Jury Directions: A New Approach

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Preface

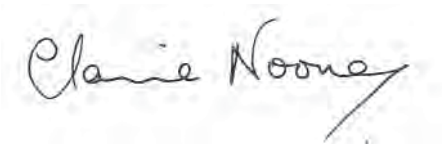
From the Secretary, Department of Justice

The Department of Justice is focused on ensuring the justice system is efficient and effective. Courts and tribunals play a vital role in realising a stronger, safer and more just Victoria. However, unacceptable court delays are undermining the justice system's ability to deliver justice across Victoria to victims and witnesses of crime, people accused of criminal offending, children in child protection matters, young people, and individuals.

Jury directions play a pivotal role in a criminal trial. Trial judges direct jurors regarding the relevant law and evidence in a case. However, in order to apply these directions jurors must be able to understand them. The Victorian Law Reform Commission's 2009 report on *Jury Directions* recognised that there are a number of problems with how the law on jury directions operates in Victoria. The law is overly complex. This leads to lengthy, and often confusing, directions being delivered to jurors and provides grounds for the disproportionate amount of avoidable jury direction related appeals and retrials. In 2010 alone, jury direction related retrials made up 14 of the 18 retrials for the year.

The Victorian Law Reform Commission's report has led to the department engaging in a wide-scale review of jury directions. The changes recommended in this report are designed to shorten and simplify jury directions and clarify when trial judges need to give directions and what the content of such directions should be. This would reduce appeals and retrials that increase delay and cause additional trauma to victims of crime. Clear jury directions will also help to ensure a fair trial and give the community confidence in jury verdicts.

I also wish to thank Criminal Law Review for their professionalism and dedication to producing this report and members of the Jury Directions Advisory Group for their advice on the department's proposals and options for change.



Dr Claire Noone
Acting Secretary

From the Director, Criminal Law Review

It is extraordinary how complex jury directions have become over the last three decades. Some directions are conceptually complex. Other directions involve fine distinctions or nuances. Appellate judges sometimes disagree about the correct characterisation of evidence and therefore disagree about whether a direction must be given. These issues are intellectually challenging and lead to many appeals about whether the directions given were legally correct and whether the trial judge did not give a direction that was necessary to ensure a fair trial.

These directions developed to ensure a fair trial. However, many directions fail to deliver a fair trial. Directions are overly complex and far too long.

Complying with the law concerning jury directions is a difficult task. However, sometimes complying with the law means providing the jury with carefully constructed explanations of the law which are legally correct but with no expectation that the jury will understand the direction. Indeed there are some directions that many lawyers would struggle with if they were in the position of jurors. From the jury's perspective, some directions are simply incomprehensible.

Jurors understand that deciding whether a person is guilty or not guilty is one of the most important decisions they will make in their life. Research shows that jurors look to the trial judge to assist them with their important task. While trial judges strive to provide this assistance, the law can make this very difficult and in some cases impossible.

A new approach is required. Working within the existing structure of the law on jury directions will simply perpetuate these problems. The recommendations in this report will fundamentally change the approach to determining whether a direction is required.

These changes are contained in the proposed new process where the prosecution and the defence will be actively involved with the trial judge when the trial judge is working out what directions to give (the jury direction request provisions). Discussions between counsel and the trial judge will identify the issues in dispute and the directions can then be tailored to address those issues. This is designed to lead to shorter, more helpful summings up that are closely targeted to the matters in issue in the trial.

Another significant reform recommended in this report concerns integrated directions. Integrated directions present the issues in the trial to the jury in a way that is easier to understand and apply. Integrated directions embed the legal issues in factual questions; a question trail will focus on the issues in the case and assist the jury with their deliberations. This is a fundamentally different way of assisting the jury to determine the issues in the case. Juries are good at determining factual questions. Redesigning directions in this way will be much more helpful to juries than traditional directions.

This report also recommends changes to significantly reduce the length of jury directions and remove the need for summaries of evidence by focusing on presenting the information in ways that will assist the jury.

Juries often ask what 'proof beyond reasonable doubt' means. Judges are essentially prohibited from assisting the jury with this issue. This report recommends changes to enable judges to assist juries with this issue, if they ask a question about it.

Post-offence conduct evidence (e.g. lying to police about never having owned a gun because it will implicate you in the offence) is a particularly egregious example of complex and unhelpful directions. These directions lead to a disproportionate number of appeals and retrials. This report recommends substantial changes to clarify when a direction is required and to simplify any direction that is given.

This report is the product of the substantial contribution, commitment and sustained effort of members of Criminal Law Review over several years, in particular Michèle Briggs, Jacinth Pathmanathan, Julia Rendell and Catherine Tobin. This process has also greatly benefited from the expertise and advice of the Jury Directions Advisory Group, which contains 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. I would like to thank everyone involved. Their expertise and commitment to improving Victoria's law of jury directions has been invaluable in the development of this report and its recommendations.

Greg Byrne
Director

The purpose of the report

This report provides recommendations to the Attorney-General for reform of Victoria's jury directions laws.

The Department of Justice has conducted a detailed review of the key aspects of the law of jury directions in Victoria. This report, *Jury Directions: A New Approach*, addresses the first stage of the review of jury directions. The report contains a discussion of the main problems with the current jury directions laws, and provides recommendations for the first stage of reforms to the law. The discussion on each of the proposed reforms includes the reasons for, and likely benefits of, these reforms.

The department's review started from the premise that the Victorian Law Reform Commission's Report on *Jury Directions* had already established that there are fundamental problems with jury directions and significant change is required. Nothing arose during the department's review that suggested anything other than that the Victorian Law Reform Commission was emphatically correct.

This 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. It would be possible to provide lengthy explanations of each important case and the nuances between cases, tracing the development of the law to the current day. This is not necessary for present purposes and there are many other resources which already provide such information. There is a list of references at the end of this paper that contain such information, as do many of the leading cases on particular issues discussed in this report.

In general, a policy discussion of the issues discussed 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.

This report sets out in detail the department's recommendations and reasons for those recommendations. The reforms recommended in the report would bring about significant legal and cultural changes in criminal trials for trial counsel and judges. This report is designed to guide the interpretation and application of the recommended Jury Directions Bill (if enacted) by providing detailed information on how the reforms were developed, and their intent. It is intended to perform an important educative role, assisting courts and practitioners to be ready for the changes when they commence.

Contents

Abbreviations

The Advisory Group	Jury Directions Advisory Group
The Charge Book	Judicial College of Victoria, *Victorian Criminal Charge Book* (2012) <http://www.judicialcollege.vic.edu.au/publications/victorian-criminal-charge-book>
The department	The Department of Justice
JCV	Judicial College of Victoria
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)
Simplification of Jury Directions Report	Justice Weinberg et al, *Simplification of Jury Directions Project: A Report to the Jury Directions Advisory Group* (August 2012)
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

Jury directions are the directions a trial judge gives to a jury to help them to decide whether the accused is guilty or not guilty. They are an essential feature of a trial by jury. Jury directions aim to ensure that people charged with crimes are tried in accordance with the law.

The High Court decision in *R v Bromley* (1986) 161 CLR 315 marked the turning point for the increased requirement to give jury directions in criminal trials. Jury directions have become complex, voluminous and uncertain within a relatively short period. In a survey of Supreme Court and County Court judges, most judges saw the 'over-intellectualisation' and complexity of jury directions as 'a major impediment to effective communication with the jury'.[1]

Jury directions are too long and too complex. Too often they do not focus on the matters in issue in the trial. This complexity and length of jury directions makes it harder for trial judges to comply with the law. This leads to errors in jury directions, resulting in appeals and retrials. The complexity, or 'over-intellectualisation', of jury directions is of major concern to whether jury directions are meeting their goal of ensuring a fair trial.

Errors identified on appeal primarily focus on what trial judges say to jurors, rather than what jurors are likely to understand. If a trial judge is required by law to give a direction that will not be understood by jurors (nor many lawyers) then such directions fail to achieve their objectives. However, whether the direction, including the nuances within the direction, was likely to have been understood by the jury or to have made a difference is usually not to the point for the purposes of an appeal. The issue is whether it is technically correct.

There is considerable research in a number of jurisdictions to indicate that jurors do not understand many directions, especially if they are long and complex. Some directions would be just as effective if they were delivered in Latin. It is essential that jury directions be clear and consistent and able to be understood and applied by jurors.

One of the principal objectives of this review is to place juror comprehension of directions as central to the determination of what directions are required and whether those directions deliver a fair trial.

The Victorian Government made an election commitment to reform jury directions in light of the VLRC Report. In this report, we recommend that a number of changes be made to the law. Our proposals are consistent with the VLRC's overall aim, and adopt and build upon the various recommendations made in the VLRC Report. The proposals have been the subject of discussion with an expert Advisory Group which has provided invaluable advice to ensure that the proposals are effective, workable and fair.

1 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [2.35], citing Elizabeth Najdovski-Terziovski, Jonathan Clough and James R P Ogloff, 'In Your Own Words: A Survey of Judicial Attitudes to Jury Communication' (2008) 18 *Journal of Judicial Administration* 65, 80.

The department recommends that a Bill address a range of reforms to:

- reduce uncertainty over when a direction is required
- clarify the roles of the trial judge and counsel
- reduce the complexity and length of directions, while ensuring that they contain information that is necessary for the jury to perform its role, and
- encourage better ways of presenting jury directions to assist the jury.

We recommend that the government introduce a Jury Directions Bill that:

- sets out guiding principles for the interpretation of the Bill
- provides a new framework for determining what directions on the law are required through the jury direction request provisions
- clarifies and simplifies the trial judge's obligations to sum up the trial
- encourages new ways of giving jury directions, that is, in the form of integrated directions and with a written jury guide
- enables the trial judge to effectively answer jury questions about the meaning of proof beyond reasonable doubt, and
- clarifies and simplifies directions on post-offence conduct.

Guiding principles

The recommended Bill would aim to drive a significant and lasting cultural change for both trial judges and counsel. The guiding principles in the Bill would assist in its interpretation and support this new approach. In addition to recognising the need for clearer and simpler directions, the Bill would recognise the roles of juries, counsel and trial judges in criminal trials as well as problems in the current approach to jury directions. This is set out in Part 4.

Request for directions and reform of the Pemble obligation

The Pemble obligation requires trial judges to direct the jury about defences and alternative verdicts that have not been raised by the accused during the trial, but that are reasonably open on the evidence. The obligation causes a number of problems, particularly due to the uncertainty about when directions are required, which results in overly complex directions that are difficult for the trial judge to give and confusing to jurors.

We recommend that the Jury Directions Bill provide a new framework for determining the directions that the trial judge should give to the jury and the content of those directions (Part 5). There are four main components in the proposed reforms:

- Counsel and the trial judge discuss the issues in the case and the directions that need to be given. As part of this process, defence counsel must identify the issues in dispute or not in dispute in the case and counsel for the prosecution and defence counsel must inform the judge of the directions that they want, or do not want, based on those issues.
- If a direction is requested by a party, the trial judge must give the direction unless there are good reasons for not doing so. If a direction is not requested, the trial judge will not normally need to give a direction.

- In very limited circumstances, in order to avoid a substantial miscarriage of justice, the trial judge has a residual obligation to give a direction whether or not defence counsel has indicated that it relates to a matter in issue, and whether or not the parties requested the direction.
- Where the accused is not legally represented, the trial judge must proceed on the basis that the accused has requested any direction which is open to the accused to request, subject to the application of good reasons and interests of justice tests. This will ensure that the accused is not disadvantaged because the accused does not know the law.

The recommended provisions would encourage directions targeted to the matters in issue as identified by counsel through discussion with the trial judge.

The obligation to sum up and integrated directions

The common law requires trial judges to sum up a case before the jury deliberates. This involves relating the evidence in the trial to the legal and factual issues that the jury must decide. Summings up appear to be failing to achieve their aim of being succinct statements of the law and the facts in issue and to contain only so much detail as is necessary to explain to the jury its task. Their current length, complexity and manner of presentation undermines their effectiveness.

We recommend that the Jury Directions Bill regulate the content and form of the trial judge's summing up (Part 6). The Bill would encourage shorter summings up by ensuring that the directions on the law, references to how counsel have put their case and identification of evidence directly relate to matters in issue. It removes any requirement to summarise how the parties put their case (including their closing addresses) or the evidence.

Current practices require jurors to perform difficult intellectual exercises, for example, to apply abstract legal concepts to the facts of the case and to listen to extensive oral directions. Accordingly, the Bill would encourage and support judges to present information to juries in various ways, including the use of written materials such as jury guides, but at the discretion of each judge. The Bill would also expressly provide that the directions on the facts and the law may be given as 'integrated directions'. A key feature of an integrated direction is that it embeds the law in factual questions on issues in the trial, avoiding a 'mini-lecture' on the law and making it easier for the jury to understand. Integrated directions can also incorporate references to how the counsel have put their cases and any relevant evidence.

Proof beyond reasonable doubt directions

One of the fundamental protections for an accused in a criminal case is the requirement for the prosecution to prove its case 'beyond reasonable doubt'. While 'proof beyond reasonable doubt' is a commonly used term, research shows that its meaning is not always clear or well understood. Trial judges cannot currently explain the concept of beyond reasonable doubt to the jury except in very limited circumstances.

The recommended Bill would enable the trial judge to explain the meaning of beyond reasonable doubt when the jury requests assistance (Part 7). To enhance transparency, and provide further legislative support for this new direction, the Bill would also provide guidance on how the concept may be explained. For example, the trial judge may refer to the presumption of innocence and indicate that it is not enough for the prosecution to persuade the jury that the accused is probably guilty or very likely to be guilty.

Post-offence conduct

'Post-offence conduct', also known as 'consciousness of guilt', refers to conduct by an accused after an alleged offence, such as lying or fleeing the scene of the crime, that may be relied on by the prosecution to show that the accused committed the crime in question. The law governing consciousness of guilt directions is a particularly egregious example of the complexity and length of jury directions and the lack of weight given to the comprehensibility of the directions to the jury. In 2009, the VLRC reported that since the mid-1990s the Court of Appeal has heard at least 84 appeals that raised consciousness of guilt directions as an issue. The appellant succeeded in 28 of those cases. These figures do not include subsequent successful appeals against conviction by Dupas and Farquharson, in 2009.

We recommend that the Bill provide a new framework for giving directions on post-offence conduct (Part 8). The reforms would remove complex common law requirements brought about by cases like *Edwards v R* (1993) 178 CLR 193 and *Zoneff v R* (2000) 200 CLR 234 and focus on the key questions, namely: when may a jury use post-offence conduct evidence; when must the trial judge give a direction concerning this kind of evidence; what must the direction contain; and when must the trial judge give a direction to prevent a jury from mistakenly using evidence as post-offence conduct evidence.

We recommend that the Bill provide that:

- The prosecution must give notice to the trial judge and the accused before the trial if it intends to use post-offence conduct evidence as an implied admission of guilt by the accused.
- If the trial judge permits the prosecution to use the evidence in this way, the judge must direct the jury about how to use the evidence in determining the accused's guilt, with the necessary content of the direction specified in the Bill.
- If the trial judge gives this mandatory direction, the accused may also request an additional direction which provides cautionary information about this type of evidence.
- In circumstances where the prosecution does not rely on the post-offence conduct evidence, but the accused is concerned about the potential misuse of such evidence by the jury, the accused may request a cautionary direction.
- The trial judge is not required to give a direction requested if there are good reasons for not doing so.

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. The NSWLRC released a consultation paper on jury directions in 2008.

The VLRC Report makes 52 recommendations relating to reform of jury directions in Victoria. The VLRC recommends that the law concerning jury directions in criminal trials be located in a single statute, and most of its recommendations relate to the content of that statute. The VLRC also makes a number of practical recommendations relating to issues such as accreditation and training.

The Victorian Government made an election commitment to legislate in line with the VLRC's report to reduce the complexity of the directions judges are required to give to juries and improve the ways in which information is presented and made available to juries.

In addition to academic commentary and reviews by law reform bodies, the judiciary has 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. For example, in *Wilson v R* [2011] VSCA 328 (at [2]), the President of the Court of Appeal stated that:

> The law governing the trial of sexual offences is now so extraordinarily complex as to throw into doubt the expectations on which the system of trial by jury is founded. Those expectations are, first, that a trial judge can reasonably be expected to explain the relevant law to the jury, in all its permutations and combinations, without falling into error; and, secondly, that the jury can reasonably be expected not only to comprehend the law as so explained, but to apply it…to the evidence which they have heard.

Problems with the law of jury directions result in errors in directions (which can lead to appeals and retrials). Also, fundamentally, the current law makes it very difficult for jurors to understand and apply the law. These (and other) problems are discussed in detail in Part 2 of this report.

1.2 Scope of this review

Our review focuses on the law of jury directions in criminal trials. We do not make recommendations for reform of the substantive law relating to criminal offences, or the law governing what evidence is admitted in a trial. Those laws determine what offence a person may be charged with, and what evidence a jury may hear at trial. For example, the trial judge may decide that particular evidence is not admissible because it is not relevant or because it has been illegally obtained.

Once those issues have been resolved, and the relevant evidence has been placed before the jury, the trial judge must direct the jury about the issues in dispute between the prosecution and the accused in accordance with the law and evidence in the trial. These jury directions perform an essential role in the trial process. Jurors are the deciders of fact in jury trials, and decide whether an accused is guilty or not guilty of the offence charged. Effective jury directions will assist jurors to perform this role in accordance with the law. If directions are not effective, this leaves jurors to navigate the evidence and arguments in a trial on their own, which makes their job harder, and may reduce the community's confidence in the criminal justice system. It is therefore vital to ensure that jury directions are as clear and helpful as possible.

There are some directions that trial judges must give in any criminal trial. These are sometimes referred to as 'general directions' or 'ineluctable directions'. They relate to the role of the judge, the parties and the jury, and the assessment of witnesses. These directions are not creating problems in practice, and are not the subject of this review.

Our review focuses on the other directions that may (or must) be given, depending on the particular trial, in order to direct the jury about the relevant law and evidence, and how that evidence is to be considered. For example, the trial judge may need to direct the jury on how they may use a particular piece of evidence. Some of these directions may be given during the trial, at the time the relevant evidence is given. Others may be given (or repeated) at the end of the trial when the judge 'sums up' the trial.

The law on jury directions in Victoria is currently spread across case law and legislation. To improve and clarify the law, legislation is required. Accordingly, in this report we discuss the content of a possible Bill – see Parts 3 to 8 of the report.

We also discuss how the Bill might affect jury directions in practice. For the proposed legislation to be effective in practice, cultural change within the courts and the legal profession will be essential. These issues are discussed throughout the report, in particular in Part 5, which relates to the proposed jury direction request provisions.

1.3 Objectives of this review

As we discuss further in Part 2 of this report, the problems with jury directions include the number and complexity of directions that trial judges are required to give, as well as their length, relevance and comprehensibility to jurors.

The current laws lead to errors in jury directions, which result in appeals and retrials. Errors identified on appeal focus on what trial judges say to jurors, rather than on what jurors understand. There is considerable research in a number of jurisdictions to indicate that jurors do not understand many directions, especially if they are long and complex.

The department recommends that the Bill address these concerns with a range of reforms to:

- reduce uncertainty over when a direction is required
- clarify the roles of the trial judge and counsel
- reduce the complexity and length of directions, while ensuring that they contain information that is necessary for the jury to perform its role, and
- encourage better ways of presenting jury directions, to assist the jury.

Both the VLRC and QLRC highlighted the need to reform the law on jury directions so that it better focuses on information that jurors need to perform their role, in a helpful and accessible way. Our proposals are consistent with this overall aim, and adopt and build upon various recommendations in those reports.

For example, our recommendations reflect the QLRC's views on integrated directions, providing jurors with written assistance, and requiring counsel to identify which directions they wish the trial judge to give, or not give. In line with the VLRC recommendations, it is proposed that the Bill contain guiding principles, refer to jury guides, and address issues related to summaries of evidence and post-offence conduct directions.

1.4 Approach to this review

This review has been conducted in consultation with an expert Advisory Group. The department prepares consultation papers for the Advisory Group. The papers discuss the current law in Victoria and its problems, as well as laws in other relevant jurisdictions. The papers also make recommendations for reform, which the Advisory Group considers in detail.

The Advisory Group was established in 2010, and first met in May 2010 (see Appendix 1 for a list of members). Topics for consultation papers are drawn both from the VLRC Report and from discussions with the Advisory Group. For example, the VLRC discussed summing up and directions on post-offence conduct in its report. However, directions on 'proof beyond reasonable doubt' were considered at the request of the Advisory Group.

To date, the Advisory Group has considered the following topics:

- post-offence conduct
- proof beyond reasonable doubt
- integrated jury directions
- summing up
- jury guides
- the Pemble obligation/jury directions request provisions
- delay and forensic disadvantage
- delay and credibility
- identification evidence, and
- right to silence.

The Advisory Group is currently examining the proposals made in the Simplification of Jury Directions Report (which is discussed below). The Advisory Group has also identified a range of other jury directions requiring review, such as opinion evidence.

Waiting until all of these further topics have been reviewed before introducing legislation would delay the implementation of important improvements to the law. Accordingly, we recommend that the first Jury Directions Bill (referred to in this report as 'the Bill') reform the first six of these topics.

A subsequent Bill or Bills could then cover the remaining topics in the above list, along with other proposals to be considered by the Advisory Group.

1.5 Other reviews

1.5.1 Simplification of Jury Directions Report

Alongside the departmental process, a joint team led by Justice Weinberg of the Court of Appeal was established to further progress the jury directions reforms. The team comprised Justice Weinberg and his staff, as well as staff from the JCV and the department. Justice Weinberg was taken 'off line' for three months for the project from mid March 2012. JCV and departmental staff worked on the project from January 2012 until July 2012.

The team produced a report on four jury directions topics for discussion with the Advisory Group. The Simplification of Jury Directions Report makes proposals for reform in the following areas:

- complicity
- inferences and circumstantial evidence
- other misconduct evidence (e.g. tendency and coincidence evidence), and
- unreliable evidence.

The Simplification of Jury Directions Report was provided to the Advisory Group in August 2012, and was released publicly in October 2012. The Advisory Group commenced discussion of the Report in August 2012.

1.5.2 Sexual offences reforms

In recent years, there has been increasing concern that Victoria's sexual offence laws lack clarity, are too complex, and result in too many appeals. There is also concern that the laws may not reflect community expectations.

Jury directions about elements of sexual offences, and defences or exceptions to such offences, can only be clear if the substantive law is clear. Addressing the complexity of jury directions in sexual offence cases therefore requires consideration of sexual offence laws themselves.

The VLRC recommended that the department review the substantive law of sexual offences in order to reduce in number, shorten and simplify the directions and warnings the trial judge must give to the jury in sex offence trials. The department's review of sexual offence laws is nearly complete.

2 Problems with jury directions

2.1 Introduction

Serious crimes are generally dealt with in the County Court or the Supreme Court. If a person charged with such a crime pleads not guilty, a jury determines whether the person is guilty of the offence charged. Jury directions (or the directions a judge gives to a jury to help them to decide whether a person is guilty or not guilty of a crime) are an essential feature of the right to trial by jury.

The trial judge must direct the jury about the elements of the offence and any defence. The judge must also warn or inform the jury about certain kinds of evidence (e.g. that an accomplice might have a reason to lie about their involvement in an offence, or how the jury may use hearsay evidence). This helps to ensure that a jury applies the relevant law to the case before them.

Judges direct juries about the evidence in the case, summarising it and discussing whether the evidence (if the jury accepts it) is capable of proving that the accused committed the offence. Judges also summarise the submissions of the prosecution and defence about why the accused is or is not guilty.

The law operates on the assumption that if a trial judge gives a direction, the jury will follow that direction. As Windeyer J said in *Gammage v R* (1969) 122 CLR 444 at 463, the jury 'must be assumed to have been faithful to their duty'.

Jury directions aim to ensure that people charged with crimes are tried in accordance with the law. They are central to ensuring that a fair trial is conducted, for example, by minimising the risk of jurors considering irrelevant matters or allowing individual prejudices to inappropriately affect their decision making. This, in turn, helps to give the community confidence in jury verdicts and the criminal justice system.

As the High Court said in *Dupas v R* [2010] HCA 20 at [28-29]:

> What…is vital to the criminal justice system is the capacity of jurors, when properly directed by trial judges, to decide cases in accordance with the law, that is, by reference only to admissible evidence led in court and relevant submissions, uninfluenced by extraneous considerations. That capacity is critical to ensuring that criminal proceedings are fair to an accused.

The law governing jury directions is currently found in legislation, Court of Appeal decisions and High Court decisions. In the VLRC Report (at [2.35]), the VLRC found that within a relatively short period, jury directions in Victoria have become complex, voluminous and uncertain.

The complexity in this area is highlighted by the differing views of trial judges and appellate court judges on how the law should apply in a particular case. Lawyers also struggle to understand some aspects of the law.

Fundamentally, the current state of the law casts doubt on whether jury directions are achieving their aim of helping the jury reach its verdict in accordance with the law. Justice Marcia Neave, in a 2012 speech on jury directions, said:

> The way in which jury directions are given and their content fails to reflect at least 30 years of linguistic and psychological research about what helps people to understand and apply what they are told. Appellate courts have focussed almost entirely on the legal correctness of directions, rather than on how they are delivered and whether jurors can understand them.[1]

While it is agreed that jurors generally perform their role conscientiously, it is increasingly recognised that what is expected of jurors is unreasonable. This is due to the length and complexity of the issues and material with which they are confronted and, sometimes, the manner in which those issues are presented.

In this Part, we discuss some of the main problems with jury directions in Victoria. The problems are considered under broad headings, but necessarily overlap with each other to some extent. In Parts 3 to 8, we recommend a number of legislative reforms to address these problems.

2.2 The sources of law and 'culture' of directions

As noted above, the law on jury directions in Victoria is found in legislation, Court of Appeal decisions, and High Court decisions.

2.2.1 Legislation

While case law is the source of many jury directions, some jury directions are contained in legislation. Section 61 of the *Crimes Act 1958* and section 165B of the *Evidence Act 2008* both relate to jury directions on delay in complaint. They overlap to a large degree, but are not entirely consistent with each other. Their interaction with the common law is also unclear. Such problems do not assist with the aim of providing clear, consistent directions.

An example of complex legislation governing jury directions can be found in the *Crimes Act* for the offence of rape. For example, complexity arises where there is evidence, or an assertion, that the accused believed that the complainant was consenting to the sexual act. The jury must consider this belief when determining whether the prosecution has proved beyond reasonable doubt that the accused was aware that the complainant was not consenting or might not have been consenting. A belief in consent is relevant because such a belief will be inconsistent with awareness of the absence of consent and, depending on the nature and strength of the belief, may be inconsistent with awareness that the complainant might not be consenting.

In addition to directions concerning the nature and strength of the belief, the jury will first need to determine whether the accused held the belief. In doing so, section 37AA(b) of the *Crimes Act* provides that the jury must consider 'whether that belief was reasonable in all of the circumstances'. The Court of Appeal has indicated in a number of cases that this direction must usually be 'balanced' with a direction explaining that 'the reasonableness or otherwise of a belief is no more than a guide to whether it was in fact held'.

The complex relationships between various concepts of 'belief', 'reasonable belief', 'awareness' and 'might not be consenting' are difficult for a trial judge to explain to juries and very difficult for juries to understand and apply.

1 Justice Marcia Neave, 'Jury Directions in Criminal Trials – Legal Fiction or the Power of Magical Thinking?' (Speech delivered at the Supreme and Federal Court Judges' Conference, Melbourne, 23 January 2012).

The difficulties are multiplied when the subtleties of such fine philosophical distinctions collide with the practical realities of a criminal trial where there is often sharply conflicting evidence and contested interpretations of the same evidence. As the Court of Appeal said in *NT v R* [2012] VSCA 213 at [19]:

> These provisions have created much difficulty for trial judges and this Court for a very lengthy period. We do not take issue with the policy which underlies the provisions but, unfortunately, however, some of the concepts utilised including those which involve subtle differences between the state of mind of belief or awareness, the interrelationship between these concepts and their degree of prescription have made these provisions almost unworkable in the context of jury trials. The problems raised by this legislation can only be addressed by urgent and wholesale amendment.

While legislation itself is problematic, part of the problem is that legislative jury directions often aim to address specific appellate decisions, working within the existing complex framework of jury directions.

2.2.2 Case law

A significant problem with the current law on jury directions concerns uncertainty over when a direction is required. It can be difficult for the trial judge to determine when a direction is required. For example, post-offence conduct directions have resulted in notoriously complex directions. It can be difficult to determine whether certain evidence is relied on as post-offence conduct evidence. Where it is not, it can be difficult to determine whether there is a danger that the jury may inappropriately use the evidence as consciousness of guilt. These issues must be resolved before the trial judge can determine what kind of direction is necessary.

In addition, in accordance with the High Court decision in *Pemble v R* (1971) 124 CLR 107, trial judges are required to direct the jury about defences and alternative verdicts that have not been raised by the accused during the trial but which are reasonably open on the evidence. This is referred to as the 'Pemble obligation'.

There are various problems with the Pemble obligation, including that it encourages judges to 'appeal proof' directions (i.e. to err on the side of caution by including directions where there is only a remote chance that they are relevant), and that it does not sit well with the respective roles of the trial judge and counsel in an adversarial system.

The Pemble obligation also highlights another problem with the current law on jury directions, namely that when a trial judge determines the relevant directions to give, too much emphasis is given to the role of the trial judge, and insufficient emphasis is given to the role of counsel. (Please see Part 5 for further discussion of the problems associated with the Pemble obligation.)

Problems with jury directions appear to be worse in Victoria than in some other states. For example, directions in Victoria are among the longest in Australia (see Table 1, in Part 2.5). The QLRC Report also observed that some of the problems in Victoria (e.g. in relation to the length of summings up) do not appear to exist in Queensland.[2] It is clear that the directions are too complex and that trial judges are held to an exacting standard in order to ensure that trials in Victoria are fair trials and the community has confidence in the criminal justice system.

It is difficult to determine when some directions are required or not required and the content of some directions. Because a misdirection may result in a retrial, trial judges will tend to 'appeal proof' their directions. This is understandable. But as trial judges give longer and more detailed jury directions, this tendency increases the risk that within those directions, they will make an error. These errors will then result in more appeals.

2 Queensland Law Reform Commission, *A Review of Jury Directions,* Report No 66 (2009) [1.52] – [1.53].

Further, if trial judges are likely to err on the side of giving a direction that is potentially open, trial counsel are more likely to rely on this 'safeguard' rather than assisting the trial judge to determine which directions are required in a particular case.

2.3 Directions may not be effective

As discussed above, the aim of jury directions is to assist the jury in its role, and to ensure that people accused of crimes are tried in accordance with the law. For this to occur, jurors need to understand the directions given to them, and to be able to apply them. This can be difficult given the number of directions, and their complexity (which are discussed further below).

In addition, the law on jury directions has developed in an ad hoc manner, and has tended to rely on assumptions about jurors and their deliberation processes that do not necessarily accord with current empirical research in this area. As the QLRC Report observed (at [3.11]):

> The jury's immunity from scrutiny, as well as the status afforded to jury decisions in the criminal justice system, has also led to many assumptions about the way in which juries operate and…the way in which juries respond to the instructions, directions, comments and warnings given to them by judges. Some of these assumptions do not withstand scrutiny and are challenged by some of the empirical evidence, particularly from psychological and psycho-linguistic sources.

This has obvious ramifications on the effectiveness of jury directions. After considering and analysing a series of empirical studies which had sought to measure jury comprehension, Ogloff and Rose concluded (in 2005) 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.[3]

This appears to be the overwhelming view. As the QLRC noted (at [3.14]), 'many commentators have questioned whether jurors are able to understand, remember and integrate the information and legal principles they are confronted with in reaching a verdict'. Particular concern has been raised about the effectiveness of directions on issues that are 'new, difficult or counter-intuitive to jurors' commonsense'.[4]

Studies show that directions may not help jurors to understand concepts even if the jurors themselves consider that the directions were helpful. The QLRC cited a New Zealand study that revealed that although most jurors found the judges' directions 'clear' and 'helpful', 72 percent of them demonstrated a misunderstanding of the law about which they had been instructed, in particular in relation to the elements of the offence about which they need to be satisfied beyond reasonable doubt before convicting. Studies from the United States and Canada have reached similar conclusions.[5]

The empirical research highlights a number of problems with current jury directions law and practice. These include:

- the way in which directions are expressed and communicated (and how this affects juror comprehension), and
- the use of 'limiting directions', namely directions that require the jury to disregard particular evidence or to limit the use of evidence.

3 James R P Ogloff and V Gordon Rose, 'The Comprehension of Judicial Instructions' in Neil Brener and Kipling D Williams (eds), *Psychology and Law: an Empirical Perspective* (Guilford Press, 2005) 407, 425, cited in Justice Weinberg et al, *Simplification of Jury Directions Project: A Report to the Jury Directions Advisory Group* (August 2012) [1.29] ('*Simplification of Jury Directions Project*').

4 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC Report 102, NSWLRC Report 112, VLRC Final Report (2005) [18.10].

5 Queensland Law Reform Commission, above n 2, [5.61] – [5.63].

2.3.1 How directions are expressed and communicated

The following is part of a direction from a 2006 case:

> If you are satisfied that one or more of the accused killed [the victim] but you are not satisfied that the Crown has not proved beyond reasonable doubt that the accused did not act in self defence, [he] is not guilty of either murder or manslaughter.

As the Chairman of the NSWLRC, James Wood AO QC noted, '[i]t is questionable whether any juror would understand this direction, or understand that in fact it contained one negative too many (the existence of which was not in fact noticed at the trial, or on appeal)'.[6]

Not surprisingly, the psycholinguistic research finds that 'plain English' strategies improve the ability of jurors to understand and apply directions. These strategies include using simple, active language, placing directions in context, and avoiding negatives where possible.[7]

However, even if trial judges use plain English in directions wherever possible, it can be difficult to give simple, clear directions. The law can be complex. It can be difficult for trial judges to express complex matters simply, while still being legally accurate.

As noted above, this is one reason why the government is considering significant reform of Victoria's sexual offence laws. The law of complicity (which is also under review) is another area in which the underlying law is so complex that clear directions are 'virtually impossible'.[8]

The balancing act required of trial judges is further complicated by the knowledge that directions may subsequently be scrutinised by appellate counsel and appellate judges for accuracy, as discussed above.

The language used by appellate judges can add to the problem. As the VLRC observes (at [2.37]):

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

Another relevant consideration is how directions are communicated to the jury. Traditionally, trial judges tend to direct juries orally (although some judges are increasingly providing written documents to supplement oral directions).

Reliance on largely verbal communication is problematic given studies on how presentation techniques can affect the ability of jurors to understand and apply information, as discussed below. It is also problematic given how long and complex directions have become in Victoria over the past 30 or so years. Prior to that, directions were generally much shorter, and so it was easier for jurors to maintain focus, even when the directions were given verbally.

Research and practical experience shows that it can be difficult for jurors to maintain interest and concentration during oral directions, especially if they are long and complex. Jurors can struggle with absorbing and recalling orally presented information. In one study, jurors also reported that 'not infrequently', there were discrepancies in the notes that they had taken, and they could not agree on what had been said.[9]

6 James Wood, 'The Trial under Siege: Towards Making Criminal Trials Simpler' (Paper presented at the District and County Court Judges Conference, Fremantle, 27 June – 1 July 2007).

7 See, for example, Robert P Charrow and Veda R Charrow, 'Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions' (1979) 79 *Columbia Law Review* 1306; L J Severance and E F Loftus 'Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions' (1982) 17 Law and Society Review, 153; P Tiersma, *Communicating with Juries: How to Draft More Understandable Jury Instructions* (National Center for State Courts, 2006).

8 *Simplification of Jury Directions Project*, above n 3, [1.38].

9 See, for example, Warren Young, Yvette Tinsley and Neil Cameron, 'The Effectiveness and Efficiency of Jury Decision Making' (2000) 24 Criminal Law Journal 89, 93, Amiram Elwork, Bruce D Sales and James J Alfini, *Making Jury Instructions Understandable* (Lexis Law Publishing, 1981) 18-20.

A 2010 British study of jurors showed that only 31 percent were able to correctly identify the two questions that the judge told them they had to answer in deciding whether the accused had acted in self defence. Giving a written summary of directions increased the percentage of jurors who could identify both questions from 31 percent to 48 percent.[10]

Changing modes of communication (such as the internet) mean that modern jurors reportedly learn better with the assistance of visual aids, such as powerpoint presentations.[11] Justice Kirby has observed that unless jury procedures are adapted to the digital age, jurors may find intolerable the often boring and tedious lengthy legal proceedings.[12]

The timing and order of directions can also be important. Young, Tinsley and Cameron conclude that:

> [J]urors do not in fact absorb information like black boxes, piece it together and make sense of it at the conclusion of the trial. Instead, their approach to the evidence tends to confirm the "story model" of jury decision-making: they actively process the evidence as it emerges, evaluating it and attempting to fit it into an evolving story which makes sense to them.[13]

Although the research on whether directions at the start of a trial are more effective than those given after the evidence is inconclusive, the research does conclude that repetition of jury directions helps jury comprehension.[14] This may suggest, for example, that directions on specific evidence should be given before the evidence is heard, and again at the end of a trial.

The way in which directions are communicated to the jury has clear implications for juror comprehension. Ineffective communication techniques compound some of the other problems with jury directions we discuss below, such as their length and complexity. These problems can lead to juror disengagement, and concerns about the basis on which jurors are reaching their verdicts.

In addition, the current laws do not necessarily focus on information that is relevant or helpful to jurors. For example, the law requires trial judges to give considerable detail in some areas (e.g. by summarising counsel's addresses), but fetters them in other areas. For example, trial judges are very restricted in their ability to explain what 'proof beyond reasonable doubt' means, even if a jury requests assistance with the meaning of the phrase. This is of considerable concern given how fundamental the phrase 'proof beyond reasonable doubt' is in criminal trials.

2.3.2 Limiting directions

Some jury directions warn juries against reasoning in a particular way. Juries are directed that some evidence can be used for one purpose, but not for another. For example, 'tendency evidence' is evidence of the character, reputation or conduct of a person, or a tendency that a person has or had. Currently, a trial judge is required to direct the jury that it *may* use such evidence to infer that it makes it more likely that the accused committed the offence charged. However, the jury is warned that it *must not* use the evidence for various other purposes (e.g. to reason that if the accused did the previous acts, he or she must have committed the offences charged, or to substitute the evidence of the previous acts for evidence of the offence charged).

10 As quoted in Neave, above n 1.

11 See, for example, T H J Eames, 'Towards a Better Direction – Better Communication with Jurors', (2003) 24 *Australian Bar Review,* 35 and J Horan, 'Communicating with Jurors in the Twenty-First Century' (2007) 29 *Australian Bar Review* 75, as cited in J Walvisch, Judicial College of Victoria, *Background Paper: Jury Directions Research* (2012) (unpublished).

12 Michael Kirby, 'Speaking to the Modern Jury: New Challenges for Judges and Advocates' (Paper presented at the Worldwide Advocacy Conference, Inns of Court School of Law, London, July 1998).

13 Young, Tinsley and Cameron, above n 9, 91. See also Elwork, Sales and Alfini, above n 9, 22-24.

14 J Alexander Tanford, 'the Law and Psychology of Jury Instructions' (1990) 69 Nebraska Law Review 71, 84, cited in *Simplification of Jury Directions Project*, above n 3, [1.44].

These directions often rely on very subtle distinctions, and can be difficult to comply with. As the QLRC observed (at [12.15]):

> The task of nimbly applying the evidence for certain purposes while somehow neutralising any further, improper influence of that evidence is difficult enough for lawyers; how much harder is it then for lay jurors to master this feat of evidentiary gymnastics? ...The cognitive load that jurors are under may impede their efforts to comply with limiting instructions, even when they are motivated to do so.

In *Zoneff v R* (2000) 200 CLR 234, Justice Kirby observed at [65] that '[i]nstructions to a jury should be comprehensible. They should avoid the unrealistic imposition on a jury of over-subtle distinctions and the imposition on judges of a duty to give directions that may actually be counter-productive to the end sought'.

Such directions can be ineffective or, as Justice Kirby notes, can have the opposite effect to that which is intended. Research shows that jurors tend not to follow directions that appear contrary to common sense, or that do not accord with their preconceived ideas of what evidence they should, or should not, consider.[15]

Studies also show that when jurors are specifically warned against reasoning in a particular way, they can be more likely to reason in that way.[16] This is because a warning to disregard certain evidence can highlight the importance of that evidence for jurors. For example, in relation to post-offence conduct, directing a jury that there are various reasons why a person may behave in a way that makes the person look guilty (and then listing those ways) could serve to highlight the apparently guilty behaviour (which is not what the direction is supposed to do).

If directions are ineffective, then there is little or no point giving them. They add to the length of a trial without any real benefit. Giving directions that may backfire (i.e. result in jurors reasoning in the opposite way than is intended) is even more problematic, as such directions can be detrimental to the party which the direction is meant to benefit.

2.4 Directions are too complex

In a 2011 speech, the Honourable Marilyn Warren, Chief Justice of Victoria, said that 'In Victoria at this time the length and complexity of jury charges [directions] in a criminal trial are in a sorry state'.[17]

Jury directions are more complex than is necessary. For instance, the directions a judge must give to a jury in a case involving trafficking in a commercial quantity of drugs are extremely complex and difficult for a jury to understand. Explaining the law of excessive self-defence, or defensive homicide, is notoriously even more complicated.

Part of the complexity is due to the offences themselves. The government is reviewing many of Victoria's criminal offences, to simplify offences where possible, and to clarify directions specific to offences. However, there are also numerous laws requiring complex directions on evidentiary issues in trials. In some areas, judges must comply with both case law and legislation (which are sometimes inconsistent with each other).

15 See, for example, the Queensland Law Reform Commission, above n 2, [12.5] – [12.16]. Also, M Cox and S Tanford, 'Effects of Evidence and Instructions in Civil Trials: An Experimental Investigation of Rules of Admissibility' (1989) 4 *Social Behaviour* 31; G Kramer, N L Kerr and J S Carroll, 'Pretrial Publicity, Judicial Remedies and Jury Bias' (1990) 14 *Law and Human Behavior* 409, as cited in Walvisch, above n 11.

16 See, for example, Evelyn Goldstein Schaefer and Kristine L Hansen, 'Similar Fact Evidence and Limited Use Instructions: An Empirical Investigation' (1990) 14 *Criminal Law Journal* 157, Roselle L Wissler and Michael J Saks, 'On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt' (1985) 9 *Law and Human Behaviour* 37; *Simplification of Jury Directions Project*, above n 3,[1.40] – [1.43].

17 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.

Current practices can also require jurors to perform difficult intellectual exercises. For example, when directing jurors on the law, judges traditionally give the jury a mini-lecture on the law, following which jurors are expected to apply the law to the facts themselves. It generally requires the jury to go though a three stage process:

- understand the explanations given on the law, including the elements of the offence
- apply the law to the facts, and
- assess whether they are satisfied that the facts or elements of the offence have been proved.

In a survey of Supreme Court and County Court judges, most judges saw the 'over-intellectualisation' and complexity of jury directions as 'a major impediment to effective communication with the jury.'[18] These challenges highlight the need for jury directions (as well as the law on jury directions) to be as clear and simple as possible.

In *R v Zoneff* (2000) 200 CLR 234, Justice Kirby observed (at [30]):

> As is its wont, the law has tended to complicate needlessly a subject that calls upon the jury's reserves of common sense. This result sends appellate courts in search of responses. These may include the provision of guidelines or standard directions which will help render the judge's charge to the jury appeal-proof. Or it may result in a conclusion that the law has become needlessly complex and that judicial directions should be simplified and confined to a minimum.

In *NJ v R* [2012] VSCA 256 [27], in relation to a sexual offences case, T Forrest AJA observed:

> If the jury was to be directed in the manner proposed by the appellant the direction, in my view, would only serve to add another unnecessary layer of complexity to the already labyrinthine directions required by ss 6, 37, 37AA, 37AAA and 38 of the Act. The jury would need to be directed that if the Crown had not satisfied it of any elements of any charges beyond reasonable doubt it may not use this lack of satisfaction in the accused's favour when considering other charges on the indictment. If, however, it was positively satisfied on balance of facts favourable to the accused relating to the issue of consent, or his belief in consent, or the issue of whether he turned his mind to it at all, and those facts related to any of the charges on the indictment, then it may use those facts when considering the issue of consent or belief in consent or whether he turned his mind to it at all as part of the material that went to those issues on the charge it was considering. In my view this type of direction is entirely unnecessary and tends to confuse the burden and standard of proof.

This concern is not unique to sexual offence cases, although those cases are often seen as particularly problematic. (As we note in Part 1 of this report, the department is currently reviewing Victoria's sexual offence laws.)

Complex directions:

- are likely to confuse jurors, which may lead to jurors not applying the direction, or applying it wrongly
- could lead to disengagement with the decision making process and affect the integrity of that process
- are more likely to contain errors, resulting in possible appeals and retrials, and
- are often long, which contributes to delays in the court system.

We discuss the length of directions, and appeals and retrials, further below.

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

2.5 Directions are too long

In the 2010 Annual Law Reform Lecture, Lord Justice Moses pointed to a number of problems in England and Wales which are similar to problems in Victoria. In relation to summing up in particular, his Honour said:

> I shall speak to you at length; I cannot even say how long I will be. There will be few intervals; about once every 1½ hours if you are lucky, or 2 hours. I cannot say how long this will last, certainly more than a day, so please do not believe you can make any sensible arrangements for the rest of the week. … You cannot interrupt or ask questions while I am speaking… There will be few visual aids; I shall expect throughout to capture your attention with the power of my voice, speaking faster during those parts of the process which I do not really understand and more slowly when it is really important.[19]

Numerous and complex directions result in long directions. Victorian juries are confronted with some of the longest directions in Australia. Directions in Victoria are also very long in comparison with some overseas jurisdictions.

In 2006, the Australian Institute of Judicial Administration (AIJA) asked Australian and New Zealand judges to estimate the lengths of their summings up and directions to juries at the end of addresses. The results are summarised in the following table, which highlights the variations among the Australian states, and between Australia and New Zealand. It sets out the judges' estimates in minutes of the time spent:

- directing on the law
- summarising the evidence, and
- directing on the parties' addresses.

As the table shows, the shortest directions were consistently those reported by New Zealand judges. In Australia, the shortest were those reported from South Australia and Western Australia, followed by Queensland. The other three states (New South Wales, Victoria and Tasmania) were relatively close to each other but all were significantly longer than the 'short' states.

Table 1: Estimated duration of summing up

	NSW	QLD	SA	TAS	VIC	WA	NZ
Five-day trial							
Law	52	36	28	58	60	41	24
Evidence	58	41	35	73	63	36	21
Addresses	31	23	21	23	22	18	18
Total	**2h 21m**	**1h 40m**	**1h 24m**	**2h 34m**	**2h 25m**	**1h 35m**	**1h 03m**
Ten-day trial							
Law	64	46	35	73	83	43	24
Evidence	115	68	64	100	131	48	28
Addresses	38	33	28	47	41	25	24
Total	**3h 37m**	**2h 27m**	**2h 07m**	**3h 40m**	**4h 15m**	**1h 56m**	**1h 16m**
Twenty-day trial							
Law	74	65	47	77	104	45	33
Evidence	231	114	112	180	188	72	43
Addresses	57	53	35	60	47	38	32
Total	**6h 02m**	**3h 52m**	**3h 14m**	**5h 17m**	**5h 39m**	**2h 35m**	**1h 48m**

Source: Queensland Law Reform Commission, *A Review of Jury Directions*, Report No 66 (2009) 72

19 Lord Justice Moses, *Summing Down the Summing Up* (Annual Law Reform Lecture, 23 November 2010) 1.

Based on this research, Victorian directions are, on average, over twice the length of Western Australian directions, and triple the length of New Zealand directions.

Even directions in New Zealand seem long when compared to average directions in Scotland (which are generally between 15 and 18 minutes) and in the United States (which are generally under 30 minutes). However, there are significantly less matters covered in these jurisdictions. For instance, Scotland does not include a summary of the evidence and in the United States, directions on the law are usually very general and are not tailored to the specifics of the case.

Jury directions in Victoria are long because:

- the law is complex and detailed (this adds to the complexity of the trial and the risk that it may miscarry)
- there are onerous requirements for lengthy summaries (failure to summarise can lead to a retrial), and
- trial judges tend to include everything to minimise the risk of forgetting something or being appealed, but this takes longer and does not help the jury.

Long directions are unlikely to achieve their aim of assisting jurors to apply the relevant law to the case, and to arrive at a fair decision. This is because jurors tend to stop listening if the directions are overly long, repetitive, confusing or do not seem particularly relevant to the case.

Long directions also contribute to delays in the court system. First, there is the time required for trial judges to prepare and give the directions. Secondly, long and complex directions, by their very nature, are more likely to contain errors. This can result in appeals and retrials.

2.6 Directions result in appeals and retrials

In addition to affecting the basis on which the jury reaches a verdict, long and complex directions and uncertain jury direction laws make the task of the trial judge more difficult, making errors in directions more likely. Errors in jury directions result in retrials, appeals and delays in the court system.

In Victoria, between 2001 and 2010, the Court of Appeal ordered 136 retrials as a direct result of jury direction related grounds of appeal.[20] The graph below identifies a breakdown of the types of direction related grounds of appeal.

Unnecessary appeals and retrials add considerably to the trauma experienced by victims of crime and their families, particularly in cases involving sexual offences.

Numerous individuals and agencies from the legal, health and community welfare sectors, including the Victorian Centres Against Sexual Assault (CASA), have urged jury directions reform because of the potential to avoid further trauma to victims that can take place under the current system.[21]

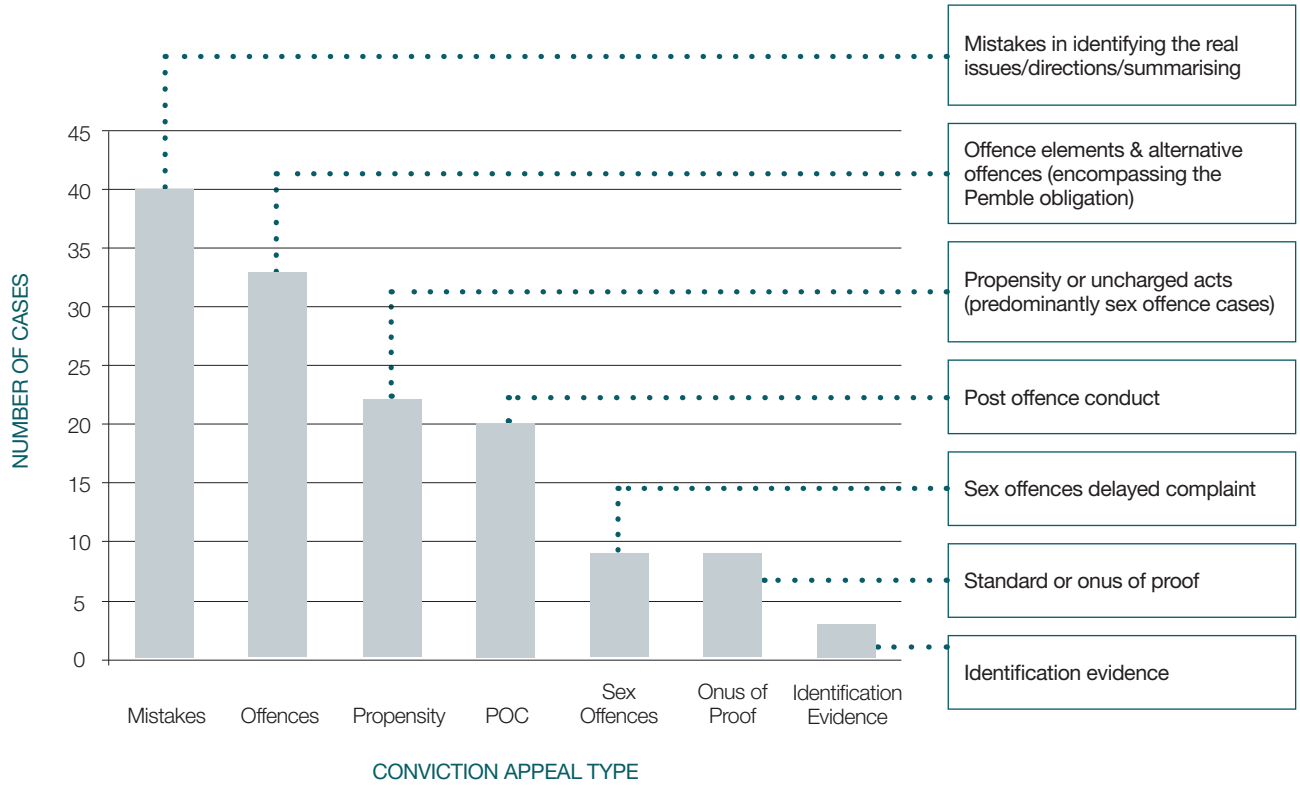
Appeals and retrials can also affect public confidence in the criminal justice system, for example, if the public perceives that an offender had a conviction set aside because of a technical problem with the law.

20 Data provided by the Office of Public Prosecutions Victoria in 2011.

21 Letter from Dr Chris Atmore, Federation of Community Legal Centres (Vic) Inc to the Hon. Robert Clark MP, Attorney-General, dated 7 September 2012 (on behalf of the Federation of Community Legal Centres (Vic) Inc, CASA, Multicultural Centre Against Family Violence, Domestic Violence Victoria, Family Violence Prevention & Legal Service, Domestic Violence Resource Centre Victoria, No To Violence Male Family Violence Prevention Association (NTV) Inc, Women with Disabilities Victoria, The Victorian Women's Trust and Women's Legal Service Victoria).

The economic cost of appeals and retrials is also significant. They contribute to delays in the criminal justice system, and are expensive. For example in the 2010 high-profile case of Farquharson, who was accused of killing his children and found guilty for a second time after being retried, the retrial lasted 95 days. Such a retrial is a significant cost to the government as among others, there are costs for the courts, prosecution, police and legal aid.

Graph 1: Conviction Appeals 2000-2010



2.7 Conclusion

As we can see from the above discussion, there are numerous problems with jury directions in Victoria. It is clear that there are a number of different sources and kinds of problems and that these problems have a snowballing effect on each other. This will continue to be the case while working within the current jury directions system. The changes recommended involve a paradigm shift to both when directions do or do not need to be given and to the content of those directions.

The aim of providing a new legislative framework for jury directions is to break out of this cycle of ever longer and more complex jury directions. While legislation can provide the capacity for real change, legislation cannot achieve this kind of change on its own. It will also depend upon changes in the approaches of trial judges to directing a jury, and changes in the way appellate courts consider jury directions and what is important in a trial. Importantly, this involves a change in focus from technical compliance with the law to communicating effectively with juries.

As Justice Neave has said:

> A 'legal fiction' is an assumption which conceals or glosses over a fact or rule in order to produce an appropriate outcome. The approach which appellate courts take in considering the correctness of jury directions often fits this definition. Appeal courts generally assume that a technically complex direction which is correct does not produce a miscarriage of justice. By contrast, an ambiguity or lack of precision in language may result in success on appeal, even if it is highly unlikely that the ambiguity or nuances in the statement would have been perceived by a lay juror. The legal fiction is that if an instruction is legally correct, the jury must have applied it.[22]

Cultural change on the part of counsel, trial judges and appeal judges will be required in order for jury directions reform to be successful in practice. Part 5 of the report, which relates to the proposed jury direction request provisions, discusses these issues in more detail.

The legislative changes that we recommend in this report should assist to facilitate cultural change. These reforms would support and further encourage the changes that are already occurring. For example, trial judges and counsel are increasingly discussing which directions are required, and the content of those directions. In *MB v R* [2012] VSCA 248, the Court of Appeal, in rejecting an argument that the trial judge's directions had been inadequate, highlighted that the way in which the trial is run, and the decisions of trial counsel, have a significant impact on which jury directions are required for a fair trial.

In the next Parts of the report, we discuss a number of possible reforms to address these problems.

22 Justice Marcia Neave, 'Jury Directions in Criminal Trials – Legal Fiction or the Power of Magical Thinking?' (Speech delivered at the Supreme and Federal Court Judges' Conference, Melbourne, 23 January 2012).

3 Introduction to the recommended Jury Directions Bill

3.1 Overview

In light of the problems with jury directions in Victoria, the department recommends that the government introduce a Jury Directions Bill that:

- sets out guiding principles for the interpretation of the Bill
- provides a new framework for determining what directions on the law are required through the jury direction request provisions
- clarifies and reduces the trial judge's obligations to sum up the trial
- encourages new ways of giving jury directions, that is, in the form of integrated directions and with a written jury guide, and
- clarifies the directions to be given on problematic areas of the law by:
  - allowing trial judges to explain the phrase 'beyond reasonable doubt', and
  - simplifying the directions on post-offence conduct.

These changes would:

- reduce the number and length of directions that trial judges are required to give to juries
- reduce the complexity of directions
- make the issues that juries are required to determine clearer, and
- reduce errors in directions to the jury (leading to fewer appeals and retrials).

3.2 The VLRC recommendations

Part 2 explores the problems with jury directions in Victoria. In particular, the Part notes that jury directions are too often ineffective, too complex, too lengthy and can lead to too many appeals and retrials. The sources of the law on jury directions, that is, legislation and case law have contributed to these problems.

The VLRC was of the opinion that a legislative response was needed to address the problems it identified with jury directions. The VLRC made 52 recommendations for reform in the VLRC Report. In particular, the VLRC thought that legislation was needed to address 'the inability of the common law to produce a workable body of law dealing with jury directions, and the complexity caused by the piecemeal introduction of statutory jury directions, particularly in the area of sexual offences'.[1]

1 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [4.2].

The VLRC recognised that making sure jurors can easily understand the law is of crucial importance given the importance of jury directions in a criminal trial. In the view of the VLRC, legislation has the capacity to:

- 'bring order, clarity and greater simplicity to this body of law' (at [4.13]), and
- 'modernise this area of law by promoting contemporary ways of communicating with juries and encouraging changes to areas that have been the source of complexity and delay' (at [4.14]).

The VLRC recommended (in recommendation 1) that the problems it identified with jury directions should be addressed by enacting a single statute, which would eventually become the sole source of the law of jury directions. However, recognising the size of this task, recommendation 2 stated that this legislation should be progressively introduced. In the view of the VLRC, this would mean that trial judges would no longer be forced 'to contend with a complex patchwork of statutory and common law rules'.[2] According to recommendation 4, the courts would be still permitted to develop jury directions in areas not covered by the statute.

The VLRC also made recommendations about the content of the legislation. In its view, jury directions legislation should:

- provide general principles to guide the content of directions (recommendation 5)
- offer guidance to the trial judge as to when to give and not give directions (recommendations 6-11)
- govern the content of procedural directions: that is, directions on the burden and standard of proof, the role of the trial judge, the jury and counsel, the requirement that the verdict be based solely on the evidence, the assessment of witnesses and unanimous verdicts; directions which are mandatory when the circumstances require (e.g. alternative verdicts, separate consideration, and perseverance); directions which may be given when the circumstances requires (e.g. majority verdicts); and directions which are of an administrative nature (e.g. jury empanelment, selecting a foreperson, trial procedure) (recommendation 12), and
- set out the essential elements of directions concerning the use of evidence. In particular, the initial legislation should provide for propensity reasoning, identification evidence, and post-offence conduct (recommendation 13).

Justice Weinberg's Simplification of Jury Directions Report looked at the issue of 'Other Misconduct Evidence', which covers the issue of propensity evidence (or tendency and coincidence evidence as it is now called) raised by the VLRC.[3] Subsequent legislation could include reform to jury directions for this area of law.

3.3 The right to a fair trial and the law of jury directions

In developing our recommendations for reform of jury directions, we have considered the potential impact of the reforms on the right to a fair trial. These issues were also considered by the VLRC in the VLRC Report after receiving advice from the Victorian Government Solicitor's Office (VGSO) (at [4.54]-[4.107]).

The right to a fair trial is a fundamental aspect of the common law. This right is recognised in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (*Charter Act*). Section 24(1) provides that:

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

2 Ibid [4.23].

3 Justice Weinberg et al, *Simplification of Jury Directions Project: A Report to the Jury Directions Advisory Group* (August 2012) chapter 4.

Section 25 of the *Charter Act* also sets out aspects of a fair trial in criminal proceedings, including the right to be presumed innocent, and other minimum fair trial guarantees. Section 25 is not an exhaustive list of all the elements of a fair trial.

The general purpose of jury directions is to ensure that the accused is tried in accordance with the law. This obviously has implications for the right to a fair trial. The High Court in *RPS v R* (2000) 199 CLR 620 [41] explained the relationship of jury directions to the right to a fair trial as follows:

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

The concept of a fair trial is a flexible and evolving concept at common law, which is not capable of precise definition. As such, it is impossible to exhaustively or comprehensively list the components of a fair trial.[4] Likewise, the *Charter Act* retains flexibility in the concept of a fair trial. Although section 25 of that Act sets out certain minimum guarantees, it does not exclude other aspects of the right to a fair trial. The flexible nature of the right to a fair trial means that the concept will evolve over time. For example, more recent statutory restrictions on the ability to cross-examine complainants on their sexual history or prohibition on the accused personally cross-examining a complainant in a sexual offence case under the *Criminal Procedure Act 2009* are accepted as not violating the right to a fair trial.

Further, although overall the concept of a fair trial is an 'absolute' right, the particular elements that make a trial fair are not absolute.[5] Therefore, just because jury direction reforms may affect particular elements of a trial that have been seen as an aspect of the right to a fair trial (e.g. removing requirements for the trial judge to direct on certain matters) the overall fairness of the trial has not been limited. The fairness of the trial needs to be looked at as a whole. The New Zealand Court of Appeal emphasised this in relation to jury directions, requiring the fairness of a summing up to be assessed in the context of the whole trial.[6] The concept of fairness includes not only the interests of the accused, but also the interests of the victim and society generally.

The directions that are required to be given to a jury as part of a fair trial will evolve over time. Changing these requirements will not necessarily compromise the overall fairness of the trial. It is relevant to note that other jurisdictions have more limited jury directions and this is seen as being consistent with the right to a fair trial. This is the case in other Australian jurisdictions, in which directions are generally shorter than in Victoria (see Part 2). International jurisdictions that have legislation protecting the right to a fair trial similar to the *Charter Act*, such as New Zealand, Canada, and the United Kingdom, also often have directions that are shorter and simpler than Victoria.

Importantly, the factors courts consider in determining the requirements for a fair trial in the context of jury directions have been unduly limited. As Neave JA has observed '[a]ppellate courts have focused almost entirely on the legal correctness of directions, rather than on how they are delivered and whether jurors can understand them'.[7] Jury directions reform provides an opportunity to enhance the right to a fair trial.

4 See *Dietrich v R* (1992) 177 CLR 292 353 (Toohey J); *Jago v District Court (NSW)* (1989) 168 CLR 23, 57.

5 *Brown v Stott* (PC) [2003] 1 AC 681, 704; see Victorian Law Reform Commission, above 1, [4.67] – [4.70].

6 *R v Shane Thomas Hoko* (Unreported, New Zealand Court of Appeal, 30 June 2003).

7 Justice Marcia Neave, 'Jury Directions in Criminal Trials – Legal Fiction or the Power of Magical Thinking?' (Supreme and Federal Court Judges' Conference, Melbourne, 23 January 2012) 3.

Where jury directions are overly complex and lengthy, jurors struggle to understand them. This impacts on the integrity of the jury's decision-making process, which in turn can compromise the fair trial of the accused. Jury directions that are consistent with how the parties have run their case and are presented in a way that the jury can readily understand should enhance the integrity and fairness of the trial.

Overall, the changes proposed in the Bill are consistent with the right to a fair trial. In fact, the changes are designed to enhance the right and ensure that the accused gets a fair trial.

3.4 The recommended Jury Directions Bill

Recommendation 1 – Introduce a Jury Directions Bill

It is recommended that the government introduce a Jury Directions Bill that includes:

a) guiding principles

b) jury direction request provisions

c) the trial judge's obligation to sum up

d) explanations of proof beyond reasonable doubt, and

e) directions on post-offence conduct.

To address some of the problems identified in Part 2, we recommend that the government introduce a Jury Directions Bill. The Bill would cover some of the particularly problematic areas of the law. Other problematic areas could be addressed in subsequent Bills. In this Part, we give a brief overview of what else the Bill should contain. The key reforms are discussed in detail in later parts of this report.

The recommendation that the government introduce a Jury Directions Bill is consistent with the recommendations of the VLRC. Unlike the VLRC, we do not recommend that the Jury Directions Bill be the sole source of the law on jury directions. Some common law directions would remain. For example, we do not recommend legislating to describe every general or 'ineluctable direction'. These directions include the role of the judge and the jury, and directions on the assessment of evidence. These directions are not causing any particular problems and codification of the directions is unnecessary. However, reference to these kinds of directions that affect the general conduct of the trial would assist to explain their role and their interaction with the jury direction request provisions (which do not apply to these general directions). Rather, the matters we recommend be included in the Jury Directions Bill target particularly problematic aspects of the law of jury directions.

3.4.1 Paragraph (a) – Guiding principles and other general provisions

We recommend that the Jury Directions Bill contain general provisions on jury directions. This would include the guiding principles (explained below), as well as other matters of a general nature. For example, we recommend that the Bill provide that trial judges need not use any particular form of words in giving directions. The Bill would regulate the content of certain directions (that is, post-offence conduct directions, and directions on proof beyond reasonable doubt). However, the Bill would not require specific wording to be used. This would give the trial judge flexibility to adapt the direction to suit the particular trial. It would also prevent appeals based on the judge not using a particular form of words.

3.4.2 Paragraph (b) – Jury direction request provisions

We recommend that the Jury Directions Bill provide a new framework for determining what a trial judge's directions to the jury should cover. This is set out in Part 5 (the jury direction request provisions). The recommended provisions would encourage directions targeted to the matters in issue as identified by counsel through discussion with the trial judge. This would be done by requiring counsel to identify the matters in issue and request the directions they want to be given in the trial.

3.4.3 Paragraph (c) – The trial judge's summing up

We recommend that the Jury Directions Bill regulate the content and form of the trial judge's summing up (see Part 6). As most directions are given during the trial judge's summing up, changes in this area are significant. The Bill would encourage shorter summings up by ensuring that the directions on the law, references to how counsel have put their case and identification of evidence directly relate to matters in issue. It removes any requirement to summarise the closing addresses of the parties and the evidence.

The Bill should expressly provide that the directions on the facts and the law may be given as 'integrated directions'. A key feature of an integrated direction is that it embeds the law in factual questions on the issues in the trial, avoiding a 'mini-lecture' on the law and making it easier for the jury to understand. Integrated directions can also incorporate references to how counsel have put their cases and any relevant evidence.

The Bill should also encourage written documents, where appropriate, to complement oral directions. For example, at the time of the summing up, the trial judge could provide the jury with a written document known as a 'jury guide', and trial judges would be encouraged to give juries transcripts of the evidence.

3.4.4 Paragraph (d) – Proof beyond reasonable doubt

The Bill should enable the trial judge to explain the meaning of proof beyond reasonable doubt when the jury requests assistance (see Part 7). While directions on the burden of proof are ineluctable or general directions that must be given in all cases, the trial judge cannot currently explain the concept of beyond reasonable doubt except in very limited circumstances. This is significant because proof beyond reasonable doubt is a very important concept in criminal trials, and because research indicates that jurors struggle with the concept.

3.4.5 Paragraph (e) – Post-offence conduct

We also recommend that the Bill provide a new framework for giving directions on post-offence conduct (also known as consciousness of guilt). This is discussed in Part 8. This is a particularly problematic area of the law that is difficult for trial judges to apply and results in complex, technical and lengthy directions. The proposed changes would clarify when the direction must be given and simplify the content of any direction. Errors in complying with the onerous requirements of the law concerning post-offence conduct have led to many appeals in Victoria.

3.5 How the Bill would work in practice

The Bill is not designed to be a comprehensive source of the law on jury directions. However, in practice, particularly with further reforms being added to the Bill, the Jury Directions Bill would be the source of much of the law on jury directions. It would replace important parts of the common law, and consolidate some of the statutory provisions that relate to the law on jury directions.

The goal of this reform is to simplify the law of jury directions and reduce the number of jury directions that are required to be given in a particular trial. This would mean that in some ways the law would be more like it was 30 or so years ago, before the law of jury directions became increasingly complex. It would reduce the number of directions that a trial judge is required to give, reduce the extent to which the trial judge is required to repeat or refer to the evidence or how the parties put their cases and simplify and shorten the content of the directions that a trial judge does give. This will be of significant benefit to jurors in undertaking their important role.

The Bill would also adopt innovations and take advantage of technological changes that have occurred in the past 30 years. For example, integrated directions offer a new way of communicating with jurors that deliver the information to jurors in a way that is easier for them to understand and apply. These are being successfully used in New Zealand. Another innovation in the Bill is to encourage a collaborative approach between the trial judge and counsel to work together to identify the directions that are relevant to matters in issue. This is designed to lead to directions that target the matters that are in issue in the trial. New technology now makes it much easier to communicate with jurors using written documents. The Bill would facilitate and encourage the provision of written material to jurors.

The changes also rely on recent jury research that gives insight into how jurors understand and apply information delivered in a trial. For example, the Bill encourages trial judges to deliver shorter directions that avoid technical language. The directions on proof beyond reasonable doubt and post-offence conduct also use terminology that would be readily understood by a lay person.

4 Guiding principles

4.1 Overview

As we discuss in Part 3, the recommended Jury Directions Bill signifies a departure from the current law of jury directions and its successful operation would require a cultural shift on the part of trial judges and practitioners.

To guide this transition, we recommend that the Jury Directions Bill include guiding principles. These principles would provide parliamentary recognition of:

- the role of the jury in criminal trials
- the problems associated with complex, technical and lengthy directions
- the role of the trial judge in criminal trials and the role of counsel to assist the judge, and
- the role of the trial judge in giving jury directions in a criminal trial.

These principles should guide the application and interpretation of the Bill.

4.2 Content of the guiding principles

The guiding principles would be key to the new approach to jury directions. They are designed to assist in the interpretation of the provisions of the Bill and to support the new approach. This should encourage a cultural shift where trial judges and counsel work together to give shorter and more easily understood directions. If a ground of an appeal against conviction concerns the trial judge's directions, and those directions are given in accordance with the recommended Bill, the guiding principles would assist in making the purpose of the reforms as clear as possible (e.g. to support shorter and clearer directions to the jury). The second reading speech and explanatory memorandum to the Bill would complement these guiding principles.

Recommendation 2 – Guiding principles

It is recommended that the Bill contain guiding principles that recognise that:

a) The role of the jury in a criminal trial is to determine issues in dispute between the prosecution and the accused.

b) In recent decades, jury directions have become increasingly complex, and this has made:

   i jury directions complex, technical and lengthy

   ii it difficult for judges to comply with the law and to avoid errors of law, and

   iii it difficult for juries to understand and apply jury directions.

c) Research indicates that jurors find complex, technical and lengthy jury directions difficult to follow.

Recommendation 2 – Guiding principles

d) It is the role of the trial judge to determine the issues in dispute in the trial and the directions, including the content of those directions, that he or she should give to the jury.

e) It is one of the duties of counsel to assist the trial judge in determining the matters in paragraph (d).

f) The trial judge should direct the jury on only so much of the law as the jury needs to know to determine the issues in the trial and, wherever possible, should explain these issues without using technical legal language, and be as clear, brief, simple and comprehensible as possible.

g) The proposed Bill should provide that the Bill be applied and interpreted having regard to the matters set out in paragraphs (a)–(f).

As discussed above, recommendation 5 of the VLRC Report recommended that the proposed jury directions legislation should contain general principles to guide the content of all directions and 'encourage modern means of communicating with jurors'. In particular, the VLRC specifies that all directions should be clear, simple, brief, comprehensible and tailored to the circumstances of the particular case.

The recommendations in this report build on the recommendations of the VLRC. In addition to recognising the need for clearer and simpler directions, the Bill should recognise the roles of juries, counsel and trial judges in criminal trials as well as problems in the current approach to jury directions. The guiding principles are drawn from *R v AJS* [2005] VSCA 288 at [55] and [56] *(R v AJS)*, which sets out the role of the trial judge (set also Part 6 – the obligation to sum up).

4.2.1 Juries

It follows that the proposed principles recognise that the role of juries is to determine the issues in dispute in the trial. Juries should only be given directions that are targeted towards the matters in issue and which assist them to perform their role. This principle is expanded on below in relation to the role of counsel and the trial judge.

The principles include recognition of current problems and set out the principles underpinning the proposed new approach to jury directions. The principles are drawn from jury research which outlines the problems that juries have with jury directions (see also Part 2 of this report). The principles recognise the current complexity of jury directions and the difficulty that jurors have in understanding these directions.

4.2.2 Trial judge and counsel

The guiding principles also recognise and explain the key roles of counsel and trial judges. The jury's ability to determine the issues that are in dispute relies on counsel and the trial judge identifying and presenting the matters in issue to the jury in a way that they can understand and apply. Accordingly, it is the responsibility of the trial judge to identify the issues in dispute, the directions that should be given, and the content of those directions. It is one of the duties of counsel to assist the trial judge in determining these matters. This principle is reflected primarily in the jury direction request provisions, which depend on counsel identifying the directions that they want the trial judges to give (see Part 5).

In giving directions, the trial judge should direct the jury on only so much of the law as is necessary for the jury to determine the issues in the trial. This derives from the explanation of the role of the trial judge in *R v AJS*. This principle is directly reflected in the recommendations on summing up (see Part 6). This ties the direction the trial judge must give to the role that the jury must perform. Further, counsel's role in requesting directions should help the trial judge to perform this role.

The trial judge should also deliver the directions in a way that is easy for a jury to understand. One aspect of this is avoiding technical legal language wherever possible. Another aspect is being as clear, brief, simple and comprehensible as possible. This is closely connected to recommendations to change the summing up given by the trial judge. It also recognises the difficulties jurors have with understanding directions as explained above.

This principle is reflected in the recommendations in relation to 'proof beyond reasonable doubt' and post-offence conduct. As part of the reforms relating to these areas of the law, the provisions reflect a simpler style of language that could be used in directing the jury, avoiding technical terms or vocabulary that may be difficult for jurors to understand (although trial judges are not restricted in the language they use in delivering these directions). For example, the content of the direction to be given on post-offence conduct avoids using the phrases 'post-offence conduct' and 'consciousness of guilt' as these are technical terms that are likely to be confusing for someone who is not legally trained.

5 Jury direction request provisions

5.1 Overview

In the case of *Pemble v R* (1971) 124 CLR 107 (*Pemble*), the High Court held that trial judges must direct the jury about defences and alternative verdicts that have not been raised by the accused during the trial, but that are reasonably open on the evidence. This is referred to as the 'Pemble obligation'.

The Pemble obligation causes a number of problems:

- *Appeal proofing*: The obligation encourages the trial judge to 'appeal proof' directions by including directions that are technically, rather than realistically, relevant to the issues.
- *Reservation of appeal points*: The obligation allows defence counsel to 'reserve' points on appeal, and conduct their defence in one way at trial, while arguing on appeal that the trial judge failed to direct the jury in another way.
- *Uncertainty in application of the obligation*: There is uncertainty about which 'defences' and alternative verdicts are actually subject to the Pemble obligation, and further uncertainty on the evidentiary threshold that must be reached for the trial judge to direct the jury on those defences and alternative verdicts. The obligation also results in overly complex directions that are difficult for the trial judge to give and confusing to the jury.
- *Unfairness to the accused*: The obligation may work to the disadvantage of the accused, for example, in a case run on the basis that the outcome must be murder or acquittal, the trial judge may in fact deprive the accused of the 'all-or-nothing' chance by introducing the alternative of manslaughter.
- *Inconsistency with the adversarial system*: The obligation does not sit well with the respective roles of the trial judge and counsel in an adversarial system where counsel's decisions should bind the client.

The difficulties that arise in relation to directions subject to the Pemble obligation also arise in relation to other directions, for example, directions on the elements of an offence, and on the evidence in a case. The reforms proposed for the Bill therefore have more far-reaching consequences than the reform of the Pemble obligation, and would provide for a procedure to identify all jury directions a trial judge should give to a jury, with the exception of general directions, such as directions on the onus and standard of proof. The proposed reforms also should not apply to directions which legislation provides must, or must not, be given in certain circumstances.

The reforms proposed in part emanate from the QLRC and VLRC recommendations and build upon their proposals. There are four main components in the proposed reforms:

- Counsel and the trial judge discuss the issues in the case and the directions that need to be given. As part of this process, defence counsel must identify the issues in dispute or not in dispute in the case and counsel for the prosecution and defence counsel must inform the judge of the directions that they want, or do not want, based on those issues.

- If a direction is requested by a party, the trial judge must give the direction unless there are good reasons for not doing so. If a direction is not requested, the trial judge would not normally need to give a direction.
- In very limited circumstances, in order to avoid a substantial miscarriage of justice, the trial judge has a residual obligation to give a direction whether or not defence counsel has indicated that it relates to a matter in issue, and whether or not the parties requested the direction.
- Where the accused is not legally represented, the trial judge must proceed on the basis that the accused has requested any direction which is open to the accused to request, unless there are good reasons, or it is in the interests of justice, to not give the direction. This would ensure that the accused is not disadvantaged because the accused does not know the law.

We propose that the Bill:

- clarify that the role of trial counsel includes assisting the trial judge in determining the issues in dispute in the trial, which directions to give to the jury and the content of those directions
- clarify the obligations of the trial judge so that the task of the judge is clearer and less onerous
- give the parties greater control over the issues the jury should focus on
- make the issues that the jury must determine much clearer and shorten the length of directions by focusing on the issues in the case
- reduce the possibility of error in jury directions by encouraging discussion of which directions to give to the jury and the content of those directions, and
- provide context at the appeal stage on the way in which issues were discussed and the importance of a direction at trial.

5.2 The current law

Pemble was convicted of murder following a one-day trial. Pemble did not dispute that he shot and killed the deceased, but claimed in unsworn evidence that the shooting was accidental. Pemble's counsel conducted the trial on the basis that he lacked the requisite state of mind for murder at the time of the killing, and asked the jury to find his client guilty of manslaughter. This is despite the fact that Pemble said the shooting was an accident and, if the prosecution could not disprove accident, Pemble could have been acquitted. The High Court held that, despite counsel's decision not to raise the possibility of an acquittal, the trial judge should have directed the jury on that possibility.

In *Pemble*, Chief Justice Barwick set out what has become known as the Pemble obligation at 118:

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

The Pemble obligation requires the trial judge to direct the jury about defences and verdicts that have not been raised by defence counsel during the trial but which are reasonably open on the evidence. The obligation requires the trial judge to advance alternative hypotheses consistent with the innocence of the accused (or the guilt of a lesser offence). This requirement is intended to ensure that the accused has a fair trial.

The VLRC found that while the failure of trial judges to comply with this obligation is sometimes a ground of appeal, its broad scope, more significantly, causes problems for trial judges because they must direct the jury about matters that defence counsel may have chosen not to address for tactical reasons.[1] In *Pemble*, for example, it is likely that defence counsel did not raise the possibility of an acquittal with the jury because it was better, tactically, to give the jury the option of manslaughter rather than risk a verdict of guilty of murder, especially when it was quite clear that Pemble had shot and killed the deceased.

Further, the obligation applies irrespective of the reason counsel did not rely on an issue. In addition to tactical or forensic reasons, it also applies where the real reason is one of oversight or incompetence. The duty may even arise where counsel for the accused states that a particular defence or alternative verdict is not in issue.[2]

In *CTM v R* [2008] HCA 25 at [84] and [113], Kirby J (dissenting) held that it was not too onerous a burden to require a trial judge to 'cover all bases' that logically arise on the evidence. Kirby J observed that *Pemble* recognised the distinct function of judges in criminal trials, and acknowledged the 'forensic privileges' of counsel for the accused to say nothing about another basis for a defence, where it is inconsistent with their primary case.[3]

5.3 Problems with the current law

In the VLRC Report, the VLRC recommended significant reform to the Pemble obligation. The VLRC considered that the Pemble obligation creates a number of problems including:

- it encourages the trial judge to 'appeal proof' directions, resulting in an added burden on the judge and the jury.
- it does not sit well with the respective roles of the trial judge and of counsel in an adversarial system of criminal justice.
- it allows counsel to 'reserve' appeal points.
- it may result in unfairness to the accused.[4]

Further problems include:

- the lack of clarity in offences and defences and the application of the Pemble obligation, and
- the increased complexity the Pemble obligation brings to jury directions.

5.3.1 Appeal proofing

In the VLRC Report, the VLRC observed that the Pemble obligation encourages the trial judge to 'appeal proof' the directions he or she gives to the jury. That is, judges err on the side of caution and include directions in relation to alternative verdicts or defences where it is unnecessary or only relevant 'on the most tenuous of bases'.[5] As a result, directions are longer, and potentially confusing for jurors.

1 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [5.65].
2 *Varley v R* (1976) 12 ALR 347, 351 (Barwick CJ).
3 *CTM v R* [2008] HCA 25 [84].
4 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper 6 (2008) [5.24] ('Victorian Law Reform Commission Consultation Paper').
5 James Wood, 'The Trial Under Siege: Towards Making Criminal Trials Simpler' (Paper presented at the District and County Court Judges Conferences, Fremantle, 27 June – 1 July 2007).

5.3.2 Contrary to the adversarial system

The High Court has stated that *Pemble* and preceding authorities 'establish a practical rule…that acknowledges and accommodates the often difficult forensic choices that defence counsel face in conducting a criminal trial, especially before a jury'.[6]

However, as the VLRC indicated, the Pemble obligation does not sit well with the respective roles of the trial judge and counsel in an adversarial system and the general rule that counsel's decisions bind the client. Sometimes the obligation means that where counsel has avoided an issue, the trial judge must direct the jury about issues and summarise evidence in relation to matters that neither counsel has referred to and may have expressly indicated are irrelevant. This can also be confusing for jurors.

In *R v Cardamone* (2007) 171 A Crim R 207 at 226, Neave JA suggested that the requirement for judges to direct on matters not requested by counsel seemed difficult to justify in the context of an adversarial system.

5.3.3 Allows counsel to reserve appeal points

The Pemble obligation permits trial counsel to say nothing, or to specifically request the trial judge to refrain from raising an alternative defence, but to subsequently 'reserve' as an appeal point the failure by the trial judge to raise the alternative defence.

The tactical use of *Pemble* by experienced counsel to 'reserve' an appeal point in this way appears to go beyond the original circumstances in which the principle was applied in that case to prevent a miscarriage of justice. The Court of Appeal has considered whether tactical decisions by counsel at trial should be taken into account at the appeal stage when determining whether a miscarriage of justice has occurred. In *R v Luhan* [2009] VSCA 30 the Court of Appeal unanimously rejected appeal grounds which were 'premised on a different trial having been conducted' than the one actually run by the defence at trial. The Court stated (at [37]):

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

5.3.4 Unfairness to the accused

The Pemble obligation may work to the disadvantage of the accused. Courts have confirmed that a fair trial according to law requires the judge to give directions even where this is to the detriment of the accused.[7]

In *R v Kane* (2001) 3 e.g. VR 542 Ormiston JA noted that in a case run on the basis that the outcome must be murder or acquittal (for example on the grounds of self-defence), the judge may in fact deprive the accused of the 'all-or-nothing' chance by introducing the alternative of manslaughter.

Ormiston JA also highlighted the possible risk of a miscarriage of justice arising from the accused being found guilty of an offence which was not raised by defence counsel. If the jury is 'left at large' as to how it decides the issues in relation to a possible verdict (except where the judge raises them in a 'necessarily neutral manner') the accused may not have had a fair opportunity to contest the issue.[8]

6 *CTM v R* [2008] HCA 25, 29 (Kirby J).

7 See Nettle JA in *R v Cardamone* (2007) 171 A Crim R 207, 224.

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

5.3.5 Lack of clarity in offences and defences and the application of the Pemble obligation

The word 'defence' is commonly used in the criminal law to refer to any answer to a criminal charge.[9] It can therefore mean the accused's denial of part of the prosecution case. In this sense, an alibi may be described as a defence.

The word 'defence' is also used in situations where the accused does not deny the elements of the offence as proved by the prosecution, but argues that some other exculpatory factor was present. In this sense, provocation, duress, and necessity are commonly referred to as defences. Such defences require the accused to present or point to evidence raising them, before the prosecution is required to disprove them beyond reasonable doubt.

Some academics argue that there is no real distinction between offences and defences, and that any distinction that is made simply comes down to 'the accidents of language, the convenience of legal drafting, or the unreasoning force of tradition'.[10] In other words, we might call something a 'defence' because it appears in a separate statutory provision from an offence or because it deals with issues which appear to be additional to the elements of an offence, but such matters might just as well be treated as part of the offence.

Case law also highlights the blurring between offences and defences. For example, in *He Kaw Teh v R* (1986) 60 ALR 449, Brennan J refers to an 'honest and reasonable mistake of fact' as an element (because its absence is a form of mens rea), when it is also commonly referred to as a 'defence' (the *Proudman v Dayman*[11] defence) applicable to offences of strict liability.

The High Court in *CTM v R* [2008] HCA 25 at [6] (Gleeson CJ and Gummow, Crennan and Kiefel JJ) acknowledged this complexity in the description of 'defences' and said that '[s]uch descriptions have their dangers but the shorthand may be convenient provided it is understood for what it is'.

One of the key issues in this area is whether the Pemble obligation:

- applies only to defences (in the sense that the prosecution does not bear the evidential burden of proof) and alternative offences, or
- applies also to tactical defences or elements of offences which are admitted or not in dispute.

Another issue that arises concerns the evidentiary burden that needs to be satisfied before the trial judge gives a direction. The VLRC found that the scope of the Pemble obligation poses a significant burden for the trial judge and that cases and commentary suggest that there is uncertainty about the evidentiary burden that activates the trial judge's obligation.[12]

In the case of *Getachew v R* [2011] VSCA 164 at [25], for example, the Court of Appeal overturned the conviction of Getachew for rape because the trial judge failed to direct the jury about the possibility that Getachew 'thought that the complainant might have fallen asleep but accepted that it was a reasonable possibility that [Getachew] believed she had finally consented' because she did not react when Getachew had disarranged her clothes and physically manipulated her prior to sexually penetrating her.

9 'A criminal charge may be defended as well by exposing or creating a deficiency in the Crown case as by erecting a positive defence as a shield': *R v Alexander and Keeley* [1981] VR 277, 285 (Young CJ, Kaye and McGarvie JJ).

10 Glanville Williams, 'Offences and Defences' (1982) 2 *Legal Studies* 233, 256.

11 (1941) 67 CLR 536.

12 Victorian Law Reform Commission Consultation Paper, above n 4, [5.25].

In March 2012, the High Court overturned the Court of Appeal's decision and reinstated Getachew's conviction for rape (*R v Getachew* [2012] HCA 10). The High Court found that the Court of Appeal was mistaken in finding that it was a live issue that the accused might have believed the complainant was consenting, even though he was aware she was or might have been asleep.

The different views in this case highlight the difficulty for the trial judge in determining whether an issue is a 'real issue' in the case (and a direction is required) or the issue is simply technically open (and no direction is required).

5.3.6 More complex jury directions

A further issue is that the Pemble obligation gives rise to immense complexity in directions, making it difficult for trial judges to comply with the obligation and for jurors to understand the directions given by the trial judge. Over the years, as the number of offences has grown and the ways in which criminal liability may arise have expanded, the task of the trial judge, for example, is no longer one of simply directing about murder, manslaughter and accident. The High Court's decision in *Gilbert v R* [2000] HCA 15 (*Gilbert*) increased the task of the trial judge considerably as the trial judge must now direct the jury on various forms of criminal complicity (or extended liability) for manslaughter that may be open on the facts. In a number of cases, the trial judge will need to direct the jury about these various possible scenarios even if the case has not been run by either the prosecution or the accused on that basis.

This complexity was further evident in *R v Nguyen* [2010] HCA 38 (*Nguyen*) which is discussed in Part 5.5.

The Simplification of Jury Directions Report, in its discussion of complicity at [2.9], referred to the case of *R v Jones* (2006) 161 A Crim R 511, which Justice Eames described as 'every trial judge's worst nightmare':

> [T]he issues raised in the trial were those that might be posed in a final year university exam by a particularly sadistic examiner. In his charge to the jury, the trial judge had to address 13 possible routes whereby, for each [of eight] accused the jury might reach a verdict of either murder or manslaughter.[13]

Part of the problem with directions concerning complicity derives from the laws of complicity being unduly complex. Where the law contains various permutations, the Pemble obligation potentially leads to jury directions about each of those permutations. This makes the directions complex for the trial judge to give and difficult for the jury to understand and apply.

5.4 The VLRC recommendations

The VLRC made the following recommendations which are related to this proposal:

7. The trial judge must give a discretionary direction that has been requested by counsel for the accused unless satisfied that there is good reason not to do so.
8. The legislation should declare that the trial judge has an obligation to give the jury any direction that is necessary to ensure a fair trial.
9. The fact that a direction is not sought, or is opposed, by counsel for the accused must be taken into account by the trial judge when determining whether any direction or warning is necessary to ensure a fair trial.

13 Justice Geoff Eames, 'Tackling the Complexity of Criminal Trial Directions: What Role for Appellate Courts' (2007) 29 *Australian Bar Review* 161, 169.

10. In determining whether any direction is necessary to ensure a fair trial and whether there is good reason to refuse a request by counsel for the accused for a particular direction the trial judge may consider any of the following matters:
    - the content of addresses by counsel and/or by the accused, if unrepresented
    - the capacity of counsel to deal with the matter adequately
    - the submissions of counsel or the accused, if unrepresented
    - any questions or requests made by the jurors
    - the extent to which the issue is a matter of common sense which the jury as a whole may be presumed to appreciate
    - whether the topic will be sufficiently addressed by another direction
    - the rights of both the prosecution and the accused person to a fair trial.

    ...

22. The nature and extent of a trial judge's obligation to direct the jury about the elements of the offences, the facts in issue and the evidence so that it may properly consider its verdict should be set out in the legislation.
23. The legislative statement of this obligation should contain the following principles:
    a) The trial judge must direct the jury about the elements of any offences charged by the prosecution that are in dispute and may do so by identifying the findings of fact they must make with respect to each disputed element.
    b) The trial judge must direct the jury about the elements of any defences raised by the accused person which must be negatived by the prosecution or affirmatively proved by the accused person and may do so by identifying the findings of fact they must make with respect to each disputed element.
    c) The trial judge must direct the jury about all of the verdicts open to them on the evidence, unless there is good reason not to do so.

    ...

h) The trial judge is under no obligation to direct the jury about the elements of the offence (or any defence) other than to comply with these requirements.

    ...

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

The proposed reforms differ from some of the recommendations made by the VLRC. The main points of difference include:

- the procedure to identify which directions should or should not be given to the jury
- the test to be applied in determining whether a direction should be given
- the scope of the obligation to give a direction and the factors to be taken into account when determining whether a direction should be given, and
- the application of the proposed reforms to an unrepresented accused.

The proposed reforms adopt recommendations 7, 22 and 23(h) with minimal change. The following discussion explains why our recommendations depart from the VLRC's recommendations (where they do). In turn this provides further explanation for the recommended approach.

5.4.1 Procedure to identify directions

It seems implicit in a number of the VLRC recommendations that the accused will be able to request certain discretionary directions (see, for example, recommendation 7). However, the VLRC did not set out a process for requesting specific directions.

Further, defences and alternative verdicts do not need to be requested under the VLRC's recommendations, but 'placed' before the jury in the closing address to trigger the trial judge's obligation to direct the jury on those matters. This aspect of the VLRC model may prove difficult to determine in some cases. A 'defence' could potentially be 'placed' before the jury where defence counsel states that the accused is not guilty, putting all the elements of the offence into issue as a defence.

To provide clarity in relation to this threshold issue, our proposed provision makes all directions relating to the matters in issue, except the general directions and mandatory directions, contingent on a request. This would provide a process for the express identification of directions and minimise the risk of a direction being missed, which would also reduce the risk of appeals.

5.4.2 The test to be applied in determining whether a direction should be given

In determining when a direction should be given, the VLRC recommends different tests depending on the type of direction:

- The trial judge must give a discretionary direction that has been requested by counsel for the accused unless satisfied that there is good reason not to do so (recommendation 7).
- In relation to elements, recommendation 23(a) requires the trial judge to direct the jury about the elements of any offences charged by the prosecution that are in dispute.
- In relation to elements of any defences, the trial judge must direct the jury on these where they have been raised by the accused person and must be negatived by the prosecution or affirmatively proved by the accused person (recommendation 23(b)).
- In relation to verdicts, the trial judge must direct the jury about all of the verdicts open to them on the evidence, unless there is good reason not to do so (recommendation 23(c)).
- However, the trial judge is not required to direct the jury on defences or alternative verdicts which counsel for the accused has not placed before the jury in final address unless it is reasonably open on the evidence, the failure of counsel to address the matter was due to error or oversight, and the trial judge is satisfied that it is necessary to direct the jury about the matter to ensure a fair trial (recommendation 34).

- The trial judge has an obligation to give the jury any direction that is necessary to ensure a fair trial (recommendation 8).

Assessing whether a defence has been 'raised' by the accused (recommendation 23(b)) or whether a defence or alternative has been 'placed' before the jury (recommendation 34), as discussed above, may be problematic.

Other aspects of the proposal may also lead to uncertainty. For example, the VLRC requires directions to the jury on defences or alternative verdicts that are 'reasonably open on the evidence' (recommendation 34). This, as Murphy J observed in *Waldrope v R* (1987) 29 A Crim R 198, 211, is a necessarily subjective exercise.

It is also unclear from the VLRC recommendations what needs to be considered to ensure there is a 'fair trial' (recommendations 8 and 34). The policy basis underpinning the Pemble obligation is that it is necessary to give directions on defences and alternative offences to ensure a fair trial. The VLRC model does not necessarily exclude such a policy basis. This, coupled with recommendations 23(b) and (c), creates a real risk that the Pemble obligation will continue to apply without significant change if the VLRC model is adopted.

Further, as discussed, the Pemble obligation (and its extended application) raises a range of problems and does not always achieve its fundamental objective of ensuring a fair trial. Any meaningful change to the law would involve some reconsideration of the directions that are required to produce a fair trial. It is anticipated that the proposed jury direction request provisions would result in the giving of directions that may not constitute a fair trial under current law. This does not mean that the proposed provisions would result in trials that are not fair trials. Rather, this reflects the gap between existing laws and the most important elements of a fair trial.

To ensure that whatever reforms are made adequately define the trial judge's obligation and ensure that directions are given in appropriate circumstances, a clearer test is desirable. We recommend that the trial judge only have an obligation to give a direction where it is requested (unless there are good reasons not to do so) or where it is required by another Act. In the majority of cases this would be the extent of the trial judge's obligation. In very limited cases, however, where for example the trial judge is concerned that counsel's decision raises issues about counsel's competency, the trial judge would have a residual obligation to give a direction that has not been requested.

To avoid complexity in the process, our proposal also applies the same test for the trial judge to apply whether the direction is on elements, defences, alternative verdicts, alternative bases of complicity or other evidentiary issues.

5.4.3 The scope of the obligation to give a direction and the factors to be taken into account when determining whether a direction should be given

In the VLRC Report, the VLRC observed that defence counsel regularly make tactical decisions which may affect the outcome of a trial. The VLRC said that in these circumstances, the accused must accept the consequences of tactical decisions made by counsel.

In relation to the Pemble obligation, the VLRC said at [5.71] that:

> A fair trial is one that is fair to both the defence and the prosecution. A rule which requires the trial judge to advance an argument, with the apparent weight of judicial office, that the defence has not raised and to which the prosecution has not had an opportunity to respond does not appear to be even handed.

This rationale forms the basis of the proposed reforms, however it puts more emphasis on the forensic decisions made by counsel than the VLRC's recommendations. Under our proposed reforms, the extent of the trial judge's obligation to direct the jury about the elements of the offences, defences, alternative verdicts, alternative bases of complicity and evidence is more limited. For example:

- The trial judge would not be required to direct the jury about all defences 'raised' by the accused, only those that have been expressly requested, unless there is good reason for not doing so.
- The trial judge would not be required to direct the jury about all of the verdicts open to them on the evidence, only those expressly requested, unless there is good reason for not doing so.
- The fact that a direction is not sought by counsel would in most cases mean that the trial judge is not required to give that direction. It is not just a factor that must be taken into account when determining whether the direction is necessary (contrary to recommendation 9 of the VLRC Report).

Our proposed reforms would provide more certainty on the scope of the trial judge's obligation to give a direction and better reflect the respective roles of the trial judge and counsel in an adversarial system and the general rule that counsel's decisions bind the client.

Our proposed reforms would also provide for fewer and broader considerations for the trial judge on what constitutes good reasons for not giving a direction (contrary to recommendation 10 of the VLRC Report). Being less prescriptive in this area should give the trial judge greater flexibility. Further, case law on section 165 of the *Evidence Act* would provide guidance on the interpretation of 'good reasons'.

The factors listed in our proposed reforms also place more emphasis on counsel being bound by the forensic decisions made in relation to the trial. In deciding whether to give a direction, for example, we propose that the trial judge not just consider the content of addresses by counsel and their submissions generally (as in recommendation 10 of the VLRC Report), but whether the direction concerns a matter not raised or relied on by the accused and whether the direction would involve the jury considering the case in a manner that is different from the way in which the accused has presented his or her case.

5.4.4 Application to unrepresented accused

The VLRC's recommendations for change to the Pemble obligation were limited to where the accused is represented. Therefore, where the accused is unrepresented, the Pemble obligation would continue to apply by virtue of the common law. We recommend that the Bill specifically address the process the trial judge must apply when determining the jury directions to give where the accused is unrepresented and align this as far as possible, and in a way that is fair, with the procedure used where the accused is represented.

5.5 Recommended jury direction request provisions

Some of the key problems with the Pemble obligation, and the giving of directions more generally, are evident in *Pemble*. First, there was no discussion between the trial judge and counsel concerning what directions should be given. Secondly, the obligation to determine the relevant directions was seen as an obligation falling solely upon the trial judge. The trial judge, who is not familiar with all of the evidence available to counsel and who is unaware of the accused's instructions to counsel, is required to instruct the jury that it may make findings beneficial to the accused about issues which defence counsel did not raise with the jury.

The proposed provisions aim to address these problems and the problems outlined above.

Recommendation 3 – Jury direction request provisions

It is recommended that the Bill provide that:

a) After the close of evidence and before the closing address of the prosecution, defence counsel must inform the trial judge whether any of the following matters are or are not in issue:

   i each element of an offence charged

   ii any defence

   iii any alternative offence including an element of any alternative offence, and

   iv any alternative basis of complicity in the offence charged and any alternative offence.

b) After the matters in issue have been identified in accordance with paragraph (a), the prosecution and defence counsel must each request that the trial judge give or not give particular directions in respect of the matters in issue and evidence in the trial relevant to the matters in issue.

c) Where the accused is not legally represented, the trial judge must proceed on the basis that the accused has requested any direction which is open to the accused to request, had the accused been represented by a legal practitioner, unless the trial judge considers that there are good reasons for not doing so or it is otherwise not in the interests of justice to give the direction.

d) If a direction is not requested, or defence counsel has indicated that the direction relates to a matter not in issue, the trial judge will not need to give a direction.

e) If a direction is requested by counsel, the trial judge must give the direction unless there are good reasons for not doing so. In determining whether there are good reasons for not giving a requested direction, the trial judge must consider:

   i the evidence in the trial, and

   ii the manner in which the prosecution and the accused have conducted their cases including whether the direction concerns a matter not raised or relied on by the accused and whether the direction would involve the jury considering the issues in the trial in a manner that is different from the way in which the accused has presented his or her case.

f) In very limited circumstances, in order to avoid a substantial miscarriage of justice, the trial judge has a residual obligation to give a direction whether or not defence counsel has indicated that it relates to a matter in issue, and whether or not the parties requested the direction.

5.5.1 Paragraphs (a) and (b) – Matters in issue and request for directions

The starting point in determining what directions should be given to the jury is understanding that the jury's role is to determine the issues that are in dispute between the parties. The trial judge's role is to direct the jury to help it fulfil this function. As the Court of Appeal said in *R v AJS* [2005] VSCA 288 at [55], it is the responsibility of the trial judge to 'direct the jury on only so much of the law as is necessary to resolve those issues [being the issues in the case]'. The best way to identify the issues that are in dispute is for the trial judge to discuss them with the parties. The parties know their own case better than anyone else.

The QLRC proposed placing a mandatory obligation on both parties to tell the trial judge which directions they each wish the trial judge to give in the summing up, and which they do not wish to be given.[14] The recommended request provisions are based on the QLRC recommendations. In addition, they extend this obligation to counsel for the accused indicating whether an issue is in dispute or not in dispute in the trial.

14 Queensland Law Reform Commission, *A Review of Jury Directions*, Report No 66 (2009) [11.143].

This should improve the discussion between the trial judge and counsel by focusing on the matters in issue first, and then identifying the directions that should be given based on the matters in issue.

The proposed reforms would change the Pemble obligation so that the trial judge no longer has the sole responsibility for determining all of the relevant directions to give to the jury. The reforms would require defence counsel to indicate whether a matter is or is not in issue, and the prosecution and accused to indicate whether or not a direction is desired in relation to the matters and evidence in issue.

This would involve some cultural change for counsel and the trial judge. Importantly, the discussion with the trial judge about the issues in the trial and the directions that are necessary would provide the best chance of identifying all relevant directions at the trial stage (rather than counsel waiting for the appeal stage before focusing on the directions that are required).

We recommend that the Bill requires defence counsel to tell the trial judge which matters are in issue in relation to the elements of the offence charged, any defence, any alternative offence and any alternative basis of complicity in the offence charged and any alternative offence. The proposed provision is deliberately broad. It does not rely on distinctions between a defence and an element of an offence (and therefore avoids some of the complexities of terminology and classification discussed earlier).

It was not clear from the VLRC recommendation which 'defences' were covered by the recommendation. The Pemble obligation appears to apply to any 'defence' that is an answer to a criminal charge. It is clear that the obligation applies to formal defences (e.g. where there is an onus on the accused to prove the defence, or the issue is open on the evidence), but it has also been applied where the 'defence' is a denial of an element of the offence or the prosecution's case (e.g. claiming not to have the requisite fault element or having an alibi). To provide clarity in this area, the proposed provision should define 'defences' inclusively and broadly (e.g. by reference to section 72 of the *Criminal Procedure Act* to capture exceptions, exemptions, provisos and so on).

The intention of the proposed provision is that all potential issues (and directions based on those issues) are discussed with the trial judge, with the exception of the general directions and any mandatory directions (e.g. as set out in the *Crimes Act* for the offence of rape in sections 37AAA and 37AA or as set out in the *Criminal Procedure Act* for alternative arrangements under Part 8.2).

General directions relate to the conduct of trials generally, including:

- the role of the trial judge, jury and counsel
- jury empanelment, selection of a foreperson
- the need to decide issues on the basis only of admissible evidence
- the need to decide each charge separately according to the evidence relating to that charge
- the assessment of witnesses
- the presumption of innocence and burden and standard of proof
- trial procedure
- the drawing of conclusions and the distinction between direct and circumstantial evidence, and
- verdicts and jury deliberations.[15]

15 Victorian Law Reform Commission, above n 1, recommendation 12.

The request for directions by the parties operates on the assumption that counsel would request the directions necessary to ensure that their client receives a fair trial. This is consistent with the duty of counsel. This process would be facilitated, checked and improved by the questions asked by the trial judge in determining what directions are or are not required.

Questioning by the trial judge about a direction that the trial judge thinks should be given, or should be considered, would be very valuable. It may be that the trial judge's questions result in counsel reconsidering an issue or realising that they should request a particular direction. Alternatively, the discussion may make very clear that the accused does not want a particular direction.

We recommend that the discussion occurs after the close of evidence so that the accused is not required to disclose their case in any way. By having this discussion before the closing addresses, this discussion may also assist the parties in making their closing addresses more focused on what is in issue. Because the prosecution will be aware of what defence counsel says is and is not in issue, the prosecution's closing address will not need to address potential issues that might be raised by either the accused or the trial judge (pursuant to the Pemble obligation). It is also likely to assist defence counsel to know what directions the trial judge is going to give, or not give, to the jury. Having both the prosecution and defence counsel focused more on the issues in the case in their addresses will then assist the jury.

Clarifying these issues would also have consequent benefits at the appeal stage in determining the importance of a direction in the trial. Often in appeal proceedings the Court of Appeal will ask whether an issue was important at the trial, or whether counsel did not ask for a direction for tactical reasons or because the issue was not a 'real issue'. There will often be different counsel at the appeal who are frequently unable to say why a direction was not requested. The proposed reforms would help to avoid such uncertainties on appeal.

The reforms proposed above would make a significant difference to:

- the manner in which issues are discussed in court
- the role and obligations of the trial judge and counsel
- identifying the issues that need to be dealt with, and
- the way in which issues are discussed on appeal.

5.5.2 Paragraph (c) – Unrepresented accused

If the accused is unrepresented, the trial judge would proceed on the basis that the accused has requested any direction which is open to the accused to request, had the accused been represented. This general rule applies unless the trial judge considers that there are good reasons not to give the direction or it is for any other reason not in the interests of justice to give the direction.

Our proposed reforms would standardise as far as possible the process in relation to unrepresented accused with the process which applies to represented accused. This would be achieved by applying the jury direction request process to an unrepresented accused.

While we recommend that defence counsel request directions, this would be too onerous for an unrepresented accused. Where the accused is represented, defence counsel must indicate whether matters such as elements and defences are or are not in issue and then, in the light of this, request that the trial judge give or not give certain directions. It would be unfair to ask an unrepresented accused to make such forensic decisions, which require legal training and experience, and inappropriate for the trial judge to perform this task.

Accordingly, we recommend that the starting point should be that where the accused is unrepresented, the trial judge should operate on the basis that:

- all matters are in issue, and
- the accused has requested all relevant directions.

From this starting point the trial judge must determine which directions to give. The trial judge is not required to give a direction that is requested by defence counsel, or assumed to have been requested by an unrepresented accused, if there are good reasons for not giving the direction. In addition the trial judge should not need to give a direction that is not in the interests of justice to give. There is considerable overlap between these tests. For instance, if there are good reasons for not giving a direction, this would meet the interests of justice test. However, both tests are necessary as the good reasons test is narrower than the interests of justice test and the good reasons test is limited to directions that are requested.

By applying the good reasons test to the unrepresented accused, this will assist the trial judge in determining the application of certain directions. For instance, in Part 8 concerning post-offence conduct provisions, we recommend that a further explanation of the good reasons test be provided. In Part 8, if a direction is requested to avoid the jury improperly using evidence as if it were post-offence conduct evidence, we recommend that the Bill specifically provide that there are good reasons for not giving a direction if the trial judge considers that there is no substantial risk that the jury might use the evidence as post-offence conduct evidence. In addition to assisting the trial judge in determining these issues, applying the good reasons test will promote consistency in approach in determining these issues irrespective of whether the accused is represented.

Despite the presumption that the unrepresented accused has requested a direction, the accused may in fact also request that the trial judge not give a direction. This request does not displace the presumption but may be a factor that the trial judge considers in deciding whether to not give a direction. Some accused may have strong views about not having certain directions given to the jury (e.g. where that involves presenting a different case from the one conducted by the accused). If the trial judge considers that there are good reasons for not giving the direction or it is otherwise not in the interests of justice to give such a direction, the trial judge will not give the direction. Other accused may have strong, but misguided, views that certain jury directions should not be given. In such a situation the trial judge should still give the direction (as it would not be in the interests of justice to not give the direction).

The ‘interests of justice’ test is a useful further test, appropriate for an unrepresented accused who does not want a direction to be given. If the accused’s view is that a direction should not be given, this does not fit neatly into factors relevant to the ‘good reasons’ test but should be able to be considered by the trial judge. The interests of justice test provides that mechanism. For a represented accused, it is proposed that a trial judge should only give a direction that the represented accused has requested the trial judge not to give where the trial judge considers it is necessary to give the direction to avoid a substantial miscarriage of justice. This different test reflects the ability of the represented accused to make appropriate forensic decisions concerning the conduct and presentation of the accused’s case.

Even where the accused is unrepresented, the prosecution will still be represented. Accordingly, it is recommended that the provisions which apply to the prosecution where the accused is represented should also apply where the accused is unrepresented. This means that the prosecution would still need to request directions, the trial judge may decide not to give a requested direction if there are good reasons for doing so and the trial judge must give a direction not requested by the prosecution (or that the prosecution requests not be given) where it is necessary to do so to avoid a substantial miscarriage of justice.

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The recommended approach will provide a high degree of consistency in the approach used by trial judges when deciding which directions to give, irrespective of whether the accused is represented or unrepresented. It will also provide the necessary flexibility for the trial judge to ensure that the accused receives a fair trial.

5.5.3 Paragraph (d) – Direction not required in relation to matter not in issue or when direction not requested

If a direction is not requested, the trial judge would not normally need to give a direction. The proposal provides a much clearer test for the trial judge (and the Court of Appeal). There is no obligation under the proposal to give a direction that is not requested unless it is a general direction or a direction that an Act provides must be given. A trial judge would also not need to give a direction about a matter which defence counsel has said is not in issue, except in the limited circumstances set out in paragraph (f) (which contains a residual obligation to give a direction).

The proposed provisions squarely raise issues about the prosecution's obligations to prove and disprove matters that are not in issue between the parties (i.e. matters that are not a basis on which the accused relies upon in the first instance to show he or she is not guilty). *Woolmington v Director of Public Prosecutions* [1935] AC 462 held that it is the duty of the prosecution to prove the guilt of the accused (subject to certain exceptions). This is generally interpreted as meaning that the prosecution bears the evidential[16] and legal[17] burden in relation to every element of an offence.[18] The prosecution also bears the legal burden in respect of most common law 'defences', once the accused has discharged the evidential burden of presenting or pointing to evidence raising the defence.

This issue was discussed by Menzies J in *Pemble,* where he said that '[t]he accused pleaded not guilty, thus putting everything in issue'. In *Pemble*, Menzies J said (at [24]) that 'counsel for the defence cannot effectively disclaim a defence open to the accused upon the evidence'.

If defence counsel does not request a direction on a particular matter, this proposed provision would result in defence counsel effectively disclaiming a defence that is open to the accused. The legislation would provide clear support for, and indeed require, defence counsel to indicate whether or not the accused disclaims a defence that is open. This would qualify or limit the existing common law rule as discussed by Menzies J.

The underlying principle of these proposed reforms is that the purpose of a trial is for the jury to determine the matters in issue between the prosecution and the accused. A trial commences when the accused is arraigned and pleads not guilty, and thereby formally 'joins issue with the Crown'.[19] The extension of this is that, if the accused indicates that a matter is not in issue, this may further define what is in issue with the Crown and affects whether there is an obligation on the trial judge to direct the jury about that matter.

5.5.4 Paragraph (e) – Trial judge must give requested directions

If a party requests a direction, the trial judge must give the direction unless there are good reasons for not doing so. This test is the same as that used under the *Evidence Act* (and in other Australian jurisdictions that have adopted the Uniform Evidence Act) in relation to certain jury directions. To promote a consistent approach, we recommend that the Bill also uses this test.

16 The burden of showing that there is sufficient evidence about a fact in issue.

17 The burden of proving a fact in issue to the requisite standard.

18 In *Woolmington v Director of Public Prosecutions* [1935] AC 462, Viscount Sankey LC did not use the word 'element', although he did (at 481) refer to a Court of Criminal Appeal decision as standing for the proposition that '…where intent is an *ingredient* of a crime there is no onus on the defendant to prove that the act alleged was accidental' (emphasis added). Interestingly, rule 10 of the presentment rules in Schedule 6 to the *Crimes Act 1958* referred to an 'essential ingredient' of an offence. These words were not replicated in clause 11 of Schedule 1 to the *Criminal Procedure Act 2009.*

19 *R v Talia* [1996] 1 VR 462.

Cases considering this phrase under section 165 of the *Evidence Act* would assist in interpreting this phrase in the current context. Good reasons may exist, for example, where a direction concerns:

- evidence or a matter that is not in issue
- a matter that is not relevant or important in the proceeding, or
- evidence that is unlikely to be improperly used by the jury.

We recommend that the Bill set out certain matters that are relevant to, but not determinative of, whether there are good reasons for not giving a requested direction. These factors would provide further guidance to the trial judge. The trial judge should have regard to the evidence in the trial and manner in which the accused and the prosecution have conducted their cases, including whether the direction concerns a matter not raised or relied on by the accused, or would involve the jury considering the issues in the trial in a manner that is different from the way in which the accused presented his or her case.

We recommend that the Bill refer to the way in which the accused and the prosecution have conducted 'their cases'. This phrase is intended to be broad in nature. It does not simply refer to the evidence led by the accused, for example, but would include everything from the parties' opening and closing addresses, to cross-examination of the witnesses, to evidence given by the accused. While the trial judge would not know the content of the closing addresses at this time, once the closing addresses are given, the trial judge may take this into account when determining whether to give a direction.

The trial judge should have regard to whether the proposed direction concerns a matter not raised or relied on by the accused, or would involve the jury considering the issues in the trial in a manner that is different from the way in which the accused has presented his or her case. The principal role for this aspect of the proposed reform is to limit defences (in a broad sense) which are open on the evidence and would require a direction based on the Pemble criteria. The two factors listed emphasise that directions should be given where they are consistent with the case the accused has put before the jury and the forensic decisions of counsel.

The words 'different from' draws on the description used in appellate cases where the court has found that the appellant's (accused's) submissions are based on a different trial having been conducted from the trial which actually was conducted. For example, in *R v Luhan* [2009] VSCA 30 [37], the Court of Appeal unanimously rejected appeal grounds which were 'premised on a different trial having been conducted' than the one actually run by the defence at trial.

Something would be 'different from' the way in which the accused presented his or her case if it depends upon the existence of facts which are contrary to those on which the accused seeks to rely in support of his or her case. For instance:

- For a charge of sexual penetration of a child under 16, if the accused argues that he did not sexually penetrate the child (e.g. it was not them or there was in fact no penetration), to ask for a direction on a specific defence that the accused believed the child was over 16 years of age, would involve the jury considering the issues in the trial in a manner that is 'different from' the way in which the accused presented his case.
- For a charge of murder, if the accused puts forward an alibi that he or she was not present at the scene of the crime, requesting a direction on self defence may involve the jury considering the issues in the trial in a manner that is 'different from' the way in which the accused presented his or her case.
- For a charge of rape, if the accused argues that no sexual penetration occurred, a direction on the accused's belief in consent may involve the jury considering the issues in the trial in a manner that is 'different from' the way in which the accused presented his case.

There may be cases where the way in which the accused presented his or her case is not clearly 'different from' the content of the direction sought. In these cases, the requirement that the trial judge have regard to whether the proposed direction concerns a matter 'not raised or relied on by the accused' may be more useful. In a rape trial, a case that the accused believed that the complainant was consenting may not be clearly 'different from', for example, evidence that the accused had consumed a substantial amount of alcohol.

However, the accused may not 'raise or rely' on the accused's intoxication because it may detract from his case that he believed that the complainant was consenting. In a situation where this issue may be open on the evidence and the accused tells the trial judge it is in issue and requests a direction, but has not 'raised or relied' on it, the trial judge may not need to give a direction. This would depend on a more detailed analysis of the issues in the case, for example, the way in which intoxication is said to arise and evidence concerning the extent of the intoxication. For instance, evidence of a higher level of intoxication is likely to be required to make this an issue in such circumstances.

A trial judge may conclude in any of the above situations that there are good reasons for not directing on an issue. These factors would assist in providing clarity to the issues to be determined. It means that directions must be given that are consistent with the accused's case and the forensic decisions of counsel. The test is not a bright line test, but it would provide further assistance for trial judges so that their obligation relates to the more substantial issues in the trial, rather than interpretations of the case which may be open on the evidence but are not overly apparent.

We propose that this part of the Bill contain important changes to the Pemble obligation. Its aim is to make it clear when a direction is not required. The purpose of the proposed reforms is to move away from directions on issues that are open on the evidence, but have nothing to do with the real issues in the trial. Such directions are more likely to confuse jurors and lend an air of unreality to the proceedings.

The proposal places a greater onus on the forensic or tactical decisions made by trial counsel, and in particular, on defence counsel to ensure their client receives a fair trial. Because the objective is to assist the jury in determining the issues in dispute, the trial judge would play an important role in filtering out requests for directions that do not relate to issues that are in dispute.

The proposed reforms would:

- relieve the burden on the trial judge to direct on a range of matters and focus the jury's attention on the key issues
- give the parties greater control over the issues that the jury focuses on, and
- minimise appeals and retrials because the trial judge's obligation to give a direction on issues not relevant to or consistent with the way the case was presented and therefore not likely to have made any difference to the outcome of the case, would be significantly reduced.

5.5.5 Paragraph (f) – Residual obligation to give direction

While the decision of counsel to not request a direction that is open or request that a direction not be given would normally mean that a direction is not given, it may be that defence counsel is either incompetent or employing a high-risk strategy. The proposal provides that the trial judge has a residual obligation to still give a direction in such circumstances.

We recommend that this provision be very limited and residual in nature, for example, where the trial judge is concerned that the accused's failure to request a direction may subsequently lead to a successful appeal on the ground of incompetence of counsel for failing to request such a direction. We do not intend that this residual component usurp or complicate the request for directions procedures outlined above. If the residual obligation plays a significant role in the trial judge's determination of whether a direction must be given, then the whole jury direction request process would be of little effect. It would also mean that the views of counsel would play less of a role in shaping the issues that the jury must determine. This would be contrary to the objectives of these reforms.

While the jury direction request provisions necessarily cannot provide a bright line test for whether a direction should be given or not given, they would provide trial judges with much greater clarity than the Pemble obligation. This in itself would help to achieve the overall objective of a fair trial where the directions given to the jury are as clear, brief, simple and comprehensible as possible.

The purpose of the residual obligation is to address a small number of cases where it is necessary to avoid a substantial miscarriage of justice that the trial judge gives a direction despite the views of counsel. As these situations cannot be predicted in advance, and would depend upon the particular circumstances of each case, the residual obligation also has some flexibility built into it. The circumstances in which the residual obligation are said to arise would no doubt be raised on appeal. If it is given a broad scope of operation it would become an important consideration in every case and operate in a manner akin to the Pemble obligation. Accordingly, the residual obligation should be drafted to operate in a manner that reflects the intended limited operation of the residual obligation. It is more limited in nature than, for example, whether a direction is 'necessary to ensure a fair trial'. We recommend that the residual obligation only operate where it is necessary to give a direction to avoid what may constitute a substantial miscarriage of justice on appeal following conviction.

The recommended reforms may lead to some changes in the grounds for appeal, resulting in more appeals based on negligence or incompetence of counsel (though presumably there would be less appeals of this kind than of those where the ground is that the trial judge failed to give a certain direction under the current system). Such appeals would need to show that the failure of the accused's counsel to request a direction was an error or irregularity that resulted in a substantial miscarriage of justice (e.g. because there was a significant possibility that it affected the outcome of the trial, see *TKWJ v R* (2002) 212 CLR 124, 149-150 (McHugh J)).

While case law indicates that counsel is obliged to assist the trial judge to ensure that the trial judge does not make any errors and to request directions to ensure their client receives a fair trial, the trial judge retains the ultimate responsibility of determining whether to give a direction or determining that there are good reasons for not giving a direction. The proposed approach reflects that both the trial judge and counsel have a responsibility to ensure that all of the correct directions are given by the trial judge, as is often discussed in cases, but reduces the scope of the residual obligation of the trial judge to determine which directions to give or not to give in a case.

The power for the Court of Appeal to set aside a conviction where there is a substantial miscarriage of justice would not be affected by the proposed reforms.

5.6 Application of the recommended reforms to murder and manslaughter

For centuries manslaughter has been available as a merciful verdict where murder is charged. This was particularly important in days where capital punishment and subsequently mandatory life imprisonment applied. While these maximum penalties have been removed in Victoria, a merciful verdict of manslaughter continues to be available primarily for at least two reasons:

- because murder is the most serious offence on the criminal calendar with consequent opprobrium following a conviction, and
- because of tradition and established practice.

Further, until 2000, it was relatively straightforward for a trial judge to direct a jury on manslaughter as an alternative to murder. However, the High Court's decision in *Gilbert* increased the task of the trial judge considerably as the trial judge must now direct the jury on various forms of criminal complicity (or extended liability) for manslaughter that may be open on the facts. In some cases, the trial judge will need to direct the jury about these various possible scenarios even if the case has not been run by either the prosecution or the accused on that basis.

Since *Gilbert*, this issue has arisen in a number of High Court cases including *Gillard v R* [2003] HCA 64 and *Nguyen*. The complexity of these issues is apparent from the decision of *Nguyen* where there were three accused (two of whom were named Dang Nguyen), who the prosecution alleged were complicit in crimes of murder and attempted murder committed by Bill Ho. The prosecution case against the Nguyens was put on three bases – acting in concert, common purpose and aiding and abetting.

The jury verdicts indicated that the jury was satisfied beyond reasonable doubt that the accused were guilty of murder. However, the convictions were set aside because the trial judge did not direct the jury about the alternative bases upon which they could have found the accused guilty of a lesser offence. In particular, the trial judge was found to be in error because she did not direct on the alternative formulations of complicity that were available for the offence of manslaughter, if the jury found the accused not guilty of murder. Trial counsel for the accused did not request such directions. Further, the High Court said that a conviction for the offence of murder (if the additional directions had been given) was not inevitable.

The complexity of complicity is discussed earlier in Part 5.3.6.

This kind of situation is one of the reasons why a change to the trial judge's obligation to direct juries is recommended, with consequent benefits for juries in the deliberation process. It is clear that all the reasons why the current law substantially complicates the task of the trial judge and the jury for other offences apply equally to the offences of murder and manslaughter. The issue is whether an exception should be made for directions concerning:

- murder and manslaughter (in the more traditional manner that applied before *Gilbert*), or
- murder and all viable cases on manslaughter (in the more extended manner that has applied since *Gilbert*).

It is difficult to determine when the requirement to give such directions should or should not apply by drawing distinctions between the different forms of criminal responsibility. Consider the following scenarios:

- A is the sole accused charged with the murder of B (by stabbing).
- C is charged with murder by counselling and procuring A to kill B.
- D is charged with murder by acting in concert, or aiding and abetting A, as D was aware that A was going to assault B (in issue is what type of assault and whether D was aware A had a knife with him).

With the traditional example in the first situation above, it is understandable that manslaughter developed as an available merciful verdict. However, if A can potentially receive the merciful verdict, there is also a strong case that a merciful verdict should be available to C and D. Further, if A received a merciful verdict and C and D did not, these kinds of inconsistent (but potentially legally permissible) verdicts can bring the law into disrepute in the community. This was raised in the context of the conviction of Heather Osland (*Osland v R* [1988] HCA 75) for the offence of murder (who was the equivalent of C or D in the above scenario) and the acquittal of her son (who was the equivalent of A in the above scenario).

An exception which applies depending upon the basis upon which the prosecution alleges the accused is criminally responsible would be very complex and would potentially create its own injustices. Accordingly, the only viable options are to either have no exception for murder and manslaughter and to treat these offences like any other offence, or to have an exception which applies irrespective of the basis on which the accused is said to be guilty of murder, which will make no change to the law as it has applied since *Gilbert*.

If no special exception is made for manslaughter, is this likely to make any difference to the traditional situation (e.g. directions about manslaughter by an unlawful and dangerous act)? It is unlikely to make any difference where the issue is whether the accused had the requisite fault element for murder (intention to kill or cause a really serious injury) or some lesser intent or fault, which may be sufficient to prove unlawful and dangerous act manslaughter. Where the issue in relation to an alternative offence is a live issue the trial judge would give directions concerning manslaughter by an unlawful and dangerous act.

However, the situation may change where the issue is one of identity or alibi for instance, and the accused's case is that it was not the accused but somebody else who killed or murdered the victim. If murder and manslaughter are treated like all other offences, defence counsel may request that the trial judge not direct the jury about manslaughter (or certain different bases of complicity) on the basis of what is and is not in issue in the trial. The trial judge would normally accept that request unless there is a special reason to invoke the residual obligation to direct the jury.

Creating an exception for murder and manslaughter would not promote, rather it would defeat, the objective of the trial judge directing the jury only about live issues in the case. Accordingly, it is recommended that no special exemption to the standard structure of the obligations on the trial judge to give directions be created for the offence of murder and manslaughter.

5.7 Practical application of proposed reforms – Case studies

As discussed, the proposal would involve some cultural change for counsel and the trial judge. The proposed reforms would require the discussion to take place before the closing address of the prosecution. This is to encourage the discussion to occur as early as possible, but once the issues in the trial have become more evident. It would not, however, prevent the parties from further discussing the issues with the trial judge after closing addresses, or as the trial progresses. In time, trial judges and parties may develop a standard form list of directions that can be checked off in each trial.

It would be in the court's interest for the trial judge to actively interact with counsel, by asking questions for example. Although the trial judge would not be compelled to do so by the proposed reforms, it is implicit in the process prescribed and it would be greatly beneficial for the trial judge to engage with counsel in this way. It would, for example, make clearer whether there are good reasons for not giving a direction requested (paragraph (e)). In particular, questioning by the trial judge may clarify whether the direction concerns a matter not raised or relied on by the accused in the conduct of his or her case. The discussion would also clarify whether the residual obligation on the trial judge described in paragraph (e) applied by making clear what counsel's intentions were and whether a direction was not requested due to a forensic decision or incompetence.

These discussions should decrease the chance of necessary directions being missed through oversight, which would make it likely that in most cases, the residual obligation set out in paragraph (f) would not be activated and the number of problems on appeal would decrease. The discussion would also assist the trial judge by providing a basis for formulating integrated directions (as discussed in Part 6 of this report).

Counsel also play a crucial role in these proposed reforms. Rather than highlighting the issues in the case closer to their closing addresses, it would be in counsel's interest to focus on the issues in the trial earlier as the framing of these issues would influence which directions the trial judge ultimately decides to give to the jury. Preparation by counsel in this regard would also improve the quality of the discussion with the trial judge.

The proposed reforms should also encourage the tailoring of directions in each case. This should reduce the number of problems on appeal and provide juries with directions that better equip them for their task in reaching a verdict.

The following case studies provide an illustration of how it is anticipated the proposed reforms would work in practice. While using real cases assists in illustrating the application of the proposals, changes have been made by exploring different scenarios about what counsel could theoretically have done under different laws. We do not know what counsel would or even might have done under different laws. Cases might also be conducted differently in the light of different laws. Accordingly, we make no comment or criticism, and do not purport to make any comment or criticism, as to any decisions actually made by counsel in conducting their case, or directions given or not given by the trial judge.

5.7.1 Case Study 1 – Directions on alternative offences and criminal complicity (based on *R v Kane* [2001] VSCA 153)

The accused, her alleged co-offenders and the victim were all prisoners at a women's correctional centre. The accused, along with the co-offenders, allegedly punched, kicked and stabbed the victim. The victim's injuries included extensive bruising, lacerations and a stab wound.

The accused was charged with one count of intentionally causing serious injury (charge 1) and one count of recklessly causing serious injury (charge 2). The accused was ultimately found guilty on count 1.

At trial, the prosecution opened its case by stating that the 'serious injury' could consist of either the stab wound alone, or all of the injuries *cumulatively* sustained by the victim. During the course of the trial, some doubt arose as to whether the accused was responsible for the stab wound. On appeal it was argued that the trial judge should have also directed the jury on two alternative offences of intentionally causing injury and recklessly causing injury. No complaint was made by defence counsel at trial, nor was any mention made by him of the issue.

The Court of Appeal ultimately decided that the shift in the course of the trial to the possibility that the jury might convict on the combination of injuries apart from the stab wound required the trial judge to direct the jury on those alternative offences. This was to protect against the danger that the jury would convict the accused of intentionally causing *serious* injury because it did not know that it was open to them to convict her of intentionally causing injury. The accused's conviction was quashed and a new trial was ordered.

Under the proposed reforms, defence counsel would have to inform the trial judge whether the alternative offences of intentionally causing injury and recklessly causing injury were 'in issue' under paragraph (a). If these were in issue, counsel would also have to request that the trial judge direct or not direct the jury on those alternative offences under paragraph (b).

In this case, it is highly likely that our proposed reforms would have worked to bring this issue to the attention of the trial judge and the parties. Once there was an issue about whether the accused was responsible for the stab wound, our proposed reforms would lead to a discussion between the trial judge and counsel concerning what is in issue in the trial.

There was considerable discussion in this case concerning whether the accused had made a clear and informed decision to not raise the alternative charges. For instance, the accused may have been concerned that the presence of the alternative charge may have led to a compromised verdict. Further, the accused may have chosen not to discuss the alternative charges because doing so would be inconsistent with, or detracted from, the case theory presented by the accused. However, it is apparent from the Court of Appeal's judgment in this case that whether the accused made such a decision could not be determined with certainty.

The extension of the application of the Pemble obligation to criminal complicity in *Gilbert* (as arose in this case) led to the Court of Appeal determining that the trial judge was required to direct the jury about alternative offences.

Our proposed reforms specifically address the issue of criminal complicity. Accordingly, it is highly likely that the discussion between the trial judge and counsel (with our proposed reforms) would ensure that it is clear whether the accused requests or does not request such a direction. If the accused did not want such a direction, the reasons for this should be clear (and recorded).

If counsel says that the alternative offences are not in issue, or does not request that the direction be given on those alternative offences, which was the case in the original trial, the trial judge would not be obliged to direct the jury on those offences (paragraph (d)). This would be a forensic decision left to counsel (e.g. counsel may consider that the accused is more likely to secure a complete acquittal if those alternative offences are not left for the jury to consider).

If counsel decided to request a direction on the alternative offences, the trial judge would usually have to give the direction unless there are good reasons for not doing so. In considering whether there are good reasons for not giving the requested direction, the trial judge in this case might have had regard to the evidence in the trial. In this case, the evidence raised some doubt during the course of the trial as to whether the accused was responsible for the stab wound.

The trial judge could also, relevantly, consider whether the direction would involve the jury considering issues in the trial in a manner that would be different from the way in which the accused had presented her case. Considering whether the injuries inflicted by the accused were a 'serious injury' or merely just an 'injury', would not necessarily involve considering the case differently from how the accused presented it.

It would be likely that in the circumstances of this case, the trial judge would direct the jury on the alternative offences, if requested to do so by the accused.

5.7.2 Case Study 2 – Directions on elements and defences (based on *R v T C* [2008] VSCA 282)

The accused stayed at his friend's house after attending a party where he became quite drunk. He continued to drink at his friend's house and there was some evidence that the accused used marijuana several times that day as well.

The complainant was put to bed on a fold-out couch in the lounge room and a mattress was set up for the accused in the same room. There was evidence from the complainant that the accused had approached him when he was lying on the couch and sexually penetrated him. Supporting evidence was given by the complainant's cousin who was also present at the time.

The accused was charged with taking part in an act of sexual penetration with a child under the age of 16. He was found guilty of the offence.

The main dispute at trial was whether the prosecution had proved that the offence occurred. The accused claimed that he did not do the act alleged by the prosecution. However, in discussion with counsel, before final addresses, the trial judge described the issue of the accused's intoxication as a matter which he thought had 'steadily escalated in its prominence in the trial'. It was agreed by both counsel that 'the full intoxication direction' had to be given. Defence counsel agreed that a direction should be given, whilst emphasising that the accused's primary case was that the impugned conduct had not taken place.

On appeal, it was argued by the defence that the trial judge had failed sufficiently to identify the ways in which intoxication could be relevant in the accused's case, namely to both the voluntariness of any conduct found by the jury to be proven beyond reasonable doubt, as well as to the formation of intent.

The Court of Appeal held that while the 'first defence' that the applicant did not do the act alleged by the prosecution was pursued by defence counsel, it was up to the trial judge to direct the jury on the 'second defence' that the accused was so intoxicated at the relevant time that the act he performed was not 'conscious, voluntary or intended'. The Court of Appeal also found that the direction on intoxication addressed, under the rubric of intention, both voluntariness and intention, even though these were 'separate concepts'. Relevant to voluntariness was the accused's remark that he thought he was 'dreaming'.

Under the proposed reforms, the accused would have to inform the trial judge which elements of the offence were in issue. In addition, the prosecution and the accused would tell the trial judge which of the elements in issue they wanted directions on. In this case, it is likely that the accused would ask the trial judge to direct the jury on the intoxication of the accused, which would lead to a discussion about the relevance of intoxication to both the voluntariness of the conduct and the formation of intent as elements of the offence.

The trial judge would then consider whether there were good reasons for not giving the direction. The trial judge would consider the evidence in the trial, for example, whether the evidence related to a matter that was not in issue or a matter that was not important in the proceeding. In this case, it does appear that the intoxication issue was at the forefront of the evidence, despite the accused's defence that he did not engage in the act alleged by the prosecution.

However, the trial judge would also consider the manner in which the accused and prosecution had conducted their cases and whether the direction concerned a matter not raised or relied on by the accused, or whether the direction would involve the jury considering the issue in a manner that is different from the way the accused presented his case to the jury. Counsel for the accused in this case ran the defence on the basis that the penetration never occurred. It is arguable that directing the jury on voluntariness and intention would concern a matter not raised or relied on by the accused and would involve the jury considering the issues in the trial in a way that is different from how the accused presented it to the jury.

This case did involve a discussion between the trial judge and counsel concerning the directions that should be given. However, the discussion did not involve a sufficient level of detail concerning how intoxication was said to be relevant. Further, counsel were also focused on whether the trial judge was required to give a direction in accordance with the Pemble obligation.

Under our proposals, counsel would need to decide whether to request such a direction. If counsel did request the direction it is highly likely that it would be given by the trial judge, at least in relation to intention. As the level of intoxication required for conduct to not be voluntary is very high it may be that this was not really an issue in the trial.

Alternatively, suppose that counsel said that they did not want the trial judge to give a direction on intoxication (whether in relation to voluntariness or intention). As was discussed in that case, counsel's defence focused exclusively on the denial that the act itself had taken place. Normally a decision by trial counsel that a direction not be given would be accepted by a trial judge.

However, the residual obligation may result in the trial judge giving a direction. The Court of Appeal discussed that limiting the accused's case to a denial that the act took place was 'highly problematic' and surprising given the weight of the evidence against him, including the testimony of the complainant and his cousin, and highly compelling DNA evidence. In such a situation, the trial judge would need to consider whether the residual obligation was enlivened.

As the possibility of not having intoxication directions was not in issue in that case, there is no information available from that case concerning the forensic reasons that counsel may have made if counsel did not wish the trial judge to give intoxication directions. At the very least, the proposal would have assisted the trial judge in teasing out the issues related to intoxication and to determine whether or not to give a direction to the jury.

5.7.3 Case Study 3 – Directions on evidence (based on *M B v R* [2012] VSCA 248)

The accused was convicted of six charges of sexual penetration of a child under 16, under care, supervision or authority, one charge of indecent act with or in the presence of a child and one charge of stalking.

The accused was a scout leader who met the complainant and her brother when they joined a scout club in early 2008. Over time, the complainant and her brother would stay overnight at the accused's house.

In respect of two of the charges, the complainant described an occasion where the accused was playing a pornographic computer game, while she stood next to him and watched him play. The complainant described the accused clicking on a broom in the game, and she saw the broom going into a vagina. Following this, the complainant lay on the kitchen table and the accused took her pants off. The accused put a condom onto a broom or duster handle and inserted it into the complainant's vagina.

Before the accused's record of interview commenced, the accused was asked whether he kept condoms at his home. He said that he did not. Condoms were later found and the accused was given an opportunity to explain.

On appeal, one of the grounds of appeal put forward was that the trial miscarried as a consequence of the trial judge's failure to direct the jury in relation to the accused's lie to the police that he did not keep or have condoms at his house. In particular, that the trial judge should have directed the jury that they were not to reason that, just because the accused may have lied about keeping condoms at home, he was guilty of the offences.

The defence case was that the sexual offending simply did not occur. In a discussion between counsel and the trial judge, the prosecutor indicated that he did not rely on lies (if they were lies) about the presence of condoms as evidence of consciousness of guilt. Defence counsel was asked whether he had anything he wished to say about the issue. Defence counsel responded in the negative.

The Court of Appeal rejected the appeal and held that the question of whether a consciousness of guilt direction should have been given was one for defence counsel to seek.

Under the proposed reforms, where the prosecution does not rely on post-offence conduct evidence as evidence of incriminating conduct, defence counsel would be able to request that the trial judge give a direction on the alleged lie to avoid the jury impermissibly using the evidence as evidence of incriminating conduct (see Part 8). In this case, defence counsel would be required to inform the trial judge whether he or she wanted a direction in relation to the lie (as evidence relevant to the matters in issue). If defence counsel did not a request a direction, as was the case here, the trial judge would not be obliged to direct the jury on that evidence.

In this case, the outcome of the proposed reforms would be the same as the Court of Appeal's conclusion, however providing for this process in legislation would provide support for such an approach and more certainty that the approach taken by the trial judge was correct.

6 The obligation to sum up

6.1 Overview

At the end of the trial, the trial judge sums up the trial to the jury. This summing up covers the law and the evidence in the trial. Most directions are given to juries as part of the summing up. However, the current law leads to summings up that are very difficult for jurors to understand, because of:

- the complexity of summings up
- the length of summings up, and
- the ways that trial judges communicate with juries and the reliance on oral summings up.

The department recommends that the Bill provide that:

- the trial judge must direct the jury on only so much of the law as is necessary to resolve the real issues of the case
- the trial judge must refer the jury to the way in which the parties have put their respective cases in relation to the facts in issue but need not summarise the closing addresses of the parties
- the trial judge need not give a summary of the evidence, but must identify so much of the evidence as is necessary for the jury to determine the matters in issue
- the summing up may be given in a combination of oral and written components
- the trial judge may give 'integrated directions', that is, directions where the legal issues are embedded in the factual issues, often in the form of questions, and
- the trial judge may provide to the jury:
  - a 'jury guide', that is, a written document to assist the jury, for example, containing a list of questions for the jury
  - a transcript of the evidence.

These reforms would:

- provide guidance concerning the requirements of a summing up, which would:
  - assist the trial judge in preparing a summing up
  - facilitate shorter summings up (which would also reduce delay)
  - reduce errors in summings up (which should result in fewer appeals and retrials), and
- assist the jury by making the issues that they must determine much clearer by encouraging:
  - new ways of communicating with the jury
  - more relevant directions that focus on the issues in dispute
  - directions that more clearly relate the legal issues to the facts.

6.2 The current law

Most jury directions are given as part of the trial judge's summing up. The primary aim of the trial judge's summing up is to equip the jury in its task of reaching a verdict. As the QLRC observed at [5.29], studies 'demonstrate that the judge's role is central in instructing and guiding a jury … It is quite understandable that jurors see the judge as their main source of guidance during a trial and as they are about to retire to deliberate.'

There is a clear duty at common law for the trial judge to sum up the case and, in doing so, to relate the evidence in the trial to the legal and factual issues that the jury must resolve. This rule was explained by the High Court of Australia in *Alford v Magee* [1952] HCA 3 at [28]. The obligation also requires the trial judge to ensure that the prosecution and defence case are clearly placed before the jury, usually by summarising the addresses of both parties.[1]

In *R v AJS* [2005] VSCA 288 at [55] Maxwell P, Nettle JA and Redlich AJA summarised the responsibilities of the trial judge as follows:

> Axiomatically, it is the responsibility of the trial judge in every jury trial:
> (a) to decide what are the real issues in the case;
> (b) to direct the jury on only so much of the law as is necessary to resolve those issues;
> (c) to tell the jury, in the light of the law, what those issues are;
> (d) to explain to the jury how the law applies to the facts of the case; and
> (e) to summarise only so much of the evidence as is relevant to the facts in issue, and to do so by reference to the issues in the case.

The standard jury summing up deals first with general directions (also called 'ineluctable directions') which relate to the conduct of trials generally. These include directions on the onus of proof, the standard of proof, the roles of the judge and the jury, the requirement to decide solely on the evidence, and how to reach a verdict. Some of these directions may be given at the start of the trial and then repeated during the summing up.

After the general directions, the trial judge will usually:

- describe the elements of the offence in detail, often using the language in the Charge Book
- identify the elements of the offence that are in dispute and refer the jury to the competing positions of the parties and to the evidence relevant to those issues
- direct the jury about any evidence that may require a special warning about its reliability or use, and
- summarise the evidence and the addresses of counsel for the jury.[2]

The QLRC identified the main components of this 'traditional' approach to directions as follows (at [6.52]):

- a block of directions about general matters such as the onus and burden of proof, the presumption of innocence and the need for unanimity
- the elements of the offence (which may often be accompanied by a written version, which may have been distributed by the prosecution)
- a block of directions covering warnings or other specific directions that arise on the evidence
- the summary of the evidence, which may be done sequentially or thematically

1 As described by Redlich JA in *R v Thompson* [2008] VSCA 144, [134].

2 See Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [6.52].

- a summary of the parties' addresses, and
- some concluding remarks, which may include a warning about the use of the transcript in jurisdictions or cases where the jury is provided with this for its deliberations.

6.3 Problems with the current law

Most jury directions will be given to the jury as part of the summing up. Therefore, many of the problems with jury directions identified in Part 2 apply here. In particular, summings up appear to be failing to achieve their aim of being succinct statements of the law and the facts in issue and to contain only so much detail as is necessary to explain to the jury its task.[3] Their current length and complexity tends to undermine their effectiveness, and may well leave juries confused rather than assisted.

In relation to the summing up, Lord Justice Moses has commented:

> We should start by identifying the problem. It is the problem of how we help a jury reach a conclusion of guilt or innocence. We seem to have hit upon a system designed to ensure, in any but the simplest of cases, that the path we require them to follow should be as obscure, as tortuous and as arduous as could possibly be devised. The problem lies in the function of the judge and his role as guide, when he embarks on a summing-up.[4]

Similarly, Lord Justice Auld has said:

> As to directions of law, our present system is to burden the jury with often highly technical and detailed propositions of law … Many judges and practitioners accept the system because that is how they have always known it, though they recognise it has become vastly more complicated for them and the jury than it was. For many others the process is, frankly, an embarrassment in its complexity and in its unreality as an aid to jurors in returning a just verdict.[5]

6.3.1 Complexity of summings up

The criminal law has become increasingly complex, and this is reflected in the complexity of jury directions (see Part 2). Complexity in jury directions can make the directions ineffective because they are not readily understood by jurors. For example, as noted in Part 2, research shows that even if jurors find the summing up 'clear' or 'helpful', a significant proportion of jurors misunderstand the law about which they received instructions.[6]

In addition to the complexity of the law, the process that the jury is expected to follow can be complex. Under the traditional approach to giving directions, the trial judge will identify and explain the elements of the law in dispute. This will often involve a 'mini-lecture' on the law. As the triers of fact, following this mini-lecture, the jury is expected to apply the law to the facts themselves. This will generally require the jury to go through a three-step process:

- understand the explanations of the law, including the elements of the offence
- apply the elements to the facts, and
- assess whether they are satisfied that the facts and elements have been proved.

This process is likely to be difficult for jurors, who are generally not legally trained. It can lead to jury disengagement and concerns about the basis on which juries are reaching their verdicts.

3 See New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [6.5] – [6.12].
4 Lord Justice Moses *Summing Down the Summing Up* (Annual Law Reform Lecture, 23 November 2010) 2.
5 Lord Justice Auld, *Review of the Criminal Courts of England and Wales*, Report (2001) chapter 11, [50].
6 See Queensland Law Reform Commission, *A Review of Jury Directions*, Report No 66 (2009) [5.61] – [5.62].

Clarifying what needs to be included in a summing up, and improving how that content is communicated, will assist juries by making summings up more relevant, helpful and understandable.

6.3.2 Lengthy summings up

In addition to being complex, the summing up is often lengthy. As discussed in Part 2.5 above, research by the AIJA in 2006 has shown that summings up in three states (New South Wales, Tasmania and Victoria) took 70% longer on average than in the 'short' states. In Victoria, the average length of summings up was four hours and 15 minutes in a 10 day trial. Of this total time, the majority of time was spent summarising the evidence and directing on the parties' addresses – just under three hours in a 10 day trial.

Of particular concern is the length of summaries of evidence and counsel's addresses. As the QLRC notes at [11.25]:

> There is a concern that long summaries of the evidence may be given without necessarily relating the evidence to the legal and factual issues in the case, and that lengthy rehearsals of the evidence (which in many cases would have also been reviewed by the parties in their addresses) are unnecessary, boring and counter-productive.

Providing comprehensive summaries of the evidence of each witness adds considerably to the length of summing up. The Court of Appeal has indicated that such summaries are unnecessary and in *R v Osborne* [2007] VSCA 250 at [23] suggested that a summary of all of the evidence may 'overburden' the jury. However, summings up continue to be a problem in Victoria. This suggests there is uncertainty about when a summary is, or is not, required, and, if a summary is given, the content of that summary.

In contrast, trial judges in New Zealand rarely summarise the evidence at all. Their summings up will refer to the evidence from witnesses relating to key issues in the case, but the evidence itself is not repeated or summarised. Juries in New Zealand are typically provided with a full copy of the transcript of evidence. Providing transcripts reduces the need to repeat or summarise evidence (as the jury can look at the transcript to refresh their memories instead). As discussed in Part 2.5 above, this results in much shorter summings up in New Zealand than in Victoria. In New Zealand, the average summing up takes about 1 hour and 16 minutes in a 10 day trial.

6.3.3 Lack of written material

The trial process has traditionally been an oral process and this has extended to the directions that the trial judge gives to the jury during the summing up. As Redlich JA noted in *R v Thompson* [2008] VSCA 144 at [146] (*Thompson*):

> The trial process is essentially an oral one. The provision of transcript or written directions cannot take the place of the oral directions which the law requires. The criminal trial proceeds upon the assumption that oral directions are an appropriate and effective means by which the jury's task is communicated to them. Oral directions are given and listened to by all of the jury in the presence of the judge and the parties in a public hearing. The parties are assured that all aspects of the jury's task have been explained to each member of the jury. The process provides transparency that would be absent if the jury were directed to act upon written instructions which they were to consider in the privacy of the jury room. Uncertainty would arise as to whether all jurors read all written material provided to them. The concept of justice being 'manifestly seen to be done' has contributed to the requirement that 'the whole direction must be by the judge in the full light of publicity'.

However, it is increasingly recognised that it can be difficult for jurors to understand and apply oral instructions, especially when they are long and complex. For example, in *Thompson* Neave JA said at [101]–[102]:

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

In support of her view, Justice Neave cited at [103] – [104] a New Zealand Law Commission study, in which jurors indicated that they would have found a written summary useful because:[7]

> it was difficult to absorb all of the trial judge's instructions at the time they were given, and a written summary could have been digested at a more leisurely pace back in the jury room some jurors differed in their interpretation of what the trial judge said, even when jurors themselves made notes, and some jurors found that written instructions would have reduced deliberation time (although research does not support this assertion).[8]

Research has shown that jurors struggle to remember and understand oral directions, while written directions have been shown to assist jurors' comprehension of the directions.[9] Written material can also resolve disputes among jurors about the content of the oral directions.[10] If jurors receive written directions, it can increase their confidence with the verdict and satisfaction with the trial process.[11]

Providing written materials is also consistent with research that shows that people learn in different ways (and that therefore jury directions should be provided in a range of different ways).[12] This is particularly the case given the improvements in communication technology which facilitate more visual methods of communicating with jurors.[13]

In recognition of these factors, the traditional approach to summing up is gradually changing. Trial judges are increasingly providing written materials to juries such as the indictment (or a version of it), materials setting out the issues for the jury to determine, transcripts of evidence and summaries of evidence or issues in the case. This is supported by section 223 of the *Criminal Procedure Act*, which provides that the trial judge may give a range of documents to the jury to assist them in their deliberations, whether it is a copy of the indictment or a transcript of the evidence from the trial or some other document that the trial judge considers appropriate.

7 New Zealand Law Commission, *Juries in Criminal Trials: Part Two: A Summary of the Research Findings*, Preliminary Paper No 37 (2001) [7.60].

8 L Heuer and S D Penrod, 'Instructing Jurors: A Field Experiment with Written and Preliminary Instructions' (1989) 13 Law and Human Behaviour 409, cited in J Walvisch, Judicial College of Victoria, *Background Paper: Jury Directions Research* (2012) (unpublished) 27.

9 See e.g. G P Kramer and D M Koenig, 'Do Jurors Understand Criminal Jury Instructions? Analysing the Results of the Michigan Juror Comprehension Project' (1989) 23 *University of Michigan Journal of Law Reform* 401; I G Prager, G Deckelbaum and B L Cutler, 'Improving Juror Understanding for Intervening Causation Instructions"'(1989) 13 *Forensic Reports* 187; Cheryl Thomas *Are Juries Fair* (London, 2010) 38-39; Lily Trimboli, 'Juror Understanding of Judicial Instructions in Criminal Trials' *Contemporary Issues in Crime and Justice* No. 119 (2008) 10 cited in Walvisch, above n 8, 25. See too New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [10.13]-[10.16].

10 Heuer and Penrod, above n 8, 411, cited in New South Wales Law Reform Commission, above n 9, [10.14].

11 Heuer and Penrod, above n 8, 411, cited in New South Wales Law Reform Commission, above n 9, [10.16].

12 NS Marder, 'Bringing Jury Instructions into the Twenty-first Century' (2006) 81 *Notre Dame Law Review* 449, cited in Walvisch, above n 8, 27.

13 Ibid; The Hon Justice Michael Kirby, 'Speaking to the Modern Jury – New Challenges for Judges and Advocates' (Paper presented at the Worldwide Advocacy Conference, London, 29 June – 2 July 1998), cited in Walvisch, above n 8, 27-28.

6.4 VLRC and QLRC recommendations

The VLRC made recommendations on summing up. It is useful to explore these recommendations before setting out the changes proposed in this report. The recommendations of the QLRC on integrated directions have also influenced the proposed reforms. While the reforms recommended by the department pursue the same goals of simplifying the law on jury directions, in some areas we have departed from the recommendations of the VLRC.

6.4.1 The content of the summing up

The VLRC made a series of recommendations which essentially involve codifying the trial judge's obligation to sum up, including setting out what directions on the law are necessary and the requirements for summarising the evidence and how the parties put their cases.[14]

The recommendations include directing the jury about elements of the offence, defences and alternative verdicts (see paragraphs (a), (b), (c) and (h) of recommendation 23). These issues are discussed in Part 5 in relation to the jury direction request provisions.

Paragraphs (d), (e) and (f) of recommendation 23 relate to the obligation to summarise evidence. Paragraph (d) provides that the trial judge must refer the jury to the evidence which is relevant to the findings of fact that they must make with respect to the contested elements of an offence. Paragraph (e) provides that in doing so, the trial judge is not required to provide an oral restatement of the evidence, unless the trial judge determines that it is necessary to do so to ensure a fair trial. Paragraph (f) provides that in determining whether it is necessary to provide the jury with an oral summary of evidence, the trial judge may have regard to:

- the length of the trial
- whether the jury will be provided with a written or electronic transcript or a written summary of the evidence
- the complexity of the evidence
- any special needs or disadvantages of the jury in understanding or recalling the evidence
- the submissions and addresses of counsel, and
- such other matters as the trial judge considers appropriate in the circumstances of the case.

The proposed provisions on identification of evidence (discussed below) have similarities with aspects of these recommendations. However, the provisions we recommend place greater emphasis on the need to keep any reference to the evidence in the summing up short and targeted to the matters in issue.

Paragraph (i) of recommendation 23 sets out the trial judge's obligation to provide the jury with a summary of the way in which the prosecution and the accused have put their cases. We recommend adopting this recommendation, with modifications, as explained below.

Paragraph (g) of recommendation 23 relates to the onus and standard of proof. It provides that the trial judge must direct the jury that they must find the accused not guilty if they cannot make any of the findings in relation to the elements beyond reasonable doubt. We do not recommend adopting this recommendation because it is unnecessary to do so. Directions on the onus and standard of proof form part of the general or 'ineluctable directions' that are given in every trial. (See also Part 7, which discusses allowing trial judges to explain the concept of 'beyond reasonable doubt').

14 Victorian Law Reform Commission, above n 2, recommendations 22 and 23.

6.4.2 Greater use of written documents

The VLRC also recommended the use of a number of written documents to facilitate the jury's work (at [5.15]-[5.18]). First, it recommended that the jury be provided with a transcript of the evidence. The VLRC was of the opinion that trial judges should be 'encouraged to provide juries with copies of the transcript of the evidence' (at [5.18]). As discussed below, this recommendation is reflected in the proposed Bill.

Secondly, recommendations 41 and 42 of the VLRC Report proposed the use of a document known as an 'outline of charges' which identifies the elements of the offences charged in the indictment (including any alternative offences) and indicates which of them are disputed by the accused and therefore need to be determined by the jury. The VLRC proposed that the outline of charges be given to the jury at the commencement of the trial.

In the United Kingdom, Lord Auld made a similar recommendation.[15] Lord Auld considered there were advantages in having a document setting out the charges and the issues at the start of the trial, which was then regularly updated during the trial in the light of the evidence given. However, these proposals were not adopted in the United Kingdom.

There are a number of difficulties with providing an outline of charges to the jury. It is likely to be resource intensive. It may create difficulties when the evidence does not emerge as expected and matters in dispute evolve over the course of the trial. It may also make the matters more difficult for jurors to understand by encouraging them to focus on legal issues, rather than the factual matters that they are required to determine. The discussion of integrated directions below explains how focusing on factual issues reduces the complexity of the task required of jurors. An outline of charges may have the opposite effect.

Finally, recommendation 43 of the VLRC Report proposed that trial judges be encouraged (though not required) to use a document known as a 'jury guide' which would be given to the jury during the summing up. This document would contain a list of questions of fact designed to guide the jury towards their verdict, and would assist with the use of integrated directions, as discussed below. The trial judge would direct the jury about the law and evidence relevant to each question in the jury guide rather than providing blocks of questions, directions on the law and then the evidence. In recommendation 44, the VLRC recommended that the trial judge develop the jury guide in consultation with counsel.

The use of a jury guide is consistent with the trial judge's obligation to decide what the real issues in the trial are and to communicate these to the jury.[16] As discussed below, in line with the VLRC recommendation, it is proposed to specifically refer to jury guides in the recommended Bill.

6.4.3 Integrated directions

What are integrated directions?

Integrated directions provide an alternative to the traditional approach to summing up the law. These directions combine the 'summary of (or references to) the evidence with the relevant directions on the law and an outline of the questions that the jury must answer into a single logical unit'.[17] The VLRC supported the use of question trails in jury guides (explained below),[18] and the QLRC recommended adopting integrated directions.[19]

Integrated directions can make complex directions much more accessible and understandable to jurors. In New Zealand, trial judges use integrated directions extensively in jury trials, and feedback on this type of directions is very positive.

15 Auld, above n 5, [21] and [24].
16 As explained by the High Court in *Alford v Magee* [1952] HCA 3, [28].
17 Queensland Law Reform Commission, above n 6, [9.88].
18 Victorian Law Reform Commission, above n 2, [6.54] – [6.57], recommendation 43.
19 Queensland Law Reform Commission, above n 6, [9.130].

The traditional approach to giving jury directions imposes a difficult task on jurors. As explained above, the traditional approach provides the jury with blocks of instructions, each of which has a separate purpose. After listening to the directions the jury must:

- understand the explanations of the law, including the elements of the offence
- apply the elements to the facts, and
- assess whether they are satisfied that the facts or elements have been proved.

Rather than requiring the jury to work through these three steps themselves, a trial judge giving an integrated direction works through the first two steps and then provides the jury with a series of factual questions, to assist the jury in determining step three. These questions embed the legal issues into the factual issues that the jury must consider or be satisfied of in order to reach a verdict. They refine the legal questions given to the jury by reducing them to questions of fact that relate to each relevant stage: for example, 'Are you satisfied that Jack stabbed Jill with the knife?' and 'Are you satisfied that Jill died as a result of the stabbing?', rather than 'Did Jack kill Jill?'.[20]

This approach enables directions to be given to a jury in a way that simplifies the information that is communicated to jurors, while still fulfilling the trial judge's obligation to point the jury to the relevant facts and evidence.

The following sample question trails illustrate this approach.[21] They are based on question trails developed by Justice Chambers of the Supreme Court of New Zealand for teaching purposes. Question trails provide the core component of integrated directions. In this section, the examples involve question trails only. Later in this part are examples of an 'integrated direction', where the question trail is combined with references to the way in which the prosecution and the accused put their cases.

Question trail

Charge 1 – Aggravated robbery

Are you satisfied that Mr Doe was the driver of the car into which Mr Brown and Mr Menzies got after robbing the bank?

Are you satisfied that, prior to the robbery, Mr Doe knew that Mr Brown intended to rob the ANZ Bank and to threaten violence, if necessary, to ensure the success of the operation?

Are you satisfied that, prior to the robbery, Mr Doe had agreed to assist by driving the get-away car?

Charge 2 – Kidnapping

Are you satisfied that Mr Doe:

a) took Ms Evans to a place different from the place she had told him she wanted to go to, and/or

b) locked the doors of the car while driving, and/or

c) drove at speed and failed to stop at traffic lights so as to prevent Ms Evans leaving the car?

Are you satisfied that Ms Evans did not consent to being in the car as Mr Doe drove to Wimbledon Reserve?

Are you satisfied that Mr Doe knew Ms Evans was not consenting to remaining in the car as he drove to Wimbledon Reserve?

Are you satisfied that Mr Doe intended to keep Ms Evans in the car without her consent?

20 See ibid [9.89].

21 See Victorian Law Reform Commission, above n 2, Appendix E, 169-171.

In the example above, the jury guide would be structured in the following way:

Jury Guide

Charge 1 – Aggravated robbery

Note: On all issues, the burden of proof beyond reasonable doubt lies on the Crown

Not in dispute: Mr Brown committed an aggravated robbery of the ANZ Bank on 3 February 2008.

1.1 Are you satisfied that Mr Doe was the driver of the car into which Mr Brown and Mr Menzies got after robbing the bank?

If yes, go to question 1.2.
If no, find Mr Doe 'not guilty' on this charge and go to charge 2.

1.2 Are you satisfied that, prior to the robbery, Mr Doe knew that Mr Brown intended to rob the ANZ Bank and to threaten violence, if necessary, to ensure the success of the operation?

If yes, go to question 1.3.
If no, find Mr Doe 'not guilty' on this charge and go to charge 2.

1.3 Are you satisfied that, prior to the robbery, Mr Doe had agreed to assist by driving the get-away car?

If yes, find Mr Doe 'guilty' on this charge and go to charge 2.
If no, find Mr Doe 'not guilty' on this charge and go to charge 2.

Charge 2 – Kidnapping

Note: On all issues, the burden of proof beyond reasonable doubt lies on the Crown

2.1 Are you satisfied that Mr Doe:

a) took Ms Evans to a place different from the place she had told him she wanted to go to, and/or

b) locked the doors of the car while driving, and/or

c) drove at speed and failed to stop at traffic lights so as to prevent Ms Evans leaving the car?

If yes, go to question 2.2.
If no, find Mr Doe 'not guilty' on this charge and STOP.

2.2 Are you satisfied that Ms Evans did not consent to being in the car as Mr Doe drove to Wimbledon Reserve?

If yes, go to question 2.3.
If no, find Mr Doe 'not guilty' on this charge and STOP.

2.3 Are you satisfied that Mr Doe knew Ms Evans was not consenting to remaining in the car as he drove to Wimbledon Reserve?

If yes, go to question 2.4.
If no, find Mr Doe 'not guilty' on this charge and STOP.

2.4 Are you satisfied that Mr Doe intended to keep Ms Evans in the car without her consent?

If yes, find Mr Doe 'guilty' on this charge and STOP.
If no, find Mr Doe 'not guilty' on this charge and STOP.

What are the advantages of integrated directions?

This style of direction offers a number of advantages. The principal advantage is that integrated directions greatly assist jurors in determining the matters in issue in the trial.

As explained above, integrated directions simplify the task that the jury is required to perform. The jury is no longer required to understand and apply complex directions on the law to the facts, rather the intermediate step is performed for them by the trial judge. Jurors are generally better at assessing factual issues and this type of direction encourages them to focus on these issues. Integrated directions may make express reference to the law unnecessary because the law is reflected in the issues (or questions) identified by the trial judge for the jury to determine. This avoids the problematic 'mini-lecture' on the law.

The removal of the intermediate steps from the jury (which they have more difficulty with) and focusing their task on determining factual issues (which they are better at) increases the chance of fair verdicts being reached in accordance with the law.

The matters in issue will be much clearer for the jury, both because of the form of the directions and because the use of integrated directions will encourage counsel to focus on the relevant factual issues earlier. This would make it much easier for the jury to focus on the factual issues from the outset of the trial.

Integrated directions would generally be much shorter than the traditional approach to jury directions, avoiding lengthy explanations of law, evidence and addresses. Research shows that jurors struggle with lengthy directions. Shorter directions are easier for jurors to understand and apply.

Integrated directions also facilitate the provision of written documents that could assist the jury. For example, a question trail can easily be reproduced in written form as part of a jury guide. As explained above, juror comprehension is improved if written documents are available.

In addition to assisting jurors, integrated directions will have advantages for the system as a whole. In particular, integrated directions can reduce delay by minimising appeals and retrials based on criticism of the summing up and because integrated jury directions will be shorter than traditional directions.[22]

6.5 Recommended summing up provisions

We recommend that the Bill clarify what is, and is not, necessary in a summing up. The Bill should encourage new ways of better communicating what the jury needs to know to perform its function. This would also reduce the possibility of error in the summing up. These proposed reforms would also help jurors' understanding of the issues they must determine.

22 Moses, above n 4, 11.

Recommendation 4 – Trial judge's summing up

It is recommended that the Bill:

a) Provide that in summing up the trial judge:

   i must explain only so much of the law as is necessary to resolve the issues in the trial

   ii must refer the jury to the way in which the parties have put their cases in relation to the facts in issue

   iii need not summarise the closing addresses of the prosecution and the accused

   iv need not give a summary of evidence and need identify the evidence only in accordance with paragraph (b) below, and

   v may use a combination of oral and written components.

b) Provide that the trial judge is required to identify the evidence in a trial only if it is necessary to assist the jury in determining the issues in the trial. In determining whether, and if so, to what extent, identification of evidence is required, the trial judge should have regard to:

   i the facts in issue

   ii the complexity of the facts in issue

   iii the length of the trial

   iv the complexity of the evidence

   v the submissions and addresses of counsel

   vi any reference by the trial judge to the way in which the parties put their cases in relation to the facts in issue

   vii any special needs or disadvantages of the jury in understanding or recalling the evidence

   viii any transcript of the evidence or other document that has been provided to the jury to assist the jury to understand the evidence, and

   ix any other matters that the trial judge considers appropriate in the circumstances of the case.

c) Provide that the trial judge may give integrated directions which:

   i may contain, or be in the form of, factual questions that address matters that the jury must consider or be satisfied of in order to reach a verdict, including the elements of the offence and any relevant defences

   ii may combine factual questions with:

      – directions on the evidence and how it is to be assessed

      – a reference to how the prosecution and the accused put their cases

      – any evidence identified under paragraph (b), and

   iii if a trial judge addresses a matter in a factual question or an integrated direction, he or she need not address the matter in directions that are not factual questions or integrated directions.

Recommendation 4 – Trial judge's summing up

d) Amend the *Criminal Procedure Act* to allow the trial judge to provide the jury with a jury guide which may contain:

   i a list of questions to assist the jury to reach its verdict (including questions that are included in or constitute integrated directions)

   ii directions on the evidence and how the evidence is to be assessed

   iii a reference to how the prosecution and accused put their cases

   iv any evidence identified by the trial judge, and

   v any other information.

e) Amend the *Criminal Procedure Act* to allow the trial judge to provide the jury with a transcript of the evidence in the trial.

6.5.1 Paragraph (a) – Obligation to sum up

This recommendation sets out the matters that must be included in a summing up, as well as matters that are not required to be included. This should assist to streamline summings up in an appropriate way, while still giving trial judges discretion to tailor their summings up to the particular case.

Determining the content of the summing up is closely related to the jury direction request provisions (see Part 5). Under those provisions, the trial judge, through discussion with the parties, will determine what directions should be given in the summing up.

Paragraph (a)(i) – Direct the jury on the law

We recommend that the Bill reflect the common law requirement for the trial judge to direct the jury on the law as part of the summing up. This is a significant aspect of the summing up. However, we recommend highlighting that the trial judge is only required to direct the jury on so much of the law as is necessary. This is drawn from the statement of the obligations of the trial judge in *R v AJS* [2005] VSCA 288 at [55] set out above. This is similar to the principle that we recommend be expressed in relation to the role of the trial judge in the guiding principles.

Under the recommended jury direction request provisions, counsel for the accused would inform the trial judge of the matters in issue in the case. This would assist in narrowing issues regarding the elements and the defences. Parties would also indicate whether they want certain evidentiary directions. Because the trial judge's obligation would only extend to directions on the issues in the trial, these proposed provisions, together with the jury direction request provisions, would help to ensure that relevant directions are given.

The recommended provisions will permit jury directions to be given in the form of traditional or integrated directions.

Paragraph (a)(ii) – Refer to how the parties have put their cases

We recommend that the trial judge be required to 'refer' to how the parties have put their cases in relation to facts in issue. This departs from the common law requirement to summarise the respective cases of both the prosecution and the defence, and to remind the jury of the arguments of counsel.[23] It also departs from the VLRC recommendation that the trial judge provide the 'jury with a summary of the way in which the prosecutor and the accused have put their respective cases'.[24]

23 *R v Thompson* [2008] VSCA 144; *RPS v R* (2000) 199 CLR 620; *R v Mogg* (2000) 112 A Crim R 417.

24 Victoria Law Reform Commission, above n 2, recommendation 23(i).

The word 'refer' would clarify that a summary is not required. Referring to the way that the parties have put their cases in relation to the facts in issue is required because it is important in identifying the issues in dispute. However, a more detailed summary will often not be necessary. The jury will have heard the addresses from counsel and it is unlikely that they will need to be reminded of these in a detailed summary. This will save time in trials and in preparation for trial judges. A shorter and more focused summing up will greatly assist jurors.

While compatible with the traditional approach to summing up, this proposed change would be particularly effective when used in integrated jury directions, as proposed below. In setting out the factual questions that the jury must consider or be satisfied of to reach their verdict, the trial judge can set out how each party put their case in relation to each particular issue.

In many cases, referring to the way in which the prosecution and accused have put their case will necessarily identify the most important evidence in the case (particularly if the trial judge gives integrated directions). Therefore, the trial judge's reference to how the parties put their cases may subsume the need for separate identification of evidence. As explained below, the intended content of this reference is relevant to determining whether evidence is required to be identified.

Paragraph (a)(iii) – Summaries of closing addresses

We recommend that the Bill make it clear that the trial judge is not required to give a summary of the closing addresses. As explained above, such a summary should not be necessary. The requirement that the trial judge refer to how the parties put their cases in relation to facts in issue should make it clear that there is no longer any obligation on the trial judge to give such a summary of closing addresses. This should further assist in avoiding blocks of jury directions where one of those blocks is a summary of closing addresses (as discussed in Part 6.2). Further, not including a summary of closing addresses will shorten the summing up, which will assist juries.

However, summaries of the parties closing addresses should not be prohibited. This is not because such summaries are to be encouraged. Rather, it is because prohibiting a summary may be counterproductive, as it may generate new appeal paths, for example, whether a number of references to how the parties have put their cases constitutes a summary.

Paragraph (a)(iv) – Identification of evidence

We do not recommend that the trial judge be required to summarise evidence. However, the trial judge would be required to identify evidence where it is necessary to assist the jury in determining the issues in the trial. As discussed above, detailed and lengthy summaries of evidence are not necessarily useful or helpful to juries. However, a jury can, and should, be provided with more assistance to understand the issues in a case and to fulfil their key role of deciding questions of fact.

Clarifying the extent to which the law requires the trial judge to identify the evidence in a case, so as to limit unnecessary repetition of the evidence and to focus the trial judge's summing up on the issues that are in dispute, would assist trial judges and juries. This is discussed in greater detail below.

Paragraph (a)(v) – May use a combination of oral and written components

We recommend that the Bill allow the trial judge's summing up to be given in a combination of oral and written components. As discussed above, in *Thompson*, Redlich JA identifies the importance of justice being seen to be done as one of the reasons underpinning the need for all jury directions to be given orally. It is essential that any directions about the law and identification of the issues in the case be provided orally. The evidence and submissions themselves are also given orally in court (subject to any order made in the particular case).

However, it is also important to encourage written materials to be given to jurors where appropriate. As discussed above, written materials can significantly assist jurors. It is not necessary for all matters that are provided in writing to be repeated orally.

For example, if a trial judge gives a detailed written summary of evidence, it is not necessary for this to be repeated orally. Such a summary would not contain any information that has not already been provided openly in court. As is common practice, the trial judge would provide any document, including a written summary, to the parties for comment before giving it to the jury. If there is a concern to ensure that the public has access to any written documents, this could be addressed by other processes (e.g. a separate process could be established in order to enable a member of the public to obtain a copy of the summaries provided to the jury).

6.5.2 Paragraph (b) – The obligation to identify evidence

Identification only required if necessary

We recommend that the Bill clarify the extent to which a trial judge is required to refer to evidence by providing that the trial judge is required to identify only so much of the evidence as is necessary to assist the jury to determine the issues in the trial. This is designed to address uncertainty about the extent to which a trial judge is required to identify the evidence in a case.

At common law, the trial judge is not required to recite every piece of evidence, but only to summarise so much of the evidence as is relevant to the facts in issue.[25] The extent to which this involves summarising the evidence varies considerably from case to case. This reflects the wide varieties of cases and issues within those cases.

For instance, the need for a summary of evidence in a short trial where there is only one issue will vary considerably from a long trial with a number of charges. The Court of Appeal of Western Australia stated:

> Taking account of the circumstances of a trial, a judge may be entitled to form the opinion that a summary of evidence is unnecessary. As observed by the High Court in *Domican*, whether the judge is bound to refer to the evidence depends on whether the jury would have sufficient knowledge and understanding of the evidence without assistance. Trials will vary considerably in their length, content and complexity.[26]

However, this is not how summaries of the law currently operate in practice. As discussed above, the length and complexity of summings up in Victoria is a significant problem. Summaries of the evidence add to this length and complexity. It is therefore recommended that the Bill specifically address this by providing guidance on whether evidence must be identified and, if so, to what extent.

New South Wales has enacted legislation that provides that the trial judge is only required to summarise the evidence if it is necessary to do so.[27] This was introduced to address similar concerns to those that exist in Victoria, that is, to respond to trial judges who perceived that they:

> were obliged to read out to the jury the evidence which had been given chronologically, starting with the first witness and going through the evidence in chief, the cross-examination and then the re-examination of each witness before turning to the next witness and so on, and who also apparently believed that by doing so they had presented to the jury the issues of fact which they had to determine.

25 See, for example, *R v Thompson* [2008] VSCA 144.

26 *Western Australia v Pollock* [2009] WASCA 96, [131] (Martin CJ) citing the principle as referred to in *R v DH* [2000] NSWCCA 360, [82].

27 Section 161 of the *Criminal Procedure Act 1986* (NSW) which is virtually identical to its predecessor, section 405AA(1) of the *Crimes Act 1900* (NSW).

> Subsection (1) of s 405AA [of the *Crimes Act 1900* (NSW)] relieved trial judges of any such perceived obligation to summarise all of the evidence. In truth, there never was such an obligation. The obligation has always been, and remains, that to which I have already referred, to present to the jury the issues of fact which they have to determine, and to do so with such reference to the facts of the case as is necessary to assist them in that task.[28]

The VLRC proposed requiring trial judges, at a minimum, to *refer* to relevant evidence, rather than restating all or any of the relevant evidence, unless it is necessary to do so to ensure a fair trial. It is not clear whether the VLRC meant to use 'refer' in its more minimalist sense of simply pointing or directing the jury to the evidence. Some cases use the words 'refer' and 'summarise' interchangeably in the context of the overriding common law obligation to provide sufficient direction to the jury to ensure a fair trial. Further, even referring to the evidence as recommended by the VLRC (rather than restating it) could be time consuming and unhelpful for the jury, and be unnecessary. In contrast to the VLRC's approach, we propose using the word 'identify' to make it clear that the trial judge is only required to point to the evidence. The trial judge is not required to summarise or restate the evidence.

The VLRC recommendation also refers to a 'fair trial' but does not otherwise give any guidance to the trial judge in making this assessment. In contrast, the proposed provision would require an identification of evidence when necessary to assist the jury to determine the issues in the trial, and then lists factors to be considered when making this determination. (These factors are discussed further in the next section). This will give the trial judge more guidance on when it is appropriate to identify evidence. Following this process is more likely to result in a fair trial.

How to determine if identification of evidence is necessary?

In addition to providing that the trial judge is not required to give a summary, it is proposed to give trial judges greater guidance about how to decide whether it is necessary to identify evidence and, if so, to what extent.

We recommend that the Bill list matters that the trial judge must consider when determining whether it is necessary to identify evidence and, if so, to what extent. It is recommended that the listed matters include:

- the facts in issue
- the complexity of the facts in issue
- the length of the trial
- the complexity of the evidence
- the submissions and addresses of counsel
- any reference by the trial judge to the way in which the parties put their cases in relation to the facts in issue
- any special needs or disadvantages of the jury in understanding or recalling the evidence
- any transcript of the evidence or other document that has been provided to the jury and may assist the jury to understand the evidence, and
- any other matters as the trial judge considers appropriate in the circumstances of the case.

The proposed list is drawn from the matters relied on under the common law and in the VLRC's recommendations to determine whether a summary of evidence is necessary.

28 *R v Piazza* (1997) 142 FLR 64, 1 – 2 (Hunt CJ at CL with whom Smart J agreed).

Although 'identifying' evidence requires much less detail to be provided to the jury than a 'summary', these considerations are still relevant to determining whether, and to what extent, evidence is required to be identified. For example, in a very short trial where the issues are clearly defined, and there is no delay between the giving of evidence and the trial judge's summing up, there may be no need, or less need, to separately identify evidence than in a complex and lengthy trial. Likewise, in a longer trial where the jury is provided with a written transcript or other document (e.g. a jury guide) the extent to which there is a need to identify evidence may be significantly reduced.

6.5.3 Paragraph (c) – Integrated directions

We recommend that the Bill expressly endorse integrated directions. It is likely that integrated directions would be accepted by appellate courts in Victoria as they are not prohibited under the current law and there is case law that supports the view that integrated directions are permissible.[29]

Legislative support for integrated directions would remove any doubt concerning the appropriateness of integrated directions and give trial judges the necessary degree of confidence to give such directions in the absence of specific appellate authority.

The power to give integrated directions would be discretionary. This recognises that sometimes traditional directions may be desirable or preferred by the trial judge and acknowledges that it will take some time for trial judges to become used to, and develop the necessary skills to prepare, integrated directions.

The use of integrated directions will also require a cultural shift among legal practitioners. Until a library of integrated directions is established and trial judges and counsel become familiar with such directions, developing integrated directions may involve additional work for trial judges and practitioners.

In giving integrated directions, the trial judge would often set out the integrated directions and, in particular, the question trail in written form and provide it to the jury as part of the jury guide (discussed below). In addition to the question trail, the document could contain a written summary of matters referred to in paragraph (c).

Paragraph (c)(i) – Question trail

A key aspect of integrated directions is the recommendation that trial judges be expressly permitted to use factual questions to assist the jury in understanding the matters that it must determine or consider to reach a verdict, otherwise known as a question trail. This would expressly allow the trial judge to embed the law in these questions.

These questions will normally concern whether the prosecution has proved the necessary elements beyond reasonable doubt. The trial judge can also explain defences and exceptions to a jury in an integrated direction (e.g. in relation to a charge of sexual penetration of a child under 16, 'Are you satisfied that A believed on reasonable grounds that B was aged 16 or older?'). The recommendation would also allow questions that a jury is required to consider but is not required to be satisfied of beyond reasonable doubt.

29 Two recent Court of Appeal cases provided obiter support for integrated directions: *MG v R* (2010) 200 A Crim R 433; *Ogden v R* [2011] VSCA 181 cited in Justice Marcia Neave, 'Jury Directions in Criminal Trials – Legal Fiction or the Power of Magical Thinking?' (Supreme and Federal Court Judges' Conference, Melbourne, 23 January 2012) 18. See too, *Alford v Magee* [1952] HCA 3, [28]; *R v AJS* [2005] VSCA 288, [55] and [56]; *Stuart v R* (1974) 134 CLR 426, [2]-[5]; *Pollock v R* [2010] HCA 35, [67].

A question trail is not appropriate for all directions about the law. The so-called ineluctable directions or general directions about matters such as the standard and burden of proof or directions relating to evidence that requires special warnings about its use (e.g. unreliable evidence) will not be able to be reduced into question form. However, these general directions will complement the jury's understanding of the question trail. For example, the trial judge could explain the standard of proof and then use a question trail that requires a jury to be 'satisfied' in accordance with the explanation of certain matters. Warnings about evidence can be incorporated as part of the integrated direction, even though they cannot be reduced into question form. Justice Chambers of the Supreme Court of New Zealand has highlighted the need for the trial judge to provide a copy of the question trail to counsel and has indicated this often leads to refinement of the issues and the question trail itself.[30]

Paragraph (c)(ii) – Other matters in integrated directions

We recommend that the Bill provide that other matters may be included in integrated directions in addition to the question trail. These matters are:

- directions on the evidence and how it is to be assessed
- a reference to how counsel have put their cases, and
- any evidence identified in the identification of evidence.

This allows the integrated directions to paint a more complete picture than a question trail alone would be able to do. For example, in combination with a question trail, the trial judge could set out how the parties have put their cases. We have amended the question trails developed by Justice Chambers of the Supreme Court of New Zealand to be an integrated direction, by including reference to how the parties have put their case.[31]

The following fictional sample is based on the current rape offences in Victoria. As well as setting out how the parties put their cases, we have also included some evidentiary directions which could be incorporated as part of the integrated direction. We note that there are different views about how best to structure the directions and questions about some of these notoriously complex issues with the offence of rape. The purpose of this example is to demonstrate how integrated jury directions may work with complex laws.

Integrated directions

Charge 1 – Rape

Note: On all issues, the prosecution must satisfy you beyond reasonable doubt

1. Are you satisfied that the accused penetrated the vagina of the complainant with his penis?

   If yes, go to question 2.
   If no, find the accused 'not guilty'.

   It is not in dispute that he (the accused) did so.

30 Justice Robert Chambers, 'How to Draft a Charge' (Speech delivered at the Eighth Annual Australasian Jury Conference; New Directions in Jury Reform, Research and Policy, Melbourne, 19 November 2010)).

31 See Victorian Law Reform Commission, above n 2, appendix E, 169-171.

2. Are you satisfied that the accused intended to penetrate the vagina of the complainant with his penis?

   If yes, go to question 3.
   If no, find the accused 'not guilty'.

   It is not in dispute that he had that intention.

3. Are you satisfied that the complainant did not consent to that penetration?

   3.1 – Are you satisfied that she was asleep, unconscious or so drunk that she could not consent?

   If yes, go to question 4.1.
   If no, go to question 3.2.

   Prosecution case: She was asleep, or drunk, and was in no state to consent at the time of the penetration.

   Defence case: She was awake and was a willing participant in sexual acts leading up to and including the penetration.

   3.2 – Are you satisfied on any other evidence that she was not consenting?

   If yes, go to question 4.1
   If no, find the accused 'not guilty'.

   Prosecution case: She had said 'no' earlier and had moved away. At the time of the fingers penetrating her vagina, and at the time of penetration by the penis, she said and did nothing to indicate her consent.

   Defence case: At no time did she say 'no' or resist in any way. She was consenting by words and conduct.

4.1 Are you satisfied that the accused did not believe that the complainant was consenting?

   If yes, go to question 4.3.
   If no, go to question 4.2.

   Prosecution case: She was asleep or so drunk or said 'no', so he could not have believed that she was not consenting. His account is not to be accepted.

   Defence case: He took steps to find out if she was consenting, and she indicated by words and conduct that she was.

   Evidentiary directions: Was the accused's belief reasonable? If you are satisfied (at 3.1) that the complainant was asleep, or unconscious or so drunk that she could not consent, and the accused was aware of this, you may consider this in deciding whether the accused's belief was reasonable. Whether the accused's belief is reasonable is relevant to whether the accused actually held the belief, but there is no requirement for the belief itself to be reasonable. If you are not satisfied at 3.1 but are satisfied at 3.2, you may have regard to any steps taken by the accused to ascertain whether the complainant was consenting or might not be consenting, and the nature of any steps taken.

4.2 Was the nature and strength of the accused's belief in consent so strong that you are not satisfied that the accused was aware that the complainant was not or might not be consenting?

If yes, find the accused not guilty.
If no, go to question 4.3.

4.3 Are you satisfied that the accused was aware that the complainant did not consent to that act at the time he did it?

If yes, find the accused 'guilty'.
If no, go to question 4.4.

Prosecution case: She was asleep or so drunk or said 'no', so he must have been aware that she was not consenting. The accused initially lied to police about even knowing the complainant because he was aware that the complainant had not consented.

Defence case: He took steps to find out if she was consenting, and she indicated by words and conduct that she was. The accused initially lied because he was scared. He had not been involved with police before and was worried that even being falsely charged would generate publicity and ruin his career.

Evidentiary direction: If you conclude that the accused lied to police about knowing the complainant, and the only reasonable explanation for that is that the accused believed he had committed rape, you must still be satisfied on all the evidence that the accused is guilty. There are all sorts of reasons why a person might behave in a way that makes them look guilty (see defence case). The accused may have lied even though he is not guilty. Even if you think that lying makes the accused look guilty, that does not necessarily mean that he is guilty.[32]

4.4 Are you satisfied that the accused was aware that the complainant might not have been consenting to that act at the time he did it?

If yes, find the accused 'guilty'.
If no, go to question 4.5[33]

Prosecution case: She was asleep or so drunk or said 'no', so he must have been aware that she might not be consenting.

Defence case: He took steps to find out if she was consenting, and she indicated by words and conduct that she was.

4.5 Are you satisfied that the accused gave no thought to whether the complainant was not or might not be consenting at the time he did the act?[34]

If yes, find the accused 'guilty'.
If no, find the accused 'not guilty'.

Prosecution case: He felt a sense of entitlement and gave no thought to her consent.

Defence case: He took steps to find out if she was consenting, and she indicated by words and conduct that she was.

32 This is a brief direction on post-offence conduct in accordance with the recommendations in this report. Even a brief direction on this issue under the current law would be very long.

33 However, if you are considering 4.4 following consideration of question 4.2, find the accused 'not guilty'.

34 Under the jury direction request provisions, explained under Part 5, it is unlikely that the jury would be presented with this as an alternative basis for conviction; rather counsel and the trial judge would discuss what matters are in issue. However, we have included this question in the integrated direction as an example for completeness.

Paragraph (c)(iii) – Separate directions are not required

If a trial judge addresses a matter in a factual question or an integrated direction, he or she should not be required to also address the matter under the traditional approach, that is, where the directions on the law and facts are distinct. This will essentially provide a trial judge with three ways of delivering jury directions:

- the traditional approach of jury directions about the law
- factual questions or integrated jury directions (where the directions about the law are embedded within factual questions)
- a combination (e.g. some of the directions are factual questions or embedded in factual questions and some directions are not).

Whatever approach the trial judge uses, the trial judge would be obliged to direct the jury about the relevant law and the way in which the parties have put their cases. Giving the trial judge more options about how to give these directions will make it easier to direct the jury in a way that best suits the particular case.

6.5.4 Paragraph (d) – Jury guides

We recommend that the Bill expressly refer to jury guides. The use of a jury guide is consistent with a trial judge's obligation to sum up. Section 223(1)(l) of the *Criminal Procedure Act* provides that, for the purpose of helping the jury to understand the issues or the evidence, the trial judge may order, at any time during the trial, that copies of any document that the trial judge considers appropriate be given to the jury. This appears to be sufficiently broad to cover jury guides.

However, to avoid any doubt and to encourage the use of jury guides, we recommend legislating to expressly permit their use. To achieve this, we recommend that jury guides be added to the list of jury documents in section 223 of the *Criminal Procedure Act*.

The jury guide offers a means for trial judges to communicate with jurors in a clear and simple way. This is consistent with research that shows that jurors are better at understanding directions when they are provided with written material (see above).

As with integrated directions, trial judges will have discretion as to whether to use a jury guide. This is consistent with the VLRC recommendation.[35]

The VLRC also recommended (at [6.55]) that the trial judge should produce the first draft of a jury guide and that it should be refined during the course of the trial with the assistance of counsel before being given to the jury. While it is anticipated that this process would be common practice, it is not considered desirable or necessary to spell this out in the legislation. Further, it is a well-established practice that the trial judge will provide counsel with any document before providing it to the jury. Including a prescriptive process of this kind may create a risk of non-compliance for technical reasons.

Content of jury guide

We recommend that the Bill provide that a jury guide may include:

- lists of questions to assist the jury in reaching a verdict
- directions on the evidence and how the evidence is to be assessed
- a reference to how the prosecution and accused put their cases
- any evidence identified by the trial judge, and
- any other information.

35 Victorian Law Reform Commission, above n 2, [6.59].

The inclusion of the second, third and fourth elements is broader than the VLRC recommendation, which only specifically mentions questions. However, these are the core components of effective integrated jury directions. This will allow integrated directions to be supported by a jury guide.

If a jury guide is used in combination with integrated directions (which would be highly desirable), the questions in the jury guide would reflect those asked by the trial judge in directing the jury about the issues in the case. For example, the jury could be given a direction about the standard of proof when presented with the first question, which asks whether they are satisfied about something beyond reasonable doubt. The trial judge would then refer the jury to the evidence which is relevant to each question in the jury guide, and to the competing arguments of counsel. A jury guide could also contain directions about the use of evidence or the testimony of particular witnesses in the context of the trial judge's reference to the evidence concerning each question. For example, directions about treating identification evidence with care could be given in the context of a question which required the jury to determine the issue of whether they were satisfied beyond reasonable doubt that it was the accused and not someone else who performed the particular act.

6.5.5 Paragraph (e) – Transcripts

Although transcripts are already given in a considerable number of cases, we recommend that the Bill amend the *Criminal Procedure Act* to expressly mention that the trial judge may provide a transcript of evidence. This emphasises that a transcript may be a very valuable tool for a jury, particularly if the jury is assisted to navigate through the transcript (e.g. by way of a document or electronic search functions). As was evident in the research conducted by Young, Tinsley and Cameron in New Zealand, jurors greatly appreciate having access to a transcript of the evidence in the trial.

7 Proof beyond reasonable doubt directions

7.1 Overview

The accused is presumed innocent until proven guilty. The prosecution must prove beyond reasonable doubt that the accused is guilty of the offence charged. The concept of 'beyond reasonable doubt' is one of the most fundamental concepts in criminal law. However, under the current law, trial judges are very limited in what they can say about its meaning, even if the jury asks for assistance.

To assist jurors to understand what 'beyond reasonable doubt' means, and to assist trial judges in explaining that meaning where appropriate, we recommend that the Bill provide that:

- if the jury asks the trial judge a question on the meaning of 'beyond reasonable doubt', the trial judge may give an explanation of the phrase
- in giving such an explanation, the trial judge may:
  - refer to the presumption of innocence and the prosecution's obligation to prove that the accused is guilty
  - indicate that it is not enough for the prosecution to persuade the jury that the accused is probably guilty or very likely to be guilty
  - indicate that it is almost impossible to prove anything with absolute certainty when reconstructing past events and the prosecution does not have to do so
  - indicate that the jury cannot be satisfied that the accused is guilty if it has a reasonable doubt about whether the accused is guilty, and
  - indicate that a reasonable doubt is not an imaginary or fanciful doubt or an unrealistic possibility, and
- the trial judge may adapt his or her explanation in order to respond to the particular question asked by the jury.

These reforms would:

- remove some of the current restrictions on trial judges explaining the meaning of 'beyond reasonable doubt'
- allow the trial judge to assist the jury by explaining the meaning of 'beyond reasonable doubt' in response to a question from the jury, and
- provide guidance to the trial judge in giving the explanation.

7.2 The current law

7.2.1 What is 'beyond reasonable doubt'?

In a criminal trial, it is the prosecution's task to prove beyond reasonable doubt that the accused is guilty of the offence with which they have been charged.

'Beyond reasonable doubt' is an imprecise term. Although the expression is well known, it is difficult to define what it means. The New Zealand Court of Appeal has observed that '[t]here are major difficulties with coming up with a form of words which is both internally consistent and effective to communicate accurately the frustratingly indeterminate nature of the concept of proof beyond reasonable doubt'.[1]

The expression is intended to convey an accurate impression of the high standard of proof that the prosecution must satisfy. Denning LJ in *Miller v Minister of Pensions* [1947] 2 All ER 372, 373 gave the following explanation of the standard of proof in a criminal trial:

> That degree is well settled. It need not reach certainty, but must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against [an accused] as to leave only a remote possibility in [the accused's] favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will do.

The standard of proof in a criminal trial is the highest legal standard available and is often contrasted with the standard of proof in a civil trial, which is 'on the balance of probabilities'. While proof beyond reasonable doubt is a higher standard than proof on the balance of probabilities, it does not require absolute certainty on the part of the fact finder. However, it suggests that a juror must have as much certainty of a person's guilt as it is reasonable to have in relation to the reconstruction of past events.

7.2.2 Directing on 'beyond reasonable doubt'

In Australia, judges direct juries that the prosecution must establish beyond reasonable doubt that the accused is guilty, that the accused is entitled to the benefit of any reasonable doubt and that the accused does not have to prove his or her innocence.

The Charge Book contains a model direction that provides that the prosecution must prove the accused's guilt beyond reasonable doubt. It then goes on to say:

> You have probably heard these words before, and they mean exactly what they say – proof beyond reasonable doubt.
>
> This is the highest standard of proof that our law demands. It can be compared with the lower standard of proof that is required in a civil case, such as where one person sues another for breach of contract. In that situation, matters only need to be proved on what is called the 'balance of probabilities'. That is, they need to be shown to be more likely than not.
>
> By comparison, in a criminal trial the prosecution must prove the accused's guilt beyond reasonable doubt.[2]

1 *R v Wanhalla* [2007] 2 NZCA 573, 585–6 [39] (William Young P, Chambers, Roberston JJ).

2 Judicial College of Victoria, *Victorian Criminal Charge Book* (2012) 1.7.2 <http://www.judicialcollege.vic.edu.au/publications/victorian-criminal-charge-book> ('*Charge Book*').

As the law currently stands, the meaning and application of the term 'beyond reasonable doubt' are regarded as the province of the jury. It is, therefore, an error on the part of the judge to intrude upon that function by attempting to define the expression.[3] The extent of the limits on what a trial judge may say is clearly illustrated in the Charge Book, which says as follows:

> What is proscribed is not a particular meaning of the word "reasonable", but the attribution of meaning to the word by a judge. To attribute meaning to "reasonable" is no part of the judge's function.
>
> It is generally undesirable even to tell the jury that the phrase beyond reasonable doubt is a "well understood expression", and that whether a doubt is reasonable is for the jury to say by setting their own.
>
> It is also undesirable for judges to distinguish between doubt and its reasonableness. They should use the composite phrase "beyond reasonable doubt" or "a reasonable doubt".
>
> Judges should not qualify their direction with references to fanciful or unreasonable doubts, unless necessary.[4]

If a jury asks for a definition of 'reasonable doubt', the trial judge may respond by explaining that such a doubt is one which the jury regards as reasonable.[5]

However, a trial judge should not attempt to expand upon the meaning of the expression unless there is a particular reason to do so.[6] For example, a judge may elaborate on the meaning of the expression when the jury asks a question about its meaning or where there is something to suggest that a misunderstanding has occurred or could occur. Even then, any elaboration should generally go no further than telling the jury that 'reasonable doubt' is a doubt which they as ordinary people may be prepared to entertain.[7]

Australian courts have also taken the view that a judge should not substitute other expressions for the expression 'beyond reasonable doubt'. Dixon CJ in *Dawson v R* (1961) 106 CLR 1, 18 stated that:

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

The point made by Dixon CJ has been reiterated repeatedly by other judges of the High Court.[8]

7.3 Problems with the current law

Requiring proof beyond reasonable doubt is one of the most important concepts in a criminal trial. Together with the presumption of innocence, this standard of proof affords an accused the most basic and fundamental protection in a criminal trial.

Given the importance of the concept, it is critical that the jury understands what it means. In some cases, a jury may ask for assistance in understanding what 'reasonable doubt' means. In addition, as we discuss further below, jury research indicates that the meaning of the concept is not as well understood as courts previously believed.

3 *R v Cavkic* (No 2) [2009] VSCA 43, [62] (Vincent JA, Nettle JA and Vickery AJA).

4 *Charge Book*, above n 2, 1.7.1.

5 *R v Chatzidimitriou* (2000) 1 VR 493.

6 See *Thomas v R* (1960) 102 CLR 584, *Dawson v R* (1961) 106 CLR 1, *Green v R* (1971) 126 CLR 28, *La Fontaine v R* (1976) 135 CLR 625, *R v Cavkic* [2005] VSCA 182.

7 *R v Lancefield* [1999] VSCA 176; *R v Cavkic* (No 2) [2009] VSCA 43, [60]; *R v Hettiarachchi* [2009] VSCA 270.

8 See, for example, *Green v R* (1971) 126 CLR 28, 33 (Barwick CJ, and McTiernan and Owen JJ), *La Fontaine v R* (1976) 136 CLR 62, 84 (Stephen J), *Darkan v R* (2006) 227 CLR 373, 395 (Gleeson CJ and Gummow, Heydon and Crennan JJ) and *Jovanovic v R* [2008] HCA Trans 406 (5 December 2008) (Hayne J).

In this context, the current restrictions on the ability of trial judges to explain the expression are highly problematic. As discussed above, judges are limited to explaining that 'reasonable doubt' is a doubt which the jury regards as reasonable, or which ordinary people may be prepared to entertain. Circular definitions such as these are unlikely to provide much assistance to juries.

In his *Report: Inquiry into the Circumstances that Led to the Conviction of Mr Farah Abdulkadir Jama*, tabled on the 6 May 2010 in the Victorian Parliament, a former Supreme Court Justice, Frank Vincent, stated:

> In my experience, juries regularly encounter great difficulty with the standard of proof in a criminal trial not involving issues and probabilities assessments of this kind and often ask for assistance. The judge then informs them [that they] cannot be provided [with an explanation] other than that 'beyond reasonable doubt' is a common English language expression that means what it conveys. Although compelled by authority to answer in that fashion, I have, when doing so, always regarded the required response to a sensible question concerning the standard of proof as ridiculous. The jury had requested assistance because they were uncertain as to what substantively the standard was or how the concept of proof beyond reasonable doubt would apply in the case that they had to determine. They would then be effectively told, 'Work it out for yourselves because I am not allowed to help you'.[9]

Jury research conducted by the Law Commission of New Zealand in 1998 examined juror understanding of the expression 'beyond reasonable doubt'.[10] Jurors were not given an explanation of the expression by the judge and reported having difficulty understanding what it means. The research reported that many jurors said that they, and the jury as a whole, were uncertain what 'beyond reasonable doubt' means. They generally thought in terms of percentages, and debated and disagreed with each other about the percentage of certainty required for 'beyond reasonable doubt', variously interpreting it as 100 percent, 95 percent, 75 percent, and even 50 percent.

Jurors' understanding of the expression 'beyond reasonable doubt' was also considered in more recent research conducted by the University of Queensland.[11] The jurors' objective understanding was tested. The results revealed that, despite their self-reported understanding, many jurors did not in fact grasp the standard of proof correctly. The jurors were asked to explain in their own words what 'beyond reasonable doubt' means, and their responses were categorised as follows:

- Eleven jurors (33%) described the standard of proof in terms of a minor or reasonable doubt (i.e. there is some doubt that is reasonable, or no reasonable alternative explanation).
- Twelve jurors (36%) described 'beyond reasonable doubt' as requiring that there be absolutely no doubt at all.
- Three jurors (9%) described the standard of proof in terms of a reasonable person test. For example, that a reasonable person would have no doubt as to the steps taken to find the accused guilty or innocent.
- Three jurors gave descriptions that could not be classified and a further three failed to give a description at all.

The University of Queensland research also indicates that at least some of the jurors reported that the standard of proof had been a topic of much discussion and some disagreement during deliberations.

9 The Hon. FHR Vincent, *Report: Inquiry into the Circumstances that Led to the Conviction of Mr Farrar Abdulkadir Jama (*Victorian Government Printer, 2010) 40.

10 New Zealand Law Commission, *Juries in Criminal Trials: Part two: A Summary of the Research Findings,* Preliminary Paper 37 (1999) Vol 2 [7.6].

11 Blake McKimmie, Emma Antrobus and Ian Davis, 'Jurors' Trial Experiences: The Influence of Directions and Other Aspects of Trials' (School of Psychology, University of Queensland, 2009) in Queensland Law Reform Commission, *A Review of Jury Directions*, Report No 66 (2009) appendix E.

The New South Wales Bureau of Crime Statistics and Research also conducted research on juror understanding of 'beyond reasonable doubt'.[12] Jurors who participated in the survey were asked a multiple-choice question in the following terms:

> People tried in court are presumed to be innocent, unless and until they are proved guilty 'beyond reasonable doubt'. In your view, does the phrase 'beyond reasonable doubt' mean [*Pretty likely* the person is guilty / *Very likely* the person is guilty / *Almost sure* the person is guilty / *Sure* the person is guilty].

Although none of the answers were in fact a correct statement in law of the meaning of the expression, the responses of jurors gave some indication of their understanding of the expression.

A total of 1,178 jurors responded to the question. Of them 55.4% answered, 'Sure the person is guilty' and 22.9% answered 'Almost sure the person is guilty'. Of the remainder, 11.6% answered 'Very likely the person is guilty' and 10.1% answered 'Pretty likely the person is guilty'.

Although the research points to a lack of understanding about what 'beyond reasonable doubt' means, it is possible that jurors are able to reach a collective understanding of what the concept means. However, it should not be necessary for a jury to have to spend time debating and discussing the meaning of the concept during deliberations. Such debate also presents a real risk that the collective conclusion of the jury is not an appropriate one.

Accordingly, although 'beyond reasonable doubt' directions were not considered as part of the Jury Directions reference conducted by the VLRC, the Advisory Group identified this area as requiring legislative reform.

The recommended reforms would allow judges to explain or clarify the meaning of 'beyond reasonable doubt' in appropriate cases. In developing these reforms, the law in other jurisdictions was considered, as were the views of law reform bodies.

7.4 Other jurisdictions

The restricted ability of Victorian judges to explain the concept of 'beyond reasonable doubt' contrasts with some other jurisdictions. For example, in some states in the United States and in Canada, a failure to elaborate on and explain the expression 'beyond reasonable doubt' constitutes an error of law.

New Zealand judges use a formulation developed by the New Zealand Court of Appeal in *R v Wanhalla* [2007] 2 NZLR 573 (*Wanhalla*). The direction, which is set out below, seeks to explain with clarity the standard of proof that is required. The majority in *Wanhalla* approved of the below wording, but emphasised that it is not mandatory.[13]

12 Lily Trimboli, 'Juror Understanding of Judicial Instructions in Criminal Trials' *Contemporary Issues in Crime and Justice* No. 119 (2008) 4.
13 *R v Wanhalla* [2007] 2 NZLR 573, [52] (William Young P, Chambers, Roberston JJ).

Wanhalla direction

> The starting point is the presumption of innocence. You must treat the accused as innocent until the Crown has proved his or her guilt. The presumption of innocence means that the accused does not have to give or call any evidence and does not have to establish his or her innocence.
>
> The Crown must prove that the accused is guilty beyond reasonable doubt. Proof beyond reasonable doubt is a very high standard of proof which the Crown will have met only if, at the end of the case, you are sure that the accused is guilty.
>
> It is not enough for the Crown to persuade you that the accused is probably guilty or even that he or she is very likely guilty. On the other hand, it is virtually impossible to prove anything to an absolute certainty when dealing with the reconstruction of past events and the Crown does not have to do so.
>
> What then is reasonable doubt? A reasonable doubt is an honest and reasonable uncertainty left in your mind about the guilt of the accused after you have given careful and impartial consideration to all of the evidence.
>
> In summary, if, after careful and impartial consideration of the evidence, you are sure that the accused is guilty you must find him or her guilty. On the other hand, if you are not sure that the accused is guilty, you must find him or her not guilty.[14]

The Wanhalla direction was developed in part from a formulation developed by the Supreme Court of Canada in *R v Lifchus* [1997] 3 SCR 320 (the Lifchus direction). In Canada, the concept of reasonable doubt must be contextualised by reference to the presumption of innocence and should be defined as a doubt based on reason and common sense which must be logically based upon the evidence or lack of evidence. The Lifchus direction is set out below.

Lifchus direction

> The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the Crown has on the evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty. What does the expression 'beyond a reasonable doubt' mean? The term 'beyond a reasonable doubt' has been used for a very long time and is a part of our history and traditions of justice. It is so ingrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high.
>
> In short, if based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied beyond a reasonable doubt.

Both the QLRC and the NSWLRC have recently considered 'beyond reasonable doubt' directions. |The NSWLRC noted that this area could benefit from legislative clarification,[15] and the QLRC recommended amending Queensland's model direction in line with the Wanhalla approach.[16] (The QLRC's recommendations are discussed in further detail below.)

14 Ibid [49].

15 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008) [1.57]

16 Queensland Law Reform Commission, above n 11 [17.40] – [17.49].

We considered whether to provide a definition of beyond reasonable doubt. The Wanhalla direction provides that guilt will be proved beyond reasonable doubt when 'you are sure' that the accused is guilty. This is based on the approach in the United Kingdom, where 'beyond reasonable doubt' is seen as the same as the term 'sure'.[17] This then involves some elaboration on the fact that when people say that they are 'sure' about something, they can apply different standards (e.g. 'I'm sure I left my keys on the table' as opposed to 'I'm sure we should get married'). However, these kinds of domestic analogies no longer seem as valuable as they may have once been. Further, while some decisions may be very important (e.g. getting married, deciding to live in another country) there may also be an element of uncertainty in such decisions and they involve looking forward rather than making assessments about past events.[18]

Our concern is that these approaches simply substitute one definition for another and do not provide any greater assistance in understanding the meaning of proof beyond reasonable doubt. Indeed, it is arguable that the analogy about marriage or moving overseas is inappropriate as it does not properly capture the relationship between the standard of proof and the context of a criminal trial.

7.5 Recommended 'beyond reasonable doubt' provisions

Given the significance of the expression in the criminal justice system and the above research conclusions, we recommend that the Bill allow trial judges, at their discretion, to answer questions from juries about the meaning of 'beyond reasonable doubt'.

The proposed amendments incorporate aspects of both the Wanhalla and Lifchus directions, and are set out below.

Recommendation 5 – Proof beyond reasonable doubt

It is recommended that the Bill provide that:

a) If the jury asks a question, whether directly or indirectly, about the meaning of proof beyond reasonable doubt, the trial judge may give an explanation of the phrase.

b) In giving such an explanation, the trial judge may:

   i refer to the presumption of innocence and the prosecution's obligation to prove that the accused is guilty

   ii indicate that it is not enough for the prosecution to persuade the jury that the accused is probably guilty or very likely to be guilty

   iii indicate that it is almost impossible to prove anything with absolute certainty when reconstructing past events and the prosecution does not have to do so

   iv indicate that the jury cannot be satisfied that the accused is guilty if it has a reasonable doubt about whether the accused is guilty, and

   v indicate that a reasonable doubt is not an imaginary or fanciful doubt or an unrealistic possibility.

c) The trial judge may adapt his or her explanation in order to respond to the particular question asked by the jury.

17 See, e.g. *R v Hepworth and Fearnley* [1955] 2 QB 600; *R v Onufrejczyk* [1955] 1 QB 388.

18 See *R v Wanhalla* [2007] 2 NZLR 573 for discussion of 'domestic analogies' in the context of beyond reasonable doubt.

7.5.1 Paragraph (a) – Trial judge may explain 'proof beyond reasonable doubt' if asked

We recommend that the Bill allow trial judges to explain the meaning of 'beyond reasonable doubt' if the jury asks a question about it.

As indicated earlier, evidence from New Zealand, Queensland and New South Wales indicates that a significant number of jurors either have difficulty with the expression or, when tested on its meaning, reveal that they apply either too low or too high a test.

Given the fundamental importance of the concept in determining whether a person is guilty, it is essential that a jury be appropriately guided in coming to understand this test if the jury is experiencing difficulty with it. It will be clear that the jury is having difficulty with the concept of proof beyond reasonable doubt if they ask a question about it. In such circumstances, a trial judge should be able to respond in a more helpful manner than is currently permitted by the law.

The proposed provision is expressed broadly, to ensure that it captures both direct and indirect questions from the jury. There is no set formula for juries to use in formulating questions, so it would be necessary for the provision to cover all types of questions.

Basing the proposal on a question from the jury and allowing the trial judge to answer a question (rather than making an explanation mandatory in each case) would be consistent with the views of the QLRC that no attempt should be made to explain the term unless the jury itself raises the issue.[19] If the trial judge decides to answer the question, he or she would be guided by the matters set out in Paragraph (b).

There are also cases where the issue does not arise and a mandatory explanation may create an issue. This proposed provision therefore focuses on those cases in which the jury requests clarification from the trial judge.

In addition, explanations of the concept are less likely to be required if judges give integrated directions. We discuss integrated directions in Part 6 of the report. In an integrated direction, the trial judge may present the jury with questions of fact in which the legal issues are embedded. These tend to make it easier for the jury to apply the 'beyond reasonable doubt' standard. As Justice Chambers of the Supreme Court of New Zealand has observed:

> Considering guilt in the round and applying a standard of "beyond reasonable doubt" is not easy. But being sure as to whether Mr Smith punched Mr Brown is much easier for juries to comprehend. They look at the evidence as to whether Mr Smith punched or not and they conclude, on the basis of that evidence, whether they are sure he punched or are not sure. Determining whether a punch occurred is, for lay people, a much easier task than determining guilt in the round.[20]

In New Zealand, the word 'sure' is a definition for 'beyond reasonable doubt', and is used as shorthand in a question trail for the more detailed explanation of beyond reasonable doubt (which still remains the ultimate standard of proof). In Victoria, the word 'satisfied' could be substituted for 'sure'.

In light of the above, and in anticipation of a progressively increasing use of integrated jury directions, we do not recommend that the Bill require the trial judge to give an explanation in every case.

19 Queensland Law Reform Commission, above n 11, [17.44]. See also ibid [118] (Glazebrook J).

20 Memorandum from Justice Robert Chambers to Greg Byrne 'Your Paper on "Proof Beyond Reasonable Doubt"' (12 April 2011) [7].

Not limiting other explanations

We recommend that the proposed provisions operate to expand the situations in which a trial judge may explain or make comment about proof beyond reasonable doubt to a jury. As discussed above (at 7.2.2), unusual circumstances may arise and a trial judge currently has a very limited capacity to respond in such circumstances. The changes we recommend should not restrict these existing powers. Rather, they should provide additional powers or circumstances in which the trial judge may assist the jury about the meaning of beyond reasonable doubt.

7.5.2 Paragraph (b) – What the trial judge may say

To enhance transparency, provide further support for this new direction, and to limit the risk of successful appeals, we recommend that the Bill provide guidance for trial judges on how they may answer questions about beyond reasonable doubt.

In other jurisdictions that permit trial judges to answer jury questions on this issue, common practices have developed. In most cases, there is only so much that can be said that will assist a jury before a trial judge will necessarily reach the point that the further explanation becomes less helpful than no explanation or may actually be misleading. This is reflected in the list of matters in proposed Paragraph (b).

If these recommendations are adopted, it is anticipated that the JCV would develop a model direction on how to answer a jury question on this issue.

Paragraph (b)(i) – The presumption of innocence and the Crown's obligation to prove guilt

The majority in *Lifchus* considered that the trial judge must explain to the jury that the standard of proof beyond reasonable doubt is inextricably linked with the presumption of innocence and the obligation of the Crown to prove the accused is guilty.[21]

There is no obligation in Victoria on judges to tell the jury about the 'presumption of innocence', or use that term in directing the jury, as long as they give a strong and clear direction about the onus and standard of proof.[22] However, best practice normally involves telling the jury about the presumption, as it will assist them to better appreciate the onus, which lies upon the prosecution.[23]

If a direction as to the standard of proof is given, a direction about the presumption of innocence is fundamental to understanding this context and therefore should also be given.

Paragraph (b)(ii) – It is not enough for the prosecution to persuade the jury that the accused is probably guilty or even that he or she is very likely guilty

The QLRC recommended that the model direction on the standard of proof be augmented by the addition of the following paragraph:

> Being satisfied beyond reasonable doubt does not require you to have no doubt whatsover that [the accused] is guilty of [the offence charged]. But it does mean that you must be convinced of [the accused's] guilt on a much stronger basis than thinking that it is more likely than not that [he or she] is guilty.[24]

21 *R v Lifchus* [1997] 3 SCR 320 [27].

22 *Charge Book*, above n 2, 1.7.1. [43].

23 *R v ALP* [2002] VSCA 210; *R v Henderson* [1999] VSCA 125; *R v Palmer* (1992) 64 A Crim R 1; *R v Reeves* (1992) 29 NSWLR 109 as cited in ibid.

24 Queensland Law Reform Commission, above n 11, [17.47].

This recommendation is based on research in Queensland and New South Wales that some jurors are mistaken when it comes to the level of certainty required, and apply too high or too low a test (i.e. interpreting the test to require that they be absolutely certain of an accused's guilt or that the prosecution need only prove that it is more likely than not that the accused is guilty).[25]

The issue is where to pitch the test. The majority in *Wanhalla* considered that jurors should be told that more than proof on the balance of probabilities is required, but that absolute certainty is not required.[26]

As the *Wanhalla* explanation leaves a large gap in the probability continuum, by indicating that it means more than 'very likely' to be guilty, this provision would assist jurors by providing more guidance on the meaning of the concept.

Paragraph (b)(iii) – Absolute certainty is not required

This follows on from paragraph (b)(ii). It is a clear and simple statement that would assist jurors to understand the concept of 'beyond reasonable doubt'. This is also connected to the next paragraphs as it indicates that in being satisfied beyond reasonable doubt, it is not necessary to reject a theoretical possibility that may exist.

Paragraph (b)(iv) – A reasonable doubt means the jury is not satisfied that the accused is guilty

The phrase 'beyond reasonable doubt' will very often raise in jurors' minds the questions of what a reasonable doubt itself is, and what should happen if they have such a doubt. Such questions should be met directly (though not comprehensively) in the judge's directions to the jury, if the jury asks a question about the concept.

This paragraph therefore provides further elaboration of the connection between proof 'beyond reasonable doubt' and being satisfied of the accused's guilt by explaining to jurors that if they do have a reasonable doubt then they cannot be satisfied the accused is guilty. This states in direct terms what follows from having a reasonable doubt, and would show the (negative) relationship between having 'a reasonable doubt' and being satisfied as to guilt.

Paragraph (b)(v) – A reasonable doubt is not an imaginary or fanciful doubt or an unrealistic possibility

This follows on from paragraph (b)(iv) and would provide further explanation of the concept by stating what a reasonable doubt is *not*.

In contrast, the Wanhalla direction provides positively that a reasonable doubt is an honest and reasonable uncertainty left in your mind about the guilt of the accused after you have given careful and impartial consideration to all of the evidence. We do not recommend that this formulation be adopted in the Bill. The expression 'reasonable uncertainty' is unlikely to provide much assistance to jurors and may be confusing.

Instead, it may be of more assistance if the trial judge provides some explanation to jurors about what is *not* a reasonable doubt. The expression 'a reasonable doubt is not an imaginary or frivolous doubt' is used in the Lifchus direction. The proposed wording of the expression has been amended to better reflect modern Australian language. For example, the reference to 'frivolous doubt' has been removed on the basis that it is not a commonly used phrase.

25 Ibid [17.46].

26 *R v Wanhalla* [2007] 2 NZLR 573, 587 [48] (William Young P, Chambers, Robertson JJ).

7.5.3 Paragraph (c) – Trial judge may adapt his or her explanation

It is likely that most questions about the phrase would be general in nature (i.e. what does it mean?), in which case the trial judge may base his or her answer on the matters listed in paragraph (b). However, we do not recommend that this be the only way in which a trial judge may answer a beyond reasonable doubt question.

Accordingly, the recommended provision is sufficiently broad to also allow judges scope to answer specific questions about the phrase. For example, if the jury asks a trial judge whether 'beyond reasonable doubt means a 70 per cent certainty', the judge would be able to answer 'no' (and could then elaborate on what the phrase does mean).

Wording of directions

The above matters would assist and guide judges in formulating answers to questions about the meaning of 'beyond reasonable doubt'. However, we recommend that the Bill clearly state that no particular form of words is required in such answers. This is consistent with the general approach to the jury directions reforms, as it leaves scope for the JCV to develop a model direction which trial judges will be able to regularly use. Further, not being prescriptive about the words used will allow trial judges to tailor their answers to the particular question, and will mean that a trial judge does not commit an error if the words used in the legislation are not exactly followed.

7.6 Interaction with defences and related directions

In developing these recommended reforms, we have considered what, if any, impact they would have when dealing with defences and related directions.

In cases where the evidential burden is on the accused, once the evidential burden has been satisfied (by adducing or pointing to evidence sufficient to raise the defence) the prosecution bears the onus of disproving the defence beyond reasonable doubt. The terms of the recommended reforms can operate alongside these requirements.

Similarly, the terms of the recommended reforms are capable of operating in cases in which the accused bears the onus of proving a defence on the balance of probabilities.

The model direction in the Charge Book for when the onus of proof is reversed provides that in any case where the onus of proof is placed on the accused, the trial judge should direct the jury that:

- it is for the jury to decide if the accused has proved the matter
- the onus may be discharged by evidence which satisfies the jury, on the balance of probabilities, of that which the accused must prove, and
- the standard of proof required is less than that required of the prosecution to prove the accused's guilt (i.e. proof beyond a reasonable doubt).[27]

As noted in the Charge Book, the charge must enable the jury to clearly appreciate the difference between proof beyond reasonable doubt and proof on the balance of probabilities.[28]

27 *Charge Book*, above n 2, 1.7.1. [53].
28 *Mizzi v R* (1960) 105 CLR 659.

In cases where there is a conflict between the evidence of prosecution witnesses and the evidence of witnesses for the accused, the trial judge may ask the jury to consider whom to believe. If this occurs, the trial judge must give what is known as a 'Liberato direction'.[29] This involves the judge giving clear directions 'about the onus and standard of proof, so that there is no risk that the jury will treat the making of a 'choice' between the witnesses as the real question, or as concluding the issue whether the prosecution has proved beyond reasonable doubt the issues which it bears the onus of proving'.[30]

The Liberato direction requires the judge to tell the jury that:

- even if they prefer the evidence of the prosecution witnesses, that does not mean that the prosecution has proved its case beyond reasonable doubt
- even if they do not positively believe the evidence for the accused, they cannot find against him or her on an issue if the evidence on which he or she relies gives rise to a reasonable doubt about that issue, and
- they must not convict the accused unless they are satisfied that the prosecution has proven the elements beyond reasonable doubt. If they are unsure where the truth lies, they must acquit.

Importantly, the requirements of a Liberato direction are compatible with the recommended reforms.

29 *Liberato v R* (1985) 159 CLR 507; see *Charge Book*, above n 2, 1.7.1. [72] – [79].

30 *R v KDY* [2008] VSCA 104; *R v SAB* [2008] VSCA 150.

8 Post-offence conduct

8.1 Overview

Post-offence conduct evidence, or consciousness of guilt evidence, is a term that refers to conduct by an accused after an alleged offence, such as lying or fleeing the scene of the crime, that may be used by the jury to infer that the accused committed the crime in question.

To prevent jurors from jumping to the conclusion that the accused is guilty because he or she engaged in such conduct, trial judges are required to direct the jury on how to use this type of circumstantial evidence when it is raised and to give certain cautionary directions.

The VLRC identified a number of issues with jury directions on post-offence conduct.[1] These related to:

- *Uncertainty over when a direction is required*: It can be difficult for the trial judge to determine when a warning is required. Trial judges are required to give a direction where the post-offence conduct evidence can be used as an implied admission of guilt by the accused, or where there is a danger the jury might impermissibly use the evidence as an implied admission of guilt. These circumstances are not always clear.
- *Characterisation of the evidence*: Trial judges must give different directions depending on how the evidence is characterised (e.g. different directions are required based on whether lies told by the accused amount to an implied admission of guilt or simply go to the accused's credit). Reasonable minds can disagree on the proper characterisation of this type of evidence.
- *The content of directions*: The directions are technically difficult to comply with and are also lengthy and complex. Further, trial judges are required to identify every item of evidence that is capable of being used as an implied admission of guilt. This is a difficult task for the trial judge and doing so does not necessarily assist the jury.
- *Potential unfairness to the accused and the prosecution*: The current directions may give the post-offence conduct evidence an undue prominence that may in fact be detrimental to the accused when the directions are in part designed to protect the accused from certain prejudices and inappropriate lines of reasoning. On the other hand, the prosecution may avoid calling this kind of evidence to avoid the risk of a retrial.

The proposed reforms emanate in part from recommendations made by the VLRC and build on these proposals. Parts of the proposed reforms are based on the approach taken in New Zealand, where appeals on this ground are rare. However, additional components have been added to the proposal so that it works effectively in conjunction with the jury direction request provisions.

1 Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009) [3.65] – [3.83] and [5.36] – [5.51].

The proposed reforms would abolish complex common law requirements and provide that:

- The prosecution must give notice to the trial judge and the accused before the trial if it intends to use post-offence conduct evidence as an implied admission of guilt by the accused.
- If the trial judge permits the prosecution to use the evidence in this way, the judge must direct the jury about how to use the evidence in determining the accused's guilt.
- If the trial judge gives this mandatory direction, the accused may also request an additional direction which provides cautionary information about this type of evidence.
- In circumstances where the prosecution does not rely on the post-offence conduct evidence, but the accused is concerned about the potential misuse of such evidence by the jury, the accused may request a cautionary direction.
- The trial judge is not required to give a direction requested if there are good reasons for not doing so.

In summary, the proposed reforms aim to:

- identify post-offence conduct evidence that the prosecution intends to rely on at an early stage of proceedings
- clarify when the trial judge is required to give a direction and what the content of that direction should be
- avoid different directions based on the characterisation of the post-offence conduct evidence
- simplify the directions given to the jury on post-offence conduct evidence so that these are easier to understand and apply
- give the accused greater control over when a direction (to protect the accused's interests) is given on post-offence conduct evidence, and
- reduce the possibility of error in post-offence conduct directions.

8.2 The current law

In the VLRC Report, the VLRC described consciousness of guilt evidence as follows (at [3.67] – [3.69]):

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

Trial judges are generally required to direct the jury on the use of post-offence conduct evidence when the evidence is capable of being used as an implied admission of guilt by the accused, or where there is a danger that the jury might impermissibly use the evidence as an implied admission of guilt. The directions are designed to prevent jurors from jumping to the conclusion that because a person engaged in such conduct, he or she must be guilty of the offence charged.

The primary direction a trial judge is required to give is known as the Edwards direction, after the High Court decision in *Edwards v R* (1993) 178 CLR 193 (*Edwards*). The direction is generally given when the prosecution relies on the evidence as an implied admission of guilt by the accused and the trial judge determines that the evidence is capable of demonstrating an implied admission of guilt. However, even where the prosecution does not rely on the evidence as an implied admission of guilt, some cases have held that the trial judge should give the Edwards direction where there is a danger that the jury might have fairly understood that the post-offence conduct was being relied upon as an implied admission of guilt (e.g. *R v MC; DPP v MC* [2009] VSCA 122).

In *Edwards*, the High Court majority held that while a lie will generally affect the credit of the accused, lies can, in limited circumstances, amount to an implied admission of guilt. The majority provided guidance (at 210-211) about what the jury should be told about a lie by the accused which may amount to an implied admission of guilt:

> [I]n any case where a lie is relied upon to prove guilt, the lie should be precisely identified, as should the circumstances and events that are said to indicate that it constitutes an admission against interest. And the jury should be instructed that they may take the lie into account only if they are satisfied, having regard to those circumstances and events, that it reveals a knowledge of the offence or some aspect of it and that it was told because the accused knew that the truth of the matter about which he lied would implicate him in the offence, or, as was said in *Reg v Lucas (Ruth)*, because of "a realization of guilt and a fear of the truth".
>
> Moreover, the jury should be instructed that there may be reasons for the telling of a lie apart from the realization of guilt. A lie may be told out of panic, to escape an unjust accusation, to protect some other person or to avoid a consequence extraneous to the offence. The jury should be told that, if they accept that a reason of that kind is the explanation for the lie, they cannot regard it as an admission. It should be recognized that there is a risk that, if the jury are invited to consider a lie told by an accused, they will reason that he lied simply because he is guilty unless they are appropriately instructed with respect to these matters.

This guidance now forms the basis of the Edwards direction. The same principles generally apply to the treatment of other forms of post-offence conduct evidence other than lies (*R v Renzella* [1997] 2 VR 88).

The VLRC Consultation Paper summarised the information an Edwards direction must contain (at [4.40]):

- the judge must identify precisely the post-offence conduct that may be evidence of consciousness of guilt
- the judge must clearly identify the circumstances and events that indicate that the conduct can amount to evidence of consciousness of guilt
- the judge must clearly identify the precise inference to be drawn from the conduct and the inferential process that the jury may choose to follow
- the judge must relate the conduct to the charges and, if the evidence is relevant to a specific issue only, instruct the jury that the evidence may only be used in that way
- in the case of lies, the judge must identify lies that only affect the accused's credibility and explain why they cannot be used as consciousness of guilt evidence
- the jury should be reminded to consider each lie separately, and by reference to each of the counts on the presentment
- the judge must summarise the test to be met before the jury can use the evidence to show a consciousness of guilt

- the judge must warn the jury that just because a person engaged in the conduct alleged, they must not reason that this means he or she is guilty of the crime charged
- the judge must explain to the jury that people may lie and yet not be guilty of an offence
- the judge must give possible innocent explanations for the conduct, 'inventing' them if necessary, and
- the judge may direct the jury that an inference of guilt must be proved beyond reasonable doubt.

When the post-offence conduct does not amount to an implied admission of guilt, but may be used to assess the credibility of the accused, trial judges are required to give a Zoneff warning if there is a danger the jury might impermissibly use the evidence as an implied admission of guilt. The direction is based on the High Court case *Zoneff v R* (2000) 200 CLR 234 (*Zoneff*) at 245 in which the majority of the High Court suggested the following direction:

> You have heard a lot of questions, which attribute lies to the accused. You will make up your own mind about whether he was telling lies and if he was, whether he was doing so deliberately. It is for you to decide what significance those suggested lies have in relation to the issues in the case but I give you this warning: do not follow a process of reasoning to the effect that just because a person is shown to have told a lie about something, that is evidence of guilt.

8.3 Problems with the current law

The VLRC reported that since the mid-1990s, the Court of Appeal has heard at least 84 appeals which raised post-offence conduct directions as an issue. The appellant succeeded in 28 of those cases.[2] These figures do not include more recent cases involving the convictions of Dupas and Farquharson for murder.

The problems caused by the current law are centred on:

- the uncertainty over when the direction is required
- difficulties in characterisation of the evidence
- the content of the directions, and
- the potential unfairness to the parties.

8.3.1 Uncertainty over when the direction is required

As discussed above, trial judges are required to direct the jury on the use of this type of circumstantial evidence when it is led by the prosecution as an implied admission of guilt and when the trial judge finds that there is a real danger that the jury may use the evidence in this way even where the prosecution does not rely on it. The VLRC found in its Consultation Paper (at [4.32]) that trial judges were likely to err on the side of caution and give the warning whenever evidence of this nature is presented.

8.3.2 Difficulties in characterisation of the evidence

It can be difficult for the court to correctly characterise post-offence conduct evidence (e.g. whether the conduct can constitute an implied admission of guilt and therefore falls into a category that requires an Edwards direction). As is apparent in some appellate decisions, reasonable minds can disagree on the proper characterisation of post-offence conduct evidence.

2 Ibid, chapter 3, footnote 116.

The complexities of this kind of evidence and when directions are required were highlighted in *R v Dupas (No 3)* [2009] VSCA 202 where Nettle JA and Weinberg JA expressed different views concerning the characterisation of evidence that Dupas had changed his appearance following the commission of the offence. Nettle JA found that the prosecution relied on this evidence as an implied admission of guilt, namely, that Dupas changed his appearance in order to avoid detection. Weinberg JA found that the evidence was circumstantial evidence of an ordinary kind and sought to confine the application of *Edwards* and *Zoneff*. Weinberg JA said (at [379]):

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

The problem in characterising evidence is compounded when multiple lies are involved. *Edwards*, in conjunction with *Zoneff*, requires the trial judge to distinguish between whether the conduct can constitute an implied admission of guilt or whether it goes to the accused's credit. A trial judge can fall into error if he or she incorrectly characterises a lie as going only to credit (and gives a Zoneff direction) when the lie is capable of being used as an implied admission of guilt (and therefore an Edwards direction is required).

As highlighted above, the Edwards direction is lengthy and complex. As the High Court stated in *Zoneff*, 'rigid prescriptive rules as to when and in what precise terms an Edwards-type direction should be given cannot be comprehensively stated'.[3] Trial judges must identify every item of evidence which is capable of being used as post-offence conduct evidence. When it is difficult to be certain whether evidence is post-offence conduct, the task of identifying all the relevant evidence is very difficult.

Such directions, given their detail and complexity, are prone to error. Even if directions are given correctly, research indicates that such long and complex directions do not assist juries in reaching a verdict and may be counterproductive with regard to ensuring the accused has a fair trial.

8.3.3 Potential unfairness to the parties

The current law can result in unfairness to both the accused and the prosecution.

The underlying premise on which the law has developed is questionable. Devlin LJ said in *R v Broadhurst* [1964] AC 441 at 457:

> It is very important that a jury should be carefully directed upon the effect of a conclusion, if they reach it, that the accused is lying. There is a natural tendency for a jury to think that if an accused is lying, it must be because he is guilty, and accordingly to convict him without more ado. It is the duty of the judge to make it clear to them that this is not so.

Research in New Zealand suggests, however, that warnings on lies and especially long or complex warnings make 'little or no difference' to jurors' evaluation of the evidence.[4] Prior to the introduction of the *Evidence Act 2006* (NZ), the approach taken by the New Zealand Courts was to avoid, if possible, the 'standard lies direction'. In *R v Robertson* [2008] NZCA 282 at [10], the trial judge had given what the court described as a 'tri-partite direction' on lies.

3 *Zoneff v R* (2000) 200 CLR 234, 244 (Gleeson CJ, Gaudron, Gummow and Callinan JJ).

4 New Zealand Law Commission, *Juries in Criminal Trials Part Two: A Summary of the Research Findings,* Preliminary Paper 37 (1999) Vol 2 [7.34].

This case pre-dated the application of the *Evidence Act*. In commenting on the trial judge's direction, the New Zealand Court of Appeal stated:

> Why do we say this was more favourable to Mr Robertson than the standard lies direction? First, it did not spell out again the alleged lies. The fact that the standard lies direction requires the judge to identify, and thus reiterate, the alleged lies is always a potential downside from the defence perspective: it gives the lies a certain prominence which they might not otherwise have. It is because of this that most judges, in fairness to the accused, do not give the standard lies direction unless requested by the defence.

On the other hand, there have also been cases where compliance with the law has led to unnecessary limitations on the prosecution case. In *R v Chang* [2003] VSCA 149, the trial judge ruled a significant number of alleged lies in the record of interview and post-offence conduct to be inadmissible. The Court of Appeal (at [43]) said that the trial judge's ruling 'confined the prosecution case on this issue quite unduly'.

Further, to avoid the risks of a retrial, sometimes the prosecution does not call this kind of evidence. In *R v Camilleri* [2001] VSCA 14, for example, the Court of Appeal observed that:

> After the decision in *Edwards* and the numerous attacks on verdicts in this State on the ground that the trial had miscarried because of what had been said or not said to the jury about consciousness of guilt, there arose a marked reluctance on the part of Crown prosecutors to rely, and trial judges to permit reliance, on consciousness of guilt. Attempts have been made in this Court in recent times to correct what appeared to it to be an undue reluctance.

8.4 Recommended post-offence conduct provisions

Recommendation 6 – Post-offence conduct

It is recommended that the Bill provide that:

a) 'Conduct' means the telling of a lie by the accused, or any other act or omission of the accused, which occurs after the event or events alleged to constitute the offence charged. 'Incriminating conduct' means conduct that amounts to an implied admission by the accused of having committed the offence charged or an element of an offence charged or which negates a defence to an offence charged.

b) The prosecution must give notice of evidence of conduct that it proposes to rely on as evidence of incriminating conduct at least 28 days before the trial is listed to commence. However the court may abridge these timelines. The prosecution must not rely on evidence of conduct as evidence of incriminating conduct unless it has given notice and the trial judge determines, on the basis of the evidence as a whole, that the evidence of conduct is reasonably capable of being viewed by the jury as evidence of incriminating conduct.

c) If the prosecution relies on evidence as evidence of incriminating conduct, the trial judge must direct the jury that:

   i it may treat the evidence as evidence that the accused believed that he or she had committed the offence charged (or an element of the offence charged, or that he or she had negated a defence to the offence charged) only if it concludes that the conduct occurred and the only reasonable explanation of the conduct is that the accused held that belief, and

   ii even if the jury concludes that the accused believed that he or she had committed the offence charged, it must still decide, on the basis of the evidence as a whole, whether the prosecution has proved the guilt of the accused beyond reasonable doubt.

Recommendation 6 – Post-offence conduct

d) If the trial judge gives the mandatory direction above, defence counsel may also request an additional direction that:

   i there are all sorts of reasons why a person might behave in a way that makes the person look guilty.

   ii the accused may have engaged in the conduct even though the accused is not guilty of the offence charged.

   iii even if the jury thinks that the conduct makes the accused look guilty, that does not necessarily mean that the accused is guilty.

e) In circumstances where the prosecution does not rely on evidence of conduct as evidence of incriminating conduct, but defence counsel is concerned about the potential misuse of such evidence by the jury, defence counsel may request a cautionary direction to the jury that:

   i there are all sorts of reasons why a person might behave in a way that makes the person look guilty.

   ii even if the jury thinks that the accused engaged in the conduct, it must not conclude from that evidence that the accused is guilty of the offence charged.

f) The trial judge is not required to refer to each act or omission of the accused in paragraph (c), or use a particular form of words.

g) The trial judge is not required to give a jury direction regarding evidence because it is incriminating conduct or may improperly be used as evidence of incriminating conduct.

   This paragraph abolishes rules based on *Edwards v R* (1993) 178 CLR 103 and *Zoneff v R* (2000) 200 CLR 234.

h) In considering whether evidence of incriminating conduct establishes, or assists in establishing, guilt, a jury is not required:

   i to reason from an indispensable intermediate fact where that fact is proved, wholly or partly, by evidence of incriminating conduct

   ii to be satisfied beyond reasonable doubt of the incriminating conduct because it proves or assists in proving, an indispensable intermediate fact, or

   iii to reason from the incriminating conduct to an indispensable intermediate fact.

This paragraph abolishes the application of *Shepherd v R* (1990) 170 CLR 573 to post-offence conduct.

8.4.1 Paragraph (a) – Definitions

There are a number of ways of describing the kind of evidence dealt with under this proposal. The evidence was in the past often referred to as consciousness of guilt evidence.

In *Zoneff* (at 258-259), Kirby J explained the origin of the term 'consciousness of guilt':

> [The phrase] can probably be traced to early psychological suggestions, picked up in the writings of Wigmore, that the commission of a crime somehow leaves 'mental traces' on the criminal which show themselves just as surely as 'indelible traces of blood, wounds or rent clothing, which point back to the deed as done by him'. According to this psychological theory, the 'traces' will ultimately find their outlet in the criminal's conduct. They will permit a jury to conclude that the accused is guilty of the offence because it elicits the manifestation of such 'traces'. They are thus equivalent to a confession or admission of guilt. There are illustrations of this theory in literature from Shakespeare to Dostoyevsky.

The term 'consciousness of guilt' has fallen out of favour because it pre-judges the accused as being guilty and suggests a conclusion about the conduct in question that tends to undermine the presumption of innocence. As the Charge Book observes:

> The term 'consciousness of guilt' is seen to be potentially misleading, and its use with juries is discouraged. More neutral language, such as 'evidence of post-offence conduct', is preferred (*Zoneff v R* (2000) 200 CLR 234 per Kirby J; *R v Nguyen* (2001) 118 A Crim R 479). Ormiston JA preferred 'implicatory evidence' or 'evidence tending to implicate the accused in participation in the offence' (*R v Franklin* (2001) 3 VR 9; *R v Chang* (2003) 7 VR 236).[5]

We recommend that the Bill use the term 'post-offence conduct' instead of 'consciousness of guilt' as the general title of the provisions. The VLRC indicated that many (but not all) people consulted considered that 'post-offence conduct' was 'a more modern and less emotive description of this evidence'.[6] Another advantage of referring to this kind of evidence as 'post-offence conduct' is that lawyers will immediately be aware of what this means, but they may be less familiar with other more neutral terms (such as 'post-incident conduct', which was recommended by the QLRC).[7]

While we recommend adopting the term 'post-offence conduct' as the general description for this kind of evidence, there is no need for trial judges to use this label with the jury. We recommend using the term 'conduct' in the provisions on directions to the jury. Removing the description of post-offence conduct evidence from the provisions on directions will mean there is no need for trial judges to use (or confuse jurors with) this description, thereby keeping the directions neutral, and as clear and simple as possible to the jury. In any case, it is likely that trial judges would refer to the substantive evidence of the conduct rather than technical descriptions which jurors are unlikely to be familiar with. A trial judge would say, for example, 'Members of the jury, you will recall that witness X gave evidence that in a conversation with the accused several months after the alleged offence, X said that the accused denied ever knowing the deceased and denied ever owning a gun. The prosecution says that these are lies and that the accused told these lies because he believed that telling the truth would incriminate him in the death of the deceased', and so forth.

The proposed reforms build on the definitions recommended by the VLRC and QLRC. Recommendation 24 of the VLRC Report proposed that the term 'post-offence conduct' be used to describe conduct which may amount to an implied admission of guilt by the accused. The QLRC's definition referred to a 'lie or other apparently incriminating conduct'.

One of the options considered for the definition involved listing the categories of post-offence conduct, for example, as lies in relation to the offence, fleeing the location of the offence, concealing evidence in relation to the offence and so on. However, it was clear that there are many different ways in which evidence may arise that would constitute post-offence conduct and the ways in which evidence may amount to an implied admission of guilt are not closed. Seeking to list all of the different kinds of post-offence conduct is necessarily problematic and almost by definition will never be comprehensive.

5 Judicial College of Victoria, *Victorian Criminal Charge Book* (2012) 4.7.1. [7] <http://www.judicialcollege.vic.edu.au/publications/victorian-criminal-charge-book>.

6 Victorian Law Reform Commission, above n 1, [5.36].

7 Queensland Law Reform Commission, *A Review of Jury Directions,* Report No 66 (2009) chapter 14.

A better approach is to instead define 'conduct' broadly, to mean the telling of a lie or any other act or omission of the accused following the alleged offence, and then to provide for a subsequent definition of 'incriminating conduct' which refers to why the evidence is so described (i.e. as an implied admission by the accused of having committed the offence charged). Segmenting the definitions into 'conduct' and 'incriminating conduct', differs from the law reform commissions' recommendations, but will improve the order and readability of the proposed Bill.

Defining 'conduct' to refer to both lies and other acts or omissions more adequately describes the subject matter of the proposed provision and reflects that in most instances, post-offence conduct consists of lies. Further, it makes it clear that the definition intends to cover Zoneff situations (or lies that are not relied on as an implied admission of guilt, discussed below).

The VLRC recommended the provision refer to 'conduct which may amount to an implied admission of guilt by the accused'. However, we recommend that the definition refer to an implied admission by the accused of having committed an offence charged or an element of an offence charged or which negates a defence to an offence charged. This will avoid any arguments about the accused's awareness of the specific 'offence charged', or where the evidence is only capable of proving some elements of an offence, but not the whole offence. We do not recommend that the definition require the accused to make an implied admission regarding the specific offence charged (e.g. infanticide). It would be enough to show that the accused knew that he or she had committed one or more of the elements of the offence charged (e.g. causing the death of his or her child), or negatived a possible defence to the offence charged.

The advantage of using the term 'implied admission of guilt' is that it will be readily recognised by practitioners and judges, as it is used in the *Evidence Act* and is also used in cases concerning post-offence conduct.

8.4.2 Paragraph (b) – Prosecution notice of evidence of incriminating conduct

Under the proposed reforms, the prosecution must give notice to the trial judge and the accused before the trial if it intends to use conduct evidence to demonstrate an implied admission of guilt by the accused of the offence charged. The trial judge would have the discretion to extend or abridge any time fixed by the Bill.

Recommendation 25 of the VLRC Report stated that legislation should require the prosecution to identify any evidence of post-offence conduct it seeks to rely on as demonstrating an awareness of guilt 'prior to commencement of addresses'. The proposal is similar to the approach proposed by the VLRC but requires more notice.

It was unclear from the VLRC's recommendation whether the VLRC was referring to the prosecution's opening or closing addresses. Without specificity, there could be an increased risk of failing to identify the post-offence conduct. Accordingly, we considered three main options:

- 28 days prior to the commencement of the trial
- before the commencement of the trial, and
- prior to the commencement of the prosecution's closing address.

The Court of Appeal has highlighted the importance of early identification of post-offence conduct. In *R v Calway* (2005) 157 A Crim R 322 at [91] and [98], the Court of Appeal described the prosecutor's decision to raise a consciousness of guilt argument just before final addresses as 'less than ideal', but stated that it did not follow that there had been a substantial miscarriage of justice.

Early identification by the prosecution would further focus attention on this evidence at an early stage and assist the defence in knowing how the prosecution case is put.

This may change the way in which the defence conducts its case. In *R v Howard* (2005) 156 A Crim R 343, the Court of Appeal ordered a retrial because the prosecution did not indicate its intention to use lies as consciousness of guilt before its closing address. Chernov JA held at [26]:

> Fairness demands that if the Crown intends to rely on consciousness of guilt it should make this known to the court at the outset of the trial. This requirement is now reflected in Practice Note No. 1 of 2004, which came into operation after the commencement of the applicant's trial. … If, for good reason, the Crown only decides to pursue such a course later in the trial, it should announce its intention to do so as soon as practicable, and before addressing the jury, and seek leave of the trial judge to press such an argument.

Further, the risk of errors on appeal will be reduced if the trial judge does not bear the ultimate responsibility of identifying every piece of evidence which may be subject to a direction, irrespective of whether the prosecution relies on the evidence as post-offence conduct evidence.

For these reasons, we recommend that the Bill prescribe that the prosecution must identify any post-offence conduct on which it seeks to rely 28 days before the commencement of the trial. A 28 day time period would align this requirement with the time line for filing the prosecution summary under the *Criminal Procedure Act.*

Given the disclosure regime under the *Criminal Procedure Act*, it should be possible in most cases for the prosecution to identify any post-offence conduct on which it seeks to rely prior to the commencement of the trial.

In the past, the Supreme Court's Practice Note No.1 of 2004 required the parties to provide at the Final Directions Hearing a 'bullet-point outline of any alleged lies and other post offence conduct sought to be relied on by the prosecution as showing consciousness of guilt'. However, Practice Note No.4 of 2010 repealed Practice Note No.1 of 2004 and there is no longer express reference to the requirement to identify post-offence conduct.

The *Evidence Act* requires certain kinds of evidence to be identified before a trial commences if the prosecution proposes to adduce that evidence (e.g. tendency evidence and hearsay evidence). Practice Notes of the Supreme Court and the County Court reflect this requirement.

There is, however, a possibility that the evidence of incriminating conduct may arise after the 28 day time period before the trial has elapsed (e.g. during the cross-examination of the accused at trial). Under the proposal, the prosecution may still rely on post-offence conduct if it has not complied with the general notice provisions, as the trial judge would have the discretion to change or extend the notice requirements if it is in the interests of justice to do so.

The notice requirement recognises the need for careful identification of this kind of evidence. This process will minimise the risk that the prosecution relies on this evidence in general terms at the trial stage but it is only at the appellate stage that the evidence is identified as evidence of incriminating conduct. It will also make clear that:

- The prosecution is not relying on the evidence as post-offence conduct evidence where it has not complied with the procedure.

- If the prosecution is not relying on the evidence as post-offence conduct evidence and the accused does not request a direction to warn against the misuse of the evidence, then, barring an issue concerning competence of counsel, the lack of reliance on the evidence or a request for a direction will generally mean that a direction is not required. The course the prosecution or the accused adopts will be determinative of the trial judge's obligation. This is a clear departure from the current law, where the trial judge must give either an Edwards or Zoneff direction even if the prosecution does not rely on the evidence.

These procedures do not change the tests for determining whether the evidence is admissible or whether the evidence constitutes an implied admission. This will continue to be determined in accordance with the common law and the *Evidence Act*.

We recommend that the trial judge determine whether post-offence conduct evidence is reasonably capable of amounting to an implied admission of guilt, before allowing the prosecution to use the evidence in this way. This is consistent with recommendation 25 of the VLRC Report. We also recommend that the Bill is clear that the trial judge may determine that evidence of conduct is reasonably capable of being viewed by the jury as evidence of incriminating conduct even where it only relates to an alternative offence (i.e. the conduct could be viewed as amounting to an implied admission by the accused of having only committed the alternative offence).

8.4.3 Paragraph (c) – Mandatory direction on use of evidence of incriminating conduct

Research in New Zealand indicates that while jurors 'took reasonable and conservative approaches' to evidence that the accused lied and did not simply conclude that an accused who lied must be guilty, if the accused did not give a satisfactory explanation for the lies, they attached considerable weight to this in their deliberations.[8]

Research in Queensland supports the view that 'simplified warnings may encourage jurors to adopt a generally more cautious and objective approach to the evidence and to rely less on stereotypes and personal beliefs'.[9] The proposal therefore provides for simplified warnings.

If the prosecution relies on post-offence conduct as evidence of incriminating conduct (after giving appropriate notice and obtaining the permission of the trial judge), we recommend that the trial judge give the jury a mandatory direction about how to use the evidence. Given the potential for misuse of this evidence, it is appropriate to make this part of the direction mandatory, rather than contingent on a prosecution or defence request under the recommendations in Part 5.

We recommend that the mandatory direction require the trial judge to direct the jury that:

- It may treat the evidence as evidence that the accused believed he or she had committed the offence charged (or an element of the offence charged or that he or she negated a defence to the offence charged) only if it concludes that the conduct occurred and the only reasonable explanation for the conduct is that the accused believed that he or she had committed the offence charged (or an element of the offence charged or that he or she negated a defence to the offence charged).
- Even if the jury concludes that the accused believed he or she had committed the offence charged, the jury must still decide on the evidence as a whole whether the prosecution has proved the guilt of the accused beyond reasonable doubt.

8 New Zealand Law Commission, above n 4, [7.34].

9 Queensland Law Reform Commission, above n 7, [14.49].

This proposal is based on the VLRC, QLRC and New Zealand *Evidence Act* approaches.

Recommendation 27 of the VLRC Report suggested that any warning which a trial judge gives about the use of evidence concerning post-offence conduct will be sufficient if it informs the jury that:

- People lie or engage in other apparently incriminating conduct for various reasons.
- The jury should not necessarily conclude that the accused person is guilty of the offence charged just because the jury consider that he or she lied or engaged in some other apparently incriminating conduct.

While the VLRC approach would reduce the complexity in the current law and shorten jury directions, it did not provide guidance on how the jury could use the evidence. We recommend more detailed guidance about how the jury may use the evidence and stronger warnings to the jury to guard against the potential misuse of this kind of evidence. The process we propose also gives the parties more control over which directions are given to the jury. For the prosecution, it will depend on what evidence it seeks to rely on, and for the accused, it will depend on whether the further cautionary direction is requested (discussed below).

Requiring the jury to only use the evidence if it concludes that the conduct occurred and the only reasonable explanation for the conduct is that the accused believed that he or she committed the offence charged draws on the stringent approach some legislation and cases take to this kind of evidence.

The New Zealand *Evidence Act* (followed by the QLRC) requires the jury to conclude that the accused did lie before it draws inferences from that evidence. The VLRC recommendation did not include this requirement. However, it seems implicit from the VLRC recommendation that the jury must reason in this way. In the course of general jury directions, it should be clear to a jury that it must conclude that a lie was told or conduct occurred before it can draw an inference from it. Further, it is implicit in the second aspect of the VLRC recommendation (warning that people may lie etc for reasons other than because they are guilty of the offence) that the jury must have concluded that the accused lied.

Expressly referring in the legislation to the requirement that the jury must have concluded that the accused did lie or engaged in other apparently incriminating conduct is preferable and makes the necessary directions more transparent.

The requirement that the only reasonable explanation of the conduct is that the accused believed that he or she had committed the offence charged is part of the standard direction on implied admissions of guilt in the Charge Book and reflects current law (*R v Russo (No.2)* [2006] VSCA 297). It recognises that post-offence conduct must be assessed in the context of the whole of the case and must not be used by the jury if there is a reasonable explanation for the conduct that is consistent with innocence.

Finally, the trial judge must direct the jury that even if it is satisfied that the accused believed that he or she had committed the offence charged, it must still decide on the basis of the evidence as a whole whether the prosecution has proved the accused's guilt beyond reasonable doubt. This reminds the jury of the general burden of proof of which it must be satisfied.

Recommendation 27 of the VLRC Report proposed a direction which used the term 'incriminating conduct'. The directions we propose here do not do so because it would require an explanation that incriminating conduct meant an implied admission and an implied admission is a phrase that the trial judge must then further explain to the jury. Avoiding technical terms will make the directions easier to understand.

We recommend that the Bill set out all matters that must be contained in a direction. There should be no common law requirements to comply with in addition to the statutory content of the direction.

Accordingly, we recommend abrogating the common law requirements in relation to post-offence conduct, particularly those attributed to *Edwards*. For example, the trial judge would not have to precisely identify each lie or the exact post-offence conduct.

Further, we recommend that *Shepherd v R* (1990) 170 CLR 573 (*Shepherd*) is abolished as far as it relates to post-offence conduct. The process of reasoning from 'strands in a cable', or indispensable intermediate facts, discussed in *Shepherd* was applied to post-offence conduct in *Edwards*, though *Edwards* recognised that post-offence conduct often does not involve this process of reasoning. In some cases, *Shepherd* as applied to *Edwards* has been interpreted to mean that the jury may only have regard to post-offence conduct where satisfied of it beyond reasonable doubt (see, for example, the discussion in *R v Ciantar* [2006] VSCA 263 (*Ciantar*) at [52]). The changes we propose will not require jurors to reason from indispensable intermediate facts, or apply any special standard of proof to post-offence conduct evidence. As the Court of Appeal said in *Ciantar* at [45]:

> As with other forms of circumstantial evidence of guilt, a jury may accept evidence of lies and other post-offence conduct and act upon it without being satisfied beyond reasonable doubt that the evidence establishes guilt (that is to say, without being satisfied that there is no other explanation of the lies and post-offence conduct which is reasonably open on the facts).

The Simplification of Jury Directions Report commented that removing the effect of *Shepherd* on directions concerning circumstantial evidence (and therefore, post-offence conduct) would offer insufficient guidance to the jury in cases where evidence should be treated as establishing an indispensable intermediate fact and may lead the jury to convict a person based on insufficient evidence.[10] However, following discussion of this issue with the Advisory Group, our view is that in cases where a common law indispensable intermediate fact direction is required, then the prominence such evidence would have in a trial, that it is clearly so pivotal to the case that it should not be acted upon unless the jury is satisfied of its existence, would guard against these risks. The jury will be directed that the prosecution must prove each element of the offence beyond reasonable doubt. Where the main evidence is post-offence conduct, in practice, the jury will need to be satisfied beyond reasonable doubt of that matter. Requiring an additional and highly complex direction (as required by *Shepherd* and criticised in the Simplification of Jury Directions Report) will not produce a fairer trial and would add complexity to directions for the trial judge and the jury.

The proposal provides for the same direction whether the incriminating conduct consists of lies or other kinds of conduct. The direction we propose is sufficiently general to apply equally to all such evidence. In the VLRC Consultation Paper, the VLRC raised the issue of the distinction between lies amounting to an implied admission of guilt and lies which affect credit and the consequent differences in jury directions. The VLRC Consultation Paper stated:

> Professor Williams has questioned whether the conceptual distinction between lies calling for a *Zoneff* warning and those calling for an *Edwards* warning is sound:
>
> *The distinction between probative lies calling for an Edwards warning, and credibility lies calling for a Zoneff warning is, it is submitted conceptually unsound. To be relevant both probative lies and credibility lies depend upon the drawing of an inference as to consciousness of guilt, and reasoning from that conclusion to support a conclusion as to the fact of guilt. The difference between the two is as to the significance of the lies, and the strength of the inference they may give rise to.*
>
> Williams argues for a more flexible, discretionary approach which would enable the trial judge 'to tailor the warning to the needs of the particular case'.[11]

10 Justice Weinberg et al, *Simplification of Jury Directions Project: A Report to the Jury Directions Advisory Group* (August 2012) [3.139].

11 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper 6 (2008), [4.49] and [4.50].

Our recommended approach differs from Professor Williams' analysis but does significantly reduce the complexity of these issues. Regardless of the characterisation of the lies, the threshold issue will be whether the prosecution relies on them. If the prosecution seeks to rely on the lies, the trial judge must determine whether the lies are capable of being viewed by the jury as incriminating conduct. If the trial judge concludes that the evidence can be so used, the trial judge must direct the jury about how they may use the evidence.

If the prosecution does not rely on the lies as evidence of incriminating conduct, there is no need to direct on it unless there is a risk that the jury might impermissibly infer the accused's guilt from such evidence (and the accused requests such a direction). In such circumstances, the trial judge no longer needs to characterise the post-offence conduct and give a separate direction based on each characterisation. The proposal focuses on the potential prejudicial effect of the evidence (if it is improperly used).

8.4.4 Paragraph (d) – Additional direction on incriminating conduct

Whether the mandatory direction should be accompanied by another direction will generally be a matter for the accused. This is consistent with the philosophy underpinning the proposed jury directions request provisions, namely that sometimes the accused may prefer that no additional directions are given (e.g. because the accused admits he/she lied or does not want the judge to highlight the evidence any further). If the accused does not request such a direction, there will be no requirement on the trial judge to give one, subject to the trial judge's residual obligation discussed in Part 5.

The proposed additional direction has three components. The trial judge must direct the jury that:

- There are all sorts of reasons why a person might behave in a way that makes the person look guilty.
- The accused may have engaged in the conduct even though the accused is not guilty of the offence charged.
- Even if the jury think that the conduct makes the accused look guilty, that does not necessarily mean that the accused is guilty.

The proposed direction uses language that the jury will easily understand. It is partly based on section 124(3)(b) and (c) of the *Evidence Act* (NZ). A similar direction was recommended by the VLRC Report (Recommendation 27). The VLRC said (at [5.49]) that the purpose of such a direction was to warn 'jurors not to jump to conclusions about whether the accused committed the offence in question by relying upon evidence of that person's conduct, which may look suspicious, at some time after the offence was committed'.

These three components capture the essence of the existing cautionary directions in a way that will be understandable to the jury and would only be used where defence counsel considers that giving them is not likely to have a 'back-fire' effect (i.e. the directions will only be given following a request from defence counsel).

The trial judge will not be required to identify possible motivations for committing the post-offence conduct (e.g. by inventing explanations) to comply with the proposal.[12]

The third and final limb of the direction involves the trial judge telling the jury that even if it thinks that the conduct makes the accused look guilty, that does not necessarily mean that the accused is guilty. This limb reflects existing requirements under the common law to explain to a jury that it should not jump to conclusions. It is also similar to the direction recommended by the VLRC and QLRC and section 124(3)(c) of the *Evidence Act* (NZ).

12 Compare *R v Nguyen* [2005] VSCA 120.

To keep the proposal consistent with the jury direction request provisions, the trial judge must give this direction if requested unless there are good reasons for not doing so.

8.4.5 Paragraph (e) – Direction to avoid risk of improper use of evidence

This proposed provision deals with a situation where the evidence is not being relied on as post-offence conduct evidence but there is a substantial risk that the jury may impermissibly use the evidence in such a manner. In this situation, the accused may request that the trial judge warn the jury not to infer the accused is guilty from the evidence.

We propose that the direction consist of the following components:

- There are all sorts of reasons why a person might behave in a way that makes the person look guilty.
- Even if the jury think that the accused engaged in the conduct, it must not conclude from that evidence that the accused is guilty of the offence charged.

To keep the proposal consistent with the jury direction request provisions, the trial judge must give this direction unless there are good reasons for not doing so.

Most recommendations or proposals in this area focus only on the obligations of the prosecution. However, if the judge does not give the jury proper directions concerning the use the jury may make of such evidence, this may operate to the detriment of the accused in obtaining a fair trial.

In *R v MC; DPP v MC* [2009] VSCA 122, the Court of Appeal held that, in spite of the prosecution indicating that it did not rely on the evidence as consciousness of guilt, the trial judge should have given an Edwards direction, and therefore ordered a retrial.

The Court of Appeal concluded that there was an inevitable risk that the jury would view the lies as having been told as a result of a consciousness of guilt. In so doing, the Court had regard to *R v Cuenco* [2007] VSCA 41 and Kirby J's judgment in *Zoneff,* that the need to give an Edwards direction:

> cannot ultimately depend upon the intention or subjective purpose of the prosecutor as to whether or not a judicial direction to a jury about that subject of lies [or conduct] must be given. The criterion must be the way the jury might use the evidence not the subjective purpose of the prosecutor in eliciting the evidence or relying upon it.[13]

The proposal protects against this risk that the jury may misuse the post-offence conduct. The approach we recommend will mean this obligation on the trial judge and line of reasoning will be displaced by the jury direction request provisions. This operates on the basis that the accused is best placed to identify potential harm or damage to their case from the evidence.

The Zoneff direction requires the trial judge to direct the jury where there is an appreciable risk or danger that the evidence could be misused. The recommended approach requires a direction where there is a request by defence counsel, unless there are good reasons for not doing so. This raises the issue of whether the proposal should provide that there are good reasons for not giving a direction where there is no 'substantial risk' that the evidence could be misused, no 'danger' of misuse, or some other test.

Given that the tenor of the changes is to identify the circumstances in which these specific directions are or may be required, the test of whether there is substantial risk should provide more guidance to the trial judge and confine directions to circumstances where they are really necessary. We propose that the Bill include this test. This would be more consistent with the threshold in *Zoneff*. Further, as discussed in previous parts, it would not be helpful if juries are given directions where they are unnecessary. This would lengthen directions and may confuse jurors.

13 *R v MC; DPP v MC* (2009) VSCA 122 [63].

8.4.6 Paragraph (f) – Form of jury direction

A trial judge need not refer to each act or omission of the accused in giving the direction in paragraph (c). This is a clear departure from the current law. Both the VLRC (Recommendation 26) and the QLRC recommend the inclusion of a provision similar to this. The VLRC said at [5.50] of the VLRC Report:

> Lengthy identification of the individual items of evidence which may be used to draw a consciousness of guilt inference is unlikely to advance the purpose of warning the jury not to jump to conclusions. This step may detract from the impact of any warning because it may cause the jury to pay too much attention to the individual items of evidence. The commission believes that the trial judge should not be required to identify every piece of consciousness of guilt evidence.

The extent of the detail concerning the evidence in the direction will usually depend upon the type of evidence. Where the evidence does not concern lies but involves flight or concealing evidence then referring to that instance of alleged post-offence conduct will be relatively straightforward.

However, where for example there is a record of interview and the prosecution alleges that it contains hundreds of lies, the proposed reform envisages that the trial judge would refer to the net effect of the numerous separate lies, in terms of the issues in the trial. For example, it might be that the trial judge says that the prosecution claims the accused was lying by:

- denying that he had ever met the victim, that he was at another place at that time and that he had no animosity towards the victim, or
- claiming that the previous managers had given her the power to authorise certain payments on behalf of the company and therefore she did not act dishonestly.

For these reasons, there is a strong case for the introduction of this change. Where there is more than one item of post-offence conduct evidence it would no longer be necessary to set out in detail every instance where that evidence is capable of being used by a jury as an implied admission of guilt. This provision will encourage simple and clear directions.

Removing this common law requirement removes the risk of technical non-compliance with the law. Further, complying with this requirement does not promote the objective of securing a fair trial.

We also recommend that the directions under these provisions need not use a particular form of words. For example, if in the mandatory direction the trial judge uses the word ‘knew’ rather than ‘believe’ to better describe the incriminating conduct, that would not be an error of law.

These proposed provisions have been designed to remove any obligation to give any additional directions required at common law. However, we do not recommend prohibiting a trial judge from doing so (i.e. the trial judge will not fall into error just because the trial judge provides additional directions).

8.4.7 Paragraph (g) – Abolition of the application of Edwards and Zoneff

This paragraph is designed to ensure that all of the trial judge’s obligations in relation to incriminating conduct, or post-offence conduct, are set out in the Bill. There is no residual application of the common law that the trial judge must apply. A direction given in accordance with the proposed provisions will be sufficient.

This abolishes rules based on *Edwards* and *Zoneff*.

8.4.8 Paragraph (h) – Abolition of the application of Shepherd to post-offence conduct

As discussed above in 8.4.3, we recommend that the Bill clearly set out that it is unnecessary for the trial judge to direct the jury, in considering whether evidence of incriminating conduct establishes, or assists in establishing, guilt:

- to reason from an indispensable intermediate fact where that fact is proved, wholly or partly, by evidence of incriminating conduct
- to be satisfied beyond reasonable doubt of the incriminating conduct because it proves, or assists in proving, an indispensable intermediate fact, or
- to reason from the incriminating conduct to an indispensable intermediate fact.

This recommended paragraph is quite complex because it deals with the different ways in which *Shepherd* may apply to post-offence conduct. *Shepherd* in itself is a very complex case and is difficult to apply, as discussed in Chapter 3 of the Simplification of Jury Directions Report. Post-offence conduct is complex because it may amount to an implied admission. Therefore, there are cases in which post-offence conduct, by definition, will prove a fact that may be a fact which is an 'indispensable intermediate fact' in the circumstances described by *Shepherd*.

The reference to 'assists in establishing' describes where the incriminating conduct may (only) prove an element of the offence charged or negate a defence to the offence charged.

The first point links the reasoning process to where the indispensable intermediate fact is sought to be proved by evidence of incriminating conduct, thereby tying the abolition of *Shepherd* to this particular reform. The purpose of the words 'wholly or partly' is to cover situations where it is the incriminating conduct in combination with other evidence which is relied upon to prove the fact in question. This broader description will avoid difficult issues for trial judges and appellate courts concerning degrees of importance of evidence (e.g. if qualifiers such as 'significant' or 'primarily' were used) in what is already a complicated area of law.

The second point is designed to avoid the application of any special evidentiary standard to this kind of evidence (which would usually arise from the application of *Shepherd*) and therefore lends further support to achieve the desired outcome.

There may be situations in which incriminating conduct must be proved beyond reasonable doubt, for example where the evidence is the only evidence which proves an element of the offence. Where that is the case, proof beyond reasonable doubt of the incriminating conduct will be required because it proves an element, but not because it proves an indispensable intermediate fact.

The third point makes clear that the reasoning process does not apply from the evidence to the fact.

8.5 Case study – sample direction

The following sample direction has been developed to illustrate the content of a direction under the recommended proposals.

These facts are derived from *R v Nguyen* [2001] VSCA 1. In that case, the prosecution alleged that the applicant killed his stepson (the deceased) with a shot fired deliberately from a shotgun at close range with intent to kill or cause really serious injury to the deceased.

The shooting occurred not long after the accused returned home from a friend's house where he had spent the evening drinking with friends and engaging in a karaoke night. In the course of the evening, he had consumed both beer and spirits.

Almost immediately after the shooting, the accused left the house by the rear door. He then disposed of the weapon, first by concealing it in bushes on the other side of the road and later by disposing of it in waters off Altona beach. When police arrived the accused told them that an unknown intruder had been responsible for the shooting. He claimed to have been sitting in the lounge room with his wife. He had also encouraged his wife and stepdaughter to make similar statements to the police.

Two days after the shooting the accused's wife went to the police and told them that the accused had been responsible for the discharge of the firearm. Later the accused told his wife in a conversation that was secretly recorded by police that the shooting was accidental and that the gun had discharged while he was cleaning it. Thereafter, in a recorded interview with police (but before police had access to the secretly recorded conversation) the accused persisted in his account that he was not involved in the shooting.

In evidence before the jury, the accused gave an account of what took place that was similar to what he had told his wife, namely that the gun had discharged accidentally while he was cleaning it.

The accused gave evidence that he lied to the police and disposed of the gun because he was scared of the police as a result of his experience with police in Vietnam. In Vietnam, police had detained and assaulted his father in prison because his father had worked for the French Government. The accused gave evidence that he was fearful that he would also be unjustly accused and detained. The accused also gave evidence that he lied because he thought, if he was arrested, he would be unable to make proper arrangements for the deceased's burial, which was very important in Vietnamese culture.

If the prosecution were to be permitted to rely on the post-offence conduct evidence as evidence of incriminating conduct, the following is an example of the mandatory direction a trial judge might give a jury under the proposed provision.

Sample direction

You have heard evidence that Mr Nguyen misled the police about his role in the shooting. First, he disposed of the gun before the arrival of the police. Second, he told police that an intruder had entered the rear of the kitchen and shot the deceased. Third, he encouraged his de facto wife and daughter to support his story of an intruder.

He later told his de facto wife in a recorded conversation that there was no intruder and that he accidentally shot the deceased while cleaning his shotgun. You also heard Mr Nguyen give this evidence in court. Some days after the conversation with his de facto wife, Mr Nguyen maintained his story to police that he was not involved in shooting the deceased.

The prosecution argued that you can use this evidence, along with the other evidence in this case, to conclude that Mr Nguyen shot the deceased with the intention to kill or cause the deceased really serious injury.

You may only use the evidence in that way if you conclude that:

- Mr Nguyen disposed of the gun and made statements to the police about an intruder [and the accused admitted that he lied about this], and
- The only reasonable explanation for Mr Nguyen doing these things is that Mr Nguyen knew [or believed] that he had intended to kill or cause really serious injury to the deceased.

[At this point, the trial judge may refer to the way in which the prosecution and defence say this was or was not the only reasonable explanation for Mr Nguyen's actions.]

If you come to those conclusions, you may use the evidence in determining whether Mr Nguyen is guilty of the offence of murder, but you must still decide on the basis of the evidence as a whole, whether the prosecution has proved that Mr Nguyen is guilty beyond reasonable doubt.

This would be the end of the direction unless the accused requests a direction under paragraph (d) as follows:

But it is important to bear in mind that there are all sorts of reasons why a person might behave in a way that makes the person look guilty. Mr Nguyen may have disposed of the gun or made statements to police about an intruder even though Mr Nguyen is not guilty.

In this case, Mr Nguyen gave evidence that the shooting was accidental and that he disposed of the gun out of panic and then lied to police for two reasons. First, he thought he would be imprisoned and would be unable to make proper arrangements for the deceased's burial which is very important for Vietnamese people. Second, he stated that because his father had been detained and assaulted by police in Vietnam, he was fearful that he too would be unjustly accused and detained.

So even if you think Mr Nguyen's actions in disposing of the gun and lying to police make him look guilty, that does not necessarily mean he is guilty.

9 Review of the proposed *Jury Directions Act*

The recommendations we make in this report are significant and far-reaching. No other Australian jurisdiction has enacted jury directions reforms of this type. If adopted, they will affect every criminal jury trial in Victoria and will involve considerable cultural change among trial judges and trial counsel. If they work as intended, trial judges and trial counsel will engage in constructive discussions on which directions are needed, and what these directions should contain. Only relevant directions will be given, and these directions will be shorter, simpler and more targeted to the issues in the trial. Directions are also likely to be presented in ways that jurors are more likely to understand and apply (e.g. by way of integrated directions).

For these reasons, we recommend that there be a formal review of the proposed *Jury Directions Act* three years after the provisions commence. After three years of operation, it will be possible to assess whether the provisions are working as intended. Such a review could also take into account the next stage of reforms (that are proposed for 2013), which by then may have been in operation for around two years.

The recommended review would not preclude ongoing monitoring of the proposed Act and responding to issues that arise, as the government considers appropriate. However, we consider that the scale and importance of the proposed reforms, which involve a completely new approach to jury directions in Victoria, warrant a more comprehensive review than the normal monitoring process can provide.

Recommendation 7 – Review of the proposed *Jury Directions Act*

It is recommended that there be a review of the operation of the proposed *Jury Directions Act* three years after the Act commences.

Appendix 1

Jury Directions Advisory Group

Greg Byrne, Criminal Law Review, Department of Justice (Chair)

President Maxwell, Court of Appeal

Justice Weinberg, Court of Appeal

Justice Osborn, Court of Appeal

Justice Coghlan, Supreme Court

Judge McInerney, County Court

Judge Sexton, County Court

Judge Gamble, County Court

Judge Tinney, County Court

Saul Holt, Victoria Legal Aid

Michael Croucher SC, Victorian Bar

Patrick Doyle, Victorian Bar

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Professor Jonathan Clough, Faculty of Law, Monash University

Appendix 2

References

Frequently cited cases

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Frequently cited legislation

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Criminal Procedure Act 2009

Evidence Act 2008

In this report, the Acts referred to are Victorian Acts unless otherwise stated.

Department of
Justice

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