the judge's view over that of the appeal court is inappropriate. Further, adoption of the 'fair trial' criterion (and, in addition, applying a test of 'necessity') is inappropriate. Of course, an appeal court will take into account that criterion when considering whether the direction should have been given. However, it will also, quite properly, take into account other criteria, including the nature of the danger justifying the direction, the degree of risk that the jury would not appreciate the danger without the direction, the degree of risk of a miscarriage of justice if the direction is not given. To reduce these considerations to 'fair trial' is quite wrong.[563]
>
> …
>
> … The *Pemble* principle should not be watered down in the way proposed. The simple reality is that the defence often has very good tactical reasons for not wanting to put an alternative case to the jury (to say 'the accused did not kill V, but if he did he did not intend to' would not be taken very seriously by a jury). However, those tactical reasons do not mean that a trial judge should ignore evidence that supports the alternative case. There may be a real issue about the alternative case even though the defence chooses not to address on it. The focus of *Pemble* is on ensuring a fair trial. While I have observed that, in some contexts, this is too narrow a perspective, it is the correct perspective in this context.[564] (notes added)

5.35 Victoria Legal Aid opposed any proposal to limit warnings to those required by counsel:[565]

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563 Paragraph [7.19] of the VLRC's Consultation Paper reads:

> Regardless of the form of the legislation, it could contain a number of provisions designed to protect and provide guidance in relation to the trial judge's discretion to give evidentiary directions. For example, the legislation could include some or all of the following kinds of provisions:
>
> i. that counsel have the primary responsibility for making comments to the jury about the evidence and relating the evidence to the issues in the case;
>
> ii. a list of matters which the trial judge should consider when deciding whether the obligation to ensure a fair trial requires the judge to give an evidentiary warning;
>
> iii. that except where otherwise provided by law, no direction or warning which is to the benefit of the accused about the use of evidence need be given by the trial judge unless it has been expressly requested by defence counsel and the judge is satisfied that the direction is necessary in order to ensure a fair trial;
>
> iv. that despite the failure of defence counsel to seek a direction or warning, the trial judge must give any direction or warning that is necessary in his or her opinion to ensure a fair trial;
>
> v. a list of warnings that are no longer required because they deal with matters of common sense. Examples might include the fact that memory diminishes with time and the fact that intoxication affects motor skills and cognitive ability. The legislation would specify that warnings of this kind are no longer necessary unless the trial judge considers that counsel has not adequately addressed the evidence concerning the issue.
>
> Question: Should there be any mandatory directions other than the procedural and substantive directions and the Alford v Magee requirement to 'sum up' to the jury? If so, what criteria should determine whether a direction is mandatory? (notes omitted)

564 Stephen Odgers SC, Submission to the Victorian Law Reform Commission, 12 November 2008, 7, 9. Odgers' submission was specifically endorsed by the joint submission of the Queensland Law Society and the Bar Association of Queensland made to this Commission's Issues Paper, although not with any specific reference the rule in *Pemble's Case*: Queensland Law Society and Bar Association of Queensland, Submission 13.

565 See Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [7.19].

> The proposal to limit warnings to those required by trial counsel will not allow the accused recourse to appeal where their counsel failed to request a warning or direction. The consequences to the accused could be severe. See for example *Chang* where a verdict of manslaughter was returned on the retrial after the murder conviction was overturned because of the failure to give a consciousness of guilt warning where counsel did not request one.[566]

5.36 The Criminal Bar Association of Victoria, and Benjamin Lindner, one of its members, also opposed reform to the rule in *Pemble's Case*:

> 1. The Obligation on the Judge to ensure a fair trial.
>
> 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 the duty to ensure a fair trial, an obligation to leave the defence to the jury.
>
> In our submission, the attitude or decisions of other players in the trial process is largely irrelevant to the overarching obligation of the trial judge. Reference to the 'tactics' of the other parties is a distraction from the real issue of the judge ensuring that a fair trial is had. Unlike the judge's role in a 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.
>
> 2. The defence failing to argue a defence before the jury.
>
> The over-riding obligation of ensuring fair trial does not fall upon counsel for the defence. Arguably, the prosecutor's duty is, in part, to ensure the accused receives a fair trial. Where, for 'forensic reasons', the defence fail to argue a defence that is reasonably open on the evidence, it remains for the judge to leave it to the jury. So says *Pemble's case.* If the defence either abandons a defence, or requests that a defence reasonably open not be left to a jury, it still remains incumbent upon the trial judge to leave it to the jury if the defence is reasonably open.
>
> We do not suggest that there is any obligation to leave 'hopeless defences' to a jury. There might be disagreement in any particular case whether a defence falls within this category or not. The argument that the defence ought not to seek a perceived 'forensic advantage' for this reason either ignores or misconstrues the roles and obligations on judge and defence counsel in a criminal trial. A criminal trial is not a sporting contest, where tactical advantage gained by one 'side' ought to be countervailed to give the opponent a 'sporting chance'. The objective of a judge in a criminal trial is not to ensure a 'level playing field'; it is a far more subtle and difficult process of ensuring that a trial be fairly conducted. As quoted in the [VLRC's] Consultation Paper at para [5.23], 'The judge's duty transcends that of Counsel … And that is what *Pemble* holds.' (*CTM v The Queen* (2008) 24 ALR 1, 23, per Kirby J.)
>
> While there is no obligation on the defence to put inconsistent defences to a jury, (if to do so would undermine a defence case), it is not logically inconsistent to require a judge to leave all defences that are reasonably open to a jury. If a judge perceives that the defence is prejudiced by that process, a direction should be framed to explain why, as a matter of completeness and fairness, a

566 Victoria Legal Aid, Submission to the Victorian Law Reform Commission, 9 December 2008.

defence is being left to them which had not been relied upon hitherto. The judge directs a jury that they should consider such alternative scenarios, not urge them to accept them.

Submission: 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 — though that does not include 'hopeless defences' or fanciful ones.

2. Response to Criticisms of the Current Approach (Consultation Paper para [5.24–5.31]

First, the rule in Pemble's Case does not in our submission, 'create several problems'. All it does is to produce consequences arising from the basic obligation of a judge within the trial process. To characterize the mere consequences of a case as 'problems' is to negatively 'pre-judge' the consequences of *Pemble*.[567] It is suggested that there are 4 such 'problems'. We now turn to them.

2.1 'Appeal-proofing' charges — If judges seek to direct juries in accordance with the law, to get it right as often as possible, that is an objective to be hailed and lauded, not criticized. Judges constantly exercise discretions. Judges constantly exercise judgments that affect the fairness of a trial. We do not suggest that there is any judicial duty to leave unreasonable or unviable or fanciful defences to a jury. Putting those to one side, we do submit that all other defences should be left for a jury to determine. There may be some cases where 'unreasonable' defences are left to a jury — presumably they are not many. They exist in a grey area where judicial minds might differ as to whether a defence is 'reasonably open' or not. Appeal courts should retain the jurisdiction to correct errors of that type.

2.2 That *Pemble's Case* is contrary to the adversary system — that it does not sit well with the respective roles of judges and of counsel.

In our submission, the principle in *Pemble's Case* fits hand-in-glove with the specific roles played by judge and counsel, particularly defence counsel, in the trial process. As the judge is independent of the evidential battleground that exists between prosecution and defence (in which both sides are constantly making tactical, or 'forensic' decisions), the judge is perfectly placed to leave to a jury otherwise inconsistent defences, or alternative charges that are not on the Presentment. The so-called risks that a jury might be confused or that the accused will unfairly benefit from a 'new hypothesis' misconstrues the role of a judge — namely the obligation to leave such matters as will result in a fair trial. This argument misconstrues a criminal trial as some sort of sporting contest. The criticism of defence counsel in para 5.28 [of the VLRC Consultation Paper] fundamentally misunderstands the difference between the roles taken by judges and counsel in the trial process.

2.3. It may result in unfairness to an accused. If there is relevant unfairness to an accused by the raising of an alternative defence, the trial judge is obliged to further direct the jury to obviate such unfairness. It is not the judge's role to ensure that the best possible defence case be left to a jury — that may well be the goal of defence counsel. In some cases, directing a jury as to alternative

567 The Commission notes that this submission refers to the proposed amendment to the rule in *Pemble's Case* as a 'watering down' of that principle, which might be similarly seen as negatively pre-judging the consequences of the amendment.

> defences may carry with it certain difficulties and challenges — but that is no reason to dispense with, or water down, the principle in *Pemble's Case*.
>
> 2.4. Allows counsel to 'reserve' appeal points. Again, defence counsel's role differs from that of a judge. Leaving incompetence of counsel aside as a ground of appeal, it is our submission there is nothing 'undesirable' about a judge leaving all reasonable defences to a jury, whether or not those defences happen to coincide with forensic decisions made (or perceived to be made) by either defence or the prosecution.
>
> **Submission: The rule in *Pemble's case* should be retained. 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. Any resultant unfairness can be obviated by further direction.**[568] (note added)

5.37 The Criminal Bar Association of Victoria concluded:

> There are times when trial counsel is put in the unenviable (or enviable) position that the evidence discloses that the accused has at least two defences which, on the face of it, might be thought to be contradictory. If, for example, an accused person's principal defence is alibi but, on a reasonable view of the evidence, it is open to acquit him of the principal count because of, say, potential doubts about the requisite *mens rea*, then, generally speaking, it is the obligation of the trial judge to leave that alternative defence to the jury. … it is for the judge to ensure *inter alia* that the jury is aware of potential defences open on the evidence, even, on occasions, when those potential defences might cut across the accused's principal defence. Trial counsel should be free to raise such alternatives in the absence of the jury for fear of undermining the accused's principal defence in the eyes of the jury. It is part of the judge's function to put such defences. It is as much a part of prosecutor's function as it is defence counsel's to alert the judge to such possibilities.[569]

5.38 On the other hand, reform in this area was supported by the Law Reform Committee of the County Court of Victoria:

> **The [VLRC] proposes** removing in most cases the requirement to direct on lesser offences and defences not relied on by the parties.
>
> **Response:**
> This is supported. If the defence chooses not to rely on an alternative or defence which was open on the evidence, the judge should not be obliged to put it on the accused's behalf. The potential for an accused to be embarrassed in his or her defence by relying on inconsistent alternatives is a product of the adversarial system, and a disadvantage, if there is one, which should rest with the accused. In that sense, it is no different from the disadvantage an accused with bad character must contend with if conducting their case in a way which

568 Benjamin Lindner (Criminal Bar Association), Submission to Victorian Law Reform Commission, 30 November 2008; Criminal Bar Association of Victoria, Submission to the Victorian Law Reform Commission, 15 December 2008, 21–25.

569 Criminal Bar Association of Victoria, Submission to the Victorian Law Reform Commission, 15 December 2008, 29.

> brings s.399(5)(b) or (c) of the Crimes Act [1958 (Vic)] into contention.[570] If it appears there has been a failure to rely on an alternative or defence due to inadvertence, ignorance or incompetence, the accused should be given the opportunity where possible, to reopen his or her case and put such arguments as they wish on the alternative to the jury. A trial judge should only be obliged to consider directing on an alternative or defence not relied on when the failure to do so is not the result of a conscious choice by the accused.[571] (note added)

5.39 A judge of that Court also made a submission to similar effect:

> I am of the view … that … a trial judge should not be required to direct on a lesser included offence or defence that has not been raised by Counsel. As the High Court have said on a number of occasions, a criminal trial is an adversary contest and if Counsel chooses not to raise a particular matter then I do not see it as part of the role of a trial judge to raise a particular defence or lesser alternative if Counsel consciously decides not to raise it.[572]

5.40 The Commission notes that Judge Murphy specifically refers to conscious decisions by counsel not to raise certain matters; he might well take a different view in relation to matters overlooked by counsel or an unrepresented defendant.

5.41 The Victorian Office of Public Prosecutions also submitted that, generally, trial judges should not be required to direct on lesser offences or defences not raised by counsel. However, a more comprehensive review of the rule in *Pemble's Case* should, in their view, await the outcome of a comprehensive review of the *Crimes Act 1958* (Vic) currently under way.[573]

VLRC's recommendations

5.42 The VLRC made the following recommendations in its recent Final Report on jury directions, proposing modification of the rule in *Pemble's 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 alter-

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570 Section 399(5) of the *Crimes Act 1958* (Vic) reads:

> (5) A person charged and called as a witness pursuant to this section shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—
>
> (a) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or
>
> (b) he has personally or by his advocate asked questions of the witnesses for the prosecution (other than his wife or former wife or her husband or former husband as the case may be) with a view to establishing his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution (other than his wife or former wife or her husband or former husband as the case may be); or
>
> (c) he has given evidence against any other person charged with the same offence.

571 Law Reform Committee of the County Court of Victoria, Submission to the Victorian Law Reform Commission, 13 March 2009, 6.

572 Judge MD Murphy, Submission to the Victorian Law Reform Commission, 5 February 2009, 6–7.

573 Office of Public Prosecutions, Submission to the Victorian Law Reform Commission, 12 February 2009, 19.

native 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 in the trial judge to direct the jury about that matter.[574]

QLRC's proposals for reform

5.43 It is not immediately obvious that a trial judge's perception of what is fair in any particular trial should not be given considerable weight by an appellate court unless there has been some manifest procedural shortcoming that results in a real risk of a miscarriage of justice (or the perception of such a risk). Odgers' submission that the higher court is often as well placed as a trial judge to assess the need for a direction seems to be overly dismissive of trial judges' ability to weigh the competing considerations that contribute to the fairness of trials before them, and to be particularly generous to appellate judges sitting at some remove from that trial assessing the proceedings on the somewhat artificial basis of the appeal papers and the submissions of counsel who may not have been present at the trial themselves.[575]

5.44 However, the Commission considers that some reform is needed in order to refine the trial judge's obligations. To assist the judge (and, indeed the parties themselves) this reform should require the parties to tell the judge which directions they each wish to be given in the summing up and, where appropriate, which they do not wish to be given. This should be done before the judge starts the summing up. The requirement that the parties inform the judge of the directions and warnings that they require need not cover standard directions such as the onus and standard of proof, and the elements of the offences charged, and should be limited to directions on specific defences and specific evidentiary warnings.

5.45 Although the final decision as to which directions should be given and when, and the content of those directions, must rest with the judge, there is no reason in principle why the parties should not be involved much more actively in assisting the judge in making those decisions before and during the trial, and immediately before

574 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [5.64]–[5.75], Rec 34, 35.

575 See [5.34] above.

the summing up. This will also assist the parties in stating their cases unambiguously before the jury.

5.46 Furthermore, the Commission anticipates that discussion of this nature will also help to reduce the difficulty associated with some complex and detailed directions. For example, the directions on self-defence are lengthy, repetitious and can be quite confusing because they refer to a number of very similar provisions of the Criminal Code (Qld) which differ from each other only in subtle respects that can easily be lost in a welter of words.[576] This might be simplified without depriving a defendant of any legitimate right to have defences considered by the jury if there is a frank discussion before the summing up as to which of the various aspects of self-defence are in fact relied on by the defendant so that direction on other aspects can be fairly and properly dispensed with.

5.47 As mentioned in chapter 3 of this Paper,[577] the judge should have the power to modify the application of these proposed rules to meet the interests of justice in individual cases, in particular where the defendant in not represented.

5.48 These reforms are consistent with the Commission's earlier proposals about greater involvement by the parties in the determination of the issues to be put to the jury and should, accordingly, be mandated by the Criminal Code (Qld). In chapter 3 of this Paper, the Commission suggested that the provisions that it proposes in relation to pre-trial disclosure be inserted into Chapter 62 of the Criminal Code (Qld).[578] The Commission suggests that this is also the appropriate place for the provisions proposed in [5.44] above.

5.49 The Commission accepts that discussions between judges and the parties in relation to jury directions are common, especially in longer or more complex trials. These proposals would, therefore, in many cases simply reflect what is already the practice. However, by taking a mandatory and statutory form, the reform would give greater emphasis on the need to actively consider and discuss the content of the directions in the summing up.

5-1 The Criminal Code (Qld) should be amended to provide that both the prosecution and the defendant must inform the judge before the start of the summing up which directions concerning specific defences and warnings concerning specific evidence they wish the judge to include in, or leave out of, the summing up.

5-2 In addition, the Criminal Code (Qld) might be amended to provide that:

(a) the judge may not give any direction that is not requested unless, in the judge's view, it is nonetheless required in order to ensure a fair trial; and

576 See submission 15.

577 See [3.138] above.

578 See [3.147] above.

(b) on appeal the court must take into account which directions and warnings were and were not requested by the parties when determining an appeal, including any consideration of the application of the proviso in section 668E(1A) of the Criminal Code (Qld).

LIMITING MATTERS THAT CAN BE RAISED ON APPEAL

5.50 One closely related issue, which had greater prominence in the VLRC's Consultation Paper than in this Commission's Issues Paper, is the apparent ease with which an appellant can raise issues on appeal that were not raised at the trial though it was open for the defendant, or defence counsel, to have done so.[579]

5.51 The question of limiting matters on appeal to matters raised or ventilated during the trial (subject to the discretion of the appellate court) is clearly not a matter of defining the duties of the trial judge. Rather, it is an aspect of the right to a fair trial,[580] and relates to a broader issue of defining the rights of an appellant and the scope of issues to which an appellate court can give consideration. However, it is conceptually connected with the rule in *Pemble's Case* in that both involve a consideration of the extent to which defendants should be forced to define and present their cases clearly at trial, and should be bound by those decisions both at trial and on appeal.

5.52 The right to appeal does not necessarily carry with it a right to have an unrestricted re-hearing of the trial. There may be, and often are, rules preventing or limiting new evidence being led on appeal, and rights of a second or further appeal may be constrained by, for example, the obligation to obtain special leave. Some decisions may not be challenged on appeal, or only challenged on a restricted basis. One pertinent example of the latter is the limited basis on which a jury's decision to convict may be challenged by an appellant.[581]

5.53 One concern about an unrestricted range of issues being open to an appellant is that it invites a defendant, properly advised by competent counsel, to try one approach at trial and, if it fails, to invoke as the basis of appeal an asserted misdirection which was not objected to at trial or the lack of a direction or warning that was not sought at the trial, with a view to a re-trial and to adopt a different approach before the second jury.

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579 See Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) ch 5; Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [5.32]–[5.35], Proposal 5, [7.71]–[7.73].

580 See also *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(4): 'Any person convicted of a criminal offence has the right to have the conviction and any sentence imposed in respect of it reviewed by a higher court in accordance with law.'

581 See Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [5.6]–5.20]. For example, an appellant may only challenge a jury's decision to convict if the jury's verdict is unreasonable or cannot be supported having regard to the evidence: see Criminal Code (Qld) s 668E(1), but subject to the proviso in s 668E(1A).

5.54 However, the current law in Queensland does not appear to allow such an unfettered approach to appeals: defendants will often be bound by the tactical or similar decisions of their counsel. The Court of Appeal said this in *R v C*:

> [32] It will seldom be the case if no objection is taken to the admissibility of evidence or where Counsel elects perhaps for tactical reasons not to apply to have the jury discharged if in the course of a trial something occurs which might arguably justify its discharge but perhaps for tactical reasons, elects to proceed with the trial relying upon directions of the trial judge to overcome any perceived prejudice that might result from that event, that such matters upon appeal may then be relied upon to upset a verdict on the ground that it is unsafe and unsatisfactory.
>
> [33] Again where in the course of a summing up a trial judge deals with matters of fact or law in a manner exhibiting no clear error or undue emphasis upon or disregard of matters thought important to the defence case, and no application is made on behalf of an accused person for specific redirections designed more clearly to bring to the attention of the jury matters relevant to their determination of facts in issue, failure by the trial judge to give directions of the kind which may arguably have been obtained by way of redirection, will seldom result in a conclusion that the resulting verdict is unsafe and unsatisfactory by reason of failure to make such application.
>
> [34] This court will be loath to conclude that a guilty verdict is unsafe and unsatisfactory on the basis only, or mainly, that in the course of the trial steps could have been taken by Counsel for the accused, but were not, which may have led either to a mistrial or to a different body of evidence being adduced which may have resulted in slightly different directions being given upon which the jury would consider its verdict.[582]

5.55 It can nonetheless be argued that the tactical decisions of counsel can never on their own be seen as supplanting the right to a fair trial, but that right does not necessarily extend to having free rein to pick and choose the tactics to be adopted at trial and a later re-trial when one approach is seen to have failed. Of course, different considerations may influence appellate courts in relation to unrepresented defendants and manifest mistakes or oversights by inexperienced counsel.

5.56 Furthermore, the basis on which an appellate court should vary an order of a trial judge that was based upon that judge's exercise of discretion is limited — the mere fact that the higher court might or would have come to different decision is not enough: according to the High Court in *House v the King,* the decision must have been based on an error of principle or otherwise 'unreasonable or plainly unjust':

> The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has

582 *R v C* [2000] QCA 385 [32]–[34] (Ambrose J; McPherson and Thomas JJA agreeing).

> the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred. Unlike courts of criminal appeal, this court has not been given a special or particular power to review sentences imposed upon convicted persons. Its authority to do so belongs to it only in virtue of its general appellate power. But even with respect to the particular jurisdiction conferred on courts of criminal appeal, limitations upon the manner in which it will be exercised have been formulated. Lord *Alverstone* LCJ said that it must appear that the judge imposing the sentence had proceeded upon wrong principles or given undue weight to some of the facts (*R v Sidlow*[583]). Lord *Reading* LCJ said the court will not interfere because its members would have given a less sentence, but only if the sentence appealed from is manifestly wrong (*R v Wolff*[584]). Lord *Hewart* LCJ has said that the court only interferes on matters of principle and on the ground of substantial miscarriage of justice (*R v Dunbar*[585]). See, further, *Skinner v The King*[586] and *Whittaker v The King*[587].[588] (notes as in original)

5.57 That said, however, the recent Queensland Court of Appeal decision in *R v Robinson*[589] demonstrates that appellate courts in this State[590] are nonetheless prepared to entertain appeal points based on an asserted misdirection when the directions complained about were not disputed at the trial notwithstanding that they had been the subject of correspondence and directions hearings before the trial,[591] were not the subject of any issue raised in the Notice of Appeal but were the subject of a point which the appellant was given leave to raise at the hearing of the appeal[592] and enlarged upon in later written submissions 'with a degree of encouragement from the bench'.[593] It should be noted that the appeal also involved a careful consideration of the proper construction of two pieces of Commonwealth legislation based on arguments apparently not made at the trial.

5.58 The VLRC put forward the following proposal in its Consultation Paper:

> **PROPOSAL 5**
>
> The appeal provision 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.

583 (1908) 1 Cr App R 28, 29.

584 (1914) 10 Cr App R 107.

585 (1928) 21 Cr App R 19, 20.

586 [1913] HCA 32; (1913) 16 CLR 336, 340 (Barton J), 342 (Isaacs J).

587 [1928] HCA 28; (1928) 41 CLR 230, 244–250.

588 *House v The King* (1936) 55 CLR 499, 504–5.

589 [2009] QCA 250.

590 Albeit by majority in this case.

591 See [2009] QCA 250 [21]–[24] (Keane JA; Muir JA agreeing).

592 [2009] QCA 250 [4] (Keane JA; Muir JA agreeing); [65] (Fryberg J dissenting).

593 [2009] QCA 250 [69] (Fryberg J dissenting).

> 7.71 The exception to this restriction would be circumstances where the Court of Appeal is satisfied that there has been a denial of the right to a fair trial. The onus of establishing that there has been a denial of a fair trial would be on the appellant.[594]

Submissions

5.59 Although it was not the subject of a specific question for consideration in this Commission's Issues Paper, some respondents expressed views about the possibility of limiting the matters that can be raised on appeal.

5.60 A judge of the District Court of Queensland, for example, supported the VLRC's proposal.[595]

5.61 A similar view was expressed by a Supreme Court judge: limiting appeal points on the summing up to matters that were raised at the trial would provide some impetus for errors to be pointed out and corrected at the first trial.[596]

5.62 The joint submission of the Queensland Law Society and the Bar Association of Queensland did not specifically comment on this issue but endorsed the submission to the VLRC made by Stephen Odgers SC, who opposed the VLRC's proposal for reform.[597]

5.63 Similar views were also expressed by a number of respondents to the VLRC's Consultation Paper. One respondent to that Paper submitted that:

> The capacity of an accused to argue on appeal that the trial judge made an error or omission in a direction given to the jury should be restricted if that matter was not raised by Defence Counsel during the trial. An exception would be in the case where there was a significant oversight on the part of Counsel which would have the effect of denying the accused the right to a fair trial. The onus would then rest on the appellant to show denial of a fair trial.[598]

5.64 Similarly, two other respondents to the VLRC jointly submitted that:

> We agree that the appeal provisions should restrict or at least limit the capacity of an accused person to argue on appeal that the trial judge made an error or omission in a direction or warning given to the jury if that matter was not raised by defence counsel during the trial.[599]

5.65 The Victorian Office of Public Prosecutions submitted that a party's failure to seek a discretionary direction should create a rebuttable presumption that the direction was unnecessary, and that it should fall to an appellant to demonstrate the denial of a fair trial (or a substantial miscarriage of justice) before an appeal on the

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594 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [7.71].

595 Submission 10.

596 Submission 7.

597 Queensland Law Society and Bar Association of Queensland, Submission 13, 19 June 2009. See [5.72] below.

598 Maria Abertos, Submission to the Victorian Law Reform Commission, 29 November 2008 [12].

599 Daniel Gurvich and Mark Pedley, Submission to the Victorian Law Reform Commission, 23 December 2008.

failure to give that direction is allowed. Otherwise, the leave of the appellate court should be required before such a ground of appeal could be raised.[600]

5.66 Reform of this area of the law also received some qualified support from the Law Reform Committee of the County Court of Victoria:

> **The [VLRC] proposes** that leave be required before a ground can be argued on appeal where the matter could have been, but was not, raised at trial. There is a rebuttable presumption that a direction, or redirection not sought at trial was not necessary. The leave hearing is to be conducted before, not at the same time as the appeal.
>
> **Response:**
> This is supported, provided the earlier proposals concerning the enacting of a code, setting out in it all matters about which directions could be given, the requirements in relation to discretionary directions, and production of the jury guide are implemented.[601]

5.67 Judge Murphy of the County Court of Victoria also supported reform in this area:

> I agree with any proposal to place an obligation on Counsel to seek relevant directions in a trial. I have no opinion as to whether leave should be required to raise a directions-based ground of appeal. I note that it may be that if this amendment is made, the spate of successful appeals on points not taken below will fall away.[602]

5.68 However, a contrary view was expressed by Victoria Legal Aid in its submission to the VLRC:

> [Victoria Legal Aid] has concerns that limiting appeal rights will erode the rights of the accused. The consequence of limiting appeal rights to issues raised at the trial is that some people will have convictions imposed at unfair trials upheld. [Victoria Legal Aid] holds the view that this is unacceptable.[603]

5.69 The Law Council of Australia also argued in its submission to the VLRC that limiting matters that could be argued on appeal was to mistake the central question that has to be answered by the appellate court:

> 10. The question for an appeal court is whether there has been a miscarriage of justice. The way in which defence counsel conducted the trial may be relevant to that question but should never be determinative of it. Equally, the views of the trial judge as to whether the accused received a fair trial cannot preclude an appeal court concluding that there has been a miscarriage of justice. While there may not have been a 'substantial' miscarriage of justice if the jury's verdict would inevitably have been the same if an identified error had not occurred (cf *AK v Western Australia* [2008] HCA 8, Gummow and Hayne JJ at [59]), a significant denial of procedural fairness at trial will necessarily constitute a substantial miscarriage of

600 Office of Public Prosecutions, Submission to the Victorian Law Reform Commission, 12 February 2009, 18.

601 Law Reform Committee of the County Court of Victoria, Submission to the Victorian Law Reform Commission, 13 March 2009, 6.

602 Judge MD Murphy, Submission to the Victorian Law Reform Commission, 5 February 2009, 6.

603 Victoria Legal Aid, Submission to the Victorian Law Reform Commission, 9 December 2008 [2.10].

justice (*Weiss v The Queen* (2005) 224 CLR 300 at 317 [45]). The financial and emotional costs of a new trial resulting from a successful appeal have little weight against the public interest in ensuring that an innocent person has not wrongly been convicted.

11. It is the responsibility of the trial judge and not defence counsel to ensure that the accused receives a fair trial: *Pemble v The Queen* [1971] HCA 20; (1971) 124 CLR 107. For example, defence counsel may for sound tactical reasons choose not to advance before the jury a defence that is reasonably open on the evidence. The trial judge should nevertheless draw that defence to the attention of the jury for its consideration (bearing in mind the onus and standard of proof).[604]

5.70 The Criminal Bar Association of Victoria also opposed the introduction of a statute or code purporting to restrict the issues open to be argued on appeal in this way:

> The Criminal Bar Association notes that in the [VLRC's] Consultation Paper there is contained a proposal that significantly increases the obligation of trial counsel in the area of directions and warnings. It is proposed that, 'no obligation or warning which is to the benefit of the accused about the use of evidence need be given by the trial judge unless it has been expressly required by defence counsel, and the judge is satisfied that direction is necessary in order to ensure a fair trial'. We further note that in the section 'The Appeal Process: respecting the role of the trial judge', under proposal 5, that the suggested appeal provisions should restrict the capacity of persons convicted at trial from raising points of law on appeal which were not raised and could have been raised during the trial. These two proposals, read together, would have the combined effect of significantly increasing the responsibility of trial counsel in the performance of their duties. In respect of this issue we repeat the point made relating to the stated 'juniorisation' of the Victorian Bar and a well overdue increase in resources, including training and an increase in Legal Aid funding. It is the submission of this Association that it would be extremely onerous to so significantly increase the already heavy trial responsibilities of counsel whilst having failed to address the issues … relating to legal aid funding and education and training.
>
> In the above context it would be, and will always remain, unfair to deprive appellants of the right to argue a ground of appeal on a point not taken in the court below, in the face of a miscarriage of justice being tolerated. The sole test should be whether a miscarriage of justice has occurred, not how the proceedings got to that point.
>
> …
>
> In effect, [Proposal 5] puts an unwarranted heavy onus on the Appellant in the appeal proceeding. Carefully analyzed, the proposal would place an immediate hurdle on the capacity of the person convicted from even raising the issue on appeal. This goes too far. It is the view of this Association that there is no need to alter the current approach taken by the Victorian Court of Appeal. If a point was not taken at trial it is a matter taken into consideration by the Court of Appeal in deciding whether to allow the appeal. Equally, if there is a miscarriage of justice despite the failure to take the point, and the proviso is not applic-

604 Law Council of Australia, Submission to the Victorian Law Reform Commission, 30 January 2009, 4.

> able, then the failure to take the point at trial will not deny the appellant's appeal. …
>
> …
>
> There will be times where counsel — at both ends of the Bar table — have missed the alternative defences open. There will be times where the judge does too. The accused should not be denied the opportunity of raising such points on appeal. … there should be no bright line that precludes reliance on such a point even if it be thought that trial counsel made a forensic choice. Why? Because there will be occasions where the accused has thereby lost a realistic chance of acquittal, and it is for the jury, properly instructed by the judge on the law and the evidence, including defences, to say whether the accused is guilty or not guilty. It is not for trial counsel or the judge to deny the accused that opportunity. Of course, a tension is immediately raised in such cases between the notion that it is counsel that shapes the issues to be fought at trial and the securing of some other chance of acquittal that was not the accused's principal line of defence. But it is a tension that is adequately dealt with by the law as it is. There is no need to change the law.[605]

5.71 In its submission to the VLRC, The Law Council of Australia also expressed concern that a criminal trial should not be reduced to a purely adversarial exercise:

> 9. Certain procedural rights and protections are accorded to the accused in order to minimise the risk of a miscarriage of justice resulting from conviction of an innocent person: *RPS v The Queen* [2000] HCA 3; (2000) 199 CLR 620 at [22]–[28]; *Azzopardi v The Queen* [2001] HCA 25; (2001) 205 CLR 50 at [34]; *Dyers v The Queen* [2002] HCA 45; (2002) 210 CLR 285 at [9]–[10], [52], [191]; *MWJ v The Queen* [2005] HCA 74; (2005) 80 ALJR 329 at [41].
>
> …
>
> 17. It follows … that the fact that defence counsel at trial has not objected to a direction given by the judge to the jury is relevant to the question of whether or not an appeal on the basis of mis-direction should be allowed, but it should never be determinative. A defence lawyer may be very inexperienced and, in some cases, even incompetent. Even competent defence lawyers make mistakes or miss issues. More importantly, as the Criminal Bar Association of Victoria pointed out in its submission, cases will arise where it is clear that there has been a miscarriage of justice notwithstanding that the defence lawyer made a competent tactical decision.[606]

5.72 Stephen Odgers SC also opposed the VLRC's proposal:

> While it is true that the criminal justice system in this country is legitimately described as 'adversarial' and that tactical decisions made by the defence during a trial should not be ignored by an appeal court, the ultimate question for an appeal court is whether there has been a 'miscarriage of justice'. Such a miscarriage may occur for a number of reasons. In this context, if a particular direction was not asked for by the defence (so that the trial judge has made no 'error

605 Criminal Bar Association of Victoria, Submission to the Victorian Law Reform Commission, 15 December 2008, 11–12, 28–30.

606 Law Council of Australia, Submission to the Victorian Law Reform Commission, 30 January 2009, 4, 5.

of law'), there will be a miscarriage of justice if the appeal court is satisfied that the direction should have been given and that the verdict might have been different if the direction had been given (see *Dhanhoa v R* (2003) 217 CLR 1 at [49]). This is a reasonable approach. The fact that a tactical decision was made not to ask for a particular direction may well lead to a conclusion by the appeal court that no real chance of acquittal was lost (presumably defence counsel considered that absence of such direction would improve the accused's chances at the trial), but that may not necessarily be the case. An accused should not be bound by the tactical decisions of defence counsel. One obvious reason is that some defence lawyers are incompetent, or make incompetent decisions, which should not rebound on the accused. Another is that even competent defence lawyers make mistakes or miss important issues. The most important reason is that a miscarriage of justice may result even if a competent defence lawyer made a decision which seemed to be the right decision at the time.

…

I have addressed this proposal at a number of points above. I am far from persuaded by what is written at 7.66–7.70 [of the VLRC's Consultation Paper].[607] Gleeson CJ had a particularly robust view of the adversarial nature of the criminal justice system, but it was not necessarily shared by other members of the High Court or the judiciary as a whole. In any event, acceptance that decisions may be made as a result of incompetence or oversight raises serious questions about this approach. Focus on 'fairness' obscures important issues of justice. As for the NSW approach, Rule 4 [of the Criminal Appeal Rules] provides only a limited impediment to appeals. It is true that leave is often refused, but that is usually because it is concluded that there was no error by the trial judge or

607 Those paragraphs read (notes omitted):

Potential for misuse of current appeal provisions

7.66 The former Chief Justice of the High Court recently held that, except in limited circumstances, the parties in a criminal trial should be bound by the conduct of their counsel. Nevertheless, in more than 50% of successful applications for leave to appeal against conviction in Victoria in 2004–2006 the successful grounds of appeal concerned issues that had not been raised at trial by defence counsel. In some instances the failure of counsel to take exception at trial may have been an oversight, but in others the failure may have been a tactical decision.

7.67 In *Nudd v the Queen*, Gleeson CJ said that fairness of process must be assessed objectively. Where counsel made a decision during a criminal trial that was objectively rational, the client should be bound by the decision of counsel, because the process was fair. In New South Wales, the Criminal Appeal Rules attempt to limit the opportunity to rely upon 'armchair' appeals. Rule 4 provides:

> *No direction, omission to direct, or decision as to the admission or rejection of evidence, given by the Judge presiding at the trial shall, without leave of the court, be allowed as a ground for appeal or an application for leave to appeal unless objection was taken at trial to the direction, omission, or decision by the party appealing or applying for leave to appeal.*

7.68 The requirement for leave has been interpreted strictly and many appeals are rejected because of the rule.

7.69 The NSW Court of Criminal Appeal sometimes accepts affidavit evidence which explains why counsel failed to take exception to a particular direction at the trial. The value of that procedure has been doubted in a judgment of the Court of Criminal Appeal and Gleeson CJ expressed concern in *Nudd* about a criminal appeal becoming an investigation into the performance of trial counsel. He stated:

> *Criminal trials are conducted as a contest, but the adversarial system does not require that the adversaries be of equal ability. … Opposing counsel may be mismatched, but this does not make the process relevantly unfair.*

7.70 In light of this, we think that any change to the appeal provisions should restrict the capacity of an accused person to argue on appeal that the trial judge made an error or omission in a direction or warning given to the jury if that matter was not raised by defence counsel during the trial.

> because there was no danger of the jury being misled, not simply because no objection was taken. There are statements in some older decisions of the NSW Court of Criminal Appeal which do appear to give real teeth to Rule 4. However, the current approach is much more limited: *Picken v R* [2007] NSWCCA 319; *Mencarious v R* [2008] NSWCCA 237; *Halmi v R* [2008] NSWCCA 259 (see also *Papakosmas v The Queen* (1999) 196 CLR 297 McHugh J at [72]). If an appeal court is satisfied that there has been a substantial miscarriage of justice (cf the proviso), leave will be granted. Having said this, however, I would not oppose introduction of a similar rule in Victoria, if only to remind appellate judges that (inferred) tactical decisions made by the defence during a trial should not be ignored by the appeal court when considering whether there has been a miscarriage of justice.[608] (note added)

VLRC's recommendations

5.73 The VLRC made these recommendations in its recent Final Report in relation to the limited curtailing of an appellant's right to raise matters on appeal concerning alleged misdirection at trial if that issue had not been raised with the trial judge:

> 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.[609]

5.74 The VLRC's conclusions involved the balancing of competing interests:

> 4.144 The [VLRC] 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 [VLRC] 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. …
>
> 4.145 The [VLRC] 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) …

608 Stephen Odgers SC, Submission to the Victorian Law Reform Commission, 12 November 2008, 2, 8–9.

609 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) 14, [4.136]–[4.147].

> 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). The [VLRC] 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.[610]

QLRC's proposals for reform

5.75 The omission by or on behalf of a defendant to object at trial to an erroneous direction or to require one that was not given can occur for many reasons, such as error or oversight by defence counsel, the lack of expertise of an unrepresented defendant or a tactical decision by competent and alert counsel that may (or may not) bring about the desired outcome. The cause of the omission can be, and often is, examined on appeal to consider the context of the omission, whether it was the result of an informed tactical decision, and the extent to which it did, or might have, given rise to a real risk of a miscarriage of justice.

5.76 In Queensland, this examination is done at the hearing of the appeal and not at a preliminary hearing for leave to appeal (or to raise on appeal a matter not raised at the trial). The VLRC, on the other hand, recommends that this matter be raised at a preliminary hearing before a single judge so that it is clear on which bases the hearing of the appeal itself would proceed, if indeed it does proceed. This would clearly present some barrier to appeals that perhaps more speculatively seek to raise points that could have been dealt with at trial and, in due course, would seek to restrict a cynical approach to such appeals by some counsel.

5.77 One advantage that the courts might perceive in this approach is the possible resolution (or 'finalisation') of cases before a single judge more quickly than at a full appeal hearing.

5.78 However, it has the disadvantage of creating another layer of process and, consequently, another layer of time and cost. Even if it does not involve witnesses, victims and other third parties, it could be seen as adding this layer without any real benefit overall. Any appeal that had a basis other than a question of misdirection not raised at trial would presumably proceed to hearing in the usual course, and so would not be disposed of by the leave application. Only those appeals based solely on a question requiring leave would be finalised at this point. The Commission has no statistics available to indicate what proportion of appeals might fall into the latter category.

5.79 An examination of a ground of appeal based on misdirection not raised at trial would of necessity involve some review of the trial as a whole including, in particular, the evidence or other aspects of the trial to which the misdirection relates. If the appeal went to a full hearing on other issues (assuming that leave to raise this question were refused) the full court would still have to conduct its own broader review of the trial, albeit on a different basis. These two separate reviews would not

610 Ibid.

necessarily cover mutually exclusive territory, with the result that there could be some (even significant) overlap. The splitting of any case, even when this involves what might be seen as purely distinct legal issues, is rarely achieved with the surgical precision that its proponents from case to case might assert.

5.80 If all issues are raised at the hearing of the appeal, the parties and court have the advantage of being able to raise all issues, which are often inter-related, on the one occasion.

5.81 As a result, the insertion of this added procedural element may not lead to any real benefit to most individual appellants or the criminal justice system as a whole, and would come at the cost of increased procedural complexity. On balance, the Commission is not presently inclined to propose a system of leave applications such as that recommended by the VLRC.

5.82 The Commission considers that, in the interests of justice and ensuring fair trials (including fair appeals), there cannot be any rule that pre-emptively limits the issues that a party can raise on an appeal. However, the conduct of the party who seeks to raise an issue that was not agitated at the trial should remain a matter for consideration by the appellate court. This should cover the party's compliance or failure to comply with the pre-trial disclosure requirements proposed in chapter 3 of this Paper[611] as well as the formal requests made by that party in relation to jury directions to be included in or excluded from the summing up. The Commission proposes that these reforms be expressly stated in section 668E of the Criminal Code (Qld).

5.83 The Commission is attracted to the submission by the Victorian Office of the Director of Public Prosecutions that the failure to request a discretionary direction or warning should create a rebuttable presumption that the direction or warning was not necessary.[612] This follows from the Commission's view that only strong incentives will force changes to practice and attitude.[613] However, the unintended consequence of such a presumption might be that the parties simply seek to protect themselves and defeat the presumption by requesting every conceivable direction or warning, leaving it to the judge to filter out the more irrelevant or fanciful requests without any real guidance from the parties. Nonetheless it is an option on which the Commission seeks further submissions.

5.84 This is consistent with the Commission's proposals in chapter 3 of this Paper that there be a more comprehensive approach to pre-trial issue identification.

5.85 The interests of justice demand that there be some flexibility in the application of any of these procedural rules and, as a result, there cannot be any fixed rules that bar a party from seeking to raise a fresh matter on appeal. However, the Commission anticipates that there will be many cases where the appellate court will hold a party to the informed decisions that it makes at the trial, in line with *R v C*.[614]

611 See [3.125]–[3.147], Proposal 3-1 above.

612 See [5.65] above.

613 See [3.142]–[3.143], Proposal 3-2 above.

614 *R v C* [2000] QCA 385. See [5.54] above.

5.86 As the Commission has previously indicated,[615] the Criminal Code (Qld) should make it clear that the trial judge has the power to modify the application of the proposed rules to meet the interests of justice in any particular case where this is warranted, especially in trials of unrepresented defendants.

5-3 The Criminal Code (Qld) should be amended to provide that the failure by the parties to request a discretionary direction or warning should create a rebuttable presumption that the direction or warning was not necessary.

5-4 There should be no rule that directions or warnings given, or not given, by a trial judge cannot form the basis of an appeal against conviction unless objection was made at the trial by the party seeking to raise this issue on the appeal.

5-5 Section 668E of the Criminal Code (Qld) should be amended to provide that, in determining whether the appeal should be granted, an appellate court should take into account:

(a) the degree of compliance by the parties with the regime of pre-trial disclosure suggested in Proposal 3-1; and

(b) whether any objection was made at the trial by the party seeking to raise the issue on the appeal to the giving (or withholding) of the direction, and to the requests (if any) made by that party to the judge prior to the summing up to give (or not to give) that direction.

615 See [3.138], [5.47] above.

Chapter 6

Directions about the Limited Use of Evidence: Amendment or Abolition

INTRODUCTION

6.1 In this review, the Commission is charged with considering whether any current jury directions should be amended or abolished.[616]

6.2 The content of, the law associated with, and the rationale behind many of the specific jury directions and warnings given in criminal trials were considered in chapter 4 of the Issues Paper.[617] Many of the difficulties associated with jury directions, and some avenues of possible improvements to directions, were outlined in some detail in chapters 6 and 8 of the Issues Paper. In chapters 4 and 8 the Commission identified a number of specific issues for consideration:

> 4-1 Which particular directions, or classes of directions, give rise to particular concern or cause recurrent problems in practice?
>
> 4-2 What is the basis of these concerns or problems?

616 See the Terms of Reference set out in Appendix A to this Paper.

617 Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009).

4-3 Are there any directions or classes of directions that can be simplified or abolished as part of the Commission's present enquiry?

…

8-1 Is it necessary or desirable to re-cast any of the jury directions given in criminal trials in Queensland?

8-2 If so, how might that be done? Would it involve any reduction or simplification of, or other change in, the directions as currently formulated?

8-3 Is it necessary or desirable to consider a reform of the law concerning the admissibility of prejudicial or other evidence for certain limited purposes only?

8-4 Is it necessary or desirable to consider a reform of the law concerning limited-use directions?

8-5 Are there ways in which the language used in jury directions can be changed to make them more comprehensible to jurors?[618]

6.3 One area of particular concern raised in the Issues Paper was that of limited-use directions; that is, directions or warnings to the jurors about the way in which they must not use certain evidence, the differential use of certain evidence or about the caution that they must exercise when considering that evidence.[619] Examples include:

- directions or warnings in relation to similar fact or propensity evidence, or evidence of uncharged conduct, which might be introduced to establish a pattern of conduct on the part of the defendant;[620]
- evidence about post-incident conduct (otherwise described as consciousness of guilt evidence) which is introduced to establish that certain conduct by the defendants after the alleged offence is evidence of the defendants' own awareness of their involvement in the offence;[621]
- evidence that is otherwise unreliable because of certain characteristics of the witness or the evidence itself, especially if the source of that unreliability may not be apparent to a juror exercising their common sense and relying on their general experience (such as identification evidence);[622] and
- directions that certain evidence should only be used for some purposes and not for others — for example, that evidence that is admitted in relation to a defendant's credit may not be used to assess guilt, or

618 Ibid 105, 170, 174.

619 Ibid [4.63]–[4.72], [4.80]–[4.102], [4.114]–[4.120], [6.42]–[6.51] and [8.14]–[8.24].

620 See ibid [4.68]–[4.72] and [4.114]–[4.120] in relation to evidence of uncharged conduct in sexual offence trials.

621 See ibid [4.63]–[4.76] in relation to the Edwards direction.

622 See ibid [4.80]–[4.102] and [4.121]–[4.128] in relation to evidence from children.

> that evidence admitted against one co-defendant cannot be used to assess the guilt of another co-defendant.[623]

6.4 One common element of each of these diverse categories of evidence is that they all require a very sophisticated handling and consideration of the evidence, which may well be taxing for an experienced criminal lawyer but is all the more onerous for a juror without experience of forensic analysis. Moreover, the focus by a trial judge on certain parts of the evidence may serve to concentrate the jurors' minds on them, contrary to the intended purpose of the directions.

6.5 The Issues Paper sought submissions as to whether any of the various directions that trial judges are required to give juries could be varied, simplified or abolished.[624] The Commission has received few responses on these questions, although they were dealt with in some of the submissions to the Victorian Law Reform Commission ('VLRC') in response to its Consultation Paper.[625]

6.6 This chapter focuses on limited-use directions. Directions given in sexual offence cases are considered in chapter 7, while chapter 8 examines a range of other specific directions.

LIMITED-USE DIRECTIONS

6.7 Doubts about the effectiveness of limited-use directions were discussed at several points in the Issues Paper.[626] There are risks that limited-use directions are too arcane, and that the intellectual task that they ask of jurors is too subtle, with the outcome that the directions are not or cannot be applied effectively, and a risk that evidence may be used in ways that were expressly prohibited.[627] Such doubts were expressed by Kirby P, in the context of directions concerning post-incident conduct, in *Zoneff v The Queen*:

> The law presumes that triers of fact are able to disregard the prejudicial aspects of testimony and adjust appropriately the weight to be attached to such evidence on the basis of its 'probative value'.[628] However, such empirical studies as have been performed on jurors' abilities to follow judicial instructions, and to divide and sanitise their minds concerning impermissible uses of evidence, have yielded results which are substantially consistent. They cast

623 See ibid [6.38]–[6.51].

624 See [6.2] above.

625 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008).

626 See Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [4.61]–[4.102], [6.42]–[6.51], [8.14]–[8.24].

627 See generally, for example, RK Cush and J Goodman-Delahunty, 'The influence of limiting instructions on processing and judgments of emotionally evocative evidence' (2006) 13(1) *Psychiatry, Psychology and Law* 110; JD Lieberman and J Arndt, 'Understanding the limits of limiting instructions: Social psychological explanations for the failures of instructions to disregard pretrial publicity and other inadmissible evidence' (2000) 6(3) *Psychology, Public Policy, and Law* 677. In the context of evidence of prior statements admitted for non-hearsay purposes, the ALRC once described the admission of evidence, relevant for more than one purpose but admissible for a limited purpose only, as imposing 'a schizophrenic task' on the tribunal: Australian Law Reform Commission, *Evidence (Interim)*, Report 26 (1985) [334].

628 Schaefer and Hansen, 'Similar Fact Evidence and Limited Use Instructions: An Empirical Investigation' (1990) 14 *Criminal Law Journal* 157 at 159.

> doubt on the assumption that jurors can act in this way.[629] Indeed, there is some empirical evidence which suggests that instruction about such matters will sometimes be counter-productive. The purpose may be to require a mental distinction to be drawn between the use of evidence for permissible, and the rejection of the same evidence for impermissible, purposes. Yet the result of the direction may be to underline in the jury's mind the significance of the issue, precisely because of the judge's attention to it.[630] Lengthy directions about lies run the risk of emphasising the lies and their importance.[631] (notes in original)

6.8 One of the issues raised in chapter 8 of the Issues Paper in relation to limited-use directions generally was whether it might be better to restrict the admission of evidence of this nature rather than to admit certain evidence for limited purposes and then instruct the jury in detail about the limited purposes for which it was admitted when those instructions were felt to be too abstract or theoretically complex for any jury reasonably to be expected to handle them and the evidence properly.[632]

Submissions

6.9 Only two of the respondents to the Commission's Issues Paper addressed the possibility of reform of limited-use directions.

6.10 The doubts about the effectiveness of limited-use directions discussed in the Issues Paper prompted the Brisbane Office of the Commonwealth Director of Public Prosecutions to suggest that 'it may be appropriate that juries receive advance warning about limited-use evidence before it is led.'[633]

6.11 Another District Court judge considered that jury directions on the use of evidence for certain limited purposes are 'incomprehensible and need re-casting.'[634]

6.12 In its submission to the VLRC's Consultation Paper, however, the Law Council of Australia argued that the retention of limited-use directions is necessary whenever prejudicial or similarly problematic evidence is led:

> 16. If evidence is admitted for one purpose or use, but may not be used for some other possible purpose or use (to which it could rationally be put), the jury must be so directed.[635]

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629 A good example may be the distinction drawn between inferential reasoning leading to the conclusion of consent as opposed to credibility in the use of evidence of 'recent complaint' in sexual offences. See for example *Crofts v R* (1996) 186 CLR 427 at 448–51; 139 ALR 455 which accepted *Kilby v R* (1973) 129 CLR 460 at 472; 1 ALR 283 as stating the applicable law.

630 Schaefer and Hansen, 'Similar Fact Evidence and Limited Use Instructions: An Empirical Investigation', (1990) 14 *Criminal Law Journal* 157 at 166.

631 (2000) 200 CLR 234 [67].

632 See Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [8.14]–[8.24]. See also the discussion of recent changes to the rules of evidence that impact on limited-use directions in New Zealand: ibid [6.49]–[6.51]. See also, for example, New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [8.58]–[8.61], in which it is noted that 'the real problem' with the multiple and complex directions required to be given on the use of evidence in conspiracy cases is 'the admissibility of evidence and what the prosecution has to show in order to make the statements attributable to one conspirator admissible against another conspirator'.

633 Brisbane Office of the Commonwealth Director of Public Prosecutions, Submission 9, 3.

634 Submission 6. These directions are discussed in the Issues Paper at [4.61]–[4.102], [6.42]–[6.51], [8.14]–[8.24].

6.13 On the other hand, Patrick Tehan QC expressed interest in simplifying the rules about the use to which complaint evidence could be put:

> The changes to the law concerning the use of complaint evidence have to my mind not easily been taken on board by trial judges. It is difficult for judges and lawyers to come to terms with the concept of complaint evidence being admitted to prove the truth of the facts alleged within the complaint. In any event once admitted, whether the jury acts upon such evidence for whatever purpose ought to be a matter for what weight they place upon it; it ought to be a relevant consideration in that exercise that the evidence is in fact hearsay.[636]

QLRC's options for reform

6.14 None of the submissions suggest how the problems created by the admission of this contentious evidence should be resolved.

6.15 Some evidence may be logically relevant for more than one purpose but admissible, because of an exclusionary rule, for one purpose (or limited purposes) only.

> In other words, when an evidentiary fact is offered for one purpose and becomes admissible by satisfying all the rules applicable to it in that capacity, it is not inadmissible because it does not satisfy the rules applicable to it in some other capacity and because the jury might improperly consider it in the latter capacity. This doctrine, though involving certain risks, is indispensable as a practical rule.[637] (note omitted)

6.16 Without such a rule, much relevant evidence would be excluded altogether.

6.17 It remains, however, for the trial judge to avoid — or at least minimise — the risk that the jury will misuse the evidence let in for limited purposes. In some circumstances, the judge may consider the danger 'so great' as to warrant the discretionary exclusion of the evidence in its entirety.[638] The judge may exclude evidence that is otherwise admissible if its prejudicial effect exceeds its probative value or if the receipt of the evidence would render the trial unfair, for example, because of some impropriety in the way the evidence was obtained.[639]

6.18 The usual means, however, is to warn the jury about the limited use to which it may put the evidence:[640]

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635 Law Council of Australia, Submission to the Victorian Law Reform Commission, 30 January 2009, 5.

636 Patrick Tehan QC, Submission to the Victorian Law Reform Commission, 26 November 2008 [4].

637 JH Wigmore, *Evidence in Trials at Common Law*, Vol 1 (revised edition, 1983) §13.

638 Lexis Nexis Online Service, JD Heydon, *Cross on Evidence*, 'Multiple relevance and admissibility' [1520] (at 2 September 2009). Also see JH Wigmore, *Evidence in Trials at Common Law*, Vol 1 (revised edition, 1983) §13.

639 Lexis Nexis Online Service, JD Heydon, *Cross on Evidence*, 'Discretion to exclude relevant evidence in criminal proceedings' [11125] (at 2 September 2009); *R v Swaffield* (1998) 192 CLR 159 [62]–[65] (Toohey, Gaudron and Gummow JJ).

640 *B v The Queen* (1992) 175 CLR 599, 619 (Dawson and Gaudron JJ). Also see, for example, *Donnini v The Queen* (1972) 128 CLR 114, 123 (Barwick CJ); and see generally Lexis Nexis Online Service, JD Heydon, *Cross on Evidence*, 'Multiple relevance and admissibility' [1520] (at 2 September 2009); JH Wigmore, *Evidence in Trials at Common Law*, Vol 1 (revised edition, 1983) §13.

> The problem which arises when evidence is admissible for one purpose but is inadmissible for another is well known to the law.[641]
>
> As Tindal CJ said in *Willis v Bernard*:[642]
>
> > 'No doubt it renders the administration of justice more difficult when evidence, which is offered for one purpose or person, may incidentally apply to another; but that is an infirmity to which all evidence is subject, and exclusion on such a ground would manifestly occasion greater mischief than the reception of the evidence.'
>
> The difficulty is one which the trial judge must endeavour to overcome. Where, in a criminal case, he admits evidence admissible for one purpose but inadmissible for another — as he is ordinarily bound to do — he should direct the jury that they must not use the evidence for the purpose for which it is inadmissible, particularly where the use of the evidence for that purpose would be adverse to the accused.[643] (notes in original)

6.19 Empirical evidence has cast doubts on the extent to which such directions are effective:

> Although it might seem that issuing a limiting instruction to jurors who have been exposed to potentially prejudicial evidence is at least better than nothing, we now know that limiting instructions can have the opposite effect to that intended. Limiting instructions may 'backfire' either because jurors are unable or unwilling to comply. In the courtroom, jurors will disobey a limiting instruction if they perceive it as a threat to their freedom to consider all of the available evidence. Jurors endeavouring to comply with an instruction to ignore inadmissible evidence might nonetheless fail because of rebounding attempts at thought suppression. Confounding such attempts might be the limiting instruction itself, which draws attention to inadmissible evidence, increasing its salience in the minds of jurors.[644] (references omitted)

6.20 It might be thought that such difficulties would be especially acute where the line between the permissible and impermissible uses of the evidence is particularly fine, as is often the case, for example, with propensity evidence.

6.21 As long as evidence is admitted for limited purposes, directions on the permitted use of the evidence will be necessary and these difficulties will persist. Changes to the rules of admissibility of such evidence may be the only way to address these concerns conclusively. The need for warnings would be removed, for example, if evidence were excluded in cases where the risk of prejudice is thought too high, and admitted for any and all purposes to which the jury may put it in other circumstances.

6.22 This approach has to some extent been adopted in New Zealand. Under the *Evidence Act 2006* (NZ), which was introduced after a comprehensive review by

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641 See Wigmore on Evidence, (revised edition, 1983), Vol 1, par 13.

642 (1832) 8 Bing 376, at p 383 [131 ER 439, at p 441].

643 See *Donnini v The Queen* (1972), 128 CLR 114, at p 123.

644 RK Cush and J Goodman-Delahunty, 'The influence of limiting instructions on processing and judgments of emotionally evocative evidence' (2006) 13(1) *Psychiatry, Psychology and Law* 110, 112–13.

the Law Commission of New Zealand,[645] instances of limited-use evidence have been reduced significantly.[646] For example:

- Once admitted, all hearsay statements and prior consistent statements are offered for the truth of their contents.[647]
- The recognised purpose of all propensity evidence is to show the person's propensity to act in a particular way or to have a particular state of mind.[648]
- There is no longer a distinction between lies going to credit and lies going to guilt.[649]

6.23 To completely remove the possibility of admitting evidence for limited purposes, however, would be a sweeping change with far-reaching consequences for the functioning of criminal trials, and should not be contemplated lightly or without a specific review of the rules of evidence. There are likely to remain at least some circumstances in which evidence should continue to be admitted for limited purposes; an example is evidence given against one defendant but not another in a joint trial.

6.24 While a change to the admission of limited-use evidence may be the surest way to remove the difficulties of limited-use directions, an alternative approach is to seek to improve the way in which such directions are given. As noted in chapter 3 of this Paper,[650] there is some evidence to suggest that early instruction to jurors may assist in their understanding. In particular, there is evidence to indicate that limited-use directions given before the evidence is heard may be more effective than instructions given later.[651]

> Research suggests that without forewarning, individuals are unaware of their own tendency to process new information through the distorted lens of prejudice, and that forewarning facilitates strategies to combat bias.[652] (note omitted)

6.25 It may therefore be appropriate to insist that, wherever possible, jurors are given advance notice of the use to which they may put limited-use evidence. Consistently with the Commission's provisional view that the use of opening statements

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645 Law Commission (New Zealand), *Evidence*, Report 55 (1999).

646 Jury Directions Symposium, Melbourne, 5–6 February 2009.

647 *Evidence Act 2006* (NZ) ss 4 (definition of 'hearsay statement'), 35(2).

648 *Evidence Act 2006* (NZ) s 40(1). A defendant may only offer propensity evidence about a co-defendant if it is relevant to a defence raised or proposed to be raised by the defendant and the judge permits it: s 42(1). The prosecution may only offer propensity evidence about the defendant if it has a probative value in relation to an issue in dispute in the proceeding which outweighs the risk that the evidence may have an unfairly prejudicial effect on the defendant: s 43(1).

649 *Evidence Act 2006* (NZ) ss 37, 124(2).

650 See [3.158]–[3.150] above.

651 Eg, RK Cush and J Goodman-Delahunty, 'The influence of limiting instructions on processing and judgments of emotionally evocative evidence' (2006) 13(1) *Psychiatry, Psychology and Law* 110, 113, 120; JD Lieberman and J Arndt, 'Understanding the limits of limiting instructions: Social psychological explanations for the failures of instructions to disregard pretrial publicity and other inadmissible evidence' (2000) 6(3) *Psychology, Public Policy, and Law* 677, 705.

652 RK Cush and J Goodman-Delahunty, 'The influence of limiting instructions on processing and judgments of emotionally evocative evidence' (2006) 13(1) *Psychiatry, Psychology and Law* 110, 113.

should be mandatory,[653] the Commission considers that, if limited-use directions are required, it may be appropriate to give them before the evidence is received whenever it is practicable to do so. The Commission is concerned, however, that pre-instruction may be problematic. Whether or not a direction is necessary, and what its particular formulation should be, is likely to become apparent only after the evidence has been heard, and perhaps not until all other relevant evidence has also been led. Nevertheless, it may be appropriate, and beneficial to the jury, to deliver limited-use directions as soon as possible after the evidence has been heard.

6.26 The effectiveness of limited-use instructions may also be improved if they are kept as simple as possible and include an explanation for the instruction, with an emphasis on procedural fairness.[654] It may also be important to avoid, as far as possible, over-emphasis of the evidence in question in order to minimise the 'backfire' effect.[655]

6.27 The Commission considers that the best means of facilitating early direction on limited-use evidence, and in accommodating concerns about the content of such directions, may be to impose a requirement on the prosecution and the defendant to inform the judge of the directions they wish to be given before, or immediately after, the limited-use evidence is heard. This would be consistent with the Commission's proposal that the parties be required to inform the judge of the directions they wish to be given during the summing up. The Commission anticipates that its proposed regime of pre-trial disclosure would also facilitate this process.

6.28 Further, the Commission expects that its proposals for the judge to order that the jury be given written aids, such as a copy of the judge's directions, and for the use of integrated directions that embed matters of law in questions of fact will assist the jury in understanding and applying limited-use directions.

6.29 While the Commission has not come to a provisional view on this issue, it has identified the following options for reform on which it seeks submissions:

6-1 The *Evidence Act 1977* (Qld) should be amended to provide that, if evidence is admitted on a limited basis, it is admitted for all purposes and no limited-use direction is required.

6-2 Alternatively, the Criminal Code (Qld) should be amended to provide that:

653 See [3.166]–[3.174], Proposals 3-3, 3-4 above.

654 JD Lieberman and J Arndt, 'Understanding the limits of limiting instructions: Social psychological explanations for the failures of instructions to disregard pretrial publicity and other inadmissible evidence' (2000) 6(3) *Psychology, Public Policy, and Law* 677, 704–5.

655 RK Cush and J Goodman-Delahunty, 'The influence of limiting instructions on processing and judgments of emotionally evocative evidence' (2006) 13(1) *Psychiatry, Psychology and Law* 110, 112–13.

(a) both the prosecution and defendant must give advance notice of any evidence it intends to adduce for a limited purpose as part of the pre-trial disclosure regime proposed by the Commission in Proposal 3-1;

(b) both the prosecution and the defendant must inform the judge before, or immediately after, the limited-use evidence is heard which directions they wish the judge to give, if any, at the time the evidence is heard;

(c) the judge is not obliged to give any limited-use direction at the time the evidence is heard that has not been requested unless, in the judge's view, it is nonetheless required in order to ensure a fair trial; and

(d) the judge is ordinarily bound to give a limited-use direction at the time the evidence is heard that has been requested by either party unless there is good reason not to in order to ensure a fair trial.

PROPENSITY EVIDENCE — UNCHARGED ACTS

6.30 Propensity evidence directions, including those required in relation to evidence of uncharged acts given in sexual offence cases, were discussed at [4.68]–[4.79] and [4.114]–[4.120] of the Issues Paper. They were also discussed at some length in the VLRC's Consultation Paper[656] and also in the NSWLRC's Consultation Paper.[657]

6.31 Propensity evidence is evidence showing that the accused has a propensity or disposition to commit crime, or crimes of the sort charged, or that the accused is the sort of person likely to have committed the crime charged. It is sometimes referred to as, and encompasses, 'similar fact' evidence. It also includes 'relationship evidence', or evidence of uncharged discreditable acts adduced as context and background to the offences charged.

6.32 Because of the risk of prejudice to the accused arising from such evidence,[658] the common law has, as a general policy, excluded propensity evidence unless it satisfies a strict test of admissibility requiring a high degree of probative

656 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) ch 3.

657 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [8.2]–[8.18], [8.43]–[8.47].

658 The perceived danger is that the jury may not only over-estimate the probative value of the evidence — reasoning that the defendant is guilty because he or she is the kind of person likely to have committed such an offence — but also that the jury may seek to punish the defendant for past misconduct. See, for example, G Flatman and M Bagaric, 'Non-similar fact propensity evidence: Admissibility, dangers and jury directions' (2001) 75 *Australian Law Journal* 190, 199.

value.[659] The test, enunciated by the High Court in *Pfennig v The Queen*,[660] requires that there is no reasonable view of the evidence that is consistent with the innocence of the accused.[661]

6.33 The common law position — which applies subject to some statutory modifications in Queensland[662] — remains, however, somewhat uncertain with the most recent High Court examination in *HML v The Queen*[663] having 'done little to resolve the tensions in this area'.[664] The position was recently summarised by Associate Professor David Hamer of the University of Queensland Law School:

> As far as the scope of the rule is concerned, there are at least two competing views. The broader interpretation is that evidence is subject to exclusion where it *reveals* the defendant's propensity for misconduct. The narrower interpretation is that evidence is subject to exclusion where it is adduced for the *purpose* of showing the defendant's propensity for misconduct. On this narrow view, it is propensity reasoning that is excluded, rather than propensity evidence per se.
>
> … Prior to *HML* the narrower interpretation may have been a little more dominant. This approach was, for example, adopted in the uniform evidence law. The tendency rule in s 97 provides that 'evidence of the … conduct of a person … is *not admissible to prove* that a person has … a tendency … to act in a particular way'.
>
> On this view, relevant evidence which only incidentally reveals a defendant's propensity for misconduct — that is, where the defendant's propensity is not a step in the reasoning from the evidence — is not subject to exclusion.[665] It can gain admission without satisfying the *Pfennig* admissibility test. For example, if one prison inmate is charged with the assault of another prison inmate, the prosecution can adduce evidence of this notwithstanding that it shows the defendant has been convicted of criminal conduct. Or, if the prosecution case is that the defendant murdered the victim because the victim was blackmailing the defendant, the prosecution will not be precluded from adducing evidence of this to show the defendant's motive. Of course, the evidence will still be subject to the trial judge's general powers to exclude and limit needlessly prejudicial evidence.
>
> On the narrow interpretation, the exclusion applies to evidence admitted for the purpose of propensity reasoning. In *Pfennig* the prosecution case was that Michael Black's murderer was a particular variety of paedophile. The prosecu-

659 See, for example, *Pfennig v The Queen* (1995) 182 CLR 461, 512–3 (McHugh J). In England and New Zealand, the starting point is that such evidence is generally admissible (though exclusions apply): *Criminal Justice Act 2003* (Eng) ss 101, 103; *Evidence Act 2006* (NZ) s 40.

660 (1995) 182 CLR 461.

661 *Pfennig v The Queen* (1995) 182 CLR 461, 481–83 (Mason CJ, Deane and Dawson JJ); *Phillips v The Queen* (2006) 225 CLR 303 [9]. See also *HML v The Queen* (2008) 235 CLR 334 [41] (Gummow), [46], [59]–[61] (Kirby J), [106], [113]–[117] (Hayne J). For an application of the test, see *R v Pretorius* [2009] QCA 58 [27]–[46] (Muir J).

662 See *Evidence Act 1977* (Qld) ss 132A, 132B.

663 (2008) 235 CLR 334.

664 David Hamer, 'The admissibility and use of relationship and propensity evidence after *HML v The Queen* (2008) 235 CLR 334' (Paper presented at University of Queensland Current Legal Issues Seminar, Brisbane, 30 July 2009) 1.

665 Examples discussed in *HML* (2008) 245 ALR 204, 213 (Gleeson CJ); Andrew Palmer, 'Propensity, Coincidence and Context: The Use and Admissibility of Extraneous Misconduct Evidence in Child Sexual Abuse Cases' (1999) 4 *Newcastle Law Review* 46, 50–1.

> tion adduced evidence of defendant's prior conviction precisely to show that he was a paedophile of that variety. And then, because he was one of the few people present at the nature reserve from which Michael disappeared, and he had shown interest in Michael, this suggested that he was the paedophile who had abducted Michael. Clearly, the defendant's propensity for abducting and sexually assaulting boys was central to the use of the evidence.[666] (emphasis and note in original)

6.34 Under this 'narrow' view, the exclusionary rule will apply to evidence adduced for a propensity purpose unless it 'tends to show that the accused is guilty … for some reason other than that he or she has committed crimes in the past or has a criminal disposition'[667] and meets the test in *Pfennig*. On this basis, evidence of prior criminal or discreditable conduct may be adduced to show the defendant's modus operandi, to establish the accused's identity, or to demonstrate the defendant's sexual interest in the complainant. In these circumstances, a limited form of propensity reasoning is permitted.

6.35 Evidence that incidentally reveals prior criminal or discreditable conduct may also be adduced for non-propensity purposes, for example, to rebut evidence of the defendant's good character[668] or as 'relationship' or 'context' evidence. As noted in the quote above, one view is that such evidence is not subject to the general exclusionary rule and will not need to meet the strict test of admissibility in *Pfennig*. Evidence of uncharged acts in sexual offence trials is often admitted, for example, to provide context for the offences charged:

> It would be artificial for the complainant to be confined simply to relating the charged offences. If the jury were forced to view these as isolated events, in a vacuum, questions would be raised that could unfairly damage the complainant's credibility.[669] Why did the complainant submit? Why didn't the complainant report the matter earlier? Why did the defendant have the confidence that the complainant would submit and not complain? The complainant's evidence, confined to the few charged occasions, may appear totally implausible. Relationship evidence answers these questions by providing necessary background and context.[670] It may reveal, for example, how the defendant groomed the child complainant, gradually moving from affectionate touching to sexual touching, and conditioning her so that she accepts as normal what is a wholly inappropriate sexual relationship.[671] (notes in original)

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666 David Hamer, 'The admissibility and use of relationship and propensity evidence after *HML v The Queen* (2008) 235 CLR 334' (Paper presented at University of Queensland Current Legal Issues Seminar, Brisbane, 30 July 2009) 3.

667 *Pfennig v The Queen* (1995) 182 CLR 461, 481 (Mason CJ, Deane and Dawson JJ).

668 As to the circumstances in which the prosecution may cross-examine the accused as to his or her bad character, see *Evidence Act 1977* (Qld) s 15(2), (3).

669 See eg *R v Nieterink* (1999) 76 SASR 56, 66 (Doyle CJ) ('*Nieterink*'); *R v Vonarx* [1999] 3 VR 618 ('*Vonarx*'), 625; *R v Beserick* (1993) 30 NSWLR 510, 515.

670 It appears questionable whether relationship is required to serve these purposes where the defendant faces multiple charges. In *Loguancio* (2000) 1 FR 235, for example, there were almost 30 charges, and yet the trial judge still suggested that uncharged acts had been adduced to 'enable the evidence relating to the charged alleged offences to be placed into a more complete and realistic context … to appreciate the significance of what may otherwise seem merely to be an isolated act or isolated acts of sexual activity …': at 238.

671 David Hamer, 'The admissibility and use of relationship and propensity evidence after *HML v The Queen* (2008) 235 CLR 334' (Paper presented at University of Queensland Current Legal Issues Seminar, Brisbane, 30 July 2009) 3–4.

6.36 In *HML v The Queen*,[672] the High Court examined the admissibility of such evidence. The Court was divided.

6.37 Gummow, Kirby and Hayne JJ upheld the 'broad' approach, holding that such evidence is admissible only if it is used as a step in reasoning toward guilt as when, for example, the evidence is used to demonstrate that the accused had a sexual interest in the complainant and was willing to act on it thus making it more likely that the accused committed the offence charged.[673] In those circumstances, specific propensity, or probability reasoning, is permitted if the jury is satisfied of the truth of the evidence beyond reasonable doubt.[674] The jury may need to be warned, however, against general, or pure, propensity reasoning that, because the accused is a bad sort of person, he or she is the kind of person likely to have committed the offence charged.[675]

6.38 Gleeson CJ, Crennan and Kiefel JJ, on the other hand, endorsed the 'narrow' view and considered that evidence of uncharged sexual acts is admissible for non-propensity purposes, notably as evidence of context to explain or render intelligible the complainant's accusations or other aspects of the charged offence.[676] In those circumstances, the jury would need to be directed as to the limited use to which the evidence may be put and against the use of propensity reasoning.[677]

6.39 Heydon J did not decide the issue, so the case provides no authoritative position.[678]

6.40 Hayne J's preference for the general exclusion of relationship evidence was premised on the risk of misuse of the evidence and his view that 'uses of the evidence cannot be segregated in the manner suggested'.[679] Against the blanket exclusion of such evidence, however, is the recognition that where the relationship evidence comes from, and relates to, the complainant, the risk may be much lower than with evidence of other misconduct:

> In *Wackerow*,[680] for example, Macrossan CJ and Byrne J suggested that the risk is lower because the propensity evidence and the evidence of the offence come from the same source — the complainant. Both hinge on the complainant's credibility. The jury is likely to focus on this as the key issue. The jury is unlikely to be distracted and overrate the complainant's credibility merely because she has made additional uncharged allegations. A jury is far more likely to overrate *independent* evidence that *demonstrates* the defendant's abhor-

672 (2008) 235 CLR 334.

673 *HML v The Queen* (2008) 235 CLR 334 [41] (Gummow), [46], [59]–[61] (Kirby J), [106], [113]–[117] (Hayne J).

674 Ibid [29]–[32] (Gleeson CJ), [132] (Hayne J), [46], [61], [63] (Kirby J), [477] (Crennan J), [506] (Kiefel J).

675 For example, ibid [62] (Kirby J).

676 Ibid [22]–[24], [27] (Gleeson CJ), [425], [455], [466]–[467] (Crennan J), [500], [505], [513] (Kiefel J). In their view, the test in *Pfennig* does not apply when evidence is used for such purposes even if it incidentally reveals a propensity to commit discreditable acts but is not relied on for that purpose; the general admissibility test inquiring whether the probative value outweighs the prejudicial effect of the evidence is to be applied.

677 Ibid [26] (Gleeson CJ), [502] (Kiefel J).

678 Ibid [289], [335].

679 Ibid [116].

680 [1998] 1 Qd R 197, 201.

> rent propensity, such as the prior child sexual assault conviction in *Pfennig*.[681] (emphasis and note in original)

6.41 Whatever the basis on which propensity evidence is admitted, it remains that the jury may need to be warned against unfair propensity reasoning and about the uses to which it may put the evidence.[682] The directions and warnings required will depend on the nature of the evidence and the purposes for which it was introduced.[683]

6.42 Propensity evidence directions have been noted as particularly problematic examples of limited-use directions.[684] As the VLRC commented in its Consultation Paper:

> The effect of directions about propensity is that the jury is being told not to reason in the way that the evidence is most probative, leading to overly intellectualised and sophisticated reasoning about how the jury can permissibly use the evidence.[685]

6.43 Such directions also draw somewhat 'artificial and incomprehensible' distinctions between permissible and impermissible propensity reasoning[686] — for example, where the evidence may be used to reason that, because the accused committed strikingly similar crimes in the past, it is likely that he or she is the person who committed the offence charged, but may not be used to reason that because the accused committed other offences, he or she is the kind of person who is likely to be guilty. Such directions have been criticised as 'contradictory'.[687] They may also have the opposite effect to that intended:

> It seems to be accepted that a judicial warning in such circumstances will remove the risk that the jury will use the evidence improperly. Others have suggested however that, by drawing attention to an impermissible line of reasoning, the trial judge may be encouraging the very line of reasoning that he or she is attempting to prevent.[688] (notes omitted)

6.44 One of the questions raised for consideration in the VLRC's Consultation Paper was whether it was appropriate to simplify the content of propensity directions.[689] In particular, the VLRC noted the following proposed approach to the simplification of propensity warnings as a possible model for reform:

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681 David Hamer, 'The admissibility and use of relationship and propensity evidence after *HML v The Queen* (2008) 235 CLR 334' (Paper presented at University of Queensland Current Legal Issues Seminar, Brisbane, 30 July 2009) 5.

682 Eg, *BRS v The Queen* (1997) 191 CLR 275, 328–32 (Kirby J).

683 Eg, *R v Pretorius* [2009] QCA 58 [61]–[63] (Muir J).

684 See Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [4.71]–[4.72].

685 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [3.136].

686 Ibid.

687 David Hamer, 'The admissibility and use of relationship and propensity evidence after *HML v The Queen* (2008) 235 CLR 334' (Paper presented at University of Queensland Current Legal Issues Seminar, Brisbane, 30 July 2009) 12, 14.

688 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [8.45].

689 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [3.143]–[3.149].

The approach suggested by Leach

3.144 One American writer suggests we acknowledge that evidence of 'other acts'[690] by the accused can be relevant to the question of whether that person actually committed the alleged act, and trust that juries are capable of more sophisticated reasoning and assessment of probative value of evidence in their reaction and analysis of human behaviour.[691] He argues that juries are capable of understanding that the fact that the accused has committed similar acts previously adds to the information, and should be discussed in the context of all the other evidence. He also argues that jurors are capable of following a judicial instruction to not punish the accused for earlier conduct, and only use it as one factor in determining how the accused acted in this case.

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

3.146 The model suggested would contain the following points:

- Evidence that the accused has committed other similar acts may be considered in determining whether they in fact committed the charged acts.
- Such evidence does not conclusively answer the question — it is one fact to be considered in combination with all the other facts.
- It would be improper to decide simply that 'because he did it before he probably did it again' without considering all the other evidence.
- To ensure that the accused is not unfairly characterised, the jury must be satisfied of the other acts and if so, whether that factor makes it more or less likely that they committed any charged act.[692]
- The jury must not seek to punish accused for any other act — he is tried only for the charges against him.
- Evidence of other acts must be considered only for determining whether he committed the present charges.[693] (notes in original)

6.45 Alternatively, the VLRC asked whether the need to give propensity warnings should be removed altogether and, if so, whether this would necessitate reconsideration of the admissibility of propensity evidence.[694]

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

691 Ibid 850, 852.

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

693 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [3.144]–[3.146].

Submissions

Propensity evidence

6.46 A few of the respondents to the Commission's Issues Paper addressed the possibility of reform of propensity evidence directions.

6.47 One judge of the District Court of Queensland submitted that propensity evidence warnings should be reconsidered:

> The general prohibition on evidence about a propensity to commit an offence needs to be reconsidered. The High Court's rigid application of the need to give propensity warnings, with few exceptions, is the source of much difficulty in practice. The warnings are counter-intuitive. As paras 4.71 and 4.72[695] point out, as a matter of common sense the evidence is often most probative, and instructions about its use for a limited purpose are difficult to explain to a jury.
>
> For example, in giving a direction about uncharged discreditable acts (the HML directions), it is necessary to warn the jury that they cannot use the evidence in a general way to reason that the accused might have committed the offence. However, at the same time, they are told that it may be taken into account to show that the accused had an improper sexual interest in the particular complainant.
>
> …
>
> In my view, the general prohibition on the use of propensity evidence should be abolished. Legislation is needed, to rescue the law from an unwise course that was adopted because of a fear that ignorant jurors would give undue weight to propensity evidence. The modern jury should be able to take it into account.[696] (note added)

6.48 The same respondent has suggested that the position would be improved by the adoption of Rule 414(a) of the United States Federal Rules of Evidence,[697] or more so by the enactment in Queensland of a position similar to section 398A of the *Crimes Act 1958* (Vic),[698] which reads:

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694 Ibid.

695 Paragraphs [4.71]–[4.72] of the Issues Paper: Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) read (notes omitted):

> 4.71 Warnings against propensity reasoning have been criticised, however, as being somewhat over-intellectualised in that 'the jury is being told not to reason in the way that the evidence is most probative'.
>
> 4.72 Moreover, any attempt to instruct a jury to use a given piece of evidence for a limited use only is asking it to do something that lawyers find hard as it is an inherently difficult and artificial intellectual exercise.

696 Submission 10. A review of the sort advocated by this respondent is beyond the scope of the Commission's present Terms of Reference.

697 That Rule reads:

> In a criminal case in which the defendant is accused of an offence of child molestation, evidence of the defendant's commission of another offence or offences of child molestation is admissible and may be considered for its bearing on any matter to which it is relevant.

698 Submission 10A.

> **398A Admissibility of propensity evidence**
>
> (1) This section applies to proceedings for an indictable or summary offence.
>
> (2) Propensity evidence relevant to facts in issue in a proceeding for an offence is admissible if the court considers that in all the circumstances it is just to admit it despite any prejudicial effect it may have on the person charged with the offence.
>
> (3) The possibility of a reasonable explanation consistent with the innocence of the person charged with an offence is not relevant to the admissibility of evidence referred to in subsection (2).
>
> (4) Nothing in this section prevents a court taking into account the possibility of a reasonable explanation consistent with the innocence of the person charged with an offence when considering the weight of the evidence or the credibility of a witness.
>
> (5) This section has effect despite any rule of law to the contrary.

6.49 Nonetheless, anecdotal comments in submissions from some respondents who have served on juries suggest that care should be taken when estimating the skill and care that jurors exhibit during their deliberations:

> The issues that concerned me following my first experience on this trial were as follows:
>
> - There is no attempt to assess jurors on their respective understandings re issues such as: what is a fact, hearsay, opinion etc. all terms associated with court hearings.
>
> …
>
> - The inability of jurors to understand / accept the full meaning and impact of a Judge's directive to a jury.
>
> …
>
> At this stage, the dissenting juror announced to all the panel members that he/she was a government social worker and the concern was that the defendant 'looked' as if 'he' could do the alleged crime. Further discussions were then commenced re any evidence etc that could support 'the looks' decision. The emotional stress erupted in the jury room when the juror was asked if any of the panel members 'looked' as if they could do a similar crime [blackmail and threatened kidnapping]. Following a lengthy de-stressing period a decision was finalized.[699]

6.50 Some of the respondents to the VLRC's Consultation Paper also commented on propensity directions. Associate Professor John Willis noted that:

> Jury directions distinguishing between illegitimate propensity reasoning and legitimate propensity reasoning are almost certainly guaranteed to confuse and mystify jurors — to say nothing of nearly everyone else.

699 Submission 2. See also Submission 5.

> In fact in many cases, jury directions which distinguish between the actual count and other alleged offending (uncharged acts) are effectively unreal.
>
> However, as long as uncharged acts are presented as part of the prosecution case, it is hard to see what jury directions are appropriate. Perhaps the best is to insist on proof beyond reasonable doubt.[700]

6.51 A judge of the County Court of Victoria also submitted that the directions in relation to propensity evidence should be simplified.[701]

6.52 The concern about admission of prejudicial propensity evidence — and the option to deal with the issue at the time of the tender of the evidence — was noted, albeit obliquely, in one submission to the VLRC:

> Propensity evidence is an uncertain area. It is appropriate for consideration for legislative definition including definitions of warnings. However, it is important that the rights of the accused are safeguarded by a proper distinction being made between true evidence and propensity or mere evidence of bad character and that juries are warned not to jump to conclusions. [Victoria Legal Aid] therefore supports the proposal for judicial warnings to the jury on the propensity evidence — particularly in relation to the limitation of such evidence.[702]

6.53 Stephen Odgers SC also commented in relation to propensity evidence that:

> The [Uniform Evidence Law] clarifies some of the current confusion under the common law in respect of 'propensity evidence'. However, confusion still exists regarding proper directions. If such dangerous evidence is admitted notwithstanding the danger of unfair prejudice, it is imperative that proper warnings be given to the jury regarding how it may, and how it may not, be used. Of course, I favour simplification of those directions to make them comprehensible. I also repeat the points I made in the editorial I wrote for the Criminal Law Journal (2007) 31 Crim LJ 269.[703] I think that, once [Uniform Evidence Law] becomes the law in Victoria, an attempt should be made by NSW and Victorian judges to agree on appropriate simple directions. The current NSW Bench Book directions are a good start.[704] (note added)

Uncharged acts

6.54 Apart from the comments of a District Court Judge noted at [6.46] above, none of the submissions made to the Commission's Issues Paper addressed the directions given on uncharged acts, although some of respondents to the VLRC's Consultation Paper referred to this issue.

6.55 In his submission to the VLRC's Consultation Paper, Stephen Odgers SC had this to say about evidence of uncharged acts in sexual offence cases:

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700 Associate Professor John Willis, Submission to the Victorian Law Reform Commission, 16 December 2008, 13.

701 Judge MD Murphy, Submission to the Victorian Law Reform Commission, 5 February 2009, 4.

702 Victoria Legal Aid, Submission to the Victorian Law Reform Commission, 9 December 2008 [2.7].

703 See [6.56] below.

704 Stephen Odgers SC, Submission to the Victorian Law Reform Commission, 12 November 2008, 5.

> I share the view that *HML* has not been a helpful development. I continue to hold the views I expressed in an editorial I wrote for the Criminal Law Journal (2007) 31 Crim LJ 269. In particular, I believe that juries should never be asked to consider whether uncharged acts actually occurred unless those acts are being relied on as evidence of guilt of the offence(s) charged. I also continue to hold the view I expressed in the editorial that a simple solution to the problem of directions in respect of 'indispensable' intermediate facts is to say to a jury in all circumstantial cases: 'If you ultimately came to the view that some intermediate fact is essential to a finding of guilt beyond reasonable doubt, I direct you that you cannot find the accused guilty unless you are satisfied of that intermediate fact beyond reasonable doubt.' Such a general direction would avoid the need to agonise over whether, as a matter of strict logic, the fact is 'indispensable' or whether, even if it is not, it must still be proved beyond reasonable doubt.[705]

6.56 Odgers' editorial in the *Criminal Law Journal* to which he referred in his submission — which appeared prior to the High Court's decision in *HML v The Queen* — made a number of points about the admissibility of propensity evidence in the context of sexual offence cases:

- While there are obvious potential dangers with such evidence, 'whatever the use that is sought to be made of it by the prosecution', its probative value may nevertheless warrant its admission. Jury directions are commonly considered 'sufficient to ameliorate any such dangers'.[706]

- The first step in determining the admissibility of such evidence is to determine the use the prosecution seeks to make of it: is it relevant to the credibility of a witness, or is it directly relevant to a fact in issue?[707]

- As to the first type of use, 'relationship' evidence might be used to rebut an attack or meet concerns about the complainant's credibility or the apparent implausibility of the complainant's allegations. If it is admitted for this purpose, 'it would be essential to make clear to the jury that the evidence may not be used as evidence of guilt'. The jury should not be asked to consider whether the uncharged conduct actually took place because of the danger the jury would use the evidence as proof of guilt.[708]

- As to the second type of use, where the evidence is led as circumstantial evidence of guilt, 'it will be necessary to isolate the precise process or processes of reasoning relied upon by the prosecution'. If the evidence relied on for this purpose is independent of the complainant, directions will 'plainly enough' be required as to the processes of reasoning for which it has been admitted. Further, the jurors should arguably be directed that, if they consider the intermediate fact to

705 Ibid 3–4. Odgers' submission was specifically endorsed by the Queensland Law Society and the Bar Association of Queensland in their joint submission to this Commission's Issues Paper, although without specific reference to limited-use directions: Queensland Law Society and Bar Association of Queensland, Submission 13, 19 June 2009.

706 S Odgers, 'Editorial: "Relationship" evidence' (2007) 31(5) *Criminal Law Journal* 269, 269.

707 Ibid.

708 Ibid 269–70.

which the evidence is directed is essential to a finding of guilt, they should not proceed to a verdict of guilty 'unless satisfied of that intermediate fact beyond a reasonable doubt'.[709]

- Only after the purpose of the tender is isolated can the admissibility test be applied. One view is that the *Pfennig* test applies only if the evidence is led for a propensity purpose. This should arguably encompass evidence 'said to show "sexual attraction" for the complainant' since it shows a tendency to have a particular state of mind and seeks to infer conduct in conformity with that tendency on a particular occasion.[710]

6.57 Whatever the correctness or appeal of Odgers' approach, the analysis of any case involving intermediate and ultimate factual decisions that the jury must make only serves to highlight that those facts, and the varying standards of proof that attach to them, must be set out to the jury in the clearest possible terms, and that concise written summaries of them, probably with some diagrammatic or graphic explanation, are perhaps essential. However, such an analysis also highlights the complexity of directions of this sort, and the fine distinctions that jurors are directed to make. Even the wording suggested by Odgers in the passage quoted in [6.55] above demonstrates the mental agility that these directions demand of jurors.

6.58 Concern about the High Court's decision in *HML v The Queen*[711] was shared by Patrick Tehan QC in his submission to the VLRC:

> I agree that there is a lack of clear direction from higher courts on uncharged acts. The case of *HML* has not helped. The cases of *R v Sadler* [2008] VSCA 198 (at [59] to [67]) and *R v McKenzie-Harg* [2008] VSCA 2006 have sought to clarify the situation in Victoria. Now a beyond reasonable doubt direction should be given on this evidence. But one can imagine of further fertile ground; for example, does the jury have to be satisfied beyond reasonable doubt of each uncharged act or simply of the proposition that the accused had a sexual interest in the complainant?[712]

VLRC's recommendations

6.59 In its Final Report, the VLRC recommended that the essential elements of the directions to be given on propensity reasoning should be included in its proposed jury directions statute[713] and recommended the adoption of the approach suggested by Leach:

> 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

709 Ibid 270.

710 Ibid 271.

711 (2008) 235 CLR 334.

712 Patrick Tehan QC, Submission to the Victorian Law Reform Commission, 26 November 2008 [1].

713 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) 14, [51.02]–[5.117], Rec 13.

> warning a jury about propensity reasoning, adopting and suitably modifying the model suggested by Leach.[714]

QLRC's options for reform

6.60 The area of propensity evidence is fraught with difficulties and uncertainty. It is not surprising that, in trying to satisfy the complicated, confusing requirements imposed by appellate courts, trial judges may give complicated, confusing directions to juries. It is overly optimistic to expect jurors to appreciate the distinctions drawn by the law in this area; attempts to impose such subtle and difficult distinctions on juries' use of the evidence would seem to do no more than add confusion rather than clarity to their task. If jurors are to be assisted, the aim should be to ensure as far as possible that juries are presented with evidence they can work with and are not unreasonably constrained in the way they go about evaluating and weighing it.

6.61 Where evidence has been led for a propensity purpose, warnings distinguishing between permissible and impermissible propensity reasoning seem particularly artificial and unnecessarily complicated. Further, if the *Pfennig* test has been met — that there is no reasonable view of the evidence, taken together, that is consistent with the innocence of the defendant — it is arguably safe to leave the evaluation of the evidence to the good sense of the jury. Juries should, wherever possible, be left to apply their common sense and life experience in evaluating and weighing the evidence appropriately without attempting to restrict them in that task.

6.62 In other cases, where propensity evidence is admitted for a non-propensity purpose, such as where it goes to credit, a reiteration of the prosecution's burden of proof in relation to the offences charged should perhaps suffice: if the evidence carries too high a risk of prejudice in those circumstances, it should probably be excluded. Indeed, excluding the evidence, rather than admitting it and expecting juries to limit their use of it, may be the better approach if the evidence is thought to carry such a high risk of prejudice and misuse by the jury as to warrant jury directions.[715] As noted earlier in this chapter, empirical research suggests that the effectiveness of limited-use directions is more limited than the law often assumes them to be.[716]

6.63 Kirby J pointed to some of the competing tensions informing the admission of propensity evidence in *HML v The Queen*.[717] On the one hand, a greater trust in juries might mean a greater willingness to admit potentially prejudicial propensity evidence:

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714 Ibid Rec 39. The model suggested by Leach is described at [6.44] above.

715 See, for example, D Boniface, 'The common sense of jurors vs the wisdom of the law: Judicial directions and warnings in sexual assault trials' (2005) 28(1) *University of New South Wales Law Journal* 261, 267 in which the author points out that while judicial directions are used to save items of evidence from discretionary excusal, the risk of unfair prejudice is underestimated if judicial directions are ineffective.

716 See [6.7], [6.19]–[6.20] above.

717 *HML v The Queen* (2008) 235 CLR 334 [56](6).

> The retention of jury trial for most contested allegations of such offences in Australia suggests a continuing acceptance of the need to entrust decision-making in such cases to 'the ordinary experiences of ordinary people'.[718] Juries resolve disputed issues and distinguish false or unproved accusations from those which they consider to have been proved to the requisite standard by applying their collective experience of life and of their fellow human beings.[719] In recent years, the House of Lords, in *Director of Public Prosecutions v P*[720] and *R v H*,[721] has demonstrated a greater willingness to trust juries with sensitive evidence than, for example, was apparent in the earlier case of *Boardman*.[722] Thus, Lord Griffiths, in the case of *H*,[723] suggested that a 'less restrictive form' of the rules excluding relevant evidence was appropriate given today's 'better educated and more literate juries'. So far as the common law of Australia is concerned, the result may also be a greater willingness in this country to permit jury access to relevant but sensitive, and potentially prejudicial, evidence.[724] The fact that potential prejudice may be susceptible of limitation through careful directions and warnings is an additional factor that tends to favour reposing greater trust in juries in cases such as the present.[725] (notes in original)

6.64 On the other hand, entrusting juries with such evidence may, somewhat ironically, necessitate an even greater number of jury directions:

> Although criminal appeals are necessarily conducted on the assumption that the jury understand and observe directions given to them about the law, there are risks, once certain evidence becomes known to the jury, that they may treat that evidence as disclosing a general disposition on the part of the accused to act as alleged in the charges. To the extent that the common law retreats from rules withholding particular evidence from the jury, and to the extent that the law permits the jury to receive and consider such evidence although not the subject of any charge, there may be a commensurate need to enlarge the judicial obligation to direct and warn the jury about the dangers of pure propensity reasoning.[726]

6.65 Indeed, in jurisdictions that have adopted a more flexible approach to admissibility, the need for jury directions remains.[727]

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718 *Doney v The Queen* (1990) 171 CLR 207 at 214.

719 cf *R v Best* [1998] 4 VR 603 at 611 per Callaway JA.

720 [1991] 2 AC 447.

721 [1992] 2 AC 596.

722 [1975] AC 421. See reasons of Crennan J at [443].

723 [1995] 2 AC 596 at 613.

724 cf reasons of Crennan J at [473].

725 *HML v The Queen* (2008) 235 CLR 334 [56](6).

726 Ibid [57](6).

727 A number of jurisdictions have modified the common law test of admissibility for propensity evidence: Uniform Evidence Acts ss 97, 98; *Evidence Act 1906* (WA) s 31A; *Evidence Act 2006* (NZ) ss 40, 43; *Criminal Justice Act 2003* (Eng) ss 101, 103. In those jurisdictions, propensity evidence is admissible, if it meets the requisite test, for specific propensity purposes. Nevertheless, warnings to the jury against 'mere' propensity reasoning may still be required as are limited-use directions with respect to propensity evidence admitted for non-propensity purposes: see, generally, Thomson Reuters Online Service, SJ Odgers, *Uniform Evidence Law*, 'Jury directions' [1.3.7400] (at 2 September 2009); Lexis Nexis Online Service, I Weldon, *Criminal Law WA*, 'Propensity warning' [30,167.10] (at 2 September 2009); Law Commission (New Zealand), *Disclosure to Court of Defendants' Previous Convictions, Similar Offending, and Bad Character*, Report 103 (2008) [3.93], [4.24]; *R v Johnson* [2009] 2 Cr App R 7 [22]–[25] (Kay LJ).

6.66 The problems of the fraught jury directions in this area are so intertwined with the conceptual and practical difficulties associated with the primary question of the admissibility of this evidence that to seek to tackle these problems with jury directions as the starting point is to misconceive the nature of the problems and to mis-identify the source of any likely solutions.[728]

In *R v J [No 2]*, Callaway J stated:

> a price has to be paid every time it is held that yet another direction is mandatory. The price must be paid with good grace if that is necessary for the attainment of justice, but not otherwise.[729]

> In order to avoid unnecessarily confusing and distracting juries with inapposite directions, courts need to take a more exacting and rigorous approach to determining the precise dangers that are inherent with propensity evidence rather than instinctively importing directions that have been tailored to accommodate relevantly different circumstances.[730] (notes in original)

6.67 One option for reform is to amend the rules, and effect, of the admissibility of propensity evidence. Under the *Evidence Act 2006* (NZ), for example, the recognised purpose of all propensity evidence is to show the person's propensity to act in a particular way or to have a particular state of mind.[731] Such a recognised purpose, whenever propensity evidence is admitted, should reduce the need for, or at least the scope of, propensity warnings. For example, rather than admitting evidence of uncharged acts as evidence of relationship or context, distinct from evidence of propensity, the legislation recognises that the evidence is admitted for a propensity purpose (as well as any other purpose for which it may be relevant). The need to direct on the limited purpose for which it was admitted and to warn against specific propensity reasoning is thus removed. However, a general propensity warning, identifying the issue to which the evidence is said to relate, may still be required.[732] Nevertheless, the Commission considers that much of the current complexity involved with propensity warnings could be reduced by similar legislative amendment in Queensland.

6.68 Much the same outcome might be achieved, however, by adopting an approach similar to that recommended by the VLRC. The Leach model direction,[733] recommended by the VLRC for inclusion in its jury directions statute, simplifies the content of the warning by removing the distinctions between specific and general propensity purposes and between propensity and non-propensity purposes. The model direction entrusts juries with the ability to consider and weigh the evidence

728 G Flatman and M Bagaric, 'Non-similar fact propensity evidence: Admissibility, dangers and jury directions' (2001) 75 *Australian Law Journal* 190, 205.

729 [1998] 3 VR 602 at 643.

730 See *R v Loguancio* [2000] VSCA 33 (24 March 2000) at [24] per Callaway JA ('directions to juries should be framed by trial judges, and evaluated by intermediate appellate courts, with a view to a workable system of justice. … If the adversarial system is to remain workable, juries must be trusted to perform their role as the triers of fact … and trial judges must retain flexibility').

731 *Evidence Act 2006* (NZ) s 40(1). Such evidence is admissible by the prosecution against the defendant 'only if the evidence has a probative value in relation to an issue in dispute in the proceeding which outweighs the risk that the evidence may have an unfairly prejudicial effect on the defendant': s 43(1).

732 See Law Commission (New Zealand), *Disclosure to Court of Defendants' Previous Convictions, Similar Offending, and Bad Character*, Report 103 (2008) [3.93].

733 See [6.44] above.

appropriately, after having been warned against general propensity reasoning and the need to consider the evidence as evidence of one fact among many. It may be that the current position is so complex and difficult as to warrant legislative intervention in Queensland similarly limiting the nature of the propensity warnings.

6.69 The Commission is also of the view that juries may be assisted by the use of integrated directions and structured factual question trees.[734] In addition, the particular dangers attending propensity evidence are such that propensity warnings, when required, may best be given wherever possible at the time the evidence is heard, although the opportunity and desirability of so doing will obviously depend on the circumstances of the case.[735]

6.70 It may be that these measures, without legislative amendments, will provide sufficient assistance to the jury in understanding the inter-relationship of the law and evidence and the lines of reasoning that it should and should not adopt in answering the questions put before it where propensity evidence has been led.

6.71 The Commission has therefore identified the following options for reform on which it seeks submissions:

6-3 The *Evidence Act 1977* (Qld) should be amended to provide that the recognised purpose of all propensity evidence is to show a person's propensity to act in a particular way or to have a particular state of mind.

6-4 Alternatively, or in addition, the *Evidence Act 1977* (Qld) should be amended to provide that a direction to the jury in relation to propensity evidence should contain the following points:

(a) Evidence that the defendants have committed other similar acts may be considered in determining whether they in fact committed the charged acts.

(b) Such evidence does not conclusively answer the question — it is one fact to be considered in combination with all the other facts.

(c) It would be improper to decide simply that 'because the defendants did it before they probably did it again' without considering all the other evidence.

(d) To ensure that the defendant is not unfairly characterised, the jury must be satisfied of the other acts and, if so, whether that factor makes it more or less likely that the defendant committed any charged act.

734 See [4.46]–[4.58], Proposal 4-1 above.

735 See [6.14]–[6.29] in relation to the reform options for limited-use directions generally.

(e) The jury must not seek to punish the defendants for any other act — the defendants are tried only for the charges against them.

(f) Evidence of other acts must be considered only for determining whether the defendant committed the present charges.

6-5 Alternatively, or in addition, the Criminal Code (Qld) should be amended, as is provided for in Proposal 6-2 above, to provide that propensity warnings should wherever possible be given at the time the evidence is heard.

POST-INCIDENT CONDUCT WARNINGS (CONSCIOUSNESS OF GUILT)

6.72 Consciousness of guilt directions were discussed in the Issues Paper at [4.63]–[4.67]. They were also considered at some length by the VLRC in chapter 4 of its Consultation Paper[736] and in the NSWLRC's Consultation Paper.[737]

6.73 While evidence of lies may be relevant to a defendant's credit, post-incident conduct such as lying, flight or concealment may also be used as circumstantial evidence of guilt. In such cases, the jury must be satisfied that the defendant's lie reveals a knowledge of the offence and that it was told because of a realisation of guilt. An Edwards direction[738] — warning the jury to this effect and pointing out that there may be other reasons, consistent with innocence, for the defendant's conduct — must be given to the jury. In giving the warning, the conduct and the circumstances that are said to indicate that it constitutes an admission must be precisely identified.[739] As a consequence, such directions are often very complex and technical, particularly as a result of the contextual information required to be given with the warning.

> Directions with regard to lies often seem to give rise to difficulties as this Court [Queensland Court of Appeal] has mentioned on more than one occasion and judges should be circumspect in giving any such direction. See, for example, *R v Brennan* [1999] 2 Qd R 529 at 530.[740]

6.74 An Edwards direction will be necessary only when the evidence is relied on as evidence of consciousness of guilt.[741] A warning — against reasoning that 'just because a person is shown to have told a lie about something, that is evidence of

736 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008).

737 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [8.19]–[8.34].

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

739 See, for example, *R v Martin, Klinge & Sambo* [2002] QCA 443 [17]–[18] (McPherson JA; Helman and Philippides JJ agreeing).

740 *R v Brewster* [2002] QCA 305, 5.

741 *Zoneff v The Queen* (2000) 200 CLR 234 [16]–[24] (Gleeson CJ, Gaudron, Gummow and Callinan JJ).

guilt' — may also be required if there is a danger that the jury may regard the lies as evidence of guilt even if it has not been relied on by the prosecution as such.[742]

6.75 The VLRC has suggested that a particular difficulty with the Edwards direction is the identification of consciousness of guilt evidence:[743]

> 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.[744] 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.[745] 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.[746] (notes as in original)

6.76 In its Consultation Paper, the VLRC suggested a number of options for reform of the Edwards direction including statutory intervention either to remove it entirely or to make it discretionary.[747] The VLRC also considered an approach adopted by the Canadian Judicial Council:

> **Remove the corroboration requirements**
>
> 4.58 Another solution is to simply remove the 'corroboration' requirements from *Edwards* and rely on a pared down direction. The result of this would be that many of the current components of the warning would no longer be required. For example, the judge would no longer need to precisely identify the conduct relied on as an implied admission of guilt, nor the events relied on by the prosecution to indicate that the post-offence conduct constitutes an admission against interest. There would also be no requirement to 'invent' possible innocent explanations for particular conduct or to distinguish between lies relevant to credit and lies going to consciousness of guilt. What would remain would be a much briefer

742 Ibid [16], [22]–[24] (Gleeson CJ, Gaudron, Gummow and Callinan JJ).

743 Victorian Law Reform Commission, *Jury Directions*, Final Report (2009) [3.73].

744 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.

745 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.

746 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.

747 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [4.51]–[4.65].

warning that communicated to the jury the basic point that people lie for reasons other than guilt.

4.59 An example of this approach is that used by the Canadian Judicial Council. Their model direction from 2004 provides:

> *You have heard evidence that [the accused] (describe briefly the relevant words and/or conduct occurring after the alleged offence) … What [the accused] did or said might help you decide whether he/she is guilty of the offence. (Review relevant evidence and relate it to alternative explanations).*
>
> *The first thing to decide is whether [the accused] actually did or said these things. If you find that he/she did not say or do these things, you must not consider this evidence in reaching your verdict.*
>
> *If you find that [the accused] did in fact do or say these things, you should consider next whether this was because he/she committed the offence charged.*
>
> *If so, you should consider this evidence, together with all the other evidence, in reaching your verdict.*
>
> *If, however, you find that the accused did or said these things for some other reason, you should not consider that as evidence of guilt.*

4.60 Adopting such an approach obviously changes the content of the warning, which raises the question of whether and to what extent the specific content of the warning should be prescribed. Options in relation to the ways in which the specific wording of the warning could be prescribed are outlined in the next section.[748] (notes omitted)

6.77 Apart from the need to simplify the length and scope of the Edwards direction, part of the warning itself seems to involve circular, and thus difficult, reasoning:

> The question is whether any of the lies which were, on the Crown case, told by the appellant were capable of being treated by the jury as an implied admission of guilt: *Edwards* (1993) 68 ALJR 40 at 48. That can only be so where —
>
> > '... the accused is telling a lie because he perceives that the truth is inconsistent with his innocence ... in telling the lie the accused must be acting as if he were guilty. It must be a lie which an innocent person would not tell' (Ibid)
>
> In the reasons from which this quotation is taken, those of Deane, Dawson and Gaudron JJ, one finds discussion of the question whether the requirement that,

748 Ibid [4.58]–[4.60]. Similarly, simplification of the direction was one of the options for reform in this area that was noted in the NSWLRC's Consultation Paper:

> One option for reform of the lies direction is to shorten it substantially and reduce it to a bare reminder to the jurors to take into account, as they see fit, any evidence showing that the accused has lied, bearing in mind that there may be reasons other than an acceptance of guilt for having done so, or that it may not indicate a lack of credibility: see New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [8.27].

for the lie to be relevant in proof of guilt, the motive for it must be a realisation of guilt involves circular reasoning. The reasons dealing with that subject include the following:

> 'But ordinarily a lie will form part of the body of evidence to be considered by the jury in reaching their conclusion according to the required standard of proof. The jury do not have to conclude that the accused is guilty beyond reasonable doubt in order to accept that a lie told by him exhibits a consciousness of guilt. They may accept that evidence without applying any particular standard of proof and conclude that, when they consider it together with the other evidence, the accused is or is not guilty beyond reasonable doubt.'[749]

6.78 This circularity of reasoning and the 'unnecessary complexity of directions on lies'[750] were also noted by the Queensland Court of Appeal in *R v Thomson*:

> … there remained of course the inherent difficulty in comprehending the *Edwards* directions. As McPherson JA, with whom Thomas J agreed, observed in *R v Brennan* [1999] 2 Qd R 529 at p.530:
>
> > Finally, I wish to enter a caution against the persistent reliance by prosecuting counsel on the phenomenon of lies by the accused as evidence of a consciousness of guilt. As was decided in *Edwards v The Queen* (1993) 178 CLR 193, the telling of lies is something that in some instances is capable of being considered as circumstantial evidence amounting to an implied admission of guilt on the part of an accused person; but the directions needed in order to correctly explain the conditions in which it is available for that purpose are convoluted and not at all easy for a judge to give, or for a jury to understand. The result often is to obscure rather than to simplify the issue to be determined.
>
> One may validly point out in this context that not the least difficulty in explaining the *Edwards* concept to a jury is to be found in the apparent circularity of reasoning, ie, that the jury is invited to consider whether a lie was told because of guilt and then to decide whether the Crown case is strong enough to prove such guilt: see *Zoneff v The Queen* at pp.257 and 260 per Kirby J. That was the line of reasoning referred to by his Honour. It has been held, however, that the circularity is only apparent and not real (see *Edwards v The Queen* at pp.209–210 per Deane, Dawson, and Gaudron JJ), but the obstacles to clear exposition remain.[751]

Submissions

6.79 None of the respondents to the Commission's Issues Paper commented on consciousness of guilt warnings. Several respondents to the VLRC's Consultation Paper, however, made submissions on this issue.

749 *R v Finn* [1994] QCA 1, 8–9 (Pincus JA).

750 *R v Thomson* [2002] QCA 548 [18] (Helman J; McMurdo P and Philippides J agreeing).

751 Ibid [14] (Helman J; McMurdo P and Philippides J agreeing).

6.80 The approach adopted by the Canadian Judicial Council received support in two submissions to the VLRC.[752] Judge MD Murphy of the County Court submitted that:

> In relation to consciousness of guilt the direction is clearly too complicated and I suggest that the direction should return to some of the earlier directions which were in very simple terms. I regard it as onerous of the Court of Appeal to require judges to formulate innocent explanations for allegedly incriminatory conduct. … I am of the view that, other than identify the matters said to constitute the consciousness of guilt, the trial judge should not be required to take any further action. That can be a matter for Counsel in their final addresses.[753]

6.81 The suggestion that jury directions in this area should return to an earlier, simpler form was also found in the submission to the VLRC by Stephen Odgers SC:

> It may be true that, prior to *Edwards*, a warning was only required where the evidence was used as corroboration. However, the High Court was right to extend the warning to any case where the evidence is used as evidence of guilt — the matters that are required to be drawn to the attention of the jury are relevant whenever the jury reasons to guilt. Again I would support the simplification of directions to make them as comprehensible as possible. However, directions should still be given because a jury may not fully appreciate the dangers of too quickly jumping from conduct like lies to guilt of the offence charged. 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. I would also favour improvement of the *Zoneff* warning — I am not convinced that a jury would understand it to mean that the evidence cannot be used as evidence of guilt at all. I think research should be done on that issue with mock juries.
>
> It follows that I support the option of reforming the content of the warnings. The content of the warnings should be determined by further research.[754]

6.82 In another submission to the VLRC, consciousness of guilt directions were the subject of detailed analysis by Benjamin Lindner, a member of the Criminal Bar Association of Victoria, parts of which are extracted here.[755] Mr Lindner's first submission dealt with the expression 'consciousness of guilt directions' itself:

> That term is as unfortunate as it is unnecessary. It is too easy to move from a finding that an item of evidence does disclose a consciousness of guilt, to a finding of 'guilt' of the crime charged. That is particularly so when the item of evidence may be just one item of evidence, and a relatively peripheral item in the circumstances of a case. The phrase should be abandoned — it casts evidence in terms of a guilty mind, rather than in more neutral terms which might better enable the evidence to be properly evaluated.

752 Daniel Gurvich and Mark Pedley, Submission to the Victorian Law Reform Commission, 23 December 2008.

753 Judge MD Murphy, Submission to the Victorian Law Reform Commission, 5 February 2009, 4.

754 Stephen Odgers SC, Submission to the Victorian Law Reform Commission, 12 November 2008, 5. The joint submission of the Queensland Law Society and the Bar Association of Queensland to this Commission's Issues Paper specifically endorsed Odgers' submission, although without specific reference to this topic: Queensland Law Society and Bar Association of Queensland, Submission 13, 19 June 2009.

755 Benjamin Lindner (Criminal Bar Association), Submission to Victorian Law Reform Commission, 30 November 2008.

> This category of evidence is better described as 'post-offence conduct'. That concept covers the same field. It includes verbal conduct (eg. lies, threats) as well as physical actions (eg. flight). The term is neutral; it does not impute any guilty state of mind from the outset (It might be argued that 'post-incident conduct' is even more neutral but cases have used the term, 'post-offence conduct', so I will adopt that usage here). 'Post-offence conduct' is itself a species of circumstantial evidence. Therefore, such evidence demands analysis as to what inferences might be drawn from the evidence, inferences that support the Prosecution contention and those that may not.
>
> …
>
> **Submission: The term 'consciousness of guilt' should be abandoned in any direction/warning given. It should in all instances be replaced with reference to 'post-offence conduct'.**[756]

6.83 Associate Professor John Willis and the Criminal Bar Association of Victoria also submitted that the term 'consciousness of guilt' should not be used.[757]

6.84 Mr Lindner also analysed in detail the content, use and purpose of directions relating to evidence of post-offence conduct:

> 2. The Analysis of 'post-offence conduct'.
>
> …
>
> Evidence of post-offence verbal conduct (eg. lies) might be weak, equivocal or powerful, depending upon what is said and the circumstances. Assuming a lie is demonstrated, the nature of the lie, the timing of it, the person to whom it is said, whether it is said to a police officer in a record of interview, or to a confidante, or to an independent person with no interest in the offence itself, the manner in which it is said — these are all matters which may effect a jury's evaluation of the weight they may accord to such evidence. All are matters properly to be taken into account by a jury. The inferences to be drawn may suggest that the particular lie told should be treated as an implied admission, or it may suggest that it should not be so treated. … While the distinction between lies as to credit and lies inferring guilt can be an all too subtle one, it does serve a useful purpose by defining the way evidence is relied upon in a Prosecution case. It thereby gives the defence an opportunity to counter it, if it can, with arguments properly directed at the way a lie is relied upon.
>
> **Submission: Judicial warnings as to the analysis of post-offence conduct should be retained to ensure juries a) apply proper reasoning to such evidence and b) guard against any jumping to conclusions not properly open.**

6.85 Mr Lindner then went on to argue for early identification by the prosecution of post-offence conduct on which it intends to rely:

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756 Ibid. It may also be argued that the term 'post-offence' conduct implies that an offence has necessarily occurred, when that too may be a matter for the jury to decide. 'Post-incident conduct' may be the most neutral of these expressions. See also n 773 below.

757 Associate Professor John Willis, Submission to the Victorian Law Reform Commission, 16 December 2008, 13; Criminal Bar Association of Victoria, Submission to the Victorian Law Reform Commission, 15 December 2008, 13–14.

> 3. Identifying 'post-offence conduct'.
>
> …
>
> An '*Edwards* warning' requires a judge to identify precisely the post-offence conduct that may amount to evidence of a consciousness of guilt. That obligation should be facilitated by a prosecutor indicating early in a trial the evidence upon which it seeks to rely in this manner. This represents no greater burden upon a judge than the formulation of many other directions called for in the course of a criminal trial.
>
> Currently, the prosecution is often not required to identify what evidence is to be relied upon as evidence of 'consciousness of guilt' or 'implied admissions' until the close of the evidence, or prior to the Prosecution final address. That is an unfortunate practice. It is just far too late in the trial process. Arguably the practice gives the prosecution an unfair forensic advantage. The defence is entitled to know the case it has to meet at the beginning of the trial, not at the final address stage of the trial. Early identification of the way post-offence conduct is relied upon also allows judges to fashion appropriate directions, after hearing submissions from counsel as to the manner in which such evidence will be left to a jury.
>
> Insofar as an '*Edwards* warning' requires a lie to be 'precisely identified', as should the circumstances and events that are said to indicate that it constitutes an admission against interest (*Edwards v R* (1993) 178 CLR 193, 210–211). That principle is consistent with the Prosecution's obligation to fully disclose the evidence upon which it relies. It should do so as early in the trial process as possible. Where an accused gives evidence, or other evidence emerges in the running of a trial upon which the prosecution seek to rely as post-offence conduct, that should be disclosed to the defence and the court as soon as practicable after the evidence is adduced.
>
> **Submission: The prosecution should identify all post-offence conduct to be relied upon as implied admissions before the jury is empanelled.**[758]

6.86 Mr Linder then submitted that jury directions on post-offence conduct 'should be sensibly crafted taking into account the actual evidence relied on' and its significance in the case. The requirement to warn the jury 'represents nothing more than a requirement to protect the fairness of the trial, or guard against unfairness':

> The directions are, like all other judicial directions of law, designed to assist jurors who might be in very unfamiliar territory when they are asked to analyse evidence to the high standards required by the criminal law.

6.87 In Mr Lindner's view, the trial judge ultimately has a responsibility to 'identify evidence capable of supporting a conclusion by a jury that an item of evidence could amount to an "implied admission"'.[759]

758 This submission was also made by the Criminal Bar Association of Victoria: Criminal Bar Association of Victoria, Submission to the Victorian Law Reform Commission, 15 December 2008, 16–17.

759 This submission was also made by the Criminal Bar Association of Victoria: Criminal Bar Association of Victoria, Submission to the Victorian Law Reform Commission, 15 December 2008, 17–18.

6.88 Similarly, Mr Lindner submitted that limited-use directions are necessary when evidence of post-offence conduct is relied on, not as evidence of an admission, but as relevant to credit only:

> While the distinction between evidence that goes only to credit and evidence that proves guilt of the crime charged is sometimes regarded as highly technical and artificial, when applied to specific items of evidence the direction should be sensibly articulated by the judge. Like other evidence (eg. propensity evidence), a judge should explain both the proper and the improper uses to be made of each item of post-offence conduct, including that in certain instances, it can only be used to disbelieve, or discredit, the accused.[760]

6.89 Mr Lindner also noted that where the risk of prejudice arising from the evidence is so great that it cannot adequately be met by jury directions, the evidence may be excluded in the judge's discretion.[761]

6.90 Mr Lindner and the Criminal Bar Association of Victoria went on to consider the various options for reform of post-offence conduct set out in the VLRC's Consultation Paper. These respondents supported some measure of simplification, although they suggested that the Canadian Judicial Council's approach may go too far:

> (iii) Remove the corroboration requirements — In para [4.58] [of the VLRC's Consultation Paper], it is suggested 'the judge would no longer need to precisely identify the conduct relied upon as an implied admission of guilt …'. For the reasons given above, given that the defence ought to be apprised of the case it has to meet as early as possible in the trial process, we do not accept that a 'pared down' direction dispensing with the matters proposed is either in the interests of fairness or justice.
>
> The model direction by the Canadian Judicial Council may be useful, indeed appropriate in certain cases. But it may prove to be just insufficient when applied to a wide variety of post-offence conduct. For example, to say 'What an accused said or did might help you to decide whether he/she is guilty of the offence' fails to grapple with the inferential nature of the evidence; it fails to embark upon any process of analysis which explains to a jury how they might approach evidence of a, potential, 'implied admission'. That is, this wording merely suggests that what an accused said or did (I interpolate, 'after the offence') might be probative of guilt conceals more about this evidential category than it reveals. And therein lies its vice. The weight of evidence is always a matter for a jury — some matters may attract strong inferences of guilt, others weak, and everything in between. Certain evidence of post-offence conduct might be so strong that it satisfies a jury beyond reasonable doubt; at the other extreme, it might not assist at all due to a compelling explanation consistent with innocence. To direct a jury that 'it might help you decide whether he/she is guilty of the offence' is not helpful, and fails to address the rationale for the direction embodied in *Edwards v R.*[762]

760 This submission was also made by the Criminal Bar Association of Victoria: Criminal Bar Association of Victoria, Submission to the Victorian Law Reform Commission, 15 December 2008, 18–19.

761 Benjamin Lindner (Criminal Bar Association), Submission to Victorian Law Reform Commission, 30 November 2008.

762 Ibid; Criminal Bar Association of Victoria, Submission to the Victorian Law Reform Commission, 15 December 2008, 19–21.

6.91 Mr Lindner then submitted that a preferred approach is to encourage the early identification of post-offence conduct evidence so that appropriate directions can be crafted with the input of counsel:

> **The Problem of re-trials, and early identification of 'post-offence conduct'.**
>
> The evidence of post-offence conduct is subject to infinite variation. That makes it a difficult subject for any general catch-all direction on the topic. That also means judges have to craft individualized directions to meet the occasion, on a case by case basis. The evidence of post-offence conduct will be more significant in some cases than others. Directions and warnings will always need to be suitably tailored to the specific evidence relied upon, and the circumstances of that evidence.
>
> This is not an issue that will resolve by either dispensing with, or emasculating, what has come to be known as an *Edwards* Direction. Its rationale is clear. The avoidance of re-trials arising from successful appeals on this ground is a laudable aim. We support it. The early identification of this category of evidence ought to be enforced. The earlier in the trial process that evidence of post-offence conduct is identified, the more likely it will be that adequate discussion can be undertaken between counsel and the trial judge. And the more likely the resultant directions/warnings will not be subject to successful appeals as all parties to the trial (including the resources of those instructing both prosecution and defence) would have turned their collective attention to the issues involved. By the time the trial judge was required to charge a jury, any issues will have been well ventilated.
>
> There are already provisions in place in the Supreme Court, namely Practice Note No 1 of 2004, Criminal Division: Final Directions (2003) 8 VR 475, which requires as follows: '6. A bullet-point outline of any alleged lies and other post-offence conduct sought to be relied on by the prosecution as showing consciousness of guilt.' Those particulars are to be provided to the court 7–10 days before the trial date ... Similarly in the County Court, Practice Note No.1 of 2000 — Case List Management System sets up a Case Conference system in which there is an opportunity to raise issues of law in a pre-trial context. It may be that these practices are not as thoroughly enforced as is desirable to ensure errors are avoided.
>
> The Judicial College has complied Bench notes and model directions on this topic … It constitutes excellent work. It ought to be the subject of further refinement, and not abandoned. That work, together with an improvement in the systems of early identification of post-offence conduct by the Prosecution would, in our submission, go some way in ameliorating the current situation of re-trials without compromising fairness or justice.[763]

6.92 Mr Lindner's submissions on this issue were echoed more briefly by Victoria Legal Aid:

> The present practice of requiring prosecutors to raise consciousness of guilt at an early stage in the trial is supported. In our view the process of working through this issue is essentially complete. [Victoria Legal Aid] consider that this

763 Benjamin Lindner (Criminal Bar Association), Submission to Victorian Law Reform Commission, 30 November 2008. See also Criminal Bar Association of Victoria, Submission to the Victorian Law Reform Commission, 15 December 2008, 21 in relation to the last paragraph cited from Mr Lindner's submission.

> is less likely to be an issue which leads to successful appeals in the future and that an attempt now to redefine matters is likely to be counter-productive.[764]

6.93 Reform of the trial judge's obligation to identify and contextualise items of consciousness of guilt evidence was opposed by the Victorian Office of Public Prosecutions ('OPP'):

> The actual warning portion of an *Edwards* direction is usually relatively brief when compared to the amount of time that must be devoted to identifying and contextualising the alleged incriminatory conduct.
>
> The technical approach mandated by *Edwards* risks smothering the warning in the surrounding contextual information. The complexity of the test creates the risk that the jury will not focus on the central issue which is the actual validity of drawing an inference adverse to the accused. In addition, when applying the *Edwards* test, a trial judge is required to formulate innocent explanations for the alleged incriminatory conduct, providing fertile ground for error.
>
> **Questions:**
> **6.1 Should the obligation on the trial judge to identify and contextualise items of consciousness of guilt evidence be removed by legislation?**
>
> **DPP/OPP response:**
> No, there are many elements to consciousness of guilt evidence — lies, post offence conduct, the selective answering of questions. In addition it must be determined if the evidence is put as consciousness of guilt or only to credit.[765]

6.94 For similar reasons, the OPP opposed consolidating consciousness of guilt directions into a broad circumstantial evidence direction,[766] stating that 'Oversimplification runs the risk of creating appeal points'.[767]

The position in New Zealand

6.95 In New Zealand, warnings about lies are now dealt with under section 124 of the *Evidence Act 2006* (NZ). That provision limits the circumstances in which a warning is required — to those in which the judge considers the jury may place undue weight on evidence of a defendant's lie, or if the defendant requests — as well as the matters that must be contained in the warning:

> **124 Judicial warnings about lies**
>
> (1) This section applies if evidence offered in a criminal proceeding suggests that a defendant has lied either before or during the proceeding.
>
> (2) If evidence of a defendant's lie is offered in a criminal proceeding tried with a jury, the Judge is not obliged to give a specific direction as to what inference the jury may draw from that evidence.

764 Victoria Legal Aid, Submission to the Victorian Law Reform Commission, 9 December 2008.

765 Office of Public Prosecutions, Submission to the Victorian Law Reform Commission, 12 February 2009, 9.

766 Ibid 11.

767 Ibid 12.

(3) Despite subsection (2), if, in a criminal proceeding tried with a jury, the Judge is of the opinion that the jury may place undue weight on evidence of a defendant's lie, or if the defendant so requests, the Judge must warn the jury that—

(a) the jury must be satisfied before using the evidence that the defendant did lie; and

(b) people lie for various reasons; and

(c) the jury should not necessarily conclude that, just because the defendant lied, the defendant is guilty of the offence for which the defendant is being tried.

(4) In a criminal proceeding tried without a jury, the Judge must have regard to the matters set out in paragraphs (a) to (c) of subsection (3) before placing any weight on evidence of a defendant's lie.

6.96 Section 124, particularly section 124(2), also goes some way to removing the distinction between lies relevant to guilt and lies relevant only to credit.[768]

VLRC's recommendations

6.97 The VLRC made the following recommendations in its Final Report in relation to directions concerning the limited use of post-incident evidence:

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

768 Jury Directions Symposium, Melbourne, 56 February 2009.

- 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.[769]

QLRC's options for reform

6.98 None of the respondents to the Commission's Issues Paper suggested how the problems created by the admission of post-incident conduct evidence should be addressed. The Commission has not reached a provisional view, but notes the following options for reform on which it seeks submissions.

6.99 One option for reform is to legislate to simplify the warnings that are required to be given. The VLRC has recommended, for example, that its jury directions statute provide that the warning may be given in general terms and need not refer to each particular item of post-offence conduct which may amount to an implied admission of guilt by the defendant, but must include reference to the following matters:[770]

- that people lie or engage in other apparently incriminating conduct for various reasons; and
- that the jury should not necessarily conclude that defendants are guilty of the offences charged just because the jury finds that they lied or engaged in some other apparently incriminating conduct.

6.100 Similarly, under the *Evidence Act 2006* (NZ), if a warning is to be given, the jury must be warned that, before using the evidence, it must be satisfied that the defendant did lie, that people lie for a variety or reasons and that the jury should not conclude that the defendant is guilty just because he or she lied.[771] No other matters are required by the statute to be included in the warning. Under that Act, a warning is required only if the judge considers the jury may place undue weight on evidence of a defendant's lie, or if the defendant so requests.[772]

6.101 The Commission also considers that any legislative provision that seeks to set out the requirements of such a warning should also provide that the terms 'consciousness of guilt' and 'post-offence' conduct should be avoided.[773]

6.102 The Commission also notes that at least some of the complexities of these directions will be reduced through the use of integrated directions in the judge's summing up.

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769 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) 15, [5.36]–[5.51].

770 The NSWLRC has also suggested that 'one option for reform of the lies direction is to shorten it substantially': New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [8.27]. See n 748 above.

771 *Evidence Act 2006* (NZ) s 124(3).

772 *Evidence Act 2006* (NZ) s 124(3).

773 See, for example, New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [8.23] in which the NSWLRC noted concerns about the use of the phrase 'consciousness of guilt' as suggesting a conclusion about the defendant's conduct that could prejudice the defendant in the eyes of the jury.

6.103 These approaches may provide a means of simplifying the content of such directions. However, one of the other issues of concern is the difficulty of identifying the circumstances in which a warning is required. One difficulty is the distinction currently drawn between evidence capable of amounting to an implied admission of guilt and evidence that is relevant to credit only. This has to some extent been overcome by section 124(2) of the *Evidence Act 2006* (NZ), which provides that the judge 'is not obliged to give a specific direction as to what inference the jury may draw' from evidence of a defendant's lie. It may be appropriate to amend the *Evidence Act 1977* (Qld) to remove the distinction between lies going to guilt and lies going to credit by providing that, once admitted, such evidence is admitted for all purposes. This would remove the need for the jury to be instructed that it may use the evidence for limited purposes only.

6.104 Another difficulty, noted by the VLRC,[774] is that of identifying whether evidence of post-incident conduct is capable of amounting to an implied admission of guilt and thus of necessitating a warning. The VLRC's recommended approach to this issue is to require early identification by the prosecution of such evidence and a determination by the judge, prior to the prosecution's address to the jury, of whether the evidence is capable of demonstrating an awareness of guilt. As this Commission has noted with respect to limited-use directions generally, it may also be appropriate to require the prosecution and defence to inform the judge whether they wish a warning to be given and to provide, in those circumstances, for the judge to give that warning at the time the evidence is heard.

6.105 The Commission therefore puts forward the following options for reform:

6-6 The *Evidence Act 1977* (Qld) should be amended to provide that, once admitted, evidence of post-incident conduct is admitted for all purposes and that there is no longer a distinction between lies going to guilt and lies going only to credit.

6-7 Alternatively, or in addition, the *Evidence Act 1977* (Qld) should be amended to provide that:

(a) a warning is required only if the judge considers that the jury may place undue weight on evidence of post-incident conduct of the defendant, or if the defendant so requests;

(b) if a warning is given, it may be given in general terms and without reference to each particular item of post-incident conduct which may amount to an implied admission of guilt by the defendant, provided that it includes reference to the following matters:

774 Victorian Law Reform Commission, *Jury Directions*, Final Report (2009) [3.73]. See [6.75] above.

(i) that people lie or engage in other apparently incriminating conduct for various reasons; and

(ii) that the jury should not conclude that the defendant is guilty just because he or she lied or engaged in other apparently incriminating conduct; and

(c) in giving such a warning, the judge should not use the words 'consciousness of guilt' or 'post-offence conduct'.

6-8 Alternatively, or in addition, the Criminal Code (Qld) should be amended, as is provided for in Proposal 6-2 above, to provide that warnings about evidence of post-incident conduct should wherever possible be given at the time the evidence is heard.

IDENTIFICATION EVIDENCE WARNINGS

6.106 Identification evidence warnings were discussed at [4.100]–[4.102] of the Commission's Issues Paper. They were also discussed at some length in the VLRC's Final Report[775] and in the NSWLRC's Consultation Paper.[776] Such warnings are a type of unreliable evidence warning but are discussed in this chapter because they raise similar issues and concerns to those that attend limited-use directions.[777]

6.107 Eyewitness identification evidence is attended by a number of dangers, well recognised by the courts:

> The circumstances of observation may not have been conducive to accuracy. The stress of the situation may have impaired perception. Subsequent information may have affected memory, producing unconscious transference whereby a person seen in one situation is confused with a person seen in another situation. The circumstances of first identification may be highly suggestive, such as where the witness is presented with a single suspect or photograph.
>
> At the trial, there may be additional problems. A jury may be prejudiced by the fact that photographs used for a photographic identification suggest that the accused has a prior criminal record or at least has been arrested on a prior occasion. They may be unduly impressed by the confidence with which the witness makes the identification. Cross-examination of the witness may not be an effective test of the quality of the evidence since there is no story to dissect, only an (apparently) simple assertion of identity.[778]

775 Ibid [3.84]–[3.137], [5.52]–[5.63].

776 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [7.25]–[7.30].

777 Warnings given in relation to unreliable witnesses are discussed in chapter 7 of this Paper: see [7.67]–[7.89], Proposals 7-3, 7-4 below.

778 'Identifying problems with identification: Editorial' (2004) 28(2) *Criminal Law Journal* 69, 69.

6.108 Perhaps the most significant danger of identification evidence is that an honest witness can make a mistake and 'few witnesses are as convincing as the honest — but perhaps mistaken — witness who adamantly claims to recognise the accused'.[779]

6.109 Given these risks, identification evidence is subject to discretionary exclusion[780] and, when admitted, will ordinarily necessitate a warning to the jury about the general dangers of convicting on identification evidence[781] and of the specific weaknesses of the evidence in the case.[782]

6.110 The common law rule, enunciated in *Domican v The Queen*,[783] requires the jury to be warned whenever identification evidence is relied on as 'any significant part of the proof of guilt' and its reliability is disputed:

> the seductive effect of identification evidence has so frequently led to proven miscarriages of justice that courts of criminal appeal and ultimate appellate courts have felt obliged to lay down special rules in relation to the directions which judges must give in criminal trials where identification is a significant issue.
>
> Whatever the defence and however the case is conducted, 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. The terms of the warning need not follow any particular formula. But it must be cogent and effective. It must be appropriate to the circumstances of the case. Consequently, the jury must be instructed 'as to the factors which may affect the consideration of [the identification] evidence in the circumstances of the particular case'. A warning in general terms is insufficient. The attention of the jury 'should be drawn to any weaknesses in the identification evidence'. Reference to counsel's arguments is insufficient. The jury must have the benefit of a direction which has the authority of the judge's office behind it. It follows that the trial judge should isolate and identify for the benefit of the jury any matter of significance which may reasonably be regarded as undermining the reliability of the identification evidence.[784] (notes omitted)

6.111 The warnings required to be given will thus depend on the nature of the evidence and the particular risks or dangers associated with it.[785]

6.112 From time to time, judges have distinguished between different types of identification evidence. One distinction has been drawn between positive identification — 'where a witness claims to recognise the accused as the person seen on an

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779 *Festa v The Queen* (2001) 208 CLR 593 [64] (McHugh J).

780 For example, failure to comply with the identification procedure requirements of the *Police Powers and Responsibilities Act 2000* (Qld) may result in discretionary exclusion of the evidence: see *Police Powers and Responsibilities Act 2000* (Qld) ss 10, 617; *Police Powers and Responsibilities Regulation 2000* (Qld) sch 10 (Responsibilities code) cll 45–53.

781 *R v Turnbull* [1977] 1 QB 224, 288; *R v Dickson* (1983) 1 VR 227, 231. Also see Supreme and District Courts Benchbook, 'Identification' [49] <http://www.courts.qld.gov.au/2265.htm> at 2 September 2009.

782 *Domican v The Queen* (1992) 173 CLR 555.

783 (1992) 173 CLR 555.

784 *Domican v The Queen* (1992) 173 CLR 555, 561–2 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

785 *Festa v The Queen* (2001) 208 CLR 593 [219] (Hayne J); *R v Finlay* (2007) 178 A Crim R 373 [38]–[41] (Holmes J).

occasion that is relevant to the charge' and which may be either direct or circumstantial evidence[786] — and 'similarity' or 'circumstantial identification evidence' — where a witness 'asserts that the general appearance or some characteristic or propensity of the accused,' such as age, race, stature or gait, 'is similar to that of the person who committed the crime'.[787] While it has been suggested that 'similarity evidence' may not require a warning,[788] it has been held in Queensland that a *Domican* warning, though not necessarily all aspects of it, should be given.[789]

6.113 A further distinction has also been drawn between positive identification by a stranger and 'recognition' evidence where the witness claims some prior knowledge of the person.[790] This distinction relates to one of the factors that may affect the reliability of the evidence, namely, the familiarity of the witness with the person and, accordingly, a full *Domican* direction on 'recognition evidence' may sometimes be unnecessary.[791]

6.114 Identification evidence warnings are dealt with in sections 116 and 165 of the Uniform Evidence Law, which generally reflect the common law position. Under section 116, a warning is required when the reliability of identification evidence is disputed.[792] Under section 165, a warning is also required if it is requested by a party, unless the judge considers there are good reasons for not giving the warning.[793] 'Identification evidence' is defined under the Uniform Evidence Law as an assertion of identity or resemblance of a defendant; it thus encompasses most, if not all, of the types of identification evidence for which common law identification warnings are required.[794]

6.115 In its Final Report, the VLRC expressed concern that, while the law on identification warnings is straightforward, its application to the facts presents difficulties in practice. In particular, it noted a concern that judges may direct on factors that are not relevant (to guard against possible appeals) or may fail to direct on factors that are relevant.[795]

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786 *Festa v The Queen* (2001) 208 CLR 593 [54] (McHugh J).

787 Ibid [56] (McHugh J). See also, for example, *R v Cavkic (No 2)* [2009] VSCA 43 [51].

788 Ibid [57] (McHugh J); *R v Cavkic (No 2)* [2009] VSCA 43 [51].

789 *R v Finlay* (2007) 178 A Crim R 373 [38]–[41] (Holmes J); *R v Zullo* [1993] 2 Qd R 572. See also *R v Cavkic (No 2)* [2009] VSCA 43 [53].

790 Eg, *R v Spero* (2006) 161 A Crim R 13 [25]–[29] (Redlich AJA).

791 *Carr v The Queen* (2000) 117 A Crim R 272 [61] (Blow J); *R v Spero* (2006) 161 A Crim R 13 [25]–[29] (Redlich AJA) and the authorities cited there.

792 *Evidence Act 2008* (Vic) s 116(1) provides that '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'. Section 116(2) provides that 'it is not necessary that a particular form of words be used in so informing the jury'. The High Court has held that this obligation applies only when the reliability of the evidence is disputed: see *Dhanhoa v The Queen* (2003) 217 CLR 1. The *Evidence Act 2008* (Vic) is to commence on 1 January 2010.

793 *Evidence Act 2008* (Vic) s 165 is very similar to the same section in the *Evidence Act 1995* (NSW), which is set out at [7.50] below.

794 *Evidence Act 2008* (Vic) s 3, Dictionary, Part 1 (definition of 'identification evidence'). And see Thomson Reuters Online Service, SJ Odgers, *Uniform Evidence Law*, 'General comments' [1.3.10000], 'Evidence of "resemblance" or "similarity"' [1.3.10010] (at 2 September 2009).

795 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [3.104].

6.116 It has also been suggested that the dangers involved with identification evidence might be better addressed as a matter of admissibility rather than by jury directions that may prove ineffective:

> there is an inter-relationship between the question of discretionary exclusion and the giving of jury warnings (and, indeed, whether expert evidence on identification has been admitted). A judge's assessment of the danger that the jury will give the evidence significantly more weight than it deserves must take into account the fact that the jury will have the benefit of the warnings required under the common law and statute. What assumptions should be made as to the likely effectiveness of such warnings?
>
> …
>
> There can be no doubt that the general assumption that juries follow judicial directions does not always hold up. For example, appeals have been allowed in cases where directions to ignore prejudicial publicity (*R v Forsyth*, unreported, NSWCCA, 19 December 1997) and to ignore particular prejudicial evidence (*R v Ibrahim* [2001] NSWCCA 72) were not assumed to have been effective.
>
> Similarly, as pointed out above, it would be unrealistic to assume that jury warnings about the dangers with identification evidence will completely remove any risk that the jury will give the evidence more weight than it deserves. In exercising the judicial discretion to exclude, judges must engage in a careful assessment of the degree of danger in the particular circumstances and balance that against the probative value of the evidence. If that value is low, the public interest in a fair trial may require exclusion of the evidence.[796]

Submissions

6.117 None of the submissions made to the Commission's Issues Paper specifically discussed identification evidence warnings; nor did any of the submissions made to the VLRC's Consultation Paper.

VLRC's recommendations

6.118 In its Final Report, the VLRC expressed the view that, while the law on identification evidence warnings 'is not particularly complex', 'greater clarity would be achieved by indicating the circumstances in which a direction is required' and setting out the essential elements of the direction in its proposed jury directions statute.[797] It made the following recommendations:

> 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.
>
> 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.

796 'Identifying problems with identification: Editorial' (2004) 28(2) *Criminal Law Journal* 69, 70–71.

797 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [5.52].

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.[798]

QLRC's options for reform

6.119 None of the respondents to the Commission's Issues Paper dealt with identification evidence warnings and whether there is a need for reform in this area.

6.120 It appears that the main concern with identification warnings is the level of detail into which the judge must go when giving the warning. In particular, the judge must identify the particular weaknesses of the evidence and is not permitted to give the warning in general terms.[799]

6.121 Judges could be assisted to this end by requiring the prosecution and defendant to inform the judge of the warnings they consider should be given and by identifying the particular weaknesses in the evidence on which they wish the judge to address the jury.

6.122 This does not, however, address the jury's needs. Beyond the general warning that honest witnesses may be mistaken, there may be little real benefit in identifying all of the possible circumstances that may undermine the reliability of the particular evidence to the jury. To the extent that simple, clear, concise directions

798 Ibid 15–16, [5.52]–[5.63].

799 *Domican v The Queen* (1992) 173 CLR 555, 561–2 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

are more effective than long, complicated directions, it may be appropriate to legislate to simplify the warning that is required.

6.123 In New Zealand, for example, section 126 of the *Evidence Act 2006* (NZ) specifies only three matters that must be broached in an identification warning:

> **126 Judicial warnings about identification evidence**
>
> (1) In a criminal proceeding tried with a jury in which the case against the defendant depends wholly or substantially on the correctness of 1 or more visual or voice identifications of the defendant or any other person, the Judge must warn the jury of the special need for caution before finding the defendant guilty in reliance on the correctness of any such identification.
>
> (2) The warning need not be in any particular words but must—
>
> (a) warn the jury that a mistaken identification can result in a serious miscarriage of justice; and
>
> (b) alert the jury to the possibility that a mistaken witness may be convincing; and
>
> (c) where there is more than 1 identification witness, refer to the possibility that all of them may be mistaken.

6.124 A truncated warning has also been recommended by the VLRC.[800]

6.125 As with limited-use directions, there may also be some benefit in giving identification warnings to the jury as early as possible in the trial, allowing the jurors to keep considerations of reliability and the possibility of mistake in mind as they hear, and weigh, the evidence. To that end, it may be appropriate that disclosure of identification evidence be required as part of the pre-trial disclosure regime proposed by the Commission in chapter 3 of this Paper, and to require the prosecution and defence to inform the judge of any identification warnings they wish to be given when the evidence is heard.

6.126 The Commission has not reached a provisional view, but notes the following options for reform on which it seeks submissions:

6-9 The *Evidence Act 1977* (Qld) should be amended to provide that a warning about identification evidence may be given in general terms. The warning need not identify all the possible weaknesses of the particular evidence, but must include reference to following matters:

(a) that the evidence depends on a witness receiving, recording and accurately recalling an impression of a person or object;

800 See [6.118] above.

(b) that a witness, or multiple witnesses, may honestly believe that their identification evidence is accurate when it is in fact mistaken;

(c) that a mistaken witness may be convincing; and

(d) that innocent people have been convicted because honest witnesses were mistaken in their evidence concerning identification.

6-10 Alternatively, or in addition, the Criminal Code (Qld) should be amended, as is provided by Proposal 6-2 above, to provide that identification warnings should wherever possible be given at the time the evidence is heard.

Chapter 7

Directions in Sexual Offence Cases: Amendment or Abolition

INTRODUCTION

7.1 In the context of this review, two particular jury directions or warnings that arise frequently in sexual offence trials are especially contentious. Both arise out of a delay by the complainant in first lodging a complaint:

- The Longman direction is concerned with the possibility (or the fact) that the defendant will have lost a forensic advantage or will be disadvantaged in the preparation of the defence as a result of the delay.

- The Kilby direction and the Crofts warning are concerned with the inference that the delay reflects adversely upon the truthfulness of the complaint and the complainant.[801]

7.2 Trial procedure in sexual offence cases has been the subject of extensive reform in recent years. This, combined with some inherent problematic features of these cases, has led to an unusually high proliferation of inconsistent and confusing directions. One feature characteristic of sexual offence cases that was part of the basis of the rationale behind some of these directions (including those that are now discredited) is the fact that the prosecution evidence is often that of the complainant alone; the very nature of these offences means that there is rarely any direct evidence supporting the complainant, whose testimony is therefore largely uncorroborated. Some of the controversial directions in these cases were rooted in concerns about the risks of convicting defendants on the basis of the uncorroborated

801 See Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [4.104]–[4.120].

evidence of a single witness. Furthermore, they were often founded on erroneous prejudices about the expected conduct of the victims of these crimes. This is exemplified in comments about the background to the Longman direction and similar directions under the Uniform Evidence Law made in the New South Wales Court of Criminal Appeal:

> 71 As a result of the experience of judges gained in conducting criminal trials, the common law established categories or classes of evidence that were considered to be potentially unreliable and about which, as a rule of practice, judges were required to warn the jury. The warning normally cautioned the jury about the potential unreliability of the evidence, the reason why the evidence might be unreliable and the manner in which the jury should consider the evidence. Usually the jury were told of the need to 'scrutinize the evidence with care' before convicting upon it. In respect of some categories, the evidence was thought to be so unreliable that the trial judge was required to tell the jury that it was dangerous to convict on the evidence unless it was corroborated. The categories in which such a warning was required was evidence given by the following types of witnesses: complainants in sexual assault cases, ***Kelleher v The Queen*** (1974) 131 CLR 534; accomplices, ***Davies v DPP*** [1954] AC 378; and children giving sworn evidence, ***Hargan v The King*** (1919) 27 CLR 13.
>
> …
>
> 75 Brennan J delivered a separate judgment [in ***Bromley v The Queen*** (1986) 161 CLR 315] in which he considered the circumstances in which a warning was to be given. His Honour stated (at 323–324):
>
> > It must be remembered that the sole raison d'etre of the rule requiring a warning to be given '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': per Mason J. in ***Kelleher v The Queen*** (1974) 131 CLR 534, at p 560. The courts have had experience of the reasons why witnesses in the three accepted categories [accomplices, children giving evidence on oath, and complainants in sexual assault cases] may give untruthful evidence wider than the experience of the general public, and the courts have a sharpened awareness of the danger of acting on the uncorroborated evidence of such witnesses. The experience of the courts has shown also that the reasons which may lead one suspect witness to give untruthful evidence are not necessarily the same as the reasons why another suspect witness may do so …
> >
> > The rules of practice requiring the giving of a warning owe their existence … 'partly to the inherent dangers involved, and partly to the fact that the danger is not necessarily obvious to a lay mind' … If the danger is equally obvious to the lay mind, a failure to warn of its existence is much less likely to result in a miscarriage of justice and thus much less likely to provide a ground for quashing a conviction than if the court has a special knowledge of the danger. If the danger is so obvious that the jury are fully alive to it without a warning, no warning need be given. …
>
> …
>
> 83 However, a warning reflects the special experience of the law with a matter of which the jury may have little knowledge or understanding: ***Crampton*** per Kirby J at 156E. So in a warning it is not sufficient for the trial judge merely

> to refer to a submission about the matter made by counsel in addressing the jury. The authority of the trial judge must be used to impress the significance of the matter on the collective mind of the jury.[802]

7.3 The Commission notes the faith placed by the High Court in the accumulated wisdom of the courts in matters in which it is assumed (by judges) that other judges have acquired insight into matters not obvious to lay jurors. In the area of long-accepted unreliability of complainants in sexual offence cases, however, this faith has been displaced by empirical evidence which has offered a perspective on the reasons for the behaviour of victims of these crimes that is at odds with how it was assumed that they did and should behave.

7.4 It should be noted that the Longman direction is not specifically confined to sexual offence cases though it is most often given in, and is often seen as primarily relevant to, those cases.[803] There are also other directions and warnings, such as those relating to evidence admitted for limited purposes only (such as propensity evidence, evidence of uncharged conduct, similar fact evidence and relationship evidence) — which are covered in chapter 6 of this Paper — which can also apply in sexual offence cases. Any sexual offence case that involves multiple counts and multiple defendants also raises the same difficulties in giving jury directions that would arise in those circumstances in any other case.

7.5 In its Issues Paper, the Commission asked whether there were any particularly problematic directions and whether any directions could be simplified or abolished.[804] The Commission also noted that the directions given in sexual offences trials have given rise to particular concern.[805]

7.6 In its Consultation Paper, the VLRC also paid considerable attention to directions given in sexual offence trials. It sought submissions on whether all of those warnings, including the Longman and Crofts directions, are necessary or could be dispensed with in some cases, and whether codification would provide greater clarity for judges.[806]

7.7 The Longman and Crofts directions, and warnings in relation to unreliable witnesses, are discussed in this chapter; chapter 6 focuses on limited-use directions; and chapter 8 examines a number of other specific directions.

THE LONGMAN DIRECTION

7.8 The High Court's statement of the trial judge's obligation to warn the jury about a defendant's disadvantage due to a delay in making a complaint is found in *Longman v The Queen*:

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802 *R v Stewart* [2001] NSWCCA 260 [71], [75], [83] (Howie J).

803 See New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [7.63].

804 Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) 105, 170. See the questions set out at [6.2] above.

805 Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [4.59], [4.104]–[4.120].

806 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) ch 3.

> Of course, any comment must be fairly balanced. For example, any comment on the complainant's failure to complain should include … that there may be 'good reasons why a victim of an offence such as that alleged may hesitate in making or may refrain from making a complaint of that offence.' But there is one factor which may not have been apparent to the jury and which therefore required not merely a comment but a warning be given to them … That factor was the applicant's loss of those means of testing the complainant's allegations which would have been open to him had there been no delay in prosecution. Had the allegations been made soon after the alleged event, it would have been possible to explore in detail the alleged circumstances attendant upon its occurrence and perhaps to adduce evidence throwing doubt upon the complainant's story or confirming the applicant's denial. After more than 20 years that opportunity was gone and the applicant's recollection of them could not be adequately tested. The fairness of the trial had necessarily been impaired by the long delay … and it was imperative that a warning be given to the jury. The jury should have been told that, as the evidence of the complainant could not be adequately tested after the passage of more than 20 years, it would be dangerous to convict on that evidence alone unless the jury, scrutinizing the evidence with great care, considering the circumstances relevant to its evaluation and paying heed to the warning, were satisfied of its truth and accuracy. To leave a jury without such a full appreciation of the danger was to risk a miscarriage of justice. The jury were told simply to consider the relative credibility of the complainant and the appellant without either a warning or a mention of the factors relevant to the evaluation of the evidence. That was not sufficient.[807]

7.9 The High Court's decisions have not laid down a standard form of words for the warning that it has required trial judges to give. However, the principles laid down in those cases, and considered by Sully J in the Supreme Court of New South Wales in *R v BWT*,[808] were summarised by the Tasmania Law Reform Institute ('TLRI') in these terms:

> Sully J's judgment indicates that the *Longman* warning has three components:
>
> - the warning (it is dangerous to convict);
> - the reasons for the warning (because the accused has been prejudiced by delay); and
> - the response to the warning (to carefully scrutinise the evidence before convicting upon it).[809]
>
> His Honour also provided guidance in framing the *Longman* warning and the wording to be used (see also Buddin J in *GS*[810]). His Honour suggested that a trial judge who is framing a *Longman* direction must ensure that the final form of the direction to the jury covers the following propositions:
>
> (i) That because of the passage of time the evidence of the complainant cannot be adequately tested;
>
> (ii) That it would be, therefore, dangerous to convict on that evidence alone;

807 (1989) 168 CLR 79, 90–1; [1989] HCA 60 [30] (Brennan, Dawson, Toohey JJ). See also *Crampton v The Queen* (2000) 206 CLR 161; [2000] HCA 60 and *Doggett v The Queen* (2001) 208 CLR 343; [2001] HCA 46.

808 (2002) 54 NSWLR 241.

809 *R v MM* (2003) 145 A Criminal R 148 (Howie J).

810 [2003] NSWCCA 73.

(iii) That the jury is entitled, nevertheless, to act upon that evidence alone if satisfied of its truth and accuracy;

(iv) That the jury cannot be so satisfied without having first scrutinised the evidence with great care;

(v) That the carrying out of that scrutiny must take into careful account any circumstances which are peculiar to the particular case and which have a logical bearing upon the truth and accuracy of the complainant's evidence; and

(vi) That every stage of the carrying out of that scrutiny of the complainant's evidence must take serious account of the warning as to the dangers of conviction.[811] (notes in original)

7.10 The standard Longman direction found in the Queensland Benchbook reads as follows:

> The complainant's long delay in reporting the incident she says happened on (insert date) has an important consequence: her evidence cannot be adequately tested or met after the passage of so many years, the defendant having lost by reason of that delay means of testing, and meeting, her allegations that would otherwise have been available.
>
> By the delay, the defendant has been denied the chance to assemble, soon after the incident is alleged to have occurred, evidence as to what he and other potential witnesses were doing when, according to the complainant, the incident happened. Had the complaint instead been made known to the defendant soon after the alleged event, it would have been possible then to explore the pertinent circumstances in detail, and perhaps to gather, and to look to call at a trial, evidence throwing doubt on the complainant's story [or confirming the defendant's denial] — opportunities lost by the delay.
>
> The fairness of the trial (as the proper way to prove or challenge the accusation) has necessarily been impaired by the long delay.
>
> So I warn you that it would be dangerous to convict upon the complainant's testimony alone unless, after scrutinizing it with great care, considering the circumstances relevant to its evaluation, and paying heed to this warning, you are satisfied beyond reasonable doubt of its truth and accuracy.[812] (notes omitted)

7.11 This wording uses the phrases 'dangerous to convict' and 'scrutinizing … with great care', both of which have been criticised as unfamiliar to lay jurors and as giving coded messages seized on by jurors to acquit.[813] They are not permitted in South Australia: see section 34CB(3) of the *Evidence Act 1929* (SA).[814]

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811 Tasmania Law Reform Institute, *Warnings in sexual offences cases relating to delay in complaint*, Final Report No 8 (2006) [1.2.4].

812 Queensland Courts, *Supreme and District Court Benchb*ook, 'Delay between (Sexual) Incident and Complaint (Longman Direction)' [65] <http://www.courts.qld.gov.au/2265.htm> at 3 September 2009. See Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [4.104]–[4.109].

813 See Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [7.66], [8.29], [8.32].

814 See [7.15] below.

7.12 There is no relevant statutory provision in Queensland that modifies the effect of the common law on the Longman direction. However, statutory provisions in a number of other Australian jurisdictions have modified the common law requirement to give a Longman warning.

7.13 Section 165B of the *Evidence Act 1995* (NSW) reads:

> **165B Delay in prosecution**
>
> (1) This section applies in a criminal proceeding in which there is a jury.
>
> (2) If the court, on application by a party, is satisfied that the defendant has suffered a significant forensic disadvantage because of the consequences of delay, the court must inform the jury of the nature of that disadvantage and the need to take that disadvantage into account when considering the evidence.
>
> (3) The judge need not comply with subsection (2) if there are good reasons for not doing so.
>
> (4) It is not necessary that a particular form of words be used in informing the jury of the nature of the significant forensic disadvantage suffered and the need to take that disadvantage into account, but the judge must not in any way suggest to the jury that it would be dangerous or unsafe to convict the defendant solely because of the delay or the forensic disadvantage suffered because of the consequences of the delay.
>
> (5) The judge must not warn or inform the jury about any forensic disadvantage the defendant may have suffered because of delay except in accordance with this section, but this section does not affect any other power of the judge to give any warning to, or to inform, the jury.
>
> (6) For the purposes of this section:
>
> (a) delay includes delay between the alleged offence and its being reported, and
>
> (b) significant forensic disadvantage is not to be regarded as being established by the mere existence of a delay.
>
> (7) For the purposes of this section, the factors that may be regarded as establishing a 'significant forensic disadvantage' include, but are not limited to, the following:
>
> (a) the fact that any potential witnesses have died or are not able to be located,
>
> (b) the fact that any potential evidence has been lost or is otherwise unavailable.[815]

815 Section 165B of the *Evidence Act 1995* (Cth) and the *Evidence Act 2008* (Vic) is in identical terms, apart from subs 7, which appears only in the NSW Act, and subs 2 which, under the Victorian Act, reads 'on application by the defendant' rather than 'by a party'. It was introduced by the *Evidence Amendment Act 2008* (Cth) and the *Evidence Amendment Act 2007* (NSW). Section 165B is not found in the *Evidence Act 2001* (Tas).

7.14 Section 61 of the *Crimes Act 1958* (Vic) reads:

> **61. Jury warnings**
>
> (1) On the trial of a person for an offence under Subdivision (8A), (8B), (8C), (8D) or (8E) or under any corresponding previous enactment or for an attempt to commit any such offence or an assault with intent to commit any such offence—
>
> (a) the judge must not warn, or suggest in any way to, the jury that the law regards complainants in sexual cases as an unreliable class of witness; and
>
> (b) if evidence is given or a question is asked of a witness or a statement is made in the course of an address on evidence which tends to suggest that there was delay in making a complaint about the alleged offence by the person against whom the offence is alleged to have been committed, the judge—
>
> (i) must inform the jury that there may be good reasons why a victim of a sexual assault may delay or hesitate in complaining about it; and
>
> (ii) must not warn, or suggest in any way to, the jury that the credibility of the complainant is affected by the delay unless, on the application of the accused, the judge is satisfied that there is sufficient evidence tending to suggest that the credibility of the complainant is so affected to justify the giving of such a warning; and
>
> (iii) must not warn, or suggest in any way to, the jury that it would be dangerous or unsafe to find the accused guilty because of the delay.
>
> (1A) If the judge, on the application of the accused in a proceeding to which subsection (1) applies, is satisfied that the accused has suffered a significant forensic disadvantage because of the consequences of the delay in making a complaint about the alleged offence by the person against whom the offence is alleged to have been committed, the judge must, in any terms that the judge considers appropriate having regard to the circumstances of the case—
>
> (a) inform the jury of the nature of the forensic disadvantage suffered by the accused; and
>
> (b) instruct the jury to take that disadvantage into consideration.
>
> (1B) Despite subsection (1A), a judge must not warn, or suggest in any way to, the jury that it would be dangerous or unsafe to find the accused guilty because of the delay.
>
> (1C) For the purposes of subsection (1A), the passage of time alone is not to be taken to cause a significant forensic disadvantage.
>
> (1D) Nothing in subsection (1A) requires a judge to give a warning referred to in that subsection if there is no reason to do so in the particular proceeding.

(1E) A judge must not give a warning referred to in subsection (1A) or a warning to the effect of a warning referred to in subsection (1A) except in accordance with this section and any rule of law to the contrary is hereby abrogated.

(1F) Nothing in subsections (1A) to (1E) affects the power of a judge to give any other warning to, or to otherwise inform, the jury.

(2) Nothing in subsection (1) prevents a judge from making any comment on evidence given in the proceeding that it is appropriate to make in the interests of justice.

(3) Despite subsection (2), a judge must not make any comment on the reliability of evidence given by the complainant in a proceeding to which subsection (1) applies if there is no reason to do so in the particular proceeding in order to ensure a fair trial.

7.15 The relevant South Australian provision is section 34CB of the *Evidence Act 1929* (SA), which reads:

34CB—Direction relating to delay where defendant forensically disadvantaged

(1) A rule of law or practice obliging a judge in a trial of a charge of an offence to give a warning of a kind known as a *Longman* warning is abolished.

Note— See *Longman v The Queen* (1989) 168 CLR 79

(2) If, in a trial of a charge of an offence, the court is of the opinion that the period of time that has elapsed between the alleged offending and the trial has resulted in a significant forensic disadvantage to the defendant, the judge must—

(a) explain to the jury the nature of the forensic disadvantage; and

(b) direct that the jury must take the forensic disadvantage into account when scrutinising the evidence.

(3) An explanation or direction under subsection (2) may not take the form of a warning and—

(a) must be specific to the circumstances of the particular case; and

(b) must not include the phrase 'dangerous or unsafe to convict' or similar words or phrases.

7.16 Criticisms of the Longman direction were noted in the Commission's Issues Paper at [4.106]–[4.107]. Some of these were also noted by Neave JA in the Victorian Court of Appeal:[816]

> I note that there has been considerable criticism of the way in which the requirement to give a *Longman* warning has been interpreted and applied. As Wood CJ at CL noted in *R v BWT*:

816 *R v RW* (2008) 18 VR 666, 680–81; [2008] VSCA 79 [56]–[58] (Neave JA).

> [The relevant passages in *Doggett*, *Crampton* and *Longman*] have been taken up, so it seems to me, as requiring that an instruction in equally positive terms, be given in every case involving a substantial delay, irrespective of whether or not there is any evidence, or basis beyond suspicion, that the absence of contemporaneity between the alleged offence and complaint, or trial has in fact (not 'might have') denied to the accused a proper opportunity to meet the charge or charges brought: see for example *R v Roddom* [2001] NSWCCA 168, *R v GJH* [2001] NSWCCA 128 and *R v Roberts* [2001] NSWCCA 163.
>
> Put another way, the effect of these decisions has been to give rise to an irrebuttable presumption that the delay has prevented the accused from adequately testing and meeting the complainant's evidence; and that, as a consequence, the jury must be given a warning to that effect irrespective of whether or not the accused was in fact prejudiced in this way.
>
> The difficulty which I have with this proposition is that it elevates the presumption of innocence, which must be preserved at all costs, to an assumption that the accused was in fact innocent, and that he or she might have called relevant evidence, or cross examined the complainant in a way that would have rebutted the prosecution case, had there been a contemporaneity between the alleged offence and the complaint or charge. That consideration loses all of its force if, in fact, the accused did commit the offence. In that event there would have been no evidence available of a positive kind, relating for example to the existence or ownership of the premises, or of a motor vehicle or other item, associated with the offence charged, or going to establish an alibi for the relevant.[817]

His Honour went on to criticise the requirement that the jury be directed that it is 'dangerous or unsafe to convict' the accused in certain circumstances. He said:

> any direction, framed in terms of it being 'dangerous or unsafe' to convict, risks being perceived as a not too subtle encouragement by the trial judge to acquit, whereas what in truth the jury is being asked to do is to scrutinize the evidence with great care.[818]

The joint Australian, New South Wales and Victorian Law Reform Commission *Report on Uniform Evidence Law* also criticised the law relating to Longman warnings,[819] and suggested that the warning required now comes very close to the corroboration warning required in sexual offence cases at common law.[820] Since the accused was presented for these offences Victorian law on Longman warnings has been substantially modified by amendments to *Crimes Act 1958*, s 61.[821] (notes as in original)

7.17 The TLRI summarised these criticisms this way:

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817 *R v BWT* (2002) 54 NSWLR 241, [13]–[15]. The comments were reproduced in the Tasmania Law Reform Institute, *Warnings in Sexual Offences relating to Delay in Complaint*, Final Report No 8 (October 2006), 18.

818 Ibid [34].

819 *Report on Uniform Evidence Law,* ALRC Report 102, NSWLRC Report 112, VLRC Final Report December 2005, 611–634 [18.72]–[18.146]. Note that the NSWLRC did not agree with the reforms proposed by the other two Commissions.

820 Ibid [18.88].

821 Amended by *Crimes (Sexual Offences) (Further Amendment) Act 2006* (Vic).

> *2.1.1* The *Longman* and *Crofts* warnings give rise to a number of practical, procedural and theoretical problems. Specifically, they introduce uncertainty into the law because it is unclear in many cases whether either or both of these warnings should be given; the warnings require complex, possibly confusing and even contradictory directions to be given to the jury; they potentially re-instate and endorse false stereotypes of sexual assault complainants and, therefore, also raise the spectre of injustice and unjustified discrimination in the criminal justice process for such complainants. Furthermore, they undermine legislative reforms to the common law designed to overcome this injustice and discrimination. The *Longman* warning is also problematic because it has developed through case law so that now it creates an irrebuttable presumption that the accused has been prejudiced in his defence by the length of delay between the commission of the alleged offence and its reporting. This presumption continues to apply and requires a warning even in cases where there is no evidence that the accused has actually been prejudiced in this way. Further, this warning is open to misinterpretation by the jury as a coded direction from the judge to acquit the accused.
>
> …
>
> *2.2.1* The complexity of the *Longman* warning, particularly where there is actually some corroboration of the complainant's account, is demonstrated and explained in the judgment of Sully J in *BWT.* Its complexity coupled with the necessity to give an adequate warning in the terms mandated by the High Court pose difficulties for trial judges in giving directions that are insulated against successful appeal and that also meet the coexisting requirement of intelligibility, simplicity and brevity. The number of successful appeals on the ground of failure to give an adequate warning provides eloquent testament to this problem …
>
> *2.3.1* The effect of the decision in *Longman*, as interpreted in *Crampton* and *Doggett*, is also controversial and problematic because it creates an irrebuttable presumption that the accused has been prejudiced by the complainant's delay in making a complaint. …
>
> *2.3.2* While it is acknowledged that delay in making a complaint can disadvantage many accused in preparing their defence, where there has been no such disadvantage, or where no specific disadvantage can be indicated, application of the *Longman* warning is irrational. It is therefore preferable that the circumstances where a *Longman* warning must be given should be limited to situations where an accused can show a specific disadvantage caused by the delay, rather than a hypothetical, presumptive disadvantage.[822]

7.18 The NSW Law Reform Commission noted four broad areas of criticism about the Longman direction:

> 7.49 First, the warning is said to have given rise to an irrebuttable presumption that delay in the complaint prevents the accused from adequately testing the complainant's evidence. The warning has an underlying assumption that the accused might have called relevant evidence had there been a contemporaneity between the alleged offence and the complaint or charge.

822 Tasmania Law Reform Institute, *Warnings in sexual offences cases relating to delay in complaint*, Final Report No 8 (2006) [2.1.1]–[2.2.1], [2.3.1]–[2.3.2].

> 7.50 It is argued that this assumption loses its force if the accused was not prejudiced in circumstances where he or she is able to call evidence in rebuttal, or where the absence of contemporaneity did not in any way deprive him or her of such an opportunity. The latter circumstance might arise, for example, where the complaint related to a time and place where the accused was in fact living alone with the complainant, and in circumstances where, no matter what inquiries were made, the case became one of word against word, such that rebuttal evidence could never have been obtained.
>
> 7.51 Secondly, it is contended that the *Longman* warning has effectively reinstated the false stereotypes about the unreliability of complainants in sexual offences cases.
>
> 7.52 Thirdly, the use of the phrase 'unsafe/dangerous to convict' has been criticised as an encroachment on the jury's fact-finding role. It is claimed that there is a risk that the jury will interpret the phrase as a suggestion or encouragement by the judge to acquit the accused.
>
> 7.53 While there are passages in some cases to the effect that the *Longman* warning does not require the use of particular words, and that a direction which does not contain the words 'dangerous' or 'unsafe' to convict is not necessarily inadequate, the weight of authority appears to be that the use of the words 'dangerous/unsafe to convict' will be essential in most cases of delay.
>
> 7.54 Finally, there is a lack of clarity as to what length of delay in making a complaint will be considered 'substantial' so as to necessitate the delivery of the warning. The *Longman* case itself involved a time lapse of more than 20 years between the alleged offences and complaint.[823] (notes omitted)

7.19 An interesting recent application of the Longman direction occurred in *Bropho v Western Australia* [2007] WADC 77.[824] The defendant was charged with seven counts of unlawful carnal knowledge of a child under the age of 13 years, and was tried by a judge alone without a jury under section 118 of the *Criminal Procedure Act 2004* (WA).[825] The complaints were first made to the Police about 10 years after the alleged offences, and 17 to 18 years before the trial was held. As the trier of fact, the judge had to direct himself as to the care with which the complainant's evidence should be viewed:

> [41] The trial judge appreciated that because the complaints made by the complainant were 10 years old when she made complaint to the police in 2000 and 17 or 18 years old by the time of trial, the appellant was entitled to the benefit of a direction in accordance with the decision in *Longman v The Queen* [1989] HCA 60; (1989) 168 CLR 79 (a *Longman* direction). Such a *Longman* direction was administered by the trial judge to himself. He scrutinised the evidence of the complainant with great care. He thought that, in the circumstances of the case, an exceptionally close scrutiny of her evidence was called for. He appreciated that the appellant was under considerable forensic disadvantage by reason of the fact that many years had elapsed from the date of the alleged offences until the date of trial. His Honour identified a number of

823 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [7.49]–[7.54].

824 A copy of this judgment does not appear to be available. The Commission is citing from the judgment of the Court of Appeal of Western Australia in *Bropho v Western Australia (No 2)* [2009] WASCA 94.

825 *Bropho v Western Australia (No 2)* [2009] WASCA 94 [7]. Comparable provisions now exist in Queensland in the Criminal Code (Qld) ss 614–615E.

> aspects of forensic disadvantage occasioned by lack of opportunity to test every aspect of the evidence.
>
> [42] When dealing with the credibility of the witnesses the trial judge repeated that, during the course of the complainant's evidence, he scrutinised her evidence with great care. He had since read and reread the transcript of her evidence and although aware of numerous shortcomings in her lifestyle (the abuse of solvents, the use of methylamphetamine, the likely effect of those substances upon mental acuity, the convictions for providing false information to police and the inconsistency between her evidence and written statements) he was nevertheless of the firm view that she was a completely truthful witness.[826]

7.20 Although this might seem somewhat artificial, there is a very clear advantage in a judge-only trial of the process of judges directing and warning themselves about the way in which certain evidence should be scrutinised: as the judges are required to deliver comprehensive reasons for judgment, their analysis of the evidence, the weight that they attached to each part of the testimony and other material, and their views of the reliability of each witness have to be carefully and methodically documented.[827] The judges' conclusions about the evidence and the process that lead to the verdicts reached on each charge are entirely transparent — in stark contrast to the position with a jury trial — and susceptible to challenge on appeal. No secrecy attaches to the judges' statement of the law, statements of the directions to themselves and their review of the evidence in the light of those directions; and any shortcomings in them can be considered in detail on appeal, if appropriate.

7.21 More importantly for this review, however, may be the comments in paragraph [42] of the judgment quoted above where the Court of Appeal notes with approval that the trial judge 'scrutinised [the witness's] evidence with great care' and had since the trial 'read and reread the transcript of her evidence'. It invites the question: what would a jury have done — or been allowed to do — in the same circumstances? If the jury had not had access to the transcript of this witness's evidence, how could it be expected to have 'scrutinised' her evidence with the same great care as the trial judge did?[828]

Submissions

7.22 Some of the respondents to the Commission's Issues Paper and the VLRC's Consultation Paper raised concerns about the Longman direction and directions in

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826 *Bropho v Western Australia (No 2)* [2009] WASCA 94 [41]–[42].

827 On this point, the Honourable JJ Spigelman AC, Chief Justice of New South Wales, has said:

> First, it is my experience and I believe it to be the universal experience of the Australian judiciary, that the need to write down in a systematic format the true reasons why a judge has reached a particular conclusion, means that that conclusion is more likely to be the correct conclusion. … A rational statement of why a decision was made should reveal, in most circumstances, the impartiality of the judge. … The objectives of predictability and consistency are significantly enhanced by the availability of reasons for the decision …

See The Hon JJ Spigelman, 'Reasons for Judgment and the Rule of Law' (Paper presented at the National Judicial college, Beijing, 10 November 2003 and Shanghai, 17 November 2003).

828 The issue of providing the jury with the transcript of evidence is discussed in this Paper at [3.227]–[3.237], [3.250]–[3.262] above.

sexual offence cases generally. For example, Patrick Tehan QC made a submission to the VLRC that:

> I think the time has now come for some form of codification and simplification of directions in sexual offence trials. I think this will tend to lessen the burden on trial judges and will also assist in overcoming the complexity identified by the [VLRC] with having statutory and common law directions.[829]

7.23 The Longman direction was singled out for specific consideration for reform by two judges of the District Court of Queensland. One of those judges submitted:

> *Longman* ought to be reformed, along the lines of NSW, Vic or SA provisions.[830] I consider the key issue is whether there is specific forensic advantage, not just the passage of time. The passage of time makes it difficult for the complainant as well as the accused and it is grossly unfair that a person who has finally gathered the courage to report a sexual assault committed many years ago should be strenuously cross-examined AND the accused remain silent without an adverse inference [indeed the trial judge must give an *Azzopardi* direction[831]] and then as well the trial judge must give the *Longman* direction.
>
> In combination, it means that the criminal trial is unjustifiably biased towards the accused.
>
> There is a great deal of research material which demonstrates that it is typical for a child to delay complaint of a sexual offence … Given this research, it is unfair to tell a jury that delay ought to be taken into account.[832] (emphasis in original, note added)

7.24 The other Queensland District Court judge noted in relation to directions in sexual offence cases that:

> In short, the language used by the High Court is too rigid and mandatory in its terms. The result has … created great difficulties for trial judges, and an advantage, often unmerited, for the accused.
>
> *Longman* has been abolished in South Australia — para 4.108.[833] A similar course should be adopted here. The appropriate warning should simply be a matter of the trial judge's discretion, depending on the facts.[834] (note added)

7.25 The Longman direction was also identified as problematic in several submissions in response to the VLRC's Consultation Paper.[835]

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829 Patrick Tehan QC, Submission to the Victorian Law Reform Commission, 26 November 2008 [3].

830 See [7.11]–[7.15] above.

831 See Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [4.61] for a description of an *Azzopardi* direction: it will 'almost always be desirable' for the judge to give a warning that no adverse inference should be drawn from the defendant's silence: *Azzopardi v The Queen* (2001) 205 CLR 50 [51].

832 Submission 6.

833 Of the Issues Paper: Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009).

834 Submission 10.

7.26 Judge MD Murphy of the County Court of Victoria made this submission:

> I support some from of consolidation in relation to sex cases and am troubled by the length of the directions required to be given, particularly in stale sex cases. Some of the model directions required to be given … go on for pages and pages in the Charge Book and I really wonder whether the jury can understand what is being said. I support the criticisms made by Wood J in his well known article.[836]

7.27 However, Stephen Odgers SC warned against the risk that the legislative 'watering down' of the warning as formulated by the High Court 'may have the unintended result that the courts show greater willingness to exclude evidence or stay trials.'[837] He considered that section 165B of the Uniform Evidence Law was a 'satisfactory approach' to the Longman direction.[838]

VLRC's recommendations

7.28 The VLRC made a number of recommendations specifically concerning directions and warnings in sexual offences trials in its recent Final Report on jury directions. The first of them outlines a general approach to be adopted in considering reform of directions in sexual offence trials:

> 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.[839]

7.29 The second of the VLRC's recommendations in this area concerns the Longman direction:

> 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),[840] in lieu of s 61 of the *Crimes Act 1958* (Vic).[841]

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835 See Dr Val Clarke, Submission to the Victorian Law Reform Commission, 28 March 2008; Sandra Burke, Submission to the Victorian Law Reform Commission, 29 January 2009; Stephen Odgers SC, Submission to the Victorian Law Reform Commission, 12 November 2008.

836 Judge MD Murphy, Submission to the Victorian Law Reform Commission, 5 February 2009, 4. Judge Murphy is presumably referring to James Wood AO QC, 'The Trial under Siege: Towards Making Criminal Trials Simpler' (Paper Presented at the District and County Court Judges Conference, Fremantle, 27 June–1 July 2007), or James Wood AO QC, 'Summing up in Criminal Trials—A New Direction' (Paper presented at the Conference on Jury Research, Policy and Practice, Sydney, 11 December 2007), or both.

837 Stephen Odgers SC, Submission to the Victorian Law Reform Commission, 12 November 2008, 1.

838 Ibid 4. Odgers' submission was expressly endorsed by the Queensland Law Society and Bar Association of Queensland in their joint submission to this Commission: Submission 13. Odgers' submission also makes comments about other aspects of jury directions in sexual offence cases. Section 165B of the Uniform Evidence Law as found in NSW is set out at [7.13] above.

839 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) 16, [5.76]–[5.101].

840 Section 165B of the *Evidence Act 2008* (Vic) is in identical terms to s 165B of the *Evidence Act 1995* (NSW), apart from s 165B(7), which does not appear in the Victorian statute, and s 165B(2) which includes slightly different wording: see [7.13] above.

841 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) 16, [5.76]–[5.101].

7.30 Section 165B of the *Evidence Act 2008* (Vic) will come into force in Victoria on 1 January 2010. However, the thrust of the VLRC's recommendation 37 is the incorporation of a provision substantially in the terms of section 165B in the jury directions statute which forms the key recommendation in the VLRC's Final Report. The VLRC said this in support of section 165B:

> 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. 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 [VLRC] 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. (note omitted)

QLRC's proposals for reform

7.31 In October 2006, the TLRI published its report on warnings in sexual offence cases relating to delay in complaint. The principal recommendation of the TLRI in relation to the Longman warning was the enactment of new provisions that:

> articulate the circumstances in which and the type of warnings that should be given and comments that should be made when there is significant delay in complaint. As the principles expressed by *Longman* have a broad application and are not confined just to sexual offences cases, the new provisions will also have a broad application, relating to all cases where there is delay in the reporting of an offence.[842]

7.32 The TLRI noted that this recommendation was consistent with recommendations of the Australian Law Reform Commission and Victorian Law Reform Commission in their joint report on Uniform Evidence Law (with which the New South Wales Law Reform Commission did not agree):

842 Tasmania Law Reform Institute, *Warnings in sexual offences cases relating to delay in complaint*, Final Report No 8 (2006) [3.3.12]. The TLRI also recommended the repeal of section 165(5) of the *Evidence Act 2001* (Tas), which is considered at [7.50] below.

Recommendation 18–3 The ALRC and the VLRC recommend that the uniform Evidence Acts be amended to provide that where a request is made by a party, and the court is satisfied that the party has suffered significant forensic disadvantage as a result of delay, an appropriate warning may be given.

The provision should make it clear that the mere passage of time does not necessarily establish forensic disadvantage and that a judge may refuse to give a warning if there are good reasons for doing so.[843]

7.33 The TLRI recommended that these new provisions should:

- require that where there has been a significant delay between the time at which an offence is alleged to have occurred and the reporting of that offence, and the accused requests that a warning be given, a warning may only be given where specific evidence is identified that demonstrates that s/he has suffered an identifiable forensic disadvantage as a result of the delay;
- stipulate that identifiable forensic disadvantage is not established by the mere fact of delay alone;
- make it clear that any warning given is to be given in accordance with s 165(2) and that it must not be couched in the particular terms laid down by the High Court in *Longman, Crampton and Doggett*;
- specify that the warning is not to be couched in terms of its being 'dangerous or unsafe to convict';
- also provide that where no specific evidence of an identifiable forensic disadvantage resulting from delay is identified and the accused requests that a warning be given, the trial judge may explain to the jury what the implications of the delay in complaint are for the accused;
- make it clear that any such explanation is not to be couched as a warning in *Longman* terms, including not being couched in terms of its being 'dangerous or unsafe to convict'; and
- stipulate that the trial judge may refuse to give a warning or explanation if there are good reasons for doing so.[844]

7.34 Those recommendations have not yet been implemented.

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843 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC Report No 102, NSWLRC Report No 112, VLRC Final Report (2005) [18.76]–[18.129] and Recommendation 18–3. The New South Wales Law Reform Commission did not agree with this recommendation: see [18.130]–[18.146]:

> To the extent to which *Longman* warnings create particular problems in terms of their formulation and overlap with other warnings that courts must give in sexual assault cases, the NSWLRC is of the view … that those problems ought to be addressed in offence-specific reviews or legislation. More generally, the NSWLRC agrees … that concerns about *Longman* warnings are not generally amenable to legislative solution. In our view, a trial judge must (subject, of course, to appellate review) retain a strong discretion, in the interests of justice, to warn about the perceptive risk of forensic disadvantage that is caused by delay in the circumstances and that may not be within the experience of the jury. The importance of such a warning is underscored, as Kirby J has pointed out, by the reluctance of Australian courts, in comparison with those in overseas jurisdictions, to grant permanent stays of proceedings to protect defendants from the injustices that can arise in attempting to mount a defence to criminal charges years or decades after an alleged offence has occurred. (at [18.146]).

844 Tasmania Law Reform Institute, *Warnings in sexual offences cases relating to delay in complaint*, Final Report No 8 (2006) iv.

7.35 It should be borne in mind that the Tasmanian legislation did not contain section 165B, which is found in the Uniform Evidence Law in New South Wales and (from 1 January 2010) Victoria, as well as in the Commonwealth legislation. Section 165B appears to have been enacted in response to the joint recommendations of the ALRC and VLRC (and notwithstanding the objection of the NSWLRC).

7.36 This Commission is attracted to the TLRI's recommendation about a statutory amendment to override the Longman direction. It appears to offset the forensic disadvantage that a defendant may suffer where there has been a significant delay in bringing a complaint by alerting the jury to this but only where an actual disadvantage has been shown. It seeks to anchor the direction to evidence (or the lack of it) in the case before the jury and not to leave it as an abstract warning invoking the formulaic, unusual and contentious expressions 'to scrutinise evidence with great care' and 'dangerous or unsafe to convict'.

7.37 As is very often the case with respect to jury directions, there is a balance to be struck by the terms of the directions themselves and by the trial judge's decision to give (or withhold) a direction in each case. This new provision seems to the Commission to strike a fair balance in cases where the material before the court warrants a warning along the lines of the Longman direction.

7-1 New provisions should be inserted into the *Evidence Act 1977* (Qld) that:

(a) require that where there has been a significant delay between the time at which an offence is alleged to have occurred and the reporting of that offence, and the defendant requests that a warning be given, a warning may only be given where specific evidence demonstrates that the defendant has suffered an identifiable forensic disadvantage as a result of the delay;

(b) stipulate that identifiable forensic disadvantage is not established by the mere fact of delay alone;

(c) specify that the warning is not to be couched in terms of it being 'dangerous or unsafe to convict' on the basis of that evidence;

(d) provide that, where no specific evidence of an identifiable forensic disadvantage resulting from delay is identified and the defendant requests that a warning be given, the trial judge may explain to the jury the implications of the delay for the defendant; and

(e) stipulate that the trial judge may refuse to give a warning or explanation if there are good reasons for doing so.

THE KILBY / CROFTS WARNING[845]

7.38 The Crofts warning arises out of a direction which was mandated by the High Court in *Kilby v The Queen*.[846] The case has been described as requiring trial judges to instruct juries that delay in complaint in sexual offence cases reflected upon the credibility of the complainant's account and was an important factor in determining whether the allegations were fabricated.[847] Barwick CJ said:

> It would no doubt be proper for a trial judge to instruct a jury that in evaluating the evidence of a woman who claims to have been the victim of a rape and in determining whether to believe her, they could take into account that she had made no complaint at the earliest reasonable opportunity. Indeed, in my opinion, such a direction would not only be proper but, depending of course on the particular circumstances of the case, ought as a general rule to be given.
>
> …
>
> In my opinion, quite apart from the fact that there may be many reasons why a complaint is not made, the want of a complaint does not found an inference of consent. It does tell against the consistency of the woman's account and accordingly is clearly relevant to her credibility in that respect.
>
> I am clearly of opinion therefore that a trial judge is not only not bound as a matter of law but not entitled to instruct a jury in the trial of an accused on a charge of rape that the failure of the woman claiming to have been raped to complain at the earliest possible opportunity is evidence of her consent to the intercourse. Statements to the contrary in *Reg. v. Hinton*[848] and in *Reg. v. Mayberry* (Court of Criminal Appeal of Queensland 1973, unreported) are not, in my opinion, supportable.[849] (note in original)

7.39 The assumptions on which this was seen to be based have been widely criticised and led to statutory amendments seeking to negate the effect of *Kilby*.[850]

7.40 Some 23 years later, the High Court considered a Victorian provision in *Crofts v The Queen*[851] that has some similarities to the later statutory response in Queensland. Section 61 of the *Crimes Act 1958* (Vic) at that time provided that in trials for certain sexual offences:[852]

> (1) …

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845 See Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [4.110]–[4.113]. See also New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [7.64]–[7.76].

846 [1973] HCA 30 [10]; (1973) 129 CLR 460.

847 See Tasmania Law Reform Institute, *Warnings in sexual offences cases relating to delay in complaint*, Final Report No 8 (2006) [1.1.2].

848 (1961) Qd R 17.

849 [1973] HCA 30 [10], [31]–[32]; (1973) 129 CLR 460, 465, 472 (Barwick CJ; McTiernan, Stephen and Mason JJ agreeing).

850 See, for example, Tasmania Law Reform Institute, *Warnings in sexual offences cases relating to delay in complaint*, Final Report No 8 (2006) [1.1.4]–[1.1.8].

851 (1996) 186 CLR 427.

852 Ibid 433, 443. Section 61 has since been amended: see [7.14] above.

> (a) the judge must not warn, or suggest in any way to, the jury that the law regards complainants is sexual cases as an unreliable class of witness; and
>
> (b) if evidence is given or a question is asked of a witness or a statement is made … which tends to suggest that there was delay in making a complaint about the alleged offence … the judge must—
>
> (i) warn the jury that delay in complaining does not necessarily indicate that the allegation is false; and
>
> (ii) inform the jury that there may be good reasons why a victim of a sexual assault may hesitate in complaining about it.
>
> (2) Nothing in sub-section (1) prevents a judge from making any comment on evidence given in the proceeding that it is appropriate to make in the interests of justice.

7.41 The High Court held that section 61 did not prevent the trial judge from giving a Kilby direction:

> Provisions such as s 61(1)(b) of the Act are not, in their terms, addressed to a fundamental alteration of the balance suggested both by commonsense and by the decision of this Court in *Kilby*. That this is so is clear from the terms of s 61(1)(b) itself. The two subparagraphs within it merely require that the judge should warn the jury that delay in complaining does not *necessarily* indicate that the allegation is false and that there may be good reasons for hesitation in complaining. The existence of such reasons had already been acknowledged by Barwick CJ in the passage cited. The use of the adverb 'necessarily' is critical to the operation of s 61(1)(b)(i). 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.
>
> That this is the correct construction of s 61(1)(b) is confirmed both by the obvious relationship between the two sub-paragraphs within it and also by the express provisions of sub-s 61(2) by which there is reserved to the judge the entitlement to make any comment 'that it is appropriate to make in the interests of justice'. Such interests obviously focus attention upon the facts of the particular case. The reservation of such an entitlement to comment makes it plain that the abiding judicial duty to assist the jury in the weighing of the potential significance of delay in complaining, in the circumstances of the particular case, remains.[853] (emphasis in original)

7.42 The majority went further:

> … the purpose of such legislation, properly understood, was to reform the balance of jury instruction not to remove the balance. The purpose was not to convert complainants in sexual misconduct cases into an especially trustworthy class of witnesses. It was simply to correct what had previously been standard practice by which, based on supposed 'human experience' and the 'experience of courts', judges were required to instruct juries that complainants of sexual misconduct were specially suspect, those complained against specially vulner-

853 (1996) 186 CLR 427, 448–9; [1996] HCA 22 (Toohey, Gaudron, Gummow and Kirby JJ).

> able and delay in complaining invariably critical. In restoring the balance, the intention of the legislature was not to 'sterilize' complainants from critical comment where the particular facts of the case, and the justice of the circumstances, suggested that the judge should put such comments before the jury for their consideration. The overriding duty of the trial judge remains to ensure that the accused secures a fair trial. It would require much clearer language than appears in s 61 of the Act to oblige a judge, in a case otherwise calling for comment, to refrain from drawing to the notice of the jury aspects of the facts of the case which, on ordinary human experience, would be material to the evaluation of those facts.[854] (notes omitted)

7.43 The duty to provide a Kilby direction does not arise in every case, however:

> Two qualifications to the duty to provide the warning suggested by *Kilby* may be accepted. The first is where the peculiar facts of the case and the conduct of the trial do not suggest the need for a warning to restore a balance of fairness. The second is that the warning should not be expressed in such terms as to undermine the purpose of the amending Act by suggesting a stereotyped view that 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. So long as the purpose of the legislation, to rid the law of such stereotypes, is kept in mind, and the terms in which the legislation is expressed are followed, judges striving to assist juries in their consideration of the facts are unlikely to fall into the kind of error that occurred in this case.[855]

7.44 The statutory response in Queensland was the introduction in 2004 of section 4A of the *Criminal Law (Sexual Offences) Act 1978* (Qld). It provides in effect that the Crofts direction cannot be given,[856] although the judge may make such other comments on the complainant's evidence as may be appropriate in the interests of justice:

> **4A Evidence of complaint generally admissible**
>
> (1) This section applies in relation to an examination of witnesses, or a trial, in relation to a sexual offence.
>
> (2) Evidence of how and when any preliminary complaint was made by the complainant about the alleged commission of the offence by the defendant is admissible in evidence, regardless of when the preliminary complaint was made.
>
> (3) Nothing in subsection (2) derogates from the power of the court in a criminal proceeding to exclude evidence if the court is satisfied it would be unfair to the defendant to admit the evidence.
>
> (4) If a defendant is tried by a jury, 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 or other complaint.

854 Ibid 451; [1996] HCA 22 (Toohey, Gaudron, Gummow and Kirby JJ).

855 Ibid 451–52;[1996] HCA 22 (Toohey, Gaudron, Gummow and Kirby JJ).

856 See sub-section 4A(4). See also Queensland Courts, *Supreme and District Court Benchbook*, 'Absence of Fresh Complaint — (this direction is made redundant by s 4A of the *Criminal Law (Sexual Offences) Act 1978)*' [63] <http://www.courts.qld.gov.au/2265.htm> at 3 September 2009.

> (5) Subject to subsection (4), the judge may make any comment to a jury on the complainant's evidence that it is appropriate to make in the interests of justice.

7.45 This provision is essentially neutral on the question of the reliability of any delayed complaint. The neutrality of section 4A can be contrasted with former section 61(1)(b) of the *Crimes Act 1958* (Vic) which was considered in *Crofts v The Queen*,[857] which speaks in terms of the possible falsity of a delayed complaint, which goes beyond the standard common law of unreliability and which is not supported by any research of which the Commission is aware. The strict neutrality of section 4A has, however, been seen as its weakness as it does not allow the judge to make any comment that might be warranted in the light of comments by the parties, especially defence counsel, although sub-section 5 might be seen as permitting some balancing remarks.[858]

7.46 Section 4A should be read together with section 632, especially sub-section (3), of the Criminal Code (Qld), which provides that:

> **632 Corroboration**
>
> (1) A person may be convicted of an offence on the uncorroborated testimony of 1 witness, unless this Code expressly provides to the contrary.
>
> …
>
> (2) On the trial of a person for an offence, a judge is not required by any rule of law or practice to warn the jury that it is unsafe to convict the accused on the uncorroborated testimony of 1 witness.
>
> (3) Subsection (1) or (2) does not prevent a judge from making a comment on the evidence given in the trial that it is appropriate to make in the interests of justice, but the judge must not warn or suggest in any way to the jury that the law regards any class of persons as unreliable witnesses.

7.47 Thus, in Queensland a judge may not tell a jury that complainants in sexual offences are a class of unreliable witnesses or that delay in making a complaint of a sexual offence is of itself an indication that the complainant's evidence is unreliable. However, judges may, in their discretion and where the interests of justice dictate, warn the jury about any unreliability in the evidence given by the particular complainant, or a particular witness, in the particular circumstances of a given case.

7.48 The proviso that trial judges may make any comment that they feel is appropriate 'in the interests of justice' to ensure a fair trial may mean that in practice subsection 4A(4) of the *Criminal Law (Sexual Offences) Act 1978* (Qld) has less application than might be first thought. However, the Commission has no information as to how and how much section 4A is applied in practice in Queensland.

7.49 Although the position in Queensland is in principle governed by section 4A, it is worth noting the criticisms of, and submissions in relation to, the Crofts direc-

857 (1996) 186 CLR 427. See [7.40] above.

858 See the comments by the Tasmania Law Reform Institute in [3.4.5] of its report discussed at [7.53] below.

tion. Section 4A(4) may in effect permit a Crofts direction, or one similar to it, when the trial judge feels that one is necessary in the interests of justice. In that sense, the Crofts warning may not be entirely obsolete in Queensland. The Queensland Benchbook stills retains a model Crofts direction although it is described there as being 'redundant'.[859] Any such direction that might be given must comply with provisions such as section 632 of the Criminal Code (Qld).

7.50 A comparable position was examined by the TLRI, which was concerned with section 165(5) of the *Evidence Act 2001* (Tas). That section deals with a judge's obligation at the request of a party to warn the jury about the unreliability of certain classes of evidence or evidence from certain classes of witnesses and of the 'need for caution in determining whether to accept the evidence and the weight to be given to it.'[860] The judge need not comply with that request if 'there are good reasons for not doing so': section 165(3). However, section 165(5) provides that the section 'does not affect any other power of the judge to give a warning to, or inform, the jury.' The TLRI recommended the repeal of section 165(5).[861] Section 165, which is very closely modelled on the same provision in the Uniform Evidence Law, deals with warnings in relation to unreliable evidence:

> **165 Unreliable evidence**
>
> (1) This section applies to evidence of a kind that may be unreliable, including the following kinds of evidence:
>
> (a) evidence in relation to which Part 2 of Chapter 3 or Part 4 of Chapter 3 applies;[862]
>
> (b) identification evidence;
>
> (c) evidence the reliability of which may be affected by age, ill health, whether physical or mental, injury or the like;
>
> (d) evidence given in a criminal proceeding by a witness who may reasonably be supposed to be criminally concerned in the events giving rise to the proceeding;
>
> (e) evidence given in a criminal proceeding by a witness who is a prison informer;
>
> (f) oral evidence of official questioning of a defendant that is questioning recorded in writing that has not been signed or otherwise acknowledged by the defendant;[863]

859 Queensland Courts, *Supreme and District Court Benchbook*, 'Absence of Fresh Complaint — (this direction is made redundant by s 4A of the *Criminal Law (sexual Offences) Act* 1978' [63] <http://www.courts.qld.gov.au/2265.htm> at 3 September 2009.

860 *Evidence Act 2001* (Tas) s 165(2)(c).

861 Tasmania Law Reform Institute, *Warnings in sexual offences cases relating to delay in complaint*, Final Report No 8 (2006) iv.

862 Chapter 3 of the *Evidence Act 2001* (Tas) deals generally with the admissibility of evidence. Part 2 (ss 59–75) deals with hearsay evidence, and Part 4 (ss 81–90) deals with admissions.

863 Paragraph (f) differs from section 165(1)(f) of the *Evidence Act 1995* (Cth).

> (g) in a proceeding against the estate of a deceased person, evidence adduced by or on behalf of a person seeking relief in the proceeding that is evidence about a matter about which the deceased person could have given evidence if he or she were alive.
>
> (2) If there is a jury and a party so requests, the judge is to—
>
> (a) warn the jury that the evidence may be unreliable; and
>
> (b) inform the jury of matters that may cause it to be unreliable; and
>
> (c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.
>
> (3) The judge need not comply with subsection (2) if there are good reasons for not doing so.
>
> (4) It is not necessary that a particular form of words be used in giving the warning or information.
>
> (5) This section does not affect any other power of the judge to give a warning to, or to inform, the jury.

7.51 This function of section 165(5) was confirmed by the NSW Court of Criminal Appeal in *R v Stewart*:

> … s 165 has its origins in the common law requirement that the trial judge give a warning to the jury in respect of potentially unreliable evidence and s 165(5) recognises that a trial judge has power to make comments and give warnings to the jury in respect of the evidence in the trial in addition to those required by the section.[864]

7.52 The TLRI's recommendation to repeal section 165(5) was not endorsed by the ALRC, NSWLRC and VLRC in their joint report on the Uniform Evidence Law:

> Given that the repeal of s 165(5) would not effect any legal change, the Commissions did not consider in [their Discussion Paper] that such an amendment would be desirable. However, the Commissions considered two alternative solutions: the first is to subject s 165(5) to a request requirement, as applies to warnings under s 165(2); the second is to amend the uniform Evidence Acts to provide that the judge's common law obligations to give warnings continue to operate unless all the parties agree that a warning should not be given. It was also suggested, in the event that either of the above solutions were adopted, that a legislative provision be included in the uniform Evidence Acts to require the trial judge to raise the issues regarding warnings with the parties and satisfy himself or herself that the parties are aware of their rights in this regard.
>
> One benefit arising from such amendments is that it would become routine for the trial judge to ask counsel to consider what warnings they will seek and to identify any such warnings prior to charging the jury. If the judge is concerned that counsel has erroneously failed to seek a particular warning, the judge can question counsel to ensure that the question has been considered and place on the record counsel's reason for not seeking the warning. Another benefit of either approach is that they might assist to clarify the role of the trial judge (and

864 *R v Stewart* [2001] NSWCCA 260 [70] (Howie J).

> hence reduce the volume of appeals) in the situation where counsel has made a tactical decision at trial not to request a warning. Neither approach would exclude appellate intervention where the failure of counsel to request a particular warning has resulted in a miscarriage of justice.[865] (notes omitted)

7.53 The TLRI also considered section 4A of the *Criminal Law (Sexual Offences) Act 1978* (Qld):

> *3.4.4* The effect of section 4A(4) has not to date received significant judicial interpretation. Consequently, it is not known whether it precludes a trial judge from making any comment at all on the issue of delayed complaint. The legislation does not prevent the defence from attempting to undermine the credibility of the complainant's account by cross-examining her or him about delayed complaint or by addressing the jury in these terms. Where this occurs, the question will be whether s 4A(4) *Criminal Law (Sexual Offences) Act 1978* (Qld) prevents a trial judge from making any comments on this tactic and the assumptions that underlie it. Section 4A(5) provides that, subject to subsection (4), the judge may make any comment to a jury on the complainant's evidence that it is appropriate to make in the interests of justice.
>
> *3.4.5* Section 4A(4) appears to be stronger than the reform recommended by the Victorian Law Reform Commission because it does not contain any 'let out' clause along the lines of the Victorian model. The major weakness of the Queensland legislation is that it does not *require* the trial judge give any counterintuitive directions to the jury about the implications of delayed complaint for the trustworthiness of the complainant's account where the defence has made this an issue in the case.
>
> *3.4.6* Given the research findings that delay in or failure to make complaint is normal, is in fact the rule rather than the exception and is what happens in the vast majority of sexual assault cases, logically the *Crofts* warning rests on a faulty premise and asks the jury to judge the credibility of complainants according to flawed reasoning.[866]

7.54 The TLRI ultimately recommended that the Criminal Code (Tas) be amended to include a provision that prohibits expressly trial judges from making a Crofts direction.[867]

7.55 The Crofts warning was also considered by the VLRC in its Consultation Paper at [3.43], where that Commission noted the criticisms of the direction made by James Wood QC:

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

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865 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC Report No 102, NSWLRC Report No 112, VLRC Final Report (2005) [18.181]–[18.182].

866 Tasmania Law Reform Institute, *Warnings in sexual offences cases relating to delay in complaint*, Final Report No 8 (2006) [3.4.4]–[3.4.6].

867 Ibid iv, 34.

- *Crofts* requires the judge to give statutory and common law directions which appear to contradict each other, risking confusion of juries.
- There is uncertainty about when the direction is required and the obligation for judges to give the warning even when not requested by counsel.
- The warning may also be misleading or operate to unfairly disadvantage the complainant, if there is no basis for suggesting any logical nexus between delay in complaint and fabrication.
- The judicially determined obligation to give a warning undermines the purpose of the legislative provisions.[868] (notes omitted)

Submissions

7.56 Submissions made to the Commission's Issues Paper did not deal with the Crofts direction, although a few of the respondents to the VLRC's Consultation Paper did.

7.57 Stephen Odgers SC rejected Justice Woods' criticism of the Crofts warning:

> There should be no confusion for a jury in telling them that they may think that delay in complaint is relevant to the credibility of the complainant, while bearing in mind that delay does not necessarily mean the complaint is false and recognizing that there are often good reasons for delay. Such a direction is a balanced one and consistent with the common sense of jurors. It would be quite wrong just to give a statutorily mandated warning which, in effect, directed the jury to simply ignore the fact of delay.[869]

7.58 The possibility of simplifying the directions and warnings that need to be given in sexual offence cases was rejected (with some qualification) in another submission to the VLRC:

> **Question: Would codification of necessary warnings in sexual offence cases ease the burden on trial judges, by providing clarity and by removing the need to consider numerous legislative and common law sources of the relevant law?** — No, the Judicial College's work on providing materials for a charge book, for bench notes and an entire, discrete Sexual Assault Manual is an excellent resource available to judges to conveniently find the applicable law and apply it to the case at hand. Those materials are updated regularly. A Code is not necessary when such a rich source of material is to be found, all in the one site.
>
> …
>
> At para 3.72–3.82 [of the VLRC's Consultation Paper], there is a discussion about evidence of 'recent complaint'. That may be an area where simplification can occur by dispensing with the admission of such evidence. In any 'non-sexual' assault, such evidence is inadmissible as a prior consistent statement. Sensibly, it is excluded as self-serving. The inclusion of such evidence in sexual

868 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [3.43].

869 Stephen Odgers SC, Submission to the Victorian Law Reform Commission, 12 November 2008, 4. This submission was endorsed by the joint submission to this Commission of the Queensland Law Society and the Bar Association of Queensland, although without specific reference to this topic: Submission 13.

> offences is, in my submission, an anachronism, reflecting historical assumptions that have been well and truly discounted (as discussed in para 3.72). Such evidence, now admitted to bolster credit, as opposed to its truth (and therefore requiring an obtuse direction on this issue), should be excluded. That would satisfy the objective of simplifying the directions in sexual cases where such evidence would not be included and, therefore, not require direction.[870]

7.59 Associate Professor John Willis was concerned that the net effect of the legislation, the evidence, the parties' arguments and the judge's direction may invite the jury to speculate improperly:

> Generalisations in this area about so-called 'myths' that jurors (and others!) cling to are not particularly helpful. I doubt that many people today assume that all genuine rape victims immediately complain and further that failure to complain immediately inevitably casts doubt on the complainant's story …
>
> On the other hand, a failure to complain immediately will in some circumstances raise the question, 'Why now, and why not then?' … Regardless of what anyone may say, everyone (be they prosecutor, defence or jury) will be asking themselves the question: if it didn't happen why would he/she make it up?
>
> In the case of recent complaint, if evidence of recent complaint exists, it will be led by the prosecution and it can be expected to assist the prosecution.
>
> Conversely, if there has not been recent complaint, then in many cases the jury (and others) will want to know why. If there is a good reason, it would be expected to be led by the prosecutor in evidence-in-chief. I would think that it would be admissible.
>
> Section 61(1)(b)(i) seems to me highly objectionable. If there is an issue about delay, the judge
>
> > 'must inform the jury that there may be good reason why a victim of a sexual assault may delay or hesitate in complaining about it.'
>
> That is tantamount to a legislative direction to speculate.[871]

VLRC's recommendations

7.60 In its Final Report on jury directions, the VLRC made this recommendation in relation to the Kilby / Crofts direction:

> 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),[872] 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.

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870 Bernard Lindner (Criminal Bar Association), Submission to the Victorian Law Reform Commission, 30 November 2008.

871 Associate Professor John Willis, Submission to the Victorian Law Reform Commission, 16 December 2008, 7–8.

872 These sub-divisions deal with rape and indecent assault, incest, sexual offences against children, sexual offences against people with a cognitive impairment, and other sexual offences respectively.

(i) Subject to subsection (ii), save for identifying the issue for the jury and the competing contentions of counsel,[873] 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.[874]

7.61 The VLRC considered section 4A of the *Criminal Law (Sexual Offences) Act 1978* (Qld) in its Final Report, but rejected any proposal of reform along the lines of that section:

> 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.[875] 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.[876] The [VLRC] 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 [VLRC] 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

873 In compliance with *Alford v Magee* (1952) 85 CLR 437. (note in original)

874 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) 16–17, [5.76]–[5.101].

875 *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.

876 Tasmania Law Reform Institute, *Warnings in Sexual Offences Cases Relating to Delay in Complaint,* Final Report 8 (2006) 31–32.

> conflict with the evidence or are based upon stereotypical assumptions about reporting of sexual offences.[877] (notes in original)

QLRC's proposals for reform

7.62 The position in Queensland is governed by section 4A of the *Criminal Law (Sexual Offences) Act 1978* (Qld) and section 632(3) of the Criminal Code (Qld). Their combined effect appears to be that set out in [7.47]–[7.49] above.

7.63 The Commission is concerned that the retention of provisions such as section 632(3) of the Criminal Code (Qld) and section 4A(5) of the *Criminal Law (Sexual Offences) Act 1978* (Qld) in effect thwarts the purpose of the rest of those sections. However, there is an argument that their retention or repeal would leave the law and trial judges in the same position.

7.64 The provisions in these two sub-sections in effect grant judges the power to ignore the rest of those sections in the interests of justice and in the interests of ensuring a fair trial. As the Commission has discussed in this Paper, the right to a fair trial, and the trial judge's various duties to ensure that the defendant receives a fair trial, can be seen as an over-riding principle governing the tenor and detail of statute and the common law, and as the touchstone against which the exercise of the trial judge's duties and discretions is measured.[878] If these provisos do no more than re-state this guiding principle, in practice little may be achieved by their repeal, except to the extent that the fact of their repeal might be some indication that resort to the basic principles of fair trials should also be made in rare or extreme cases. The TLRI commented to similar effect that:

> Section 165(5) [of the *Evidence Act 2001 (Tas)*] appears to be largely superfluous, and, as Crawford J of the Supreme Court submits, the effect of its repeal 'will not be significant'. The repeal of the section would not have an adverse impact on the fair trial imperative that is safeguarded in the legislation. However, … the proposal to repeal s 165(5) could go some way to 'ensuring that the *Crofts* and *Longman* warnings would only be given in appropriate circumstances.'[879]

7.65 The Commission's provisional view (on which it seeks further submissions) is to propose an amendment to section 4A(5) to deal with the criticism made by the TLRI[880] along the lines of the view expressed by the VLRC that judges should have the 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'.[881] The Commission is concerned that any amendment of this nature not permit the re-introduction into Queensland of directions and warnings based on outdated and discredited assumptions.

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877 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [5.93]–[5.94]. See also [7.53]–[7.54] above.

878 See [2.2]–[2.20] above.

879 Tasmania Law Reform Institute, *Warnings in sexual offences cases relating to delay in complaint*, Final Report No 8 (2006) [3.2.5].

880 See [3.4.5] of the TLRI's report quoted at [7.53] above.

881 See [5.94] of the VLRC's Final Report quoted at [7.61] above.

7.66 An amendment to section 632 of the Criminal Code (Qld) is proposed in [7.88] and Proposal 7-3 below.

7-2 Section 4A of the *Criminal Law (Sexual Offences) Act 1978* (Qld) should be amended to give judges the 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'.

WARNINGS ABOUT EVIDENCE FROM UNRELIABLE WITNESSES

7.67 The Kilby / Crofts warning is one species of warnings about evidence from classes of witnesses whom the law conventionally regarded as unreliable and whose evidence, therefore, had to be treated with caution unless corroborated. The concerns about evidence from unreliable witnesses apply to all criminal trials, but are dealt with in this chapter because of their close connection with directions given in sexual offence trials.

7.68 Directions and warnings about unreliable evidence, cautioning careful assessment of the weight of particular evidence, were discussed in chapter 4 of the Commission's Issues Paper.[882] Historically, warnings have been required in respect of the uncorroborated evidence of certain classes of reputedly unreliable witnesses such as accomplices, children and sexual offence complainants, and in relation to other potentially unreliable evidence such as identification evidence. To those classes may be added indemnified witnesses, witnesses who have received a discount on sentence in return for testifying against the defendant,[883] and prison informers. The assumptions that underlay these warnings — that jurors were incapable of recognising the unreliability of the evidence and would apply it incorrectly without specific guidance — have been shown to be outmoded and in some cases offensive.

7.69 This is one example of the peculiarly inconsistent way in which lawyers have viewed juries. Juries are lauded, on some occasions, for their good common sense and their ability to bring community values and their general experience of life to bear when determining guilt. On other occasions they are treated as incapable of dealing with evidence by relying on that common sense and as needing specific guidance as to how to deal with some forms of evidence. That guidance was based on the experience of judges and other lawyers that lacked empirical support and was said to be based on their collective wisdom. That wisdom was later discredited.[884] It can also seen be as an example of problems created by the common law

882 See Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [4.80]–[4.102]. See also New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [7.12]–[7.19], [7.31]–[7.39], [8.57].

883 See *Penalties and Sentences Act 1992* (Qld) s 13A.

884 See Justice Roslyn Atkinson, 'Women and Justice — Is there Justice for Women?' (Paper presented at the Inaugural National Women's Conference, Canberra, 27 August 2001); (2003) 3(1) *Law and Justice Journal* 75.

which the common law may well have been slow, if not unable, to correct, and which needed statutory intervention.

7.70 The common law position has been modified in Queensland by section 632 of the Criminal Code (Qld).[885] Under that provision, a judge is no longer required to warn the jury against convicting on the uncorroborated evidence of one witness, but may still make such comment on the evidence as it is appropriate to make in the interests of justice. In so doing, however, the judge must not 'warn or suggest in any way to the jury that the law regards any class of persons as unreliable witnesses'.[886] Unreliable evidence warnings therefore need to be carefully crafted to avoid offending this provision.

7.71 By way of comparison, sections 164 and 165 of the Uniform Evidence Law deal with corroboration and unreliable evidence warnings.[887] Section 164 provides that corroboration warnings are not required:[888]

> **164 Corroboration requirements abolished**
>
> (1) It is not necessary that evidence on which a party relies be corroborated.
>
> (2) Subsection (1) does not affect the operation of a rule of law that requires corroboration with respect to the offence of perjury or a similar or related offence.
>
> (3) Despite any rule, whether of law or practice, to the contrary, but subject to the other provisions of this Act, if there is a jury, it is not necessary that the judge—
>
> (a) warn the jury that it is dangerous to act on uncorroborated evidence or give a warning to the same or similar effect; or
>
> (b) give a direction relating to the absence of corroboration.

7.72 In relation to evidence that may be unreliable,[889] section 165 provides that, if a party requests and unless there are good reasons for not doing so, the judge is to warn the jury that the evidence may be unreliable, 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.[890] No

885 Section 632 is set out in [7.46] above.

886 Criminal Code (Qld) s 632(3).

887 Section 165 is set out in [7.50] above. Sub-section 164(4) of the *Evidence Act 2001* (Tas) does not appear in the Uniform Evidence Law. Section 164(4) provides that 'a judge is not to warn a jury or suggest to a jury that it is unsafe to convict a person on the uncorroborated evidence of a child because children are classified by law as unreliable witnesses.' But see ss 165(6), 165A of the Uniform Evidence Law, which do not appear in the Tasmanian legislation.

888 See also *Evidence Act* (NT) s 9C, which prohibits a warning that it is unsafe to find a person guilty on the uncorroborated evidence of that child because children are classified by the law as unreliable witnesses; and *Evidence Act 1929* (SA) s 12A, which restricts the circumstances and nature of the warning that may be given with respect to the uncorroborated evidence of a child.

889 *Evidence Act 2008* (Vic) s 165(1) lists a number of types of evidence that may be unreliable; the list is not exhaustive.

890 *Evidence Act 2008* (Vic) s 165(2), (3).

particular form of words is required,[891] and the judge's common law power to warn the jury or comment on the evidence is not affected.[892]

7.73 Statutory provisions such as these, however, do not remove the over-riding common law requirement to give a warning if, in the circumstances of the case, it is necessary 'to avoid a perceptible risk of miscarriage of justice'.[893] Nonetheless, research in New South Wales indicates that warnings about the risk of relying on uncorroborated evidence were given in the majority of sexual assault cases.[894]

7.74 Apart from the difficulties in determining when, and in what form, warnings are required, there is also a concern that, by drawing attention to the evidence, such warnings may have the opposite effect on the jury.

Submissions

7.75 Few respondents to the Commission's Issues Paper dealt specifically with unreliable evidence or corroboration warnings.

7.76 A Supreme Court Judge submitted that warnings have always carried the risk of being counter-productive. This respondent referred, as an example, to warnings about accomplice evidence; by the time the judge has identified for the jury all the potentially corroborative evidence, the warning has lost its force.[895] This concern was also expressed by the Office of the Director of Public Prosecutions.[896]

7.77 One respondent, who was a former juror, submitted that:

> I believe the jury would have benefited had there been clearer information from the judge on what weight the jury should place on information in the interview compared with evidence under oath.[897]

7.78 As noted at [3.19] of this Paper, another former juror expressed concern about the counter-productive effect of directions to ignore particular evidence:

> ***It appeared that the Judge in issuing the directive actually ensured that the matter was flagged for further discussion in the isolation of the jury room.***[898] (emphasis in original)

7.79 In its submission to the VLRC opposing the introduction of a jury directions statute, the Law Council of Australia expressed concern about the prospect of change to directions relating to unreliable evidence:

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891 *Evidence Act 2008* (Vic) s 165(4).

892 *Evidence Act 2008* (Vic) s 165(5).

893 *Bromley v The Queen* (1986) 161 CLR 315, 325 (Brennan J); *Longman v The Queen* (1989) 168 CLR 79, 86 (Brennan, Dawson and Toohey JJ); *Robinson v The Queen* (1999) 197 CLR 162 [20]; *Tully v The Queen* (2006) 230 CLR 234 [51] (Kirby J), [89]–[92] (Hayne J), [158]–[161] (Crennan J); *R v Hayes* [2008] QCA 371 [91]–[94].

894 See New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [7.34].

895 Submission 7.

896 Submission 15.

897 Submission 5.

898 Submission 2.

14. Some warnings mandated by the law in respect of certain evidence have been developed to minimise the risk of a miscarriage of justice arising from that evidence. Watering down those warnings will necessarily raise the question whether a fair trial for the accused can be had at all.

15. If prosecution evidence is of a type that may be unreliable and the jury may not fully appreciate that potential unreliability, an appropriate warning should be given unless there are good reasons not to (cf Uniform Evidence Law, s 165). As the Law Council outlined in its submission to the ALRC Discussion Paper 69, 'Section 165 by giving a non-exhaustive list provides the necessary flexibility and the overriding requirement that the judge use the power of direction to avoid a miscarriage of justice remains the proper focus of the directions.' Conversely, if a court can be confident that the jury will fully appreciate the potential unreliability of the evidence without a judicial warning, no such warning need be given. The VLRC proposals appear to be inconsistent with s 165 of the Uniform Evidence Law.[899]

QLRC's proposals for reform

7.80 The starting point is that a warning is required when there are matters 'of which the judge has special knowledge, experience or awareness' that are capable of affecting the evaluation of the evidence and which are thought to be outside the jury's appreciation.[900] In falling back on this reasoning, however, judges may themselves be relying on outmoded or otherwise unsupportable 'misapprehensions'.[901]

7.81 It has been suggested that matters thought to warrant or require a warning may in fact be matters that a modern jury can be expected to fully appreciate. For example, in relation to identification evidence in the form of photographs or videos which are of poor quality[902] and in relation to uncorroborated complainant evidence;[903] the potential unreliability in many such cases will be apparent to the jury without the need for a warning.

7.82 Further, there are risks that unreliable evidence warnings may either be too strong, or may become diluted by other information and thus become counter-productive. Warnings to 'scrutinise the evidence with great care' may be taken as a coded instruction to disregard the evidence entirely and warnings that it would be 'dangerous to convict' the accused on certain evidence alone (or which use similarly stern language) may be interpreted as an invitation to acquit.[904] On the other hand, warnings that are followed or preceded by an identification of potentially corroborative evidence, as has often been done in the case of accomplice evi-

899 Law Council of Australia, Submission to the Victorian Law Reform Commission, 30 January 2009, 5.

900 *Carr v The Queen* (1988) 165 CLR 314, 325 (Brennan J).

901 *FGC v Western Australia* [2008] WASC 47 [6] (Wheeler JA).

902 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [7.30].

903 D Boniface 'The common sense of jurors vs the wisdom of the law: Judicial directions and warnings in sexual assault trials' (2005) 28(1) *University of New South Wales Law Journal* 261, 267; New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [7.35].

904 Consultation, Dr B McKimmie, School of Psychology, University of Queensland, 9 December 2008; Office of the Director of Public Prosecutions, Submission 15. See also *Robinson v The Queen* (2006) 162 A Crim R 88 [19] (Spigelman CJ); *R v BWT* (2002) 54 NSWLR 241 [34] (Wood CJ); New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [7.2], [7.36].

dence, for example, may weaken the warning and leave jurors with a heightened impression of reliability.

7.83 There would also appear to be some difficulties in giving unreliable evidence warnings that explain why the evidence may be unreliable without infringing the prohibition in section 632 of the Criminal Code (Qld) against suggesting that the law regards any particular class of persons as unreliable witnesses. This difficulty is apparent from the model directions set out in the Queensland Benchbook.

7.84 In particular the model directions in the Queensland Benchbook about evidence from accomplices and other unreliable witnesses need to be considered. It reads:

> **I should now discuss an important matter that has been referred to by counsel in the addresses — the question of the evidence of (**alleged accomplice**). It is suggested that (**name of witness**) was involved (**with the defendant**) in the offence.**
>
> OR
>
> **In this case (**name of witness**) admits to being involved in the commission of the offence.**
>
> OR
>
> **(**Name of witness**) has been convicted of the offence.**
>
> **You should approach your assessment of the evidence of [**the witness**] with caution. A person who has been involved in an offence may have reasons of self-interest to lie or to falsely implicate another in the commission of the offence. The evidence of such a person is of its nature potentially unreliable, and it is therefore necessary for you to scrutinise the evidence carefully before acting on it. (**The witness**), having been involved in the [**offence**] is likely to be a person of bad character. For this reason, his evidence may be unreliable and untrustworthy. Moreover [**the witness**] may have sought to justify his conduct, or at least to minimise his involvement, by shifting the blame, wholly or partly, to others.**
>
> **Perhaps [**the witness**] has sought to implicate the defendant and to give untruthful evidence because he apprehends that he has something to gain by doing so. [He has pleaded guilty and indicated that he is prepared to give evidence against his co-accused, the defendant in this case. You may consider that he has an expectation of being dealt with more leniently as a result of his co-operation with the authorities. [***To be adapted if witness has been sentenced pursuant to s 13A of the*** Penalties and Sentences Act 1992**].**
>
> **Whilst it is possible to identify some reasons why he may have for giving false evidence, there may be other reasons for giving false evidence which are known only to him.**
>
> **(**The witness's**) evidence, if not truthful, has an inherent danger. If it is false in implicating the defendant, it will nevertheless have a seeming plausibility about it, because he will have familiarity with at least some of the details of the crime.**

[The defence points to this evidence (briefly describe evidence**) in support of its argument to you that (**the witness**) is not telling the truth. On the other hand, the prosecution submits to you that (**the witness**) is a truthful and reliable witness and relies on (**briefly describe evidence**).]**

Other matters which you may think bear upon the reliability of the evidence of (the witness**) are (**briefly describe evidence**).**

In view of the matters I have touched upon, it would be dangerous to convict the defendant on the evidence of (the witness**) unless you find that his evidence is supported in a material way by independent evidence implicating the defendant in the offence.**

[There is evidence coming from an independent source which is capable of supporting the evidence of (the witness**) in a material way. It is a matter for you as to whether you accept that evidence. If you do accept it, it is a matter for you whether you think it does support (**the witness's**) evidence in this way. The evidence is (**briefly describe evidence**).**

OR

There is no other evidence that supports (the witness's**) evidence in a significant way].**

By the *Criminal Law Amendment Act 2000* operational 27 October 2000, s 632 now provides:

> "(1) A person may be convicted of an offence on the uncorroborated testimony of 1 witness, unless this Code expressly provides to the contrary.
>
> (2) On the trial of a person for an offence, a judge is not required by any rule of law or practice to warn the jury that it is unsafe to convict the accused on the uncorroborated testimony of 1 witness.
>
> (3) Subsection (1) or (2) does not prevent a judge from making a comment on the evidence given in the trial that it is appropriate to make in the interests of justice, but the judge must not warn or suggest in any way to the jury that the law regards any class of persons as unreliable witnesses."

In *Robinson* (1999) 197 CLR 162, 168–9, the Court said:

> "Sub-section (2) negates a requirement, either generally or in relation to particular classes of case, to warn a jury 'that it is unsafe to convict the accused on the uncorroborated testimony of one witness'. That does not mean, however, that in a particular case there may not be matters personal to the uncorroborated witness upon whom the Crown relies, or matter relating to the circumstances which bring into operation the general requirement considered in *Longman*. Moreover, the very nature of the prosecution's onus of proof may require a judge to advert to the absence of corroboration."

The requirement in *Longman* (1989) 168 CLR 79 is that since a defendant could be convicted on the evidence of one witness only, the law was required to address the problem of unreliability. Such unreliability could arise from matters personal to the witness, or from the circumstances of a particular case. The law

> requires a warning to be given 'whenever a warning is necessary to avoid a perceptible risk of miscarriage of justice arising from the circumstances of the case' (86).
>
> The 2000 amendment to sub-section (3) seems to prevent the trial judge from giving an unreliability warning in relation to "any class of persons" which must include accomplices. The amendment was a result of the Women's Task Force recommendations; and was designed to overcome the anomaly as between child witnesses and child complainants identified by in *Robinson* (1998) 102 A Crim R 89, 91.[905]

7.85 This direction is couched in terms that confine the warning to the particular witness and his or her testimony and to the particular evidence that otherwise relates to that testimony. It makes no broad statements about any class of person but contains the warning that is permitted by section 632 to reflect the older warnings mandated by law. As has been noted elsewhere in this Paper,[906] if there is extensive corroborative evidence that the judge would be obliged to summarise or refer to in conformity with the model direction, the admonitory effect of the warning may well be lost or over-ridden, in which case it may have been a better exercise of discretion not to give any warning at all, as is permitted by section 632(2).

7.86 The Benchbook also contains model warnings in relation to evidence given by indemnified witnesses, witnesses who have given a statement to the police in consideration for a lighter sentence, and witnesses with mental disabilities. The first two model directions incorporate the expression 'scrutinise with great care' (as does the model general Robinson direction), and the third uses 'dangerous to convict'. None is couched in terms of the witness being a member of a class of unreliable witnesses (and so does not infringe section 632(3)) although the general statements of the witnesses' incentives to tailor their evidence are in very board terms not specifically personalised to the witness in question. They are not required in every case, as the notes in the Benchbook indicate. The model directions and notes read:

> Indemnified Witness
>
> **In this case the prosecution relies on the evidence of (**Y**), who, as you have heard, has been given an indemnity against prosecution provided that he gives truthful evidence here. There is a risk, of course, that having been protected from prosecution in that way, (**Y**) may have an incentive not to depart from the statement he gave to police, whether it is right or wrong, so as not to arouse any suspicions of untruthfulness. And he may wish to ingratiate himself with the authorities to ensure he maintains his indemnified position. You should therefore, scrutinize his evidence with great care. You should only act on it if after considering it and all the other evidence in the case, you are convinced of its truth and accuracy.**

905 Queensland Courts, *Supreme and District Court Benchbook*, 'Accomplices' [37] <http://www.courts.qld.gov.au/2265.htm> at 3 September 2009. This adopts the layout in the Benchbook, where the words to be spoken to the jury are printed in bold type, and the variables, notes and other commentary are set out in other fonts.

906 See [7.76] above.

Witness who has given a Section 13A Statement

The prosecution relies on the evidence of (Y**), who gave a statement to the police which had the effect of reducing his own sentence. Under Queensland sentencing law, sentences may be reduced by the court where the offender undertakes to co-operate with law enforcement authorities by giving evidence against someone else. If an offender receives a reduced sentence because of that sort of co-operation, and then does not co-operate in accordance with his undertaking, the sentencing proceedings may be re-opened and a different sentence imposed. You can see therefore, that there may be a strong incentive for a person in that position to implicate the defendant when giving evidence. You should therefore scrutinize his evidence with great care. You should only act on it after considering it and all the other evidence in the case, you are convinced of its truth and accuracy.**

Witness With a Mental Disability

You have heard evidence that (Y**) has a long-standing condition of schizophrenia which disposes him to hallucinations and delusions, particularly if he is not keeping up with his prescribed medication. That creates a risk that his evidence might be the result of delusion rather than based in reality. Because of that risk you must approach his evidence with special care. You can act on it if you are convinced of its accuracy but it would be dangerous to convict the defendant on his evidence if you could not find other evidence to support it [supporting evidence may be found, if you accept it in…].**

Section 632(3) *Code* prohibits the giving of any warning or suggestion that the law regards any class of persons as unreliable witnesses. However, it remains the case that the evidence of certain types of witness is likely to be underlain by motivations not immediately obvious to a jury.

…

In *Robinson v R* (1999) 197 CLR 162 a unanimous High Court judgment considered s 632(3) of the *Code* and held (at [20]) that:

> "Once it is understood that s 632(2) is not aimed at, and does not abrogate, the general requirement to give a warning whenever it is necessary to do so in order to avoid a risk of miscarriage of justice arising from the circumstances of the case, but is directed to the warnings required by the common law to be given in relation to certain categories of evidence, its relationship to the concluding words of s 632(3) becomes clear, although the symmetry between the two provisions is not perfect.
>
> [21] Subsection (2) negates a requirement, either generally or in relation to particular classes of case, to warn a jury that 'it is unsafe to convict the accused on the uncorroborated testimony of 1 witness.' That does not mean, however, that in a particular case there may not be matters personal to the uncorroborated witness upon whom the Crown relies or matters relating to the circumstances, which bring into the operation the general requirement considered in *Longman*.'

In *R v Tichowitsch* [2006] QCA 569 the Court of Appeal considered s 632 and the decision in the High Court in *Tully v The Queen* [2006] HCA 56. The Court of Appeal held that s 632 makes it clear that a warning is not required solely

because a complaint is uncorroborated, or a child, or the alleged offence is sexual. However, features of such cases can result in a warning being necessary; in *Robinson v R, Tully v R,* and *R v Tichowitsch* the decisions stressed that whether a warning was necessary to avoid a perceptible risk of a miscarriage of justice depended on the circumstances of the case, and the warning should refer to and identify those circumstances.

In *Tully*, Crennan J referred at [179] to various intermediate appellate level distillations; in essence those require that a trial judge identify to the jury the features which the judge considers warrant a specific warning, the reasons for the warning, and the proper response to it (to scrutinize the evidence with care). The judge should not simply repeat counsel's arguments, but 'express the unmistakable authority of the Court.' (*JJB v The Queen*, 161 A Crim R 187 at 195).

A suggested '*Robinson*' warning might be:

> **You will need to scrutinize the evidence of (the complainant) with great care before you could arrive at a conclusion of guilt. That is because of (the following circumstances):**
>
> - **the delay between the time of (each) (the) alleged incident and the time the defendant was told of the complaint, and the lack of any opportunity to prove or disprove the allegation by, for example, a timely medical examination;**
>
> - **the age of the complainant at the time of the alleged incident;**
>
> - **the difference between the accounts the complainant has given;**
>
> - **these other matters** (identify them).

You should only act on that evidence if, after considering it with that warning in mind, and all the other evidence, you are convinced of its truth and accuracy.

The evidence of prison informers has been regarded as generally requiring a warning, as has the evidence of indemnified witnesses and witnesses who have had the benefit of a reduced sentence pursuant to s 13A *[Penalties and Sentencing] Act*. It is not, however, inevitable that such a warning must be given in respect of every indemnified witness.

'The general law requires a warning to be given whenever a warning is necessary to avoid a perceptible risk of miscarriage of justice arising from the circumstances of the case'. Thus, 'where there is some particular reason, such as bad character or hostility or self-interest, to question seriously the bona fides of a prosecution witness, the trial judge should give the jury such warning as is appropriate of the possible danger of basing a conviction on the unconfirmed

> testimony of that witness.'[907] But the mere possibility of mistakenness is not enough.
>
> A warning should be given where a witness whose evidence is important has some mental disability which may affect his capacity to give reliable evidence. It may also be appropriate, depending on the circumstances, to warn in respect of a witness whose recollection is likely to be drug-affected.[908] (note in original, some notes omitted)

7.87 If, as is proposed in chapter 5 of this Paper and as is often the case now in practice,[909] there is discussion between the judge and the parties before the summing up starts as to which directions should be included, the need or desirability for an unreliable evidence warning could be considered and unnecessary or counter-productive warnings avoided.

7.88 Other concerns have been raised with the use in directions, as is sometimes confirmed expressly in statute, of the expression 'dangerous or unsafe to convict'. The concern is that this is taken by jurors to be a coded instruction to acquit, or at very least to disregard this witness's evidence.[910] In fact, the warning is that the evidence ought to be treated with caution and not relied on to convict unless it is supported by independent corroborative evidence or the jury is otherwise satisfied that it is in fact reliable. Those expressions should not be used — section 632 of the Criminal Code (Qld) should be amended to state that, and Chapters 37 and 60 of the Queensland Benchbook should be amended accordingly.

7.89 Notwithstanding the Commission's general acceptance of the proposition that jurors may well benefit from some direction about problematic or unusual evidence before that evidence is given, this may well be an area where such direction would be inappropriate. The Commission is concerned that any suggestion before a witness gives evidence that that evidence should be treated with caution would unfairly put into the minds of the jurors the idea that the evidence should be treated in a special way at a time when it is not known what, if any, evidence may ultimately corroborate it. That can only be fully considered when all the relevant evidence has been admitted, perhaps not until the end of the case.

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907 *Sinclair & Dinh* (1997) 191 LSJS 53. The passage continues: '…There is no prescribed formula for the warning and it will often be sufficient to give it in brief and unelaborated terms. Its purpose will usually be to share with the jury the courts' "sharpened awareness" of the danger of acting on the uncorroborated evidence of such witnesses.'

908 Queensland Courts, *Supreme and District Court Benchbook*, 'Witnesses Whose Evidence May Require a Special Warning ("Robinson" direction)' [60] <http://www.courts.qld.gov.au/2265.htm> at 3 September 2009.

909 See [5.43]–[5.49], Proposals 5-1, 5-2 above.

910 Consultation, Dr B McKimmie, School of Psychology, University of Queensland, 9 December 2008. Also see *Robinson v The Queen* (2006) 162 A Crim R 88 [19] (Spigelman CJ); *R v BWT* (2002) 54 NSWLR 241 [34] (Wood CJ); New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [7.2], [7.36]. The Commission also notes the contrary view expressed by Legal Aid Queensland, at least where those expressions are used in the abstract:

> Similarly, we do not necessarily accept the suggestion that directions informing juries that it would be 'dangerous or unsafe to convict', or directions commanding jurors to 'scrutinise the evidence with great care', are either confusing for juries to comprehend or difficult to explain, if questioned by a jury. Rather, we would suggest that both concepts are ones that should be readily understood by jurors, when properly equated with specific evidence and the issues in a trial. (Submission 16, 5.)

7-3 Section 632 of the Criminal Code (Qld) should be amended to state that warnings to a jury about the unreliability of evidence must not use expressions such as 'dangerous to convict' or 'unsafe to convict'.

7-4 Chapters 37 and 60 of the Supreme and District Court Benchbook should be amended to remove the expression 'dangerous to convict'.

Chapter 8

Other Specific Directions: Amendment or Abolition

INTRODUCTION

8.1 The Commission's Terms of Reference require it to consider whether any jury directions should be amended or abolished.[911] In its Issues Paper, the Commission considered a range of specific directions and sought submissions on the types of directions that have caused particular or recurrent concerns and whether any directions could appropriately be simplified or abolished.[912]

8.2 Directions on the limited use of evidence are discussed in chapter 6 of this Paper and chapter 7 focuses on directions given in sexual offence trials. This chapter considers a number of other specific directions such as those on the standard of proof, reaching a verdict, and criminal responsibility.

'BEYOND REASONABLE DOUBT'

8.3 The expression 'beyond reasonable doubt' is very well known outside criminal trials but it is almost exquisitely difficult to define — in the words of the New Zealand Court of Appeal, it is 'frustratingly indeterminate'.[913] Attempts to define it are in fact strenuously discouraged by appellate courts and the Queensland Bench-

911 The Terms of Reference are set out in Appendix A to this Paper.

912 See, in particular, Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) ch 4, 105, 170. See the questions set out at [6.2] above.

913 *R v Wanhalla* [2007] 2 NZLR 573 [39] (William Young P).

book.[914] The difficulties associated with this expression, and judicial attempts to define it and juries' attempts to understand it, were discussed in the Issues Paper at [7.55]–[7.63].[915]

8.4 The model direction to be given at the opening of every criminal trial found in the Queensland Benchbook includes the following:

> Burden and standard of proof
>
> > A defendant in a criminal trial is presumed to be innocent. So before you may return a verdict of guilty, the prosecution must satisfy you that the defendant is guilty of the charge in question, and must satisfy you of that beyond reasonable doubt.[916]

8.5 The Queensland Benchbook also contains the following direction if the jury is seeking clarification:[917]

> **Reasonable Doubt**
>
> The suggested direction should only be given where the jury indicates that it is struggling with the concept.[918] It draws on *Krasniqi* (1993) 61 SASR 366; cf *Chatzidimitriou* [2000] 1 VR 493, 498, 503, 509.
>
> **A reasonable doubt is such a doubt as you, the jury, consider to be reasonable on a consideration of the evidence. It is therefore for you, and each of you, to say whether you have a doubt you consider reasonable. If at the end of your deliberations, you, as reasonable persons, are in doubt about the guilt of the defendant, the charge has not been proved beyond reasonable doubt.**[919] (notes and formatting as in original)

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914 See the extract from the Queensland Benchbook set out in [8.5] below, and the cases referred to in that extract.

915 See also New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [4.12]–[4.62].

916 Queensland Courts, *Supreme and District Court Benchbook*, 'Trial Procedure' [5B.4] <http://www.courts.qld.gov.au/2265.htm> at 3 September 2009.

917 Queensland Courts, *Supreme and District Court Benchbook*, 'Reasonable Doubt' [57] <http://www.courts.qld.gov.au/2265.htm> at 3 September 2009.

918 The direction is not intended to be an inflexible and all encompassing code: *R v Clarke* [2005] QCA 483, [53].

919 Explanatory glosses on the classical formula of proof beyond reasonable doubt are discouraged: see *Darkan v The Queen* (2006) 80 ALJR 1250, [69], [131], *Green v The Queen* (1971) 126 CLR 28, 31; *Ketchup* [1982] Qd R 732; *Holman* [1997] 1 Qd R 373; *Reeves* (1992) 29 NSWLR 109, 117; *Goncalves* (1997) 99 A Crim R 193, 196, 203 (see Footnote 9 to 24.4)

Expansion of the direction through use of impermissible expressions has resulted in misdirection: see *Green v The Queen* (1971) 126 CLR 28, 32–33; *R v Punj* [2002] QCA 333, [11]; *R v Irlam; ex parte A-G* (Qld) [2002] QCA 235, [53], [56], [58]; *R v Kidd* [2002] QCA 433, p4; *R v Bain* [2003] QCA 389, [18], [33]. Cf *R v Booth* [2005] QCA 30, [4]–[5]; *R v Moffatt* [2003] QCA 95, pp 5–6; *R v Clarke* [2005] QCA 483, [53].

The High Court in *Darkan v The Queen* (2006) 80 ALJR 1250, [69], has recently reiterated that the expression beyond reasonable doubt ought not be elaborated explaining the justification as follows.

> "… One is that 'beyond reasonable doubt' is an expression 'used by ordinary people and is understood well enough by the average man in the community'. … A second consideration is that departures from the formula 'have never prospered'. … A third consideration is that expressions other than 'beyond reasonable doubt' invite the jury 'to analyse their own mental processes', which is not the task of a jury. … Finally, as Kitto J said in *Thomas v The Queen*:

8.6 Denning LJ gave this explanation of the standard (or degree) of proof:

> That degree is well settled. It need not reach certainty, but must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a [defendant] as to leave only a remote possibility in [the defendant's] favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice.[920]

8.7 Three overseas jurisdictions, Canada, New Zealand and England and Wales, have sought to explain the expression 'beyond reasonable doubt' with formulations based on 'Are you sure …?' or 'Has the prosecution made you sure …' or 'Has the prosecution satisfied you so that you are sure …?'.[921] The last of these dates back to 1950 in England.[922] These paraphrases have been criticised as too elastic or too stringent, especially when 'sure' is used with 'satisfied',[923] and may pose their own difficulties in comprehension or assessment by the jury.[924] The NSW Law Reform Commission noted that:[925]

> 4.62 Ultimately, there may not be much in the choice between 'sure' and 'certain'. The English practice book *Archbold*, which generally prefers 'beyond reasonable doubt', has observed:
>
> > it is well established that the standard of proof is less than certainty ... As in ordinary English 'sure' and 'certain' are virtually indistinguishable, it savours of what the late Sir Rupert Cross might have described as 'gob-

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> Whether a doubt is reasonable is for the jury to say; and the danger that invests an attempt to explain what 'reasonable' means is that the attempt not only may prove unhelpful but may obscure the vital point that the accused must be given the benefit of any doubt which the jury considers reasonable." (footnotes omitted)

Where the jury frame a question about proof beyond reasonable doubt in terms of percentage or odds: 'It is inherent in the expression of the standard by reference to a percentage chance of guilt or by some assessment of the odds as in a wager, that some doubt must exist that is to be disregarded once the arbitrarily fixed percentage or rate is reached … that misconception could have been removed by instructing them that the question that they had to determine was whether the prosecutor had established the guilt of the accused … beyond reasonable doubt. If, after carefully considering the evidence, reasonable doubt existed in their minds, then it was their duty to acquit. They should have been told that they were not to approach their task by reference to some calculation or percentages. To do so, of course, acknowledges the existence of a doubt which may or may not be reasonable, but which is then disregarded': *R v Carkic, Athanasai & Clarke* [2005] VSCA 182 at paragraphs 227, 228.

920 *Miller v Minister of Pensions* [1947] 2 All ER 372, 373.

921 See, for example, William Young, 'Summing-up to Juries in Criminal Cases—What Jury Research says about Current Rules and Practice' [2003] *Criminal Law Review* 665, 673–4.

922 *Kritz* [1950] 1 KB 82, 89–90 (Lord Goddard CJ); *Summers* [1952] 1 All ER 1059, 1060 (Lord Goddard CJ). See John Montgomery, 'The criminal standard of proof' (1998) 148 *New Law Journal* 582.

923 William Young, 'Summing-up to Juries in Criminal Cases—What Jury Research says about Current Rules and Practice' [2003] *Criminal Law Review* 665, 674–5.

924 Justice Geoff Eames, 'Tackling the complexity of criminal trial directions: What role for appellate courts?' (Paper presented at the Supreme Court and Federal Court Judge Conference, Perth, 23 January 2007); (2007) 29 *Australian Bar Review* 178, 180. See also John Montgomery, 'The criminal standard of proof' (1998) 148 *New Law Journal* 582; Michael Zander, 'The criminal standard of proof—how sure is sure?' 2000 (150) *New Law Journal* 1517; Chris Heffer, 'The Language of Conviction and the Convictions of Certainty: Is "Sure" an Impossible Standard of Proof?' (2007) 5(1) *International Commentary on Evidence*, Article 5.

925 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [4.62].

> bledegook' to tell the jury that while they must be 'sure' they need not be 'certain'.[926] (note in original)

8.8 A wide variety of formulations is found in the United States, only very few of which declare that the expression does not need to be defined.[927] One unhelpful example is 'such proof as precludes every reasonable hypothesis except that which tends to support, and is proof which is wholly consistent with the guilt of the accused, and inconsistent with any other rational conclusion'.[928]

8.9 The following formulation was reached by a majority of the New Zealand Court of Appeal:

> The starting point is the presumption of innocence. You must treat the accused as innocent until the Crown has proved his or her guilt. The presumption of innocence means that the accused does not have to give or call any evidence and does not have to establish his or her innocence.
>
> The Crown must prove that the accused is guilty beyond reasonable doubt. Proof beyond reasonable doubt is a very high standard of proof which the Crown will have met only if, at the end of the case, *you are sure* that the accused is guilty.
>
> It is not enough for the Crown to persuade you that the accused is probably guilty or even that he or she is very likely guilty. On the other hand, it is virtually impossible to prove anything to an absolute certainty when dealing with the reconstruction of past events and the Crown does not have to do so.
>
> What then is reasonable doubt? A reasonable doubt is an honest and reasonable uncertainty left in your mind about the guilt of the accused after you have given careful and impartial consideration to all of the evidence.
>
> In summary, if, after careful and impartial consideration of the evidence, you are sure that the accused is guilty you must find him or her guilty. On the other hand, if you are not sure that the accused is guilty, you must find him or her not guilty.[929]

8.10 That same majority also concluded that the jury should not be given the circular advice that a reasonable doubt is a doubt that is reasonable,[930] and that the jury could helpfully be directed (in line with a Canadian approach) that absolute certainty is not required but that proof merely on the balance of probabilities is not sufficient.[931]

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926 P J Richardson (ed), *Archbold Criminal Pleading, Evidence and Practice* (Sweet and Maxwell, 2002), 473.

927 See John Montgomery, 'The criminal standard of proof' (1998) 148 *New Law Journal* 582.

928 Quoted in John Montgomery, 'The criminal standard of proof' (1998) 148 *New Law Journal* 58, and also in Michael Zander, 'The criminal standard of proof—how sure is sure?' 2000 (150) *New Law Journal* 1517.

929 *R v Wanhalla* [2007] 2 NZLR 573 [49] (William Young P, Chambers, Robertson JJ). See also James Wood AO QC, 'Summing up in Criminal Trials—A New Direction' (Paper presented at the Conference on Jury Research, Policy and Practice, Sydney, 11 December 2007) 7–8.

930 Such a circular explanation can be found in the Queensland Benchbook: see [8.5] above.

931 *R v Wanhalla* [2007] 2 NZLR 573 [48] (William Young P, Chambers, Robertson JJ). See also 'Noticeboard' (2007) 11 *International Journal of Evidence and Proof*, 62–3.

8.11 It has been suggested that the best approach is to confront the jury squarely with the indeterminate nature of the expression rather than avoiding the problem by offering no explanation.[932]

Submissions

8.12 The particular difficulties associated with this expression trouble jurors. One respondent to the Issues Paper (who has served as a juror on three trials) had this to say on 'beyond reasonable doubt':

> Reasonable doubt is a term freely used in the court room environment, experienced with equal uncertainty in classrooms and court rooms, yet human nature really doesn't [accept] it. …
>
> 'Reasonable doubt' must be one of the most varying factors in the human conscience and certainly in the jury room confines where interpretation of the definition can run riot.[933]

8.13 This is reinforced by one District Court judge, in whose opinion 'juries do not understand "beyond reasonable doubt"':

> I am confirmed in this view by the questions I have received in re-direction notes. The suggested directions where the jury indicates it is struggling with the concept is in my view incomprehensible and unhelpful — indeed, several juries have used those very words![934]

8.14 Legal Aid Queensland submitted that, given that this issue has been considered at length, there is 'no proper basis for changing the current position or revisiting this issue' and that the courts' 'warnings about the perils of expanding upon the meaning of the phrase should be noted.'[935]

8.15 It was observed in a consultation with the Office of the Director of Public Prosecutions that the expression 'beyond reasonable doubt' is repeated very frequently during any trial to the point of over-use, and that on occasion it is used by counsel with an intonation at a particular point that might be seen as suggesting to the jurors that they should in fact have a reasonable doubt in relation to the issue being discussed. It was submitted that here, as elsewhere with jury directions, errors in emphasis matter.[936]

QLRC's proposals for reform

8.16 The significant difficulties in trying to define the expression 'beyond reasonable doubt' do not, in the Commission's provisional view, of themselves compel a change to any other expression such as 'Are you sure …?'. There is presently no

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932 William Young, 'Summing-up to Juries in Criminal Cases—What Jury Research says about Current Rules and Practice' [2003] *Criminal Law Review* 665, 675–6.

933 Submission 2.

934 Submission 6.

935 Submission 16, 5.

936 Submission 15.

convincing evidence that this will not simply create further difficulties in attempting to define the new formulation. Indeed, 'Are you sure …?' seems to invite further questions or some form of pseudo-mathematical inquiry such as 'How sure is "sure"? — Is it 100% sure (which is ***not*** required under the present formulation) or something less, in which case, how much less? Is 90% sure sufficient?' This would simply transfer the dilemma to the new terminology without achieving any greater certainty for the jury or the public generally. However, research has also indicated that this exercise is done by juries in trying to understand 'beyond reasonable doubt'.[937]

8.17 'Beyond reasonable doubt' has currency in the community, no doubt in part due to its antiquity and the great proliferation of crime programs on television. However, juries do from time to time ask for assistance in understanding it.[938] The mere fact that the expression is part of the bedrock of Australian criminal law would not of itself be sufficient reason that it should remain unchanged. However, the Commission considers that there is at present no compelling case for changing the current, hallowed formulation.

8.18 The expression also provides an interesting counterpoint to the usual civil standard of proof, 'on the balance of probabilities', which the Commission suspects does not have quite the same degree of public recognition. 'On the balance of probabilities' might informally be equated with being at least 51% sure or more formally with an event being more likely than not. In any event, a consideration of the two expressions together[939] could well demonstrate to a jury without any further elaboration by a judge that 'beyond reasonable doubt' requires a greater, even if unquantifiable, measure of certainty than the balance of probabilities.

8.19 The Commission is also satisfied that there is nothing to be gained by trying to define or paraphrase the expression 'beyond reasonable doubt' beyond the current model direction in the Queensland Benchbook (with one qualification),[940] noting

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937 William Young, 'Summing-up to Juries in Criminal Cases—What Jury Research says about Current Rules and Practice' [2003] *Criminal Law Review* 665, 675; James Wood AO QC, 'Summing up in Criminal Trials—A New Direction' (Paper presented at the Conference on Jury Research, Policy and Practice, Sydney, 11 December 2007), 7.

The Commission also notes the research undertaken by the NSW Bureau of Crime Statistics and Research reported in the Issues Paper at [7.59]–[7.63]:

> People tried in court are presumed to be innocent, unless and until they are proved guilty 'beyond reasonable doubt'. In your view, does the phrase 'beyond reasonable doubt' mean [*Pretty likely* the person is guilty / *Very likely* the person is guilty / *Almost sure* the person is guilty / *Sure* the person is guilty].
>
> …
>
> A total of 1,178 jurors responded to this question. Of them, 55.4% answered 'Sure the person is guilty' and 22.9% answered 'Almost sure the person is guilty', a combined sub-total of 78.3%. Of the remainder, 11.6% answered 'Very likely the person is guilty' and 10.1% answered 'Pretty likely the person is guilty': Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [7.59], [7.61].

See NSW Bureau of Crime Statistics and Research (L Trimboli) 'Juror understanding of judicial instructions in criminal trials' *Crime and Justice Bulletin* No 199 (2008).

938 Anecdotal comments suggest that this happens less frequently when a formulation using 'sure' is used: see James Wood AO QC, 'Summing up in Criminal Trials—A New Direction' (Paper presented at the Conference on Jury Research, Policy and Practice, Sydney, 11 December 2007) 8.

939 Which might occur in those relatively rare cases where the defendant might bear an onus of proof of a particular defence on the balance of probabilities.

940 See [8.21] below.

the strong statements in the Queensland Court of Appeal and the High Court that judges ought not attempt to do so.[941] The Commission supports the approach adopted in the Benchbook that no attempt at explaining 'beyond reasonable doubt' should be made unless the jury itself raises the issue.

8.20 However, the Commission notes the advice in Young's article that the jury should be told that the expression cannot be defined. It would be better to say this than to present a definition that is circular and therefore not very useful as if it were the answer to the jury's concerns when it is quite unlikely to be.

8.21 The Commission is also concerned that the third sentence in the model direction in the Benchbook, which introduces a concept based on jurors being 'reasonable persons', may either be incorrect as a matter of law or at least unhelpful and inconsistent with the previous sentences in that direction. This assumes that any doubt held by a reasonable person is a reasonable doubt. However, it is the quality of the doubt that is critical, not the quality of the jurors. The Commission proposes that this third sentence be amended by deleting those words from it, and suggests that this sentence might be re-worded to the following effect:

> If, at the end of your deliberations, you have a reasonable doubt about the guilt of the defendant, then you cannot find the defendant guilty of that charge.

8-1 There should be no attempt to define 'beyond reasonable doubt' in statute or in model directions such as the Queensland Supreme and District Court Benchbook.

8-2 The model direction in Chapter 57 of the Queensland Supreme and District Court Benchbook should be amended by:

(a) deleting 'as reasonable persons' from the last sentence, and re-wording it to the following effect: 'If, at the end of your deliberations, you have a reasonable doubt about the guilt of the defendant, then you cannot find the defendant guilty of that charge'; and

(b) adding a short statement to the effect that the expression 'beyond reasonable doubt' cannot be given a more precise definition than that given in the Benchbook.

PARTIES TO OFFENCES

8.22 The directions required to be given on the operation of sections 7, 8 and 10A of the Criminal Code (Qld) were discussed at [4.41]–[4.45] of the Issues Paper. Those sections deem individuals to be criminally responsible for an offence in several circumstances, including aiding, or counselling or procuring, another person to commit the offence. Each provision involves different elements and both subject-

941 See the cases cited in the footnotes to the extract from the Queensland Benchbook set out in [8.5] above.

ive and objective tests, and it is not uncommon for more than one of these party provisions to be relevant in a trial. The complexity of their operation is reflected in the model directions of the Queensland Benchbook, which run to 15 pages, including notes.[942]

8.23 The relevant statutory provisions are found in chapter 2 (sections 7 to 10A) of the Criminal Code (Qld); they read:

> **7 Principal offenders**
>
> (1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say—
>
> (a) every person who actually does the act or makes the omission which constitutes the offence;
>
> (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
>
> (c) every person who aids another person in committing the offence;
>
> (d) any person who counsels or procures any other person to commit the offence.
>
> (2) Under subsection (1)(d) the person may be charged either with committing the offence or with counselling or procuring its commission.
>
> (3) A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.
>
> (4) Any person who procures another to do or omit to do any act of such a nature that, if the person had done the act or made the omission, the act or omission would have constituted an offence on the person's part, is guilty of an offence of the same kind, and is liable to the same punishment, as if the person had done the act or made the omission; and the person may be charged with doing the act or making the omission.
>
> **8 Offences committed in prosecution of common purpose**
>
> When 2 or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

942 Queensland Courts, *Supreme and District Court Benchbook*, 'Parties to An Offence: ss 7, 8' [71] <http://www.courts.qld.gov.au/2265.htm> at 3 September 2009. These directions are set out in full in Appendix D of the Issues Paper.

…

10A Interpretation of ch 2

(1) Under section 7, a person's criminal responsibility extends to any offence that, on the evidence admissible against him or her, is either the offence proved against the person who did the act or made the omission that constitutes that offence or any statutory or other alternative to that offence.

(2) Under section 8, a person's criminal responsibility extends to any offence that, on the evidence admissible against him or her, is a probable consequence of the prosecution of a common intention to prosecute an unlawful purpose, regardless of what offence is proved against any other party to the common intention.

(3) This section does not limit any other provision of this chapter.

Submissions

8.24 None of the respondents to the Commission's Issues Paper made submissions on this issue.

SELF-DEFENCE

8.25 Where self-defence is relevant, the judge may need to address the jury on its elements. In Queensland, the defence comprises three separate but related defences under sections 271(1), 271(2) and 272 of the Criminal Code (Qld). Each provision is addressed to different circumstances, involves different elements and the application of both subjective and objective tests. The relevant provisions read:

271 Self-defence against unprovoked assault

(1) When a person is unlawfully assaulted, and has not provoked the assault, it is lawful for the person to use such force to the assailant as is reasonably necessary to make effectual defence against the assault, if the force used is not intended, and is not such as is likely, to cause death or grievous bodily harm.

(2) If the nature of the assault is such as to cause reasonable apprehension of death or grievous bodily harm, and the person using force by way of defence believes, on reasonable grounds, that the person can not otherwise preserve the person defended from death or grievous bodily harm, it is lawful for the person to use any such force to the assailant as is necessary for defence, even though such force may cause death or grievous bodily harm.

272 Self-defence against provoked assault

(1) When a person has unlawfully assaulted another or has provoked an assault from another, and that other assaults the person with such violence as to cause reasonable apprehension of death or grievous bodily harm, and to induce the person to believe, on reasonable grounds, that it is necessary for the person's preservation

> from death or grievous bodily harm to use force in self-defence, the person is not criminally responsible for using any such force as is reasonably necessary for such preservation, although such force may cause death or grievous bodily harm.
>
> (2) This protection does not extend to a case in which the person using force which causes death or grievous bodily harm first begun the assault with intent to kill or to do grievous bodily harm to some person; nor to a case in which the person using force which causes death or grievous bodily harm endeavoured to kill or to do grievous bodily harm to some person before the necessity of so preserving himself or herself arose; nor, in either case, unless, before such necessity arose, the person using such force declined further conflict and quitted it or retreated from it as far as was practicable.

8.26 In some trials, more than one of the provisions may be relevant, so that multiple and complex jury directions may be required. These issues were discussed at [4.46]–[4.49] of the Issues Paper.[943]

Submissions

8.27 None of the respondents to the Commission's Issues Paper discussed self-defence directions.

PROVOCATION

8.28 The directions dealing with the defences of provocation are among the most detailed and complicated of those included in the Queensland Benchbook. The direction on the partial defence of provocation to murder was discussed in some detail in chapter 6 of the Issues Paper.[944] It is a telling example of trial judges' difficulties in simplifying jury directions when the law itself is particularly complex.

8.29 The partial defence of provocation in relation to a charge of murder is found in section 304 of the Criminal Code (Qld):

> When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation, and before there is time for the person's passion to cool, the person is guilty of manslaughter only.

943 The Queensland Benchbook directions on self-defence are set out in full in Appendix D to the Issues Paper. This area was also considered by the NSWLRC in New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [9.16]–[9.25], [9.64], [9.77]–[9.80], though in relation to directions on the law stated in *Crimes Act 1900* (NSW) ss 418, 419.

944 See Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [6.19]–[6.22], [6.24]–[6.25]. The Queensland Benchbook direction is set out in full in Appendix D of the Issues Paper. This area was also discussed by the NSWLRC at New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [9.26]–[9.43], [9.65]; although the directions in that State are based on a different statutory provision (*Crimes Act 1900* (NSW) s 23), some of the issues that arise reflect those that arise in Queensland under Criminal Code (Qld) s 304.

8.30 The defence must be left to the jury whenever it is open, even tenuously, on the version of events disclosed by the evidence most favourable to the defendant.[945] The jury must not only grapple with the language of the defence, but must also apply a difficult composite test where the subjective characteristics and circumstances of the defendant are relevant for one part but not, generally, for the other.

Submissions

8.31 None of the respondents to the Commission's Issues Paper commented on the difficulties of directing juries on provocation. However, one District Court judge made the following general comment:

> The ability to simplify jury directions is very limited, in view of the complexity of the law as stated by the Court of Appeal and the High Court. Perhaps appellate court judges should think more about juries?[946]

QLRC's proposals for reform

8.32 Complex law can lead to complex jury directions. That would seem to be the case in relation to the model directions in the Queensland Benchbook on sections 7, 8, 10A, 271, 272 and 304 of the Criminal Code (Qld).

8.33 If these model directions (and any others given by trial judges on issues of extended criminal responsibility for a criminal act, self-defence and provocation) accurately reflect the law, then the Commission suggests that they ought nonetheless be reviewed with the purpose of seeing whether they can be simplified or otherwise re-structured without compromising their legal accuracy.

8.34 The Commission acknowledges that the model directions in the Benchbook are reviewed and amended from time to time in light of developments in the law. However, the Commission considers that these (and other) directions should be reviewed to examine in particular the extent to which they can be re-worked in the style of the integrated directions proposed by the Commission in chapter 3 of this Paper: see Proposals 3-5 to 3-7 above.

8.35 The Commission acknowledges that integrated directions that are to be adapted to meet the factual circumstances of each case cannot be set out fully in any model directions. However, the overall structure of, say, directions on self-defence can be prepared with appropriate gaps for the insertion of the references to the evidence, any necessary directions or warnings and the factual questions that the jury must consider.

8.36 The fact that complicated statutory provisions give rise to complex, problematic jury directions may well be a prompt to consider reform of the substantive law in question. However, that cannot happen as part of the Commission's present review.

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945 *R v Stingel* (1990) 171 CLR 312, 318.

946 Submission 6.

8-3 The directions to be given to juries in relation to sections 7, 8, 10A, 271, 272 and 304 of the Criminal Code (Qld) should be reviewed to examine the extent to which they can be re-worked in the style of the integrated directions advocated in Proposals 3-5 to 3-7.

THE BLACK DIRECTION

8.37 Specific directions that may also need to be given to the jury after it has retired to consider its verdict were discussed in the Issues Paper at [4.51]–[4.55].[947] This discussion highlighted the inconsistency between the Black direction mandated by the High Court and the *Jury Act 1995* (Qld) after amendments in September 2008 which now allow majority verdicts in certain jury trials in Queensland.

8.38 The standard Black direction, which exhorts apparently hung juries to continue to deliberate to seek to arrive at a verdict, was enunciated by the High Court in *Black v The Queen* at a time when unanimity was required in all cases:

> 'Members of the jury,
>
> I have been told that you have not been able to reach a verdict so far. I have the power to discharge you from giving a verdict but I should only do so if I am satisfied that there is no likelihood of genuine agreement being reached after further deliberation. Judges are usually reluctant to discharge a jury because experience has shown that juries can often agree if given more time to consider and discuss the issues. But if, after calmly considering the evidence and listening to the opinions of other jurors, you cannot honestly agree with the conclusions of other jurors, you must give effect to your own view of the evidence.
>
> Each of you has sworn or affirmed that you will give a true verdict according to the evidence. That is an important responsibility. You must fulfil it to the best of your ability. Each of you takes into the jury room your individual experience and wisdom and you are expected to judge the evidence fairly and impartially in that light. You also have a duty to listen carefully and objectively to the views of every one of your fellow jurors. You should calmly weigh up one another's opinions about the evidence and test them by discussion. Calm and objective discussion of the evidence often leads to a better understanding of the differences of opinion which you may have and may convince you that your original opinion was wrong. That is not, of course, to suggest that you can, consistently with your oath or affirmation as a juror, join in a verdict if you do not honestly and genuinely think that it is the correct one.
>
> Experience has shown that often juries are able to agree in the end, if they are given more time to consider and discuss the evidence. For that reason, judges usually request juries to reexamine the matters on which they are in disagreement and to make a further attempt to reach a verdict before they may be

947 See also New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [4.72]–[4.80], where they are described as 'perseverance directions'.

> discharged. So, in the light of what I have already said, I ask you to retire again and see whether you can reach a verdict.'[948]

8.39 Until recently, in Queensland all jury verdicts had to be unanimous. Amendments to the *Jury Act 1995* (Qld) in 2008, however, introduced majority verdicts (of 11 jurors out of a jury of 12, or of 10 jurors out of a jury of 11) in certain circumstances.[949]

8.40 The jury's verdict must, generally speaking, be unanimous. This certainly remains the position even after the 2008 amendments in the following cases:

- murder trials;
- trials for offences under section 54A(1) of the Criminal Code (Qld) relating to demands on government agencies with menaces where a mandatory sentence of life imprisonment may be imposed;
- trials for offences against a law of the Commonwealth; and
- where a jury has been reduced to ten people by the time that it gives its verdict.[950]

8.41 However, in other cases a jury may be asked to deliver a majority verdict if it is unable to reach a unanimous verdict. If after the 'prescribed period' of at least eight hours[951] the jury has not reached a unanimous verdict and the judge is satisfied that the jury is unlikely to do so after further deliberation, the judge may ask the jury to reach a majority verdict.[952] If a majority verdict can be reached, that then becomes the verdict of the jury.[953]

8.42 In these circumstances, a majority verdict is the verdict of all but one of the jurors (ie, 11 out of a jury of 12 or ten out of a jury of 11).[954]

8.43 This formulation suggests that a two-phase approach must be adopted: the jury should first seek to reach unanimity but, if the trial judge is satisfied that it cannot after deliberating for at least eight hours, the jury may then be asked to return a majority verdict agreed to by all but one of them, if it can.[955] This hints that

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948 *Black v The Queen* (1993) 179 CLR 44, 51–2 (Mason CJ, Brennan, Dawson and McHugh JJ).

949 *Jury Act 1995* (Qld) ss 59, 59A. Majority verdicts were introduced by the *Criminal Code and Jury and Another Act Amendment Act 2008* (Qld).

950 *Jury Act 1995* (Qld) s 59. Even in cases involving these charges, majority verdicts may be available where the defendant is liable to be convicted of another offence (for example, manslaughter on a charge of murder) as if the defendant were originally charged with that other offence: *Jury Act 1995* (Qld) s 59(4).

951 The 'prescribed period' is a period of at least eight hours (with breaks excluded) plus any other period that the judge considers reasonable having regard to the complexity of the trial: *Jury Act 1995* (Qld) s 59A(6).

952 *Jury Act 1995* (Qld) s 59A(2).

953 *Jury Act 1995* (Qld) s 59A(3).

954 *Jury Act 1995* (Qld) s 59A(6).

955 *Jury Act 1995* (Qld) s 59A(2) reads:

> If, after the prescribed period, the judge is satisfied that the jury is unlikely to reach a unanimous verdict after further deliberation, the judge may ask the jury to reach a majority verdict.

somehow the jury will deliberate for the prescribed period either unaware that it can return a majority verdict or somehow suppressing the knowledge that it can.

8.44 The possibility of accepting a majority verdict has been noted as presenting difficulties for the Black direction.[956] It has been suggested in Victoria and New South Wales that the effect of the Black direction may be undermined if the possibility of taking a majority verdict is mentioned before the preconditions have been met.[957]

8.45 This issue has not yet been judicially considered in Queensland.

8.46 The direction set out in the Queensland Benchbook is in substantially the same terms as the standard Black direction.[958] However, the Benchbook contains the following bench notes cautioning against any premature mention of the possibility of taking a majority verdict:

> Black Direction
>
> Where the jury indicate that they are unable to reach a verdict and the preconditions for allowing a majority verdict direction under s 59A of the *Jury Act* are not or not yet satisfied, a direction as outlined by the High Court in *Black v The Queen* (1993) 179 CLR 44 at 51 should be given, keeping in mind of course that the jury must be free to deliberate without any pressure being brought to bear on them:
>
> …
>
> Where the jury indicates it is deadlocked before the time has come to consider a majority verdict, a trial judge in giving a Black direction, should not make reference to the circumstances being imminent for the taking of a majority verdict: see *R v VST* (2003) 6 VR 569; [2003] VSCA 35 at [38] and *RJS v R* (2007) 173 A Crim R 100; [2007] NSWCCA 241 at [22]–[23] where such reference was found to undermine the Black direction.
>
> In *Hanna v R* [2008] NSWCCA 173 the Court of Appeal left open for future consideration the question of whether the combining of a Black direction with a direction that a majority verdict could be accepted had the effect of undermining the Black direction so as to amount to error. Hoeben J, without expressing a final decision on the matter, was inclined to view that the effect of the Black direction was undermined by the giving of a simultaneous direction that a majority verdict could be returned. James J observed at [23] that a preferable course for the trial judge to have adopted in that case was to have given a Black direction without referring to the possibility of a majority verdict so as to allow the jury further time in which to endeavour to reach a unanimous verdict. See also *RJS*

956 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper No 4 (2008) [4.74].

957 *R v VST* (2003) 6 VR 569 [38] (Phillips JA); *RJS v The Queen* (2007) 173 A Crim R 100 [21]–[22] (Spigelman CJ); *Hanna v The Queen* [2008] NSWCCA 173 [23] (James J), [25] (Hoeben J). See New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [4.77].

958 Queensland Courts, *Supreme and District Court Benchbook*, 'Jury Failure to Agree' [52] <http://www.courts.qld.gov.au/2265.htm> at 3 September 2009.

> *v R* [2007] NSWCCA where Spigelman CJ at [25] made similar observations to those of James J in respect of the circumstances that arose in *RJS*.[959]

8.47 These issues have been discussed by a commentator in New Zealand writing on that country's imminent move to majority verdicts, who argued in robust terms that there should be no lack of frankness with the jury:

> It is also likely that making jurors aware from the outset that a majority verdict is possible after a period of time will allow more efficient jury deliberations. Majority verdicts were introduced to avoid a trial being derailed by a single 'rogue' juror who would not engage in proper deliberations about the evidence. Let us imagine what may happen in a jury room where the jurors are aware that a majority verdict can ultimately be returned … In either case the aim of the law reformers has been achieved. A rogue juror has been rendered powerless, or has been converted to one of 12 jurors all engaging with the evidence. … If majority verdicts are to prevent rogue jurors frustrating the majority, let us tell the majority![960]
>
> … Certainly the jury [who does not know about the possibility of a majority verdict] will operate differently from one where jurors are aware that a majority verdict is possible, either because they have researched their obligations before the trial or through their own, or an acquaintance's, experience with majority verdicts at an earlier trial. In those cases jurors may readily determine that for some counts there is a working 11–1 majority and they can pass on with some reasonable expedition to the areas genuinely in dispute.
>
> Principle also favours giving full direction as early as possible. If we genuinely regard the jury as a central and valuable element in the criminal trial, it makes little sense not to tell the jurors at the outset exactly what the task before them is. For them to be left to deliberate on a false premise … is simply demeaning to the jurors individually and collectively. The Australian cases which favour such a disingenuous approach reflect a judicial philosophy at odds with the legislative decision to accept majority verdicts … There is no good reason to perpetuate such thinking …
>
> Lastly … the Australian approach is even more demeaning of the judges who are supposed to direct the jury as to all the relevant law yet are then forbidden to do so. …
>
> Surely the more sensible approach is to treat jurors as capable of understanding their role, even if it is made more complex by the majority verdict provisions, and applying the law properly and fairly. This is, after all, the premise on which all rules as to jury directions are founded. Juries should be told the truth, and the whole truth, as to the verdicts they may return.[961] (note added)

Submissions

8.48 No submissions were received by the Commission in relation to the Black direction or its inconsistency with the *Jury Act 1995* (Qld).

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959 Queensland Courts, *Supreme and District Court Benchbook*, 'Jury Failure to Agree' [52] <http://www.courts.qld.gov.au/2265.htm> at 3 September 2009.

960 A jury might become highly frustrated if it learns that a majority verdict is permissible only after it has spent several hours in needlessly dealing with a rogue juror who simply will not participate properly.

961 Jeremy Finn, 'What shall we tell the jury?' (2009) *New Zealand Law Journal* 168, 169.

QLRC's proposals for reform

8.49 There is a clear inconsistency in principle, even if it is not apparent in the precise wording of the direction, between the Black direction and the possibility, in relevant cases, of the jury delivering a majority verdict after the prescribed period of deliberation has elapsed. To deliver a standard Black direction in such a trial has the appearance of dealing at least disingenuously, or even unfairly, with the jury.

8.50 Moreover, it relies on the jury having no knowledge of the relevant provisions of the *Jury Act 1995* (Qld), or at least putting that knowledge to one side for at least eight hours of deliberations. A jury that has arrived at an 11–1 (or 10–1) decision knowing of the possibility of a majority verdict can simply sit out the required minimum deliberation period without trying to engage in any further deliberations to seek to persuade the minority juror.

8.51 It is clearly desirable that in as many cases as possible juries reach unanimous verdicts freely after proper deliberation. However, Parliament has legislated that in many cases it is appropriate to accept as the verdict of the jury a verdict that has been agreed by all but one juror, provided that the jury has deliberated for an appropriately long period to indicate that further deliberations are unlikely to achieve unanimity.

8.52 Although not necessarily part of Parliament's rationale, this may also have the effect, where juries know of the possibility of returning a majority verdict, of reducing the prospect of minority jurors being unfairly pressured to adopt the majority's view simply to bring the case to an end.[962]

8-4 The *Jury Act 1995* (Qld) should be amended to over-ride the requirement to give a Black direction in the terms currently mandated by the High Court, and to provide that in appropriate cases a court may, or even should, inform the jury at the start of deliberations:

(a) that the jury is expected to reach a unanimous verdict;

(b) that, if a unanimous verdict cannot be reached, a majority verdict may be returned; and

(c) of the terms on which a majority verdict may be returned.

8-5 Chapter 52 of the Queensland Benchbook should be amended to reflect the terms of Proposal 8-4.

962 Two former jurors who responded to the Commission's Issues Paper reported pressure being placed on dissenting or uncertain jurors to agree with the majority so that the jury would not be sequestered overnight and jurors could meet personal commitments: Submission 2; Submission 3.

Chapter 9

Jury Directions Research Project

INTRODUCTION

Terms of Reference

9.1 The Terms of Reference in this review specifically direct the Commission to consider conducting, or commissioning, research into the ways in which jurors process evidence, judicial directions and warnings, and other information given to them in court during criminal trials:

> In undertaking this reference, the Commission is to have particular regard to:
>
> (a) subject to authorisation being given by the Supreme Court under section 70(9) of the *Jury Act 1995* (Qld), conducting research into jury decision-making in Queensland with a view to obtaining information about:
>
> - The views and opinions of jurors about the number and complexity of the directions, warnings and comments required to be given by a judge to a jury and the timing, manner and methodology adopted by judges in summing up to juries;
>
> - The ability of jurors to comprehend and apply the instructions given to them by a judge;
>
> - The information needs of jurors;

Confidentiality of jury information

9.2 Research of this nature is ordinarily severely restricted by the statutory confidentiality that surrounds jury deliberations under section 70 of the *Jury Act 1995* (Qld). Section 70(2) imposes a strict prohibition on the publication to the public of 'jury information'.[963] 'Jury information' is defined in section 70(17) of the Act to mean:

963 Section 70(2) reads:

> A person must not publish to the public jury information.

(a) information about statements made, opinions expressed, arguments advanced, or votes cast, in the course of a jury's deliberations; or

(b) information identifying or likely to identify a person as, or as having been, a juror in a particular proceeding.

9.3 Similar prohibitions exist under the Act against a person seeking the disclosure of jury information from a member or former member of a jury (section 70(3)) and against a juror or former juror disclosing any jury information if that person has reason to believe that any of that information is likely to be, or will be, published to the public (section 70(4)). The same maximum penalty of two years' imprisonment applies for a breach of those provisions.

9.4 Accordingly, any research that the Commission may wish to undertake in the course of this enquiry would ordinarily be severely constrained by the operation of section 70.

Orders of the Supreme Court

9.5 However, under section 70(9), the Attorney-General may apply to the Supreme Court of Queensland for authorisation to conduct research projects involving the questioning of members or former members of juries, and the publication of the results of that research. That authorisation may be given on any conditions that the Court considers to be appropriate: section 70(10).

9.6 The Attorney-General filed an application for such an authorisation in the Supreme Court on 24 July 2008. That application was heard by the Chief Justice, the Honourable Paul de Jersey, on 15 September 2008. His Honour made the following Orders:

1. Pursuant to s 70(9) of the *Jury Act 1995* (Qld), the Queensland Law Reform Commission ('QLRC') is authorised to:

   (a) conduct a research project into jury decision-making in Queensland, which will involve the questioning of former members of juries; and

   (b) publish the results of the research project.

2. Pursuant to s 70(10) of the *Jury Act 1995* (Qld), that authorisation is on the condition that:

   (a) the former members of juries not be identified in any publication by the QLRC;

   (b) the former members of juries be permitted to decline to assist and to decline to answer one or more questions; and

   (c) the QLRC shall ensure that any former member of juries whom it contacts for the purpose of the research project is advised of the

Maximum penalty — 2 years imprisonment.

> contents of this order and, in particular, of the terms of the previous two conditions.

JURY DIRECTIONS RESEARCH PROJECT

9.7 As noted in chapter 1 of this paper, in June 2009 the Commission contracted with the School of Psychology at the University of Queensland to undertake a line of practical research into jurors' information needs and the comprehension and application by juries of jury directions and other information and material.[964] The project will be led by Dr Blake McKimmie, a Senior Lecturer in the School of Psychology at the University of Queensland.

9.8 That project covers criminal trials in the Supreme Court and District Court of Queensland in Brisbane in mid-2009. Participation by former jurors who sat on those trials is entirely voluntary. Their participation involves a questionnaire which they are asked to complete immediately after they have been discharged by the trial judge, followed by an interview conducted with them privately within the following fortnight. It is anticipated that about 200 jurors will be involved and that the majority of them will have sat on District Court trials, in keeping with the statistics that demonstrate that far more trials are heard in that court than in the Criminal Division of the Supreme Court.[965]

9.9 The research does not involve any participation by jurors while they are sitting on trials or at any time before they have been discharged by the trial judge. All participants will, therefore, be former jurors at the time of their participation.

9.10 In general terms, apart from general demographic information, the questionnaire asks jurors about:

- the content and range of information that they received at various stages of the trial from the judge, the prosecutor and the defendant or defence counsel;
- written and other material received from the judge or either of the parties;
- the extent to which they found any of this information useful or hard to understand or apply;
- whether there was any information that they would have liked but did not receive, or any information that they would have preferred to have received at a different time during the trial; and

964 See [1.17]–[1.19] above.

965 See the statistics in chapter 5 of the Commission's Issues Paper in this reference: Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009); see especially table 5.1. Those statistics show that in 2006–07 (and ignoring matters dealt with in the Magistrates Court), 82.5% of criminal matters were commenced in the District Court and the remaining 17.5% in the Supreme Court. These figures do not, however, indicate how many in each court were disposed of by jury trial or resulted in other outcomes.

- the extent to which they found any aspect of the trial procedure helpful or unhelpful in their job as jurors and in understanding the law.

9.11 The interview is intended to allow the former jurors to elaborate on any of the matters covered in the questionnaire about which they wish to add some further comments or to clarify their answers, and to ask them some further questions about the material they received during the trial that are more easily dealt with in discussion rather than in the somewhat constrained limits of a formal questionnaire.

9.12 At all times, the results of the questionnaires and the records of the interviews will be prepared and stored to ensure the confidentiality of the jurors' identities and to avoid the identification of the trials on which they sat.

9.13 The University of Queensland is to provide its final Report on the results of this project to the Commission by 30 September 2009.

9.14 The results of this research will be incorporated into the Commission's final Report in this review, which is due to be delivered to the Attorney-General by 31 December 2009.

Appendix A

Terms of Reference — Jury Directions

Jury directions review

I, Kerry Shine, Attorney-General and Minister for Justice and Attorney-General and Minister Assisting the Premier in Western Queensland, having regard to:

- the critical role juries have in the justice system in Queensland to ensure a fair trial;
- the reviews currently being undertaken by the New South Wales Law Reform Commission and Victorian Law Reform Commission of directions and warnings given by a judge to a jury in a criminal trial; and
- the Jury Charges Research Project currently being undertaken by the Australian Institute of Judicial Administration;

refer to the Queensland Law Reform Commission (the Commission) pursuant to section 10 of the *Law Reform Commission Act 1968* (Qld), the review of directions, warnings and summing up given by a judge to jurors in criminal trials in Queensland and to recommend any procedural, administrative and legislative changes that may simplify, shorten or otherwise improve the current system.

In undertaking this reference, the Commission is to have particular regard to:

(a) subject to authorisation being given by the Supreme Court under section 70(9) of the *Jury Act 1995* (Qld), conducting research into jury decision-making in Queensland with a view to obtaining information about:

- The views and opinions of jurors about the number and complexity of the directions, warnings and comments required to be given by a judge to a jury and the timing, manner and methodology adopted by judges in summing up to juries;
- The ability of jurors to comprehend and apply the instructions given to them by a judge;
- The information needs of jurors;
- ~~The nature of the split for hung juries;~~

- ~~The reason/s for a juror or jurors' dissent in hung juries;~~[966]

(b) directions or warnings which could be simplified or abolished;

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

(d) the extent to which the judge needs to summarise the evidence for the jury;

(e) possible solutions to identified problems relating to jury directions and warnings, including whether other assistance should be provided to jurors to supplement the oral summing up; and

(f) recent developments and research in other Australian and overseas jurisdictions.

In undertaking this reference, the Commission is to work, where possible and appropriate, with other law reform commissions and consult stakeholders.

The Commission is to provide a report to the Attorney-General and Minister for Justice and Minister Assisting the Premier in Western Queensland on the results of the research and the review by 31 December 2009.

Dated the 7 day of April 2008

Kerry Shine MP
Attorney-General and Minister for Justice
And Minister Assisting the Premier in Western Queensland

966 These two dot points were deleted from the Terms of Reference in a letter from the Attorney-General, the Hon Cameron Dick MP, to the Honourable Justice Roslyn Atkinson, Chairperson of the Queensland Law Reform Commission, dated 5 May 2009.

Appendix B

List of Respondents to Issues Paper

His Honour Judge CJL Brabazon, District Court of Queensland

The Honourable Justice JH Byrne, RFD, Supreme Court of Queensland

Commonwealth Director of Public Prosecutions

Mr Graham Kearney

Law Council of Australia

Legal Aid Queensland

The Honourable Justice M McMurdo AC, President of the Queensland Court of Appeal

Her Honour Judge H O'Sullivan, District Court of Queensland

The Office of the Director of Public Prosecutions

Queensland Law Society and the Bar Association of Queensland (jointly)

South West Brisbane Community Legal Centre

In addition, the Commission received written or oral submissions from five members of the public, four of whom identified themselves as having served on juries in Queensland, and one of whom had been a defendant in a trial and re-trial in Queensland.[967] The Commission has taken the view that their names should not be published to ensure that there is no improper publication or other disclosure of jury information.

967 See [1.34] above.