JURY DIRECTIONS ON TRIAL – A PATHWAY THROUGH THE LABYRINTH?

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> *We should start by identifying the problem. It is the problem of how we help a jury reach a conclusion of guilt or innocence. We seem to have hit upon a system designed to ensure, in any but the simplest of cases, that the path we require them to follow should be as obscure, as tortuous and as arduous as could possibly be devised. The problem lies in the function of the judge and his role as guide, when he embarks on a summing-up.*[2]

> *It is not difficult to predict that the task for juries will become more difficult in the future. Evidentiary issues will increase in complexity. This will be a product of both increasing scientific knowledge and an increase in the prosecution of complex corporate and finance related crimes. The demand from appellate judges for accuracy of language in explaining the law and the requirement to give an increasing number of warnings to the jury to take care will make the task of absorbing the judge's directions more difficult for the average juror.*[3]

> *A system of criminal law cannot be attuned to the needs of the people whom it exists to serve unless its administration, proceedings and judgments are comprehensible by both the accused and the general public and have the appearance, as well as the substance, of being impartial and just … Few lawyers with practical experience in criminal matters would deny the importance of the institution of the jury to the maintenance of the appearance, as well as the substance, of impartial justice in criminal cases … That is not, of course, to close one's eyes to reality and assert that the traditional criminal trial by jury is without any identifiable weaknesses … [C]ontemporary circumstances have raised new questions about, and placed additional strains upon, the institution of the criminal trial by jury.*[4]

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1 Judge, Court of Appeal, Supreme Court of Victoria. The opinions expressed are my own. They are not to be taken as reflecting the views of any other member of the Supreme Court of Victoria. I wish to acknowledge the enormous assistance given to me in the preparation of this paper by my Associate, Emily Brott.

2 Lord Justice Moses, 'Summing Down the Summing-Up' (Speech delivered at the Judiciary of England and Wales Annual Law Reform Lecture, Inner Temple, 23 November 2010) 2 <http://www.judiciary.gov.uk/media/speeches/2010/speech-moses-lj-summing-down-summing-up>.

3 Peter McClellan, 'Looking Inside the Jury Room' (2011) 10(3) *The Judicial Review* 315, 327.

4 *Kingswell v The Queen* (1985) 159 CLR 264, 301–2 (Deane J).

1 It is a truth, universally acknowledged, that a jury, prior to commencing its deliberations, must be in want of a clear set of directions as to how to go about their task.[5]

2 The High Court has summarised the obligations of a trial judge, when providing jury directions, in the following terms:

> 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.[6]

3 Recently, in *Lane v The Queen*,[7] the New South Wales Court of Criminal Appeal had this to say:

> The duty of a judge in a jury trial is:
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> - to explain to the jury the relevant law (without excursions into interesting but inapplicable legal principles);
> - to place that explanation in the context of the facts of the case;
> - to explain how the law applies to the facts of the particular case;
> - to give these explanations in the context of the issues in the particular case;
> - to identify the issues in the case as they have been fought between the parties; and
> - to direct the jury on what those issues are.
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> The above propositions are drawn from the decision of the High Court in *Alford v Magee* [1952] HCA 3 ; 85 CLR 437 at 466. They have been adopted on

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5 With apologies to Jane Austen for having the temerity to bastardize the immortal opening lines of *Pride and Prejudice*.

6 *RPS v The Queen* (2000) 199 CLR 620, 637 [41] (Gaudron ACJ, Gummow, Kirby and Hayne JJ) (emphasis in original) (citations omitted).

7 [2013] NSWCCA 317.

many occasions since, relevantly for present purposes in *Stevens v R* [2005] HCA 65 ; 227 CLR 319 by Gleeson CJ and Heydon J. See also *Huynh v R* [2013] HCA 6 ; 87 ALJR 434 at [31]. In *Stevens*, Gleeson CJ and Heydon J were in dissent as to the outcome of the case, but the application of *Alford v Magee* principles is not controversial. Their Honours went on to say, at [18]:

> A summing-up in a murder trial is not meant to take the form of an essay on the law of homicide, with points given for comprehensiveness. Juries decide issues of fact, not law. The task of the trial judge is to formulate for the decision of the jury the issues of fact which they need to resolve in order to return a verdict. In formulating those issues, the judge may think it appropriate to refer to legal principles by way of explanation, but the task of the jury is to decide facts …[8]

4 It all sounds terribly simple. Trial judges are obliged to explain to juries, in simple and clear language, how to apply the law to a particular case. Of course, in practice, directing a jury these days is an onerous task. Getting it right often requires a level of erudition that, historically, would never have been expected. The task is made even more difficult when the law in so many given areas is itself highly complex and prone to being misunderstood.

The problem with jury directions in their current form

In recent years, trial judges have increasingly found themselves constrained to give jury directions that they regard as confusing and unhelpful. Chief Justice Warren has commented that jury directions are often 'replete with length, turgidity, complexity, and double, even multiple negatives'.[9] In some areas, directions are, quite frankly, almost incomprehensible.[10] Evidence suggests that directions given in

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8 Ibid [36].

9 Chief Justice Marilyn Warren, 'Making it Easier for Juries to be the Deciders of Fact' (Paper presented at the Criminal Justice in Australia and New Zealand — Issues and Challenges for Judicial Administration Conference, Australian Institute of Judicial Administration, Sydney, 8 September 2011).

10 See, eg, *Viro v The Queen* (1978) 141 CLR 88, 146–7 (Mason J), where the directions to a jury on the issue of self-defence contained a number of negatives and double negatives, and were considered by those who practised in the area of crime as almost unintelligible.

their current, over-intellectualised,[11] form are largely misunderstood by juries.[12]

5 Lord Justice Moses, speaking extra-judicially on the relationship between judge and jury, whimsically replicated, by way of introduction to his lecture, a judge's summing-up to a jury:

> I shall speak to you at length; I cannot even say how long I will be. There will be few intervals; about once every 1½ hours if you are lucky, or 2 hours. I cannot say how long this will last, certainly more than a day, so please do not believe you can make any sensible arrangements for the rest of the week. You will not be able to take a proper note; even if you had pen and paper, your neighbour will be pressing hard upon your writing arm. You cannot interrupt or ask questions while I am speaking ... I shall be speaking in a language entirely foreign to you. There will be few visual aids; I shall expect throughout to capture your attention with the power of my voice, speaking faster during those parts of the process which I do not really understand and more slowly when it is really important.
>
> Before I finish my lecture it would be as well if you did not discuss it amongst yourselves because you will not, until I finish, have learnt all I wish to teach nor had the opportunity to appreciate my objective. Please, if I haven't finished today do not discuss it with anyone else when you get home tonight. When I have finished I shall set you an exam. It is not the sort of exam with which you will be familiar. You must all agree the answer. You will receive the same mark and you will never know if you have reached the right answer.[13]

6 The issues raised by Lord Justice Moses, though presented in a somewhat theatrical manner, can be partly attributed to the requirements placed on trial judges to direct juries in terms that can withstand the scrutiny of higher courts.[14] Criminal trials are replete with 'untapped potential for judicial error'.[15]

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11 Victorian Law Reform Commission, *Jury Directions: Final Report,* Report No 17 (2009) 4, 30 [2.35] ('*VLRC Report*'), citing Elizabeth Najdovski-Terziovski, Jonathan Clough and James R P Ogloff, 'In Your Own Words: A Survey of Judicial Attitudes to Jury Communication' (2008) 18 *Journal of Judicial Administration* 65, 80.

12 James R P Ogloff and V Gordon Rose, 'The Comprehension of Judicial Instructions' in Neil Brewer and Kipling D Williams (eds), *Psychology and Law: an Empirical Perspective* (Guilford Press, 2005) 407, 425. See also, Marie Comiskey, 'Initiating Dialogue: About Jury Comprehension of Legal Concepts: Can the "Stagnant Pool" be Revitalised?' (2010) 35 *Queen's Law Journal* 625, 629.

13 Moses, above n 2, 1.

14 Justice Mark Weinberg, 'The Criminal Law — A "Mildly Vituperative" Critique' (2011) 35 *Melbourne University Law Review* 1177, 1191.

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

7 One can hardly blame trial judges for adopting what might be described as a defensive approach to judging, when in 2010 alone, erroneous jury directions gave rise to 14 of the 18 retrials ordered by the Court of Appeal in Victoria for that year.[16] Yet the unfortunate reality, as any trial judge would know, is that the more complex the direction or warning, 'the more likely it is that [the jury] will forget or misinterpret' the guidance provided by the judge.[17] Glazed eyes and blank stares are all too commonly reported products of a judge's summing-up.

8 In response to concerns about the complexity, uncertainty and burdensome length of jury directions, the Victorian Law Reform Commission (VLRC), with extensive assistance from the profession, published a comprehensive report in May 2009 on the subject.[18] The *VLRC Report* recognised that:

> The state of the law of jury directions is conducive of judicial error. Trial judges often face problems in determining when to give directions and in formulating the content of directions. Errors in jury directions have resulted in many retrials being ordered on appeal. The complexity of jury directions does not assist effective communication with juries.[19]

9 These problems, according to the VLRC, have come about relatively recently.[20] In the 1970s, for example, jury directions were far shorter, and much less complex, than they are today.[21]

10 Following a comprehensive survey of a number of Australian and New Zealand judges in 2006, it was found that the average estimated length of the judge's charge to the jury following a ten day trial in Victoria was 255 minutes.[22] For a

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16 Department of Justice — Criminal Law Review, *Jury Directions: A New Approach* (2012) 3.

17 *KRM v The Queen* (2001) 206 CLR 221, 234 [37] (McHugh J).

18 *VLRC Report*, above n 11.

19 Ibid 8.

20 Ibid.

21 See, eg, *R v Lowery and King (No 2)* [1972] VR 560, where Smith J directed the jury as to the law relating to accused acting in concert and accused acting as principals in the first and second degrees. His Honour's directions were expressed in less than three pages. See also *R v Charlton* [1972] VR 758, 762–3.

22 James R P Ogloff et al, *The Jury Project: Stage 1 — A Survey of Australian and New Zealand Judges* (Australian Institute of Judicial Administration, 2006) 27.

twenty day trial, that figure increased to 349 minutes.[23] In contrast, our New Zealand brethren reported that the average charge for a ten day trial occupied some 76 minutes, and for a 20 day trial, 108 minutes.[24] In fact, it was found that putting to one side New South Wales and Tasmania, jury directions in Victoria took far longer than any other state or territory in Australia. Western Australian directions, in terms of length, rival those of New Zealand.[25] But if we want an even starker contrast, we can look to Scotland, where it is said that the standard jury direction takes between 15 and 18 minutes.[26]

11 Looking further abroad, jury instructions (as they are known in the United States) usually take no more than about 30 minutes.[27] In most American States, and in federal jurisdiction, judges typically give juries a 'pattern direction', a copy of which is handed to them. These directions are approved by permanent specialist bodies, and are regularly monitored and reviewed. For this reason, appeals against conviction on the basis of jury misdirection are extremely rare in the United States.[28]

12 As an example of the practice in the United States, consider the 2012 prosecution of John Edwards, the former Democratic Senator from North Carolina and Vice Presidential nominee, for breach of Federal campaign finance laws.[29] In a case involving a 19 page indictment, testimony from more than 30 witnesses, upwards of 200 exhibits, and a period of offending for one charge covering more

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23 Ibid.

24 Ibid.

25 Ibid.

26 Moses, above n 2, 7.

27 Justice Mark Weinberg et al, *Simplification of Jury Directions Project: A Report to the Jury Directions Advisory Group* (2012) 3 ('*Simplification of Jury Directions Report*').

28 Ibid.

29 *US v Edwards*, 2012 WL 1119875 (M.D.N.C) cited in Paul Marcus, 'Judges Talking To Jurors In Criminal Cases: Why U.S. Judges Do It So Differently from Just About Everyone Else' (2013) 30 *Arizona Journal of International and Comparative Law* 1, 48. It was alleged that Edwards failed to report over $1 million given to him and spent in order to cover up his scandalous affair with a woman who gave birth to his child.

than six years, the judge's charge to the jury lasted a little over an hour.[30] This is remarkable. In Victoria, that charge would almost certainly have spanned at least several days.

13 One notable difference between the obligation to give directions in most parts of Australia and the requirement to instruct the jury in the United States is that in this country, judges have traditionally felt obliged to remind the jury, in some detail, of the evidence presented during the trial. American judges are under no such duty. In fact, judges in the United States 'are wary about giving any directions as to the evidence'.[31] This is partly due to the fact that:

> There is a long line of cases reversing … trial judges for asking questions of witnesses that the courts find indicate a bias by the trial judge or bringing in evidence not in the record.[32]

14 It has been suggested that the Americans place far more faith in the ability of their jurors than we do in this country.[33] One reason may be that the institution of trial by jury in the United States has an entrenched constitutional basis, whereas that is true in Australia only in relation to federal indictable offences.[34] The jury's role as the arbiter of fact is one which, in the United States, is treated almost reverentially. The theory is that when a judge refers to the evidence (necessarily in a selective fashion), the jury may be influenced, inappropriately, by the choice made as to the material emphasised.

15 As any Victorian trial judge can attest, summarising evidence can add hours,

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30 Counsel completed their closing arguments in the afternoon that the judge instructed the jury. The jury began its deliberations the following morning. After deliberating for more than 50 hours over several days, the jury acquitted Edwards on one charge but remained deadlocked on the others. The judge declared a mistrial, after which the Government decided to drop the case.

31 Marcus, above n 29, 11.

32 Ibid 12.

33 Ibid 41.

34 *Commonwealth of Australia Constitution Act (The Constitution) 1900* (Cth) s 80.

if not days, to a charge.[35] The Victorian Court of Appeal has stated that such detailed summaries are unnecessary.[36] The High Court has made it clear that a trial judge is not bound to remind the jury of all of the evidence led during the course of the trial.[37] Nonetheless, there has been, until recently, a degree of uncertainty, in Victoria at least, as to what level of detail may be required in this regard.[38]

16 On the one hand, it has been said that the trial process is essentially an oral one, requiring the judge's traditional 'summing-up' of the evidence.[39] On the other, it has been said that the delivery of a short charge, providing a 'road map' of the relevant issues, combined with the provision to the jury of written materials summarising the evidence as it relates to those issues, might actually 'assist jury comprehension and [thereby] lead to a fairer trial than a very lengthy oral charge'.[40]

17 Another issue is technique. As the law stands, juries need to be given directions that involve inherently difficult concepts. It can be argued that the revision of jury directions, in accordance with what are described as 'psycholinguistic principles' may improve juror comprehension.[41] However, the fact remains that using simpler language to express these difficult concepts will, at best, alleviate, but not resolve, the current situation.[42]

18 Of course, that does not mean that trial judges, fearful of being criticised on

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35 According to the *VLRC Report*, above n 11, in *R v Lam* (the 'Salt nightclub murders' trial) the summing-up occupied some 19 days. The appeal judgment is reported at (2008) 185 A Crim R 453.

36 *R v Osborne* [2007] VSCA 250, [23] (Curtain AJA, with whom Vincent and Neave JJA agreed).

37 *Domican v The Queen* (1992) 173 CLR 555, 560 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

38 See, eg, *R v Thompson* (2008) 21 VR 135 ('*Thompson*'); *R v Gose* (2009) 22 VR 150 ('*Gose*'); *R v Harman* [2009] VSCA 78 ('*Harman*').

39 *Thompson* (2008) 21 VR 135, 166 [146] (Redlich JA), cited with approval in *Gose* (2009) 22 VR 150, 158 [42] (Vickery AJA, with whom Vincent and Nettle JJA agreed); *Harman* [2009] VSCA 78, [49]–[53] (Dodds-Streeton JA, with whom Kellam JA and Vickery AJA agreed).

40 *Thompson* (2008) 21 VR 135, 154 [102] (Neave JA).

41 Laurence J Severance and Elizabeth F Loftus, 'Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions' (1982) 17 *Law & Society Review* 153, 194.

42 Ogloff and Rose, above n 12, 428.

appeal, should couch their directions in language close to that which is found in appellate judgments or, perhaps still worse, legal texts. Yet, all too often, this is precisely what occurs. It contributes, in its own way, to far lengthier and more complex directions on a range of topics.

The legal framework

19 The situation which has prevailed in Victoria until comparatively recently has not come about in a vacuum. As I have earlier alluded, our guiding principles are a jumble of ad hoc statutory and common law doctrines reactively developed without a clear prevailing framework in place.

20 As the *VLRC Report* noted, the only organising common law principle, enunciated by the High Court in *Longman v The Queen,* is that a trial judge should give all directions necessary to avoid a 'perceptible risk of miscarriage of justice'.[43]

21 The generality of this statement, according to the VLRC, has made it 'difficult to apply in particular cases'.[44] In that vein, the law of jury directions is the 'product of unsystematic judicial development',[45] based on a large volume of highly particularised warnings drawn from those specific fact scenarios coming before the appellate courts. It is that incremental development of the law that has produced an overly-technical and largely prolix body of case law which continues to evolve while remaining incapable of precise description.

22 While the High Court has the power to provide guidance about the language to be used when giving particular common law directions,[46] there are many examples where its 'assistance' to trial judges has done little to allay uncertainty and confusion.

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43 (1989) 168 CLR 79, 86 (Brennan, Dawson and Toohey JJ).

44 *VLRC Report,* above n 11, 8.

45 Ibid 67 [4.7].

46 Such as the direction given to deadlocked juries, as articulated in *Black v The Queen* (1993) 179 CLR 44, or the direction emanating from *Zoneff v The Queen* (2000) 200 CLR 234 ('*Zoneff*') on lies affecting credibility.

23 One such instance is to be found in the direction to be given to a jury where there is evidence before it of an accused's uncharged sexual acts. In *HML v The Queen*,[47] the High Court delivered seven separate judgments, spanning more than 170 pages of the Commonwealth Law Reports, which, the Victorian Court of Appeal in *R v Sadler*[48] observed, failed to 'express any clear view' on the precise issue before the Court. In fact, the Court of Appeal struggled with the task of ascertaining any ratio in *HML*, referring to what the High Court had said, in that case, in the following guarded terms:

> With respect, therefore, on a strict analysis, we understand the law *for the time being* to remain that ...[49]

24 It must be said that, in Victoria, until recently, the legislature has done little to ease the burden resting upon trial judges in directing juries. From about the 1980s, Parliament has, on a number of occasions, legislated for particular directions to be given with regard to different offences.[50] This is particularly so in relation to sexual offences.[51] Regrettably, such reforms have, in many instances, led to even more confusion.[52]

25 This point is exemplified by the law regarding delay in complaint in sexual offence cases. In *Kilby v The Queen*,[53] the High Court held that judges should instruct juries that delay in complaint might cast doubt on the reliability of that evidence and

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47 (2008) 235 CLR 334 ('*HML*').

48 (2008) 20 VR 69, 87 [60] ('*Sadler*').

49 Ibid [62] (emphasis added).

50 See, eg, s 222 of the *Criminal Procedure Act 2009* (Vic) which confers wide powers on trial judges to give directions to juries. Similarly, s 165 of the *Evidence Act 2008* (Vic) ('*Evidence Act*') requires judges to give warnings about 'evidence of a kind that may be unreliable'. The second tranche of jury direction reform in Victoria will, if enacted, confine that provision to civil cases, and set out in simpler, and it is to be hoped, clearer terms, the types of warnings that may be required in particular cases.

51 *Crimes Act 1958* (Vic) ('*Crimes Act*') ss 37, 37AAA and 37AA.

52 See, eg, *R v Getachew* (2012) 248 CLR 22. See also Asher Flynn and Nicola Henry 'Disputing Consent: The Role of Jury Directions in Victoria' (2012) 24(2) *Current Issues in Criminal Justice* 167.

53 (1973) 129 CLR 460 ('*Kilby*').

that they should take this into account when evaluating the credibility of the allegations.

26 Section 61 of the *Crimes Act*, introduced in 1991, required judges to give two separate directions to juries where delay in complaint was raised. The judge was required to warn the jury that delay did not necessarily indicate that the allegation was false, and, to inform the jury that there might be good reasons for such delay. The section was obviously intended to override the common law rule pronounced in *Kilby*. However, it was subsequently held in *Crofts v The Queen*[54] that, at least in some circumstances, the section did not overcome the need for the trial judge to warn the jury about the effect of delay on the credibility of a complainant. This is but one example of how, despite clear legislation, judicial exegesis can still prevail. More on sexual offence directions later.

27 Having outlined, in this general way, some of the problems associated with jury directions, the balance of this paper will be divided into three parts. Firstly, I will consider the broader issue of the burgeoning length of the criminal trial (which has far-reaching consequences for jury directions). Secondly, I will look at some specific examples of problem directions. Finally, I will draw attention to a number of legislative reforms that have been and are being implemented in Victoria.

The increasing length of criminal trials

Everyone knows the maxim, often attributed to William Gladstone, that 'justice delayed is justice denied'. Speedy justice, and shorter trials are two sides of the same coin. No doubt Gladstone would be both astonished and appalled at the duration of some of our modern criminal trials.[55] At the very least, it must be said, we have

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54 (1996) 186 CLR 427.

55 See, eg, *R v Wilson and Grimwade* [1995] 1 VR 163 ('*Grimwade*'), where the appellants were convicted after a retrial in the County Court on 19 counts of fraudulently inducing the investment of moneys. The retrial (the earlier trial having been aborted) exceeded 22 months in duration and occupied 294 sitting days. The presentation of evidence and the addresses of counsel were prolonged and disconnected, and there were frequent gaps in the court's sitting. In allowing an appeal, and substituting acquittals for both appellants, the Court concluded that juries could deal with 'long and complex trials and have been known to do so

fallen short in this regard.

28 It is hard to come by comprehensive statistics in this area.[56] Unfortunately, there are no national sources providing indicative data on changes to the average length of a criminal trial. The length of trials will vary considerably from state to state.[57]

29 There is, however, a general consensus that criminal trials are taking far longer than was once the case. Some recent New South Wales statistics suggest that between 1996 and 2007, the length of the average District Court trial had increased by almost 3 days.[58]

30 In light of that problem, the New South Wales Attorney-General set up a working group to evaluate the deficiencies in the trial process and recommend ways to remedy them.[59] The working group identified a number of areas that contributed to overall trial inefficiency. These included: general juror comprehension, the conduct of counsel, a lack of early identification of issues in contention, and the manner in which evidence was presented.[60]

31 In Victoria, similar problems have been identified. Indeed, the Chief Judge of the County Court noted that criminal trials are increasing in length for the following reasons:

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satisfactorily when given appropriate opportunity and assistance' at [176]. The jury in this case, however, according to the Court, were not appropriately assisted. The Court applied the test laid down in *Higgins v The Queen* (1994) 71 A Crim R 429, namely that in trials bedevilled by significant delay and discontinuity, the question to be asked was whether there was a real danger that the jury failed to perform their function properly. The Court in *Grimwade* concluded that such danger existed.

56 Janet Chan and Lynne Barnes, *The Price of Justice? Lengthy Criminal Trials in Australia* (Hawkins Press, 1995) 13. See also Jason Payne, 'Criminal Trial Delays in Australia: Trial Listing Outcomes' (Research and Public Policy Series No 74, Australian Institute of Criminology, 2007) 12.

57 Payne, above n 56, 12.

58 Jason Arditi, 'Criminal Trial Efficiency' (Research Brief No 11, New South Wales Parliamentary Library, New South Wales Parliament, 2009) 4. In 1996 the average District Court trial lasted 4.6 days. That number increased to 7.25 days by 2007.

59 The Trial Efficiency Working Group convened in 2008 and published their findings in May 2009.

60 Arditi, above n 58, 1.

- increased complexity of criminal matters — fraud and drug crimes, for example, involve greater sophistication requiring more detailed and technical evidence, leading to more onerous demands being placed on jurors;
- there has been a 'proliferation of procedural and evidentiary rules' consuming substantial court time;
- the quality of legal representation for both the Crown and defence is declining; and
- there are fewer trial judges who have experience in the conduct of criminal trials.[61]

32 I will touch on these suggested reasons for lengthier trials, and add several of my own.

33 First, we are seeing ever more detailed, highly prescriptive, inflexible and, dare I say, poorly drafted legislation, requiring the further development of case law.

34 Take, for example, the Uniform Evidence Act scheme for dealing with what is now described as 'tendency and coincidence' evidence. Section 97 of the *Evidence Act* was enacted, presumably, in part at least, to simplify the rules concerning the admissibility of what is termed 'tendency evidence'. The section provides that evidence of the 'character, reputation or conduct of a person' or 'a tendency that a person has or had' is not admissible to prove a tendency to act in a particular way or have a particular state of mind unless, inter alia, that evidence has 'significant probative value'. Section 98 deals with the admissibility of 'coincidence evidence', that is, evidence which uses the improbability that two or more events occurred coincidentally to prove that a person performed a particular act or had a particular state of mind. An overall threshold requirement is that contained in s 101 whereby neither tendency nor coincidence evidence can be used against an accused unless its

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61 Chief Judge Rozenes, 'The Impetus for Change' (Speech delivered at the Reform of Criminal Trial Procedure Conference, Australian Institute of Judicial Administration, 2001) cited in Payne, above n 56, 12.

probative value 'substantially outweighs any prejudicial effect' it may have.

35 This alleged 'simplification' to what had previously been a complex but workable branch of the law has resulted in an extraordinarily difficult body of legal doctrine, not just at the level of admissibility, but also in terms of jury directions. This is the product, almost certainly unintended, of the limited use direction introduced by s 95 of the *Evidence Act*.[62]

Where propensity evidence (or perhaps more accurately, evidence of other misconduct) is admitted for some purpose other than tendency or coincidence, a trial judge is now statutorily required to direct the jury that they can use that evidence for that purpose only and not to prove propensity. Sections 97 and 98 are therefore, and to that extent, 'diluted', by using s 95 to admit evidence of past discreditable conduct provided a 'limited use' direction is also given.[63] Whether such directions actually achieve anything tangible, in a practical sense, and serve to prevent juries from making impermissible use of evidence of this kind, is surely doubtful. It is rather like asking someone to conjure up an image of a green horse. They are then asked to focus, at length, upon that image. They are next told to put that image entirely out of their mind, to forget that they were ever asked to picture it.[64] That is clearly a somewhat daunting task. This phenomenon has a technical name. It is known as 'ironic processing'. It occurs where an individual's deliberate attempts to suppress or avoid certain thoughts, paradoxically, render those thoughts more persistent.[65]

36 It can therefore be seen, that the directions that must now be given when tendency or coincidence evidence is led, while clarifying the use to be made of

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62 That section provides that if evidence is not admitted under either ss 97 or 98, it must not be used to establish tendency or coincidence even though it may be admitted for some other purpose. An example is where such evidence is admitted to rebut evidence of good character or where it used to establish relationship or context.

63 *VLRC Report*, above n 11, 64 [3.169].

64 This is a variant of an example often given by Vincent JA when his Honour was a member of the Victorian Court of Appeal.

65 Joel D Lieberman, Jamie Arndt and Matthew Vess, 'Inadmissible Evidence and Pretrial Publicity: The Effects (and Ineffectiveness) of Admonitions to Disregard' in Joel D Lieberman and Daniel A Krauss (eds) *Jury Psychology: Social Aspects of Trial Processes – Psychology in the Courtroom, Volume 1* (Ashgate Publishing Limited, 2009) 67, 84.

certain types of propensity evidence, effectively preserve, and perhaps heighten, the difficulties associated with the most problematic (and complex) parts of the common law that such reforms were intended to overcome.[66]

37 Secondly, appellate judgments are often written from a lofty, and detached perspective without any adequate appreciation of how trials are actually conducted. Appellate judges are not necessarily well placed to work out how best to convey to lay jurors the various matters that will assist them in their task.

38 Despite the criticisms some commentators have levelled at the jury system,[67] it is quite wrong, in my opinion, to think that modern jurors lack the intelligence to follow what is going on in a contemporary legal trial. In most cases, evidence of even a highly technical nature can be presented in a manner that is able to be understood.[68] Of course there will always be some individuals who serve on juries who, for whatever reason, either cannot or will not grapple with the real issues before them. That is why we have 12 minds working together, as opposed to one.[69]

39 Appellate courts spend a great deal of time, and expend much intellectual capital, in seeking to refine the criminal law. The analysis that results may well be highly sophisticated, carefully nuanced, and rigorously sound. Where we fail is in translating our judgments into practical and succinct directions which trial judges can then adapt, and deliver to lay jurors. It might be said that the caseloads of intermediate appellate judges are too heavy to allow them the time required to formulate directions that would meet this standard. Yet the unfortunate reality is that we seem to have reached the point, in certain areas of the criminal law, where it

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66 *VLRC Report*, above n 11, 64 [3.170].

67 Professor Glanville Williams believed that jurors with low IQs would be particularly susceptible to deciding cases on the basis of prejudice and emotion: Glanville Williams, *The Proof of Guilt* (Stevens, 3rd ed, 1963) 271 cited in Jacqueline Horan, 'Communicating With Jurors in the Twenty-First Century' (2007) 29 *Australian Bar Review* 75, 77. See also Jacqueline Horan, *Juries in the 21st Century* (Federation Press, 2012) 44–70.

68 It helps that jurors today are more likely to come from a wider pool of the community with higher educational standards than did jurors of past eras.

69 For a discussion on the benefits of group decision making, see Horan, 'Communicating With Jurors …', above n 67, 78–9. See also Geoff Eames, 'Towards a Better Direction — Better Communication with Jurors' (2003) 24 *Australian Bar Review* 35, 40.

is simply impossible, on the existing state of the authorities, to do anything to make trial judges' lives more bearable, still less to assist juries in the performance of their task.

40 Thirdly, as Chief Judge Rozenes correctly noted, we are seeing fewer trial judges who, prior to their appointment, had any experience with juries. Judges who have never practised in criminal law, and have no familiarity whatever with jury trials, are likely to take considerably longer to deliver their rulings on points that arise during the course of the trial. They are also likely to charge juries at far greater length than their more experienced colleagues.

41 Justice Eames, writing extra-judicially, commented adversely upon the fact that Australian courts did not provide more training to judges in the crafting and delivery of jury directions.[70]

42 Finally, cutbacks in legal aid funding mean that we are seeing a large number of inexperienced and inadequately equipped counsel, briefed to appear in trials that are simply beyond them. The same is true of some counsel who are briefed externally on behalf of the Office of Public Prosecutions. It goes without saying that retaining counsel who are not sufficiently well-equipped to handle the trials for which they are briefed is a false economy. Counsel, whether they prosecute or defend, should have the experience and ability properly to assess the legal ramifications of the available evidence. In particular, they should be in a position to assist the trial judge in all matters likely to arise in the course of the trial, including the directions that each side submits should be given to the jury.

43 I joined the Court of Appeal in 2008. Regrettably, in each of my six years on the Court, I have seen a number of trials miscarry simply because counsel who appeared at first instance fell into basic error on matters that ought to have been relatively straight forward.

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70 Eames, above n 15, 188.

The 'problem' directions

44 In 2012, the *Simplification of Jury Directions Report* (prepared for the Jury Directions Advisory Group ('JDAG')), identified a number of instances where jury directions were unnecessarily complex, and suggested some avenues for reform.[71] I shall refer to this work, as well as the *VLRC Report,* in an attempt to highlight just how serious the problem of jury directions had, by then, become in Victoria.

Lies (and other post-offence conduct) as consciousness of guilt

45 Evidence of post-offence conduct falls into two broad categories: lies and other forms of post-offence behaviour (including acts, such as flight, and omissions). Both areas are governed by similar legal principles.[72] Here, I wish to focus primarily on lies.

46 The failure to give appropriate directions concerning lies has, in the past, been one of the main causes of successful appeals and orders for retrial in Victoria.[73] When used for evidentiary purposes, lies are a species of circumstantial evidence. One difficulty with this type of evidence is that inferences about mental states are notoriously uncertain.[74] More often than not, jurors will approach the task of evaluating evidence of proven lies by considering what they would have said or done in the accused's situation. There are obvious dangers in going down that path. For that reason, appellate courts, over time, developed a series of ever more refined and nuanced warnings reminding jurors not to jump to conclusions about why an accused behaved in a certain way.

47 These warnings became mandatory, and somewhat inflexible, following the High Court decision in *Edwards v The Queen*,[75] where the majority stated:

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71 Weinberg et al, above n 27.

72 *Jury Directions Act 2013* (Vic) s 22 ('*Jury Directions Act*'); *R v Renzella* [1997] 2 VR 88 ('*Renzella*'); *R v Boros* [2002] VSCA 181; *R v Ciantar* (2006) 16 VR 26 ('*Ciantar*').

73 Eames, above n 15, 166.

74 *VLRC Report*, above n 11, 47 [3.69].

75 (1993) 178 CLR 193 ('*Edwards*').

> [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 realization of guilt and a fear of the truth".
>
> Moreover, the jury should be instructed that there may be reasons for the telling of a lie apart from the realization of guilt. A lie may be told out of panic, to escape an unjust accusation, to protect some other person or to avoid a consequence extraneous to the offence. The jury should be told that, if they accept that a reason of that kind is the explanation for the lie, they cannot regard it as an admission. It should be recognized that there is a risk that, if the jury are invited to consider a lie told by an accused, they will reason that he lied simply because he is guilty unless they are appropriately instructed with respect to these matters. And 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 accused may be confused. He may not recollect something which, upon his memory being jolted in cross-examination, he subsequently does recollect.[76]

48 From this statement of the law there developed, through the cases, a series of incredibly elaborate jury directions, all of which had to be given substantially in the form laid down in *Edwards*. In summary, the judge was required to:

- warn the jury that just because an accused lied, it did not follow that he or she was guilty. The judge had to set out the range of other reasons why an accused may have lied, such as panic, shame, protecting another person, fear of the police, as well as any other explanation proffered by defence counsel;
- explain the difference between, and the uses that could be made of, lies which went only to credibility and lies that constituted an implied admission of guilt, before identifying precisely those lies that were capable of constituting an admission of guilt in the particular case and those that could only go to credit. The judge had to explain that those lies going only to credit could not be used as proof of guilt by way of an admission, but only as relevant to credit (and, as to which, a *Zoneff*[77] warning might

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[76] Ibid 210–11 (Deane, Dawson and Gaudron JJ) (citations omitted).

[77] In that case the trial judge erroneously gave an *Edwards* direction to the jury where the prosecution had not presented the case as one in which the jury would be entitled to convict on the basis that any lies found would be a ground for an inference of guilt of the particular charges. The High Court said that a direction which might appropriately have been given was one in the following terms: 'You have heard a lot of questions, which attribute lies to the accused. You will make up your own mind about whether he was telling lies and if he was,

have been given);

- clearly identify the factual circumstances and events which indicated that each lie might actually constitute an implied admission of guilt;
- articulate the precise inference which could be drawn from each lie and the reasoning process that would have enabled the jury to draw that inference;
- relate each lie as identified to the appropriate charge on the indictment and remind the jury that each lie was to be considered separately. If the inference to be drawn from the lie was not that the accused committed the physical element but related to another element of the offence (i.e., where the physical elements were admitted but the lie might have constituted an implied admission that the act was not committed in self-defence) then the judge had to precisely specify that as the inference that was open to the jury;
- warn the jury that there were four requirements that had to be met if a lie was to be treated as an admission. These were:
    - that the accused made the statement;
    - that the accused knew it to be untrue when said;
    - that it related to a circumstance or event under consideration by the jury;
    - that the accused must have believed in his or her commission of the crime[78] and that telling the truth would lead to implication; and
- make clear to the jury that an inference of guilt was to be proved beyond reasonable doubt.[79]

49 As can readily be seen, the obligation to direct the jury in conformity with these principles imposed a heavy, if not intolerable, burden on trial judges. A

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whether he was doing so deliberately. It is for you to decide what significance those suggested lies have in relation to the issues in the case but I give you 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' at [23]. The Court went on to say that 'a direction in such terms might be adaptable to other cases in which there is a risk of a misunderstanding about the significance of possible lies even though the prosecution has not suggested that the accused told certain lies because he or she knew the truth would implicate him or her in the commission of the offence' at [24].

78 As opposed to a realisation of having engaged in some lesser form of unlawful activity: *Ciantar* (2006) 16 VR 26.

79 Eames, above n 15, 167.

developing class of specialist appellate advocates, expert in the art of trawling, became adept at subjecting each line of a judge's charge on lies to the most minute scrutiny. Any departure from the *Edwards* template was seized upon, and treated as having given rise to a miscarriage of justice. Merely identifying the evidence capable of giving rise to the inference for which the Crown contended was itself fraught with difficulty. The judge had to consider for himself or herself whether there was an innocent explanation for the lie (assuming the relevant statement was found to be a lie) which the jury could not reasonably exclude.[80] A possible innocent explanation of that kind would preclude the judge from giving the *Edwards* consciousness of guilt warning. However, if, in the trial judge's opinion, the jury might have accepted or rejected the innocent explanation for the lie, the judge was required to give the warning. Understandably, as opinions readily differed as to how the jury might treat any posited explanation for the lie, judges often found themselves balanced somewhat precariously in determining whether to give the direction or not. A misjudgement on that point could be fatal to any conviction.[81]

50 Add to this the further complexity caused by the exception to the *Edwards* warning where the evidence of the lie (or post-offence conduct) was proffered merely as one component of an entirely circumstantial case, and not as an 'indispensible link in a chain of reasoning towards guilt'.[82] I shall return to this additional complication at a later point. In such cases, the jury would not need to be told that they had to be satisfied beyond reasonable doubt of the fact of the lie.[83] Contrast that with a situation where lies made up essentially a good part of the prosecution case, and the jury would have to be given what is generally described as a *Shepherd* direction.

51 Distinctions of this kind may appeal to logicians. However, they do little to enhance respect for our criminal justice system. I have, myself, tried — I fear in vain

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80 *VLRC Report*, above n 11, 49 [3.76].

81 See, eg, *Renzella* [1997] 2 VR 88.

82 *Shepherd v The Queen* (1990) 170 CLR 573 ('*Shepherd*').

83 *R v Cavkic (No 2)* (2009) 28 VR 341, 366 [88] ('*Cavkic*').

— to explain to juries, in painstaking terms, the difference between those lies which may count as implied admissions, and those lies that go merely to credibility. Professor Rupert Cross had a term for this type of conceptual analysis. He called it 'gibberish'. I might not myself go that far, but I understand the sentiment. It is time that we stopped pretending that directions of this kind have any real meaning to ordinary lay jurors. They serve no purpose, other than to generate confusion. Regrettably, all too often, they also provide a vehicle for unmeritorious points to be taken on appeal.

52 I have considered just some of the difficulties associated with the *Edwards* direction. There are others. It is instructive to note that no other common law jurisdiction, apart from the states and territories of Australia, adopts anything like the approach mandated by the High Court in *Edwards*. This includes England and Wales, New Zealand, Canada, and the United States. Those jurisdictions have all managed to deal with the subject of lies in very short compass. Jury directions on this subject are generally brief in the extreme. They also make perfectly good sense.

53 In Victoria, we have finally taken what I regard as the sensible step of changing the law to depart from the requirements of the *Edwards* direction. It has taken legislation to bring about that result. Of course, once the High Court has spoken on a subject, and assuming that it is unwilling to reconsider the matter, no other route is open.

54 Part 6 of the *Jury Directions Act*, which came into force on 1 July 2013, has brought about a dramatic change to the directions to be given where there is evidence of 'incriminating conduct' (the new label assigned to behaviour indicating what was once called 'consciousness of guilt'). Model directions that formerly occupied some 25 pages[84] in the Victorian *Charge Book*,[85] have now been reduced to but a handful of sentences.

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84 Eames, above n 15, 166.

85 Judicial College of Victoria, *Victorian Criminal Charge Book* ('*Charge Book*') <http://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#19193.htm>.

55 The first notable change to the law in this area, found in s 23 of the *Jury Directions Act*, requires the prosecution to give notice when evidence will be relied on as 'incriminating conduct'. Further, the Act sets out in simple and clear terms a series of directions that the judge must give when evidence is sought by the Crown to be used as incriminating conduct.[86] There are also additional directions that an accused may request when such evidence is relied on, or where there is a risk that the jury may improperly use evidence in that manner.[87] These statutory directions replace the common law directions emanating from both *Edwards* and *Zoneff*.

56 A direction under s 25 requires the trial judge to tell the jury that they may use the evidence to find that the accused believed that he or she:

- committed the offence charged;
- committed an element of the offence charged; or
- negated a defence to the offence charged;

only if they find that:

- the conduct occurred; and
- the only reasonable explanation of the conduct is that the accused held that belief.

57 While the test for admission and use of incriminating conduct evidence remains unchanged, s 25 removes the obligation on the judge, previously imposed at common law, to refer laboriously to each individual act or omission capable of constituting an admission of guilt, and to all of the other possible reasons for the accused having done what he or she did.[88] These changes will, I think, save considerable time and effort, and most certainly overcome some of the difficulties discussed earlier. The JDAG, the body that advised the Government on the *Jury Directions Act*, took the view that the new provisions would contribute significantly

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86 *Jury Directions Act* s 25.

87 Ibid ss 26–7.

88 Cf *Edwards* 178 CLR 193; *Ciantar* (2006) 16 VR 26.

to simplification in this area without in any way affecting the right to a fair trial. Early indications are positive.

Complicity

58 The law relating to secondary liability of offenders is confusing, and unprincipled. In his dissenting judgment in *Clayton v The Queen*,[89] Kirby J, speaking in the context of a challenge to the continued retention of the common law doctrine of extended common purpose, had this to say about the law of complicity generally:

> This part of the common law is in a mess. It is difficult to understand. It is very hard to explain to juries. It involves a portion of the law made by judges. What the judges have expressed with imperfect results, they can re-express with greater justice and rationality …[90]

59 Regrettably, the other members of the Court took a different view as regards the retention of that doctrine. They were not prepared, on that occasion, to revisit their own creation. Accordingly, extended common purpose continues to plague the law in this area.

60 The idea that a person who promotes or assists the commission of a crime is just as blameworthy as the person who actually carries out the offence,[91] can at its most basic level, be described in two ways: assisting or encouraging (aiding, abetting, counselling or procuring)[92] and participating in group activity (acting in concert, joint criminal enterprise and extended common purpose). Each set of directions has its own complexities. The assisting or encouraging directions overlap to a considerable degree. Each variant has its own technical requirements. The group activity directions sometimes have the effect of requiring juries to distinguish

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89 (2006) 231 ALR 500 ('*Clayton*').

90 Ibid 509–10 [43].

91 Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook, 3rd ed, 2010) 381.

92 In Victoria, the common law still governs the principles of complicity, but is supplemented by s 323 of the *Crimes Act*. That section provides that a person who aids, abets, counsels or procures the commission of an indictable offence may be tried or indicted and punished as a principal offender. The section operates procedurally, but does not alter or modify the substantive common law.

between those forms of complicity which are derivative in nature, and those which are not. This is far from easy.

61 In addition, the terminology traditionally adopted at common law varies greatly. Courts in different states sometimes use the same language to refer to different forms of participation, while on other occasions, different terminology is used to refer to precisely the same type of liability. The High Court itself has often been guilty of imprecision of language in this area, partly because it has picked up the terminology used in the particular state from which the appeal had been brought.

62 For example, in *McAuliffe v The Queen*,[93] Brennan CJ, Deane, Dawson, Toohey and Gummow JJ said that 'common purpose' could be described as 'joint criminal enterprise', and that:

> [T]hose terms – common purpose, common design, concert, joint criminal enterprise – are used more or less interchangeably to invoke the doctrine which provides a means, often an additional means, of establishing the complicity of a secondary party in the commission of a crime.[94]

63 Contrast *Osland v The Queen*,[95] where 'concert' was said to involve primary liability[96] and therefore, contrary to what the Court had said in *McAuliffe*, could not be used 'more or less interchangeably' with either joint criminal enterprise or extended common purpose. Both of those forms of complicity have been said to be derivative in nature.

64 Almost a quarter of a century ago, Professor Glanville Williams delivered this devastating critique of the state of the common law in relation to complicity:

> The authorities do not state a consistent fault principle for accessories. Sometimes they require a purpose, to bring about a crime; sometimes knowledge; sometimes an intention in a wide sense; sometimes they are satisfied with an intention to play some part in bringing it about; sometimes they use a formula that embraces recklessness. As so often happens, the

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93 (1995) 183 CLR 108 ('*McAuliffe*').

94 Ibid 113.

95 (1998) 197 CLR 316 ('*Osland*').

96 Ibid 342 [72] (McHugh J).

> courts are chiefly concerned to achieve a result that seems right in the particular case, leaving commentators to make what they can of what comes out.[97]

65 Difficult as it may be to believe, the current version of the *Charge Book* contains more than 70 pages on the subject of complicity alone. This part of the *Charge Book* is separated into multiple sections, each containing detailed bench notes and an assortment of model charges.[98] It is a truism that juries often have to be directed on a number of different forms of complicity in the one trial. For example, it is by no means uncommon for the prosecution to present its case on several alternative bases. The one set of facts may give rise to counselling and procuring, aiding and abetting, acting in concert, and joint criminal enterprise. Cases of this kind represent a particular circle of hell for trial judges.

66 Victoria is not the only state in which complicity directions have become unwieldy and prone to appealable error. The same problems have been identified in New South Wales.[99] Not surprisingly, our English[100] and Canadian brethren[101] struggle with jury directions in this area as well.

67 After a comprehensive review, the New South Wales Law Reform Commission recommended that the law on complicity be codified in order to deal with 'the inconsistent doctrinal bases' and 'gaps or uncertainties in the common law' which left the law in an 'unsatisfactory state'.[102]

68 An example of the absurdity into which some complicity directions have descended is to be found in *R v Jones*,[103] a South Australian case which Justice Eames,

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97 Glanville Williams, 'Complicity, Purpose and the Draft Code — 1' (1990) *Criminal Law Review* 4, 4.

98 *Charge Book*, above n 85, 5.1–5.6.

99 New South Wales Law Reform Commission, *Complicity*, Report No 129 (2010) xi ('*NSWLRC Complicity*').

100 *Serious Crime Act* 2007 (UK) ch 27.

101 David Watt, *Watt's Manual of Criminal Jury Instructions* (Carswell, 2005).

102 *NSWLRC Complicity*, above n 99, xi.

103 (2006) 161 A Crim R 511 ('*Jones*') cited in Eames, above n 15, 170.

again writing extra-judicially, described as 'every trial judge's worst nightmare'.[104]

69 In a trial that ran for more than 50 days, eight accused were charged with murder. The jury convicted four of them, but could not reach a verdict in relation to the remainder.

70 The trial judge was tasked with dealing with the full spectrum of complicity directions. He had to address a multitude of possible routes to conviction for each of the eight accused. In addition to oral directions, the judge provided the jury with extensive written directions headed 'Summary of Directions — [name of the accused]'.[105] Each of the eight such documents totalled 12 pages, and posed a series of questions under the following sequential headings:

> A Murder, B Manslaughter (other than by way of excessive self-defence), C Joint enterprise to commit murder, D Extended joint enterprise, E Murder — aiding and abetting, F Manslaughter [containing a further three internal separate headings], and G Joint enterprise to assault — manslaughter.[106]

71 On appeal, the appellants challenged a variety of directions given by the trial judge regarding joint criminal enterprise, extended joint criminal enterprise and aiding and abetting. They also argued that the extraordinary complexity of the trial, and indeed the sheer length of the directions provided to the jury, had resulted in a miscarriage of justice.

72 In affirming the convictions, the Full Court nonetheless was highly critical of the state of the law in this area. Duggan J observed:

> Although the trial was exceedingly complex, I do not think that this factor, of itself, should vitiate the convictions. However, I have expressed concern about specific aspects of the directions on joint enterprise and aiding and abetting as well as what I perceive to be deficiencies in linking, in a comprehensive manner, the legal directions to the facts, particularly in relation to the various bases of liability.[107]

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104 Eames, above n 15, 170.

105 *Jones* (2006) 161 A Crim R 511, 573 [328].

106 Ibid [329].

107 Ibid 572 [318].

73 Yet it is not only complex fact scenarios involving multiple accused that give rise to problems. There is, as I have previously suggested, an understandable tendency on the part of trial judges to err on the side of caution. Defensive judging leads inevitably to prolix directions, with every conceivable variant of complicity upon which the Crown has relied receiving its full measure of treatment.[108]

74 On the other hand, a 'universal complicity direction which summarises … all conceivable modes of participation, irrespective of whether they are applicable to the facts relied upon'[109] is neither helpful to the jury nor fair to the accused.

75 In *R v Tangye*[110] Hunt CJ at CL criticised the Crown's constant and inappropriate invocation of the doctrine of 'extended joint criminal enterprise' (known in Victoria as 'extended common purpose') in an effort to avoid falling between two stools. His Honour said:

> The Crown needs to rely upon a straightforward joint criminal enterprise only where — as in the present case — it cannot establish beyond reasonable doubt that the accused was the person who physically committed the offence charged. It needs to rely upon the extended concept of joint criminal enterprise, based upon common purpose, only where the offence charged is not the same as the enterprise agreed. This Court has been making that point for years, and it is a pity that in many trials no heed is taken of what has been said.[111]

76 I turn now to some of the conceptual difficulties in this area. I have no desire to revisit the 'tortured procedural history'[112] of the law of complicity. It is sufficient, for the purposes of this paper, to observe that the position in Victoria is, and always

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108 The recent decision of the High Court in *James v The Queen* (2014) 306 ALR 1 ('*James*') represents a refreshing departure from an almost obsessive adherence to the principles often attributed to *Pemble v The Queen* (1971) 124 CLR 107 ('*Pemble*'). The Court in *James* held that a trial judge is not obliged to leave a lesser alternative verdict to the jury where the accused deliberately and specifically eschews that course. The case has broader implications, and may be taken as providing support for trial judges who require the Crown to nail its colours to the mast, and not seek to rely upon multiple variants of complicity, resulting in trials that are almost unmanageable.

109 Bronitt and McSherry, above n 91, 437.

110 (1997) 92 A Crim R 545 cited in Bronitt and McSherry, above n 91, 437.

111 (1997) 92 A Crim R 545, 556 (citations omitted).

112 Keith John Michael Smith, *A Modern Treatise on the Law of Criminal Complicity* (Clarendon Press, 1991) 22.

has been, that liability for counselling and procuring, and for aiding and abetting, is derivative. There is less certainty regarding joint criminal enterprise and extended common purpose. To the extent that acting in concert is viewed as separate from joint criminal enterprise, the authorities dealing with this subject do not speak with one voice.

77 There is debate among commentators as to whether liability for complicity should indeed be characterised as derivative.[113] In short, the difficulty is that there is no rational basis for excusing a person for an offence merely because the actual perpetrator has a defence which is not available to the accused. For that reason, we have seen, in Victoria, judges straining to employ 'fictions' in order to avoid unjust outcomes.

78 One such device was used in the case of *R v Hewitt*.[114] There, two accused were charged with three counts each of aggravated rape against a 15 year old girl. While the accused did not himself engage in any sexual acts with the complainant, he insisted that she permit his co-accused to have sex with her. The prosecution case was that the accused and the co-accused had 'acted in concert'.

79 The trial judge, however, raised the possibility of a case against the accused as a 'constructive principal' through the 'innocent agency' of the co-accused. He did so because the co-accused might well have had a defence to the charge of rape on the basis that he mistakenly believed that the complainant was consenting. No such defence would have been open to the accused who knew full well that this was not the case. The judge directed the jury that they could convict the accused and at the same time acquit the co-accused. The jury did exactly that. The Court of Appeal affirmed the adequacy of the trial judge's directions on innocent agency, thereby circumventing any requirement that liability for concert might be derivative.

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113 See Simon Bronitt, 'Defending Giorgianni — Part Two: New Solutions for Old Problems in Complicity' (1993) 17 *Criminal Law Journal* 305, 317–8; George P Fletcher, *Basic Concepts of Criminal Law* (Oxford University Press, 1998) 195.

114 [1997] 1 VR 301.

80 Another useful example of a 'pragmatic' approach to the derivative nature of the law on complicity is to be found in *Osland*. The appellant had been subjected to physical and emotional abuse over many years. On the day in question she drugged her husband before her son, and co-accused, beat him to death. Together they buried the body in a grave they had dug earlier that day. They then filed a missing persons report with the police.

81 At their joint trial, the appellant and her son relied on both self-defence and provocation. After lengthy submissions concerning 'battered woman syndrome', the appellant was convicted of murder, while the jury were unable to agree in relation to her son. Subsequently, at his retrial, the son was acquitted.

82 The High Court, by majority, upheld the appellant's conviction. As she had been convicted on the basis of acting in concert, for which liability was said to be primary and not derivative,[115] her son's subsequent acquittal did not render her conviction unsafe or unsatisfactory. Moreover, the verdicts were not inconsistent.[116]

83 Justice Callinan expressed his strong disapproval of the current state of the law in the following terms:

> The distinctions generally owe their existence to technical and substantive differences with respect to modes of trial, jurisdiction, punishment and benefit of clergy, all matters of diminished or no importance in modern times. For more than a century, legislative attempts have been made to simplify the law in these areas. This Court should not reverse that process.[117]

84 One of the most challenging issues in this area involves the doctrine of group activity, variously referred to as common purpose (in Victoria) and joint criminal enterprise (in New South Wales). There is also a question of whether 'acting in concert' and 'joint design' are separate from these other forms of group activity.[118] The particular problem that must be addressed is how to deal with the phenomenon

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115 (1998) 197 CLR 316, 360 [128] (McHugh J).

116 Ibid.

117 Ibid 399–400 [204].

118 *McAuliffe* (1995) 183 CLR 108, 113–4 (Brennan CJ, Deane, Dawson, Toohey and Gummow JJ).

of a divergence between the offence originally agreed upon, and that which was ultimately committed.

85 At common law, liability can be established where the crime committed falls within the scope of the original agreement. There is no particular difficulty, in principle, with that form of complicity. The alternative would be to excuse an offender from liability on the basis that the actual offence committed differed in some marginal way from that which had been agreed.

86 There is, however, another form of liability which is far less capable of justification. This is the doctrine to which I have earlier referred, known variously as extended common purpose or extended joint criminal enterprise. Here, there is said to be liability where the actual crime committed cannot be said to fall within the scope of the agreement reached between the parties, but was foreseen as a *possible* consequence.[119] This is a very low threshold indeed.

87 As Kirby J pointed out in *Clayton,* this doctrine is entirely unprincipled.[120] Take the following example. Two offenders agree to burgle a house. One of them is armed with a baseball bat, and the other one not. They are aware that the premises are occupied. Neither intends any injury to any of the occupants. The bat is simply there to intimidate.

88 Upon entry into the premises, the two offenders are confronted by the householder. The accused armed with the bat strikes a blow. He does not intend to kill or cause really serious injury, although he foresaw the possibility that really serious injury might occur when he agreed to carry out the burglary. He is not guilty of murder.[121] The co-accused has exactly the same state of mind as the offender who wielded the bat. He does not intend to kill or cause really serious injury. He too

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119 *McAuliffe* (1995) 183 CLR 108; *Clayton* (2006) 231 ALR 500.

120 (2006) 231 ALR 500, 509–10 [43]. See also Luke McNamara, 'A Judicial Contribution to Over-Criminalisation?: Extended Joint Criminal Enterprise Liability for Murder' (2014) 38 *Criminal Law Journal* 104, where the doctrine of extended common purpose was subjected to serious criticism.

121 Subject to s 3A of the *Crimes Act*.

foresaw the possibility that really serious injury might occur when he entered into the relevant agreement. Assuming that liability for extended common purpose is primary and not derivative, he is guilty of murder.

89 It is difficult to see how anyone can countenance such an obviously unjust and irrational result. Yet that is precisely what the law as it presently stands dictates.

90 Other complaints about extended common purpose, apart from obvious concerns with its associated long and complex jury directions, include that:

- it is so broad so as to effectively envelope the offence of manslaughter;
- it is inconsistent with the principles governing liability for other forms of complicity; and
- it is contrary to principles of criminal responsibility to hold a person liable for an offence, such as murder, that is foreseen merely as a 'possibility'.

91 In the *Simplification of Jury Directions Report*, it was suggested that, the *Crimes Act* should be amended, and the law of complicity put on a statutory footing.[122] The proposed amendment would have taken the following form:

> **324 Interpretation**
>
> (1) For the purposes of this Subdivision, a person is involved in the commission of an offence if the person—
>
> (a) Intentionally assists, encourages [or brings about] the commission of the offence or an offence of the same general character; or
>
> (b) enters into an agreement, arrangement or understanding with another person to commit the offence or an offence of the same general character.
>
> (2) In determining whether a person has encouraged the commission of an offence, it is irrelevant whether or not the principal offender in fact was encouraged to commit the offence.
>
> (3) A person may be involved in the commission of an offence, by act or omission—

122 Weinberg et al, above n 27, 93.

(a) even if the person is not physically present at the location where the offence is committed; and

(b) whether or not the person realises that the facts constitute an offence.[123]

92 An additional amendment to the *Crimes Act* would have rendered a person 'involved' in the commission of an offence liable to be tried or indicted and punished as a principal offender, under s 324.[124]

93 As with any statutory reform, the proposed amendment has its difficulties. The phrase 'same general character' is intended to cover those cases where there has been divergence from the original plan or agreement. However, that expression is unquestionably vague, and may generate further unwanted confusion. At the same time, the task of drafting a codified version of complicity which encompasses the possibility of divergence is a difficult one, and requires a careful balancing of the need for certainty, and flexibility.

94 Additionally, a policy question arises. Should a component of foreseeability (whether objective or subjective) be built into particularly the divergence aspect of the statutory reformulation?

95 Some other suggested reforms to the law on complicity include provisions:

- deeming a person involved in the commission of an offence to have committed the offence unless the accused has terminated his or her involvement before the commission of the offence or has taken all reasonable steps to prevent the commission of the offence;
- to the effect that other offenders need not be prosecuted in order for a person who is involved in the commission of an offence to be found guilty of the offence; and
- making it possible for a person to be found guilty of 'being involved in the commission of an offence' even if the jury is unable to determine whether the person is guilty as a principal offender or as a person involved in the commission of the offence.[125]

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123 Ibid 93–4.

124 Ibid.

125 Ibid 94–5.

96 The introduction of reforms along these lines would probably solve a number of the difficulties associated with nomenclature, the lack of precision in defining the fault element for different forms of complicity, and the problem of divergence. They would also, undoubtedly, simplify jury directions. However, it must be borne in mind that reforms on this scale require careful consideration if there are not to be, at the end of the day, unintended consequences.

Standard of proof

97 Many trial judges have, over the years, complained of the constraints imposed upon them by appellate courts, which prevent them from assisting jurors in understanding what is meant by proof 'beyond reasonable doubt'. It has been said that it is notoriously difficult to explain to jurors, who would never have cause to apply that standard to anything in their daily lives, just what it means.[126]

98 Paradoxically, in this context, the complaint from the bench is not that the jury direction regarding the standard of proof is unduly long, or even particularly complex. It is rather, that in addition to the expression 'beyond reasonable doubt' being vague and imprecise, judges are extremely limited in what they can say on this subject.

99 These limits are clearly demonstrated by reference to the *Charge Book* which states that '[it] is generally undesirable even to tell the jury that the phrase beyond reasonable doubt is a "well understood expression".'[127] It is also said to be undesirable to say to them that whether a doubt is reasonable is for them to say by setting their own standards.[128] The *Charge Book* suggests that judges should not distinguish between a doubt, and its reasonableness. They should, rather, confine their language to the composite phrase 'beyond reasonable doubt', or 'a reasonable doubt', and say little more.[129]

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126 James Wood, 'Jury Directions' (2007) 16 *Journal of Judicial Administration* 151, 159.

127 *Charge Book*, above n 85, 1.7.1.

128 Ibid.

129 Ibid.

100 Traditionally, all that trial judges have been able to say on this subject is that the standard of proof in criminal cases does not require absolute certainty, and is stricter than the civil standard, which is the 'balance of probabilities'. Should the jury ask further questions, the recommended approach is to:

> provide no more elaboration than that a reasonable doubt is a doubt that the jury considers reasonable, or to inform the jury, somewhat unhelpfully, that the law does not permit of any further explanation than that given in the initial direction.[130]

101 The *Charge Book* makes it clear that '[t]o attribute meaning to "reasonable" is no part of the judge's function'.[131] To quote Chief Justice Dixon:

> [I]t is a mistake to depart from the time-honoured formula. It is, I think, used by ordinary people and is understood well enough by the average man in the community. The attempts to substitute other expressions, of which there have been many examples not only here but in England, have never prospered.[132]

102 Frankly, I rather doubt that the 'time-honoured formula' is used by ordinary people, and I am confident that it is not understood well enough by the average man in the community. I also doubt that juries are greatly assisted by being told that the words mean exactly what they say. If the meaning were that clear, one would scarcely expect to have the number of questions, routinely put, by jurors as to how that expression should be understood.

103 Being the highest standard of proof required in any trial, beyond reasonable doubt does not require absolute certainty. It plainly requires something less than that. However that 'something' cannot be reduced to a statistical, or probability analysis.[133]

104 In a New Zealand Law Commission study on juror comprehension, it was found that jurors 'generally thought in terms of percentages … variously

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130 New South Wales Law Reform Commission, *Jury Directions,* Consultation Paper No 4 (2008) 69–70 (citations omitted).

131 *Charge Book*, above n 85, 1.7.1.

132 *Dawson v The Queen* (1961) 106 CLR 1, 18 ('*Dawson*').

133 To do so would provide grounds for an appeal.

interpreting [the criminal standard] as 100 per cent, 95 per cent, 75 per cent, and even 50 per cent'.[134] While the meaning and application of the term are unquestionably 'the province of the jury',[135] if they are denied further guidance on this point, there is a serious risk that they will apply certain types of impermissible reasoning. Given the centrality of the standard of proof to the fairness of a criminal trial, this is alarming.

105 In contrast to the Australian position, Canada has taken a far more facilitative approach. In *R v Lifchus*,[136] the Supreme Court of Canada held that trial judges were obliged to provide proper guidance to the jury on the meaning of the criminal standard of proof. A failure to do so could amount to an error of law.

106 In New Zealand, what is described as the *Wanhalla*[137] direction is based on the Canadian approach expounded in *Lifchus*. It is expressed as follows:

> The starting point is the presumption of innocence. You must treat the accused as innocent until the Crown has proved his or her guilt. The presumption of innocence means that the accused does not have to give or call any evidence and does not have to establish his or her innocence.
>
> The Crown must prove that the accused is guilty beyond reasonable doubt. Proof beyond reasonable doubt is a very high standard of proof which the Crown will have met only if, at the end of the case, you are sure that the accused is guilty.
>
> It is not enough for the Crown to persuade you that the accused is probably guilty or even that he or she is very likely guilty. On the other hand, it is virtually impossible to prove anything to an absolute certainty when dealing with the reconstruction of past events and the Crown does not have to do so.
>
> What then is reasonable doubt? A reasonable doubt is an honest and reasonable uncertainty left in your mind about the guilt of the accused after you have given careful and impartial consideration to all of the evidence.
>
> In summary, if, after careful and impartial consideration of the evidence, you are sure that the accused is guilty you must find him or her guilty. On the

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134 New Zealand Law Commission, *Juries in Criminal Trials: Part 2*, Preliminary Paper 37 (1999) vol 2, 54 [7.15].

135 Department of Justice — Criminal Law Review, above n 16, 89.

136 [1997] 3 S.C.R 320 ('*Lifchus*').

137 *R v Wanhalla* [2007] 2 NZLR 573 ('*Wanhalla*').

other hand, if you are not sure that the accused is guilty, you must find him or her not guilty.[138]

107 The *Jury Directions Act* now enables judges in Victoria to assist juries on the standard of proof by providing them with far clearer, and more detailed instruction on that point than the common law previously allowed. While judges are still prohibited from expanding on the meaning of 'beyond reasonable doubt' in the course of initial directions, they are now permitted to respond to jury questions, or other manifestations of uncertainty, by providing elucidation on this point.

108 Section 21 of the *Jury Directions Act* permits judges to provide an explanation of the term 'beyond reasonable doubt' by referring to the presumption of innocence and the Crown's obligation to prove the guilt of the accused. The judge can, in response to the jury question on the subject of the standard of proof, indicate that:

- it is not enough for the prosecution to persuade the jury that the accused is probably guilty or very likely to be guilty; or
- it is almost impossible to prove anything with absolute certainty when reconstructing past events (and the prosecution does not have to do so); or
- the jury cannot be satisfied that the accused is guilty if the jury has a reasonable doubt about whether the accused is guilty; or
- a reasonable doubt is not an imaginary or fanciful doubt or an unrealistic possibility.

109 Further, the Act allows the trial judge to adapt his or her explanation of the phrase 'beyond reasonable doubt' in order to respond to the particular question asked by the jury, or correct any specific misconception that they may have.[139]

110 These directions are based on *Lifchus* and *Wanhalla*. What is missing from the

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138 Ibid [49] (William Young P, Chambers and Robertson JJ).

139 *Jury Directions Act* ss 21(2) and 6. Cf the common law position as expounded in *Dawson* (1961) 106 CLR 1, 18 (Dixon CJ); *Thomas v The Queen* (1960) 102 CLR 584; *Green v The Queen* (1971) 126 CLR 28; *La Fontaine v The Queen* (1976) 136 CLR 62. In those cases the High Court made clear that a trial judge should not, in ordinary circumstances, attempt to define the expression or expand upon its meaning, unless there is a particular reason to do so. This position has been affirmed by the Victorian Court of Appeal on multiple occasions: *R v Chatzidimitriou* (2000) 1 VR 493; *Cavkic* (2009) 28 VR 341; *Benbrika v The Queen* (2010) 29 VR 593 ('*Benbrika*').

Victorian reforms is the concluding sentences featured in both those formulations which equate 'satisfied beyond reasonable doubt' with being 'sure'. In Victoria, it would seem, the use of the term 'sure' as a synonym for the standard of proof remains prohibited.[140]

111 It has been suggested that a failure to equate the phrase with being 'sure' poses a 'serious risk of injustice' as juries may place the standard closer to the 'balance of probabilities' rather than 'almost certain'.[141] The counter argument is that the notion of 'sureness' is a standard that varies, depending on context and personal experience. Equating 'beyond reasonable doubt' with being sure, and necessarily providing analogies to explain the different standards of 'sureness' (as is the approach in the United Kingdom), might do more harm than good.[142]

Circumstantial evidence

112 I briefly touched on circumstantial evidence in the context of my discussion of 'consciousness of guilt' and the new *Jury Directions Act* provisions dealing with 'incriminating conduct'. There I mentioned the difficulties associated with directing juries regarding lies which formed part of an overall circumstantial case.

113 Directions regarding circumstantial evidence have long had far wider implications for jury comprehension in the context of the standard of proof. *Chamberlain v The Queen (No 2)*[143] is the starting point for any discussion in this area. There, the High Court held that a jury could not view a fact as a basis for an inference of guilt unless they were satisfied beyond reasonable doubt of the existence of that fact.[144]

114 Initially it was thought that *Chamberlain* required jurors to be satisfied beyond

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140 *Benbrika* (2010) 29 VR 593.

141 Shaun Ginsbourg, 'Criminal Jury Directions: A New Framework' (2013) 87(8) *Law Institute Journal* 36, 38.

142 Department of Justice — Criminal Law Review, above n 16, 93.

143 (1984) 153 CLR 521 ('*Chamberlain*').

144 Ibid 536 (Gibbs CJ and Mason J).

reasonable doubt of every fact upon which they based an inference of guilt.[145] The position was clarified in *Shepherd* where the High Court said that only those 'intermediate facts' that were 'indispensable links in a chain of reasoning towards an inference of guilt' needed to be proved to that high standard.[146] Dawson J explained the concept of an 'indispensible intermediate fact' by contrasting two types of circumstantial case, one involving proof of the accused's guilt by referring to the evidence as establishing 'links in a chain' (sequential reasoning), the other viewing the evidence as 'strands in a cable' (accumulated reasoning).[147] It was only the 'sequential' or 'link in the chain' reasoning cases that required the prosecution to prove any fact beyond reasonable doubt, and even then, only those facts that were 'indispensible links in the chain'.[148]

115 The first hurdle for any trial judge in giving the jury a *Shepherd* direction is identifying those 'indispensible intermediate facts' that make up the 'links' in the chain of reasoning. An issue that commonly arises is whether Dawson J was referring to a fact that is objectively indispensible, or one which may subjectively be thought by the jury to be indispensible.[149] Judges have differed on this point.[150]

116 The subjective view is, of course, more challenging. Where it is unclear whether a particular fact is, to the jury, an indispensible link, or merely a strand in the cable, the judge will first need to determine that one or more facts might reasonably be regarded by jurors as 'indispensible links in the chain'. The judge will then have to explain, without necessarily using this language, the difference between 'links in the chain' and 'strands in the cable' reasoning, before giving the *Shepherd*

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145 *R v Sorby* [1986] VR 753; *R v Maleckas* [1991] 1 VR 363.

146 *Shepherd* (1990) 170 CLR 573, 579 (Dawson J).

147 Ibid. The metaphor regarding the distinction between 'strands in a cable' and 'links in a chain' appears to have been coined by John Henry Wigmore, *Evidence in Trials at Common Law* (Little, Brown & Co, Revised by James H. Chadbourn, 1981) vol 9, [2497]. See generally, for a helpful discussion of the law on this point, the recent decision of the Australian Capital Territory Court of Appeal in *Munro v The Queen* [2014] ACTCA 11 (Burns J).

148 *Shepherd* (1990) 170 CLR 573. See also *Cavkic* (2009) 28 VR 341, 358.

149 Weinberg et al, above n 27, 109.

150 See, eg, *R v Merritt* [1999] NSWCCA 29; *Minniti* v *The Queen* (2006) 196 FLR 431; *R v Debs* [2007] VSC 169; *Cavkic* (2009) 28 VR 341. See also *R v Davidson* (2009) 75 NSWLR 150.

direction relating to the standard to be applied to the 'indispensible' facts. This is a particularly burdensome task for trial judges, and one that often leaves juries looking puzzled.

117 In borderline cases, judges must be careful to ensure that juries are told, fully and accurately, that they must be satisfied beyond reasonable doubt of any particular fact that forms a 'link in a chain' before they can rely on that fact. In most 'strands in a cable' cases, judges do not have to comment on the standard of proof to be applied to individual facts. It is the combined weight of those facts that must be considered by the jury in determining whether they are satisfied beyond reasonable doubt that the accused is guilty of the offence charged.

118 Judges also have to consider whether, even where the particular fact is not a 'link in the chain', it is of such importance in the trial as to warrant giving the jury what is described as a 'prudential direction' to the same effect.[151]

119 In a postscript to his judgment in *LRG*, Callaway JA had this to say:

> At a criminal trial the guilt of the accused must be proved beyond reasonable doubt. In addition, there are at least two kinds of evidence that have to be proved to that standard. The first is evidence that amounts to an indispensable link in a chain of reasoning leading to guilt. That is because a chain is as strong as its weakest link. If an indispensable link is established only on the balance of probabilities, the chain of reasoning cannot establish guilt beyond reasonable doubt. The second kind is evidence which, although logically only a strand in a cable, is of such practical importance that it is prudent to direct the jury that they must be satisfied about it beyond reasonable doubt.[152]

120 The law on prudential directions can therefore be summarised as follows:

> The fact that the … evidence was not a link in a chain of reasoning does not dispose of the question whether such a direction should have been given to the jury. It is well recognised that such a direction may be required in relation to a piece of evidence if that evidence, "although logically only a strand in a cable, is of such practical importance that it is prudent to direct the jury that they must be satisfied about it beyond reasonable doubt." As Winneke P

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151 *Walford v McKinney* [1997] 2 VR 353; *R v Best* [1998] 4 VR 603 ('*Best*'); *R v Kotzmann* [1999] 2 VR 123 ('*Kotzmann*'); *R v Heaney* [1999] VSCA 169; *R v Tragear* (2003) 9 VR 107; *R v Doherty* (2003) 6 VR 393; *Ciantar* (2006) 16 VR 26; *R v LRG* (2006) 16 VR 89 ('*LRG*'); *R v Gojanovic (No 2)* [2007] VSCA 153; *R v Dickinson* [2007] VSCA 111; *Kotvas v The Queen* [2010] VSCA 309 ('*Kotvas*').

152 (2006) 16 VR 89, 99 [39].

> stated in *R v Doherty*, such a direction can be reconciled with the statements of Dawson J in *Shepherd*. Even in a "strands in a cable" case, there may be some facts on which the Crown relies which are so influential that, standing alone, they should be treated as though they were indispensable links in a chain of reasoning towards guilt. Accordingly, where a fact assumes such importance to the prosecution case, the trial judge will, as a matter of prudence, so direct a jury to ensure that a perceptible risk of a miscarriage does not occur.[153]

121 It need hardly be said that the refinements associated with *Shepherd* directions, and their 'prudential' extensions, are unlikely to provide much real assistance, in a practical sense, to jurors engaged in the task of deciding whether the Crown has established the guilt of the accused.

122 I wish only to add that despite the High Court having made it clear, in *Edwards,* that a lie, which is relied upon as an alleged admission need not itself be proved beyond reasonable doubt, there is still some uncertainty as to whether, in the case of post-offence conduct, a *Shepherd* direction should be given.[154]

123 Judges in Victoria, concerned to give effect to the 'prudential' extension to *Shepherd*, 'out of an abundance of caution',[155] still often direct juries, to be satisfied beyond reasonable doubt as to the constituent facts giving rise to post-offence conduct. An example is *R v Lam (Ruling No 18)*[156] where Redlich J (as his Honour then was) adopted the approach taken in *Laz.*

124 That approach is difficult to reconcile with the observation by the Victorian Court of Appeal in *Cavkic* that:

> where lies or other conduct are used as evidence of consciousness of guilt as part of a circumstantial evidence case … it is not usually necessary to

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153 *Kotvas* [2010] VSCA 309, [26] (Redlich JA) (citations omitted).

154 *Edwards* (1993) 178 CLR 193, 210 (Deane, Dawson and Gaudron JJ). Take, for example, *R v Laz* [1998] 1 VR 453 ('*Laz*'), which held that a *Shepherd* direction would ordinarily be required where the Crown case was based, to a considerable degree, on post-offence conduct, even if such conduct was merely part of the overall circumstantial case presented. In *Velevski v The Queen* (2002) 187 ALR 233, the High Court took a somewhat different approach, holding that there was no requirement to direct the jury that they had to be satisfied beyond reasonable doubt as to the fact of the lie, and its significance, unless it was 'an intermediate link in a chain of reasoning'. Of course, in most cases, a lie will not meet that description, and no *Shepherd* direction will be required.

155 *R v Deruiter* [2003] VSCA 66, [31] (Warren AJA).

156 [2005] VSC 292.

establish the character of the conduct beyond reasonable doubt.[157]

125 These differing approaches, based upon caution, and what is said to be 'prudence', merely highlight the lack of certainty in this area. A starting place would, of course, be to clarify whether a subjective or objective approach should be taken towards the concept of 'indispensability' raised in *Shepherd.* An even better solution might be to reconsider whether there really is a need for *Shepherd* directions to be retained at all.

126 A further exception to the *Shepherd* analysis relates to confessions and admissions. Where such evidence is led by the Crown, judges traditionally direct juries that they must not act upon it unless satisfied beyond reasonable doubt both that the admission was made, and that it was true.[158] They do so even where the evidence in question cannot be said to be an 'indispensable link in the chain' of reasoning upon which the Crown relies.

127 In *Kotzmann* Callaway JA suggested that even without the *Shepherd* conditions having been met, such a direction was desirable, in the case of admissions, 'for prudential reasons'.[159]

128 The final exception to *Shepherd,* to which I shall refer, relates to tendency and coincidence evidence, and to what is sometimes described as context or relationship evidence.

129 In Victoria it has generally been accepted that the facts upon which tendency or coincidence reasoning rest must ordinarily be proved beyond reasonable doubt. That is so irrespective of whether those facts constitute 'indispensible links in a chain', as required in *Shepherd*.[160]

130 In practice, the limits of this approach are uncertain. Most cases that have

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157 (2009) 28 VR 341, 366 [88].

158 *Burns v The Queen* (1975) 132 CLR 258.

159 [1999] 2 VR 123, 130 [21]; See also *R v Franklin* (2001) 3 VR 9, 52–3 (Ormiston JA).

160 *Sadler* (2008) 20 VR 69, 88 [63] (Nettle, Redlich and Dodds-Streeton JJA); *SWC v The Queen* [2011] VSCA 264, [14].

addressed this issue concern sexual offences. Little has been said, regarding the standard of proof in relation to tendency or coincidence evidence, in cases other than those involving such offences.

131 The position in other parts of Australia is unclear. There appear to be conflicting views, with Tasmania and the Australian Capital Territory requiring the facts on which tendency evidence is based to be proved beyond reasonable doubt, irrespective of the nature of the case.[161] New South Wales and Queensland, on the other hand, draw a distinction between tendency evidence led to show that the accused had a sexual interest in the complainant, and other types of tendency evidence.[162] Western Australian and South Australian decisions are divided on the issue.[163]

132 As with tendency evidence, evidence of coincidence relies on a process of inferential reasoning. The standard of proof to be applied, in a coincidence case, will depend upon whether the jury uses the evidence to establish the identity of the offender, or merely as an adjunct to support the credibility of prosecution witnesses. The former requires the jury to be satisfied beyond reasonable doubt that two similar offences were committed by the same person, and that the accused committed one of them.[164] It is irrelevant, in that sense, whether the evidence is an 'indispensible intermediate fact'. By way of contrast, a jury need not be satisfied beyond reasonable doubt of the truth of any particular witness where the inference goes merely to bolster credibility. The jury may, of course, be satisfied of the truth of the

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161 *Townsend v Tasmania* [2007] TASSC 17; *R v Fairbairn* (2011) 250 FLR 277, 295 (Refshauge J).

162 See, eg, *R v Hagarty* (2004) 145 A Crim R 138; *Qualtieri v The Queen* (2006) 171 A Crim R 463; *DJV v The Queen* (2008) 200 A Crim R 206 ('*DJV*'); *R v FDP* (2008) 74 NSWLR 645 ('*FDP*'); *DJS v The Queen* [2010] NSWCCA 200 ('*DJS*'); *R v CAH* (2008) 186 A Crim R 288; *MBO v The Queen* [2011] QCA 280 ('*MBO*').

163 *KMB v Western Australia* [2010] WASCA 212; *PIM v Western Australia* (2009) 40 WAR 489; *Stubley v Western Australia* [2010] WASCA 36 (overturned by the High Court, but not on this point); *R v Nieterink* (1999) 76 SASR 56; *R v IK* (2004) 89 SASR 406; *R v Clifford* (2004) 233 LSJS 157; *R v O, AE* (2007) 172 A Crim R 100; *R v M, RB* (2007) 172 A Crim R 73.

164 *R v Gee* (2000) 113 A Crim R 376.

evidence given by that witness through the combined effect of all of the evidence in the case.[165]

133 In *WRC,* Hodgson JA articulated the point as follows:

> The whole force of coincidence evidence is the co-existence of two or more pieces of evidence, so that satisfaction beyond reasonable doubt might come from this co-existence, whereas it could not come from any single piece of evidence considered on its own.[166]

134 Adding yet another layer of complexity, there is an exception to the previous point where there is a suggestion that there may have been collusion, or innocent cross-contamination on the part of various witnesses, particularly child witnesses in sexual offence cases. In that event, cross-admissibility may be rejected at an evidentiary level. However, even if it is not, the jury must still be warned that they need to be satisfied beyond reasonable doubt that no such collusion or contamination exists.[167]

135 As can be seen, directions regarding the permissible uses of coincidence evidence are far more complex than those required in a standard *Shepherd* direction. Directions of this kind are particularly prone to error, and from time to time result in successful appeals.

136 As if tendency and coincidence directions were not sufficiently complex, there is yet another area that consistently creates difficulty. I refer to the interplay between *Shepherd* directions, and evidence of what is said to be 'context' or perhaps 'relationship'. The law in this area remains extraordinarily complex. This is perhaps due to the uncertainty created by the decision of the High Court in *HML* discussed earlier.

137 The lack of any clear ratio in *HML* has resulted in each state having adopted its own position with regard to the standard of proof on matters of context. In New

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165 *R v WRC* (2002) 130 A Crim R 89 ('*WRC*'); *Best* [1998] 4 VR 603.

166 (2002) 130 A Crim R 89, 108 [58].

167 *R v Glennon (No 2)* (2001) 7 VR 631; *R v Gilbert* (2007) 176 A Crim R 451; *R v Rajakaruna (No 2)* (2006) 15 VR 592; *Best* [1998] 4 VR 603. Cf *LRG* (2006) 16 VR 89.

South Wales and Queensland, it has been held that context evidence need not be proved beyond reasonable doubt.[168]

138 The position in Victoria is far less clear.

139 In *Sadler*, the accused was convicted of rape and a raft of other offences against a woman with whom he was co-habiting. As part of its case, the Crown relied on uncharged acts consisting largely of threats of violence by the accused towards the complainant. These threats were said to bear on the relationship between them.

140 When charging the jury, the judge directed them that it was not a legal requirement that the uncharged acts be proven beyond reasonable doubt. The Court of Appeal, no doubt doing the best that it could, suggested that the following principle could be distilled from *HML*:

> [W]here evidence of uncharged sexual acts is admitted under the common law test propounded in *Pfennig*, and a priori the evidence is relied upon as a step in reasoning to a conclusion of guilt, the jury must be directed that they cannot find that the accused had a sexual interest in the complainant unless satisfied of that beyond reasonable doubt.[169]

141 However, the Court of Appeal continued:

> Despite the strength of the judgments of Kirby and Hayne JJ (and thus of Gummow J) and the observations of Heydon J, as to the need for uncharged sexual acts to be proved beyond reasonable doubt in jurisdictions where *Pfennig* provides the criteria for admissibility, the majority of judges in *HML* did not express any clear view as to whether uncharged sexual acts *must always be proved* beyond reasonable doubt.[170]

142 The Court went on to say:

> [E]vidence of uncharged sexual acts, like evidence of other uncharged acts, may be tendered as relationship evidence put forward as demonstrating the context in which the charged offence was committed, and that, generally speaking, if it is tendered for that purpose alone, as opposed to establishing a sexual interest in the complainant and a disposition on the part of the accused

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168 *DJV* (2008) 200 A Crim R 206; *FDP* (2008) 74 NSWLR 645; *DJS* [2010] NSWCCA 200; *MBO* [2011] QCA 280; *R v Rae* [2009] 2 Qd R 463. See also *Roach v The Queen* (2011) 242 CLR 610.

169 (2008) 20 VR 69, 87 [59] (Nettle, Redlich and Dodds-Streeton JJA) (citations omitted).

170 Ibid 87 [60] (emphasis added).

> to act to gratify that interest, it is not necessary for a trial judge to give separate directions about the standard of proof applicable to such uncharged acts, unless the judge perceives that the jury are likely to use the uncharged acts as a step in the reasoning towards guilt or that it is unrealistic to contemplate that any reasonable juror would differentiate between the reliability of the complainant's evidence as to the uncharged acts and as to the charged acts.
>
> If so, it follows that the standard of proof applicable to uncharged acts, and the directions to be given to the jury as to the use which they may and may not make of evidence of the uncharged acts, *will continue to vary according to whether the Crown relies on the evidence of uncharged acts to establish a propensity to commit acts of the kind which are charged or merely for contextual and explicative purposes* of the kind adumbrated by Crennan and Kiefel JJ in *HML*.
>
> …
>
> Pending further guidance from the High Court, *a judge should ordinarily assume that there is a real risk of the jury using evidence of uncharged sexual acts as a sufficiently important step in their process of reasoning to guilt to warrant particular mention and, therefore, the judge should ordinarily direct the jury that they should not conclude from the evidence of uncharged acts that the accused had a sexual interest in the complainant unless they are satisfied of those acts beyond reasonable doubt.*
>
> We do not consider that the same applies to uncharged acts of a non-sexual nature.[171]

143 *Sadler* creates still more uncertainty as to how a trial judge should direct a jury in relation to uncharged acts in combination with the *Shepherd* requirements. The distinction drawn between uncharged acts in sexual cases, and such acts in non-sexual cases, is difficult to justify at the level of principle. However, it is understandable that the prejudice associated with the reception of such evidence in sexual cases warrants a stronger warning about the dangers of its misuse, and some additional protection for the accused.

144 It can be seen that the challenges posed by *Shepherd*, and the various exceptions that have developed to its application, have led to an unfortunate state of affairs. The directions typically given in such cases are inherently difficult to follow, and may be incomprehensible to lay jurors. They also lend themselves to potential error, and wasteful appeals.

145 Other jurisdictions throughout the common law world have been able to

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171 Ibid 87–9 [62]–[66] (citations omitted) (emphasis added).

develop clear and succinct directions with regard to the standard of proof to be applied in cases involving circumstantial evidence.

146 In New Zealand, for example, the prosecution is only required, as a general rule, to establish the elements of a crime beyond reasonable doubt. No other facts need be proved to that standard.[172]

147 In *Thomas,* Turner J outlined the law on this subject in the following succinct terms:

> It is of course inherent in the process of conviction by jury that the jury must be convinced as a whole, and each member must be convinced individually, beyond reasonable doubt of the *guilt of the accused*. This necessarily extends to every essential element of the crime charged: and a direction to a different effect will be a misdirection in law. The necessity for giving such a direction has its source in the *presumption of innocence*, as to the existence and effect of which a jury must be directed … And this direction must necessarily include a sufficient direction, varying from case to case, as to the kind, content, and quality of the evidence by which the presumption of innocence may be rebutted by the Crown.[173]

148 His Honour continued:

> Different members may individually be convinced beyond reasonable doubt of the guilt of the accused, by their individual acceptance of *different facts*. Circumstantial evidence has by some writers been likened to a rope composed of a number of cords, a sufficient number of which, taken together, may without the others support the burden of proof. Some jurors may find it supported by some cords, other jurors by others.
>
> This is why, in my opinion, it has not, except in the exceptional cases … been found necessary, or even proper, to direct jurors that they must collectively find proved beyond reasonable doubt the circumstantial facts which the Crown puts forward as cumulatively supporting a conclusion of guilt. While the conclusion as to guilt is the conclusion of the jury as a whole, and one of which they and each of them individually must be convinced beyond reasonable doubt, the circumstances on which any individual juror relies in being led to such a conclusion may not be the same in the case of all the jurors. Some may properly rely on circumstances which others reject.[174]

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172 *Thomas v The Queen* [1972] NZLR 34 ('*Thomas*'); *R v Puttick* (1985) 1 CRNZ 644 (CA); *R v Guo* [2009] NZCA 612.

173 [1972] NZLR 34, 41 (emphasis in original).

174 Ibid.

149 The Canadian Supreme Court has adopted a similar approach.[175] Canadian juries are generally told to consider the cumulative impact of all the evidence presented to them, and not to focus upon any individual fact or facts upon which the prosecution relies. The one exception to this is what might be termed 'a sole piece of evidence case', namely where there is but one piece of evidence upon which the entire case depends. An example would be a confession. In such a case, the jury will be told that they must be satisfied beyond reasonable doubt both that the confession was made, and that it was true.[176]

150 The position in the United States varies from state to state. In California, the standard direction in relation to circumstantial evidence has been reduced to just a few paragraphs. The Jury Instruction in that State is expressed as follows:

> Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt.
>
> Also, before you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable.[177]

151 In Victoria, the initial draft of the second tranche of legislative reform of jury directions, the *Jury Directions Amendment Bill 2013* (Vic) ('*Jury Directions Amendment Bill*'), contained two clauses designed to overcome the rule attributed to *Shepherd* that, in appropriate cases, a jury is to be directed that it must be satisfied beyond reasonable doubt of an indispensible intermediate fact. The Bill also sought to abolish the rule attributed to *Sadler,* that a jury is to be directed that it must be satisfied beyond reasonable doubt of uncharged acts that it would use as a step in the process of reasoning towards guilt, and any other rule of the common law that

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175 *R v White* [1998] 2 S.C.R 72.

176 Weinberg et al, above n 27, 138.

177 Judicial Council of California, *Criminal Jury Instructions* (2014) 52.

requires a jury to be directed that it must be satisfied beyond reasonable doubt of any matter, apart from an element of the offence or the absence of any relevant defence. There is a 'sole evidence' exception, such as is recognised in Canada, to allow, for example, for cases that turn essentially upon a single piece of evidence.[178]

152 The *Jury Directions Amendment Bill* also contains a number of provisions dealing with jury directions involving what is compendiously described as 'other misconduct evidence' (defined as coincidence evidence, tendency evidence, evidence of other discreditable acts and omissions of an accused, not directly relevant to a fact in issue, or 'context evidence'). Clause 14 of the Bill, which would have the effect of introducing a new s 31 into the *Jury Directions Act*, would reduce what is presently a vast body of complex (and all but incomprehensible) law to a short statement, couched in simple terms, of what a judge must say to a jury where evidence of this type is led. Importantly, however, whether any such direction is given is primarily dependent on whether defence counsel requests it. The Bill continues the philosophy of the *Jury Directions Act*, adjusting the balance between the responsibility that rests upon the trial judge in moulding jury directions to requiring defence counsel to consider whether particular directions are required, and to make clear to the judge that this is what the defence seeks.

153 The *Jury Directions Amendment Bill* also modifies, and simplifies, jury directions on 'unreliable evidence', including — in particular — identification evidence, delay and forensic disadvantage in sex cases, and directions on the accused not giving evidence or calling witnesses. In particular, directions based on the rule attributed to *Weissensteiner v The Queen*,[179] and applied in *Azzopardi v The Queen*,[180] as well as the rule attributed to *Jones v Dunkel*,[181] are rendered simpler, and it is to be hoped, clearer.

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178 *Jury Directions Amendment Bill* cl 11, which would have the effect of introducing new ss 19A and 19B into the *Jury Directions Act*.

179 (1993) 178 CLR 217.

180 (2001) 205 CLR 50.

181 (1959) 101 CLR 298.

154 Regrettably, the *Jury Directions Amendment Bill* was rejected, without having been debated, or even, it would seem, considered. This was because an independent member of the Legislative Assembly (who normally supported the Government) voted, on this occasion, with the opposition. He did so ostensibly to signify his dissatisfaction with the Government's failure to organise the legislative business timetable appropriately. In other words, the merits of the Bill did not enter into the equation. Ordinarily, under Victorian Parliamentary practice, a bill once rejected, cannot be re-presented in the same form for a period of 12 months. Fortunately, it now seems that the Government and opposition are working towards a solution which will enable the Bill to be presented again, before the election which is due in November 2014, and hopefully enacted this year.

Other reform options

155 There is much literature to date on possible solutions to the wayward state of jury directions in criminal trials. I have touched on some of the specific changes to problem directions already introduced by the *Jury Directions Act* and those under consideration for later tranches of the reform process. I wish to raise some other more general improvements introduced in the first tranche before considering further alternative avenues for reform.

The Jury Directions Act more broadly

156 The *Jury Directions Act*, while not a code or a comprehensive source of law on jury directions,[182] was enacted to target and consolidate those particularly problematic aspects of the law. Aside from addressing some of the more inflexibly complex directions, the Act was also developed to provide general guidance to judges on how to reduce the length of their charges, using simpler and clearer language, and doing so without being haunted by the spectre of being overturned on appeal.

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182 Department of Justice — Criminal Law Review, above n 16, 34.

157 The first of these provisions are the guiding principles articulated in s 5. That section is effectively a parliamentary recognition of the untenable state of the law, and an acknowledgement that it is for the trial judge to determine the matters in issue in the trial, the directions to give to the jury, and the content of those directions. Trial judges should avoid technical language, be clear, brief and simple, and address the jury only insofar as is necessary in order to outline for them the issues in the trial.

158 In that vein, the trial judge need not use any particular form of words in his or her directions. The section also highlights counsel's responsibility to assist the trial judge in giving appropriate directions.

159 The second general mechanism facilitating simplification of jury directions is the request provisions under pt 3 of the *Jury Directions Act*.[183] Section 10 requires defence counsel, following the close of evidence and before the prosecutor's closing address, to inform the trial judge whether the following matters are or are not in issue:

(a) each element of the offence charged;

(b) any defence;

(c) any alternative offence, including an element of any alternative offence;

(d) any alternative basis of complicity in the offence charged and any alternative offence.

160 Further, s 11 places the onus squarely on counsel to request the trial judge to give directions, or not, relating to the matters in issue and the evidence in the trial relevant to the matters in issue. If a matter is not in issue (as indicated by counsel under s 10) and a direction has not been requested under s 11, the trial judge is not obliged to give a direction.[184]

161 Not only do these provisions distribute the responsibility between counsel

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183 This part does not apply to those directions termed 'general directions' which relate to the conduct of trials generally. These include directions about the roles of the trial judge, the jury and counsel, trial procedure, and the burden and standard of proof, to name but a few.

184 *Jury Directions Act* s 13.

and the trial judge for providing the jury with adequate directions, they ease the pressure upon trial judges to give directions out of an abundance of caution.

162 Further, trial judges have a discretion not to give a requested direction where 'there are good reasons for not doing so'.[185] They must, however, give a direction (contrary to counsel's request not to do so, or where counsel has failed to make a request that the direction be given) where 'it is necessary to avoid a substantial miscarriage of justice'.[186]

163 Part 3 also expressly modifies[187] what was known at common law as the rule in *Pemble*.[188] That case, much misunderstood, has been interpreted as requiring a trial judge to direct the jury about defences, and alternative verdicts not raised or relied upon by the defence during the trial, but which are thought to be reasonably open on the evidence.

164 The duty to direct a jury regarding matters of this kind was said to arise out of a need to ensure the accused received a fair trial. Barwick CJ articulated the principle as follows:

> Whatever course counsel may see fit to take, no doubt bona fide but for tactical reasons in what he considers the best interest of his client, the trial judge must be astute to secure for the accused a fair trial according to law. This involves, in my opinion, an adequate direction both as to the law and the possible use of the relevant facts upon any matter upon which the jury could in the circumstances of the case upon the material before them find or base a verdict in whole or in part.[189]

165 *Pemble* has been the source of a great deal of difficulty over the years. In truth,

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185 Ibid s 14.

186 Ibid s 15. That expression, which is taken from the language used in s 276 of the *Criminal Procedure Act 2009* (Vic), may be problematic. It seems to require trial judges to predict the outcome of an appeal in the event that a challenge is mounted to the decision not to give a particular direction. Clause 10 of the *Jury Directions Amendment Bill* proposes to amend that formulation by substituting for it a new test. In effect, the trial judge must give the jury a direction if he or she considers that there are 'substantial and compelling reasons' for doing so even though the direction has not been requested under s 11.

187 *Jury Directions Act* s 16.

188 (1971) 124 CLR 107.

189 Ibid 117–18.

the case was a simple one. Counsel for the accused chose, for tactical reasons, not to press for an acquittal on a charge of murder. Rather, he opted to press for manslaughter which he thought had a greater chance of succeeding. A perfectly viable defence of accident was never left to the jury. Not surprisingly, that was held to be unacceptable.

166 The obligation to leave an alternative count of manslaughter to a jury, on a charge of murder, has received much judicial consideration. In *Mraz v The Queen*,[190] the High Court referred to its earlier decision in *Ross v The King*,[191] in which Higgins J said the following:

> I thoroughly concur with the view put by the Supreme Court that "the absence of any express direction as to manslaughter was an omission, as far as it went, entirely in the prisoner's favour". As those who are familiar with murder trials well know, if the only alternatives before a jury are acquittal and sentence of death, there is a strong tendency to shrink from pronouncing a verdict which leads to death.[192]

167 The Court in *Mraz,* in ultimately finding that it was erroneous to leave the alternative charge of manslaughter to the jury in the circumstances of that case, was of the view that despite the abolition of the death penalty (therefore diminishing the impetus to run an 'all or nothing' case):

> [I]t is clear that the appellant was entitled to have the issues decided upon the graver charge and, to us, it seems quite wrong to attempt to justify the verdict of manslaughter, returned in the circumstances of this case, by the observation that the jury, upon an issue of manslaughter which they were invited to consider, must have reached conclusions on issues of fact which would have required them, if properly instructed, to have returned a verdict of murder. It is, of course, quite possible to say that the same conclusions on these issues of fact must have led the jury to find the appellant guilty of murder if they had been properly instructed. But it would be ignoring the realities of the matter to assume that if they had been required to consider whether they should convict the appellant of murder or acquit him they would have reached the same conclusions.[193]

168 Almost half a century later, the High Court again considered the issues raised

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190 (1955) 93 CLR 493, 507 (Williams, Webb and Taylor JJ) ('*Mraz*').

191 (1922) 30 CLR 246 ('*Ross*').

192 Ibid 273.

193 (1955) 93 CLR 493, 507–8 (Williams, Webb and Taylor JJ).

by *Mraz* and *Ross* in *Gilbert v The Queen*.[194] It noted that where the majority in *Mraz* referred to:

> "ignoring the realities of the matter", one of the contemporary realities to which they were referring was the death penalty. That was why, tactically, defence counsel might prefer to conduct a homicide case on a "murder-or-nothing" basis.[195]

169 While the death penalty had long been abolished, there were, in the Court's opinion, other, 'perhaps equally influential, realities' at play.[196] The Court went on to say:

> This is an age of concern for the victims of violent crime, and their relatives. To adapt the words of Fullagar J [in *Mraz*], a jury may hesitate to acquit, and may be glad to take a middle course which is offered to them.[197]

170 The High Court in *Gilbert* reversed the position taken by the Court below, which endorsed the trial judge's decision not to leave manslaughter to the jury, and found that a 'rational jury, properly instructed, could have failed to reach the state of satisfaction necessary for a conviction of murder'.[198] Accordingly, it was said that:

> The question would be whether they had a doubt about which of two possibilities reflected the appellant's state of mind. To say they could not rationally have entertained any doubt about that appears to us to be going too far.[199]

171 The High Court again returned to the issue in *Gillard v The Queen*.[200] There, Kirby J highlighted the need for great care on the part of the trial judge to avoid depriving an accused of a verdict of acquittal by posing the lesser alternative verdict of manslaughter.[201] His Honour ultimately held, however, that:

> If the jury were deprived of the opportunity to consider verdicts of manslaughter, potentially more favourable to the appellant than those that

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194 (2000) 201 CLR 414 ('*Gilbert*').

195 Ibid 421 (Gleeson CJ and Gummow J with whom Callinan J ultimately agreed).

196 Ibid.

197 Ibid.

198 Ibid 422.

199 Ibid 422–3.

200 (2003) 219 CLR 1 ('*Gillard*').

201 Ibid 30 [83].

> they returned, the deprivation of that chance undermines the integrity of the trial. At least it does so in this case where the convictions entered are of murder and carry the heaviest penalty known to the law.[202]

172 Hayne J took a similar view. According to his Honour, *Gilbert* stood for the proposition that appellate courts must consider at least the possibility that the jury, although properly instructed, did not apply those directions given to them, but instead chose to return a guilty verdict (rather than acquit), 'despite not being satisfied to the requisite standard of all the matters which the trial judge's directions required them to consider'.[203]

173 The authorities were most recently discussed in *James,* where an appellant argued that the principles in *Gilbert* and *Gillard* should be extended to the trial of all offences on the basis of Barwick CJ's frequently cited passage in *Pemble.*[204] The majority held that the principles expounded in *Gilbert* and *Gillard* were concerned with the consequences of the trial judge's failure to leave manslaughter to the jury in circumstances where such a lesser alternative was open.[205] This was based on an historical recognition of the gravity of a murder conviction. Those cases did not, in the Court's view:

> state any wider principle respecting the obligation to leave alternative verdicts for included offences (including alternative verdicts for offences other than manslaughter on an indictment of murder) or the consequences of the failure to do so.[206]

174 It is therefore well established, at least since *Pemble,* that where a person is on trial for murder, and the evidence is capable of supporting the lesser alternative charge of manslaughter, the trial judge must put manslaughter to the jury.[207] That is so even where the accused has chosen, for tactical purposes, to oppose such a direction. The case does not stand for any wider rule to the effect that every viable

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202 Ibid 33 [96] (citations omitted).

203 Ibid 35 [107].

204 (2014) 306 ALR 1, 8 [24].

205 Ibid [23] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

206 Ibid (citations omitted).

207 *Lane* [2013] NSWCCA 317, [39].

alternative verdict be left to the jury in every case.[208]

175 Aside from the issue of leaving lesser alternative verdicts to the jury, *Pemble* has also given rise to broader concerns. The decision has undoubtedly contributed significantly to the length of many trials, as judges feel constrained to direct juries on matters that are only barely raised on the facts, and represent a complete departure from the way in which the case has been conducted. Numerous appeals have been run on the basis that the trial judge failed to leave a particular defence, or directed as to some specious alternative verdict. All too often, such appeals have succeeded.

176 I can fully understand why counsel would wish to avoid running inconsistent defences. If the accused claims not to have been present at the scene of a crime, it is difficult to have, as an alternative defence, that the requisite mental state has not been established. Of course, a trial judge can be asked by counsel to put that alternative defence, even though it does not feature in his or her closing address. And a trial judge will normally do so, even under the new approach taken by the *Jury Directions Act*. However, that will be because the direction is sought. It will not be because the judge takes the view that, spurious as the alternative defence may be, *Pemble* requires that it be put, though not requested.

177 A final note on *Pemble.* I endeavoured to illustrate just how complex complicity directions can be when I earlier discussed the case of *Jones.* One of the reasons why it was so difficult to direct the jury in that case was because of the obligation in *Pemble* to give jury directions about 'each permutation' of the law of complicity as it related to each accused.[209] While a transformation of the law of complicity is still under consideration, the modification of the rule in *Pemble* has at least gone some of the way towards simplifying the delivery of jury directions in that area.

178 The remaining general mechanism to which I will draw your attention is to be

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208 *James* (2014) 306 ALR 1.

209 Department of Justice — Criminal Law Review, above n 16, 44.

found in pt 4 of the *Jury Directions Act*.

179 The obligation on trial judges to summarise the law and evidence in a trial has become one of the most significant contributors to the length and complexity of jury directions in Victoria. As mentioned earlier in *Stevens v The Queen,* while a judge's summing-up is not meant to 'take the form of an essay on the law … with points given for comprehensiveness',[210] this is precisely the form that the summing-up has taken in many trials.

180 Since the introduction of pt 4 of the *Jury Directions Act*, trial judges are now required to explain, only so much of the law as is necessary for the jury to determine the issues in the trial.[211] The judge need not give a summary of the evidence, as would have traditionally been given at common law, but must identify only 'so much of the evidence as he or she considers necessary to assist the jury to determine the issues in the trial'.[212] In identifying the evidence necessary to assist the jury, it is upon the judge to determine the extent of this exercise, having regard to the facts in issue and the complexity of those facts, the length of the trial, the complexity of the evidence, the parties' submissions and any reference to the way in which each side put its case in relation to the issues in trial.[213]

181 Moreover, judges no longer need to summarise the parties' closing addresses, but need only refer to the way in which either side put their cases in relation to the issues at trial.[214] In summing-up, judges may also give integrated directions in the form of factual questions addressing matters that the jury must consider or be satisfied of in order to reach a verdict, including the elements of the offence and any relevant defences.[215] Finally, judges are able to use a combination of oral and written

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210 (2005) 222 ALR 40, 45 [18] (Gleeson CJ and Heydon JJ).

211 *Jury Directions Act* s 17(a).

212 Ibid s 17(c).

213 Ibid s 18.

214 Ibid s 17(b)

215 Ibid s 19.

components and are not restricted by means of communication with the jury.[216]

182 These provisions are, in my opinion, some of the most significant reforms brought about by the Act. They will undoubtedly reduce the length of criminal trials in Victoria while demystifying the process of summing-up the case for the jury.

Simplification of the substantive law

183 While the *Jury Directions Act* has already had a positive effect on the criminal trial process in Victoria, other reforms are needed to avoid falling back into the sorry state that we had reached in recent years. The substantive content of the criminal law invariably influences the complexity of jury directions.

184 One area that makes this perfectly clear is the law, as it stands, particularly in Victoria, on sexual offences. Despite comprehensive reform over the past decade,[217] the relevant provisions of the *Crimes Act* dealing with rape remain unduly complicated and in urgent need of simplification. However, this paper is not the place for a detailed analysis of all that is wrong with the current law on this subject.

Establishment of a permanent jury directions monitoring body

185 Judges rely heavily on bench notes and model charges, such as those contained within the *Charge Book,* to provide appropriate directions to juries. However, pattern directions of this kind should be seen as guides, and not as statutory formulations. There are examples of cases in which it has been held that the recommended direction, contained in the *Charge Book*, was itself erroneous.[218]

186 This position must change. We cannot have judges relying on suggested charges that are deemed to be incorrect. In Michigan, for example, Model Criminal

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216 Ibid s 17(d).

217 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004); *Crimes (Sexual Offences) Act 2006* (Vic); *Crimes (Sexual Offences) (Further Amendments) Act 2006* (Vic); *Crimes Amendment (Rape) Act 2007* (Vic).

218 See, eg, *Gordon v The Queen* [2010] VSCA 207.

Jury Instructions are developed by the Michigan State Bar Criminal Jury Instruction Committee and are presently in use for criminal trials. The Committee is appointed by an Administrative Order of the Michigan Supreme Court and is composed of attorneys and judges 'whose duty it [is] to ensure that the criminal jury instructions accurately and understandably inform jurors about the legal process in which they will participate and the law that they are to apply'.[219]

187 It is the responsibility of the committee to provide trial courts with instructions that are concise, understandable and accurate.[220] Of course, it is recognised that jury instructions may require variance from those published by the Committee, particularly where the law has changed and the Committee is still drafting new instructions.[221] Similarly, the evidence in a particular case may require some variation from the standard instructions.[222]

188 The position in Victoria is markedly different. Since 2002, the Judicial College of Victoria ('JCV') has been providing judicial education and professional development to judicial officers. It was created under the *Judicial College of Victoria Act 2001* (Vic). Under that Act, the JCV is given a broad power to assist in the professional development of judicial officers and to produce relevant publications, however, no mention is made of jury directions.

189 While the importance of the *Charge Book* (which is published by the JCV) was affirmed by the Victorian Court of Appeal in *R v Said,*[223] the authority of the publication remains uncertain, with little recourse for judges who rely on an erroneous model direction. This position can be contrasted with that of California where Rule 2.1050 of the 2014 California Rules of Court states that:

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219 Michigan Judiciary, *Model Criminal Jury Instructions* (3 January 2014) Michigan One Court of Justice Website <http://courts.mi.gov/courts/michigansupremecourt/criminal-jury-instructions/pages/default.aspx>.

220 Ibid.

221 Ibid.

222 Ibid.

223 [2009] VSCA 244.

> The California jury instructions approved by the Judicial Council are the official instructions for use in the state of California. The goal of these instructions is to improve the quality of jury decision making by providing standardized instructions that accurately state the law in a way that is understandable to the average juror.

190 While Rule 2.1050 contains a caveat to the effect that 'the articulation and interpretation of California law … remains within the purview of the Legislature and the courts of review', that State has nonetheless taken an authoritative step towards entrenching the binding authority of those model directions. I believe we would do well to adopt that approach in Victoria.

Conclusion

191 Not so long ago I delivered a lecture, which was ultimately published as a law review article, in which I delivered what I described as a 'mildly vituperative critique' of the criminal law.[224] This paper on jury directions may aptly be described as an addendum to that paper. My sentiments concerning the state of the criminal law in Victoria remain the same.

192 Reforming the way we deal with jury directions in Victoria, is, in my opinion, one of the most important challenges to our criminal justice system. It is unacceptable for us to continue to direct juries in terms that we know make no sense at all. It is clear how we arrived at this position. A number of variables ranging from poorly drafted and over-prescriptive legislation, well-meaning but misconceived appellate judgments, and a lack of relevant experience on the part of some key players has led to this unfortunate state of affairs. The question now is how do we remedy the situation?

193 In Victoria we have seen some positive reforms leading, I think, to a much needed overhaul of some of the most troubling jury directions. If the Legislature can get its act together, there may be more worthwhile reform to come.

194 As I have attempted to make clear in this paper, enacting a statute that

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224 Weinberg, above n 14.

purports to codify (and simplify) the law on jury directions is not of itself a guaranteed solution to the very many problems that attach to jury trials at present. The substantive law relating to criminal offences is probably just as much to blame for the undue complexity that plagues many criminal trials.

195 Going forward, in relation to jury directions, the task is one of effective communication. Will what is said in a charge assist or hinder jury comprehension? Can jury directions be made clearer and more succinct?

196 It must be remembered that 'bean counters', by their very nature, always explore new ways to find savings. All too often, they set their eyes on soft targets, and trial by jury is seen by some in that light.

197 Even those who really should know better sometimes rail at trial by jury as anachronistic, and a luxury that we can no longer afford. It starts with narrowing the field for jury trials so that, for example, highly complex fraud cases are said to be better dealt with by judge alone. It moves along to trial by judge alone, at the option of the accused. Inexorably, the very institution of the jury is marginalised, and ultimately seen as dispensable.

198 If we do not take steps, now, to address some of the difficulties associated with lengthy and confusing jury directions, trial by jury for serious criminal matters will be at risk, and may, within a generation or so, become nothing more than a distant memory.

199 Many years ago, an ill-tempered County Court judge in Victoria asked defence counsel, appearing on a plea, why the judge should not order that the accused be flogged. Counsel paused for a moment, and replied, somewhat courageously, 'because that would be a particularly stupid thing to do'. The same can be said of the suggestion, increasingly floated, that trial by jury, being too expensive, should be wound back or even abolished. As one who has conducted several judge alone trials, I can say, firmly, that 'that would be a particularly stupid thing to do'.