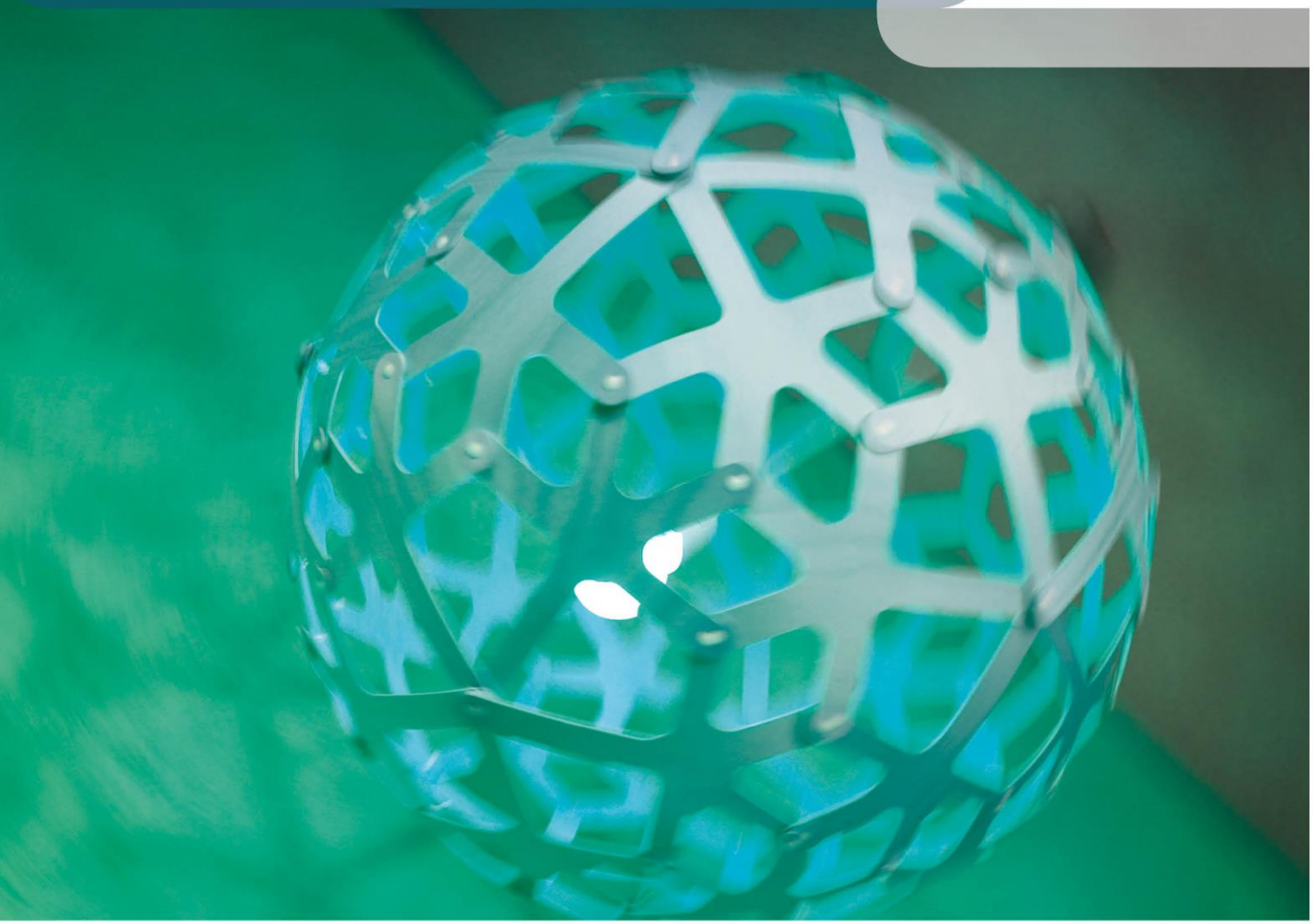
Jury Directions: A Jury-Centric Approach Part 2

Criminal Law Review



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From Special Counsel, Criminal Law Review

Lord Justice Moses described the traditional approach to jury directions as 'a system designed to ensure, in any but the simplest of cases, that the path we require [the jury] to follow should be as obscure, as tortuous and as arduous as could possibly be devised.'[1]

The aim of jury directions is to ensure a fair trial with the jury verdict representing the application of the law to the facts as found by the jury. However, after reviewing many empirical studies measuring jury comprehension, Ogloff and Rose concluded that 'jurors appear largely incapable of understanding judicial instructions as they are traditionally delivered by the judge...The overwhelming weight of the evidence is that [jury] instructions are not understood and therefore cannot be helpful.'[2]

With the jury directions reform project now in its seventh year, Victoria has recognised and addressed many of the problems with traditional jury directions. The *Jury Directions Act 2013* was the first step in the reform process. The centrepiece of that Act, the jury directions request provisions in Part 3, required the prosecution and the defence to be actively involved in requesting the directions that should be given to the jury.

The *Jury Directions Act 2015* (the *Jury Directions Act*) restructured the legislation and made a number of refinements to ensure that Part 3 operates as effectively as possible. Early reports indicate that this approach has encouraged shorter, simpler jury directions that focus on the issues that the jury must determine. The *Jury Directions Act* also reformed specific problematic evidentiary jury directions, including identification evidence, delay and forensic disadvantage, and unreliable evidence, to provide a template for simple and short directions in these areas of law.

The *Crimes Amendment (Sexual Offences and Other Matters) Act 2014*, the *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* and the *Crimes Amendment (Sexual Offences) Act 2016* improved jury directions in rape and sexual assault trials, and trials involving family violence.

This report discusses the next stage of reforms: the Jury Directions and Other Acts Amendment Bill 2017 (the Bill). The Bill adds new provisions to the *Jury Directions Act* to address further problematic evidentiary directions, including directions on previous representations, interest in the outcome of the trial, motive to lie and differences in the complainant's account. These amendments will assist trial judges to explain complex areas of law to the jury in an accurate and comprehensible way. The Bill also confirms the application of the *Jury Directions Act* to certain criminal proceedings without juries.

This process has greatly benefited from the expert knowledge and contributions of the Jury Directions Advisory Group, which comprises high-level representatives from the Court of Appeal, the Supreme Court, the County Court, the Office of Public Prosecutions, Victoria Legal Aid, the Victorian Bar and the Judicial College of Victoria, as well as academics specialising in jury research. The Advisory Group has discussed and debated each jury direction provision in the proposed Bill at considerable length.

This report is also the product of the substantial contribution, commitment and sustained effort of members of Criminal Law Review over several years, in particular Michèle Briggs, Julia Rendell and Philippa Ross.

I would like to thank everyone involved in this project. Their commitment to improving Victoria's jury directions law has been invaluable in the development of the Bill and this report.

Greg Byrne PSM

Special Counsel

[1] Lord Justice Moses, 'Summing Down The Summing-Up' (Speech delivered at the Annual Law Reform Lecture, London, 23 November 2010).
[2] 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.

The purpose of the report

This report is designed to guide the interpretation and application of the proposed Jury Directions and Other Acts Amendment Bill 2017 (if enacted) by providing detailed information on how the reforms were developed, and their intent. It is intended as both an explanation of the reasons for the reforms, which may assist in the interpretation of the provisions, and as an informational resource following the commencement of the Bill, which is designed to assist courts and practitioners to be ready for the changes when they commence. Accordingly, for convenience, in this report, a reference to the 'Bill' is a reference to the Jury Directions and Other Acts Amendment Bill 2017.

Over the past several years, the Department of Justice & Regulation (formerly the Department of Justice) has conducted a detailed review of key aspects of the law of jury directions in Victoria. The first stage of legislative reform was the *Jury Directions Act 2013,* which created a new framework for jury directions and addressed two problematic jury directions. In 2014, further reforms were contained in the *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* and the *Crimes Amendment (Abolition of Defensive Homicide) Act 2014*. In 2015, the *Jury Directions Act 2015* consolidated the existing jury directions legislation, with some refinements, and addressed a number of additional jury directions.

The department has produced reports to coincide with each major stage of reforms. For the 2015 reforms, the department prepared *Jury Directions: A Jury-Centric Approach.* This report consolidated much of the information contained in the department's previous two reports, but reorganised and updated that information.

This report discusses the proposed 2017 reforms. Like the previous reports, the report does not contain detailed analyses of the history of the development of jury directions in Victoria or Australia, nor does it contain detailed expositions of the many cases relevant to particular jury directions. In general, a policy discussion of the issues addressed in this report does not turn upon fine distinctions and analyses of the application of existing laws. Many of the issues considered are more fundamental, and consider the underlying reasons for, and approach to, jury directions.

Contents

Abbreviations

Advisory Group	Jury Directions Advisory Group
Bill	Jury Directions and Other Acts Amendment Bill 2017
Charge Book	Judicial College of Victoria, *Victorian Criminal Charge Book*, www.judicialcollege.vic.edu.au
Criminal Procedure Act	*Criminal Procedure Act 2009*
department	The Department of Justice & Regulation (formerly the Department of Justice)
Evidence (Miscellaneous Provisions) Act	*Evidence (Miscellaneous Provisions) Act 1958*
Evidence Act	*Evidence Act 2008*
JCV	Judicial College of Victoria
Juries Act	*Juries Act 2000*
Jury Directions: A New Approach	Criminal Law Review, Department of Justice, *Jury Directions: A New Approach* (January 2013) www.justice.vic.gov.au/home
Jury Directions: The Next Step	Criminal Law Review, Department of Justice, *Jury Directions: The Next Step* (December 2013) www.justice.vic.gov.au/home
Jury Directions: A Jury-Centric Approach	Criminal Law Review, Department of Justice and Regulation, *Jury Directions: A Jury-Centric Approach* (March 2015) www.justice.vic.gov.au/home
Jury Directions Act	*Jury Directions Act 2015*
NSWLRC	New South Wales Law Reform Commission
QLRC	Queensland Law Reform Commission
QLRC Report	Queensland Law Reform Commission, *A Review of Jury Directions*, Report No 66 (2009)
Weinberg Report	Justice Weinberg et al, *Simplification of Jury Directions Project: A Report to the Jury Directions Advisory Group* (August 2012) http://www.supremecourt.vic.gov.au
VLRC	Victorian Law Reform Commission
VLRC Consultation Paper	Victorian Law Reform Commission, *Jury Directions*, Consultation Paper 6 (2008)
VLRC Report	Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009)

Executive Summary

Introduction

The Bill will insert new provisions into the *Jury Directions Act 2015* to improve and simplify the directions that are given in a number of areas, including previous representation evidence and majority verdict directions. The Bill will also make related amendments to other Acts, including the *Criminal Procedure Act 2009* and the *Juries Act 2000*, as well as applying aspects of the *Jury Directions Act* to criminal proceedings without a jury.

Application of the *Jury Directions Act* to criminal proceedings without juries

The *Jury Directions Act* currently applies to criminal trials. It aims to guide the way that jurors reason about certain evidence by improving and simplifying the directions that are given on such evidence (and prohibiting certain statements and suggestions from the trial judge and counsel).

For consistency, magistrates and judges hearing criminal matters without a jury should act and reason in accordance with the Act where possible. Accordingly, the Bill will apply relevant aspects of the Act to specified criminal proceedings without juries. The intention is to ensure, for example, that magistrates hearing a summary matter direct themselves in a manner consistent with how a jury would be directed under the Act.

Previous representations

Directions on previous representation evidence generally focus on how the evidence should be used and where relevant, its potential unreliability. Directions on use are given under the *Evidence Act 2008* and are working well. Directions on unreliable evidence are already governed by the *Jury Directions Act.*

However, in addition to these directions, the common law may require trial judges to give additional directions on previous representation evidence. These directions are often unhelpful and unnecessary. For example, jurors do not need to be told that repeating a statement does not make it true. Accordingly, the Bill will provide that these directions are not required. This will reassure judges that they do not need to give the directions in order to 'appeal proof' their directions.

Doubts concerning the truthfulness or reliability of a complainant's evidence

The *Markuleski* direction requires trial judges to direct juries, in word against word cases, that if they have a reasonable doubt concerning the truthfulness or reliability of the complainant's evidence in relation to one or more charges, that must be taken into account in assessing the truthfulness or reliability of the complainant's evidence generally.

Courts and commentators criticise the direction for conflicting with the separate consideration direction and being unfairly advantageous to the accused, among other reasons. While the direction is infrequently given in Victoria, there are good policy reasons for ensuring that it is not given at all. Accordingly, the Bill will abolish the *Markuleski* direction.

The accused giving evidence and interest in the outcome

Common law directions on an accused who gives evidence include directions that are confusing, inconsistent or potentially inaccurate (e.g., the jury should treat the accused's evidence in the same way as other witnesses, but that the accused is probably under more stress than any other witness). The common law also generally prohibits trial judges from directing juries that a general interest in the outcome of the trial is a factor to consider when assessing witnesses, including the accused. However,

the scope of this prohibition is uncertain, leading to appeals and retrials, and leaving jurors with little or no assistance on how to assess interest in the outcome of the trial.

The Bill will simplify what can and cannot be said about these two issues, by prohibiting certain statements and directions, and specifying the content of permissible directions.

Whether a prosecution witness has a motive to lie

If the issue of whether a prosecution witness (including the alleged victim) has a motive to lie is raised, trial judges must currently give lengthy directions that are unclear in scope, invite the jury to speculate and may reinforce outdated notions that victims, particularly of sexual offences, frequently lie. Different directions are required depending on whether the issue was raised by the prosecution (or a prosecution witness) or the accused.

To simplify this area, and to be fair to both the accused and the victim, the Bill will require directions on motive to lie to focus on the onus of proof and to remind jurors that the accused does not have to prove a motive to lie. The Bill will also provide that no other directions on this issue are to be given. This will leave the question of credibility of the witness to the jury to assess, as is appropriate, and abolish a particularly problematic common law direction, the *Palmer* direction.

Differences in a complainant's account

It is a common misconception that a 'real' victim of a sexual offence will describe the offending consistently each time. However, research shows that gaps and inconsistencies (both within and between accounts) are common. For example, a complainant may describe an offence differently because of how they retain and recall memories, the context of the disclosure, stress or embarrassment.

Defence counsel often highlight differences in a complainant's account in court. To encourage jurors to approach this aspect of the complainant's evidence neutrally (i.e. without unwarranted assumptions) the Bill will require trial judges to give a corrective direction in appropriate trials. The proposed content of the direction reflects the research in this area and includes that differences in accounts are common, and that both truthful and untruthful accounts may contain differences. Similar to the directions on delay and credibility in the *Jury Directions Act*, the direction will be in general terms. Defence counsel will still be able to argue how differences in account do, or may, affect the credibility of the particular complainant.

Perseverance and majority verdicts

If a jury is having difficulty reaching a unanimous verdict, trial judges may currently give a direction encouraging the jury to persevere to reach a unanimous verdict (a perseverance direction) at the same time as explaining that the jury may sometimes return a majority verdict. This is unhelpful and confusing for jurors.

The Bill will avoid the perseverance direction undermining the majority verdict direction by providing that the trial judge must not direct the jury to persevere to reach a unanimous verdict at the same time as (or immediately before or immediately after) the trial judge gives a majority verdict direction.

The Bill will also amend the *Juries Act 2000* to allow trial judges to accept a majority verdict if the jury has deliberated for a period of time that the court thinks is reasonable, having regard to the nature and complexity of the trial. This will replace the existing arbitrary rule that requires six hours of deliberation.

Jury deliberations

Trial judges can only direct the jury as to the sequence in which verdicts must be delivered in court. They are prohibited from directing the jury to consider offences or other specified matters, such as

elements of an offence or defences, in a particular order. This distinction is arbitrary and limits the assistance juries can receive to structure their deliberations.

The Bill will allow trial judges to direct the jury on the order in which to consider the offences, elements of an offence, defences, matters in issue, or alternative bases of complicity. This will provide clear guidance to juries as to how to approach their deliberations in an effective way in appropriate cases.

Alternative evidence directions

Under the *Criminal Procedure Act* and the *Evidence (Miscellaneous Provisions) Act 1958*, trial judges must give mandatory directions to juries if evidence is given by alternative means (e.g., by CCTV). For example, jurors are warned not to draw any adverse inference to the accused, or give the witness's evidence any greater or lesser weight because of the making of the arrangements.

Alternative arrangements are now common, making mandatory directions unnecessary. In addition, the language of the directions is problematic (particularly the reference to 'adverse inferences') and research shows that limiting directions such as these may backfire. Accordingly, the Bill will repeal these provisions, so that they no longer need to be given in each trial.

Exceptions to the hearsay rule

Section 66 of the *Evidence Act 2008* and section 377 of the *Criminal Procedure Act 2009* both contain exceptions to the hearsay rule that may apply when the maker of a representation is available to give evidence. Section 377 applies only to certain child complainants in sexual offence proceedings who are under 18 years old when the proceedings commence, while section 66 applies more broadly to criminal trials where the fact asserted in the representation was 'fresh in the memory' of the person when they made the representation.

It is undesirable to have provisions in different Acts that overlap in some respects. It is more appropriate for the exception in section 377 to be moved to the *Evidence Act*, alongside the hearsay rule and other exceptions to that rule. Accordingly, the Bill will integrate section 377 into section 66 and broaden the exception so that it applies in any criminal proceeding if the person made the representation before turning 18 and was a victim in the proceeding. This will allow more evidence of child victims to be admitted, reflecting that often a child's initial statement about an offence will be the best evidence of contested facts.

Jury Guide

Research shows that jurors would like more written and visual aids during trials. The Jury Directions Advisory Group has developed a 'Jury Guide', a general jury guide which is a short document, specific to criminal trials, that includes both practical and legal information. The Bill will give legislative support to a general jury guide.

The Jury Guide, which is currently being trialled in the County and Supreme Courts, contains written preliminary directions to reinforce important information on criminal trials and complement the oral directions given by trial judges at the start of trials. The Jury Guide also provides practical guidance to jurors on how to conduct their deliberations.

1 Review of the law on jury directions

1.1 Background to this review

In recent years, the issue of jury directions in criminal trials has been the subject of considerable research and commentary in Australia and relevant overseas jurisdictions (in particular, New Zealand, Canada and the United Kingdom).

Both the VLRC and the QLRC released reports on jury directions in 2009.[3] The NSWLRC released its report on jury directions in 2012. In addition to academic commentary and reviews by law reform bodies, the judiciary expressed increasing concern about the law on jury directions, and the effect that the law has on juries, trials and the criminal justice system generally.[4]

To reform the law in this area, the department is undertaking an extensive review of jury directions. The first stage of reforms resulted in the enactment of the *Jury Directions Act 2013*, which commenced on 1 July 2013. That Act contained a new framework for determining which directions are given in a criminal trial, clarified the obligations of trial judges to sum up a case and encouraged more effective ways of communicating with juries. The Act also addressed jury directions on post-offence conduct and the meaning of beyond reasonable doubt. The department's January 2013 report, *Jury Directions: A New Approach*, explains the background and intent of the reforms contained in that Act.

Further proposed reforms, addressing a number of evidentiary jury directions that the VLRC or stakeholders identified as requiring reform, were contained in the Jury Directions Amendment Bill 2014 (the 2014 Bill). The department's December 2013 online report, *Jury Directions: The Next Step*, explained the background and intent of those reforms.

Amendments to the *Jury Directions Act 2013* to reform jury directions on family violence, and rape and sexual assault, were enacted by the *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (the *Defensive Homicide Act*) and the *Crimes Amendment (Sexual Offences and Other Matters) Act 2014*, respectively. The *Defensive Homicide Act* also contained reforms to the substantive law on complicity, which will facilitate simpler, more helpful jury directions in that area of law.

In 2015, a new principal Act was created, the *Jury Directions Act 2015*. This Act consolidated the existing jury directions legislation, with some refinements, with the amendments contained in the 2014 Bill.

The reforms to complicity, and three other topics covered by the 2014 and 2015 Bills, were examined in the 2012 *Simplification of Jury Directions Project* report (the Weinberg Report). The Weinberg Report was produced by a team of staff from the department and the JCV, and led by the Honourable Justice Weinberg of the Court of Appeal. The Weinberg Report is available at www.supremecourt.vic.gov.au and contains a comprehensive discussion and examination of these topics. The department's paper on the complicity reforms was released online in October 2014, and these topics were also discussed in *Jury Directions: A Jury-Centric Approach*.

1.2 Scope of this report

This report relates to the proposed Jury Directions and Other Acts Amendment Bill 2017. The Bill will add new provisions to the *Jury Directions Act* to address further problematic jury directions, and make

[3] Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009); Queensland Law Reform Commission, *A Review of Jury Directions*, Report No 66 (2009).
[4] See, e.g., *Wilson v The Queen* [2011] VSCA 328 [2]. See also, Chief Justice Marilyn Warren, 'Making it Easier for Juries to be the Deciders of Fact' (Paper presented at the AIJA Criminal Justice in Australia and New Zealand — Issues and Challenges for Judicial Administration, Sydney, 8 September 2011) 1.

related amendments to other Acts. As with the previous reports, this report is limited to the major jury directions provisions of the Bill. For example, it does not discuss the jury empanelment provisions in the Bill or consequential amendments.

This report does not replicate the general information contained in the department's previous reports. For example, Part 1 of *Jury Directions: A Jury-Centric Approach* includes sections on the VLRC Report and the right to a fair trial, and Part 2 of that report discusses problems with jury directions. Those issues and considerations continue to inform the jury directions reform process, but we have chosen not to replicate that discussion in this report.

1.3 Objectives of this review

As referred to above, this review was prompted by significant problems with jury directions in Victorian criminal trials. Part 2 of *Jury Directions: A New Approach* discussed these problems, which include the number and complexity of directions that trial judges are required to give, as well as their length, relevance and comprehensibility to jurors. That Part was updated and included as Part 2 in *Jury Directions: A Jury-Centric Approach*.

As those reports discussed, these problems led to errors in jury directions, which resulted in appeals and retrials. Errors identified on appeal focused on what trial judges said to jurors, rather than on what jurors understood. Research in a number of jurisdictions indicates that jurors do not understand many directions as they are traditionally given,[5] especially if they are long and complex.

The department's review of jury directions aims to:

- reduce errors in jury directions
- make the issues that juries must determine clearer
- improve the way in which information is provided to juries
- reduce delay by shortening jury directions, and
- reduce the number of retrials, which will reduce stress and trauma to victims of crime.

1.4 Approach to this review

This review has been conducted in consultation with an expert advisory group. The Advisory Group was established in 2010, and first met in May 2010 (see Appendix 1 for a list of current members).

The department prepared consultation papers for the Advisory Group on the reforms discussed in this report. The papers examine the current law in Victoria and its problems, as well as laws in other relevant jurisdictions. The papers also make recommendations for reform.

The department continues to prepare papers for the Advisory Group. However, waiting until all these topics have been considered would delay the implementation of important improvements to the law. Accordingly, it is preferable that the Bill be introduced as soon as it is practicable to do so. A subsequent Bill could then cover the other topics being considered.

[5] Ogloff and Rose, above n 2.

2 Introduction to the Bill

The Bill will:

- apply aspects of the *Jury Directions Act* to magistrates and judges, including appellate judges, hearing criminal matters without a jury
- provide that certain directions on previous representation evidence are no longer required
- abolish a problematic direction on assessment of the truthfulness and reliability of complainants' evidence (the *Markuleski* direction)
- improve evidential directions to be given on:
  - evidence of the accused and interest in the outcome of the trial
  - motive to lie, and
  - differences in a complainant's account
- improve the law relating to perseverance and majority verdict directions
- allow trial judges to direct juries on the order in which to consider the offences charged, the elements of an offence or alternative offence, and any defences or relevant issues in dispute
- support the use of a general jury guide
- abolish mandatory directions on the giving of evidence by alternative means
- consolidate and improve the hearsay exceptions in relation to certain previous representation evidence, and
- give trial judges greater discretion to decide when to accept a majority verdict in appropriate cases.

The majority of these amendments will be to the *Jury Directions Act*. The Bill will also amend the *Criminal Procedure Act*, the *Evidence Act*, the *Evidence (Miscellaneous Provisions) Act* and the *Juries Act*.

3 Application of *Jury Directions Act* to criminal proceedings without juries

3.1 Overview

The *Jury Directions Act* currently applies to criminal trials. For consistency, it is appropriate that the Act also apply to relevant criminal proceedings without a jury. For example, the Act provides that forensic disadvantage to an accused due to delay may only be taken into account if the court is satisfied that the accused has actually experienced a significant forensic disadvantage. It is appropriate that a magistrate hearing a criminal case involving delay and forensic disadvantage uses this same reasoning.

Similarly, where the Act prohibits a trial judge from giving a particular direction (e.g., because the content of the direction is incorrect or misleading), it would be inappropriate for a judge hearing an appeal to reason in accordance with that direction.

Accordingly, the Bill will specify how the *Jury Directions Act* applies to proceedings without juries.

3.2 Provisions to apply the *Jury Directions Act* to criminal proceedings without juries

1 — Application of Act to criminal proceedings without juries

The Bill will provide that:

a) The provision applies to:
   - i a summary hearing or committal proceeding under the *Criminal Procedure Act 2009*
   - ii an appeal or case stated under the *Criminal Procedure Act 2009*
   - iii an appeal or case stated under Part 5.4 of the *Children, Youth and Families Act 2005*
   - iv a special hearing under Division 3 of Part 5A of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, and
   - v an appeal under section 24AA or 38ZE of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*.

b) The court's reasoning with respect to any matter in relation to which Part 4, 5, 6 or 7 of the *Jury Directions Act* makes provision:
   - i must be consistent with how a jury would be directed in accordance with this Act, and
   - ii must not accept, rely on or adopt a statement or suggestion that this Act prohibits a trial judge from making or a direction that this Act prohibits a trial judge from giving.

3.2.1 Paragraph (a) — relevant proceedings

The provision will apply to magistrates and judges hearing a range of criminal matters, including magistrates conducting summary hearings and committals, judges hearing appeals from the Magistrates' Court and the Children's Court, and judges in the Court of Appeal exercising either appellate or original jurisdiction.

3.2.2 Paragraph (b) — how the Act applies

Parts 4, 5, 6 and 7 of the Act contain evidential directions, directions on sexual offence and family violence matters, and general directions. A court's reasoning with respect to any matter covered by these Parts must be consistent with how a jury would be directed in accordance with the *Jury Directions Act*.

In addition, a court must not accept, rely on or adopt a statement or suggestion that the Act prohibits a trial judge from making (see, e.g., sections 33 and 42 of the Act), or a direction that the Act prohibits a trial judge from giving (see the proposed provisions discussed in Parts 5 and 6).

This provision does not impose any additional procedural requirements on magistrates or judges (or counsel or an accused). For example, this section does not require magistrates and judges to comply with the procedural requirements of the *Jury Directions Act*, such as:

- the jury direction request provisions in Part 3
- preconditions to the giving of directions where Part 3 does not apply (e.g., section 52(1)), or
- notice provisions (e.g., section 19).

By imposing the broad requirement that courts reason consistently with 'how a jury would be directed', the section will operate similarly to a hearing in which the parties had requested every direction that it would have been open to request (unless there would have been good reasons not to give a requested direction).

4 Previous representations

4.1 Overview

Trial judges currently give directions on how previous representation evidence may be used and, where relevant, directions on the potential unreliability of the evidence. Directions on use are given under the *Evidence Act*. These directions are working well and do not need to be addressed by specific legislation. Directions on unreliable evidence are already dealt with in the *Jury Directions Act*.

However, the common law currently requires trial judges in some cases to give additional directions on previous representation evidence that are unhelpful and confusing for jurors. Judges may feel obliged to give these directions out of an abundance of caution (i.e. to minimise the risk of appeals).

To simplify the law in this area, the Bill will make it clear that these directions are no longer required. This will reassure trial judges that they do not have to give the directions, and encourage judges to confine their directions to the most important aspects of this type of evidence (i.e. how it is to be used and where relevant, its potential unreliability).

4.2 The current law

A 'previous representation' is defined in the *Evidence Act* to mean 'a representation made otherwise than in the course of giving evidence in the proceeding in which evidence of the representation is sought to be adduced'. The term 'representation' is also defined in the *Evidence Act*, and applies to conduct as well as statements.

Previous representations include:

- complaint evidence
- prior consistent statements, and
- prior inconsistent statements.

Under section 136 of the *Evidence Act,* trial judges may limit the use of such evidence.[6] Accordingly, trial judges generally give directions on previous representations to alert jurors to:

- how they may use (or not use) the evidence, and
- where relevant, the potential unreliability of the evidence.

Unreliable evidence directions are governed by Division 3 of Part 4 of the *Jury Directions Act*. Directions on use of previous representation evidence, which are given under the *Evidence Act*, are working well. However, the common law may require trial judges to give the following additional directions on previous representation evidence.

Repetition does not make the statement true

In *Papakosmas v The Queen* (1999) 164 ALR 548, Gleeson CJ and Hayne J noted at [7] that the trial judge had directed the jury that 'you have got to be careful because you will understand that, if you are lying about it originally, then the fact that you keep repeating it does not make it any less of a lie'. At [42], their Honours referred to that direction as 'appropriate'. The Charge Book provides that trial judges should give such directions 'where relevant'.[7]

[6] However, judges are discouraged from doing so. See, *Papakosmas v The Queen* (1999) 164 ALR 548. See also, *ISJ v The Queen* [2012] VSCA 321.
[7] Judicial College of Victoria, *Victorian Criminal Charge Book*, 4.13.1 — Bench Notes: Previous Representations (last updated 29 June 2015) [93].

Do not substitute a general complaint for evidence of a specific charge

R v HJS [2000] NSWCCA 205 provides that where a complaint is made in very general terms (e.g., it relates to a course of conduct, but specific offences were charged), the trial judge should warn the jury not to substitute events in the complaint for evidence relating to a specific charge.

Evidence from a witness who heard (etc.) the statement is not independent proof

When there is evidence of a complaint from a third party who heard, saw or perceived the statement being made, the judge may need to direct that the evidence does not independently confirm the complainant's evidence of the commission of the offence. In *R v Stoupas* [1998] 3 VR 645 at 652, Winneke P (Ashley AJA agreeing) held that because of the 'risk that the jury will mistake it for evidence that is independent of the maker of the statement…[a] judge should…ensure, by appropriate directions, that the jury does not misunderstand the nature of the evidence or misuse it'.

4.3 Problems with the current law

Problems with these additional common law directions are discussed below.

Repetition does not make a statement true

It seems self-evident that repeating something does not make it true. Counsel may wish to emphasise this in their closing address, but this is not an issue on which judges need to direct juries. In *R v Kesisyan* [2003] NSWCCA 259, Meagher J, at [10]–[11], disagreed with counsel's argument that the trial judge should 'have told the jury that a lie, when once told, does not transmogrify itself into a truth by being repeated. If a lie is repeated, it still remains a lie.' His Honour stated that '[w]ith respect, that is such a startlingly evident proposition that, in my view, no jury need be told that. There is no reason why, on a matter like that, a judge should treat the jurors as if they were in fact lacking intelligence.'

The issue of repetition is specifically addressed in the identification evidence provisions in Division 4 of Part 4 of the *Jury Directions Act*. Those provisions require, in relevant cases, trial judges to direct that more than one identification witness can be mistaken. However, identification evidence can be distinguished on the basis of its inherent unreliability, and the known miscarriages of justice that have occurred due to mistaken identification evidence. In addition, repetition in the context of identification evidence involves different people making the same 'identification', not the same person repeating a statement.

Do not substitute a general complaint for evidence of a specific charge

The Weinberg Report discussed problems with anti-substitution directions in the context of other misconduct evidence, and specifically recommended that provisions on other misconduct evidence avoid such directions.[8] This direction may mistakenly lead jurors to think that the complaint evidence is not relevant at all. Such a direction could also be seen as unnecessary and insulting to jurors, particularly given that research indicates that jurors approach their task conscientiously.

Evidence from a witness who heard (etc.) the statement is not independent proof

This requirement arose in the context of law that required corroboration of the evidence of sexual assault complainants.[9] Now that corroboration requirements have been abolished (except in relation to the offences of perjury or a similar or related offence) by section 164 of the *Evidence Act*, the direction is less relevant. This direction could be misunderstood by jurors to mean that the complainant's evidence needs to be independently confirmed. Also, it is arguably obvious to jurors that just because a witness heard the complainant say something does not mean that the complainant's statement is necessarily true.

[8] Justice Weinberg et al, *Simplification of Jury Directions Project: A Report to the Jury Directions Advisory Group* (August 2012) [4.76]–[4.81], [4.227]. This recommendation is reflected in the provisions on other misconduct evidence in Division 2 of Part 4 of the *Jury Directions Act 2015*.
[9] *R v Stoupas* [1998] 3 VR 645, 653 (Winneke P).

4.4 Provisions on previous representations

The legislation should encourage directions in this area to be given only when necessary and, if given, to be as simple and helpful as possible. Accordingly, the Bill will provide that the three common law directions on previous representations (discussed above) are no longer required. This will reassure trial judges that they do not need to give these directions in order to 'appeal proof' their summing up.

2 — Previous representation directions that are no longer required

The Bill will provide that:

a) If evidence is given of a previous representation, the trial judge is not required to direct the jury that repeating a previous representation does not make the asserted fact true.

b) The trial judge is not required to direct the jury that the evidence of the previous representation does not independently confirm the victim's evidence of the commission of the alleged offence, if:

   i evidence is given of a previous representation by a person who saw, heard or otherwise perceived the representation being made, and

   ii the representation is a complaint, made by the victim of an alleged offence, about the commission of the offence.

c) The trial judge is not required to direct the jury not to substitute the evidence of the previous representation for evidence relating to a specific charge, if:

   i evidence is given of a previous representation

   ii the representation is a complaint, made by the victim of an alleged offence, about the commission of the offence, and

   iii the complaint is made in general terms.

5 Doubts regarding the truthfulness or reliability of complainant's evidence—the *Markuleski* direction

5.1 Overview

At common law, there is a line of authority that requires trial judges to direct the jury that if it has a reasonable doubt concerning the truthfulness or reliability of the complainant's evidence in relation to one or more charges, that must be taken into account in assessing the truthfulness or reliability of the complainant's evidence generally (a *Markuleski* direction).

The *Markuleski* direction has been criticised by a range of stakeholders, including Victorian courts and the National Child Sexual Assault Reform Committee. It is infrequently given in Victoria, but there are good reasons why it should not be given at all.

Accordingly, the Bill will abolish the *Markuleski* direction.

5.2 The current law

In New South Wales, *R v Markuleski* requires the trial judge to direct the jury, in word against word cases, that if it has a reasonable doubt concerning the truthfulness or reliability of the complainant's evidence in relation to one or more charges, that must be taken into account in assessing the truthfulness or reliability of the complainant's evidence generally (known as the *Markuleski* direction).[10] This direction derives from case law on inconsistent verdicts.[11]

Courts in Victoria have criticised the *Markuleski* direction and indicated that the direction should not generally be given.[12] The Charge Book sets out reasons why the direction should be avoided, including the following:

- it may dilute the effect of the separate consideration direction
- it may lead to impermissible tendency reasoning, and
- it is likely to confuse rather than assist the jury.[13]

However, at common law, the direction was still required in Victoria if 'some unusual feature of the case' gave rise to a 'specific risk that a miscarriage of justice may occur without such a direction'.[14]

Part 3 of the *Jury Directions Act* now applies to the *Markuleski* direction. If defence counsel requests the direction, the trial judge must give the direction unless there are good reasons not to do so. The good reasons test would allow the trial judge to look at case law prior to the *Jury Directions Act*, which recognised that the direction should not generally be given in Victoria. However, the good reasons test may be interpreted as allowing the direction in a wider range of circumstances than the limited or unusual cases where it is permitted under the common law.

[10] *R v Markuleski* [2001] NSWCCA 290. See, Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book*, [5–1590] Suggested *R v Markuleski* (2001) 52 NSWLR 82 direction — multiple counts (last updated October 2016).
[11] *R v Markuleski* [2001] NSWCCA 290; *Jones v The Queen* (1997) 191 CLR 439.
[12] See, e.g., *R v PMT* [2003] VSCA 200 [31].
[13] Judicial College of Victoria, *Criminal Charge Book*, 4.18.1 — Bench Notes: Word Against Word Cases (last updated 29 June 2015) [2], citing *R v PMT* [2003] VSCA 200; *RJL v The Queen* (2004) 150 A Crim R 82; *R v Liddy* (2002) 81 SASR 22; *R v PB* [2006] SASC 229; *Flora v The Queen* [2013] VSCA 192.
[14] *R v Goss* [2007] VSCA 116 [4].

5.3 Problems with the current law

As noted above, Victorian courts have criticised the *Markuleski* direction.

The Queensland Benchbook notes that the 'direction draws attention to the point that the credibility of the complainant is a separate question from that of whether or not the defendant should be convicted on each separate count'.[15]

The National Child Sexual Assault Reform Committee Report on *Alternative Models for Prosecuting Child Sex Offences in Australia* also criticises the *Markuleski* direction and recommends that each Australian jurisdiction abolish the *Markuleski* direction in sexual offence proceedings.[16] The Report indicates that:

- the reasoning is inconsistent with the separate consideration direction
- the direction 'may give the jury the mistaken impression that, having decided on an acquittal in relation to one count, they must find the defendant not guilty on the other counts', and
- the direction arguably 'swings the balance in an adversarial trial too far in favour of the accused'.[17]

5.4 Abolition of the *Markuleski* direction

The Bill will prohibit trial judges from giving the *Markuleski* direction. Instead of 'complainant', the provision refers to 'victim'. This is because the proposed provision is not limited to sexual offence proceedings. While the direction is usually only given in 'word against word' cases, which are often sexual offence cases, the criticisms of the direction apply equally in other criminal proceedings.

The prohibition will not extend to counsel, as doing so may prevent defence counsel from advancing this type of argument in appropriate ways. If the prohibition applied to counsel, it would mean that counsel could not suggest in any way that a jury's reasonable doubt about the credibility or reliability of a complainant on one charge must be taken into account on another. Such a prohibition would inappropriately restrict counsel or may not be capable of being enforced.

If counsel makes such an argument, the Note to the provision makes it clear that the trial judge may refer to that argument when complying with section 65 of the *Jury Directions Act* (Trial judge's obligations when summing up), particularly section 65(b).

3 — Abolition of the *Markuleski* direction

The Bill will provide that:

a) In a trial in which more than one offence is charged, the trial judge must not direct the jury that if the jury doubts the truthfulness or reliability of the victim's evidence in relation to a charge, that doubt must be taken into account in assessing the truthfulness or reliability of the victim's evidence generally or in relation to other charges.

Note: This provision prohibits the trial judge from giving a particular direction to the jury. This does not limit the obligation of the trial judge to refer the jury to the way in which the prosecution and the accused put their cases in relation to the issues in the trial—see section 65.

[15] Queensland Courts, *Supreme and District Courts Criminal Directions Benchbook*, 34.2 — Separate Consideration of Charges — Single Defendant (last updated February 2016).
[16] Dr Annie Cossins, 'Alternative Models for Prosecuting Child Sex Offences in Australia' (Report of the National Child Sexual Assault Reform Committee, 2010) 136–7.
[17] Ibid 136.

6 Accused giving evidence and interest in outcome of trial

6.1 Overview

If an accused decides to give evidence, the common law allows the trial judge to give certain directions about that evidence that are confusing, inconsistent or potentially inaccurate (including a direction which provides that the jury should treat the accused's evidence in the same way as other witnesses, but that the accused is probably under more stress than any other witness).

On a related issue, the common law generally prohibits trial judges from directing the jury that a general interest in the outcome of the trial is a factor to consider when assessing witnesses, including the accused. However, uncertainty as to the scope of this prohibition on trial judges and the prosecution has led to appeals and retrials, while juries do not receive assistance on how to assess interest in the outcome of the trial.

The Bill will simplify what can and cannot be said about these two issues, by prohibiting certain statements and certain directions, and specifying the content of directions.

6.2 The current law

Directions on the evidence of the accused are not mandatory, and are given on request of counsel. While there are no strict common law rules on the content of directions, trial judges may direct juries:

- that the accused undertook to tell the truth and submit to cross-examination
- on the onus of proof, and
- on how to assess the evidence of the accused, in particular that:
  - a guilty person may decide to tough out cross-examination in the hope that he or she will be more likely to be believed, but that there is nothing more an innocent person can do than to give evidence and subject him or herself to cross-examination, and
  - you should treat the accused's evidence in exactly the same way that you treat the evidence of any other witness, but bearing in mind that the accused is probably under more stress than any other witness.

The common law limits when trial judges can direct juries on using interest in the outcome of the trial in assessing witnesses, including the accused. In *Robinson v The Queen [No 2]* (1991) 180 CLR 531 (*Robinson*), the High Court held that the trial judge cannot direct the jury that interest in the outcome of the trial is a factor to consider when assessing witnesses, and in particular, when assessing the accused. Such a direction would undermine the presumption of innocence, because the accused always has an interest in the outcome of the trial.[18] This prohibition extends to witnesses other than the accused, because, as the Charge Book notes, directing the jury to consider witnesses' interests in the outcome:

- will invariably affect the accused, as he or she has the greatest interest in the outcome, and
- undermines the presumption of innocence.[19]

The Charge Book states that, in exceptional circumstances, the judge may direct the jury to correct improper prosecution argument. This should be confined to reminding the jury that the accused is

[18] *Hargraves & Stoten v The Queen* [2011] HCA 44, 45.
[19] Judicial College of Victoria, *Victorian Criminal Charge Book*, 4.1.1. — Bench Notes: The Accused as a Witness (last updated 29 June 2015) [17], citing *Stafford v The Queen* (1993) 67 ALJR 510; *Robinson v The Queen (No 2)* (1991) 180 CLR 531; *De Rosa v Western Australia* (2006) 32 WAR 136.

presumed innocent and that it would be unfair to disregard their evidence because of their interest in the outcome of the trial.[20]

The rule in *Robinson* has been extended to prohibit prosecutors' comments and cross-examination of the accused on interest in the outcome of the trial.[21] It does not prevent an accused from raising a witness's interest in the outcome of the trial. This issue is related to the issue of motive to lie (see Part 7 of this report).

6.3 Problems with the current law

Evidence of the accused

The direction that the accused undertook to tell the truth and submit to cross-examination is unlikely to add any value. Trial judges outline the process of giving evidence in preliminary directions and jurors will see for themselves that witnesses (including the accused) make an affirmation or oath to tell the truth and undergo cross-examination.

The direction on assessing evidence (i.e. a guilty person may tough out cross-examination, but there's nothing more an innocent person may do) contains two competing propositions that arguably neutralise each other. The competing nature of the directions may confuse the jury and have the unintended consequence of focusing attention on the motivation of an accused to give particular evidence given their interest in the outcome of a trial. This direction appears to be unique to Victoria. For example, it does not appear in the model directions in Queensland, New South Wales, the United Kingdom or Canada.

Under the second direction, the jury is directed to treat the accused in the same way as other witnesses, but then is immediately directed to treat the accused differently, because he or she is probably under more stress. This is both confusing and potentially inaccurate. It is not necessarily the case that the accused is under more stress than other witnesses. Victims, witnesses and accused people are all likely to be stressed, to varying degrees, by the process of giving evidence. This direction appears inconsistent with directions commonly given about how to assess the evidence of witnesses generally (which provide that giving evidence is stressful and that people giving evidence react and appear differently).

The direction is also potentially unfair, particularly in 'oath on oath' cases where a jury must assess the evidence of the alleged victim and the accused where there is little other relevant evidence. Whilst to convict, the jury will need to be satisfied of every element of the offence beyond reasonable doubt, the direction to consider the stress of the accused may tip the balance inappropriately in favour of the accused. Again, this direction appears to be unique to Victoria. For example, model directions in Canada tell the jury to treat the accused's evidence in the same way as any other witness, and the UK, NSW and Queensland do not differentiate the accused's evidence from evidence of other witnesses.[22]

Interest in the outcome of the trial

The rule in *Robinson* raises a number of issues. First, there is a lack of clarity about the scope of the prohibition from *Robinson*. Judges have interpreted the provision in a number of different ways. For example, Jeremy Gans notes that the case has been interpreted as:

- prohibiting 'any directions by the trial judge on the interest of the accused or on the general role of interest as a test of credibility'
- allowing 'the general directions on the question of interest, except where they fall within certain defined classes of comments', and

[20] Ibid [20], citing *De Rosa v Western Australia* (2006) 32 WAR 136; *R v Rezk* [1994] 2 Qd R 321.
[21] *Robinson v The Queen (No 2)* (1991) 180 CLR 531.
[22] See, Canadian Judicial Council — National Judicial Institute, *Model Jury Instructions*, 9.6 — Testimony of Person Charged (The W. (D.) Instruction) (last updated June 2012) [1]. See also, Judicial College of the United Kingdom, *The Crown Court Compendium — Part 1: Jury and Trial Management and Summing Up* (last updated February 2017); Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book* (last updated October 2016); Queensland Courts, *Supreme and District Courts Criminal Directions Benchbook* (last updated February 2016).

- allowing 'a specific discussion of the interests of the accused' but requiring 'a balanced approach on the part of the trial judge to ensure the accused is treated fairly'.[23]

This lack of clarity leads to appeals and retrials on the issue of the accused's interest in the outcome of the trial.[24]

Second, the prohibition on directing the jury on interest in the outcome of the trial may mean that the jury is deprived of assistance on how to use that evidence when it arises. It is a matter of commonsense that the accused has a general interest in the outcome of the trial. As Heydon J noted in *Hargraves v The Queen*, regarding the facts in *Robinson,* '[a] jury would inevitably be struck by the circumstance that someone on trial for rape who puts in issue only non-consent has a great deal to lose by not presenting the strongest possible testimony supporting consent'.[25] The limited circumstances in which a direction can be given may mean that the jury is often not provided with assistance on how to assess interest in the outcome of the trial. This creates a risk that the jury will reason based on a general interest in the outcome of the trial that any accused person will have.

6.4 Directions on accused giving evidence and interest in outcome of trial

The Bill will prohibit certain suggestions and statements about general interest in the outcome of the trial, while still allowing statements about an accused or a witness's particular interest in the outcome. A particular interest may be avoiding a civil claim or protecting a third party.

The Bill will also simplify directions on the giving of evidence by the accused or the accused's interest in the outcome. The directions will retain helpful aspects of the common law (e.g., to remind the jury that the accused does not have to give evidence) and abolish unhelpful aspects (e.g., the problematic directions discussed above). When the accused gives evidence, the directions will focus on treating that evidence in the same way as the evidence of any other witness.

4 — The giving of evidence by an accused and an accused's or a witness's interest in outcome of trial

The Bill will provide that:

a) The trial judge, the prosecution and defence counsel (or, if the accused is unrepresented, the accused) must not say, or suggest in any way, to the jury that:
   i an interest in the outcome of the trial is a factor to take into account in assessing the evidence of witnesses generally, or
   ii the evidence of an accused is less credible, or requires more careful scrutiny, because any person who is on trial has an interest in the outcome of that trial.

Note 1: Section 7 provides for correction of statements or suggestions to the contrary of this provision.

Note 2: The trial judge, the prosecution and defence counsel (or, if the accused is unrepresented, the accused) may say or suggest that a witness, or an accused, has a particular interest in the outcome of the trial and this interest does or may affect the credibility of the witness or the accused.

b) Defence counsel may request under the jury direction request provisions that the trial judge direct the jury on either or both of:
   i the giving of evidence by the accused, or
   ii the interest that the accused has in the outcome of the trial.

c) In giving a direction referred to in paragraph (b), the trial judge must explain that:
   i the accused is not required to give evidence
   ii the fact that the accused has given evidence does not change the prosecution's obligation to prove that the accused is guilty
   iii the jury must assess the evidence of the accused in the same way that the jury assesses the evidence of

[23] Jeremy Gans, 'Directions on the Accused's Interest in the Outcome of the Trial' (1997) 21 *Criminal Law Journal* 273. See also, *Hargraves & Stoten v The Queen* [2011] HCA 44, 53 (Heydon J).
[24] See, e.g., *Drash v The Queen* [2012] VSCA 33; *R v McMahon* (2004) 8 VR 10; *R v Haggag* (1998) 101 A Crim R 593. See also, Gans, above n 23, which cites a number of cases on the topic.
[25] *Hargraves & Stoten v The Queen* [2011] HCA 44, 55.

4 — The giving of evidence by an accused and an accused's or a witness's interest in outcome of trial

any other witness, and

iv the jury must not give less weight to the evidence of the accused just because any person who is on trial has an interest in the outcome of that trial.

d) In giving a direction referred to in paragraph (b)(i), the trial judge must not direct the jury about the following matters:

i whether the accused is under more stress than any other witness, or

ii that the accused gave evidence because a guilty person who gives evidence will more likely be believed or an innocent person can do nothing more than give evidence.

Note: This section prohibits the trial judge from giving directions to the jury about particular matters. This does not limit the obligation of the trial judge to refer the jury to the way in which the prosecution and the accused put their cases in relation to the issues in the trial—see section 65.

6.4.1 Paragraph (a) — prohibited statements and suggestions

In relation to the trial judge and prosecution, this paragraph reflects the common law. However, it clarifies when the trial judge and prosecution cannot comment (i.e. they cannot make general statements about interest in the outcome of the trial) and when they can comment (i.e. where a specific interest in the outcome is alleged—see Note 2). This is consistent with section 104 of the *Evidence Act* which allows cross-examination of the accused on a motive to be untruthful.

This paragraph expands the common law position by providing that defence counsel also cannot say or suggest that interest in the outcome of the trial is a factor to take into account in relation to assessing the evidence of witnesses generally, while still allowing defence counsel to raise specific interests. This approach is simpler and consistent with other provisions in the *Jury Directions Act* (e.g., in relation to the directions on delay and credibility). As these limitations are designed to protect the accused by avoiding drawing attention to the interest of the accused in the outcome of the trial, extending this provision to defence counsel should not be problematic.

Note 2 clarifies that the provision does not limit the ability of the trial judge and the parties to comment on a witness's or an accused's particular interest in the outcome of the trial. As with directions on delay and credibility, it is not necessary to set out a specific direction setting out what the trial judge will say if a specific interest is alleged. These directions will likely involve referring to the particular arguments being advanced by the parties.

6.4.2 Paragraphs (b)–(d) — directions on the accused giving evidence and interest in the outcome

Paragraph (b) allows defence counsel to request a direction on the giving of evidence by the accused and/or the accused's interest in the outcome of the trial. Under the jury direction request provisions in Part 3 of the *Jury Directions Act*, the trial judge must generally give a direction on the issue if requested by defence counsel. This focuses on the forensic decision-making of the parties in determining whether a direction should be given.

At common law, this direction was only to be given in exceptional circumstances. Basing the direction on the request process may mean that it is given more frequently. However, as the jury will generally be aware of the accused's interest in the outcome of the trial as a matter of common sense, it will often be useful to provide assistance to the jury as to how to use, or not use, that interest.

Paragraph (c) sets out the content of this direction. Subparagraphs (c)(i) and (ii) remind the jury of the presumption of innocence and the onus of proof. These address the underlying premise for the *Robinson* prohibition (i.e. that comments on the accused's interest in the outcome of the trial may undermine the presumption of innocence).

Subparagraph (c)(iii) provides that the jury should treat an accused's evidence in the same way as any other witness's evidence. This is consistent with part of the common law direction on assessment of an

accused's evidence. Subparagraph (c)(iv) provides that the jury must not give less weight to the accused's evidence just because any accused person has an interest in the outcome of a trial. This is based on the common law direction not to disregard the accused's evidence.

Not all of these paragraphs will be relevant or helpful in each case. In line with the general Part 3 process, when counsel is requesting a direction, counsel should specify which of the paragraphs they would like covered in the direction.

Paragraph (d) abolishes the problematic common law directions on assessment of an accused's evidence that are discussed above.

7 Motive to lie

7.1 Overview

The issue of whether a prosecution witness (including the alleged victim) has a motive to lie may be raised by:

- the accused or defence counsel (see section 103 of the *Evidence Act*)
- the prosecution or a witness raising the issue inadmissibly (e.g., by the witness saying 'Why would I lie?'), or
- the jury in a question to the trial judge.

If the issue is raised, trial judges must currently give lengthy directions. The scope of these directions is unclear and may reinforce outdated notions that victims, particularly of sexual offences, frequently lie. For example, trial judges must direct the jury that the absence of a motive to lie cannot enhance a complainant's credibility as there are many reasons people may lie. Confusingly, juries are then told not to speculate about any motive to lie.

To be fair to both the accused and the victim, the Bill will require directions on motive to lie to focus on the onus of proof. The Bill will also provide that no other directions on this issue are to be given. This will leave the question of credibility of a witness to the jury to assess, as is appropriate, and abolish the problematic *Palmer*[26] direction (which is discussed below).

7.2 The current law

Motive to lie can arise in any trial, but most often arises in sexual offence trials. As the issue of the complainant's motive to lie will arise in most sexual offence trials and the content of the common law directions (set out below) favour the accused, there is a strong incentive for defence counsel to request a direction under Part 3 of the *Jury Directions Act*.

Once a request is made the trial judge will generally be required to give the direction in accordance with section 14 of the Act. Accordingly, under the current law, directions are likely to be given in almost every sexual offence trial.

The Charge Book sets out different directions depending on whether:

1) the accused alleges that the complainant has a specific motive to lie, which the prosecution has sought to rebut, or
2) it is alleged that the complainant does not have a specific motive to lie, for example, by the prosecution or the complainant.[27]

The accused alleges the complainant has a motive to lie

In situation (1), where the accused has raised a specific motive to lie and the prosecution has sought to rebut that motive, the trial judge may need to direct the jury that:

- even if the jury rejects the motive to lie, that does not mean that the complainant is telling the truth, and it does not enhance the credibility of the complainant, but it just removes one reason to reject their evidence
- the prosecution must still satisfy the jury that the complainant is telling the truth, and
- the complainant may have an unknown reason to lie, and people sometimes lie for no discernible reason. [28]

[26] *Palmer v The Queen* (1998) 193 CLR 1.
[27] Judicial College of Victoria, *Victorian Criminal Charge Book*, 4.4.1. — Bench Notes: Complainant's Motive to Lie (last updated 1 July 2013) [30]–[38].

In this situation, the trial judge should not tell the jury that it must take the suggested motive to lie into account in favour of the accused if it cannot reject it, or that it must be satisfied beyond reasonable doubt that the suggested motive to lie had no basis in order to convict.[29] Further, the trial judge should not tell the jury that the absence of a motive to lie is a factor that is relevant to the accused's guilt. Rather, the absence of a motive to lie is neutral.[30]

It is alleged that there is not a motive to lie

In situation (2), that is, where it has been alleged improperly that the complainant does not have a specific motive to lie, the jury should be warned that:

- there are many reasons why people lie
- the accused is not required to provide a motive to lie and it is unfair to expect him or her to do so
- it should not speculate on the complainant's motive to lie
- it must not reason that because there is no apparent motive to lie, the complainant is telling the truth
- an inability to identify a motive to lie cannot enhance the credibility of the complainant, and
- the prosecution bears the onus of proof beyond reasonable doubt.[31]

In this situation, it is not sufficient for the trial judge to tell the jury that the accused is not required to prove his or her innocence and is not required to provide a motive for what he or she alleges is a false accusation.[32]

7.3 Problems with the current law

There are a number of problems with the current directions on motive to lie. These directions are designed to protect the interests of the accused. However, the underlying basis for the directions has been criticised for supporting outdated notions about sexual assault and assumes that complainants frequently lie about sexual assault.[33] Today, this assumption is known to be an incorrect 'rape myth'.[34] The accused frequently raises the complainant's motive to lie in sexual offence trials. For example, a 1996 study by the NSW Department for Women found that in half of the sexual assault trials in NSW the complainant was cross-examined on motives for making a false claim.[35] According to this study, defence counsel commonly suggested that the motive for the complainant was to obtain victim's compensation.[36]

The content of the directions may further reinforce the assumption that complainants frequently lie about sexual assault. Although the accused is often responsible for raising the complainant's motive to lie in the first place, the directions are designed to ensure that there is no disadvantage to the accused,

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[28] Ibid [31]–[32]. See also, *Palmer v The Queen* [1998] 193 CLR 1 [10]; *R v Uhrig* NSW CCA (24 October 1996) 16–17; *R v SAB* [2008] VSCA 150 [31], [35].
[29] *R v SAB* [2008] VSCA 150 [36].
[30] *Palmer v The Queen* [1998] 193 CLR 1 [9].
[31] Judicial College of Victoria, *Victorian Criminal Charge Book*, 4.4.1. — Bench Notes: Complainant's Motive to Lie (last updated 1 July 2013) [37]. See also, *R v RC* [2004] VSCA 183 [30].
[32] *R v RC* [2004] VSCA 183.
[33] Kylie Weston-Scheuber, 'A Prosecutorial Perspective on Sexual Assault' (Paper presented at the Australasian Institute of Judicial Administration Conference, Sydney, 7–9 September 2011) 11; Jeremy Gans, 'Why Would I be Lying? The High Court in *Palmer v R* Confronts an Argument that may Benefit Sexual Assault Complaints' (1997) 29 *Sydney Law Review* 568.
[34] See, e.g., Victorian Law Reform Commission, *Sexual Offences*, Final Report (2004); Elisabeth McDonald and Yvette Tinsley (eds), *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, 2011) 42 (although the authors note that more research is required to determine more accurately the rate of false allegations); Candida L Saunders, 'The Truth, the Half-Truth, and Nothing Like the Truth: Reconceptualizing False Allegations of Rape' (2012) 52 *British Journal of Criminology* 1152; Liz Kelly, 'The (In)credible Words of Women: False Allegations in European Rape Research' (2010) 16 *Violence Against Women* 1345, 1346; Crown Prosecution Service, 'CPS Policy for Prosecuting Cases of Rape' (Policy statement, Crown Prosecution Service in England and Wales, 2012) [5.5].
[35] New South Wales Department for Women, *Heroines of Fortitude: the Experience of Women in Court as Victims of Sexual Assault* (Department for Women, 1996) 151.
[36] Ibid 153.

even if he or she raises a 'spurious allegation of fabrication'.[37] Even if the complainant can refute the allegation of motive to lie this does not operate to his or her benefit.[38]

In particular, the problematic *Palmer* direction provides that if the jury rejects the alleged motive of the witness to lie (e.g., because the jury accepts the evidence given by the witness in rebuttal of the allegation raised by defence counsel) or decides that the witness did not have a motive to lie, this cannot enhance the credibility of the witness. Such a direction is unfair to the witness and unfairly advantageous to the accused. It suggests to the jury that even if it rejects the alleged motive to lie, the complainant should be regarded with suspicion. It may also suggest to the jury that a complainant has hidden motives.[39]

Other jurisdictions have model directions on motive to lie that do not focus on the issue of credibility or the truthfulness of the complainant. Despite the position in *Palmer*, which is generally followed in Australia, the Bench Books in New South Wales and Queensland do not directly focus on the issue of credibility in their model directions.[40]

Some aspects of the directions are common sense matters that arguably need not be included in the direction. For example, the model direction when motive to lie is raised but no specific motive is suggested by the defence includes the statement:

> There are many possible reasons why a person might lie. Just because the accused cannot identify the precise reason in this case does not mean there is not one.

This statement is common sense. It is unlikely to be necessary to tell a jury this. Further, the direction may suggest that the complainant is likely to lie.

Also, the directions limit how the jury may use the absence of a motive to lie. For example, the jury may be told that if it rejects the defence's assertion of a motive to lie and accepts the prosecution submission, this cannot be relied on to show that the complainant is telling the truth or to enhance the credibility of the complainant's evidence. Likewise, if the prosecution raises the motive to lie, the jury may be told that it should not speculate on motives that the complainant might have for lying. Research shows that limiting directions of this nature are often ineffective. There is a risk that they may backfire and have the opposite effect intended, leading jurors to speculate.

Finally, the number of matters that need to be covered in the directions makes appeals and retrials on the adequacy of directions more likely. The length and complexity of these directions also makes them more difficult for jurors to understand and apply.

7.4 Directions on whether a prosecution witness has a motive to lie

To clarify and simplify this area of the law, and to ensure that directions are fair to both the accused and the complainant (or witness), the Bill will set out what trial judges must include in a direction. These requirements are much shorter and simpler than the common law directions. The Bill will also provide that the trial judge must not otherwise direct on the issue of whether a prosecution witness has a motive to lie. This will abolish the *Palmer* direction and leave it to the jury to decide how motive to lie (or lack of such a motive) affects the witness's credibility, as is appropriate.

[37] Weston-Scheuber, above n 33, 11.
[38] Ibid.
[39] Gans, above n 33, 578.
[40] Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book*, [3–625] — Motive to Lie and the Onus of Proof (last updated October 2016); Queensland Courts, *Supreme and District Courts Criminal Directions Benchbook*, 43A — Cross-examination as to complainant's motive to lie (last updated May 2013).

5 — Whether a prosecution witness has a motive to lie

The Bill will provide that:

a) If the issue of whether a witness for the prosecution has a motive to lie is raised during a trial, defence counsel may request under the jury direction request provisions that the trial judge direct on that issue.

b) In giving a direction referred to paragraph (a), the trial judge must explain:

   i the prosecution's obligation to prove that the accused is guilty, and

   ii that the accused does not have to prove that the witness had a motive to lie.

c) Except as provided by this Division, a trial judge is not required or permitted to direct the jury on the issue of whether a witness for the prosecution has a motive to lie.

7.4.1 Paragraphs (a) and (b) — directions on motive to lie

Like most directions under the *Jury Directions Act*, these directions would be requested under Part 3. However, if the absence of a motive to lie is raised after the general Part 3 process (e.g., by the prosecution in the closing address, or in a jury question) counsel has a continuing obligation and capacity under Part 3 to request a direction if they want it to be given.[41] In practice, it is expected that trial judges and counsel will be able to apply the request process in a flexible manner to address this type of situation.

Paragraph (b) requires the trial judge to refer to the prosecution's obligation to prove that the accused is guilty and to explain that the accused does not have to prove that the witness has a motive to lie. One of the key problems with the question of a motive to lie being raised (either in relation to its existence or absence) is that the jury may become confused about the onus of proof and incorrectly assume that the accused must prove the motive to lie.[42] This paragraph makes it clear that the accused does not have to prove a motive to lie, and reminds the jury of the onus of proof.

7.4.2 Paragraph (c) — no other directions to be given

This paragraph will form part of the abolition provision in the Bill and will provide that no directions on whether a prosecution witness has a motive to lie are to be given (except for the direction in paragraph (b)). This will abolish the problematic *Palmer* direction and leave it up to jurors to assess how the absence or existence of motive to lie affects the witness's credibility.

[41] *Xypolitos v The Queen* [2014] VSCA 339.
[42] Gans, above n 33.

8 Differences in a complainant's account

8.1 Overview

Division 1 of Part 5 of the *Jury Directions Act* addresses common misconceptions about delay in complaint, or lack of complaint, in sexual offence trials. Another common misconception in sexual offence trials is that a 'real' victim would remember all the details of an offence and be consistent in how they describe that offence whenever they are asked to do so.

Research shows that people retain and recall memories differently, and that a traumatic event may affect these processes. Research also shows that accounts of a sexual offence often contain differences (i.e. gaps or inconsistencies) and that differences may arise in both truthful and untruthful accounts.

The Bill will reflect this research in a 'corrective' direction that aims to assist jurors to approach a complainant's evidence neutrally, rather than with preconceived notions about 'real' victims.

8.2 Misconceptions about differences

These directions address a gap in the current law. Accordingly, it is helpful to discuss the rationale behind, and intended effect of, the proposed provisions, and to refer to the research and commentary on which the proposed provisions are based.

Associate Professor Annie Cossins, in discussing common myths and misconceptions in sexual offence cases, points to the misconception that 'inconsistencies or omissions in evidence represent evidence of fabrication since truthful people remember all the details'.[43] The misconception arises from the tendency of people to think that a victim will always give a complete and consistent account of a sexual offence because a 'real' victim would remember all of the details of the offence, and would be consistent in how they describe the offence. The proposed direction aims to address this misconception.[44]

Research concludes that people retain and recall memories differently, that a traumatic event may affect these processes, and that genuine accounts often contain inconsistencies. Professor Louise Ellison writes that:

> [T]he basic notion that inconsistency implies deception is based on a prevalent but erroneous view of memory working passively, much like a video recorder...The malleable nature of memory means that truth-tellers can be expected to gain, lose and change information over time…Significantly, research suggests that the normal variability of memory can be further exacerbated by the impact of trauma, such as that experienced by victims of sexual assault.[45]

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[43] Dr Annie Cossins, 'Expert Witness Evidence in Sexual Assault Trials: Questions, answers and law reform in Australia and England' (2013) 17 *The International Journal of Evidence and Proof* 74, 80.

[44] Other commentators (including some overseas courts) have also referred to this as a common myth, stereotype, unwarranted assumption or misconception. See, e.g., American Prosecutors Research Institute, *Introducing Expert Testimony to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions* (2007) 12, 21–2; Kimberly A Lonsway and Joanne Archambault, 'Dynamics of Sexual Assault: What does Sexual Assault Really Look Like?' (Training Module, End Violence Against Women International, August 2006, last updated November 2012); Judicial College of the United Kingdom, *The Crown Court Compendium — Part 1: Jury and Trial Management and Summing Up*, 20–1: Sexual Offences — The dangers of assumptions (last updated February 2017).

[45] Louise Ellison, 'Closing the Credibility Gap: The Prosecutorial Use of Expert Witness Testimony in Sexual Assault Cases' (2005) 9 *International Journal of Evidence and Proof* 239, 242–3. See also, e.g., The British Psychological Society, 'Guidelines on Memory and the Law' (Report from the Research Board, British Psychological Society, June 2008) 2 (which are attached to the NSW Sexual Assault Trials Handbook); Criminal Justice Sexual Offence Taskforce, 'Responding to Sexual Assault: The Way Forward' (Report of the Attorney-General's Department of New South Wales, December 2005) 120–2; Department of Defence, 'Report to the President of the United States on Sexual Assault Prevention and Response' (Report of the United States of America Department of Defence, November 2014) 71; Andrew Palmer, 'Child Sexual Abuse Prosecutions and the Presentation of the Child's Story' (1997) 23(1) *Monash University Law Review* 171, 192; Joyce W Lacy and Craig E L Stark, 'The Neuroscience of Memory: Implications for the Courtroom' (2013) 14(9) *Nature Reviews Neuroscience* 649.

Despite this, research indicates that highlighting differences 'is likely to be an extremely effective means of discrediting the witness'.[46]

Research also indicates that differences in accounts are common. For example, an August 2016 report published by the Royal Commission into Institutional Responses to Child Sexual Abuse found that in the sample study, defence counsel raised inconsistencies within the complainant's own evidence in more than 90 per cent of cases.[47] In a 2003 New Zealand study, 76 per cent of children in the study made changes to one or more of their earlier statements under cross-examination.[48] Significantly, a 2006 simulation study (where the researchers knew what was and was not correct), also from New Zealand, found that children changed over 40 per cent of correct responses during cross-examination style questioning.[49]

Research also shows that inconsistencies in a child's account may be the result of confusion or intimidation as a result of being questioned by an authoritative figure:

> There is a distinction between errors of reporting due to internal factors, such as memory changes, and errors of reporting due to external or social forces. The belief that a cross-examiner has uncovered a dishonest and inconsistent witness could, in the case of a child witness, actually mean that cross-examination has produced a confused and/or psychologically stressed child who has 'succumb[ed] to the effects of complex, misleading, or aggressive questioning even when he or she was originally telling the truth.'[50]

Differences in a complainant's accounts can be vital to the accused's case, especially in 'word on word' cases. Accordingly, the proposed provisions would not limit defence counsel's ability to conduct a case based on highlighting any differences. The defence could continue to argue how the differences may affect the particular complainant's credibility and/or reliability, and could request relevant directions (e.g., on the potential unreliability of the complainant's evidence). The defence could also request standard directions about credibility and reliability, and differences or inconsistencies in evidence, in the normal way.

However, where there are differences, it is important that the jury deal with those differences on an informed basis, rather than based on a misconception about differences. Informing the jury about why there may be differences, and that differences are common, will not be unfair to the accused. It is in the community's interest in ensuring a fair trial that the issues are determined on a level playing field, rather than one where there is a real risk that an accused may derive an advantage based on a common misconception. The proposed direction aims to address this misconception, and its effect on the credibility and reliability of the complainant, so that trials are fair to the accused, the complainant and the community.

Similar directions are given in England and Wales. As the Crown Court Compendium (the Compendium) states, in relation to sexual offences:

> There is a real danger that juries will make and/or be invited by advocates to make unwarranted assumptions. It is important that the judge should alert the jury to guard against this. This must be done in a fair and balanced way and put in the context of the evidence and the arguments raised by both for the prosecution and the defence. The judge must not give any impression of supporting a particular conclusion but should warn the jury against approaching the evidence with any preconceived assumptions.[51]

The model direction in the Compendium on inconsistent accounts provides that:

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[46] Ellison, above n 45, 242.

[47] Martine Powell et al, 'An evaluation of how evidence is elicited from child sexual abuse complainants' (Report for the Royal Commission into Institutional Responses to Child Sexual Abuse, August 2016). This study examined complainants in sexual offence cases prosecuted in Victoria, New South Wales and Queensland from three different age groups (children, adolescents and adults).

[48] Rachel Zajac, Julien Gross and Harlene Hayne, 'Asked and Answered: Questioning Children in the Courtroom' (2003) 10 *Psychiatry, Psychology and the Law* 199.

[49] Rachel Zajac, and Harlene Hayne, 'The Negative Effect of Cross-examination Style Questioning on Children's Accuracy: Older Children are Not Immune' (2006) 20 *Applied Cognitive Psychology* 3.

[50] Dr Annie Cossins, 'Cross-examination in child sexual assault trials: evidentiary safeguard or an opportunity to confuse?' (2009) *Melbourne University Law Review* 33, 79 (footnotes omitted).

[51] Judicial College of the United Kingdom, *The Crown Court Compendium — Part 1: Jury and Trial Management and Summing Up*, 20–1: Sexual Offences — The dangers of assumptions (last updated February 2017) [7].

> [Y]ou must avoid making an assumption that because [the victim] has said something different to someone else her evidence to you is untrue…Experience has shown that inconsistencies in accounts can arise whether a person is telling the truth or not. This is because the memory of someone who has had an experience of the kind complained of in this case may be affected by it in different ways and this may have a bearing on that person's ability to take in, register and recall it.[52]

8.3 Directions on differences in a complainant's account

6 — Differences in a complainant's account

The Bill will provide that in a trial that relates (wholly or partly) to a charge for a sexual offence or a charge for an offence of conspiracy or incitement to commit a sexual offence:

a) Difference in an account includes:
   - i a gap in that account
   - ii an inconsistency in that account, and
   - iii a difference between that account and another account.

b) If, after hearing submissions from the parties, the trial judge considers that there is evidence in the trial that suggests a difference in the complainant's account of the offence charged that is relevant to the complainant's credibility or reliability, the trial judge must direct the jury in accordance with paragraph (c).

c) In giving a direction referred to in paragraph (b), the trial judge must inform the jury that:
   - i it is up to the jury to decide whether the offence charged, or any alternative offence, was committed
   - ii differences in a complainant's account may be relevant to the jury's assessment of the complainant's credibility and reliability
   - iii experience shows that:
     - people may not remember all the details of a sexual offence or may not describe a sexual offence in the same way each time
     - trauma may affect different people differently, including by affecting how they recall events
     - it is common for there to be differences in accounts of a sexual offence, and

Example: People may describe a sexual offence differently at different times, to different people or in different contexts.

     - both truthful and untruthful accounts of a sexual offence may contain differences, and
   - iv it is up to the jury to decide:
     - whether or not any differences in the complainant's account are important in assessing the complainant's credibility and reliability, and
     - whether the jury believes all, some or none of the complainant's evidence.

d) The trial judge may repeat a direction under this section at any time in the trial.

e) Paragraphs (c)–(d) do not limit the trial judge directing the jury on evidence given by an expert witness.

8.3.1 Paragraph (a) — definition of 'differences'

The term 'differences' is used in the Canadian model direction on this issue.[53] It is defined inclusively to cover the more common 'differences', that is, gaps and inconsistencies in accounts, and differences between accounts.

8.3.2 Paragraphs (b) and (c) — directions on differences

Paragraph (b) is based on section 52(1) of the *Jury Directions Act*, which relates to directions on delay and credibility (but unlike that section, does not allow directions to be given before any evidence is adduced in the trial, as differences will only become apparent during the giving of evidence).

Paragraph (c) sets out the content of the direction. Subparagraphs (i), (ii) and (iv) provide context to the corrective direction in (iii) by making it clear to jurors that it is up to them to decide whether the charged

[52] Ibid, example 3.
[53] Canadian Judicial Council — National Judicial Institute, *Model Jury Instructions*, 7.10 — Prior Inconsistent Statements of Non-Accused Witness (Credibility) (last updated March 2011) [4].

offence occurred, and that it remains up to them to decide whether any differences are important or not in assessing the complainant's credibility and reliability, and whether they accept the complainant's evidence.

The corrective direction in subparagraph (iii) addresses the main misconceptions discussed above. The first two points relate to memory and the effect that trauma may have on memory and recall. The fourth point notes that both truthful and untruthful accounts may contain differences. This addresses the misconception that a genuine account is unlikely to contain differences, but acknowledges that both truthful and untruthful accounts may contain differences.

The third point explains that differences in a complainant's accounts are common, as the research shows. Referring to what is 'common' is also consistent with section 52(4) of the *Jury Directions Act*, which contains a corrective direction on delay in complaint (and which also reflects extensive research and commentary). As the example indicates, how a complainant describes their account may differ depending on the context. For instance, a young complainant may tell her best friend certain details shortly after being assaulted, but may withhold various details out of embarrassment when later telling her teacher. Indicating that something is common does not mean (or imply) that it occurs in each case. However, informing the jury of these matters will assist to neutralise general misconceptions, so that jurors are more likely to consider the complainant's evidence without unwarranted scepticism.

9 Perseverance and majority verdicts

9.1 Overview

If a jury is having difficulty reaching a unanimous verdict, trial judges can currently give a direction encouraging the jury to persevere to reach a unanimous verdict (a perseverance direction). In giving this direction, trial judges can also explain that the jury may in some circumstances return a majority verdict.[54] Case law provides that it is preferable to give a perseverance direction prior to making reference to the possibility of taking a majority verdict.[55] The current sequence in which trial judges give these directions is unhelpful and confusing for jurors.

The Bill will clarify when directions about perseverance and majority verdicts may be given, and avoid the perseverance direction undermining the majority verdict direction.

The Bill will also amend the *Juries Act* to give trial judges greater discretion to decide when to accept a majority verdict.

9.2 The current law

At common law, the jury must be instructed about the need for unanimity and the possibility of a majority verdict should not be unduly emphasised. The model direction in the Charge Book about unanimous and majority verdict, alludes to the possibility of majority verdicts but does not explain to the jury when they are available.[56]

If the jury is having difficulty reaching a unanimous verdict, the trial judge may give a perseverance direction encouraging the jury to persist with deliberations. Depending on the period of time for which the jury has deliberated (see also Part 9.5), the judge should also consider whether to permit a majority verdict to be returned, and whether to provide the jury with a further opportunity to reach a unanimous verdict or give the majority verdict direction at the same time as the perseverance direction.[57]

The Charge Book indicates that, in most cases, it will be preferable to give a perseverance direction prior to making reference to the possibility of taking a majority verdict 'so as to provide the jury with a further opportunity to reach a unanimous verdict'.[58] Accordingly, the Charge Book contains two versions of this direction—one that does not permit majority verdicts and one that does.[59]

The version that allows a majority verdict tells the jury to persevere, but also explains that the jury may return a majority verdict. The Charge Book provides that '[e]ven if a majority verdict is allowed, the trial judge should continue to stress to the jury the importance of trying to reach a unanimous verdict'.[60]

9.3 Problems with the current law

There are a number of problems inherent in the current approach to perseverance and majority verdict directions. These directions appear to be contradictory in nature. The perseverance direction urges

[54] Pursuant to section 46(4) of the *Juries Act 2000*, majority verdicts in criminal trials are available for all Victorian criminal offences, except for murder, treason and certain major drug offences. The jury directions amendments do not change the law in this area.
[55] See *R v Ahmet*; *DPP v Ahmet* [2009] VSCA 98.
[56] Judicial College of Victoria, *Victorian Criminal Charge Book*, 3.9.2.2 — Charge: Unanimous and Majority Verdicts (last updated 1 February 2006).
[57] *R v Muto & Eastey* [1996] 1 VR 336; *R v Ahmet* [2009] VSCA 86.
[58] Judicial College of Victoria, *Victorian Criminal Charge Book*, 3.9.5.1 — Bench Notes: Perseverance and Majority Verdict Directions (last updated 25 August 2010) [11].
[59] Judicial College of Victoria, *Victorian Criminal Charge Book*, 3.9.5.2 — Charge: Unanimous Verdict Required and 3.9.5.3 — Charge: Majority Verdict Allowed (last updated 1 February 2006).
[60] See *R v Muto & Eastey* [1996] 1 VR 336.

jurors to continue to attempt to reach a unanimous verdict, while the majority verdict direction is based on the validity of a majority verdict in certain cases. Directing the jury to continue to strive for a unanimous verdict at the same time as directing the jury that it may return a majority verdict is likely to be confusing to jurors and risks undermining the effectiveness of both directions.

This is because it leaves to the juror the task of resolving the tension between the directions. Some jurors may focus on the component of the perseverance direction which emphasises the need to resolve differences while other jurors may focus on the majority verdict direction which indicates that unanimity is not essential. For a jury that has already indicated that it has not been able to reach agreement, giving such directions at the same time may not assist the jury to find a path forward. Further, the content of the perseverance direction means that while it may be helpful at some stages in deliberations, it will not always be helpful. Some jurors who have been carefully deliberating, but without agreement, may not react as intended by the perseverance direction, when informed that they must 'try to resolve their differences', and may not be assisted by the direction. Having already tried their best to reach agreement, being told to try harder may be unhelpful or simply result in further pressure to compromise. This may be the case even though the jury is directed 'not to agree to a verdict if you do not honestly and genuinely think that it is the correct one'. The potential difficulties with this direction arise most clearly if the direction is given at, or near to, the time when the judge gives a majority verdict direction.

Further, this approach strongly implies that majority verdicts are a lesser type of verdict. Majority verdicts are available for most criminal offences in Victoria and any implication that they are inferior to unanimous verdicts is undesirable.

9.4 Directions on perseverance and majority verdicts

The Bill will clarify when the trial judge can give directions about perseverance and majority verdicts. If the judge is satisfied that the circumstances for taking a majority verdict, set out in the *Juries Act*, have been met, it is inappropriate to undermine a direction on a majority verdict by requiring a perseverance direction to be given first, or to be given at the same time as the majority verdict direction.

7 — Perseverance and majority verdicts

The Bill will provide that:

a) Majority verdict direction means an explanation that it is possible, or may be possible in some circumstances, for the jury to return a majority verdict instead of a unanimous verdict.

b) The trial judge must not direct the jury to persevere to reach a unanimous verdict at the same time as (or immediately before or immediately after) the trial judge gives a majority verdict direction.

c) The trial judge may give a majority verdict direction to the jury whether or not the trial judge has previously directed the jury to persevere to reach a unanimous verdict.

Note: *R v Ahmet*; *DPP v Ahmet* [2009] VSCA 86 includes a statement that it is preferable for the trial judge to direct the jury to persevere to reach a unanimous verdict before the trial judge gives a majority verdict direction. Under this provision, it is not necessary to do so.

9.5 Time limits for accepting majority verdicts

A related issue concerns when a trial judge may accept a majority verdict. Currently, section 46 of the *Juries Act* provides that if a jury is unable to agree on its verdict or has not reached a unanimous verdict after deliberating for at least six hours, the court may discharge the jury or take a majority verdict if one is available. However, the court must refuse to take a majority verdict if the court 'considers that the jury has not had a period of time for deliberation that the court thinks reasonable, having regard to the nature and complexity of the trial.'

The six hour time limit means that trial judges sometimes have to ‘fill in’ time, particularly in relatively simple cases in which the jury has become deadlocked early during deliberations.

Accordingly, the Bill will amend section 46 to give trial judges greater discretion to decide when to accept a majority verdict. Each trial is different and the trial judge is in the best position to determine the most appropriate course of action where the jury indicates that it is deadlocked.

Amended section 46(2) will allow the trial judge to discharge the jury or accept a majority verdict if a jury has deliberated for a period of time that the court thinks is reasonable, having regard to the nature and complexity of the trial. This is the same as the current ‘test’ for taking a majority verdict, but removes the arbitrary six hour time limit.

The proposed amendments do not alter the list of offences for which majority verdicts are not permitted in Victoria (i.e. murder, treason, specific serious drug offences and Commonwealth offences).

10 Jury deliberations

10.1 Overview

Presently, trial judges can only direct the jury as to the sequence in which verdicts must be delivered in court, not the particular order in which the jury should consider offences or other specified matters such as elements of an offence or defences. For example, a trial judge cannot direct the jury to consider the offence of murder before considering the alternative offence of manslaughter and cannot say when the jury must consider self-defence. The distinction between delivering verdicts in a particular order and considering the verdicts in a particular order is arbitrary. In addition, it deprives the jury of assistance in structuring its deliberations.

The Bill will allow trial judges to direct the jury on the order in which to consider the offences, elements of an offence, defences, matters in issue, or alternative bases of complicity. This will allow judges to provide clear guidance to juries as to how to approach their deliberations in an effective way. This may also lessen the possibility of a 'compromised' verdict and reduce the prospect of a hung jury caused by confusion or disagreement about the interaction between alternative charges.

10.2 The current law

In *Stanton v The Queen* [2003] HCA 29 (*Stanton*), the majority of the High Court held that a judge may make suggestions to the jury as to how to organise their deliberations, but cannot direct the jury to consider alternative charges in a particular order. Instead, a jury can only be directed as to the sequence in which the verdicts must be delivered. A direction will be erroneous if it can be understood to direct the jury to consider alternative charges in a particular order, having regard to the trial and directions as a whole. The Victorian Court of Appeal affirmed this principle and concluded that 'a direction which purports to direct a jury as to a sequence of reasoning is contrary to law'.[61]

However, although trial judges cannot direct the jury on how to consider the sequence of alternative charges, they must direct the jury on the sequence in which verdicts must be delivered. In particular, juries cannot return a verdict on an alternative charge until it returns a verdict on the principal charge.[62]

10.3 Problems with the current law

The rule in *Stanton* makes it difficult for trial judges to provide guidance to juries in structuring their deliberations as it is unclear where the 'effect' of a direction will dictate the sequence in which the jury should consider alternative charges, rather than the sequence in which it should return the verdicts. As a result, judges may need to direct juries about how to approach alternative charges in an overly cautious manner that provides little assistance to the jury in structuring its deliberations. This may exacerbate what can already be a complicated undertaking. Research into jury deliberations has shown that uncertainty as to how to approach multiple alternative charges is one of the common misunderstandings experienced by juries.[63]

Also, the prohibition is arbitrary. If the jury is required to deliver the verdicts in a particular order, it will often mean that there is a logical order in which to consider the verdicts. However, this order may not be immediately apparent to jurors, so the current limitations may deprive jurors of valuable guidance.

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[61] *Medici v The Queen* [2013] VSCA 111; *Smith v The Queen* [2013] VSCA 112.
[62] See *Medici v The Queen* [2013] VSCA 111; *Smith v The Queen* [2013] VSCA 112; *Vo v The Queen* [2013] VSCA 225.
[63] See, e.g., New Zealand Law Commission, *Juries in Criminal: Part Two: A Summary of Research Findings*, Preliminary Paper No 37(2) (1999) [7.23]–[7.24].

Documents such as flow charts and question trails (and integrated directions) may assist the jury with deliberations by explaining how the jury's conclusions on one issue may indicate its verdict on that charge, and that there are further issues to consider on another charge. For example, flow charts have been used in Supreme Court murder trials for many years to indicate matters such as if the fault element for murder is not proved, the jury should then consider manslaughter. Helping jurors to navigate this process should be encouraged rather than discouraged.

10.4 Directions on jury deliberations

The Bill will allow trial judges to direct on the order in which offences and other specified matters (such as elements and defences) must be considered by the jury. This will allow trial judges to assist jurors in in structuring their deliberations, in appropriate cases. The Bill will also retain the current ability of trial judges to suggest an order in which the jury may wish to consider these matters.

8 — Jury deliberations

The Bill will provide that:

a) Paragraph (b) applies to a trial in which there is more than one offence in respect of which the jury may return a verdict.

Example: Section 421 of the *Crimes Act 1958* provides that on an indictment for murder a person found not guilty of murder may be found guilty of other offences, including manslaughter.

b) The trial judge may direct the jury on the order in which the jury must consider the offences.

Example: In a homicide trial, the trial judge may direct the jury to consider the offence of manslaughter only if the jury first finds the accused not guilty of murder.

c) Nothing in paragraph (b) prevents the trial judge from directing the jury on the order in which the jury may consider the offences.

d) The trial judge may direct the jury on the order in which it must consider the following matters:

   i some or all of the elements of an offence charged or an alternative offence

   ii defences to an offence charged or an alternative offence

   iii the matters in issue, and

   iv an alternative basis of complicity in the commission of an offence charged or an alternative offence.

Note: This may take the form of an integrated direction or factual question under section 67.

e) Nothing in paragraph (d) prevents the trial judge from directing the jury on the order in which the jury may consider the matters referred to in that paragraph.

11 Alternative evidence directions

11.1 Overview

Currently, provisions in the *Criminal Procedure Act* and the *Evidence (Miscellaneous Provisions) Act 1958* require mandatory directions to be given if evidence is given by alternative means (e.g., by CCTV or pre-recorded evidence is played for the jury).

The directions warn jurors not to draw any adverse inference against the accused or give the witness's evidence any greater or lesser weight because of the making of the arrangements. Certain provisions also require trial judges to refer to the routine nature of the arrangements.

As alternative arrangements are now common, mandatory directions are no longer necessary. The language of the directions is problematic and there is also a risk of the directions having the opposite effect of what is intended. Accordingly, the Bill will repeal these provisions, so that the directions are no longer mandatory. However, trial judges will retain the discretion to give the directions if appropriate or necessary.

11.2 The current law

When witnesses in sexual offence and family violence proceedings give evidence by alternative means (e.g., by CCTV), section 361 of the *Criminal Procedure Act* requires trial judges to warn jurors not to:

- draw any adverse inference to the accused, or
- give the witness's evidence any greater or lesser weight because of the making of the arrangements.

Sections 375 and 375A of the *Criminal Procedure Act* relate to special hearing arrangements (e.g., where a child complainant has their evidence recorded prior to trial). In addition to the warning above, trial judges must tell jurors that it is routine practice to pre-record evidence in these matters. There are also similar provisions in section 382 of the *Criminal Procedure Act*, which applies where a recording of evidence of a complainant is given during a criminal trial for a sexual offence, and section 42V of the *Evidence (Miscellaneous Provisions) Act*, which relates to evidence given by audiovisual link.

11.3 Problems with the current law

As CCTV and video-recordings are now commonplace, it is unlikely that jurors would draw adverse inferences from the use of such arrangements, or treat the witness's evidence differently from other evidence.

The wording of the directions is problematic, in particular the reference to 'adverse inferences' is unlikely to be easily understood by jurors.

Also, importantly, research shows that 'limiting' directions such as these may backfire (i.e. have the opposite effect to what is intended). That is, for example, the directions may result in jurors thinking 'she must be giving evidence by CCTV because he's such a violent man'.

Rather than giving these directions, it would be preferable for trial judges to give a simple statement during preliminary directions to the effect that evidence may be given in various ways (e.g., by CCTV or by pre-recorded evidence). This is reflected in the general Jury Guide which is currently being trialled in the County and Supreme Courts (see also Part 13).

11.4 Repeal of mandatory alternative evidence directions

The Bill will repeal these provisions.

The Bill does not prohibit the giving of such directions. The Bill also does not retain these directions and provide that they may be given upon request under Part 3. If they are retained in this form, the question would then be on what basis would a trial judge decide that a direction should be given (or not given) in one case compared with another? Given the lack of evidence that this kind of direction serves a useful purpose, and the risk that they may have a backfire effect, specifically recognising these directions risks them remaining in practice because they used to be given. While it is difficult to envisage circumstances in which these directions would be desirable, it is possible that this may arise and therefore the directions have not been prohibited.

9 — Repeal of mandatory alternative evidence directions

The Bill will repeal:

- Sections 361, 375, 375A and 382 of the *Criminal Procedure Act 2009*, and
- Section 42V of the *Evidence (Miscellaneous Provisions) Act 1958*.

12 Exceptions to the hearsay rule

12.1 Overview

There are two exceptions that currently apply when the maker of a representation is available to give evidence which may result in hearsay evidence being admissible:

- section 66 of the *Evidence Act*, which creates an exception in criminal trials where the fact asserted in the representation was 'fresh in the memory' of the person when they made the representation, and
- section 377 of the *Criminal Procedure Act*, which creates an exception in sexual offence trials where the representation is made by a complainant who is under 18 years of age when the trial commenced.

The Bill will integrate section 377 into section 66 and broaden the operation of the exception so that it applies in any criminal proceeding if the person made the representation before turning 18 and is a victim of an offence to which the proceeding relates.

12.2 The current law

Both section 66 of the Evidence *Act* and section 377 of the *Criminal Procedure Act* contain exceptions to the hearsay rule if the maker of the previous representation is available to give evidence.

Section 66 of the *Evidence Act* creates an exception in criminal trials where the fact asserted in the representation was 'fresh in the memory' of the person when they made the representation.

Section 377 of the *Criminal Procedure Act* creates an exception in sexual offence proceedings if a complainant under 18 years of age is available to give evidence about an asserted fact, or if his or her credibility is relevant. The representation must be made by a complainant who is under 18 years of age when the proceedings commenced.

12.3 Problems with the current law

It is undesirable to have different provisions on this issue in different Acts. In *Bryan Stark v The Queen* [2013] VSCA 34, President Maxwell noted at [62] that section 377 would be better placed in the *Evidence Act* rather than the *Criminal Procedure Act.* It is logical to move the section 377 exception to the *Evidence Act*, along with provisions on the hearsay rule itself, and other exceptions to the rule.

Section 66 seems to be working well. However, the scope of section 377 could be improved. The provision currently applies only to sexual offence matters, where the child complainant is under 18 when the matter reaches court. Given the delays that may occur between an alleged offence and the matter reaching court (particularly in sexual offences matters, where delay in complaint is a common occurrence), this restriction seems inappropriate and unfair, and may result in the evidence of such complainants being excluded unnecessarily. Confining the exception to sexual offence matters also means that child victims in any other type of criminal proceeding, such as family violence related matters or violent crimes, need to come under the section 66 exception in order to have their evidence admitted.

12.4 Amended exceptions to the hearsay rule

10 — New section 66 of the *Evidence Act*

The Bill will substitute section 66(2) so that:

a) The hearsay rule does not apply to evidence of the representation that is given by the person who made the representation or a person who saw, heard or otherwise perceived the representation being made if:
   i the person who made the representation has been or is to be called to give evidence, and
   ii either when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation, or the person who made the representation is a victim of an offence to which the proceeding relates and was under the age of 18 years when the representation was made.

The effect of current section 66 will remain as it is and section 377 will be repealed. Amendments to the content of current section 377 are discussed in turn.

Applies only in relation to asserted facts

The Bill will provide that this exception only applies in relation to asserted facts, in line with section 66 of the *Evidence Act*. Evidence of the representation would need to be tied to an asserted fact. The *Evidence Act* allows previous representation evidence to be used both to assess credibility and to prove the truth of the facts asserted in the representation. If the evidence is only relevant to the credibility of the complainant or victim (i.e. not to the truth of an asserted fact), it would no longer be admissible.

Not confined to sexual offence proceedings

Section 377 of the *Criminal Procedure Act* applies only to complainants in sexual offence proceedings. The section is based on former section 41D of the *Evidence Act 1958,* which was enacted in 2006 in response to recommendation 139 of the VLRC Sexual *Offences: Law and Procedure* report.[64] As the VLRC concluded at [5.124], 'the child's initial statement about the abuse will often be the 'best evidence' of contested facts', and 'there are compelling reasons to allow the court to admit children's hearsay evidence in sexual assault cases, provided the jury is made aware of the factors that may affect the reliability of this evidence'.

The VLRC report was necessarily confined in scope (by its reference) to sexual offence proceedings. However, there are sound policy reasons to apply the exception to hearsay evidence from a child victim of any offence, not just a sexual offence. The considerations noted by the VLRC also apply to the evidence of child victims in other criminal trials, such as family violence matters (which is why the proposal applies to any criminal proceeding). The proposal treats child victims as a distinct category to which an exception should apply by virtue of the child's age and their role in the proceedings (i.e. their status as a victim, not just a witness). The proposal also reflects that children who disclose sexual offences are most likely to tell a parent or friend, and that initial reporting to authorities, including police and health professionals, is rare.[65]

Removal of the 'sufficiently probative' requirement

Section 377 required the evidence of the representation from the child complainant to be 'sufficiently probative, having regard to the nature and content of the representation and the circumstances in which it was made'. This requirement may have been included in the legislation to reflect general comments made by the VLRC about when the evidence of child complainants should be admitted.

[64] Victorian Law Reform Commission, *Sexual Offences*, Final Report (2004).
[65] See, e.g., Cossins, above n 16, 86–7; Dr Catherine Esposito, 'Child Sexual Abuse and Disclosure: What does the research tell us?' (New South Wales Department of Family & Community Services, 2014) 15–17; Royal Commission into Institutional Responses to Child Sexual Abuse, 'What we are learning about responding to child sexual abuse' (Interim Report Vol 1, Part 5, Royal Commission into Institutional Responses to Child Sexual Abuse, 2014) 157.

There is no rational basis for including this requirement in the revised provision given the framework in the *Evidence Act*, including section 137. Under the *Evidence Act*, such evidence will only be admitted if it is relevant, subject to exclusions such as the balancing test referred to in section 137, which requires the court to refuse to admit evidence adduced by the prosecution if its probative value is outweighed by the danger of unfair prejudice to the accused.

The 'sufficiently probative' test is not used in the *Evidence Act*. It is undesirable to have a different test for one kind of evidence. Evidence will have sufficient probative value if it outweighs its prejudicial effect and is admissible if it also meets the other circumstances in which such evidence may be admitted. This *Evidence Act* framework (and the special considerations that apply to child victims) also make it unnecessary to require the asserted facts to be 'fresh in the memory' of the child.

In addition, other directions (such as the unreliable evidence directions in the *Jury Directions Act*) will be sufficient to ensure that the potential unreliability of such evidence will be brought to the jury's attention.

Applies if the complaint was made before turning 18

Section 377 applies if the complainant was aged under 18 at the time of the (sexual offence) proceedings. The Bill will provide that the exception applies if the representation was made before the person turned 18, regardless of when the proceeding commences. There may be lengthy delays between the date of the alleged offending and the commencement of proceedings. The relevant issue is the age of the person making the representation, not their age when the matter reaches court.

13 Jury Guide

13.1 Overview

The Advisory Group has developed the 'Jury Guide', a general jury guide to provide Victorian juries in criminal trials with greater practical guidance and support. The Jury Guide, which is currently being trialled in the County and Supreme Courts, contains written preliminary directions to reinforce important information on criminal trials and to complement the oral directions given by trial judges at the start of trials. The Jury Guide also provides practical guidance to jurors on how to conduct their deliberations. The Bill will give legislative support to a general jury guide.

13.2 The current law

Section 222 of the *Criminal Procedure Act* gives trial judges broad discretion to address the jury on matters that are relevant to the performance of the jury's functions. Section 223 of that Act allows trial judges to give the jury a variety of documents to help it understand the issues and evidence in the trial.

13.3 Problems with the current law

Jurors are likely to read and be assisted by a short document, specific to criminal trials, that includes both practical and legal information. Research has shown that jurors would like 'more and better use' of written and visual aids throughout the trial process and that providing written material during a trial can assist jurors with both substantive and procedural matters.[66] Research in the USA indicates that 'people retain between 10–15 per cent of information presented orally and 65–87 per cent of information presented visually'.[67] The court room tradition of oral delivery of information remains strong. The strength of presenting information visually does not mean that oral presentation must give way. Indeed, research has:

> shown that vocalisation of written material facilitates memory. Thus, the ideal is to present materials in both modes at the same time.[68]

Sections 222 and 223 of the *Criminal Procedure Act* already appear sufficiently broad to permit the use of a general jury guide. However, it is preferable to expressly refer to a general jury guide to support its use and to allow for regulations requiring a general jury guide to be given in every trial, if this is considered appropriate. A new provision also distinguishes a general jury guide from case specific material, which may be developed and provided to a jury (under sections 222 and 223).

13.4 General jury guide

The Bill will insert a new provision into the *Criminal Procedure Act* to give legislative support for a general jury guide and allow for the making of regulations to require its use in each trial. (It will also make consequential amendments to current section 223 of the *Criminal Procedure Act*.)

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[66] Jacqueline Horan, *Juries in the 21st Century* (Federation Press, 2012) 76–7.
[67] Michael E. Cobo, 'A Strategic Approach to Demonstrative Exhibits and Effective Jury Presentations' (1990) 3 *PLI/Lit* 359. See also, Robert Seltzer, 'Evidence and Exhibits at Trial' (1990) 387 *PLI/Lit* 371 as cited in Damian Schofield and Stephen Mason, 'Using Graphical Technology to Present Evidence' in Stephen Mason (ed) *Electronic Evidence* (Lexus, 2nd ed, 2010) 139–40 as cited in Jacqueline Horan and Shelley Maine, 'Criminal Jury Trials in 2030: A Law Odyssey' (2014) 41 *Journal of Law and Society* 551, 560.
[68] Amiram Elwork, Bruce Sales and James Alfini, *Making Jury Instructions Understandable* (Michie Co., 1982) 19–20 as cited in Roger M Young, 'Using Social Science to Assess the Need for Jury Reform in South Carolina' (2000) 52 *South Carolina Law Review* 135.

11 — New section 223A of the *Criminal Procedure Act*

The Bill will insert new section 223A to provide that:

a) For the purpose of helping the jury to perform its functions and understand the trial process, the trial judge may order, at any time during the trial, that copies of a general jury guide are to be given to the jury in any form that the trial judge considers appropriate.

b) Despite paragraph (a), if regulations referred to in paragraph (e) are made, the trial judge must order, at the prescribed time (if any) during the trial, that copies of a general jury guide that complies with those regulations be given to the jury.

c) A general jury guide may contain any of the following:

  i general information about the process of criminal trials, including information about:
    - the roles of the jury, the judge and the parties, and
    - the usual order of events in a trial

  ii general information about legal concepts that are relevant to criminal trials, including information about:
    - the presumption of innocence, and
    - the requirement of proof beyond reasonable doubt

  iii general information about jury deliberations and processes, including information about:
    - what to do if a juror has a question
    - appointing a foreperson, and
    - ways in which the jury may wish to organise itself, discuss the evidence and the law, and vote, and

  iv any other general information.

d) A general jury guide may include pictures and diagrams.

e) The regulations may prescribe:

  i matters that are to be addressed in, or the form and content of, a general jury guide that must be given to the jury, and

  ii the time at which that general jury guide must be given to the jury.

13.4.1 Paragraphs (a), (b) and (e) — giving general jury guides and making regulations

These paragraphs allow trial judges to give general jury guides (or require them to do so in a consistent manner, if regulations are made under (e)).

13.4.2 Paragraphs (c) and (d) — content of guides

Paragraph (c) contains an inclusive list of matters that general jury guides may cover. The matters listed reflect matters covered in the guide currently being trialled. That guide also contains pictures and diagrams (e.g., flow charts) to assist jurors, as provided for in paragraph (d).

Appendix 1 — List of Jury Directions Advisory Group members (as of February 2017)

Greg Byrne PSM (Chair)	Department of Justice & Regulation
President Maxwell AC	Court of Appeal
Justice Weinberg	Court of Appeal
Justice Osborn	Court of Appeal
Justice Croucher	Supreme Court
Judge Sexton	County Court
Judge Hampel	County Court
Judge Gamble	County Court
Judge Mullaly	County Court
Peter Morrissey SC	Victorian Bar/Criminal Bar Association
Patrick Doyle	Victorian Bar/Criminal Bar Association
Bruce Gardner PSM	Office of Public Prosecutions
Matthew Andison	Office of Public Prosecutions
Matthew Weatherson	Judicial College of Victoria
Helen Fatouros	Victoria Legal Aid
David Gibson	Victoria Legal Aid
Professor Jonathan Clough	Monash University
Dr Jacqueline Horan	University of Melbourne