



Queensland  
Law Reform Commission

**A Review of Jury Directions**

Report  
Volume 2



**Queensland  
Law Reform Commission**

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Report

Volume 2

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# Summary of Recommendations

The following table sets out the Commission's Recommendations in summary form.

The first digit in each Recommendation number indicates the chapter in which that Recommendation is found.

No.	Recommendation	Para
<b>No codification</b>		
7-1	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 should not be enacted in Queensland.	7.99
<b>Queensland Supreme and District Court Benchbook</b>		
7-2	The Queensland Supreme and District Court Benchbook should continue to be refined and relied upon by judges and practitioners in this State.	7.139
<b>Pre-trial disclosure</b>		
8-1	<p>Chapter 62 of the Criminal Code (Qld) should be amended to include a pre-trial disclosure regime that has the following features:</p> <ol style="list-style-type: none"> <li data-bbox="360 1379 1278 1514">(1) 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.</li> <li data-bbox="360 1547 1278 1749">(2) 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 of indictable offences.</li> <li data-bbox="360 1783 1278 1984">(3) 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 on by the prosecution, ought to be given statutory effect in this regime.</li> </ol>	8.206

No.	Recommendation	Para
8-1	<p>(4) 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.</p> <p>(5) 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.</p> <p>(6) The pre-trial disclosure regime should require defendants to disclose the general nature of their defence, 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.</p> <p>(7) Defendants should not be required by the pre-trial disclosure regime under the Criminal Code (Qld) 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.</p> <p>(8) 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.</p> <p>(9) 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.</p> <p>(10) 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 defendant to comply with his or her obligations of pre-trial disclosure can lead to any inference about the guilt of that defendant on any charge before the jury. Comment may be made on other matters, such as that party's credit.</p> <p>(11) 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 proviso in section 668E(1A) of the Criminal Code (Qld).</p> <p>(12) 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.</p>	8.206

No.	Recommendation	Para
8-2	<p>The consequences of non-compliance with the recommended pre-trial disclosure regime should include the following:</p> <ol style="list-style-type: none"> <li data-bbox="360 465 1276 600">(1) the denial of the right to lead evidence that is relevant to a matter that ought to have been disclosed pursuant to the provisions recommended in Recommendations 8-1(3), (4) or (6) above without the leave of the trial judge;</li> <li data-bbox="360 633 1276 734">(2) a requirement that the court take a defendant's compliance or non-compliance into account when determining the sentence if the defendant is convicted; and</li> <li data-bbox="360 768 1276 902">(3) 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).</li> </ol>	8.206
8-3	The jury should wherever possible be informed of matters not in dispute in an agreed statement of facts or similarly neutral manner by the trial judge.	8.206
8-4	No special sanctions are necessary in relation to either 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 with the recommended regime of pre-trial disclosure. These issues should be handled under the courts' general powers in this regard.	8.206
8-5	There should be an urgent review of legal aid funding to remove any disincentive that might operate to discourage the early delivery of criminal defence briefs; for example, by adequately remunerating legal practitioners for interlocutory work, especially any additional pre-trial work required by the Commission's other recommendations or other proposed changes to the criminal justice system.	8.206
<b>Informing a jury about the issues in the trial</b>		
9-1	The Criminal Code (Qld) should be amended to require the trial judge to invite the defendant (if represented) to make an opening statement at the close of the opening address by the prosecution. The defendant should not be required to make any opening statement at that time.	9.78
9-2	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.	9.78

No.	Recommendation	Para
9-3	<p>The Criminal Code (Qld) should be amended to provide that the judge may address the jury at any time on:</p> <ol style="list-style-type: none"> <li>(1) the issues that are expected to arise, or have arisen, in the trial;</li> <li>(2) the relevance to the conduct of the trial of any admissions made, directions given or matters determined prior to the commencement of the trial;</li> <li>(3) 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.</li> </ol>	9.78
<b>Integrated jury directions</b>		
9-4	<p>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).</p>	9.130
9-5	<p>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.</p>	9.130
9-6	<p>These integrated directions should be supplemented wherever appropriate by written guides to the law, directions and questions to be answered by the jury.</p>	9.130
<b>Written and other assistance for juries</b>		
10-1	<p>The Criminal Code (Qld) should be amended to provide that:</p> <ol style="list-style-type: none"> <li>(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: <ol style="list-style-type: none"> <li>(a) the indictment;</li> <li>(b) any document setting out the elements of each offence charged and any alternative offences;</li> <li>(c) any document admitted as evidence;</li> <li>(d) any statement of facts;</li> <li>(e) the opening statement and closing address by the prose-</li> </ol> </li> </ol>	10.154

No.	Recommendation	Para
	<p>cution, any opening statement and closing address by a defendant (or summaries of those statements and addresses) and the defendant's response to any notice to make pre-trial admissions issued by the prosecution;</p> <p>(f) any address of the judge to the jury;</p> <p>(g) any schedules, chronologies, charts, diagrams, summaries or other explanatory material;</p> <p>(h) transcripts of evidence or audio or audiovisual recordings of evidence;</p> <p>(i) transcripts of any audio or audiovisual recordings;</p> <p>(j) any of the judge's directions to the jury;</p> <p>(k) any document setting out decision trees, flowcharts or checklists of questions for consideration by the jury; and</p> <p>(l) any other document that the judge considers appropriate.</p>	
10-1	(2) The trial judge may specify when and in what format any such material is to be given to the jury, and may make such comments or give such instructions to the jury on the use of any such material as the judge considers necessary in the interests of justice.	10.154
10-1	<p>(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:</p> <p>(a) the burden and standard of proof;</p> <p>(b) the role of the judge and jury;</p> <p>(c) the elements of each offence charged (and any alternative charge) and each defence (to the extent that defences have been identified by the defendant); and</p> <p>(d) admissions, agreed facts or other matters about which there is no dispute between the parties.</p>	10.154

No.	Recommendation	Para
<b>Questions from jurors</b>		
10-2	<p>The Queensland Supreme and District Court Benchbook should be amended by:</p> <ol style="list-style-type: none"> <li data-bbox="357 533 1284 667">(1) 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</li> <li data-bbox="357 696 1284 768">(2) removing the reservation about informing juries of their right to ask questions based on <i>Lo Presti</i> [1992] VR 696.</li> </ol>	10.193
<b>Choosing a jury speaker</b>		
10-3	<p>Rule 48(1) of the <i>Criminal Practice Rules 1999</i> (Qld) should be amended by:</p> <ol style="list-style-type: none"> <li data-bbox="357 965 1284 1059">(1) deleting the words ‘as early as is convenient’ from the last paragraph of the wording set out in that Rule to be spoken by the proper officer; and</li> <li data-bbox="357 1088 1284 1160">(2) adding at the end of that paragraph the words, ‘The speaker will deliver your verdict at the end of the trial.’</li> </ol>	10.241
<b>Parties’ obligations to identify relevant jury directions</b>		
11-1	<p>The Criminal Code (Qld) should be amended to provide that both the prosecution and the defendant (if represented) 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.</p>	11.143
11-2	<p>In addition, the Criminal Code (Qld) should be amended to provide that:</p> <ol style="list-style-type: none"> <li data-bbox="357 1559 1284 1664">(1) the judge is not obliged to 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</li> <li data-bbox="357 1693 1284 1888">(2) in appeals asserting any misdirection or inadequate direction of the jury by the trial judge, 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).</li> </ol>	11.143



No.	Recommendation	Para
<b>Propensity evidence</b>		
13-1	<p>The <i>Evidence Act 1977</i> (Qld) should be amended to:</p> <ol style="list-style-type: none"> <li data-bbox="359 495 1276 663">(1) remove the exclusionary rule in <i>Pfennig v The Queen</i> (2008) 235 CLR 334 that applies to propensity evidence and to provide that evidence should not be inadmissible simply because it is evidence that shows the defendant has engaged in other criminal acts or misconduct;</li> <li data-bbox="359 696 1276 864">(2) provide that, if evidence that shows that the defendant has engaged in other criminal acts or misconduct is admitted 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;</li> <li data-bbox="359 898 1276 1066">(3) provide that, notwithstanding paragraph (2), if the judge considers that the jury may engage in unfair prejudicial propensity reasoning in relation to the evidence, or if the defendant so requests and the judge considers it appropriate to do so, the judge must warn the jury that: <ol style="list-style-type: none"> <li data-bbox="438 1099 1276 1223">(a) evidence that the defendant has engaged in other criminal or other misconduct is not conclusive of guilt. It is no more than one fact to be considered in combination with all the other facts;</li> <li data-bbox="438 1256 1276 1391">(b) it would be improper to decide that, simply because the defendant has engaged in other criminal or other misconduct before, he or she is probably guilty, without considering all the other evidence; and</li> <li data-bbox="438 1424 1276 1559">(c) the jury must not seek to punish the defendant for any other act — the defendant is only on trial, and liable to be punished, for the charges currently against him or her; and</li> </ol> </li> <li data-bbox="359 1592 1276 1659">(4) provide that, if a warning is given under paragraph (3), it may be given in general terms.</li> </ol>	13.80
13-2	If the recommendations in 13-1 above are not implemented, there should be a review of the law on propensity evidence in Queensland with a view to its reform.	13.80

No.	Recommendation	Para
<b>Directions about post-incident conduct</b>		
14-1	<p>The <i>Evidence Act 1977</i> (Qld) should be amended provide that:</p> <ul style="list-style-type: none"> <li>(1) if evidence of a defendant's lie or other apparently incriminating post-incident conduct such as flight or concealment 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;</li> <li>(2) despite paragraph (1), if the judge considers that the jury may place undue weight on the evidence, or if the defendant so requests and the judge considers it appropriate to do so, the judge must warn the jury that: <ul style="list-style-type: none"> <li>(a) the jury must be satisfied before using the evidence that the defendant did lie or engage in the other apparently incriminating conduct;</li> <li>(b) people lie or engage in other apparently incriminating conduct, such as flight or concealment, for various reasons; and</li> <li>(c) the jury should not conclude that the defendant is guilty just because he or she lied or engaged in the other apparently incriminating conduct; and</li> </ul> </li> <li>(3) if a warning is given under paragraph (2): <ul style="list-style-type: none"> <li>(a) 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; and</li> <li>(b) the judge should not use expressions such as 'consciousness of guilt' or 'post-offence conduct'.</li> </ul> </li> </ul>	14.56
<b>Warnings following delay in prosecution (Longman)</b>		
15-1	<p>The <i>Evidence Act 1977</i> (Qld) should be amended by the insertion of new provisions that state that:</p> <ul style="list-style-type: none"> <li>(1) 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 in prosecuting a charge (including any delay in reporting the alleged offence), 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;</li> </ul>	15.58

No.	Recommendation	Para
	<p>(2) significant forensic disadvantage is not established by the mere fact of delay alone;</p> <p>(3) warnings given in accordance with these provisions should not use the expressions 'dangerous or unsafe to convict' or 'scrutinise with great care';</p> <p>(4) the trial judge may refuse to give a warning or explanation if there are good reasons for doing so; and</p> <p>(5) warnings about the disadvantages suffered by reason of delay in prosecution (including any delay in reporting the alleged offence) may only be given in accordance with these new provisions.</p>	
<b>Directions about unreliable evidence</b>		
16-1	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 'scrutinise with great care', 'dangerous to convict' or 'unsafe to convict'.	16.54
16-2	Chapters 37 and 60 of the Supreme and District Court Benchbook should be amended to remove the expressions 'scrutinise with great care' and 'dangerous to convict'.	16.54
16-3	<p>The model directions in the Supreme and District Court Benchbook in relation to prison informers, accomplices, indemnified witnesses and other witnesses whose evidence might be regarded as unreliable should be reviewed:</p> <p>(1) to determine whether they can be re-structured as integrated directions in accordance with Recommendations 9-4 to 9-6; and</p> <p>(2) to ensure that they do not arguably breach section 632 of the Criminal Code (Qld).</p>	16.54
<b>'Beyond reasonable doubt'</b>		
17-1	There should be no attempt to define 'beyond reasonable doubt' in statute or in model directions such as those in the Queensland Supreme and District Court Benchbook.	17.49

No.	Recommendation	Para
17-2	<p>The model direction in Chapter 57 of the Queensland Supreme and District Court Benchbook should be amended by:</p> <ol style="list-style-type: none"> <li data-bbox="363 465 1278 629">(1) adding a short statement to the effect that being satisfied beyond reasonable doubt does not require jurors to have no doubt whatsoever that the defendant is guilty of the offence charged, but that they must be convinced that the defendant is more than just probably or even very probably guilty; and</li> <li data-bbox="363 667 1278 797">(2) deleting ‘as reasonable persons’ from the last sentence, and rewording 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’.</li> </ol>	17.49
<b>Use of integrated directions for certain offences</b>		
17-3	<p>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-structured as integrated directions in accordance with Recommendations 9-4 to 9-6.</p>	17.88
<b>The Black direction — non-unanimous verdicts</b>		
17-4	<p>The <i>Jury Act 1995</i> (Qld) should be amended to over-ride the requirement to give a Black direction in the terms currently mandated by the High Court in cases where a verdict of all but one of the jurors may be given, and to provide that in those cases the court should inform the jury at the start of deliberations:</p> <ol style="list-style-type: none"> <li data-bbox="363 1335 1278 1395">(1) that the jury is expected to reach a unanimous verdict and to make every reasonable effort to do so;</li> <li data-bbox="363 1433 1278 1563">(2) that, if a unanimous verdict cannot be reached after an appropriate period of deliberation, the judge may ask the jury to reach and deliver a verdict agreed to by all but one of the 12 (or 11) jurors; and</li> <li data-bbox="363 1601 1278 1630">(3) of the circumstances in which such a verdict may be delivered.</li> </ol>	17.115
17-5	<p>Chapter 52 of the Queensland Benchbook should be amended to reflect the terms of Recommendation 17-4.</p>	17.115

# Chapter 11

## Reforming Jury Directions: The Duties of a Trial Judge

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### INTRODUCTION

11.1 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,<sup>1</sup> but also considered concerns about jury directions, and the summing up, as a whole.

11.2 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

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<sup>1</sup> Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009), 105, 170, 174. See [8.2] above.

chapter. Issues relating to the content of specific directions are examined in chapters 12 to 17 of this Report.

## DUTY TO RELATE THE EVIDENCE TO THE LAW — *ALFORD V MAGEE*

11.3 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*:

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.<sup>2</sup> (emphasis added)

11.4 The objective of the summing up was also considered by the High Court in *RPS v The Queen*:

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.<sup>3</sup> (notes omitted)

11.5 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.<sup>4</sup>

2 (1952) 85 CLR 437, 466; [1952] HCA 3 [28].

3 (2000) 199 CLR 620, 637; [2000] HCA 3 [41]–[42] (Gaudron ACJ, Gummow, Kirby and Hayne JJ).

4 See also Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [2.63]–[2.66].

11.6 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 evidence is taken.<sup>5</sup> I do not understand the statements of Gaudron ACJ, Gummow, Kirby and Hayne JJ in *RPS v The Queen*,<sup>6</sup> which encourage reticence in making comments on the facts, to be contrary to that view.<sup>7</sup> (notes as in original)

11.7 This sentiment is reiterated in the introduction to the Queensland Supreme and District Court Benchbook:

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.<sup>8</sup>

11.8 Section 620 was considered by McHugh J in the High Court in *Fingleton v The Queen*:

Section 620 of the Criminal Code declares that, after the evidence has concluded and counsel 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'. The court does not discharge that duty by merely referring the jury to the law that governs the case and leaving it to them to apply it to the facts of the case. The key term is 'instruct'. That requires the court to identify the real issues in the case, the facts that are relevant to those issues and an explanation as to how the law applies to those facts [cf *Alford v Magee* (1952) 85 CLR 437 at 466]. As McMurdo P said in *Mogg* [(2000) 112 A Crim R 417 at 427 [54]], ordinarily the duty imposed on a trial judge in respect of a summing-up requires the judge to identify the relevant issues and relate those issues to the relevant law and facts of the case. In the same case, after referring to s 620 Thomas JA said [(2000) 112 A Crim R 417 at 430 [73]]:

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 evidence is taken. [Footnote omitted]

The statements of the learned President and Thomas JA show that the law concerning a summing-up in trials under the Criminal Code is no different from the law in trials at common law. Their Honours' statements are consistent with the statements of Gaudron ACJ, Gummow, Kirby and Hayne JJ in *RPS v R* [(2000) 199 CLR 620 at 637 [41]] concerning the duty of a trial judge in jurisdictions that have no counterpart to s 620 ...<sup>9</sup>

5 *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.

6 [2000] HCA 3; (2000) 74 ALJR 449 paras 41–43.

7 *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].

8 *R v Sparrow* [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 30 November 2009. The Introduction to the Queensland Benchbook has some other interesting comments about the purpose of a judge's directions and summing up; it is reproduced in full in Appendix D to this Paper.

9 (2005) 227 CLR 166; [2005] HCA 34 [77]–[78].

11.9 The trial judge's obligation to summarise the evidence was considered in detail by the Court of Appeal of Western Australia in *Western Australia v Pollock*.<sup>10</sup> Martin CJ adopted the enunciation of the principle stated by Wheeler JA (who was also in *Pollock*) in *Pezzino v Western Australia*:<sup>11</sup>

However, as to the broad proposition that in every case a Judge must include a collective resume of the evidence and a brief outline of the arguments in relation to that evidence, it must be said that this proposition does not seem to be consistent with s 112 of the *Criminal Procedure Act 2004* (WA) ('the Act'). That section requires a Judge to instruct the jury on the law applicable to the case, but as to the facts provides that the Judge may make such observations about the evidence that the Judge thinks necessary in the interests of justice (replacing the former s 638 of the Criminal Code (WA)<sup>12</sup> which was in broadly similar terms). I would, of course, accept that a Judge has a duty to ensure a fair trial and must refer to and explore so much of the evidence as is necessary in order to achieve that end. Section 112 is plainly not intended to detract from that duty.

It seems to me that the effect of s 112 of the Act is rather similar to that of s 161 of the *Criminal Procedure Act 1986* (NSW) which provides that at the end of a criminal trial a Judge 'need not summarise the evidence given in the trial if of the opinion that, in all the circumstances of the trial, a summary is not necessary'. That section permits a Judge not to summarise, rather than permitting the Judge to do so, as s 112 does, but each provision must be understood as giving a Judge a discretion which is to be exercised in the interests of ensuring a fair trial. A very useful survey of authority in New South Wales and in the High Court concerning the role of a Judge in relation to factual issues in a criminal trial generally was undertaken in the New South Wales Court of Criminal Appeal in *R v DH* [2000] NSWCCA 360. The relevant authorities are considered in some detail from [68] through to [79] inclusive of that decision. Their effect is then summarised at [82] through to [86] in the following terms:

[82] Taking account of the circumstances of a trial, a judge may be entitled to form the opinion that a summary of the evidence is unnecessary. As observed by the High Court in *Dominican*, whether the judge is bound to refer to the evidence depends on whether the jury would have sufficient knowledge and understanding of the evidence without assistance. Trials will vary considerably in their length, content and complexity. Allen J observed in *Condon* (adopted by Wood J in *Williams*) that guidance for the jury needs to focus on the critical issues.

[83] *Williams* referred to the short length of the trial as being a factor which would favour the appropriateness of a trial judge's decision not to summarise the facts. Wood J also referred to a single issue trial, when the summing-up follows immediately upon the defence address, as a factor relevant to the decision not to summarise the evidence.

[84] As I have said, Wood J's remarks about respecting the common sense and intelligence of the jury, as well as respecting the decision of counsel in acquiescing in the judge's decision and not seeking any further directions, are important. They are apposite to this trial which was relatively short (4 days), notwithstanding the interposition of other matters and an early adjournment

10 [2009] WASCA 96.

11 [2006] WASCA 131.

12 Criminal Code (WA) s 638 was in identical terms to Criminal Code (Qld) s 620, set out in [11.5] above. *Criminal Procedure Act 2004* (WA) s 112 reads:

After addresses have been made in accordance with section 145 and before the jury retires to consider its verdict, the judge must instruct the jury on the law applicable to the case and may make any observations about the evidence that the judge thinks necessary in the interests of justice.



on one day to allow the complainant to receive advice. Moreover, the facts were within a small compass, involving only two counts. The trial was principally a contest of credibility between the complainant and the appellant, with the focus on the complainant's credibility. This must have been patently apparent to the jury and was underlined by his Honour in the summing-up. It is difficult to see what would have been gained (for the jury) by a restatement of the factual matters already the subject of addresses by the Crown and defence.

[85] The strictures of the High Court in *RPS* are relevant. A judge is not bound to comment on the facts unless her or his other functions require it. In many cases, the safer course to take is to make no comment on the facts except to remind the jury of counsels' arguments. This remark by their Honours in *RPS* raises the question of the possible dangers which may be inherent in summarising the evidence. The trial judge here was aware of this possibility when he raised the issue with counsel. He referred to the lack of a transcript and the manner in which some witnesses gave their evidence (including the complainant) making note taking almost impossible. There was the clear risk that, in summarising the evidence, his Honour could have misled the jury.

[86] There is also the point made in *Davis*, another short trial with only six witnesses, that summing up on the evidence may lead to a one-sided appearance being presented to the jury. [26]–[27]<sup>13</sup> (note added)

#### 11.10 Martin CJ concluded:

[4] Section 112 of the *Criminal Procedure Act 2004* (WA), read with the observations of the High Court in *RPS* and of Wheeler JA in *Pezzino*, make it clear that trial judges in this state do not have a general duty to address on the facts in each and every case. In this state, a trial judge will be obliged to address on the facts if, and only to the extent that, it is necessary in order to ensure a fair trial. In assessing whether or not an address on the facts is appropriate in a particular case, trial judges will do well to remember the counsel provided by the High Court in *RPS*:

Often, perhaps much more often than not, the safer course for a trial judge will be to make no comment on the facts beyond reminding the jury, in the course of identifying the issues before them, of the arguments of counsel. [42]<sup>14</sup>

11.11 In this case, the trial judge's failure to relate the law to the evidence in the summing up was roundly criticised on appeal.<sup>15</sup>

11.12 As in many other aspects of criminal trial procedure, the trial judge's task in this respect is a matter of striking the right balance. The summing up is just that: a summary of the case, not a repetition of it.

227 In his summing up, the trial judge said that he would attempt to summarise the evidence that had been given in the trial. He said that he would not summarise the evidence in detail, but would try 'to give you a snapshot of what the witnesses said and picking [*sic*] out some bits of the evidence and some bits of the cross-examination that you may think are relevant to the task before you.'

13 [2009] WASCA 96 [2]. Part of this passage was also cited by Miller JA at [138].

14 [2009] WASCA 96 [4].

15 [2009] WASCA 96 [84]–[103] (Miller JA).

- 228 The trial judge said that he would attempt to summarise the evidence but not bring all of the evidence to the attention of the jury. By that he did not mean that the jury ought to ignore evidence which was relied on by the appellant in his defence. Indeed, he had said earlier in his summing up:

In summarising the evidence, I will, of course, have to be selective. However, I want to stress that the mere fact that I leave out part of a particular witness' evidence does not mean that that evidence is not important. Similarly, the fact that I include evidence from a particular witness does not make that evidence more important than the evidence of other witnesses. You must consider all of the evidence not just parts of the evidence that I mention. Which parts of that evidence are important or not important is a matter for you to determine.

- 229 There is no obligation on a trial judge to mention all of the evidence which is favourable to an accused person in the trial judge's summing up.
- 230 It is the responsibility of an accused's counsel to bring to the jury's attention evidence which might be inconsistent with the inferences the Crown seeks to draw from the circumstantial evidence. The appellant's counsel discharged that obligation at length in his address to the jury.
- ...
- 236 No obligation rested upon the trial judge to put every piece of evidence which might have undermined the Crown to the jury again in the trial judge's summing up. Of course, there are circumstances where a judge might omit to mention evidence which, as a result, distorts the charge which has been given to the jury. This was not one of those cases.<sup>16</sup>

11.13 The trial judge is also required to put the cases of the respective parties fairly to the jury. Naturally, the reported cases deal with complaints by aggrieved defendants about the way in which their cases were put to the jury rather than complaints by the prosecution. This issue was recently dealt with the Queensland Court of Appeal in *R v Lacey*:

- [6] The trial judge's duty is relevantly identified in the following passage from *Domican v The Queen*:<sup>17</sup>

'But that requirement does not oblige the judge to put to the jury every argument put forward by counsel for the accused. This Court has said that it "is hardly necessary to say that as a reason for granting a new trial, after a conviction in a criminal case, it is not enough that the presiding judge has not mentioned to the jury all the matters which were set up on behalf of the accused as affecting probabilities". Whether the trial judge is bound to refer to an evidentiary matter or argument ultimately depends upon whether a reference to that matter or argument is necessary to ensure that the jurors have sufficient knowledge and understanding of the evidence to discharge their duty to determine the case according to the evidence.' (footnotes omitted)

- [7] It was held also in *RPS v The Queen*<sup>18</sup> that while it is incumbent on the trial judge to put the accused's case fairly in summing up, there is no obligation on the trial judge to repeat the arguments of counsel in detail. The trial

<sup>16</sup> *McNeill v The Queen* (2008) A Crim R 467, 502–3.

<sup>17</sup> (1992) 173 CLR 555 at 561.

<sup>18</sup> (2000) 199 CLR 620 at [41].

judge's duty will be discharged by a fair and balanced approach reminding the jury of the issues in the trial, the applicable law and any commentary on the evidence which the judge sees fit to make.<sup>19</sup> (notes in original)

11.14 The appeal was dismissed. The majority held that the summing was 'fair and balanced'. The trial judge had properly identified the issues for the jury and the failure to discretely summarise the defence and prosecution arguments did not give rise to any unfairness.<sup>20</sup> However, in separate reasons McMurdo P, though agreeing that the appeal should be dismissed, said this:

[The defendant's] counsel at trial did not ask for the judge to summarise the arguments of counsel. It follows that [the defendant] now bears the onus of establishing that the failure to direct the jury may have affected the verdict: *Dhanhoa v The Queen*.<sup>21</sup> It is well-established that, ordinarily, judges, in giving jurors final directions in criminal trials, should identify the issues, relate those issues to the relevant law and evidence and then outline the main competing arguments of counsel.<sup>22</sup> ... In the course of identifying the issues for the jury and relating those issues to the relevant law, the judge adequately and fairly focussed the jury on the competing contentions of counsel, although admittedly without any discrete summation of the main arguments of counsel. The judge's omission to discretely summarise the competing contentions of counsel in the circumstances of this case did not amount to a 'wrong decision of any question of law' or 'a miscarriage of justice' under s 668E *Criminal Code* 1899 (Qld). I emphasise that it is ordinarily prudent for trial judges to discretely outline the main competing argument of counsel.<sup>23</sup> (notes in original)

### NSWLRC's Consultation Paper

11.15 The components of the trial judge's duty to sum up to the jury were considered in detail in the NSWLRC's Consultation Paper.<sup>24</sup> The NSWLRC did not propose any change to the judge's duty to set out the law that is relevant to the jury's decision. It did suggest, however, that there may be a need for judges' summaries of the evidence and of the parties' addresses to be limited to avoid unduly lengthy summings up.<sup>25</sup>

### VLRC's proposals and recommendations

11.16 This issue was also discussed in the VLRC's Consultation Paper.<sup>26</sup> Of particular concern to the VLRC was that summings up take too long. Part of the reason for this is what the VLRC described as 'a lack of trust between trial and appellate courts'.<sup>27</sup>

11.17 The trial judge's role in this regard was strongly supported by Victoria Legal Aid<sup>28</sup> and the Criminal Bar Association of Victoria in their submissions to the VLRC's Consultation Paper. The Criminal Bar Association of Victoria commented that:

19 [2009] QCA 275 [6]–[7] (de Jersey CJ, Keane, Muir and Chesterman JJA). See also the related case *R v Lacey* [2009] QCA 274 [47], [68]–[85] (de Jersey CJ, Keane, Muir and Chesterman JJA).

20 [2009] QCA 275 [18] (de Jersey CJ, Keane, Muir and Chesterman JJA).

21 (2003) 217 CLR 1 at 13.

22 *Domican v The Queen* (1982) 173 CLR 555; *R v Mogg* [2000] QCA 244 at [50]–[54], [71]–[73], [83].

23 [2009] QCA 275 [50] (McMurdo P). See also her Honour's similar remarks in the related case *R v Lacey* [2009] QCA 274 [217].

24 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [6.5]–[6.54].

25 *Ibid* [6.18]–[6.24], [6.54].

26 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [5.39]–[5.75].

27 *Ibid* [5.51].

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*.<sup>29</sup>

11.18 In its Final Report, the VLRC recommended that the trial judge's duty to sum up to the jury should be set out in its proposed jury directions statute, and that the common law rule in *Alford v Magee* should guide the content of the legislative provision.<sup>30</sup> The VLRC's recommendations are considered below in the context of judges' summaries of the evidence.

### The Issues Paper

11.19 The Commission's Issues Paper did not specifically raise this as an issue for consideration and none of the respondents to the Issues Paper addressed it.

### The Discussion Paper

11.20 The Commission made no proposal for reform to the judge's duty to relate the law to the evidence as part of the summing up to the jury in its Discussion Paper.<sup>31</sup>

### Submissions

11.21 No submission in response to the Discussion Paper commented on this topic.

### The QLRC's views

11.22 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 recommendation 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

11.23 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.

11.24 A great deal of time in the judges' summings up in some jurisdictions is occupied by summarising the evidence.

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28 See Victoria Legal Aid, Submission to the Victorian Law Reform Commission, 9 December 2008 [2.9].

29 Criminal Bar Association of Victoria, Submission to the Victorian Law Reform Commission, 15 December 2008, 27.

30 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [5.13]–[5.14], Rec 22 and 23.

31 Queensland Law Reform Commission, *A Review of Jury Directions*, Discussion Paper WP67 (2009) [5.9].

11.25 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.<sup>32</sup>

11.26 In Queensland, where a typical summing up and directions by a judge may occupy two to three hours, the summary of the evidence necessarily takes only a portion of this time, and is a relatively short time in comparison with the duration of the trial as a whole. Jurors responding to the University of Queensland survey reported that a summary of the evidence was included in the judge's summing up in every case, and that while the summing up was perhaps longer than they thought necessary, it was one of the most important and helpful aspects of the trial.<sup>33</sup>

11.27 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.<sup>34</sup>

11.28 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).<sup>35</sup> 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

32 The issue of the provision of the transcript of evidence to juries is considered at [10.73]–[10.114] above.

33 School of Psychology, University of Queensland (Blake McKimmie, Emma Antrobus and Kathryn Havas), 'Jurors' Trial Experiences: The Influence of Directions and Other Aspects of Trials', Report (November 2009) 11–12, 21–2.

34 [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 30 September 2009.

35 Australian Institute of Judicial Administration (James RP Oglloff, 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].

to this Commission that ‘the Victorian practice [of recounting the evidence], which has resulted in extraordinarily long charges, should be avoided at all costs’.<sup>36</sup>

11.29 An extreme example of this is a relatively recent case in Victoria where the trial judge, Redlich J, summarised the evidence for 19 hearing days, just under four weeks. The trial itself had taken about seven months before the summing up. The case involved seven defendants charged with two counts of murder and alternative charges, and involved complex issues of complicity. The issues also included alleged lies as evidence of the co-defendants’ consciousness of guilt. The Commission is not aware to what extent the summing up was supported by written material provided to the jury but it seems highly unlikely that any jury could effectively apply any summary of this length without reference to written aids of some sort.

11.30 In its judgment on appeal in this case, the Court of Appeal approved the trial judge’s directions in relation to the limit on the use of the evidence of one co-defendant against another co-defendant, which were described as ‘more than adequate’.<sup>37</sup> The Court of Appeal then concluded that, ‘There is no reason to consider that the jury did not fully comprehend and properly apply his Honour’s directions’.<sup>38</sup> The basis of the Court’s confidence in the jury in this regard is not stated or otherwise obvious from the judgment. But the Court’s faith in the jury had its limits. It is clear from the later findings of the Court in upholding some of the appeals that it did not agree with some of the jury’s conclusions; some of the convictions were quashed because the evidence did not support the inference of guilt beyond reasonable doubt.<sup>39</sup>

11.31 By contrast, trial judges in New Zealand rarely summarise the evidence at all. Their summings up will refer to the witnesses whose evidence relates to particular key issues in the case, but the evidence itself is not repeated or summarised. Juries in New Zealand are typically provided with a full copy of the transcript of evidence (known there as ‘judge’s notes’ or ‘notes of evidence’), and the practice there appears to rely on jurors’ checking the evidence for themselves.

11.32 It has been said that a summary of the evidence is counter-productive because it simply repeats what the jurors have already heard and is therefore not particularly helpful to them, and because it overlooks the difference between the roles of counsel and the role of the judge.<sup>40</sup> It may become necessary, however, if the parties’ addresses do not adequately cover the evidence or do so in an overly selective way.

11.33 By the time that jurors hear a judge summarising the evidence, they will have already heard the evidence itself and both addresses, in which the prosecution and the defence will each have spent some time pointing the jury to the evidence on which they rely and suggesting to the jurors how they should regard it.<sup>41</sup> Of course, the nature of

36 Submission 10. One judge from Western Australia, one of the ‘short States’ has recently stated that judges ‘should not engage in a lengthy summary of the evidence’: The Hon Justice Michael Murray, ‘Bad Press: Does the Jury Deserve It? Communicating with Jurors’ (Paper presented at the 36th Australian Legal Convention, Perth, 17–19 September 2009) 7

37 *The Queen v Lam* [2008] VCSA 109 [45].

38 *Ibid.*

39 *Ibid* [99], [113], [140]–[141].

40 Jury Directions Symposium, Melbourne, 5–6 February 2009. A judge who simply repeats counsel’s submissions also runs the risk of repeating counsel’s errors: *ibid.*

41 See *R v Lacey* [2009] QCA 274 [85] (de Jersey CJ, Keane, Muir and Chesterman JJA), where it was observed that:

particular evidence may require the judge to give certain directions or warnings which are mandated by law and which are not themselves a re-statement of the evidence.

11.34 It is unclear to what extent a third detailed review of the evidence by the judge can assist, rather than confuse or bore, jurors. There may be little real advantage to be gained by a judge summarising the evidence at any length as part of the final summing up of the case to the jury. It would seem that a judge would need to deal with evidence that is the subject of specific warnings or is otherwise controversial or difficult to consider. Otherwise, however, it may be that any further recitation of the evidence itself (as opposed, say, to references to the witnesses or their evidence) is unnecessary or even counter-productive.

11.35 Any reform that is directed to a shortening of summaries of evidence should proceed in tandem with other reforms improving and expanding the written material provided to assist jurors in their understanding of the case as it proceeds and in their deliberations.

### NSWLRC's Consultation Paper

11.36 In its Consultation Paper, the NSWLRC observed that while 'best practice is for a judge to summarise the evidence in a way that relates the summary to the issues which the jury must determine':<sup>42</sup>

it is not uncommon for judges to continue to provide exhaustive analyses of the evidence, even in short trials, or for counsel to complain that the summing-up was unbalanced or deficient where this did not occur.<sup>43</sup>

11.37 This is despite the express preservation of the trial judge's discretion not to summarise the evidence in section 161 of the *Criminal Procedure Act 1986* (NSW):

#### 161 Summary by Judge

- (1) At the end of a criminal trial before a jury, a Judge need not summarise the evidence given in the trial if of the opinion that, in all the circumstances of the trial, a summary is not necessary.
- (2) This section applies despite any rule of law or practice to the contrary.
- (3) Nothing in this section affects any aspect of a Judge's summing up function other than the summary of evidence in a trial.

11.38 The NSWLRC sought submissions on what limits, if any, should be placed on the judge's summary of the evidence.<sup>44</sup>

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The appellant's counsel's address immediately preceded the summing up and was thus fresh in the jury's mind when the directions were given. It is arguable that a précis or summary of the submissions of defence counsel, particularly when coupled with the summary of the Crown case which would have accompanied it, would have detracted from the force of the appellant's counsel's submissions.

42 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [6.14].

43 *Ibid* [6.24].

44 *Ibid* 6, Issue 6.2.

## VLRC's proposals and recommendations

11.39 In its Consultation Paper, the VLRC suggested that the issue could be clarified in Victoria 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'.<sup>45</sup>

11.40 Several of the respondents to the VLRC's Consultation Paper made submissions on this issue.<sup>46</sup> 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.<sup>47</sup> 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'.<sup>48</sup>

11.41 In its Final Report, 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 negated by the prosecution or affirmatively proved by the accused person and may do so by identifying the findings of fact they must make with respect to each disputed element.
  - c) The trial judge must direct the jury about all of the verdicts open to them on the evidence, unless there is good reason not to do so.
  - d) The trial judge must refer the jury to the evidence which is relevant to the findings of fact they must make with respect to the contested elements of each offence.
  - e) In referring the jury to relevant evidence the trial judge is not required to provide the jury with an oral restatement of all or any of that

45 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [7.46], 101.

46 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.

47 See [11.28] above.

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



- evidence, unless the judge determines, in the exercise of the judge's discretion, that it is necessary to do so in order to ensure a fair trial.
- f) In determining whether it is necessary to provide the jury with an oral summary of evidence, the trial judge may have regard to the following matters:
- the length of the trial
  - whether the jury will be provided with a written or electronic transcript or summary of the evidence
  - the complexity of the evidence
  - any special needs or disadvantages of the jury in understanding or recalling the evidence
  - the submissions and addresses of counsel
  - such other matters as the judge deems appropriate in the circumstances of the case
- g) The trial judge must direct the jury that they must find the accused not guilty if they cannot make any of the findings of fact referred to in Paragraph (a) beyond reasonable doubt.
- h) The trial judge is under no obligation to direct the jury about the elements of the offence (or any defence) other than to comply with these requirements.
- i) The trial judge must provide the jury with a summary of the way in which the prosecutor and the accused have put their respective cases.<sup>49</sup>

## The Issues Paper

11.42 This issue was discussed in chapter 9 of the Issues Paper;<sup>50</sup> this Commission raised the following question for consideration:

- 9-2 What, if any, advantage is there to a jury in maintaining the current practice of summarising the evidence ...?<sup>51</sup>

## Submissions

11.43 Several respondents to the Issues Paper commented on the judge's role in summarising the evidence.

11.44 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.<sup>52</sup>

49 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) 14–15, [5.1]–[5.14].

50 Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [9.84]–[9.91].

51 *Ibid* 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 10 of this Report.

11.45 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.<sup>53</sup>

11.46 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.<sup>54</sup>

11.47 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.<sup>55</sup>

## The Discussion Paper

11.48 In its Discussion Paper, the Commission expressed the provisional view 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. It considered that, if implemented, its proposals about the use of integrated directions would greatly assist trial judges in discharging this obligation.<sup>56</sup>

### Further submissions

11.49 No submission in response to the Discussion Paper commented on this topic.

## The QLRC's views

11.50 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.

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52 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.'

53 Submission 4.

54 Submission 11.

55 Submission 7.

56 Queensland Law Reform Commission, *A Review of Jury Directions*, Discussion Paper WP67 (2009) [5.22]–[5.24].

11.51 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.

11.52 However, the implementation of the Commission's recommendations 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.

## MATTERS NOT RAISED BY THE PARTIES — *PEMBLE'S CASE*

11.53 The rule in *Pemble v The Queen*<sup>57</sup> 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.<sup>58</sup>

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.<sup>59</sup>

11.54 Indeed, this rule entitles a defendant to abandon, or withhold addressing the jury on, a particular defence but to require the judge to direct on that same defence. This might be done tactically if, for example, this defence is not consistent with the main defence advanced at the trial.<sup>60</sup>

11.55 However, the rule does not mean that a judge must put every possible alternative defence or charge to the jury. The rule in *Pemble v The Queen* was considered by the Queensland Court of Appeal in *R v Willersdorf*,<sup>61</sup> where the Court placed some broad limits on the rule:

The duty to inform the jury of available alternative verdicts is an aspect of the duty of a trial judge to see that the trial is conducted according to law and that the jury is properly instructed in relation to available defences. The proper discharge of that duty does not require the presentation of every conceivable defence. To do so might tend to obfuscate the true defence. A familiar example of this arises in homicide cases in which there may arise the theoretical possibility of multiple alternative forms of the defence of self-defence. Defence counsel commonly ask that not too many alternatives be placed before the jury for this very reason. The selection of the live issues depends on the evidence in the particular case.<sup>62</sup>

A stricter approach may, however, be seen in cases where manslaughter has not been left to the jury as an alternative to murder.<sup>63</sup> The duty to allow manslaughter to

57 (1971) 124 CLR 107; 45 ALJR 333.

58 (1971) 124 CLR 107, 117 (Barwick CJ).

59 *Pemble v The Queen* (1971) 124 CLR 107, 117–8 (Barwick CJ).

60 See, for example, *CTM v The Queen* (2008) 82 ALJR 978, [2008] HCA 25; *R v TC* [2008] VSCA 282.

61 [2001] QCA 183.

62 See *R v Bojovic* [2000] Qd R 189; *R v Craig* [1998] QCA 277; CA No 139 of 1998, 15 September 1998.

63 *Gilbert v The Queen* [2000] HCA 15; (2000) 74 ALJR 676 per Gleeson CJ, Gummow and Callinan JJ; McHugh and Hayne JJ dissenting.

go to the jury in cases of murder if there is any basis on the evidence for such a verdict, is well recognised.<sup>64</sup> For historical reasons, a person on trial for murder has sometimes been given an opportunity to receive a merciful verdict of manslaughter even when strict logic might suggest that such a verdict is not really open.<sup>65</sup> I do not think that the same attitude should necessarily be taken in relation to the entire criminal calendar of offences. ...

The ultimate conclusion in *Rehavi* is that a jury should be permitted to return any verdict available on the evidence if this is consistent with justice to the accused. The reservation 'consistent with justice to the accused' of course recognises inter alia that there are situations such as a true 'all or nothing' case, where the offering of conviction on a lesser charge might jeopardise the accused's chance of complete acquittal. Consistently with the authorities including *Rehavi*,<sup>66</sup> I conclude that whenever an alternative verdict *fairly arises for consideration on the whole of the evidence* then failure to leave it to the jury prima facie deprives the accused of a chance of acquittal of the principal offence. A tactical request from defence counsel is a matter that must be taken into account in the overall assessment of miscarriage of justice, but it is not conclusive. The ultimate duty to ensure fairness rests with the trial judge, and this is not always achieved by acquiescing in the request of defence counsel.<sup>67</sup> (notes and emphasis as in original)

11.56 This issue also arose in the High Court in *Keenan v The Queen*,<sup>68</sup> on appeal from the Queensland Court of Appeal.<sup>69</sup> Kiefel J (with whom Hayne, Heydon and Crennan JJ agreed) discussed the Court of Appeal's conclusion that the alternative charge of grievous bodily harm (an alternative to unlawfully doing grievous bodily harm with intent) should have been left to the jury:<sup>70</sup>

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.<sup>71</sup>

... 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.<sup>72</sup> (notes in original)

11.57 It seems that the trial judge's duty is to assess which set of directions (especially those concerning defences) should be left to the jury on the basis of an analysis of what is most advantageous to the defendant; the defendant's avowed or implied tactics are a guide to this but are not necessarily decisive.

11.58 The limits on the judge's duty, and the problems that can arise when the duty to direct a jury on complex matters, including defences that are 'not properly before them', were noted by Vincent JA in the Victorian Court of Appeal:

64 *Mancini v DPP* [1942] AC 1; *Pemble* (1971) 124 CLR 107; *Markby* (1978) 140 CLR 108, 113.

65 Note discussion in *Gilbert* (above) at paras [14] to [17].

66 *R v Rehavi* [1999] 2 Qd R 640; *Benbolt* [1993] 67 A Crim R 11, 14–17, 27–29; *R v Pureau* [1990] 19 NSWLR 372, 377.

67 [2001] QCA 183 [18]–[20] (Thomas JA).

68 [2009] HCA 1.

69 *R v Keenan* [2007] QCA 440.

70 *R v Keenan* (2009) 83 ALJR 243, [2009] HCA 1 [138]–[139] (Kiefel J; Hayne, Heydon and Crennan JJ agreeing).

71 *R v Willersdorf* [2001] QCA 183 at [20] per Thomas JA, McPherson JA and Chesterman J agreeing.

72 See *Harwood v The Queen* (2002) 188 ALR 296 at 300 [16]; [2002] HCA 20.

The task of a trial judge in determining this question is, as Charles JA pointed out, a remarkably difficult one as the cases to which he referred amply demonstrate. Eames JA in the passage quoted by him<sup>73</sup> has drawn attention to the very different functions of the judge and jury in a criminal trial, emphasizing the 'grave responsibility' assumed in withdrawing the issue. But the judge does have a role to play and must assume that responsibility in an appropriate case.

Although the judge is, of course, required to put before the jury any defence that may be available to an accused on the view of the evidence most favourable to him, even in the face of the express disavowal of the particular defence, it is not required that the judge instruct the jury with respect to every possibility, however remote, from ordinary human experience or community standards it may be.<sup>74</sup> Many theoretical possibilities and arguments are considered and discarded by the judge and counsel alike in the day to day conduct of criminal trials. Often, as a consequence of shared understandings and experience, if such possibilities are referred to at all, it is only in passing and briefly. Counsel regularly make well-informed and sensible judgments about the wisdom of pursuing particular lines of approach in the justified belief that they may simply invite rejection by the jury not only of the specific possibility or argument, but the defence in general. Ultimately there must be, and fortunately there usually is, a sense of reality about the process.

From the perspectives of the trial judge and jury alike, the respective roles performed by them in a criminal trial becomes increasingly complex and onerous. The number of issues and volume of material with which they must deal on occasions can be seen to strain the process to its limits, and even cast doubt upon the confidence with which the outcome can be accepted.

The provision of instructions is designed to ensure that the jury understand what it is that they have to decide, what material can or cannot be taken into account in arriving at their decision and the manner in which that material may be used. Often, as a trial judge, I experienced concern about the capacity of jury members to follow and comply with the plethora of sometimes complicated instructions that I was obliged to give them. I am confident that this view would be generally shared by most, if not all, of those currently performing that role. It is not simply a question of the protraction of an already complex and costly process that is involved, but much more importantly the reliability of the jury verdict and the respect with which it is regarded in the community. It is clearly inappropriate for a judge to address issues that are not properly before them. To do so attracts the risk of the introduction of confusion and the perception of unreality to which I have earlier adverted.<sup>75</sup> (notes as in original)

11.59 The model direction in the Queensland Benchbook on the issue of defences not raised by counsel is in these terms:

**Direction where a defence is not raised by counsel but raised on the evidence<sup>76</sup>**

**I wish to say something to you about a further possible defence that arises for your consideration. It concerns the defence of [provocation etc]. It is my duty**

73 At [17].

74 *R v Tuncay* [1998] 2 VR 19 at 30 per Hedigan AJA.

75 *R v Yasso* [2004] VSCA 127 [54]–[57]. Ultimately, Vincent JA was in the minority in this case and the appeal based on the trial judge's failure to leave the defence of provocation to the jury was upheld 2–1.

76 The judge is obliged to instruct the jury concerning any defence (even one not raised or pressed by a party or indeed disclaimed by the parties) that fairly arises on the evidence and therefore needs to be considered by the jury in reaching their verdict. See *Stevens v The Queen* (2005) 80 ALJR 91, *Fingelton v The Queen* (2005) 79 ALJR 1250 at [77]–[80], *Murray v The Queen* (2002) 211 CLR 193 at [78.4], [151], *Stingel v The Queen* (1990) 171 CLR 312 at 333–334.

to direct with all possible defences which arise and therefore need to be considered by you in reaching your verdict, even where they are not raised by defence counsel. And the fact that I am mentioning this matter does not mean I have some particular view about it.

It is for you to consider this additional matter, as with all matters. (You will not need to consider it, should you find the defendant not guilty on the basis that the prosecution had not excluded [eg self defence] beyond a reasonable doubt).<sup>77</sup> (notes and formatting as in original)

## NSWLRC's Consultation Paper

11.60 The NSWLRC considered this issue in its Consultation Paper<sup>78</sup> observing the relevance of the adversarial nature of criminal trials in determining whether and to what extent judges should be able to put matters of law, arguments, defences or alternative charges to the jury even if the parties have not raised them:

Such a consideration is significant, since it adds to the complexity of the trial in circumstances where counsel in the closing addresses have given no assistance to the jury on the alternatives. Perhaps greater attention in this respect should be given to the adversarial context in which criminal trials are conducted, leaving it to the parties to settle the issues for determination.<sup>79</sup> (note omitted)

## VLRC's proposals and recommendations

11.61 The VLRC's Consultation Paper also discussed the rule in *Pemble's Case*,<sup>80</sup> 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.<sup>81</sup>

77 Queensland Courts, *Supreme and District Court Benchbook*, 'Direction where a defence is not raised by counsel but raised on the evidence' [61A] <<http://www.courts.qld.gov.au/2265.htm>> at 30 November 2009.

78 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [6.38]–[6.53].

79 Ibid [6.52]. See also *ibid* 7, Issue 6.4.

80 See Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) ch 5, [7.72]–[7.73].

81 Ibid [7.73].

## 11.62 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.<sup>82</sup>

**Submissions**

11.63 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.

11.64 Stephen Odgers SC argued against a 'watering down' of the *Pemble* principle:

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.<sup>83</sup> 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 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.<sup>84</sup>

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82 Ibid.

83 See [11.114] below.

84 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.

...

... 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.<sup>85</sup> (notes added)

11.65 Victoria Legal Aid also opposed any proposal to limit warnings to those required by counsel:<sup>86</sup>

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.<sup>87</sup>

11.66 The Criminal Bar Association of Victoria, and Benjamin Lindner, one of its members, also opposed reform to the rule in *Pemble's Case*, submitting that the over-riding duty to ensure a fair trial ultimately falls on the trial judge:

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

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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)

85 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: Queensland Law Society and Bar Association of Queensland, Submission 13.

86 See Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [7.19].

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



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 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.**

11.67 The Criminal Bar Association of Victoria and Lindner also criticised the VLRC’s characterisation of the rule in *Pemble’s case* as problematic:

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*.<sup>88</sup> 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.

88 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.

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 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.**<sup>89</sup> (note added)

#### 11.68 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.<sup>90</sup>

#### 11.69 On the other hand, reform in this area was supported by the Law Reform Committee of the County Court of Victoria:

89 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.

90 Criminal Bar Association of Victoria, Submission to the Victorian Law Reform Commission, 15 December 2008, 29.

**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 brings s.399(5)(b) or (c) of the Crimes Act [1958 (Vic)] into contention.<sup>91</sup> 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.<sup>92</sup> (note added)

11.70 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.<sup>93</sup>

11.71 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.

11.72 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.<sup>94</sup>

91 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.

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

93 Judge MD Murphy, Submission to the Victorian Law Reform Commission, 5 February 2009, 6–7.

94 Office of Public Prosecutions, Submission to the Victorian Law Reform Commission, 12 February 2009, 19.

### **VLRC's recommendations**

11.73 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 alternative verdict, which counsel for the accused did not place before the jury in final address unless the trial judge is satisfied that:
  - the defence or alternative verdict is reasonably open on the evidence, and
  - the failure of defence counsel to address the matter was due to error or oversight by counsel and was not adopted for tactical reasons in the interest of the accused, and
  - the trial judge is satisfied that it is necessary to direct the jury about the matter in order to ensure a fair trial.
  
35. When determining whether it is necessary to direct the jury about any 'defence' or alternative verdict in the circumstances referred to in Recommendation 34, it shall be presumed, unless the judge is satisfied to the contrary, that a decision taken by counsel, for tactical reasons, not to advance a 'defence' or alternative verdict to the jury removes any obligation in the trial judge to direct the jury about that matter.<sup>95</sup>

### **The Issues Paper**

11.74 The rule in *Pemble's Case* was discussed in chapter 6 of the Commission's Issues Paper.<sup>96</sup> Although the Commission did not pose any specific questions for consideration on this issue, some respondents commented on it.

### **Submissions**

11.75 A Supreme Court judge submitted 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.<sup>97</sup>

11.76 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'.<sup>98</sup>

95 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [5.64]–[5.75], Rec 34, 35.

96 Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [6.32]–[6.37].

97 Submission 7.

98 Submission 16, 3.

11.77 However, the Office of the Director of Public Prosecutions submitted that it was 'bizarre' to leave inconsistent defences to a jury.<sup>99</sup>

## The Discussion Paper

11.78 The Commission's provisional view in its Discussion Paper was that the trial judge's obligations could best be refined and clarified by requiring the parties to tell the judge, before the summing up, which evidentiary directions and directions on specific defences they each wish to be given in the summing up and, where appropriate, which they do not wish to be given.<sup>100</sup> It therefore made the following proposals on which it sought further submissions:

- 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
  - (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).<sup>101</sup>

## Further submissions

11.79 Legal Aid Queensland submitted, as it had done in response to the Issues Paper,<sup>102</sup> that the current law in this area is sound.<sup>103</sup>

11.80 The Office of the Director of Public Prosecutions generally agreed with the Commission's approach in Proposals 5-1 and 5-2 but felt that they should go further and give the defence an opportunity to 'choose their ground decisively'.<sup>104</sup>

11.81 The Brisbane Office of the Commonwealth Director of Public Prosecutions observed that in its experience what was proposed in Proposal 5-1 'ordinarily happens as a matter of practice.' However, 'a legislative amendment to this effect may ensure that it happens in all matters.'<sup>105</sup> Similarly, it also generally agreed with Proposal 5-2.<sup>106</sup>

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99 Submission 15.

100 Queensland Law Reform Commission, *A Review of Jury Directions*, Discussion Paper WP67 (2009) [5.43]–[5.49].

101 *Ibid* 164–5, Proposals 5-1 and 5-2.

102 See [11.76] above.

103 Submission 16A, 12.

104 Submission 15A.

105 Submission 9A, 6.

106 *Ibid*.

11.82 The Bar Association of Queensland had no difficulty with the sentiments expressed in Proposal 5-1 but felt that they were unnecessary: they are, it was submitted, 'no more than statements as to what can presently be expected in practice' and that greater emphasis was not needed as 'they are matters within the control of the judges dealing with individual cases.'<sup>107</sup>

11.83 The Bar Association also submitted that this would introduce an unwanted rigidity into this area of practice:

The difficulty with enshrining these practices into written form and particularly mandatory form, is that (as is also recognised in the Discussion Paper), there will be a need to allow the power to modify the application of the proposed rules to meet the interests of justice in individual cases, including where there is an unrepresented defendant. These considerations immediately exemplify the lack of flexibility which is introduced commensurately with mandatory requirements as to matters of practice.<sup>108</sup>

11.84 The Bar Association of Queensland did not support Proposal 5-2. Firstly:

there is no good reason to depart from the current situation where the trial judge is responsible for deciding what directions are required and seeking any necessary assistance in that regard from counsel. There is no good reason for introducing formal complexity into the trial process by shifting this responsibility to counsel and then to complicate the judge's task in the way proposed in 5-2(a).<sup>109</sup>

11.85 Secondly, for the reasons discussed at [8.170] above in relation to Proposal 3-2 and at [11.127]–[11.128] below in relation to Proposals 5-3 to 5-4, the Bar Association of Queensland submitted that there is 'no warrant for mandating what an appeal must consider'.<sup>110</sup>

### The QLRC's views

11.86 It is not immediately obvious to the Commission 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<sup>111</sup> 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.

11.87 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

107 Submission 13A, 19. The Queensland Law Society endorsed and supported the whole of the submissions by the Bar Association of Queensland: Submission 13B.

108 Submission 13A, 19–20.

109 Ibid 20.

110 Ibid.

111 See [11.64] above.

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.

11.88 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 the summing up. This will also assist the parties in stating their cases unambiguously before the jury.

11.89 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.<sup>112</sup> 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.

11.90 The purpose of the Commission's recommendations is to focus the attention of all lawyers in a criminal trial on the directions and warnings that the jury ought to be given at the trial before the summing up to assist them in getting these questions sorted out correctly at trial and not on appeal or at a re-trial with all the cost and distress that this causes defendants, victims, witnesses and their families and supporters.

11.91 Consistently with the recommendations in chapter 8 of this Report,<sup>113</sup> 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 is not represented. Nonetheless, the Commission's proposal can be modified to accommodate legitimate concerns that judges should have the flexibility to deal fairly with unrepresented defendants.

11.92 These reforms are also consistent with the Commission's earlier recommendations about the 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 8 of this Report, the Commission suggested that the provisions that it recommends in relation to pre-trial disclosure be inserted into Chapter 62 of the Criminal Code (Qld).<sup>114</sup> The Commission suggests that this is also the appropriate place for the provisions recommended in [11.87] above.

11.93 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 recommendations would, therefore, in many cases simply reflect what is already

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112 See Submission 15.

113 See [8.202], [8.206], and especially Rec 8-1(12) above.

114 See [8.158], [8.206], Rec 8-1 above.

the practice. However, by taking a mandatory and statutory form, the reform would give greater emphasis to the need to actively consider and discuss the content of the directions in the summing up.

11.94 The Commission also notes that the absence of complaint in relation to a judge's directions at the trial is a matter that the appellate court will note when considering an appeal based on the inadequacy of or error in those directions.<sup>115</sup>

## Recommendations

11.95 The Commission's recommendations in relation to the parties' obligations to inform the trial judge of the directions and warnings that they wish the judge to give (or not give) are set out towards the end of this chapter.<sup>116</sup>

## LIMITING MATTERS THAT CAN BE RAISED ON APPEAL

11.96 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.<sup>117</sup>

11.97 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,<sup>118</sup> 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.

11.98 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.<sup>119</sup>

11.99 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

115 See, eg, *Lacey v The Queen* [2009] QCA [76] (de Jersey CJ, Keane, Muir and Chesterman JJA).

116 See [11.143] below.

117 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].

118 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.'

119 See [6.6]–[6.20] above. 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).



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.

11.100 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.<sup>120</sup>

11.101 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.

11.102 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 a 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

120 *R v C* [2000] QCA 385 [32]–[34] (Ambrose J; McPherson and Thomas JJA agreeing).

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 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*<sup>121</sup>). 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*<sup>122</sup>). 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*<sup>123</sup>). See, further, *Skinner v The King*<sup>124</sup> and *Whittaker v The King*<sup>125, 126</sup> (notes as in original)

11.103 That said, however, the recent Queensland Court of Appeal decision in *R v Robinson*<sup>127</sup> demonstrates that appellate courts in this State<sup>128</sup> 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,<sup>129</sup> 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<sup>130</sup> and enlarged upon in later written submissions ‘with a degree of encouragement from the bench’.<sup>131</sup> 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.

## VLRC’s proposals and recommendations

11.104 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.

121 (1908) 1 Cr App R 28, 29.

122 (1914) 10 Cr App R 107.

123 (1928) 21 Cr App R 19, 20.

124 [1913] HCA 32; (1913) 16 CLR 336, 340 (Barton J), 342 (Isaacs J).

125 [1928] HCA 28; (1928) 41 CLR 230, 244–250.

126 *House v The King* (1936) 55 CLR 499, 504–5.

127 [2009] QCA 250.

128 Albeit by majority in this case.

129 See [2009] QCA 250 [21]–[24] (Keane JA; Muir JA agreeing).

130 [2009] QCA 250 [4] (Keane JA; Muir JA agreeing); [65] (Fryberg J dissenting).

131 [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.<sup>132</sup>

### **Submissions**

11.105 A number of respondents to the VLRC's Consultation Paper supported the VLRC's proposal. 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.<sup>133</sup>

11.106 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.<sup>134</sup>

11.107 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 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.<sup>135</sup>

11.108 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.<sup>136</sup>

11.109 Judge Murphy of the County Court of Victoria also supported reform in this area:

132 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [7.71].

133 Maria Abertos, Submission to the Victorian Law Reform Commission, 29 November 2008 [12].

134 Daniel Gurvich and Mark Pedley, Submission to the Victorian Law Reform Commission, 23 December 2008.

135 Office of Public Prosecutions, Submission to the Victorian Law Reform Commission, 12 February 2009, 18.

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

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.<sup>137</sup>

11.110 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.<sup>138</sup>

11.111 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 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).<sup>139</sup>

11.112 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,

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

138 Victoria Legal Aid, Submission to the Victorian Law Reform Commission, 9 December 2008 [2.10].

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

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 applicable, 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.<sup>140</sup>

11.113 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].

...

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140 Criminal Bar Association of Victoria, Submission to the Victorian Law Reform Commission, 15 December 2008, 11–12, 28–30.

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.<sup>141</sup>

11.114 Stephen Odgers SC also opposed the VLRC's proposal, arguing that it distorts the real question on appeal, which is whether there has been a miscarriage of justice:

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 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].<sup>142</sup> Gleeson

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

142 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 'arm-chair' 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.

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 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.<sup>143</sup> (note added)

### **VLRC's recommendations**

11.115 The VLRC made these recommendations in its 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.<sup>144</sup>

11.116 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. ...

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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.

143 Stephen Odgers SC, Submission to the Victorian Law Reform Commission, 12 November 2008, 2, 8–9.

144 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) 14, [4.136]–[4.147].

- 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) ...
- 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.<sup>145</sup>

## The Issues Paper

11.117 Appeals on the basis of alleged misdirection, or failure to give a direction that was required, were discussed in chapter 5 of the Commission's Issues Paper.<sup>146</sup> Although it was not the subject of a specific question for consideration, some respondents expressed views about the possibility of limiting the matters that can be raised on appeal.

## Submissions

11.118 A judge of the District Court of Queensland, for example, supported the VLRC's proposal.<sup>147</sup>

11.119 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.<sup>148</sup>

11.120 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.<sup>149</sup>

## The Discussion Paper

11.121 In its Discussion Paper, the Commission expressed the provisional view that, in the interests of justice and ensuring a fair trial, there cannot be any rule that pre-

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145 Ibid.

146 Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [5.6]–[5.20].

147 Submission 10.

148 Submission 7.

149 Queensland Law Society and Bar Association of Queensland, Submission 13, 19 June 2009. See [11.114] below.



emptively limits the issues that a party can raise on an appeal. However, the Commission considered the conduct of a party who seeks to raise an issue on appeal that was not agitated at the trial should remain a matter for consideration by the appellate court and that it may be appropriate that failure to request a discretionary direction or warning should create a rebuttable presumption that the direction was not necessary.<sup>150</sup> The Commission therefore put forward the following options for reform on which it sought further submissions:

- 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.<sup>151</sup>

### **Further submissions**

11.122 Generally, Legal Aid Queensland cautioned against importing into Queensland any recommendations arising from the Victorian Law Reform Commission's enquiry 'given the apparently very different context existing in that state.'<sup>152</sup> More specifically, Legal Aid Queensland did not support the Commission's proposals:

At present the Queensland Court of Appeal, in direction based appeals, routinely has considerable regard to what directions were sought by the parties, and whether the directions given were commented on by counsel.

There is no need for legislative change in this area. Unintended consequences of the reform proposed will be to visit unfairness upon some appellants and to prolong and complicate trials by parties requesting more directions.

11.123 However, the Brisbane Office of the Commonwealth Director of Public Prosecutions submitted that the rebuttable presumption outlined in Proposal 5-3 'may be appropriate' to clarify what is often, but not always, the approach in practice:

Ordinarily when considering appeal grounds the Court of Appeal should, and in our experience routinely does, have regard to the manner in which the accused

150 Queensland Law Reform Commission, *A Review of Jury Directions*, Discussion Paper WP67 (2009) [5.75]–[5.86].

151 Queensland Law Reform Commission, *A Review of Jury Directions*, Discussion Paper WP67 (2009) 176, Proposals 5-3 to 5-5.

152 Submission 16A, 12. See also [1.52]–[1.54], [4.88]–[4.94] above.

conducted his case. For example, if a re-direction on a particular aspect was not sought, an appeal court is, in our experience, less likely to rule that the trial has miscarried because of the absence of that direction. As noted in the [Discussion Paper], *R v Robinson* [2009] QCA 250, provides an example of a case where a matter not raised at trial or in any appeal documentation, was allowed to be raised at the hearing of the appeal. It is submitted that the preferable position should be that such situations be truly exceptional. Ordinarily an appellant should not be permitted to submit to an appeal court grounds that the jury were misdirected when redirections of that nature were not sought at trial. Further, issues of law should generally not be permitted to be raised for the first time on appeal. As noted in the [Discussion Paper], in some jurisdictions, most notably in New South Wales, there is a limit on matters that can be raised on appeal ... It is generally agreed that as noted in para 5.82 of the [Discussion Paper] there should not be 'any rule that preemptively limits the issues that a party can raise on an appeal'. Appeal courts should have wide powers to prevent miscarriages of justice. As noted at para 5.54 of the [Discussion Paper], the Queensland Court of Appeal's practice is that the tactical or other decisions of counsel at trial will form a 'de facto' limit on matters that may be raised on appeal.<sup>153</sup> As noted in the [Discussion Paper] at para 5.82 an inflexible rule that limits matters that can be raised on appeal is not in the interests of justice. There should be an expectation however that, ordinarily, evidence not objected to at trial or redirections not sought after the judge's summing up cannot generally be relied upon as grounds of appeal.<sup>154</sup> (note in original)

11.124 In relation to Proposal 5-4, the Brisbane Office of the Commonwealth Director of Public Prosecutions agreed with the submission that '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'<sup>155</sup> but that in its experience 'matters not raised at trial face an initial "hurdle" on appeal.'<sup>156</sup> The Brisbane Office of the Commonwealth Director of Public Prosecutions agreed with Proposal 5-5.<sup>157</sup>

11.125 The Office of the Director of Public Prosecutions ('ODPP') agreed generally with Proposals 5-3 to 5-5; it was not convinced that justice requires fanciful possibilities [of acquittal] to be kept open. Even so, it felt that Proposal 5-3 simply re-stated the current position and that Proposal 5-4 added little: appellate courts generally take the failure of defence counsel to raise an issue at trial as an indication that there was no miscarriage of justice.<sup>158</sup>

11.126 The ODPP supported Proposal 5-5(a) but submitted in relation to Proposal 5-5(b) that an appellate court would always return to the question of whether there had been a miscarriage of justice, and that to tinker with this carries the risk of 'perilous' unintended consequences.<sup>159</sup>

11.127 The Bar Association of Queensland noted with approval the statement by the Commission in the Discussion Paper which is re-stated at [11.140] above,<sup>160</sup> and submitted that these views should inform the issue dealt with in Proposal 5-3:

153 See, for example, *R v Falzon (No 2)* (1993) 1 Qd R 618 at 635–6.

154 Submission 9A, 6.

155 Ibid; see [11.119] above.

156 Submission 9A, 6.

157 Ibid 7.

158 Submission 15A.

159 Ibid.

160 Submission 13A, 20. The Queensland Law Society endorsed and supported the whole of the submissions by the Bar Association of Queensland: Submission 13B.

It is undesirable that a rebuttable presumption be created as a matter of law because of a failure to request a direction or warning, when it can be expected that an appeal court could only uphold a ground of appeal if the error in the failure to give the warning is established and this amounts to a substantial miscarriage of justice.

To put it simply and as correctly noted in the Discussion Paper (at para 5.55), not only can tactical decision of counsel never on their own be seen as supplanting the right to a fair trial, appellate courts are well placed to gauge such considerations and as to whether the failure to request the direction is as a result of a mistake or oversight by inexperienced counsel or otherwise.<sup>161</sup>

#### 11.128 For similar reasons, the Bar Association of Queensland opposed Proposal 5-3:

In the first instance, we consider that the Commission has correctly identified that it is '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' but we cannot agree with the proposal that compliance or non-compliance with the any procedural requirements of pre-trial disclosure or formal requests for the inclusion of particular directions in the summing-up, can or should inform the issues to be determined under s.668E of the *Criminal Code* (Qld).<sup>162</sup>

### The QLRC's views

11.129 Some of the submissions on these issues and others invoke the adversarial nature of the criminal justice systems in Australia in support of various arguments about how jury trials should operate and how concepts such as 'fairness' ought to operate in practice, while others argue that these systems are not truly adversarial in nature and that reform ought to be considered from a different perspective.<sup>163</sup> The Commission finds that the debate in a review of the criminal justice system is not necessarily assisted by reliance on concepts of its asserted adversarial (or other) nature. If the criminal justice system is more accurately regarded as a modified adversarial, or hybrid, system, then the invocation of its adversarial nature can be selective and inconsistent. In that event, it may be more useful to dispense that a consideration of jury trials in that light and focus on concepts of fairness and more effective means of providing information to juries as the touchstones of reform in this area.

11.130 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.

11.131 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

161 Submission 13A, 21.

162 Ibid.

163 See, eg, [4.61], [4.84], [7.14], [8.14], [8.76], [8.78]–[8.79], [8.175]–[8.176], [8.180], [10.11], [11.60], [11.64], [11.66]–[11.67], [11.69]–[11.70], [11.113]–[11.114] above.

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.

11.132 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.

11.133 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.

11.134 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 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.

11.135 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.

11.136 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.

11.137 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 explicitly 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 8 of this Report<sup>164</sup> 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.

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164 See [8.201], Rec 8-2(3) above.

11.138 The Commission was 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.<sup>165</sup> This followed from the Commission's view that only strong incentives will force changes to practice and attitude. 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.

11.139 A recommendation along these lines would have been consistent in principle with the Commission's recommendations in chapter 8 of this Report that there be a more comprehensive approach to pre-trial issue identification. However, the Commission has concluded that it is unnecessary to go so far as to invoke rebuttable presumptions and that Recommendation 11-2 is sufficient in this respect.

11.140 The interests of justice demand that there be some flexibility in the application of any of these procedural rules and, as a result, there ought not be any fixed rules that bar a party (even on a prima facie basis) 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*.<sup>166</sup>

11.141 As the Commission has previously indicated,<sup>167</sup> 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.

11.142 Notwithstanding these observations, Commission does not make any formal recommendation in this area based on the three Proposals in its Discussion Paper.<sup>168</sup>

- The issues covered in Proposals 5-3 and 5-5(a) are now covered by Recommendation 11-2 and it is unnecessary to repeat them.
- Proposal 5-4, which stipulated that there not be a rule limiting the basis of appeals, need not take the form of a formal recommendation.
- Proposal 5-5(b) duplicates Recommendation 8-2(3) and need not be repeated.

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165 See [11.107] above.

166 *R v C* [2000] QCA 385. See [11.100] above.

167 See [8.202], [11.90] above.

168 See [11.121] above.

## Recommendations

11.143 The Commission makes the following recommendations:

**11-1 The Criminal Code (Qld) should be amended to provide that both the prosecution and the defendant (if represented) 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.**

**11-2 In addition, the Criminal Code (Qld) should be amended to provide that:**

- (1) the judge is not obliged to 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**
- (2) in appeals asserting any misdirection or inadequate direction of the jury by the trial judge, 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).**

# Chapter 12

## Directions about the Limited Use of Evidence

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### INTRODUCTION

12.1 In this review, the Commission was charged with considering whether any current jury directions should be amended or abolished.<sup>1</sup> To this end, the Commission identified a number of specific issues for consideration in chapters 4 and 8 of its Issues Paper:

- 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?
- 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?<sup>2</sup>

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1 See the Terms of Reference set out in Appendix A to this Report.

2 Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) 105, 170, 174.

12.2 One class of directions identified as being, at times, especially complex and difficult for jurors to comprehend are evidentiary directions.<sup>3</sup> The Commission's Issues Paper and Discussion Paper raised particular concern about limited-use directions (also sometimes referred to as 'limiting instructions'); that is, directions or warnings about the way in which jurors must not use certain evidence, the differential use of certain evidence or the caution that jurors must exercise when considering that evidence. Examples include:

- directions or warnings in relation to similar fact or propensity evidence, or evidence of uncharged conduct, which is introduced to establish a pattern of conduct on the part of the defendant or 'context';
- evidence about post-incident conduct (otherwise described as 'consciousness of guilt evidence'), which is introduced to establish that certain conduct by defendants after the alleged offence is evidence of their own awareness of their involvement in the offence;
- 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); 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 that evidence admitted against one co-defendant cannot be used to assess the guilt of another co-defendant.

12.3 Each of these diverse categories of evidence requires a 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. However, limited-use directions encompass a wide range of directions: in fact, on one level, almost all evidence is admitted for specific, and thus limited, purposes. Not all such evidence requires a jury direction, and the jury is expected to analyse it, rely on it or reject it in line with its own evaluation of its truth and probative value. And even among those that do require directions, not all will pose significant difficulties for juries.

12.4 While limited-use directions are often identified as ones that pose difficulties for juries, those difficulties appear to be confined to particular types of limited-use directions. Consequently, reforms should be directed to specific, problematic directions rather than to all directions that fall into what is an immensely broad, and somewhat loosely defined, category of 'limited-use directions'. This chapter discusses limited-use directions in general; in the two chapters that follow, consideration is given to some specific types of directions: propensity warnings and warnings about post-incident conduct.

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3 Eg Hon J Wood AO QC, 'Jury directions' (2007) 16 *Journal of Judicial Administration* 151.



## LIMITED-USE DIRECTIONS

12.5 Evidence that is inadmissible for one purpose, because of an exclusionary rule, may nevertheless be admissible for another purpose.

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.<sup>4</sup> (note omitted)

12.6 Thus evidence that is logically relevant for more than one purpose may be admitted for a limited purpose only. Without such a rule, much relevant evidence would be excluded altogether. Much of the time this may be relatively unproblematic. Sometimes, however, the evidence may seem so emotionally resonant or intuitively relevant to an assessment of the defendant's guilt that, despite being admitted for some more limited purpose, it may impact on the jury's decision-making in a manner that is unfair to the defendant. In those circumstances, the fear is that the jury will use the evidence (consciously or otherwise) for purposes other than those for which it was admitted. This may occur, for example, when evidence of a defendant's bad character or lies is admissible as to credit but not to guilt.<sup>5</sup> In those situations, there is a risk that the jury will act upon unfair prejudice against the defendant rather than a consideration of whether the current charge has been made out.<sup>6</sup>

12.7 It therefore remains 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.<sup>7</sup> In Queensland, at common law 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,

4 JH Wigmore, *Evidence in Trials at Common Law*, Vol 1 (revised ed, 1983) §13.

5 Under section 15 of the *Evidence Act 1977* (Qld), the prosecution may cross-examine the defendant as to bad character in four circumstances:

- if the matter is probative of guilt;
- if the questions are directed to showing that another defendant is not guilty of the offence charged;
- if the defendant has sought to establish his or her own good character or has impugned the character of the prosecutor, a prosecution witness or any other person charged in the proceeding; or
- if the defendant has given evidence against another person charged in the proceeding.

In the first two situations, the evidence will be relevant to specific issues in the case. Similarly, evidence of good character may be used both for assessing the defendant's credibility and assessing the likelihood of the defendant's guilt: *Attwood v The Queen* (1960) 102 CLR 353, 359; *Melbourne v The Queen* (1999) 198 CLR 1 [156] (Hayne J). In the latter two situations, however, the evidence of bad character will go to credit only, necessitating a limited-use direction. See, for example, the suggested direction in the Queensland Benchbook to be given when bad character evidence is led to rebut the defendant's evidence of good character: Queensland Courts, Supreme and District Court Benchbook, 'Bad Character/Previous Convictions' [42.2]–[42.3] <<http://www.courts.qld.gov.au/2265.htm>> at 30 November 2009. That direction is set out in full in Appendix D to this Report.

6 *BRS v The Queen* (1997) 191 CLR 275, 326–7 (Kirby J).

7 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 ed, 1983) §13.

because of an impropriety in the way the evidence was obtained.<sup>8</sup> The usual means, however, is to warn the jury about the limited use to which it may put the evidence:<sup>9</sup>

The problem which arises when evidence is admissible for one purpose but is inadmissible for another is well known to the law.<sup>10</sup>

As Tindal CJ said in *Willis v Bernard*:<sup>11</sup>

'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.<sup>12</sup> (notes in original)

12.8 The need for limited-use directions (or 'limiting instructions') arises out of the judge's duty to assist the jury in the performance of its task and because of the potentially unfair prejudicial impact of the evidence. The conventional legal wisdom that it may be necessary to counteract the prejudicial effect of evidence is supported by empirical evidence. For example, studies have shown that jurors are more likely to convict when they have heard evidence of the defendant's prior convictions for similar offences or for particularly distressing crimes like indecent assault of children.<sup>13</sup> Research has also shown that juries are strongly influenced by, and tend to convict on, graphic and emotionally-charged evidence (such as gruesome photographic evidence) even when it is conveyed to them in words only.<sup>14</sup> Judges may thus sometimes warn the jury about the need to consider evidence of this kind dispassionately. Such a direction was given in *R v Zammit* and approved of on appeal:

8 See generally 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 [21]–[25], [29] (Brennan CJ), [57]–[61], [62]–[65] (Toohey, Gaudron and Gummow JJ); *R v Butler* [2009] QCA 111 [106] (Keane JA). The discretion to exclude evidence because its prejudicial effect outweighs its probative value is sometimes referred to as the 'Christie discretion' after the decision in *R v Christie* [1914] AC 545. The discretion to exclude evidence if its admission would render the trial unfair because of an impropriety or unfairness in the way it was obtained is sometimes referred to as the 'Bunning v Cross discretion' after the decision in *Bunning v Cross* (1978) 141 CLR 54. Cf s 137 of the Uniform Evidence Law: see [12.18] below.

9 *B v The Queen* (1992) 175 CLR 599, 619 (Dawson and Gaudron JJ). See also, eg, *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 ed, 1983) §13.

10 See Wigmore on Evidence, (revised edition, 1983), Vol 1, par 13.

11 (1832) 8 Bing 376, at p 383 [131 ER 439, at p 441].

12 See *Donnini v The Queen* (1972), 128 CLR 114, at p 123.

13 See, eg, J McEwan, 'Fact finding and Evidence' in D Carson et al (eds), *Applying Psychology to Criminal Justice* (2007) 97–114, 98.

14 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, 111–112. Confessional evidence, even if the confession is uncorroborated, known to be elicited by coercive methods, and there is other evidence consistent with innocence, also tends to bias jurors in favour of the prosecution case and guilty verdicts: eg SM Kassin, 'The psychology of confessions' (2008) 4 *Annual Review of Law and Social Science* 193, 208–9.

Members of the jury, the issue in this case ... is whether or not the Crown can prove that the accused was the perpetrator of the killing and the robbery, therefore you should look at the photographs<sup>15</sup> in a calm deliberate and dispassionate fashion. I have ruled that it is appropriate that you should see these photographs in order that you make the determination in the context of the reality of what happened, but you should bear in mind that you shouldn't use any emotion.<sup>16</sup>

12.9 In delivering the leading judgment in the NSW Court of Criminal Appeal, Wood CJ at CL (with whom Ireland and Kirby JJ agreed) said that there was 'no reason to suppose that the jury failed to take account of this direction.'<sup>17</sup>

12.10 Notwithstanding judicial confidence in the capacity of jury directions to cure the prejudicial impact of certain evidence, doubts about their efficacy have been raised:

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'.<sup>18</sup> However, such empirical studies as have been performed on jurors' abilities to follow judicial instructions, and to divide and sanitise their minds concerning impermissible uses of evidence, have yielded results which are substantially consistent. They cast doubt on the assumption that jurors can act in this way.<sup>19</sup> 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.<sup>20</sup> Lengthy directions about lies run the risk of emphasising the lies and their importance.<sup>21</sup> (notes in original)

12.11 As noted in this passage, there has been research on the effect that warnings of this nature have on a jury. The results are mixed but most research has yielded 'unfavourable results',<sup>22</sup> that is, that limited-use directions did not have their intended effect.<sup>23</sup> For example, as noted at [7.164] of this Report, a former juror expressed concern about the counter-productive effect of directions to ignore particular evidence:

15 Which showed the mutilated face of the deceased.

16 *R v Zammit* [1999] NSWCCA 65 [157] (Wood CJ at CL).

17 *Ibid* [158] (Wood CJ at CL).

18 Schaefer and Hansen, 'Similar Fact Evidence and Limited Use Instructions: An Empirical Investigation' (1990) 14 *Criminal Law Journal* 157 at 159.

19 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.

20 Schaefer and Hansen, 'Similar Fact Evidence and Limited Use Instructions: An Empirical Investigation', (1990) 14 *Criminal Law Journal* 157 at 166.

21 *Zoneff v The Queen* (2000) 200 CLR 234 [67] (Kirby J).

22 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, 112.

23 *Ibid* 112–3. See also 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; AJ Wistrich, C Guthrie and JJ Rachlinski, 'Can judges ignore inadmissible information? The difficulty of deliberately disregarding' (2005) 153 *University of Pennsylvania Law Review* 1251. 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].

***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.***<sup>24</sup>  
(emphasis in original)

12.12 Several reasons have been put forward for this:

- Jurors may be unwilling or unable to comply as it is perceived as a constraint on their ability to review all of the evidence.
- Attempts at thought-suppression ‘rebound’ or simply draw more attention to the evidence which the directions seek to de-emphasise.<sup>25</sup>
- Conversely, jurors’ attempts to comply with the instruction may result in over-compensation.<sup>26</sup>

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.<sup>27</sup> (references omitted)

12.13 Some limited-use directions may pose more difficulties for jurors than others. In the University of Queensland research, 14 jurors of the 33 in the sample (42%) said that they had been given directions about the limited use of evidence and ten of those indicated that the directions had concerned the use of evidence against one defendant but not another in trials involving multiple defendants. Jurors generally said that they had understood those directions and found them helpful; it also appears from the jurors’ descriptions of the directions that they did understand the import of those directions:

Fourteen jurors indicated that the judge gave them directions that they may only use a particular piece of evidence [for] one purpose and not another. Average ratings of subjective understanding, helpfulness, and clarification for those 14 jurors who reported receiving these directions (rated on a 7 point scale, with 1 = not at all, and 7 = very much), showed that these jurors felt they understood the limited use directions very well ... found them very helpful ... did not find these directions hard to understand ... nor did the majority feel they needed further clarification ...

Of these 14 jurors reporting receiving limited use directions, only ten gave a description of the directions, and in all cases the directions related to the presence of multiple defendants and using witnesses’ evidence to evaluate the case against one defendant but not another.

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24 Submission 2.

25 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, 112–3. See also School of Psychology, University of Queensland (Blake McKimmie and Kathryn Havas), ‘An Experiment to Test the Effect of Simplifying Directions’, Report (November 2009) 5–6, and the research cited there.

26 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, 119–20.

27 Ibid 112–13. See also generally, eg, DJ Devine et al, ‘Jury decision making: 45 years of empirical research on deliberating groups’ (2001) 7(3) *Psychology, Public Policy, and Law* 622, 666–7.

Descriptions of limited use directions:

...

'Two accused people charged for the same offence but the evidence for one offender cannot be used against the offence of the second. Separate evidence needs to be provided for each person in a trial.' — Juror 22.

'Accounts relayed by one defendant could only be used in reference to that defendant and not the other.' — Juror 23.<sup>28</sup>

12.14 That research was not able, however, to evaluate the extent to which jurors were able to apply those directions; nor did it yield any information about other types of limited-use directions that may have posed more difficulties, such as directions on propensity evidence or evidence of lies. Moreover, one juror noted at least some difficulty in applying the direction, although this was more an issue of memory than of intellectual confusion:

'In my case with multiple defendants it was sometimes difficult to recall which piece of evidence could be used against which defendant. I would have appreciated a list, in the case where there were several dozen witnesses, that listed which witness's evidence could be used against which particular defendant.' — Juror 25.<sup>29</sup>

12.15 The task of nimbly applying the evidence for certain purposes while somehow neutralising any further, improper influence of that evidence is difficult enough for lawyers;<sup>30</sup> how much harder is it then for lay jurors to master this feat of evidentiary gymnastics? During the trial, jurors are faced with the 'challenging cognitive task' of processing 'a great deal of information of both psychological and legal relevance at the same time that they experience substantial pressure regarding the serious consequences of their decision'.<sup>31</sup> The cognitive load that jurors are under may impede their efforts to comply with limiting instructions, even when they are motivated to do so. Jurors' efforts are also likely to be obstructed when the line between the permissible and impermissible uses of the evidence is particularly fine, as is often the case with propensity evidence. For example, in the survey conducted by the University of Queensland, one of the things that jurors felt had hindered them in their task was that there were aspects of the law 'that seemed to contradict other aspects of the law'.<sup>32</sup> In the end, the evidence, having been admitted, may well be applied by jurors in accordance with whatever weight and for whatever purposes they consider relevant.

12.16 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 might be removed, for example, if evidence were

28 School of Psychology, University of Queensland (Blake McKimmie, Emma Antrobus and Kathryn Havas), 'Jurors' Trial Experiences: The Influence of Directions and Other Aspects of Trials', Report (November 2009) 19.

29 Ibid 20.

30 And judges: AJ Wistrich, C Guthrie and JJ Rachlinski, 'Can judges ignore inadmissible information? The difficulty of deliberately disregarding' (2005) 153 *University of Pennsylvania Law Review* 1251.

31 N Steblay et al, 'The impact on juror verdicts of judicial instruction to disregard inadmissible evidence: A meta-analysis' (2006) 30 *Law and Human Behavior* 469, 470.

32 School of Psychology, University of Queensland (Blake McKimmie, Emma Antrobus and Kathryn Havas), 'Jurors' Trial Experiences: The Influence of Directions and Other Aspects of Trials', Report (November 2009) 23.

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. It might also be both more elegant in practice and more rigorous in principle to focus on whether material should be admitted as evidence at all rather than admitting evidence with a shadowy function or status.

12.17 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 the Law Commission of New Zealand,<sup>33</sup> instances of limited-use evidence have been reduced significantly.<sup>34</sup> For example:

- Previous statements of a testifying witness are no longer considered hearsay and, once admitted, they may be used not only for credit but also for the truth of their contents. This curbs the need for directions distinguishing between hearsay and non-hearsay purposes.<sup>35</sup>
- 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.<sup>36</sup> This may obviate the need to give elaborate directions distinguishing between permissible and impermissible propensity reasoning.
- The judge is no longer required to direct the jury on the inferences that they may draw from evidence of a defendant's lie. Jurors may thus be spared the need to grapple with a distinction between lies going to guilt and lies going only to credit.<sup>37</sup>

12.18 Section 137 of the Uniform Evidence Act<sup>38</sup> has also been seen as one step in the process of removing limited-use directions.<sup>39</sup> It reads:

Exclusion of prejudicial evidence in criminal proceedings

In a criminal proceeding, the court **must refuse** to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant. (emphasis added)

12.19 There is no equivalent statutory provision in Queensland. However, at common law, the judge has a discretion to exclude otherwise relevant and admissible evidence if its prejudicial effect exceeds its probative value.<sup>40</sup>

33 Law Commission (New Zealand), *Evidence*, Report 55 (1999).

34 Jury Directions Symposium, Melbourne, 5–6 February 2009.

35 *Evidence Act 2006* (NZ) ss 4 (definition of 'hearsay statement'), 18, 35. And see Law Commission (New Zealand), *Evidence: Reform of the Law*, Report 55 (1999) Vol 1 ch 4, 7; Law Commission (New Zealand), *Evidence: Code and Commentary*, Report 55 (1999) Vol 2, ss 4, 37, [C18], [C166]–[C168].

36 *Evidence Act 2006* (NZ) s 40(1). Also see P Williams, 'Evidence in criminal law: Codification and reform in the Evidence Act 2006' (2007) 13 *Auckland University Law Review* 228, 235–6.

37 *Evidence Act 2006* (NZ) ss 37, 124(2). And see Law Commission (New Zealand), *Evidence: Reform of the Law*, Report 55 (1999) Vol 1, [481]–[485]; Law Commission (New Zealand), *Evidence: Code and Commentary*, Report 55 (1999) Vol 2, s 110, [C392]–[C395].

38 *Evidence Act 1975* (Cth). A similar provision applies in New Zealand: *Evidence Act 2006* (NZ) s 8. It provides that 'the Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will (a) have an unfairly prejudicial effect on the proceeding; or (b) needlessly prolong the proceeding'.

39 See 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, 111.

12.20 The Uniform Evidence Act provision ostensibly removes the trial judge's discretion by mandating the rejection of evidence if the prejudicial risk of it being used unfairly by a jury is outweighed by its value in proving (or tending to prove) a fact in issue. The question of the admission or rejection of evidence is one controlled by lawyers, both at the trial as well as on appeal. If, because of its potential prejudice, evidence that would normally attract a warning is instead excluded altogether, the jury would no longer be given the demanding and artificial — and possibly unnecessary — task of applying the evidence for some purposes but not for others. However, this approach still requires a decision by the judge as to the relative weight of the prejudice and the probative value, so that the task set by section 137 is 'analogous to a discretionary judgment.'<sup>41</sup> Even when the probative value is sufficient to justify admission of the evidence, there may nevertheless remain some risk of unfair prejudice that warrants a cautionary warning.

12.21 To completely remove the possibility of admitting evidence for limited purposes would be a sweeping change with far-reaching consequences for the functioning of criminal trials, and should not be contemplated lightly. There will remain at least some circumstances in which evidence should continue to be admitted for limited purposes; an example is evidence in a joint trial given against one defendant but not another. Nevertheless, there may be some benefit in providing, for some specific types of evidence, that, once admitted, the evidence may be used for whatever purpose the jury thinks fit, subject of course to whatever general cautionary warning the judge considers necessary.

12.22 There may also be less radical alternatives to improve the efficacy of limited-use directions. The social psychological research on the effect of limiting instructions indicates a number of potential strategies. One approach is to recast limited-use directions in simpler and more general terms to improve jurors' ability to understand and apply them, as well as their motivation for following them. This might involve a reformulation of some of the more complex and counter-intuitive directions into shorter and more general cautionary warnings. This might be combined with a judicial discretion to withhold a direction, or to give a truncated one, if the direction would do more harm than good.

[I]t may be more effective to provide a weak soft-sell approach to admonishing jurors to prevent reactance from occurring rather than using a strong and absolute promulgation. Such a strategy might also reduce the rebound effects that occur from attempts at mental suppression.

...

... further mitigation of the ineffectiveness of limiting instructions may come from attempts to limit the cognitive demands of jurors when they attempt to ignore the inadmissible information. Thus, although some reasoning suggests that explanations from the judge might be helpful, it may also be important that instructions are fairly easy to understand and do not excessively increase mental demands.<sup>42</sup>

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40 See n 8 above.

41 Lexis Nexis Online Service, JD Heydon, *Cross on Evidence*, 'Discretion to exclude relevant evidence in criminal proceedings' [11125] (at 7 December 2009), citing *R v Blick* (2000) 111 A Crim R 326, [20].

42 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, citing JD Lieberman and BD Sales, 'What social science teaches us about the jury instruction process' (1997) 3 *Psychology, Public Policy, and Law* 1.

12.23 The experimental research conducted by the University of Queensland found, for example, that simplified warnings encouraged jurors to rely less on stereotypes about the defendant and their personal beliefs, and to adopt a generally more cautious and objective approach to the case.<sup>43</sup>

12.24 Another strategy is to provide jurors with an explanation for the direction or warning, with reference to the need for a fair trial.

[I]t may be helpful to provide an explanation behind the limiting instruction. 'Such an explanation would eliminate some of the conflict experienced by jurors ... and [they would be] less likely to view their options as limited'. Consequently, they would view the court procedures 'as less arbitrary and more reasonable'. A policy explanation may reduce feelings of resentment and reactance.<sup>44</sup>

12.25 Finally, early instruction and forewarning to jurors may assist in their ability to follow the directions:

Persuasion studies have demonstrated that forewarning participants that they will be exposed to prejudicial information is effective at creating resistance and reducing the effectiveness of subsequent persuasive messages. This phenomenon is known as *inoculation*. Thus, it may be useful to caution jurors at the beginning of the trial that evidence of a defendant's criminal record may not be considered an indication of guilt and to warn jurors to disregard evidence when an objection is sustained. However, care must be taken to word pretrial instructions in such a way that reactance is not produced. A similar potential solution for reducing the effects of inadmissible evidence comes from Wilson and Brekke's (1994) model of mental contamination. From this perspective, mental contamination by intrusive thoughts occurs when an individual is not aware of the potentially biasing effects of information. Thus, any instructions designed to forewarn jurors might also include explanations of how inadmissible testimony can influence people so that jurors are better prepared to defend against it.<sup>45</sup>

12.26 While research has produced mixed results, they do suggest that a warning after the evidence has been presented comes too late for some jurors, who will have already processed, weighed and possibly judged the evidence.<sup>46</sup> This is more likely to happen when juries are presented with evidence without having a clear framework given to them at the outset of the trial within which to work.<sup>47</sup> Limited-use directions given before, or at the time the evidence is heard (sometimes called 'running instruc-

43 School of Psychology, University of Queensland (Blake McKimmie and Kathryn Havas), 'An Experiment to Test the Effect of Simplifying Directions', Report (November 2009) 13–14.

44 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, citing L Eichorn, 'Social science findings and the jury's ability to disregard evidence under the federal rules of evidence' (1989) 52 *Law and Contemporary Problems* 341, 353.

45 Ibid 705, citing JA Tanford, 'The law and psychology of jury instructions' (1990) 69 *Nebraska Law Review* 71; WJ McGuire, 'Inducing resistance to persuasion' in L Berkowitz (ed), *Advances in experimental social psychology* (1964) Vol 1, 192–229; WJ McGuire, 'Attitudes and attitude change' in G Lindzey & E Aronson (eds), *Handbook of social psychology* (1985, 3rd ed) Vol 2, 233–346; RE Petty and JT Cacioppo, 'Forewarning, cognitive responding, and resistance to persuasion' (1977) 35 *Journal of Personality and Social Psychology* 645; and TD Wilson and N Brekke, 'Mental contamination and mental correction: Unwanted influences on judgments and evaluations' (1994) 1 *Psychological Bulletin* 117.

46 See 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, 113–114, 120.

47 See [9.5]–[9.6], [9.24]–[9.33] above.



tions'), may therefore be more effective than instructions given during the summing up at the end of the trial.<sup>48</sup>

[W]ithout 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.<sup>49</sup> (note omitted)

12.27 Multiple exposures to legal instructions might also help jurors' grasp of the law.<sup>50</sup> In some instances, however, it might be appropriate to avoid repetition of an instruction so that the jury is not reminded of prohibited lines of reasoning 'hitherto less prominent in their memory'.<sup>51</sup>

12.28 The desirability of giving directions as the need arises has not gone unnoticed by the courts:

It will often be appropriate and desirable that the jury be given directions at about the time that the evidence is introduced which affect the way in which they may view the testimony of a particular type of witness or which explain how a particular category of evidence may be used or warn the jury as to the impermissible use of such evidence. Directions given in this timely fashion ensure that the jury will receive the greatest assistance in assessing the significance of the evidence which it hears.<sup>52</sup> (note omitted)

12.29 Pre-instruction may, however, involve its own problems. Whether or not a direction is necessary, and what its particular formulation should be, may often 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 in some instances.

## VLRC's proposals and recommendations

12.30 Limited-use directions were discussed in the VLRC's Consultation Paper in the context of sexual offence cases.<sup>53</sup>

48 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.

49 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.

50 JRP Ogloff and VG Rose, 'The Comprehension of Judicial Instructions' in N Brewer and KD Williams (eds) *Psychology and Law: An Empirical Perspective* (2005) 407–444, 431.

51 J McEwan, 'Fact finding and evidence' in D Carson et al (eds), *Applying Psychology to Criminal Justice* (2007) 97–114, 97.

52 *R v PZG* (2007) 171 A Crim R 62 [22], citing *R v Kirby* [2000] NSWCCA 330 [68] (Wood CJ). See also, E Najdovski-Terziovski, J Clough and JRP Ogloff, 'In your own words: A survey of judicial attitudes to jury communication' (2008) 18 *Journal of Judicial Administration* 65, 78. See also, for example, *R v GVV* (2008) 20 VR 395, [27]–[28] (Lasry AJA) in which it is noted that the trial judge gave a limited use direction in relation to relationship evidence after the opening addresses had been given, which was then repeated and expanded on in the summing up.

53 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [3.71]–[3.172].

12.31 In its submission to the VLRC's Consultation Paper, 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.<sup>54</sup>

12.32 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.<sup>55</sup>

12.33 In its Final Report, the VLRC recommended that the essential elements of directions concerning the use of evidence, including those in relation to propensity, post-incident conduct and identification, be set out in its proposed jury directions statute and recommended that those directions be given in a simplified form.<sup>56</sup> The VLRC's recommendations in relation to those specific types of directions are discussed in chapters 13, 14 and 16 respectively.

## The Issues Paper

12.34 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 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.<sup>57</sup>

## Submissions

12.35 Only two of the respondents to the Commission's Issues Paper addressed the possibility of reform of limited-use directions:

- The Brisbane Office of the Commonwealth Director of Public Prosecutions suggested that, because of the doubts about the effectiveness of limited use directions, 'it may be appropriate that juries receive advance warning about limited-use evidence before it is led.'<sup>58</sup>

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

55 Patrick Tehan QC, Submission to the Victorian Law Reform Commission, 26 November 2008 [4].

56 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [4.45], [5.33], 73, Rec 13.

57 See Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [8.14]–[8.24].

58 Brisbane Office of the Commonwealth Director of Public Prosecutions, Submission 9, 3.

- A judge of the District Court considered that jury directions on the use of evidence for certain limited purposes are ‘incomprehensible and need re-casting.’<sup>59</sup>

## The Discussion Paper

12.36 The Commission did not reach a provisional view on this issue in its Discussion Paper but instead put forward two Proposals for reform (drafted as alternative options) on which it sought further 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:
- 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;
  - 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;
  - 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
  - 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.<sup>60</sup>

12.37 The Commission also noted that concerns about these types of directions might be addressed in some measure by the use of integrated directions in the summing up, which should simplify the directions that are ultimately given to the jury.

### Further submissions

12.38 Legal Aid Queensland (‘LAQ’) opposed both of the Commission’s Proposals, reiterating the view that it had expressed in its earlier submission to the Commission’s Issues Paper that:

The underlying difficulty in attempting to frame reforms to directions is the complexity of the relevant substantive and procedural law, which consequently complicates the directions. The law relating to limited-use directions is an example of this reality.

We would support attempts to ensure directions are given in appropriate plain English, as noted in the Issues Paper, provided always that such directions remain in a form according to law. Some caution is needed in this approach.<sup>61</sup>

59 Submission 6.

60 Queensland Law Reform Commission, *A Review of Jury Directions*, Discussion Paper WP67 (2009) [6.14]–[6.29], 184, Proposals 6-2 and 6-2.

61 Submission 16A, 12.

12.39 LAQ submitted that these issues should be addressed as part of a wider review of the laws of evidence:

We are concerned that attempted reform of specific directions will result in unfairness to accused persons. The complexity of some of the more problematic directions arises, as noted above, from the complexity of the underlying substantive and procedural law. That is the issue to be addressed.

Accordingly, we favour the approach of these issues being addressed in the context of a wider review of our evidence laws (including consideration of whether Queensland should adopt the Uniform Evidence laws), rather than the approach of attempting to reform particular areas by either isolated amendments of our existing laws of evidence; or amendment of the Criminal Code regarding the content of specific related directions.<sup>62</sup>

12.40 LAQ noted that New Zealand provides a legislative precedent for change but considered it prudent to evaluate the impact of those changes before adopting them:

We do not discount the possible benefits of approaches such as those adopted under the New Zealand *Evidence Act 2006*. However, we would be interested in receiving further feedback as to the operation of those amendments in practice, and particularly about their impact on accused persons and their entitlement to a fair trial, before expressing any more definite views. Such an exercise could be carried out as part of a wider evidence laws review, as we have suggested.<sup>63</sup>

12.41 LAQ also submitted that the ‘same observations apply to issues concerning propensity evidence; consciousness of guilt; and identification evidence directions.’<sup>64</sup>

12.42 The Office of the Director of Public Prosecutions (‘ODPP’) also expressed some concern about Proposal 6-1. The ODPP submitted that, if evidence is admitted for all purposes and no limited-use direction is required, the issue would be shifted one step back to the question of admissibility or exclusion. In its view, the courts would probably be less inclined to admit evidence under such a scheme and, as a consequence, the proposal risks ‘throwing the baby out with the bath water’. The ODPP also noted that different considerations apply with different types of evidence: it argued that the proposed approach might work for evidence of lies but not, for example, with propensity evidence.<sup>65</sup>

12.43 The Bar Association of Queensland (‘BAQ’) also opposed Proposal 6-1, questioning whether there is really sufficient evidence to indicate that limited-use directions are ineffective.<sup>66</sup>

In relation to the observation doubting the effectiveness of limited use directions because they are too subtle for jurors to be able to effectively apply, this is not necessarily so nor is it necessarily easy to judge.

There may be some research on the question, but the only objective research referred to in the footnotes dates from 1990. In the absence of broad ranging and precise evidence on the point, this may not be a particularly persuasive feature.

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62 *ibid* 12–13.

63 *Ibid* 13.

64 *Ibid*.

65 Submission 15A.

66 Submission 13A. The Queensland Law Society endorsed and supported the whole of the submissions by the Bar Association of Queensland: Submission 13B.

Jurors are infinitely variable. Each jury can be expected to contain a range of abilities, experience and intelligence. It is for the more able to assist the others, and failing this, for the jury to seek redirections from the Judge.<sup>67</sup>

12.44 The BAQ's comments in this regard appear to have overlooked the results of other empirical evidence, reported as recently as 2006, and referred to in the Commission's Issues Paper, Discussion Paper, and again in this Report.<sup>68</sup>

12.45 In the BAQ's view, limited-use directions are a necessary feature of fair criminal trials:

A criminal trial is an important legal process, and the rights of an accused person (presumed innocent) to a trial featuring the fairest and most precise of legal procedures should not lightly be modified. Courts are capable of making difficult concepts clear to juries.

The Association would support the submission to the VLRC's consultation paper by the Law Council of Australia, to the effect that retention of limited use directions is necessary whenever evidence having a prejudicial capacity or which would be inadmissible for some purpose, is led for some other legitimate purpose.<sup>69</sup>

The Association adopts the observation in paragraph 6.23 of the [Commission's Discussion] paper<sup>70</sup> to the effect that complete removal of limited purpose evidence would be a sweeping change with far-reaching consequences for the functioning of criminal trials and should not be contemplated lightly or at all.<sup>71</sup> (notes added)

12.46 The BAQ expressed some support, however, for limited-use directions to be given at the time the evidence is heard, as was suggested in Proposal 6-2:

The Association endorses the approach of seeking improvement in the way in which such directions are given. The members of the Association endorse the idea that limited use directions given at the time the evidence is heard may be more effective. A desirable approach would be to give the relevant directions when the evidence is called, and then repeat them in the summing up.

Accordingly, the Association would commend the reform proposed in 6-2 in preference to that proposed in 6-1.<sup>72</sup>

12.47 The Brisbane Office of the Commonwealth Director of Public Prosecutions also reiterated its previous submission that it 'may be appropriate that juries receive advance warning about limited-use evidence before it is led.'<sup>73</sup>

12.48 The ODPP, however, expressed some reservations about Proposal 6-2. In its view, this would add to the burden of counsel. The ODPP submitted that it would become clear during the course of the trial whether limited-use evidence is being adduced and for what purposes; much of this depends on the way in which the

67 Submission 13A, 22.

68 See Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 [8.22]–[8.24]; Queensland Law Reform Commission, *A Review of Jury Directions*, Discussion Paper WP67 (2009) [6.19]; and [12.11] above.

69 See [12.31] above.

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

71 Submission 13A, 22.

72 Ibid 22–3.

73 Submission 9A, 7; see [12.35] above.

evidence comes out. To raise an expectation at the outset that the evidence will be relied on in a particular way would lead, in the ODP's view, to disruptive and unnecessary arguments later in the trial if things take a different turn.<sup>74</sup>

### The QLRC's views

12.49 Limited-use directions encompass directions and warnings on a vast range of evidence. The Commission accepts the anecdotal commentary and empirical evidence to the effect that some directions falling within this category pose particular difficulties for juries. It also considers, however, that many other such directions are largely unproblematic: the University of Queensland's research suggests, for example, that jurors generally do understand directions about the use of evidence in relation to one defendant but not another in trials involving multiple defendants.<sup>75</sup> On balance, the Commission does not consider it appropriate or desirable to propose blanket reforms that would apply to a category that is so broad as to overlook the important distinctions between the evidence and directions that it encompasses. To do so would carry a risk of unintended consequences for the fairness of criminal trials in which such evidence is admitted.

12.50 The Commission therefore agrees with the submissions that it is not appropriate for all evidence that is admissible on a limited basis to be admitted for all purposes with no limited-use direction being required. It is unclear how this would impact on the admissibility of evidence and the risk of undermining the fairness of criminal trials is too high to warrant such blanket reform.

12.51 As the Office of the Director of Public Prosecutions submitted, however, it may nonetheless be appropriate to consider reforms in relation to some specific, and particularly problematic, directions. The Commission has done so in relation to propensity warnings and post-incident conduct warnings in chapters 13 and 14 of this Report.

12.52 The Commission also accepts the notion, supported by the available empirical evidence, that earlier directions can be more effective when dealing with limited-use evidence. This approach provides a practical means of improvement on a case-by-case basis. It is also consistent with the Commission's Recommendation in chapter 9 of this Report for a provision that, among other things, the judge may address the jury on the law or the evidence at any time during the trial.<sup>76</sup> The Commission also notes the support from some of the submissions for a specific legislative provision for the judge to give limited-use directions at the time the evidence is heard.

12.53 In the Commission's view, however, it is better to maintain the flexibility of the judge's discretion as to the timing of such directions or warnings. While advance instruction may be both appropriate and possible in some circumstances (and is already given in some criminal trials),<sup>77</sup> it may be undesirable or impractical in others. For example, the judge may take the view that a direction given at the time the evidence is heard may be counter-productive in attracting the jury's attention to a line of reasoning or aspect of the evidence that might otherwise go unnoticed. It might also be dangerous to give an early direction if it is likely to be affected by other evidence

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74 Submission 16, 5.

75 See [12.13] above.

76 See Rec 9-3 above.

77 See [12.28] above.

that is yet to be heard. In this regard, the Commission notes the submission of the Office of the Director of Public Prosecutions that provision for early instruction may sometimes lead to more, rather than less, confusion or disruption. Whilst the Commission is of the view that judges should actively consider giving limited-use directions at the time the evidence is heard, the Commission considers that its recommendation in chapter 9 is sufficient legislative encouragement in this regard and no further provision is required.

12.54 The Commission also anticipates that the use of integrated directions in the summing up, as it has recommended in chapter 9,<sup>78</sup> will help put limited-use directions in context for the jury, making them easier for the jury to understand and apply.

12.55 The Commission makes no formal recommendations for reform generally of the admissibility of, or directions to be given in relation to, evidence admitted for limited purposes.

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78 See [9.79]–[9.130], Rec 9-4 to 9-6 above.





# Chapter 13

## Directions about Propensity Evidence

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### INTRODUCTION

13.1 The Commission’s Terms of Reference required it to consider whether any particular jury directions should be amended or abolished. The Commission identified a number of issues for consideration in this respect in its Issues Paper, including whether it is necessary or desirable to re-cast any of the jury directions currently given in Queensland criminal trials or to consider reform of the law concerning the admissibility of prejudicial evidence.<sup>1</sup> With this in mind, the Commission drew particular attention in its Issues Paper and the Discussion Paper to propensity evidence warnings.<sup>2</sup> These directions are among the most difficult and complex for juries, largely as a result of the complexity of the underlying substantive law on the admissibility of propensity evidence. This chapter therefore considers their possible reform.

### PROPENSITY EVIDENCE

13.2 Propensity evidence about a defendant is evidence showing that the defendant has a propensity or disposition to commit crime, or crimes of the sort charged, or that the defendant is the sort of person likely to have committed the crime charged.<sup>3</sup> 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. When relied on in this way, propensity evi-

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1 See [12.1] above. The Terms of Reference are set out in Appendix A to this Report.

2 Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [4.68]–[4.79], [4.114]–[4.120]; Queensland Law Reform Commission, *A Review of Jury Directions*, Discussion Paper WP67 (2009) [6.30]–[6.105].

3 As a broad class of evidence, propensity evidence is not limited to evidence of a defendant’s bad character; it also covers good character evidence and evidence of a witness’s propensity. However, it is evidence of bad character adduced by the prosecution against the defendant that has attracted the most controversy and with which this discussion is concerned. Section 15 of the *Evidence Act 1977* (Qld) limits the circumstances in which the prosecution may cross-examine the defendant as to bad character: see n 4 below.

dence is a form of circumstantial evidence that invites inferential reasoning towards guilt. The defendant's bad character might also be revealed incidentally by the admission of evidence relevant for another purpose, such as credit.<sup>4</sup> There are thus three main classes of evidence to which the label 'propensity evidence' might attach, as shown in the following table:

Description	Example	Reasoning
Propensity evidence adduced for a specific and permissible propensity purpose and, thus, as circumstantial evidence of guilt	Similar fact evidence adduced to show modus operandi, identity etc	This involves 'specific' or 'permissible' propensity reasoning toward guilt
Evidence that reveals prior offending or misconduct only incidentally	Evidence that the charged offence occurred whilst the defendant was in prison for another offence	This does not involve specific propensity reasoning towards guilt; the evidence of other offending is simply entangled with the evidence of the present charge
Bad character evidence that is adduced to impugn the defendant's credibility	Evidence of prior convictions for perjury	This involves credibility reasoning such that the disclosure of misconduct is potentially discrediting of the defendant's evidence

**Table 13.1: Classes of propensity evidence**

13.3 Propensity evidence is, by its very nature, often highly relevant. It is often attended, however, by a heightened risk of unfair prejudice to the defendant, and possible prejudice to the fairness of the trial. The perceived danger is not only that the jury may over-estimate the probative value of the evidence — reasoning that the defendant must be guilty because he or she is the kind of person likely to have committed an offence — but also that the jury may seek to punish the defendant for past misconduct or may feel disinclined to give the defendant the full benefit of any reasonable doubt.<sup>5</sup> Functional and procedural considerations also arise:

[T]he proliferation of issues will call upon extra resources; the jury might become confused and substitute an element from the other alleged misconduct for an unproven element in the present charges; the defendant may be surprised by the raising of these other events at trial, and not in a position to respond to them; it will be

4 Under the *Evidence Act 1977* (Qld) s 15, the prosecution may cross-examine the defendant as to bad character in four circumstances:

- if the matter is probative of guilt;
- if the questions are directed to showing that another defendant is not guilty of the offence charged;
- if the defendant has sought to establish his or her own good character or has impugned the character of the prosecutor, a prosecution witness or any other person charged in the proceeding; or
- if the defendant has given evidence against another person charged in the proceeding.

In the first two situations, the evidence will be relevant to specific issues in the case. Similarly, evidence of good character may be used both for assessing the defendant's credibility and assessing the likelihood of the defendant's guilt: *Attwood v The Queen* (1960) 102 CLR 353, 359; *Melbourne v The Queen* (1999) 198 CLR 1 [156] (Hayne J). In the latter two situations, however, the evidence of bad character will go to credit only, necessitating a limited-use direction. See, for example, the suggested direction in the Queensland Benchbook to be given when bad character evidence is led to rebut the defendant's evidence of good character: Queensland Courts, Supreme and District Court Benchbook, 'Bad Character/Previous Convictions' [42.2]–[42.3] <<http://www.courts.qld.gov.au/2265.htm>> at 30 November 2009. That direction is set out in full in Appendix D to this Report.

5 Eg G Flatman and M Bagaric, 'Non-similar fact propensity evidence: Admissibility, dangers and jury directions' (2001) 75 *Australian Law Journal* 190, 199; D Hamer, 'The structure and strength of the propensity inference: Singularity, linkage and the other evidence' (2003) 29(1) *Monash University Law Review* 137, 140.

arduous for the defendant to be 'put to answer' not 'to one alleged event, but ... for a good part of her life'. Finally, on a broader policy level, it appears inconsistent with the goal of rehabilitation to allow a defendant's prior offences to be used against them. It would endorse a forensic strategy that could turn out to be self-fulfilling — the more the police focus on known offenders, the more difficult it is for them to rejoin mainstream society, leading to the creation of 'an underclass of "usual suspects"'.<sup>6</sup> (notes omitted)

13.4 The law has been concerned to exclude, or at least guard against, unfair prejudicial propensity reasoning (sometimes referred to as 'mere', 'general', or 'impermissible' propensity reasoning) that just because the defendant has engaged in other criminal or bad conduct, he or she is probably guilty of, or should be punished for, the offence charged:

It is in the eye of the law not generally permissible to seek to prove an accused guilty by showing the accused to have a propensity or disposition to commit crime or crime of a particular kind or that the accused was the sort of person likely to have committed the crime charged.<sup>7</sup>

13.5 Evidence of any kind that is otherwise relevant and admissible is, of course, subject to discretionary exclusion if its prejudicial effect exceeds its probative value or if its admission would render the trial unfair.<sup>8</sup> Because of the very high risk of prejudice to the defendant arising from propensity evidence, however, (and in an effort to curb unfair prejudicial propensity reasoning) the common law has, as a general policy, excluded propensity evidence unless it satisfies a further strict test of admissibility requiring a high degree of probative value.<sup>9</sup> The test, enunciated by the High Court in *Pfennig v The Queen*,<sup>10</sup> requires that there be no reasonable view of the evidence, taken as a whole, that is consistent with the innocence of the accused.<sup>11</sup> This is referred to in this chapter as the 'exclusionary rule'.

### ***HML v The Queen***

13.6 The common law position as to what evidence is subject to the exclusionary rule remains somewhat uncertain with the most recent High Court examination in *HML v The Queen*<sup>12</sup> having 'done little to resolve the tensions in this area'.<sup>13</sup> The position

6 D Hamer, 'The structure and strength of the propensity inference: Singularity, linkage and the other evidence' (2003) 29(1) *Monash University Law Review* 137, 140–141.

7 LexisNexis Australia, *Cross on Evidence*, 'Similar Fact Evidence: Relevance via disposition' [21030] (at 8 December 2009).

8 See generally 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 [21]–[25], [29] (Brennan CJ), [57]–[61], [62]–[65] (Toohey, Gaudron and Gummow JJ); *R v Butler* [2009] QCA 111 [106] (Keane JA). The discretion to exclude evidence because its prejudicial effect outweighs its probative value is sometimes referred to as the 'Christie discretion' after the decision in *R v Christie* [1914] AC 545. The discretion to exclude evidence if its admission would render the trial unfair because of an impropriety or unfairness in the way it was obtained is sometimes referred to as the 'Bunning v Cross discretion' after the decision in *Bunning v Cross* (1978) 141 CLR 54.

9 Eg *Pfennig v The Queen* (1995) 182 CLR 461, 512–3 (McHugh J).

10 (1995) 182 CLR 461.

11 *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 J), [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).

12 (2008) 235 CLR 334.

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.<sup>14</sup>

13.7 Thus, under the narrow view, the exclusionary rule applies only when the evidence is used for a propensity purpose (the 'use condition'); but under the broad view, evidence is caught by the exclusionary rule if it discloses prior misconduct, even if it is not sought to be used for that purpose (the 'contents' or 'disclosure' condition).<sup>15</sup> Hamer's summary continues:

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.<sup>16</sup> 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 prosecution 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.<sup>17</sup> (emphasis and note in original)

13.8 Under this 'narrow' view, evidence will be excluded if it is adduced for a propensity purpose unless it 'tends to show that the accused is guilty ... for some

13 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.

14 Ibid 3.

15 Andrew Palmer, 'Propensity, coincidence and context: The use and admissibility of extraneous misconduct evidence in child sexual abuse cases' (1999) 4(1) *Newcastle Law Review* 46, 49–50.

16 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.

17 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.

reason other than that he or she has committed crimes in the past or has a criminal disposition<sup>18</sup> 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.<sup>19</sup> In these circumstances, a limited form of propensity reasoning is permitted.

13.9 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<sup>20</sup> or as 'relationship' or 'context' evidence.<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup> (notes in original)

13.10 In *HML v The Queen*,<sup>25</sup> the High Court examined the admissibility of such evidence. The Court was divided.

13.11 Gummow, Kirby and Hayne JJ each separately upheld the 'broad' approach, holding that relationship 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.<sup>26</sup> In those

18 *Pfennig v The Queen* (1995) 182 CLR 461, 481 (Mason CJ, Deane and Dawson JJ).

19 See generally, LexisNexis Australia, *Cross on Evidence*, 'Similar Fact Evidence' [21040]–[21075] (at 10 December 2009). Also see, eg, *Gipp v The Queen* (1998) 194 CLR 106 [9]–[10] (Gaudron J).

20 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). Also see Queensland Courts, *Supreme and District Court Benchbook*, 'Bad Character/Previous Convictions' [42] <<http://www.courts.qld.gov.au/2265.htm>> at 30 November 2009.

21 See generally *R v Rae* [2008] QCA 385.

22 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.

23 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.

24 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.

25 (2008) 235 CLR 334.

26 *HML v The Queen* (2008) 235 CLR 334 [41] (Gummow), [46], [59]–[61] (Kirby J), [106], [113]–[117] (Hayne J).

circumstances, specific propensity (or probability) reasoning is permitted if the jury is satisfied of the truth of the evidence beyond reasonable doubt.<sup>27</sup> 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.<sup>28</sup> 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'.<sup>29</sup>

13.12 Gleeson CJ, Crennan and Kiefel JJ, on the other hand, in separate judgments 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, and that the *Pfennig* test does not apply.<sup>30</sup> 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.<sup>31</sup>

13.13 Heydon J did not decide the issue, so the case provides no authoritative position.<sup>32</sup>

## Statutory provisions

13.14 What the appropriate threshold for admission of propensity evidence should be, how it should be applied, and what evidence should be required to pass through it have long been and continue to be the subject of much debate.<sup>33</sup> As the Law Commission of New Zealand put it:

- 1 The disclosure of a defendant's previous convictions or misconduct to a jury has always been an intensely difficult area.
- 2 As a matter of logic, previous convictions or misconduct which point to a propensity to offend in the way now charged are relevant evidence. If a person has a propensity to offend, then it is somewhat more likely that person will have offended.
- 3 As a matter of human nature, previous convictions or misconduct can be prejudicial, particularly where the previous offending is of a distasteful

27 Ibid [29]–[32] (Gleeson CJ), [132] (Hayne J), [46], [61], [63] (Kirby J), [477] (Crennan J), [506] (Kiefel J).

28 Eg *ibid* [62] (Kirby J). And see the lengthy remarks of Hayne J at [119]–[133] about framing the appropriate directions set out in Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [4.117].

29 Ibid [116].

30 *HML v The Queen* (2008) 235 CLR 334 [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.

31 Ibid [26] (Gleeson CJ), [502] (Kiefel J).

32 Ibid [289], [335].

33 Lord Justice Auld commented, for example that:

This is a complex issue, for which there are no straightforward answers. It has been widely accepted for some time that reform is needed, but much dispute as to the form it should take: see, The Right Honourable Lord Justice Auld, 'Chapter 11: The Trial: Procedures and Evidence' in *Review of the Criminal Courts of England and Wales*, Report (2001) [115].

character. A fact finder can lose impartiality and balance, with corresponding risks that the trial will not be fair.

- 4 The difficulty has always been to balance these conflicting relevance and prejudice considerations.<sup>34</sup>

13.15 Kirby J pointed to some of the competing tensions informing the admission of propensity evidence in *HML v The Queen*.<sup>35</sup> On the one hand, a greater trust in juries might mean a greater willingness to admit potentially prejudicial propensity evidence:

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’.<sup>36</sup> 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.<sup>37</sup> In recent years, the House of Lords, in *Director of Public Prosecutions v P*<sup>38</sup> and *R v H*,<sup>39</sup> has demonstrated a greater willingness to trust juries with sensitive evidence than, for example, was apparent in the earlier case of *Boardman*.<sup>40</sup> Thus, Lord Griffiths, in the case of *H*,<sup>41</sup> 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.<sup>42</sup> 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.<sup>43</sup> (notes in original)

13.16 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.<sup>44</sup>

13.17 The complexities in this area of law have prompted different legislative attempts at clarification in several common law jurisdictions. In Queensland, the common law

34 Law Commission (New Zealand), *Disclosure to Court of Defendants’ Previous Convictions, Similar Offending, and Bad Character*, Report 103 (2008) [1]–[4].

35 *HML v The Queen* (2008) 235 CLR 334 [56](6).

36 *Doney v The Queen* (1990) 171 CLR 207 at 214.

37 cf *R v Best* [1998] 4 VR 603 at 611 per Callaway JA.

38 [1991] 2 AC 447.

39 [1992] 2 AC 596.

40 [1975] AC 421. See reasons of Crennan J at [443].

41 [1995] 2 AC 596 at 613.

42 cf reasons of Crennan J at [473].

43 *HML v The Queen* (2008) 235 CLR 334 [56](6).

44 *Ibid* [57](6).

applies, subject to section 132A of the *Evidence Act 1977* (Qld).<sup>45</sup> It provides that the mere possibility of collusion or suggestion in relation to similar fact evidence does not render the evidence inadmissible:<sup>46</sup>

**132A Admissibility of similar fact evidence**

In a criminal proceeding, similar fact evidence, the probative value of which outweighs its potentially prejudicial effect, must not be ruled inadmissible on the ground that it may be the result of collusion or suggestion, and the weight of that evidence is a question for the jury, if any.

13.18 A number of jurisdictions have gone further.

**South Australia**

13.19 In October this year, the Evidence (Propensity Evidence) Amendment Bill 2009 (SA) was introduced to the South Australian parliament. It proposes to insert a new section 34CC in the *Evidence Act 1929* (SA), to apply in proceedings for ‘major indictable offences’, in similar terms to section 398A of the *Crimes Act 1958* (Vic): see [13.22] below. The Bill is intended to move the test ‘towards favouring disclosure of the propensity evidence and leaving its weight to the jury’.<sup>47</sup> As at 14 December 2009, the Bill had not been debated in Parliament.

**Western Australia**

13.20 Section 31A of the *Evidence Act 1906* (WA), which was inserted to ‘provide the courts with greater capacity to admit propensity and relationship evidence’,<sup>48</sup> provides — in a ‘particularly inelegant’ formulation<sup>49</sup> — that the probative value of the evidence, ‘compared to the degree of risk of an unfair trial’, must be such that ‘fair-minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial’:

**31A. Propensity and relationship evidence**

(1) In this section —

**propensity evidence** means —

- (a) similar fact evidence or other evidence of the conduct of the accused person; or

45 Also see *Evidence Act 1977* (Qld) s 132B. It provides that, for certain types of criminal proceedings, relevant evidence of the history of the domestic relationship between the defendant and the person against whom the alleged offence was committed is admissible in the proceeding.

46 This provision overrides the effect of the decision in *Hoch v The Queen* (1988) 165 CLR 292 that because of the possibility of concoction between the three complainants, the evidence lacked the requisite probative force necessary for its admission. Similar provision applies in Western Australia: *Evidence Act 1906* (WA) s 31A(3). Contra *Evidence Act 2006* (NZ) s 43(3)(e).

47 South Australia, *Parliamentary Debates*, Legislative Council, 14 October 2009, 3524 (Hon DGE Hood) (Second Reading Speech).

48 See the Second Reading Speech of the Criminal Law Amendment (Sexual Assault and Other Matters) Bill 2004 (WA): Western Australia, *Parliamentary Debates*, Legislative Assembly, 30 June 2004, 4608 (Mr JA McGinty, Attorney General).

49 CR Williams and S Draganich, ‘Admissibility of propensity evidence in paedophilia cases’ (2006) 11(1) *Deakin Law Review* 1, 22.



- (b) evidence of the character or reputation of the accused person or of a tendency that the accused person has or had;

**relationship evidence** means evidence of the attitude or conduct of the accused person towards another person, or a class of persons, over a period of time.

- (2) Propensity evidence or relationship evidence is admissible in proceedings for an offence if the court considers —
  - (a) that the evidence would, either by itself or having regard to other evidence adduced or to be adduced, have significant probative value; and
  - (b) that the probative value of the evidence compared to the degree of risk of an unfair trial, is such that fair-minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial.
- (3) In considering the probative value of evidence for the purposes of subsection (2) it is not open to the court to have regard to the possibility that the evidence may be the result of collusion, concoction or suggestion.

### **Uniform Evidence Law**

13.21 Under sections 97 and 98 of the Uniform Evidence Law, evidence is inadmissible for tendency or coincidence purposes<sup>50</sup> unless the court considers that ‘the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value’. In addition, section 101 provides that tendency or coincidence evidence adduced by the prosecution cannot be used against the defendant unless ‘the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant’.

### **Victoria**

13.22 The Uniform Evidence Law will commence in Victoria on 1 January 2010. Until then, the position is governed by section 398A of the *Crimes Act 1958* (Vic), which was introduced in an attempt to overturn the *Pfennig* test.<sup>51</sup>

#### **398A Admissibility of propensity evidence**

- (1) This section applies to proceedings for an indictable or summary offence.

50 Under the Uniform Evidence Acts, tendency evidence is evidence ‘of the character, reputation or conduct of a person, or a tendency that a person has or had’ that is adduced ‘to prove that a person has or had a tendency (whether because of the person’s character or otherwise) to act in a particular way, or to have a particular state of mind’: s 97(1). Coincidence evidence is evidence that two or more events occurred that is adduced ‘to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally’: s 98(1). This means that coincidence evidence is led to prove that two events are *not* coincidences. For a recent discussion of the operation of these provisions, see Judge John Goldring, ‘Raven mad: “Scientific reasoning”; “tendency” and “coincidence” evidence’ (2009) 31 *Australian Bar Review* 308.

51 CR Williams and S Draganich, ‘Admissibility of propensity evidence in paedophilia cases’ (2006) 11 *Deakin Law Review* 1, 20. The test enunciated in s 398A(2) was adapted from one enunciated in *DPP v P* [1991] 2 AC 447, 460 (Lord Mackay) and inserted by *Crimes (Amendment) Act 1997* s 14. The *Statute Law Amendment (Evidence Consequential Provisions) Act 2009* (Vic), which was assented to on 24 November 2009 and will commence on 1 January 2010, repeals s 398A.

- (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.

### **New Zealand**

13.23 The test under the New Zealand legislation calls for a balancing of the probative value and prejudicial effect of the evidence. Under section 43 of the *Evidence Act 2006* (NZ), the prosecution may offer propensity evidence about a defendant in a criminal proceeding 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’. Section 43 of the Act also lists the matters for consideration when applying this test:<sup>52</sup>

#### **43 Propensity evidence offered by prosecution about defendants**

- (1) The prosecution may offer propensity evidence about a defendant in a criminal proceeding 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.
- (2) When assessing the probative value of propensity evidence, the Judge must take into account the nature of the issue in dispute.
- (3) When assessing the probative value of propensity evidence, the Judge may consider, among other matters, the following:
  - (a) the frequency with which the acts, omissions, events, or circumstances which are the subject of the evidence have occurred:
  - (b) the connection in time between the acts, omissions, events, or circumstances which are the subject of the evidence and the acts, omissions, events, or circumstances which constitute the offence for which the defendant is being tried:
  - (c) the extent of the similarity between the acts, omissions, events, or circumstances which are the subject of the evidence and the acts, omissions, events, or circumstances which constitute the offence for which the defendant is being tried:

<sup>52</sup> The New Zealand propensity evidence provisions were recently considered in a review by the New Zealand Law Commission, headed by the Hon Andrew McGechan QC, a retired judge of the High Court of New Zealand. It concluded that it was too early to assess the effect of the changes made by those provisions, introduced in 2006, and proposed to report on the situation again in early 2010. See Law Commission (New Zealand), *Disclosure to Court of Defendants’ Previous Convictions, Similar Offending, and Bad Character*, Report 103 (2008) iv.

- (d) the number of persons making allegations against the defendant that are the same as, or are similar to, the subject of the offence for which the defendant is being tried:
  - (e) whether the allegations described in paragraph (d) may be the result of collusion or suggestibility:
  - (f) the extent to which the acts, omissions, events, or circumstances which are the subject of the evidence and the acts, omissions, events, or circumstances which constitute the offence for which the defendant is being tried are unusual.
- (4) When assessing the prejudicial effect of evidence on the defendant, the Judge must consider, among any other matters,—
- (a) whether the evidence is likely to unfairly predispose the fact-finder against the defendant; and
  - (b) whether the fact-finder will tend to give disproportionate weight in reaching a verdict to evidence of other acts or omissions.

13.24 Under section 40 of the Act, ‘propensity evidence’ is defined as:

evidence that tends to show a person’s propensity to act in a particular way or to have a particular state of mind, being evidence of acts, omissions, events, or circumstances with which a person is alleged to have been involved [not including] evidence of an act or omission that is 1 of the elements of the offence for which the person is being tried.

13.25 The admissibility test applies if the evidence ‘tends to show’ a propensity, and would thus be wide enough to apply even if the evidence is not adduced for a propensity *purpose*. However, the Court of Appeal in New Zealand appears to have taken the view that evidence is ‘propensity evidence’, and thus subject to the higher threshold for admissibility, only if it is relied upon primarily for that purpose.<sup>53</sup>

## England

13.26 In England and Wales, the reception of propensity evidence against a defendant is governed by provisions in the *Criminal Justice Act 2003* (Eng),<sup>54</sup> which have been the subject of much criticism.<sup>55</sup> Under that Act, ‘bad character’ evidence includes evidence of previous offending (whether or not the subject of a conviction), other ‘reprehensible behaviour’ or a disposition towards such misconduct.<sup>56</sup> Under section 101(1), such evidence is admissible under that Act if it can pass through one of seven ‘gateways’:

- (1) In criminal proceedings evidence of the defendant’s bad character is admissible if, but only if—

53 See Zannah Johnston, ‘Recognising propensity evidence’ (2009) Sept, *New Zealand Law Journal* 284, discussing *R v Te Pania* [2007] NZCA 429; *R v R* [2008] NZCA 342; and *R v Gooch* [2009] NZCA 163.

54 *Criminal Justice Act 2003* (Eng) pt 11 ch 1. Those provisions were preceded by an extensive review by the English Law Commission: The Law Commission (England and Wales), *Evidence of Bad Character In Criminal Proceedings*, Report 273 (2001).

55 James Goudkamp, ‘Bad character evidence and reprehensible behaviour’ (2008) 12 *International Journal of Evidence & Proof* 116, 116–17, and the references cited there.

56 *Criminal Justice Act 2003* (Eng) ss 98, 112(1). ‘Reprehensible behaviour’ is not defined.

- (a) all parties to the proceedings agree to the evidence being admissible,
- (b) the evidence is adduced by the defendant himself or is given in answer to a question asked by him in cross-examination and intended to elicit it,
- (c) it is important explanatory evidence,
- (d) it is relevant to an important matter in issue between the defendant and the prosecution,
- (e) it has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant,
- (f) it is evidence to correct a false impression given by the defendant, or
- (g) the defendant has made an attack on another person's character.

13.27 For the purposes of 101(1)(d), the core gateway, a matter in issue includes the question whether the defendant has a propensity to commit offences of the kind charged, which may be established by proof of previous offending of the same description or in the same category. It also includes the question whether the defendant has a propensity to be untruthful.<sup>57</sup> Evidence is not admissible under gateway 101(1)(d), however, if it 'would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it'.<sup>58</sup>

13.28 Whilst the gateway determines the admissibility of the evidence, it does not necessarily restrain the purposes for which it may be used; once admitted, the evidence can be used for other relevant purposes.<sup>59</sup> As a result, it has been noted that 'there might at least be fewer arguments about the need for "intellectual acrobatics"' by fact finders where evidence is relevant both to credit and propensity.<sup>60</sup> However, jury directions on the relevance of the evidence, and warnings against placing undue reliance on previous convictions, are still required.<sup>61</sup> While there is no rigid formula, the judge should explain the following to the jury:

1. The mere existence of the convictions is not conclusive of guilt or untruthfulness.
2. Even if the convictions do show a propensity, that does not signify guilt or untruthfulness in the instant case.
3. Whether the convictions demonstrate a propensity is their decision.

57 *Criminal Justice Act 2003* (Eng) s 103.

58 *Criminal Justice Act 2003* (Eng) s 101(3).

59 Ben Fitzpatrick, 'Criminal Justice Act 2003: Bad character provisions' (2006) 70 *Journal of Criminal Law* 390, 396; Colin Tapper, *Cross and Tapper on Evidence* (11th ed, 2007) 430; *R v Highton* [2005] EWCA Crim 1985.

60 Ben Fitzpatrick, 'Criminal Justice Act 2003: Bad character provisions' (2006) 70 *Journal of Criminal Law* 390, 396.

61 Colin Tapper, 'The law of evidence and the rule of law' (2009) 68(1) *Cambridge Law Journal* 67, 87, citing *R v Edwards* [2005] EWCA Crim 1813; *R v Hanson* [2005] EWCA Crim 824; *R v Highton* [2005] EWCA Crim 1985; *R v MM* [2006] EWCA Crim 2317; *R v Murphy* [2006] EWCA Crim 3408; *R v Clarke* [2006] EWCA Crim 3427; *R v Awaritefe* [2007] EWCA Crim 706; *R v McDonald* [2007] EWCA Crim 1194. Also see Colin Tapper, *Cross and Tapper on Evidence* (11th ed, 2007) 430.

4. What the defendant has said about the previous convictions must be taken into account.
5. A finding of propensity is only one relevant issue in the determination of guilt and must be considered in the light of all the other evidence.<sup>62</sup>

## Propensity directions

13.29 Whatever the basis on which propensity evidence is admitted, it remains that the jury will probably need to be warned against unfair propensity reasoning and about the uses to which it may put the evidence.<sup>63</sup> Thus, as noted above, jury warnings are required even under the English provisions where propensity evidence, once admitted, may be used for any relevant purpose.<sup>64</sup> As Kirby J explained in *BRS v The Queen*:

The basis in legal policy for judicial directions to juries on the differential use of evidence admitted in a trial is the judge's obligation to assist the jury in the performance of their task. Without assistance, there could be a risk that a jury will act upon prejudice towards, or revulsion against, the accused. They might fall into the trap of propensity reasoning, ie concluding that because the accused did another act, he or she must be guilty of the acts charged. They might divert their attention from considering whether the prosecution has proved the crimes charged, as distinct from different acts which are not before the jury for trial.

The judge should not invite the jury to act irrationally for such invitations will be ignored. In a limited number of cases, propensity reasoning will be permitted. But otherwise, the judge must assist the jury in the limited use to which the evidence may be put since the jury, uninstructed, are not likely to be aware of such considerations and of the need for particular care.<sup>65</sup> (notes omitted)

13.30 The directions required in any given case will depend on the nature of the evidence and the purposes for which it was introduced.<sup>66</sup> The Queensland Benchbook contains some dozen suggested directions dealing with evidence of previous convictions or bad character, similar fact evidence and evidence of uncharged discreditable conduct, as well as a general propensity warning.<sup>67</sup>

62 Ben Fitzpatrick, 'Bad character: Criminal Justice Act 2003; Defendant's Bad Character; s. 101 "gateways"' (2006) 70 *Journal of Criminal Law* 109, 114, citing *R v Edwards* [2005] EWCA Crim 1813. And see *R v Hanson* [2005] EWCA Crim 824 [18].

63 Eg *BRS v The Queen* (1997) 191 CLR 275, 328–32 (Kirby J); *Gipp v The Queen* (1998) 194 CLR 106 [10] (Gaudron J). In jurisdictions that have modified that the admissibility of propensity evidence, cautionary warnings with respect to propensity evidence may still be required: see, generally, Thomson Reuters Online Service, SJ Odgers, *Uniform Evidence Law*, 'Jury directions' [1.3.7400] (at 13 November 2009); Lexis Nexis Online Service, I Weldon, *Criminal Law WA*, 'Propensity warning' [30,167.10] (at 13 November 2009); Law Commission (New Zealand), *Disclosure to Court of Defendants' Previous Convictions, Similar Offending, and Bad Character*, Report 103 (2008) [3.93], [4.24].

64 See [13.28] above. Also see, for example, *R v Johnson* [2009] 2 Cr App R 7 [22]–[25] (Kay LJ).

65 *BRS v The Queen* (1997) 191 CLR 275, 326–7.

66 Eg *R v Pretorius* [2009] QCA 58 [61]–[63] (Muir J).

67 Queensland Courts, *Supreme and District Court Benchbook*, 'Bad Character/Previous Convictions' [42]; 'Similar Fact Evidence' [50]; 'Evidence of other Sexual (or violent) Acts or other "Discreditable Conduct"' [66] <<http://www.courts.qld.gov.au/2265.htm>> at 30 November 2009. These include the following: 'Bad Character/Previous Convictions of Witness' [42.1]; 'Evidence as to the defendant's previous convictions or bad character where he has made an issue of his own character or that of prosecution witnesses' [42.2]; 'Evidence directed to showing that the defendant is guilty of the offence charged' [42.3]; 'Evidence directed to showing that a co-defendant is not guilty' [42.4]; 'Where the defendant has given evidence against a co-defendant' [42.6]; 'Where the defendant's convictions are inadvertently raised in the course of the trial' [42.6]; 'Where the Crown seeks to establish the defendant's identity as the offender' [50.1]; 'Where the Crown seeks to establish the defendant's modus operandi' [50.2]; 'Where the Crown have joined charges against a number of complain-

13.31 Propensity evidence directions have been noted as particularly problematic examples of limited-use directions,<sup>68</sup> and their efficacy in neutralising the prejudicial effect of such evidence has been doubted.<sup>69</sup> There appear to be two main problems.

13.32 The first is that they require a mental compartmentalisation of the evidence that may seem both counter-intuitive and intellectually difficult, if not impossible. One example is when the evidence can be used to assess the defendant's credit, but not his or her guilt. An especially 'artificial and incomprehensible' distinction is also sometimes drawn between permissible ('specific') and impermissible ('general' or 'mere') propensity reasoning<sup>70</sup> — for example, where the jury may reason that, because the accused committed similar acts in the past, perhaps with the same distinctive modus operandi or such as to show a sexual interest in the complainant, it is likely that he or she is the person who committed the offence charged — but may not reason that, just because the accused has committed other offences, he or she is a bad person and therefore the kind of person who is likely to be guilty. Such directions have, understandably, been criticised as 'contradictory'.<sup>71</sup> This difficulty can be seen by comparing the suggested direction in the Queensland Benchbook on evidence of uncharged sexual acts, which reads, in part, that:

**[I]f you are satisfied that the evidence demonstrates that the defendant had a sexual interest in the complainant and that the defendant had been willing to give effect to that interest by doing those other acts ... you may think that it is more likely that the defendant did what is alleged in the charge(s) under consideration.**<sup>72</sup>

with the general propensity warning that may sometimes be given in the same case and which cautions that:

**If you accept [the evidence of the incidents not the subject of charges], you must not use it to conclude that the defendant is someone who has a tendency to commit the type of offence with which he is charged; so it would be quite wrong for you to reason you are satisfied he did those acts on other occasions, therefore it is likely that he committed a charged offence or offences.**<sup>73</sup>

13.33 While the subtleties of this intellectual and esoteric distinction may be sound in theory for lawyers, it is unrealistic to expect ordinary people to grasp it or engage with it. Moreover, an insistence on the distinction, insofar as the jury is concerned, would seem to obscure the fact that, while there may be an intermediate step in the inferential

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ants' [50.3]; 'Other Sexual Activity' [66.1]; 'Discreditable (or violent) Conduct' [66.2]; 'General Propensity Warning' [66.4]. These are set out in full in Appendix D to this Report.

68 Eg Hon J Wood AO QC, 'Jury directions' (2007) 16 *Journal of Judicial Administration* 151, 155.

69 Studies in other jurisdictions have shown, for example, that limiting instructions may be of little or no effect with respect to prior conviction evidence: eg RL Wissler and MJ Saks, 'On the inefficacy of limiting instructions: When jurors use prior conviction evidence to decide on guilt' (1985) 9(1) *Law and Human Behavior* 37; E Greene and M Dodge, 'The influence of prior record evidence on juror decision making' (1995) 19(1) *Law and Human Behavior* 67; KL Pickel, 'Inducing jurors to disregard inadmissible evidence: A legal explanation does not help' (1995) 19(4) *Law and Human Behavior* 407.

70 Hon J Wood AO QC, 'Jury directions' (2007) 16 *Journal of Judicial Administration* 151, 155.

71 Eg 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.

72 Queensland Courts, *Supreme and District Court Benchbook* [66.1]–[66.2] <<http://www.courts.qld.gov.au/2265.htm>> at 30 November 2009.

73 *Ibid* [66.4] at 30 November 2009.

reasoning involved (for example, an inference about the defendant's modus operandi, motive or intention), the real reason propensity evidence is adduced is to show propensity and thus a greater likelihood of guilt.<sup>74</sup>

13.34 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.<sup>75</sup>

13.35 In his review of the criminal courts of England and Wales, Lord Justice Auld pointed to the somewhat paradoxical view of juries that underlies such directions:

Prominent among the reasons for retaining a lay element in the administration of criminal justice is a belief in their worldly judgment and common sense. Magistrates and jurors are seemingly trusted now, where as a result of the conduct of a defendant's case his previous bad character goes in, to distinguish between its relevance to his credibility but not to his propensity, a distinction which must be incomprehensible to most jurors and, possibly to many magistrates. Yet they are not to be trusted as a generality to assess such evidence for themselves.<sup>76</sup>

13.36 He noted the complexities of the law in this area and expressed the view that the technical rules of admissibility of evidence should give way to greater trust in judicial and lay fact-finders 'to give relevant evidence the weight it deserves'.<sup>77</sup> Empirical research confirming the prejudicial impact of such evidence on juries may, however, put such faith in some doubt.<sup>78</sup>

13.37 The second problem with propensity warnings is that they may backfire: by drawing attention to an impermissible line of reasoning, the jury may become more attuned to, and thus more inclined to employ, such reasoning.<sup>79</sup> This is perhaps most likely to arise when the evidence of other misconduct is revealed only incidentally and is not expressly relied on for a propensity purpose. In those situations, a warning from the judge may do no more than draw attention to a prohibited line of propensity reasoning that might otherwise have gone unnoticed. Warnings might also be counter-productive if they come too late in the trial: if the propensity evidence has assumed a central role in the trial, the intuitive line of reasoning which it invites may already have impressed itself on the jurors' minds and an admonition at the end of the trial may have little effect or, worse, re-emphasise the reasoning it seeks to discourage. In those cases, earlier directions might be helpful.

74 See, for example, the following observation about the propensity evidence provisions of the *Evidence Act 2006* (NZ):

Similar fact evidence or character evidence has finally been called what it actually is — evidence of propensity — in sections 40 to 43 of the Act. 'Propensity' is no longer a dirty word in the law of evidence, and the drafters of the Act clearly accepted that evidence showing that the accused has previously done substantially similar acts to those alleged shows that the accused has a *propensity* to commit such acts, and is therefore more likely to have committed the acts in issue: P Williams, 'Evidence in criminal law: Codification and reform in the Evidence Act 2006' (2007) 13 *Auckland University Law Review* 228, 235–6.

75 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [3.136].

76 The Right Honourable Lord Justice Auld, 'Chapter 11: The Trial: Procedures and Evidence' in *Review of the Criminal Courts of England and Wales*, Report (2001) [120].

77 Ibid [78], [113].

78 See [12.8] above.

79 See [12.12] above.

## NSWLRC's Consultation Paper

13.38 The NSWLRC noted the risk that propensity warnings may backfire in its Consultation Paper:

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.<sup>80</sup> (notes omitted)

## VLRC's proposals and recommendations

13.39 Propensity warnings were also discussed at some length in the VLRC's Consultation Paper.<sup>81</sup> One of the questions posed in that Paper was whether it would be appropriate to simplify the content of propensity directions.<sup>82</sup> In particular, the VLRC noted the following proposed approach to the simplification of propensity warnings as a possible model for reform:

The approach suggested by Leach

3.144 One American writer suggests we acknowledge that evidence of 'other acts'<sup>83</sup> 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.<sup>84</sup> 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.

80 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [8.45]. See generally *ibid* [8.2]–[8.18], [8.43]–[8.47].

81 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) ch 3.

82 *Ibid* [3.143]–[3.149].

83 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.

84 *Ibid* 850, 852.



- 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.<sup>85</sup>
- 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.<sup>86</sup> (notes in original)

13.40 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.<sup>87</sup>

### **Submissions**

13.41 Some of the respondents to the VLRC's Consultation Paper 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.

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.<sup>88</sup>

13.42 A judge of the County Court of Victoria also submitted that the directions in relation to propensity evidence should be simplified.<sup>89</sup>

13.43 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

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85 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.

86 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [3.144]–[3.146].

87 *Ibid*.

88 Associate Professor John Willis, Submission to the Victorian Law Reform Commission, 16 December 2008, 13.

89 Judge MD Murphy, Submission to the Victorian Law Reform Commission, 5 February 2009, 4.

the proposal for judicial warnings to the jury on the propensity evidence — particularly in relation to the limitation of such evidence.<sup>90</sup>

13.44 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.<sup>91</sup> 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.<sup>92</sup> (note added)

13.45 A number of respondents also commented specifically on directions about evidence of uncharged acts. Odgers was one:

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.<sup>93</sup>

13.46 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’.<sup>94</sup>
- 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?<sup>95</sup>

90 Victoria Legal Aid, Submission to the Victorian Law Reform Commission, 9 December 2008 [2.7].

91 See [13.46] below.

92 Stephen Odgers SC, Submission to the Victorian Law Reform Commission, 12 November 2008, 5.

93 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, Submission 13, 19 June 2009.

94 S Odgers, ‘Editorial: “Relationship” evidence’ (2007) 31(5) *Criminal Law Journal* 269, 269.

95 Ibid.

- 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.<sup>96</sup>
- 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 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’.<sup>97</sup>
- 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.<sup>98</sup>

13.47 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 [13.45] above demonstrates the mental agility that these directions demand of jurors.

13.48 Concern about the High Court’s decision in *HML v The Queen*<sup>99</sup> 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?<sup>100</sup>

96 Ibid 269–70.

97 Ibid 270.

98 Ibid 271.

99 (2008) 235 CLR 334.

100 Patrick Tehan QC, Submission to the Victorian Law Reform Commission, 26 November 2008 [1].

### **VLRC's recommendations**

13.49 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<sup>101</sup> 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 warning a jury about propensity reasoning, adopting and suitably modifying the model suggested by Leach.<sup>102</sup>

### **The Issues Paper**

13.50 Propensity evidence directions, including those required in relation to evidence of uncharged acts given in sexual offence cases, were discussed in chapter 4 of the Commission's Issues Paper.<sup>103</sup>

### **Submissions**

13.51 Only a few of the respondents to the Commission's Issues Paper addressed this issue. 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<sup>104</sup> 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 propen-

101 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) 14, [51.02]–[51.117], Rec 13.

102 Ibid Rec 39. The model suggested by Leach is described at [13.39] above.

103 See Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [4.68]–[4.79], [4.114]–[4.120].

104 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.

sity evidence. The modern jury should be able to take it into account.<sup>105</sup> (note added)

13.52 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,<sup>106</sup> or more so by the enactment in Queensland of a provision similar to section 398A of the *Crimes Act 1958* (Vic).<sup>107</sup>

13.53 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.<sup>108</sup>

## The Discussion Paper

13.54 In its Discussion Paper, the Commission observed that it seems overly optimistic to expect jurors to act on the subtle and difficult distinctions drawn by the law in this area; and that, 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 unnecessarily confused in the way they go about evaluating and weighing it. The Commission identified a number of options for reform with this goal in mind:

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105 Submission 10. A review of the sort advocated by this respondent is beyond the scope of the Commission's present Terms of Reference.

106 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.

107 Submission 10A. Section 398A of the *Crimes Act 1958* (Vic) is set out at [13.22] above. That section is to be repealed by the *Statute Law Amendment (Evidence Consequential Provisions) Act 2009* (Vic), which was assented to on 24 November 2009 and will commence on 1 January 2010.

108 Submission 2. See also Submission 5.

- 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.
  - (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.<sup>109</sup>

### **Further submissions**

13.55 Legal Aid Queensland ('LAQ') objected to the options for reform identified in the Discussion Paper, citing the same comments that it made in relation to limited use evidence generally; namely, that the difficulties associated with these directions result from the complexities of the underlying substantive law and that attempts at reform should not proceed without a wider review of the laws of evidence because of the risk that changes may result in unfairness to defendants.<sup>110</sup>

13.56 The Office of the Director of Public Prosecutions ('ODPP') also expressed concern about the notion of providing that once evidence of propensity is admitted, it may be used for all relevant purposes. In its view, this may see propensity evidence excluded more often, rather than admitted with directions to the jury. The ODPP submitted that the admission of propensity evidence is already very difficult, it is hard to understand why it should be made even more difficult. The ODPP expressed a preference for more liberal admission of propensity evidence. In its view, the dangers of propensity evidence are grossly overstated.<sup>111</sup>

109 Queensland Law Reform Commission, *A Review of Jury Directions*, Discussion Paper WP67 (2009) 199–200, Proposals 6-3 to 6-5. See also *ibid* [6.14]–[6.29], 184, Proposals 6-1 and 6-2.

110 Submission 16A, 13. See [12.38]–[12.41] above.

111 Submission 15A.

13.57 The ODPP was happy, however, with Proposal 6-4. In its view, the simplification of propensity directions along the lines of the Commission's proposal would be an improvement to the present system.<sup>112</sup>

13.58 The Bar Association of Queensland ('BAQ') opposed both Proposals 6-3 and 6-4.<sup>113</sup> In its view, it would be inappropriate to do away with the need for general propensity warnings. The BAQ submitted that the 'similar fact evidence' direction in the Queensland Benchbook is the appropriate template for the necessary directions:

The premise that juries are not permitted to proceed on the basis that because the accused had committed other offences, he or she is generally the sort of person who might commit the present offence, is fundamental. Accordingly and for this reason alone, this Association would oppose the suggested reform in 6.3 as potentially being a radical and sweeping reform opposed to a substantial body of jurisprudence and inconsistent with the warnings sought to be preserved by proposal 6-4.

It is our view that the existing '*similar fact evidence*' direction in the Supreme and District Courts Bench Book is an appropriate template.<sup>114</sup> It has features in common with the suggested model from the VLRC, is well explained and well footnoted.<sup>115</sup> (note added)

13.59 The BAQ was also concerned that the Commission's Proposals did not clarify the types of evidence it intends to be captured:

The Association accepts that propensity evidence is a difficult area and that *HML v. The Queen*<sup>116</sup> may have done little to resolve all of the tensions in this area.

Although the proposals appear to be directed at evidence in the nature of 'uncharged acts', they are not expressly so limited and if anything is seen as being resolved by the decision in *HML*, it is this category of evidence, at least as far as the prosecution rely upon it to prove a sexual attraction to a particular complainant and it has that capacity.

Accordingly it is respectfully suggested that it is not clear as to what is meant to be comprehended by 'propensity evidence' in the proposals or as to precisely what is sought to be achieved. Also it is not clear as to why there is separate and disjunctive reference to use of propensity evidence in proof of a particular state of mind, as this is more usually proved by reference to the circumstances relevant to and surrounding the act in issue.<sup>117</sup> (note in original)

13.60 While the BAQ submitted that 'no particular need for reform arises in this area', it nonetheless endorsed the suggestion in Proposal 6-5 that 'propensity warnings should be given at the time the evidence is heard'.<sup>118</sup>

112 Ibid.

113 Submission 13A. The Queensland Law Society endorsed and supported the whole of the submissions by the Bar Association of Queensland: Submission 13B.

114 See Supreme and District Courts Benchbook, 'Similar Fact Evidence' [50] <<http://www.courts.qld.gov.au/2265.htm>> at 13 November 2009. This is set out in full in Appendix D to this Report.

115 Submission 13A, 24.

116 (2008) 235 CLR 334.

117 Submission 13A, 23–4.

118 Ibid 24.

## The QLRC's views

13.61 It is evident to the Commission that the law on propensity evidence is not only very complex — for lawyers, judges and juries alike — but is in an unsatisfactory state of uncertainty. The Commission notes in this regard the lack of consensus between the several Australian and other common law jurisdictions canvassed in this chapter that have attempted legislative reform in this area. In the Commission's analysis, propensity directions are clearly in need of reform, but it is neither possible nor desirable to consider such reform without also dealing with the question of admissibility. It agrees with Legal Aid Queensland's submission that the complexity of propensity directions results from the complexity of the underlying substantive law.

13.62 'Propensity evidence' captures a broad range of evidence, as shown in Table 13.1 above, and there is considerable fluidity within its boundaries and between its sub-categories. Even on the limited analysis in this chapter, it is apparent that different types of propensity evidence are adduced for different purposes and only sometimes for specific propensity purposes, but that **all** such evidence potentially carries the risk of unfair prejudicial (and thus impermissible) propensity reasoning. As noted earlier in this chapter, it is this latter form of reasoning — jumping from evidence of other misconduct to a conclusion of guilt — that, properly in the Commission's view, the law is concerned to guard against.<sup>119</sup>

13.63 In the Commission's view, the common law exclusionary rule in *Pfennig v The Queen*<sup>120</sup> is failing. Despite its recent consideration by the High Court in *HML v The Queen*,<sup>121</sup> the scope of the rule remains unclear and confused and leaves open a number of unsatisfactory possibilities. Under the narrow approach, where the rule applies only if the evidence is adduced for a propensity purpose:

- evidence so adduced will have to meet a higher threshold admissibility test but, if admitted, may still involve a risk of unfair prejudicial reasoning despite, and in some instances by virtue of, its high probative value; and
- evidence that only incidentally reveals prior misconduct will not need to meet a higher threshold for admission and will thus more readily be introduced despite it, too, potentially carrying a risk of unfair prejudicial propensity reasoning.

13.64 Under the broad approach, where the rule applies when the evidence reveals prior misconduct even if it is not adduced for a propensity purpose:

- evidence that does not depend on propensity reasoning for its relevance and probative value may nonetheless be excluded for failing to meet the higher threshold test; but
- even when such evidence is admitted, it may still involve a risk of unfair prejudicial propensity reasoning.

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119 See [13.4] above.

120 (2008) 235 CLR 334.

121 (1995) 182 CLR 461.



13.65 On either approach, the trial judge is faced with the difficult task of appropriately characterising the evidence in question to determine whether the exclusionary rule applies. Relationship evidence is an example of the vastly divergent views that different judges — even the experienced judges of the High Court — can take in this regard.

13.66 The exclusionary rule appears to have created more, rather than less, confusion among lawyers, judges and, ultimately, juries. It begs the question — that is still unresolved by the common law — of what evidence it applies to. It gives rise to unhelpful and tortuous intellectual exercises by judges in order to admit relevant and probative evidence despite the exclusionary rule; for example, by characterising evidence of uncharged discreditable conduct as mere context evidence rather than as evidence of propensity. Juries are then also confronted with these artificial distinctions by being given complex directions about the particular uses to which they may put the evidence.

13.67 Moreover, under either interpretation, the exclusionary rule does not itself fully mitigate the risk of unfair prejudicial propensity reasoning. The only way to do so would be by way of blanket exclusion of all propensity evidence, a clearly unsatisfactory approach given that it would exclude much relevant and probative evidence.

13.68 One of the consequences of all of this is that the directions required to be given to juries are unnecessarily complex and confusing both for judges and juries. The result is that judges are at greater risk of error in their summings up, with the attendant risk of re-trial, and that juries will be unable or unwilling to comply with the directions; in neither case has the law done its best to guard against unfair trials.

13.69 The Commission agrees with the judicial and academic commentary and available empirical evidence canvassed in this chapter that propensity directions are overly complex, difficult to apply, and potentially counter-productive.<sup>122</sup> Instructions to use evidence of uncharged acts, for example, as evidence of relationship or background but not as evidence of a propensity to commit offences of the sort charged are especially problematic. The Commission considers that directions on the way in which the jury may use propensity evidence may also overshadow and undermine the more general admonition against ‘mere’ propensity reasoning. It is, in the Commission’s view, this warning that is of crucial significance and which ought to be given to juries when they are confronted with propensity evidence. The Commission agrees with the submission of the Bar Association of Queensland that such a warning should be retained; it considers, however, that such a warning should not be confined to ‘similar fact’ evidence but should be available with respect to all types of ‘propensity evidence’ when necessary.

13.70 The Commission considers that, rather than continue to burden juries with difficult distinctions between permissible and impermissible uses of ‘propensity evidence’, the focus should be on ensuring that the evidence that is admitted for the jury’s consideration is relevant and probative to an issue in the trial so that its use and weight can be left to the jury, subject only to a general warning against unfair propensity reasoning. As with evidence of lies or other post-incident conduct, the Commission considers that propensity evidence is highly variable, context-dependent and properly a matter for the jury.<sup>123</sup>

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122 See [13.31]–[13.37] above.

123 See [14.52] below.

13.71 To that end, the Commission considers that there is little merit in continuing to distinguish, at the stage of admission, between different types of ‘propensity evidence’ or, indeed, between ‘propensity’ and other categories of evidence. As the operation of the current exclusionary rule shows, it can be very difficult to determine whether evidence is ‘propensity evidence’ or not. Rather than have the admissibility of such evidence prima facie determined on the basis of such unsatisfactory categorisations, the Commission is inclined to the view that admissibility should be determined on the same basis as any other evidence. In this way, evidence will be admissible if it is relevant and probative of a fact in issue, unless the judge considers that it should be excluded. The Commission acknowledges that propensity evidence will often, by its nature, tend to have a higher prejudicial effect than other forms of evidence and should not, therefore, be admitted lightly. However, the Commission considers that the trial judge’s discretion to exclude evidence if its probative value is outweighed by its prejudicial effect, or if its admission would otherwise be unfair,<sup>124</sup> should be sufficient safeguard in this respect.

13.72 The Commission is therefore inclined to the view that the test for admission of ‘propensity evidence’, enunciated in *Pfennig v The Queen*<sup>125</sup> — that such evidence is inadmissible unless there is no reasonable view of the evidence that is consistent with the innocence of the accused — should be removed, and that propensity warnings should be simplified. There should no longer be a rule that evidence is prima facie inadmissible simply because it is ‘propensity evidence’. Neither should judges continue to be required to direct the jury as to what inference it may draw from such evidence; once admitted, propensity evidence should be admissible for any purpose, including a specific propensity purpose, but this should be a matter for the jury alone. The Commission does not intend that this would remove the requirement for the judge to instruct the jury, in those cases and circumstances where it is necessary to do so, that they may act on the evidence only if they are satisfied the defendant actually engaged in the other misconduct.

13.73 The Commission notes the concern of the Director of Public Prosecutions that the combined effect of such provisions might lead to the exclusion of evidence more often than is presently the case. Whether this would be so is unclear; the Commission nonetheless considers it preferable that the fairness of criminal trials is not left to rest on elaborate and confusing propensity directions that juries are unlikely to be able to follow.

13.74 Further, the Commission considers that a propensity warning should be given only if the judge considers there is a risk that the jury may engage in unfair prejudicial propensity reasoning (though this may nonetheless be quite often), and should be given in simple terms. In some instances, evidence that reveals a prior conviction or other misconduct will be of such limited consequence in the trial that the trial judge may properly consider that there is no need for a warning or that a warning may be counter-productive. In many cases, however, a warning against reasoning that, just because the defendant has engaged in some other misconduct, he or she is probably guilty of, or ought to be punished for, the offence charged will be necessary in the interests of ensuring a fair trial.

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124 See [13.5] above.

125 (1995) 182 CLR 461.

13.75 As noted earlier, the Commission considers that the requirement to give such warnings is of critical importance to the fairness of criminal trials and should be retained. It also notes the experimental research conducted by the University of Queensland which shows that simplified directions are effective at encouraging jurors to adopt a generally more cautious and objective approach to the evidence and to place less reliance on stereotypes and personal beliefs.<sup>126</sup> The Commission considers that this is of particular importance in the context of propensity evidence.

13.76 The Commission favours and recommends an approach that is generally consistent with its recommendations in relation to directions about lies and other post-incident conduct in chapter 14 of this Report,<sup>127</sup> and that is also generally consistent with the approach adopted by the Victorian Law Reform Commission.<sup>128</sup>

13.77 The Commission acknowledges Legal Aid Queensland's concern that attempts at reform in this area must proceed cautiously. The Commission's review is not one of the wider laws of evidence. It is clear within the context of this review that the difficulties associated with propensity directions are closely connected with the rules of admissibility of propensity evidence. It is also clear to the Commission that the law on propensity evidence, including its admissibility, is in an unsatisfactory state and in need of reform. This review presents an opportunity for the Commission to recommend appropriate reforms and the Commission is reluctant to let this opportunity pass. It would nonetheless be imprudent for the Commission to recommend sweeping changes to the law without giving it adequate consideration. The Commission notes in this regard that it put forward proposals in its Discussion Paper for such changes on which it sought, and received, submissions from the peak professional bodies involved in criminal trials in Queensland and to which the Commission has had regard. After serious consideration, and on balance, the Commission considers it appropriate to make the recommendations set out below.

13.78 The Commission also considers that if its recommendations are not implemented as a result of this review, there should be a review of the law on propensity evidence in Queensland with a view to its reform.

13.79 In addition, the Commission anticipates that its recommendations in chapter 9 of this Report for the use of integrated directions in the summing up will improve the comprehensibility of propensity directions.<sup>129</sup> It does not consider it necessary, in light of its recommendation that the judge may address the jury on the law or the evidence at any time during the trial,<sup>130</sup> however, to recommend a provision, as proposed in its Discussion Paper, for the judge to give propensity warnings when the evidence is heard. To do so may be unduly restrictive of the judge's discretion as to the timing of directions.<sup>131</sup>

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126 School of Psychology, University of Queensland (Blake McKimmie and Kathryn Havas), 'An Experiment to Test the Effect of Simplifying Directions', Report (November 2009).

127 See [14.48]–[14.56], Rec 14-1 below.

128 See [13.39], [13.49] above.

129 See [9.79]–[9.130], Rec 9-4 to 9-6 above.

130 See Rec 9-3 above.

131 Also see [12.51]–[12.52] above.

## Recommendations

13.80 The Commission makes the following recommendations:

**13-1 The *Evidence Act 1977* (Qld) should be amended to:**

- (1) remove the exclusionary rule in *Pfennig v The Queen* (2008) 235 CLR 334 that applies to propensity evidence and to provide that evidence is not inadmissible simply because it is evidence that shows the defendant has engaged in other criminal acts or misconduct;**
- (2) provide that, if evidence that shows that the defendant has engaged in other criminal acts or misconduct is admitted 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;**
- (3) provide that, notwithstanding paragraph (2), if the judge considers that the jury may engage in unfair prejudicial propensity reasoning in relation to the evidence, or if the defendant so requests and the judge considers it appropriate to do so, the judge must warn the jury that:
  - (a) evidence that the defendant has engaged in other criminal or other misconduct is not conclusive of guilt. It is no more than one fact to be considered in combination with all the other facts;**
  - (b) it would be improper to decide that, simply because the defendant has engaged in other criminal or other misconduct before, he or she is probably guilty, without considering all the other evidence; and**
  - (c) the jury must not seek to punish the defendant for any other act — the defendant is only on trial, and liable to be punished, for the charges currently against him or her; and****
- (4) provide that, if a warning is given under paragraph (3), it may be given in general terms.**

**13-2 If the recommendations in 13-1 above are not implemented, there should be a review of the law on propensity evidence in Queensland with a view to its reform.**

# Chapter 14

## Directions about Evidence of Post-Incident Conduct

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### INTRODUCTION

14.1 The Terms of Reference for this review required the Commission to consider whether any particular jury directions should be amended or abolished and the Commission sought submissions to that end in its Issues Paper.<sup>1</sup> Both the Issues Paper and the Discussion Paper drew specific attention in this regard to, among other matters, the warnings given about evidence of lies or other post-incident conduct (sometimes called ‘consciousness of guilt’ directions).<sup>2</sup> These directions involve unnecessary complexity and confusion for juries. This chapter therefore considers their possible reform.

### POST-INCIDENT CONDUCT WARNINGS (CONSCIOUSNESS OF GUILT)

14.2 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; that is, it may be argued that a lie told by a defendant amounts to an implied admission of guilt.<sup>3</sup>

14.3 In such cases, the jury must be satisfied that the defendant’s lie reveals some knowledge of the offence and that it was told because of a realisation of guilt. An Edwards direction<sup>4</sup> — 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

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1 See [12.1] above. The Terms of Reference are set out in Appendix A to this Report.  
2 Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [4.63]–[4.67]; Queensland Law Reform Commission, *A Review of Jury Directions*, Discussion Paper WP67 (2009) [6.72]–[6.105].  
3 *Edwards v The Queen* (1993) 178 CLR 193, 208 (Deane, Dawson and Gaudron JJ).  
4 See *Ibid*.

indicate that it constitutes an admission must be precisely identified.<sup>5</sup> Also, if an alternative lesser offence is available, the judge must instruct the jury that, if the lie shows a realisation of guilt, it may show such a realisation with respect to the lesser, and not necessarily the primary, offence.<sup>6</sup> Warnings about lies are required so that the jury does not unfairly reason that, simply because the defendant lied, he or she must be guilty.<sup>7</sup>

#### 14.4 The requirements of the warning were set out in the High Court's decision in *Edwards v The Queen*:

[I]n any case where a lie is relied upon to prove guilt, the lie should be precisely identified, as should the circumstances and events that are said to indicate that it constitutes an admission against interest. And the jury should be instructed that they may take the lie into account only if they are satisfied, having regard to those circumstances and events, that it reveals a knowledge of the offence or some aspect of it and that it was told because the accused knew that the truth of the matter about which he lied would implicate him in the offence, or, as was said in *Reg v Lucas (Ruth)*, because of 'a realisation of guilt and a fear of the truth'.

Moreover, the jury should be instructed that there may be reasons for the telling of a lie apart from the realization of guilt. A lie may be told out of panic, to escape an unjust accusation, to protect some other person or to avoid a consequence extraneous to the offence. The jury should be told that, if they accept that a reason of that kind is the explanation for the lie, they cannot regard it as an admission.<sup>8</sup> (notes omitted)

14.5 An Edwards direction will be necessary only when the evidence is relied on as evidence of consciousness of guilt.<sup>9</sup> A warning — against reasoning that 'just because a person is shown to have told a lie about something, that is evidence of 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.<sup>10</sup> In other words, in some circumstances, the judge may sometimes warn the jury that they may use the evidence of lies in assessing the defendant's credit, but not his or her guilt. This is often referred to as a Zoneff warning.<sup>11</sup>

14.6 Chapter 38 of the Queensland Benchbook contains an Edwards direction.<sup>12</sup> The Benchbook also includes a model direction on lies going to credit only:<sup>13</sup>

5 Eg *R v Martin, Klinge & Sambo* [2002] QCA 443 [17]–[18] (McPherson JA; Helman and Philippides JJ agreeing).

6 See *R v Mitchell* (2007) 174 A Crim R 52; [2007] QCA 267 [26], [31] (Williams JA), [41], [48], [50] (Keane JA), [60] (Mullins J, agreeing).

7 Eg *Zoneff v The Queen* (2000) 200 CLR 234 [58].

8 (1993) 178 CLR 193, 210–11 (Deane, Dawson and Gaudron JJ).

9 *Zoneff v The Queen* (2000) 200 CLR 234 [16]–[24] (Gleeson CJ, Gaudron, Gummow and Callinan JJ).

10 Ibid [16], [22]–[24] (Gleeson CJ, Gaudron, Gummow and Callinan JJ).

11 See Ibid.

12 Queensland Courts, *Supreme and District Court Benchbook*, 'Lies Told By The Defendant (Consciousness of Guilt)' [38] <<http://www.courts.qld.gov.au/2265.htm>> at 13 November 2009. This is set out in full in Appendix D to this Report. The Benchbook also contains a suggested direction dealing with flight as demonstrating consciousness of guilt: *ibid*, 'Flight and other Post Offence Conduct as Demonstrating Consciousness of Guilt' [48] at 13 November 2009.

13 Ibid 'Lies Told by The Defendant (Going only to credit)' [39] at 13 November 2009.

**Lies Told By The Defendant  
(Going only to credit)**

**You have heard questions [or have heard submissions from the prosecution] which attribute lies to the defendant. You will make up your own mind about whether he was telling lies and, if so, whether he was doing that deliberately.**

**It is for you to decide what significance those suggested lies have in relation to the issues in the case. You may decide that if you find the defendant has lied, that (only) affects (his/her) credibility.<sup>14</sup>**

**However, you should bear in mind this warning: do not follow a process of reasoning to the effect that just because a person is shown to have told a lie about something, that is evidence of guilt.<sup>15</sup>**

**[The mere fact that the defendant tells a lie is not in itself evidence of guilt. A defendant may lie for many reasons, for example: to bolster a true defence, to protect someone else, to conceal disgraceful conduct of his, short of the commission of the offence, or out of panic or confusion. If you think that there is, or may be, some innocent explanation for his lies, then you should take no notice of them.<sup>16</sup>] (formatting and notes as in original)**

14.7 One of the difficulties with directions on lies, and other seemingly incriminating post-incident conduct, is in deciding whether to give an Edwards direction or a more general Zoneff warning about lies going only to credit.<sup>17</sup> The VLRC has suggested that identifying consciousness of guilt evidence can be particularly problematic for trial judges:<sup>18</sup>

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.<sup>19</sup> 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.<sup>20</sup> 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

14 The direction in these first two paragraphs less the last sentence is a suggested direction in *Zoneff* (2000) 200 CLR 234 at [23]. The last sentence in the second paragraph draws on what Gleeson CJ and Hayne J wrote in *Dhanhoa v R* (2003) 199 ALR 547 at [32] and McHugh and Gummow JJ wrote at [59].

15 *Zoneff* (2000) 200 CLR 234 [23].

16 *Chevathen & Dorrick* [2001] QCA 337 [28]–[32].

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

18 Victorian Law Reform Commission, *Jury Directions*, Final Report (2009) [3.73].

19 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](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.

20 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.

of a consciousness of guilt inference in the circumstances of that case.<sup>21</sup> (notes as in original)

14.8 This issue also arose in a recent Victorian Court of Appeal case. In *R v Dupas (No 3)*,<sup>22</sup> there was evidence that the defendant, who was charged with murder, had changed his prescription glasses and hair style after the alleged murder had taken place. The prosecution's submission was that this was circumstantial evidence adding to the case against the defendant. One of the questions before the appeal court was whether the judge should have given an Edwards direction in relation to that evidence. Nettle JA found that the 'logical subtext' of the prosecutor's submissions on the evidence was that the defendant was seeking to change his appearance in order to avoid detection and that he was doing so out of a consciousness of guilt of the deceased's murder.<sup>23</sup> As a consequence, Nettle JA held that an Edwards direction should have been given. Weinberg JA, however, considered that the evidence was 'nothing more than circumstantial evidence, of the most ordinary kind, upon which the Crown relied in order to strengthen its case'.<sup>24</sup> In his view, an Edwards direction was unnecessary:

It is an indisputable fact that the form in which the Edwards direction must now be given has led to enormous difficulty in the conduct of criminal trials in this State.<sup>25</sup> Such a direction, and the attendant problems associated with the related Zoneff warning,<sup>26</sup> should be confined, so far as practicable, to the very special difficulties that are normally associated with lies. The Edwards direction, which is specifically tailored to those very special difficulties, is not well suited to other, broader, categories of circumstantial evidence.<sup>27</sup>

14.9 The Queensland Court of Appeal has also noted the difficulties these directions cause for trial judges:

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.<sup>28</sup>

14.10 As noted in chapter 6 of this Report, the Edwards direction has recurred as a ground of appeal in recent Queensland cases.<sup>29</sup>

14.11 Even if the evidence can be easily characterised as being relevant either to credit only or also to guilt, the directions that result in either case may be difficult for

21 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.

22 [2009] VSCA 202.

23 *R v Dupas (No 3)* [2009] VSCA 202 [23]–[24].

24 Ibid [378].

25 See generally: Victorian Law Reform Commission, *Jury Directions: Final Report 17* (2009) [3.71]–[3.81]. The Commission observes that since the mid 1990s, the Victorian Court of Appeal has heard at least 84 appeals which raised consciousness of guilt as an issue, the appellant having succeeded in 28 of those cases.

26 *Zoneff v R* (2000) 200 CLR 234.

27 *R v Dupas (No 3)* [2009] VSCA 202 [379].

28 *R v Brewster* [2002] QCA 305, 5.

29 See [6.53] above.



jurors to follow. A Zoneff warning may suffer the same deficiencies that have been identified with other limited use directions; in particular, the unreality of expecting jurors to mentally compartmentalise their use of the evidence. One commentator has described the distinction between lies going to credit and lies going to guilt as 'conceptually flawed' in that both types of lies 'derive probative force from the same line of reasoning', the difference between them being 'a difference of significance or weight' only:<sup>30</sup>

The expression 'credibility lies' is something of a misnomer. ... Lies of any sort can only be used as a basis for reasoning towards guilt if they are lies which are believed to spring from a realisation of complicity in the crime charged, ie, from a consciousness of guilt. The difference between probative lies and credibility lies is a difference of significance or weight. Probative lies are those which form the basis for a powerful inference of guilt. Credibility lies are those which are of less weight or significance in pointing towards guilt.<sup>31</sup>

14.12 Whether or not this view is correct as a matter of law, it points to the difficulty for jurors in understanding and applying a Zoneff warning.

14.13 Edwards directions may be difficult to follow. They are often very complex and technical, particularly as a result of the contextual information required to be given with the warning. Part of the Edwards direction also 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, 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.'<sup>32</sup>

14.14 This circularity of reasoning and the 'unnecessary complexity of directions on lies'<sup>33</sup> were also noted by the Queensland Court of Appeal in *R v Thomson*:

30 CR Williams, 'Lies as evidence' (2005) 26 *Australian Bar Review* 313, 320–1.

31 Ibid 321.

32 *R v Finn* [1994] QCA 1, 8–9 (Pincus JA).

33 *R v Thomson* [2002] QCA 548 [18] (Helman J; McMurdo P and Philippides J agreeing).

[T]here 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.<sup>34</sup>

14.15 Warnings on the use of lies are considered necessary because of the risk that the jury will unfairly reason that the telling of a lie necessarily implies guilt. Little empirical research appears to have been conducted on the efficacy of such directions. Research conducted with former jurors in New Zealand, however, showed that such directions may make ‘little or no difference’ to jurors’ evaluation of the evidence.<sup>35</sup> Significantly, it also showed that, while jurors may have departed from the directions, they nevertheless ‘took reasonable and conservative approaches’ to the evidence and ‘did not display any tendency to jump to the conclusion that the defendant was guilty merely because he or she had lied’.<sup>36</sup>

[I]t can be very tentatively concluded that the instructions made little or no difference to the way in which jurors evaluated the evidence in the case. They were generally prepared to assess the credibility of witnesses, including the accused, in a pragmatic way, and where they believed that the accused was telling lies and that there was no satisfactory explanation for these lies, they not surprisingly attached considerable weight to this in reaching their verdict. It seems that the standard direction on lying was simply perceived to be counter-intuitive and was therefore disregarded. Juries did not automatically jump to the conclusion that the accused was guilty because he or she told lies to the police or in the witness box, but they found it impossible, and perhaps nonsensical, to proceed as if the evidence had not been given at all.<sup>37</sup>

34 Ibid [14] (Helman J; McMurdo P and Philippides J agreeing).

35 Law Commission (New Zealand) (W Young, N Cameron and Y Tinsley), *Juries in Criminal Trials Part Two: A Summary of the Research Findings*, Preliminary Paper 37 (1999) Vol 2 [7.34].

36 W Young, ‘Summing-up to juries in criminal cases — What jury research says about current rules and practice’ (2003) *Criminal Law Review* 665, 679.

37 Law Commission (New Zealand) (W Young, N Cameron and Y Tinsley), *Juries in Criminal Trials Part Two: A Summary of the Research Findings*, Preliminary Paper 37 (1999) Vol 2 [7.34].

14.16 It has therefore been suggested that consciousness of guilt warnings in relation to lies ‘may be unnecessarily restrictive’.<sup>38</sup>

14.17 It has also been noted that describing the evidence in question as evidence of ‘consciousness of guilt’ or ‘post-offence conduct’ may incorporate a starting assumption, or too ready inference, of guilt.<sup>39</sup> A warning that employs such phraseology may thus be suggestive of the very thing it warns against.

## New Zealand

14.18 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.
- (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.

14.19 Section 124 gives effect to the recommendation of the Law Commission of New Zealand (‘LCNZ’) in its review of the law of evidence. The LCNZ had expressed the view that directions on lies had become ‘needlessly complex’. It considered that, ‘like any item of circumstantial evidence, the inference to be drawn from it is a matter for the jury’.<sup>40</sup> While a warning should continue to be given in some circumstances, the LCNZ

38 W Young, ‘Summing-up to juries in criminal cases — What jury research says about current rules and practice’ (2003) *Criminal Law Review* 665, 679.

39 See the submissions made to the VLRC’s Consultation Paper discussed at [14.25]–[14.26] below.

40 Law Commission (New Zealand), *Evidence: Reform of the Law*, Report 55 (1999) Vol 1, [481].

recommended that the question whether the lie should be used to assess truthfulness or guilt should be left to the jury.<sup>41</sup>

[The provision] changes the law by allowing evidence of a defendant's lies to be left to the jury without any further or specific direction about how the jury should use that evidence. Under *subs (2)*, if the prosecution alleges that the defendant lied because he or she had a guilty mind, the issue becomes a matter of inference for the fact-finder. The judge will no longer be required to explain to the jury just *how and why* the lie could point to guilt.<sup>42</sup> (emphasis in original)

14.20 Section 124(2) thus removes the distinction between lies relevant to guilt and lies relevant only to credit.<sup>43</sup>

### NSWLRC's Consultation Paper

14.21 In its Consultation Paper, the NSWLRC noted the possibility of simplifying the content and scope of directions on lies:<sup>44</sup>

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. Similar formulations are regarded as acceptable in other jurisdictions. The Supreme Court of Canada has observed:

the best way for a trial judge to address [the danger that juries might jump too quickly from evidence of post-offence conduct to an inference of guilt] is simply to make sure that the jury are aware of any other explanations for the accused's actions, and that they know they should reserve their final judgment about the meaning of the accused's conduct until all the evidence has been considered in the normal course of their deliberations. Beyond such a cautionary instruction, the members of the jury should be left to draw whatever inferences they choose from the evidence at the end of the day.<sup>45</sup> (note in original)

### VLRC's proposals and recommendations

14.22 The VLRC suggested a number of options for reform of the Edwards direction in its Consultation Paper, including statutory intervention either to remove it entirely or to make it discretionary.<sup>46</sup> 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.

41 Ibid [482]–[483].

42 Law Commission (New Zealand), *Evidence: Code and Commentary*, Report 55 (1999) Vol 2, [C393].

43 Jury Directions Symposium, Melbourne, 56 February 2009.

44 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [8.27]. See generally *ibid* [8.19]–[8.34].

45 *R v White* [1998] 2 SCR 72, [57].

46 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [4.51]–[4.65].

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 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.<sup>47</sup> (notes omitted)

## Submissions

14.23 Several respondents to the VLRC's Consultation Paper made submissions on this issue. The approach adopted by the Canadian Judicial Council received support in two submissions to the VLRC.<sup>48</sup> 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.<sup>49</sup>

14.24 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:

47 Ibid [4.58]–[4.60].

48 Daniel Gurvich and Mark Pedley, Submission to the Victorian Law Reform Commission, 23 December 2008.

49 Judge MD Murphy, Submission to the Victorian Law Reform Commission, 5 February 2009, 4.

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.<sup>50</sup>

14.25 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.<sup>51</sup> Mr Lindner's first submission was that the expression 'consciousness of guilt' should be abandoned:

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.

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).<sup>52</sup>

14.26 Associate Professor John Willis and the Criminal Bar Association of Victoria also submitted that the term 'consciousness of guilt' should not be used.<sup>53</sup>

14.27 Lindner also argued that judicial warnings on the use of such evidence should be retained and that the prosecution should be required to identify any post-offence conduct on which it intends to rely at an early stage of the trial:

50 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: Queensland Law Society and Bar Association of Queensland, Submission 13, 19 June 2009.

51 Benjamin Lindner (Criminal Bar Association), Submission to Victorian Law Reform Commission, 30 November 2008.

52 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 [14.17] above.

53 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.

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.**

...

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.

...

**Submission: The prosecution should identify all post-offence conduct to be relied upon as implied admissions before the jury is empanelled.**<sup>54</sup>

14.28 In Lindner's view, the trial judge has a responsibility both to 'identify evidence capable of supporting a conclusion by a jury that an item of evidence could amount to an "implied admission"',<sup>55</sup> and to give a limited use direction when the evidence is 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.<sup>56</sup>

14.29 The Commission notes that the weight to be attached to evidence that the defendant has lied and the inferences to be drawn from it are, on Lindner's own analysis, properly a matter for the jury; on its own, this says little about the need for detailed judicial instructions on those matters and perhaps adds support to the argument that, once cautioned about jumping from a conclusion that the defendant lied to a conclusion of guilt, juries should be left to use the evidence in whatever way they consider appropriate.

54 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.

55 Ibid 17–18.

56 Ibid 18–19.

14.30 Lindner and the Criminal Bar Association of Victoria went on to consider the various options for reform of post-incident 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*.<sup>57</sup>

14.31 Lindner then submitted that a preferred approach is to encourage the early identification of post-incident 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

57 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, 19–21.



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.<sup>58</sup>

14.32 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 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.<sup>59</sup>

14.33 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.<sup>60</sup>

14.34 For similar reasons, the OPP opposed consolidating consciousness of guilt directions into a broad circumstantial evidence direction,<sup>61</sup> stating that 'Oversimplification runs the risk of creating appeal points'.<sup>62</sup>

**VLRC's recommendations**

14.35 In its Final Report, the VLRC recommended simplification of warnings on post-incident conduct, and an obligation on the prosecution to identify the evidence relied on as demonstrating an awareness of guilt prior to the parties' closing addresses:

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'.

58 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.

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

60 Office of Public Prosecutions, Submission to the Victorian Law Reform Commission, 12 February 2009, 9.

61 Ibid 11.

62 Ibid 12.

25. The legislation should require the prosecution to identify, prior to the commencement of addresses, any evidence of particular post-offence conduct of the accused upon which it seeks to rely as demonstrating an awareness of guilt on the part of the accused as to any offence. The judge must decide whether any item of evidence concerning post-offence conduct by the accused is capable of amounting to an implied admission of guilt of any offence before the prosecutor may address the jury about the conclusions it might draw from this evidence.
26. If the trial judge decides to give the jury a warning about the use of evidence concerning post-offence conduct by the accused, the trial judge should be permitted to provide the warning in general terms and should not be required to refer to each particular item of post-offence conduct which may amount to an implied admission of guilt by the accused person.
27. Any warning which a trial judge gives to a jury about the use of evidence concerning post-offence conduct by the accused will be sufficient if it contains reference to the following matters:
  - People lie or engage in other apparently incriminating conduct for various reasons
  - The jury should not necessarily conclude that the accused person is guilty of the offence charged just because the jury find that he or she lied or engaged in some other apparently incriminating conduct.<sup>63</sup>

## The Issues Paper

14.36 Post-incident conduct directions were discussed in chapter 4 of this Commission's Issues Paper, but none of the respondents commented on this issue.<sup>64</sup>

## The Discussion Paper

14.37 The Commission did not reach a provisional view in its Discussion Paper, but noted the possibility of legislating to simplify the content of warnings about evidence of lies and removing the distinction between lies relevant to guilt and lies relevant to credit only. It noted that the use of integrated directions and requests by the parties as to whether a direction is necessary, might also help ameliorate some of the difficulties identified with these types of warnings. It thus proposed the following options for reform, on which it sought further submissions:

- 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;

63 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) 15, [5.36]–[5.51].

64 See Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [4.63]–[4.67].

- (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:
  - (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.<sup>65</sup>

### **Further submissions**

14.38 As with other limited-use directions, Legal Aid Queensland did not consider it appropriate to make legislative changes to consciousness of guilt warnings in the absence of a wider review of the laws of evidence.<sup>66</sup>

14.39 In relation to the Edwards direction, the Office of Director of Public Prosecutions ('ODPP') commented that lies are context-dependent and that this is properly a matter for the jury. In its view, one of the difficulties with directions on lies is the argument that the defendant might have lied out of a consciousness of guilt of a lesser charge (say, manslaughter rather than murder), leading to 'hopelessly artificial directions' on the use of the evidence. Those directions, the ODPP submitted, do not articulate a useful process of reasoning for the jury and are certainly problematic. In its view, the Zoneff warning is much simpler and more appropriate.<sup>67</sup>

14.40 The ODPP therefore supported Proposal 6-6 for the removal of the distinction between lies going to credit and lies going to guilt. The ODPP noted that in practice it is very hard to draw such a distinction, even for lawyers and judges. The ODPP also noted that there is already legislative precedent for this approach.<sup>68</sup>

14.41 The ODPP was also happy with Proposal 6-7. In its view, a direction should only be necessary if there is a risk that the jury may attach undue weight to the lie; the only point that really needs to be made to the jury is that people lie for reasons other than guilt and that, accordingly, the jury should not conclude that, just because the defendant lied, he or she is guilty.<sup>69</sup>

65 Queensland Law Reform Commission, *A Review of Jury Directions*, Discussion Paper WP67 (2009) [6.98]–[6.105], 212–13, Proposals 6-6 to 6-8. Proposal 6-2 is set out at [12.35] above.

66 Submission 16A, 13. See [12.37]–[12.40] above.

67 Submission 15A.

68 Ibid.

69 Ibid.

14.42 The Brisbane Office of the Commonwealth Director of Public Prosecutions supported Proposal 6-6, noting that an Edwards direction is only ‘rarely sought’ and that more often the warning about lies going only to credit is given:

Given that requests for the Edwards direction are only made in the clearest cases and that doubts are expressed in the research as to the effectiveness of limited-use directions, it seems appropriate that the standard wording given in relation to lies going only to credit is appropriate in all circumstances.<sup>70</sup>

14.43 The Bar Association of Queensland (‘BAQ’), however, opposed Proposal 6-6 and, with one qualification, Proposal 6-7:

The Association’s position on this question is broadly that the law does not need substantial reform at the moment and that the current draft directions in the jury book are appropriate. Thus, Reform 6.6 would be opposed. Further, Reform 6.7 goes too far, is not necessary, represents too great a change to the present system of *jurisprudence*, and is therefore opposed. The qualification is that the change of wording in 6.7(c) may be appropriate.<sup>71</sup> (italics in original)

14.44 The BAQ favoured the continued use of the current directions set out in the Queensland Benchbook:<sup>72</sup>

There is some difficulty in treating these various categories of evidence, such as lies (consciousness of guilt), lies (credit) and flight or concealment, as one body for the purpose of jury directions. The Queensland Bench Book has separate guideline directions for ‘*consciousness of guilt*’ lies, credit lies and flight demonstrating consciousness of guilt. They are clear, well researched, well drafted, and capable of being adapted to any particular factual situation.

This is not to suggest that the area is completely straightforward, but the Association sees no particular need for substantial reform.<sup>73</sup> (italics in original)

14.45 It also submitted that the apparent circularity of reasoning of the Edwards direction ‘is not ... capable of unqualified acceptance’:

For example, at 6.78 the [Commission’s Discussion Paper] quotes from *R v. Thomson*<sup>74</sup> to the effect:

*‘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, i.e. that the jury is invited to consider whether a lie was told because of guilty and then decide whether the Crown case is strong enough to prove such guilt ... It has been held, however, that the circularity is only apparent and not real ... but the obstacles to clear exposition remain.’*<sup>75</sup> (note in original)

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70 Submission 9A, 7.

71 Submission 13A, 25–6. The Queensland Law Society endorsed and supported the whole of the submissions by the Bar Association of Queensland: Submission 13B.

72 See Supreme and District Courts Benchbook, ‘Lies Told By The Defendant (Consciousness of Guilt)’ [38], ‘Lies Told By The Defendant (Going only to credit)’ [39], ‘Flight and other Post Offence Conduct as Demonstrating Consciousness of Guilt’ [48] <<http://www.courts.qld.gov.au/2265.htm>> at 13 November 2009. The first of these is set out in full in Appendix D to this Report.

73 Submission 13A, 25–6.

74 [2002] QCA 548 at [18].

75 Submission 13A, 25.

14.46 The BAQ endorsed aspects of Bernard Lindner's submission response to the VLRC's Consultation Paper: that the term 'consciousness of guilt' should not be used, that judicial directions as to the analysis of post-incident conduct should be retained, and that the prosecution should identify all post-incident conduct to be relied on as implied admissions of guilt before the jury is empanelled.<sup>76</sup> As to the last of these, the BAQ submitted that the appropriate area for such a provision would be the disclosure provisions of the Criminal Code (Qld).<sup>77</sup>

14.47 The BAQ also expressed support for the suggestion in Proposal 6-8 that 'warnings about evidence of post-incident conduct should, where possible, be given at the time the evidence is heard'.<sup>78</sup>

### The QLRC's views

14.48 The Commission accepts the judicial and other commentary that directions on lies are problematic, both in terms of identifying when a direction is required and what it should contain, and the jury's ability to make sense of the direction. The Edwards direction is particularly complex and thus potentially confusing for juries. As noted elsewhere in this Report, the greater the clarity of judges' directions to juries, the more likely it is that jurors will be able to understand and apply those directions, and the better assurance there will be that the jury directions have guarded against an unfair trial.<sup>79</sup>

14.49 The Commission is of the view that directions on lies, and other post-incident conduct, are necessary to ensure a fair trial and should be retained. Because of the risk of unfair prejudice to the defendant, a warning to the jury is necessary to guard against convictions simply on the basis that the defendant lied or engaged in other apparently incriminating conduct without a consideration of the rest of the evidence. The Commission also accepts the notion, supported by the available empirical evidence that while jurors can adopt a cautious approach to such evidence, complex directions on lies are likely to be ignored.<sup>80</sup> The experimental research conducted by the University of Queensland also shows that simplified warnings may encourage jurors to adopt a generally more cautious and objective approach to the evidence and to rely less on stereotypes and personal beliefs.<sup>81</sup>

14.50 The Commission is therefore of the view that, while directions on post-incident conduct should be retained, provision should be made for their simplification. Where evidence of a lie, or of other post-incident conduct, is sought to be relied on as evidence of guilt or as evidence impugning the defendant's credibility, the jury should be warned about the danger of concluding that, simply because the defendant lied, he or she is guilty. Moreover, a warning to that effect in simple terms is the crux of what should be required.

14.51 The Commission considers that the approach taken in section 124 of the *Evidence Act 2006* (NZ) is generally appropriate in this regard and that a provision in

76 Ibid. See [14.25], [14.27], [14.31] above.

77 Ibid 25.

78 Ibid 26.

79 See [3.16] and [7.140]–[7.172] above.

80 See [14.15] above.

81 School of Psychology, University of Queensland (Blake McKimmie and Kathryn Havas), 'An Experiment to Test the Effect of Simplifying Directions', Report (November 2009).

similar terms should be enacted in Queensland. The Commission also considers that the provision should apply not just to evidence of lies but to evidence of other post-incident conduct such as flight and concealment. In the Commission's view, a simplified direction in the terms proposed is sufficiently general to apply with equal application to all such evidence without any risk of unfairness. This is also consistent with the approach recommended by the Victorian Law Reform Commission.<sup>82</sup>

14.52 The Commission also agrees with the submission of the Office of the Director of Public Prosecutions that lies and other post-incident conduct are context-dependent and properly a matter for the jury. It also agrees with the Bar Association of Queensland that it is important for the prosecution to identify evidence of post-incident conduct that it relies on as amounting to an admission of guilt, since this will assist the judge in determining whether a warning will be required. However, the Commission considers that its recommendations for pre-trial disclosure of issues and formal requests by the parties for particular directions or warnings in chapters 8 and 11 of the Report<sup>83</sup> adequately address this. It is unnecessary (and not necessarily helpful) to continue to require trial judges to identify precisely for the jury all of the conduct and circumstances capable of amounting to an admission of guilt. The Commission is therefore of the view, consistent with the recommendation of the Victorian Law Reform Commission,<sup>84</sup> that provision should also be made that the trial judge may give a post-incident conduct warning in general terms and need not refer to each particular item of post-incident evidence that may be relied on in this way.

14.53 In addition, the Commission considers that expressions such as 'consciousness of guilt' and 'post-offence conduct' should be avoided when a judge gives such a warning. As noted above, those phrases are somewhat loaded terms;<sup>85</sup> they also appear to the Commission to be instances of unwelcome jargon in the context of a communication to the jury.

14.54 Given its recommendation in chapter 9 that the judge may address the jury on the law or the evidence at any time during the trial,<sup>86</sup> the Commission does not consider it necessary to recommend further specific legislative provision for post-incident conduct warnings to be given when the evidence is heard, as was proposed in the Discussion Paper. In this regard, the Commission considers it important to maintain the judge's discretion as to the timing of directions.<sup>87</sup>

14.55 As was noted in the context of limited-use directions in general, the Commission also considers that juries will be assisted in understanding and applying post-incident conduct warnings when they are given as part of a summing up given in the style of integrated directions as recommended in chapter 9.<sup>88</sup>

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82 See [14.35] above.

83 See Rec 8-1, 11-1 and 11-2 above.

84 See [14.35] above.

85 See [14.17] above.

86 See Rec 9-3 above.

87 Also see [12.51]–[12.52] above.

88 See [9.79]–[9.130], Rec 9-4 to 9-6 above.

## Recommendations

14.56 The Commission makes the following recommendation:

**14-1 The *Evidence Act 1977* (Qld) should be amended to provide that:**

- (1) if evidence of a defendant's lie or other apparently incriminating post-incident conduct such as flight or concealment 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;**
- (2) despite paragraph (1), if the judge considers that the jury may place undue weight on the evidence, or if the defendant so requests and the judge considers it appropriate to do so, the judge must warn the jury that:**
  - (a) the jury must be satisfied before using the evidence that the defendant did lie or engage in the other apparently incriminating conduct;**
  - (b) people lie or engage in other apparently incriminating conduct, such as flight or concealment, for various reasons; and**
  - (c) the jury should not conclude that the defendant is guilty just because he or she lied or engaged in the other apparently incriminating conduct; and**
- (3) if a warning is given under paragraph (2):**
  - (a) 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; and**
  - (b) the judge should not use expressions such as 'consciousness of guilt' or 'post-offence conduct'.**





# Chapter 15

## Directions in Sexual Offence Cases

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### INTRODUCTION

15.1 The evidence in sexual offence trials may require a number of evidentiary warnings and directions, some of which can be particularly complex and difficult.<sup>1</sup> These matters are dealt with in a separate part of the Queensland Benchbook.<sup>2</sup>

15.2 One of the more controversial areas of jury directions is that of warnings to be given, or not given, about the unreliability of certain evidence and the restricted use that a jury should make of it. Both the common law and statute bear on this area and are not entirely consistent. For example, while the Criminal Code (Qld) limits the warnings that can be given in relation to the unreliability of uncorroborated evidence, the common law duty of a trial judge to ensure a fair trial may require, in the particular circumstances of a case, that an unreliable-evidence warning be given.<sup>3</sup>

15.3 The problem of potentially unreliable evidence can arise in any criminal case but particular difficulties and concerns have arisen in relation to the evidence given in sexual offence trials.<sup>4</sup>

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1 Eg Hon J Wood, 'Jury directions' (2007) 16 *Journal of Judicial Administration* 151, 153; 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; Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [3.1].

2 Queensland Courts, *Supreme and District Court Benchbook*, [62]–[66] <<http://www.courts.qld.gov.au/2265.htm>> at 13 November 2009.

3 See [16.7] below.

4 As to the types of evidentiary directions that may be required in sexual offence cases, see Queensland Courts, *Supreme and District Court Benchbook* [62]–[66] <<http://www.courts.qld.gov.au/2265.htm>> at

15.4 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.<sup>5</sup>

15.5 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 characteristic feature of sexual offence cases that informed 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 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'être 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*

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13 November 2009.

5 See Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [4.104]–[4.120].

*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: *Crompton* 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.<sup>6</sup>

15.6 The Commission notes the faith placed by courts in their own accumulated wisdom on matters in which it is assumed (by judges) that other judges have acquired insights that are not obvious to lay jurors. In the area of the 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.<sup>7</sup>

15.7 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.<sup>8</sup> There are also other directions and warnings, such as those relating to evidence admitted for limited purposes only (such as evidence of uncharged conduct) — which are covered in chapters 12 and 14 of this Report — 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.

15.8 The VLRC paid considerable attention to directions given in sexual offence trials in its Consultation Paper and Final Report on jury directions. 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

6 *R v Stewart* [2001] NSWCCA 260 [71], [75], [83] (Howie J).

7 See, for example, chapters 4 and 5 in this Report.

8 See New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [7.63].

greater clarity for judges, and ultimately made a number of recommendations for reform.<sup>9</sup>

15.9 In its Issues Paper, the Commission asked whether there were any particularly problematic directions and whether any directions could be simplified or abolished.<sup>10</sup> The Commission also noted that the directions given in sexual offences trials have given rise to particular concern.<sup>11</sup> In its Discussion Paper, the Commission made a number of Proposals for reform in relation to the Longman and Crofts directions, which are set out in this chapter.<sup>12</sup> The chapter also canvasses the recommendations and commentary on the Longman and Crofts warnings in the VLRC's Final Report on jury directions, the NSWLRC's Consultation Paper on jury directions, and the Tasmanian Law Reform Institute's 2006 Report on warnings in sexual offence cases.

## THE LONGMAN DIRECTION

15.10 One of the most controversial of all jury warnings is the Longman direction about the forensic disadvantage to the defendant of the complainant's delay in making the complaint.<sup>13</sup> The Longman direction is not restricted by the terms of the High Court's decision to sexual offence cases but is used most often in that context.<sup>14</sup>

15.11 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*:

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 evi-

9 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) ch 3; Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) ch 5.

10 Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) 105, 170. See the questions set out at [12.1] above.

11 Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [4.59], [4.104]–[4.120].

12 Ibid ch 7.

13 *Longman v The Queen* (1989) 168 CLR 79. This is distinguished from the more general obligation, also enunciated in that case, to give a warning 'wherever necessary to avoid a perceptible risk of miscarriage of justice arising from the circumstances of the case': 86. Such warnings are sometimes also referred to as Longman warnings or directions. See [16.11] below.

14 See 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) [18.70] and fn 139 for a description of other circumstances when this direction may be required.

dence 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.<sup>15</sup>

15.12 The High Court's decisions have not mandated 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*,<sup>16</sup> 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).<sup>17</sup>

His Honour also provided guidance in framing the *Longman* warning and the wording to be used (see also Buddin J in *GS*<sup>18</sup>). 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;
- (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.<sup>19</sup> (notes in original)

15 (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.

16 (2002) 54 NSWLR 241.

17 *R v MM* (2003) 145 A Criminal R 148 (Howie J).

18 [2003] NSWCCA 73.

19 Tasmania Law Reform Institute, *Warnings in sexual offences cases relating to delay in complaint*, Final Report No 8 (2006) [1.2.4].

15.13 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.<sup>20</sup> (notes omitted)**

15.14 This wording uses the phrases 'dangerous to convict' and 'scrutinizing ... with great care', both of which have been criticised as being unfamiliar to lay jurors and as giving coded messages seized on by jurors to acquit,<sup>21</sup> although others have commented that they are apposite in the circumstances in which these directions are given.<sup>22</sup> In South Australia, section 34CB(3)(b) of the *Evidence Act 1929* (SA) prohibits any warning relating to delay in complaint where the defendant was forensically disadvantaged from including the phrase 'dangerous or unsafe to convict' or similar words or phrases.<sup>23</sup>

15.15 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. In New South Wales, Victoria and South Australia, the judge must not warn or suggest to the jury that it would be dangerous or unsafe to convict the defendant solely because of delay in making the complaint.<sup>24</sup>

20 Queensland Courts, *Supreme and District Court Benchbook*, 'Delay between (Sexual) Incident and Complaint (Longman Direction)' [65] <<http://www.courts.qld.gov.au/2265.htm>> at 13 November 2009. See Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [4.104]–[4.109].

21 Eg *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]; Victorian Law Reform Commission, *Sexual Offences*, Final Report (2004) [7.132].

22 See *R v Mazzolini* [1999] 3 VR 113, [76] (Ormiston JA): 'The words "danger" or "dangerous" (or even "unsafe") seem to give to a warning the sense of urgency and emphasis it requires, and so has been used for many years'.

23 See [15.19] below.

24 Also see *Evidence Act 1995* (Cth) s 165B.

15.16 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.<sup>25</sup>

15.17 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—

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<sup>25</sup> Section 165B of the *Evidence Act 1995* (Cth) and of the *Evidence Act 2008* (Vic) are 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).

- (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.

15.18 The provisions in sub-sections 61(1)(b)(ii) to (iii) and (1A) to (2) were inserted in the *Crimes Act 1958* (Vic) in 2006 to give effect to the recommendation of the Victorian Law Reform Commission in its 2004 report on sexual offences to restrict the circumstances in which a warning about delay can be given:<sup>26</sup>

The current law in the *Crimes Act 1958*<sup>27</sup> in relation to jury warnings in sexual offence cases was designed to reflect the reality that many sexual offence victims delay reporting the offence. The Crimes Act provides that a judge must not warn or suggest to the jury that the law regards complainants in sexual offence cases as an unreliable class of witness.

The Crimes Act also provides that if delay in reporting the offence is raised as an issue in the trial, the judge must tell the jury that there may be good reasons for such delay.

Despite the intent of these provisions, the High Court has said that they do not prevent a trial judge from commenting that a delay in reporting a sexual assault could affect the credibility of the complainant. This was developed in the case of *Crofts v. R* and is known as a Crofts warning.<sup>28</sup> This means that in certain sexual assault cases where there has been a delay in reporting, the judge may be required to give conflicting instructions to a jury. On the one hand the judge must not warn or suggest to the jury that the law regards complainants as an unreliable class of witness, yet on the other hand they are obliged by law to comment that a delay in reporting affects the credibility of the complainant.

The High Court has also held that the law does not remove the need to warn juries about the effect of delay on the ability of the accused to put forward a defence. This law was developed in the case of *R v. Longman* and is known as a Longman warning. The warning advises the jury in sexual offence cases that by reason of delay it would be 'unsafe or dangerous' to convict on the uncorroborated evidence of the complainant alone.

The Victorian Law Reform Commission found that the purpose of the current legislative provisions is being undermined by these common-law warnings. The statutory directions and the common-law directions appear to contradict each other and consequently cause confusion for juries.

It has also been found that the widespread use of these warnings serves to perpetuate outdated assumptions surrounding female victims of sexual assault — in particular that women lie about rape and are therefore unreliable witnesses.

The new provisions will ensure that such warnings will be restricted to cases where a request has been made for such a warning by the accused and the court is satisfied that the accused has in fact suffered some significant forensic disadvantage due to a delay in reporting.

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26 Crimes (Sexual Offences) (Further Amendment) Act 2006 (Vic) s 3. And see Victorian Law Reform Commission, *Sexual Offences*, Final Report (2004) [7.132]–[7.133], Rec 170.

27 Section 61 of the *Crimes Act 1958* (Vic) as it applied prior to the 2006 amendments is set out at [15.62] below.

28 The decision in *Crofts v The Queen* (1996) 186 CLR 427 is discussed at [15.62]–[15.65] below.

The mere passage of time will not necessarily establish a significant forensic disadvantage, and the judge may refuse to give the warning if there are good reasons for doing so.

These amendments address concerns that these warnings are being given routinely in cases involving increasingly shorter periods of delay and in circumstances where they had not been requested.

No particular form of words will need be used when giving the warning, but the judge must not suggest that it would be 'dangerous or unsafe to convict' the accused because of any demonstrated forensic disadvantage. This form of words, which has been routinely used in the past, has the potential to be interpreted by juries as a direction to acquit the accused and, ultimately, to usurp the jury's function in evaluating evidence. For these reasons this form of words will be prohibited.<sup>29</sup> (notes added)

15.19 In 2008, section 34I(5) of the *Evidence Act 1929* (SA) was repealed and a new provision, section 34CB, was enacted, abolishing the requirement to give a Longman direction as to delay in complaint.<sup>30</sup> It 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.

15.20 The issues surrounding the Longman direction have been noted in many places. For example, the Chair of the New South Wales Law Reform Commission, the Hon James Wood AO QC has made these observations:<sup>31</sup>

29 Second Reading Speech of the Crimes (Sexual Offences) (Further Amendment) Bill 2006 (Vic): Victoria, Legislative Assembly, 10 August 2006, 2793–4 (Hon R Hulls, Attorney-General). Also see Explanatory Memorandum, Crimes (Sexual Offences) (Further Amendment) Bill 2006 (Vic) 1–3.

30 *Statutes Amendment (Evidence and Procedure Act) 2008* (SA) ss 16, 17.

31 The Hon J 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) 5. The Hon James Wood is a former Justice of the Supreme Court of New South Wales and is currently the Chairperson of the New South Wales Law Reform Commission. See also Tasmania Law Reform Institute, *Warnings in sexual offence cases relating to delay in complaint*, Final Report No 8 (2006).

Problems with this direction relate to:

- its emergence as a rigid and ritual incantation, even for cases with a relatively short delay;
- the irrebuttable presumption, which is logically questionable, that the accused has in fact suffered a prejudice through delay (which is not the case where he did in fact commit the offence);
- the re-introduction, through a back door, of the inherent unreliability of complainants in sexual assault cases;
- uncertainty as to the length of delay that is required for its use;
- the use of the expression 'dangerous (or unsafe) to convict' with its inherent invitation to acquit;
- the use of unfamiliar language in a convoluted, formulaic direction, which inevitably raises questions, for example, as to what more is meant by the requirement to 'scrutinise the evidence with great care' than that which is already embodied in the conventional direction as to the standard of proof; and
- the tendency of trial judges to use it in virtually every case, so as to appeal-proof the summing up.

Some of these difficulties were noted by Chief Justice Doyle in *R v [BFB]*.<sup>32</sup>

15.21 In the South Australian Court of Criminal Appeal, Doyle CJ also noted in *R v BFB* the potential difficulties faced by trial judges in giving the Longman direction:

The difficulty that trial judges are experiencing in this area is probably due to the fact that there are no hard and fast lines to be drawn. The issue is whether there is a circumstance in the case that gives rise to a perceptible risk of a miscarriage of justice, and accordingly gives rise to the need for a warning. That will depend on the circumstances of the case, the time that elapsed, and whether the accused is placed at a significant disadvantage. Sometimes a relatively short lapse of time will put the accused at a disadvantage. Sometimes a lengthy lapse of time will not put the accused at a disadvantage. It all depends on the circumstances. Alternatively, there may be a factor that calls for a comment rather than a warning. These are matters on which views can differ. Views have differed in appeal courts. Nor can trial judges resort to the easy course of giving a warning when there is a possibility that one might be called for. The giving of excessive and inappropriate warnings will be unfair to complainants, contrary to the public interest in a regularly conducted trial process, confusing to juries and runs the risk of returning this aspect of the law to an approach from which Parliament endeavoured to extract it, when Parliament enacted provisions such as s 341(5) of the *Evidence Act 1929 (SA)* [which provides that the judge is not required to warn the jury that it is unsafe to convict the accused on the uncorroborated evidence of the alleged victim of the offence].<sup>33</sup>

15.22 Some of the difficulties with the Longman direction were also noted by Neave JA in the Victorian Court of Appeal:<sup>34</sup>

32 (2003) 87 SASR 278.

33 (2003) 87 SASR 278 [38].

34 *R v RW* (2008) 18 VR 666, 680–81; [2008] VSCA 79 [56]–[58] (Neave JA).

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*:

[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.<sup>35</sup>

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.<sup>36</sup>

The joint Australian, New South Wales and Victorian Law Reform Commission *Report on Uniform Evidence Law* also criticised the law relating to Longman warnings,<sup>37</sup> and suggested that the warning required now comes very close to the corroboration warning required in sexual offence cases at common law.<sup>38</sup> 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.<sup>39</sup> (notes as in original)

35 *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.

36 *Ibid* [34].

37 *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.

38 *Ibid* [18.88].

39 Amended by *Crimes (Sexual Offences) (Further Amendment) Act 2006* (Vic).

15.23 An interesting recent application of the Longman direction occurred in *Bropho v Western Australia* [2007] WADC 77.<sup>40</sup> 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).<sup>41</sup> 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 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.<sup>42</sup>

15.24 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 attach 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.<sup>43</sup> The judges' conclusions about the evidence and the process that leads 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

40 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.

41 *Bropho v Western Australia (No 2)* [2009] WASCA 94 [7]. Comparable provisions now exist in Queensland in the Criminal Code (Qld) ss 614–615E.

42 Ibid [41]–[42].

43 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).

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.

15.25 More importantly for this review, however, are 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?<sup>44</sup>

## TLRI's Report

15.26 In October 2006, the TLRI published its report on warnings in sexual offence cases relating to delay in complaint. The TLRI summarised the criticisms of the Longman direction this way:

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 *Crompton* 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

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44 The issue of providing the jury with the transcript of evidence is discussed at [10.73]–[10.114] above.

*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.<sup>45</sup>

15.27 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.<sup>46</sup>

15.28 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):

**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.<sup>47</sup>

15.29 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;

45 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].

46 Ibid [3.3.12]. The TLRI also recommended the repeal of section 165(5) of the *Evidence Act 2001* (Tas), which is considered at [15.74] below.

47 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 perceptible 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]).

- 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, Crompton 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.<sup>48</sup>

15.30 Those recommendations have not yet been implemented.

15.31 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).

### NSWLRC's Consultation Paper

15.32 In its Consultation Paper on jury directions, the NSW Law Reform Commission noted the following 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.

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

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48 Tasmania Law Reform Institute, *Warnings in sexual offences cases relating to delay in complaint*, Final Report No 8 (2006) iv.



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.<sup>49</sup> (notes omitted)

## VLRC's proposals and recommendations

15.33 Directions in sexual offence cases, and the *Longman* direction in particular, were also discussed at length in the VLRC's Consultation Paper on jury directions.<sup>50</sup>

15.34 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.<sup>51</sup>

15.35 The *Longman* direction was also identified as problematic in several submissions in response to the VLRC's Consultation Paper.<sup>52</sup>

15.36 Judge MD Murphy of the County Court of Victoria made this submission:

I support some form 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.<sup>53</sup>

15.37 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

49 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [7.49]–[7.54].

50 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) ch 3.

51 Patrick Tehan QC, Submission to the Victorian Law Reform Commission, 26 November 2008 [3].

52 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.

53 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.

trials.<sup>54</sup> He considered that section 165B of the Uniform Evidence Law was a 'satisfactory approach' to the Longman direction.<sup>55</sup>

15.38 In its Final Report, the VLRC made a number of recommendations specifically concerning directions and warnings in sexual offences trials. 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.<sup>56</sup>

15.39 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),<sup>57</sup> in lieu of s 61 of the *Crimes Act 1958* (Vic).<sup>58</sup>

15.40 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

54 Stephen Odgers SC, Submission to the Victorian Law Reform Commission, 12 November 2008, 1.

55 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 [15.16] above.

56 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) 16, [5.76]–[5.101].

57 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 [15.16] above.

58 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) 16, [5.76]–[5.101].

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)

## The Issues Paper

15.41 The Commission discussed, and sought submissions on, the Longman direction in chapter 4 of its Issues Paper.<sup>59</sup>

### Submissions

15.42 Two judges of the District Court of Queensland responding to the Issues Paper singled out the Longman direction for specific consideration for reform. One of those judges submitted:

*Longman* ought to be reformed, along the lines of NSW, Vic or SA provisions.<sup>60</sup> 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<sup>61</sup>] 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.<sup>62</sup> (emphasis in original, note added)

15.43 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.<sup>63</sup> 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.<sup>64</sup> (note added)

59 Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [4.104]–[4.109].

60 See [15.14]–[15.18] above.

61 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].

62 Submission 6.

63 Of the Issues Paper: Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009).

64 Submission 10.

## The Discussion Paper

15.44 In its Discussion Paper, the Commission expressed the provisional view that the TLRI's recommendation about statutory amendment to override the Longman direction appears to be an appropriate approach to reform. It therefore made the following proposal, on which it sought further submissions:

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.<sup>65</sup>

### Further submissions

15.45 The Office of the Director of Public Prosecutions ('ODPP') agreed with Proposal 7-1 to amend the Longman warning. The ODPP commented that one of the problems with Longman warnings is the difficulty in determining whether the delay is long enough to trigger the warning. Judges sometimes give elaborate warnings in cases where the delay is as short as six months. The ODPP also commented that if the defendant is guilty, he or she has not been deprived of any opportunity by the delay.<sup>66</sup>

15.46 Legal Aid Queensland, however, opposed any reduction to the warnings that are currently required to be given for the benefit of the defence:

We do not support any reduction in the established areas warranting judicial warning or comment. The justification for such directions is soundly based and necessary, at present, to provide a fair trial for an accused.<sup>67</sup>

15.47 Similarly, the Bar Association of Queensland ('BAQ') objected to the Commission's proposals for reform, noting that the proposals involve a 'danger ... of reasoning on the basis of presumed guilt rather than presumed innocence'.<sup>68</sup> It submitted that

65 Queensland Law Reform Commission, *A Review of Jury Directions*, Discussion Paper WP67 (2009) [7.31]–[7.37], 237, Proposal 7-1.

66 Submission 16A, 13.

67 Submission 15A.

68 Submission 13A, 28. The Queensland Law Society endorsed and supported the whole of the submissions by the Bar Association of Queensland: Submission 13B.

prejudice to the defendant might be ‘presumed’ even if it is not possible to identify a specific prejudice on the evidence:

The High Court, in *Longman v. The Queen*<sup>69</sup> correctly noted the prejudicial effect that delay in making a complaint can have upon a Defendant.

Sometimes, it is not possible to specifically point to an aspect of prejudice. There may be presumed prejudice from delay. For example, in *Herron v. McGregor*<sup>70</sup> McHugh JA said:

*‘Memories fade. Relevant evidence becomes lost. Even when written records are kept, long delay will frequently create prejudice which can never be proved affirmatively ... what has been forgotten can rarely be shown. In some cases delay makes it simply impossible for justice to be done: Birkitt v James [1978] AC 297. In Lawrence [1982] AC 510 Lord Hailsham LC pointed out that ‘where there is delay the whole quality of justice deteriorates.’*

There is a danger here of reasoning on the basis of presumed guilt rather than presumed innocence. An innocent accused is likely to confront significant difficulty in attempting to recall precise but potentially important detail of events that were otherwise unremarkable to him or her but which could be important in casting doubt on an allegation raised after significant delay. In many cases it will not be direct refutation but examination of surrounding detail that will be critical.

In some circumstances this problem may even extend to identifying that there are witnesses or other evidence which could cast doubt on the version given by a complainant and yet because of the delay, the identity of such witnesses is not ascertainable by the defence.

Such difficulties may or may not appear in the evidence at trial. In these circumstances, the Association’s position is that the *Longman* warning should remain in its present incarnation.<sup>71</sup> (notes in original)

15.48 The BAQ also considered it appropriate for the warning to be couched in terms of it being ‘dangerous or unsafe to convict’ the defendant:

As to the form of words, the High Court was careful to refer to the words ‘dangerous to convict’ in reaching its decision. A similar conclusion was reached in the case of *Robinson*<sup>72</sup>. The Association’s position is that in fairness, to protect the position of an accused person who is affected by delay, the warning in its present terms should remain.<sup>73</sup> (note in original)

## The QLRC’s views

15.49 This Commission was attracted to the TLRI’s recommendation about a statutory amendment to override the Longman direction.<sup>74</sup> 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

69 (1989) 168 CLR 79.

70 (1986) 6 NSWLR 246.

71 Submission 13A, 28.

72 (1999) 197 CLR 162.

73 Submission 13A, 29.

74 See [15.27]–[15.29] above.

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’.

15.50 However, on further consideration the Commission prefers, and recommends, that the *Evidence Act 1997* (Qld) be amended along the lines of section 165B of the *Evidence Act 1995* (NSW).<sup>75</sup>

15.51 The Commission’s Proposal 7-1(a) required a party (presumably the defendant) to lead ‘specific evidence’ that demonstrates that that party had suffered an ‘identifiable forensic disadvantage’. This invited questions as to what that evidence might be and what standard of evidence would satisfy a court in any particular case. The approach under section 165B does not require specific evidence, and so a court might be satisfied on a party’s submissions alone in the context of a particular case that there had been significant forensic disadvantage that warranted a direction to the jury.

15.52 The use of the word ‘significant’ indicates that the disadvantage must be more than merely trivial. The requirement that the court be satisfied that a party has suffered a disadvantage means that the warning that follows is given when it is warranted and not as a matter of routine. The fact that there will have been some specific debate in court about the need for the warning (in the absence of the jury) will mean that both the judge and counsel will have turned their minds specifically to the need for, and the terms of, any warning to be given.

15.53 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 appears to warrant a warning along the lines of the Longman direction.

15.54 Concerns have been raised with the use in directions of the expression ‘dangerous or unsafe to convict’, as is sometimes confirmed expressly in statute. The concern is that this is taken by jurors to be a coded instruction to acquit, or at very least to disregard a particular witness’s evidence.<sup>76</sup>

15.55 The Commission has similar concerns with, and has reached similar conclusions in relation to, the expression ‘scrutinise with great care’.

15.56 The Commission’s concerns with these expressions lie not so much with the warnings that they seek to impart to the jury; rather, the problems lie with the use of

75 This section is set out in [15.16] above.

76 Consultation, Dr B McKimmie, School of Psychology, University of Queensland, 9 December 2008. 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]; Victorian Law Reform Commission, *Sexual Offences*, Final Report (2004) [7.132]. 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.)

unusual expressions that could well seem to non-lawyers sitting on juries to convey particular unintended meaning or to be laden with particular emphasis or significance. If the warning to be conveyed to the jury is that it should review certain evidence carefully, especially if it not corroborated, before reaching any conclusions based on it (or on it alone), then these simpler words can be used. The Commission is seeking to avoid jury directions that are couched in words that may well be familiar to lawyers but which may well be unfamiliar to others, and so carry undue weight in the minds of jurors.

15.57 The warning that should be given when any parties have suffered any forensic disadvantage beyond their control should inform the jury of the nature of that disadvantage in specific terms and its impact on the affected party, and that the jury should, therefore, take this into account when assessing the evidence as a whole. Accordingly, the Commission recommends that these loaded expressions not be used in any amended Longman direction given to juries.

## Recommendations

15.58 The Commission makes the following recommendation:

**15-1 The *Evidence Act 1977* (Qld) should be amended by the insertion of new provisions that state that:**

- (1) 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 in prosecuting a charge (including any delay in reporting the alleged offence), 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;**
- (2) significant forensic disadvantage is not established by the mere fact of delay alone;**
- (3) warnings given in accordance with these provisions should not use the expressions ‘dangerous or unsafe to convict’ or ‘scrutinised with great care’;**
- (4) the trial judge may refuse to give a warning or explanation if there are good reasons for doing so; and**
- (5) warnings about the disadvantages suffered by reason of delay in prosecution (including any delay in reporting the alleged offence) may only be given in accordance with these new provisions.**

## THE KILBY / CROFTS WARNING<sup>77</sup>

15.59 Another problematic direction relating to sexual offences is the Crofts direction, also named after the High Court decision in which it was discussed.<sup>78</sup>

15.60 The Crofts warning arises out of a direction which was mandated by the High Court in *Kilby v The Queen*.<sup>79</sup> 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.<sup>80</sup> 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*<sup>81</sup> and in *Reg. v. Mayberry* (Court of Criminal Appeal of Queensland 1973, unreported) are not, in my opinion, supportable.<sup>82</sup> (note in original)

15.61 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*.<sup>83</sup>

15.62 Some 23 years later, the High Court considered a Victorian provision in *Crofts v The Queen*<sup>84</sup> that has some similarities to the later statutory response in Queensland.

77 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].

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

79 [1973] HCA 30 [10]; (1973) 129 CLR 460.

80 See Tasmania Law Reform Institute, *Warnings in sexual offences cases relating to delay in complaint*, Final Report No 8 (2006) [1.1.2].

81 (1961) Qd R 17.

82 [1973] HCA 30 [10], [31]–[32]; (1973) 129 CLR 460, 465, 472 (Barwick CJ; McTiernan, Stephen and Mason JJ agreeing).

83 Eg 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]. Cf South African Law Commission, *Sexual Offences Report*, Project 107 (2002) [5.4.4], in which it was recommended that no inference should be drawn only from delay in complaint.

84 (1996) 186 CLR 427.



Section 61 of the *Crimes Act 1958* (Vic) at that time provided that in trials for certain sexual offences:<sup>85</sup>

- (1) ...
  - (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 ... 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.

15.63 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.<sup>86</sup> (emphasis in original)

85 Ibid 433, 443. Section 61 has since been amended: see [15.17] above. A number of other jurisdictions have similar provisions requiring a direction to the effect that delay in making a complaint does not necessarily mean the complainant's allegations are false: see *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 71; *Sexual Offences (Evidence and Procedure) Act* (NT) s 4(5)(b); *Evidence Act 1929* (SA) s 34M; *Criminal Code* (Tas) s 371A; *Evidence Act 1906* (WA) s 36BD.

86 (1996) 186 CLR 427, 448–9; [1996] HCA 22 (Toohey, Gaudron, Gummow and Kirby JJ).

#### 15.64 The majority went further:

[T]he 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 vulnerable 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.<sup>87</sup> (notes omitted)

#### 15.65 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.<sup>88</sup>

15.66 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,<sup>89</sup> 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.

87 Ibid 451; [1996] HCA 22 (Toohey, Gaudron, Gummow and Kirby JJ).

88 Ibid 451–52; [1996] HCA 22 (Toohey, Gaudron, Gummow and Kirby JJ).

89 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 13 November 2009.

- (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.
- (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.

15.67 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*,<sup>90</sup> and 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.<sup>91</sup>

15.68 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.

15.69 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.

15.70 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 sub-section 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.

90 (1996) 186 CLR 427. See [15.62] above.

91 See the comments by the Tasmania Law Reform Institute in [3.4.5] of its report discussed at [15.78] below.

15.71 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 direction. 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'.<sup>92</sup> Any such direction that might be given must comply with provisions such as section 632 of the Criminal Code (Qld).

15.72 The fact that the requirement to give the Crofts direction varies within Australia is just one aspect of the difficulties surrounding it.

15.73 Other difficulties with this direction have been noted by, for example, the Hon James Wood, who has observed:

[This is a] direction which is given, as is commonly required by statute, that the failure of a victim of a sexual assault to make a complaint, or a timely complaint, does not necessarily mean that the victim's allegations are false, because there may be good reasons why a victim may hesitate to complain, is then counterbalanced by a direction to the effect that the absence of a complaint, or a delay in a complaint, may be taken into account in evaluating the victim's credibility and reliability.

Problems with this direction relate to:

- the inherent inconsistency between the two propositions and lack of any guidance as to the way they are to be reconciled;
- the dubious assumption which underlies this balancing direction that victims of sexual assaults will raise a complaint at the first reasonable opportunity, an assumption that was questioned by Justices Gaudron and Gummow in *Suresh v The Queen*;<sup>93</sup>
- the justification for the balancing direction when there is nothing beyond the fact of delay in complaint to raise any question as to the complainant's credibility; and
- the re-introduction of the inherent unreliability of such victims.<sup>94</sup> (note in original)

## TLRI's Report

15.74 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'.<sup>95</sup> The judge need not comply with that request if 'there are good reasons for not doing so':

92 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 13 November 2009.

93 (1998) 72 ALJR 769.

94 Hon J Wood AO QC, 'Jury directions' (2007) 16 *Journal of Judicial Administration* 151, 154.

95 *Evidence Act 2001* (Tas) s 165(2)(c).

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).<sup>96</sup>

15.75 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;<sup>97</sup>
  - (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;<sup>98</sup>
  - (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.

96 Tasmania Law Reform Institute, *Warnings in sexual offences cases relating to delay in complaint*, Final Report No 8 (2006) iv.

97 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.

98 Paragraph (f) differs from section 165(1)(f) of the *Evidence Act 1995* (Cth).

- (5) This section does not affect any other power of the judge to give a warning to, or to inform, the jury.

15.76 This function of section 165(5) was confirmed by the NSW Court of Criminal Appeal in *R v Stewart*:

[Section] 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.<sup>99</sup>

15.77 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 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.<sup>100</sup> (notes omitted)

15.78 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.

99 *R v Stewart* [2001] NSWCCA 260 [70] (Howie J).

100 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].

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.<sup>101</sup>

15.79 The TLRI ultimately recommended that the Criminal Code (Tas) be amended to include a provision that expressly prohibits trial judges from making a *Crofts* direction.<sup>102</sup>

### NSWLRC’s Consultation Paper

15.80 The NSWLRC also noted a number of criticisms of the Kilby / *Crofts* direction in its Consultation Paper on jury directions:<sup>103</sup>

- it involves two ‘seemingly contradictory directions’;
- it is often given ‘as a matter of course regardless of the presence of good reasons for the delay’; and
- it ‘preserves the assumption that delay ... affects the credibility of the complainant’.

15.81 With respect to the last point, the NSWLRC observed:

7.70 This assumption is not in accord with the current body of research showing that it is common for sexual assault victims not to complain immediately. For example, the Victorian Law Reform Commission (‘VLRC’) conducted an empirical study covering sexual assault cases in Victoria between 1994 and 2002 which found that, although over half the reports of rape were made within a week, a significant number — 11.5% — were made five years after the alleged event. Delays in reporting occurred more frequently and for a longer period in cases of incest and sexual penetration of a child under 16 years; only 16% of such offences were reported within a week, 41% were reported at least two years after the offence, and over 30% were reported more than five years later.<sup>104</sup>

7.71 The results of the VLRC study are in line with international studies on child sexual assault victims. A study which reviewed data from several international studies found, among other things, that about 60% to 70% of people who were sexually abused when they were young had not told anyone about the abuse when they were children.<sup>105</sup> This implies that a large majority of those who participated in

101 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].

102 *Ibid* iv, 34.

103 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [7.64]–[7.76].

104 Victorian Law Reform Commission, *Sexual Offences: Law and Procedure*, Final Report (2004) [2.37]–[2.46].

105 K London, et al, “Disclosure Of Child Sexual Abuse: What Does the Research Tell Us About the Ways that Children Tell?” (2005) 11 *Psychology, Public Policy, and Law* 194.

these studies did not disclose the fact that they were sexually abused as children until they reached adulthood.<sup>106</sup> (notes in original)

## VLRC's proposals and recommendations

15.82 The Crofts warning was also considered by the VLRC in its Consultation Paper, 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:

- *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.<sup>107</sup> (notes omitted)

## Submissions

15.83 A few of the respondents to the VLRC's Consultation Paper commented on the Crofts direction.

15.84 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.<sup>108</sup>

15.85 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**

106 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [7.70]–[7.71].

107 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [3.43].

108 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: Submission 13.



**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 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.<sup>109</sup>

15.86 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.<sup>110</sup>

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

110 Associate Professor John Willis, Submission to the Victorian Law Reform Commission, 16 December 2008, 7–8.

### VLRC's recommendations

15.87 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),<sup>111</sup> the issue of the effect of any delay in complaint, or absence of complaint, on the credibility of the complainant should be a matter for argument by counsel and for determination by the jury.
- (i) Subject to subsection (ii), save for identifying the issue for the jury and the competing contentions of counsel,<sup>112</sup> 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.<sup>113</sup>

15.88 The VLRC considered section 4A of the *Criminal Law (Sexual Offences) Act 1978* (Qld) in its Final Report, but rejected any reform proposal 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.<sup>114</sup> 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

111 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.

112 In compliance with *Alford v Magee* (1952) 85 CLR 437. (note in original)

113 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) 16–17, [5.76]–[5.101].

114 *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.

complaint upon the trustworthiness of the complainant's account.<sup>115</sup> 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 conflict with the evidence or are based upon stereotypical assumptions about reporting of sexual offences.<sup>116</sup> (notes in original)

## The Issues Paper

15.89 Although the Crofts direction was discussed in the Commission's Issues Paper, none of the respondents commented specifically on it.

## The Discussion Paper

15.90 The Commission's provisional view in its Discussion Paper was that section 4A(5) of the *Criminal Law (Sexual Offences) Act 1978* (Qld) should be amended to address the TLRI's criticism: see [15.78] above. It therefore made the following proposal for reform, on which it sought further submissions:

- 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'.<sup>117</sup>

## Further submissions

15.91 Legal Aid Queensland did not specifically comment on Proposal 7-2, but was generally opposed to any reduction in the warnings currently required to be given in sexual offence cases.<sup>118</sup>

15.92 The Bar Association of Queensland did not support Proposal 7-2.<sup>119</sup>

Defence submissions to juries about delayed complaint in any particular case are based on evidence given at the trial. They are designed to demonstrate impugned credit on behalf of the complainant. It is difficult to see what directions could be given pursuant to the proposed amendment to correct accurate statements based on the evidence which on the facts may be relevant to credit and in any event are a matter for the jury.<sup>120</sup>

115 Tasmania Law Reform Institute, *Warnings in Sexual Offences Cases Relating to Delay in Complaint*, Final Report 8 (2006) 31–32.

116 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [5.93]–[5.94]. See also [15.78]–[15.79] above.

117 Queensland Law Reform Commission, *A Review of Jury Directions*, Discussion Paper WP67 (2009) [7.62]–[7.66], 249, Proposal 7-2.

118 Submission 16A, 13. See also [15.45] above.

119 Submission 13A, 29–33. The Queensland Law Society endorsed and supported the whole of the submissions by the Bar Association of Queensland: Submission 13B.

120 Ibid 33.

15.93 In its view, the current provision in section 4A(5) of the *Criminal Law (Sexual Offences) Act 1978* (Qld) is both clear, and appropriate, such that there is no obvious need for change:

It is respectfully observed that a difficulty in responding to this recommendation is that it is not clear as to what is sought to be achieved and more significantly, precisely what identified difficulty is sought to be addressed. For instance, there can be no doubt that judges presently have power to 'give appropriate directions to correct statements by counsel that conflict with the evidence'. This position is reflected and preserved by s.4A(5), which provides that, subject to sub-section (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. Juries are regularly instructed by trial Judges during their summing up that the submissions of Counsel are not evidence, merely arguments designed to persuade to a particular point of view.

Experienced counsel do not deliberately make submissions that conflict with the evidence. In the event that incorrect submissions with respect to the evidence are made to a jury during an address, trial judges have the power and use it, to correct counsel. This is simply part of the judge's role in ensuring trials are conducted according to law and in a balanced manner. Fairness to both the Crown and Defence is arguably the touchstone of a properly conducted criminal trial. To let a submission by either Counsel that conflicts with the evidence in the trial without comment to a jury would not be conducive to the conduct of a fair trial.

...

The purpose of the section is plain and unambiguous. Judges are specifically prohibited from suggesting to or warning juries 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. Section 4A(4) sensibly recognises that the law should not regard a failure to complain at the earliest opportunity by itself as necessarily undermining the credibility of a complainant.<sup>121</sup> (emphasis in original)

15.94 Furthermore, in the BAQ's view, the Commission's proposal overlooks the fact that delay in complaint may, for reasons other than inappropriate stereotypical assumptions, affect the complainant's credibility:

The perception of stereotypical assumptions is more problematic. We would point out that the current law recognises that a complainant's evidence is not more reliable or less reliable only because of the length of the time before a complaint is made. However, a jury is entitled to consider all aspects of the evidence and whilst the section permits the prosecution to lead evidence of complaint with the view to it being used by a jury as it relates to the complainant's credibility, it is for the jury to decide whether the relevant circumstances tell for or against that credibility.

...

The section does not prevent cross examination on the issue with a view to impugning credit during the trial. It is often the case in practice that other facts surrounding the making of a complaint tend to be relevant to a complainant's credibility. Section 4A(5) preserves the discretion of a Trial judge to make any comment appropriate in the interests of justice but subject to the prohibition in s.4A(4).

Offences of a sexual nature are often alleged to have taken place in circumstances where only two people, defendant and complainant, are directly present. Frequent-

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121 Ibid 29, 31.

ly, at trial the only evidence capable of proving the case against the accused beyond reasonable doubt is the evidence of the complainant. As noted by Thomas J,<sup>122</sup> the history of disclosure by the complainant can often shed light on the credibility of this evidence, often but not always in favour of the prosecution.

The proposed amendment appears to be impermissibly aimed at elevating the credibility of all complainants in sexual offences. The proposed amendment is plainly designed to discourage cross examination aimed at discrediting a complainant in a sexual matter because of circumstances relevant to a delay in complaining. There is no forensic advantage in cross examining about a delayed complaint and making submissions as to the effect of that delayed complaint on the complainant's credibility to the jury, only to have the trial Judge later correct Counsel's submissions to the jury and tell the jury that they are to disregard those submissions and cross examination because of stereotypical assumptions about the reporting of sexual offences.<sup>123</sup> (emphasis in original, note added)

15.95 The BAQ submitted that, just as evidence of complaint is admissible 'as a buttress to credit and to show consistency of conduct', the explanation for the timing of the complaint may also cast doubt on the complainant's credibility:

It cannot sensibly be suggested that delayed complaint invariably has nothing whatsoever to do with the credibility of complainants. If it be the case that delayed complaint has no effect on the credibility of complainants and is as the Tasmanian Law Reform Institute suggests,<sup>124</sup> normal and the rule rather than the exception and what happens in the vast majority of sexual assault cases, no logical reason exists for evidence of complaint as a buttress to credit and to show consistency of conduct and the logical reform would be to remove the exceptional basis upon which this evidence is admissible.

However that would be to deny the prosecution the availability of what experience tells can be a powerful addition to a prosecution case and it must be noted that s.4A(2) makes admissible 'evidence of how and when any preliminary complaint was made'. The prosecution frequently urge a timely complaint as supporting consistency of conduct of the complainant. It submits in its address to the jury that such conduct makes the complainant more reliable and believable. In other words, the timely complaint in this sense is a buttress to the credit of the complainant.

We also accept that in general there are many reasons as to why complaints are not made at the first reasonable opportunity. That is not to say the explanation for timing of complaint is not something that may affect the credibility of a complainant in a particular case and is relevant and probative of the facts in issue and a matter for the jury's consideration.

It is submitted that s.4A sensibly recognises that on occasions the circumstances surrounding the making of a complaint (including as to when and how it is made) may be seen as being damaging to the complainant's credit. Subsection (5) of the section is clear in its intent by preserving the situation.<sup>125</sup>

15.96 The Office of the Director of Public Prosecutions ('ODPP'), however, expressed the view that reducing the capacity for comments in the nature of a Crofts warning may

122 In *R v S* (1998) 103 A Crim R 101, 105.

123 Submission 13A, 29, 31–2.

124 See 7.53 of the Discussion Paper [Queensland Law Reform Commission, *A Review of Jury Directions*, WP67 (2009)]. And see [15.78] above.

125 Submission 13A, 33.

be a good thing. In the ODPP's experience, some judges make such comments as a matter of some routine. The ODPP was content with Proposal 7-2.<sup>126</sup>

### The QLRC's views

15.97 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 [15.69]–[15.71] above.

15.98 The Commission was 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) might in effect thwart 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.

15.99 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 Report, 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.<sup>127</sup> 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.'<sup>128</sup>

15.100 The Commission's Proposal was to amend section 4A(5) to deal with the criticism made by the TLRI<sup>129</sup> 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'.<sup>130</sup> The Commission was concerned that any amendment of this nature should not permit the re-introduction into Queensland of directions and warnings based on outdated and discredited assumptions.

15.101 However, on further consideration the Commission is now content that no further amendment to section 4A of the *Criminal Law (Sexual Offences) Act 1978* (Qld) is warranted. Any instruction or remark that might be made to a jury about delay in complaint (or any other matter) is in many cases either a question of common sense obser-

126 Submission 15A.

127 See [7.3]–[7.35] above.

128 Tasmania Law Reform Institute, *Warnings in sexual offences cases relating to delay in complaint*, Final Report No 8 (2006) [3.2.5].

129 See [3.4.5] of the TLRI's report quoted at [15.78] above.

130 See [5.94] of the VLRC's Final Report quoted at [15.88] above.

vation of human behaviour, in which case a direction is not required, or the subject of admitted factual evidence — anything else is likely to be speculation — in which case it can be the proper subject of addresses by the parties and remarks by the trial judge in the summing up.

15.102 As was noted in submissions,<sup>131</sup> trial judges already have the power to make such comments as the Commission had proposed in relation to evidence of delay in complaint as the interests of justice require in each case. This power includes the power (or duty) to correct any remarks made by a party that might be based on erroneous or poorly based stereotypical assumptions about complainants (or any other person). Further amendment is not required.

15.103 An amendment to the wording of section 632 of the Criminal Code (Qld) is recommended in [16.49] and Recommendation 16-1 below in relation to warnings about unreliable evidence.

15.104 Otherwise, the Commission makes no recommendation to amend the law in relation to jury directions or warnings that are concerned with inferences that delay in reporting the alleged offence may reflect adversely upon the truthfulness of the complainant.

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131 See [15.93] above.





# Chapter 16

## Directions about Unreliable Evidence

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### INTRODUCTION

16.1 This chapter covers two related types of warnings given to juries about the special care that they should exercise when dealing with evidence that is regarded as particularly unreliable:

- evidence from unreliable witnesses; that is, witnesses whose evidence should be treated with caution (unless independently corroborated) due to their background or personal circumstances; and
- eyewitness identification evidence, the unreliable nature of which would not ordinarily be appreciated by jurors without any experience of forensic analysis.

### WARNINGS ABOUT EVIDENCE FROM UNRELIABLE WITNESSES

16.2 To ensure a fair trial<sup>1</sup> and as part of instructing the jury on the law that they need in order to decide the issues in the trial,<sup>2</sup> the judge may need to warn the jury 'about how they should *not* reason or about particular care that must be shown before

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1 *RPS v The Queen* (2000) 199 CLR 620 [41]; *Zoneff v The Queen* (2000) 200 CLR 234 [55] (Kirby J).

2 *Alford v Magee* (1952) 85 CLR 437, 466.

accepting certain kinds of evidence'.<sup>3</sup> Whether a warning of this sort is required depends on the circumstances of the case and whether it is necessary to avoid a miscarriage of justice.<sup>4</sup> As Brennan J explained in *Carr v The Queen*:

In the majority of cases the assessment of the evidence can be left to the jury's experience unaided by judicial warnings but there are some occasions when a warning is needed. A warning is needed when there is a factor legitimately capable of affecting the assessment of evidence of which the judge has special knowledge, experience or awareness and there is a perceptible risk that, unless a warning about that factor is given, the jury will attribute to an important piece of evidence a significance or weight which they might not attribute to it if the warning were given.<sup>5</sup>

16.3 While it is not possible, therefore, to define *a priori* the cases in which a warning is needed, the common law has historically recognised certain categories of evidence which, it was said, 'judicial experience (actual or inherited) has shown to be unsafe to act upon so frequently that a warning has become mandatory'.<sup>6</sup>

16.4 In particular, warnings have in the past 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.<sup>7</sup> To those classes may be added indemnified witnesses, witnesses who have received a discount on sentence in return for testifying against the defendant,<sup>8</sup> and prison informers. The assumptions that underlay some of these warnings and the requirement to give them in every case — 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.<sup>9</sup>

16.5 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 in relation to some categories of evidence.<sup>10</sup> It can also be seen as an example of problems created by the com-

3 *RPS v The Queen* (2000) 199 CLR 620 [41].

4 *Bromley v The Queen* (1986) 161 CLR 315, 325 (Brennan J).

5 *Carr v The Queen* (1988) 165 CLR 314, 325. See also, eg, *FGC v Western Australia* [2008] WASCA 47 [3] (Wheeler JA).

6 *Carr v The Queen* (1988) 165 CLR 314, 325 (Brennan J). Also see *Jenkins v The Queen* (2004) 211 ALR 116 [25].

7 *Bromley v The Queen* (1986) 161 CLR 315, 323 (Brennan J). A fourth category of 'persons of admittedly bad character' had also been recognised. See generally, LexisNexis Australia, *Carter's Criminal Law of Queensland*, 'Circumstances where warnings might be given' [s 632.25] (at 13 November 2009). In Queensland, the Criminal Code (Qld) also specifically required a warning to be given about uncorroborated accomplice evidence: Criminal Code (Qld) s 632, reprint 1B.

8 See *Penalties and Sentences Act 1992* (Qld) s 13A.

9 Eg 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) [18.20].

10 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.

mon law which the common law may well have been slow, if not unable, to correct, and which needed statutory intervention.

16.6 Legislation has sought to abolish directions based on assumptions about certain categories of individuals.

16.7 In Queensland, the common law position has been modified by section 632 of the Criminal Code (Qld).<sup>11</sup> 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’.<sup>12</sup> Unreliable evidence warnings therefore need to be carefully crafted to avoid offending this provision.<sup>13</sup>

16.8 Sections 164 and 165 of the Uniform Evidence Law also deal with corroboration and unreliable evidence warnings.<sup>14</sup> Section 164 provides that corroboration warnings are not required:<sup>15</sup>

**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.

11 Section 632 is set out in [15.68] above.

12 Criminal Code (Qld) s 632(3).

13 For a direction that was held to be in contravention of this section, see *R v CAH* (2008) 186 A Crim R 288; [2008] QCA 333 [17], [22] (McMurdo P): see n 39 below.

14 Section 165 is set out in [15.75] above. See generally 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) [18.29]–[18.38]. 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.

15 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. Cf South African Law Commission, *Sexual Offences Report*, Project 107 (2002) [5.23], [5.3.3], which recommended the removal of the corroboration and cautionary requirements applying in that jurisdiction with respect to sexual offence complainants.

16.9 In relation to evidence that may be unreliable,<sup>16</sup> 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.<sup>17</sup> No particular form of words is required,<sup>18</sup> and the judge's common law power to warn the jury or comment on the evidence is not affected.<sup>19</sup>

16.10 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'.<sup>20</sup>

16.11 The effect of one such provision in Western Australia, directed to the uncorroborated evidence of sexual offence complainants,<sup>21</sup> was considered by the High Court in *Longman v The Queen*.<sup>22</sup> The Court held that the provision abolished only the requirement to warn of the general danger of acting on the uncorroborated evidence of alleged victims of sexual offences as a class.<sup>23</sup> The provision did not affect the responsibility to give a warning whenever necessary 'to avoid a perceptible risk of miscarriage of justice arising from the circumstances of the case'.<sup>24</sup> There may be matters personal to the uncorroborated witness or other circumstances that give rise to the need for a direction in the particular case.<sup>25</sup>

16.12 The High Court made a similar finding in *Robinson v The Queen* in respect of section 632 of the Criminal Code (Qld).<sup>26</sup> Consequently, unreliable evidence warnings

16 Uniform Evidence Law s 165(1) lists a number of types of evidence that may be unreliable; the list is not exhaustive.

17 Uniform Evidence Law s 165(2), (3).

18 Uniform Evidence Law s 165(4).

19 Uniform Evidence Law s 165(5).

20 *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].

21 *Evidence Act 1906* (WA) s 36BE(1). Now see s 50.

22 (1989) 168 CLR 79.

23 *Ibid* 86–7 (Brennan, Dawson and Toohey JJ), 95 (Deane J), 104 (McHugh J).

24 *Longman v The Queen* (1989) 168 CLR 79, 86 (Brennan, Dawson and Toohey JJ); *Bromley v The Queen* (1986) 161 CLR 315, 325 (Brennan J). Such warnings are sometimes referred to as 'Longman warnings': eg, *FGC v Western Australia* [2008] WASC 47 [1]–[2] (Wheeler JA). This is distinguished from the specific direction required to be given about the forensic disadvantage to the defendant of the complainant's delay in making the complaint which was also mandated in *Longman v The Queen* (1989) 168 CLR 79 and which, consequently, is commonly referred to as the 'Longman direction'. The latter is discussed in chapter 15 of this Report.

25 *Robinson v The Queen* (1999) 197 CLR 162 [19], [21]. In that case, the factors that gave rise to the need for a warning included the witness's age, the witness's apparent suggestibility, and the inconsistency in the witness's evidence together with the uncorroborated nature of the witness's evidence: [25]–[26]. See also, for example, *R v DAN*, in which it was held that, while a warning about the potential unreliability of the evidence of a drug addict or person with a criminal history will usually be unnecessary (because the factors that undermine the witness's reliability are likely to be obvious to the jury), it may be necessary to give a warning if the evidence is of crucial significance: [2007] QCA 066 [110], [119] (Williams JA), [135] (Holmes JA). Also see *R v Beattie* (2008) 188 A Crim R 542.

26 *Robinson v The Queen* (1999) 197 CLR 162 [20]. This was prior to the amendment made to s 632(3) substituting 'persons' for 'complainants'. See n 44 below.

are often referred to in Queensland as Robinson warnings or directions. The position in Queensland was recently summarised by Keane JA in *R v Hayes*:<sup>27</sup>

The enactment of the present s 632 of the *Criminal Code* in 1997 involved a decisive legislative rejection of judicial stereotyping of witnesses because of their membership of a particular class. It meant that it was no longer proper for trial judges to warn juries against the reliability of particular classes of witnesses. ...

...

There are, of course, cases where the circumstances are such as to create a risk of miscarriage of justice perceptible as to the trial judge for reasons other than an assumption about the unreliability of a witness in a particular category.<sup>28</sup>

16.13 If a warning is required on this basis, it should be given with reference to the particular factors giving rise to the perceived risk of miscarriage of justice.<sup>29</sup>

16.14 Nonetheless, because particular risks are almost invariably found to be attached to certain categories of evidence, warnings for many types of evidence in practice appear largely to 'have survived the statutory prohibitions'.<sup>30</sup> Research in New South Wales indicates, for example, that warnings about the risk of relying on uncorroborated evidence were given in the majority of sexual assault cases.<sup>31</sup>

16.15 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.<sup>32</sup> In falling back on this reasoning, however, judges may themselves be relying on outmoded or otherwise unsupportable 'misapprehensions'.<sup>33</sup>

16.16 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<sup>34</sup> and in relation to uncorroborated complainant evidence<sup>35</sup> the potential unreliability in many such cases may be apparent to the jury without the need for a warning.

27 Also see *R v Tichowitsch* [2007] 2 Qd R 462 [61]–[74] (Keane JA); *R v A* [2000] QCA 520 [142]–[143] (Atkinson J); *Tully v The Queen* (2006) 230 CLR 234 [89], [92] (Hayne J).

28 [2008] QCA 371 [91]–[94]. Also see *R v Tichowitsch* [2007] 2 Qd R 462 [72] (Keane JA), citing *Tully v The Queen* (2006) 230 CLR 234:

The need for a judicial warning that it would be unsafe to convict the accused had to be found in the perception of a risk of a miscarriage of justice where the risk arose for reasons, apparent to the judge but not the jury, beyond the mere fact that the prosecution case depended on the uncorroborated evidence of a child complainant.

29 *Robinson v The Queen* (1999) 197 CLR 162 [26]. See n 25 above.

30 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) [18.27].

31 See New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [7.34].

32 *Carr v The Queen* (1988) 165 CLR 314, 325 (Brennan J).

33 *FGC v Western Australia* [2008] WASC 47 [6] (Wheeler JA).

34 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [7.30].

35 *Ibid* [7.35]. 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.

16.17 Wheeler JA of the Western Australian Court of Appeal has made the following observations in relation to *Robinson*-type warnings:

While the principle can be readily stated, it cannot be so readily applied. It is a principle which gives rise to difficulty and confusion, not only for trial judges, but also for courts of appeal. A search of a database of Australian decisions in the 18 years since *Longman* was decided throws up hundreds of cases grappling with the question of whether a warning was or was not required in the light of particular circumstances. Trial judges are, of course, generally alive to the need to give a warning where it is necessary to avoid a perceptible risk of a miscarriage of justice, and are anxious to ensure that no risk of a miscarriage of justice arises in the cases over which they preside, so that the cases do not as a rule stem from any overlooking of relevant principle. The difficulty is not one of principle, but of fact (see, for example, the differing views expressed in *Tully v The Queen* [2006] HCA 56; (2006) 81 ALJR 391 [57], [87] and [91], [132], [151], [186]).

...

In the case of *Winmar*, this court considered, in relation to identification evidence, the problem of identifying aspects of evidence about which courts have special experience or expertise. The reasons in that case note that there is a danger, when judges attempt to assist juries by warning them about particular aspects of the evidence, that judges themselves may be basing their views upon their own misapprehensions of 'general' experience, or of human psychology, or of the state of scientific understanding. That danger is increased by the tendency, in appeals of this kind, for counsel to put forward a 'grab bag' of 'factors' which may bear upon the reliability of the evidence, without any coherent explanation of their significance, in an attempt to persuade either the trial judge, or an appellate court, that these are factors which common sense, or universal judicial experience, demonstrate must always affect reliability. ... It is an approach which, if successful, creates unnecessary and undesirable uncertainty in the conduct of criminal trials.<sup>36</sup>

16.18 The difficulty of proposing or relying on standard unreliable evidence directions is apparent from those observations. The duty to tailor the summing up to the needs of the particular case is such that no particular formula is required so long as the warning is clear enough.<sup>37</sup>

16.19 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.<sup>38</sup> As was explained, for example, by Atkinson J in *R v A*:

The prohibition found in s632(3) does not relieve a judge from the duty to comment on the evidence as necessary or appropriate in the interests of justice but the judge should be careful to ensure that in doing so he or she does not suggest that any class of witness is unreliable.<sup>39</sup>

36 *FGC v Western Australia* [2008] WASCA 47 [4]–[6].

37 *Eg R v Stewart* [1993] 2 Qd R 322, 323, 324.

38 See [16.24], [16.29], [16.34], [16.35] below.

39 [2000] QCA 520 [143]. For an example of a direction that was held to be in contravention of s 632(3), by warning the jury in general terms that that the evidence of a sexual offence complainant should be approached with caution, see *R v CAH* (2008) 186 A Crim R 288 [17], [22] (McMurdo P). The portion of the judge's directions that were held to be in error read as follows:

16.20 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.

16.21 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.<sup>40</sup> 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 evidence, for example, may weaken the warning and leave jurors with a heightened impression of reliability.

### Accomplice evidence

16.22 At common law, the judge was required to warn the jury that it is dangerous to convict the defendant on the evidence of an accomplice unless it is corroborated.<sup>41</sup> The rationale for the warning was explained by the High Court in *Jenkins v The Queen*:

The principal source of unreliability, although it may be compounded by the circumstances of a particular case, is what is regarded as the natural tendency of an accomplice to minimise the accomplice’s role in a criminal episode, and to exaggerate the role of others, including the accused. Accomplices are regarded by the law as a notoriously unreliable class of witness, having a special lack of objectivity. The warning to the jury is for the protection of the accused. The theory is that fairness of the trial process requires it. It is a warning that is to be related to evidence upon which the jury may convict the accused. The reference to danger is to be accompanied by a reference to a need to look for corroboration. The hypothesis is that the evidence in question is in contest, and that it inculpates the accused.<sup>42</sup>

16.23 Prior to the statutory modification of the requirement to give a corroboration warning, the warning was to be accompanied by an explanation of the reason for the warning and why it might be dangerous to rely on the uncorroborated evidence of an

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*Now, ladies and gentlemen, in a case of this nature where sexual misconduct is alleged by the complainant, you must approach her evidence with great care and with caution. You should scrutinise her evidence carefully and you need to be satisfied of its accuracy and reliability beyond reasonable doubt before you can convict. Human experience in the Courts is that complainants in such matters for all sorts of reasons and sometimes for no reason at all, tell a false story which is very easy to fabricate and very difficult to refute. Now, I’m not suggesting for one moment that the complainant told a false story but I’m telling you that this is a matter that you must consider in your evaluation of her evidence.*

40 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]; Victorian Law Reform Commission, *Sexual Offences*, Final Report (2004) [7.132].

41 See [16.4] above. See *Davies v DPP* [1954] AC 378, 399 in relation to the requirement to give a warning when an accomplice has given evidence for the prosecution. Also see former s 632 of the Criminal Code (Qld), reprint 1B which required a corroboration warning for accomplice evidence; *R v CBR* [1992] 1 Qd R 637, 642; *R v Button* [1992] 1 Qd R 552. However, as noted in *Jenkins v The Queen* (2004) 211 ALR 116 [32], the common law rule about accomplice warnings was ‘not so mechanical as to call for a warning in any case in which an accomplice gives any evidence which may be relied upon to establish the prosecution case’ but required ‘a consideration of the issues as they have emerged from the way in which the case has been conducted’.

42 (2004) 211 ALR 116 [30].

accomplice.<sup>43</sup> A difficulty in giving such directions now is the extent to which they may suggest, contrary to section 632(3) of the Criminal Code (Qld), that the law regards accomplices as an unreliable class of witnesses; if an accomplice warning is given, it 'must be given in a way that does not warn or suggest that the law regards any class of persons as unreliable'.<sup>44</sup> As a result, the wording of any such warning must now be carefully considered.

16.24 The model directions dealing with accomplice evidence in the Queensland Benchbook are in these terms:

**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.<sup>45</sup> (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.**

43 *R v Button* [1992] 1 Qd R 552.

44 *R v LX* [2007] QCA 450 [26] (McMurdo P); *Criminal Code* (Qld) s 632(3). Prior to amendments made in 2000, the proviso in s 632(3) of the Criminal Code (Qld) applied only in relation to 'any class of complainants' and so did not apply in the case of accomplices. This difficulty was noted in *Robinson v The Queen* (1999) 197 CLR 162 [22] and in 2000 the section was amended to refer to 'any class of persons' thus encompassing accomplices and other witnesses: *Criminal Law Amendment Act 2000* (Qld) s 31. As to the judge's discretion to give an accomplice warning under s 632 prior to the 2000 amendment, see *R v Rhodes* [1999] QCA 55 [34] (McMurdo P).

45 See [16.25] below for a comment about this sentence.



**(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.<sup>46</sup> (note added)

16.25 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. Although it generally makes no broad statements about any class of person, the fourth paragraph might be seen as going too far in this regard. As has been noted by others,<sup>47</sup> 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).

16.26 Difficulties with the giving of such directions might be overlooked, however, given that, where an accomplice gives evidence for the prosecution inculcating the defendant, an accomplice warning is unlikely to be challenged by the defendant on appeal.<sup>48</sup>

16.27 Additional dangers attend the giving of a warning when the accomplice is a co-defendant in the trial, particularly when each co-defendant seeks to incriminate the other. To avoid the risk of undermining the presumption of innocence,<sup>49</sup> an accomplice warning in respect of a co-defendant must make it clear that the warning relates only to the use of the evidence as against the co-defendant and that it has no application to the accomplice's evidence in his or her own defence.<sup>50</sup> Such directions may tend to confuse, rather than enlighten, the jury, as Brennan J pointed out in *Webb v The Queen*:

Confusion would be especially likely when the same part of an accused witness' testimony exculpates the accused witness and inculpates the co-accused. The jury would then be directed to treat that evidence in one way in deciding the guilt or innocence of the accused witness and in another way when deciding the guilt or innocence of the co-accused inculpated by the evidence.<sup>51</sup>

16.28 The potential self-interest of each defendant is also likely to be 'blindingly obvious' to the jury, making an accomplice direction 'otiose'.<sup>52</sup> Trial judges must there-

46 Queensland Courts, *Supreme and District Court Benchbook*, 'Accomplices' [37] <<http://www.courts.qld.gov.au/2265.htm>> at 13 November 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.

47 See [16.40] below.

48 See, for example, the comments made in *R v Lowe* [2004] QCA 398 [4]; *R v Henning* (Unreported, New South Wales Court of Criminal Appeal, Gleeson CJ, Campbell and Mathews JJ, 11 May 1990).

49 *Robinson v The Queen* (1991) 180 CLR 531; *Webb v The Queen* (1994) 181 CLR 41.

50 *Webb v The Queen* (1994) 181 CLR 41; *R v Lowe* [2004] QCA 398 [14], [20].

51 (1994) 181 CLR 41, 65.

52 *R v Pearl* [2005] QCA 237 [16] (de Jersey CJ).

fore exercise considerable care in deciding whether a warning should be given<sup>53</sup> and are to be given 'considerable latitude' in their approach on appeal.<sup>54</sup>

16.29 The suggested accomplice warning in the case of a co-defendant in the Queensland Benchbook is in the following straight-forward terms:

**Evidence of Defendant in Respect of a Co-Defendant**

**What the defendant (insert name) has said while giving evidence may be used not only for or against him but also for or against the other defendant(s).**<sup>55</sup>

**However, to the extent to which that evidence implicates (name of other(s)) in the (describe offences), scrutinize it carefully. There is a danger that, in implicating (name of other(s)), (defendant witness) may have been concerned to shift the blame.**<sup>56</sup>

**This warning is restricted to those parts of the evidence of (defendant witness) which inculpate (name of other(s)) in the offence: it does not apply to the evidence as it relates to (name of witness)'s own case.**

*Warning: do not give the direction in the second paragraph without giving the direction in the third.*<sup>57</sup> (notes and formatting as in original)

## Prisoner informer evidence

16.30 As with accomplices, it is generally recognised that the evidence of a prisoner informer is attended by a risk of unreliability.<sup>58</sup> In *Pollitt v The Queen*, the High Court considered that, because such evidence will be potentially unreliable in all but exceptional cases, it will ordinarily be necessary to warn the jury that it is dangerous to act on the evidence unless the informer's account is substantially confirmed by independent evidence:

There is no rule of law or practice identifying evidence from a source of that kind as evidence which must be corroborated or as evidence upon which it is dangerous to convict without corroboration. However, it is always the duty of a trial judge to warn of the danger of convicting on evidence which is potentially unreliable and it would only be in an exceptional case that the evidence of a prison informer would not fall into that category. Thus, in all but the exceptional case, it is necessary for a trial judge to warn of the danger of convicting on evidence of that kind unless corroboration is provided.

53 *R v Lowe* [2004] QCA 398 [20].

54 *R v Henning* (Unreported, New South Wales Court of Criminal Appeal, Gleeson CJ, Campbell and Mathews JJ, 11 May 1990), quoted with approval in *Webb v The Queen* (1994) 181 CLR 41. See also *R v Pearl* [2005] QCA 237 [15] (de Jersey CJ).

55 *Nessel* (1980) 5 A Crim R 374, 383.

56 There are difficulties in formulating a direction where an accomplice testifies in the defence case. It is contrary to *Robinson* (1999) 180 CLR 531 to direct that a defendant's evidence may be subjected to particular scrutiny because of his interest in the outcome. To do so is to undermine the presumption of innocence. Accordingly, when a defendant who gives evidence implicates a co-defendant, the nature and extent of an accomplice warning, if any, cannot be answered without reference to the circumstances of the particular case: *Webb & Hay* (1994) 181 CLR 41, 65-66, 92-95. But if some warning is to be given, the judge must not permit the jury to believe that it might attach to the defendant's evidence in his own case: *Webb & Hay*, 165. See also *R v Skaf, Ghanem, and Hajeid* [2004] NSWCA 74 at [159]–[168]; *R v Johnston* [2004] NSWCA 58 at [141]; *R v Lewis & Baira* [1996] QCA 405; *R & G v R* (1995) 63 SASR 417; and *R v Rezk* [1994] 2 Qd R 321 at 330.

57 Queensland Courts, *Supreme and District Court Benchbook*, 'Evidence of Defendant in Respect of a Co-Defendant' [26] <<http://www.courts.qld.gov.au/2265.htm>> at 13 November 2009.

58 *Eg R v Carroll* [2001] QCA 394 [30].

rated by other evidence connecting or tending to connect the accused with the offence charged.<sup>59</sup> (note omitted)

16.31 As McHugh J explained in that case:

Many years of experience in hearing prisoners give evidence for and against accused persons has alerted the judiciary to the unreliability of the evidence of serving prisoners. But it is by no means certain that every juror fully appreciates that unreliability which arises not so much because the prisoner has been convicted of serious crime but because the character of that person has been altered for the worse by exposure to the values and culture of prison society.<sup>60</sup>

16.32 In *R v Clough*, Hunt CJ at CL in the New South Wales Court of Criminal Appeal made the following remarks about what is required at common law:<sup>61</sup>

The direction to be given must be moulded to fit the circumstances of the particular case, and not follow any set formula. It should, however, include warnings:

(a) that the experience of the courts over the years has demonstrated that the evidence of such witnesses is potentially unreliable, together with the explanation as to why that is so;

(b) that it is for that reason necessary to scrutinise the evidence of the particular witness in question with great care;

(c) that, in the absence of substantial confirmation provided by independent evidence that the confession was in fact made, it is dangerous to convict upon the evidence of that witness;

(d) that such independent evidence is unlikely to be provided by a fellow prisoner, because he is likely to be motivated to concoct his evidence for the same reasons; and

(e) that, having regard to the potential unreliability of the evidence, there is a risk of a miscarriage of justice if too much importance is attached to it.

The judge must as well instruct the jury to consider any specific matters which could reasonably be regarded as undermining the credibility of the witness.

On the other hand, the judge should also draw to the jury's attention any matters which could reasonably be regarded as confirming the evidence of the prisoner informant.<sup>62</sup>

16.33 In *R v Dupas (No 3)*, Nettle JA of the Victorian Court of Appeal also held that the judge should identify the specific matters that are capable of undermining the reliability of the evidence in the particular case, but noted that whether the judge's summing up, viewed as a whole, is sufficient 'to bring home to the jury the danger' of acting on

59 *Pollitt v The Queen* (1992) 174 CLR 558, 599 (Dawson and Gaudron J). See also *ibid* 585–6 (Brennan J); 614–15 (McHugh J). Also see, generally, *R v Dupas (No 3)* [2009] VSCA 202 [27]–[34] (Nettle JA).

60 *Pollitt v The Queen* (1992) 174 CLR 558, 614.

61 Since that case was decided, s 165 of the *Evidence Act 1995* (NSW) has been enacted. Under s 165(1)(e), (2), (3) the trial judge must, if a party so requests and unless there are good reasons for not doing so, warn the jury that evidence given by a prison informer may be unreliable, inform the jury of 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. See also *Evidence Act 1995* (Cth) s 165; *Evidence Act 2001* (Tas) s 165.

62 (1992) 28 NSWLR 396, 406.

the evidence is a matter to be assessed in light of the witness's cross-examination and counsel's final address.<sup>63</sup>

16.34 In Queensland, the common law position is modified by statute. The warning will need to be carefully framed to avoid offending section 632(3) of the Criminal Code (Qld), which prevents a judge from suggesting that the law regards any particular class of people as unreliable witnesses. The Queensland Benchbook includes the following suggested directions:

Confession to a prison informer

**The prosecution relies on the evidence of (Y), a former cellmate of (X), who says that (X) confessed the offence to him while they were in custody together. Before you act on the evidence of (Y), you should consider whether you are satisfied of his reliability, accuracy and honesty. You should take into account the fact that while it would be easy enough for (Y) to concoct that evidence, it is very difficult for someone in (X)'s position to refute it. [There is no independent evidence available either way.] You should also take into account the prospect that (Y) may have been motivated to fabricate his evidence, thinking that he will derive some benefit in terms of sentence, treatment or release on parole.**

**You would have regard to (Y)'s record of convictions for dishonesty, and you would have regard to what he stood to gain, or thought he stood to gain, by giving evidence against the defendant. It would be dangerous to act on the evidence of (Y), if there were no independent evidence confirming it. [However you should consider whether the following evidence does provide confirmation of what (Y) says about (X)'s having admitted the offence to him: ...].<sup>64</sup> (note omitted)**

## Indemnified witnesses

16.35 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 would not infringe section 632(3)) although the general statements of the witnesses' incentives to tailor their evidence are in very broad 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**

63 [2009] VSCA 202 [44], [48]–[50], [52].

64 Queensland Courts, *Supreme and District Court Benchbook*, 'Out-of-Court Confessional Statements' [36.3] <<http://www.courts.qld.gov.au/2265.htm>> at 13 November 2009.

**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.**

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.'<sup>65</sup> 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

65 *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.'

whose recollection is likely to be drug-affected.<sup>66</sup> (note in original, some notes omitted)

### VLRC's proposals and recommendations

16.36 The VLRC gave some consideration to unreliable evidence warnings in the context of sexual offence cases in its Consultation Paper on jury directions.<sup>67</sup>

16.37 In its submission to the VLRC in which it opposed 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:

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.<sup>68</sup>

16.38 Ultimately, the VLRC recommended that the essential elements of directions concerning the use of evidence be set out in its proposed jury directions statute.<sup>69</sup>

### The Issues Paper

16.39 Unreliable evidence warnings were discussed in chapter 4 of this Commission's Issues Paper.<sup>70</sup> Few respondents, however, dealt specifically with unreliable evidence or corroboration warnings.

### Submissions

16.40 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; in his view, by the time the judge has identified for the jury all the

66 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 13 November 2009.

67 Eg Victorian Law Reform Commission, *Jury Directions*, Consultation Paper (2008) [3.47]–[3.57].

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

69 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [4.45], [5.33], 73, Rec 13.

70 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].



potentially corroborative evidence, the warning has lost its force.<sup>71</sup> This concern was also expressed by the Office of the Director of Public Prosecutions.<sup>72</sup>

## The Discussion Paper

16.41 In its Discussion Paper, the Commission observed that its Proposal for the parties to inform the judge prior to the summing up which directions and warnings should, or should not, be given would assist in avoiding unnecessary or counter-productive unreliable evidence warnings. The Commission also made the following Proposals for reform, on which it sought further submissions:<sup>73</sup>

- 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'.

## Further submissions

16.42 Both Legal Aid Queensland ('LAQ') and the Bar Association of Queensland ('BAQ') were opposed to Proposals 7-3 and 7-4.<sup>74</sup> LAQ submitted that the 'justification for such directions is soundly based and necessary, at present, to provide a fair trial for an accused':

It is our experience that juries will commonly proceed to conviction despite the giving of such warnings, reflecting an understanding that the warning, quite rightly, requires them to proceed with caution, and to take steps such as looking for independent corroborative evidence before convicting.

There is a sound basis for warning juries about the inherent unreliability of evidence from sources such as prison informers, and juries need to be told of the dangers of acting on such evidence.<sup>75</sup>

16.43 The BAQ also submitted that if the circumstances of a particular case require, an unreliable evidence warning is an appropriate aid to the jury:

[W]e should add that from our perspective, there is nothing inconsistent with this approach and with an approach which otherwise lauds the value of the involvement of juries in the criminal trial process. Obviously, that involvement comes with the benefit of an expectation that juries will be appropriately and adequately instructed by trial judges as to the performance of their function and accordingly, the assessed value of the application of the common sense, community values and experience in life by jurors, assumes the benefit of appropriate instruction by judges, including as to clear and unequivocal warnings when there is a need to exercise particular care in the assessment of the evidence.

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71 Submission 7.

72 Submission 15.

73 Queensland Law Reform Commission, *A Review of Jury Directions*, Discussion Paper WP67 (2009) [7.80]–[7.89], 259, Proposals 7-3 and 7-4.

74 Submissions 13A, 16A. The Queensland Law Society endorsed and supported the whole of the submissions by the Bar Association of Queensland: Submission 13B.

75 Submission 16A, 13.

As reference to the guideline directions in the Bench Book indicate, such directions need to be given in the context of the circumstances of particular cases and the issues that have arisen in the evidence in those cases and are not given in isolation but rather in the context of an examination of all the evidence and particularly the need to look for independent support for problematic evidence. This is not only a logical incident of the decision process involved but one that is actually aided by clear and emphatic direction as when there is need to exercise particular care.

Such directions will only be appropriate in a limited category of cases and can, where appropriate, guide an outcome which would avoid a miscarriage of justice which might otherwise occupy valuable time and resources in the appeal courts.<sup>76</sup>

#### 16.44 It disagreed that the phrase 'dangerous or unsafe to convict' should be avoided:

We do not agree with these recommendations and do not share the concern expressed at 7.88 of the [Commission's] Discussion Paper that expressions such as 'dangerous or unsafe to convict' are taken by jurors to be a coded instruction to acquit, or to disregard a witnesses evidence. It is not the experience of members of this Association that this is the outcome when such directions are given, at least in any inappropriate way.

The basic premise upon which such an instruction is to be given is where it is considered necessary 'to avoid a perceptible risk of miscarriage of justice'. In that context, such an instruction can be seen to be an uncoded direction for the jury to exercise caution and to carefully consider the basis upon which they would convict. In these circumstances, the use of such direct and unequivocal language is apt to bring home this obligation to the jury in a clear and emphatic way and with the weight of the authority of the judge's office.<sup>77</sup>

#### 16.45 LAQ also commented that, even if the words 'dangerous to convict' are not used, 'no alternate form of words is proposed to cover the need for some form of specific instruction of the jury'.<sup>78</sup>

16.46 The Office of the Director of Public Prosecutions ('ODPP'), however, agreed with Proposal 7-3 and submitted that the phrase 'scrutinise with great care' should similarly be avoided by judges. In its view, this instruction assumes that the jury does not scrutinise all the evidence with great care, as they do, and is thus taken as a coded instruction to ignore the evidence or to acquit. The ODPP submitted that words to the effect of 'pause for reflection' or 'take particular heed of this warning in examining the evidence of X' could be substituted.<sup>79</sup>

### The QLRC's views

16.47 The Commission did not propose in its Discussion Paper that warnings about unreliable evidence should be abolished or even scaled back. Its Proposals dealt only with some contentious, loaded expressions that sometimes appear in these warnings. Some of the submissions in response to the Discussion Paper seem to have read more into those Proposals than they were intended to contain. The Commission accepts that trial judges have, and should retain, the duty to give warnings of this nature when the circumstances of the evidence require.

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76 Submission 13A, 34.

77 Ibid 33.

78 Submission 16A, 13.

79 Submission 15A.

16.48 If, as is recommended in chapter 11 of this Report, and as is often the case now in practice,<sup>80</sup> 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 any unnecessary or counter-productive warnings avoided.

16.49 For reasons discussed by the Commission in chapter 15 in relation to its recommendations about the Longman direction,<sup>81</sup> the Commission recommends that the expressions ‘dangerous or unsafe to convict’ and scrutinise with great care’ not be used in the any warnings to be given to juries about unreliable evidence or evidence from unreliable witnesses.

16.50 These warnings do not require any particular formulation, and the Commission does not accept the criticism that its Proposals should be rejected because, in part, no alternative forms of words was proposed. It is the artful formulation of directions when plain English is required that the Commission seeks to avoid.<sup>82</sup>

16.51 Notwithstanding the Commission’s general acceptance of the proposition that jurors may well benefit from some direction about problematic or unusual evidence before or when 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, and indeed before any evidence that would indicate particular personal circumstances or characteristics of the witness that would give rise to the need for a warning. That can only be fully considered when all the relevant evidence has been admitted, perhaps not until the end of the case.

16.52 On reviewing the model directions referred to in this chapter, the Commission has become concerned that some of them may be at risk of offending against section 632 of the Criminal Code (Qld). They do not appear to refer to characteristics or matters personal to the witnesses in question as revealed by the evidence in the case but appear to speculate in more general terms. For example, the model direction in relation to prison informers tells jurors that they should take into account ‘the prospect that (Y) may have been motivated to fabricate his evidence’.<sup>83</sup> Similar concerns arise in relation to the warnings about accomplices and indemnified witnesses.<sup>84</sup>

16.53 The Commission recommends that these and similar directions be reviewed to determine whether they can be re-structured as integrated directions in accordance with Recommendations 9-4 to 9-6 above. At the same time, consideration should be given to ensuring that these warnings, whether or not they are re-drafted, do not arguably fall foul of section 632 of the Criminal Code (Qld).

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80 See [11.86]–[11.94], Rec 11-1, 11-2 above.

81 See [15.54]–[15.56] above.

82 See the comments in relation to the use of plain English at [5.77]–[5.85] above.

83 See [16.34] above.

84 See [16.24]–[16.25] and [16.35] above respectively.

## Recommendations

16.54 The Commission makes the following recommendations:

- 16-1 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 ‘scrutinise with great care’, ‘dangerous to convict’ or ‘unsafe to convict’.**
- 16-2 Chapters 37 and 60 of the Supreme and District Court Benchbook should be amended to remove the expressions ‘scrutinise with great care’ and ‘dangerous to convict’.**
- 16-3 The model directions in the Supreme and District Court Benchbook in relation to prison informers, accomplices, indemnified witnesses and other witnesses whose evidence might be regarded as unreliable should be reviewed:**
- (1) to determine whether they can be re-structured as integrated directions in accordance with Recommendations 9-4 to 9-6; and**
  - (2) to ensure that they do not arguably breach section 632 of the Criminal Code (Qld).**

## IDENTIFICATION EVIDENCE WARNINGS

16.55 Eyewitness identification evidence can be extremely persuasive but is also notoriously prone to error, and misidentifications have contributed to many significant miscarriages of justice.<sup>85</sup> The Australian Law Reform Commission has noted some Australian examples:

[One] case of notoriety was the case of Joey Hamilton (1975–76) where a false identification appeared to have resulted in a wrongful conviction.<sup>86</sup> In another Victorian case a man named McMahon was committed for trial on a charge of the murder of a young girl. The evidence against him was largely that of his identity with the man seen in the company of the girl at the relevant time. After committal but before trial, Mr Book KC, the Senior Prosecutor for the King, went to Leeton (NSW) to make inquiries concerning the prisoner’s alibi, and satisfied himself of its substance, whereupon a nolle prosequi was filed. Some years afterwards Arnold Sode-man, who was executed in 1936 at the Coburg (Vic) gaol for a similar crime, con

85 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) [13.4]. The ALRC lists several instances of this in England, the United States and Australia in its Interim Report on the law of evidence: Australian Law Reform Commission, *Evidence (Interim)*, Report 26 (1985) Vol 1 [416].

86 ABC, Four Corners (3 July 1976) Transcript, ‘A Case of Mistaken Identity’: DM Thomson & SL Robertson, ‘Person Recognition: The Effect of Context’, Monash University (Unpublished paper) 24-25.

fessed to the murder in question.<sup>87</sup> The Commission has been referred to cases where the identification was seriously open to question.<sup>88</sup> (notes in original)

16.56 The accuracy of an identification, dependent on the processes of memory acquisition, retention and retrieval, can be compromised by many factors — including the circumstances of the initial observation, the characteristics of the witness or the target, post-event information, and identification procedures — and jurors may have difficulty distinguishing between accurate and inaccurate eyewitness evidence.<sup>89</sup>

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.<sup>90</sup>

16.57 Perhaps the most significant danger of identification evidence, which is supported by empirical studies, is that an honest and confident witness can still be mistaken and 'few witnesses are as convincing as the honest — but perhaps mistaken — witness who adamantly claims to recognise the accused'.<sup>91</sup> In other words,

the most significant difficulty with identification evidence is that — in contrast with other categories of oral testimony — the confidence or apparent credibility of an eyewitness [does] not necessarily correlate with the degree of accuracy of this person's identification.<sup>92</sup>

16.58 Given these risks, identification evidence is subject to discretionary exclusion<sup>93</sup> and, when admitted, will ordinarily necessitate a warning to the jury about the general

87 JV Barry, 'The Problem of Human Testimony' (1938) 11 *ALJ* 314, 317.

88 Australian Law Reform Commission, *Evidence (Interim)*, Report 26 (1985) Vol 1 [416].

89 See generally, Law Commission (New Zealand), *Evidence: Total Recall? The Reliability of Witness Testimony*, Miscellaneous Paper 13 (1999) ch 3; BL Cutler and SD Penrod, *Mistaken Identification: The Eyewitness, Psychology, and the Law* (1995) ch 6–8; GL Wells and EF Loftus, 'Eyewitness memory for people and events' in AM Goldstein and IB Weiner (eds), *Handbook of Psychology* (2003), Vol II (Forensic Psychology) 149–60, 155–8.

90 'Identifying problems with identification: Editorial' (2004) 28(2) *Criminal Law Journal* 69, 69. Also see *R v Dupas (No 3)* [2009] VSCA 202 [314]–[316] (Weinberg JA), citing *Alexander v The Queen* (1981) 145 CLR 395, 426 (Mason J).

91 *Festa v The Queen* (2001) 208 CLR 593 [64] (McHugh J). Eyewitness confidence is not a good predictor of accuracy; while confidence at the time of the identification is a modest indicator of accuracy, confidence can be inflated by post-event information: BL Cutler and SD Penrod, *Mistaken Identification: The Eyewitness, Psychology, and the Law* (1995) 95–6; A Bradfield and DE McQuiston, 'When does evidence of eyewitness confidence inflation affect judgments in a criminal trial?' (2004) 28(4) *Law and Human Behavior* 369, 370.

92 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) [13.5].

93 *Alexander v The Queen* (1981) 145 CLR 395. 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. Cf *Uniform Evidence Law* s 114;

dangers of convicting on identification evidence<sup>94</sup> and of the specific weaknesses of the evidence in the case.<sup>95</sup>

16.59 The common law rule, stated in *Domican v The Queen* and applying in Queensland, 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'.<sup>96</sup> In giving the warning, the judge must identify the factors that may affect consideration of the evidence in the circumstances of the case and any matters of significance that may reasonably be regarded as undermining the reliability of the evidence:

[T]he 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.<sup>97</sup> (notes omitted)

16.60 The warnings required to be given will thus depend on the nature of the evidence and the risks or dangers associated with it in the particular case.<sup>98</sup> While some weaknesses may seem to be 'a matter of common sense'<sup>99</sup> — such as poor lighting or excessive distance during the initial observation, or significant delay between the event and the subsequent identification — other potential weaknesses may be 'very different from what people expect them to be'.<sup>100</sup> For example, the high level of stress

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*Evidence Act 2006* (NZ) s 45 pursuant to which failure to comply with the prescribed formal identification procedures may render the evidence automatically inadmissible.

94 *R v Turnbull* [1977] 1 QB 224, 288; *R v Dickson* (1983) 1 VR 227, 231. Also see, generally, M Bromby, M MacMillan and P McKellar, 'An examination of criminal jury directions in relation to eyewitness identification in Commonwealth jurisdictions' (2007) 36 *Common Law World Review* 303; Supreme and District Courts Benchbook, 'Identification' [49] <<http://www.courts.qld.gov.au/2265.htm>> at 13 November 2009.

95 *Domican v The Queen* (1992) 173 CLR 555.

96 *Ibid.*

97 *Ibid* 561–2 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

98 *Festa v The Queen* (2001) 208 CLR 593 [219] (Hayne J); *R v Finlay* (2007) 178 A Crim R 373 [38]–[41] (Holmes J).

99 *R v Dupas (No 3)* [2009] VSCA 202 [357] (Weinberg JA). In that case, Weinberg JA expressed the view that it is not every potential weakness with the evidence that must be highlighted, noting, for example, that the impact of delay on the reliability of the witness's memory is likely to be 'perfectly obvious' to the jury and a 'matter of common sense'.

100 Law Commission (New Zealand), *Evidence: Reform of the Law*, Report 55 (1999) Vol 1 [200]. Some studies have shown that jurors are insensitive to many of the factors that undermine the reliability of eyewitness identification and instead rely heavily on eyewitness confidence, even though it is not a good predictor of accuracy: BL Cutler and SD Penrod, *Mistaken Identification: The Eyewitness, Psychology, and the Law* (1995) ch 13; JC Brigham, AW Wasserman and CA Meissner, 'Disputed eyewitness identification evidence: Important legal and scientific issues' (1999) Summer, *Court Review* 12, 21. See n 91 above.

experienced when seeing a violent crime is more likely to interfere with the witness's ability to accurately encode the details of the event and the characteristics of the offender, than to enhance it as is often supposed. An offender's appearance is also less likely to be accurately perceived and encoded when a weapon is present, or if the offender's hair or hairline is hidden or disguised. 'Cross-racial' identifications also tend to be less accurate.<sup>101</sup>

16.61 Chapter 49 of the Queensland Benchbook contains suggested directions warning of the special need for caution in relying on visual identification evidence which point to some of the factors that might undermine the reliability of the evidence:<sup>102</sup>

**The issue of identification is one for you to decide as a question of fact.**<sup>103</sup>

...

**You must examine carefully the circumstances in which the identification by the witness was made. How long did the witness have the person, said to be the defendant, under observation? At what distance? In what light? Was the observation impeded in any way? Had the witness ever seen the defendant before? If so, how often? If only occasionally, had the witness any special reason for remembering the defendant? What time elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description given to the police by the witness when first seen and the evidence the witness has now given?**

**The evidence of each individual witness, while important in itself, should not be regarded by you in isolation from the other evidence adduced at the trial. Other evidence tending to implicate the defendant may be highly relevant, and may justify a conviction, while the evidence of identification, if it stood alone, would be insufficient.**<sup>104</sup>

**Where evidence is given by a stranger to the defendant or a casual acquaintance, you should treat the evidence of identification with care. You should be cautious about concluding that identification has been established in such a case, and scrupulous to be satisfied first that the identifying witness is not only honest in his evidence, but also accurate.**<sup>105</sup>

**An identification by one witness may support evidence of identification by another, but you must bear in mind that even a number of honest witnesses may be mistaken about such a matter.**<sup>106</sup> (notes in original)

16.62 The suggested directions then indicate a place for the judge to set out the 'evidence capable of supporting the visual identification of the defendant' followed by the 'specific weaknesses which appeared' in the evidence.<sup>107</sup>

101 BL Cutler and SD Penrod, *Mistaken Identification: The Eyewitness, Psychology, and the Law* (1995) ch 7; JC Brigham, AW Wasserman and CA Meissner, 'Disputed eyewitness identification evidence: Important legal and scientific issues' (1999) Summer, *Court Review* 12, 13–15; BL Cutler, 'A sample of witness, crime, and perpetrator characteristics affecting eyewitness identification accuracy' (2006) 4 *Cardozo Public Law, Policy, and Ethics Journal* 327.

102 Queensland Courts, *Supreme and District Court Benchbook*, 'Identification' [49] <<http://www.courts.qld.gov.au/2265.htm>> at 13 November 2009.

103 See *Donnini* [1973] VR 67.

104 *Beble* [1979] Qd R 278, which was approved by the High Court in *Chamberlain* (1984) 153 CLR 521.

105 See *Sutton* [1978] WAR 94 and *Domican*.

106 See *Weeder* (1980) 71 Cr App R 228 and *Chamberlain*.

16.63 From time to time, judges have differentiated between different types of identification evidence.<sup>108</sup> One distinction has been drawn between positive identification — ‘where a witness claims to recognise the accused as the person seen on an occasion that is relevant to the charge’ and which may be either direct or circumstantial evidence<sup>109</sup> — 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’.<sup>110</sup> While it has been suggested that ‘similarity evidence’ may not require a warning,<sup>111</sup> it has been held in Queensland that a *Domican* warning, though not necessarily all aspects of it, should be given.<sup>112</sup>

16.64 A further distinction has also sometimes been drawn between positive identification by a stranger and ‘recognition’ evidence where the witness claims some prior knowledge of the person.<sup>113</sup> 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.<sup>114</sup>

16.65 In its Final Report, the VLRC expressed concern that, while the law on identification warnings is straight-forward, 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.<sup>115</sup> This Commission notes that while misdirections on identification evidence may, appropriately, be a ground of appeal in a particular trial,<sup>116</sup> the VLRC’s concern does not of itself say anything about the appropriateness or otherwise of the underlying requirement to give identification evidence warnings or of the form in which they should be given.

16.66 Some empirical studies have shown that juror sensitivity to the unreliability of identification evidence is not enhanced by judicial instructions, even when the instructions isolate specific reliability factors. This could be because of the difficulties of integrating the information or because the instructions are confusing. Enhancing juror sensitivity depends not merely on informing jurors of those factors, but on jurors’ abilities to integrate and use that information; a cognitive-psychological task that is far from easy.<sup>117</sup> On the other hand, jurors in one study were more sceptical of the identification evidence in general and less likely to convict on it when they had received a judi-

107 Queensland Courts, *Supreme and District Court Benchbook*, ‘Identification’ [49.2] <<http://www.courts.qld.gov.au/2265.htm>> at 13 November 2009.

108 Eg *R v Dupas (No 3)* [2009] VSCA 202 [310]–[312] (Weinberg JA).

109 *Festa v The Queen* (2001) 208 CLR 593 [54] (McHugh J).

110 *Ibid* [56] (McHugh J). See also, for example, *R v Cavkic (No 2)* [2009] VSCA 43 [51].

111 *Festa v The Queen* (2001) 208 CLR 593 [57] (McHugh J); *R v Cavkic (No 2)* [2009] VSCA 43 [51].

112 *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].

113 *Eg R v Spero* (2006) 161 A Crim R 13 [25]–[29] (Redlich AJA).

114 *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.

115 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [3.104].

116 As noted in chapter 6 of this Report, directions on identification evidence have featured in at least some recent Queensland criminal appeal judgments: see [6.53] above.

117 *Ibid* 216–17.



cial warning.<sup>118</sup> Some more recent studies also showed that instructions on whether law enforcement officials had complied with identification procedure guidelines impacted on jurors' assessments of the eyewitness's credibility and the likely accuracy of the identification.<sup>119</sup>

16.67 To the extent that simple, clear, concise directions are more effective than long, complicated directions, it is generally appropriate to ensure that all jury directions, including those on identification evidence, are comprehensible and thus only as detailed as is required. As the experimental research conducted by the University of Queensland found, simplified warnings may encourage jurors to adopt a generally more cautious and objective approach and to rely less on stereotypes and their personal beliefs.<sup>120</sup> This is precisely the sort of approach to identification evidence that an identification warning is intended to encourage. The Commission also notes, however, that an overly simplified direction that amounts to nothing more than a bare warning to consider the evidence carefully does little to communicate to the jury the real import of the warning or to give the jury an appreciation for the issues that it is hoped will encourage and enable them to adopt the cautious approach the warning advocates.

16.68 It has also been suggested that the unreliability of identification evidence might be better addressed as a matter of admissibility rather than by jury directions that may prove ineffective:

[T]here 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.<sup>121</sup>

118 Ibid 217.

119 RP Fisher and MC Reardon, 'Eyewitness Identification' in D Carson et al (eds) *Applying Psychology to Criminal Justice* (2007) 21–38, 35.

120 School of Psychology, University of Queensland (Blake McKimmie and Kathryn Havas), 'An Experiment to Test the Effect of Simplifying Directions', Report (November 2009) 13–14.

121 'Identifying problems with identification: Editorial' (2004) 28(2) *Criminal Law Journal* 69, 70–71.

16.69 Some commentators have also argued that the dangers of eyewitness identification evidence should be the subject of expert evidence.<sup>122</sup>

## Uniform Evidence Law

16.70 Identification evidence warnings are dealt with in sections 116 and 165 of the Uniform Evidence Law, which generally reflect the common law position.<sup>123</sup> Under section 116, a warning is required when the reliability of identification evidence is disputed:<sup>124</sup>

### 116 Directions to jury

- (1) If identification evidence has been admitted, the judge is to inform the jury:
  - (a) that there is a special need for caution before accepting identification evidence, and
  - (b) of the reasons for that need for caution, both generally and in the circumstances of the case.
- (2) It is not necessary that a particular form of words be used in so informing the jury.

16.71 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. While it is not necessary that a particular form of words be used, the judge must:

- (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.<sup>125</sup>

16.72 '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.<sup>126</sup>

122 Eg J McEwan, 'Fact finding and Evidence' in D Carson et al (eds), *Applying Psychology to Criminal Justice* (2007) 97–114, 99; JC Brigham, AW Wasserman and CA Meissner, 'Disputed eyewitness identification evidence: Important legal and scientific issues' (1999) Summer, *Court Review* 12; OP Holdenson, 'The admission of expert evidence of opinion as to the potential unreliability of evidence of visual identification' (1988) 16 *Melbourne University Law Review* 521. The main perceived advantage of expert evidence is in drawing the jury's attention to the psychological factors that may undermine the accuracy of the identification; there is some evidence that expert evidence improves jurors' abilities to distinguish accurate from inaccurate identification evidence: BL Cutler and SD Penrod, *Mistaken Identification: The Eyewitness, Psychology, and the Law* (1995) 239–41.

123 Under s 114 of the Uniform Evidence Law, visual identification evidence is generally admissible only if it was obtained by an identification parade. Section 115 of the Uniform Evidence Law also limits the circumstances in which picture identification evidence may be admitted. Those provisions are not included in the *Evidence Act 2001* (Tas).

124 The High Court has held that s 116(1) applies only when the reliability of the evidence is disputed: see *Dhanhoa v The Queen* (2003) 217 CLR 1.

125 Uniform Evidence Law s 165(2).

126 Uniform Evidence Law s 3, Dictionary, Part 1 defines 'identification evidence' to mean evidence that is:

## New Zealand

16.73 In New Zealand, section 126 of the *Evidence Act 2006* (NZ) specifies only three matters that must be broached in an identification warning:<sup>127</sup>

### 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<sup>128</sup> or voice<sup>129</sup> 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. (notes added)

16.74 This provision gave effect to a recommendation by the New Zealand Law Commission in its review of the law of evidence.<sup>130</sup> As part of that review, the NZLC canvassed empirical research on the unreliability of eyewitness identification evidence at some length.<sup>131</sup> Informed by that research, the NZLC expressed the view that, if

- 
- (a) an assertion by a person to the effect that a defendant was, or resembles (visually, aurally or otherwise) a person who was, present at or near a place where:
    - (i) the offence for which the defendant is being prosecuted was committed, or
    - (ii) an act connected to that offence was done,
 at or about the time at which the offence was committed or the act was done, being an assertion that is based wholly or partly on what the person making the assertion saw, heard or otherwise perceived at that place and time, or
  - (b) a report (whether oral or in writing) of such an assertion.

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 13 November 2009).

127 *Evidence Act 2006* (NZ) s 4(1) defines 'visual identification evidence' as evidence that is:

- (a) an assertion by a person, based wholly or partly on what that person saw, to the effect that a defendant was present at or near a place where an act constituting direct or circumstantial evidence of the commission of an offence was done at, or about, the time the act was done; or
- (b) an account (whether oral or in writing) of an assertion of the kind described in paragraph (a).

128 *Evidence Act 2006* (NZ) s 4(1) defines 'voice identification evidence' as evidence that is:

an assertion by a person to the effect that a voice, whether heard first-hand or through mechanical or electronic transmission or recording, is the voice of a defendant or any other person who was connected with an act constituting direct or circumstantial evidence of the commission of an offence.

129 The admissibility of visual identification evidence is dealt with under s 45 of the *Evidence Act 2006* (NZ) which generally requires that the evidence was obtained by a formal identification procedure.

130 Law Commission (New Zealand), *Evidence: Reform of the Law*, Report 55 (1999) Vol 1 [216]–[217]; Law Commission (New Zealand), *Evidence: Evidence Code and Commentary*, Report 55 (1999) Vol 2, 250, s 112.

131 Law Commission (New Zealand), *Evidence: Total Recall? The Reliability of Witness Testimony*, Miscellaneous Paper 13 (1999).

relevant, the following matters could be included in a warning given under the new provision:

- the difficulty of assessing the reliability of identification evidence, particularly as a witness's confidence, or lack of confidence, does not necessarily indicate how reliable their identification evidence is;
- the ways in which events surrounding the witness's observation of the defendant may have influenced the quality of the identification evidence (eg, time of observation, lighting, distance of witness from offender, weather conditions, the stress inherent in the situation, whether violence was used, or whether a weapon was involved);
- the ways in which any factors particular to the individual witness may have influenced the quality of the identification evidence (eg, poor eyesight or hearing, or bias);
- the ways in which any factors relating to the defendant may have influenced the quality of the identification evidence (eg, the use of a disguise);
- the fact that if the witness and defendant are of a different race/ ethnicity, the identification may be less reliable;
- the greater the period of time between the sighting and the identification, the greater the likely deterioration of memory;
- the fact that memory of peripheral detail, and the quality or consistency of descriptions given by the witness, may not be indicators of reliability.<sup>132</sup>

### NSWLRC's Consultation Paper

16.75 Identification evidence warnings were also discussed in the NSWLRC's Consultation Paper.<sup>133</sup> One of the issues identified by the NSWLRC was whether warnings should be required about matters that would be considered obvious to any jury.<sup>134</sup>

### VLRC's recommendations

16.76 Identification warnings were discussed at some length in the VLRC's Final Report.<sup>135</sup> 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.<sup>136</sup> 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.

132 Law Commission (New Zealand), *Evidence: Evidence Code and Commentary*, Report 55 (1999) Vol 2 [C398].

133 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [7.25]–[7.30].

134 *Ibid* [7.30], 138, Issue 7.4(2).

135 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [3.84]–[3.137], [5.52]–[5.63].

136 *Ibid* [5.52].

29. In the jury directions legislation, 'identification evidence', 'recognition evidence' and 'similarity evidence' should be given distinct definitions. The definitions should extend to the identification of objects.
30. Where 'identification evidence' is admitted and the reliability of that evidence is disputed, the legislation should require the judge to warn the jury about the unreliability of the evidence.
31. Where 'recognition evidence' or 'similarity evidence' is admitted, the legislation should require the judge to warn the jury about the unreliability of the evidence upon the request of counsel for the accused, unless the judge is satisfied that there is good reason not to do so.
32. The warning must, in the case of 'identification evidence', and may, in the case of 'recognition evidence' or 'similarity evidence', direct the jury that there is a special need for caution before accepting the evidence and that:
  - The identification, recognition or similarity evidence depends on a witness receiving, recording and accurately recalling an impression of a person or object
  - A witness, or multiple witnesses, may honestly believe that their identification, recognition or similarity evidence is accurate when it is in fact mistaken
  - Innocent people have been convicted because honest witnesses were mistaken in their evidence concerning identification, recognition or similarity.
33. The judge is not required to use any particular form of words when giving a warning, but must inform the jury of any matter of significance bearing on the unreliability of the evidence in the circumstances of the case.<sup>137</sup>

## The Issues Paper

16.77 Identification evidence warnings were discussed in chapter 4 of the Commission's Issues Paper.<sup>138</sup> None of the respondents identified any need for reform of identification warnings.

## The Discussion Paper

16.78 The Commission did not reach a provisional view on identification warnings in its Discussion Paper, but identified some possible options for reform to address the concern that such warnings may require the judge to go into considerable detail and thus leave the jury with overly long, and perhaps unnecessarily detailed, directions:<sup>139</sup>

- 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:

137 Ibid 15–16, [5.52]–[5.63].

138 See Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [4.100]–[4.102].

139 Queensland Law Reform Commission, *A Review of Jury Directions*, Discussion Paper WP67 (2009) [6.119]–[6.126], 218–19, Proposals 6-9 and 6-10.

- (a) that the evidence depends on a witness receiving, recording and accurately recalling an impression of a person or object;
- (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.

### **Further submissions**

16.79 Legal Aid Queensland did not consider it appropriate to make legislative changes to identification warnings in the absence of a wider review of the laws of evidence, and cited the concerns it raised about changes to limited-use directions generally.<sup>140</sup>

16.80 The Bar Association of Queensland ('BAQ') also opposed Proposal 6-9.<sup>141</sup> In its view, identification warnings that bring the specific weaknesses of the evidence to the jury's attention are both necessary to avoid miscarriages of justice and, in practice, effective:

The approach taken by the High Court in *Domican v. R*<sup>142</sup> has been applied in Queensland since that decision, in respect of cases of disputed identification and is regarded as uncontroversial. That approach is predicated upon acceptance of the need to be particularly careful as to the seductive effect of this category of evidence. An honest but mistaken identification witness (and particularly one who is convinced of the correctness of their identification) is capable of presenting as a convincing witness. However and in addition to the general reasons for being cautious before accepting and acting upon such evidence, particular weaknesses may be established in relation to this evidence.

Therefore, in the context that proper conviction can only be achieved upon proof beyond reasonable doubt, the requirement that a trial judge specifically bring such weaknesses to the attention of the jury is not only a sensible requirement but one necessary to guard against miscarriage of justice. The underlying rationale is the need to bring to bear the authority of the judge's office to alerting the jury as to the need to have particular regard to these considerations, in the context of the careful approach required in respect of this type of evidence.

The experience of members of this Association is that these requirements are well understood and work quite effectively in practice. In the context of an entire summation such directions are balanced by and considered in the light of references to the crown case and the strengths and weaknesses to be otherwise found in that case. Once again it is expected and happens that counsel are called upon to assist the trial judge in the identification of relevant aspects of the evidence for the purpose of this part of the summation.

140 Submission 16A, 13. See [12.37]–[12.40] above.

141 Submission 13A. The Queensland Law Society endorsed and supported the whole of the submissions by the Bar Association of Queensland: Submission 13B.

142 (1992) 173 CLR 555.

We are not aware of and the Discussion Paper does not identify any basis for concern as to the application of these fundamental principles in criminal trials in Queensland. In those circumstances, the Bar Association's position is that there should not be any move to legislate in respect of, let alone to do so to circumscribe, the requirements for summation in relation to disputed identification evidence.<sup>143</sup> (note in original)

16.81 The Office of the Director of Public Prosecutions ('ODPP'), however, supported Proposal 6-9 and the simplification of directions on identification evidence. The ODPP commented that the present necessity to identify every possible weakness with the evidence is 'a game without rules' and an 'unnecessary forensic exercise'. The ODPP also commented that fanciful weaknesses are often 'grossly oversold'.<sup>144</sup>

16.82 The ODPP also commented that in practice, an identification warning is given in every case that involves identification evidence, even if there is other evidence pointing to guilt. To direct the jury in every case assumes that the jury will consider the identification evidence to the exclusion of all the other evidence. In its view, a warning should not be given in every case.<sup>145</sup>

### The QLRC's views

16.83 It is evident that there are significant dangers in relying on identification evidence alone to support a conviction. The Commission agrees with Legal Aid Queensland and the Bar Association of Queensland that identification warnings are therefore necessary and justified in appropriate cases to guard against unfair trials.

16.84 In its Discussion Paper, the Commission proposed that identification evidence warnings should be simplified. The Commission had in mind the concern expressed by the Victorian Law Reform Commission that the requirement for judges to identify the specific weaknesses of the evidence in the particular case was overly burdensome and may leave considerable room for appealable error. The Commission is not now convinced, however, that this concern is necessarily borne out in Queensland, nor that it warrants legislative reform. It notes the submission of the Bar Association of Queensland that, in the experience of its members, the 'requirements are well understood and work quite effectively in practice'.<sup>146</sup>

16.85 The Commission notes that there is some evidence that identification warnings that isolate specific factors which may undermine the reliability of the evidence do not necessarily improve jurors' sensitivity to those specific matters.<sup>147</sup> The Commission notes, however, that juries are not experts, and are not expected to be, either before or after they have been instructed by the judge. The Commission is not satisfied that there is sufficient indication that identification warnings, in the form mandated by *Domican v The Queen*,<sup>148</sup> do not appropriately encourage juries to consider eyewitness identification evidence carefully. Indeed, the Commission notes that there is at least some evidence to indicate that when jurors are instructed in this way, they are likely to adopt a

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143 Submission 13A, 26–7.

144 Submission 15A.

145 Ibid.

146 Submission 13A: See [16.80] above.

147 See [16.66] above.

148 (1992) 173 CLR 555.

generally more cautious approach to the evidence.<sup>149</sup> In the Commission's view, a warning that identifies the specific weaknesses of the evidence puts the warning in its proper context for the jury. It may not be realistic to expect juries to fully integrate all the information about such weaknesses in their thinking, but by giving juries concrete examples, the Commission expects the warning is likely to be more effective.

16.86 Moreover, the Commission considers that the specification of identifiable weaknesses with the evidence is important in the interests of guarding against an unfair trial. This is also consistent with the Uniform Evidence Law provisions<sup>150</sup> and even with the provision recommended by the VLRC.<sup>151</sup> In this regard, the Commission agrees with the Bar Association of Queensland that the current law should be retained.

16.87 To the extent that any doubts may remain about the efficacy of jury directions in overcoming the dangers of identification evidence, the Commission notes that jury directions are but one of many possible safeguards; jury directions on identification evidence ought not to be seen as carrying the entire burden of dealing with the difficulties associated with evidence of this kind. Other measures include the formalisation of police procedures for identifications, the discretionary exclusion of identification evidence, cross-examination of witnesses, and, possibly, the reception of expert evidence.<sup>152</sup>

16.88 The Commission has therefore decided not to follow its Proposal for legislative simplification of identification evidence warnings, lest the attempt inappropriately restrict the trial judge's discretion to instruct the jury as the interests of justice demand in each case, and thus makes no recommendation for any such reform.

16.89 Concerns about the possible prolixity or complexity of such warnings can also be met, in the Commission's view, by their being given as part of a summing up structured in the style of integrated directions as has been recommended in chapter 9 of this Report.<sup>153</sup> The efficacy of identification evidence warnings might also be improved by giving them, when it is appropriate and possible to do so, at the time the evidence is heard. To that end, the Commission notes its recommendation, also in chapter 9 of this Report, that judges may inform the jury on matters of law or the evidence at any time during the trial.<sup>154</sup>

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149 See [16.66] above.

150 Uniform Evidence Law ss 116(1)(b), 165(2)(b): See [16.70]–[16.71] above.

151 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) 15–16, [5.52]–[5.63], Rec 33: See [16.78] above.

152 See [16.58], [16.68]–[16.69] above.

153 See Rec 9-4 to 9-6 above.

154 See Rec 9-3 above.



# Chapter 17

## Other Specific Directions

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### INTRODUCTION

17.1 The Commission's Terms of Reference required it to consider whether any jury directions should be amended or abolished.<sup>1</sup> 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 should be simplified or abolished.<sup>2</sup>

17.2 Some types of evidentiary directions and warnings were identified as particularly difficult. They are considered in chapters 12 to 16 of this Report. Some other specific directions — namely, those on the criminal standard of proof, reaching a unanimous verdict, and aspects of criminal responsibility — were also given particular attention in the Commission's Issues Paper and Discussion Paper. They are the subject of this chapter of the Report.

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1 The Terms of Reference are set out in Appendix A to this Report.

2 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 [12.1] above.

## ‘BEYOND REASONABLE DOUBT’

17.3 Some directions that are given in every criminal trial concern the burden and standard of proof.

17.4 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’.<sup>3</sup> No doubt many members of the public, and therefore many jurors, have their own view of what the expression means, though they, like many lawyers, may well have great difficulty explaining it or articulating it using other words that avoid a circular definition. Judicial attempts to define it are in fact strenuously discouraged by appellate courts and the Queensland Benchbook.<sup>4</sup>

17.5 Denning LJ gave this explanation of the standard (or degree) of proof in criminal cases:

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.<sup>5</sup>

17.6 The model directions to be given at the opening of every criminal trial found in the Queensland Benchbook include 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.**<sup>6</sup>

17.7 The Queensland Benchbook also contains the following direction, adding a standardised gloss to the meaning of ‘beyond reasonable doubt’, which is to be given only if the jury is seeking clarification:<sup>7</sup>

### Reasonable Doubt

The suggested direction should only be given where the jury indicates that it is struggling with the concept.<sup>8</sup> 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**

3 *R v Wanhalla* [2007] 2 NZLR 573 [39] (William Young P).

4 See the extract from the Queensland Benchbook set out in [17.7] below, and the cases referred to there.

5 *Miller v Minister of Pensions* [1947] 2 All ER 372, 373.

6 Queensland Courts, *Supreme and District Court Benchbook*, ‘Trial Procedure’ [5B.5] <<http://www.courts.qld.gov.au/2265.htm>> at 24 November 2009.

7 *Ibid*, ‘Reasonable Doubt’ [57] <<http://www.courts.qld.gov.au/2265.htm>> at 24 November 2009.

8 The direction is not intended to be an inflexible and all encompassing code: *R v Clarke* [2005] QCA 483 [53].

**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.**<sup>9</sup>  
(notes and formatting as in original)

17.8 As if acknowledging that this expression does not require further definition — or perhaps in concession to the inherent difficulties associated with paraphrasing or giving it a non-circular definition, even for experienced lawyers — the Benchbook specifies that it should only be given when the jury is struggling with the concept (as disclosed, presumably, by questions from the jury to the judge), and judges are discouraged from adding their own comments.

17.9 The Benchbook's default position, that the trial judge should not try to explain the expression, is consistent with authority that it is not an expression that can be defined or paraphrased easily, or possibly at all.<sup>10</sup>

17.10 Jurors' understanding of this expression was canvassed in both the recent research conducted by the University of Queensland<sup>11</sup> and in a survey conducted by the NSW Bureau of Crime Statistics and Research.<sup>12</sup>

9 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*:

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 Cavkic, Athanasi & Clarke* [2005] VSCA 182 at paragraphs 227, 228.

10 The Commission also notes that the last sentence of the Queensland Benchbook entry on ‘beyond reasonable doubt’ introduces the idea that jurors are ‘reasonable’ people and that doubts that they hold, being reasonable, are reasonable doubts. There might be some question as to the accuracy (or helpfulness) of blending concepts of reasonable doubt and reasonable people. See n 19, [17.48] below.

On 11 December 2009, the High Court refused special leave in an application for leave to appeal from the decision of the Court of Appeal of Victoria in *R v Cavkic, Athanasi & Clarke* referred to in n 9 above. That appeal, had it proceeded, would have ventilated questions about the correctness of the High Court's relatively recent decision in *Darkan v The Queen* (2006) 80 ALJR 1250: *Clarke v The Queen; Athanasi v The Queen; Cavkic v The Queen* [2009] HCATrans 336.

11 See [2.17] above and Appendix E to this Report.

17.11 The majority of jurors in the University of Queensland's research reported that the judge had explained the burden and standard of proof in his or her summing up.<sup>13</sup>

17.12 The majority (66%) also reported that they had understood the directions on 'beyond reasonable doubt' 'very much', rated the Judge's explanation as helpful (with scores of 6 or 7 out of 7), and said that they had not found the Judge's explanation hard to understand or in need of clarification.<sup>14</sup>

17.13 The jurors' objective understanding was also tested; the results revealed that, despite their self-reported understanding, many jurors did not in fact grasp the standard of proof correctly.<sup>15</sup> The jurors were asked to explain in their own words what 'beyond reasonable doubt' means, and their responses were categorised in the following ways:<sup>16</sup>

- Eleven jurors (33%) described the standard of proof in terms of a minor or reasonable doubt (ie, there is some doubt that is reasonable, or no reasonable alternative explanation). For example:

For me — Is there a plausible alternative that would substitute for the case put by the prosecution. ie. Is there another reasonable explanation. — Juror 11

...

'Not necessarily complete but convinced beyond a probable factor.'— Juror 15<sup>17</sup>

- Twelve jurors (36%) described 'beyond reasonable doubt' as requiring that there be absolutely no doubt at all. For example:

'To not have any doubt whatsoever.' — Juror 17

...

'You either have total evidential proof or feel convinced beyond any doubt. — Juror 30.<sup>18</sup>

- Three jurors (9%) described the standard of proof in terms of a reasonable person test. For example:

That a reasonable person would have no doubt as to the steps taken to find the defendant guilty or innocent — Juror 6<sup>19</sup>

12 NSW Bureau of Crime Statistics and Research (L Trimboli) 'Juror understanding of judicial instructions in criminal trials' *Crime and Justice Bulletin* No 199 (2008). See [3.87] above.

13 School of Psychology, University of Queensland (Blake McKimmie, Emma Antrobus and Kathryn Havas), 'Jurors' Trial Experiences: The Influence of Directions and Other Aspects of Trials', Report (November 2009) 11.

14 Ibid 15.

15 While the researchers found that the 'more jurors said they understood the direction [on burden of proof], the more accurate they were when describing what they thought the direction meant', they found no such relationship in relation to jurors' understanding of 'beyond reasonable doubt': Ibid 17.

16 Ibid 13–15.

17 Ibid.

18 Ibid 14.

I did not need an explanation, but the deliberation revealed some wanted a much higher level of proof than I thought reasonable or even possible. For me it is what a reasonable person may conclude or infer from the evidence laid before the court. In other words, after weighing the evidence the conclusion drawn is not outweighed by doubt. — Juror 10<sup>20</sup>

- Three jurors gave descriptions that could not be classified and a further three jurors failed to give a description at all.<sup>21</sup>

17.14 The commission notes that, while it is relatively easy to identify some clearly incorrect descriptions (such as those requiring absolute certainty of guilt), it is not so easy to determine the correctness or otherwise of many of the others. For example, a juror who asks whether there is ‘another reasonable explanation’ might in effect be transferring an onus onto the defendant to provide such an explanation. The research thus demonstrates the difficulty of defining the expression. It would also seem to indicate that a significant portion of the jurors may have misunderstood what the standard of proof entails.

17.15 Jurors were also asked to rate how convincing, strong, persuasive and clear the presentation of the prosecution and defence cases were. The researchers found some significant relationships between those evaluations and jurors’ subjective understanding of the directions on the burden and standard of proof: jurors who said that they had understood those directions rated the prosecution’s case more positively, and the more jurors said they understood the directions, the less positively they evaluated the defence case.<sup>22</sup> The research by the University of Queensland also indicates that at least some of the jurors reported that the standard of proof had been a topic of much discussion, and some disagreement, during deliberations.<sup>23</sup>

17.16 The relevant question asked of the jurors who agreed to participate in a survey by the NSW Bureau of Crime Statistics and Research (‘BOCSAR’) was a multiple-choice question with four possible answers in these terms:

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].<sup>24</sup>

17.17 It is not hard to identify shortcomings in the way in which these jurors were surveyed: the authors acknowledge, for example, the self-reporting nature of the questionnaire.<sup>25</sup> Other concerns arise out of the range of answers from which the jurors were required to choose. For example, none of the answers from which the jurors had to

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19 Ibid 14.

20 Ibid 13.

21 Ibid 13, 15.

22 Ibid 18–19.

23 School of Psychology, University of Queensland (Blake McKimmie, Emma Antrobus and Kathryn Havas), ‘Jurors’ Trial Experiences: The Influence of Directions and Other Aspects of Trials’, Report (November 2009) 24, 26. See also Submission 2 discussed at [17.32] below.

24 NSW Bureau of Crime Statistics and Research (L Trimboli) ‘Juror understanding of judicial instructions in criminal trials’ *Crime and Justice Bulletin* No 199 (2008) 4.

25 Ibid 10–11.

choose was in fact a correct statement in law of the meaning of the expression.<sup>26</sup> Nonetheless, the jurors' responses shed some light on their understanding of the expression and what may be seen as its 'translation' into the vernacular.

17.18 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'.<sup>27</sup>

17.19 Justice Young AO of the Supreme Court of New South Wales made these comments on these results:

BOCSAR said the research indicated that the view of appellate courts that there is no need to clarify the term was wrong and that jurors would benefit from some clear instruction as to its meaning (see eg *Thomas v the Queen* (1960) 102 CLR 584; *Green v The Queen* (1971) 126 CLR 28).

This is probably true, but the catch is, 'What would be a clear instruction'. In the past when trial judges attempted a 'clarification', appellate courts were wont to say that the judge had just created more confusion. The survey would show that at least 77% of jurors think that they have to find the accused guilty only if they are at least almost sure of guilt and the majority would be even stricter. This is probably as good as it gets in the real world.<sup>28</sup>

17.20 The BOCSAR survey also considered the responses on the standard of proof in the light of other self-reported responses and characteristics of the jurors:

- Jurors who reported that they 'completely understood' the judge's instructions were more likely than others to answer 'Sure' or 'Almost sure'.
- Jurors who heard cases involving sexual offences against adults or children were 1.4 times as likely to answer 'Pretty likely' or 'very likely', whereas jurors hearing other cases were 1.1 times more likely to answer 'Sure' or 'Almost sure'.
- Jurors whose first language was English were more likely to answer 'Sure' or 'Almost sure' than other jurors, but other socio-economic factors did not appear to be related.
- The provision of written materials to the jury did not appear to be related to the responses.<sup>29</sup>

17.21 Juror understanding of the expression 'beyond reasonable doubt' was also examined as part of a wider jury research project conducted by the Law Commission of New Zealand in 1998. Jurors surveyed and interviewed in that research were not given

26 However, the standard of proof in England, Canada and New Zealand has been changed to a formula based on 'Are you sure ...?' In that context, questions seeking to paraphrase 'beyond reasonable doubt' in terms of being sure could be seen as more relevant. See [17.22] below.

27 NSW Bureau of Crime Statistics and Research (L Trimboli) 'Juror understanding of judicial instructions in criminal trials' *Crime and Justice Bulletin* No 199 (2008) 4.

28 Justice PW Young, 'Current Issues: Jury system' (2009) 83 *Australian Law Journal* 71, 71–2.

29 NSW Bureau of Crime Statistics and Research (L Trimboli) 'Juror understanding of judicial instructions in criminal trials' *Crime and Justice Bulletin* No 199 (2008) 4.

an explanation of the expression by the judge and reported having difficulty in understanding what it meant:

[M]any jurors said that they, and the jury as a whole, were uncertain what 'beyond reasonable doubt' meant. They generally thought in terms of percentages, and debated and disagreed with each other about the percentage certainty required for 'beyond reasonable doubt', variously interpreting it as 100 per cent, 95 per cent, 75 per cent, and even 50 per cent. Occasionally this produced profound misunderstandings about the standard of proof.<sup>30</sup>

## Other jurisdictions

17.22 Three overseas jurisdictions, Canada, New Zealand and England and Wales, have sought to explain or replace 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 ...?'.<sup>31</sup> The last of these dates back to 1950 in England.<sup>32</sup> These paraphrases have been variously criticised either as too elastic or too stringent, especially when 'sure' is used with 'satisfied',<sup>33</sup> and may pose their own difficulties in comprehension or assessment by the jury.<sup>34</sup> The NSW Law Reform Commission noted that:<sup>35</sup>

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 'gobbledegook' to tell the jury that while they must be 'sure' they need not be 'certain'.<sup>36</sup> (note in original)

17.23 The following formulation was reached by a majority of the New Zealand Court of Appeal in *R v Wanhalla*:

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.

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- 30 Law Commission (New Zealand), *Juries in Criminal Trials Part Two: A Summary of the Research Findings*, Preliminary Paper 37, Vol 2 (1999) [7.16].
- 31 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.
- 32 *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.
- 33 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.
- 34 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.
- 35 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [4.62].
- 36 PJ Richardson (ed), *Archbold Criminal Pleading, Evidence and Practice* (Sweet and Maxwell, 2002), 473.

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.<sup>37</sup>

17.24 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,<sup>38</sup> 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.<sup>39</sup>

17.25 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.<sup>40</sup> 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’.<sup>41</sup>

17.26 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.<sup>42</sup>

17.27 In *Ladd v The Queen*, Martin CJ suggested in the Northern Territory Court of Criminal Appeal that at least some further explanation to the jury may be appropriate:

Notwithstanding that elaboration is to be avoided, it is permissible to instruct the jury that it is not enough for the Crown to prove that the accused is probably guilty and that the Crown must go further and prove guilt beyond reasonable doubt.

In the circumstances identified in *Green*, or if asked by the jury to explain or define the meaning of ‘beyond reasonable doubt’ or ‘reasonable’, it may be appropriate to instruct the jury:

37 *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.

38 Such a circular explanation is found in the Queensland Benchbook: see [17.7] above.

39 *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.

40 See John Montgomery, ‘The criminal standard of proof’ (1998) 148 *New Law Journal* 582.

41 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.

42 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. Also see, for example, *Ladd v The Queen* (2009) 157 NTR 29; [2009] NTCCA 6 [212] (Martin CJ).



- (i) That fantastic and unreal possibilities should not be used by the jury as a source of reasonable doubt.
- (ii) That it is not appropriate for the judge to endeavour to define the meaning of 'reasonable' because the jury itself sets the standard of what is reasonable in the circumstances, and whether a doubt is reasonable is for the jury to determine.<sup>43</sup>

## NSWLRC's Consultation Paper

17.28 The New South Wales Law Reform Commission ('NSWLRC') also discussed the difficulties associated with judicial attempts to define this expression and juries' attempts to understand it in its Consultation Paper on jury directions.<sup>44</sup>

17.29 It observed that one of the reasons that judicial attempts to define or explain the expression 'beyond reasonable doubt' have been discouraged is 'the separation of the fact-finding role':<sup>45</sup>

the judge should not usurp the jury's function in applying the standard of proof by seeking to attribute some content of equivalent level of certainty to the expression 'reasonable'.

17.30 However, the NSWLRC also noted the concern that 'the time-honoured expression lacks a common usage and understanding' which has led some courts to attempt to explain the expression to the jury.<sup>46</sup> The NSWLRC sought submissions on whether the expression 'beyond reasonable doubt' should continue to be used and, if so, how, if at all, it should be explained to the jury.<sup>47</sup>

## The Issues Paper

17.31 This Commission discussed and sought submissions on the difficulties with the expression 'beyond reasonable doubt' in chapter 7 of its Issues Paper.<sup>48</sup>

### Submissions

17.32 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.<sup>49</sup>

43 (2009) 157 NTR 29; [2009] NTCCA 6 [212].

44 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [4.21]–[4.62].

45 *Ibid* [4.30].

46 *Ibid* [4.40], [4.42].

47 *Ibid* 78, Issue 4.7.

48 Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [7.55]–[7.63].

49 Submission 2.

17.33 This was 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!<sup>50</sup>

17.34 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.’<sup>51</sup>

17.35 It was observed in a consultation with the Office of the Director of Public Prosecutions that the expression ‘beyond reasonable doubt’ is repeated during every jury 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’.<sup>52</sup>

## The Discussion Paper

17.36 In its Discussion Paper, the Commission noted the difficulties in defining or paraphrasing the expression ‘beyond reasonable doubt’ and made the following Proposals for reform, on which it sought submissions:<sup>53</sup>

- 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.

## Further submissions

17.37 The Office of the Director of Public Prosecutions did not specifically comment on Proposals 8-1 or 8-2, but did reiterate its earlier submission that the burden and standard of proof is repeated frequently during criminal trials. In its view, since the advent of mass media and the decline in the use of juries in civil trials, people generally

50 Submission 6.

51 Submission 16, 5.

52 Submission 15.

53 Queensland Law Reform Commission, *A Review of Jury Directions*, Discussion Paper WP67 (2009) [8.16]–[8.21], 267, Proposals 8-1 and 8-2.

know well the ‘hallowed formula beyond reasonable doubt’ and do not need constant instruction on it: its excessive repetition may in fact serve as a coded hint to acquit.<sup>54</sup>

#### 17.38 Legal Aid Queensland did not object to Proposal 8-2(a):

We have previously stated that we thought there was no proper basis for changing the current position or revisiting this issue.

We note the proposal in [Proposal] 8.2(a) to the effect that the wording of the model direction might be altered slightly. We have a neutral view on this proposal.<sup>55</sup>

17.39 Nor did the Bar Association of Queensland. It agreed that there should be no attempt to further define the concept of ‘beyond reasonable doubt’. The Bar Association submitted that members of the Bar find that difficulties with this concept arise relatively infrequently in practice, and that the current model direction in the Benchbook was ‘adequate’. However, the Association had no objection to the committee responsible for the Benchbook considering the proposed modifications to the model direction.<sup>56</sup>

### The QLRC’s views

17.40 The significant difficulties in trying to define the expression ‘beyond reasonable doubt’ do not, in the Commission’s view, of themselves compel a change to any other expression such as ‘Are you sure ...?’. There is presently no 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.

17.41 ‘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.<sup>57</sup> The mere fact that the expression is part of the bedrock of Australian criminal law is not of itself sufficient reason that it should remain unchanged. However, the Commission considers that there is no compelling case for changing the current formulation.

17.42 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<sup>58</sup> could well demonstrate to a jury without any further elaboration by a judge

54 Submission 15A.

55 Submission 16A, 13.

56 Submission 13A, 34–5. The Queensland Law Society endorsed and supported the whole of the submissions by the Bar Association of Queensland: Submission 13B.

57 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.

58 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.

that 'beyond reasonable doubt' requires a greater, even if unquantifiable, measure of certainty than the balance of probabilities.

17.43 However, the standard of proof is not a mathematical construct and should not be converted into one. It is not a quantifiable measure; it is (as with so much in a criminal trial) a question of weighting, and the key to striking the right balance is the concept of reasonableness.<sup>59</sup>

17.44 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),<sup>60</sup> noting the strong statements in the Queensland Court of Appeal and the High Court that judges ought not attempt to do so.<sup>61</sup> 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.

17.45 The Commission notes the advice in Young's article that the jury should be told that the expression cannot be defined.<sup>62</sup> The Commission accepts that it might 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. Although this was proposed in the Discussion Paper, the Commission now considers that another amendment to the model direction in the Benchbook is preferable.

17.46 Research demonstrates that some jurors fall into error when asked to state their understanding of 'beyond reasonable doubt' by interpreting it as requiring that they be absolutely certain of a defendant's guilt before convicting him or her, or that guilt can be established if it is simply more likely than not that the defendant committed the offence charged (ie, on the balance of probabilities, although jurors would not usually use this expression).<sup>63</sup> Research has also indicated that some jurors analyse the standard of proof as a pseudo-arithmetical exercise.<sup>64</sup> In light of these responses by jurors, the Commission recommends that the directions given to jurors about the standard of proof should be expanded by including a brief statement of what 'beyond reasonable doubt' **does not** encompass in order to seek to dispel misconceptions that jurors must be absolutely sure of guilt before convicting or that the prosecution need only prove that it is more likely than not that the defendant is guilty of the offences charged. This approach is consistent with that advocated by the New Zealand Court of Appeal in *R v Wanhalla*.<sup>65</sup>

59 See *Ladd v The Queen* (2009) 157 NTR 29; [2009] NTCCA 6 [212] (Martin CJ): 'The adjective "reasonable" has a role to play in qualifying the noun "doubt".'

60 See [17.48] below.

61 See the cases cited in the footnotes to the extract from the Queensland Benchbook set out in [17.7] above.

62 See [17.26] above.

63 See the discussion at [17.13] and [17.18] above.

64 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. See also the research undertaken by the NSW Bureau of Crime Statistics and Research discussed at [17.16] above and that by the Law Commission of New Zealand discussed at [17.21] above.

65 See the third paragraph of the passage from that majority judgment in that case recorded in [17.23] above.

17.47 Accordingly, the Commission recommends that the model direction on the standard of proof be augmented by the addition of a paragraph along the lines of the formulation of the New Zealand Court of Appeal<sup>66</sup> or to the following effect:

Being satisfied beyond reasonable doubt does not require you to have no doubt whatsoever that [the defendant] is guilty of [the offence charged]. But it does mean that you must be convinced of [the defendant's] guilt on a much stronger basis than thinking that it is more likely than not that [he or she] is guilty.

17.48 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. The proposition in this sentence assumes that any doubt held by a reasonable person is a reasonable doubt, which at least some jurors accept as a correct paraphrasing of 'beyond reasonable doubt'.<sup>67</sup> However, it is the quality of the doubt that is critical, not the quality of the jurors.<sup>68</sup> The Commission therefore recommends that this third sentence be amended by deleting those words from it, and that this sentence 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.

## Recommendations

17.49 The Commission makes the following recommendations:

**17-1 There should be no attempt to define 'beyond reasonable doubt' in statute or in model directions such as those in the Queensland Supreme and District Court Benchbook.**

**17-2 The model direction in Chapter 57 of the Queensland Supreme and District Court Benchbook should be amended by:**

**(1) adding a short statement to the effect that being satisfied beyond reasonable doubt does not require jurors to have no doubt whatsoever that the defendant is guilty of the offence charged, but that they must be convinced that the defendant is more than just probably or even very probably guilty; and**

**(2) 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'.**

66 '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': *R v Wanhalla* [2007] 2 NZLR 573 [49] (William Young P, Chambers, Robertson JJ).

67 See n 19, 20, [17.13] above.

68 Eg *Ladd v The Queen* (2009) 157 NTR 29; [2009] NTCCA 6 [212] (Martin CJ).

## OFFENCES AND CRIMINAL RESPONSIBILITY

17.50 More than 80 specific offences, including some Commonwealth offences, are the subject of suggested directions in the Queensland Benchbook.<sup>69</sup> These are designed to assist in directing the jury on the elements of the offences charged which the prosecution must prove.

17.51 The length and complexity of the suggested directions is necessarily determined by the law. Some of the directions are longer and more detailed than others.<sup>70</sup> Some directions set out in detail and in a structured way the elements of the specific offences charged. One example is the direction relating to the offence of dangerous operation of a motor vehicle under section 328A of the Criminal Code (Qld):

**The prosecution must prove that the defendant:**

- (1) Operated a motor vehicle.<sup>71</sup>**
- (2) In a place,<sup>72</sup> namely: .....,**
- (3) Dangerously.**
- (4) [As a result of the dangerous operation of the motor vehicle, causing the death of the deceased/grievous bodily harm].**
- (5) [The defendant was adversely affected by alcohol].<sup>73</sup>**
- (6) [If it has been alleged that the defendant has been previously convicted of any of the offences referred to in s 328A(2) or (3) this circumstance of aggravation must be pleaded and proved.]**

**The term ‘operates a motor vehicle dangerously’ means ‘operates a vehicle at a speed or in a way that is dangerous to the public having regard to all the circumstances’ including:**

- (A) the nature, condition and use of the place; and**
- (B) the nature and condition of the vehicle; and**
- (C) the number of persons, vehicles or other objects that are, or might reasonably be expected to be, in the place; and**
- (D) the concentration of alcohol in the operator’s blood; and**
- (E) the presence of any other substance in the operator’s body.’**

69 Queensland Courts, *Supreme and District Court Benchbook*, ‘Offences’ [90]–[156] <<http://www.courts.qld.gov.au/2265.htm>> at 24 November 2009.

70 Compare, for example, the suggested directions on arson and possession of a dangerous drug: *ibid* ‘Arson s 461’ [92.1]; ‘Drugs: Possession – *Drugs Misuse Act 1986*’ [106.1].

71 ‘Operated’ is not defined in the Code, but in most cases it will be sufficient to read out to the jury such parts of the definition of ‘operates ... a vehicle dangerously’ in sub-section (5) as are relevant to the facts of the case. If it is alleged that the defendant was not the driver, then the prosecution would have to plead ‘dangerously interfered with the operation of a vehicle’ as provided for in sub-section (4). If it is alleged that the defendant was the driver, then proof of that fact will be sufficient to satisfy the requirement that the defendant ‘operated’ a motor vehicle. The Macquarie Dictionary defines the term as ‘to work or use a machine’.

72 The 1997 amendments provide that the offence can occur in ‘any place’ (other than a place being used to test vehicles from which other traffic is excluded at the time), whereas previously the offence was confined to ‘on a road or in a public place’.

73 In *R v Anderson* [2005] QCA 304 Keane JA, with whose reasons Williams JA agreed, approved at [70] a direction to the jury which explained ‘adversely affected by alcohol’ as meaning some material influence upon the person from the consumption of alcohol; Keane JA added at [71] that the trial judge was referring to a material detraction from the driver’s ability to control a vehicle in consequence of the driver’s consumption of alcohol, and that that was a correct understanding of the words.

**The operation of a vehicle includes the speed at which the vehicle is driven and all matters connected with the management and control of the vehicle by the driver, such as keeping a lookout, turning, slowing down and stopping.**

**The expression ‘operates a vehicle dangerously’ in general does not require any given state of mind on the part of the driver as an essential element of the offence. A motorist may believe he or she is driving carefully yet be guilty of operating a vehicle dangerously. ‘Dangerously’ is to be given its ordinary meaning of something that presents a real risk of injury or damage.**

...<sup>74</sup> (notes and formatting as in original)

17.52 The Queensland Benchbook also includes specific directions in relation to Commonwealth drug offences.<sup>75</sup> These suggested directions take the same form as those for other specific offences in setting out the elements of the offences that must be proved by the prosecution. It also includes suggested directions on general criminal responsibility under the Criminal Code 1995 (Cth), which differs from the position in Queensland.<sup>76</sup>

17.53 As part of directing the jury on the law applicable to the case, the judge will also need to address relevant matters of criminal responsibility in the summing up. The Queensland Benchbook contains several suggested directions relevant to criminal responsibility under the Criminal Code (Qld), including:<sup>77</sup>

- attempts;
- conspiracy and evidence in conspiracy cases;
- aiding, counselling and procuring the commission of an offence, and the commission of an offence by common unlawful purpose (ie, parties to offences);
- charges of being an accessory after the fact;
- defences such as unwilled acts, accident, mistake of fact, insanity, intoxication, and capacity;
- acts or omissions done or made in circumstances of sudden or extraordinary emergency, or under compulsion;
- defence of dwelling and defence of moveable property;
- self-defence, provocation, and diminished responsibility; and
- criminal negligence.

74 Queensland Courts, *Supreme and District Court Benchbook*, ‘Dangerous Operation of a Motor Vehicle s 328A’ [103.1]–[103.2] <<http://www.courts.qld.gov.au/2265.htm>> at 24 November 2009. This direction continues with a discussion of other factors that may be relevant, such as the driver’s consumption of alcohol as a circumstance of aggravation.

75 Ibid ‘Offences’ [105]–[105B].

76 Ibid ‘Proof of Mental and Physical Elements: Commonwealth Offences’ [89].

77 Ibid ‘Criminal Responsibility’ [67]–[88].

17.54 Some suggested directions on criminal responsibility are lengthier and more complex than others — directions on parties to offences, self-defence and provocation are examples of the lengthier directions.<sup>78</sup> The judge's directions will also become more complicated in cases involving multiple defences.

## Parties to offences

17.55 Sections 7 and 8 of the Criminal Code (Qld) deem individuals to be criminally responsible for an offence in several circumstances, including aiding, or counselling or procuring, another person to commit the offence. They provide that the following people are criminally responsible for an offence:<sup>79</sup>

- every person who actually does the punishable act;<sup>80</sup>
- every person who does an act, or makes an omission, to enable or aid another person to commit the offence;<sup>81</sup>
- every person who aids another person in committing the offence;<sup>82</sup>
- any person who counsels or procures any other person to commit the offence,<sup>83</sup> and
- each of two or more persons who commit an offence in the prosecution of a common unlawful purpose.<sup>84</sup>

17.56 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;

78 See [17.55]–[17.60], [17.61]–[17.67], [17.68]–[17.74] below respectively. See also Appendix D to this Report, in which the various model directions in the Benchbook in relation to these provisions are set out.

79 Criminal Code (Qld) ss 7, 8 apply to all offences against the statute law of Queensland: *Renwick v Bell* [2002] 2 Qd R 326; LexisNexis Australia, *Carter's Criminal Law of Queensland*, 'Application to simple offences' [s 7.10], [s 8.15] (at November 2009).

80 Criminal Code (Qld) s 7(1)(a).

81 Criminal Code (Qld) s 7(1)(b).

82 Criminal Code (Qld) s 7(1)(c).

83 Criminal Code (Qld) s 7(1)(d).

84 Criminal Code (Qld) s 8.



- (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.

...

## 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.

17.57 Each provision involves different elements. In respect of aiding, for example, the defendant must have known, when assisting the offender, that the principal offender intended to commit the offence.<sup>85</sup> For counselling or procuring, however, as long as the offence was a probable consequence<sup>86</sup> of carrying out the defendant's counsel, the defendant is criminally responsible, even if the offence differs from what was counselled.<sup>87</sup>

85 *R v Lowrie* [2000] 2 Qd R 529; *R v Jeffrey* [2003] 2 Qd R 306.

86 A 'probable consequence' is more than a possible consequence and is probable in the sense that it could well happen: *Darkan v The Queen* (2006) 227 CLR 373.

87 Criminal Code (Qld) ss 7(1)(d), 9; *Stuart v The Queen* (1974) 134 CLR 426, 445.

17.58 The party provisions also involve both subjective and objective elements. For example, under section 8 there must have been a common intention to prosecute an unlawful purpose, with the result that the defendant's state of mind is relevant.<sup>88</sup> It also requires the offence so committed<sup>89</sup> to have been a probable consequence of the prosecution of the common unlawful purpose; for that test, actual foresight of the defendant is not necessary.<sup>90</sup>

17.59 It is not uncommon for more than one of these party provisions to be relevant in a trial.<sup>91</sup> Where a group of people is involved in the commission of an offence, it may be difficult to single out a principal offender,<sup>92</sup> but this does not prevent a person being convicted as a party.<sup>93</sup> In addition, the Criminal Code (Qld) provides that a person charged as a party under section 7 or 8 may be convicted of the same or a lesser offence as the principal offender.<sup>94</sup>

17.60 The complexity of the operation of the parties provisions is reflected in the model directions of the Queensland Benchbook, which run to 15 pages, including notes.<sup>95</sup> After setting out the substance of the relevant provision, the Benchbook provides directions on the matters of which the jury need to be satisfied and the meaning of relevant terms such as 'probable consequence'.

## Self-defence

17.61 In Queensland, the defence of self-defence comprises three separate but related defences under sections 271(1), 271(2) and 272 of the Criminal Code (Qld).<sup>96</sup> Each provision is addressed to different circumstances and involves different elements.

- Section 271(1) provides a defence if the force used is reasonably necessary and is not intended, and is not such as is likely, to cause death or grievous bodily harm.
- Section 271(2) provides a defence for the use of force that is necessary even if such force may cause death or grievous bodily harm, on certain conditions.
- Section 272 provides a defence for the use of such force as is reasonably necessary for the person's preservation from death or grievous bodily

88 *R v Barlow* (1997) 188 CLR 1, 13.

89 The offence must have been committed in the prosecution or furtherance of the common intention. See generally, LexisNexis Australia, *Carter's Criminal Law of Queensland* [s 8.25]–[s 8.35] (at November 2009).

90 *Darkan v The Queen* (2006) 227 CLR 373 [60], [125]; *Stuart v The Queen* (1974) 134 CLR 426.

91 Eg *R v Da Costa* [2005] QCA 385; *R v Palmer* [2005] QCA 2.

92 Eg *R v Lowrie* [2000] 2 Qd R 529, 535 (McPherson JA).

93 *R v Jeffrey* [2003] 2 Qd R 306.

94 Criminal Code (Qld) s 10A.

95 Queensland Courts, *Supreme and District Court Benchbook*, 'Parties to An Offence: ss 7, 8' [71] <<http://www.courts.qld.gov.au/2265.htm>> at 24 November 2009. These directions are set out in full in Appendix D of the Report.

96 Also see Criminal Code (Qld) s 273 (Aiding in self-defence).

harm from a provoked assault<sup>97</sup> even though such force may cause death or grievous bodily harm.

17.62 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.

17.63 These defences all involve both subjective and objective elements. For example, under section 271(2), the defendant's state of mind is relevant as he or she must have an apprehension of death or grievous bodily harm and a belief as to the action necessary to preserve himself or herself. It also requires the defendant's apprehension to be reasonable and the defendant's belief to be based on reasonable grounds, thereby importing objective requirements.<sup>98</sup> Directions on self-defence will be further complicated if a number of alternative defences are raised in the trial.

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97 That is, this defence applies if a person has unlawfully assaulted another or has provoked an assault from another: Criminal Code (Qld) s 272(1). If the use of force causes death or grievous bodily harm and, before the necessity of preservation arose, the person intended or endeavoured to cause death or grievous bodily harm, the defence applies only if the person declined further conflict and quitted it or retreated from it as far as was practicable before the necessity arose: s 272(2).

98 *R v Gray* (1998) 98 A Crim R 589.

17.64 Suggested directions on sections 271 and 272 are set out in the Queensland Benchbook.<sup>99</sup> The Benchbook also contains the following general notes which highlight the potential complexity of the directions:

**General Notes on Self-defence**

The two limbs of s 271 are more commonly raised than any other section. The following notes concentrate largely upon s 271, and make brief mention of s 272.

*Preliminary question — which limb or limbs of the above defences should be considered by the jury?*

‘Sometimes both limbs of s 271 will be appropriately left to the jury. But more often than not the consequence of summing-up on both limbs may be confusion which detracts from proper consideration of the true defence. Speaking very generally, in homicide cases the first limb of s271 seems best suited for cases where the deceased’s initial violence was not life-threatening and where the reaction of the [defendant] has not been particularly gross, but has resulted in a death that was not intended or likely; in other words cases where it can be argued that the unlikely happened when death resulted. The second limb seems best suited for those cases where serious bodily harm or life-threatening violence has been faced by the [defendant], in which case the level of his or her response is not subject to the same strictures as are necessary under the first limb. The necessity for directions under both limbs may arise in cases where the circumstances are arguably but not clearly such as to cause a reasonable apprehension of grievous bodily harm on the part of the [defendant]. In cases where the initial violence is very serious, most counsel will prefer to rely upon s 271(2) alone. It is only cases in the grey area where it is arguable but not sufficiently clear that the requisite level of violence was used by the deceased person that directions under both subsections will be desirable. The above general statements are not intended to paraphrase the meaning of the subsections. They are given with a view to identifying the broad streams of cases under which one or other or both of these defences may be appropriate’.<sup>100</sup>

Sometimes directions on a third alternative defence (under s 272) are requested. Generally speaking that defence helps a defendant who has started to fight and has then been threatened by massive over-reaction, or at least by such violence as to cause reasonable apprehension of death or grievous bodily harm.

Where there is a conflict in the evidence concerning who was responsible for the initial assault, or for provocation for the assault, it may be necessary to give the jury an alternative direction under s 272, to be applied if they consider that the defendant was responsible for the commencement of hostilities.

Discussion with counsel and commonsense will often narrow the true defence down to sensible limits and avoid the highly confusing exercise of multiple alternative directions under ss 271(1), 271(2) and 272. But there will be rare cases where all three will be necessary.<sup>101</sup> (note in original)

17.65 A recent decision of the Queensland Court of Appeal highlights the difficulties imposed on trial judges by the complexity of the law and, in particular, the burden of

99 Queensland Courts, *Supreme and District Court Benchbook* [86]–[86B] <<http://www.courts.qld.gov.au/2265.htm>> at 24 November 2009. These are set out in full in Appendix D to this Report. 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.

100 *Bojovic* [2000] 2 Qd R 183, 186.

101 Queensland Courts, *Supreme and District Court Benchbook*, ‘Self-Defence: s 271(1)’ [86.1] <<http://www.courts.qld.gov.au/2265.htm>> at 24 November 2009.

proof that falls on the prosecution not only to prove its case beyond reasonable doubt but in almost all cases also to disprove any defences raised by or otherwise available to the defendant. In *R v Edwards*<sup>102</sup> the direction in question related to the defence of self-defence, but it illustrates the more general difficulties that are encountered in giving directions on statutory provisions that are far from straight-forward.

17.66 The Court of Appeal considered this direction by the trial judge to the jury on the prosecution's onus of negating a defence of self-defence:

[I]f you don't accept the complainant or if you have a doubt about that version, and the accused's version has not been proved by the Crown beyond reasonable doubt not to be the one not to have happened, then the accused is entitled to the benefit of the doubt in relation to self defence.<sup>103</sup>

17.67 In the Court of Appeal's judgment it was 'clear that the triple negative rendered that part of the direction virtually unintelligible and it is clearly incorrect', and the prosecution conceded on the appeal that in isolation this direction was confusing.<sup>104</sup> However, in the context of much longer directions on the burden of proof in relation to this defence, the Court concluded that the flaw was overcome by the judge's correct statement of the approach that the jury should take in its analysis of the defence later in the summing up, and in a re-direction that was 'sensible' and favourable to the defendant. The appeal was dismissed as it 'could not be said that the [defendant] has lost a real chance of an acquittal through judicial error.'<sup>105</sup>

## Provocation

17.68 The directions dealing with the defences of provocation are among the most detailed and complicated of those included in the Queensland Benchbook. It is a telling example of trial judges' difficulties in simplifying jury directions when the law itself is particularly complex.

17.69 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.

17.70 A judge is required to leave this defence to be considered by the jury whenever it is open on the version of events disclosed by the evidence most favourable to the defendant.<sup>106</sup> The judge must, therefore, direct the jury on it even if it is tenuous or barely raised on the evidence, and even if not expressly raised as a defence by the defendant.<sup>107</sup>

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102 [2009] QCA 122.

103 Ibid [3].

104 Ibid [40] (White J, McMurdo P and Wilson J concurring).

105 Ibid [44]–[45] (White J, McMurdo P and Wilson J concurring).

106 *R v Stingel* (1990) 171 CLR 312, 318.

107 *Pemble v the Queen* (1971) 124 CLR 107, 117–18 (Barwick CJ); see [11.53]–[11.59] above.

17.71 A jury faced with the task of applying this defence must first come to grips with the language of the section itself. It must then be instructed that there is a two-fold test (which contains both subjective and objective elements) that it must apply, which does not emerge immediately from the words used in the Code. The jury must determine (a) whether the defendant was in fact so provoked as to lose self-control and act in the heat of passion, and (b) in cases where the defendant's immaturity may be relevant, whether an ordinary person (or, in some cases, an ordinary person of the defendant's age) could have lost self-control in the same circumstances.

17.72 The 'ordinary person' test for the partial defence of provocation has been criticised for being too hard for juries to understand and apply.<sup>108</sup> In *R v Makotia*, Smart J in the New South Wales Court of Criminal Appeal made the following comment about the provocation test:

In practice the gravity of the provocation/self-control distinction has proved hard to explain to a jury in terms which are intelligible to them.

...

Many trial judges in this State give juries both verbal and written directions on provocation. Juries struggle with the distinction and find it hard to grasp. Many do not do so. The directions on provocation and the distinction frequently lead to a series of questions indicating that these issues are causing difficulty, prolonged deliberation by juries and, not infrequently, to juries being unable to agree whether the accused is guilty of murder or manslaughter. This leads to a retrial. I have been left with the firm impression that, despite extensive endeavours to explain the directions, the jury has had trouble appreciating their import. Other trial judges have had similar experiences. It is important that juries have a good understanding of what they are required to do.<sup>109</sup>

17.73 In *R v Voukelatos*, Murphy J in the Victorian Court of Criminal Appeal stated that when faced with the complexities of the provocation test, jurors may 'dismiss such refinements and decide as they thought to be fair and just in the circumstances'.<sup>110</sup>

17.74 An examination of the model direction in the Queensland Benchbook demonstrates the complexity of the concepts behind the defence. It is difficult to state those concepts clearly and concisely, and as a result it is difficult for jurors to apply them. The model direction runs for several pages, without any reference to the specific evidence in any given case.<sup>111</sup>

108 Eg *R v Makotia* (2001) 120 A Crim R 492 [18]–[19] (Smart J); *R v Rongonui* [2000] 2 NZLR 385 [177], [205] (Thomas J), [216] (Blanchard J), [236] (Tipping J); *R v Voukelatos* [1990] VR 1, 12–13 (Murphy J); *Director of Public Prosecutions v Camplin* [1978] AC 705, 718 (Lord Diplock); and B McSherry, 'Afterword: Options for the Reform of Provocation, Automatism and Mental Impairment' (2005) 12(1) *Psychiatry, Psychology and Law* 44, 45.

109 (2001) 120 A Crim R 492 [18]–[19].

110 [1990] VR 1, 12.

111 Queensland Courts, *Supreme and District Court Benchbook*, 'Provocation: s 304' [87] <<http://www.courts.qld.gov.au/2265.htm>> at 24 November 2009. The model direction is set out in full in Appendix D to this Report. This area was also discussed in 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 under Criminal Code (Qld) s 304.

## NSWLRC's Consultation Paper

17.75 The NSWLRC considered how directions on substantive law, including defences such as self-defence and provocation, can be made more comprehensible.<sup>112</sup> It observed that the reasonable or ordinary person test involved in defences is particularly problematic. For example:<sup>113</sup>

Where provocation and duress are in issue, the jurors need to be reminded that they are not to answer the relevant question concerning the response of the reasonable or ordinary person by inquiring what their own reaction would or may have been. Rather, they are to select such person as a hypothetical member of the community with the necessary attributes required by law for that person. Quite how jurors select such a person, and what attributes they are expected to assign to him or her, remains unexplained, and very much a matter for conjecture. Indeed, the test of the hypothetical ordinary person is difficult to understand and difficult for juries to apply. Some academic writers also argue the test has led to inconsistent decisions by juries.<sup>114</sup> (note in original)

17.76 The NSWLRC observed that criminal provisions often employ 'complex or obscure language' that has a technical legal meaning but that is not in common usage. It suggested that the legislature should be encouraged to avoid such language when framing new provisions.<sup>115</sup>

17.77 The NSWLRC also suggested that juries' comprehension might be improved if the elements of the substantive law were covered in the judge's preliminary directions, at the start of the trial.<sup>116</sup>

## The Issues Paper

17.78 Jury directions about the elements of offences and aspects of criminal responsibility, including those with respect to sections 7, 8, 10A, 271, 272 and 304 of the Criminal Code (Qld), were discussed in chapters 4 and 6 of the Commission's Issues Paper.<sup>117</sup>

17.79 However, none of the respondents to the Issues Paper commented on the difficulties of directing juries on the parties provisions, on self-defence or 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?<sup>118</sup>

112 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) ch 9.

113 Ibid [9.74].

114 Queensland Law Reform Commission, *A Review of the Defence of Provocation*, Working Paper 63 (2008), [12.39].

115 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [9.85]–[9.89].

116 Ibid [9.90]–[9.99].

117 Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009) [4.34]–[4.50], [6.19]–[6.22], [6.24]–[6.25].

118 Submission 6.

## The Discussion Paper

17.80 In its Discussion Paper, the Commission observed that the model directions in relation to sections 7, 8, 10A, 271, 272 and 304 of the Criminal Code (Qld) contained in the Queensland Benchbook should be reviewed with the purpose of seeing whether they can be simplified or otherwise re-structured without compromising their legal accuracy:<sup>119</sup>

- 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.

### Further submissions

17.81 The Bar Association of Queensland did not support this Proposal, consistently with its lack of support of a 'regimented approach' to integrated directions:

As we see it, the style of integrated direction is a matter for individual trial judges to apply to appropriate cases and it is therefore a matter for those individual judges (with the assistance they can expect from trial counsel) to take whatever benefit may be derived from the Bench Book model and work those into appropriate directions, designed to deal with the circumstances of particular cases. In this regard, it can be noted that the Bench Book model in relation to directions in respect of most of these sections, necessarily contain a number of alternatives and in many cases, it will be only one or perhaps a few of those alternatives that are relevant.<sup>120</sup>

### The QLRC's views

17.82 Complex law can lead to complex jury directions, as was acknowledged by the Bar Association of Queensland.<sup>121</sup> 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).

17.83 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.

17.84 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 recommended by the Commission in chapter 9 of this Report: see Recommendations 9-4 to 9-6 above.

119 Queensland Law Reform Commission, *A Review of Jury Directions*, Discussion Paper WP67 (2009) [8.32]–[8.36], 272, Proposal 8-3.

120 Submission 13A, 35. The Queensland Law Society endorsed and supported the whole of the submissions by the Bar Association of Queensland: Submission 13B. See [9.79]–[9.130] above in relation to integrated directions.

121 Submission 13A, 35.



17.85 The Commission acknowledges that integrated directions — which are by their very nature tailored to meet the factual circumstances of each case — cannot be set out in full in any model directions. This is essential, in any event, to avoid the regimentation that concerns the Bar Association of Queensland. 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. Alternatively, or in addition, an example direction based on a hypothetical fact situation might be drafted and included in the Benchbook as a guide.

17.86 The Commission does not agree that Proposal 8-3 can be seen as ‘regimenting’ the directions under discussion, or any other. On the contrary, one feature of integrated directions — which the Commission sees as a strength — is that, as they seek to avoid boilerplate directions on the law, they have to be crafted to suit each case even more so than many current standard directions. There ought be no regimentation in directions that are purposely tailored to meet the factual circumstances of each case.

17.87 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.

## Recommendations

17.88 The Commission makes the following recommendation:

**17-3 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-structured as integrated directions in accordance with Recommendations 9-4 to 9-6.**

## THE BLACK DIRECTION

17.89 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 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.<sup>122</sup>

17.90 Until recently, all jury verdicts in Queensland had to be unanimous. Amendments to the *Jury Act 1995* (Qld) in 2008, however, introduced non-unanimous verdicts (of 11 jurors out of a jury of 12, or of 10 jurors out of a jury of 11) in certain circumstances.<sup>123</sup>

17.91 The Commission notes that the expression 'majority verdict' (which is used in the *Jury Act 1995* (Qld))<sup>124</sup> in this context may be misleading to people (including jurors) who are not familiar with the details of the *Jury Act 1995* (Qld) provisions as it may suggest that a verdict can be delivered if agreed by a simple majority of, say 7–5. The *Jury Act 1995* (Qld) in fact permits only one dissenting juror in cases where 'majority verdicts' are permitted.

17.92 The jury's verdict must, generally speaking, be unanimous. Even after the 2008 amendments this remains the position 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.<sup>125</sup>

17.93 However, in other cases a jury may be asked to deliver a non-unanimous verdict if it is unable to reach a unanimous verdict. If after the 'prescribed period' of at least eight hours<sup>126</sup> the jury has not reached a unanimous verdict and the judge is satis-

122 *Black v The Queen* (1993) 179 CLR 44, 51–2 (Mason CJ, Brennan, Dawson and McHugh JJ).

123 *Jury Act 1995* (Qld) ss 59, 59A. Non-unanimous verdicts were introduced by the *Criminal Code and Jury and Another Act Amendment Act 2008* (Qld).

124 See, eg, n 130 below.

125 *Jury Act 1995* (Qld) s 59. Even in cases involving these charges, non-unanimous 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).

126 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).

fied that the jury is unlikely to do so after further deliberation, the judge may ask the jury to reach a non-unanimous verdict.<sup>127</sup> If a verdict can be reached with only one dissenting juror, that then becomes the verdict of the jury.<sup>128</sup> In these circumstances, the jury's verdict is in fact 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).<sup>129</sup>

17.94 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 non-unanimous verdict agreed to by all but one of them, if it can.<sup>130</sup> This assumes that the jury will deliberate for the prescribed period either somehow unaware that it can return a non-unanimous verdict or suppressing the knowledge that it can.

17.95 The possibility of accepting a non-unanimous verdict has been noted as presenting difficulties for the Black direction.<sup>131</sup> 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 non-unanimous verdict is mentioned before the preconditions for doing so have been met.<sup>132</sup>

17.96 This issue has not yet been judicially considered in Queensland.

17.97 The direction set out in the Queensland Benchbook is in substantially the same terms as the standard Black direction.<sup>133</sup> However, the Benchbook contains the following bench notes cautioning against any premature mention of the possibility of taking a non-unanimous 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

127 *Jury Act 1995* (Qld) s 59A(2).

128 *Jury Act 1995* (Qld) s 59A(3).

129 *Jury Act 1995* (Qld) s 59A(6).

130 *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.

131 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper No 4 (2008) [4.74].

132 *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].

133 Queensland Courts, *Supreme and District Court Benchbook*, 'Jury Failure to Agree' [52] <<http://www.courts.qld.gov.au/2265.htm>> at 24 November 2009.

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 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*.<sup>134</sup>

17.98 These issues have been discussed by a commentator in New Zealand writing on that country's imminent move to non-unanimous 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 cases of rogues jurors] 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!<sup>135</sup>

... 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

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134 Ibid.

135 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.

as to jury directions are founded. Juries should be told the truth, and the whole truth, as to the verdicts they may return.<sup>136</sup> (note added)

## NSWLRC's Consultation Paper

17.99 In its Consultation Paper, the New South Wales Law Reform Commission considered the impact of non-unanimous verdicts on the Black direction (called in NSW a 'perseverance direction').<sup>137</sup> It expressed some concern over the wording of a perseverance direction delivered before the pre-conditions for a non-unanimous verdict have been met:

4.80 One outstanding question is whether the existing directions in the Bench Book, in not clarifying what is meant by a majority verdict, may also be confusing to jurors, who may, for example, assume that a majority of seven to five may ultimately be acceptable. This may affect the dynamic of their deliberations.<sup>138</sup>

## The Issues Paper

17.100 The Black direction was discussed in chapter 4 of the Commission's Issues Paper.<sup>139</sup> This discussion highlighted the inconsistency between the Black direction mandated by the High Court and the 2008 amendments to the *Jury Act 1995* (Qld) allowing non-unanimous verdicts in certain jury trials. However, no submissions were received by the Commission on this issue.

## The Discussion Paper

17.101 In its Discussion Paper, the Commission noted that 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 being asked to deliver a non-unanimous 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.

17.102 The Commission noted, moreover, that this approach 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.

17.103 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 a long enough period and the judge is satisfied that further deliberations are unlikely to achieve unanimity.

17.104 The Commission considered that although not necessarily part of Parliament's rationale, this may also have the effect, where juries know of the possibility of returning

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136 Jeremy Finn, 'What shall we tell the jury?' (2009) *New Zealand Law Journal* 168, 169.

137 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [4.72]–[4.80].

138 *Ibid* [4.80].

139 Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2008) [4.51]–[4.55].

a non-unanimous verdict, of reducing the prospect of dissenting jurors being unfairly pressured to adopt the majority's view simply to bring the case to an end.<sup>140</sup>

17.105 The Commission therefore expressed the provisional view that legislative amendment is necessary to address the apparent inconsistency between the traditional common law Black direction and the new rules in Queensland allowing non-unanimous verdicts in some cases. It therefore made the following Proposals for reform, on which it sought further submissions:<sup>141</sup>

- 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.

### **Further submissions**

17.106 The Office of the Director of Public Prosecutions commented that its initial view had been that there was merit in withholding the possibility of taking a non-unanimous verdict from the jury to encourage an attempt to reach unanimity, but was persuaded that the jury should not be deceived and agreed with the Commission's Proposals as a logically sensible approach to the issue.<sup>142</sup>

17.107 Legal Aid Queensland, however, opposed the Commission's Proposals as premature:

Given the lack of any authority on this point in Queensland, and the content of the existing Benchbook notes regarding the authorities on point in Victoria and New South Wales, we would prefer to see this issue addressed by appellate authority in the context of consideration of whether an accused has received a fair trial according to law, in the particular circumstances of their case.<sup>143</sup>

17.108 The Bar Association of Queensland submitted that it is clearly desirable that in as many cases as possible juries reached unanimous verdicts, and noted that this was the underlying premise of the relevant provisions in the *Jury Act 1995* (Qld).<sup>144</sup> It observed that it is not merely the passage of time that will tell a judge whether a jury is truly unable to reach a unanimous verdict, and that unanimous verdicts can be

140 Two former jurors who responded to the Commission's Issues Paper reported pressure being placed on dissenting or uncertain jurors to agree with the other jurors so that the jury would not be sequestered overnight and jurors could meet personal commitments: Submission 2; Submission 3.

141 Queensland Law Reform Commission, *A Review of Jury Directions*, Discussion Paper WP67 (2009) [8.49]–[8.52], 276, Proposals 8-4 and 8-5.

142 Submission 15A.

143 Submission 16A, 13.

144 Submission 13A, 36. The Queensland Law Society endorsed and supported the whole of the submissions by the Bar Association of Queensland: Submission 13B.

reached, even in difficult cases, after the eight-hour time period has passed, sometimes with a Black direction.<sup>145</sup>

17.109 The Bar Association submitted that, although there are ‘clear tensions’ between the Black direction and the possibility of a non-unanimous verdict after a period of deliberation, the only difficulty with the direction is that it refers to the possibility of discharge as the only alternative outcome to unanimous agreement.<sup>146</sup> Accordingly:

because that form of direction was formulated in a context where discharge was the only alternative, there could be no objection to a reformulation to the effect of the judge needing to be satisfied of unlikelihood of agreement before exercise of any power to discharge or take a majority verdict.<sup>147</sup>

17.110 The Bar Association of Queensland also opposed reform based on the considerations set out in [17.102] and [17.104] above: these are not situations that can be legislated against and the Proposals would ‘simply entrench the prospect of sitting out the required minimum deliberation period and increase the prospect of minority jurors who expect that their position will be overtaken by a majority verdict, simply giving in to bring the case to an end.’<sup>148</sup>

Accordingly, in our view, it is of fundamental importance that the jury be both required to and have explained to them at the outset, the expectation of reaching a unanimous verdict if possible. In this regard, the ability to give a Black type direction remains a possibility and perhaps a necessity, in order to lay the proper foundation for the exercise of discretion to take a majority verdict.

As long as this expectation was explained to the jury in clear terms, there should be no difficulty in also explaining to the jury that the judge may take a unanimous verdict or alternatively discharge the jury if, after the required period of deliberation, he or she is satisfied that the jury are unlikely to reach a unanimous verdict.<sup>149</sup> (emphasis in original)

17.111 The Brisbane Office of the Commonwealth Director of Public Prosecutions noted that any amendment to the *Jury Act 1995* (Qld) and the Queensland Benchbook would need to recognise the requirement for unanimous verdicts when the court is conducting trials in relation to offences under Commonwealth law.<sup>150</sup>

## The QLRC’s views

17.112 The Commission considers that it is only fair to the jury to inform it fully of the terms of its obligations to deliver a verdict. It should be informed in cases where a non-unanimous verdict is possible of the fact that it may return a verdict agreed to by all but one juror and of the circumstances in which that may occur.

17.113 The directions to the jury should avoid the expression ‘majority verdict’ as it carries a risk of implying that the verdict may be given by a simple majority, for example, 7–5 (or indeed on any basis other than 11–1 or 10–1).

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145 Ibid 36–7.

146 Ibid 36.

147 Ibid.

148 Ibid 37.

149 Ibid.

150 Submission 9A, 7–8.

17.114 Nonetheless, it is in principle far preferable that the jury reach a unanimous verdict if at all possible, and this is reflected in the terms of section 59 and 59A of the *Jury Act 1995* (Qld). Accordingly, the direction to the jury in cases where a non-unanimous verdict may be given should still emphasise that the jury is expected reach a unanimous verdict and that it should make every reasonable effort to do so.

## Recommendations

17.115 The Commission makes the following recommendations:

**17-4** 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 in cases where a verdict of all but one of the jurors may be given, and to provide that in those cases the court should inform the jury at the start of deliberations:

- (1) that the jury is expected to reach a unanimous verdict and to make every reasonable effort to do so;
- (2) that, if a unanimous verdict cannot be reached after an appropriate period of deliberation, the judge may ask the jury to reach and deliver a verdict agreed to by all but one of the 12 (or 11) jurors; and
- (3) of the circumstances in which such a verdict may be delivered.

**17-5** Chapter 52 of the Queensland Benchbook should be amended to reflect the terms of Recommendation 17-4.



# 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;~~<sup>1</sup>
- (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

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<sup>1</sup> 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**

### **Respondents to the 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, Brisbane Office

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.<sup>1</sup> 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.

## Respondents to the Discussion Paper

The Bar Association of Queensland

The Commonwealth Director of Public Prosecutions, Brisbane Office

Legal Aid Queensland

The Office of the Director of Public Prosecutions

The Queensland Law Society

Women's Legal Service

In addition, the Commission received written or oral submissions from a member of the public who had been a defendant in a trial and re-trial in Queensland.<sup>2</sup> The Commission has taken the view that that respondent's name should not be published to ensure that there is no improper publication or other disclosure of jury information.

The Queensland Law Society wrote a short submission, endorsing and supporting that from the Bar Association of Queensland. Throughout this Report, where the Commission refers to the submission from the Bar Association of Queensland (submission 13A) it should be understood that the Queensland Law Society has formally adopted that submission.

The Law Council of Australia did not make a submission in response to the Discussion Paper but did provide the Commission with a copy of its submission dated 16 January 2009 to the Senate Legal and Constitutional Affairs Committee in relation to the Federal Court of Australia Amendment (Criminal Jurisdiction) Bill 2008 (Cth), which is relevant to the issue of pre-trial disclosure.<sup>3</sup>

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2 See [1.41] above.

3 See [8.179]–[8.180] above.

# Appendix C

## Extracts from Queensland Statutes

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## **CRIMINAL CODE (QLD)**

### **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; 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; or
  - (m) encouraging the parties to narrow the issues and any other administrative arrangement to assist the speedy disposition of the trial.
- (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.

#### **590A Notice of alibi**

- (1) An accused person shall not upon the person's trial on indictment, without the leave of the court, adduce evidence in support of an alibi unless, before the expiration of the prescribed period, the person gives notice of particulars of the alibi.
- (2) An accused person shall not upon the person's trial on indictment, without the leave of the court, call any other person to give evidence in support of an alibi unless—
- (a) the notice under subsection (1) includes the name and address of the person or, if the name or address is not known to the accused person at the time the accused person gives the notice, any information in the accused person's possession that may be of material assistance in locating the person; or
  - (b) where the name or address is not included in the notice, the court is satisfied that the accused person, before giving the notice, took and thereafter continued to take all reasonable steps to secure that the name or address would be ascertained; or
  - (c) where the name or address is not included in the notice and the accused person subsequently discovers the name or address or receives other information that may be of material assistance in locating the person, the accused person gives notice forthwith of the name, address or, as the case may be, other information; or
  - (d) where the accused person is notified by or on behalf of the director of public prosecutions that the person has not been traced by the name or located at the address given, the accused person gives notice forthwith of any information then in the accused person's

possession or subsequently received by the accused person that may be of material assistance in locating the person.

- (3) The court shall not refuse leave under this section if it appears to the court that the accused person was not, upon the accused person's committal for trial, informed by the justices of the requirements of this section.
- (4) Evidence tendered to disprove an alibi may, subject to a direction by the court, be given before or after evidence is given in support of the alibi.
- (5) A notice purporting to be given under this section on behalf of the accused person by the person's solicitor shall, until the contrary is proved, be deemed to be given with the authority of the accused person.
- (6) A notice under this section—
  - (a) shall be in writing; and
  - (b) shall be given to the director of public prosecutions; and
  - (c) shall be duly given if it is delivered to or left at the Office of the Director of Public Prosecutions or sent by certified mail addressed to the director of public prosecutions at the director's office.
- (7) In this section—

evidence in support of an alibi means evidence tending to show that by reason of the presence of the accused person at a particular place or in a particular area at a particular time the accused person was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission.

the prescribed period means the period of 14 days after the date of the committal for trial of the accused person.

### **590B Advance notice of expert evidence**

- (1) If an accused person intends to adduce expert evidence in relation to an issue in the person's trial, the person must—
  - (a) as soon as practicable—give the other parties to the trial written notice of the name of the expert, and any finding or opinion he or she proposes to adduce; and
  - (b) as soon as practicable before the trial date—give the other parties to the proceeding a copy of the expert report on which the finding or opinion is based.
- (2) The directions judge under section 590AA or trial judge may fix times for compliance with subsection (1).



**604 Trial by jury**

- (1) Subject to chapter division 9A and subsection (2), if the accused person pleads any plea or pleas other than the plea of guilty, a plea of autrefois acquit or autrefois convict or a plea to the jurisdiction of the court, the person is by such plea, without any further form, deemed to have demanded that the issues raised by such plea or pleas shall be tried by a jury, and is entitled to have them tried accordingly.
- (2) Issues raised by a plea of autrefois acquit or autrefois convict must be tried by the court.

**618 Evidence in defence**

At the close of the evidence for the prosecution the proper officer of the court shall ask the accused person whether the person intends to adduce evidence in the person's defence.

**619 Speeches by counsel**

- (1) Before any evidence is given at the trial of an accused person the counsel for the Crown is entitled to address the jury for the purpose of opening the evidence intended to be adduced for the prosecution.
- (2) If the accused person or any of the accused persons, if more than 1, is defended by counsel, and if such counsel or any of such counsel says that the accused person does not intend to adduce evidence, the counsel for the Crown is entitled to address the jury a second time for the purpose of summing up the evidence already given against such accused person or persons for whom evidence is not intended to be adduced.
- (3) At the close of the evidence for the prosecution the accused person, and each of the accused persons, if more than 1, may by himself, herself or the person's counsel address the jury for the purpose of opening the evidence (if any) intended to be adduced for the defence, and after the whole of the evidence is given may again address the jury upon the whole case.
- (4) If evidence is adduced for an accused person, the counsel for the Crown is entitled to reply.
- (5) If evidence is adduced for 1 or more of several accused persons, but not for all of them, the counsel for the Crown is entitled to reply with respect to the person or persons by whom evidence is so adduced, but not with respect to the other or others of them.
- (6) However, a Crown Law Officer is entitled to reply in all cases, whether evidence is adduced by any accused person or not.

**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.
- (2) After the court has instructed the jury they are to consider their verdict.

**624 Special verdict**

In any case in which it appears to the court that the question whether an accused person ought or ought not to be convicted of an offence may depend upon some specific fact, or that the proper punishment to be awarded upon conviction may depend upon some specific fact, the court may require the jury to find that fact specially.

**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.

**646 Discharge of persons acquitted**

If the jury find that the accused person is not guilty, or give any other verdict which shows that the person is not liable to punishment, the person is entitled to be discharged from the charge of which the person is so acquitted.

**668D Right of appeal**

- (1) A person convicted on indictment, or a person convicted of a summary offence by a court under section 651, may appeal to the Court—
  - (a) against the person's conviction on any ground which involves a question of law alone; and
  - (b) with the leave of the Court, or upon the certificate of the judge of the court of trial that it is a fit case for appeal, against the person's conviction on any ground of appeal which involves a question of fact alone, or question of mixed law and fact, or any other ground which appears to the Court to be a sufficient ground of appeal; and

- (c) with the leave of the Court, against the sentence passed on the person's conviction.
- (2) A person summarily convicted under section 651 may appeal to the court, with the leave of the court, against the sentence passed on conviction, including any order made under that section.

#### **668E Determination of appeal in ordinary cases**

- (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 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) Subject to the special provisions of this chapter, the Court shall, if it allows an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered.
- (3) On an appeal against a sentence, the Court, if it is of opinion that some other sentence, whether more or less severe, is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal.

#### **668F Powers of Court in special cases**

- (1) If it appears to the Court that an appellant, though not properly convicted on some count or part of the indictment, has been properly convicted on some other count or part of the indictment, the Court may either affirm the sentence passed at the trial or pass such sentence, whether more or less severe, in substitution therefor, as it thinks proper, and as may be warranted in law by the conviction on the count or part of the indictment on which it considers the appellant has been properly convicted.
- (2) Where an appellant has been convicted of an offence, and the jury could on the indictment have found the appellant guilty of some other offence, and on the finding of the jury it appears to the Court that the jury must have been satisfied of facts which proved the appellant guilty of that other offence, the Court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity.

- (3) Where, on the conviction of the appellant, the jury have found a special verdict, and the Court considers that a wrong conclusion has been arrived at by the court of trial on the effect of that verdict, the Court may, instead of allowing the appeal, order such conclusion to be recorded as appears to the Court to be in law required by the verdict, and pass such sentence, whether more or less severe, in substitution for the sentence passed at the trial, as may be warranted in law.
- (4) If on any appeal it appears to the Court that, although the appellant committed the act or made the omission charged against the appellant, the appellant was not of sound mind at the time when the act or omission alleged to constitute the offence occurred, so as not to be responsible therefor according to law, the Court may quash the sentence passed at the trial, and order the appellant to be kept in strict custody in the same manner as if a jury had found that fact specially under section 647.

#### **669 Power to grant new trial**

- (1) On an appeal against a conviction on indictment, the Court may, either of its own motion or on the application of the appellant, order a new trial in such manner as it thinks fit, if the Court considers that a miscarriage of justice has occurred, and that, having regard to all the circumstances, such miscarriage of justice can be more adequately remedied by an order for a new trial than by any other order which the Court is empowered to make.
- (2) If the Court makes an order for a new trial and the appellant is not granted bail, the order is taken to be a warrant for the appellant's detention under the *Corrective Services Act 2006*, section 9(1)(a).

#### **669A Appeal by Attorney-General**

- (1) The Attorney-General may appeal to the Court against any sentence pronounced by—
  - (a) the court of trial; or
  - (b) a court of summary jurisdiction in a case where an indictable offence is dealt with summarily by that court;and the Court may in its unfettered discretion vary the sentence and impose such sentence as to the Court seems proper.
- (1A) The Attorney-General may appeal to the Court against an order staying proceedings or further proceedings on an indictment.
- (2) The Attorney-General may refer any point of law that has arisen at the trial upon indictment of a person in relation to any charge contained therein to the Court for its consideration and opinion thereon if the person charged has been—
  - (a) acquitted of the charge; or

- (b) discharged in respect of that charge after counsel for the Crown, as a result of a determination of the court of trial on that point of law, has duly informed the court that the Crown will not further proceed upon the indictment in relation to that charge; or
  - (c) convicted, following a determination of the court of trial on that point of law—
    - (i) of a charge other than the charge that was under consideration when the point of law arose; or
    - (ii) of the same charge with or without a circumstance of aggravation.
- (2A) The Attorney-General may refer to the Court for its consideration and opinion a point of law that has arisen at the summary trial of a charge of an indictable offence, if the person charged has been—
- (a) acquitted of the charge at the summary trial; or
  - (b) discharged on the charge after the prosecution, because of a decision on the point of law by the court of trial, indicates to the court that it will not further proceed on the charge in the proceeding before the court; or
  - (c) convicted, following a determination of the court of trial on that point of law—
    - (i) of a charge other than the charge that was under consideration when the point of law arose; or
    - (ii) of the same charge with or without a circumstance of aggravation.
- (3) Notice of the reference shall be given to the person acquitted or, as the case may be, discharged.
- (4) Upon the reference the Court shall hear argument—
- (a) by the Attorney-General or by counsel on the Attorney-General's behalf; and
  - (b) if the person so desires, by the person acquitted or discharged or by counsel on his or her behalf;
- and thereupon shall consider the point referred and furnish to the Attorney-General its opinion thereon.
- (5) Where the reference relates to a trial in which the person charged has been acquitted or convicted, the reference shall not affect the trial of nor the acquittal or conviction of the person.

- 
- (6) If a person convicted summarily of an indictable offence appeals to a District Court judge under the *Justices Act 1886*, section 222 or the *Juvenile Justice Act 1992*, part 6, division 9, subdivision 3, and, in relation to the same conviction, the Attorney-General appeals under this section—
- (a) the convicted person's appeal is, by force of this section, removed to the Court of Appeal; and
  - (b) both appeals must be heard together by the Court of Appeal.
- (7) In this section—
- discharged*** includes the dismissal or striking out of a charge at a summary trial.

**JURY ACT 1995 (QLD)<sup>1</sup>****Part 5 Formation of juries****Division 1 Number of jurors in trials****32 Juries for civil trials**

The jury for a civil trial consists of 4 persons.

**33 Juries for criminal trials**

The jury for a criminal trial consists of 12 persons.

**34 Reserve jurors**

- (1) The judge before which a civil or criminal trial is to be held may direct that not more than 3 persons be chosen and sworn as reserve jurors.
- (2) Reserve jurors—
  - (a) are to be selected in the same way as ordinary jurors; and
  - (b) are liable to be challenged and discharged in the same way as ordinary jurors; and
  - (c) must take the same oath as ordinary jurors; and
  - (d) are otherwise subject to the same arrangements as other jurors during the trial.
- (3) If a juror dies or is discharged after a trial starts but before the jury retires to consider its verdict, and a reserve juror is available, the reserve juror must take the vacant place on the jury.<sup>2</sup>
- (4) If 2 or more reserve jurors are available, the juror to take the place on the jury must be decided by lot or in another way decided by the judge.
- (5) When a jury retires to consider its verdict, a reserve juror who has not been called on to take a place on the jury must be discharged from further attendance at the trial.
- (6) The death or discharge of a reserve juror before the juror has been called on to take a vacant place on the jury does not affect the validity of the trial.

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1 The footnotes to the extracted sections of the *Jury Act 1995* (Qld) are those found in reprint No. 3B, which is the most recent reprint.

2 See section 56 (Discharge or death of individual juror).

## Division 2 Suitability of jurors

### 35 Information about prospective jurors to be exchanged between prosecution and defence in criminal trials

- (1) If a party to a criminal trial obtains information about a person who has been summoned for jury service that may show the person is unsuitable to serve as a juror in the trial, the party must disclose the information to the other party as soon as practicable.
- (2) The *Criminal Law (Rehabilitation of Offenders) Act 1986* does not apply to the disclosure of information under this section.<sup>3</sup>

## Division 4 Supplementary jurors

### 38 Supplementary jurors

- (1) If a trial is likely to be delayed because there are no persons or not enough persons, who have been summoned for jury service, available for the selection of a jury, the judge may, on application by a party to the proceeding, direct the sheriff to make up or supplement a jury panel by selecting from among persons who are qualified for jury service and instructing them to attend for jury service.
- (2) The number of persons to be selected, and the way the selection is to be made, must be as directed by the judge.
- (3) The persons instructed to attend for jury service under this section become (subject to being excused or discharged under this Act) members of the jury panel from which the jury for the trial is to be selected.
- (4) Unless the person has a reasonable excuse, a person must not fail to comply with—
  - (a) an instruction to attend for jury service under this section; or
  - (b) a further instruction about jury service given by the sheriff or the judge.

Maximum penalty—10 penalty units or 2 months imprisonment.

- (5) A contravention of subsection (4) may be dealt with either as an offence or a contempt of the court.

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<sup>3</sup> The *Criminal Law (Rehabilitation of Offenders) Act 1986*, section 6, places restrictions on disclosure of the criminal history of a person by someone if the rehabilitation period under the Act has come to an end.



## Part 6 Jury trials

### Division 1 Procedure following selection of jury

#### 50 Jury to be sworn

The members of the jury must be sworn to give a true verdict, according to the evidence, on the issues to be tried, and not to disclose anything about the jury's deliberations except as allowed or required by law.<sup>4</sup>

#### 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.

### Division 3 Segregation of jury in criminal cases

#### 53 Separation of jury

- (1) After the jury in a criminal trial has been sworn, the jury must not separate until it has given its verdict or has been discharged by the judge.
- (2) However, a jury may separate in accordance with this section.
- (3) Before a jury retires to consider its verdict, the judge must allow the jury to separate during a lunch or dinner adjournment to obtain meals.
- (4) However, if the judge considers that allowing the jury to separate during a lunch or dinner adjournment may prejudice a fair trial, the judge may order the jury not to separate.
- (5) Subsection (6) applies subject to subsections (3) and (4).
- (6) Also, before a jury retires to consider its verdict, the judge may, if the judge considers that allowing the jury to separate would not prejudice a fair trial, allow the jury to separate—
  - (a) during an adjournment of the court; or
  - (b) while proceedings are held in the jury's absence.
- (7) After the jury has retired to consider its verdict, the judge—

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<sup>4</sup> For the form of the oath, see the *Oath Act 1867*, sections 21 (Swearing of jurors in civil trials) and 22 (Swearing of jurors in criminal trials). Under the *Oaths Act 1867*, section 17, a juror may make an affirmation instead of an oath in certain cases (see also section 5 of that Act).

- (a) may allow the jury to separate, or an individual juror to separate from the jury, if the judge considers that allowing the jury or juror to separate would not prejudice a fair trial; and
  - (b) may impose conditions to be complied with by the jurors or juror.
- (8) A juror must comply with any conditions imposed by the judge under subsection (7)(b), unless the juror has a reasonable excuse.

Maximum penalty—10 penalty units or 2 months imprisonment.

- (9) If a juror separates from the rest of the jury in contravention of a provision of this section, the juror may be punished summarily for contempt of the court.
- (10) The validity of proceedings is not affected if a juror contravenes a provision of this section but, if the contravention is discovered before the verdict is given, the judge may discharge the jury if the judge considers that the contravention appears likely to prejudice a fair trial.

#### **54 Restriction on communication**

- (1) While a jury is kept together, a person (other than a member of the jury or a reserve juror) must not communicate with any of the jurors without the judge's leave.
- (2) Despite subsection (1)—
- (a) the officer of the court who has charge of the jury may communicate with jurors with the judge's leave; and
  - (b) if a juror is ill—communication with the juror for arranging or administering medical treatment does not require the judge's leave.
- (3) A person who contravenes subsection (1) may be punished summarily for a contempt of the court.
- (4) The validity of proceedings is not affected by contravention of this section but, if the contravention is discovered before the verdict is given, the judge may discharge the jury if the judge considers that the contravention appears likely to prejudice a fair trial.

#### **57 Continuation of trial with less than full number of jurors**

- (1) If a juror dies or is discharged after a trial begins, and there is no reserve juror available to take the juror's place, the judge may direct that the trial continue with the remaining jurors.
- (2) However, a civil trial cannot continue with less than 3 jurors and a criminal trial cannot continue with less than 10 jurors.

- (3) The verdict of the remaining jurors has the same effect as if all the jurors had continued present.

## **59 Verdict in criminal cases for particular offences must be unanimous**

- (1) This section applies to the following criminal trials on indictment—
  - (a) a trial for any of the following offences—
    - (i) murder;
    - (ii) an offence against the Criminal Code, section 54A(1) if, because of the circumstances of the offence, the offender is liable to imprisonment for life, which can not be mitigated or varied under the Criminal Code or any other law;
    - (iii) an offence against a law of the Commonwealth; or
  - (b) a trial before a jury consisting of only 10 jurors when it gives its verdict.
- (2) For subsection (1)(b), it does not matter that at any time before its verdict was given the jury consisted of more than 10 jurors.
- (3) The verdict of the jury must be unanimous.
- (4) However, if on the trial of an offence mentioned in subsection (1)(a)(i) or (ii)—
  - (a) the jury is unable to reach a unanimous verdict; and
  - (b) the defendant is liable to be convicted of another offence not mentioned in subsection (1)(a)(i) or (ii); in relation to the conviction for the other offence, section 59A applies as if the defendant were originally charged with the other offence.

## **59A Verdict in criminal cases for other offences**

- (1) This section applies to a criminal trial on indictment other than the following trials—
  - (a) a trial for an offence mentioned in section 59(1)(a); or
  - (b) a trial before a jury as mentioned in section 59(1)(b).
- (2) 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.
- (3) If the jury can reach a majority verdict, the verdict of the jury is the majority verdict.

- (4) For the definition in subsection (6), prescribed period, paragraph (a), the periods mentioned in subparagraphs (i), (ii) and (iii) are the periods reasonably calculated by the judge.
- (5) A decision of the judge under subsection (4) is not subject to appeal.
- (6) In this section—

**majority verdict** means—

- (a) if the jury consists of 12 jurors—a verdict on which at least 11 jurors agree; or
- (b) if the jury consists of 11 jurors—a verdict on which at least 10 jurors agree.

**prescribed period** means—

- (a) a period of at least 8 hours after the jury retires to consider its verdict, not including any of the following periods—
  - (i) a period allowed for meals or refreshments;
  - (ii) a period during which the judge allows the jury to separate, or an individual juror to separate from the jury;
  - (iii) a period provided for the purpose of the jury being accommodated overnight; or
- (b) the further period the judge considers reasonable having regard to the complexity of the trial.

## **60 Jury may be discharged from giving verdict**

- (1) If a jury cannot agree on a verdict, or the judge considers there are other proper reasons for discharging the jury without giving a verdict, the judge may discharge the jury without giving a verdict.
- (2) If proceedings before a jury are to be discontinued because the trial is adjourned, the judge may discharge the jury.
- (3) A decision of a judge under this section is not subject to appeal.

## **Part 8 Miscellaneous**

### **69A Inquiries by juror about accused prohibited**

- (1) A person who has been sworn as a juror in a criminal trial must not inquire about the defendant in the trial until the jury of which the person is a member has given its verdict, or the person has been discharged by the judge.

Maximum penalty—2 years imprisonment.

- (2) Subsection (1) does not prevent a juror making an inquiry being made of the court to the extent necessary for the proper performance of a juror's functions.
- (3) In this section—

*inquire* includes—

  - (a) search an electronic database for information, for example, by using the Internet; and
  - (b) cause someone else to inquire.

## **70 Confidentiality of jury deliberations**

- (2) A person must not publish to the public jury information.

Maximum penalty—2 years imprisonment.

- (3) A person must not seek from a member or former member of a jury the disclosure of jury information.

Maximum penalty—2 years imprisonment.

- (4) A person who is a member or former member of a jury must not disclose jury information, if the person has reason to believe any of the information is likely to be, or will be, published to the public.

Maximum penalty—2 years imprisonment.

- (5) Subsections (2) to (4) are subject to the following subsections.
- (6) Information may be sought by, and disclosed to, the court to the extent necessary for the proper performance of the jury's functions.
- (7) If there are grounds to suspect that a person may have been guilty of bias, fraud or an offence related to the person's membership of a jury or the performance of functions as a member of a jury, the court before which the trial was conducted may authorise—
  - (a) an investigation of the suspected bias, fraud, or offence; and
  - (b) the seeking and disclosure of jury information for the purposes of the investigation.
- (8) If a member of the jury suspects another member (the suspect) of bias, fraud or an offence related to the suspect's membership of the jury or the performance of the suspect's functions as a member of the jury, the member may disclose the suspicion and the grounds on which it is held to the Attorney-General or the director of public prosecutions.

- (9) On application by the Attorney-General, the Supreme Court may authorise—
- (a) the conduct of research projects involving the questioning of members or former members of juries; and
  - (b) the publication of the results of the research.
- (10) The Supreme Court may give an authorisation under subsection (9) on conditions the court considers appropriate.
- (11) Information identifying or likely to identify a person as, or as having been, a juror in a particular proceeding may be disclosed—
- (a) in the course of the proceeding—by any person with the court's permission or with lawful excuse; or
  - (b) after the proceeding has ended—by the juror or someone else with the juror's consent.
- (12) A former member of a jury may disclose jury information to a health professional who is treating the former member in relation to issues arising out of the former member's service on the jury.
- (13) The health professional may ask the former member to disclose jury information for the purpose of treating the former member in relation to issues arising out of the former member's service on the jury.
- (14) The health professional must not disclose jury information to anyone else unless the health professional considers it necessary for the health or welfare of the former member.
- Maximum penalty—2 years imprisonment.
- (15) Subsection (14) does not apply in as far as the health professional discloses information that identifies the health professional's patient to the sheriff for the purpose of the sheriff advising whether the patient was a former member of a jury.
- (16) The sheriff may disclose to the health professional information advising whether the patient was a former member of a jury.
- (17) In this section—

**doctor** includes a person registered as a medical practitioner under a law of the Commonwealth, or another State, that corresponds to the *Medical Practitioners Registration Act 2001*.

**health professional** means a person who practices a profession prescribed under a regulation for the definition, and includes a doctor and a psychologist.

**jury information** means—

- (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.

**psychologist** means a person registered as a psychologist under the *Psychologists Registration Act 2001* or under a law of the Commonwealth, or another State, that corresponds to that Act.

**treat**, in relation to a patient of a health professional, means provide a service to the patient in the course of the patient's seeking or receiving advice or treatment.

**EVIDENCE ACT 1997 (QLD)****21R Jury direction**

- (1) This section applies if there is a jury and a person charged—
  - (a) does not have a legal representative other than for the cross-examination of a protected witness; or
  - (b) does not have a legal representative for the cross-examination of a protected witness.
- (2) The court must give the jury any warning the court considers necessary to ensure the person charged is not prejudiced by any inference that might be drawn from the fact the person charged has been prevented from cross-examining the protected witness in person.

**21S Orders, directions and rulings concerning protected witnesses**

The court may make any orders or give any directions or rulings it considers appropriate for the purposes of this division on the court's own initiative or on an application made to the court by a party to the proceeding.

**93C Warning and information for jury about hearsay evidence**

- (1) This section applies if evidence is admitted under section 93B (**hearsay evidence**) and there is a jury.
- (2) On request by a party, the court must, unless there are good reasons for not doing so—
  - (a) warn the jury the hearsay evidence may be unreliable; and
  - (b) inform the jury of matters that may cause the hearsay evidence to be unreliable; and
  - (c) warn the jury of the need for caution in deciding whether to accept the hearsay evidence and the weight to be given to it.
- (3) It is not necessary for a particular form of words to be used in giving the warning or information.
- (4) This section does not affect another power of the court to give a warning to, or to inform, the jury.



**CRIMINAL LAW (SEXUAL OFFENCES) ACT 1978 (QLD)****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.
- (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.
- (6) In this section—

**complaint** includes a disclosure.

**preliminary complaint** means any complaint other than—

- (a) the complainant's first formal witness statement to a police officer given in, or in anticipation of, a criminal proceeding in relation to the alleged offence; or
- (b) a complaint made after the complaint mentioned in paragraph (a).

*Example—*

Soon after the alleged commission of a sexual offence, the complainant discloses the alleged commission of the offence to a parent (**complaint 1**). Many years later, the complainant makes a complaint to a secondary school teacher and a school guidance officer (**complaints 2 and 3**). The complainant visits the local police station and makes a complaint to the police officer at the front desk (**complaint 4**). The complainant subsequently attends an appointment with a police officer and gives a formal witness statement to the police officer in anticipation of a criminal proceeding in relation to the alleged offence (**complaint 5**). After a criminal proceeding is begun, the complainant gives a further formal witness statement (**complaint 6**).

Each of complaints 1 to 4 is a preliminary complaint. Complaints 5 and 6 are not preliminary complaints.

## **CRIMINAL PRACTICE RULES 1999 (QLD)<sup>5</sup>**

### **Chapter 10 Trial proceedings**

#### **44 Definition for ch 10**

In this chapter—

**proper officer** means a judge, a judge's associate or the person appointed by a judge as the proper officer for this chapter.

#### **45 Application of ch 10**

- (1) This chapter applies at an accused person's trial.
- (2) This chapter also applies, with the necessary changes, to the hearing of a charge of a summary offence against an accused person under the Code, section 651.<sup>6</sup>

#### **46 Procedure on arraignment—Code, s 594<sup>7</sup>**

- (1) The proper officer must address the accused person as follows—
  - (a) for an accused person arraigned alone—
 

‘AB, you are charged that on [state date] at [state place] you [state charge in the indictment using the second person].

‘AB, how do you plead, guilty or not guilty?’;
  - (b) for accused persons arraigned together—
 

‘AB and CD, you are charged that on [state date] at [state place] you [state charge in the indictment using the second person, and repeating the names of each accused person as to anything alleged against the accused person, to the exclusion of any other accused person].

‘AB, how do you plead, guilty or not guilty?’

‘CD, how do you plead, guilty or not guilty?’.
- (2) The proper officer is taken to have complied with subrule (1) if the proper officer uses other words complying with the requirements of the Code, section 594.

<sup>5</sup> The footnotes relating to the *Criminal Practice Rules 1999* (Qld) are as set out in those Rules.

<sup>6</sup> Criminal Code, section 651 (Court may decide summary offences if a person is charged on indictment)

<sup>7</sup> Section 594 has been renumbered as section 597C under the *Evidence (Protection of Children) Amendment Act 2003*, section 20

**47 Statement to accused person of right of challenge—Jury Act, s 39**

- (1) If the accused person pleads not guilty, the proper officer must address the accused person as follows—

‘AB (and CD), these representatives of the community whom you will now hear called may become the jurors who are to decide between the Crown and you on your trial.

‘If you wish to challenge them, or any of them, you, or your representative, must do so before the bailiff begins to recite the words of the oath or affirmation.’

- (2) In a private prosecution, the reference to the Crown must be replaced by a reference to the private prosecutor.
- (3) In a Commonwealth prosecution, the reference to the Crown must be replaced by a reference to the prosecuting authority.
- (4) The proper officer is taken to have complied with subrule (1) if the proper officer uses other words complying with the requirements of the *Jury Act 1995*, section 39.

**48 Giving the accused person into the charge of the jury—Jury Act, s 51**

- (1) After the jury who have been sworn are called and they have answered, the proper officer must address the jury as follows—

‘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.’

- (2) The proper officer is taken to have complied with subrule (1) if the proper officer uses other words complying with the requirements of the *Jury Act 1995*, section 51.

**49 Giving jury a copy of the indictment**

After the jury has been sworn, the judge may give to the jury a copy of the indictment with any changes, including omissions, the judge considers appropriate in the circumstances.

**50 Addressing an accused person at the end of the prosecution evidence—Code, s 618**

- (1) At the end of the prosecution evidence, the proper officer must address the accused person as follows—

‘The prosecution having closed its case against you, I must ask you if you intend to adduce evidence in your defence. This means you may give evidence yourself, call witnesses, or produce evidence.

‘You may do all or any of those things, or none of them.’.

- (2) The proper officer is taken to have complied with subrule (1) if the proper officer uses other words complying with the requirements of the Code, section 618.

**51 Addressing a convicted person before sentencing—Code, s 648**

- (1) If the plea or verdict is guilty, the proper officer must address the convicted person as follows—

‘AB, you have been convicted [for a plea of guilty say ‘on your own plea of guilty’] of [state the offence charged in the words of the indictment or by stating the heading of the schedule form for the offence]. Do you have anything to say as to why sentence should not be passed on you?’.

- (2) The proper officer is taken to have complied with subrule (1) if the proper officer uses other words complying with the requirements of the Code, section 648.

# Appendix D

## Extracts from the Queensland Benchbook

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These model directions are taken from the Queensland Benchbook: see Queensland Courts, Supreme and District Court Benchbook, available online at <<http://www.courts.qld.gov.au/2265.htm>>.

The Courts’ website also publishes update notes when the Benchbook is amended, the most recent of which is dated February 2009. The extracts from the Benchbook used in this Report take those update notes into account, where relevant.

Footnotes and formatting appear as in the model directions themselves, except for the footnote numbering, which follows the consecutive numbering used in this Report.

Text in **bold** indicates the material that is to be read to the jury. Text in normal weight includes notes to the judge and discussion of the law in relation to the directions in question.

## Introduction<sup>1</sup>

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.<sup>2</sup>

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'.<sup>3</sup>

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.<sup>4</sup>

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.<sup>5</sup>

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.<sup>6</sup>

### Trial Judge's role in summing up

Gaudron A-CJ, Gummow, Kirby and Hayne Justices said in *RPS v The Queen* (1999) 199 CLR 620 at 637 that:

- the fundamental task of a Trial judge is to ensure a fair trial of the accused;

1 Queensland Courts, *Supreme and District Court Benchbook*, 'Introduction' [4] <<http://www.courts.qld.gov.au/2265.htm>> at 30 November 2009.

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

3 *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].'

4 *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].

5 *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'.

6 *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'.

- this will require the judge to instruct the jury about so much of the law as the jury need to know in order to dispose of the issues;
- that will require instructions about the elements of the offence, the burden and standard of proof and of the respective functions of judge and jury;
- and 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.
- None of this must be permitted to obscure the division of functions between judge and a jury, and that it is for the jury and it alone to decide the facts.
- Although a Trial judge may comment on the facts, the judge is not bound to do so except to the extent that the judge's other functions require it.
- Often, perhaps much more often than not, the safer course for a Trial judge will be to make no comment on the facts beyond reminding the jury, in the course of identifying the issues before them, of the arguments of counsel.

McMurdo P described it this way in *R v Mogg* (2000) 112 A Crim R 417 at 427 at [54]:

'The onerous duties of a Trial judge will ordinarily include identifying the issues, relating the issues to the relevant law and the facts of the case and outlining the main arguments of counsel'.

In *R v ITA* [2003] NSWCA 174 that court remarked at [90] *inter alia* that:

'The precise nature of the task of the judge depends on many things, including the context of the trial, its length, its complexity, the way that it has been run, the issues that arise and, importantly, whether counsel seek more from the judge than that which has been provided. The judge must ensure that the case of the accused is put fairly before the jury and, of course, must ensure that the accused has a fair trial. In fulfilling this duty, the judge will derive important assistance from counsel. The atmosphere at a criminal trial is not easy to assess on appeal. Counsel at trial are well placed to determine whether, in the light of the way in which the case has been run, particular directions to the jury are defective'.

## Parties to An Offence: ss 7, 8<sup>7</sup>

### Section 7

(Read the section or relevant parts to the jury).

General:

**This section extends criminal responsibility to any person who is a party to an offence. The section makes each of the following persons guilty of an offence.**

- **The person or persons who actually do the act or one or more of the acts in the series which constitute the offence.<sup>8</sup>**
- **Each person who does an act for the purpose of aiding another to commit the offence.**
- **Each person who aids another to commit the offence.**
- **Each person who counsels or procures another to do it.**

**So it is not only the person who actually does a criminal act who may be found guilty of it. Anyone who aids — that is, assists or helps or encourages — that person to do it may also be guilty of the (same or a less serious) offence.<sup>9</sup>**

Aiding (general):

**That is the basis on which the defendant is charged with [offence] in the case before you. The prosecution argues that, although it was not the defendant who actually committed the [offence], the defendant is also guilty of [that offence] because he aided (the alleged principal offender) to commit it.**

**Proof of aiding involves proof of acts and omissions intentionally directed towards the commission of the principal offence, by the perpetrator and proof that the defendant was aware of at least the essential matters constituting the crime in contemplation.<sup>10</sup> To aid means to assist or help.<sup>11</sup>**

**The prosecution do not need to prove that the person who actually committed the offence has also been convicted.<sup>12</sup> It is enough if the prosecution proves, not necessarily the identity of the perpetrator, but that there was a principal offender or perpetrator, and proof of the commission of an offence by that someone, and that the defendant aided that person to commit it. The prosecution must prove that that other perpetrator was guilty of committing the offence by evidence which is admissible against the defendant.<sup>13</sup>**

<sup>7</sup> Queensland Courts, *Supreme and District Court Benchbook*, 'Parties to An Offence' [71.1]–[71.15] <<http://www.courts.qld.gov.au/2265.htm>> at 30 November 2009.

<sup>8</sup> *R v Wyles; ex parte A-G* [1977] Qd R 169, approved in *R v Webb; ex parte A-G* [1990] 2 Qd R 275.

<sup>9</sup> See *Barlow v R* (1997) 188 CLR 1 (now apparently confirmed by s 10A of the Code)

<sup>10</sup> *R v Tabe* [2003] QCA 356 at [12]

<sup>11</sup> *R v Sherrington* [2001] QCA 105

<sup>12</sup> *R v Lopuszynski* [1971] QWN 13

<sup>13</sup> *R v Buckett* (1995) 132 ALR 669 at 676



The prosecution must prove that the defendant knew that the type of offence which was in fact committed was intended; but not necessarily that that particular offence would be committed on that particular day at that particular place.<sup>14</sup> It is not enough if the prosecution prove the defendant knew only of the possibility that the offence might be committed.

S 7(1)(b)(c) direction (shorter version)

**You may find the defendant guilty of the (offence) only if you are satisfied beyond reasonable doubt of three things. The first is that** (an identified or unidentified perpetrator) **committed the offence; that is, that** (the perpetrator) [outline elements of offence]. **The second is that the defendant in some way assisted** (the perpetrator) **to** [commit offence].<sup>15</sup> **The third is that, when he assisted** (the perpetrator) **to do so, the defendant knew**<sup>16</sup> **that** (the perpetrator) **intended to** [identify acts of which offence is comprised].

**As to the first two, there is evidence** [outline elements of offence as to which there is evidence of assistance].

**However, the defendant can be found guilty of the [offence] only if you are satisfied beyond reasonable doubt that, when he** [identify respects in which the defendant is said to have given assistance] **he knew** (the perpetrator) **was going to** [identify acts, and intent if relevant, constituting offence]. **If you are not satisfied that the defendant knew that** (the perpetrator) **meant to do those things, or if you have a reasonable doubt about it, then you must find him not guilty of** [the offence charged].<sup>17</sup>

S 7(1)(b) direction (expanded version)

**The prosecution must prove to your satisfaction beyond reasonable doubt each of the following things:**

1. **that** (the identified perpetrator or an unidentified perpetrator) **committed the offence.**
2. **that the defendant did acts or made omissions for the purpose of enabling or aiding that person to commit the offence.**
3. **that the defendant did so with the intention to aid** (the alleged perpetrator or unidentified perpetrator) **to commit the offence.**

14 *R v Ancutta* [1991] 2 Qd R 413

15 Generally, mere presence during the commission of a crime by another is not of itself sufficient to involve criminal responsibility as an aid under s 7; but is nevertheless capable of affording some evidence to that effect; *Jefferies v Sturcke* [1992] 2 Qd R 392, 395.

16 See *Lowrie* [2000] 2 Qd R 529

17 *Jefferies* CA 154 of (1997) *Lowrie* (2000) 2 Qd R 529

4. **that the defendant had actual knowledge or expectation of the essential facts of that offence, that is, all the essential matters which make the acts done a crime,<sup>18</sup> (including [where relevant]) the state of mind of the (alleged perpetrator or unidentified perpetrator)<sup>19</sup> when that person committed the offence.**

S 7(1)(c) direction (expanded version)

**The crown must prove to your satisfaction beyond reasonable doubt that:**

1. **(the identified or alleged perpetrator, or an unidentified perpetrator) committed the offence.**
2. **the defendant knowingly aided<sup>20</sup> that person.**
3. **that the defendant had actual knowledge or expectation of the essential facts of the principal offence, (including, [where relevant]) the state of mind of the principal offender.**

Counselling s 7(1)(d)

**For the prosecution to prove beyond reasonable doubt that the defendant is guilty because he counselled (the perpetrator) to commit the offence of (identify offence), the prosecution must prove beyond reasonable doubt:**

1. **(the perpetrator) committed the offence of ..... (acts which constitute the offence, with intent if relevant).**
2. **that the defendant counselled, in the sense of urging or advising, (the perpetrator) to commit that offence.**
3. **that (the perpetrator) committed that offence after being urged or advised by the defendant to commit (that offence or an offence of -- describe offence).**
4. **that (the perpetrator) committed the offence when carrying out that counsel.**

[Section 7(1)(d) direction combined with s 9]

5. **that the facts constituting the offence actually committed (by the perpetrator) were a probable consequence of carrying out the counsel given by the defendant. A probable consequence is more than a mere possibility. For a consequence to be a probable one, it must be one that you would regard as probable in the sense that it could well have happened. So, the facts constituting the offence actually committed (by the perpetrator) must be shown to be 'a probable consequence' of carrying out the counselling, in the sense that**

18 *R v Giorgianni* (1984-5) 156 CLR 493 at 482

19 *R v Stokes and Difford* (1990) 51 A Crim R 135; *R v Pascoe* CA No 242 of 1997

20 *R v Beck* [1990] 1 Qd 30 and *R v Tabe* [2003] QCA 356 at [36], judgment of Mackenzie J

**they could well have happened as a result of carrying out the counselling.<sup>21</sup>**

**In considering whether the defendant urged or advised the perpetrator to commit (the offence) you must consider with care what it was that the defendant urged or advised (the perpetrator) to do, if anything.**

In *R v Georgiou* [2002] QCA 206 the Court of Appeal suggested that explanation for the meaning of 'counselled' was not essential; while noting that Gibbs J used the terms 'urged' or 'advised' in *Stuart v R* (1976) 134 CLR 426 at 445.

S 7(1)(d) counselling with s 9 — example

**In the present case, the defendant did not tell (the perpetrator) to kill (the victim) or to injure him seriously; but the question for you is whether the killing of (the deceased) by (the perpetrator) with an intention to kill or do grievous bodily harm to him was a probable consequence of his carrying out the defendant's plan to assault (the deceased) with a baseball bat. In law each of them has taken to have murdered (the deceased) if (but only if) murdering (the deceased) was a probable consequence of (the perpetrators) carrying out the defendant advising or urging to give (the deceased) a beating.**

**A probable consequence is more than a mere possibility. For a consequence to be a probable one, it must be one that you would regard as probable in the sense that it could well have happened. So, the facts constituting the offence actually committed must be shown to be 'a probable consequence' of carrying out the counselling, in the sense that they could well have happened as a result of carrying out the counselling.**

**If you are left in doubt whether murder was a kind of offence that was a probable consequence of (the perpetrators) carrying out the defendant's advice, then you may find the defendant guilty of the lesser offence of manslaughter. For that you need to be satisfied beyond reasonable doubt that (the perpetrator's) killing of (the deceased), without any intention to cause death or grievous bodily harm, was the probable consequence of carrying out the advice to give (the deceased) a beating. If you are left with a reasonable doubt about that, then you must return verdicts of not guilty of murder and not guilty of manslaughter.**

S 7(1)(d): procure

**To procure means to bring about, cause to be done, prevail on or persuade, try to induce. To procure means to procure by endeavour. You procure a thing by setting out to see that it happens and taking the appropriate steps to produce that happening.<sup>22</sup>**

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21 See *Darkan v The Queen* (2006) 80 ALJR 1250, [72]–[81], [130]–[132]

22 *R v F*

**Procuring involves more than mere encouragement, and means successful persuasion<sup>23</sup> to do something. You may find the defendant guilty of the [offence charged] on the basis of procuring only if you are satisfied beyond reasonable doubt of these things:**

- **That [the perpetrator, identified or unidentified] committed the offence;**
- **That the defendant procured (that perpetrator) to commit that offence by successfully persuading (the perpetrator) to do it and thereby bringing about the commission of the offence;**
- **The defendant knew that (the perpetrator) intended to (commit the acts constituting the offence).**

Presence at scene — aiding by encouraging

**A defendant may assist or aid another by giving actual physical assistance in the commission of an offence, but it is not necessary for the crown to show actual physical assistance. Wilful encouragement can be enough, certainly if the defendant intended that (the perpetrator) should have an expectation of aid from the defendant in the commission of (the offence).**

**Where the prosecution alleges aiding by encouragement, such as from the presence of the person charged at the commission of the offence, the prosecution must prove both that the person charged as an aider did actually encourage the perpetrator in the commission of the offence, such as by presence at the scene; and also that the person charged intended to encourage the commission of that offence (by his or her presence).<sup>24</sup> Voluntary and deliberate presence during the commission of a crime without opposition or real dissent may be evidence of wilful encouragement or aiding.<sup>25</sup>**

Assault by a number of persons resulting in the victim's death.

**For the prosecution to establish criminal responsibility for murder under either s 1(b) or (c) it is necessary for it to prove that the defendant committed his act to enable or aid one or more of the others to kill or do grievous bodily harm to the victim, knowing that that other or others intended to kill or inflict grievous bodily harm upon the victim. It is not necessary to prove that the defendant himself had such an intention; it is sufficient (and necessary) that the defendant knew that one or more of the others had it and that, knowing this, did an act to aid or enable that or those others to kill or do grievous bodily harm.<sup>26</sup>**

23 *R v Adams* [1998] QCA 64 [6]

24 *R v Clarkson, Carroll, and Dodd* (1971) 55 Cr AR 445; *R v Beck* [1991] Qd R 30

25 *R v Beck* at [37]

26 This direction follows the decision in *R v Pascoe* (CA No 242 of 1997 unreported)

## Section 8

Read the section to the jury:

**So, if two or more people plan to do something unlawful together and, in carrying out the plan, an offence is committed, the law is that each of those people is taken to have committed that offence if (but only if) it is the kind of offence likely to be committed as the result of carrying out that plan.**

**For the prosecution to prove the defendant guilty relying on this section, it is necessary for you the jury to be satisfied beyond reasonable doubt:**

1. **that there was a common intention to prosecute an unlawful purpose. You must consider fully and in detail what was the alleged unlawful purpose, and what its prosecution was intended to involve;**
2. **that (the offence charged) was committed in the prosecution or carrying out of that purpose. You must consider carefully what was the nature of that actual crime committed;**
3. **that the offence was of such a nature that its commission was a probable consequence of the prosecution of that purpose.<sup>27</sup>**

Common unlawful purpose

**Obviously, a great deal depends on the precise nature of any common unlawful purpose, proved by the evidence in the light of the circumstances of the case, particularly the state of knowledge of the defendant.<sup>28</sup> It is the defendant's own subjective state of mind as established by the evidence, which decides what was the content of the *common* intention to prosecute an unlawful purpose.<sup>29</sup> That common intention is critical because it defines the restrictions on the nature of the acts done or omissions made which the defendant is deemed by the section to have done or made.**

**When considering what any common intention was, and what was any common unlawful purpose, you should consider whether you are satisfied beyond reasonable doubt that the defendant agreed to a common purpose:**

(by way of example only)

- **that involved the possible use of violence or force; or**
- **to carry out a specific act;<sup>30</sup> or**

27 This direction combines what Gibbs J (and Mason J) wrote in *Stuart v R* at CLR 443 with the words of s 8

28 Jacobs J in *Stuart v R* at CLR 454

29 So held in the joint judgement of Brennan CJ, Dawson and Toohey JJ in *R v Barlow* (1996–1997) 188 CLR at page 13

30 See *The Queen v Keenan* [2009] HCA 1 at [118].

- **that involved inflicting some serious physical harm on the victim.**<sup>31</sup>

Commission of the offence in the prosecution of the common unlawful purpose

**If you are satisfied beyond reasonable doubt there was a common intention to prosecute an unlawful purpose and what that was, you must ask if you are satisfied beyond reasonable doubt that an offence of (describe offence)<sup>32</sup> was committed in the prosecution or furtherance or carrying out that purpose. If you are so satisfied, then in considering whether you are satisfied beyond doubt that the nature of the offence committed was such that its commission was a probable consequence of the prosecution or furtherance or carrying out of the common unlawful purpose,<sup>33</sup> the probable consequence is a consequence which would be apparent to an ordinary reasonable person in the position of (the defendant) with (the defendant's) state of knowledge at the time when the common purpose was formed. That test is an objective one and is not whether (the defendant) himself recognised the probable consequence or himself realised or foresaw it at the time the common purpose was formed.**<sup>34</sup>

Probable Consequence

**A probable consequence is more than a mere possibility. For a consequence to be a probable one, it must be one that you would regard as probable in the sense that it could well have happened. So, for the offence actually committed to be 'a probable consequence' of carrying out the counselling, the commission of the offence must be not merely possible, but probable in the sense that they could well have happened in the prosecution of the unlawful purpose.**<sup>35</sup>

#### **S 8 — Direction on alternative verdict open — s 10(A)**

**If you are satisfied that acts constituting an offence were committed, and that the commission of those acts was the probable consequence of the prosecution of the unlawful common purpose, it does not matter that the actual perpetrator who committed those acts did so with a specific intent, where the fact the perpetrator had that intent was not itself either subjectively agreed or an objectively probable consequence of the prosecution of that unlawful common purpose. The**

31 See *The Queen v Keenan* [2009] HCA 1. Care must be taken in identifying the common intention by focusing only on the means used to effect the common unlawful purpose (per Hayne J at [85]). Where a method by which physical harm is to be inflicted has been discussed, or may be inferred as intended, it does not follow that the use of other means will prevent a person being held criminally responsible. In some cases the means intended to be used may permit an inference as to the level of harm intended. (per Kiefel J at [121]). An inference about the level of harm involved in the common purpose to be prosecuted may be drawn from the general terms in which an intended assault is described, the motive for the attack and the objective sought to be achieved, amongst other factors (per Kiefel J at [120].)

32 Refer to the act or omission and its nature, the harm it causes and the intention with which it is inflicted. Where, for example, the act is one of shooting, the question for the jury may be whether the shooting which caused grievous bodily harm was an offence of such a nature that its commission was a probable consequence of the common purpose, such as it is found to be (per Kiefel at [132, 133].)

33 See *The Queen v Keenan* [2009] HCA 1.

34 *Stuart v R*, at CLR 453-5, (Jacobs J); *R v Pascoe* CA 242 of 1997 (McPherson JA at page 9; Davies JA at page 12)

35 See *Darkan v The Queen* (2006) 80 ALJR 1250, [72]–[81], [130]–[132]

defendant can still be convicted of the offence constituted by those acts, but not the offence of committing those acts with that extra specific intent, where that specific intent was not an agreed or probable consequence of carrying out that purpose.

For example, if you are satisfied beyond reasonable doubt that in fact a murder occurred, which is an unlawful killing of another person committed by a perpetrator who intended to cause the victim death or grievous bodily harm, you must obviously ask yourselves whether you are satisfied beyond reasonable doubt that that offence of unlawful killing with that specific intent was objectively a probable consequence of the prosecution of the subjectively agreed unlawful purpose held in common, if any, which you have found to exist. If you were so satisfied, (and satisfied of other relevant matters) you could find the defendant guilty of murder.

However, if you are not so satisfied, you would then consider whether the commission of an offence of manslaughter was a probable consequence of carrying out the agreed unlawful purpose. Manslaughter is an offence of unlawful killing when one person kills another in circumstances not authorised, justified, or excused by law. There is no element of intention to kill or do grievous bodily harm in manslaughter.

If you were satisfied beyond reasonable doubt that an unlawful killing of another person in circumstances which would amount to manslaughter, and the acts constituting such an offence, were committed, and that the commission of those acts and that offence of manslaughter was objectively a probable consequence of prosecuting the subjectively agreed unlawful purpose, then you could find the defendant guilty of manslaughter; even though satisfied that the actual perpetrator went *beyond* the agreed or probable consequences and committed the more serious offence of murder.

#### Section 8 — direction on group assault resulting in death

For the Crown to prove beyond reasonable doubt that the defendant is guilty of murder on the basis of s 8, it must prove to your satisfaction beyond reasonable doubt that a probable consequence of the prosecution of the common purpose of assaulting (the deceased) must have been that one or more of the people attacking (the deceased) would have the intention of doing (the deceased) at least grievous bodily harm. The relevant common intention which must be proven beyond reasonable doubt, contemplated by s 8 and necessary to support a verdict of guilty of murder, is one to commit an assault of sufficient seriousness that an intention to cause death or grievous bodily harm on the part of at least one or more of those attacking (the deceased) was a probable consequence of the prosecution of that purpose. If that probable consequence is absent, but the assault the subject of the common intention was nevertheless of sufficient seriousness that a death was the probable consequence and it occurred, the proper verdict is manslaughter. It is not necessary in either case that those consequences were intended or even foreseen by the defendant.<sup>36</sup>

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36 This direction is taken from *R v Pascoe* CA No 242 of 1997 unreported

[Example] Here the evidence is that the defendant and (B) planned to rob a bank together, and, in carrying out that plan together, (B) murdered Mr Smith the bank teller. In those circumstances, the defendant is in law taken to have murdered Mr Smith if (but only if) murdering someone was the kind of offence that was a probable consequence of carrying out the plan to rob the bank.

If you are satisfied of those matters, then the offence committed by the defendant [or by each of the defendants] is murder. I have already told you that murder is killing someone with the intention of causing death or doing grievous bodily harm. If you are not satisfied that murder, in the sense of killing with such an intention, was the kind of offence that was a probable consequence of carrying out such a plan, then you may find the defendant guilty (if at all) only of the lesser offence of manslaughter. For that, you would have to be satisfied that death was something that was likely to result from carrying out the plan.<sup>37</sup>

Here the defendant may be found guilty of murdering Mr Smith the bank teller (if but only if) you are satisfied beyond reasonable doubt that killing him with that intention was something that was a probable consequence of carrying out the plan to rob a bank. If you are not satisfied of that, then you may find the defendant guilty at most only of manslaughter.

If you are left in doubt whether murder was the kind of offence likely to result from carrying out their plan, then you may find the defendant guilty of the lesser offence of manslaughter. For that you need to be satisfied beyond reasonable doubt that killing Smith, without any intention to cause death or grievous bodily harm, was something that was a probable consequence of carrying out the plan to rob. If you are left with a reasonable doubt about that, then you must return verdicts of not guilty of murder and not guilty of manslaughter.

To establish criminal responsibility on the part of a defendant under s 7(1)(b) or s 7(1)(c), the prosecution must prove that he knows 'the essential facts constituting or making up the offence that is being or about to be committed by the person he is aiding or assisting'.<sup>38</sup> It is not necessary to prove that the defendant had a specific intention to commit the offence, but it is necessary to show that he knew of the intention of the principal offender to do so.<sup>39</sup> Knowledge of no more than a possibility that the offence might be intended will not suffice.<sup>40</sup> Thus, where the charge is murder under s 302(1)(a), it must be shown that the defendant assisted or aided the principal offender in carrying out the killing knowing that the time of doing so that the other was intending to kill the victim or do him grievous bodily harm. If that state of knowledge is not established the defendant may be guilty of manslaughter, subject to defences under s 23(1) of the *Criminal Code*.

A person 'aids' another to commit an offence if he assists or helps him to do so. It is not necessary for the aider to be present at the crime but he must be 'aware at least of what is being done...by the other actor'.<sup>41</sup>

37 Where there is an 'escalating' plan or intention, it is essential that the defendant be proved to have been a party to that expanded intention: *Ritchie* [1998] QCA 188.

38 *R v Jeffrey* [1997] QCA 460; [2003] 2 Qd R 306; *Giorgianni v The Queen* (1985) 156 CLR 473 at 482; *R v Brown* [2007] QCA 161, [48].

39 *Jeffrey*; *Lowrie*, 535.

40 *Lowrie*, 525, 541.

41 *Sherrington & Kuchler* [2001] QCA 105, 7.



'Procuring' in s 7(1)(d) has been defined as 'effort, care, management or contrivance towards the obtaining of a desired end'.<sup>42</sup> It has been said that it involves more than mere encouragement; it entails successful persuasion.<sup>43</sup> A person may be charged under s 7(1)(d) with procuring another to commit an offence with a circumstance of aggravation where the circumstance of aggravation merely attracts additional punishment rather than constituting a specific offence.<sup>44</sup>

Section 9 expands criminal responsibility for 'counselling' by making the counsellor liable for an offence committed by the principal other than what was counselled where the facts constituting the committed offence are a probable consequence of carrying out the counsel.<sup>45</sup>

Section 10A(1) *Code*, which was inserted shortly after the decision in *Barlow*<sup>46</sup> (although the amending bill was introduced before the High Court's decision), provides that the criminal responsibility of a secondary party under s 7 extends to any offence that, on the evidence admissible against him is either the offence proved against the principal offender 'or any statutory or other alternative to that offence.' While the meaning of the sub-section is far from clear, it does seem that its effect includes enabling a jury to convict of a lesser offence when the secondary offender's intent as an aider, counsellor or procurer extends no further than that offence. It does not allow a person charged under s 7(b) (c) or (d) to be convicted of an offence which, though technically a statutory alternative, is independent in its factual basis of the offence committed by the principal offender.<sup>47</sup>

'Offence' should be given the same meaning in both ss 7 and 8 *Code*, that is 'the element of conduct (an act or omission) which, if accompanied by prescribed circumstances, or causing a prescribed result or if engaged in with a prescribed state of mind, renders a person engaging in the conduct liable to punishment'.<sup>48</sup>

Section 10A(2) *Code* provides that a defendant's criminal responsibility under s 8 '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'. Consistently with the analysis in *Barlow*, it follows that a defendant may be found guilty of the principal offence to the extent that its elements were the probable consequence of a common intention to prosecute an unlawful purpose. So, in the case of murder under s 302(1)(a), the 'nature' of the offence for the purposes of s 8 is to be regarded as consisting of the *elements* of murder (unlawful killing plus intent), rather than murder itself.<sup>49</sup>

42 *Castiglione* [1963] NSW R 1, 6, a meaning adopted in *Chan* [2000] QCA 347, [52].

43 *Adams* [1998] QCA 64, 6.

44 *Webb* [1995] 1 Qd R 680, 685.

45 For an examination of the relationship between s 7(1)(d) and s 9 see *Oberbillig* [1989] 1 Qd R 342, 345; *Hutton* (1991) 56 A Crim R 211. See also *Darkan v The Queen* (2006) 80 ALJR 1250.

46 *Barlow* (1997) 188 CLR 1, 9.

47 *Sullivan & Marshall* [2000] QCA 393.

48 *Barlow; Sullivan & Marshall*.

49 *Brien & Paterson* [1991] 1 Qd R 634, 645.

Thus an defendant charged under s 302(1)(a) may be convicted of manslaughter, notwithstanding that the principal offender is convicted of murder, if intentional killing was not a probable consequence of their mutual plan but an unlawful killing, objectively speaking, was.<sup>50</sup>

Where acts of violence escalate beyond the level of force initially contemplated, it is necessary, before a secondary party can be held criminally responsible under s 8, that the jury be satisfied he shared in the expanded intention to inflict such greater violence.<sup>51</sup>

Where the prosecution relies on s 8 responsibility in relation to a murder charge brought under s 302(1)(b) ('death ... caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life'), the question as what extent the elements of the offence were a probable consequence of the unlawful purpose will entail a consideration of whether it was a probable consequence that an act of such a nature as to be likely to endanger human life as the act which caused death would occur. If that element were missing a secondary offender could not be convicted of murder but might be convicted of manslaughter.<sup>52</sup>

The expression 'a probable consequence' used in s 8 and s 9 *Code* was considered recently in *Darkan v The Queen* (2006) 80 ALJR 1250. The High Court held that the expression 'a probable consequence' does not mean a consequence likely to happen on the balance of probabilities (which would be unduly generous to a defendant). A more exacting standard than a 'possibility' is imposed by the expression. The expression means more than a real or substantial possibility (a test which would be unduly harsh to a defendant). The expression 'a probable consequence' means the occurrence of the consequence is probable in the sense that it could well happen. It was stated at [81]:

'It is not necessary in every case to explain the meaning of the expression 'a probable consequence' to the jury. But where it is necessary or desirable to do so, a correct jury direction under s 8 would stress that for the offence committed to be 'a probable consequence' of the prosecution of the unlawful purpose, the commission of the offence had to be not merely possible, but probable in the sense that it could well have happened in the prosecution of the unlawful purpose. And where it is desirable to give the jury a direction as to the meaning of the expression 'a probable consequence' in s 9, a correct jury direction would stress that for the facts constituting the offence actually committed to be 'a probable consequence' of carrying out the counselling, they had to be not merely possible, but probable in the sense that they could well have happened as a result of the carrying out the counselling.'

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50 It is, conversely, conceivable that the secondary party may be guilty of a more serious offence than the principal offender: See *Barlow*, 14, eg. diminished responsibility. See *R v Hallin* [2004] QCA 18.

51 *Ritchie* [1998] QCA 188.

52 *Brien & Paterson*.

**SELF-DEFENCE: S 271(1)<sup>53</sup>****General Notes on Self-defence**

The two limbs of s 271 are more commonly raised than any other section. The following notes concentrate largely upon s 271, and make brief mention of s 272.

*Preliminary question — which limb or limbs of the above defences should be considered by the jury?*

‘Sometimes both limbs of s 271 will be appropriately left to the jury. But more often than not the consequence of summing-up on both limbs may be confusion which detracts from proper consideration of the true defence. Speaking very generally, in homicide cases the first limb of s271 seems best suited for cases where the deceased’s initial violence was not life-threatening and where the reaction of the [defendant] has not been particularly gross, but has resulted in a death that was not intended or likely; in other words cases where it can be argued that the unlikely happened when death resulted. The second limb seems best suited for those cases where serious bodily harm or life-threatening violence has been faced by the [defendant], in which case the level of his or her response is not subject to the same strictures as are necessary under the first limb. The necessity for directions under both limbs may arise in cases where the circumstances are arguably but not clearly such as to cause a reasonable apprehension of grievous bodily harm on the part of the [defendant]. In cases where the initial violence is very serious, most counsel will prefer to rely upon s 271(2) alone. It is only cases in the grey area where it is arguable but not sufficiently clear that the requisite level of violence was used by the deceased person that directions under both subsections will be desirable. The above general statements are not intended to paraphrase the meaning of the subsections. They are given with a view to identifying the broad streams of cases under which one or other or both of these defences may be appropriate’.<sup>54</sup>

Sometimes directions on a third alternative defence (under s 272) are requested. Generally speaking that defence helps a defendant who has started to fight and has then been threatened by massive over-reaction, or at least by such violence as to cause reasonable apprehension of death or grievous bodily harm.

Where there is a conflict in the evidence concerning who was responsible for the initial assault, or for provocation for the assault, it may be necessary to give the jury an alternative direction under s 272, to be applied if they consider that the defendant was responsible for the commencement of hostilities.

Discussion with counsel and commonsense will often narrow the true defence down to sensible limits and avoid the highly confusing exercise of multiple alternative directions under ss 271(1), 271(2) and 272. But there will be rare cases where all three will be necessary.

The following observations were made by McPherson JA in *R v Young* [2004] QCA 84 at [6] and [7]:

53 Queensland Courts, *Supreme and District Court Benchbook*, ‘Self-Defence: s 271(1)’ [86] <<http://www.courts.qld.gov.au/2265.htm>> at 30 November 2009.

54 *Bojovic* [2000] 2 Qd R 183, 186.

[6] Both subsections of s 271 are predicated upon the happening of an unlawful assault, and both make it 'lawful' (and as such not criminal) to use force as a defence against the assailant, although the extent of the force that is authorized under s 271(1) differs from that permitted under s 271(2). In the case of the former, it is limited to such force 'as is reasonably necessary to make effectual defence against the assault', and the force used must not be intended or likely to cause death or bodily harm. The standard adopted is objective and it does not depend on the impression formed by the person assaulted about the degree of force needed to ward off the assailant. If an honest and reasonable mistake is made about it, the exculpatory provisions of s 24 of the *Code* are doubtless available in appropriate circumstances.

[7] Section 271(2), on the other hand, is concerned with a different state of affairs. It authorizes the use of more extreme force by way of defence extending even to the infliction of death or grievous bodily harm on the assailant. It is available where the person using such force cannot otherwise save himself or herself from death or grievous bodily harm, or believes that he or she is unable to do so except by acting in that way. The belief must be based on reasonable grounds; but, subject to that requirement, it is the defender's belief that is the definitive circumstance.'

## S 271(1) Directions

**I must now give you instructions on the law about self-defence. If the prosecution cannot, to your satisfaction beyond reasonable doubt exclude the possibility that [the wounding or injury] occurred in self-defence as the law defines it, that is the end of the case. The defendant's use of force would be lawful and you should find him not guilty.<sup>55</sup>**

**The criminal law does not only punish; it protects as well. It does not expect citizens to be unnaturally passive especially when their safety is threatened by someone else. Sometimes an attacker may come off second best but it does not follow that the one who wins the struggle has committed a crime. The law does not punish someone for reasonably defending himself or herself, as I will shortly explain when I read a section from our Code. You should appreciate that the law is drawn in fairly general terms to cover any situation that may arise. Each jury has to apply it to a particular situation according to the facts of the particular case. No two cases are exactly alike, so the results depend heavily on the commonsense and community perceptions that juries bring into court.**

[Read the sub-section].

**You will see that there are four matters you must consider in respect of this defence:**

- 1. There must have been an unlawful assault on the accused defendant.**
- 2. The defendant must not have provoked that assault. 'Provocation' means any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, to deprive him of the power of self control, and to induce him to assault the person by whom the act or insult is done or offered.**
- 3. The force used by the defendant was reasonably necessary to make effectual defence against the assault.**
- 4. The force used was not intended and was not such as was likely to cause death or grievous bodily harm.**

**The burden remains on the prosecution at all times to prove that [the defendant] was not acting in self-defence, and the prosecution must do so beyond reasonable doubt before you could find [the defendant] guilty.**

**The first matter that arises is whether [the defendant] was unlawfully assaulted by [name other person]. If you conclude [the other person] did not assault the defendant, this defence is not open.**

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<sup>55</sup> The following cases may be of assistance: *Bojovic* [2000] 2 Qd R 183; *Gray* (1998) 98 A Crim R 589; *Prow* [1990] 1 Qd R 64; *Muratovic* [1967] Qd R 15; *Marwey* (1977) 138 CLR 630; *Zecevic v DPP* (1987) 162 CLR 645 (re requirements in a common law summing-up).

[If appropriate, direct the jury] **it is common ground** [or that the evidence suggests] **that the [deceased] [complainant] unlawfully assaulted the defendant and that on that basis the first part of the section is satisfied in the defendant's favour.**

**The second matter that arises is that, if there was such an assault, whether the defendant provoked it.**

[It has been suggested<sup>56</sup> that a jury should treat an assault as unprovoked unless they decide beyond reasonable doubt that the assault was provoked by the defendant. If there is an issue on this first point, deal with the competing contentions and then proceed.]

**If you conclude that [the defendant] provoked the assault then this particular defence is not open to him. On this basis the prosecution has properly excluded the defence and you need not consider it further.<sup>57</sup> Otherwise you go on to consider these further matters.**

**The next way the prosecution seeks to exclude the defence is this. It argues that the force that [the defendant] used was not reasonably necessary to make effectual defence against that assault.**

**In considering this, bear in mind that a person defending [himself] cannot be expected to weigh precisely the exact amount of defensive action that may be necessary. Instinctive reactions and quick judgments may be essential. You should not judge the actions of the defendant as if he had the benefit of safety and leisurely consideration.**

[Here an example might help e.g. if the assault is a push or a punch, a person may not be justified in shooting the other person who pushed or punched him.]

**When considering this question, you should understand that whether the degree of force used was reasonably necessary to make effectual defence against an assault is a matter for your objective consideration and does not depend on the defendant's state of mind.**

**The final matter is whether the force the defendant used was not intended and was not such as was likely to cause death or grievous bodily harm. 'Grievous bodily harm' means any bodily injury of such a nature that, if left untreated, it would endanger or be likely to endanger life or cause or be likely to cause permanent injury to health. The fact that the force used did cause death or grievous bodily harm is not the point. The question is whether it was likely to happen in all the circumstances.**

**[In appropriate cases] there remains a question of whether the prosecution has satisfied you that the defendant intended to kill the complainant or to do him**

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56 Kerr [1976] 1 NZLR 335

57 On this basis, then s 271(2) is not open either. But it might be necessary in an appropriate case to give directions under s 272.

**grievous bodily harm?**<sup>58</sup> So, if the prosecution satisfies you beyond reasonable doubt:

1. That the defendant was not unlawfully assaulted by the [complainant]; or
2. That the defendant gave provocation to the [complainant] for the assault; or
3. That the force used was more than was reasonably necessary to make effectual defence; or
4. That the force used was either intended or was likely to cause death or grievous bodily harm;

then the prosecution has proved that the defendant does not apply.

Remember there is no burden on the defendant to satisfy you that he was acting in self-defence. The prosecution must satisfy you beyond reasonable doubt that he was not.

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58 *R v Gray* (1998) 98 A Crim R 589, *R v Greenwood* [2002] QCA 360 at [20]. This does not often arise as a separate issue under s 271(1), because in cases where this is likely counsel usually opt for a direction under s 271(2).

**Section 271(2) — Self-Defence against unprovoked assault  
when there is death or GBH<sup>59</sup>**

I must now tell you the law concerning self-defence. If the prosecution cannot, to your satisfaction beyond reasonable doubt exclude the possibility that [the killing] occurred in self-defence as the law defines it, that is the end of the case. The defendant's use of force would be lawful and you should find him not guilty.<sup>60</sup>

The criminal law does not only punish; it protects as well. It does not expect citizens to be unnaturally passive especially when their safety is threatened by someone else. Sometimes an attacker may come off second best but it does not follow that the one who wins the struggle has committed a crime. The law does not punish someone for reasonably defending himself or herself, as I will shortly explain when I read a section from our Code. You should appreciate that the law is drawn in fairly general terms to cover any situation that may arise. Each jury has to apply it to a particular situation according to the facts of the particular case. No two cases are exactly alike, so the results depend heavily on the commonsense and community perceptions that juries bring into court. You will not be surprised to know that if the violence of the attacker is such that the person defending [himself] reasonably fears for his life or safety then the violence that might be justified will be great[er] also. The level of justifiable self-defence depends very much on the level of danger created by the attacker and the reasonableness of the defendant's reaction.

Read the first part of 271(1), and all of s 271(2) to the jury.

**The first matter that arises is whether [the defendant] was unlawfully assaulted by [name other person]. If you conclude [the other person] did not assault the defendant, this defence is not open.**

[If appropriate, direct the jury] **it is common ground [or that the evidence suggests] that the [deceased/complainant] unlawfully assaulted the defendant and that on that basis the first part of this section is satisfied in the defendant's favour.**

**The second matter is that if there was such an assault, whether the defendant provoked that assault.**

[It has been suggested<sup>61</sup> that a jury should treat an assault as unprovoked unless satisfied beyond reasonable doubt that the assault was provoked by the defendant. If there is an issue on this first point, deal with the competing contentions and then proceed.]

**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,**

59 Queensland Courts, *Supreme and District Court Benchbook*, 'Section 271(2) — Self-Defence against unprovoked assault when there is death or GBH' [86A] <<http://www.courts.qld.gov.au/2265.htm>> at 30 November 2009.

60 The following cases may be of assistance: *Bojovic* [2000] 2 Qd R 183; *Gray* (1998) 98 A Crim R 589; *Prow* [1990] 1 Qd R 64; *Muratovic* [1967] Qd R 15; *Marwey* (1977) 138 CLR 630; *Zecevic v DPP* (1987) 162 CLR 645 (re requirements in a common law summing-up).

61 *Kerr* [1976] 1 NZLR 335.



on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm, it is lawful for the person to use such force as is necessary for defence, even though such force may cause death or grievous bodily harm.<sup>62</sup>

‘Grievous bodily harm’ means any bodily injury of such a nature that, if left untreated, it would endanger or be likely to endanger life or cause or be likely to cause permanent injury to health.

The critical question is whether the defendant believed on reasonable grounds that the force used was necessary for defence.<sup>63</sup> The important issue is the state of mind or belief of the defendant. The question is whether the prosecution has proved beyond reasonable doubt that the defendant did not actually believe on reasonable grounds that it was necessary to do what the defendant did to save (himself or another) from death or grievous bodily harm.

The defendant does not have to prove that his response was reasonable. The prosecution must satisfy you that the defendant did not actually believe on reasonable grounds that he had to do what he did to save himself from being killed or from a very serious injury.

You will need to assess, looking at all the circumstances of the case, the level of physical menace which you think that the deceased [or complainant] was actually presenting before the fatal [or serious] force was used by the defendant.

Remember that a person defending himself cannot be expected to weigh precisely the amount of defensive action which may be necessary.

Instinct to reaction and quick judgment may be essential and you should not judge the actions of the defendant as if he had the benefit of safety and leisurely consideration.<sup>64 65</sup>

If the prosecution satisfies you beyond reasonable doubt that:

1. That the defendant was not unlawfully assaulted by the [deceased/complainant]; or
2. That the defendant gave provocation to the [deceased/complainant] for the assault; or
3. That the nature of the assault was not such as to cause reasonable apprehension of death or grievous bodily harm; or

62 In ‘Battered Woman Syndrome’ cases, expert evidence may be adduced as to the defendant’s heightened awareness of danger, and the jury should be directed to its relevance to the defendant’s belief as to the risk of grievous bodily harm or death. (General directions as to evidence of experts will be appropriate in such instances). Equally, the actual history of the relationship may require direction as going to the existence of reasonable grounds for any belief; *Osland* (1998) 197 CLR 316 at 337.

63 *R v Wilmott* [2006] QCA 91.

64 *Gray* (1998) 98 Crim R 589.

65 The prosecution can no longer rely upon a submission that the force used by a defendant was not ‘necessary’ for defence. Under 271(2) the crucial factor is said to be the appellant’s actual state of belief, and that it be based on reasonable grounds. For discussion see *Julian* (1998) 100 A Crim R 430; *Corcoran* (2000) 111 A Crim R 126, and *R v Wilmott* (2006) QCA 91.

4. **The defendant did not actually believe on reasonable grounds that he could not otherwise save himself [or another] from death or grievous bodily harm; or**

**then the defence is excluded.**

**Remember there is no burden on the defendant to satisfy you that he was acting in self-defence. The prosecution must satisfy you beyond reasonable doubt that he was not.**

## Section 272 — Self-Defence against provoked assault, when there is death or grievous bodily harm<sup>66</sup>

### Section 272

The three basic propositions in s 272(1) are:

- (a) Reasonable apprehension of death or grievous bodily harm by the defendant,
- (b) belief by the defendant on reasonable grounds that it is necessary to save himself from death or grievous bodily harm that he use force; and
- (c) that the force which the defendant used was reasonably necessary for his preservation.

A conflict of opinion exists concerning the application of the requirement in the last part of s 272 (2) that the defendant should decline further conflict and quit or retreat.<sup>67</sup> Although it does not directly deal with the point, *Gray v Smith*<sup>68</sup> tends to suggest that this is not generally an additional requirement to a defence arising under s 272(1). Until clarified by authority, the safer course would seem to be to confine this additional requirement of retreat to the exceptional cases with which subsection (2) deals.

It is not necessary to set out particular forms of summing-up under s 272. It is suggested that subsection (1) be taken proposition by proposition, and the evidence and submissions applied to each proposition, followed by the question whether the prosecution has excluded that proposition beyond reasonable doubt. The exclusion of any one of the consecutive propositions is of course enough for the exclusion of that defence.

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66 Queensland Courts, *Supreme and District Court Benchbook*, 'Section 272 — Self-Defence against provoked assault, when there is death or grievous bodily harm' [86B] <<http://www.courts.qld.gov.au/2265.htm>> at 30 November 2009.

67 Contrast *Muratovic*, 28 with *Johnson* [1964] Qd R 1, 14.

68 [1997] 1 Qd R 485.

## PROVOCATION: S 304<sup>69</sup>

You only need to consider the issue of provocation if you provisionally reach the view that the defendant had the necessary intent to kill or cause grievous bodily harm and that he would be guilty of murder.

Under our law, the defence of provocation operates in the following way. When a person kills another under circumstances which would constitute murder, and he/she does so in the heat of passion caused by sudden provocation and before there is time for his/her passion to cool, he/she is guilty of manslaughter only. The defence therefore operates as a partial defence, not a complete defence, because if it applies its effect is to reduce what would otherwise be a verdict of murder to one of manslaughter.

What then is provocation? In this context, provocation has a particular legal meaning.<sup>70</sup> Provocation consists of conduct which:

- (a) causes a loss of self-control on the part of the defendant; and
- (b) could cause an ordinary person to lose self-control and to act in the way which the defendant did.

*Was the defendant actually provoked?*

You must consider whether the deceased's conduct, that is, the things the deceased did or said, or both, caused the defendant to lose his/her self control and to [here insert the fatal act]? In that regard, you must consider the conduct in question as a whole and in the light of any history of disputation between the deceased and the defendant, since particular acts or words which considered separately could not amount to provocation, may, in combination or cumulatively, be enough to cause the defendant to actually lose his/her self control.<sup>71</sup>

In considering whether the alleged provocative conduct caused the defendant to lose control, you must consider the gravity or level of seriousness of the alleged provocation so far as the defendant is concerned, that is, from this particular defendant's perspective. This involves assessing the nature and degree of seriousness *for the defendant* of the things the deceased said and did just before the fatal attack.

Matters such as the defendant's [race, colour, habits, relationship with the deceased and age] are all part of this assessment. And you must appreciate that conduct which might not be insulting or hurtful to one person may be extremely hurtful to another because of such things as that person's age, sex, race, ethnic

69 Queensland Courts, *Supreme and District Court Benchbook*, 'Provocation' [87] <<http://www.courts.qld.gov.au/2265.htm>> at 30 November 2009.

70 Provocation for this purpose takes its meaning from the common law, not from s 268: *Callope* [1965] Qd R 456; *Young* [1957] St R Qd 599; *Angelina* [2001] 1 Qd R 56, 64. Cf *Masciantonio* (1995) 183 CLR 58 at 66. For useful cases see: *Buttigieg* (1993) 69 A Crim R 21; *Stingel* (1990) 171 CLR 312; *Romano* (1984) 36 SASR 283, 289.

71 *Stingel* at 326.

**or cultural background, physical features, personal attributes, personal relationships or past history.<sup>72</sup>**

**So you must consider the gravity of the suggested provocation to this particular defendant. The acts relied on by the defendant as relevant in affecting his/her mind and causing him/her to lose self-control include ...** [Summarise evidence of provocative conduct and of its effect upon the defendant. Refer to the special characteristics of the defendant raised by the evidence. This would include in an appropriate case the 'battered wife syndrome'. It will be necessary to relate any expert evidence as, for example, with regard to the 'battered wife syndrome' to the particular facts and circumstances of the subject case. Summarise the defence and prosecution cases.]

*Was the defendant acting while provoked?*

**A further matter for your consideration is whether the defendant acted in the heat of passion, caused by sudden provocation and before there was time for his/her passion to cool. You must consider whether the defendant was actually deprived of self-control and killed the deceased whilst so deprived.<sup>73</sup>** [Summarise the competing defence and prosecution cases.]

*Could an ordinary person have been so provoked?<sup>74</sup>*

**You must also consider whether the alleged provocation was such that it was capable of causing an ordinary person to lose self control and to form an intention to kill or do grievous bodily harm and to act upon that intention as the deceased did, so as to give effect to it.<sup>75</sup>**

**An 'ordinary person' is simply one who has the minimum powers of self control<sup>76</sup> expected of an ordinary citizen [who is sober, not affected by drugs] of the same age as the defendant.<sup>77</sup> The ordinary person is expected to have the ordinary human weaknesses and emotions common to all members of the community, and to have self-control at the same level as ordinary citizens, so that extraordinary aggressiveness or extraordinary want of self control on the part of the defendant confers no protection against conviction for murder.**

**It is for the prosecution to prove beyond reasonable doubt that the suggested provocation in all its gravity for this defendant was insufficient to cause an ordinary person in the defendant's position to lose self control and act as he/she did.**

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72 *Stingel* at 326.

73 Where there is evidence of intoxication it may be appropriate to add:  
**A person's intoxication may be taken into account when considering whether the defendant did in fact lose control as the result of provocative behaviour. It is a question of fact for you, the jury, as to whether the defendant's loss of self control was caused by the deceased's words or conduct, or solely by the inflammatory effects of drink or drugs.** (Note that intoxication is not a relevant consideration in determining the impact of the provocation on the ordinary person.)

74 *Stingel*, 327–32.

75 See *Masciantonio* at 69; also *Johnson v The Queen* (1976) 136 CLR 619, 639, 642.

76 *Stingel*, 327.

77 Note that in *Stingel* at 331 the High Court stated that the preferable approach is to attribute the age of the defendant to the ordinary person of the objective test, at least in any case where it may be open to the jury to take the view that the defendant is immature by reason of youthfulness. However, age is the only characteristic or attribute of the particular defendant which may be attributed to the 'ordinary person' for the purposes of the objective test; the sex of the defendant is not an attribute which the High Court considered to be available for similar application in this context.

**So you must ask yourself whether an ordinary person, reacting to the alleged level of provocation, could<sup>78</sup> suffer a similar loss of control. That is, could an ordinary person who is subjected to ... [describe the alleged conduct, for example, a sexual advance by the victim which is aggravated because of the defendant's special sensitivity to a history of violence and sexual assault within the family<sup>79</sup>] have lost self control and acted as you find the defendant did? [By eg stabbing the deceased, reacting by inflicting serious violence on the deceased, accompanied by intention to kill or to cause at least grievous bodily harm].**

*Onus*

**It is for the prosecution to satisfy you beyond reasonable doubt that the defendant did not act under provocation before a verdict of murder is appropriate. The prosecution will have succeeded in satisfying you that provocation is excluded as a defence, if it has satisfied you beyond reasonable doubt of any one of the following matters:**

1. **the potentially provocative conduct of the deceased did not occur; or**
2. **an ordinary person [where relevant *of the same age as the defendant*] in the circumstances could not have lost control and acted like the defendant acted with intent to cause death or grievous bodily harm; or**
3. **the defendant did not lose self-control; or**
4. **the loss of self-control was not caused by the provocative conduct; or**
5. **the loss of self-control was not sudden (for example, the killing was pre-meditated); or**
6. **the defendant did not kill while his/her self-control was lost; or**
7. **when the defendant killed there had been time for his/her loss of self-control to abate.**

**If you are satisfied beyond reasonable doubt as to any of these matters, then the prosecution has disproved provocation, and if you are satisfied beyond reasonable doubt as to all the elements of murder, to which I have earlier referred, the appropriate verdict is 'guilty of murder'. If, however, a reasonable doubt remains as to provocation, you must acquit the defendant of murder. In that event, you would convict him/her of manslaughter if satisfied beyond reasonable doubt of all the elements of manslaughter to which I have referred.<sup>80</sup>**

*Preliminary question* — when is the issue sufficiently raised to let it go to the jury as an issue?

It is sufficient to raise provocation if there is some evidence which might induce a reasonable doubt as to whether the prosecution has negated the question of provocation.<sup>81</sup> A trial judge in determining whether the issue of provocation is raised on the evidence must look at the version of events most favourable to the defendant open on

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78 *Stingel*, 329.

79 Note that none of the attributes or characteristics of the particular defendant will be necessarily irrelevant to an assessment of the content and extent of the provocation involved in the relevant conduct: *Stingel* at 324.

80 *R v Rae* [2006] QCA 207, [37].

81 *Van Den Hoek v The Queen* (1986) 161 CLR 158, 162.

the evidence which could lead a jury acting reasonably to be satisfied beyond reasonable doubt that the killing was unprovoked.<sup>82</sup> More needs to be raised than the reasonable possibility of dispute and friction. Various forms of conduct capable of producing anger in others have been ruled to be incapable of raising this issue (eg a bare confession of adultery is not enough). The cases are usefully reviewed in *Buttigieg*.<sup>83</sup> Note that in *Buttigieg*<sup>84</sup> the Court of Appeal observed that in respect of provocation as a defence to murder, 'It seems now to be accepted in the cases that the use of words alone, no matter how insulting or upsetting, is not regarded as creating a sufficient foundation for this defence to apply to a killing, except perhaps in 'circumstances of a most extreme and exceptional character'.' However, the issue should be left to the jury if the trial judge is 'in the least doubt whether the evidence is sufficient'<sup>85</sup>, even if it is not requested by the defence and is in fact inconsistent with a defence raised.<sup>86</sup>

#### *Directing the jury*

The gravity of the provocative conduct must be assessed from the perspective of the particular defendant, so that his 'age, sex, race, physical features, personal attributes, personal relationships and past history may be relevant to an objective assessment of the gravity of a particular wrongful act or insult.'<sup>87</sup> In a case of 'battered person syndrome' expert evidence as to the defendant's state of 'heightened arousal' may be of significance as providing the context in which an apparently minor insult is to be viewed.<sup>88</sup> The history of an abusive relationship will of course be relevant also.

The doctrine of provocation is not confined to loss of self-control arising from anger or resentment but extends to a sudden and temporary loss of self-control due to emotions such as fear or panic as well as anger or resentment; the central element in the doctrine is the sudden and temporary loss of self-control.<sup>89</sup>

A critical matter for assessment is whether a hypothetical ordinary person could under such provocation lose self-control and do the act causing death. In that objective test, the age of the defendant where it is relevant to level of maturity should be attributed to the 'ordinary person'.<sup>90</sup> It is to be noted that the reference is to the ordinary person and not to the average person.<sup>91</sup> Reference should not be made in this context to a 'reasonable person'; to do so is to suggest a requirement of a higher level of control.<sup>92</sup> An instruction that the jury put themselves, as the embodiment of the ordinary person, in the defendant's shoes should be avoided.

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82 *Stingel*, 334; *Masciantonio*, 67–68; *Buttigieg*, 27, *Rae*, [29].

83 *Buttigieg*, 26–35.

84 *Buttigieg*, 37.

85 *Pangilinan*, 64, *Van Den Hoek*, 161–162, 169.

86 *Pangilinan*, 64. See also *R v Cowan* [2005] QCA 424 at [21], [22].

87 *Stingel*, 326.

88 *Osland* (1998) 197 CLR 316, 337.

89 *Van Den Hoek*, 168; *Pangilinan*, 64.

90 *Stingel*, 329, 331; *Mogg* (2000) 112 A Crim R 417.

91 *Stingel*, 322.

92 *Stingel*, 326–8; *Vidler* (2000) 110 A Crim R 77.

## BAD CHARACTER/PREVIOUS CONVICTIONS<sup>93</sup>

### Bad Character/Previous Convictions of Witness

**Evidence has been given that [X], who gave evidence for the prosecution (or defendant), has previous convictions. That is something you can take into account when considering his credibility and the weight to be given to his evidence.**

**The fact that someone has previous convictions does not necessarily mean his evidence has to be rejected out of hand. It is a matter for you what weight you give to the fact that he has been previously convicted.**

**In deciding that, you look at the rest of the evidence, including any evidence that supports his evidence independently, and weigh his evidence and the fact that he has convictions in that context.**

**If after you have done that, you are satisfied that he is a truthful and accurate witness you can act on his evidence notwithstanding that he has previous convictions.**

*[Where explicit warning as to dangers warranted]:* **The fact that someone has a history of criminal behaviour does not necessarily mean he is lying on this occasion. But because of the extent of his criminal record, and the kind of offences for which he has been convicted, you should keep in mind the dangers in accepting him as a truthful witness. You have to exercise caution before you act on his evidence. [refer to any independent evidence supporting his evidence.]**

**But, if you are satisfied he is a truthful witness after having seen him give evidence and having considered his evidence in conjunction with the other evidence and given due weight to the dangers about acting on his evidence, you can act on the version of facts he has given.**

There is no general rule that a warning should be given of the dangers of convicting on the uncorroborated evidence of witnesses possessing bad character or a criminal record. It is a question to be considered in any case as to whether the witness' record or the circumstances of the case are such as to make an explicit warning necessary.<sup>94</sup>

93 Queensland Courts, *Supreme and District Court Benchbook*, 'Bad Character/Previous Convictions' [42] <<http://www.courts.qld.gov.au/2265.htm>> at 13 November 2009.

94 *Sinclair and Dinh* (1997) 191 LSJS 53.



Bad Character/Previous Convictions of Defendant<sup>95</sup>

1. Evidence as to the defendant's previous convictions or bad character where he has made an issue of his own character or that of prosecution witnesses

**Evidence has been given that defendant has convictions for .....**

**That fact must not be used by you to say that because he has committed offences before, therefore he must be guilty of the present offence.**

**Its use is more limited than that. It is this. The manner in which the defence has been conducted has involved a challenge to the truthfulness of prosecution witnesses. In evaluating the defendant's evidence and determining what impact it has on your assessment of the truthfulness of the prosecution witnesses, you are entitled to take into consideration that the defendant is a person who has convictions for offences of [.....].**

**A finding that you reject his evidence and accept that of the prosecution witnesses may lead you to find him guilty if the challenged evidence proves or helps to prove the elements of the offence. But you must come to any finding of guilt by that process, not by assuming that because of his criminal record he must have committed the offence for which he is now on trial.**

The jury should be given a clear statement of the limited purpose of permitting evidence of previous convictions or bad character to be adduced by cross-examination under s 15(2)(c) (that is, to deny the defendant the benefit of a false claim as to good character, or to discredit him where he is in conflict with prosecution witnesses whose character he has attacked, but not, per se, as tending to his guilt of the offence charged.)<sup>96</sup> That is so whether counsel requests such a direction or not.<sup>97</sup>

2. Evidence directed to showing that the defendant is guilty of the offence charged.

**You have heard in this trial this evidence (identify evidence given by prosecution witnesses or defendant in cross-examination). It is relevant to the prosecution case in this way and this way only. It goes, if you accept it, to showing that [explain relevance]. That is the specific purpose for which the prosecution has been allowed to lead the evidence and you must not use it for any other purpose. You may not seek to draw some inference from it that because the defendant has [been charged with or committed other offences or been said to have been involved in undesirable conduct, as the case may be] that he is therefore more**

<sup>95</sup> Section 15(2) *Evidence Act 1977* deals with the asking of questions tending to show that a defendant is of bad character or has committed offences. The four circumstances in which a defendant may be cross-examined under s 15(2) are: where the defendant has sought to establish his own good character or has cast imputations on the character of prosecution witnesses; where the matter is probative of guilt of the offence charged; where the questions are directed to showing that another defendant is not guilty of the offence with which they have been charged; and where the defendant has given evidence against a co-defendant. In the first three instances, leave is required. It can be seen that the evidence in the second and third instances will be relevant to the issues in the case, and thus may also be the subject of questions put to witnesses other than the defendant, whereas in the first and fourth it may merely affect credibility.

<sup>96</sup> *Donnini* (1972) 128 CLR 114.

<sup>97</sup> *BRS* (1997) 191 CLR 275.

likely to have committed the offence you are considering. In other words, it would be quite wrong for you to say, having heard that evidence, that the defendant is the sort of person likely to have committed the offence.

**If you accept this evidence you may use it only to consider whether it assists the prosecution, in the way I have described, to prove its case against the defendant.**

Evidence may emerge on the prosecution case or through cross-examination of the defendant himself<sup>98</sup> which indicates that he has been charged with or convicted of other offences, or is otherwise adverse to his character. Such evidence is, of course, admissible if it is directly probative of the offence before the court.<sup>99</sup> In such an instance it is necessary to explain the relevance of the evidence while making it clear that no inference of disposition or propensity can be drawn.

3. Evidence directed to showing that a co-defendant is not guilty.

- (a) Where evidence goes to show that co-defendant is not guilty of an offence with which the defendant is not charged -

**You have heard in this trial this evidence (identify evidence given by witnesses or defendant in cross-examination). [Mr X], counsel for [the co-defendant] has asked these questions and led this evidence to show that it was [the defendant] who committed the offence of ..... and not [the co-defendant]. It goes, if you accept it, to showing that [explain relevance].**

**You may use it in these ways only: It can be used, if accepted by you, as going to the proof of the prosecution case against [the co-defendant] on this charge, and also as detracting from the prosecution case against [the co-defendant].**

- (b) Where evidence goes to show that co-defendant is not guilty of an offence with which both are charged:

**[A], counsel for [the co-defendant] cross-examined [the defendant]/led evidence from a number of witnesses to the following effect [set out evidence]. It goes, if you accept it, to showing that it was [the defendant] who committed the offence of ..... and not [the co-defendant] [explain relevance]. You must consider it for that purpose only; that is insofar as it concerns the case against [co-defendant]. It forms no part of the evidence against [defendant] on the charge of ..... It cannot advance the prosecution case against him in any way. In particular it is not permissible for you to say, if you were to accept that evidence, that because [defendant] may have committed that offence he is therefore likely to have committed the offence with which he has been charged. The evidence has no rele-**

98 With leave under s 15(2)(a) *Evidence Act*.

99 See for example *Aston-Brien* [2000] QCA 211 in which the alleged provision of amphetamines immediately after a rape was described as 'an integral part of the prosecution case'; *Ettles* (1997) 27 MVR 265 in which the defendant's ingestion of cannabis was relevant to his manner of driving on a dangerous driving charge; *Ogd (No 2)* (2000) 50 NSWLR 444 in which an admission of having done 'these things' to the complainant (i.e. sexual assault) was made during the course of a similar assault on a witness; and *Grosser* (1999) 73 SASR 584 in which a history of the defendant's prior arrest on fraud and firearms charges was relevant to charges of attempted murder arising out of a police siege of the defendant's farmhouse. See also direction on Similar Facts.

**vance to the charge against [defendant]. Its only relevance is to the charge against [co-defendant].**

Evidence may be adduced from witnesses or from a defendant in cross-examination<sup>100</sup> which is adverse to his character, but has a purpose in showing that a co-defendant is not guilty of an offence of which he has been charged. Such evidence must go to the issues, either in the Prosecution's case against the co-defendant or the co-defendant's defence; merely showing that the defendant was of bad character would not, of itself, advance the co-defendant.

There is a distinction to be drawn between the situation in which the defendant and co-defendant are both charged with the offence on which the co-defendant wishes to adduce the evidence; and that in which the co-defendant only is charged (as might occur for example, where there is a joint indictment involving a series of offences with a factual nexus but not all defendants are charged with every offence).

In the former situation it would seem to follow that the evidence would both tend to exculpate the co-defendant and inculpate the defendant of an offence with which he was charged and a direction in terms of 2 above should be given.

In the second case the evidence, while relevant to the issues against the co-defendant, could only be impermissible bad character evidence as against the defendant and the jury should be directed to consider it only in the co-defendant's case.

4. Where the defendant has given evidence against a co-defendant.

**[A], counsel for [co-defendant] cross-examined [defendant] as to [prior convictions/bad character]. His answers may be taken into account by you in assessing the credibility of the evidence [defendant] has given against [co-defendant] and considering whether you think he has been truthful in that regard. The evidence of his previous convictions/bad character may not be used by you however, to say that because he has admitted to having done such things in the past he is somehow more likely to be guilty of the crime with which he is charged. It would be wrong to proceed in that way.**

Cross-examination of the defendant attempting to show his commission of other offences or bad character is permissible<sup>101</sup> where a defendant gives evidence against a co-defendant. That situation arises where the defendant gives evidence which 'supports the prosecution case against the co-defendant in a material respect or undermines the defence of the co-defendant'<sup>102</sup>. Cross-examination in this instance may be designed to show that the co-defendant is the perpetrator of the crime, in which case the considerations set out at 3 above will apply and a direction in whichever of the forms is appropriate should be given.

Alternatively the questioning may be designed to attack the credit of the defendant. In that event a direction in the terms above is suggested.

100 The situation contemplated by s 15(2)(b) *Evidence Act*.

101 By virtue of s 15(2)(d), without leave of the Court.

102 *Crawford* [1997] 1WLR 1329, 1333 applying *Murdoch v Taylor* [1965] AC 574, 592.

5. Where the defendant's convictions are inadvertently raised in the course of the trial

**You heard evidence that the defendant has in the past been convicted of an offence [or has been in custody]. That evidence is irrelevant. It would be unfair to speculate about it, and you must not use it in any way. I direct you that you should put it entirely out of your minds.**

### **SIMILAR FACT EVIDENCE<sup>103</sup>**

**A. Where the Crown seeks to establish the defendant's identity as the offender.**

**You must first be satisfied that the defendant was responsible for the earlier acts. The evidence on which you may be so satisfied is .....**

**If you are not so satisfied, you must completely disregard the evidence of the earlier acts.**

**If you are so satisfied, do you consider that the similarities between the earlier acts and the acts which are the subject of this indictment are so striking that you are satisfied beyond reasonable doubt that the same person was responsible on each occasion? In deciding that, ask yourselves whether the similarities are so striking that you are able to exclude coincidence beyond reasonable doubt.**

**It is certainly not enough that you consider that the defendant, having been responsible for the earlier acts, is the sort of person who might, or even would, commit the offence alleged in the indictment. You must go far beyond that and decide whether - to repeat the proper test - the similarities are so striking that you are able to exclude coincidence beyond reasonable doubt. Are the similarities so striking as to show that the defendant has put his stamp, his signature, upon the acts, and to lead you to conclude that he must have been the person responsible for both the earlier acts and the offence alleged?**

**These are the similarities identified by the prosecution .....**

**These are the defence submissions to you in relation to the alleged similarities .....**

**B. Where the Crown seeks to establish the defendant's modus operandi**

**First of all you would have to accept the evidence of the witnesses as to what happened [on the other occasions]. I will go through that evidence and what the Crown and the defence said about it shortly. If you don't accept that evidence you should disregard it entirely.**

**If you do accept that evidence, it can still be of no use to you unless you can be satisfied that there is so strong a pattern, that the conduct on each occasion is so strikingly similar, that as a matter of common sense, and standing back, looking objectively at it, the only reasonable inference is that the same sequence of events occurred on this occasion. If you are not satisfied of that, you should put the evidence out of your mind. It would be entirely irrelevant to this case and it would be wrong to use it against the defendant. You certainly must not proceed on the basis that if you thought he'd [committed the other offences] he was generally the sort of person who might, or even would, commit [this offence].**

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103 Queensland Courts, *Supreme and District Court Benchbook*, 'Similar Fact Evidence' [50] <<http://www.courts.qld.gov.au/2265.htm>> at 13 November 2009.

Similar acts may of course be later than the act the subject of a charge, so the directions would require modification if that were the case.

C. Where the Crown have joined charges against a number of complainants:

**You will remember that I have told you that you must consider the evidence in relation to each charge separately and reach a separate verdict in respect of each.<sup>104</sup> That direction is subject to the following directions on how you may use the evidence of the complainants in combination, but only in the limited way described in these directions.**

**You must look at all the evidence to see if the prosecution has proved its case on each charge against each complainant, and you must be satisfied that the evidence of each complainant is credible and reliable before you can use that complainant's evidence in any way. In considering that, you must be satisfied that the evidence of each of the complainants is independent, and I direct you that you cannot use the evidence of the complainants in combination unless you are satisfied that there is no real risk the evidence is untrue by reason of concoction. The value of any combination, and likewise any strength in numbers, is completely worthless if there is any real risk that what the complainants said is untrue by reason of concoction by them. You must be satisfied that there is no real risk of concoction; a real risk is one based on the evidence, not one that is fanciful or theoretical.**

**If you are satisfied that there is no real risk of concoction, then when considering the evidence about any one incident or allegation from any one complainant, such as the evidence of [complainant A] (whom who have judged credible and reliable) you may have regard to the evidence of (all the other complainants) (whom you have likewise considered credible and reliable). The prosecution argue that there is no reasonable view of the evidence of those other complainants, and the evidence of complainant A, other than that the defendant is guilty as alleged by complainant A, and that the same applies when considering the evidence of each complainant.**

(It would be appropriate to list the similarities the prosecution relies on as striking, and the dissimilarities and matters that take away from the prosecution argument).

**The evidence of [any one complainant] (whom you accept as credible and reliable) can be used by you as a circumstance which might confirm, support, or strengthen the evidence of [complainant A]; but only if you are satisfied on all the evidence you have heard that there is no reasonable view of it other than the defendant is guilty of the offences involving complainant A, and that the possibility that the complainants are [all] lying can be rejected.<sup>105</sup>**

104 This direction assumes that charges involving different complainants have been joined on the basis that the evidence from each is admissible on the trial of the charges in respect of the other or others, and admitted in conformity with the decision in *Phillips v R* (2006) 224 ALR 216.

105 In *DPP v Boardman* [1975] AC 421 Lord Wilberforce wrote (at 444) that 'This probative force is derived, if at all, from the circumstance that the fact testified to by the several witnesses bear to each other such a striking similarity they, must when judged by experience and commonsense, either all be true, or have arisen from a cause common to the witnesses or from pure co-incidence.'

**However the evidence of the other complainants cannot be used in the following ways when considering the evidence of [complainant A]**

**You cannot use that evidence to reason like this ‘The evidence persuades us that he is the sort of person who could commit these sort of offences, or is of bad character, and therefore we will convict him of all the charges.’**

**You cannot say to yourselves that if you are satisfied beyond reasonable doubt that he committed offences against [another complainant] that he therefore must have committed the offences alleged by [complainant A] and so we will convict him of that.**

## EVIDENCE OF OTHER SEXUAL (OR VIOLENT) ACTS OR OTHER 'DISCREDITABLE CONDUCT'<sup>106</sup>

### Other Sexual Activity

The defendant is charged with only the [number] offences set out in the indictment. You must consider each charge separately. If you find that you have a reasonable doubt about an essential element of a charge, you must find the defendant not guilty of that charge.

In addition to the evidence of the complainant concerning the [number] offences charged on the indictment, you have also heard evidence from him or her of other alleged incidents in which he or she says sexual activity involving the defendant occurred, [describe evidence if necessary].

As you have heard, the complainant has not been specific about when that activity occurred or in what circumstances. You can only use this evidence if you accept it beyond a reasonable doubt<sup>107</sup>. If you do not accept it then that finding will bear upon whether or not you accept the complainant's evidence relating to the charges before you beyond a reasonable doubt<sup>108</sup>. If you do accept the complainant's evidence that these other acts of a sexual nature took place then you can only use that against the defendant in relation to the charges before you if you are satisfied that the evidence demonstrates that the defendant had a sexual interest in the complainant and that the defendant had been willing to give effect to that interest by doing those other acts<sup>109</sup>. If persuaded of that, you may think that it is more likely that the defendant did what is alleged in the charge(s) under consideration<sup>110</sup>. If you are not so satisfied then the evidence cannot be used by you as proof of the charges before you.

Of course, whether any of those other acts occurred and if they did, whether those occurrences make it more likely that, on a different occasion, the accused did the act(s) with which he/she is charged, is a matter for you to determine. Remember even if you are satisfied that some or all of those other acts did occur, it does not inevitably follow that you would find him/her guilty of the act(s) the subject of the charge(s). You must always decide whether, having regard to the whole of the evidence the offence(s) charged has/have been established to your satisfaction beyond reasonable doubt.

NOTE: A general propensity warning may be required depending on the circumstances of the case. For example, the other sexual activity may be of a different type or magnitude than the charged offences. See below for the form of a general propensity warning.

<sup>106</sup> Queensland Courts, *Supreme and District Court Benchbook*, 'Evidence of other Sexual (or violent) Acts or other "Discreditable Conduct"' [66] <<http://www.courts.qld.gov.au/2265.htm>> at 13 November 2009.

<sup>107</sup> *HML v R* [2008] HCA 16; 82 ACRJ 723 per Hayne J at [196]. Because the jury may use this evidence as a step towards inferring guilt the jury may use it in that way only if persuaded of its truth beyond a reasonable doubt.

<sup>108</sup> See also Separate Consideration of Charges – Single Defendant (Direction 34) for a *Markuleski* direction.

<sup>109</sup> *HML*, Hayne J at [132].

<sup>110</sup> *HML*, Hayne J at [132].



### Discreditable (or violent) Conduct

**The defendant is charged with only the [number] offences set out in the indictment. You must consider each charge separately. If you find that you have a reasonable doubt about an essential element of a charge, you must find the defendant not guilty of that charge.**

**The prosecution has also placed before you evidence of other conduct by the defendant which it says proves certain matters which may be relevant to your consideration of the charges [describe evidence if necessary].**

**You can only use that evidence if you are satisfied of it beyond a reasonable doubt<sup>111</sup>. If you do not accept the evidence then that finding will bear on whether or not you accept the complainant's evidence relating to the charges before you beyond a reasonable doubt<sup>112</sup>. If you do accept this evidence then it can only be used by you in relation to the charge(s) before you in the specific way in which I now direct<sup>113</sup>.**

**The evidence may be used by you to find (specify the use to which the prosecution say the evidence is relevant) e.g. why the complainant acquiesced to the offences or did not make a complaint or to rebut accidental touching etc.**

Where, as commonly occurs, there is evidence from the complainant of the use of violence or force when an adult who was then purporting to exercise discipline is now charged with sexual abuse, an appropriate direction could be to the jury to support an argument that the complainant may have submitted to the defendant out of fear and could indicate a desire on the defendant's part to exercise control over the complainant. It might also provide a motive for the complainant making allegations against the defendant. On occasions evidence of other discreditable conduct may also be alleged sexual acts which may be used to show a pattern of 'grooming' the complainant, and accustoming him or her to sexual contact; it may put the charges in a context of a course of conduct that might explain the complainant's failure to react with surprise to the particular charged acts, and explain the defendant's confidence that the complainant would submit to them. A failure to complain about individual acts might well be explicable if the charged conduct was simply part of a pattern that continued for some time.

Those suggestions are taken from the decision in *R v IK* [2004] 89 SASR 406 at [48]–[55] and *R v Ryan* [2003] QCA 285 at [31], [43]–[44] and [59]. There may be other

111 *HML*, Hayne J at [196]. Any discreditable conduct which is an indispensable link in proving the charges in the indictment should be proved beyond a reasonable doubt. Other members of the Court in *HML* were of the view that the beyond reasonable doubt standard was not required where the evidence was admitted for other purposes e.g. to answer questions which the jury might have and so negative inferences they might draw (Kiefel J at [501]). However, it is suggested, that rather than confuse the jury with different standards of proof required depending on the purpose for which the evidence is to be used, it would be preferable (and safer) to direct that the jury must be satisfied beyond a reasonable doubt before using this evidence for any purpose. An exception to this may be where the evidence relates only to alleged violent acts. There may be appropriate to direct that the jury may only need to be satisfied that the conduct occurred.

112 See also Separate Consideration of Charges – Single Defendant (Direction 34) for a *Markuleski* direction.

113 In *HML* various judges for the High Court identified specific purposes to which this evidence can be relevant. For example, as providing answers to questions that the jury might have, "such as questions about the complainant's reaction, or lack of it, to the offences charged, or questions about whether the offences charged were isolated events." (Kiefel J at [513]).

bases for an admission of the evidence of other discreditable conduct: for example to rebut a particular defence, such as accident.

NOTE: A general propensity warning will usually be required with respect to the admission of this evidence. The other discreditable conduct will usually be of a different type than the charged offences although evidence of other sexual misconduct may be capable of proving propensity where it is capable of proving other matters as described above. The appropriate direction depends on the circumstances of the particular case. See below for the form of a general propensity warning.

### **General Propensity Warning**

**You should have regard to the evidence of the incidents not the subject of charges only if you find it reliable. If you accept it, you must not use it to conclude that the defendant is someone who has a tendency to commit the type of offence with which he is charged; so it would be quite wrong for you to reason you are satisfied he did those acts on other occasions, therefore it is likely that he committed a charged offence or offences.**

**Further, you should not reason that the defendant had done things equivalent to the offences charged on the other occasions and on that basis could be convicted of the offences charged even though the particular offences charged are not proved beyond reasonable doubt.**<sup>114</sup>

**Remember that the evidence of incidents not the subject of charges comes before you only for the limited purpose mentioned, and, before you can find the defendant guilty of any charge, you must be satisfied beyond reasonable doubt that the charge has been proved by evidence relating to that charge.**

**If you do not accept the complainant's evidence relating to incidents not the subject of charges, take that into account when considering her evidence relating to the alleged events the subject of the charges before you.**<sup>115</sup>

NOTE: In *HML v R* [2008] HCA 16; (2008) 82 ALJR 723, the High Court considered the admissibility of evidence of the 'discreditable conduct' and the jury directions to be given. The court expressly stated that the terms 'uncharged acts' and 'relationship evidence' are to be avoided.

The evidence of other 'discreditable conduct' which involves sexual offences allegedly committed upon the complainant may be part of a charged offence under s 229B Criminal Code (maintaining an unlawful sexual relationship)<sup>116</sup>. In such cases, the evidence may be relied on by the jury to directly establish the offence and, of course, that other conduct would need to be proved beyond a reasonable doubt.

If the evidence is to be admissible it shows that the defendant had acted in a sexual way towards the complainant on one or more other occasions. It may show that the defendant 'had demonstrated that he had a sexual interest in the complainant and has been willing to give effect to that interest by doing those other acts', such that the jury

<sup>114</sup> This suggested direction was referred to by the Court of Appeal with approval in *R v WO* [2006] QCA 21.

<sup>115</sup> See also Separate Consideration of Charges – Single Defendant (Direction 34) for a *Markuleski* Direction.

<sup>116</sup> See *R v UC* [2008] QCA 194 at [3].

may think it is more likely that the defendant did what is alleged in the charge under consideration. The evidence must satisfy the test in *Pfennig v R* (1995) 182 CLR 461, that is where there is no reasonable view of that evidence consistent with the accused person's innocence<sup>117</sup>.

In cases where the prosecution is going to lead evidence of other 'disreputable conduct', before the prosecution opening the trial judge should request the prosecution to specify the evidence to be lead and to indicate on what basis/bases it is relevant<sup>118</sup>. Questions of admissibility may then be argued.

For the guidance of trial judges it is appropriate to set out the remarks of Hayne J in *HML v R* (minus the footnotes) which appears to be the position of a majority of the High Court.

'Jury directions:

119. The directions that should be given where a complainant gives evidence of sexually improper conduct, other than the conduct which is the subject of the charges preferred against the accused, will vary from case to case. What follows in these reasons is not put forward as a model direction. It is not expressed in terms that are suitable to that purpose. Not all of the matters mentioned later as appropriate for consideration in framing suitable directions will find express reflection in what the jury are told. And, of course, there may be additional matters that should be reflected in the directions that are given.

120. Further, and more fundamentally, any suggested forms of direction put forward as 'standard' or 'model' directions will very likely mislead if their content is not properly moulded to the particular issues that are presented by each particular case. Model directions are necessarily framed at a level of abstraction that divorces the model from the particular facts of, and issues in, any specific trial. That is why such directions must be moulded to take proper account of what has happened in the trial. That moulding will usually require either addition to or subtraction from the model, or both addition and subtraction.

121. The fundamental propositions stated by the Court in *Alford v Magee*, which have since been referred to many times, must remain the guiding principles. First, the trial judge must decide what the real issues are in the particular case and tell the jury, in the light of the law, what those issues are. Second, the trial judge must explain to the jury so much of the law as they need to know to decide the case and how it applies to the facts of the particular case.

122. Neither purpose is adequately served by the bare recitation of forms of model directions. Not only are the real issues not identified for the jury, no sufficient explanation is given to the jury of how the relevant law applies to the facts of the particular case. But the particular facts and circumstances of these three cases reveal that it may be necessary for trial judges to consider at least the following matters in framing the directions to give to a jury about evidence of other sexual conduct of an accused directed at the complainant but which is not conduct the subject of charges being tried.

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117 *HML* per Hayne J at [132].

118 *HML* per Hayne J at [123].

123. First, framing appropriate directions self-evidently depends upon how the trial has proceeded. Accordingly, in most cases it will be desirable, before evidence is led, to ask the prosecutor to identify (a) what evidence will be adduced which may demonstrate sexual conduct towards the complainant, other than the conduct founding the charges being tried, and (b) how it is alleged the evidence is relevant. It will usually be necessary, and helpful, to have the prosecutor describe each step along the path (or paths) of reasoning from the intended proof of other sexual conduct which it is expected that the prosecutor will submit that the jury may follow. The evidence may be relevant for more than one reason.

124. The kinds of use to which it is possible to put evidence of offences or other discreditable acts other than those being tried are indicated in r 404(b) of the United States Federal Rules of Evidence with its reference to 'proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident'. In 1994, the Federal Rules of Evidence were amended to make special provision governing evidence of similar crimes and similar acts in cases concerning sexual assault and child molestation. It is not necessary to examine those provisions. For the moment it is sufficient to confine attention to r 404(b) as indicating possible kinds of use of evidence of offences or other discreditable acts other than those being tried. It is as well to add, however, that it may be doubted that the list given in the rule is exhaustive and that, in any event, leading American commentators point out that the decision whether to admit the evidence "is not to be made simply by labelling the evidence".

125. As the plurality reasons in *Pfennig* rightly pointed out:

'There is no one term which satisfactorily describes evidence which is received notwithstanding that it discloses the commission of offences other than those with which the accused is charged. *It is always propensity evidence* but it may be propensity evidence which falls within the category of similar fact evidence, relationship evidence or identity evidence. *Those categories are not exhaustive and are not necessarily mutually exclusive.* The term "similar fact" evidence is often used in a general but inaccurate sense.' (Emphasis added)

It is because shorthand terms like 'relationship evidence' are inexact, that the purpose or purposes for which it is sought to adduce the evidence will seldom be sufficiently expressed by simply using that or some other shorthand description. It is the identification of each step along the path of reasoning that is necessary and useful.

126. Second, as is often the case in relation to disputed questions of admissibility of evidence at a criminal trial, comparisons between prejudicial effect and probative value may be invited when considering reception of the evidence of sexual conduct other than the offences being tried. In drawing such comparisons, the important consideration is what prejudice, distinct from what the evidence proves, the accused may suffer if the evidence is adduced. In this regard it is important to recall that in cases of the kinds now under consideration the other acts and events which it is sought to prove will seldom be of a kind or quality that is radically different from the conduct which is charged. Further, the

evidence of other acts and events will often not have the specificity and particularity of evidence led about the charged acts. This lack of specificity will be unlikely to constitute prejudice to an accused of a kind that outweighs the probative value properly attributed to the evidence of other conduct.

127. If it is submitted that a comparison must be made between the probative value and prejudicial effect of evidence of other conduct it would be rare that the comparison will be important in framing directions to the jury, but possible forms of prejudice that are identified, and are distinct from what the evidence proves, may inform consideration of what the jury should be told about use of the evidence.

128. Third, if not by the end of the evidence, then certainly by the end of counsel's addresses, it will be apparent what use the parties have sought to make of the evidence of other sexual conduct. And in any event, the trial judge will then have to decide what are the real issues in the case and what is the law that the jury need to know to decide those issues. Both the relevance of the evidence of other events, as that relevance was identified at the outset of the trial, and any possible forms of prejudice that were said to follow from its admission, will very likely bear upon how the directions should be framed. And proper identification of the real issues in the case may mean that it is unnecessary to give any direction to the jury about some of the uses to which the evidence might be put (in particular its use in providing the context within which events the subject of charges are said to have occurred).

129. Fourth, in framing directions to the jury about evidence of events of a sexual kind other than those that are the subject of charge it will seldom, if ever, be helpful to speak of 'propensity' or 'disposition'. 'Propensity' and 'disposition' are words that jurors are not likely to find helpful. And as pointed out in *Pfennig*, the evidence of other criminal acts or other discreditable conduct is propensity evidence. Further, it will usually be better not to describe the evidence of other events of a sexual kind as evidence of 'uncharged acts'. 'Uncharged acts' suggests that what is described could have been the subject of charges. That may not be right. The conduct described may not be criminal; the description of the conduct may not be sufficiently specific to found a charge. Describing the events as 'uncharged acts' may invite speculation about why no charges were laid.

130. Fifth, the jury must be told to consider separately each charge preferred against the accused. The jury must be told to consider all of the evidence that is relevant to the charge under consideration. The jury must be told that they may find some evidence of a witness persuasive and other evidence not. And the jury must be told, therefore, that they must consider all of the evidence that the complainant gave and, if the accused gave evidence, all of his or her evidence, but that, like the evidence of every witness, they may accept or reject parts of the evidence each gave.

131. Sixth, it may be appropriate, in some cases, to tell the jury that they do not have to decide whether the other sexual conduct occurred. That is, it may be appropriate to tell the jury that they may be persuaded of the accused's guilt of one or more charges even if they are unable to decide, or do not find it necessary to consider, whether any of that conduct occurred. Conversely, if they are

persuaded that the other conduct did occur they may entertain a reasonable doubt of guilt in respect of any of the charges.

132. Seventh, the directions about how the evidence may be used by the jury will reflect not only what uses the parties have sought to make of it in argument, but also the legal basis for its admission. The evidence of other acts is admissible if it meets the test in *Pfennig*. That being so, it will be necessary to tell the jury that if, on all the evidence, they are.

133. But whether any of the other events happened, and if any did, whether their occurrence makes it more likely that, on a different occasion, the accused did what he is charged with doing, are matters for the jury. And even if the other events did happen, the conclusion that the accused did what is charged is not inevitable. The jury must always decide whether, having regard to all the evidence, they are persuaded beyond reasonable doubt that the charge they are considering has been proved.

200. As will be apparent from what has been said already, the directions about how the evidence of other sexual conduct and events might properly be used should have focused upon whether the evidence established, beyond reasonable doubt, that the appellant had a sexual interest in the complainant and had given effect to that desire by his actions. The manner of expressing that direction will, of course, depend upon the way the case has proceeded. In particular, the way in which the accused's sexual interest is described may depend upon the ways in which the parties have chosen to describe it. Words like 'passion', 'desire' or 'attraction' have often been used to describe what moves the accused in a case like those now under consideration. Sometimes epithets like 'guilty' or 'illicit' or 'unnatural' have been used to embellish the description. There is no one formula which must be used. As a general rule the use of embellishing epithets is neither helpful nor desirable. What is important is that the jury's attention is focused upon whether the evidence of other sexual conduct or events proves the accused had a sexual interest in the complainant and had carried that interest into effect."

### ***Longman* Direction for other sexual or discreditable conduct**

The first two paragraphs of a direction regarding other discreditable acts would usually be the same as the *Longman* Direction at No 65.1, except that the words 'the incident' will probably be replaced by the words 'the other alleged incident(s) in which (s)he says sexual activity occurred'.

The third paragraph of the suggested direction appearing at No 65.2 would ordinarily and more sensibly be:

**I warn you that it would be dangerous to accept as reliable the complainant's evidence alone of those other alleged incidents in which she says sexual activity happened 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.**

As to the need for this direction on occasions, see *R v RWB* (2003)87 SASR 256 at 271.

Some judges have expressed reservations about non-specific 'relationship evidence' and the care with which its characterization, reception and use must be treated.<sup>119</sup> These reservations are now encapsulated in *HML v R*.

In *R v Nieterink* (1999) 76 SASR 56, Doyle CJ pointed out that in many cases of sexual offences against children, the evidence of uncharged acts have several potential uses. The evidence of a particular relationship might be admissible to explain a criminal act, or the circumstances in which it was committed, that might otherwise be surprising, and, on that account, implausible. The evidence may establish a pattern of guilt to explain a child's submission and silence. The term 'background' is unsatisfactory because of its failure to identify the precise manner in which it is suggested that the evidence of the uncharged acts can be used.

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119 See *Tully v R* (2006) 231 ALR 712, (2006) ALJR 391 per Callinan J.

## LIES TOLD BY THE DEFENDANT (CONSCIOUSNESS OF GUILT)<sup>120</sup>

**The prosecution relies on what it says are lies told by the defendant as showing that he is guilty of the offence.<sup>121</sup>**

[Here identify precisely the lies relied upon by the prosecution together with the basis on which they are said to be capable of implicating the defendant in the commission of the offence charged and not of some lesser offence<sup>122</sup>].<sup>123</sup>

**Before you can use this evidence against the defendant, you must be satisfied of a number of matters. Unless you are satisfied of all these matters, then you cannot use the evidence against the defendant.**

**First, you must be satisfied that the defendant has told a deliberate untruth. There is a difference between the mere rejection of a person's account of events and a finding that the person has lied. In many cases, where there appears to be a departure from the truth, it may not be possible to say that a deliberate lie has been told. The defendant may have been confused; or there may be other reasons which would prevent you from finding that he has deliberately told an untruth.**

**Secondly, you must be satisfied that the lie is concerned with some circumstance or event connected with the offence. You can only use a lie against the defendant if you are satisfied, having regard to those circumstances and events, that it reveals a knowledge of the offence or some aspect of it.**

**Thirdly, you must be satisfied that the lie was told because the defendant knew that the truth of the matter would implicate him in the commission of the offence [and not of some lesser offence].<sup>124</sup> The defendant must be lying because he is conscious that the truth could convict him. There may be reasons for the lie**

120 Queensland Courts, *Supreme and District Court Benchbook*, 'Lies Told By The Defendant (Consciousness of Guilt)' [38.1]–[38.3] <<http://www.courts.qld.gov.au/2265.htm>> at 13 November 2009. The Benchbook also contains a suggested direction dealing with flight as demonstrating consciousness of guilt: Queensland Courts, *Supreme and District Court Benchbook*, 'Flight and other Post Offence Conduct as Demonstrating Consciousness of Guilt' [48] <<http://www.courts.qld.gov.au/2265.htm>> at 13 November 2009.

121 As a general rule an *Edwards* (1993) 178 CLR 193 direction should only be given if the prosecution contends that a lie is evidence of guilt, in the sense that it was told because 'he accused knew that the truth would implicate him in (the commission) of the offence': *Edwards*, 211, 363, as explained in *Zoneff* (2000) 200 CLR 234 [17]. Courts of Appeal have warned of the need for circumspection and care in the use of this direction: *Brennan* [1999] 2 Qd 529, 531; *Walton and Harman* [2001] QCA 309 [61]. See *Chang* (2003) 7 VR 236 as to the circumstances whether an *Edwards* direction should be given concerning post-offence conduct, particularly flight and concealment, where that conduct is relied upon by the prosecution as evidence of guilt or is likely to be used by the jury as such.

122 *Richens* [1993] 4 All ER 877, 886.

123 *Osland* (1998) 197 CLR 316, *Zoneff* [17].

124 See *Meko v R* (2004) 146 A Crim R 131 the WA Court of Criminal Appeal for a discussion on the possible directions where the lie reveals confessions of guilt in respect of one only of the number of alternative charges. See also *R v MAX* [2007] QCA 267 per Keane JA at [48], [50] and comments of Williams JA at [31] 'where, as here, murder is the offence charged and manslaughter is available as an alternative verdict, it is incumbent upon the trial judge, if a *Edwards* direction is given, to indicate the element of the offence that is said to be admitted by the telling of the lie in question. If that element is merely the implication of the accused in the killing then the jury should be instructed that the admission is so limited. If the admission is said to establish the element of intent then the jury should be so instructed and they should be warned that they ought not simply infer from the fact that the accused was implicated in the killing that he had the requisite intention.'



**apart from a realisation of guilt. People sometimes have an innocent explanation for lying.**

(The judge should direct attention to any innocent explanation that may account for the telling of a lie. For example; in an attempt to bolster up a just cause, or out of shame, or out of a wish to conceal embarrassing or disgraceful behaviour. A lie may be told out of panic, or confusion, or to escape an unjust accusation; to protect some other person or to avoid a consequence extraneous to the offence.) [If a lesser offence is open or charged then the judge should tell the jury that the lie cannot be used as consciousness of guilt of the offence if the lie was told to conceal involvement in the lesser offence.]<sup>125</sup>

**If you accept that a reason of this kind is the explanation for the lie, then you cannot use it against the defendant. You can only use it against the defendant if you are satisfied that he lied out of a realisation that the truth would implicate him in the offence.**

[If the lie is relied upon to materially support (corroborate) the evidence of a particular witness, e.g. an accomplice, a prison informant etc., the jury should be directed that the statement must be clearly shown to be a lie by evidence other than that of the evidence to be corroborated.<sup>126</sup> In such an eventuality the judge should precisely identify the evidence (independent of the witness whose evidence is said to be supported by the lie) which shows that the defendant has lied.]

[If the lie relied upon by the prosecution is the only evidence against the defendant, or is an indispensable link in a chain of evidence necessary to prove guilt then the following direction must be given.]<sup>127</sup>

**Finally, in this case the alleged lie is the only evidence against the defendant [or is a critical fact in the prosecution's circumstantial case against him]. Before you can use the lie against the defendant, you must be satisfied beyond reasonable doubt not only that he lied but also that he lied because he realised that the truth would implicate him in the offence.**

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125 *Box & Martin* [2001] QCA 272 [8]; *Wehlow* [2001] QCA 193 [5], [33].

126 *Edwards* 211, 363,

127 *Edwards* 210, 362.



**Appendix E**  
**Jury Directions Research Project**

**Report from the  
University of Queensland, School of Psychology**



# Jurors' Trial Experiences: The Influence of Directions and Other Aspects of Trials

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November 2009

## Executive Summary

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A survey and follow up interviews were conducted to ask jurors about their experiences sitting on trials in the Brisbane District and Supreme Courts. It was found:

### **Trial transcript**

A transcript in whole or part was provided either by rereading or in hard copy to less than half of the jurors. Locating relevant sections of the transcript was difficult however (either in the hard copy or for reading back). Jurors who did not receive the transcript thought it would have been helpful.

### **Comprehension of directions**

Sixty-one percent of jurors correctly understood *burden of proof*, and *beyond reasonable doubt* tended to be described as requiring a standard of proof that was either consistent with, or higher than, that which is technically required.

Jurors however reported that they understood both directions without difficulty, and the more that they felt they understood both directions, the more positively they viewed the Prosecution case.

Further, the more jurors thought they understood the meaning of *burden of proof*, the more they relied on their common sense and the Prosecution's evidence, and the less they relied on the Defence evidence, in arriving at a verdict.

Different understandings of *beyond reasonable doubt* led to difficulties in reaching agreement in the deliberation room.

### **Judge's summing up**

This was reported as being more comprehensive than the opening remarks, and although jurors felt it was somewhat longer than necessary, they thought it was helpful and the repetition was necessary.

When jurors were provided with questions by the Judge to guide their deliberations, they generally felt that it was appropriate that these questions were given at the end of the trial.

### **Helpful and unhelpful aspects**

The most helpful aspects were the Judge's summing up and lists of charges or other written materials.

The least helpful aspects were the lawyers being confusing, broad legal issues, and the meaning of reasonable doubt.

Jurors identified a number of things that they would have found helpful to have--the top two were access to transcripts and a written summary of the relevant laws.

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## Project Overview

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Recently, there has been a concerted effort in a number of jurisdictions in Australia to examine the issue of jury directions. Law reform commissions in Queensland, New South Wales, Victoria, and Tasmania have been examining jury directions from a number of different perspectives. One focus of the Terms of Reference for the Queensland Law Reform Commission is juror understanding of directions. This project aimed to examine juror understanding, or comprehension, of directions using two approaches.

This project involved a survey distributed to jurors sitting on trials in the Supreme and District courts in Brisbane over a two-month period in 2009. Jurors were asked to reflect on their experiences during the trial, in particular on what they thought the directions relating to *beyond reasonable doubt* and *burden of proof* meant. These directions were chosen as they would be present in each trial, and, except for infrequent occasions for *burden of proof*, the directions given would be the same.

Analyses allowed jurors' objective and subjective understanding of these directions to be compared, and also allowed the relationship between understanding of directions and perceptions about the trial to be examined. The survey also asked about limited used directions, although these were not present in every case. Finally, jurors were asked more generally about the aspects of the trial that they thought had been particularly helpful or aspects that had hindered.

The survey was followed up with a telephone interview. This allowed the research team to gain a fuller understanding of participants' survey responses and explore perceptions about aspects of the trial that were not anticipated in the questionnaire.

Together, these provide rich descriptive data of jurors' experiences in real trials, a measure of the extent to which jurors understand common directions in trials, and a measure of what understanding of directions is associated with.

## Jurors' Trial Experiences

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### Methodology

#### **Measures and Procedure**

A 12-page survey was developed by staff at the University of Queensland in consultation with the Queensland Law Reform Commission (see Appendix).

Questions assessed jurors' perceptions of various aspects of the trial. For example, jurors were asked to indicate what areas were covered by the opening remarks and closing addresses made by the Prosecution and Defence. They were also asked to indicate the areas covered by the Judge's opening remarks and summing up. Jurors were also asked how much they felt they understood directions relating to *burden of proof* and *beyond reasonable doubt*. Their actual understanding of these directions was also assessed.

Jurors were asked to indicate whether expert testimony was presented, whether they were given limited use directions, and whether they had access to a transcript. The survey asked jurors to rate the usefulness of various aspects of the trial, and whether the duration of the closing remarks and summing up were appropriate. Finally, jurors also provided an evaluation of the Prosecution and Defence cases and rated the extent to which a number of factors influenced their final decisions.

The survey was distributed to jurors at the end of selected criminal trials in the Supreme and District Courts in Brisbane, Queensland, between August 6 and October 8, 2009. Staff from the Sheriff's Office distributed the surveys, and jurors could either complete them in the Courts' Complex or return them via a reply-paid envelope that was included in the survey pack.

A semi-structured interview protocol was also developed for use with jurors who indicated that they would be willing to be contacted for a brief interview. A member of the research team at the University of Queensland contacted jurors via telephone within two-weeks of the end of the trial. During this interview, jurors were asked about their perceptions of the addresses made, and assistance given, by the Judge, Prosecutor, and Defence. They were also asked additional questions about directions they had been given. It was also an opportunity for jurors to elaborate on some of the questions asked within the survey.

#### **Samples**

##### *Survey*

A total of 14 trials held in the Supreme and District Courts were included in the sample. A breakdown of charges and verdicts is presented in Table 1. A total of 33 jurors (of a pool of 168 jurors) returned surveys during this time. The overall response rate for those who were provided the survey was therefore 21.85% (17 surveys that were not distributed to jurors were not counted towards the total number of surveys given to jurors). The final sample included 17 females and 16 males, with an average age of 43.30 years. All jurors who participated had English as a first language and self-identified as not being Indigenous Australians. Further juror information is presented in Table 2.

Table 1.  
Descriptive details of trials included in the sample.

Court		Verdicts		Type of Offence	
District	11	Guilty	41	Assault offences	6
Supreme	3	Not Guilty	15	Sexual offences	3
		Unable to reach a verdict	2	Murder	1
				Stalking	1
				Drug offences	1
				Fraud	1
				Unreported	1
				Total Counts	58

Note: There were more counts/verdicts than trials due to multiple counts within trials.

Table 2.  
Juror details.

Gender	Age (years)	Employment	Education	
Male 16	Average 43.30	Professional 23	Partly completed Secondary School	1
Female 17	SD 13.74	Employed in the home 3	Secondary School	5
	Minimum 21.00	Retired 4	Apprenticeship	1
	Maximum 69.00	Full time student 2	Diploma or Certificate	12
		No response 1	Bachelor's Degree	4
			Postgraduate Certificate or Diploma	6
			Postgraduate Degree	4

### *Interview*

Seventeen jurors (10 females, 7 males; average age of 52 years) who completed the survey also indicated that they were willing to be contacted for a short interview. One juror was unable to be contacted in a reasonable time to complete an interview, so the total number of interviews conducted was reduced to sixteen.

## Elements of the Trial

### **Opening Remarks**

Jurors were asked to identify the elements that were explained to them in opening remarks made by the Judge, Prosecutor and Defence. Thirty nine percent reported that all elements as listed in Table 3 were present in the Judge's opening remarks, 75.8% reported that all elements were present in the Prosecutor's opening remarks, and 57.6% reported that all elements were present in the Defence opening remarks. Table 3 presents a breakdown of percentages of jurors who reported each element that was explained to them.

Three jurors said that it was hard or impossible to apply the Judge's opening remarks. One said they found choosing the speaker difficult, one said that the wording of the indictment meant that they needed more time than was available to be able to accurately write it in note form, and the other juror had difficulties with the concept of *beyond reasonable doubt* and deciding what was reasonable due to the broad legal terms used in the Judge's opening remarks.

Table 3.  
Percentage of jurors reporting elements of opening remarks explained to them.

	Judge's Remarks	Prosecution's Remarks	Defence Remarks
The Nature of Offence(s)	94%	97%	
Outline of Case		100%	82%
Outline of Legal Issues	73%	76%	58%
The People in the Courtroom and their Roles	76%		
The Need to Choose a Speaker	94%		
How to Choose a Speaker	58%		
When to Choose a Speaker	76%		
The possibility of taking notes	94%		
The possibility of asking questions	85%		
That jurors must not make their own enquiries	100%		

### Other Opening Remarks and Supporting Materials

In addition, a small number of jurors (less than 5) reported that the Judge, Prosecutor, or Defence explained other things in their opening remarks. These included the Judge explaining his or her role “concerning points of law”, the possible length of the trial, and the need to be impartial and not influenced by outside factors, the Defence being self-represented and thus not providing an outline of their case.

Of the seventeen jurors who indicated that the prosecutor provided written summaries or other materials, eleven said the prosecutor provided a summary of the indictment of charges, and six said the prosecutor provided materials related to the evidence. Only three jurors said the Defence provided additional supporting materials; all noted that these related to the evidence rather than being a summary of the charges. Three jurors said that the judge provided additional materials describing or outlining the charges.

### Timing of Defence Remarks

All but one of the jurors interviewed commented that the order of the opening addresses of the Judge, Prosecutor and Defence was appropriate. The one remaining juror, who commented in an interview that the Defence did not make an opening address until after the presentation of the Prosecution case, indicated that they would have liked to have heard from the Defence earlier.

*“I would've liked to have heard the defence address, simply to extend what their strategy was because I felt that others were left wondering, well, you know, when is the defence gonna come on and say something?” – Juror 11*

### Transcript

Fourteen jurors reported receiving copies of a transcript of the evidence, either whole or in part. Two jurors also indicated that the Judge read out the transcript in the courtroom when requested. Of the jurors who did not report receiving a transcript, 13 (out of 19) said that they would have liked a copy of the transcript, but only two jurors specifically asked for one. When interviewed, two of these jurors who had not received a transcript indicated that they did not realise that they would not be able to access the transcript during deliberations, but five other

interviewees indicated that they had enough evidence to deal with in deliberations and so transcripts did not seem necessary.

Of those 14 jurors initially reporting receiving a transcript, five reported that they had to ask for a copy of the transcript and four said they were able to take the transcript into the jury room during deliberations. For those jurors who said they received a transcript, the extent to which the transcript was helpful in deliberations and in reaching a verdict was rated on a scale of 1 (*not at all helpful*) to 7 (*very helpful*). Jurors used the full range of this scale for both questions, with an average rating of helpfulness in deliberations of 4.43 (95% CI = 2.91 to 5.94), and average rating of helpfulness in verdict of 4.14 (95% CI = 2.53 to 5.76), with 46.2% rating the transcript as very helpful in both deliberations and verdicts (i.e., they scored 7 on both of these items).

Jurors who were interviewed also discussed the use of the transcript, highlighting many of the same points as covered in responses to the surveys. In general, jurors who had not received the transcript felt that it would have helped them in their deliberations, with some not realising that this would not be provided to them as a matter of course. Those who had received some part of the transcript mostly had had it read to them by the Judge, which they found helpful as they felt it "took all the emotion out of it" (Juror 8). However, some jurors who received the transcript or had sections replayed or read to them had difficulties in remembering which particular sections they wanted to hear again, which may have reduced the usefulness of the transcript.

#### Example Comments Regarding Transcripts:

*"Well, I got the impression that we weren't allowed to ask. That the transcript wasn't something that we were allowed to have. Which I found quite strange, because, if we're there listening to all the evidence, why shouldn't you be allowed to get the transcript? But that was the impression I got, that we were not allowed, well, we weren't supposed to get it." – Juror 7*

*"I think that we didn't realise that if we wanted to hear any part of the transcript that we couldn't have it. I think we thought that it would be on a piece of paper or something and we could read it and discuss it." - Juror 8*

*"No, no transcript, as in written transcripts. Anything we particularly, there was one instance where we needed to hear, um, a certain part of someone's testimony, and we just asked the judge for that and then we came back into the courtroom to listen to that." – Juror 26*

*"It was hard to be specific on what we might want to read over again. So, if you think, 'oh, I wouldn't mind seeing a bit of that evidence again.', 'Which part?' ... You know, you can't really pinpoint what you want to re-read." – Juror 17*

#### Expert Witnesses

Twenty-two jurors indicated that expert witnesses testified in the trial they served on. Thirteen of these jurors said that they received a report from the expert witness, and all but one juror said they were able to take this report with them into the deliberation room. Jurors said that the reports varied in utility however, using the entire range of the 7-point rating scale. The average rating of helpfulness in deliberations was 5.77 (95% CI = 4.63 to 6.90), and average rating of helpfulness in verdict was 4.85 (95% CI = 3.72 to 5.97). The majority did say the report was useful (rating of 6 or 7).

## Closing Addresses and Summing Up

Jurors were also asked to identify the elements that were explained to them in the summing up by the Judge, and the closing addresses made by the Prosecutor and Defence. Seventy-eight percent reported that all elements as listed in Table 4 were present in the Judge's summing up, 70% reported that all elements were present in the Prosecutor's closing address, and 64% reported that all elements were present in the Defence closing address.

Table 4 presents a breakdown of numbers of jurors who reported each element that was explained to them. Jurors were also asked to report on a 7-point scale about the length of each of the Prosecution, Defence, and Judge's summing up/closing statements, with 1 indicating the address was too short and 7 indicating the address was too long. A rating of 4 would therefore indicate an appropriate length.

The average ratings were 4.09 (95% CI = 3.75 to 4.43), 4.39 (95% CI = 3.97 to 4.82), and 4.58 (95% CI = 4.30 to 4.86) for the Prosecution, Defence, and Judge respectively. Single sample *t*-tests on these ratings compared to a rating of 4 (an appropriate length), revealed that the Judge's summing up was seen to be significantly longer than jurors felt was needed,  $t(32) = 4.18$ ,  $p < .001$ , though the Prosecution,  $t(32) = 0.55$ ,  $p = .59$ , and the Defence address,  $t(32) = 1.89$ ,  $p = .07$ , were not significantly longer than needed.

Table 4.

Percentage of jurors reporting elements of closing addresses/Judge's summing up explained to them.

	Judge's Summing Up	Prosecutor's Address	Defence Address
Outline of Law Relevant to Case	100%	76%	76%
Outline of Elements of Offence(s)	100%	88%	76%
Outline of Elements of Defence(s)	94%		82%
Outline of questions to answer to arrive at a verdict	97%	79%	90%
Case Summary	94%	97%	100%
Evidence Summary	100%	91%	91%
The meaning of 'Burden (or Onus) of Proof'	91%		
The Standard of Proof	88%		

Seven jurors indicated that the Prosecution provided additional materials; three said they received something from the Defence, and two said the Judge gave them extra materials. Of the materials provided by the Prosecution, the majority related to evidence, and one juror said that they received a description of the charges and one juror said they received a table of the offences and the witnesses. Jurors rated all of these additional materials as helpful (range 4-7, with only two not being rated as 7, *very helpful*). Materials provided by the Defence and the Judge all related to pieces of evidence, and all were rated as helpful (a score of 6 or 7 out of 7). None of the jurors described the actual materials in specific detail, except one who mentioned that some of the witnesses had made use of Powerpoint.

## Judge's Summing Up (Charge)

While jurors did indicate that the Judge's summing up was longer than necessary, responses from the interviews provided more insight into this matter. Interviewees were questioned further regarding their perceptions of the Judge's summing up, and all reported that it was helpful to them. For some, the Judge's summing up was slightly repetitive, but others found the repetition necessary to stay on track. Example responses are provided below.

*"But definitely when the judge did her closing speech, quite a number of people thought, oh this is important, need to write this down. It was obviously helping them clarify or umm... yeah, clarify and keep focused." – Juror 4*

*"My only comment was that, I think [he] probably kept on saying it a number of times, which I didn't especially need. But no, he couldn't have made it any clearer; he worked very hard to really focus our minds on what we had to do." – Juror 9*

*"No, the judge's summing up at the end was very clear, and ah, I wouldn't say concise. And it clicked." – Juror 14*

*"And theirs probably bears the most weight, you know. Because he's the bloke who knows the law better than the others, you know, he's running the show, really. So, when he gives a direction, we really, sort of, that's important, very very important. So we take that back to the jury room, for sure. And we often said, 'what did the judge say. The judge said this', you know. And so, his direction is by far the most weighty. But, I noticed, they're really fair, and in their summation, they summarise both, both the sides." – Juror 17*

*"Yes, the judge did go through charge by charge, defendant by defendant, charge by charge, and listed out what evidence could be used against which person. Unfortunately, it was also pretty quickly said. So not all of us got it down on paper. Um... there was a lot of discussion in the jury room about that. And we did actually have to go back and ask on one of those points too. Like, which evidence could be – like a certain piece of evidence and could it be used against a certain person." – Juror 25*

*"Very clearly explaining the law, um the things that we could consider and not consider. The things that were admissible against certain people or not. Um, all that sorts of things, it's very helpful. Because you couldn't mull around all of those things. You knew that you could use this against someone, and you could use this, and this is acceptable, and this, and she explained in regards to the facts and the laws, you know, broke it all down for us, so it was sort of like fitting together the jigsaw pieces, in a way. And yeah, it's very helpful. Without the judge you'd be, you know, running around you know, for days I think, you know, trying to sort it all out. Yeah, very good to have them, the points of law and the facts you can consider or not." – Juror 27*

## Summary

Each of the elements of the Judge's, Prosecutor's, and Defence opening remarks that are provided to assist jurors were reported as being present by the majority of jurors. For the Judge's remarks, only a minority of jurors reported all elements being covered in their trial. Additional guidance in choosing a speaker would appear to be helpful. Approximately 9% of jurors found it difficult to apply the Judge's opening remarks. A written summary of the charges was provided by the Prosecutor in about a third of the cases. Other supporting materials were not frequently provided. Likewise, a transcript in whole or part was provided either by rereading or in hard copy to less than half of the jurors. Approximately half of the jurors who received transcripts thought they were very helpful (the overall helpfulness rating was only average however). Some jurors found it difficult to locate relevant sections of the transcript, or ask for relevant sections of the transcript to be read back, when seeking clarification. Jurors who did not receive the transcript thought it would have been helpful. When an expert witness testified and provided a written report, jurors generally found the report useful. The Judge's summing up was reported as being more comprehensive than the opening remarks, and although jurors felt it was somewhat longer than necessary, they thought it was helpful and the repetition was necessary. The Prosecution and Defence closing remarks were seen as being of appropriate length.



## Directions

### **Beyond Reasonable Doubt**

Jurors were asked specifically about the directions given to them regarding *beyond reasonable doubt*. All jurors were asked to briefly explain in their own words what these directions meant, and to what extent they thought they understood the directions. Given the difficulties with classifying alternative descriptions of the concept of *beyond reasonable doubt* as either accurate or inaccurate, jurors' explanations were categorised according to whether they represented the following standards of proof:

Balance of probabilities: It was more likely than not that the defendant was guilty.

Minor/reasonable doubt: There was some doubt that was reasonable, or no reasonable alternative explanation.

No doubt: There was absolutely not doubt at all.

There were a number of other responses that were classified as describing a reasonable person test involving what a reasonable person would conclude, and there were several responses that could not be classified or that were missing.

It is acknowledged that there could be several other ways of categorising jurors' responses, and that some responses might fit in more than one category.

### Balance of Probabilities

*I did not need an explanation, but the deliberation revealed some wanted a much higher level of proof than I thought reasonable or even possible. For me it is what a reasonable person may conclude or infer from the evidence laid before the court. In other words, after weighing the evidence the conclusion drawn is not outweighed by doubt. - Juror 10*

### Minor / Reasonable Doubt (or restatement)

*With the information provided, the evidence supplied to the jury, both sides heard clearly by the defence and the Crown; the jury members were to concluded and decide who is guilty beyond reasonable doubt. - Juror 4*

*The judge did give us further clarification when the vote was stuck on the 3rd day. It means that I believe the evidence proves that the incident occurred the way that it was stated/charged. It can constitute a witness statement if I find that witness credible. If other witnesses state that similar events took place by the accused (but not necessarily a stated event) this can be counted to add weight to the initial witness statement. There doesn't need to be a photo/video of the particular event in action for an event to be "beyond reasonable doubt". - Juror 9*

*For me - Is there a plausible alternative that would substitute for the case put by the prosecution. ie. Is there another reasonable explanation. - Juror 11*

*If you can infer a reasonable alternative explanation for the evidence, that is reasonable doubt. - Juror 13*

*(From interview) Beyond reasonable doubt is beyond any reasonable doubt. ... I can sort of see whether there's any doubt about it or not. .. It's sort of like 90-10 or something like that. - Juror 14*

*Not necessarily complete but convinced beyond a probable factor. - Juror 15*

## Jurors' Trial Experiences

*Must be sure of the accused's guilt. Must be sure there is no other reasonable account of events. - Juror 16*

*Is it possible that the incident did not occur as per the charge? Is it reasonable - is there any real possible likelihood of the incident not occurring when leaving in mind all of the supportive evidence combined. - Juror 18*

*Exactly what it says 'beyond reasonable doubt' - Juror 19*

*You are satisfied that a particular event occurred and the truth has been reasonably established. - Juror 21*

*Beyond what is a reasonable assumption. - Juror 32*

## No Doubt

*If there is any doubt at all in your mind you must say not guilty - Juror 1*

*That you have no doubt that the case has been proven/disproved - clear evidentiary that is undeniably true and not open to interpretation - Juror 2*

*With the evidence provided there is no uncertainty - Juror 7*

*To not have any doubt whatsoever. - Juror 17*

*The crown had to prove to us, beyond reasonable doubt. This to me means there is to be no doubt what-so-ever as to the evidence. Beyond reasonable doubt means simply that - to have no doubt in the case. - Juror 22*

*That you the juror have no reservations, doubts or maybe in regard to the law and its application to the trial at hand. There can be NO doubt. - Juror 24*

*If the overwhelming body of evidence produced points to a conclusion or inference, and no alternative view can be logically ascertained or put forward, then this constitutes beyond reasonable doubt. - Juror 26*

*On a scale of 1 to 10 - 10 being the highest, 1 being the lowest - If I think "1" - that is still reasonable doubt and not enough to bring in a guilty verdict. - Juror 27*

*If you have any doubt, the defendant is not guilty. Beyond they are guilty. - Juror 29*

*You either have total evidential proof or feel convinced beyond any doubt. - Juror 30*

*Any doubt at all, you would not find a guilty verdict. - Juror 31*

*If you had a doubt over the accused and his/her guilt that is being guilty then you be unable to say he is guilty. - Juror 33*

## Reasonable Person

*That a reasonable person would have no doubt as to the steps taken to find the defendant guilty or innocent - Juror 6*

*That there is no reasonable doubt of a reasonable person that the defendant is guilty. - Juror 12*

*Beyond the point that a reasonable, ordinary person would consider that something could have occurred or not have occurred or that a reasonable person would do*

*themselves. Belief that the event/action was a reasonable one for an ordinary person. Taking into account the situation without sympathy or bias - Juror 28*

#### Other / Unclassifiable

*"Beyond reasonable doubt" to me, means you are convinced the defendant is either guilty or not guilty despite the charges not being proven - Juror 8*

*Based on the witness statements made and any evidence, the jury cannot say an accused person is guilty based on the lack of information - Juror 23*

*That there is no other reasonable or plausible reason open on the evidence to suggest the accused may be innocent. - Juror 25*

*(No response) - Juror 5*

*(No response) - Juror 20*

*(No response) - Juror 33*

As can be seen from these responses, there was a range of explanations of *beyond reasonable doubt*. When responses did not centre on minor or reasonable doubt, they tended to require a level of proof that was higher than that technically necessary, or a comparable standard of proof based around what a reasonable person would expect.

Jurors were asked how much they understood the directions relating to *beyond reasonable doubt*, how helpful the directions were, and whether they would have liked further clarification. Table 5 shows jurors' average (mean) ratings of their subjective understanding of *beyond reasonable doubt* (rated on a 7 point scale, with 1 = *not at all*, and 7 = *very much*).

Table 5.  
Jurors' subjective understanding of beyond reasonable doubt.

Subjective Rating of Understanding	Mean (SD)
To what extent did you understand what Judge said about Beyond Reasonable Doubt?	6.64 (0.49)
To what extent did you find what the Judge said about Beyond Reasonable Doubt helpful?	6.42 (0.90)
To what extent did you find what the Judge said about Beyond Reasonable Doubt hard to understand?	1.88 (1.39)
To what extent would you have liked any further clarification of the Beyond Reasonable Doubt?	2.06 (1.68)

Jurors' average ratings revealed that they thought that the directions were helpful and that they understood the Judge's direction, and most did not need further clarification on the directions. A majority of jurors (66%) said that they were understood the direction very much, thought what the Judge said was very helpful (rating 6/7), and did not find what the Judge said hard to understand or required clarification (rating 1/2).

#### **Burden of Proof**

Jurors were also asked about the directions given to them in relation to *burden of proof*. Again, they were asked to explain the directions in their own words. These explanations were then coded as either accurate or inaccurate (including no description). Responses were

coded as incorrect if there was a clear misunderstanding of the direction, such as describing a shift in the burden to the defendant (1 response), the burden was on the jury to assess the evidence (5 responses), or there was no attempt at an answer (7 responses). Overall, 20 out of 33 jurors accurately described *burden of proof*. Example accurate and inaccurate responses are provided below.

#### Burden of proof: Accurate

*"The burden or onus of proof was with the prosecution. The accused does not need to prove their innocence which is why they do not have to testify. The prosecution has to prove that the accused is guilty, not the other way around."* – Juror 8

*"It is for the crown to prove the accused's guilt, not for the accused to prove his/her innocence"* - Juror 24

*"A person is innocent. The burden is on the crown to prove guilt. Our job is to weigh that evidence."* – Juror 9

*"The prosecution had the task of proving the accused committed the offence and that the accused did not have to prove their innocence as this is assumed under our system"* - Juror 14

#### Burden of proof: Inaccurate

*"That the burden (or onus) of proof lies solely on the person, or evidence, to which you are considering. That you must make your own assessment of the credibility/reliability of that person or evidence and decided how much weight to give it toward the proof of innocence or guilt without bias."* – Juror 27

*"Not sure - My understanding onus is responsibility and therefore, onus of proof is the juries (sic) responsibility on judging only on the proof (evidence) given."* – Juror 21

*"The ability to prove all allegations on account of the plaintiff up to or until a shift in burden goes to the defendant."* – Juror 23

*"I do not remember the judge using this term, however I believe this term means that although the charges cannot be proven, the jury was to be "beyond reasonable doubt" before bringing down a verdict."* – Juror 7

Jurors were again asked how much they understood the directions relating to *burden of proof*, how helpful the directions were, and whether they would have liked further clarification of each of these concepts. Table 6 shows the jurors' average (mean) ratings of their subjective understanding of each of these directions (rated on a 7 point scale, with 1 = *not at all*, and 7 = *very much*).

Jurors' average ratings revealed that they thought the directions were helpful and that they understood the Judge's direction, and most did not need further clarification on the directions. A majority of jurors (57%) said that they were understood the direction very much, thought what the Judge said was very helpful (rating 6/7), and did not find what the Judge said hard to understand or required clarification (rating 1/2).

Next, the relationship between jurors' subjective and objective understandings of *burden of proof* was assessed using a correlation. A correlation represents how much of the variation in one measure can be explained by variation in another measure--it does not say whether one measure causes changes in another measure.

A correlation can range in value from +1, where an increase in one measure is matched by an increase of the same amount in the other measure, to -1, where an increase in one measure is matched by a decrease of the same amount in the other measure. A correlation of 0 represents no relationship between the two measures.

The relationship between jurors' subjective and objective understandings of the Judge's *burden of proof* direction was significant, but only moderate (see Table 6). The more that jurors said they understood the direction, the more accurate they were when describing what they thought the direction meant. Jurors' subjective understanding accounted for approximately 17% of the variation in their objective understanding of the direction. There were no other significant relationships between objective understanding of *burden of proof* and the various measures of subjective understanding of this direction.

Table 6.  
Correlations between jurors' subjective and objective understandings of burden of proof.

Subjective Rating of Understanding	Mean (SD)	Correlation with Objective Understanding of <i>Burden of proof</i>
To what extent did you understand what Judge said about Burden of proof?	5.97 (1.60)	.41*
To what extent did you find what the Judge said about Burden of proof helpful?	6.03 (1.27)	.36
To what extent did you find what the Judge said about Burden of proof hard to understand?	2.10 (1.54)	-.23
To what extent would you have liked any further clarification of Burden of proof?	2.13 (1.69)	-.11

Note: \*Indicates correlation is significant at  $p < .05$

### Directions and Influence of Aspects of the Trial

The correlations between subjective and objective understanding of *burden of proof* and subjective understanding of *beyond reasonable doubt* and the degree to which various factors influenced jurors' verdicts (rated on a scale of 1 to 7 with 1 = *not at all* and 7 = *very much*) are presented in Table 7.

Subjective understanding of the direction of *beyond reasonable doubt* was not related to any of the ratings of influence.

Subjective ratings of understanding of *burden of proof* were significantly related to the extent to which jurors' reported that they were influenced by the Prosecution and Defence evidence in arriving at their verdict. Jurors' reliance on common sense was also strongly positively related to their subjective understanding of the meaning of *burden of proof*.

Those jurors who thought that they had a better understanding of *burden of proof* felt they were more influenced by the evidence presented by the Prosecution and their own common sense. These jurors also felt they were less influenced by the Defence evidence when deciding on a verdict.

Table 7.

Correlations between understanding of the directions and ratings of influence of different aspects of the case on reaching a verdict.

Influence on Jurors' Verdicts	Mean (SD)	Beyond Reasonable Doubt	Burden of Proof	
		Subjective Understanding	Objective Understanding	Subjective Understanding
Prosecution Evidence	5.33 (1.65)	.16	.28	.63**
Defence Evidence	4.06 (1.74)	.10	-.31	-.36*
Judge's Instructions	5.88 (1.08)	.27	-.21	-.15
Morals	4.52 (1.99)	.01	.05	.29
Common Sense	5.67 (1.51)	.00	.19	.74**
Decision Judge would want	1.94 (1.58)	-.27	-.15	-.08
Decision Community would want	2.73 (2.10)	-.28	-.17	.05

Note: \*\*  $p < .01$ , \*  $p < .05$

The positive relationship between subjective understanding of *burden of proof* and the influence of the Prosecution's evidence is somewhat encouraging, as it suggests that jurors who felt they understood the direction appear to be applying the direction by placing more weight on the Prosecution's evidence when weighing up their decision. However, the relationships between subjective understanding of the direction and the influence of the Defence evidence and the influence of jurors' own common sense suggests that jurors may not fully understand the meaning of the direction. Jurors weighed the Defence evidence less heavily and relied on their common sense to a greater degree the more that they felt they understood the direction.

### Directions and Ratings of the Prosecution and Defence Case

Jurors were also asked to rate the Prosecution and Defence cases on the following dimensions: convincingness, strength, persuasiveness, clarity, and how well they were presented. Ratings were on a 7-point scale, with a rating of 7 being more positive and a rating of 1 being more negative (e.g., for the item relating to the strength of the case, a rating of 7 was *strong* and a rating of 1 was *weak*).

The items for the Prosecution and Defence cases were averaged (with the exception of the item relating to clarity, which was removed as it did not reliably fit with the other items) to create an overall rating of the Prosecution and Defence. The average rating for the Prosecution was 5.02 (95% CI = 4.46 to 5.59), and for the Defence it was 3.90 (95% CI = 3.33 to 4.47). Reliabilities were high for both scales ( $\alpha = .91$ ).

Independent groups *t*-tests showed that, as would be expected, the Prosecution's case was rated significantly more positively when a guilty verdict was reached ( $M = 5.95$ , 95% CI = 5.49 to 6.40) than when a not guilty verdict was reached ( $M = 3.77$ , 95% CI = 3.02 to 4.51),  $t(31) = -5.61$ ,  $p < .001$ . Likewise, the Defence case was rated significantly more positively when a not guilty verdict was reached ( $M = 5.18$ , 95% CI = 4.55 to 5.81) than when a guilty verdict was reached ( $M = 2.90$ , 95% CI = 2.34 to 3.46),  $t(30) = 5.76$ ,  $p < .001$ .

Table 8 shows the relationship between ratings of the Prosecution and Defence cases and subjective (*beyond reasonable doubt*, *burden of proof*) and objective understandings (*burden of proof*). Jurors' subjective understanding of both directions was positively related to their ratings of the Prosecution's case--jurors who felt they had a better understanding of the directions rated the Prosecution's case more positively.

There was also a significant negative relationship between jurors' subjective understanding of *burden of proof* and jurors evaluation of the Defence case--the more that jurors felt they understood the direction about *burden of proof*, the less positively they evaluated the Defence case.

Table 8.

Correlations between understanding of directions and ratings of the Prosecution and Defence cases.

Direction		Evaluation of Prosecution's Case	Evaluation of Defence Case
Beyond Reasonable Doubt	Subjective Understanding	.42*	-.25
<i>Burden of proof</i>	Objective Understanding	.05	-.23
	Subjective Understanding	.38*	-.47*

Note: \*  $p < .05$

### Limited Use Directions

Fourteen jurors indicated that the judge gave them directions that they may only use a particular piece of evidence of one purpose and not another. Average ratings of subjective understanding, helpfulness, and clarification for those 14 jurors who reported receiving these directions (rated on a 7 point scale, with 1 = *not at all*, and 7 = *very much*), showed that these jurors felt they understood the limited use directions very well ( $M = 6.64$ , 95% CI = 6.28 to 7.01), found them very helpful ( $M = 6.71$ , 95% CI = 6.44 to 6.98), did not find these directions hard to understand ( $M = 1.43$ , 95% CI = 0.99 to 1.87), nor did the majority feel they needed further clarification ( $M = 2.00$ , 95% CI = .087 TO 3.13).

Of these 14 jurors reporting receiving limited use directions, only ten gave a description of the directions, and in all cases the directions related to the presence of multiple defendants and using witnesses' evidence to evaluate the case against one defendant but not another.

Descriptions of limited use directions:

*"There were 2 defendants and I can recall no specific instructions given but it was clear to us all which evidence applied to what. In fact the evidence was largely common."* – Juror 9.

*"Video testimony of 1 defendant against another."* Juror 12.

*"Multiple defendants and different charges."* – Juror 13.

*"Police proceedings - the judge said we have to dismiss anything said about some else who is mentioned in the tape recordings and we could only use, for evidence, what the person said about what they did, no one else."* – Juror 21.

*"Two accused people charged for the same offence but the evidence for one offender cannot be used against the offence of the second. Separate evidence needs to be provided for each person in a trial."* – Juror 22.

*"Accounts relayed by one defendant could only be used in reference to that defendant and not the other."* – Juror 23.

*"1. The police record of interview given by one accused was admissible against him and not the other accused. 2. The pre-recorded evidence provided as part of the crown case"*

*was to be treated in the same way as if the children had given evidence 'live' in the courtroom before us.” – Juror 24.*

*“In my case with multiple defendants it was sometimes difficult to recall which piece of evidence could be used against which defendant. I would have appreciated a list, in the case where there were several dozen witnesses, that listed which witness's evidence could be used against which particular defendant.” – Juror 25.*

*“- Statements made by particular witnesses/defendants could only be used against particular defendants and not other(s). - Forensics/ballistics/material evidence etc could be used to provide weight toward innocence/guilt depending on whether you believed the results were accurate/that the physical evidence correlated. - Phone calls - id ownership with reports but need to consider the other evidence to decide who you believed was on the phone at the time call was made.” – Juror 27.*

*“Two defendants giving video tape interview evidence about the same incident. Direction - to only use the evidence relating to the individual giving the evidence.” – Juror 33*

### **Judge's Questions to the Jury to Guide Deliberations**

Responses from jurors' interviews regarding the timing of questions provided by the Judge to help them reach their verdict indicated that there might have been some misunderstanding in what these questions were. Of the 16 jurors participating in the interviews, six reported that they had received these questions at the beginning of the trial, eight reported they had received them at the end, and two reported that they did not know when these were first presented to them.

Of the eight jurors who reported receiving such questions at the end of the trial, only one reported that they would have liked to have received these questions any earlier than they did. Generally, their reasons for not wanting these questions earlier were that they were not relevant earlier or felt they would have clouded their impressions of the evidence.

For example:

*“I don't think you possibly could. I mean you're working towards a conclusion, aren't you. And you'd conclude before you get there.” – Juror 9*

*“Ah, no, because any earlier, it would have made no bearing, in the particular case. So, it only was relevant while we were deliberating.” – Juror 26*

*“Ah, no, because it would've clouded it, I think, um, all the other things you needed to consider, so... Yeah, even though it made a lot of, it was important that it was made last, so that then we could, not sort of be confused by things, you know, because, the way that it was, you had to concentrate on, you know, the evidence.” – Juror 27*

### **Summary**

Approximately 61% of jurors correctly understood the direction relating to *burden of proof*, and there was a diverse range of descriptions of the directions for *beyond reasonable doubt*, most of which described a standard of proof consistent with, or higher than, that technically required. Despite, this jurors reported that they understood both directions, they found the Judge's directions helpful, they did not find the directions hard to understand, and did not feel that they needed further explanation of these concepts. Except for the moderate relationship between jurors' subjective and objective understanding of *burden of proof*, jurors' sense of understanding did not correspond to actual understanding of these directions. Further, the more they thought they understood the meaning of *burden of proof*, the more they relied on



their common sense and the Prosecution's evidence, and the less they relied on the Defences evidence, in arriving at a verdict. In addition, the more they thought they understood *burden of proof*, the less positively they evaluated the Defence case and the more positively they evaluated the Prosecution's case. Likewise, the more jurors felt they understood the meaning of *beyond reasonable doubt* the more positively they evaluated the Prosecution's case. When jurors were provided with questions by the Judge to guide their deliberations, they generally felt that it was appropriate that these questions were given at the end of the trial.

### Facilitators and Inhibitors

#### **Aspects of the Trial that Helped**

Jurors were asked within the survey to identify whether there were any aspects of the trial that were particularly helpful for them. All 33 jurors surveyed responded with at least one element of the trial that was especially helpful in their role as a juror. Several key themes emerged from analysing jurors' responses, as presented in Figure 1. The elements that jurors felt helped them were most frequently centred on the Judge's summing up, in particular mentioning the directions and explanations given to jurors by the Judge.

Example responses from surveys (labels in bold relate to columns in Figure 1):

**Directions:**

*"The directions given put me at ease and allowed me to decide the verdict by law not by feeling only." – Juror 1*

*"The judge explained what constituted "reasonable doubt" and how to determine what was adequate evidence." – Juror 8*

**Clarification:**

*"The law that was explained to us." – Juror 22*

*"Clarification of law in regards to elements of self defence." – Juror 23*

**Summary:**

*"Given the length of the trial, it was helpful to have a full summary of the trial." – Juror 6*

*"Judge's summing up." – Juror 17*

**Clear explanations**

*"Given the complexity of the defences raised, the Judge was very thorough and put it in terms which were easy to understand as a juror." – Juror 24*

*"The clear way in which the prosecutor addressed the jury, staff members in the court, the judge and the bailiff. The prosecutor explained things clearly and with dedication and determination." – Juror 3*

**Structure:**

*"The structure and presentation was clear, relevant and well balanced." – Juror 10*

*"Clarification of which facts to decide, in which order." – Juror 12*

Interviewees also highlighted these same types of features as helping them during the trial. Many jurors who were interviewed maintained that the Judge's summing up (and, to a lesser extent, the addresses of the Prosecution and Defence) were important in guiding their deliberations and keeping them focussed. Interviewees also frequently stated that evidence

(either material or testimonial) was often very helpful to them during the trial and in deliberations.

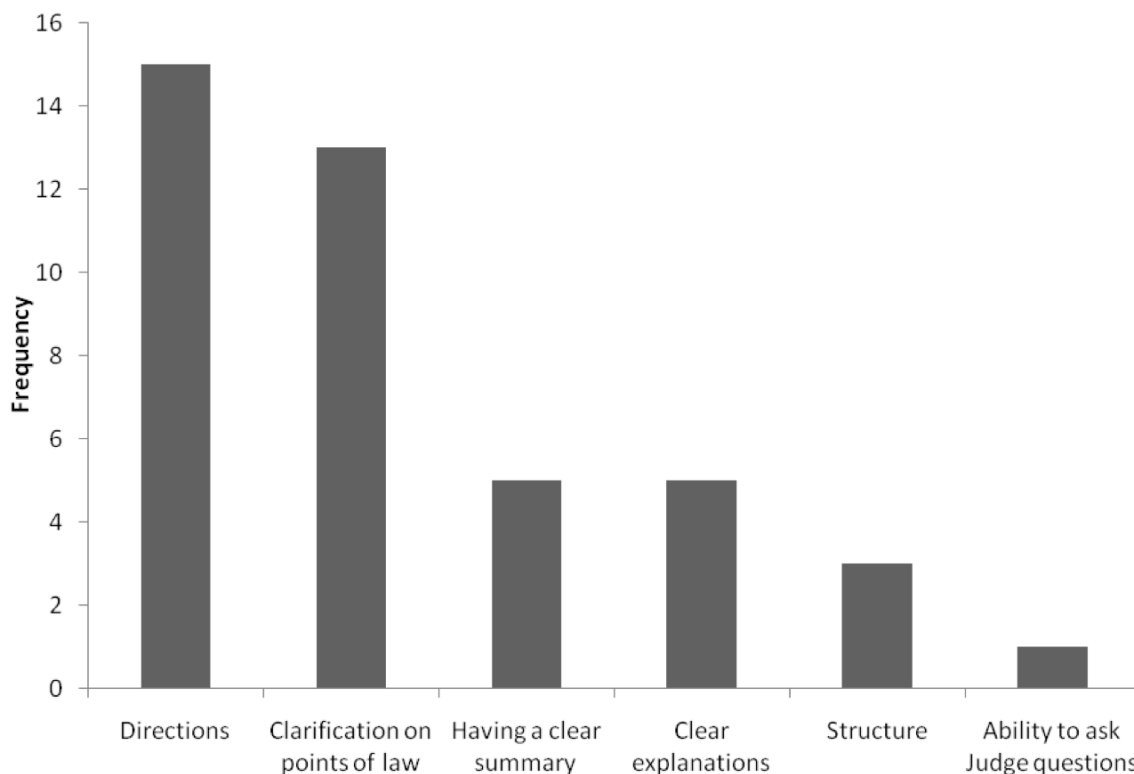


Figure 1. Summary of responses from surveys regarding aspects of the trial that were especially helpful for jurors.

Jurors who had received lists of charges or other written materials reported finding these to be very helpful. Additional things that emerged from the interviews as being helpful were the cooperation between the Judge, Prosecution and Defence, being instructed by the Judge to take as much time as they needed to deliberate, and the Judge’s explanation of the law.

*“All the summing up, by the defence, um... and then by the prosecution, and then the judge summed up, well gave his summary on what the defence and the prosecutor had said. So yes, I found that very helpful.” – Juror 7*

*“I think that the counsel’s summing up was pretty important, because they, they’re over that case really thoroughly, and they know to pinpoint the most critical pieces of evidence that will, you know, that will, that’s on their side. So that probably is pretty helpful. I mean, as I said before, the summing up was very very good, and he also just, I liked the very, the very, pertinent pieces of evidence, and he summarises them. I mean, it doesn’t mean that you discard all else, but it’s just, they know their stuff and they help you to focus in on critical stuff.” – Juror 17*

### Aspects of the Trial that Hindered

Jurors were asked within the survey to identify whether there were any aspects of the trial that they felt hindered them in their job as a juror. Fifteen of the 33 jurors surveyed indicated there was at least one aspect of the trial that caused them to have difficulties during the trial (see Figure 2).

Example responses from surveys:

**Lawyers confusing:** “Defence was deliberately confusing and mixing things up.” – Juror 12

**Legal issues:** “The legal issues as they were very broad ie. we had to decide what was reasonable force, reasonable discipline by a carer etc.” – Juror 8

**Reasonable doubt:** “Reasonable Doubt - A difficult concept for 12 jurors to reach a common understanding or standard. I don't think there is a 'fix' for this because it's subjective for each juror.” – Juror 10

**Contrary legal aspects:** “Aspects of the law that seemed to contradict other aspects of the law.” – Juror 22

**Lack of structure:** “The trial seemed to jump steps and then go back 3 steps. I suppose that is how it is sometimes. Some of the jurors found it hard to keep track.” - Juror 31

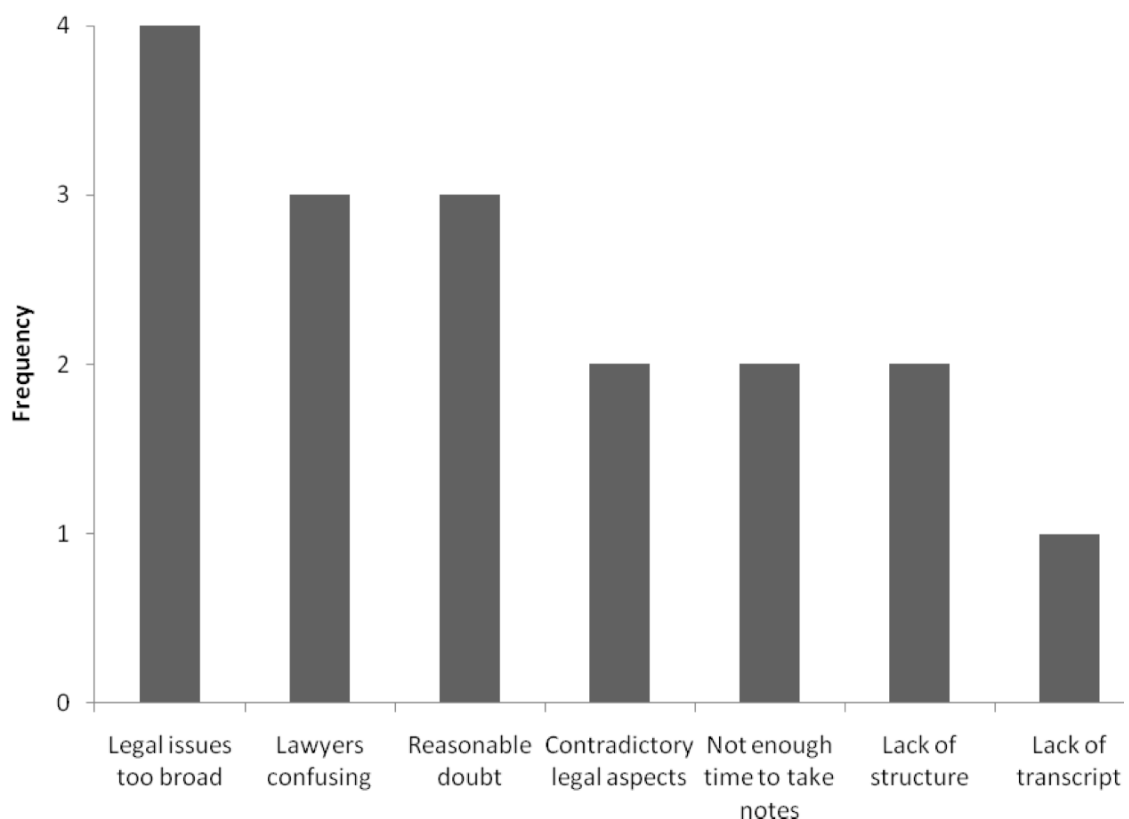


Figure 2.  
Summary of responses from surveys regarding aspects of the trial that jurors felt hindered them.

As in the survey responses, jurors who participated in the interviews were mostly quite positive about their experience as a juror, and most just re-iterated points from their surveys about the things that they felt caused difficulties throughout the trial, often focussing on legal issues such as definitions and directions.

Some interviewees also reported that difficulties were often related to the evidence, a frustration with the methods of questioning adopted by the lawyers, or the lack of a case given by the Defence (even though they were aware that that was not required).

An additional element that caused reservations among some interviewees was the beginning of the trial. The beginning of the trial was seen by some as somewhat overwhelming--they found it hard at the beginning to comprehend everything without a clear introduction and reminder of what exactly was expected of them throughout the trial.

*"It was all very full on to start with, and you know, I've never done it before, so I didn't actually realise what the process was going to be like. As soon as you sat down, it just basically, you already knew the charges, 'cause you'd hear it over in the other courtroom, and basically, they just went straight full into it. And it was very full on, very, not intimidating, but, it was very, I guess, you didn't really feel like you were actually in reality. It was sort of like "what on earth is going on". So, you were, I thought that the way that they did it was, you know, very well structured and, in the way that they all take their time. I thought that it was good that they started off, you know, explaining, like the judge spoke to us and made sure that we were aware of what was expected and things like that. And then the prosecutor then started and made his address, or her address, and then the people that, the defendants... It was a lot to take in. And it can be a little intimidating." – Juror 27*

A large number of the jurors who were interviewed also discussed the directions, particularly *beyond reasonable doubt*, and the difficulties that differing understandings of this direction (among other things) caused during deliberations.

*"But without going into the contents of the deliberation, the really stressful process was to do with individual's having a very very different mindset on what that might mean. So in other words, ah, requiring an almost impossible level of certainty. Ah, which was clearly just not manageable. The really difficult part of the whole process was that, in the jury room, um... and I think it largely had to do with understanding the nature of, the decision making process. Well a couple of the other jurors who had a requirement in terms of the evidence which I thought was totally unachievable. " – Juror 9*

### Further Assistance

Jurors were also asked within the survey to identify possible ways that they thought that the trial procedure could have been improved to help them better understand the evidence or the law, or any other assistance that they thought could have been provided by either the Prosecutor, Defence, or the Judge. Nineteen jurors reported at least one aspect that they thought would have been of further assistance to them throughout the trial, with a breakdown of the themes presented in Figure 3.

Example Responses from Survey:

**Transcript:** *"When video/audio interview were presented we were given written transcript of these. The whole jury thought that these we could keep. So we did not take a lot of notes on or put the notes on transcript. They were all taken back. This needs to be made clear" – Juror 28*

**Relevant laws:** *"A written summary of the relevant laws would have been useful in understanding the legal aspects of the trial." – Juror 22*

**Written summaries:** *"Written summaries by all parties for us to read rather than just listen to." – Juror 22*

**List of evidence:** *"In my case with multiple defendants it was sometimes difficult to recall which piece of evidence could be used against which defendant. I would have appreciated a list, in the case where there were several dozen witnesses, that listed which witness's evidence could be used against which particular defendant."* – Juror 25

**Role of barristers:** *"It would have been helpful to have been told that as there were two accused, it was effectively 2 cases being heard at the same time and what role their respective barristers play."* - Juror 24

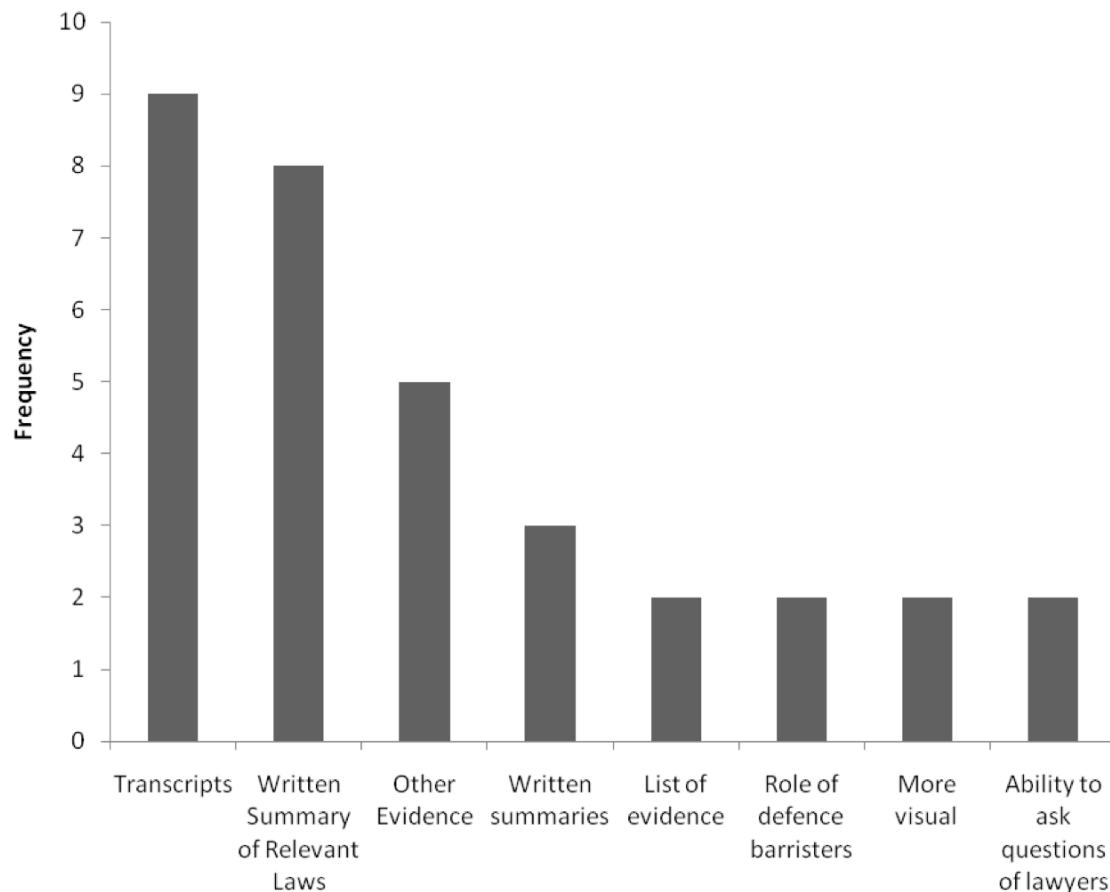


Figure 3.

Summary of responses from surveys regarding things that jurors felt would have been helpful to have during the trial.

Again, interviews of jurors reinforced these key themes, with jurors frequently suggesting that written summaries or written lists of evidence, laws and directions would have been helpful to them. Given the problems that were highlighted regarding difficulties with deliberations and conflicts regarding directions, most jurors who were interviewed felt that having something written down, either regarding the exact wording of the law (or, alternatively, the law in layman's terms), a summary of all the evidence, or the Judge's summation, to refer to during deliberations would have aided them.

*"Well if we could've asked for a, for the law, for the actual law on a piece of paper that we could've handed around the jury room, that might've been handy too."* – Juror 8

*"As ever, you know, these trials turned on dates and times and things. Um, now I know it doesn't help the defence in some way, but, it would have been helpful to have a summary of, at some point in the trial, and I think the prosecution probably could have provided us sort of a summary of dates, times, it would have been good."* – Juror 11

*I don't really know what they're allowed to do and not allowed to do. But I suppose just having maybe some more clarification on what the law, the definitions and things like that. But I don't know whether they'd be allowed to give you, you know, maybe a piece of paper that was cleared by the courts, sort of explain the law in a layman's term, because when she explained it in layman's terms in the courthouse, in the courtroom, that made it a lot easier to understand. – Juror 27*

## **Summary**

The part of the trial that jurors' felt was most helpful to them was the Judge's summing up as it guided their deliberations and kept them focussed. Lists of charges or other written materials were said to also be very helpful, along with the Judge's explanation of the law. About half of the jurors said that there was an aspect of the trial that hindered their ability to perform their duty. The three leading hindrances were: the lawyers being confusing, broad legal issues, and the meaning of reasonable doubt. The majority of interviewees indicated that different understandings of *beyond reasonable doubt* led to difficulties in reaching agreement in the deliberation room. The importance of allowing enough for jurors to settle in was affirmed as several jurors found their duty overwhelming at first. Jurors identified a number of things that they would have found helpful to have--the top two were access to transcripts and a written summary of the relevant laws.

Appendix - Survey Instrument

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## Juror Experience Survey: Information for Participants

Thank you for participating in this research, which is being conducted by staff from the School of Psychology at the University of Queensland and the Queensland Law Reform Commission.

We are interested in examining how jurors such as you perceive and understand the information given to you during the trial, the addresses by the Judge, Prosecution and Defence, and any assistance you may have received in court. We are grateful for your participation as the success of our research depends on the assistance of participants such as you.

This survey is being conducted with the approval of the Supreme and District Courts, and the Attorney-General.

As part of the orders of the Courts approving this research, you should be aware that:

- The responses that you provide on this questionnaire will remain anonymous and confidential.
- Data from this research will be published in de-identified form, and so no individual's responses will be able to be identified.
- Participation in this study is entirely voluntary; you may withdraw from the study at any point simply by indicating that you wish to do so. You can also decline to answer any individual question on the survey.

Further detailed information about this project can be found on the back of this sheet.

Thank you for your time.

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Reform Commission



## Juror Experience Survey: Detailed Information for Participants

### **Background**

We are specifically interested in how you experienced and understood the information given to you during the trial and your views about particular types of assistance you might have received. We are particularly interested in the directions given to the jury by the judge about the law and about how the jury should (or should not) deal with certain parts of the evidence. We are also interested, in broad terms, how the presentation of evidence was perceived.

### **Project Activities**

Your participation in this research will involve completing a survey about the trial you just heard. It is important that you understand that we are not asking about your deliberations as a jury or what you or your fellow jurors individually thought about the guilt or innocence of the defendant.

### **Anticipated Risk and Benefit**

We anticipate no elevated risk to you in your role as a juror--you will not breach your duties as a juror by participating in this study. We do expect that your participation will help provide a better understanding of jurors' experiences.

### **Confidentiality**

The completed questionnaires will be securely stored after return to staff at the University of Queensland. Only members of the research team will have access to the written responses. Please do not write your name, or any information that might identify the trial you heard, on this questionnaire.

### **Ethical Approval Details**

This study has been cleared in accordance with the ethical review processes of the University of Queensland and within the guidelines of the National Statement on Ethical Conduct in Human Research. You are, of course, free to discuss your participation with project staff (contactable on: 3346 9519). If you would like to speak to an officer of the University not involved in the study, you may contact one of the School of Psychology Ethics Review Officers, John McLean, Brooke Andrew, or Courtney von Hippel directly on 3365 6394 or by email: [john@psy.uq.edu.au](mailto:john@psy.uq.edu.au) for John McLean, on 3365 7427 or email [brooke@psy.uq.edu.au](mailto:brooke@psy.uq.edu.au) for Brooke Andrew, or on 3365 7293 or e-mail: [courtney@psy.uq.edu.au](mailto:courtney@psy.uq.edu.au) for Courtney von Hippel. Alternatively, you may leave a message with Ann Lee (3365 6448, [ann@psy.uq.edu.au](mailto:ann@psy.uq.edu.au)) for an ethics officer to contact you, or contact the University of Queensland Ethics Officer, Michael Tse, on 3365 3924, e-mail: [humanethics@research.uq.edu.au](mailto:humanethics@research.uq.edu.au)

### **Further Information**

If you have any questions about this project or would like to obtain a copy of the results once available, you can contact the project staff. Dr Blake McKimmie (UQ) is contactable on: 3346 9519 or [b.mckimmie@psy.uq.edu.au](mailto:b.mckimmie@psy.uq.edu.au), Ms Emma Antrobus (UQ) is contactable on 3365 7278 or [e.antrobus@psy.uq.edu.au](mailto:e.antrobus@psy.uq.edu.au), and Mr Ian Davis (QLRC) is contactable on 3247 4544 or [juries@qlrc.qld.gov.au](mailto:juries@qlrc.qld.gov.au).

# Juror Experience Survey



## Overview

Thank you for taking the time to participate in this survey of jurors. Your responses will help provide a better understanding of what jurors experience during jury trials.

This research consists of two activities:

- This survey
- A short follow up interview by telephone within the next couple of weeks

It is of course your choice whether you participate in either of these activities. If you wish to participate in the short follow up interview, please read the information below and complete your contact details.

When you are ready to begin the survey, please turn over the page. If you need additional space for any of your written responses, extra space is provided at the end of the survey. Please note the question number your response relates to next to any additional text.

## Interview

1. If you are interested in being contacted by telephone by the researchers for a short follow up interview, please write your phone number in the space below. Our interviewer, based at the University of Queensland, will contact you via telephone within two weeks of the trial finishing.

We do not wish to personally identify you or ask about your jury's deliberations. The interview focuses on aspects of the trial procedure and how these impacted on your job as a juror. Your responses will help the Queensland Law Reform Commission make recommendations to help the Courts in Queensland better assist jurors in their important role.

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Contact phone number: .....

Preferred time to call: .....

Unless you indicate otherwise, we will attempt to contact you during business hours.

This information will be detached from this questionnaire after we have contacted you.



# Juror Experience Survey

If you need additional space for any of your written responses, extra space is provided at the end of the survey. Please note the question number your response relates to next to any additional text.

## Opening Remarks by the Judge

1. Did the Judge explain any of the following at the start of the trial?

- No  Yes      The nature of the offence(s) charged
- No  Yes      The people in the courtroom and their roles
- No  Yes      The need to choose a speaker
- No  Yes      How to choose a speaker
- No  Yes      When to choose a speaker
- No  Yes      An outline of the legal issues that were likely to arise
- No  Yes      The possibility of taking notes
- No  Yes      The possibility of asking questions
- No  Yes      That jurors must not make their own enquiries about the case outside the court
- No  Yes      Anything else? What were they?

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.....  
.....

2. Were any of these hard or impossible to apply?

- No  Yes      Which ones?

.....  
.....  
.....  
.....

3. Did the Judge provide written summaries or other materials (such as outlines, PowerPoint slides) with his or her opening statement?

- No  Yes      (a) What were these materials?

- .....
- .....
- .....
- .....

(b) Please use the box next to each item to rate how helpful it was to you as a juror on the following scale:

*Not at all*    1    2    3    4    5    6    7    *Very much*



**Limited Use Directions**

14. Did the Judge give you instructions that you may only use a particular piece of evidence for one purpose and not another?

Some examples include: In cases with multiple defendants, that you should only use a particular piece of evidence in considering the charges against one of the defendants and not the others; Using a piece of evidence to establish if the defendant knew the victim, but not to determine whether the defendant committed the alleged offence.

Please note: You may or may not have received such directions, as they are not given in every case.

No  Yes

(a) To what extent did you understand what the Judge said about these directions?

*Not at all*      1      2      3      4      5      6      7  
*Very much*

(b) To what extent do you think what the Judge said about these directions was helpful?

*Not at all*      1      2      3      4      5      6      7  
*Very much*

(c) To what extent did you find what the Judge said about these directions hard to understand?

*Not at all*      1      2      3      4      5      6      7  
*Very much*

(d) To what extent would you have liked any further clarification of these directions?

*Not at all*      1      2      3      4      5      6      7  
*Very much*

(e) Briefly describe what the directions specifically related to:

.....  
.....  
.....  
.....  
.....  
.....  
.....  
.....  
.....  
.....

**Opening Remarks by the Prosecutor**

15. Did the Prosecutor explain any of the following to you at the beginning of the trial?

No  Yes      The nature of the offence(s) charged

No  Yes      An outline of the legal issues that were likely to arise

No  Yes      An outline of the Prosecution case and the evidence that it would involve

No  Yes      Anything else? What were they?

.....  
.....  
.....

## Opening Remarks by the Prosecutor con'td

16. Did the Prosecutor provide written summaries or other materials with his or her opening statement?

No  Yes

(a) What were these materials?

.....

.....

.....

.....

(b) Please use the box next to each item to rate how helpful it was to you as a juror on the following scale:

*Not at all*   1   2   3   4   5   6   7   *Very much*

## Opening Remarks by the Defence

17. Did the Defence explain any of the following to you at the beginning of the trial or at the beginning of the Defence case?

No  Yes     An outline of the Defence case and the evidence that it would involve

No  Yes     An outline of the legal issues that were likely to arise

No  Yes     Anything else? What were they?

.....

.....

.....

18. Did the Defence provide written summaries or other materials with his or her opening statement?

No  Yes

(a) What were these materials?

.....

.....

.....

.....

(b) Please use the box next to each item to rate how helpful it was to you as a juror on the following scale:

*Not at all*   1   2   3   4   5   6   7   *Very much*

## The Prosecution Case

19. Overall, how convincing was the case presented by the Prosecution?

*Not at all*   1   2   3   4   5   6   7   *Very much*

20. Please think back to the evidence presented by the Prosecution. How would you rate this evidence on the following dimensions?

*Weak*     1     2     3     4     5     6     7     *Strong*

*Clear*     1     2     3     4     5     6     7     *Unclear*

*Unpersuasive*   1   2   3   4   5   6   7   *Persuasive*

*Poorly presented*   1   2   3   4   5   6   7   *Well presented*

## The Defence Case

21. Overall, how convincing was the case presented by the Defence?

*Not at all*    1    2    3    4    5    6    7    *Very much*

22. Please think back to the arguments made by the Defence. How would you rate these arguments on the following dimensions?

<i>Weak</i>	1	2	3	4	5	6	7	<i>Strong</i>
<i>Clear</i>	1	2	3	4	5	6	7	<i>Unclear</i>
<i>Unpersuasive</i>	1	2	3	4	5	6	7	<i>Persuasive</i>
<i>Poorly presented</i>	1	2	3	4	5	6	7	<i>Well presented</i>

## Expert Witnesses

23. Were there any expert witnesses in your trial?

No     Yes

2. Were you given copies of any report or notes relating to the expert's testimony?

No     Yes

(a) Were you allowed to take the report or notes into the jury room during deliberations? .....  No  Yes

(b) To what extent was the report or notes helpful in your deliberations?

*Not at all*    1    2    3    4    5    6    7    *Very much*

(c) To what extent was the report or notes helpful in reaching a verdict?

*Not at all*    1    2    3    4    5    6    7    *Very much*

(a) Would you have liked a copy of the report or notes?.....  No  Yes

(b) Did you ask for a copy of the report or notes? .....  No  Yes

## Address by the Prosecutor at the end of the trial

24. Did the Prosecutor provide any of the following at the end of the trial?

No     Yes    An outline of the law that was relevant to the case

No     Yes    An outline of the elements of the offence(s)

No     Yes    An outline of the questions that you had to answer in order to arrive at your verdict

No     Yes    A summary of the Prosecution case

No     Yes    A summary of the evidence



**Address by the Prosecutor at the end of the trial cont'd**

25. Did the prosecutor give you any written summaries or aids (such as outlines, PowerPoint slides) to accompany his or her address at the end of the trial?

No  Yes

(a) What were these materials?

- .....
- .....
- .....
- .....

(b) Please use the box next to each item to rate how helpful it was to you during deliberations and in reaching a verdict on the following scale:

*Not at all*    1    2    3    4    5    6    7    *Very much*

26. Was there any other written assistance that you would have liked to have received from the Prosecutor to help you understand the law, the evidence, or to come to your verdict?

No  Yes

What was it?

- .....
- .....
- .....
- .....

27. Was there anything that was covered in the address by the Prosecutor that you would have preferred to have covered earlier?

No  Yes

What was it?

- .....
- .....
- .....
- .....

28. To what extent was the Prosecutor's address:

*Too short*    1    2    3    4    5    6    7    *Too long*

**Address by the Defence or Defendant at the end of the trial**

29. Did the Defence or Defendant provide any of the following at the end of the trial?

- No  Yes    An outline of the law that was relevant to the case
- No  Yes    An outline of the elements of the offence(s)
- No  Yes    An outline of the elements of the defence(s)
- No  Yes    An outline of the questions that you had to answer in order to arrive at your verdict
- No  Yes    A summary of the defence case
- No  Yes    A summary of the evidence

**Address by the Defence or Defendant at the end of the trial cont'd**

30. Did the Defence or Defendant give you any written summaries or aids (such as outlines, PowerPoint slides) to accompany his or her address at the end of the trial?

No  Yes



(a) What were these materials?

- .....
- .....
- .....
- .....

(b) Please use the box next to each item to rate how helpful it was to you during deliberations and in reaching a verdict on the following scale:

*Not at all*    1    2    3    4    5    6    7    *Very much*

31. Was there any other written assistance that you would have liked to have received from the Defence to help you understand the law, the evidence, or to come to your verdict?

No  Yes



What was it?

- .....
- .....
- .....
- .....

32. Was there anything that was covered in the address by the Defence or Defendant that you would have preferred to have covered earlier?

No  Yes



What was it?

- .....
- .....
- .....
- .....

33. To what extent was the Defence's or Defendant's address:

*Too short*    1    2    3    4    5    6    7    *Too long*

**Summing up by the Judge at the end of the trial**

34. Did the Judge give or explain any of the following to you at the end of the trial?

- No  Yes    An outline of the law relevant to the case
- No  Yes    An outline of the elements of the offence(s)
- No  Yes    An outline of the elements of the defence(s)
- No  Yes    The meaning of "burden (or onus) of proof"
- No  Yes    The standard of proof that should be applied
- No  Yes    An outline of the questions that you had to answer in order to arrive at your verdict
- No  Yes    A summary of the parties' closing addresses
- No  Yes    A summary of the evidence

**Summing up by the Judge at the end of the trial cont'd**

35. Did the Judge give you any written summaries or aids (such as outlines, PowerPoint slides) to accompany his or her summing up?

No  Yes

(a) What were these materials?

.....  
 .....  
 .....  
 .....

(b) Please use the box next to each item to rate how helpful it was to you during deliberations and in reaching a verdict on the following scale:

*Not at all*   1   2   3   4   5   6   7   *Very much*

36. Was there any other written assistance that you would have liked to have received as part of the Judge's summing up to help you understand the law, the evidence, or to come to your verdict?

No  Yes

What was it?

.....  
.....  
.....  
.....

37. Was there anything that was not covered in the Judge's summing up that you now feel would have been helpful?

No  Yes

What was it?

.....  
.....  
.....  
.....

38. Was there anything that was covered in the summing up that you would have preferred to have covered earlier in the trial?

No  Yes

What was it?

.....  
.....  
.....  
.....

39. The summing up was:

*Too short*   1   2   3   4   5   6   7   *Too long*

40. Was there any part of the summing up that was particularly helpful?

No  Yes

What was it?

.....  
.....  
.....

**Summing up by the Judge at the end of the trial cont'd**

41. Was there any part of the summing up that was particularly unhelpful or difficult to apply?

No  Yes

What was it?

.....

.....

.....

.....

.....

**Trial Procedure**

42. Was there any aspect of the trial (especially the presentation and content of any directions about the law or other information) that you felt helped you in your job as a juror?

No  Yes

What was it?

.....

.....

.....

43. Was there any aspect of the trial (especially the presentation and content of any directions about the law or other information) that you felt hindered you in your job as a juror?

No  Yes

What was it?

.....

.....

.....

44. Is there any way in which you think the trial procedure (especially the presentation and content of any directions about the law or other information) could have been improved to help you better understand the evidence?

No  Yes

What was it?

.....

.....

.....

45. Is there any way in which you think the trial procedure (especially the presentation and content of any directions about the law or other information) could have been improved to help you better understand the law?

No  Yes

What was it?

.....

.....

.....

## Transcript

46. Were you given copies of any transcript (whole or in part) of the evidence?

No

Yes

(a) Did you have to ask for a copy of the transcript? .....  No  Yes

(b) Were you allowed to take it into the jury room during deliberations? .....  No  Yes

(c) To what extent was the transcript helpful in your deliberations?

*Not at all*    1    2    3    4    5    6    7    *Very much*

(d) To what extent was the transcript helpful in reaching a verdict?

*Not at all*    1    2    3    4    5    6    7    *Very much*

.....  
 (a) Would you have liked a copy of the transcript?.....  No  Yes

(b) Did you ask for a copy of the transcript?.....  No  Yes

## Verdict

47. In trying to reach a decision, how influential were each of the following?

	<i>Not at all</i>							<i>Very much</i>
	1	2	3	4	5	6	7	
The evidence presented by the Prosecution	1	2	3	4	5	6	7	
The evidence presented by the Defence	1	2	3	4	5	6	7	
The instructions given to you by the Judge	1	2	3	4	5	6	7	
What you thought was morally right	1	2	3	4	5	6	7	
Your common sense	1	2	3	4	5	6	7	
The decision you thought the Judge would want	1	2	3	4	5	6	7	
The decision you thought the community would want	1	2	3	4	5	6	7	

## Demographics

48. What is your gender?.....  Female  Male

49. What is your age? ..... (years)

50. What is your highest level of formal education? (Tick one)

- Primary school
- Partly completed secondary school
- Secondary school
- Apprenticeship
- Diploma or certificate from college of advanced education
- University bachelor's degree
- Postgraduate certificate or diploma
- Postgraduate degree

## Demographics cont'd

51. What is your current employment status? (Tick one)

- Professional
- Self-employed
- Employed in the home
- Unemployed
- Retired
- Full-time student

52. Are you an Indigenous Australian (Aboriginal or Torres Strait Islander)?.....  No  Yes

53. Is English your first language?.....  No  Yes

54. Have you ever served as a juror before?.....  No  Yes

55. Have you ever been a defendant in a criminal case?.....  No  Yes

56. Have you ever been a victim of crime?.....  No  Yes

57. Have you ever been in court as a witness to a crime? .....  No  Yes

## Case Details

58. What was the offence or offences the Defendant was charged with?

.....

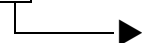
59. How many counts of this offence or offences did you have to consider? .....

60. Which Court did you hear the case in? (Tick one)

- District Court
- Supreme Court
- Not sure

61. Did your jury reach a verdict?

No  Yes



(a) Was the verdict?.....  Unanimous  11:1 Majority  10:1 Majority

(b) Was the defendant?

- Not Guilty of all offences
- Not Guilty of some offences and Guilty of some offences
- Guilty of all offences

Thank you for taking the time to complete this survey. If you are interested in taking part in a short interview about the procedures used in the trial, please read the section on the first page of this survey.



## Juror Experience Survey: Educational Debriefing

As we mentioned earlier, this project is looking at how jurors such as you perceive and understand the trial procedure, the addresses by the Judge, Prosecution and Defence, and any assistance you may have received. We are specifically interested in how you experienced and understood the information given to you during the trial and your views about particular types of information you might have been given.

It is hoped that this information will provide a better understanding of the types of help that might be useful for jurors, how easy or difficult it is for jurors to understand and follow directions given to them by the Judge, and how the presentation of this information during the trial helps or hinders your role as a juror.

What will happen next is that staff at the University of Queensland will summarise all participants' responses to this survey and prepare a report for the Queensland Law Reform Commission. The Law Reform Commission will then prepare a set of recommendations to the Attorney-General on the issue of jury directions with the ultimate aim of improving the way in which jurors are instructed about their role.

If you would like to find out more about this project, you can access the Law Reform Commission's Issues Paper on the topic of jury directions at this address:

[http://www.qlrc.qld.gov.au/wpapers/WP66.PDF](http://www qlrc.qld.gov.au/wpapers/WP66.PDF)

You are of course welcome to contact any of the project staff to discuss the project. You can also contact us if you would like to receive a summary of the project outcomes once we have finalised our analyses. Our contact details are listed on the information sheet.

A copy of this sheet, the information sheet, and other project information can be found at this website: <http://www.psy.uq.edu.au/~blake/jurorexperiencesurvey>.

Thank you again for taking the time to complete the juror experience survey.

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