SIMPLIFICATION OF

JURY DIRECTIONS PROJECT

A REPORT TO THE JURY DIRECTIONS ADVISORY GROUP
AUGUST 2012

COMPLICITY

INFERENCES AND CIRCUMSTANIAL EVIDENCE

OTHER MISCONDUCT EVIDENCE

JURY WARNINGS/UNRELIABLE EVIDENCE

State Government Victoria
Department of Justice
Judicial College of Victoria

SIMPLIFICATION OF JURY DIRECTIONS PROJECT

A REPORT TO THE JURY DIRECTIONS ADVISORY GROUP
AUGUST 2012

CHAPTER 3: INFERENCES AND CIRCUMSTANTIAL EVIDENCE

CHAPTER 5: JURY WARNINGS / UNRELIABLE EVIDENCE

PREFACE

EXECUTIVE SUMMARY

1.1 This report (hereafter described as 'the Report'), prepared by Weinberg JA and staff from the Judicial College of Victoria and the Department of Justice, considers in detail a number of areas of law which currently give rise to jury directions which are extremely complex, and often described as unintelligible. For reasons that will be later explained, four areas have been chosen for close analysis. These are:

(a) complicity;

(b) inferences and circumstantial evidence;

(c) evidence of other misconduct – tendency and coincidence; and

(d) jury warnings – unreliable evidence

1.2 The Report builds upon recent work carried out in both this country and overseas upon jury directions by the Victorian Law Reform Commission and other law reform bodies. That work has concluded that jury directions are, by and large, unduly complex and in need of reform. The recommendations contained in the Report are designed to address the issues identified by those bodies and to reduce the undue complexity and length of jury directions currently given in this State.

1.3 The Report considers the approaches taken to jury directions in other jurisdictions in Australia and overseas. It highlights practices and parts of model charges in those jurisdictions which, if used as a model for reform in this State, might reduce the complexity and length of jury directions.

1.4 In preparing the Report the authors consulted with a number of judges and practitioners with substantial experience in conducting criminal trials. The authors also had regard to academic opinion and research into the

psychology relating to the way in which jurors approach their task.

1.5 The Report contains five chapters. Each chapter on a particular area of substantive law contains recommendations intended to ameliorate some of the problems currently plaguing jury directions in this State.

1.6 Stated broadly and in summary form, those recommendations are:

- **Complicity**. The law in this area is in urgent need of reform. Amendments to the *Victorian Criminal Charge Book*[1] alone will be not be sufficient to ensure the clarity and coherence of jury directions. Legislative amendment is necessary. The Report recommends the enactment of a statutory provision stating, generally, that a person 'involved in' the commission of an offence is taken to have committed that offence. The recommended provision removes many of the unprincipled nuances of the law of complicity which have for so long rendered it impossible to explain this doctrine, which is of course of vital practical importance, in clear and simple terms. For example, the recommended provision (set out at pages 93-5):

  - expressly states that the accused need not be present at the scene of the commission of the offence to be liable as a secondary offender;
  - clearly states that the primary offender need not have been prosecuted or found guilty of the offence in order for the secondary offender to be found guilty;
  - protects the victim of an offence from potential liability as a secondary offender where the offence is intended to protect that person; and
  - clearly abolishes the current law relating to complicity, including the doctrine of extended common purpose (which has for many years created a great deal of practical and conceptual difficulty).

- **Inferences and Circumstantial Evidence**. Experience, together with an understanding of the literature in this area, shows that the issues surrounding circumstantial evidence often confuse juries. To some extent, these problems can be mitigated by using the simpler term 'to conclude' rather than 'to infer' to describe the use of circumstantial evidence. It is also important to dispel any notions in the jurors' minds that this class of evidence is in any way inherently less valuable than

[1] Judicial College of Victoria, *Victorian Criminal Charge Book* ('*Charge Book*') < http://www.justice.vic.gov.au/emanuals/CrimChargeBook/default.htm>

direct evidence. These matters are dealt with by amendments to the model *Charge Book* direction.

However, there are more systemic difficulties in this area. In part, the confusion surrounding this topic stems from High Court decisions holding that facts used to ground certain inferences must be proved beyond reasonable doubt.[2] At present, there is a distinct lack of clarity as to when directions to that effect need to be given. Seven options are put forward to improve the situation. These include legislative amendment to the effect that it is the element of the offence alone that must be proved to this standard. This would in effect return the law to the state it was in before *Chamberlain v The* Queen.[3] Another option, which is that favoured by the Report, is to require the judge first to identify facts which are objectively essential to the jury's verdict, and to then direct the jury that they must be satisfied of those facts, as identified by the judge, beyond reasonable doubt. A draft provision to give effect to this option is set out at pages 152-5. Regardless of which option is adopted, it is anticipated that the jury would be directed as to these matters as part of the general charge on standard of proof rather than as part of the charge on inferences.

The Report also considers directions based on *R v Hodge*.[4] Such directions warn juries of the dangers of drawing inculpatory inferences based on evidence which, in fact, is also capable of innocent explanation. The Report concludes that while such a direction will often be desirable, it ought not be mandatory. If such a direction is given, it may be useful to state to the jury that it must be satisfied that the accused's guilt is the 'only reasonable conclusion' arising from the evidence. A model charge is set out at the conclusion of the Chapter at pages 164 and 176-7.

- **Evidence of Other Misconduct - Tendency and Coincidence**. The Report recommends a two-fold approach to simplifying jury directions in this area. First, and as a preliminary measure, the language used in the model direction should be simplified. Alone, this simplification may not require legislative amendment. Simplified model directions appear at pages 271-4. The directions deliberately do not follow the language used in *R v Vonarx*[5] and *R v Grech*.[6] The model directions deal with situations where evidence is admitted as:

    - tendency evidence;

---

2 See *Chamberlain v The Queen (No 2)* (1984) 153 CLR 521; *Shepherd v The Queen* (1990) 170 CLR 573.

3 (1984) 153 CLR 521.

4 (1838) 2 Lew 227; 168 ER 1136.

5 [1999] 3 VR 618.

6 [1997] 2 VR 609.

- tendency and coincidence evidence;
- coincidence evidence but not as tendency evidence; or
- context evidence but not as tendency or coincidence evidence.

Secondly, legislative reform of the necessary content of the warnings given in this area is recommended. The proposed provision has been drafted in light of extensive research in this area which casts doubt on the utility of limited use warnings, and suggests that a jury given a limited use warning is, in fact, more likely to reason in a prohibited manner. The draft provision is set out at pages 262-4. The provision:

- deals concisely with tendency, coincidence and context evidence (defined as 'other misconduct evidence');
- provides that a judge need not give a direction as to the permissible and impermissible uses of such evidence unless a direction is sought by counsel for the defence;
- sets out the sufficient content of any direction on other misconduct evidence; and
- specifically abolishes existing rules of law inconsistent with these recommendations.

- **Jury Warnings - Unreliable Evidence**. This chapter considers unreliable evidence warnings under ss 165 and 165A of the *Evidence Act 2008*. It concludes that no substantial reforms to these provisions are required, as they do not appear to be creating problems in practice, and are broadly consistent with the reforms to the principles set out in *Pemble v The Queen*[7] proposed by the Jury Directions Advisory Group. Accordingly, the Report recommends that ss 165 and 165A be replicated in the new Jury Directions Act, with minor amendments. The draft provisions are set out at pages 312-4 and 326-7. Amongst other matters, those minor amendments:

  - provide that trial judges only need to point out significant matters affecting reliability; and
  - abolish common law to the contrary of the provisions.

  These amendments should assist to reduce the length and complexity of directions in this area. The chapter also considers corroboration warnings under s 164 of the *Evidence Act 2008*. The Report does not recommend any changes to that section. Finally, the chapter discusses possible changes to the model unreliable evidence directions in the *Charge Book* (set out at pages 329-330).

[7] (1971) 124 CLR 107.

PERSONS CONSULTED IN THE COURSE OF THE PREPARATION OF THIS REPORT:

Supreme Court of Victoria, Court of Appeal
Justice R Redlich

Supreme Court of Victoria, Trial Division
Justice P Coghlan

County Court of Victoria
Judge R Punshon
Judge W Wilmoth
Judge G Mullaly
Judge M Dean
Judge R Maidment

Office of Public Prosecutions
Mr P Kidd SC
Ms C Quinn

Criminal Bar Association
Mr P P Priest QC
Mr O P Holdenson QC

Victoria Legal Aid
Mr S Holt

Law Institute of Victoria
Mr J Dowsley
Mr T Gattuso

The Hon John Coldrey QC
The Hon Geoffrey Eames QC
The Hon Frank Vincent QC
Professor James Ogloff – Centre for the Study of Behavioural Science, Monash University
Associate Professor Jonathan Clough – Law Faculty, Monash University

NOTE:

While staff from the Department of Justice have contributed to writing this report, the views expressed and recommendations made in this Report do not necessarily reflect the views of the Department of Justice or the Attorney-General.

1. INTRODUCTION: THE NEED FOR SIMPLIFICATION

Background

1.1 In May 2009, the Victorian Law Reform Commission ('VLRC') published a Report entitled 'Jury Directions'.[1] In preparing the Report, the VLRC was assisted by a number of trial and appellate judges, Crown prosecutors, and barristers with extensive criminal law experience.

1.2 The VLRC had been asked by the Attorney-General to 'review the law and practice concerning the directions which judges give to juries in criminal trials and to recommend changes for improvement.'[2] The terms of reference were deliberately broad. In particular, the VLRC was requested to have regard to the 'overall aims of the criminal justice system', including the 'prompt and efficient resolution of criminal trials' and 'procedural fairness for accused people'.[3]

1.3 It is important to put the *VLRC Report* into context. There had been concern, for some years, that the law regarding jury directions had become too complex. It was said that it did not encourage judges to use modern means of communicating with juries, and that juries were sometimes given very lengthy and complex directions that were unhelpful. Further, appeals against conviction were succeeding on a regular basis because of errors in the directions given.

---

1 For the background to that Report, see Victorian Law Reform Commission, *Jury Directions: Final Report*, Report No 17 (2009) 4 ('*VLRC Report*').
2 Ibid 5.
3 Ibid.

1.4 To appreciate the depth of the problem which confronted the VLRC, it is useful to refer to some statistics. In a 2006 survey of judges experienced in the conduct of criminal trials in Australia and New Zealand, it was found that the average estimated length of the charge following a ten day jury trial in Victoria was 255 minutes. For a twenty day trial, that figure increased to 349 minutes, or nearly 6 hours.[4] By contrast, the average estimated charge length for trials conducted in New Zealand was 76 minutes for a ten day trial, and 108 minutes for a twenty day trial.[5] In Australia, only New South Wales came close to rivalling Victoria in terms of sheer length of jury directions. In Western Australia, the average estimated length of a charge following a ten day jury trial was only 116 minutes, and for a twenty day trial, a mere 155 minutes.[6] In other words, it took less than half the time to deliver a jury charge in Western Australia than it took to deliver a charge in an equivalent case in Victoria.

1.5 The brevity of jury instructions in Scotland puts the matter into even starker contrast. There, the standard jury direction takes between 15 and 18 minutes.[7]

1.6 Directions in the United States are also substantially shorter than those

---

4 James R P Ogloff, Jonathan Clough, Jane Goodman-Delahunty and Warren Young, *The Jury Project: Stage 1 – A Survey of Australian and New Zealand Judges* (Australian Institute of Judicial Administration, 2006) 27.

5 Ibid.

6 Ibid.

7 Lord Justice Moses, 'Summing Down the Summing-Up' (Speech delivered at the Judiciary of England and Wales Annual Law Reform Lecture, Inner Temple, 23 November 2010) 8 <http://www.judiciary.gov.uk/media/speeches/2010/speech-moses-lj-summing-down-summing-up>. See also Justice Mark Weinberg, 'The Criminal Law: A Mildly Vituperative Critique' (2012) 35 *Melbourne University Law Review* 1178, 1192-6.

given in Victoria. Typically, they take no more than about 30 minutes.[8] In the 2012 prosecution of John Edwards for breach of federal campaign finance laws, the judge's charge to the jury lasted approximately 75 minutes. This is remarkable considering that the case was extremely complex, and the evidence voluminous. More than 30 witnesses testified, and there were upwards of 200 exhibits. On the conspiracy count alone (one of six counts on the indictment), the period of the offending covered more than six years. Clearly, if such a case were conducted in this State the charge would taken substantially longer than 75 minutes. Indeed, given the current practice, it would likely extend over several days.

1.7 This situation has prompted a number of calls for reform. To take but one example, in a joint paper Geoffrey Flatman, the then Director of Public Prosecutions, and Professor Mirko Bagaric commented that, in their opinion, 'jury instructions may have become too numerous and expansive'.[9]

1.8 The *VLRC Report* recognised the 'voluminous' nature of the jury directions currently given in this State.[10] It stated further that:

> The state of the law of jury directions is conducive of judicial error. Trial judges often face problems in determining when to give directions and in formulating the content of directions. Errors in jury directions have resulted in many retrials being ordered on appeal. The complexity of jury directions does not assist effective communication with juries.[11]

---

8 The practice in most American States, and in Federal jurisdiction, is to deliver what is known as a 'pattern direction', a copy of which is handed to the jury. These pattern directions have been approved by specialist bodies, and are constantly kept under review. As a result, appeals against conviction, based upon misdirection of the jury, are almost non-existent in the United States. It should be noted that judges in the United States rarely, if ever, summarise the evidence led at trial in the course of their jury directions. Indeed, they are often enjoined by law from doing so.

9 Geoffrey Flatman and Mirko Bagaric, 'Juries Peers or Puppets: The Need to Curtail Jury Instructions' (1998) 22 *Criminal Law Journal* 207.

10 *VLRC Report*, above n 6, 30

11 Ibid 8.

1.9 The *VLRC Report* further noted that the only organising common law principle was that a trial judge should give all directions necessary to avoid a 'perceptible risk of miscarriage of justice'.[12] The generality of this statement was said to render it difficult to apply to individual cases.[13]

1.10 The *VLRC Report* recommended the enactment of a single statute dealing with jury directions which would 'require all jury directions to be as clear, brief, simple and comprehensible as possible.'[14]

1.11 Initial reaction to the *VLRC Report* seemed positive. In *Wilson v The Queen*,[15] Maxwell P echoed its criticisms of the law and said that

> if the Victorian community is to continue to have confidence in the operation of jury trials, there needs to be legislative intervention to simplify the directions which judges are required to give.[16]

1.12 Little was done, however, in the immediate aftermath of its publication, to implement its principal recommendations.

1.13 That all changed two years ago. In May 2010, a body known as the Jury Directions Advisory Group ('JDAG') met for the first time.

1.14 That body was constituted under the chairmanship of Mr Greg Byrne, Director of Criminal Law Review, Department of Justice. It has met on a number of occasions. Its members include judges, practitioners, academics and policy advisers. All are highly experienced and expert in the criminal law.

1.15 JDAG focuses, at present, on the following areas of law relevant to the topic of jury directions (some, though not all, arise out of the *VLRC Report*):

---

12 *Longman v The Queen* (1989) 168 CLR 79, 86 (Brennan, Dawson and Toohey JJ).
13 *VRLC Report*, above n 1, 8.
14 Ibid.
15 [2011] VSCA 328.
16 Ibid [5] (Maxwell P).

- post offence conduct;
- directions in relation to the phrase 'beyond reasonable doubt';
- summarising the evidence and integrated directions;
- provision of transcripts to the jury;
- directions on alternative offences/defences and the obligation on parties to identify directions to be given (hereafter referred to as 'the *Pemble* reforms');
- identification evidence;
- delay and forensic disadvantage;
- delay and credibility of the complainant;
- the right to silence (not yet considered); and
- the complainant's motive to lie (not yet considered).

1.16 A separate review body known as the Sexual Offences Advisory Group has also been established. That body first met in August 2010. It is also chaired by Mr Byrne. Its members include judges, practitioners and representatives of the Department of Justice. Its task is to consider reform the law relating to sexual offences in this State.

1.17 Both JDAG and the Sexual Offences Advisory Group meet regularly. They have produced much valuable work.

1.18 At the same time, it was considered that there would be utility in conducting a more concentrated examination of certain particularly problematic areas of the law. These areas of law are noteworthy for their sheer complexity, and the length of jury directions that they typically generate. The areas considered appropriate for close analysis were:

- complicity;
- inferences and circumstantial evidence;

- evidence of prior misconduct - tendency and coincidence; and
- jury warnings and unreliable evidence.

1.19 At the instigation of the Chief Justice and the President of the Court of Appeal, a team was constituted to review jury directions in those areas. That team comprised Weinberg JA, together with his staff,[17] and staff from the Judicial College of Victoria[18] and the Department of Justice. [19]

1.20 The work of that team is presented in this report. Each member of the team has contributed significantly to both the research that has gone into the summary of the current law, and the discussion of possible avenues for reform. The Report is very much a joint effort. It represents the considered view of the team as a whole.

Approach and Method

1.21 The Report is the product of several months of research and consultation with members of the judiciary, academics and practitioners experienced in criminal law. The authors met regularly to discuss issues relating to the above areas of law and to consider how jury directions in those areas might be rendered less complex.

1.22 In order to assess the state of the current law, the authors met with a consultative committee comprising members of the judiciary from the Court of Appeal, the Trial Division of the Supreme Court and the County Court.[20] All were experienced in the conduct of criminal trials.

1.23 The consultative committee provided assistance in several ways. First, it provided a first-hand account of the problems currently associated with

---

17 Jack O'Connor, Milla Bursac and Maria Luzza.
18 Matthew Weatherson, Jamie Walvisch and Tin Bunjevac.
19 Michèle Briggs and Jacinth Pathmanathan.
20 Justice of Appeal Redlich and Justice Coghlan, and their Honours Judge Punshon, Judge Wilmoth, Judge Mullaly, Judge Dean and Judge Maidment.

charging the jury in a criminal trial. Secondly, it expressed a view on whether simplification of jury directions in the above areas of law would be possible without legislative amendment. Thirdly, it considered whether various proposed reforms would have a significant benefit in practice. Finally, it made a number of suggestions for useful reform.

1.24 The assistance of the consultative committee was invaluable in the preparation of this Report.

1.25 The significant assistance of the Office of Parliamentary Counsel in the drafting of the proposed statutory provisions contained in this Report should also be noted. A member of that body, Ms Diana Fagan, attended several meetings with the authors and the consultative committee in order to discuss the feasibility of certain legislative amendments which had been suggested, and to clarify the precise nature of the proposed legislation so that it could be drafted accurately, coherently and intelligibly.

1.26 The authors also benefited from academic input in the field of psychology, particularly regarding how psychology may explain or predict jury reasoning processes in certain cases. Research in this field proved especially useful in gaining an appreciation of the impact of complex jury directions on juror comprehension. It was also employed in order to analyse the likely effect of the proposed reforms and to assess whether they would have any benefit in practice.

Scope of the Problem: Research into the Intelligibility of Jury Directions

1.27 The academic research considered in the preparation of the Report includes not only assessment of the language used in directing the jury from a psychological perspective, but also empirical studies on the actual levels of

comprehension demonstrated by mock jurors after listening to a judge's charge.

1.28 Overall, the literature presents a bleak picture of the effectiveness of the jury directions currently given in this State and elsewhere.

1.29 Academic research has 'almost unanimously' concluded that a 'jury's ability to comprehend legal instructions is poor and that there is room for considerable improvement.'[21] Two leading researchers in this area, Ogloff and Rose, put the matter even more starkly after considering and analysing a series of empirical studies which had sought to measure jury comprehension. They stated that

> jurors appear largely incapable of understanding judicial instructions as they are traditionally delivered by the judge … [t]he overwhelming weight of the evidence is that [jury] instructions are not understood and therefore cannot be helpful.[22]

1.30 The principal contributing factor to the problem of unintelligibility is that jury instructions are overly complex. Jury directions drafted in dense and legalistic language are unlikely to be understood by lay jurors. Such language is nevertheless commonly used in jury directions due to a perceived risk of a successful appeal if those directions do not precisely echo the language used in appellate judgments.[23]

1.31 One suggested solution is to reformulate jury directions by reference to psycholinguistic principles. For example, in a 1979 study published in the

---

21 Marie Comiskey, 'Initiating Dialogue: About Jury Comprehension of Legal Concepts: Can the "Stagnant Pool" be Revitalized?' (2010) 35 *Queen's Law Journal* 625, 629.

22 James R P Ogloff and V Gordon Rose, 'The Comprehension of Judicial Instructions' in Neil Brewer and Kipling D Williams (eds), *Psychology and Law: an Empirical Perspective* (Guilford Press, 2005) 407, 425.

23 For a useful discussion of this phenomenon, see Bethany K Dumas, 'Jury Trials: Lay Jurors, Pattern Jury Instructions, and Comprehension Issues' (2000) 67 *Tennessee Law Review* 701, 708.

Columbia Law Review, Robert and Veda Charrow sought to measure the degree of juror comprehension and to identify linguistic methods of increasing juror comprehension.[24] The authors tested jury comprehension by means of 'paraphrase tests'. In those tests, persons who had listened to a jury direction were required to then paraphrase it.[25] The accuracy of the paraphrasing indicated whether the listener had understood the direction. The test scores obtained indicated that the subjects had difficulty understanding the instructions.[26] This finding of poor levels of juror understanding has since been verified on numerous occasions. In 1997, a summary of empirical research on the topic stated that:

> it has been consistently shown that jurors do not understand a large portion of the instructions presented to them. It is common to find over half the instructions misunderstood, and even the most optimistic results indicate that roughly 30% of the instructions are not understood.[27]

1.32 Charrow and Charrow then sought to isolate certain aspects of the directions which had caused difficulty. For instance, they found, in accordance with psycholinguistic research, that double or triple negatives had a major impact on jury comprehension.[28] This finding is consistent with the Australian experience of the confusion experienced in applying the directions on self-defence given by the High Court in *Viro v The Queen*.[29] As is well known, the *Viro* directions contained a number of negatives and double negatives, and were considered almost unintelligible.

1.33 The study found that when the paraphrase test was repeated following

---

24 Robert P Charrow and Veda R Charrow, 'Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions' (1979) 79 *Columbia Law Review* 1306.

25 Ibid 1310.

26 Ibid 1316.

27 Joel D Lieberman and Bruce D Sales, 'What Social Science Teaches us about the Jury instruction Process' (1997) 3 *Psychology, Public Policy and Law* 589, 596-7.

28 Charrow and Charrow, above n 1.20, 1324.

29 (1978) 141 CLR 88, 146-7 (Mason J).

certain linguistic amendments made to the direction, levels of jury comprehension were significantly higher. Those amendments included the:[30]

- inclusion of verb forms in preference to nominalisation;
- reduction of passive verb forms, particularly in subordinate clauses;
- simplification of language to use commonly used words in preference to complex legal language;
- reduction of 'word lists' of several more or less synonymous words to one word or two; and
- elimination of negatives.[31]

1.34 A study by Severance and Loftus in 1982 came to a similar conclusion. In that study, the authors made revisions to pattern instructions in accordance with psycholinguistic principles. They found 'concrete evidence that psycholinguistic changes in pattern instructions can improve jurors' abilities to both comprehend and apply pattern instructions.'[32]

1.35 This research into the utility of psycholinguistics provides a useful basis for simplifying jury directions.

1.36 However, it may be that the legal concepts on which the jury must be directed in this State are themselves so complex that intelligible jury directions are impossible, even after substantial linguistic modification.

1.37 Empirical research tends to support the proposition that conceptual complexity cannot be wholly ameliorated by linguistic modification of jury directions. Following their 1982 study, Severance and Loftus concluded that while linguistically revised directions did improve jury comprehension, there

---

30 Charrow and Charrow, above n 1.20, 1329.

31 For an expansive lists of psycholinguistic methods of aiding comprehension, see J Alexander Tanford, 'The Law and Psychology of Jury Instructions' (1990) 69 *Nebraska Law Review* 71, 81.

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

were still a considerable number of instances of miscomprehension.[33] Other studies have reached similar conclusions.[34] Therefore, it appears that there is a limit to the benefits of linguistic modification of jury directions.

1.38 One explanation put forward by Ogloff and Rose to explain the limitations of linguistic modification is that the sheer complexity of the legal concepts involved is such that they remain difficult to understand regardless of how they are expressed.[35] As one writer put it, '[i]f the law itself is incoherent, no amount of redrafting of pattern instructions is going to result in jurors understanding it.'[36] Certainly, this is apparent when it comes to explaining doctrines such as complicity to juries. It is virtually impossible to explain the law of complicity, in its current form, to juries in a readily intelligible manner. The other areas of law discussed in this report also suffer from a high degree of inherent complexity.

1.39 The issue of complexity of the law being a limiting factor in the simplification of jury directions poses a major problem. As Severance and Loftus point out, it necessitates 'input from both psychological and legal perspectives'.[37] Ultimately, the only solution may be to substantially reform the areas of law under consideration. In some cases, this might require substantial overhaul and perhaps complete codification. Indeed, that is precisely the conclusion reached in this Report as to the law of complicity.

1.40 A further area of difficulty identified in the academic literature is that known as 'reactance theory'. Broadly, that theory holds that where jurors are specifically warned against reasoning in a particular way, they are, in effect, more likely to in fact reason in that prohibited manner. This has major

33 Ibid.
34 See the discussion in Ogloff and Rose, above n 22, 428.
35 Ibid.
36 Tanford, above n 31, 102.
37 Severance and Lofus, above n 33, 184.

ramifications where evidence is admitted for one purpose, but is inadmissible for another.[38] The theory raises the question whether limiting instructions in fact serve their purpose, or indeed, any constructive purpose at all.[39]

1.41 A study conducted by Broeder in 1959 illustrates the theory.[40] In that study, jurors were assigned the task of making an award of damages in a tort case. When not told that the defendant had insurance, the jury made an average award of $33,000. When they were made aware of the insurance, the average award increased to $37,000. When the jurors were aware of the insurance and given an instruction to disregard it, the average award increased markedly to $46,000. The direction to disregard insurance had the effect of highlighting its importance as far as the jury was concerned.

1.42 The result of Broeder's study is entirely in accordance with the experience of practitioners experienced in the conduct of criminal trials. It has long been acknowledged amongst practitioners and judges that there may be sensible forensic reasons for defence counsel to decline a limited use warning.

1.43 The research suggests that the stronger the judge's limiting use direction, the more likely it is that the jury will engage in the forbidden reasoning.[41] In light of this research, it might be preferable to state limited use directions in less strong language, or, depending on the attitude of the parties, not to give them at all. The latter approach is, of course, inconsistent with the *Pemble v The Queen* obligation to direct the jury as to any matter upon which the jury could base a verdict, notwithstanding the tactical decisions of counsel.[42] This issue is discussed later in the Report.

---

38 See, eg, *Evidence Act 2008* s 95.

39 See generally Paula Rogers, 'Supporting the Right to Fair Trial with Reforms to Jury Directions and Jury Selection' (2012) 32 *Queensland Lawyer* 26, 33.

40 Dale Broeder, 'The University of Chicago Jury Project' (1959) 38 *Nebraska Law Review* 744.

41 See, eg, Lisa Eichhorn, 'Social Science Findings and the Jury's Ability to Disregard Evidence under the Federal Rules of Evidence' (1989) 52 *Law and Contemporary Problems* 341, 346-7.

42 (1971) 124 CLR 107, 117-8 (Barwick CJ).

1.44 The literature also raises other matters which have the potential to affect jury comprehension. One is the question of when directions should be given. There is no clear consensus, however, as to whether directions given at the start of a trial are any more effective than those given at the conclusion of the evidence.[43] One useful finding that does arise from psychological research is that repetition of jury instructions has a beneficial effect on jury comprehension.[44] The timing and number of directions is of course subject to the demands of each trial and it may not always be possible or desirable for trial judges to repeat directions on certain points. Nevertheless, it may be useful, for example, for a direction to be given regarding use of evidence at the time it is admitted and then, again, during the final charge.

1.45 This approach recognises the reality that jurors process evidence – and form their views on it – as the trial progresses. If a jury is only directed as to the permissible use that may be made of an item of evidence at the conclusion of the evidence as a whole, they may be required to revise their initial views of that item of evidence, and its importance in the trial. This is an unrealistic burden to place on jurors.[45] This issue will be discussed throughout the Report, and particularly with reference to directions regarding tendency, coincidence and context evidence.

1.46 It is understood that there are limits to the utility of studies which rely on mock jurors to reach conclusions about the thought processes of actual jurors involved in real cases. First, mock jurors will be aware that their decisions will have no consequence in practice. Jurors in a real trial are plainly aware that their verdict will have real consequences for the accused. Secondly,

---

43 See generally Lieberman and Sales, above n 27, 629-30; Ogloff and Rose, above n 22, 431-2.

44 Tanford, above n 31, 84.

45 See Timothy D Wilson and Nancy Brekke, 'Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations' (1994) 116 *Psychological Bulletin* 117, 117.

many studies rely too heavily on university students to make up mock juror pools.[46] To that extent, the data based upon such studies may be distorted. The conclusions outlined above have, however, been repeatedly verified over many years, and must be given due weight. The conclusions also accord with the experience of many practitioners and judges. For these reasons, this Report treats the studies referred to above as useful guides to jury thought processes.

1.47 To conclude, psychological research has informed the approach taken in this Report to the consideration of the reform of jury directions. The changes recommended by the Report seek to simplify jury directions in a realistic manner which recognises that there are limits to jurors' powers of comprehension. In some areas of law, as will be seen, the only realistic means of simplification is to substantially modify the law underlying the directions. And the Report has not hesitated to recommend such modification, where appropriate.

---

46 See Richard L Wiener, Daniel A Krauss and Joel D Lieberman, 'Mock Jury Research: Where do we go from Here? (2011) 29 *Behavioral Sciences and the Law* 467, 470.

2. COMPLICITY

Overview

2.1 The doctrine of complicity determines when one party, by virtue of his or her actions, may be held criminally responsible for the actions of another.[1] The law relating to complicity should be clear and capable of being understood by ordinary lay persons. Regrettably, in its current form, it meets neither of these requirements.

2.2 It is astonishing to think that the *Victorian Criminal Charge Book*[2] contains 76 closely-typed pages on this subject alone. The discussion is broken up into 16 separate sections. There are detailed bench notes dealing with 'acting in concert' (8 pages), 'joint criminal enterprise' (4 pages), 'extended common purpose' (3 pages), 'aiding, abetting, counselling and procuring' (11 pages) and 'assisting offender' (4 pages). There are separate model charges for 'acting in concert' (6 pages), 'joint criminal enterprise' (6 pages), 'extended common purpose' (5 pages), 'counselling and procuring' (5 pages), 'aiding and abetting' (6 pages) and 'assisting offender' (6 pages).

2.3 The current situation is even worse than that suggested by the sheer length of the material. There is typically a degree of overlap between the various forms of complicity so that, for example, a jury might have to be directed, in the one case, as to counselling and procuring, aiding and abetting, acting in concert, and joint criminal enterprise. Each of these forms of complicity has its own inherent difficulties. It is hardly surprising, therefore, that trial judges find the task of instructing juries in this area particularly onerous. It is also hardly surprising that a significant number of appeals succeed on the basis of misdirection as to this branch of the law.

---

1 Of course, the liability of the secondary party is not a substitution for the liability of the principal offender, but is in addition to that liability. Complicity is generally equated with 'accessorial liability', and is usually regarded as derivative in nature. It should be kept separate from the joint liability of principals where the liability of each offender is primary.

2 Judicial College of Victoria, *Victorian Criminal Charge Book* ('*Charge Book*').

The Current Law and Its Critics

2.4 The law of complicity has developed in what has been described as a 'rather haphazard and inconsistent fashion'.[3]

2.5 It is easy to understand why complicity is a basic form of criminal conduct. Though she did not strike the fatal blow, Lady Macbeth was at least as culpable as her husband in the murder of Duncan. Yet, while such culpability is intuitively grasped, the theoretical basis of the doctrine seems to be poorly understood.

2.6 A notable exception is the work of Professor K J M Smith. He writes as follows:

> Criminalising indirect participation can be approached in two fundamentally different ways: by regarding the substance of liability as the secondary actor's mental association with or commitment to a criminal objective, as manifested in and evidenced by his overt action; or, shifting the focus, through his culpable activities, making the secondary party share responsibility for the occurrence of the principal offence.[4]

2.7 In other words, complicity may be viewed as a kind of inchoate offending, endangerment based, but directed towards the specific conduct of the person said to be complicit. Alternatively, complicity can be seen as parasitic or derivative in nature. This second approach makes the accessory's liability contingent upon the actual commission of a principal offence by another, and renders the accessory equally guilty with the principal offender.

2.8 As will be seen, the common law has always favoured the derivative approach. That model is, however, deficient in a number of key respects. Its imperfections have led to the development of some rather refined notions of primary, or inchoate, liability, all of which have been engrafted upon the original derivative model. Regrettably, this has contributed to the complexity

---

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

4 K J M Smith, *A Modern Treatise on the Law of Criminal Complicity* (Clarendon Press, 1991) 2-3.

and confusion associated with this subject.

2.9 Justice Geoffrey Eames, writing extra-judicially, commented upon the difficulty that trial judges routinely face when charging juries on this subject.[5] He referred to one case in particular, *R v Jones*,[6] as 'every trial judge's worst nightmare'. He added:

> …the 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.[7]

2.10 In *Jones*, the South Australian Court of Criminal Appeal held, by majority, that the directions regarding complicity given by the trial judge had been adequate. All members of the Court, however, condemned the 'exceedingly complex'[8] nature of the law in this area and acknowledged the extraordinary burden that the judge's charge had imposed upon the jury.

2.11 To illustrate the absurdity into which some aspects of the trial had descended, Justice Eames quoted from the trial judge's charge on 'joint enterprise'. In a written direction to the jury, the judge had said:

> 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 those accused did not act in self-defence, [the accused] is not guilty of either murder or manslaughter.[9]

2.12 Apart from the fact that this particular direction contained a quadruple negative (two more negatives than any individual limb of the much-maligned direction on self-defence that the High Court at one time endorsed in *Viro v The Queen*),[10] it apparently went unnoticed, both at trial and on appeal, that there was one 'not' too many in the passage set out above.[11]

---

5 Justice Geoff Eames, 'Tackling the Complexity of Criminal Trial Directions: What Role for Appellate Courts' (2007) 29 *Australian Bar Review* 161, 169.
6 (2006) 161 A Crim R 511 ('*Jones*').
7 Eames, above n 5, 169.
8 (2006) 161 A Crim R 511, 572 (Duggan J).
9 Ibid 173.
10 (1978) 141 CLR 88.
11 Eames, above n 5, 173.

2.13 Many judges have expressed frustration at the sheer complexity of this branch of the law. *R v Makin*[12] provides a good example. In that case, the deceased had been struck repeatedly with a baton, before having his throat slit with a knife. In the course of three separate interviews with police, the accused confessed to the killing. At the conclusion of the third interview, however, he claimed that he had not in fact killed the deceased. He added that he was afraid to say anything more.

2.14 The accused gave evidence at his trial. He said that he had gone to the deceased's home, in company with another man, and had been present when that other man killed the deceased.

2.15 The Crown invited the jury to convict the accused of murder, either as the principal offender — which was the Crown's primary position — or, if they accepted any part of the accused's evidence, as an aider and abettor. Defence counsel submitted that the accused should be acquitted of murder and convicted instead of being an accessory after the fact.

2.16 In directing on the possibility of murder by aiding and abetting, the trial judge charged in accordance with *R v Lowery & King (No 2)*.[13] In addition, his Honour felt constrained (presumably by the principle laid down in *Pemble v The Queen*)[14] to direct the jury as to another possibility, not raised by either side. This was that the accused might be guilty of manslaughter on the basis of acting in concert. The accused was convicted of murder.

2.17 On appeal, it was submitted that the trial judge's charge gave rise to the risk, based upon the *Lowery & King* direction that had been given, that the jury might have convicted the accused on the basis that he intentionally

---

12 (2004) 8 VR 262 ('*Makin*').
13 (1972) VR 560 ('*Lowery & King*').
14 (1971) 121 CLR 107.

conveyed his assent or concurrence to the other man, even if he had not intended to assist or encourage him in what he was doing. That submission was rejected.

2.18 It was further submitted that the trial judge had erred in failing to direct the jury as to the possibility of manslaughter, not just by acting in concert, but also by aiding and abetting.

2.19 That latter submission was upheld. The Court of Appeal concluded that the jury might have considered that the accused, by his conduct, encouraged the other man to bash the deceased, but nonetheless entertained a reasonable doubt as to whether he encouraged him to kill or cause inflict really serious injury. In that regard, it was said that a direction on manslaughter by aiding and abetting would have been more appropriate than the direction given on manslaughter by concert.

2.20 Ormiston JA joined in the decision to allow the appeal, and order a retrial. His Honour did so reluctantly. He described the law in this area as producing

> needlessly complicated charges to juries where both they and the accused deserve instructions expressed with clarity and simplicity on the real issues.[15]

2.21 What ought to have been a perfectly straightforward trial, in which the Crown alleged that the accused had, by his own actions, killed the deceased, took on what Ormiston JA described as 'an air of unreality'.[16] This was because of the vast array of possible ways in which it was suggested that the accused could have been held liable for the death of the deceased.

2.22 In *Clayton v The Queen,*[17] Kirby J expressed disquiet as to the complexity of the modern law of complicity. In that case, the High Court was

---

15 *Makin* (2004) 8 VR 262, 263.
16 Ibid.
17 (2006) 231 ALR 500 ('*Clayton*').

asked on behalf of the appellant to revisit the principles governing 'extended common purpose'. It was submitted that this doctrine, as well as the entire general law of complicity, had become virtually incomprehensible.

2.23 That submission was rejected by the majority.[18] Kirby J, however, delivered a powerful and, with respect, carefully reasoned dissent. His Honour said:

> **[113]** The need for re-expression of the law on extended common purpose liability is also demonstrated by the undue complexity that has been introduced by the separate and disharmonious principles to be applied in respect of each of the three ways in which the prosecution sought to justify the applicants' guilt of murder at their trial. For two of these ways (acting in concert and aiding and abetting) intention on the part of the accused at least to cause really serious injury has to be proved. But for the third (extended common purpose liability), proof of intention as such is unnecessary. This distinction introduces a needless disparity and complexity that must be extremely confusing to juries, as well as difficult for trial judges who have the responsibility of explaining secondary criminal liability to a group of lay citizens performing jury service. What jurors must make of the disparity, and the nuances of difference between the distinct modes of possible reasoning to their conclusion, is best not thought about.
>
> **[114]** The unreasonable expectation placed upon Australian trial judges (affirmed by appellate courts) to explain the idiosyncrasies of differential notions of secondary liability to a jury is something that should concern this Court. Especially so in the case of major points of difference in the governing legal principles (such as the absence of reference to specific intention in the explanation of extended common purpose liability). In my view it behoves this Court to try harder to find a unifying principle for secondary criminal liability. After all, the object is to explain to a jury, on the basis of common facts, how they may reason to a single conclusion, namely guilty, or not guilty, of murder. The law should not be as unjust, obscure, disparate and asymmetrical as it is. Its present shape can only cause uncertainty for trial judges and confusion to juries. Where, as in these applications, a specific application was made to this Court to rationalise and unify the applicable law, we should not rebuff the request so peremptorily and uncritically. On the contrary, this is precisely the kind of case in which a court such as this fulfils its role as expositor of the general principles of the common law for this country.
>
> **[115]** The joint reasons suggest that the issues for the jury's verdicts need not be over-elaborate or over-complicated in trials of the present kind. I wish that I could agree. The experienced trial judge who presided at the trial of the present applicants that lasted 46 sitting days charged the jury over 3 days. In the hope, no doubt, of avoiding accidental error in his oral directions, he

---

18 Ibid 505 [21].

provided the jury with written instructions that reflected the substantial complexities of the elements of each of the three ways in which the prosecution put its arguments for verdicts of guilty of murder. In accordance with *McAuliffe*, the written direction asked the jury, relevantly, to decide whether:

> The Accused you are considering foresaw as a possibility in the carrying out of the agreed understanding or arrangement that death or really serious injury would occur by a conscious, voluntary and deliberate act of one of them not done in self defence.

[116] For issues which the majority say are relatively simple, a great deal of effort was consumed to explain the different principles to the jury, and correctly so. Much of counsel's addresses at the trial were devoted to the same points. The prosecution was entitled to present the cases against the three applicants in every way lawfully available to it. However, the ensuing disparities and inconsistencies in the applicable principles of secondary liability introduce undue complexity to the applicable legal rules upon which the jury are told they must act.

[117] Such complexity is also inconsistent with the basic function of jury trial. In these proceedings this Court cannot solve all of the problems presented by the complexity. However, in my view, the Court should endeavour, when the opportunity is presented, to remove or reduce at least the most obvious inconsistencies of which the applicants complain. If ever there was a part of the law where consistency and symmetry should be at a premium, it is where murder is charged and where the trial judge has the duty of explaining to the jury, by reference to the facts, how they may reason to their verdict on that charge. These are powerful reasons for reducing the disharmony in the separate modes of reasoning which are occasioned by the present law on extended common purpose liability. The applicants specifically requested this Court to do so. On this occasion, there is no procedural or technical impediment to the Court's responding to the request.[19]

2.24 Kirby J subsequently repeated his criticisms of the doctrine of extended common purpose in *R v Taufahema*.[20]

2.25 The New South Wales *Criminal Trial Courts Bench Book*, published by the Judicial Commission of New South Wales,[21] deals with the whole of the law of complicity in a much more succinct manner than does the *Criminal Bench Book*. It puts forward model directions for 'accessor[ies] before the

---

19 Ibid 527-8.

20 (2007) 228 CLR 232, 274-5 [115]-[116].

21 Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book* (2012) <http://www.judcom.nsw.gov.au/publications/benchbks/criminal/index.html>.

fact',[22] 'aider[s] and abettor[s]',[23] 'joint criminal enterprise' and 'common purpose'.[24] Importantly, it contains no separate treatment of 'acting in concert'.

2.26 Although the law is stated more briefly in the New South Wales Bench Book, and certainly more simply, it is still regarded in that State as being in an entirely unsatisfactory state.

2.27 In December 2010, the New South Wales Law Reform Commission published a lengthy Report, running for some hundreds of pages, dealing exclusively with complicity. The Report concludes:

> The inconsistent doctrinal bases for [secondary or derivative liability in relation to accessories before the fact, principals in the second degree, parties to a joint criminal enterprise, and parties to an extended joint criminal enterprise] and the gaps or uncertainties in the common law, have left the law in an unsatisfactory state. In order to deal with these problems, the Commission recommends a 'codification' of the relevant principles to supersede those that currently exist at common law.[25]

2.28 In England, complicity is still governed by the common law, save for incitement which has been codified.[26] The law, as understood in that country, continues to pose problems. The current *Crown Court Bench Book*[27] requires some 31 pages of close text merely to outline the basic principles of accessorial liability. It also provides a series of 'illustrations' which are designed to assist trial judges in formulating their directions on this subject. It should be noted that, in England, there are no pattern directions as such.

2.29 The position is no better in Canada. For example, Watt's *Manual of*

---

22 Ibid [2-710].
23 Ibid [2-730].
24 See ibid [2-800]-[2-900].
25 New South Wales Law Reform Commission, *Complicity*, Report No 129 (2010) xi.
26 *Serious Crime Act* 2007 (UK) c 27.
27 Judicial Studies Board, *Crown Court Bench Book: Directing the Jury* (2010).

Criminal Jury Instructions contains a series of pattern directions regarding complicity which runs for 26 pages.[28]

2.30 In summary, almost every jurisdiction that has considered the law of complicity in recent years has concluded that it is far too complex, that it lacks coherence, and that only some form of codification can cure the problem.[29]

The Need for Statutory Reform

2.31 The English Law Commission, as long ago as 1972, as part of its program of codification of the criminal law, suggested that radical surgery would be required if the law of complicity were to be rendered coherent.[30]

2.32 In 1993, the English Law Commission again called for a new scheme of statutory offences to replace the common law of complicity.[31] In 2006,[32] a further Report by that body resulted in the adoption of a series of new statutory inchoate offences of encouraging or assisting the commission of a crime.[33] These offences, being inchoate, are not derivative. They do little more than replace the common law of incitement.

2.33 As previously indicated, the New South Wales Law Reform Commission has recommended virtual codification of this branch of the law. The Report states that the aim should be to harmonise the elements of each form of liability, to replace archaic expressions with modern language, and to frame the recommended provisions, wherever appropriate, in a way

---

28 David Watt, *Watt's Manual of Criminal Jury Instructions* (Carswell, 2005). This text is frequently used by trial judges in Canada in formulating jury directions. See generally *R v Macdonald* [2008] ONCA 778 (20 November 2008) [19] (Sharpe JA).

29 See generally for the benefits of such codification, when dealing with the general principles of criminal responsibility, Matthew Goode, 'Codification of the Criminal Law' (2004) 28 *Criminal Law Journal* 226.

30 The Law Commission, 'Codification of the Criminal Law' (Working Paper No 43, 30 June 1972).

31 The Law Commission, 'Assisting and Encouraging Crime' (Consultation Paper No 131, 1993).

32 The Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report No 300 (2006).

33 See *Serious Crime Act 2007* (UK) c 27, pt 2.

compatible with the equivalent provisions to be found in the Commonwealth *Criminal Code Act 1995* (Cth) ('*Criminal Code*').[34]

2.34 The Victorian Law Reform Commission, in its Report entitled 'Jury Directions',[35] was also highly critical of the law relating to complicity.[36] As has been noted, Justice Eames, one of the principal consultants to the Commission, and a major contributor to the Report, had earlier focused heavily upon the deficiencies in the current law of complicity.[37]

A. Historical background

2.35 It is impossible to understand how the modern law of complicity came to be in its present form without some appreciation of 'its tortured procedural history'.[38]

2.36 The common law distinguished between different modes of complicity depending upon the nature of the offence said to have been assisted or encouraged. Thus, in relation to felonies, the law identified several 'degrees' of participation. The person who physically carried out or perpetrated the offence was designated the 'principal in the first degree'. Any person who assisted or encouraged the perpetrator during the commission of the offence was described as a 'principal in the second degree' (often called an 'aider and abettor').[39] Any person not physically present during the commission of the offence, but who had previously assisted, encouraged, or otherwise contributed to its commission, was described as an 'accessory before the fact'. There was also a separate category of complicity for those who, after the commission of an offence, provided assistance to the perpetrator. These were

---

34 New South Wales Law Reform Commission, *Complicity*, Report No 129 (2010) xi.
35 Victorian Law Reform Commission, *Jury Directions*: *Final Report* , Report No 17 (2009).
36 Ibid 31.
37 Eames, above n 5.
38 K J M Smith, above n 4, 22.
39 And sometimes styled an 'accessory at the fact' by ancient writers: see J W C Turner (ed), *Kenny's Outlines of Criminal Law* (Cambridge University Press, 18th ed,1964) 66.

known, in the case of felonies, as 'accessories after the fact'.[40]

2.37 These terms did not apply to lesser offences, whether indictable (misdemeanours) or summary. The law deemed all accessories, in relation to such offences, to be principals.

2.38 The distinctions once drawn between different modes of participation stemmed from early judicial attempts to overcome some of the difficulties presented by the common law's attachment to viewing accessorial liability as derivative in nature.[41]

2.39 From about the 13th century, the common law developed a strict rule that an accessory to a felony could not be convicted unless it was proved that the actual perpetrator of the crime had been both convicted and punished. Plainly, this was unduly restrictive, and unsatisfactory.

2.40 From about the 16th century, English courts began to resort to a legal fiction that deemed accessories who were present at the scene, aiding and abetting the commission of the offence, to be 'principals'.

2.41 This fictitious device found statutory expression in England in the 19th century.[42] Thereafter, any person who aided, abetted, counselled or procured the commission of a felony was liable to be tried and punished as a principal offender.[43] From that time, any accessory could be indicted even though the principal felon had not yet been convicted, or even if he or she was not amenable to justice. Basically, and despite the abolition of the distinction

---

40 Accessories after the fact stood in a different category to other forms of complicity. Their liability was more remote from that of the principal offender. Their offence was viewed as distinct and different from the crime committed by the actual perpetrator, although dependent upon the 'fact' of the felony: see generally *Mahadeo v The Queen* [1936] 2 All ER 813. It is not proposed to deal with this form of complicity in this chapter.

41 For a valuable discussion of the theoretical differences between criminalising indirect participation directly (inchoate or endangerment based) or alternatively 'parasitically' or derivatively, see K J M Smith, above n 4, ch 4.

42 *Accessories and Abettors Act 1861* (UK), 24 & 25 Vic, c 94.

43 The same is true in Victoria. See *Crimes Act 1958* s 323.

between felonies and misdemeanours, that remains the position in Victoria today.

B. The derivative basis of complicity

2.42 Of course, much of the learning regarding complicity is today only of historical interest. For one thing, as has been noted, the distinction between felonies and misdemeanours is no longer maintained in this State. This means that it is unnecessary, and inappropriate, to characterise aiders and abettors, who are present at the scene of the offence, as 'principals in the second degree'. It also means that counsellors and procurers are no longer characterised as accessories before the fact.[44]

2.43 Section 323 of the *Crimes Act 1958* provides that '[a] person who aids, abets, counsels or procures the commission of an indictable offence may be tried or indicted and punished as a principal offender.' This section, and others like it, by deeming all secondary parties to be principal offenders, have been held to be merely declaratory of the common law.[45] For example in *Giorgianni v The Queen*,[46] Mason J observed that provisions of this kind were merely procedural in nature and did not create any substantive offences.

2.44 One thing is clear. The current position in this State is that the liability of secondary parties to a crime is derivative. A person cannot be party to a crime without it being established that someone else, the actual offender, committed that crime. This means, for example, that if the actual offender has been tried and acquitted, the secondary party is immune from liability.

2.45 The common law's hold upon derivative liability as the basis for complicity is powerful. Even where the entire law of complicity has been

---

44 *R v Froggertt* [1965] 1 QB 152; *R v Creamer* [1966] 1 QB 72.

45 *Gould & Co Ltd v Houghton* [1921] 1 KB 509; *Director of Public Prosecutions (Northern Ireland) v Maxwell* [1978] 1 WLR 1350, 1359; *Giorgianni v The Queen* (1985) 156 CLR 473.

46 (1985) 156 CLR 473, 490 ('*Giorgianni*').

codified, liability is still generally regarded as derivative.[47]

2.46 Linking accessorial liability to proof that an offence has been committed can give rise to difficulty. Unlike attempt, conspiracy and incitement (all of which are inchoate offences and can be viewed as genuine extensions of criminal liability), complicity continues to be regarded as nothing more than the participation of a secondary party in an offence actually committed by someone else.

2.47 As will be seen, this creates problems when it comes to characterising the fault element, in particular, that must be established in order to make out a case based upon complicity.

2.48 There is much debate among legal scholars as to whether liability for complicity should be derivative. For example, Simon Bronitt has written, on this subject:

> In both England and Australia, the derivative nature of criminal complicity has been a major source of academic dissatisfaction with the common law. The derivative nature of complicity links the liability of the accessory to the *guilt* of the perpetrator. This produces many conceptual strains within complicity.
>
> …
>
> A rational system of secondary liability should be based on the accessory's own mental attitude and conduct. Culpability should not be determined by sharing the perpetrator's mens rea … nor should it depend upon the completion of the crime contemplated by the perpetrator.[48]

2.49 To the same effect, Professor George P Fletcher has written:

> The substantive question with regard to the principal's liability is much more difficult. Suppose that the perpetrator is insane or diplomatically immune to prosecution. Should it follow that the people who aided him in committing robbery will not be liable at all? It would certainly seem odd to let the accessories go because the state could not secure a conviction against

---

47 See, eg, s 11(2) of the *Criminal Code Act* 1995 (Cth) which requires, as a condition for liability, that the offence must have been committed by someone if there is to be complicity. Of course, there is no need for the principal offender to have been prosecuted or convicted.

48 Simon Bronitt, 'Defending *Giorgianni* – Part Two: New Solutions for Old Problems in Complicity' (1993) 17 *Criminal Law Journal* 305, 317-8.

> the principal. Yet what does it mean to say that the accessory's responsibility derives from that of the principal. It must derive from *something*. The problem is determining what that 'something' is. The two extreme positions are these:
>
> 1. The principal must at least be guilty in principle, of having committed the offense.
>
> 2. The principal need not be guilty of anything. Indeed, the intended principal need not have carried out the crime at all.
>
> There is much support, in theory at least, for the first doctrine. And as we shall see, there is growing support around the world for the opposite extreme, which renders liability for complicity independent of the actions of others.
>
> A middle position emerges by asking the questions: What is the minimal condition for liability? What must occur before we can think of holding anyone liable for the offense? The right answer, it seems to me, is that there must arise a criminal state of affairs. This means that some human act must constitute a wrongful violation of the law. Once we know that some individual has acted wrongfully, without justification, in violation of the law, then we can ask the question: To whom is this action attributable? Who shall be held responsible, and to what degree, for the unlawful state of affairs. Everyone who contributed causally to the occurrence of the unlawful state of affairs should then answer according to his or her personal culpability.
>
> This abstract way of putting the theory of complicity reduces it to a simple formula. The principal must act wrongfully or unlawfully .... The principal will be punished for the offence if and only if the principal is also culpable, that is, not excused, for acting wrongfully in violation of the law. An accessory can be punished if and only if the accessory is also culpable, that is, not excused, for having contributed to the occurrence of the wrongful violation of the law.[49]

C. Likiardopoulos v The Queen

2.50 The issue of whether complicity should continue to be regarded as derivative was raised before the High Court in *Likiardopoulos v The Queen*, an appeal that was heard on 31 May 2012. [50]

2.51 The facts were as follows. The badly decomposed body of the victim was found in bushland some five months or so after he went missing. The

---

49 George P Fletcher, *Basic Concepts of Criminal Law* (Oxford University Press, 1998) 195.

50 The decision of the Court of Appeal is reported at (2010) 208 A Crim R 84 ('*Likiardopoulos*').

appellant, together with five other men, was charged with murder. However, the Crown accepted pleas to lesser offences from all the accused, apart from the appellant, who pleaded not guilty to a charge of murder. Two of those men gave evidence for the prosecution at the appellant's trial. The appellant was convicted of murder.

2.52 The case against the appellant was put on two separate and alternative bases:

- that he was party to a joint criminal enterprise to assault the victim with the intention of causing him really serious injury; or
- that he counselled or procured the others to assault the victim with the intention of causing him really serious injury.

2.53 The case was not put as one of acting in concert. That may be because there was doubt as to whether the appellant was physically present when the deceased was bashed. *Lowery & King* stipulates that acting in concert requires proof of such presence if it is to be relied upon.[51]

2.54 The primary issue argued in the High Court was whether it was an abuse of process for the Crown to have continued with a charge of murder against the appellant in circumstances where it had accepted pleas of guilty to lesser offences by all other participants. It should be noted that the trial was conducted throughout on the basis that the Crown, notwithstanding its willingness to accept such pleas from the other men, had to establish, as against the appellant, that the crime of murder had in fact been committed.[52]

2.55 The Crown argued, before the High Court, that the common law, as it was understood in England, had developed to the point that complicity should no longer be regarded as derivative. In its written submissions, the

---

51 [1972] VR 560, 561 (Smith J).

52 Counselling or procuring is, and always has been, regarded as derivative in nature. See, eg, *Surujpaul v The Queen* (1958) 42 Cr App R 266. So too is joint criminal enterprise, which is, as will be seen, separate in that respect from acting in concert.

Crown contended that all that need be proved, in order to establish complicity, was that someone had committed the *actus reus* of the offence. It was submitted that the Crown no longer needed to establish that the principal offence had been committed. If that submission were to be accepted, complicity would no longer be regarded as fully derivative. Indeed, it would attach to a secondary party even if that party did not have the same *mens rea* as the actual perpetrator of the crime in question.

2.56 The Crown argued that there was now in existence, in England, a considerable body of authority to support its contention that complicity was no longer derivative.[53] Indeed, the Crown went further and pointed to Privy Council authority which held that even the acquittal of an alleged perpetrator, at an earlier trial, was no bar to the subsequent conviction of a different party charged on the basis of complicity.[54] If that Privy Council decision states the common law correctly, complicity is no longer to be regarded as derivative at all.

D. Should liability in complicity be primary and not derivative?

2.57 Professor John Smith, perhaps the leading scholar in the field of criminal law in England, strongly supported a non-derivative approach to complicity.[55] So too does Professor Peter Gillies who has written extensively on this subject from an Australian perspective.[56]

2.58 The abolition of the requirement that complicity be derivative has much to commend it. There is no reason, in principle, why an accused should be immune from prosecution for an offence simply because the person who actually perpetrated that offence has a defence that is not available to the accused. No such immunity attaches to principals who act in concert, or are

---

53 See *R v Howe* [1987] 1 AC 417; *R v Loukes* [1996] 1 Cr App R 444.

54 *Hui Chi-ming v The Queen* [1992] 1 AC 34.

55 See J C Smith, 'R v Millward: Commentary' [1994] *Criminal Law Reports* 528; J C Smith, 'Criminal Liability of Accessories: Law and Law Reform' (1997) 113 *Law Quarterly Review* 453.

56 Peter Gilles, *Criminal Law (*Lawbook, 4th ed, 1997) 185.

held liable through doctrines such as innocent agency, and there is no justification for treating complicity any differently. Of course, the law would be much easier to apply if such a change were effected.

2.59 It must be acknowledged, however, that the common law regarding complicity is less developed in this country than in England. The High Court has repeatedly made it clear that accessorial liability is to be viewed as derivative.[57] It would be a dramatic change if that Court were now, suddenly, to accept the Crown's submissions in *Likiardopoulos* and put complicity on a completely new footing.

2.60 The same may be said of the Victorian Court of Appeal.[58] From time to time, that Court's rigid adherence to the theory that complicity is derivative has given rise to difficulty. For example, the Court has, on occasion, had recourse to what might be described as 'fictitious devices', such as the doctrine of innocent agency, in order to avoid an unjust outcome. In one case, it was held that the accused, who was perfectly aware that the victim was unwilling to have sexual intercourse with anyone, could be convicted of aiding and abetting rape, even though the 'principal offender', who actually had intercourse with her, was acquitted because he mistakenly believed she was consenting.[59]

2.61 It should not be assumed that there is unanimity among legal scholars in calling for complicity to be rendered non-derivative. Professor Glanville Williams always maintained that, as a matter of ordinary logic, this could not be done. In effect, his position, succinctly put, was that 'unless there is a perpetrator of a crime, there cannot be an accessory.'[60]

---

57 *Walsh v Sainsbury* (1925) 36 CLR 464, 477 (Isaacs J) (dissenting); *Cain v Doyle* (1946) 72 CLR 409, 426 (Dixon J); *Jackson v Horne* (1965) 114 CLR 82; *Giorgianni* (1985) 156 CLR 473, 491 (Mason J).

58 *R v Hewitt* [1997] 11 VR 301.

59 Ibid.

60 Ibid 311 (Winneke P). See generally Glanville L Williams, *Textbook of Criminal Law* (Stevens & Sons, 2nd ed, 1983) 368.

2.62 The decision of the High Court in *Osland v The Queen*[61] was a watershed so far as the theory of complicity was concerned in this country. There, the High Court held, by majority, that 'acting in concert' (which, it was accepted, was sometimes viewed as synonymous with 'joint criminal enterprise' and 'common purpose') was in fact a form of primary liability. As such, a party to that concert could be convicted while the other party was either acquitted or, as in the case of *Osland* itself, subject to a hung jury.

2.63 McHugh J (with whom Kirby J essentially agreed) based his judgment upon the fact that liability in concert was primary, and not derivative. His Honour distinguished between acting in concert and other, more traditional, forms of accessorial liability such as aiding and abetting, and counselling and procuring, which he readily accepted were derivative.[62]

2.64 Gaudron and Gummow JJ dissented. Their Honours' conceptual analysis did not differ greatly from that of McHugh J. They saw no reason why a secondary party could not be convicted of an offence even though the actual perpetrator had been acquitted. This could result from the fact that the evidence admissible against each differed. The basis upon which they dissented was factual. They could see no justification for the different outcomes that had been reached, in relation to Heather Osland and her son, in the particular circumstances of the case.

2.65 Callinan J took a different approach. His Honour had little time for the rigid, and highly technical, rules surrounding complicity. He said:

> The distinctions generally owe their existence to technical and substantive differences with respect to modes of trial, jurisdiction, punishment and benefit of clergy, all matters of diminished or no importance in modern times. For more than a century, legislative attempts have been made to simplify the law in these areas. This Court should not reverse that process.[63]

---

61 (1998) 197 CLR 316 ('*Osland*').
62 Ibid 341-51.
63 Ibid 399-400.

2.66 The approach taken by Callinan J bears a striking resemblance to the Crown's submission in *Likiardopoulos* that the High Court 'finally sweep away all the outdated distinctions between principals and accessories in favour of a single coherent principle underlying the law of complicity.'[64] In *Osland*, Callinan J favoured a test of 'sufficient significant contribution' as the basis upon which any notion of complicity should rest.[65]

2.67 Interestingly, in *R v Franklin*,[66] Vincent J adopted a similarly pragmatic approach to complicity, eschewing its refinements, when, as the trial judge in that case, he directed the jury that they could find the accused complicit in murder if they were satisfied that he was sufficiently involved in the commission of the offence, in a causal sense, to make it appropriate to visit him with liability. His Honour's charge to the jury was regarded as too bold by the Court of Appeal which, nonetheless, upheld the conviction on the basis of the proviso.

The Basic Forms of Complicity

2.68 Broadly speaking, there are two forms of complicity currently recognised at common law. The first consists of assisting or encouraging the commission of an offence. The second involves various forms of what might be termed 'group activity'. It is necessary to say something about each before considering what reforms may be desirable in this area.

A. Assisting and Encouraging

2.69 The key provision dealing with assisting and encouraging the commission of an indictable offence in this State is, as has been noted, s 323 of

---

64 The Queen, 'Respondent's Submissions', Submission in *Likiardopoulos v The Queen,* M124 of 2012, 1 May 2012.

65 (1998) 197 CLR 316, 403. See also *Royall v The Queen* (1991) 172 CLR 378, 398 (Brennan J), 411 (Deane and Dawson JJ), 441 (McHugh J).

66 [2001] 3 VR 9.

the *Crimes Act 1958*.[67] This section is expressed in the archaic language of the common law and is as follows:

> 323. Abettors in indictable offences triable as principal offenders
>
> A person who aids, abets, counsels or procures the commission of an indictable offence may be tried or indicted and punished as a principal offender.

2.70 Section 324 is to similar effect, but deals with summary offences only.

2.71 Section 323 identifies four types of conduct that can give rise to accessorial liability. The four terms chosen, 'aider', 'abettor', 'counsellor' and 'procurer', all replicate a concept well known to the common law. Each of them was recognised as having its own distinct meaning.

2.72 For example:

- An 'aider' was one who, while present at the scene of the crime,[68] helped, supported or assisted the perpetrator of the offence.[69] No causal connection was necessary between the act of assistance and the decision to commit the relevant offence.[70] If two persons were involved in a fight and a bystander cheered them on, that bystander could be said to have 'aided' the commission of the offence without having caused that offence, or in any way brought it about.
- An 'abettor' was one who, while present at the scene of the crime, incited or encouraged the perpetrator to commit the offence.[71] The word 'abets' connoted actual encouragement, and not merely an intent to do so. Thus, a case built around 'abetting' was said to require proof that the accused's words or

---

67 Section 325 deals with assisting offenders, or what was formerly termed 'accessory after'. This Chapter does not deal with that offence. It appears not to have given rise to any great difficulty, when it comes to jury directions.

68 *Ferguson v Weaving* [1951] 1 KB 814.

69 *Thambiah v The Queen* [1966] AC 37.

70 *Howell v Doyle* [1952] VLR 128, 134.

71 *Wilcox v Jeffrey* [1951] 1 All ER 464.

conduct contributed in some way to the perpetrator's decision to commit the crime.

- A 'counsellor' was one who advised or encouraged the perpetrator to commit an offence.[72] No causal link needed to be demonstrated.[73]
- A 'procurer' was one who induced or caused that offence to be committed.[74] The *Charge Book* does not stipulate that there must be a causal link between the act of procuring and the offence committed. At common law, however, such a link seems to have been required.[75]

2.73 The use of these four terms in s 323 sometimes still causes difficulty. However, a number of problems have been overcome by the development of a common sense approach to this outdated terminology.

2.74 For example Cussen ACJ in *R v Russell*[76] said, of the terms, 'aid', 'abet', 'counsel' or 'procure', that:

> All the words are instances of one general idea, that the person charged as a principal is in some way linked in purpose with the person actually committing the crime, and is by his [or her] words or conduct doing something to bring about, or rendering more likely such commission.

2.75 In *Giorgianni*,[77] Mason J noted the 'substantial overlap' of the four forms of accessorial liability described above. He stressed the importance of considering the general concept which they all embodied, rather than dealing with them individually.

2.76 In *R v Wong*,[78] Kellam J characterised each of these four terms as simply 'descriptive of a single concept'. His Honour was willing to abandon

---

72 *R v Calhaem* [1985] QB 808.
73 *Charge Book*, above n 2, ch 5.5.2.
74 *R v Beck* [1985] 1 All ER 571.
75 *Attorney-General' Reference (No 1 of 1975)* [1975] QB 773.
76 [1933] VLR 59, 66-7.
77 (1985) 156 CLR 473.
78 (2005) 202 FLR 1.

some of the ancient learning in this area. For example, he concluded that there was no difference whatsoever between an 'aider' and an 'abettor' so far as proof of causation was concerned. Indeed, he went further and concluded that the modern law of aiding and abetting no longer required physical presence at the scene as a condition of liability.[79]

2.77 Most modern commentators also regard the traditional language of complicity as outmoded. Professor Sanford Kadish, for example, suggested that accessorial liability should be couched in simple terms which distinguish between only two forms of conduct: assistance and encouragement.[80] That same approach has been widely adopted by law reform bodies which have considered this subject.

2.78 In light of all this current learning, it is somewhat odd that s 323, and most other legislation that has sought to codify the law of complicity, continues to use the old common law terminology.[81] There seems to be general agreement that juries would find it easier to understand accessorial liability if plain and ordinary language were used to explain the underlying concepts.

B. Group Activity

2.79 Where two or more persons agree to engage in a joint criminal venture, each is liable for the acts of all other parties to the agreement. What is less clear, however, is the precise basis upon which that liability rests.

C. The Charge Book Approach

2.80 In an attempt to bring some coherence to this branch of the law, the

---

79 Ibid 11-17.

80 S Kadish, 'Complicity, Cause and Blame: A Study in the Interpretation of Doctrine' (1985) 73 *California Law Review* 324. These two terms have been adopted as the basis for complicity in England: see the Serious Crime Act (2007) (UK) c 27 ss 44-46. In *R v Arafan* it was expressly noted that the traditional terminology, 'aiding', 'abetting', 'counselling' or 'procuring', essentially 'describe[s] a person who assists or encourages someone else to commit an offence': (2010) 206 A Crim R 216, 218 (Maxwell P and Weinberg JA).

81 See generally Bronitt and McSherry, above n 3, 385-6.

Charge Book suggests that there are three distinct ways in which a person, in this State, may be liable for taking part in a joint criminal venture. These are:

- **Acting in Concert**. This doctrine requires proof that the accused agreed to take part in a criminal enterprise, that an offence within the scope of the agreement was committed, and that the accused was present at the time.
- **Joint Criminal Enterprise**. This doctrine requires proof that the accused agreed to take part in a criminal enterprise, that the accused participated in that enterprise in some relevant way, and that an offence within the scope of the agreement was committed. It differs from acting in concert in that the accused need not have been present when the offence was committed.
- **Extended Common Purpose**. This doctrine requires proof that the accused agreed to take part in a criminal enterprise, that the accused foresaw the possibility that another party to the arrangement would commit an offence outside the scope of the agreement, and that the party committed the foreseen offence in the course of carrying out the agreement.

2.81 It has been suggested that these forms of joint criminal endeavour have evolved in order to impose collateral liability for any offence committed pursuant to an agreement to commit a crime.[82] Indeed, 'common purpose', in that sense, is seen by some as closely linked to historical doctrines such as 'felony murder'[83] and other forms of constructive liability.

2.82 The idea that there should be three separate forms of group activity within the broad ambit of complicity, each with its own elements and body of rules, seems wrong in principle. The difficulties are heightened by the fact that one such form of group activity, acting in concert, is regarded as non-derivative, while both others are viewed as derivative. Explaining this to a

---

82 Ibid 384.

83 Or murder under s 3A of the *Crimes Act 1958* (Vic).

jury would be nothing less than a recipe for confusion.

D. Problems of Nomenclature

2.83 To make matters worse, this is an area where nomenclature has resulted in confusion. A number of the key terms used in relation to the various forms of complicity involving group activity are used in inconsistent ways. The High Court has, on occasion, described the terms 'acting in concert', 'joint criminal enterprise' and 'common purpose' as interchangeable. On other occasions, however, it has insisted upon a strict separation between them.

2.84 To take an example of the former approach, in *McAuliffe*,[84] the High Court said of 'common purpose' that it

> applies where a venture is undertaken by more than one person acting in concert in pursuit of a common criminal design. Such a venture may be described as a joint criminal enterprise. *Those terms - common purpose, common design, concert, joint criminal enterprise - are used more or less interchangeably to invoke the doctrine which provides a means, often an additional means, of establishing the complicity of a secondary party in the commission of a crime*. The liability which attaches to the traditional classifications of accessory before the fact and principal in the second degree may be enough to establish the guilt of a secondary party: in the case of an accessory before the fact where that party counsels or procures the commission of the crime and in the case of a principal in the second degree where that party, being present at the scene, aids or abets its commission. But the complicity of a secondary party may also be established by reason of a common purpose shared with the principal offender or with that offender and others. Such a common purpose arises where a person reaches an understanding or arrangement amounting to an agreement between that person and another or others that they will commit a crime. The understanding or arrangement need not be express and may be inferred from all the circumstances. If one or other of the parties to the understanding or arrangement does, or they do between them, in accordance with the continuing understanding or arrangement, all those things which are necessary to constitute the crime, they are all equally guilty of the crime regardless of the part played by each in its commission.

2.85 The Court went on to say:

> Not only that, but each of the parties to the arrangement or understanding is guilty of any other crime falling within the scope of the common purpose

---

84 (1995) 183 CLR 108, 113-4 (Brennan CJ, Deane, Dawson, Toohey and Gummow JJ) (emphasis added).

> which is committed in carrying out that purpose. Initially the test of what fell within the scope of the common purpose was determined objectively so that liability was imposed for other crimes committed as a consequence of the commission of the crime which was the primary object of the criminal venture, whether or not those other crimes were contemplated by the parties to that venture. However, in accordance with the emphasis which the law now places upon the actual state of mind of an accused person, the test has become a subjective one and the scope of the common purpose is to be determined by what was contemplated by the parties sharing that purpose.

2.86 There are plainly difficulties with this analysis. If, as we now know, as a result of *Osland*, 'acting in concert' involves primary and not derivative liability, how is it possible for that term to be 'more or less' interchangeable with 'common purpose', 'common design' and 'joint criminal enterprise'? After all, the High Court has said on a number of occasions that those forms of liability are derivative.

2.87 To complicate matters further, the actual terms used to describe these distinct forms of group activity vary greatly from State to State. In New South Wales, for example, 'acting in concert' is scarcely ever spoken of in terms, and seems to be regarded as nothing more than another term for 'joint criminal enterprise'.

2.88 Indeed, the courts in New South Wales have developed their own preferred terminology. In that State, 'joint criminal enterprise' is used in at least three separate ways. It applies:

- Where the accused has entered into an agreement with the principal offender to commit a particular crime that is subsequently perpetrated by that offender. This is known in as 'straightforward joint criminal enterprise'.
- Alternatively, where the accused has entered into an agreement with the principal offender to commit a particular crime but, for whatever reason, a different crime is subsequently perpetrated. The accused is liable, on the basis of joint criminal enterprise, if that incidental crime is one which falls within the general scope of the agreed criminal enterprise. This is known as 'extended joint criminal enterprise', or

sometimes simply as 'common purpose'.

- Further and alternatively, where the accused has entered into an agreement with the principal offender in a joint criminal enterprise to commit a particular offence, quite separate from that with which the accused is ultimately charged, and that latter offence, though it falls outside the scope of the enterprise, was foreseen as a possible consequence of the offending. This is known as 'extended common purpose'.

2.89 It is doubtful whether the law as stated in New South Wales is any more coherent, or comprehensible, than the law as stated in Victoria. The better view may be that the common law is in an unsatisfactory state in both jurisdictions. One thing, however, seems perfectly obvious. No jury directed along these lines is likely to have any real appreciation, or understanding, of what it is they are being asked to do.

E. The Position in England: Secondary Parties

2.90 It must be said that the English approach to complicity is scarcely more coherent than that adopted in Victoria.

2.91 The latest edition of *Archbold: Criminal Pleading, Evidence and Practice* suggests that the words 'aid', 'abet', 'counsel' and 'procure', all of which are central to traditional notions of accessorial liability, continue to have separate meanings.[85] Whether this is of any consequence in practice is perhaps doubtful.[86] Nonetheless, the courts have tended to construe these words in keeping with the common law, as it developed in relation to felonies. The abolition of the distinction between felonies and misdemeanours seems to have made little or no difference.

2.92 Although 'presence' may still be a requirement of aiding and

---

85 James Richardson (ed), *Archbold: Criminal Pleading, Evidence and Practice* (Sweet & Maxwell, 2012) ('*Archbold*'). See also *Attorney General's Reference (No 1)* [1975] QB 773.

86 J C Smith, 'Criminal Liability of Accessories: Law and Law Reform' above n 55, 453

abetting,[87] that notion is construed somewhat loosely. Thus, it is recognised that an aider and abetter may be 'present', giving assistance to the principal offender, while still some distance away from the scene of the crime.

2.93 So far as group activity is concerned, the position in England is even less certain than it appears to be in this country. The subject is dealt with in *Archbold* under separate headings: 'Principals' and 'Secondary Parties'.[88] It is recognised that two or more individuals can be principals in the same crime, but the distinction between a joint principal, and an abettor, is said to be difficult, and unnecessary, to draw.[89]

2.94 So far as principals are concerned, they need not be present at the commission of an offence.[90] Moreover, it is recognised that a principal can be liable as such without having done any act personally towards the commission of the offence. An example would be where the doctrine of innocent agency applies.

2.95 Insofar as group activity is concerned, the English generally use either 'joint enterprise' or 'common design' to characterise this form of complicity. Where two or more persons embark on a joint enterprise, each is liable for the acts done in pursuance of that joint enterprise. That includes liability for unusual consequences arising out of the execution of the agreed joint enterprise. However, if one of the parties to the venture goes beyond what has been agreed, the other participants are not liable for the consequences of that unauthorised act.[91]

2.96 There seems to be little to gain from emulating the English approach in this area. The discussion of complicity in *Archbold*, for example, is confused

---

87 Richardson, *Archbold*, above n 85, [18-13] casts doubt upon the continued existence of this requirement.

88 Richardson, *Archbold*, above n 85.

89 Ibid [18.6].

90 *R v Harley* (1830) 4 C & P 369.

91 *R v Anderson & Morris* [1966] 1 QB 110.

and, at points, all but incomprehensible.[92] And while the *Crown Court Bench Book* contains some useful illustrations of possible jury directions, its exposition of legal doctrine is difficult to follow.

Codifying the Law of Complicity

2.97 There have been several attempts in recent years to codify the law of complicity. One difficulty with this approach is, of course, the problem of varying nomenclature. Even if one can specify with precision the exact form of secondary liability that is being addressed, the rules that govern that form of liability are likely to be uncertain.

2.98 Any attempt at codification will also be fraught with difficulty because of the large number of conceptual and policy issues that must be addressed. For example, although it is always said that 'mere presence' cannot give rise to accessorial liability, there has been a longstanding debate about how much more is required. The cases suggest that whether or not an accused is found to be complicit depends upon the precise character of the 'presence' that is established, and whether it gives rise to some form of encouragement.[93] A norm that is fact-specific, and based upon questions of degree, is not always easy to codify.

2.99 Another issue that has troubled the courts, and needs to be addressed in any statutory modification, is whether an omission is capable, in some circumstances, of giving rise to a finding of complicity.[94]

2.100 Also troubling is the question whether a person, who has intentionally provided assistance or encouragement to the principal offender, can nonetheless avoid responsibility for any consequent offence by taking steps to

---

92 It extends over a series of chapters, with separate treatment being accorded to mens rea, and the actus reus, as well as differentiation between homicide and other offences.

93 *R v Coney* (1882) 8 QBD 534, 557-7; *R v Lam* (2008) 185 A Crim R 453, 478. Cf *Wilcox v Jeffrey* [1951] 1 All ER 464; *R v Clarkson* [1971] 1 WLR 1402.

94 *R v Russell* [1933] VLR 59.

withdraw from any involvement in that offence.[95]

2.101 These, and other similar issues, must all be addressed if there is to be a sensible and comprehensive overhaul of the current law relating to complicity. Difficult as they are, they pale into insignificance when compared with the problem of expressing, in statutory form, the exact fault element that should be required with respect to accessorial liability.

Some Specific Conceptual Difficulties

A. The Fault Element

2.102 Before turning to the details of the current law, it is worth noting that one suggestion that has been proffered regarding the fault element in complicity is that a distinction should be drawn between attitude (or purpose) on the one hand and cognition (or knowledge) on the other.[96]

2.103 This area is so complex that it must be deconstructed.

2.104 It may be convenient to consider first the traditional forms of accessorial liability. In *Giorgianni*, the High Court held that the mental element required for aiding, abetting, counselling and procuring was knowledge of the essential facts that constituted the offence. Knowledge, of course, includes belief.

2.105 The facts of the case were as follows. The accused leased and operated a prime-mover and trailer. He employed a driver who lost control of that vehicle when it suffered a brake failure while heavily loaded with coal. It crashed into two cars, killing five people and seriously injuring another.

---

95 *White v Ridley* (1978) 140 CLR 342. Modern attempts at codification all seem to include specific provisions designed to accommodate withdrawal as a defence. For example, the Commonwealth *Criminal Code* provides in s 11.2(4) that:

(4) A person cannot be found guilty of aiding, abetting, counselling or procuring the commission of an offence if, before the offence was committed, the person:
(a) terminated his or her involvement; and
(b) took all reasonable steps to prevent the commission of the offence.

96 Bronitt and McSherry, above n 3, 397.

2.106 The accused was convicted of five counts of culpable driving causing death and one count of culpable driving causing grievous bodily harm. These were strict liability offences.

2.107 The Crown case was that the accused had 'procured' the act of culpable driving because he had caused the truck to be driven whilst fully aware that it had brake problems following maintenance that had recently been undertaken.

2.108 The trial judge had directed the jury that the Crown had to establish that the accused either knew, or ought to have known, that the brakes were defective. He went on to state that it would be sufficient if the accused had behaved 'recklessly', not caring whether or not the brakes were defective.

2.109 The High Court rejected any notion that negligence, or even recklessness, would be sufficient for this form of complicity. The majority (Wilson, Deane and Dawson JJ) said

> there is no basis upon which it can be said that where a statutory offence requires no proof of intent, it is unnecessary in order to establish secondary participation in the commission of that offence to prove actual knowledge of all the essential facts of the offence. Intent is an ingredient of the offence of aiding and abetting or counselling and procuring and knowledge of the essential facts of the principal offence is necessary before there can be intent. … It is actual knowledge which is required and the law does not presume knowledge or impute it to an accused person where possession of knowledge is necessary for the formation of a criminal intent.[97]

2.110 Their Honours continued:

> Aiding, abetting, counselling or procuring the commission of an offence requires the intentional assistance or encouragement of the doing of those things which go to make up the offence.[98]

2.111 And further, their Honours stated:

> The necessary intent is absent if the person alleged to be a secondary

---

97 (1985) 156 CLR 473, 504.

98 Ibid 505.

participant lacks knowledge that the principal offender is doing something or is about to do something which amounts to an offence.[99]

2.112 In dealing with recklessness, the majority accepted that the fact that a person had deliberately abstained from making an inquiry about some matter of which he was aware might lead to an inference of actual knowledge. However, their Honours insisted that actual knowledge had to be proved, and not imputed or presumed knowledge.[100]

2.113 Put simply, *Giorgianni* holds that, at common law, accessorial liability, like the inchoate offences of attempt and conspiracy, requires proof of specific intent, and not mere recklessness.[101] Thus, if an accused orders or urges the commission of a particular crime, and the principal offender intentionally commits another, the accused will not ordinarily be liable as a counsellor or procurer.

2.114 It is paradoxical, having regard to the very specific and narrow intent that must be established for 'aiding', 'abetting', 'counselling' and 'procuring', that the position is quite different when it comes to group activity. In that situation, an accused may be found to be complicit even though the requisite mental state for the commission of the principal offence is lacking.

2.115 In England, the common law has struggled with the fault element that is required to establish liability for group activity. For example, it has been held that a secondary party is guilty of murder if he participates in a joint criminal venture with the knowledge that another participant might use force with the requisite intent for murder, and that is precisely what occurs.[102] The theory is that the accused, having lent himself to that joint venture, has given assistance and encouragement to his co-offenders in circumstances where he

---

99 Ibid 506.

100 Ibid. Gibbs CJ and Mason J agreed with the majority that actual knowledge was required, but considered that wilful blindness was to be equated with such knowledge: at 482 (Gibbs CJ), 495 (Mason J).

101 (1985) 156 CLR 473, 506.

102 *R v Powell; R v English* [1999] 1 AC 1; *Chan Wing-Siu v The Queen* [1985] AC 168.

realises death or grievous bodily harm might result.

2.116 The authors of *Archbold* argue that this much broader approach to mens rea should also be adopted in relation to 'aiding', 'abetting', 'counselling' and 'procuring'.[103] The safeguard against overreach, in such cases, is said to be a requirement that the accused contemplate what might happen as a 'real', and not 'fanciful', possibility.

2.117 As the law stands at present, it is not necessary for the Crown to prove that an accused charged as an aider and abettor should know the precise details of the actual crime that is contemplated, and in fact committed. It is sufficient to establish that the accused is aware of the type of crime that is to take place. Where an accused has counselled or procured another to commit a specific kind of offence, and that other has in fact committed an offence of that general nature, the accused will be guilty of counselling or procuring.

2.118 In *Johnson v Youden*, Lord Goddard CJ set out the position as follows:

> Before a person can be convicted of aiding and abetting the commission of an offence he must at least know the essential matters which constitute that offence.[104]

2.119 Lord Goddard's formulation leaves a number of questions unanswered. As previously indicated, there has been considerable debate, in England, as to precisely what degree of knowledge must be proved in order to establish the fault element for complicity.[105] Even where it is agreed that the test must be wholly subjective, there is no consensus as to whether both specific intent and knowledge must be proved, or whether knowledge alone is sufficient.

---

103 Richardson, *Archbold*, above n 85, [17-67].

104 *Johnson v Youden* [1959] 1 KB 544, 546-7.

105 See I H Dennis, 'The Mental Element for Accessories', in P Smith (ed) *Criminal Law: Essays in Honour of JC Smith* (London, Butterworths, 1987). Cf G R Sullivan, 'Intent, Purpose and Complicity' [1988] *Criminal Law Review* 641; IH Dennis, 'Intent and Complicity: A Reply' [1988] *Criminal law Review* 649. Dennis argues that the fault element for complicity requires both knowledge and purpose. Sullivan, on the other hand, sees actual knowledge as sufficient.

2.120 In Australia, *Giorgianni* governs this issue. Bronitt and McSherry argue that the High Court's decision should be understood to have determined that specific intent (i.e. purpose) must be shown in order to establish any of the traditional forms of accessorial liability.[106]

2.121 It can be argued, as a matter of principle, that recklessness should be sufficient as the fault element for complicity.[107] In *Re Pong Su*,[108] a case involving the interpretation of the complicity provisions of the Commonwealth *Criminal Code*, Kellam J accepted that the majority in *Giorgianni* had specifically rejected the notion that it was possible to 'aid', 'abet', 'counsel' or 'procure' the commission of an offence by acting recklessly. However, his Honour held that *Giorgianni* did not resolve the question of the interpretation of the relevant provisions of the *Criminal Code*. He concluded that the intention of Parliament, in enacting s 11.2 of the *Criminal Code*, was to exclude recklessness as a fault element for complicity save in relation to 'common purpose', which is the subject of s 11.2(3)(b).[109]

2.122 Plainly, the question whether the fault element of accessorial liability should be narrowly confined, as *Giorgianni* holds (just as it is for inchoate offences such as attempt and conspiracy), remains a live issue, at least when it comes to considering statutory reform.

B. The Commonwealth Criminal Code

2.123 The difficulties associated with codification of complicity, and particularly with regard to the fault element for that doctrine, are best

---

106 See Bronitt and McSherry, above n 3, 399-400.

107 See *Director of Public Prosecutions (Northern Ireland) v Maxwell* [1978] 1 WLR 1350. See also B Fisse (ed), *Criminal Law* (Lawbook, 5th ed, 1990) 331-2; Simon Bronitt, 'Defending Giorgianni – Part One: The Fault Element Required for Complicity' (1993) 17 *Criminal Law Journal* 242; Simon Bronitt, 'Defending Giorgianni – Part Two: New Solutions for Old Problems in Complicity' (1993) 17 *Criminal Law Journal* 305.

108 (2005) 159 A Crim R 300.

109 A distinction of this kind is calculated to confuse any jury that might be considering both forms of complicity as alternative modes of participation.

exemplified by the approach taken in the Commonwealth *Criminal Code*.

2.124 Section 11.2 of the *Criminal Code* relevantly provides:

> (1) A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.
>
> (2) For the person to be guilty:
>
> (a) the person's conduct must have in fact aided, abetted, counselled or procured the commission of the offence by the other person; and
>
> (b) the offence must have been committed by the other person.
>
> (3) For the person to be guilty, the person must have intended that:
>
> (a) his or her conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed; or
>
> (b) his or her conduct would aid, abet, counsel or procure the commission of an offence and have been reckless about the commission of the offence (including its fault elements) that the other person in fact committed.

2.125 Section 11.2A, introduced into the *Criminal Code* in 2010,[110] deals with what the Code terms 'joint commission'. It is in the following terms:

> *Joint Commission*
>
> (1) If
>
> (a) a person and at least one other party enter into an agreement to commit an offence; and
>
> (b) either:
>
> (i) an offence is committed in accordance with the agreement (within the meaning of subsection (2)); or;
>
> (ii) an offence is committed in the course of carrying out the agreement (within the meaning of subsection (3));

[110] Inserted by the *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth) sch 4. The provision came into force on 20 February 2010.

the person is taken to have committed the joint offence referred to in which ever of subsection (2) or (3) applies and is punishable accordingly.

Offence committed in accordance with the agreement

(2) An offence is committed in accordance with the agreement if:

(a) the conduct of one or more parties in accordance with the agreement makes up the physical elements consisting of conduct of an offence (the ***joint offence***) of the same type as the offence agreed to; and

(b) to the extent that a physical element of the joint offence consists of a result of conduct—that result arises from the conduct engaged in; and

(c) to the extent that a physical element of the joint offence consists of a circumstance—the conduct engaged in, or a result of the conduct engaged in, occurs in that circumstance

Offence committed in the course of carrying out the agreement

(3) An offence is committed in the course of carrying out the agreement if the person is reckless about the commission of an offence (the ***joint offence***) that another party in fact commits in the course of carrying out the agreement.

Intention to commit an offence

(4) For a person to be guilty of an offence because of the operation of this section, the person and at least one other party to the agreement must have intended that an offence would be committed under the agreement.

Agreement may be non-verbal etc

(5) The agreement:

(a) may consist of a non-verbal understanding; and

(b) may be entered into before, or at the same time as, the conduct constituting any of the physical elements of the joint offence was engaged in.

Termination of involvement etc

(6) A person cannot be found guilty of an offence because of the operation of this section if, before the conduct constituting any of the physical elements of the joint offence concerned was engaged in, the person:

(a) terminated his or her involvement; and

(b) took all reasonable steps to prevent that conduct from being engaged in.

Person may be found guilty even if another party not prosecuted etc

(7) A person may be found guilty of an offence because of the operation of this section even if:

(a) another party to the agreement has not been prosecuted or has not been found guilty; or

(b) the person was not present when any of the conduct constituting the physical elements of the joint offence was engaged in.

Special liability provisions apply

(8) Any special liability provisions that apply to the joint offence apply also for the purposes of determining whether a person is guilty of that offence because of the operation of this section.

2.126 Of course, Division 5 of the Code sets out the various fault elements that operate in relation to Commonwealth offences:

5.1 Fault elements

(1) A fault element for a particular physical element may be intention, knowledge, recklessness or negligence.

(2) Subsection (1) does not prevent a law that creates a particular offence from specifying other fault elements for a physical element of that offence.

5.2 Intention

(1) A person has intention with respect to conduct if he or she means to engage in that conduct.

(2) A person has intention with respect to a circumstance if he or she believes that it exists or will exist.

(3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.

5.3 Knowledge

A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events.

5.4 Recklessness

(1) A person is reckless with respect to a circumstance if:

(a) he or she is aware of a substantial risk that the circumstance exists or will exist; and

(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

(2) A person is reckless with respect to a result if:

(a) he or she is aware of a substantial risk that the result will occur; and

(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

(3) The question whether taking a risk is unjustifiable is one of fact.

(4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.

5.5 Negligence

A person is negligent with respect to a physical element of an offence if his or her conduct involves:

(a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and

(b) such a high risk that the physical element exists or will exist;

that the conduct merits criminal punishment for the offence

2.127 The treatment of the elements of complicity in s 11.2 and s 11.2A, as combined with the general fault elements set out in Division 5, can hardly be described as a model of clarity. The fault element for complicity under s 11.2 is intent, insofar as assisting or encouraging is concerned, but recklessness when it comes to the commission of the offence itself. The same is true in relation to complicity under s 11.2A. What must be proved is an intent to commit an offence. However, recklessness as to a different offence will be sufficient to ground liability for that offence. In other words, as with many

parts of the *Criminal Code*, there are dual mental elements involved. In some cases, as where the Crown relies upon different modes of complicity, juries will have to be directed as to both sets of fault elements. The permutations that can arise, particularly when one has regard to the physical elements that may be in play, are likely to render any charge all but incomprehensible.

C. Recklessness and Divergence

2.128 There are two basic questions surrounding the fault element in complicity that must be addressed. The first, discussed earlier, is whether recklessness should suffice for 'aiding', 'abetting', 'counselling' or 'procuring'. The second is how to deal with the problem of 'divergence' — where the actual offence committed differs materially from the crime that was specifically contemplated by the accused.[111]

2.129 As previously indicated, the common law speaks of 'knowledge of the essential facts' of an offence as being a necessary element of both assisting and encouraging, and common purpose. That expression is, of course, somewhat opaque. It involves questions of fact and degree. Is it sufficient to establish that the accused is aware, in general terms, of the general nature of the offence that the principal offender is contemplating? Or must his knowledge be more detailed and specific than that?

2.130 At common law, it was sufficient to establish accessorial liability if the secondary party had knowledge of the 'general type'[112] of the offence to be committed. The House of Lords has held that it is sufficient that the crime committed by the perpetrator was one from a limited range of offences contemplated by the party said to be complicit.[113]

2.131 In *R v Bainbridge*,[114] the accused supplied oxygen cutting equipment to

---

111 Bronit, 'Defending Giorgianni – Part One', above n 107, 256-7.
112 Ibid 256.
113 *Director of Public Prosecutions (Northern Ireland) v Maxwell* [1978] 1 WLR 1350.
114 [1960] 1 QB 129 ('*Bainbridge*').

others who used it to break into a bank and steal cash. The English Court of Appeal held that the accused was liable for the breaking and entry into the bank as he knew, when he supplied the equipment, that it would be used for purposes broadly of that kind. It was not necessary to establish that he was aware of the particular premises to be burgled, or that he knew when the crime was to take place.

2.132 It has been suggested that broadening the scope of the knowledge that is required for complicity creates a risk of overreach. The effect of *Bainbridge* is that a person who assists another to commit a particular crime might be liable for all crimes of that same type subsequently committed by the principal offender. In reality, of course, that risk is likely to be more theoretical than real.

2.133 There have been some attempts to impose restrictions upon *Bainbridge* by statute. The Canadian Law Reform Commission, for example, proposed that an accessory should not be liable in circumstances where there is a difference between the offence that the accessory intended to promote, and the offence that was actually committed, except where that difference relates only to the 'identity of the victim or to the degree of harm'.[115] Even that proposal creates its own problems. The expression 'degree of harm' is itself highly uncertain. Moreover, as has been noted, although this proposal might ameliorate some of the undesirable consequences which flow from the derivative nature of complicity, it does not tackle the source of the problem, which is, so it is said, the lack of a non-derivative facilitation offence in the present law.[116]

2.134 The recent case of *Smith, Garcia & Andreevski v The Queen*[117] provides a useful example of the treatment given to cases of divergence in this State.

---

115 Law Reform Commission of Canada, *Recodifying Criminal Law*, Report 31 (1987) 47. See generally Bronitt and McSherry, above n 3, 402-4.

116 Bronit, 'Defending Giorgianni – Part One', above n 107, 257.

117 [2012] VSCA 5 ('*Smith, Garcia and Andreevski*').

Garcia and Andreevski were both charged with and convicted of manslaughter arising out of their involvement in a violent confrontation during which their co-offender, Smith, stabbed a member of a rival group of young men with a boning knife. The victim subsequently died.

2.135 There was evidence that, before the fight, Smith, Garcia and Andreevski, in company with others, had expressed their intention to 'chop up' the rival group members. Smith pleaded guilty to murder. During the course of their trial, it was submitted on behalf of Garcia and Andreevski that whatever the nature of their arrangement with Smith, it did not involve his use of a deadly weapon, and most certainly did not contemplate that any of their targeted victims would be killed.

2.136 On appeal, it was submitted that Smith's actions fell entirely outside the scope of any agreement reached. Accordingly, neither Garcia nor Andreevski could be convicted on the basis of concert.[118] Indeed, it was submitted that in order for concert to be made out, the Crown was required to prove that Garcia and Andreevski had entered into an agreement with Smith to stab, not just anyone, but the actual victim of his attack.

2.137 Both Garcia's appeal, and that of Andreevski, were dismissed. In the course of rejecting their arguments, the Court of Appeal considered the effect of the House of Lords' decision in *R v Powell; R v English.*[119] In that case, the House of Lords had held that where a party to a joint enterprise realised that the actual perpetrator might, in the course of that enterprise, cause the death of another with murderous intent, that party, too, was liable to be convicted of murder. Conversely, where the perpetrator had departed from the agreed enterprise in forming and acting upon such an intent in a way that was not foreseen by the accused, then the accused could not be convicted of any form of homicide.

---

118 The case was not run on the basis of extended common purpose.

119 [1999] 1 AC 1.

2.138 The Court in *Smith, Garcia and Andreevski* also referred to *Rahman v The Queen*, a more recent decision of the House of Lords.[120] In that case the victim was attacked by a group of men armed with blunt weapons and subsequently died from his injuries. It was discovered post-mortem that the blow which caused his death had in fact been inflicted by a knife. It could not be established which of the four accused had stabbed the victim. It was argued on behalf of each of them that none had realised that any of the attackers might produce a knife and use it to stab the victim.

2.139 Lord Brown held that, as a matter of principle:

> If B realises (without agreeing to such conduct being used) that A may kill or intentionally inflict serious injury, but nevertheless continues to participate with A in the venture, that will amount to a sufficient mental element for B to be guilty of murder if A, with the requisite intent, kills in the course of the venture *unless (i) A suddenly produces and uses a weapon of which B knows nothing and which is more lethal than any weapon which B contemplates that A or any other participant may be carrying and (ii) for that reason A's act is to be regarded as fundamentally different from anything foreseen by B*.[121]

2.140 In *Smith, Garcia and Andreevski*, the Court of Appeal noted that Garcia had been well aware of the fact that Smith was armed with a boning knife when he attended at the affray. Andreevski was also aware, at least in general terms, that weapons of a similarly lethal nature had been brought to the scene. In those circumstances, as neither man had been charged with murder, the Crown had only needed to prove, by way of mens rea, that each accused had intended to commit an unlawful and dangerous act. In such a case, the perpetrator of the act causing death might be guilty of murder, while those who had merely agreed to participate in the affray could be guilty of the lesser offence of manslaughter.[122]

2.141 No matter how the fault element in complicity is defined, there will be problems associated with applying that definition in any given circumstances.

---

120 [2009] 1 AC 129 ('*Rahman*').

121 Ibid 165 (emphasis in original).

122 See also *R v Nguyen* (2010) 242 CLR 491.

The draftsperson cannot be expected to anticipate every conceivable eventuality when seeking to lay down broad principles of fault liability in this area. Any attempt to do so will result in an overly prescriptive set of provisions, and cause more problems than it resolves. It will obviously be preferable to leave questions of this kind to the common sense of the jury to determine.

D. The New South Wales Law Reform Commission Report on Complicity

2.142 To illustrate just how difficult it is to draft a simple and clear statement of the fault element in complicity, it is worth noting the discussion of this subject by the New South Wales Law Reform Commission in its 2010 Report on complicity. It must be remembered that the Commission regarded itself as constrained, to some degree, by a need to harmonise the law, if possible, with the provisions of the *Criminal Code*.

2.143 The Commission recommended the enactment of two sets of provisions, one dealing with what might be termed 'traditional accessorial liability', and the other with what it described as 'joint criminal enterprise complicity'. These draft provisions are in the following terms:

> **Accessorial Liability**[123]
>
> 3.1 The principles concerned with the criminal responsibility of accessories before the fact, and of principles in the second degree, should be the subject of a statutory provision to the following effect:
>
> (1) Where D assists or encourages P to commit an offence, then D is taken to have committed that offence.
>
> **Encourage** includes command, request, propose, advise, incite, induce, persuade, authorise, urge, and threaten or place pressure on another to commit an offence.
>
> (2) For D to be guilty, P must have committed the offence.
>
> (3) For D to be guilty, he or she must have intended to assist or encourage the commission of the offence or an offence of the

123 New South Wales Law Reform Commission *Complicity*, Report No 129 (2010) xvi.

same type, knowing or believing in the existence of the facts and circumstances that in law constitute respectively the offence or an offence of the same type.

[A legislative note and the second reading speech should state that the question of whether an offence is capable of being "of the same type" should be an issue of law for the judge but it should remain an issue for the jury to determine whether on the facts of the case the offence intended was of the same type. They should also state that the phrase "of the same type" is intended to mean the same thing as the phrase "of the type" in the Criminal Code (Cth) and should pick up any relevant judicial interpretation of that phrase.]

(4) D may be found guilty under these recommendations

(a) whether or not any other person alleged to be involved in the offence has been prosecuted or has been convicted; and

(b) whether or not D was physically present when P committed the offence.

(5) D may be found guilty even if P has been convicted of a lesser offence because of a defence or partial defence available to P but not available to D.

(6) D cannot be found guilty of assisting or encouraging the commission of an offence if, before the offence was committed:

(a) D terminated his or her involvement; and

(b) D took all reasonable steps to prevent the commission of the offence.

(7) D is not guilty of assisting or encouraging an offence if D is a person for whose benefit or protection the offence exists.

(8) D may be found guilty if the trier of fact is satisfied beyond reasonable doubt that D is either guilty as a principal offender or as an accessory, but is not able to determine which.

(9) An alternative verdict of guilty of incitement may be returned if the requirements for proving the commission of the substantive offence by P have not been met, but the other elements required for an offence of incitement are present.

(10) D should be liable to the same punishment as if he or she had committed the substantive offence.

3.2 The liability of a person who assists or encourages a non-responsible person to commit an offence should be governed by a statutory

provision which incorporates the following elements:

(1) A person (D) who assists or encourages another person (P) to commit the physical elements of an offence is to be taken to have committed that offence, and is punishable accordingly, even though P is not responsible in law for the offence, where:

(a) P has committed the physical elements required for an offence;

(b) D has, in relation to that offence, the mental element required for its commission; and

(c) P's conduct (whether or not together with D's conduct) would have constituted an offence on the part of D if D had engaged in it.

(2) D shall be liable for the offence even though P is not responsible in law for the relevant conduct by reason of duress, mental illness, age, lack of knowledge of the true facts, honest but mistaken belief, or otherwise.

Joint Criminal Enterprise Complicity

4.1 The principles concerned with basic joint criminal enterprise should be the subject of a statutory provision which would render the participants liable for an offence which is committed, pursuant to its terms, as follows:

(1) Where at least two people enter into an agreement to commit an offence and that offence is committed, each is to be taken to have committed the offence and is punishable accordingly.

(2) The agreement may consist of an express agreement or a non-verbal understanding.

(3) The agreement may be entered into before, or at the same time as, the conduct constituting any of the physical elements of the offence.

(4) The existence of the agreement and the nature of the offence which is the subject of the agreement may be inferred from the conduct of the parties to the agreement.

(5) The "offence" shall be taken to include the precise offence agreed to as well as any offence that is, having regard to the nature and scope of the agreement, necessarily incidental to its commission or that is of the same type as that agreed to.

(6) The parties must have intended that the offence would be committed pursuant to their agreement.

(7) A party to the agreement may be found guilty of the offence, even if:

(a) another party to the agreement has not been prosecuted or has been found not guilty or has been convicted of a lesser offence by reason of a defence or qualified defence that is available to that party but that is not available to him or her (that is, the first-named party); or

(b) he or she was not present when any of the conduct constituting the physical elements of the joint offence occurred.

(8) Any limitation provisions or defences that apply in relation to the offence apply in relation to each party respectively for the purpose of determining whether that party is guilty of that offence or of a lesser or other offence by reason of the operation of these provisions.

(9) A party to the agreement cannot be found guilty of an offence by reason of the operation of these provisions if, before the conduct constituting any of the physical elements of that offence was engaged in, he or she:

(a) terminated his or her involvement; and

(b) took all reasonable steps to prevent that conduct from being engaged in.

(10) A party to the agreement cannot be found guilty of an offence by reason of the operation of these provisions if he or she is a person for whose benefit or protection the offence exists, and he or she is the person in respect of whom it is committed.

(11) Where the trier of fact is satisfied beyond reasonable doubt that a party to the joint agreement committed an offence because of the operation of these provisions or committed an offence otherwise than because of the operation of these provisions, but cannot determine which, the trier of fact may find that party guilty of the offence.

[**Note:** In relation to recommendation 4.1, a legislative note and the second reading speech should state that the question of whether an offence is capable of being "incidental to" the commission of an offence or is of the same type is an issue of law for the judge, and that otherwise any relevant question is one of fact for the jury.]

4.2 (1) Where two or more people carry out the physical elements that, in combination, constitute an offence, then each person

who had the mental elements required for that offence is taken to have committed the offence and is punishable accordingly as a principal offender, even though it may not be established otherwise that they were party to a joint criminal enterprise.

(2) A person may be found guilty of the offence even if another person alleged to have committed the offence has not been prosecuted or not found guilty or has been convicted of a lesser offence by reason of a defence or qualified defence available to that person.

(3) Any limitation provisions or defences that apply in relation to the offence apply in relation to each person for the purpose of determining whether he or she is guilty of that offence by reason of the operation of these provisions.

(4) Where the trier of fact is satisfied beyond reasonable doubt that a person committed an offence, because of the operation of these provisions or committed an offence otherwise than because of the operation of these provisions, but cannot determine which, the trier of fact may find such person guilty of the offence.

4.3 The principles concerned with extended joint criminal enterprise should be the subject of a statutory provision which would render a secondary party to a joint criminal enterprise (D) liable for an additional offence committed by another party to the enterprise (P) in the circumstances, and subject to the provisions, which are set out as follows:

(1) D and at least one other person, P, enter into an agreement giving rise to a "joint criminal enterprise" to commit an offence (the "agreed offence").

(2) The agreement giving rise to the joint criminal enterprise may consist of an express agreement or a non-verbal understanding between D and P to commit the agreed offence.

(3) The existence of the joint criminal enterprise and the nature of the agreed offence may be inferred from the conduct of the parties.

(4) The agreed offence shall be taken to include the precise offence agreed to, as well as any offence that is, having regard to the nature and scope of the agreement, necessarily incidental to its commission or that is of the same type as that agreed to.

(5) D and P intend that the agreed offence be committed.

(6) In the course of carrying out the joint criminal enterprise or in attempting to do so, P does an act with the mental elements

that would support a conviction of P for an offence ("the additional offence") that differs from the agreed offence.

(7) Save for a case of homicide (which is subject to recommendation 4.3(8), D foresaw that, in the course of carrying out the joint criminal enterprise, there was a substantial risk that P would commit the additional offence (such foresight being present at the time of, or immediately before, the commission of the additional offence).

(8) Where P causes a death in the course of carrying out a joint criminal enterprise (other than one in which there was a common intention to kill or cause grievous bodily harm, being a joint criminal enterprise within the meaning of and subject to the provisions contained in recommendation 4.1) then, D will be liable for:

(a) murder if D foresaw that it was probable (that is, likely) that a death would result from an act of P that was done with intent to kill or cause grievous bodily harm, in the course of carrying out the joint criminal enterprise in which D was participating; or

(b) if not satisfied of (8)(a), then manslaughter if D foresaw that there was a substantial risk that a death would result from an unlawful act that was done by P in the course of carrying out the joint criminal enterprise in which D was participating,

such foresight on the part of D being respectively present at the time of (or immediately before) the act causing the death.

(9) D will be guilty of the additional offence even if, at the time of its commission by P, he or she was absent from the place of its commission.

(10) D may be convicted of the additional offence, even if P has not been prosecuted or has been found not guilty of the additional offence, unless in a case where P has been acquitted of the additional offence, a conviction of D for that offence would involve the return of an inconsistent verdict or offend against the rule of incontrovertibility.

(11) D may be convicted of the additional offence even if P has been convicted of a lesser offence because of a defence or qualified defence available to P but not available to D.

(12) Otherwise any defences or qualifying provisions that would apply to the additional offence and be personal to D will apply for the purpose of determining D's guilt for the additional offence.

(13) D will not be guilty of the additional offence if, before the act of P constituting that offence, D:

(a) terminated his or her involvement as a party to the joint criminal enterprise; and

(b) took all reasonable steps to prevent the joint criminal enterprise being carried out.

(14) D will not be guilty of the additional offence if D is a person for whose benefit or protection that offence exists.

[**Note:** In relation to recommendation 4.3, a legislative note and the second reading speech should state that the question of whether an offence is capable of being "incidental to" the commission of an offence or is of the same type is an issue of law for the judge, and that otherwise any relevant question is one of fact for the jury.]

2.144 These recommended provisions have their attractions. However, they also suffer from certain drawbacks. They retain complicity's derivative nature, so that an accused cannot be guilty of either form of complicity unless the prosecution can establish, as against the accused, that the offence in question was actually committed. Their principal drawback is that they are unnecessarily prolix. Their attachment to the language of the Commonwealth *Criminal Code* should not be viewed as a positive feature. However, one attribute that they have, which the *Criminal Code* lacks, is the adoption of a single fault element, namely intent, for both forms of complicity.

2.145 It should be noted that the draft provision retains a form of extended joint criminal enterprise which is not only complex, but requires a different approach in relation to homicide from that taken in relation to all other offences. Indeed, the fault element for murder via extended joint criminal enterprise (foresight of probability) differs from the fault element for manslaughter under that doctrine (foresight of substantial risk). These provisions have little to commend them.

2.146 The draft provisions have not, as yet, been enacted in New South Wales.

Miscellaneous Problems

A Aiding and Abetting – Protection of the Victim

2.147 Any substantial reform of the law of complicity must include the enactment of provisions that exempt from liability victims who 'aid', 'abet', 'counsel' or 'procure' the commission of offences against themselves.[124] Thus, where a child under the age of 16 has sexual relations with an adult, it would obviously be absurd to treat that child as an accessory. After all, the relevant offence was created in order to protect children, and not to criminalise them.

2.148 It should be noted that the United Kingdom Supreme Court in *R v Gnango* recently held that there is no 'common law rule that precludes conviction of a defendant of being party to a crime of which he was the actual or intended victim.'[125] This makes it all the more desirable to enact provisions designed to deal with this situation.

B Joint Principals - Offending outside the Scope of Accessorial Liability

2.149 Offences can, of course, be committed jointly. In such cases, liability is primary and not derivative. They do not fall within the basic principles of complicity.

2.150 Two or more persons can be joint principals if, by their actions, they each contribute to the commission of an offence. For example, if a number of individuals attack another person, all intending to kill him, and the combined effect of their blows is to bring about his death, each of them is said to be a joint principal.

2.151 In order to deal with the situation where it cannot be determined whether an accused has acted as an accessory, or as a principal offender, many modern codes provide that a guilty verdict can be returned without any

---

124 *R v Tyrrell* [1894] 1 QB 710.

125 [2011] UKSC 59 (14 December 2011) [52] (Lord Phillips and Lord Judge).

need to specify the precise basis of liability.[126] In such cases, the jury need not all agree upon the mode of participation, or the form of liability. They can simply return a verdict of guilty of the primary offence. The judge will then form his or her view of the role played by the accused, based upon the evidence.

C Innocent Agency

2.152 Another form of primary liability, not based on complicity, is that known as 'innocent agency'.[127] The law has developed in such a way as to enable a person, by means of this doctrine, to be convicted of a criminal offence, even where the actual perpetrator is entirely innocent. The 'aider and abettor' is, by this doctrine, converted into a principal offender.

2.153 An innocent agent is one who is not considered criminally responsible. That may be for any one of a host of reasons. It may be because he or she is an infant, suffers from mental impairment, lacks knowledge of requisite facts, commits an offence under duress, or holds an innocent belief.[128]

Acting in Concert – The Victorian Approach

2.154 On occasion, it may be difficult to determine whether an accused should be characterised as a joint principal, or as complicit based on some form of derivative liability. The evidence surrounding the commission of the offence may be uncertain in that regard.

A. Lowery and King

2.155 A doctrine that has developed, primarily in Victoria, in order to accommodate this situation is that of 'acting in concert'.

---

126 *Criminal Code Act 1995* (Cth) s 11.2(7).

127 Curiously, s 11.3 of the *Criminal Code Act 1995* (Cth) dealt specifically with this topic. The section is now entitled 'Commission by Proxy', but seems to encompass much the same conduct.

128 *White v Ridley* (1978) 147 CLR 342 provides a useful example. There the accused engaged an airline carrier unwittingly to import Cannabis into Australia. See also *Cogan v Leak* [1976] QB 217.

2.156 The classic formulation of this doctrine is to be found in Smith J's charge to the jury in *Lowery and King*.[129] His Honour said:

> The law says that if two or more persons reach an understanding or arrangement that together they will commit a crime and then, while that understanding or arrangement is still on foot and has not been called off, they are both present at the scene of the crime and one or other of them does, or they do between them, in accordance with their understanding or arrangement, all the things that are necessary to constitute the crime, they are all equally guilty of that crime regardless of what part each played in its commission.

B. Osland v The Queen

2.157 There was, for some time, controversy as to the precise nature of liability under this doctrine. That matter was finally put to rest by the High Court in *Osland*.[130]

2.158 In that case, Heather Osland and her son, David Albion, were jointly charged with the murder of Mrs Osland's husband, Frank. The deceased had a history of violence towards his wife, and also towards his stepson, David.

2.159 On the morning that he was killed, both Heather Osland and her son dug what could only be described as a 'grave' for Frank. Later that day, Mrs Osland drugged her husband by lacing his dinner with a sedative. Subsequently, she assisted her son in killing him by holding him down while David bashed him across the head with a metal pipe. They then buried his body. Thereafter, they pretended, for some years, that he had simply walked out on the family and not been heard from again.

2.160 At their trial, both Mrs Osland and her son relied upon self-defence and provocation. In support of Heather Osland's claim of self-defence, evidence was led of Frank's many years of mistreatment of her. Indeed, it was argued that she suffered from 'battered woman syndrome'. This was to no avail as she was convicted of murder. However, the same jury were

---

129 [1972] VR 560.

130 (1998) 197 CLR 316.

unable to agree upon a verdict for her son. He was subsequently retried and, on that occasion, acquitted.

2.161 The Court of Appeal dismissed Heather Osland's appeal against conviction. She then appealed to the High Court. Before that Court it was submitted on her behalf, for the first time, that her conviction for murder could not stand because it was inconsistent with the jury's inability to reach a verdict in relation to her son. By majority, her appeal was dismissed.

2.162 The majority (McHugh, Kirby and Callinan JJ) noted that the Crown had presented its case against Heather Osland and her son on the basis of acting in concert. It had never been suggested, until the matter reached the High Court, that her conviction for murder was in any way dependent upon the jury finding that her son was himself guilty of murder.

2.163 The majority accepted the Crown's submission that where two or more persons act in concert, the verdicts in relation to each may differ.

2.164 McHugh J (with whom Kirby J broadly agreed) based his conclusion upon the fact that Heather Osland was acting pursuant to an agreement, arrangement or understanding with her son to kill her husband Frank and, by reason of the fact that she was present at the time, could be said to be acting in concert. In those circumstances, it was open to the jury to convict her of murder, but fail to agree upon a verdict for her son. Plainly, this would be so where the evidence admissible against one party was greater than that admissible against the other.

2.165 Callinan J approached the matter on the basis that, where two or more persons act in concert, they are causatively jointly responsible for the commission of the crime. His Honour considered that, on the facts, Mrs Osland had contributed significantly to her husband's death. She had, after all, prepared his grave, drugged him, been present at the time of his death, held him down during his death throes, and planned the burial and

concealment of his grave. Essentially, therefore, his Honour focused upon causation as the underlying basis for Mrs Osland's guilt.

2.166 Gaudron and Gummow JJ dissented. They accepted that there is no necessary inconsistency between the conviction of a person who substantially contributes to the death of another, and the acquittal of a person whose act is the immediate and proximate cause of death. However, in their opinion, none of the acts performed by Heather Osland contributed sufficiently to her husband's death to warrant holding her criminally responsible.

2.167 Putting the question of causation to one side, Gaudron and Gummow JJ then considered whether Heather Osland and her son had, in fact, acted in concert. In their view, the only way in which she could be convicted under that doctrine was if her son had acted pursuant to an understanding or arrangement with her that they would kill Frank Osland. No such understanding or arrangement could be demonstrated, however, unless the Crown first negated self-defence and provocation in relation to David. Self-evidently, the jury's failure to agree upon a verdict in his case meant that these defences had not been negated.[131]

2.168 It may be said, therefore, that *Osland* establishes, first, that acting in concert is a form of primary, and not derivative, liability, and secondly, that where two or more people act in concert the verdicts in relation to each may differ.

2.169 It is interesting to note that had the Crown formulated its case against Heather Osland as one of aiding and abetting (which it could perfectly well have done), the jury's failure to agree upon a verdict in relation to her son would have prevented her conviction. Moreover, the same difficulty would

---

131 Bronitt and McSherry make the point that the reasoning of the dissentients is difficult to follow. They comment that as McHugh J pointed out, there is no inconsistency in finding that David was acting in self defence, or under provocation and at the same time pursuant to an understanding or arrangement with his mother to kill: above n 3.

have arisen had Mrs Osland not been physically present at the scene at the precise moment that her husband was killed. For then, the Crown would have had to rely upon some form of joint criminal enterprise, or common purpose, rather than acting in concert. Liability under joint criminal enterprise is of course derivative.

2.170 Technical distinctions of this kind, entirely divorced from genuine questions of principle, do nothing to promote confidence in the administration of criminal justice.

Extended Common Purpose

2.171 It is sometimes thought that the doctrine of extended common purpose is a recent development in the common law. Indeed, its critics see it as having been created by judicial fiat as recently as about 1980. That view is incorrect.

2.172 Extended common purpose is by no means a novel doctrine. As Professor J C Smith has said:

> It would be quite wrong to suppose that parasitic accessory liability — liability for a crime not intentionally assisted or encouraged by A but merely foreseen by him—is a recent development in the law, an innovation by the Privy Council in *Chan Wing-siu*. The rule imposing liability for offences committed in the course of committing the offence assisted or encouraged seems to be almost as old as the law of aiding and abetting itself.[132]

2.173 Liability for incidental offences committed pursuant to a common purpose or joint enterprise has a long history in England, as well as in this country.

2.174 In *R v Anderson and Morris*,[133] the two accused set out, pursuant to a joint agreement, to assault a particular victim. Anderson was armed with a knife, though Morris claimed he was unaware of that fact. Anderson was seen punching the victim. Morris stood nearby but refused to take part in the fight. During the course of the confrontation, Anderson stabbed the victim to

---

132 J C Smith, 'Criminal Liability of Accessories: Law and Law Reform' above n 55, 455.

133 [1966] 2 QB 110 ('*Anderson and Morris*').

death. He was convicted of murder. Morris was convicted of manslaughter.

2.175 On appeal, Morris's conviction was quashed. This was because the Court of Appeal regarded Anderson's actions, in stabbing the deceased, as having gone far beyond what had been tacitly agreed as the joint enterprise. Accordingly, Anderson's conduct should be viewed as unauthorised by Morris.

2.176 Broadly speaking, the Court of Appeal in *Anderson and Morris* went some way towards recognising extended common purpose when it observed that where two or more individuals were involved in a joint criminal enterprise, they would each be liable for all offences committed during the course of that joint venture. This was subject to the qualification that no such liability would attach if the actual offence committed fell squarely outside the scope of the agreement.

2.177 The High Court cited *Anderson and Morris* with apparent approval in *Varley v The Queen*.[134]

2.178 From about 1980 onwards, the High Court appears to have recognised a wider principle of fault liability for incrimination under what has come to be known as 'extended common purpose'.

A. Johns v The Queen

2.179 The starting point appears to be the decision of the High Court in *Johns v The Queen*.[135] There, the accused took part in a robbery. He waited in the getaway car while two others entered the premises to commit the crime. The accused knew that they were armed with guns and he expected them to be loaded. He also knew that one of his co-offenders was quick-tempered and had a history of violence.

---

134 (1976) 12 ALR 347, 353 (Barwick CJ).

135 (1980) 143 CLR 108 ('*Johns*').

2.180 In the course of the robbery a struggle took place. The victim was shot and killed. Johns was convicted as an accessory before the fact to murder. The High Court dismissed his appeal against conviction. It held the law to be that if an accused contemplated, as a possibility, that someone might be shot and killed in the course of a robbery, that accused would be guilty of murder.

2.181 Later cases widened the doctrine still further. *Chan Wing-Siu v The Queen,* a decision of the Privy Council, was pivotal in this development.[136] In that case, the Privy Council, relying upon *Johns*, stated:

> The case must depend on the wider principle whereby a secondary party is criminally liable for acts by the primary offender of a type which the former foresees but does not necessarily intend. That there is such a principle is not in doubt. It turns on contemplation or, putting the same idea in other words, authorisation, which may be express or is more usually implied. It meets the case of a crime foreseen as a possible incident of the common unlawful enterprise. The criminal culpability lies in participating in the venture with that foresight.[137]

2.182 In other words, liability under this doctrine is not limited to the commission of offences that are tacitly agreed upon, as may have been the case in *Johns*, but extends to any offence which an accused foresees as a possible incident of the original joint enterprise.[138]

B. McAuliffe v The Queen

2.183 In *McAuliffe*,[139] the High Court elaborated further upon this doctrine. Two teenage brothers, Sean McAuliffe and his brother David, together with their friend Matthew Davis, decided to either rob or bash someone near Bondi Beach. Sean McAuliffe was armed with a hammer and Matthew Davis with a baton or stick. There was no evidence that David McAuliffe was aware that either his brother or Davis were so armed.

---

136 [1985] AC 168 ('*Chan Wing-Siu v The Queen*').
137 Ibid 175.
138 See also *Hui Chi-ming v The Queen* [1992] 1 AC 34.
139 (1995) 183 CLR 108.

2.184 The three men set upon two victims. David McAuliffe punched and kicked one of them, and Matthew Davis bashed that person with a stick. Matthew Davis then chased that same person onto an elevated footpath which ran along the path of a cliff. Sean McAuliffe then kicked that person in the chest. This caused him to fall from the footpath into a shallow body of water in the rocks a short distance below. The victim's body was later found washed out to sea. The cause of death was said to be a combination of the fall from the cliff and drowning.

2.185 All three accused were convicted of murder. On appeal to the High Court, Sean McAuliffe and his brother argued that although they may have intended to cause their victim some harm, they did not intend to cause him grievous bodily harm. Accordingly, so it was submitted, they could not be guilty of murder.

2.186 The High Court dismissed the appeal. It specifically endorsed the broader principle of extended common purpose that had been developed by the Privy Council in *Chan Wing-Siu*, stating:

> There was no occasion for the Court [in *Johns*] to turn its attention to the situation where one party foresees, but does not agree to, a crime other than that which is planned, and continues to participate in the venture. However, the secondary offender in that situation is as much a party to the crime which is an incident of the agreed venture as he is when the incidental crime falls within the common purpose. Of course, in that situation the prosecution must prove that the individual concerned foresaw that the incidental crime might be committed and cannot rely upon the existence of the common purpose as establishing that state of mind. But there is no other relevant distinction. As Sir Robin Cooke observed [in *Chan Wing Siu v The Queen*], the criminal culpability lies in the participation in the joint criminal enterprise with the necessary foresight and that is so whether the foresight is that of an individual party or is shared by all parties. That is in accordance with the general principle of the criminal law that a person who intentionally assists in the commission of a crime or encourages its commission may be convicted as a party to it.[140]

---

140 *McAuliffe* (1995) 183 CLR 108, 117-118 (Brennan CJ, Deane, Dawson, Toohey and Gummow JJ).

C. Gillard v The Queen

2.187 *McAuliffe* was subsequently followed in *Gillard*, a case that has been greatly criticised.

2.188 In *Gillard*,[141] Kirby J identified the single policy consideration that lay behind the doctrine of extended common purpose:

> Those who participate in activities highly dangerous to life and limb share equal responsibility for the consequences of the acts that ensue. This is because, as the law's experience shows, particularly when dangerous weapons are involved in a crime scene, whatever the actual and earlier intentions of the secondary offender, the possibility exists that the primary offender will use the weapons, occasioning death or grievous bodily harm to others. The law then tells the secondary offender not to participate because doing so risks equal inculpation in such serious crimes as ensue.

D. Criticisms of the Doctrine

2.189 As previously indicated, the next major stage in the development of extended common purpose came with *Clayton*. It will be recalled that in that case the High Court was invited to reconsider the desirability of maintaining the doctrine. Six members of the High Court declined to do so. Kirby J, however, had by this stage come to the view that extended common purpose was an unsound doctrine, and concluded that the earlier authorities should at least be reconsidered.

2.190 The doctrine of extended common purpose is widely regarded with disfavour. First, it represents an entirely unprincipled departure from principle by holding that an accused can be convicted of an offence, resulting from his or her involvement in a joint criminal enterprise, merely because he or she foresees the possibility that some other incidental crime may be committed. It is really a form of constructive liability.

2.191 Secondly, the doctrine enables an accessory to be convicted of a more

---

141 (2003) 219 CLR 1, 24.

serious offence than the actual perpetrator. That of itself is perhaps not unusual, but it does call for some reflection.[142]

2.192 Thirdly, the doctrine exacerbates the already existing disparity between the fault element required for one form of complicity, namely 'aiding', 'abetting', 'counselling' and 'procuring',[143] and that required for common purpose. It enables the Crown to rely upon 'significantly divergent tests'[144] for convincing a jury that the same accused was guilty of the one offence, with all the potential for confusion that this entails.

2.193 Fourthly, it is said that the doctrine of extended common purpose is now so all-encompassing that it leaves little scope for a jury, in a trial for murder, to return a verdict of manslaughter.[145]

2.194 Fifthly, and for present purposes perhaps most importantly, the law in this area has now been rendered even more complex, and less comprehensible, than it ought to be.

2.195 The actual perpetrator of an act causing death charged with murder cannot be convicted of that offence unless it is shown that he intended to kill or at least cause really serious injury, or that he foresaw the probability of death or really serious injury. A secondary party, charged on the basis of extended common purpose, can, however, be convicted of murder provided that he foresaw merely the possibility that someone might be killed or really seriously injured in the course of committing the agreed offence. This seems basically wrong in principle. The only justification for that outcome is that identified by Kirby J in *Gillard*, namely policy. The aim must be to deter individuals from participating in joint criminal activity, even at the expense of distorting fundamental doctrine.

---

142 There is nothing wrong with that result if liability is regarded as primary rather than derivative. It may be thought to be otherwise in cases where liability is said to be secondary.

143 *Giorgianni* (1985) 156 CLR 473.

144 *Clayton* (2006) 230 ALR 500, 525 (Kirby J).

145 Ibid 527 (Kirby J).

2.196 In addition, it is not as though the law on extended common purpose is applied consistently across the various States. Bronitt and McSherry make the point that the modern code provisions[146] dealing with this subject differ in key respects from its treatment in the more traditional code States.[147] It is unnecessary for present purposes to elaborate upon these differences. The matter is dealt with comprehensively by the learned authors.[148] Their treatment repays careful consideration.

2.197 To take just one illustration of the difficulties that now typically arise in a case involving principles of complicity, consider the decision of the High Court in *R v Taufahema*.[149] There, the accused was the unlicensed driver of a stolen car carrying his brother and two friends. All four youths were on parole and each of them was carrying a loaded weapon. A police car pursued the stolen vehicle which was being driven erratically and at excessive speed. The stolen car struck a gutter and stopped. The four men fled, but as they did so, one of them fired five shots into the windscreen of the police car, killing one of the police officers.

2.198 Each of the youths was charged with murder. At their trial, the Crown variously identified the agreement to commit the 'foundational crime' (which would give rise to the doctrine of extended common purpose) as being one to

---

146 Commonwealth, Australian Capital Territory and Northern Territory.

147 Queensland, Western Australia and Tasmania. The test for extended common purpose under those codes appears to be objective, rather than subjective. In its review of Commonwealth law dealing with principles of criminal responsibility which led ultimately to the enactment of the Commonwealth *Criminal Code*, the Gibbs Committee rejected the objective test applied in the traditional code States as outmoded and recommended instead the adoption of the current common law approach in dealing with this subject. The Model Criminal Code Officers Committee also recommended a subjective, and not objective, approach. Plainly, by its terms, the Commonwealth *Criminal Code* contemplates that 'common purpose' will be viewed as merely one form of accessorial liability, and not as a form of primary liability.

148 Bronitt and McSherry, above n 3, 424-8.

149 (2007) 228 CLR 232.

(a) evade lawful arrest, (b) hinder a police officer in the execution of his duty or (c) commit an armed robbery. [150]

2.199 The New South Wales Court of Criminal Appeal set aside the convictions and entered judgments of acquittal. The Crown then successfully appealed to the High Court. That Court quashed the judgments of acquittal and ordered a retrial. In doing so, the Court characterised the foundational offence as one of 'an enterprise of armed robbery'. Plainly, however, the decision to describe the joint criminal enterprise in that way was problematic. Other characterisations could reasonably have been drawn.

2.200 In *Taufahema*, Kirby J, still greatly concerned about the lack of principle associated with extended common purpose, pointed out the difficulties associated with the various permutations that can arise in any case of complicity. His Honour said:

> If two such able and experienced judges as Sully J and Wood CJ at CL, both undoubted experts in the criminal law, could err in their directions to the jury on this subject, something appears to be needed to render the law simpler and more comprehensible. The majority in *Clayton* (125) rejected the opportunity. I must accept that decision. But this Court will see many more cases of this kind until the underlying law is re-expressed either by the Court or by Parliament in a way that addresses the present defects and uncertainties.[151]

2.201 Notably, Kirby J favoured Professor J C Smith's approach to directing juries on this subject. That approach was to tell the jury that they had

> to be sure that the secondary offender either wanted the principal offender to act as he or she did, with the intention which he or she had, or knew that it was virtually certain that the principal offender would do so.[152]

---

150 Attempts to identify the 'foundational crime' sometimes generate substantial confusion. In *R v May* [2012] NSWCA 111 for example, a case involving an agreement to commit murder contingent upon the giving of a signal by one co-offender to the other, it was submitted by the Crown that the case, on one view of the evidence, was really one of extended common purpose. The 'foundational' crime was said to be 'an agreement to murder subject to a contingency'. Bathurst CJ rejected that argument and held that the actual offence and the foundational offence were the same, namely the murder of the deceased. In those circumstances, 'the introduction of the concept of joint criminal enterprise was unnecessary and likely to cause confusion in the minds of the jury: at [260] (Bathurst CJ).

151 (2007) 228 CLR 232, 275 (footnote omitted).

152 J C Smith, 'Criminal Liability of Accessories: Law and Law Reform' above n 55, 465.

2.202 Bronitt and McSherry comment, with some force, that a direction along the lines put forward by Professor Smith would be easy to understand. It would also ensure that the fault element associated with group activity was more closely aligned with that endorsed by the High Court in *Giorgianni*.[153]

Confusion and Misunderstanding

2.203 Although liability for 'counselling, procuring, aiding and abetting', 'common purpose', and 'acting in concert' are all said to be conceptually distinct modes of participation in crime, they can, and frequently do, overlap. It is by no means unusual for the Crown to argue that each and every one of these forms of complicity arises on the same facts. Because an accused in such a case is normally charged, and convicted, as a principal offender, there may be uncertainty, at the sentencing stage, as to the basis upon which liability is said to rest.[154] The same may be true at the appellate level.

2.204 The decision in *Osland* casts light upon the difficulties that can arise in this area. Heather Osland was prosecuted as a principal offender on the basis that she acted in concert with her son. For that reason, his subsequent acquittal was not inconsistent with her conviction, nor did it render her conviction unsafe. As noted previously, the entire position would have been different had the Crown relied, not just upon acting in concert, but upon some form of derivative liability. In such a case, it might not be possible to know whether the jury convicted on the basis of acting in concert or aiding and abetting.

2.205 Recent decisions have lamented the confusion that often arises with regard to the relationship between various doctrines of complicity.

---

153 Bronitt and McSherry, above n 3, 434.

154 Charles Taylor was acquitted of joint criminal enterprise but convicted of aiding and abetting by the Special Court for Sierra Leone (International Criminal Court). Presumably there will be sentencing consequences arising out of this finding: *Prosecutor v Taylor* (Judgment) (Special Court for Sierra Leone, Trial Chamber 11, Case No SCSL-03-01-T, 30 May 2012).

2.206 In *Likiardopoulos*,[155] the Court of Appeal dealt with a submission that 'joint criminal enterprise' was essentially the same as acting in concert.[156] Accordingly, so it was submitted, joint criminal enterprise required proof of the appellant's presence at the scene of the offending (in that case a prolonged battery leading to death). The Court rejected that submission. It held that the elision of principles suggested by it was erroneous. Physical presence was not required in every case of joint criminal conduct. Any relevant act of participation, on the part of the accused, along the way to the commission of the offence would suffice.[157]

2.207 Bronitt and McSherry comment that there is clearly potential, in Victoria, for acting in concert and common purpose to overlap on essentially the same facts. They argue that if the law remains in its current state, juries will have to be carefully directed as to which basis of liability – concert or common purpose – is relied upon.[158]

2.208 Where common purpose is relied upon, a secondary party can, of course, be guilty of a lesser offence than the actual perpetrator.[159]

2.209 The problems in this area are heightened when the Crown seeks to invoke acting in concert as well as one or more of the various forms of derivative liability. Matters are made still worse when extended common purpose is also invoked.

2.210 In *R v Tangye*,[160] Hunt J deprecated this practice, and the practice of invoking extended common purpose in situations that did not call for its

---

155 (2010) 208 A Crim R 84.

156 In *Gillard* (2003) 219 CLR 1, 35, Hayne J regarded these two forms of complicity as interchangeable. This is yet another illustration of the problems raised by nomenclature.

157 See also *Arafan* (2010) 206 A Crim R 216, 231 (Maxwell P and Weinberg JA).

158 Bronitt and McSherry, above n 3, 437.

159 For example, see *Barlow v The Queen* (1997) 188 CLR 1, where the perpetrator was guilty of murder, but the accessory, through common purpose, only of manslaughter. See also *Smith, Garcia & Andreevski v The Queen* [2012] VSCA 5.

160 (1997) 92 A Crim R 545 ('*Tangye*').

application. His Honour said

> it will be seen from the passages quoted that the judge has referred — apparently interchangeably — to a joint criminal enterprise and to the so-called doctrine of common purpose which extends the concept of a joint criminal enterprise. Where — as here — no such extended concept was relied upon, it was both unnecessary and confusing to refer to it.
>
> The Crown needs to rely upon a straightforward joint criminal enterprise only where — as in the present case — it cannot establish beyond reasonable doubt that the accused was the person who physically committed the offence charged. It needs to rely upon the extended concept of joint criminal enterprise, based upon common purpose, only where the offence charged is not the same as the enterprise agreed. This Court has been making that point for years, and it is a pity that in many trials no heed is taken of what has been said.[161]

2.211 Despite the assistance offered by judgments such as that in *Tangye*, the fact remains that many trial judges find it extraordinarily difficult to charge juries on the principles of complicity. They seek refuge in the use of pattern directions taken from the *Charge Book*, using the language set out therein.

2.212 The standard directions contained in the *Charge Book* are carefully drafted to accord with the numerous subtle refinements of the law in this area. However, discussions with trial judges suggest that they themselves find complicity to be a subject that they simply do not understand. One can only imagine what this means to jurors who are required to make sense of what can only be described as a morass of complex law.

Simplification of Jury Directions – Is Legislative Reform Required?

2.213 The only realistic way in which jury directions regarding complicity can be simplified is through significant statutory reform. Merely changing the language used in the *Charge Book* is not an option.

2.214 Of course, codification of this branch of the law is by no means a simple task. Among the matters to be taken into account in drafting any new scheme are the following:

---

161 Ibid 556.

(a) What terminology should the new provisions adopt? In particular, how do we overcome the use of archaic language, and the problems of nomenclature that have for so long bedevilled complicity?

(b) What mental state or fault element should the Crown be required to establish in order to prove that a secondary party has been complicit in the commission of an offence?

(c) How should the question of 'divergence' be dealt with? Is there a place, in a codified body of law, for a doctrine such as 'extended common purpose'?

(d) What exceptions are necessary in order to exculpate conduct which would otherwise attract liability? How should these exceptions be framed?

2.215 The abolition of archaic terms such as 'aid, abet, counsel or procure' in relation to the actus reus of traditional accessorial liability is overwhelmingly supported. Some modern codes use terms such as 'assist or encourage', and 'bring about' as replacements for the older language.

2.216 One particular option which seems to have merit is to adopt a single all-encompassing phrase such as 'knowingly concerned', or perhaps even better, 'knowingly involved', as the sole form of secondary liability.

2.217 It is plain that any expression of this kind will need elaboration and further definition. Otherwise, by its very imprecision, it may bring within the ambit of the criminal law conduct that should not be regarded as criminal.

2.218 To speak of being 'knowingly concerned', or 'knowingly involved', in the commission of an offence is, without more, insufficient. For one thing, terms such as 'concerned' or 'involved' need explanation. So too does the mental state inherent in the concept of doing something 'knowingly'.

2.219 A policy choice will have to be made as to whether the fault element in complicity should be kept relatively confined (in accordance with *Giorgianni*),

or whether it should be extended to include some form of recklessness. If a wider fault element is chosen, it will have to be defined. In that regard, the choice will presumably be between foresight of probability, or foresight of a 'significant risk'.

2.220 One advantage in adopting an overarching physical element such as 'knowingly concerned' is that this is a term that has been extensively considered by the courts and given a reasonably precise meaning. This means that there is, in existence, a body of case law surrounding this expression which can be called in aid of its construction.[162] The term 'knowingly concerned', or one like it, has been used in numerous statutes as the basis for complicity.[163]

2.221 To take but one example, it has been held that 'knowingly concerned' – a phrase that is plainly synonymous with 'knowingly involved' – means more than mere 'concern, interest or anxiety'.[164]

2.222 In *Yorke v Lucas*, the High Court observed that the phrase

> requires a party to a contravention to be an intentional participant, the necessary intent being based upon knowledge of the essential elements of the contravention.[165]

2.223 Though in that case the High Court was considering the use of 'knowingly concerned' in the context of the *Trade Practices Act 1974* (Cth), there seems to be no reason why that same interpretation should not be applied in other contexts.[166]

2.224 It is also interesting to note that the language used by the High Court in *Yorke v Lucas* in relation to the fault element implicit within the term

---

162 See, eg, *R v Campbell* (2008) 73 NSWLR 272.

163 See, eg, *Fair Work Act 2009* (Cth) s 550; *Personal Property Securities Act 2009* (Cth) s 224; *Corporations Act 2001* (Cth) s 79.

164 *R v Tannous* (1987) 32 A Crim R 301, 306 (Lee J); *R v Haddad* (1988) 33 A Crim R 400.

165 (1985) 158 CLR 661, 670 (Mason ACJ, Wilson, Deane and Dawson JJ).

166 See, eg, *R v Edwards* (1992) 173 CLR 653 in which that interpretation was applied in a corporations law matter.

'knowingly concerned' is remarkably similar to that employed by that same Court when dealing with the fault element required for procuring,[167] namely 'knowledge of the essential elements of the contravention'.

2.225 There will also have to be included within the ambit of 'knowingly involved' a separate form of complicity designed to encompass group activity. In principle, there is no reason why complicity should not be made out if there has been a conspiracy proved which has resulted in the commission of the agreed offence.

2.226 There are, however, some potential disadvantages in employing a phrase such as 'knowingly concerned'. As the response provided by Victoria Legal Aid notes, the phrase does not 'on its face tell a jury in language likely to be understood what … conduct is intended to be caught'. Although its meaning is intended to be informed by the extensive case law outlined above, it may well be unduly optimistic to consider that the legal meaning of the phrase has been definitively settled so as to entirely avoid the need for lengthy legal argument as to the content of the jury directions it would necessitate.

2.227 Further, the utility of a phrase such as 'knowingly concerned' depends largely upon the overall scheme of the legislation finally decided upon. As the response by the Director of Public Prosecutions acknowledges, 'knowingly concerned' is a concept capable of being 'flexibly applied'. Those flexible qualities mean that such a concept would not sit well within a legislative provision which also includes reference to more 'fixed' or prescriptive concepts to describe traditional accessorial liability and group liability. That is because there would be some doubt as to what conduct is intended to be caught by the phrase 'knowingly concerned' which is not also covered by an 'assist or encourage' provision or a separate provision covering group liability.

---

167 *Giorgianni* (1985) 156 CLR 473.

2.228 As discussed earlier, the fault element required for traditional forms of accessorial liability is set out in *Giorgianni*. Basically, that case holds that specific intent must be established.

2.229 Some legislative reforms have moved away, in part at least, from the narrow view of the fault element in complicity expressed in *Giorgianni*. The Commonwealth *Criminal Code*, for example, has expanded that fault element by including within it a particular form of recklessness. One possible option for reform, in relation to the requirement stipulated by *Giorgianni* that the prosecution establish knowledge of 'essential facts', would be to hold a person complicit if that person 'either knew *or suspected* the existence of facts which would constitute the commission of the offence or … acted *recklessly*, *not caring whether the facts existed or not*.'[168]

2.230 Plainly, this is an important issue. As with all forms of criminal responsibility, the level at which the fault element is pitched is critical to the range of conduct caught by the offence.

2.231 At the same time, there is much to be said for retaining the *Giorgianni* approach.[169] For one thing, the test laid down in *Giorgianni* brings the law relating to complicity into line with inchoate offences such as attempt and conspiracy. Attempted murder requires proof of an intent to kill, and nothing less. Conspiracy, too, requires an intent on the part of each alleged conspirator to commit the offence that is the subject of the alleged agreement.[170] In neither case is recklessness sufficient.

2.232 As noted earlier, the problem of 'divergence' arises when the offence actually committed is materially different from that contemplated by the accused who is said to be complicit.

---

168 *R v Glennan* [1970] 2 NSWR 421 (emphasis added).

169 See, eg, Bronitt, 'Defending Giorgianni – Part 2', above n 48.

170 *R v LK* (2010) 241 CLR 177, 228 (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

2.233 One solution would be to enact a provision which extends liability to anyone intentionally assisting or encouraging the commission of an offence, or an offence of the same general type or character.

2.234 Of course, there will always be difficulties in determining whether the particular offence committed is of the same type or character as that originally contemplated.[171] There is no bright line solution. No code can avoid such problems of definition.

2.235 A closely related issue is the fate of extended common purpose. As previously discussed, the law currently provides that an accused who agrees to commit an armed robbery is guilty of murder if he or she foresees even the mere 'possibility' that an accomplice will shoot someone, with murderous intent, in the course of the robbery.[172]

2.236 In *Clayton*, the majority justified the retention of extended common purpose in the following terms:

> If a party to a joint criminal enterprise foresees the possibility that another might be assaulted with intention to kill or cause really serious injury to that person, and, despite that foresight, continues to participate in the venture, *the criminal culpability lies in the continued participation in the joint enterprise with the necessary foresight*. That the participant does not wish or intend that the victim be killed is of no greater significance than the observation that the person committing the assault need not wish or intend *that* result, yet be guilty of the crime of murder. [173]

2.237 Basically, the doctrine of extended common purpose was seen as a necessary component of the law's response to group related crime. No doubt, at a policy level, that is a perfectly reasonable position. The fact that the doctrine runs contrary to fundamental principle should not, however, be ignored. Nor should it be forgotten that extended common purpose adds a

---

171 The phrase is intended to bear a similar meaning to the term 'of the type' used in the Commonwealth *Criminal Code*, and also to the phrase 'of the same type' proposed by the New South Wales Law Reform Commission. If anything, the phrase 'of the same general character', might be thought to have a broader scope than the phrase 'of the same type'.

172 See, eg, *Clayton* (2006) 231 ALR 500.

173 Ibid, 505 (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ).

layer of complexity to what is already a difficult branch of the law. The majority discounted that contention.[174] With respect, it is difficult to accept their conclusion in that regard.

2.238 Serious thought needs to be given to whether the doctrine of extended common purpose should be retained in any statutory reform of complicity. There is plainly much force in Kirby J's repeated criticisms of the doctrine, particularly in his observation that it suffers from 'incongruent principles' and alters the necessary fault element in a way which leads to overbroad criminal liability.[175] Certainly, the doctrine cannot be reconciled with the approach taken in *Giorgianni* to the fault element in complicity.

2.239 If the doctrine is to be retained, it would surely be preferable to recast the fault element required in order for it to be made out. At the very least, there ought to be a requirement of foresight of a 'probability' (or even 'strong probability') rather than a mere 'possibility'.[176] To narrow the scope of this form of complicity would to some extent mitigate the conceptual difficulties that arise when the Crown puts its case on complicity in various alternative ways, each with its own specific, and distinct, fault element.

Exceptions to Complicity

A. Withdrawal

2.240 Any codification of complicity will necessarily require the enactment of a series of recognised exceptions to that doctrine. There has already been reference made, for example, to the existence of the 'withdrawal' exception in the Commonwealth *Criminal Code*.

---

174 Ibid 506 [25].

175 Ibid 507 [31].

176 In *Clayton* (2006) 231 ALR 500, 532 [125], Kirby J suggested, following a test proposed by Professor John Smith, a test of 'virtual certainty' that another participant in the enterprise would commit murder, or that the accused wanted the other participant to commit a murder.

2.241 In broad terms, that exception seems to be well-drafted, and to deal adequately with this subject.

2.242 The test of 'all reasonable steps' having been taken differs slightly from the common law as expounded in *White v Ridley*.[177] Though the standard of 'reasonableness' is retained, the test proposed in the draft provision set out later in this Chapter applies that standard not to the steps necessary to undo the effect of the accused's own actions in assisting, encouraging or bringing about the offence, but rather to the steps taken by the accused to prevent the commission of the offence.

2.243 The New South Wales Law Reform Commission correctly identified the public interest at stake when it observed:

> it seems more realistic, if D is to escape liability by withdrawing his support, that D take whatever reasonable steps are available to prevent the offence occurring.[178]

2.244 There is also something to be said for the addition of a qualification to an 'all reasonable steps' provision so that it is made clear that this defence is available only when the accused has not previously acted so as to render the commission of the offence unavoidable. This additional provision seems necessary as a matter of policy. Moreover, it would be consistent with the law as stated in *White v Ridley*.

2.245 The question of what constitutes a 'reasonable step' is a factual one to be considered in the particular circumstances of each case.

2.246 The New South Wales Law Reform Commission identified some of the factors which may go to reasonableness as follows:[179]

- the significance of the assistance or encouragement previously given;

177 (1978) 140 CLR 342.
178 New South Wales Law Reform Commission, *Complicity*, Report No 129 (2010) 55.
179 Ibid 78.

- the seriousness of the offence in contemplation and its likely consequence;
- whether or not D can be satisfied, on reasonable grounds, by P's response that the offence will not occur;
- any element of risk or duress posed by P; and
- D's age and maturity.

2.247 This is a useful enumeration of the matters that should be considered. It would be a helpful addition to any bench book or model direction on the subject of withdrawal.

2.248 One further factor to be considered in determining whether all 'reasonable steps' have been taken might be whether the withdrawal was communicated to the principal offender.[180]

B. Exceptions for Victims who are Complicit

2.249 Further, for the reasons given by the New South Wales Law Reform Commission,[181] it is appropriate to include in any legislation dealing with complicity an exception stating that a person is not liable for assisting or encouraging an offence against himself or herself.

2.250 The doctrine of complicity should not be used to convict, as a secondary party, a victim who assists, encourages an offence that, as a matter of policy, is intended to benefit or protect that person.

Other Matters

A. Omissions

2.251 A further question to be considered is whether a new statutory enactment should extend the possible ambit of complicity to omissions done

---

180 See generally *White v Ridley* (1978) 140 CLR 342; *Criminal Code Act Compilation Act 1913* (WA) s 8(2)(b).

181 New South Wales Law Reform Commission, *Complicity*, Report No 129 (2010) 56.

with intent to 'assist or encourage' the commission of a crime.

2.252 There seems to be no reason why omissions should not fall within the general principles of complicity. In an illuminating article published in the *Law Quarterly Review*, Professor J C Smith gave as an example the situation of a 'butler who deliberately omits to lock the door to facilitate the entry of burglars who rob his employer'.[182] In such a case, there is no sensible distinction to be drawn between deliberately leaving the door open and opening it. To make that distinction would result in absurdity.

B. Causation

2.253 An important matter to consider in drafting any statutory provision in this area is whether causation is to be regarded as an essential element of at least some forms of complicity. Must it be shown that the secondary party, by his or her acts or omissions, contributed to or brought about the commission of the offence by the actual perpetrator?

2.254 Section 11.2(2)(a) of the Commonwealth *Criminal Code* appears, at first glance, to include a causation requirement. It states that a prerequisite for liability under the 'aids, abets, counsels or procures' provision is that the 'person's conduct must have in fact aided, abetted, counselled or procured the commission of the offence by the other person'.

2.255 As the New South Wales Law Reform Commission has pointed out, however, a section drafted in that manner leaves it open to doubt whether 'that provision was intended to introduce a causation link or was merely intended to flag the need for a positive act by [the secondary party].'[183]

2.256 In Victoria, there has been considerable resistance to the notion that causation is a necessary element of liability for aiding and abetting.

---

182 J C Smith, 'Criminal Liability of Accessories: Law and Law Reform' above n 55, 463.

183 New South Wales Law Reform Commission, *Complicity*, Report No 129 (2010) 50.

2.257 In *R v Lam*, the Court of Appeal said:

> The prosecution is not required to establish that the acts said to constitute aiding and abetting in fact assisted or encouraged the principal in the first degree. The suggestion in some of the authorities to which I have referred that it must be established that the principal in the first degree was in fact assisted or encouraged do not in my respectful opinion accord with principle or those authorities which I regard as persuasive and plainly correct. Such a direction to a jury would be too favourable. It would impose an impossible burden upon the prosecution, who would rarely be in a position to place evidence before a jury as to the effect of the secondary participant's conduct on the principal offender's state of mind.[184]

2.258 It should be noted that *Lam* concerned aiding and abetting. It is difficult to see how, if procurement is alleged, causation can be eliminated as a matter to be proved.

C. Incitement

2.259 Some thought must be given as to whether the law regarding incitement must itself be reformed if complicity is to be codified. The proposed statutory model, set out later in this Chapter, requires proof, as against an accused, that an offence was in fact committed. The question that remains to be considered is what liability, if any, should attach to a person who assists or encourages the commission of an offence when no such offence was in fact committed.

2.260 Further, incitement may be important in other ways. For example, the question whether, and in what circumstances, an accused who has withdrawn from a criminal enterprise may still be guilty of incitement must be addressed.

2.261 At present, s 321G of the *Crimes Act 1958* sets out comprehensively the law of incitement in this State. That section provides:

> (1) Subject to this Act, where a person in Victoria or elsewhere incites any other person to pursue a course of conduct which will involve the commission of an offence by:
>
> (a) the person incited;

---

184 (2008) 185 A Crim R 453, 464 (Buchanan, Vincent and Kellam JJA) ('*Lam*').

(b) the inciter; or

(c) both the inciter and the person incited –

if the inciting is acted on in accordance with the inciter's intention, the inciter is guilty of the indictable offence of incitement.

(2) For a person to be guilty under subsection (1) of incitement the person

(a) must intend that the offence the subject of the incitement be committed; and

(b) must intend or believe that any fact or circumstance the existence of which is an element of the offence in question will exist at the time when the conduct constituting the offence is to take place.

(3) A person may be guilty under subsection (1) of incitement notwithstanding the existence of facts of which the person is unaware which make commission of the offence in question by the course of conduct incited impossible.

2.262 The term 'incite' is defined to 'include command, request, propose, advise, encourage or authorise'.[185]

2.263 The New South Wales Law Reform Commission in its 2010 Report considered that the law of incitement should be 'enlarged to cover acts of assistance or facilitation [by the secondary party] where they are directed at encouraging [the commission] of an offence'.[186]

2.264 As discussed earlier, the *Serious Crime Act 2007* (UK) enacted a series of inchoate offences, which replaced the common law of incitement. Broadly speaking, that Act creates an inchoate facilitation offence. Interestingly, s 44 uses the expression 'encouraging or assisting' the commission of an offence as the basis for liability.

2.265 There is a strong case for modifying the law of incitement as currently enacted in the *Crimes Act 1958*. Consistency with any reform of complicity

185 *Crimes Act 1958* s 2A.

186 New South Wales Law Reform Commission, *Complicity*, Report No 129 (2010) 242.

would suggest that the terms 'assist or encourage' should be used in that regard. This would ensure that acts of assistance prior to the planned commission of an offence (which have the effect of encouraging the principal offender) are not treated any differently from acts of encouragement.

A Possible Model for Statutory Reform

2.266 In drafting a new set of provisions dealing with complicity, attention should be given not only to the strengths and weakness of the Commonwealth *Criminal Code* and the New South Wales Law Reform Commission's draft statutory provisions set out above,[187] but also to a quite different model. It is useful to consider s 550 of the *Fair Work Act 2009* (Cth). That section provides:

> ***Involvement in contravention treated in same way as actual contravention***
>
> (1) A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision.
>
> (2) A person is involved in a contravention of a civil remedy provision if, any only if, the person:
>
> (a) has aided, abetted, counselled or procured the contravention; or
>
> (b) has induced the contravention, whether by threats or promises or otherwise; or
>
> (c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
>
> (d) has conspired with others to effect the contravention.

2.267 This model has a number of attractions. First, it is drafted in clear and simple language. Secondly, as mentioned earlier, the use of the phrase 'knowingly concerned' in s 550(2)(c) involves an expression that is well known to the law in this area. Thirdly, the style of drafting is less prescriptive than that found in either of the two other models previously considered.

---

187 Above at [2.142].

2.268 If the *Fair Work Act 2009* (Cth) provision is to be used as the basis for legislative reform of complicity, it will require some modification. For example, it would surely be preferable to omit the phrase 'aided, abetted, counselled or procured' in s 550(2)(a), and to substitute an expression such as 'assisted or encouraged'. It would also be necessary to include provisions dealing with the requisite fault element for complicity, the particular problems associated with group activity, and various specific issues identified earlier, including withdrawal.

The Fair Work Act *Model*

2.269 One possible legislative model, built around the *Fair Work Act* provision, and favoured by this Report, would be as follows:

00 Complicity

For Subdivisions (1) and (2) of Division 1 of Part II of the **Crimes Act 1958 substitute—**

"(1) ***Involvement in commission of offences***

323 Definition

In this Subdivision—

principal offender means a person who actually performs the physical elements of an offence.

324 Interpretation

(1) For the purposes of this Subdivision, a person is involved in the commission of an offence if the person—

(a) intentionally assists, encourages [*or brings about*] the commission of the offence or an offence of the same general character; or

(b) enters into an agreement, arrangement or understanding with another person to commit the offence or an offence of the same general character.

(2) In determining whether a person has encouraged the commission of an offence, it is irrelevant whether or not the principal offender in fact was encouraged to commit the offence.

(3) A person may be involved in the commission of an offence, by act or omission—

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

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

324A Person involved in commission of offence taken to have committed the offence

(1) Subject to subsection (3), if an offence (whether indictable or summary) is committed, a person who is involved in the commission of the offence is taken to have committed the offence.

(2) Despite subsection (1), a person is not taken to have committed an offence if—

(a) before the conduct constituting one or more of the physical elements of the offence commences, the person—

(i) terminates his or her involvement in the commission of the offence; and

(ii) takes all reasonable steps to prevent the commission of the offence; and

(b) the person's prior actions have not rendered the commission of the offence unavoidable.

(3) Nothing in this section imposes liability on a person for an offence that, as a matter of policy, is intended to benefit or protect that person.

324B Other offenders need not be prosecuted

A person who is involved in the commission of an offence may be found guilty of the offence whether or not any other person

is prosecuted for or found guilty of the offence.

324C Offender's role need not be determined

A person may be found guilty of an offence by virtue of section 324A if the trier of fact is satisfied that the person is guilty either as a principal offender or as a person involved in the commission of the offence but is unable to determine which applies.

324D Abolition of complicity at common law

(1) The law of complicity (aiding, abetting, counselling or procuring the commission of an offence) at common law is abolished.

(2) The doctrines at common law of acting in concert, joint criminal enterprise and common purpose (including extended common purpose) are abolished."

A Guide to the Proposed Legislation

(i). Outline

2.270 This draft provision aims to simplify the law of complicity by restating it comprehensively, clearly and concisely.

2.271 The proposed legislation first set out in the initial draft of this Report specified three categories of conduct which would give rise to criminal liability. They were the current ss 324(1)(a)-(b) set out in the draft legislation, in addition to a provision covering persons 'in any way knowingly concerned in the commission of the offence or an offence of the same general character…'.

2.272 That provision prompted a variety of responses. Though the response from Victoria Legal Aid disapproved of the 'knowingly concerned' formulation, the Law Institute of Victoria and the Director of Public

Prosecutions both expressed strong agreement with that phrase or one substantially similar to it.

2.273 Having carefully considered the responses received regarding the draft Report, a decision was made to omit the 'knowingly concerned' provision from the final recommended legislative provision. Subsections (a) and (b) of the revised draft are, by themselves, sufficiently broad to capture the conduct which ought to be subject to criminal liability under the doctrine of complicity.

2.274 The legislation is drafted so as to replace the current ss 323-324 of the *Crimes Act 1958* (those sections are currently headed 'abettors in indictable offences' and 'abettors in summary offences'.)

(ii) Proposed Section 324

2.275 This proposed section, which is headed 'Interpretation', provides that a person is 'involved' in the commission of an offence if the person acts in any one of two ways, namely:

(a) intentionally assists, encourages, or brings about the commission of the offence or an offence of the same general character; or

(b) enters into an agreement, arrangement or understanding with another person to commit the offence (or an offence of the same general character).

(iii) Proposed Subsection (1)(a)

2.276 Proposed subsection (1)(a) is intended to cover the same circumstances as the 'aid, abet, counsel and procure' formula used at common law and in s 323 of the *Crimes Act 1958*, and to re-express that formula in modern language. The phrase 'or brings about' was included in the draft Report as a substitute for the 'procure' element of the old formula. On balance, after carefully considering the response provided by Victoria Legal Aid, a tentative decision was made to delete that phrase. That decision was made on the basis

that assistance and encouragement are sufficiently broad concepts to cover cases traditionally dealt with under the heading of procurement. The phrase is included within the draft italicised and bracketed in order to bring the question of its inclusion to the attention of the Jury Directions Advisory Group.

2.277 The word intentionally in proposed subsection (1)(a) ensures, in keeping with *Giorgianni*, that a purposive state of mind is required for complicity**.** For the avoidance of doubt, the mental state described by the use of the term 'intentionally' is not just an intention to assist or encourage, but an intention to assist or encourage another to commit a particular offence, or an offence of the same general character.

2.278 The response provided by the Criminal Bar Association notes that there may be some uncertainty surrounding the phrase 'of the same general character' which is common to proposed subsections 1(a) and 1(b). The phrase is intended to invite an objective factual comparison between the offence assisted or encouraged and the one actually committed by the principal offender. A note to that effect would be a useful addition to bench books on this topic, as too would be the inclusion of some examples.

(iv) Proposed Subsection (1)(b)

2.279 This proposed subsection covers group activity in which an accused has entered 'into an agreement, arrangement or understanding with another person to commit the offence or an offence of the same general character.' It is, in truth, a 'completed conspiracy offence'. That is to say that liability under this ground will be made out if a conspiracy has been proved which has resulted in the commission of the substantive offence which was the subject of the conspiracy.

2.280 The fault element required for this mode of participation will be in line with that specified for traditional forms of accessorial liability in *Giorgianni*. That is because it seems implicit in the terms 'agreement, arrangement or

understanding' that there must be a specific degree of knowledge, and intent, in order to fall within the notion of a conspiracy.[188]

(v) Proposed Section 324(2)

2.281 Proposed s 324(2) provides that encouragement given by a person need not have been effective in order for a person to be 'involved' in the commission of an offence for the purposes of proposed s 324(1).

2.282 The legislation imposes no causation requirements in any form of complicity. As the proposed provisions do not include, as presently drafted, an express replacement for the 'procure' element of the old formula, there is no need to implement any such causation requirement. As the response from Victoria Legal Aid points out, the absence of such a requirement will significantly simplify jury directions on this topic.

(vi) Proposed Section 324(3)(a)

2.283 This proposed section states that a person may be 'involved' in the commission of an offence by act or omission. For the reasons given earlier in this Chapter, there is no reason in principle to distinguish between acts and omissions.

2.284 Further, although proposed s 324(1) contains no express requirement of physical presence, it is desirable to include a provision stating clearly that such presence is not required for any form of complicity based on proposed s 324(1). Proposed section 324(3)(a) will avoid the need to consider, afresh, that issue every time a new fact situation arises which calls into question whether the case is based upon concert, or some other form of group activity.[189] The proposed section is intended to ensure that all relevant acts of participation are considered, and not merely those carried out at the place where the offence was in fact committed.

---

188 *R v LK* (2010) 241 CLR 177.

189 This was exactly what occurred in *Likiardopoulos*.

(vii) Proposed Section 324(3)(b)

2.285 This proposed section is included solely for the avoidance of doubt.

(viii) Proposed Section 324A

2.286 The basis of liability centres on the phrase 'involved in the commission of the offence'. This notion of 'involvement' in an offence is defined in proposed section 324 as discussed above.

2.287 Proposed section 324A replicates s 323 of the *Crimes Act 1958*. It operates procedurally, and provides that any person found to have been involved in the commission of an offence is to be dealt with as though he or she had committed that offence.

2.288 The subsidiary phrase — 'if an offence ... is committed' — is intended to make it clear that liability for complicity under this new model continues to be derivative. In other words, there must be proof, as against the accused, that the offence he or she is said to have been involved in was actually committed.

2.289 Plainly, as discussed earlier, whether complicity should be regarded as a wholly derivative offence is contentious.

2.290 There are at least two possible alternatives to retaining derivative liability. The first would be to retain such liability, but in an attenuated form. Thus, it would be sufficient, under this alternative, to establish simply, as against the accused, that the 'perpetrator' had carried out the physical elements of the offence. This would allow the conviction of an accused against whom both the fault element and physical element can be proved even if the perpetrator has a complete defence available and is acquitted.

2.291 The second is to move completely away from derivative liability. In other words, this would dispense entirely with the requirement that the prosecution prove that the offence was in fact committed. Liability in such circumstances would be based entirely upon the accused's own actions and

state of mind. Complicity would be inchoate. Liability would be primary and non-derivative. In *Likiardopoulos*, the High Court was asked by the Crown to recast the common law to bring about this result. However, whether the Court would be prepared to take such a far-reaching and radical step must, at this stage, be regarded as problematic. On the hearing of the appeal on 31 May 2012, Heydon J stated his view in argument that any substantial change in the derivative nature of complicity would be a 'job for Parliament'.[190]

2.292 It is important to emphasise that if the subsidiary phrase in the proposed section is retained, it does not extend to require proof, in addition to the fact that the offence was committed, that the principal offender was prosecuted or convicted for their involvement in that offence. Proposed section 324B is intended to make that clear.

(ix) Proposed Section 324A(2)

2.293 This proposed section provides for a defence of withdrawal which is couched in terms substantially similar to those found in the Commonwealth *Criminal Code*.

2.294 As discussed earlier, the language of 'all reasonable steps to prevent the commission' of the offence is preferable to the common law requirement that the accused person take steps to undo their own involvement.

2.295 No definition of 'reasonable steps' is attempted. Clearly, the phrase must take on a suitable meaning adapted to the particular circumstances of each case. As discussed above, a list of possible factors to consider in this regard would make a useful addition to a bench book or model charge on the topic of withdrawal.

2.296 The final qualification — that the person must not have 'previously acted so as to render the commission of the offence unavoidable' — does not appear in the *Criminal Code*, but is consistent with the common law on this

190 *Likiardopoulos v The Queen* [2012] HCA Trans 129.

subject. It also has a strong basis in policy.

(x) Proposed Section 324A(3)

2.297 This section is intended to make it clear that no person shall be liable for their involvement in an offence that, as a matter of policy, is intended to benefit or protect that person.

2.298 The provision is based on the terminology used in the Commonwealth *Criminal Code*[191] and recommended by the New South Wales Law Reform Commission.[192]

2.299 It is recognised that, in most cases, common sense will ensure that a victim is not prosecuted under these provisions.

2.300 As discussed above, however, there are sound reasons for the inclusion of such a provision.

(xi) Proposed Section 324B

2.301 This proposed section provides that prosecution or conviction of the principal offender is not a prerequisite for a secondary party's liability under these provisions.

2.302 This proposed section does not remove the obligation on the Crown to prove, by evidence admissible against the secondary party, that an offence was in fact committed.

(xii) Proposed Section 324C

2.303 This proposed section is modelled on s 11.2(7) of the *Criminal Code* and the draft provision suggested by the New South Wales Law Reform Commission.[193]

---

191 *Criminal Code* s 11.5(4)(b). That section provides for the defence in cases of conspiracy. Interestingly, the exception is not expressly set out in ss 11.2 or 11.2A of the Code.

192 New South Wales Law Reform Commission, *Complicity*, Report No 129 (2010) 56.

193 Ibid xv.

2.304 The proposed section ensures that where an accused is charged with the substantive offence as the principal offender, the trier of fact may instead determine (on its view of the evidence) that the accused is guilty under these provisions.

(xiii) Proposed Section 324D

2.305 This proposed section provides for the abolition of complicity at common law. It is intended that the new provisions operate as an exhaustive statement of the law of complicity in this State.

Conclusion

2.306 Legislative reform of the type recommended is supported, in general terms, by the Supreme Court and County Court Judges consulted in the preparation of this Report, all of whom recognise the undue complexity associated with the law of complicity in its present form and the need to take urgent steps to ameliorate that problem. Introduction of such legislation would bring this State into line with those jurisdictions that have either codified the law in this area, or are in the course of doing to. It would in no way diminish the right of an accused to a fair trial.

UPDATE
(17 September 2012)

2.307 On 14 September 2012, soon after the finalisation of the Report, the High Court handed down its judgment in *Likiardopoulos v The Queen*.[194]

2.308 The Court unanimously dismissed the appeal. It rejected the argument that to prosecute the appellant for murder, in circumstances where the Crown had accepted pleas to lesser offences from his co-offenders, had a tendency to bring the administration of justice into disrepute.

2.309 In so deciding, the Court noted that the Crown was perfectly entitled, in the exercise of its prosecutorial discretion, to prosecute the appellant (and not his co-offenders) for murder. Reasons for adopting such a course included the lack of evidence supporting a conviction for murder against the co-offenders, as well as the fact that it was open to view the appellant's moral culpability as greater than that of his co-offenders.[195]

2.310 The Court also declined the Crown's invitation to 'sweep away all the outdated distinctions between principals and accessories'. It dismissed the appeal on a somewhat narrower basis. Gummow, Hayne, Crennan, Kiefel and Bell JJ (with whom French CJ relevantly agreed) said:

> … accepting that liability on the accessorial case was purely derivative, the evidence in the appellant's trial was capable of proving that those whom the appellant was said to have directed and encouraged to commit the offence had murdered the deceased.[196]

2.311 To similar effect, Heydon J said:

---

194 [2012] HCA 37.

195 Ibid [38]-[39] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

196 Ibid [27].

> If the appellant's argument were to be accepted, the appellant would have had to analyse the evidence in such a way as to support the conclusion that none of the principals were guilty of murder. This the argument did not do. And the argument could not have done it. Instead the appellant relied on various catch-phrases, emphasised in the following quotations. The appellant said: 'there was, *for juristic purposes*, no murder by any of the persons relied on as potential principals.' The appellant put it another way: 'there could be, *for legal purposes*, no murder in circumstances where the Crown had accepted pleas of guilty from those persons upon whom they relied as the principal offenders'. The appellant submitted that the prosecution's stance was 'not *open in law*'. The 'juristic' and 'legal' element in the submission was that the prosecution had accepted pleas of guilty from the alleged principal offenders, not to murder, but to manslaughter and to being an accessory after the fact to manslaughter. That 'juristic' and 'legal' element cloaked the fact that for all practical purposes the alleged principal offenders were guilty of murder.[197]

2.312 Accordingly, the issues raised in the Crown's Notice of Contention did not arise for determination, and there was no need to embark upon a far-ranging conceptual analysis of the doctrine of complicity. It was sufficient that the evidence admissible against the appellant was capable of proving that at least one of his co-offenders had committed the crime of murder. That was so regardless of whether they had actually been prosecuted for that offence.

2.313 The Court also confirmed that the Court of Appeal had been correct in rejecting the appellant's contention that the trial judge had erred in directing the jury that they need not be satisfied that the appellant was present throughout the assault. Gummow, Hayne, Crennan, Kiefel and Bell JJ noted that the trial judge had 'entertained no … misapprehension' that presence was an essential element in establishing the appellant's guilt as a party to the joint criminal enterprise.[198]

---

197 Ibid [44] (emphasis in original).

198 Ibid [21].

3. INFERENCES AND CIRCUMSTANTIAL EVIDENCE

Overview

3.1 When making their determination of the facts in a criminal trial, jurors do not need to rely solely on evidence of what a witness personally saw, heard or did. They can rely on inferences drawn from that evidence. Consequently, the law has come to draw a distinction between two different types of evidence:

- Direct evidence: evidence which directly proves a fact in issue, without requiring jurors to draw any inferences; and
- Circumstantial evidence: evidence of a related fact or facts, from which jurors can infer the existence of the fact in issue.[1]

3.2 The distinction between direct and circumstantial evidence does not relate to the nature or content of the evidence given (for example, whether it is evidence of an event the witness personally saw, rather than evidence of an event they were told about), but to the way in which the evidence is to be used. If it is necessary for jurors to infer a particular fact from the evidence, it will be circumstantial evidence of that fact.

3.3 The ability of jurors to draw inferences from the evidence presented in court raises three issues that will be addressed in turn in this Chapter:

(i) Do jurors need to be directed that the facts on which their inferences are based must be proved to a particular standard;

(ii) Do jurors need to be directed that they must be satisfied that all reasonable hypotheses consistent with the accused's innocence have been excluded beyond reasonable doubt; and

(iii) Do the jurors need to be given any other directions about inferences and circumstantial evidence.

---

1 See, eg, *Shepherd v The Queen* (1990) 170 CLR 573 ('*Shepherd*').

Standard of Proof for Facts

A. General principles: **Chamberlain** *and* **Shepherd**

3.4 Traditionally, it was widely understood that the prosecution only needed to establish the elements of a crime (and disprove any relevant defences) beyond reasonable doubt. They were not required to prove any other facts to that standard.[2]

3.5 This understanding changed in 1984, when the High Court held in *Chamberlain v The Queen (No 2)* that if proof of an element of a crime is to be inferred, the facts relied upon to found the inference must also be proved beyond reasonable doubt. In this regard, Gibbs CJ and Mason J said:

> [T]he jury cannot view a fact as a basis for an inference of guilt unless at the end of the day they are satisfied of the existence of that fact beyond reasonable doubt... The statement by Lord Wright in *Caswell v. Powell Duffryn Associated Collieries, Ld*, that 'There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish' is obviously as true of criminal as of civil cases. The process of reasoning in a case of circumstantial evidence gives rise to two chances of error: 'first from the chances of error in each fact or consideration forming the steps and second from the chance of error in reasoning to the conclusion': *Morrison v. Jenkins*. It seems to us an inescapable consequence that in a criminal case the circumstances from which the inference should be drawn must be established beyond reasonable doubt. We agree with the statement in *Reg. v. Van Beelen*, that it is 'an obvious proposition in logic, that you cannot be satisfied beyond reasonable doubt of the truth of an inference drawn from facts about the existence of which you are in doubt'.[3]

3.6 The judgment in *Chamberlain* was initially interpreted as requiring jurors to be satisfied, beyond reasonable doubt, of *all* of the facts upon which they based their inferences.[4] However, in *Shepherd*[5] the High Court rejected that interpretation. They held that the majority in *Chamberlain* were only referring to *intermediate facts which are an indispensable step upon the way to an*

---

2 See, eg, *R v Dickson* [1983] 1 VR 227, 235 (Starke ACJ, Crockett and McGarvie JJ).

3 *Chamberlain v The Queen (No 2)* (1984) 153 CLR 521, 536 (Gibbs CJ and Mason J) (citations omitted) ('*Chamberlain*').

4 See, eg, *R v Sorby* [1986] VR 753; *R v Maleckas* [1991] 1 VR 363.

5 (1990) 170 CLR 573.

inference of guilt. Other facts upon which inferences are based need not be proved beyond reasonable doubt.

3.7 There are two essential aspects of the decision in *Shepherd*. First, it is only 'intermediate facts' that may need to be proved beyond reasonable doubt, not the individual pieces of evidence presented by the witnesses. The concept of an 'intermediate fact' was explained by Dawson J as follows:

> Circumstantial evidence is evidence of a basic fact or facts from which the jury is asked to infer a further fact or facts. It is traditionally contrasted with direct or testimonial evidence, which is the evidence of a person who witnessed the event sought to be proved. The inference which the jury may actually be asked to make in a case turning upon circumstantial evidence may simply be that of the guilt of the accused. However, in most, if not all, cases, that ultimate inference must be drawn from some intermediate factual conclusion, whether identified expressly or not. Proof of an intermediate fact will depend upon the evidence, usually a body of individual items of evidence, and it may itself be a matter of inference. More than one intermediate fact may be identifiable; indeed the number will depend to some extent upon how minutely the elements of the crime in question are dissected, bearing in mind that the ultimate burden which lies upon the prosecution is the proof of those elements.[6]

3.8 Secondly, not all intermediate facts will need to be proved beyond reasonable doubt. It is only intermediate facts that are 'indispensable links in a chain of reasoning towards an inference of guilt' that may need to be proved to that standard.[7] While some intermediate facts will fit this description, others will not.

3.9 To help explain this concept of an indispensable intermediate fact, Dawson J drew a distinction between two different types of circumstantial case:

- Cases in which the accused's guilt is proved by sequential reasoning ('links in a chain'); and

---

6 Ibid 579.

7 Ibid 579 (Dawson J). For the sake of simplicity, these facts will be referred to as 'indispensable intermediate facts'.

- Cases in which the accused's guilt is proved by an accumulation of detail ('strands in a cable').[8]

3.10 It is only in 'chain' cases that the prosecution must prove any facts beyond reasonable doubt – and then only if those facts are indispensable links in the chain.[9] By contrast, in 'cable' cases the prosecution generally does not need to prove any individual facts to that standard.[10] Jurors may base their inference of guilt on the whole of the evidence, regardless of whether they are satisfied that any particular fact has been proved beyond reasonable doubt.

3.11 The principles established in *Shepherd* (and *Chamberlain*) are seen to be simply an amplification of the requirement that the prosecution prove its case beyond reasonable doubt. They do not reflect a separate rule concerning the standard of proof for facts.[11]

3.12 It is important to note that while these principles were established in the context of circumstantial evidence, they seem to be of broader application. They appear to establish the standard of proof for *all* facts, regardless of whether those facts are sought to be proved directly or indirectly, or provide the basis for a subsequent inference.

B. Identifying 'Indispensable Intermediate Facts'

3.13 As judges may need to direct the jury about the standard of proof for any 'intermediate facts which constitute indispensable links in a chain of reasoning towards an inference of guilt'[12] (a '*Shepherd* direction'), it is important that they understand precisely which facts fall within this category.

3.14 It is clear that this is, to some extent, a question of logic, as was noted by the Queensland Court of Appeal in *R v Jones*:

> [T]here must be found some reason for distinguishing from others the

---

8 Ibid.
9 Ibid. See also *R v Cavcik (No 2)* (2009) 28 VR 341, 358 (Vincent, Nettle JJA and Vickery AJA).
10 There are limited exceptions to this rule: see below [3.34]-[3.74] ff.
11 *Chamberlain* (1984) 153 CLR 521; *Shepherd* (1990) 170 CLR 573.
12 *Shepherd* (1990) 170 CLR 573, 579 (Dawson J).

> intermediate step which is to be the subject of a *Shepherd* direction, in order to necessitate such a direction. Such an intermediate step would ordinarily, one would expect, be a point of central importance in a logical sense and not merely because one side or the other places emphasis upon it.[13]

3.15 However, it is not clear whether the concept of an 'indispensable intermediate fact' refers to a fact that *is objectively indispensable* (i.e., without which the prosecution case could not succeed), or a fact which *may be considered indispensable by the jury* (depending on what view of the facts they take).

3.16 In *R v Merritt*,[14] the New South Wales Court of Criminal Appeal held that the latter approach was correct:

> Ultimately… it is for the trial judge to determine whether to give directions that relate the standard of proof to what are, or might be, intermediate facts 'which constitute indispensable links in a chain of reasoning towards an inference of guilt'. It is important in this regard, we think, to appreciate that the trial judge should, in considering this question, ask whether the jury might reasonably regard certain facts as intermediate facts even if, as it happened, his Honour did not regard any of the facts in that light.

3.17 Thus, in *Merritt* the Court held that the judge should have directed the jury that *if* they regarded any particular fact as being an indispensable link in the chain of proof, then that fact must be proved to their satisfaction beyond reasonable doubt before they could convict. A similar direction was seen to be appropriate in *R v Debs*.[15]

3.18 The correctness of this view was doubted in a later decision of the New South Wales Court of Criminal Appeal, *R v Davidson*. In that case, Simpson J adopted a more objective view, holding that:

> Whether a fact on which the Crown relies as part of a circumstantial case is or is not 'indispensable' may be tested by asking whether, in the

---

13 [1993] 1 Qd R 676, 680 (Macrossan CJ, Pincus and McPherson JJA).

14 [1999] NSWCCA 29, [70] (Wood CJ at CL, James and Adams JJ) (citations omitted). See also *Minniti v The Queen* [2006] NSWCCA 30.

15 [2007] VSC 169 ('*Debs*'). See also *R v Cavcik (No 2)* (2009) 28 VR 341, 358 (Vincent, Nettle JJA and Vickery AJA).

> absence of evidence of that fact, there would nonetheless be a case to go to the jury. If the answer is in the affirmative, even if the Crown case is weakened, even considerably, the fact is not 'indispensable'. Where the answer is in the negative, the fact is 'indispensable' and the jury should be directed accordingly.[16]

3.19 This approach aligns with the views expressed by Gleeson CJ and Hayne J in *Velevski v The Queen.*[17] In addressing an argument that a beyond reasonable doubt direction should have been given in relation to evidence of post-offence conduct, they said:

> It was submitted that the jury *may* (but need not) have concluded that the telling of the lie settled any reasonable doubt that consideration of the other evidence tendered at trial allowed. *If* the jury followed this path, it would, so it was said, make the telling of the lie an indispensable intermediate fact. It was the *possibility* that the jury might reason in this way that called, so it was submitted, for judicial instruction about how it should be undertaken.
>
> The argument should be rejected. It proceeds from a premise about the way in which the jury might approach the task which is wrong. It assumes that the jury will consider the evidence in separate and isolated compartments. That assumption is not made because the evidence relates to different steps in a chain of reasoning, but solely because it suits the appellant's immediate forensic purposes to isolate one of the pieces of evidence as the critical element that will conclude the issue of guilt. Once it is accepted, as it was, that the telling of the lie was not necessarily an intermediate indispensable fact in this case, it becomes apparent that the jury had to consider the evidence as a whole. The lie was not a separate fact which, together with other facts, would form links in a chain of reasoning.

3.20 It is thus currently unclear precisely which facts must be the subject of a *Shepherd* direction. As seen below, this lack of clarity is one of the causes of confusion in the area.[18] If the *Shepherd* direction is to be retained, it is essential that this issue be resolved.

C. Current directions about the standard of proof

3.21 Following from the general principles outlined above, there appear to be three different directions that could be given in relation to the standard of

---

16 (2009) 75 NSWLR 150, 165. See also *R v Zaiter* [2004] NSWCCA 35, [8] (Ipp JA); *Burrell v The Queen* [2009] NSWCCA 163.

17 (2002) 187 ALR 233, 244-5 ('*Velevski*').

18 See also *Minniti v The Queen* [2006] NSWCCA 30, [41] (Sully J).

proof in cases involving circumstantial evidence:

(i) A direction for cases where it is clear that there are no indispensable intermediate facts (clear 'cable' cases);

(ii) A direction for cases where there clearly is an indispensable intermediate fact (clear 'chain' cases); and

(iii) A direction where it is not clear whether or not there is an indispensable intermediate fact (ambiguous cases).

3.22 In some cases, it may also be appropriate to give a 'prudential direction'. This issue is addressed later in the Chapter.[19]

(i) Clear Cable cases

3.23 Where it is clear that there are no indispensable intermediate facts (i.e., all relevant facts are simply strands in a cable), there will usually be no need to give a specific direction about the standard of proof for individual facts.[20] It will generally be sufficient to tell the jury that they can only convict the accused if they are satisfied beyond reasonable doubt, upon the combined force of such circumstances as have been established to their satisfaction, that the accused committed the offence.[21]

(ii) Clear Chain cases

3.24 Where it is clear that there is a fact that *by necessity* constitutes an indispensable link in a chain of reasoning towards guilt, a judge should generally:

- Identify the relevant fact; and
- Direct the jury that they cannot use that fact as a basis for inferring guilt unless it has been proved beyond reasonable doubt.[22]

3.25 However, as the point of the direction is to assist the jury in

---

19 See below, [3.75]-[3.82].

20 In some cases a prudential direction should be given: see below, [3.75]-[3.82].

21 *Shepherd* (1990) 170 CLR 573; *R v Kotzmann (No 2)* (2002) 128 A Crim R 479.

22 See, eg, *Shepherd* (1990) 170 CLR 573; *Gipp v The Queen* (1998) 194 CLR 106; *R v Zaiter* [2004] NSWCCA 35.

understanding how the criminal standard of proof applies in the particular case, such a direction should not be given 'where it would be unnecessary or confusing to do so'.[23]

3.26 In *R v Davidson*[24] it was suggested that the usefulness of such a direction may depend on the number of facts in the case. Where there are very few, it may be helpful to give a direction. By contrast, where there are 'numerous separate facts, of varying degrees of probative force, it could very well be confusing to do so'.

3.27 It has been said that the circumstances in which this direction will need to be given are exceptional. In most cases it will be sufficient to instruct the jury that they must be satisfied that every element of the offence has been proved beyond reasonable doubt.[25]

(iii) Ambiguous cases

3.28 As noted above, there are conflicting views about whether the concept of an 'indispensable intermediate fact' refers to a fact that *is objectively indispensable* (i.e., without which the prosecution case could not succeed), or a fact *which may be considered indispensable by the jury* (depending on what view of the facts they take).

3.29 If the former position is correct, then there will not be any ambiguous cases. It should be apparent from the nature of the prosecution's case whether a fact is indispensable.

3.30 By contrast, if the latter position is correct, cases may arise in which it will not be clear whether a particular fact is an 'indispensable intermediate fact', or whether it is simply a 'strand in a cable'. Either position may be arguable, depending on the view of the facts taken by the jurors. In such

---

23 *Shepherd* (1990) 170 CLR 573, 579 (Dawson J). See also *R v Cavcik (No 2)* (2009) 28 VR 341, 358 (Vincent, Nettle JJA and Vickery AJA); *Hannes v DPP (Cth) (No 2)* (2006) 165 A Crim R 151, 299 (Barr and Hall JJ).

24 (2009) 75 NSWLR 150, 152 (Spigelman CJ).

25 See, eg, *R v Kotzmann* [1999] 2 VR 123.

cases, it is said to be for the jurors to determine whether or not the relevant fact is an indispensable intermediate fact. If they find that it is, they will need to be satisfied of that fact beyond reasonable doubt.[26]

3.31 If this view is adopted, where a judge considers that one or more facts might reasonably be regarded by the jurors as indispensable links in their chain of reasoning towards guilt, the judge may need to:

- Identify the relevant fact(s);
- Identify the competing views (i.e. that the facts may be of the chain or cable type); and
- Direct the jury that if they consider a fact to be an indispensable link in their chain of reasoning towards an inference of guilt, they need to be satisfied of that fact beyond reasonable doubt before convicting the accused.[27]

3.32 Alternatively, it may be acceptable to simply direct the jury that they need to be satisfied, beyond reasonable doubt, of any evidence that is 'essential to their reasoning process'.[28]

3.33 In such cases, it will *not* be appropriate to direct the jury that they *must* be satisfied of a particular fact beyond reasonable doubt before they can rely on it. That would be 'an unwarranted usurpation of the jury's function'.[29]

D. Main exceptions to the **Shepherd** *principles*

3.34 There are currently a number of areas in which judges are required to give a beyond reasonable doubt direction in relation to facts which do not meet the '*Shepherd* test' (i.e., facts which are not indispensable intermediate facts). These appear to be exceptions to the general principles set down in *Shepherd*.

3.35 The following sections examine three categories of evidence that

---

26 *Debs* [2007] VSC 169; *R v Merritt* [1999] NSWCCA 29.
27 See, eg, *Debs* [2007] VSC 169; *R v Merritt* [1999] NSWCCA 29.
28 *R v Farquharson* (2009) 26 VR 410, 463 (Warren CJ, Nettle and Redlich JJA).
29 Ibid.

commonly require such a direction to be given: confessions and admissions, evidence of post-offence conduct (consciousness of guilt evidence), and tendency, coincidence and context evidence.

(i) Confessions and admissions

3.36 Juries are customarily directed that they must not act on evidence of a confession or admission unless they are satisfied, beyond reasonable doubt, that it was made and it was true (a '*Burns*' direction).[30]

3.37 Judges are not obliged to give a *Burns* direction in every case in which evidence of a confession or admission is admitted. It is for the judge to determine whether a direction is required, based on the circumstances of the case.[31] However, a judge who fails to give the direction may risk being overturned on an appeal.[32]

3.38 Consequently, a *Burns* direction is generally given in relation to all confessions and admissions, even if they do not constitute indispensable intermediate facts. This is acknowledged to be an exception to the general *Shepherd* principles, but is seen to be desirable 'for prudential reasons'.[33]

(ii) Evidence of post-offence conduct

3.39 In some circumstances, jurors can infer from lies or other post-offence conduct that the accused had implicitly admitted some kind of responsibility for the offence.[34]

3.40 In line with the general principles laid down in *Shepherd*, the High

---

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

31 See, eg, *Burns v The Queen* (1975) 132 CLR 258; *R v Mitchell* [2006] VSCA 289.

32 See, eg, *R v Mitchell* [2006] VSCA 289; *R v Baker* [2001] QCA 326, [24] (Thomas JA) (where the failure to give a *Burns* direction was described as an 'elementary and fundamental' error).

33 *R v Kotzmann* [1999] 2 VR 123, 130 (Callaway JA). See also *R v Franklin* (2001) 3 VR 9, 43 (Ormiston JA) ('*Franklin*').

34 See, eg, *Edwards v The Queen* (1993) 178 CLR 193; *R v Ciantar* (2006) 16 VR 26. It should be noted that the Jury Directions Advisory Group has made recommendations about the directions that should be given in relation to evidence of post-offence conduct. These included recommendations concerning the standard of proof. It was acknowledged, however, that those recommendations may need to be amended in light of this Report.

Court held in *Edwards v The Queen* that:

> Although guilt must ultimately be proved beyond all reasonable doubt, an alleged admission constituted by the telling of a lie may be considered together with the other evidence and for that purpose does not have to be proved to any particular standard of proof. It may be considered together with the other evidence which as a whole must establish guilt beyond reasonable doubt if the accused is to be convicted. If the lie said to constitute the admission is the only evidence against the accused or is an indispensable link in a chain of evidence necessary to prove guilt, then the lie and its character as an admission against interest must be proved beyond reasonable doubt before the jury may conclude that the accused is guilty. But ordinarily a lie will form part of the body of evidence to be considered by the jury in reaching their conclusion according to the required standard of proof. The jury do not have to conclude that the accused is guilty beyond reasonable doubt in order to accept that a lie told by him exhibits a consciousness of guilt. They may accept that evidence without applying any particular standard of proof and conclude that, when they consider it together with the other evidence, the accused is or is not guilty beyond reasonable doubt.[35]

3.41 Despite this clear statement limiting the need for a beyond reasonable doubt direction to post-offence conduct which meets the *Shepherd* test, in *R v Laz*[36] the Victorian Court of Appeal held that a beyond reasonable doubt instruction should also be given in cases where the evidence 'might be seen by the jury themselves as amounting to the only evidence against the accused'. The Court went so far as to suggest that trial judges should *assume* that a jury may see the evidence of post-offence conduct as the only evidence upon which they could rely to convict the accused, and tailor their directions accordingly.

3.42 In *R v Franklin*, Ormiston JA argued that the principle set down in *Laz* was appropriate, in light of the significance that evidence of post-offence conduct often comes to assume in a case. He believed that a beyond reasonable doubt direction was necessary to address the risk that:

---

35 (1993) 178 CLR 193, 210 (Deane, Dawson and Gaudron JJ).

36 [1998] 1 VR 453, 468-9 (Ormiston and Charles JJA and Vincent AJA). See also *R v Camilleri* (2001) 119 A Crim R 106, 140 (Ormiston JA) ('*Camilleri*'); *R v Franklin* (2001) 3 VR 9, 48-54 (Ormiston JA).

> the jury will find itself impelled on insufficient materials to reach a conclusion which is conventionally described as one of 'consciousness of *guilt*'. I believe it was to obviate the clear risks of such a conclusion that the learned judge expressed himself as he did, in an attempt to ensure that the jury would only place the tag of 'guilt' on the applicant on the strictest possible basis.[37]

3.43 While Ormiston JA also followed the *Laz* approach in *Camilleri*,[38] that approach was questioned by Phillips CJ and Brooking JA in both *Camilleri* and *Franklin*. They held that dicta in *Laz* could not impinge on the standard of proof laid down by the High Court in *Edwards*.

3.44 In *Velevski*[39] the High Court also held that the kind of approach taken in *Laz* was wrong. They held that even if the jury might choose to act solely upon the evidence of post-offence conduct, a beyond reasonable doubt direction will not be required unless the requirements of the *Shepherd* test have been met. They said that it is wrong for a judge to look at the way in which the jury *might* approach their task, assuming they will consider the evidence in separate and isolated compartments of which one may be seen to be critical. The key issue is whether the conduct is the only evidence against the accused, an intermediate indispensable fact, or simply a part of the evidence as a whole.

3.45 The different approaches taken by the courts in relation to this issue reflect the different approaches taken to the concept of 'indispensability' outlined above.[40] In cases such as *Velevski*, the courts appear to have interpreted that term as meaning 'objectively indispensable'. By contrast, in cases like *Laz* the courts include within that concept cases in which the jury may consider the evidence indispensable to their reasoning.

3.46 Regardless of the authorities in the area, judges in Victoria frequently

---

37 (2001) 3 VR 9, 49 (citations omitted).

38 (2001) 119 A Crim R 106, 140-1.

39 (2002) 187 ALR 233. See also *R v Kotzmann* [1999] 2 VR 123; *Camilleri* (2001) 119 A Crim R 106, 117-18 (Phillips CJ and Brooking JA); *Franklin* (2001) 3 VR 9, 11 (Phillips CJ), 31-2 (Brooking JA); *R v Deruiter* [2003] VSCA 66.

40 See 'Identifying "Indispensable Intermediate Facts"', above [3.13]-[3.20].

give a beyond reasonable doubt direction in relation to evidence that does not meet the requirements of the *Shepherd* test 'out of an abundance of caution'.[41] While not technically necessary, such a direction is given for 'prudential reasons'.[42]

3.47 Although a beyond reasonable doubt direction does not need to be given in all cases in which post-offence conduct is relied upon as an implied admission of guilt, some cases appear to suggest that it should be given most of the time. For example, in *R v Lam (Ruling No 18)*, Redlich J suggested that it is appropriate to give a beyond reasonable doubt direction 'where the lies relied upon, though only strands in a cable, assume such importance in the prosecution case that they are likely to assume significance in any reasoning by the jury towards a conclusion of guilt'.[43] He later noted that '[e]vidence that an accused has made an implied admission of guilt, though it be only one piece of evidence *is in most cases likely to be a matter of significance to a jury*'.[44] The logical conclusion to be drawn from these two passages seems to be that a beyond reasonable doubt direction should generally be given.[45]

3.48 However, this conflicts with other statements made by the courts. For example, in *R v Cavcik (No 2)* it was observed that 'where lies or other conduct are used as evidence of consciousness of guilt as part of a circumstantial evidence case… it is not usually necessary to establish the character of the conduct beyond reasonable doubt'.[46]

3.49 Regardless of which view is adopted, it appears clear that in Victoria judges may be required to give a beyond reasonable doubt direction in

---

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

42 *R v Ciantar* (2006) 16 VR 26, 42 (Warren CJ, Chernov, Nettle, Neave and Redlich JJA). See also *R v Lam (Ruling No 18)* [2005] VSC 292; *R v Wally White (Ruling)* [2007] VSC 189; *R v Farquharson* (2009) 26 VR 410, 462 (Warren CJ, Nettle and Redlich JJA).

43 [2005] VSC 292, [36]. See also *R v Farquharson* (2009) 26 VR 410, 462 (Warren CJ, Nettle and Redlich JJA).

44 [2005] VSC 292, [39] (emphasis added).

45 Similar reasoning appears to underlie the judgments in *R v Laz* [1998] 1 VR 453; *Camilleri* (2001) 119 A Crim R 106, 140 (Ormiston JA); *R v Franklin* (2001) 3 VR 9, 48-54 (Ormiston JA).

46 (2009) 28 VR 341, 366 (Vincent and Nettle JJA and Vickery AJA). See also *R v Farquharson* (2009) 26 VR 410, 462 (Warren CJ, Nettle and Redlich JJA).

relation to evidence of post-offence conduct that does not meet the requirements of the *Shepherd* test. While failing to give such a direction will not necessarily constitute a miscarriage of justice, it is possible that it will.[47]

(iii) Tendency, coincidence and context evidence

3.50 While the general directions to be given in relation to tendency, coincidence and context evidence are discussed in chapter 4, it is appropriate to examine issues concerning the standard of proof of these classes of evidence here.

3.51 The standard of proof for this evidence is not consistent across Australia. Different jurisdictions apply different rules, and even within jurisdictions there is disagreement on the operation of some of these rules. Further, some jurisdictions hold that different standards of proof apply depending on whether the case involves sexual or non-sexual offences.

(a) Tendency evidence

3.52 'Tendency evidence' is evidence that is used to prove that a person has or had a tendency to act in a particular way, or to have a particular state of mind.[48]

3.53 It can be seen from this definition that the use of tendency evidence requires jurors to infer from certain facts that the accused has or had a particular tendency. This raises the question of whether the jurors must be satisfied that those facts have been proved beyond reasonable doubt before they may draw that inference.

3.54 In Victoria, it has traditionally been held that the facts on which tendency reasoning is based must be proved beyond reasonable doubt.[49] While most cases that have addressed the issue have involved sexual offences,

---

47 See, eg, *R v Farquharson* (2009) 26 VR 410.

48 *Evidence Act 2008* s 97.

49 See, eg, *R v Sadler* (2008) 20 VR 69, 88 (Nettle, Redlich and Dodds-Streeton JJA). See also *SWC v The Queen* [2011] VSCA 264, [14] (Ashley JA).

it has not been suggested that the requirement of proof beyond reasonable doubt is limited to such cases.

3.55 Although there is relatively little authority on this issue, courts in Tasmania and the Australian Capital Territory also seem to require the facts on which tendency evidence is based to be proved beyond reasonable doubt, regardless of the nature of the case.[50]

3.56 By contrast, in New South Wales and Queensland a distinction is drawn between tendency evidence led to show that the accused had a sexual interest in the complainant, and other types of tendency evidence.[51] In relation to former category, the courts have relied upon the dissenting judgment of McHugh and Hayne JJ in *Gipp v The Queen*[52] to hold that the primary facts, as well as the intermediate fact of the tendency itself, must always be established beyond reasonable doubt.[53] In contrast, the general *Shepherd* principles apply to other types of tendency evidence.[54]

3.57 In Western Australia, there is a division of opinion on this issue. Justices Buss and Owen have stated that a beyond reasonable doubt direction is required in relation to propensity evidence of child sexual abuse, but that the general *Shepherd* principles to all other cases. Other judges, such as Pullin and Wheeler JJA, have held that courts should always follow the *Shepherd* principles, giving a beyond reasonable doubt direction only if the propensity evidence is an indispensable link in a chain of reasoning leading to guilt.[55]

3.58 In South Australia, which still operates under the common law, there are three different views on the standard of proof for uncharged acts. One

---

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

51 See, eg, *R v Hagarty* [2004] NSWCCA 89; *Qualtieri v The Queen* (2006) 171 A Crim R 463; *DJV v The Queen* [2008] NSWCCA 272; *FDP v The Queen* [2008] NSWCCA 317; *DJS v The Queen* [2010] NSWCCA 200; *R v CAH* [2008] QCA 333; *MBO v The Queen* [2011] QCA 280.

52 (1998) 194 CLR 106, 132 (HcHugh and Hayne JJ).

53 While there was originally some dissent on this issue (see, eg, *R v MM* (2000) 112 A Crim R 519, 541 (Hulme J), 542 (Dowd J)), it is now settled principle.

54 *Qualtieri v The Queen* (2006) 171 A Crim R 463.

55 See *KMB v WA* [2010] WASCA 212; *PIM v WA* (2009) 40 WAR 489; *Stubley v WA* [2010] WASCA 36 (overturned by the High Court, but not on this point).

view is that issue must be resolved on a case by case basis by a conventional application of the rule from *Shepherd*. Another view is that because of the practical importance of evidence of uncharged acts, the jury must not use such evidence unless satisfied of the course of conduct alleged beyond reasonable doubt. A third view is that a beyond reasonable doubt direction is only required where the uncharged acts are closely intertwined with the charged acts.[56]

3.59 It is clear that each of these jurisdictions follow *Shepherd* to the extent that if tendency evidence is considered to be an indispensable intermediate fact, a beyond reasonable doubt direction must be given.[57] However, most of the judgments in the area go further, requiring a direction to be given in relation to all evidence of 'guilty passion' or other sexual acts, regardless of its importance or indispensability. Some jurisdictions, such as Victoria, ACT and Tasmania go even further, and require a direction to be given in relation to all tendency evidence, regardless of whether or not it meets the requirements of the *Shepherd* test.

(b) Coincidence evidence

3.60 'Coincidence evidence' is evidence which uses the improbability of two or more events occurring coincidentally to prove that a person performed a particular act, or had a particular state of mind.[58]

3.61 The use of 'coincidence evidence' also relies on a process of inferential reasoning, in which the jury:

- Infers from evidence of similarities between two or more events, and the circumstances in which the events occurred, that it is improbable that the events occurred coincidentally; and

---

56 *R v Nieterink* (1999) 76 SASR 206; *R v IK* (2004) 89 SASR 406; *R v Clifford* [2004] SASC 104; *R v O, AE* (2007) 172 A Crim R 100; *R v M, RB* (2007) 172 A Crim R 73.

57 Such circumstances are likely to be very rare, because tendency evidence 'of its very nature is unlikely to be a link in a chain of sequential reasoning, even where it is an essential component of the Crown case': *R v Kotzmann* [1999] 2 VR 123, 132 (Callaway JA). See also *R v LRG* (2006) 16 VR 89, 99 (Callaway JA) ('*LRG*').

58 *Evidence Act 2008* s 98.

- Infers from the improbability of such a coincidence the existence of a relevant fact in issue.[59]

3.62 In Australia, the need for a direction about the standard of proof for coincidence evidence largely depends on the way the jury may use the coincidence evidence (e.g., to infer the offender's identity or to support the credibility of witnesses).

3.63 Where the evidence may be used to establish the identity of the offender (due to the similarities between the *modus operandi* of two offences), the jury are generally directed that they may only use the evidence in that way if they are satisfied beyond reasonable doubt:

- That the two offences were committed by the same person; and
- That the accused committed one of the offences.[60]

3.64 By contrast, when the evidence may be used to support the credibility of witnesses, the jury will not usually[61] need to be directed about the standard of proof required for such evidence. This is because the jury may be satisfied of the truth of the evidence by the combined effect of all the witnesses, even if they could not be satisfied of the truth of the evidence of any witness standing alone.[62]

3.65 However, if there is evidence to suggest that the evidence is tainted by collusion or innocent infection, the jury must be directed that they cannot use the coincidence evidence unless they are satisfied beyond reasonable doubt that no such contamination exists.[63] In *R v Best*, Callaway JA indicated that while this may not be technically necessary according to the *Shepherd*

---

59 Ibid. See also *R v DCC* (2004) 11 VR 129.

60 *R v McGranaghan* [1995] 1 Cr App R 559; *R v Downey* [1995] 1 Cr App R 547; *Townsend v Tasmania* [2007] TASSC 17; *R v Gee* (2000) 113 A Crim R 376.

61 In *R v Pidoto* [2009] VSCA 166, the Court of Appeal suggested that there may be cases where the jury *do* need to be satisfied of the truth of the other witnesses beyond reasonable doubt before using the evidence to provide support for the complainant's evidence. However, the court did not indicate when it is necessary to apply this standard.

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

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

principles, it was 'wise' to do so, accorded with the practice in England, and was 'obviously conducive to justice'.[64]

3.66 As is the case with tendency evidence, it is clear that the law requires more than is suggested by a straightforward application of *Shepherd*. A beyond reasonable doubt direction must be given whenever evidence needs to be assessed *sequentially* to determine whether it is incriminatory, regardless of whether it is an *indispensable* intermediate fact. This includes:

- Evidence used to establish the identity of the offender; and
- Evidence suggesting collusion or innocent infection.

(c) Context evidence

3.67 'Context Evidence' is evidence that provides essential background information that allows the jury to assess and evaluate the other evidence in the case in a true and realistic context.[65]

3.68 The High Court's decision of *HML v The Queen*[66] has produced considerable confusion in this area. This is because each judge produced a separate judgment, and the underlying principles are left unclear when trying to identify any majority position. As a result, each State has taken its own position on the meaning and effect of *HML*.

3.69 Courts in New South Wales[67] and Queensland[68] have held that context evidence does not need to be proved beyond reasonable doubt. The High Court has also held, in relation to context evidence of previous violence led under specific Queensland laws relating to domestic violence, that it is not

---

64 [1998] 4 VR 603, 611.

65 See, eg, *R v AH* (1997) 42 NSWLR 702.

66 (2008) 235 CLR 334 ('*HML*').

67 *DJV v The Queen* (2008) 200 A Crim R 206; *R v FDP* (2009) NSWLR 645; *DJS v The Queen* [2010] NSWCCA 200.

68 *R v CAH* (2008) 186 A Crim R 288; *R v MBO* [2011] QCA 280; *R v Rae* (2008) 2 Qd R 463. See also *Roach v The Queen* (2011) 242 CLR 610.

necessary or appropriate to give any direction on the standard of proof.[69]

3.70 By contrast, in Victoria a direction about the standard of proof must be given if:

> the judge perceives that the jury are likely to use the uncharged acts as a step in the reasoning towards guilt or that it is unrealistic to contemplate that any reasonable juror would differentiate between the reliability of the complainant's evidence as to the uncharged acts and as to the charged acts.[70]

3.71 In this regard, the Court warned judges that they should:

> ordinarily assume that there is a real risk of the jury using evidence of uncharged sexual acts as a sufficiently important step in their process of reasoning to guilt to warrant particular mention and, therefore, the judge should ordinarily direct the jury that they should not conclude from the evidence of uncharged acts that the accused had a sexual interest in the complainant unless they are satisfied of those acts beyond reasonable doubt.
>
> We do not consider that the same applies to uncharged acts of a non-sexual nature.[71]

3.72 This approach deviates from the general *Shepherd* principles, insofar as it requires a direction to be given in relation to facts which do not constitute an indispensable intermediate step in a chain of reasoning towards guilt. This requirement appears to be a pragmatic response to attempts by prosecutors to avoid the onerous tests associated with tendency evidence by seeking to have the evidence led only as context evidence. The courts have chosen to allow this to occur, but have sought to redress the risk of prejudice by the use of a judicial direction that sets a high standard of proof before the jury may use the evidence.

3.73 It is important to highlight the fact that the approach taken in *Sadler* only applies to context evidence of sexual offences. It does not apply to other forms of context evidence, which remain subject to the general principles laid down in *Shepherd*.

---

69 *Roach v The Queen* (2011) 242 CLR 610.
70 *R v Sadler* (2008) 20 VR 69, 88 (Nettle, Redlich and Dodds-Streeton JJA).
71 Ibid 89.

3.74 The correctness of *Sadler*, and its continued application under the *Uniform Evidence Act*, is a matter of uncertainty in Victoria. In *SJF v The Queen*[72] the court affirmed its correctness, whereas in *Neubecker v The Queen*[73] and *SWC v The Queen,*[74] two differently constituted courts stated that a direction on standard of proof was not necessary in circumstances where the evidence was led as context evidence alone.

E. Evidence of 'practical importance': A unifying theme?

3.75 One question raised by these three exceptions to the general *Shepherd* principles is whether they are simply discrete areas of law with special rules, or whether they are reflective of some broader category of 'additional facts' which must be proved beyond reasonable doubt despite not meeting the requirements of the *Shepherd* test.

3.76 This issue was addressed by Callaway JA in *R v Kotzmann*.[75] He initially rejected the idea that they constituted discrete exceptions to the general principles, instead concluding that 'there is a wider class of additional facts which are not links in a chain of sequential reasoning but do have to be established beyond reasonable doubt'. He saw these to be facts which are 'so important that the jury could not convict the accused unless they were satisfied of them beyond reasonable doubt'.

3.77 However, in a postscript to his judgment, Callaway JA resiled from this position. Instead, he ultimately agreed with Batt JA, who held that there were no 'additional facts, whatever they may be, that have to be proved beyond reasonable doubt even though they are not, in the strictly logical sense, indispensable links in a chain of sequential reasoning'.[76] Callaway JA was persuaded that a strict application of the *Shepherd* principles was 'superior both in principle and as a matter of practice to requiring proof

---

72 [2011] VSCA 281.
73 [2012] VSCA 58.
74 [2011] VSCA 264.
75 [1999] 2 VR 123, 131-2.
76 *R v Kotzmann* [1999] 2 VR 123, 139.

beyond reasonable doubt of an indeterminate class of additional facts'.[77]

3.78 A number of years later, however, Callaway JA returned to his initial view that there are some facts which must be proved beyond reasonable doubt, despite not meeting the *Shepherd* test. He said:

> At a criminal trial the guilt of the accused must be proved beyond reasonable doubt. In addition, there are at least two kinds of evidence that have to be proved to that standard. The first is evidence that amounts to an indispensable link in a chain of reasoning leading to guilt. That is because a chain is as strong as its weakest link. If an indispensable link is established only on the balance of probabilities, the chain of reasoning cannot establish guilt beyond reasonable doubt. The second kind is evidence which, although logically only a strand in a cable, is of such practical importance that it is prudent to direct the jury that they must be satisfied about it beyond reasonable doubt. [78]

3.79 In relation to this 'second kind of evidence', Callaway JA gave the example of a sex offence case 'where the Crown relies on similar fact evidence and probability reasoning but there is a possibility of collusion or innocent infection'.[79] However, he noted that this kind of 'prudential direction' is not limited to trials for sexual offences. On this point, his Honour cited *R v Kotzmann*,[80] *R v Heaney*[81] and *R v Ciantar*[82] – cases involving evidence of post-offence conduct and other admissions. It thus seems clear that he saw each of the three exceptions discussed above as being examples of the general principle that a beyond reasonable doubt direction should be given where the relevant evidence 'is of such practical importance' that it is prudent to do so.

3.80 The need for such a 'prudential direction' has been accepted in a number of other cases.[83] For example, in *R v Franklin*,[84] Ormiston JA stated that there are certain categories of facts, such as confessions or admissions,

---

77 Ibid 38.

78 (2006) 16 VR 89, 99. Vincent and Ashley JJA agreed with Callaway JA's reasons.

79 *R v LRG* (2006) 16 VR 89, 99.

80 [1999] 2 VR 123, 130 (Callaway JA).

81 [1999] VSCA 169, [32] (Callaway JA).

82 (2006) 16 VR 26, 42 (Warren CJ, Chernov, Nettle, Neave and Redlich JJA).

83 See, eg, *R v Heaney* [1999] VSCA 169, [32] (Callaway JA); *R v Franklin* (2001) 3 VR 9, 43 (Ormiston JA); *R v Tragear* (2003) 9 VR 107, 114 (Callaway JA); *R v Lam (Ruling No 19)* [2005] VSC 293, [1] (Redlich JA); *R v Lam (Ruling No 18)* [2005] VSC 292.

84 (2001) 3 VR 9, 43.

which call for proof beyond reasonable doubt despite not meeting the test laid down in *Shepherd*. Similar comments were made by Redlich J in *R v Lam (Ruling No 18)*,[85] using evidence of post-offence conduct as an example.

3.81 In *Kotvas v The Queen*,[86] Redlich JA summarised the law in this area as follows:

> The fact that the … evidence was not a link in a chain of reasoning does not dispose of the question whether such a direction [on the criminal standard of proof] should have been given to the jury. It is well recognised that such a direction may be required in relation to a piece of evidence if that evidence, 'although logically only a strand in a cable, is of such practical importance that it is prudent to direct the jury that they must be satisfied about it beyond reasonable doubt.' As Winneke P stated in *R v Doherty*, such a direction can be reconciled with the statements of Dawson J in *Shepherd*. Even in a 'strands in a cable' case, there may be some facts on which the Crown relies which are so influential that, standing alone, they should be treated as though they were indispensable links in a chain of reasoning towards guilt. Accordingly, where a fact assumes such importance to the prosecution case, the trial judge will, as a matter of prudence, so direct a jury to ensure that a perceptible risk of a miscarriage does not occur.

3.82 It thus seems clear that in Victoria, a beyond reasonable doubt direction is necessary where the evidence in question is particularly significant to the prosecution case, even if that evidence is not 'indispensable'. Failure to give such a direction may provide grounds for a successful appeal.[87]

F. Risk of prejudice or misunderstanding

3.83 Cases such as *LRG*[88] and *Kotvas*[89] appear to suggest that the three exceptions to the *Shepherd* principles discussed above are explicable by virtue of their practical importance. While such evidence often will be significant, in some cases the evidence will simply be a relatively minor part of the

---

85 [2005] VSC 292.
86 [2010] VSCA 309, [26] (citations omitted).
87 See, eg, *R v Farquharson* (2009) 26 VR 410.
88 *R v LRG* (2006) 16 VR 89.
89 *Kotvas v The Queen* [2010] VSCA 309 ('*Kotvas*').

prosecution's case.[90] Yet it appears that a beyond reasonable doubt direction may nevertheless need to be given. This raises the question of whether there is another possible reason (apart from the significance of the evidence) for giving a beyond reasonable doubt direction in those areas.

3.84 It is possible that these exceptions have developed due to the perception that there is a high risk that the jury will misunderstand the evidence or be prejudiced by it in some way. Consequently, it is considered prudent to at least require the jury to be satisfied that it has been proved to the criminal standard before it can be relied upon.

3.85 For example, it appears that the court's approach to context evidence in *R v Sadler*[91] did not develop due to the significance of that evidence to the prosecution's case, but rather due to the risk of prejudice posed by that evidence. The court sought to redress this risk by requiring judges to give a direction that sets a high standard of proof before the jury may use the evidence.

3.86 Similar reasoning may lie behind the need for a beyond reasonable doubt direction in relation to tendency evidence. Such evidence will often not be of particular significance to the prosecution's case, yet a beyond reasonable doubt direction may nonetheless be required. This could be an attempt to innoculate the jury against the high risk of prejudice implicit in such evidence.

3.87 This could also be the reason why a beyond reasonable doubt direction is frequently given in relation to evidence of post-offence conduct, even if that evidence is not especially important to the prosecution's case. This appears to be what Ormiston JA was suggesting in *Franklin*, when he said that such a direction was necessary to address the risk that:

---

90 This may especially be the case for context evidence and evidence of post-offence conduct, but may also be the case for confessions and admissions, tendency evidence or coincidence evidence.

91 (2008) 20 VR 69.

> the jury will find itself impelled on insufficient materials to reach a conclusion which is conventionally described as one of 'consciousness of *guilt*'. I believe it was to obviate the clear risks of such a conclusion that the learned judge expressed himself as he did, in an attempt to ensure that the jury would only place the tag of 'guilt' on the applicant on the strictest possible basis.[92]

3.88 In relation to confessions and admissions, it has been stated that one of the reasons why a *Burns* direction is necessary is due to a concern that jurors may confine their attention to the question of whether the confession or admission was made, and overlook the need to separately consider whether it was truthful.[93] While this is a slightly different risk to those outlined in the areas above, it is clear that the need for this direction is also not purely derived from the potential significance of the evidence.

3.89 It should be noted, however, that in each of these areas the evidence in question often *will* be of particular significance. It is perhaps the combination of this fact, combined with the risk of prejudice or misunderstanding, that has led to the development of the exceptions.

G. Other possible exceptions to the **Shepherd** *principles*

3.90 The focus of this Chapter has been on three well-established exceptions to the *Shepherd* principles. It has sometimes been suggested that there are, or should be, other exceptions to the general principles. The following sections examine suggestions that have been made in two particular areas: motive and DNA evidence.

(i) Motive

3.91 In *Penney v The Queen*,[94] Callinan J appeared to suggest that, if motive is to be used as a factual basis for an inference of guilt, it must be established beyond reasonable doubt. If this were the case, motive would seem to be another exception to the *Shepherd* principles, because motive will rarely be an

---

92 (2001) 3 VR 9, 49 (citations omitted).

93 *R v Green* (2002) 4 VR 471, 481 (Charles JA).

94 (1998) 155 ALR 605, 611-12. See also *R v Murphy* (1985) 4 NSWLR 42.

indispensable link in a chain of sequential reasoning towards guilt.[95]

3.92 However, in compliance with *Shepherd*, subsequent appellate decisions have confined the reasoning in *Penney* to cases in which the prosecution's case is dependent upon motive (i.e., where it is an indispensable intermediate fact). These will be very rare, because the jury is generally not asked to infer guilt from motive alone.[96] In other cases, motive will be treated as a conventional piece of circumstantial evidence, and will not need to be proved beyond reasonable doubt.[97]

(ii) DNA evidence

3.93 In *R v Juric*,[98] it was suggested that a beyond reasonable doubt direction should be given in relation to DNA evidence, even if it was not an indispensable intermediate fact. Nettle J rejected this argument, holding:

> While the DNA evidence may be regarded as an important part of the Crown case, in the sense of an important piece of evidence, and while there is authority that a crucial piece of evidence may be regarded as an 'additional fact' which, even though it may not be an essential link in the chain of logic, has to be proved beyond reasonable doubt, the Court of Appeal has said that that is not the law. There are no 'additional facts ... that have to be proved beyond reasonable doubt even though they are not, in the strictly logical sense, indispensable links in a chain of sequential reasoning'. The correct analysis is as explained by BJ James J in the second Pantoja appeal. Therefore, unless one is dealing with a case like Lewis or Tran, where there is no evidence apart from the DNA evidence or, perhaps, where the Crown case apart from the DNA evidence is 'weak', it is not necessary that the reliability of DNA evidence be established beyond reasonable doubt. In this sort of case the DNA evidence may be regarded as one among a number of facts, none of which is necessarily established beyond reasonable doubt, but on the basis of the totality of which a jury may be satisfied beyond reasonable doubt.

---

95 *R v Kotzmann* [1999] 2 VR 123, 131 (Callaway JA).

96 *HML* (2008) 235 CLR 334, 351 (Gleeson CJ; *R v Pantoja* [1998] NSWSC 565; *R v Plevac* [1999] NSWCCA 351; *MAH v The Queen* [2006] NSWCCA 226, [22] (Grove J); *R v Kotzmann* [1999] 2 VR 123; *Neill-Fraser v Tasmania* [2012] TASCCA 2, [174] (Crawford CJ); *Newman v The Queen* [2011] SASCFC 36, [66], [77]-[79] (Gray J); *R v Darwiche* [2011] NSWCCA 62, [368]-[375] (Johnson J).

97 See *R v Gavare* [2012] SASCFC 52, [100] (Anderson J); *Wood v The Queen* [2012] NSWCCA 21, [700] (McClellan CJ at CL).

98 [2003] VSC 382, [64] (Nettle J). See also *R v Berry* (2007) 17 VR 153; *R v Jones* [1993] 1 Qd R 676.

3.94 It can be seen from this quote that Nettle J rejected the idea of treating DNA as a separate exceptional category. However, he did appear to suggest that a beyond reasonable doubt direction may be necessary where the DNA evidence is not technically *indispensable*, but is highly significant (due to the prosecution's case being otherwise 'weak'). In *R v Berry*, the Court also held that a prudential direction should be given where the DNA evidence is critical.[99]

3.95 It could be argued that this is another example of evidence which will often be highly significant to the prosecution's case, but also contains a high risk of prejudice. In this regard, there is a growing body of research that suggests that jurors tend to overvalue forensic evidence at the expense of all other kinds of evidence.[100]

H. Content of the 'prudential direction'

3.96 It is clear from cases such as *LRG*[101] and *Kotvas*[102] that a 'prudential direction' about the standard of proof should be given if:

- The practical importance of particular evidence makes such a direction prudent; or
- There are facts the prosecution relies upon that are so influential that, standing alone, they should be treated as though they were indispensable links in a chain (even though they are not).[103]

3.97 In *R v Lam (Ruling No 19)*,[104] Redlich J held that it is 'a matter for the jury as the triers of fact to determine what facts they consider are so important in their reasoning that they ought be established beyond reasonable doubt'.[105] Consequently, it will ordinarily be sufficient to direct the jury that 'such facts as they consider critical should be proved beyond reasonable doubt'.

---

99 (2007) 17 VR 153.

100 See Saby Ghoshray, 'Untangling the CSI Effect in Criminal Jurisprudence: Circumstantial Evidence, Reasonable Doubt and Jury Manipulation' (2006) 41 *New England Law Review* 533.

101 *LRG* (2006) 16 VR 288.

102 *Kotvas* [2010] VSCA 309.

103 Ibid; *LRG* (2006) 16 VR 288.

104 [2005] VSC 293, [4].

105 See also *Debs* [2007] VSC 169.

3.98 This direction has been worded in a number of different ways, such as requiring the jury to be satisfied beyond reasonable doubt of facts which are 'central to their reasoning',[106] are 'an essential component of their reasoning',[107] are 'of significance in the establishment of an element'[108] or which are 'indispensable to their conclusion'.[109]

3.99 The use of these different terms was addressed by Whelan J in *R v White (Ruling)*, in relation to a direction he proposed to give concerning the standard of proof for evidence of post-offence conduct. He said:

> The prosecutor … submitted that the references to proof being required beyond reasonable doubt where the lie was seen to be significant rather than essential was placing on the prosecution a higher burden than the law provides for…In my view it is prudent to use 'significant' rather than 'essential' or 'indispensable'. Where there are many matters which might be relied upon, as is the case here, directing the jury to apply the criminal standard only to what is 'essential' or 'indispensable' seems to me to be potentially confusing. I think it is preferable to follow the suggested draft in this case. I accordingly determined to follow the draft I had circulated and to use the term 'significant'.[110]

3.100 While this type of general direction will ordinarily be sufficient, in *R v Lam (Ruling No 19)*,[111] Redlich J noted that there will be cases in which the judge must identify the specific facts that need to be proved beyond reasonable doubt.

I. Issues concerning the **Shepherd** *direction*

3.101 Courts have repeatedly noted that the *Shepherd* direction is simply an amplification of the requirement that the prosecution prove its case beyond reasonable doubt. Its purpose is to explain to the jury how that standard applies to circumstantial evidence, in order to prevent the jury from erroneously jumping to a conclusion of guilt. While this is clearly an

---

106 *R v Lam (Ruling No 19)* [2005] VSC 293, [1] (Redlich J).
107 *R v Best* [1998] 4 VR 603, 619 (Callaway JA).
108 *Franklin* (2001) 3 VR 9, 43 (Ormiston JA). See also *R v Cavcik (No 2)* (2009) 28 VR 341, 358 (Vincent, Nettle JJA and Vickery AJA).
109 *R v Doherty* (2003) 6 VR 393, 407 (Winneke P).
110 [2007] VSC 189, [5].
111 [2005] VSC 293.

important aim, a number of difficulties with the direction can be identified:

- It may be very difficult for jurors to understand or apply;
- It may impermissibly trespass on the jury's role;
- It may cause the jury's deliberations to be 'short-circuited';
- It may be unnecessary; and
- It creates fertile grounds for appeal.

3.102 These issues are addressed in turn below.

(i) Difficulties with juror comprehension

3.103 As noted above, there are currently four possible directions that could be given in relation to circumstantial evidence:

(i) Directions for clear 'cable' cases;

(ii) Directions for clear 'chain' cases;

(iii) Directions for cases where it is not clear which category the evidence falls into; and

(iv) Prudential directions.

3.104 Directions that fall into the first, second or fourth categories should not pose too much difficulty for jurors.[112] Those directions should be relatively straightforward and simple to apply.

3.105 However, directions in the third category are likely to be both difficult to understand and apply. This can be seen clearly from the case of *R v Debs*.[113] In that case, there was a dispute about whether or not the absence of seminal staining was an indispensable intermediate fact. Kaye J held that this was ultimately a jury question to determine, and so he proposed directing the jury as follows:

---

112 Although prudential directions will generally be straightforward, it has been suggested that in some cases they may become 'impossibly complicated': see *R v Kotzmann* [1999] 2 VR 123, 131 (Callaway JA).

113 [2007] VSC 169, [9].

Firstly, the jury must be satisfied beyond reasonable doubt that the accused man had unprotected sexual intercourse with the deceased at the crime scene at or about the time at which she was killed. Secondly, the Crown relies on an inference to prove that fact beyond reasonable doubt; therefore, to be satisfied of that fact beyond reasonable doubt, the jury must be satisfied that that is the only reasonable inference open to them in the circumstances. Thirdly, I shall direct the jury that there are competing arguments as to whether the evidence relating to the lack of seminal staining on the crutch of the deceased's underpants, and as to the significance of that absence, is indispensable to the inference relied on by the Crown. I intend to briefly summarise the competing positions, which I expect will be put to the jury in final address, and I shall instruct the jury that if they accept what I understand will be the submission or analysis put to the jury on behalf of the accused, namely that the evidence relating to the absence of seminal staining on the crutch of the underpants is indispensable to the inference that the accused and the deceased had sexual intercourse at the crime scene, then they must be satisfied beyond reasonable doubt relating to that evidence; and, in particular, if they are of the view that that is an indispensable part of the Crown case, they must be satisfied beyond reasonable doubt as to two factual matters, firstly, that, in fact, no seminal stain was deposited in the crutch of the deceased's underpants as a consequence of sexual intercourse between the accused and the deceased; and, secondly, that the only reasonable explanation for that absence is that the deceased had not put on her underpants between the time she had sexual intercourse with the accused and the time at which she was shot and killed.[114]

3.106 The current charge reflects Kaye J's suggested structure, stating:

In this case, you have been asked to infer [*insert relevant conclusion*][115] from [*identify facts which constitute links in the chain of reasoning*].

The prosecution and defence hold <u>different views</u> about the importance of [this fact/these facts] to your decision.[116] The <u>defence</u> contends that [it is/they are] <u>essential to your determination</u> of [*insert relevant conclusion*]. According to defence counsel, if you do not find [this fact/each of these facts] to be true, then you must find the accused not guilty. [*Explain defence reasoning*].

By contrast, the <u>prosecution</u> contends that [this fact/these facts] simply form <u>part of the entirety of the evidence</u>, and are **<u>not</u>** <u>essential</u> to your decision. According to the prosecution, you can find the accused guilty even if [this fact/these facts] are not true, on the basis of the other evidence in the case. [*Explain prosecution reasoning*].

---

114 Ibid [9].

115 The relevant conclusion may be that the accused committed one of the elements of the offence, or it may simply be that the accused is guilty.

116 If this matter has not been addressed by counsel, this part of the charge will need to be modified accordingly.

> It is for you to determine the importance of [this fact/these facts] to your reasoning. If you think that any of these facts are essential to your determination of [*insert relevant conclusion*], then you must be satisfied that those facts have been proven beyond reasonable doubt. If you have any doubts about facts which are central to your reasoning, you cannot find NOA guilty.

3.107 It seems unlikely that a jury will be able to understand or apply this direction. This undermines the entire purpose of the direction, which is to help the jury to understand how the standard of proof applies to circumstantial evidence.

(ii) Trespassing on the jury's role

3.108 It is arguable that by directing the jury that they must be satisfied of certain facts beyond reasonable doubt, the judge is impermissibly trespassing on the jury's role.[117]

3.109 This argument was raised by McHugh J in his dissenting judgment in *Shepherd*:

> Jurors are under a duty not to find an accused person guilty of an offence unless they are satisfied beyond reasonable doubt of that person's guilt. But they are not under a duty to find any particular fact beyond reasonable doubt. Indeed, absent any statutory direction to the contrary, they are under no duty to find any particular fact: see *Otis Elevators Pty Ltd v. Zitis* (1986) 5 NSWLR 171, at pp 197-201. To direct the jury that, as a matter of law, they cannot find an accused person guilty of an offence unless they find a particular fact beyond reasonable doubt would be to trespass upon their right to determine whether, upon evidence properly admitted, the guilt of the accused had been proved beyond reasonable doubt. If, absent a *Chamberlain* direction, the jury would be persuaded beyond reasonable doubt of the guilt of the accused, how can they be directed to disregard a fact, proved on the balance of probabilities, which they would use to reach that degree of persuasion? No doubt a trial judge has the right to suggest to the jury that they might think that, on the evidence, they could not be satisfied that the accused was guilty beyond reasonable doubt unless they found that a particular fact was proved beyond reasonable doubt. But the existence of that right in the trial judge provides no support for the proposition that the jury must be directed that they cannot rely on a

---

117 The jury's role is to determine the facts, apply relevant principles of law to those facts, and return a verdict: See, eg, *R v Dao* (2005) 156 A Crim R 459; *R v Nguyen* [2006] VSCA 158; *Azzopardi v The Queen* (2001) 205 CLR 50.

> circumstance to found an inference of guilt unless that circumstance is proved beyond reasonable doubt.[118]

(iii) Causing the jury's deliberations to be 'short-circuited'

3.110 In *R v White,*[119] the Supreme Court of Canada suggested that directing the jury that they must be satisfied that certain facts have been proved beyond reasonable doubt before they can convict creates a risk that the jury will 'short-circuit' their decision-making process, by concluding that the accused is guilty simply because they are satisfied that this 'important' evidence has been proved beyond reasonable doubt.

3.111 For example, in *White*, the Court was considering whether a beyond reasonable doubt direction should be given in relation to evidence of post-offence conduct. In holding that such a direction should usually not be given, the Court said:

> If the jury determined beyond a reasonable doubt that the accused fled or lied because he or she was aware of having committed the crime charged, they would be less likely to give full consideration to the rest of the evidence. If, on the other hand, the jury failed to determine the motivation of the accused to such a high standard of proof, they would be forced to exclude the evidence of post-offence conduct, which might otherwise be useful in the context of the case as a whole. In either case, the verdict is likely to be reached on the basis of less than all the evidence.[120]

(iv) No need for a direction

3.112 In *R v Davidson*,[121] the New South Wales Court of Criminal Appeal suggested that a prudential direction about the standard of proof for facts may be unnecessary, as it will already be obvious to the jury that they must be satisfied of indispensable facts beyond reasonable doubt:

> There is an element of redundancy in this analysis. If it be the case that a jury believes that particular facts are 'indispensable links in their chain of reasoning towards an inference of guilt' then it is unlikely that

---

118 (1990) 170 CLR 573, 594 (McHugh J).

119 [1998] 2 SCR 72 ('*White*').

120 [1998] 2 SCR 72, [49] (Major J). See also *R v Ilina* [2003] MBCA 20, [92] (Scott CJM) (Court of Appeal of Manitoba).

121 [2009] NSWCCA 150, [10] (Spigelman CJ) ('*Davidson*').

> a jury could come to a conclusion that the offence was established beyond reasonable doubt unless that fact were so established. Indeed, that is so unlikely as to need no specific direction. The very hypothesis, that is, that the jury itself regarded a particular fact as an 'indispensable link' would prevent the jury convicting in view of the clear direction always given about the obligation of the Crown to prove guilt beyond reasonable doubt. There may be circumstances in which a jury needs to be informed of a matter that should be obvious, however, in my opinion the proposition … that it is 'usually essential' to give the direction therein referred to is not consistent with subsequent authority.

3.113 While in *Davidson* the Court was addressing a direction that the jury must be satisfied of 'indispensable' facts beyond reasonable doubt, their reasoning would seem to apply equally to 'significant' or 'important' facts.

(v) Fertile grounds for appeal

3.114 The requirement to give a *Shepherd* direction or a prudential direction provides fertile grounds for appeal, due to the possibility that the judge will fail to give such a direction when it is required.

3.115 While this is always a possibility whenever a judge is required to give a direction, the risk seems particularly high in this area due to the lack of clarity concerning the law. In particular, it is not clear:

- Which facts should be considered to be 'intermediate indispensable facts', and what role the judge and jury play in this determination;
- Precisely when a 'prudential direction' should be given in relation to confessions and admission, evidence of post-offence conduct and tendency, coincidence or context evidence; and
- Which other 'additional facts' (if any) need to be proved beyond reasonable doubt.

J. Other jurisdictions

3.116 The approach taken to the standard of proof for facts varies across jurisdictions. The following sections examine the law in New Zealand, Canada, England, California and New York.

(i) New Zealand

3.117 The New Zealand courts 'have always shied away from specifying a standard of proof with respect to individual pieces of evidence'.[122] Instead, they have held that the prosecution only needs to establish the elements of a crime (and any relevant defences) beyond reasonable doubt. They are not required to prove any other facts to that standard.[123]

3.118 While the New Zealand courts see this position as being consistent with the approach taken in *Shepherd*,[124] neither their case law nor their Bench Book have focused on the need for directions in certain 'chain' or other cases.

3.119 New Zealand courts have, however, recognised the need to direct the jury that they may only take evidence into account if they think that it is reliable enough to be worth considering. They have suggested that, in explaining this concept, the terms 'satisfied' and 'not satisfied' are 'as good as we can probably get'.[125] It should be noted that these terms are *not* intended to suggest that the beyond reasonable doubt standard applies.

(ii) Canada

3.120 The Canadian Supreme Court has also adopted a strict view that the standard of proof only applies to the ultimate determination of guilt or innocence, and not to individual pieces of evidence.[126] Consequently, it is generally not necessary to give a *Shepherd*-style direction in Canada.[127]

3.121 In reaching this conclusion, the Supreme Court has acknowledged that there are concerns about the jury erroneously jumping to a conclusion of guilt,

---

122 *Weatherson v The Queen* [2011] NZCA 276, [81] (Chambers J), citing *R v Puttick* (1985) 1 CRNZ 644; *Wi v The Queen* [2009] NZSC 121. See also *Ngarino v The Queen* [2011] NZCA 263, [26] (Chambers J).

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

124 *R v Guo* [2009] NZCA 612.

125 *Weatherston v The Queen* [2011] NZCA 276, [81]. See also Institute of Judicial Studies, *Criminal Jury Trials Bench Book*, March 2010 (Confidential), 10.18.

126 *R v Arp* [1998] 3 SCR 339; *R v Morin* [1988] 2 SCR 345; *R v Mackenzie* [1993] 1 SCR 212; *Stewart v The Queen* [1977] 2 SCR 748, 759-781 (Pigeon J); *R v Bouvier* [1985] 2 SCR 485.

127 *R v White* [1998] 2 SCR 72 ('*White*').

but has held that this risk is better addressed by warning the jury about the need for caution before drawing an inference of guilt, and about the need to consider all of the evidence in the case, rather than by imposing a separate burden of proof.[128] To do otherwise is to intrude into the province of the jury and risks detracting from the value of the jury system by injecting 'artificial legal rules with respect to the natural human activity of deliberation and decision making'.[129]

3.122 This approach applies to all types of evidence, including disputed pre-trial admissions, consciousness of guilt evidence and identification evidence.[130] In most cases, Canadian juries are told not to examine individual items of evidence separately, but to consider the cumulative impact of all the evidence in the case.

3.123 There are, however, two exceptions to this general rule. First, there are certain classes of evidence (e.g., confessions) which cannot be used unless the jury is satisfied that a threshold requirement has been met (e.g., that the accused made the confession). Ordinarily, the jury must be satisfied of that threshold requirement on the balance of probabilities. However, in those rare cases where the evidence in question is capable of proving guilt *by itself*, the jury must be satisfied of the threshold requirement beyond reasonable doubt.[131]

3.124 Second, a beyond reasonable doubt direction may be given in those rare cases in which a particular piece of evidence is the only evidence in the case, or constitutes substantially all of the prosecution's evidence.[132] Such a direction should only be given in 'the clearest and most exceptional

---

128 Ibid [48].

129 Ibid [41].

130 Ibid. On this point, *White* overruled *R v Poirier* (1995) 56 BCAC 131 (Court of Appeal for British Columbia) and *R v Court* (1995) 99 CCC (3d) 237 (Ontario Court of Appeal), which had held that a beyond reasonable doubt instruction was always required for consciousness of guilt evidence.

131 *R v Arp* [1998] 3 SCR 339.

132 *R v Mackenzie* [1993] 1 SCR 212; *R v White* [1998] 2 SCR 72; *R v Arp* [1998] 3 SCR 339.

circumstances', based on the importance of a particular piece of evidence in the circumstances of the case. It does not apply *a priori* whenever evidence of a particular class is led.[133]

3.125 Canadian courts have accepted that there may be some cases in which consciousness of guilt evidence, or evidence of a disputed pre-trial admission, meets this requirement. In such cases, a direction will generally be necessary. However, a direction will not be required in relation to ambiguous or inconclusive admissions.[134]

3.126 Even where the evidence meets this requirement, it may not be desirable to give a direction on the standard of proof, due to the risk of confusing the jury and causing them to short-circuit their deliberations.[135]

(iii) England

3.127 The position in England is less clear, as the courts have not addressed the issue to the same extent as Australian, Canadian or New Zealand courts. However, they also appear to have rejected any general requirement to give a beyond reasonable doubt direction in relation to indispensable intermediate facts.

3.128 This seems to follow from the House of Lords' influential judgment in *McGreevy v DPP*,[136] which is addressed in detail below.[137] Although the Court in that case was addressing the question of whether the judge had to direct the jury that they needed to be satisfied that there were no reasonable hypotheses consistent with the accused's innocence, the statements made

---

133 *R v White* [1998] 2 SCR 72; *R v Ilina* [2003] MBCA 20, [92] (Scott CJM) (Court of Appeal of Manitoba).

134 *R v Mackenzie* [1993] 1 SCR 212.; *R v Flynn* (1996) 111 CCC (3d) 521, 539 (Donald J) (Court of Appeal for British Columbia); *R v Ng* (2006) ABCA 230, [36] (Berger JA) (Alberta Court of Appeal).

135 *R v White* [1998] 2 SCR 72; *R v Ilina* [2003] MBCA 20, [92] (Scott CJM) (Court of Appeal of Manitoba). See 'Causing the Jury's Deliberations to be 'Short-Circuited'' above for further information about this issue : at [3.110]-[3.111].

136 [1973] 1 WLR 276.

137 See 'When Must a *Hodge* Direction Currently be Given?', below [3.195]-[3.200].

seem equally applicable in the present context.[138]

3.129 Subsequent cases have not suggested any need for a beyond reasonable doubt direction in relation to indispensable intermediate facts, and this issue is not addressed in the *Crown Court Bench Book*. In that regard, the sample charge on circumstantial evidence simply states:

> You should examine each category of evidence in turn and decide whether you accept it. Clearly, if you reject a significant part of the prosecution evidence that will affect how you approach your final conclusion.[139]

3.130 However, English courts have held that the following matters must be proved beyond reasonable doubt:

- The character of a statement as a lie (before using the statement as part of a consciousness of guilt inference);[140]
- That multiple witnesses have not colluded or had their recollections contaminated (before using the statements as similar fact evidence);[141]
- That the accused has a propensity to commit the kind of offences in question (before using that finding of propensity as part of a chain of reasoning to guilt);[142]
- That a confession was not obtained by oppression or due to anything which was likely to render the confession unreliable (before using the confession).[143]

3.131 The *Crown Court Bench Book* also includes numerous sample directions where the jury are told that they must be sure[144] of some matter, before acting on a piece of evidence, including:

---

138 *McGreevy v DPP* [1973] 1 WLR 276, 285-6 (Lord Morris).

139 Judicial Studies Board, *Crown Court Bench Book: Directing the Charge* (2010) 37 ('*Crown Court Bench Book*').

140 *R v Burge* [1996] 1 Cr App R 163, 174 (Kennedy LJ). The court also said that the jury must be 'sure' that the defendant did not lie for an innocent reason: at 174. This may import a requirement of satisfaction beyond reasonable doubt.

141 *R v H* [1995] 2 AC 596; *N(H) v The Queen* [2011] EWCA Crim 730, [39] (Pitchford LJ).

142 *N(H) v The Queen* [2011] EWCA Crim 730, [31] (Pitchford LJ). This requires the jury to be sure both that the evidence relied upon to establish the propensity is true, and that the propensity in question exists: *Crown Court Bench Book*, above n 139, 178.

143 *Police and Criminal Evidence Act 1984* (UK), s 76.

144 As the *Crown Court Bench Book*, above n 139 notes, 'Being sure is the same as entertaining no reasonable doubt': at 14.

- That a confession was true;[145]
- That an anonymous witness did not have an improper motive for giving evidence, before the jury acts upon it;[146] and
- That identification evidence was accurate.[147]

(iv) United States

3.132 The Judicial Council of California's *Criminal Jury Instructions* require the jury to be satisfied of each fact that is *essential* to their conclusion to be proved beyond reasonable doubt. It states:

> Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt.[148]

3.133 By contrast, the New York State Office of Court Administration's *Criminal Jury Instructions* require the jury to be satisfied that all facts on which 'an inference of guilt can be drawn' have been proved beyond reasonable doubt.

K. Options for reform

3.134 It is clear that the prosecution must prove the elements of a crime, and disprove any relevant defences, beyond reasonable doubt. This 'core requirement' must sit at the heart of any reforms in this area. The key question that is addressed in this section is what *other* facts (if any) should be proved to that standard.

3.135 The following sections address seven different possibilities:

(i) No additional facts;

(ii) Facts that are objectively essential to the prosecution's case;

(iii) Facts which constitute the only evidence in the case, or substantially all

---

145 Ibid ch 15(1) Confessions.
146 Ibid ch 6(2) Anonymous Witnesses: at 101.
147 Ibid ch 7 Identification Evidence.
148 Judicial Council of California, *Criminal Jury Instructions* (2012) 56.

of the evidence;

(iv) Facts which the judge considers to be of practical importance;

(v) Facts which the jury considers to be essential or significant;

(vi) Facts which the judge considers to be particularly prejudicial; or

(vii) Facts which fall within defined categories of evidence (e.g., confessions and admissions).

3.136 For reasons that follow, the Report recommends that Option 2 be adopted.

Option 1: No additional facts

3.137 One possibility for reform would be to return the law to the state it was in before *Chamberlain.*[149] This could be done through a legislative amendment that clearly states that a judge only needs to direct the jury that the prosecution must prove the elements of a crime, and disprove any relevant defences, beyond reasonable doubt.

3.138 This approach has the benefit of simplicity. It also addresses each of the difficulties created by the current approach: the relevant direction will be simple, will not trespass on the jury's role, and will provide little grounds for appeal.

3.139 However, under this approach the jury is offered no guidance about how to apply those general principles to a circumstantial case, especially a case where there are indispensable intermediate facts. This may lead the jury to convict a person on the basis of insufficient evidence. In order to address this risk, it is desirable to provide the jury with at least some assistance in well-defined cases. The Report therefore rejects this option.

Option 2: Objectively essential facts

3.140 In *Shepherd*, the High Court held that only intermediate facts which are an indispensable step upon the way to an inference of guilt must be proved

149 (1984) 153 CLR 521.

beyond reasonable doubt. Other facts upon which inferences are based need not be proved to that standard.[150]

3.141 As noted above, there is a lack of clarity about whether the concept of an 'indispensable intermediate fact' refers to a fact that *is objectively indispensable,* or one which *may be considered indispensable by the jury* (depending on what view of the facts they take). A second possibility for reform would be to clarify that the former interpretation is correct.[151]

3.142 Under this approach, a judge would be required to:

- Identify any fact which is objectively essential to the prosecution's case (i.e., a fact without which the prosecution case could not succeed as a matter of law); and
- Direct the jury that that fact must be proved beyond reasonable doubt.

3.143 This approach has the benefit of highlighting for the jury facts which are logically essential to their decision, and so should be proved to the criminal standard. While this is perhaps not technically necessary, it is likely to provide them with useful assistance in fulfilling their role.

3.144 As the direction is limited to facts which are *logically* essential (rather than which the judge considers to be *significant*), it also does not trespass greatly on the jury's role. The judge is simply pointing out a fact which, by necessity, is essential to their decision. In addition, these cases are likely to be exceptional, so such a direction will be rare.

3.145 If this approach is adopted, the jury charge on inferring guilt from circumstantial evidence would be significantly simplified, as there would no longer be any 'ambiguous cases' where the jury would need to be given complicated 'either/or' directions. Instead, a specific fact would be

---

150 (1990) 170 CLR 573.

151 This is the approach taken in *Davidson* (2009) 75 NSWLR 150 and *Burrell v The Queen* [2009] NSWCCA 163. It also appears to be the approach taken in the New South Wales Charge Book. An alternative approach would be to confirm that it is the *latter* interpretation which is correct. This option is addressed below (see 'Evidence the Jury Considers to be Essential or Significant', below [3.164]-[3.169].

highlighted, and the jury directed of the need to be satisfied of that fact beyond reasonable doubt. This has the added benefit of fitting well with a fact-based approach to charging, as the judge will simply need to instruct the jury that a particular fact must be proved beyond reasonable doubt, rather than give an abstract direction of law.

3.146 In drafting legislation in this area, care will need to be taken to ensure that the concept of an 'essential fact' is properly defined. It must be made clear that:

- The question of whether or not a fact is 'essential' is a matter of logic. A fact will only fall within this category if the prosecution's case cannot possibly succeed without it, as a matter of law; and
- It is for the judge (not the jury) to determine whether or not a particular fact is 'essential'.

3.147 It should be noted that under this approach, a beyond reasonable doubt direction may sometimes be required in relation to confessions and admissions, evidence of post-offence conduct, coincidence evidence or DNA evidence. However, such a direction will only be required if the relevant evidence is essential to the prosecution's case. It will not be necessary as a matter of prudence. It is expected that under this option a beyond reasonable doubt direction will *never* be necessary in relation to tendency evidence or context evidence, as these forms of evidence will never be essential.[152]

3.148 One possible difficulty with this approach is that it still requires judges to ascertain which facts are 'essential', leaving the door open to possible

---

152 A minor difficulty may arise in those rare cases where evidence is led for both tendency *and* coincidence purposes, and the coincidence use is logically indispensable to the accused's guilt. Following the model suggested above, the evidence would need to be proved beyond reasonable doubt if used for coincidence purposes, but not for tendency purposes. However, it would be highly undesirable to direct the jury that they *only* need to be satisfied beyond reasonable doubt of the relevant evidence *if* they are using it for coincidence purposes. Such a direction would be very confusing and difficult to apply. Consequently, it is recommended that in such circumstances, the jury should be directed that they must be satisfied of the relevant evidence beyond reasonable doubt before they can use it, despite the fact that, if used solely for tendency purposes, the evidence would technically not need to be proved to that standard.

appeals (if they fail to do so properly). However, this risk could be minimised by combining this reform with the *Pemble* reforms already recommended by the Jury Directions Advisory Group. The obligation to identify essential intermediate facts will then be contingent on a request by counsel, and the judge will not be required to identify other facts unless that is necessary to avoid a substantial miscarriage of justice.

3.149 The responses from the Law Institute of Victoria, Victoria Legal Aid and the Director of Public Prosecutions all supported this option, while the Criminal Bar Association preferred a variation on Options, described below.

3.150 The Report considers that this is the best avenue for reform. This option strikes an appropriate balance between protecting the rights of the accused, providing the jury with assistance in a manner they will be capable of understanding, maintaining an appropriate distinction between the roles of the judge and jury, and limiting the grounds of appeal. It also appears to be the approach taken by the courts in New South Wales, so its adoption will help to harmonise the law.

3.151 Given the large quantity of conflicting case law in this area, this option will require legislative implementation. One possible approach is outlined at the end of this section (after the other possible options for reform have been examined).

Option 3: Sole or substantial evidence

3.152 A third possible option would be to adopt the Canadian approach to this issue, [153] and to limit the need for a direction to evidence which is the only evidence in the case, or constitutes substantially all of the prosecution's evidence.

3.153 This has many of the same benefits as the previous option: it will only be necessary in rare cases where it will be useful to highlight the relevant

153 *R v Mackenzie* [1993] 1 SCR 212; *R v White* [1998] 2 SCR 72; *R v Arp* [1998] 3 SCR 339.

information to the jury; the judge's charge should be relatively clear and straightforward; it does not trample on the jury's role to a great extent; and it sits well with fact-based charging. It has the added benefit of avoiding the need for judges to consider whether a particular fact is logically 'essential' to the prosecution's case. It is sufficient for the judge to make an assessment that the evidence constitutes substantially all of the prosecution's evidence.

3.154 However, this test is somewhat narrower in scope than the test of whether a fact is 'essential'. It will not include facts that the prosecution case cannot succeed without, but which do not constitute substantially all of the evidence in the case. It therefore provides a lesser degree of protection to the accused.

3.155 In addition, as it is not a test of pure logic (instead relying on a judge's assessment of whether a fact constitutes *substantially* all of the evidence), it creates the possibility for arguments about whether a particular fact falls within the definition.

3.156 For these reasons, the Report does not consider that this option is to be preferred. It should be considered only if Option 2 is considered to be undesirable or unworkable for some reason.

Option 4: Evidence the Judge considers to be of practical importance

3.157 In Victoria, it appears that a beyond reasonable doubt direction must currently be given in relation to evidence that is 'of such practical importance that it is prudent' to give such a direction.[154] A fourth option for reform would be to legislatively mandate that a direction be given in such circumstances.

3.158 While this direction could be given in addition to one of the other directions outlined above (as is currently required), this appears to be

---

154 *LGR* (2006) 16 VR 89, 99 (Callaway JA). Vincent and Ashley JJA agreed with Callaway JA's reasons at [42]-[43].

unnecessary – as any evidence which is 'essential' or 'substantially all of the evidence' in a case will surely be 'of practical importance'. It would therefore appear to be an alternative option for reform.

3.159 This option provides additional protection for the accused, insofar as it ensures not only that essential facts be proved to the criminal standard, but also facts that the judge considers to be highly significant. It also acknowledges that juries may not reason logically, and may improperly base their decisions on evidence that is not indispensable. It ensures that if they do so, they must be satisfied that the relevant evidence has been proved to a high standard.

3.160 However, the scope of this test is very unclear, and it may be difficult for judges to apply. In particular, it is not clear how a judge would determine whether a particular fact is 'of practical importance'. It appears that this phrase is capable of bearing at least two meanings:

(i) The fact is likely to be *important to the jury* in reaching their decision; or

(ii) the fact has central *significance to the prosecution's case*, even though it is not technically essential.

3.161 If the former meaning is adopted, the test appears to improperly trespass on the role of the jury. This was the vice the High Court warned against in *Velevski,*[155] when it held that judges should not take into account the way that juries might approach their task.[156] In addition, it is likely to be difficult for a judge to decide what the jury may or may not consider to be important.

3.162 The latter meaning avoids this problem, by focusing on the place the evidence has in the prosecution's case. In this regard, a distinction should be drawn between:

---

155 (2002) 187 ALR 233, 244-5 (Gleeson CJ and Hayne J).

156 The High Court has warned in other circumstances of the dangers of speculating on how a jury may reason: see *Weiss v The Queen* (2005) 224 CLR 300.

- Evidence on which the prosecution has *placed emphasis*; and
- Evidence which is *objectively important* to the prosecution's case.

3.163 It does not seem appropriate for a decision about standard of proof directions to be based on the extent to which a party emphasises a certain fact. The need for a direction on the facts should, at the very least, be based on the objective importance of the fact in question. However, this test is also open to dispute, and likely to lead to argument and appeal.

3.164 These definitional problems could all be addressed in legislation. Regardless of their resolution, however, the end result will be the broadening of the category of facts which must be proved beyond reasonable doubt. This approach also creates a risk that the jury will short-circuit their decision making process, concluding that the accused is guilty simply because they are satisfied that this 'important' evidence has been proved beyond reasonable doubt.[157] The Report therefore does not recommend this option. It is the Report's view that directions on the standard of proof of facts should be confined to those rare cases where the evidence in question is essential, rather than simply significant or important.

Option 5: Evidence the jury considers to be essential or significant

3.165 Another possible option for reform would be to require judges to direct the jury that they must be satisfied, beyond reasonable doubt, of any matters that they consider to be essential or significant.[158]

3.166 This differs from the previous option, insofar as the relevant assessment is made by the *jury* rather than the *judge*. It therefore avoids some of the difficulties outlined above. For example, the judge would not be trespassing on the jury's role in any way, and would not be required to

---

157 This concern was raised by the Canadian Supreme Court in *R v White* [1998] 2 SCR 72: see above, [3.110]-[3.111].

158 This was the approach taken by the Jury Directions Advisory Group in relation to the standard of proof for evidence of post-offence conduct, subject to further investigation of the issue in this Report.

identify specific facts which the jury may consider to be important.

3.167 It seems likely that this option would be supported by the Criminal Bar Association, whose response suggested that the difficulties in this area could be fixed by simply adjusting the Charge Book to make it clear that a fact is indispensable if the *jury* finds that it is indispensable.[159] While Option 5 goes somewhat further (by making legislative amendments to clarify the law in this area, rather than simply amending the Charge Book), the outcome would be the same.

3.168 While this option aims to protect the accused (insofar as it requires the jury to be satisfied, beyond reasonable doubt, of a broad category of facts), that aim is potentially undermined by the lack of assistance given to the jury. Simply directing the jury that they must be satisfied of anything they consider to be essential or significant, without pointing out the facts that *are* potentially essential or significant, may be of little practical use to the accused.

3.169 This problem could be remedied by requiring judges to identify the facts which the jury may consider to be essential or significant, but leaving the ultimate determination to the jury. However, this is likely to lead to very complex charges in those ambiguous cases where there is dispute about whether or not a fact really is 'essential' or 'significant'. In such cases, the judge may feel required to direct the jury along the lines suggested in cases such as *Debs*.[160] It is unlikely that a jury will be able to understand or apply such a direction.

3.170 This option also suffers from the same drawback as the previous option: it broadens the class of evidence that must be proved beyond reasonable doubt. Instead of being narrowly defined, the jury must be satisfied beyond reasonable doubt of anything they consider to be essential or significant. It is the Report's view that this is too onerous, and may

159 The Association recommended supplementing this approach with a special rule requiring proof beyond reasonable doubt of other misconduct evidence: See Chapter 4.

160 [2007] VSC 169, [9] (Kaye J): see above, [3.105].

undermine the cumulative nature of circumstantial evidence.

3.171 While the Report does not recommend adopting this option, if it is implemented the Report recommends using a term such as 'significant' or 'important' rather than 'essential'.[161] This is likely to be easier for a jury to understand, and will not require them to undertake some kind of logical analysis of the prosecution's case. The Report also recommends that judges *not* be required to identify facts that may be 'significant' (or arguments about that issue), in order to avoid the need for a direction such as that given in *Debs*.

Option 6: Prejudicial facts

3.172 It has been suggested that one of the reasons for the development of the three main exceptions to the *Shepherd* principles is the perception that there is a high risk that the jury will misunderstand the relevant evidence or be prejudiced by it in some way. Consequently, it has been considered prudent to at least require the jury to be satisfied that it has been proved to the criminal standard before it can be relied upon.[162]

3.173 It would be possible to give this principle legislative backing: to require judges to give a beyond reasonable doubt direction in cases where they consider there to be a high risk that juries will over-value the relevant evidence in some way, or be prejudiced by it.

3.174 This option minimises the risk of the jury misusing such evidence by placing a high threshold requirement on its use. It also avoids the drawbacks associated with conventional limiting instructions,[163] and does not highlight (and thus potentially reinforce) the particular form of prejudice to the jury.

3.175 Despite these advantages, the Report does not recommend this option for a number of reasons:

---

161 On this issue, see *R v White (Ruling)* [2007] VSC 189, [5] (Whelan J).

162 See above, [3.83]-[3.89].

163 See Chapter 1 for a summary of the limitations of such instructions.

- It is not appropriate to address the risk of prejudice through the operation of the standard of proof. That risk is more appropriately addressed through admissibility requirements, warnings and limiting directions;
- This approach would preserve the uncertainty that currently affects this area of the law, and is likely to result in frequent appeals;
- This approach may perversely give the relevant evidence greater salience than it deserves in the jury's decision making process; and
- This approach involves an unwarranted expansion in the number of matters which must be proved beyond reasonable doubt.

Option 7: Defined categories of evidence

3.176 A final possibility for reform would be to legislatively specify certain types of evidence which must be proved beyond reasonable doubt. This could include confessions and admissions, evidence of post-offence conduct, tendency, coincidence and context evidence, or DNA evidence.

3.177 This option would have the advantage of clarifying the law in these areas. It could be clearly stated, for example, that whenever tendency evidence is admitted, it must be proved beyond reasonable doubt. This approach appears to be supported by the Criminal Bar Association in relation to evidence of 'other misconduct'.[164]

3.178 The main problem with this approach is that it does not require judges to examine the factors which underlie the need for a beyond reasonable doubt direction (such as the significance of the evidence or the risk of prejudice posed by that evidence). It instead relies on a conclusive approach based on the category of evidence. This leads to:

- A risk of over-inclusion, by requiring a direction to be given in relation to *all* evidence within a certain category, when only some evidence within that category is properly deserving of such a direction;
- A risk of under-inclusion, by overlooking or omitting certain categories of evidence for which a beyond reasonable doubt direction should be

164 See Chapter 4 for further discussion of this issue.

given.

3.179 This problem could be overcome by adopting an approach similar to that taken in relation to unreliable evidence in s 165 of the *Evidence Act 2008* whereby the legislation:

- States a general principle (e.g., that a beyond reasonable doubt direction should be given in relation to evidence a judge considers to be significant to the prosecution's case: see Option 4 above); and
- Lists a number of categories that fall within the scope of that general principle (e.g., confessions and admissions, tendency evidence).

3.180 However, the Report does not consider that such an approach would provide any significant improvements to the current state of the law. As the listed categories would be no more than examples of evidence that might or might not fit the actual test, many of problems identified above would continue to exist. Moreover, this approach again broadens the category of facts which must be proved beyond reasonable doubt. As noted above, it is the Report's view that this is unnecessary, and may undermine the cumulative nature of circumstantial evidence.

L. Proposed Legislation

3.181 The following legislative model aims to implement the reforms suggested in Option 2 above.[165]

Part 00 – Matters to be Proved Beyond Reasonable Doubt

A. Definitions

In this Part–

essential fact means a fact without proof of which the prosecution case against the accused could not as a matter of law succeed;

trial judge has the same meaning as in the **Criminal Procedure Act 2009.**

165 See para [3.140] ff.

B. Matters on which a beyond reasonable doubt direction may be given

(1) Unless an enactment otherwise provides, the only matters that a trial judge may direct the jury must be proved beyond reasonable doubt are–

(a) the elements of the offence charged or an alternative offence of which the accused may be found guilty;

(b) the absence of any available defence; and

(c) any essential fact.

(2) The question of whether a fact is an essential fact is a question of law**.**

C. Jury direction about an essential fact

(1) This section applies if a trial judge determines that a fact is an essential fact.

(2) Notwithstanding that a trial judge determines that a fact is an essential fact, the trial judge only needs to direct the jury that the essential fact must be proved beyond reasonable doubt if–

(a) a party so requests; or

(b) it is necessary to do so to avoid a substantial miscarriage of justice.

(3) A trial judge need not direct the jury that an essential fact must be proved beyond reasonable doubt if there are good reasons for not doing so.

(4) In giving a direction under subsection (2), a trial judge must–

(a) identify the essential fact; and

(b) direct the jury that it must be satisfied of that fact beyond reasonable doubt before the accused may be found guilty of the offence charged or an alternative offence.

D. Abolition of common law rules

Any rule of law or practice that requires or permits a

	jury direction that any facts other that those referred to in section B must be proved beyond reasonable doubt is abolished.

M Commentary on the proposed legislation

(i) Title

3.182 The proposed part is entitled 'Matters to be Proved Beyond Reasonable Doubt'. It is anticipated that it will be located towards the beginning of the relevant Act, alongside any other provisions addressing the standard of proof.

(ii) Proposed Section A

3.183 Proposed section A defines the concept of an 'essential fact' in such a way as to make it clear that it refers to *objectively indispensable* facts, rather than facts which are merely of practical significance to the prosecution's case. A particular fact will only be considered to be 'essential' if the prosecution's case could not, as a matter of law, succeed without it.

3.184 It is also important to note that the proposed section refers to 'facts' rather than individual pieces of evidence. This is intended to include intermediate findings of fact which are based on a concatenation of evidence.

(iii) Proposed Section B

3.185 Proposed section B(1) provides that a judge may *only* direct the jury that elements, defences and essential facts must be proved beyond reasonable doubt. Consequently, judges are prohibited from directing the jury that any other facts must be proved beyond reasonable doubt. The Report considers that such a provision is necessary in order to ensure consistent charging in this area. In particular, the Report is concerned that without such a provision, some judges will continue to give a beyond reasonable doubt direction in relation to non-essential facts (for prudential reasons), while others will choose to only give a direction in relation to essential facts. The Report does not consider such an outcome to be desirable.

3.186 The Report acknowledges, however, that this will be a significant change, which may be met with some resistance. It may be considered to improperly trespass on a judge's discretion to direct the jury in the way he or she considers to be most appropriate in the circumstances of the case. It may also open the door to additional appeals (where a judge gives a beyond reasonable doubt direction in relation to a fact which is argued to be non-essential). If these factors are considered to be significant, the legislation could be amended to provide that 'the only matters that a trial judge *is required* to direct the jury must be proved beyond reasonable doubt' are those listed in the provision. This would make it clear that judges do not have to give a beyond reasonable doubt direction in relation to non-essential facts, but may do so if they see fit.

3.187 Proposed section B(2) makes it clear that it is for the *judge* to determine, as a question of law, whether a particular fact is an 'essential fact'. This is not a matter that should be left to the jury.

(iv) Proposed Section C

3.188 Proposed sections C(1)-(2) provide that even where a fact has been identified as an 'essential fact', a direction about the standard of proof may only be given upon request or if necessary to avoid a substantial miscarriage of justice. This is consistent with the proposed reforms to the *Pemble* obligation. Also consistent with those proposed reforms is section C(3), which provides that a judge need not give a direction if there are good reasons for not doing so.

3.189 The response from the Law Institute of Victoria expressed concern about proposed section C(3), suggesting that it may provide 'many avenues for appeal'. In addition, it queried whether this provision was necessary, in light of the operation of proposed section C(2). It is the Report's view that this provision *is* necessary, as it enables a judge to refuse to give the direction despite the request of a party. It is anticipated that this power would be

exercised in cases where a direction is likely to confuse the jury, or where the judge considers a direction to be unnecessary. While this may lead to some appeals, it is the Report's view that this is preferable to requiring judges to give unnecessary or confusing directions.

3.190 Proposed section C(4) addresses the directions that must be given in relation to essential facts. It takes a fact-based approach to this issue, simply requiring the judge to identify the relevant fact and direct the jury that it must be proved beyond reasonable doubt. The Report considers such an approach to be preferable to explaining complicated notions of 'chains' and 'cables' to juries.

(v) Proposed Section D

3.191 Proposed section D abolishes any rule of law or practice to the contrary of the proposed provisions. This includes the general principles laid down in cases such as *Shepherd* and *Chamberlain*, as well as the specific principles established in relation to confessions and admissions, evidence of post-offence conduct, and tendency, coincidence and context evidence.

Excluding Competing Inferences

3.192 This section of the Chapter looks at whether jurors need to be given a direction to the effect that all reasonable hypotheses consistent with the accused's innocence must be excluded beyond reasonable doubt.

3.193 The first report of a jury being given such a direction comes from *R v Hodge*, in which:

> Alderson, B., told the jury, that the case was made up of circumstances entirely; and that, before they could find the prisoner guilty, they must be satisfied, 'not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person.'
>
> He then pointed out to them the proneness of the human mind to look for—and often slightly to distort the facts in order to establish such a proposition—forgetting that a single circumstance which is inconsistent

> with such a conclusion, is of more importance than all the rest, inasmuch as it destroys the hypothesis of guilt.[166]

3.194 It can be seen from this quote that there are two parts to this direction. The first part directs the jury that they must be satisfied that reasonable hypotheses have been excluded (the '*Hodge* direction'). This is simply an amplification of the requirement that the prosecution must prove its case beyond reasonable doubt.[167] It seeks to explain how that requirement applies in a case where the jury is required to infer the accused's guilt.

3.195 By contrast, the second part of the direction warns the jury of some of the dangers involved in the process of drawing inferences (the '*Hodge* warning'). It points out that people have a tendency to jump to conclusions, and attempts to prevent them from doing so in the case they are hearing.

3.196 The need for a *Hodge* direction and a *Hodge* warning are addressed separately below.

A. When must a **Hodge** *direction currently be given?*

3.197 It is clear that, before the jury can convict the accused, the circumstances must be such as to be inconsistent with any reasonable hypothesis other than his or her guilt.[168] However, it is not clear precisely when a jury must be directed about this matter (i.e. when a *Hodge* direction must be given).

3.198 In *McGreevy v DPP*,[169] it was argued that a *Hodge* direction should *always* be given in wholly circumstantial cases. This contention was comprehensively rejected by the House of Lords, who held:

> To introduce a rule as suggested by learned counsel for the appellant

---

166 (1838) 2 Lew 227; 168 ER 1136. This passage was quoted with approval by the High Court in *Peacock v The Queen* (1911) 13 CLR 619, 634 (Griffith CJ).

167 *Plomp v The Queen* (1963) 110 CLR 234; *Grant v The Queen* (1975) 11 ALR 503; *Shepherd* (1990) 170 CLR 573; *R v Kotzmann* [1999] 2 VR 123; *R v Rajakaruna* (No 2) (2006) 15 VR 592.

168 See, eg, *Peacock v The Queen* (1911) 13 CLR 619; *Martin v Osborne* (1936) 55 CLR 367; *Plomp v The Queen* (1963) 110 CLR 234; *Knight v The Queen* (1992) 175 CLR 495.

169 [1973] 1 WLR 276.

> would, in my view, not only be unnecessary but would be undesirable. In very many criminal cases it becomes necessary to draw conclusions from some accepted evidence. The mental element in a crime can rarely be proved by direct evidence. I see no advantage in seeking for the purposes of a summing up to classify evidence into direct or circumstantial with the result that if the case for the prosecution depends (as to the commission of the act) entirely on circumstantial evidence (a term which would need to be defined) the judge becomes under obligation to comply when summing up with a special requirement. The suggested rule is only to apply if the case depends 'entirely' on such evidence. If the rule is desirable why should it be so limited? And how is the judge to know what evidence the jury accept? Without knowing this how can he decide whether a case depends entirely on circumstantial evidence? If it were to apply, not only when the prosecution depends entirely on circumstantial evidence, but also if 'any essential ingredient' of the case so depends, there would be a risk of legalistic complications in a sphere where simplicity and clarity are of prime importance.
>
> In agreement with the Court of Criminal Appeal I would reject the contention that there is a special obligation upon a judge in the terms of the proposition of law that I have set out. There should be no set formulae which must be used by a learned judge. In certain types of cases there are rules of law and practice which require a judge to give certain warnings though not in any compulsory wording to a jury. But in the generality of cases I see no necessity to lay down a rule which would confine or define or supplement the duty of a judge to make clear to a jury in terms which are adequate to cover the particular features of the particular case that they must not convict unless they are satisfied beyond reasonable doubt.[170]

3.199 This reasoning has been explicitly adopted in Victoria,[171] and is also the view of the High Court.[172] For example, in *Grant v The Queen*, Barwick CJ held that there is neither a rule of practice nor a rule of law that requires such a direction to be given in circumstantial evidence cases. He said:

> Whether or not it is either proper or necessary is a matter which, in the first place, the trial judge must resolve for himself. I use the word 'proper' because I can well understand that in some cases the direction might confuse more than assist the jury, depending on the nature of the case and of the evidence given in support of it.
>
> Where the circumstances of the case seem to require that some such direction be given, the summing up regarded as a whole may prove to

170 Ibid 285-6 (Lord Morris).

171 See *R v Rajakaruna (No 2)* (2006) 15 VR 592, 598 (Redlich JA).

172 See, eg, *Shepherd v The Queen* (1990) 170 CLR 573; *Grant v The Queen* (1975) 11 ALR 503, 504 (Barwick CJ)..

> be, and generally may be likely to be, inadequate. On the other hand, having regard to the circumstances of the case and the nature of the summing up, the failure to give the special direction may not in a particular case result in an inadequacy of the summing up as a whole. It may none the less be concluded from the terms of the summing up that the jury were fully instructed.
>
> The trial judge, therefore, in the case where circumstantial evidence is relied upon by the prosecution, must consider whether or not the case calls for the assistance of the jury by the giving of a direction specifically directed to the application of the onus of proof to circumstantial evidence.[173]

3.200 There are two parts of this passage that are worth highlighting. First, Barwick CJ limits his statement to cases in which 'circumstantial evidence is relied upon by the prosecution'. This point was picked up by Callaway JA in *R v Rajakaruna (No 2)*,[174] who noted that a specific direction may only be required in a case that is 'largely circumstantial'. In other cases a clear direction on the burden and standard of proof will usually be sufficient.

3.201 Second, a *Hodge* direction should only be given if it will assist the jury. This point was emphasised by the Victorian Court of Criminal Appeal in *R v Sorby*,[175] which held that a direction should only be given if, in a particular case, the jury cannot be expected to understand and apply the rules concerning the onus and standard of proof, so far as they apply to circumstantial evidence.

3.202 In practice, however, it appears that a *Hodge* direction is customarily given whenever a case against an accused rests substantially upon circumstantial evidence.[176] In *R v Kotzmann*, Callaway JA suggested that a 'strong direction' should be given to that effect 'in most circumstantial cases'.[177] The one exception appears to be those cases in which the only

---

173 (1975) 11 ALR 503, 504.
174 (2006) 15 VR 592, 593.
175 [1986] VR 753.
176 See *Barca v The Queen* (1975) 133 CLR 82, 99-108 (Gibbs, Stephen and Mason JJ).
177 *R v Kotzmann* [1999] 2 VR 123, 138.

substantial inference which needs to be drawn is about the accused's state of mind.[178]

B. When must a **Hodge** *warning currently be given?*

3.203 It was noted above that in *Hodge*, Alderson B gave two distinct instructions. In addition to directing the jury about the need to be satisfied that reasonable hypotheses have been excluded (the '*Hodge* direction'), he warned the jury about the 'proneness of the human mind to look for—and often slightly to distort the facts in order to establish … a proposition—forgetting that a single circumstance which is inconsistent with such a conclusion, is of more importance than all the rest, inasmuch as it destroys the hypothesis of guilt' (the '*Hodge* warning').

3.204 Most of the cases in this area have focussed solely on the *Hodge* direction, ignoring the possible need for a *Hodge* warning. While it has been noted that the *Hodge* direction is required *because* 'the human mind is apt to jump to conclusions, attaching too much weight to a fact that is really only a strand in a cable or being too quickly convinced by an accumulation of detail that is in truth explicable as coincidence or in some other way consistent with innocence',[179] Australian cases have not suggested that there is a need to warn the jury of this fact.

3.205 By contrast, the Northern Ireland *Crown Court Bench Book*[180] explicitly incorporates the *Hodge* warning into its charge on circumstantial evidence, stating:

> [C]ircumstantial evidence must be examined with great care for a number of reasons. First of all, such evidence could be fabricated. Secondly, to see whether or not there exists one or more circumstances which are not merely neutral in character but are inconsistent with any other conclusion than that the defendant is guilty. This is particularly important because of the tendency of the human mind to look for (and

---

178 *R v Rogerson* (1992) 65 A Crim R 530; *R v Tillott* (1991) 53 A Crim R 46; *R v Shepherd (No 3)* (1988) 85 ALR 387; *McGreevy v DPP* [1973) 1 WLR 276.

179 *R v Kotzmann* [1999] 2 VR 123, 138 (Callaway JA).

180 Judicial Studies Board for Northern Ireland, *Crown Court Bench Book* (2010).

> often to slightly distort) facts in order to establish a proposition, whereas a single circumstance which is inconsistent with the defendant's guilt is more important than all the others because it destroys the conclusion of guilt on the part of the defendant.[181]

3.206 It can be seen that in addition to the traditional *Hodge* warning, this charge also warns the jury to examine circumstantial evidence with care because of the risk of fabrication. English courts have also suggested warning the jury of this possibility.[182] While the *Crown Court Bench Book* does not explicitly adopt such a suggestion, it does warn the jury to examine circumstantial evidence with care.

C. Should a **Hodge** *direction or warning be given?*

3.207 The courts have repeatedly stated that the *Hodge* direction is simply an amplification of the need to prove the accused's guilt beyond reasonable doubt. It aims to explain to the jury how that general principle applies to a case that largely relies on circumstantial evidence.

3.208 It is arguable that such a direction is unnecessary, and perhaps even patronising, as the jury is already likely to understand that they cannot convict the accused if any other reasonable explanations are open. This appears to be the position taken by the House of Lords in *McGreevy v DPP* in the following passage:

> The particular form and style of a summing-up, provided it contains what must on any view be certain essential elements, must depend not only upon the particular features of a particular case, but also upon the view formed by a Judge as to the form and style that will be fair and reasonable and helpful. The solemn function of those concerned in a criminal trial is to clear the innocent and to convict the guilty. It is, however, not for the Judge but for the jury to decide what evidence is to be accepted and what conclusion should be drawn from it. It is not to be assumed that members of a jury will abandon their reasoning powers and, having decided that they accept as true some particular piece of evidence, will not proceed further to consider whether the effect of that piece of evidence is to point to guilt or is neutral or is to point to innocence. Nor is it to be assumed that in the process of weighing up a great many separate pieces of evidence they will forget

---

181 Ibid 4.1.

182 See, eg, *Teper v The Queen* [1952] AC 480; *R v Saleh* [2012] EWCA Crim 484.

> the fundamental direction, if carefully given to them, that they must not convict unless they are satisfied that guilt has been proved and has been proved beyond all reasonable doubt.'….
>
> In my view, the basic necessity before guilt of a criminal charge can be pronounced is that the jury are satisfied of guilt beyond all reasonable doubt. This is a conception that a jury can readily understand and by clear exposition can readily be made to understand. So also can a jury readily understand that from one piece of evidence which they accept various inferences might be drawn. It requires no more than ordinary common sense for a jury to understand that if one suggested inference from an accepted piece of evidence leads to a conclusion of guilt and another suggested inference to a conclusion of innocence a jury could not on that piece of evidence alone be satisfied of guilt beyond all reasonable doubt unless they wholly rejected and excluded the latter suggestion. Furthermore a jury can fully understand that if the facts which they accept are consistent with guilt but also consistent with innocence they could not say that they were satisfied of guilt beyond all reasonable doubt. Equally a jury can fully understand that if a fact which they accept is inconsistent with guilt or may be so they could not say that they were satisfied of guilt beyond all reasonable doubt.
>
> In my view, it would be undesirable to lay it down as a rule which would bind judges that a direction to a jury in cases where circumstantial evidence is the basis of the prosecution case must be given in some special form provided always that in suitable terms it is made plain to a jury that they must not convict unless they are satisfied of guilt beyond all reasonable doubt.[183]

3.209 The Report has some sympathy with this view. Even without specific judicial direction, it seems likely that the jury will understand that they cannot convict the accused if there is some reasonable explanation of the facts which is consistent with his or her innocence.

3.210 A contrary view is put by the Director of Public Prosecutions, whose response notes the *Hodge* direction is a common sense direction which prosecutors often use when deciding whether a case is worth prosecuting. The response states that the direction is not patronising, it focuses the jury's mind on the need to exclude defences, and supports other directions on the burden of proof.

---

183 *McGreevy v DPP* [1973] 1 WLR 276, 281-5 (Lord Morris).

3.211 On balance, the Report is not convinced that there is much point in giving a *Hodge* direction alone. However, it believes that such a direction will serve a useful purpose if given together with a *Hodge* warning. The Report considers that it will often be useful to highlight for the jury the potential dangers *implicit* in inferential reasoning, and to warn them not to jump to conclusions. To emphasise the need for caution when drawing inferences, it would be useful to conclude by giving a version of the *Hodge* direction. A suggested charge has been included at the end of this Chapter, which the Report recommends that *a judg*e consider giving whenever a case relies substantially on circumstantial evidence. This direction should not be mandatory.

3.212 It will be seen that the suggested charge includes a direction which states that, in determining whether an inference is reasonable, the jury should consider the evidence as a whole. A reasonable inference can be drawn from a combination of facts, none of which viewed alone would support that inference. This direction reflects the current law,[184] and is customarily given in circumstantial evidence cases. The Report believes it provides useful assistance to the jury about the way in which they should assess circumstantial evidence, and should be retained.

3.213 The Report does not recommend warning the jury that circumstantial evidence may be fabricated (as is done in England and Northern Ireland). The Report does not believe that circumstantial evidence poses any greater risk in this regard than direct evidence.

3.214 The Report also does not recommend directing the jury to examine circumstantial evidence with care. Such a direction suggests that circumstantial evidence is somehow less reliable than direct evidence, which is not the case. In addition, the jury should examine *all* evidence with care, not just circumstantial evidence.

---

184 See, eg, *Chamberlain v The Queen* (1984) 153 CLR 521*; R v Sorby* [1986] VR 753; *Shepherd v The Queen* (1990) 170 CLR 573; *R v Hillier* (2007) 233 ALR 634; *R v Allen* [2007] VSCA 97.

D. Suggested Criminal Charge Book alterations

A.	The Report recommends that the *Criminal Charge Book* be amended to include a section that identifies the potential dangers implicit in inferential reasoning, and warns the jury not to jump to conclusions. This warning should not be mandatory.

Other Directions About Inferences and Circumstantial Evidence

3.215 The final part of this Chapter examines three other issues that may need to be addressed when directing the jury about inferences and circumstantial evidence:

(i) The meaning of the terms 'inference' and 'circumstantial evidence';

(ii) A warning against speculating or guessing; and

(iii) An explanation that circumstantial evidence and direct evidence are of equal probative value.

A. Defining 'inference' and 'circumstantial evidence'

3.216 The terms 'inference' and 'circumstantial evidence' are not commonly used or understood.[185] To aid juror comprehension of the charge it would therefore appear desirable (if possible) to avoid the use of these terms. If that is not possible, then it is essential that they be explained clearly and simply.

3.217 Avoiding the use of the term 'inference' also overcomes one of the difficulties identified in the literature on jury directions, which suggests that it is not sufficient to simply define a legal concept on one occasion and then cross-refer back to that definition. This is because the jury is unlikely to be able to recall and apply the definition they were previously given.[186]

3.218 Three main questions are therefore raised by this part of the charge:

---

185 See, eg, Peter M Tiersma, *Communicating with Juries: How to Draft More Understandable Jury Instructions* (2006) 10 *Scribes Journal of Legal Writing* 1; Lily Trimboli, 'Juror Understanding of Judicial Instructions in Criminal Trials' (2008) 119 *Contemporary Issues in Crime and Justice* 1.

186 Federal Judicial Center Committee to Study Criminal Jury Instructions, *Pattern Criminal Jury Instructions* (Federal Judicial Center, 1982).

(i) Is it necessary or desirable to use the word 'inference'?

(ii) Is it necessary or desirable to use the phrase 'circumstantial evidence'?

(iii) How should the relevant terms and concepts be explained?

(i) Should the word 'inference' be used?

3.219 While a direction defining inferences does not appear to be mandatory, in *R v Rajakaruna (No 2)* Callaway JA stated that '[a] direction on the nature of inferences… is relevant in most criminal trials and should ordinarily be given'.[187]

3.220 There appear to be three interrelated reasons for doing so:

(i) The judge may need to make it clear to the jury that they can engage in a process of inferential reasoning;

(ii) The judge may need to give the jury a direction which requires the term 'inference' to be used and understood by the jury (e.g., about the need to exclude competing inferences beyond reasonable doubt); and

(iii) It is a term that the judge or counsel may have used during the trial (e.g., when explaining what inferences can be drawn from the facts), which is not commonly understood.

3.221 Neither of the first two reasons appears to require the word 'inference' to be used in the charge. For example, it would seem to be possible to explain the process of inferential reasoning, and the associated directions, by instead using the word 'conclusion'. This word, which does not appear to differ significantly in meaning from 'inference', is much more commonly used and understood, and is unlikely to require judicial explanation.[188]

3.222 While this may not prevent counsel from using the term 'inference' in their addresses, there would seem to be little benefit in doing so (if the judge has not used that term). Good advocacy would seem to involve using terms

187 (1996) 15 VR 592, 593.

188 While it seems unlikely that a judge would need to *define* the word 'conclusion' he or she may still need to give directions concerning the *process* of drawing conclusions, including an anti-speculation warning (see below).

that are more likely to be understood by the jury, rather than terms that are not in common usage.

3.223 However, it is possible that there will be contexts in which judges may wish to use the term 'inference' rather than 'conclusion' for some reason. It is also possible that even if judges avoid use of the term, counsel will nevertheless continue to use it. It may therefore be desirable to continue to define the concept in the charge.

3.224 Despite these possibilities, it is the Report's view that the *Criminal Charge Book* should use the word 'conclusion' rather than 'inference'.[189] While a judge may occasionally still need to define the term 'inference' (e.g., where it has been frequently used by counsel), the circumstances in which this is necessary should become increasingly rare over time if judges (following the *Criminal Charge Book*'s example) stop using that word as much as possible.

(ii) Should the phrase 'circumstantial evidence' be used?

3.225 There is no legal requirement to explain the phrase 'circumstantial evidence' to the jury, and the current charge does not do so.

3.226 At first sight, this approach appears to be desirable, in light of the fact that the phrase is not well understood. As a general principle of juror comprehension, it is preferable to avoid the use of such phrases.

3.227 However, many other jurisdictions use this term in their jury charges.[190] There appears to be three main reasons for doing so:

(i) The judge may wish to direct the jury that it is possible to convict a person on the basis of direct evidence or circumstantial evidence (either as a general principle, or because counsel has used the term 'circumstantial evidence' or described the prosecution case as 'purely circumstantial');

---

189 This is also the recommendation of the New Zealand Bench *Criminal Jury Trials Bench Book* above n 125 Book.

190 These include: New South Wales, Queensland, South Australia, New Zealand, England, Canada and a number of jurisdictions in the United States.

(ii) The judge may wish to direct the jury that circumstantial evidence may be of equal probative value to direct evidence. Such a direction may require an explanation of what 'circumstantial evidence' means; and

(iii) The phrase 'circumstantial evidence' is occasionally used outside legal circles, but its precise legal meaning is frequently misunderstood.[191] A judge may consider it desirable to redress any common misunderstandings of the phrase.

3.228 As noted below, it is the Report's view that judges should redress the common misunderstandings of the phrase 'circumstantial evidence', and should explicitly tell juries that circumstantial evidence may be of equal probative value to direct evidence.[192] Consequently, it is the Report's view that this phrase should be used in the charge. However, due to the prevalence of misunderstandings regarding circumstantial evidence, judges should minimise the use of the phrase and instead use an expression such as 'indirect evidence' which does not attract these misconceptions. One possible way of doing so is put forward in the suggested charge at the end of this Chapter.

(iii) How should the concepts be explained?

3.229 While replacing the term 'inference' with 'conclusion' overcomes the need to explain the meaning of the relevant term (as 'conclusion' is a commonly used word), judges will still need to tell the jury that they may engage in an inferential reasoning process, and explain how it may operate. If the phrase 'circumstantial evidence' is introduced, it will also need to be explained.

3.230 In most jurisdictions, this is accomplished by the use of an abstract example.[193] Thus, the current charge on inferences gives the example of

---

191 See, eg, Peter M Tiersma and Mathew Curtis, 'Testing the Comprehensibility of Jury Instructions: California's Old and New Instructions on Circumstantial Evidence' (2008) 1 *Journal of Court Innovation* 231.

192 This reasoning appears to underlie the inclusion of the phrase in the Pattern Criminal Federal Jury Instructions for the 7th Circuit in the United States.

193 Jurisdictions that include an abstract example include New South Wales, Queensland, Canada, California and New York.

inferring from the fact that the ground outside is wet, as are all of the cars and trees in the street, that it has rained.[194]

3.231 An alternative approach would be to select examples from the case itself. This is the approach adopted in the New Zealand *Criminal Jury Trials Bench Book*, which states:

> There are frequent, if not usually successful, complaints about judicial inference directions. There would be less in the way of complaint from appellants (and fewer chances of successful appeals) if Judges did not direct in abstract terms on inferential reasoning, but rather drew attention to any inferences that the Crown—or the defence—may have contended for and then direct in terms appropriate to those inferences. Sometimes prosecutors invite juries to draw pretty doubtful inferences on subsidiary aspects of the case. Where this happens the Judge should not hesitate to give appropriate directions.

3.232 However, New Zealand courts have emphasised that care must be taken in selecting the inferences to use as examples. Judges have been warned to maintain a distinction between explaining the process of drawing inferences (supported by appropriate examples) and describing parts of the Crown case aimed at establishing guilt.[195]

3.233 Due to these difficulties, the Report does not consider that this is an appropriate approach to take. The Report recommends that a simple example – such as the rain example – should be used to illustrate the relevant concepts.

B. Anti-speculation direction

3.234 In *R v Rajakaruna (No 2)*,[196] Callaway JA stated that a direction comparing inferences with speculation (an 'anti-speculation direction') is relevant in most criminal trials and should ordinarily be given.

---

194 Judicial College of Victoria, *Victorian Criminal Charge Book* 3.5.1.2 - Charge: Inferences ('*Criminal Charge Book*').

195 *R v Papple* [2006] NZCA 276, [31] (O'Regan J). In some cases it will not be possible to find a relevant example from the case. In such cases, it will not be an error to simply explain the concept of inferences without use of an example: *R v Ross & Ross* [1999] NZCA 32, [28] (Goddard J).

196 (1996) 15 VR 592, 593.

3.235 While such a direction is currently included in the *Criminal Charge Book*, it is arguable that it is unnecessary for two reasons:

(i) Jurors will already be aware of the serious nature of criminal trials, and the importance of not basing their decisions on mere speculation; and

(ii) A short warning against speculation is unlikely to affect those who are inclined to 'jump to conclusions'.

3.236 However, in light of the serious nature of a criminal trial, and the risk of jurors jumping to conclusions too readily, the Report considers that some direction that brings the issue to the jurors' attention, and at least aims to prevent speculation, is worthwhile.

3.237 The Report is not convinced, however, that the example the *Criminal Charge Book* currently uses to illustrate this issue should be retained.[197] The Report believes that a jury will be able to readily understand the distinction between a guess and a reasonable conclusion, without the need for a detailed illustration. In this regard, the Report notes that a number of other jurisdictions give an anti-speculation direction, without providing such an example.[198]

3.238 In addition, the Report considers that the current example may

---

197 In this regard, the Charge on Inferences states (*Charge Book* 3.5.1.2):

> Let me give you an example to illustrate the difference. Imagine you see me here in Melbourne at 5:00 this afternoon. You then fly to Sydney, and see me there at 8:00 this evening. In such a case, even though you did not see me on an airplane, it would be safe to infer that I flew there – because there is no other way that I could have arrived so quickly. You would be entitled to draw such an inference in a criminal trial.
>
> However, it would **not** be reasonable to infer that I flew with Qantas. Such an inference would be unreasonable because I could have flown with another airline instead, such as Virgin or Jetstar. To conclude that I flew with Qantas would be to guess or speculate.
>
> While we might be willing to act upon such speculation in our daily lives, it is not safe to reason in that way in a criminal trial. Because of the serious nature of a criminal trial, you must be very careful about the way that you reason, and only rely on reasonable inferences.

198 These include Queensland, New Zealand and Scotland.

improperly lead the jury to think that they can only draw an inference if there is no other possible explanation for the facts. While the jury must be satisfied that there is no reasonable explanation consistent with the accused's innocence before drawing an inference of *guilt*, this high standard does not apply to every inference the jury may draw in a case.[199] The Report therefore recommends that the example concerning flights be removed from the charge.[200]

C. Probative value of circumstantial evidence

3.239 There is nothing in the law that makes proof by circumstantial evidence unacceptable or suspect of itself.[201] Consequently, circumstantial evidence is considered to be of equal probative value to direct evidence.

3.240 Despite this fact, academic studies suggest that jurors tend to undervalue circumstantial evidence in comparison to direct evidence. This raises the question of whether the judge should attempt to address this misconception in his or her charge. This is not done at present.

(i) Undervaluation of circumstantial evidence

3.241 Tiersma and Curtis have noted that 'there appears to be a common belief among ordinary citizens that circumstantial evidence refers to weak or unreliable proof, rather than being simply an alternative way to prove a fact (which is how the law understands it)'.[202]

3.242 The view that circumstantial evidence is inferior to direct evidence has been borne out in a number of mock juror studies, including those conducted by Wells and Tiersma and Curtis.

---

199 Technically, it is only when the jury infers that an element of the offence or an indispensable intermediate fact has been proved, or a relevant defence has been disproved, that they must be satisfied that there is no other reasonable explanation for the facts: *Shepherd* (1990) 170 CLR 573. On this point, see also *R v Puttick* (1985) 1 CRNZ 644.

200 By contrast, the example concerning rain should be retained: see above, [3.230].

201 *De Gruchy v The Queen* (2002) 211 CLR 85.

202 Tiersma and Curtis, above n 191, 232.

(a) Wells' study

3.243 The foremost study in this area was conducted by Gary Wells,[203] and involved a mock civil case where a bus ran over a woman's pet dog. The bus in question could have been from either a blue bus company or a grey bus company. The mock jurors were split into two groups:

- The 'direct evidence' group received direct evidence from a weigh station attendant, who recorded a blue bus passing through the station at the relevant time. There was also cross-examination that established that the witness recorded the wrong colour bus 20% of the time.
- The 'circumstantial evidence' group received an analysis of the tyre tracks left at the scene. They were told that the tracks matched 80% of the blue bus company buses and 20% of the grey bus company buses.[204]

3.244 The study found that the jurors in the 'direct evidence' group were significantly more likely to find the blue bus company liable than the 'circumstantial evidence' group.[205] This has become known as the 'Wells effect'.

3.245 It has been suggested[206] that the Wells effect is the result of the fact that when assessing direct evidence of guilt (such as identification evidence), the jury often only needs to resolve one question: whether or not the evidence is true. By comparison, when assessing circumstantial evidence of guilt a two-stage process is required:

(i) Is the evidence true; and

(ii) Even if the evidence is true, does that mean the accused is guilty?

---

203 G Wells, 'Naked Statistical Evidence of Liability: Is Subjective Probability Enough?' (1999) 62 *Journal of Personality and Social Psychology* 533.

204 Technically, both groups have received circumstantial evidence, as the evidence of the weigh station attendant is relevant only if the jury draws the further inference that the bus which passed through the weigh station struck the dog. Despite this, the two groups recorded statistically significant differences in their results.

205 The disparity was lowest among judges and highest among MBA students.

206 Peter W Murphy, 'Some Reflections on Evidence and Proof' (1999) 40 *South Texas Law Review* 327; Kevin John Heller, 'The Cognitive Psychology of Circumstantial Evidence' (2006) 105 *Michigan Law Review* 241, 267-8.

3.246 Heller has suggested that where jurors are required to consider the second issue separately, it increases the likelihood that they will be able to think of an innocent explanation for the evidence, even if they accept that it is true. By contrast, accurate direct evidence does not require any inferential process, and so does not permit any competing explanation.

3.247 Heller argues that this difference gives rise to the 'certainty effect':

> When individuals make decisions that could turn out to be wrong, they 'overweight outcomes that are considered certain, relative to outcomes which are merely probable'…
>
> The certainty effect indicates that it is not enough for jurors to believe that the probability of the defendant's guilt exceeds some minimum threshold; because the possibility of a false conviction is so aversive, they need to be completely confident that the defendant is guilty. Direct evidence, with its appearance of certainty, is that convincing; circumstantial evidence, with its open admission of the possibility of error, is not. Daniel Shaviro says it best: '[s]tatistical-probability cases do not involve a greater risk of verdict error than other types of cases, only a more overt risk.[207]

3.248 Heller also argues that direct evidence naturally provides the jury with a narrative account of how the crime occurred, and so the jury can conceptualise the event. By contrast, circumstantial evidence will only provide factors for inferring guilt, leaving the jury at large to construct a plausible narrative. Where the jury is unable to do so, it is likely to be reluctant to convict.[208]

3.249 Heller suggests that it may be possible to overcome the jury's undervaluation of circumstantial evidence by:

- Telling them that their ability to imagine an exculpatory scenario is not the same as reasonable doubt; and
- Explaining in detail how they should use the evidence presented at trial to determine the objective probability of the defendant's guilt.

---

207 Ibid 283-284, citing Daniel Shaviro, Statistical-Probability Evidence and the Appearance of Justice' (1990) 103 *Harvard Law Review* 530, 538.

208 Heller, above n 206, 269.

(b) Tiersma and Curtis' study

3.250 Tiersma and Curtis examined this issue from a different perspective, looking at the effect that two different directions had on student comprehension of the meaning of 'circumstantial evidence'.[209] They found that:

- There is little doubt that the participants were heavily influenced by the ordinary meaning of circumstantial evidence as referring to less reliable proof; and
- That this misunderstanding interfered with their ability to correctly grasp the legal meaning of the concept.

3.251 Tiersma and Curtis concluded that judges should try to counteract this misconception by drawing explicit attention to it:

> Thus, judges might instruct jurors that despite what they may have heard from other sources, circumstantial evidence is as valid a way to prove a fact as any other type of evidence. What matters is how strong or weak the evidence is, not whether it is direct or circumstantial.[210]

(c) The 'CSI effect'

3.252 While the research presented above claims that jurors tend to devalue circumstantial evidence, there is a growing body of research that suggests that there may be one exception to this trend: forensic evidence.

3.253 It has been suggested that the 'CSI effect' may lead jurors to overvalue forensic evidence at the expense of all other kinds of evidence - both direct and indirect.[211] This may lead jurors to:

- Improperly convict on the basis of flawed forensic evidence; or
- Improperly refuse to convict where there is a strong direct and circumstantial evidence case, because of the lack of supporting forensic evidence.

---

209 Tiersma and Curtis, above n 191.
210 Ibid 257.
211 Ghoshray, above n 100.

(ii) Overvaluation of direct evidence

3.254 The flip side to the research outlined above is that juries often tend to overvalue the strength of direct evidence. That is, they will often convict on the basis of weak or tenuous direct evidence, without giving proper consideration to the potential weaknesses of that evidence.

3.255 This problem has been confirmed by projects like the Innocence Project, which have found that the majority of unsafe convictions involved inaccurate identification evidence. Other major contributing factors include false confessions, concealment of exculpatory evidence and improper forensic procedures.[212]

3.256 Heller suggests that it may be possible to overcome the jury's overvaluation of direct evidence by:

- Telling the jury that an easily imagined inculpatory scenario does not necessarily prove the defendant's guilt beyond a reasonable doubt;
- Specifically addressing the fact that the narrative structure of direct evidence tends to make even weak or unreliable eyewitness identifications or confessions easy to imagine; and
- Explaining in detail how the jury should use the evidence presented at trial to determine the objective probability of the defendant's guilt.[213]

(iii) Conclusion

3.257 In light of the research outlined above, the Report believes it is desirable to tell the jury that circumstantial evidence may be as strong as (or even stronger than) direct evidence. This approach has been taken in a number of other jurisdictions, including New South Wales, South Australia, Scotland, Canada, California and New York.

3.258 The Report believes that judges should attempt to counteract the common misconceptions concerning the strength of circumstantial evidence,

---

212 See *The Innocence Project*: http://www.innocenceproject.org (16 March 2012); Heller, above n 206.

213 Heller, above n 206, 262, 304-5.

by explicitly addressing the issue.

Suggested Criminal Charge Book alterations

The Report recommends that the following changes be made to the *Criminal Charge Book*:

A. Where possible, the word 'inference' should be replaced by the word 'conclusion'.

B. Judges should continue to warn the jury against guessing, but the example currently used to illustrate the distinction between a guess and a reasonable conclusion should be removed.

C. Judges should tell jurors that circumstantial evidence may be as strong, or even stronger than, direct evidence.

D. Judges should explicitly address the common misconception that circumstantial evidence is weaker than direct evidence.

3.259 While the response of the Criminal Bar Association argues that there are no difficulties with the current directions, and so there is no need for these changes, the responses of the Law Institute of Victoria, Victoria Legal Aid and the Director of Public Prosecutions all support these proposed simplifications. For the reasons outlined above, the Report respectfully takes a different view from the Criminal Bar Association, and continues to recommend the suggested alterations.

3.260 Victoria Legal Aid's response makes two further suggestions. First, it suggests that the phrase 'circumstantial evidence' should be avoided altogether, due to its pejorative connotations. While the Report acknowledges that this phrase is commonly misunderstood (as discussed above), it does not agree that the best approach to this issue is to avoid using it altogether. Instead, it believes that the common misconceptions should be confronted directly, by using the phrase 'circumstantial evidence', and explaining that such evidence may be as strong, or even stronger than, direct evidence. However, the Report agrees that subsequent use of the phrase should be limited.

3.261 The second suggestion made by Victoria Legal Aid is to include a

warning against the risk of over-valuing direct evidence. The Report respectfully disagrees with this suggestion. It believes that the desirability of giving such a warning is outweighed by the difficulties involved in drafting and delivering a warning that does not confuse the jury.

Suggested Charge

3.262 The following charge incorporates the recommendations made above.

Charge: Inferences and Circumstantial Evidence

Evidence can come in many forms. It can be evidence about what someone saw or heard. It can be an exhibit admitted into evidence. It can be someone's opinion.

Some evidence can prove a fact directly. For example, if a witness said that s/he saw or heard it raining outside, that would be direct evidence of the fact that it was raining.

Other evidence can prove a fact indirectly. For example, if a witness said that s/he saw someone enter the courthouse wearing a raincoat and carrying an umbrella, both dripping wet, that would be indirect or 'circumstantial' evidence of the fact that it was raining outside. You can conclude from the witness's evidence that it was raining, even though s/he didn't actually see or hear the rain.

As far as the law is concerned, it makes no difference whether evidence is direct or indirect. Although people often believe that indirect or circumstantial evidence is weaker than direct evidence, that is not true. It can be just as strong or even stronger. What matters is how strong or weak the particular evidence is, not whether it is direct or indirect.

However, you must take care when drawing conclusions from indirect evidence. You should consider all of the evidence in the case, and only draw reasonable conclusions based on the evidence that you accept. Do not guess. While we might be willing to act on the basis of guesses in our daily lives, it is not safe to do that in a criminal trial.

[*In cases involving a significant amount of circumstantial evidence, add the following shaded section.*]

In determining whether a conclusion is reasonable, you should look at all of the evidence together. It may help you to consider the pieces of evidence to be like the pieces of a jigsaw puzzle. While one piece may not be very helpful by itself, when all the pieces are put together the picture may become clear.

However, when putting all the pieces together, you must take care not to jump to conclusions. It is sometimes easy for people to be too readily persuaded of a fact, on the basis of insufficient evidence or evidence that turns out to be truly coincidental. Once convinced of that fact, they may then seek support for it in the other evidence, perhaps distorting that evidence to fit their theory or disregarding

'inconvenient' facts. You must make sure that you do not do this. You must keep an open mind, and be prepared to change your views

You may only convict the accused if you are satisfied that his/her guilt is the only reasonable conclusion to be drawn from the whole of the evidence, both direct and indirect. If there is another reasonable view of the facts which is consistent with the accused's innocence, then the prosecution will not have proved his/her guilt beyond reasonable doubt, and you must acquit him/her.

A. Commentary on the Suggested Charge

3.263 The suggested charge differs from the current charge in the following ways:

- It is a unified charge that addresses all relevant matters concerning inferences and circumstantial evidence. By contrast, there are currently two separate charges in the *Criminal Charge Book*;
- It uses the term 'conclusion' rather than 'inference';
- It addresses the common misconception that circumstantial evidence is weaker than direct evidence;
- It has removed the example about flights (which was used to illustrate the difference between a guess and a safe inference);
- It uses the example of jigsaw puzzles to illustrate the need to consider the evidence as a whole;
- It contains a warning about the potential dangers of inferential reasoning;
- It does not contain a direction about the standard of proof for 'essential facts'. If the recommendations outlined above are implemented, it is anticipated that the standard of proof for such facts will be addressed when charging the jury about the standard of proof generally, rather than as part of the charge on inferences.[214]

[214] In this regard, it may be appropriate for the Jury Directions Advisory Group to consider this issue as part of their general reforms in relation to onus and standard of proof.

4. OTHER MISCONDUCT EVIDENCE (Tendency, Coincidence and Context)

Summary

4.1 This Chapter examines the directions that must be given in relation to tendency and coincidence evidence under the *Evidence Act 2008* and the residual category of evidence commonly called 'context' or 'relationship' evidence. For the benefit of clarity and convenience, these forms of evidence are all grouped under the label 'other misconduct evidence' as there are many common issues across the different forms of evidence.

4.2 Based on the following review of the law of jury directions and the empirical research on the effectiveness of jury directions regarding other misconduct evidence, the Report considers that substantial simplification is necessary. Such reform provides advantages for the accused, the jury and the court system itself by eliminating complex and incomprehensible directions which are recognised as potentially counter-productive.

4.3 Under the recommended model, the general obligation to direct the jury on other misconduct evidence would be abolished. Instead, a judge would only direct on other misconduct evidence where there was a request from a party. If the judge does give a direction, then it would be limited to (1) a brief statement of how the evidence is relevant, (2) an instruction to be careful in how the jury uses the evidence, (3) an explanation that the evidence is only part of the prosecution's case and (4) an instruction not to use the evidence for any other purpose. If evidence is not admitted as tendency evidence, then in recognition of widespread concerns about propensity reasoning, a judge may also warn the jury not to engage in such reasoning.

4.4 Under this model, the primary responsibility for deciding how to deal with other misconduct evidence will fall on the parties. A defendant may make a forensic decision that the best way of addressing other misconduct evidence is to minimise its prominence in the trial or might instead seek to persuade the jury that the evidence does not point to guilt. Whether the judge

needs to supplement the defence arguments with a direction will become a matter for election by the defence, subject to a residual obligation to give a direction if necessary, such as where defence counsel is incompetent. The accused will no longer operate under the shadow of the judge giving a mandatory direction which poses a real risk of highlighting the evidence to the jury and producing a 'backfire effect' to his or her detriment. Judges will also no longer be required to draw complex distinctions between permissible and impermissible modes of reasoning and juries will not be expected to understand directions and draw distinctions that have troubled judges and evidence scholars across the common law world for over 100 years.

4.5 This model is expected to reduce the number of appeals on the adequacy of jury directions regarding other misconduct evidence in three ways. First, the direction will be contingent on a request and so appeals about the failure to give a direction will be less common. Second, the process of the request will require the judge and the parties to discuss how the evidence is relevant and will clarify the main part of the direction that must be adapted to the facts of each case. This process of discussing the charge with the parties will promote a charging practice that accords with the issues in the case as understood by the parties. Third, the content of the direction is simpler than current requirements and should be easier for judges to understand and accurately explain to a jury.

Background

4.6 From 1 January 2010, Victorian proceedings have been governed by the Uniform Evidence Law, following the commencement of the *Evidence Act 2008* (*'UEA'*). The Uniform Evidence Law is a set of model evidence provisions

that were first implemented in New South Wales[1] and the Commonwealth,[2] and were later enacted in Tasmania[3] and the Australian Capital Territory.[4]

4.7 The *UEA* replaces the common law of propensity evidence and similar fact evidence with new language (tendency evidence and coincidence evidence), new tests for admissibility (significant probative value), notice requirements, and a further test of balancing probative value and prejudicial effect where the prosecution seeks to lead the evidence.[5]

4.8 Section 95 of the *UEA* restricts the use to which evidence may be put:

> (1) Evidence that under this Part is not admissible to prove a particular matter must not be used to prove that matter even if it is relevant for another purpose.
>
> (2) Evidence that under this Part cannot be used against a party to prove a particular matter must not be used against the party to prove that matter even if it is relevant for another purpose.[6]

4.9 The admissibility rules for tendency evidence and coincidence evidence (the tendency rule and the coincidence rule, respectively) describe types of evidence used to allow a jury to engage in certain types of reasoning.

4.10 Tendency reasoning applies where the jury uses evidence of the character, reputation or conduct of a person, or a tendency that a person has or had to prove that the person has or had a tendency to act in a particular way or to have a particular state of mind.[7] The jury may then use that finding of tendency as part of the evidence to prove that a person acted in accordance with that tendency on another occasion.

---

1 *Evidence Act 1995* (NSW).
2 *Evidence Act 1995* (Cth).
3 *Evidence Act 200*1 (Tas).
4 *Evidence Act 2011* (ACT).
5 *Evidence Act 2008* ss 97-98, 101.
6 Ibid s 95.
7 Ibid s 97.

4.11 Evidence that the accused had a sexual interest in the complainant in a trial for a sexual offence is tendency evidence, and is one of the most commonly admitted forms of tendency evidence.[8]

4.12 Coincidence reasoning (sometimes called probability reasoning[9]) applies where the jury uses evidence that two or more events occurred to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to similarities in the events or circumstances in which they occurred, it is improbable that the events occurred coincidentally.[10]

4.13 Coincidence evidence can take a wide variety of forms, as it can be relevant to many different issues in a criminal trial. Coincidence evidence might be led to show:

- That two or more offences were committed by the same person, based on some significant distinguishing feature in how the offences were committed;[11]
- That two or more complainants are giving truthful evidence, given the improbability that several complainants would tell such similar lies about the same accused;[12] or
- That a defence of accident is implausible, given the accused's involvement in other similar events.[13]

4.14 Tendency and coincidence evidence share the common element that it usually takes the form of evidence that a person engaged in conduct on an occasion that is not the subject of a particular offence charged, but is led to show that it is more likely that the accused is guilty of that offence. Another

---

8 See, eg, *HML v The Queen* (2008) 235 CLR 334 ('*HML*'); *R v Mckenzie-McHarg* [2008] VSCA 206; *R v AH* (1997) 42 NSWLR 702; *Rolfe v The Queen* [2007] NSWCCA 155; *R v ELD* [2004] NSWCCA 219; *R v Greenham* [1999] NSWCCA 8.

9 See *RR v The Queen* [2011] VSCA 442, [37] (Redlich JA); *RJP v The Queen* [2011] VSCA 443.

10 *Evidence Act 2008* s 98.

11 See, eg, *R v Ellis* (2003) 58 NSWLR 700.

12 See, eg, *DPP v Boardman* [1975] AC 421.

13 See, eg, *Makin v A-G (NSW)* [1894] AC 57.

form of evidence that has this quality is commonly referred to as 'context evidence'.

4.15 Context evidence is led to allow a jury to assess the case in a realistic contextual framework, and to answer questions that the jury might otherwise ask if the evidence had been led as a series of isolated and disconnected events. Such evidence is commonly led in sexual offence cases to explain the complainant's failure to protest or complain, or to explain the accused's confidence to offend with witnesses nearby.[14] It has also been led in homicide cases to show the history of the relationship between the accused and the deceased.[15]

4.16 The warnings necessary in relation to tendency, coincidence and context evidence overlap. For this reason, they are examined together in this chapter under the collective heading of 'other misconduct evidence'.

Current Charges

4.17 The law currently requires judges to give complex directions about the permissible and impermissible uses of tendency evidence, coincidence evidence and context evidence whenever such evidence is led.

4.18 In Victoria, the following standard direction is used for tendency evidence:

> Members of the jury, the prosecution has led evidence that [list all relevant tendency evidence]. The prosecution argues that [summarise prosecution arguments on the use of tendency evidence]. In response, the defence says [summarise defence arguments on the use of tendency evidence].
>
> I must now direct you about how you may use this evidence and then I will give you directions about how you must not use this evidence.

---

14 *R v Josifoski* [1997] 2 VR 68; *R v Loguancio* (2000) 1 VR 235; *KTR v The Queen* [2010] NSWCCA 271.

15 *Wilson v The Queen* (1970) 123 CLR 334; *Roach v The Queen* (2011) 242 CLR 601, 625 (French CJ, Hayne, Crennan and Kiefel JJ).

> The prosecution says that this evidence shows that NOA had a pattern of behaviour to [*describe alleged tendency*]. If you accept the evidence, you may infer that NOA had this pattern of behaviour, and may further infer that this makes it more likely that NOA committed the offence(s) charged. You will remember what I told you about drawing inferences.
>
> I will now direct you on how you must not use this evidence.
>
> You must not use the evidence to reason that, if NOA did [*describe other acts*], s/he *must* have committed the offences charged. This evidence, and the pattern of behaviour the prosecution says that it reveals, is only part of the evidence. Other bad behaviour in the past cannot alone prove guilt.
>
> Similarly, you must not substitute the evidence of [*describe other acts*] for the evidence of the offences charged. You can only convict the accused of the offences charged if you are satisfied beyond reasonable doubt of *those* offences. It would be wrong to say 'I am satisfied that NOA [*describe an uncharged act*] and so I will convict him/her of [*describe charged act*], since that is the same kind of conduct'. Proof of these acts is not the same as proof of the offences charged, but this evidence may help you decide whether the offences charged are proven.
>
> Finally, you must not allow the evidence of [*describe other acts*] to cause you to close your mind against the accused or cause you to pay less attention to the other evidence. Evidence of [*describe other acts*] is only part of the evidence the prosecution relies upon and when making your decision, you must consider all the evidence.
>
> Ultimately the questions for you in dealing with this evidence are: does it establish the alleged pattern of behaviour and does this then make it more likely that the accused committed the offence(s) charged? [16]

4.19 For coincidence evidence, the standard direction identifies four discrete uses of coincidence evidence and includes an optional section for inclusion where there is an issue concerning whether the witness' evidence is truly independent. In the common case where evidence is held to be cross-admissible between several complainants to support their credibility and there is an issue concerning collusion, the standard direction states:

> Members of the jury, the prosecution has led evidence that [summarise all relevant coincidence evidence]. The prosecution argues that [summarise prosecution arguments on the use of coincidence evidence]. In response, the defence says [summarise defence arguments on the use of coincidence evidence].
>
> I must now direct you about how you may use this evidence and then I will

[16] Judicial College of Victoria, *Victorian Criminal Charge Book* 1.16.2 ('*Criminal Charge Book*').

give you directions about how you must not use this evidence.

As you will understand, the prosecution argument is that it is improbable that all these events occurred by coincidence. Instead, the prosecution says that you can use the unlikelihood of coincidence to infer that [*identify the facts-in-issue that the evidence may be used to explain. Possibilities include:*

- That an offence was committed;
- That it was the accused who committed the offence;
- That the accused was acting voluntarily;
- That the accused had a particular mental state when s/he committed the offence; and/or
- That several independent witnesses or complainants have given truthful evidence.]

This involves drawing an inference from the evidence.

You will remember that I told you that, in a criminal trial, you may only draw an inference as part of the prosecution's case if it is the only reasonable inference to be drawn from the facts. This means that you can **only** infer that several independent [witnesses / complainants] have given truthful evidence if you are satisfied beyond reasonable doubt that the [witnesses / complainants] accounts are so similar that they cannot be explained by coincidence. In such a situation, you might infer that the only reasonable explanation for the similarities is that each of the [witnesses / complainants] is telling the truth.

The defence has suggested that the evidence that [*identify relevant coincidence evidence*] is not true. In particular, they have alleged that this evidence, and the apparent similarities between this evidence and [*identify relevant evidence*], are due to [*describe and explain the suggested causes of contamination, such as collusion, unconscious influence or media publicity*]. The prosecution denies this, arguing [*insert prosecution argument*].

It is for you to determine whether or not [*insert names of witnesses*] were telling the truth. However, you may **only** draw an inference from the fact that they all gave such similar accounts if you are satisfied beyond reasonable doubt that their accounts were not contaminated in any way. If you think there is a possibility that [identify all relevant possible causes of contamination] then you may **not** draw that inference. Remember that, while the accused raised this matter, the onus of proof rests on the prosecution.

I will now direct you on how you must not use this evidence.

You must not use the evidence to reason that, if NOA did [*describe other acts*], s/he must have committed the offences charged. This evidence, and the coincidence the prosecution says that it reveals, is only part of the evidence. Other bad behaviour in the past cannot alone prove guilt.

Similarly, you must not use the evidence to reason that NOA is the kind of person who commits offences of this nature, and so s/he is more likely to have committed the offences charged. You must make your decision on the evidence, and not on any views about what type of person the accused is.

You also must not substitute the evidence of [*describe other acts*] for the evidence of the offences charged. You can only convict the accused of the offences charged if you are satisfied beyond reasonable doubt of those offences. It would be wrong to say 'I am satisfied that NOA [*describe an uncharged act*] and so I will convict him/her of [*describe charged act*], since that is the same kind of conduct'. Proof of these acts is not the same as proof of the offences charged, but this evidence may help you decide whether the prosecution has proven the offences charged.

Finally, you must not allow the evidence of [*describe other acts*] to cause you to close your mind against the accused or cause you to pay less attention to the other evidence. Evidence of [*describe other acts*] is only part of the evidence the prosecution relies upon and when making your decision, you must consider all the evidence.

Ultimately the questions for you in dealing with this evidence are: does it establish that it is improbable that these similarities arose by coincidence and does this then make it more likely that the accused committed the offence(s) charged? [17]

4.20 Finally, the standard direction on context evidence states:

Members of the jury, the prosecution has led evidence that [*identify context evidence*]. I must now direct you about how you may use this evidence and then I will give you directions about how you must not use this evidence.

If you accept this evidence, you may use it to place the alleged offence(s) in a complete and realistic context and setting.

[Explain how the provision of contextual information can assist the jury. Possibilities include helping the jury to understand:

- The complainant's alleged conduct or state of mind at the time of the offence, such as why s/he might have submitted to the accused's demands or did not complain about the alleged offending;

- The accused's alleged conduct or state of mind at the time of the offence, such as why s/he felt able to act in a particularly brazen manner;

- The circumstances of the alleged offence, such as to show that the complainant does not say that the offence occurred 'out of the blue'].

It is important that you **only** use this evidence to understand the context of the alleged offence. It is only relevant to make the other evidence intelligible and to answer questions you might otherwise ask. It is **not** evidence that

[17] Ibid 1.16.5.

proves or disproves NOA's guilt of the offences charged.

It is also important that you **only** use this evidence if you accept that it is true. If you do not believe the evidence, or do not think that it provides you with any assistance, then you should disregard it.

I will now direct you on how you must not use this evidence.

You must not use the evidence to reason that, if NOA did [*describe other acts*], s/he *must* have committed the offences charged. This evidence, and the context the prosecution says that it reveals, is only part of the evidence. Other bad behaviour in the past cannot alone prove guilt.

Similarly, you must not use the evidence to reason that NOA is the kind of person who commits offences of this nature, and so s/he is more likely to have committed the offences charged. You must make your decision on the evidence, and not on any views about what type of person the accused is.

You also must not substitute the evidence of [*describe other acts*] for the evidence of the offences charged. You can only convict the accused of the offences charged if you are satisfied beyond reasonable doubt of *those* offences. It would be wrong to say 'I am satisfied that NOA [*describe an uncharged act*] and so I will convict him/her of [*describe charged act*], since that is the same kind of conduct'. Proof of these acts is not the same as proof of the offences charged, but this evidence may help you decide whether the offences charged are proven.

Finally, you must not allow the evidence of [*describe other acts*] to cause you to close your mind against the accused or pay less attention to the other evidence. Evidence of [*describe other acts*] is only part of the evidence the prosecution relies upon and when making your decision, you must consider all the evidence.

Rather, the questions for you in dealing with this evidence are: does it help you to understand the context of the alleged offence, does it make the other evidence intelligible and does it assist in answering questions you might otherwise ask?[18]

4.21 As is seen in these extracts, the content of the impermissible use directions changes depending on the permissible uses of the evidence.

Issues Regarding Other Misconduct Evidence

4.22 The law on the admission and use of evidence of acts of prior misconduct is difficult and complex. The continued uncertainty produced by

[18] Ibid 4.16.8.

recent High Court decisions such as *HML*[19] and *R v BBH*[20] is demonstrative of the difficulties this kind of evidence presents at the highest levels of the court hierarchy in Australia.

4.23 Much has been written about the operation of the exclusionary rules and when those rules apply. It is not intended to add to or repeat such discussions, unless necessary to understand the operation of the law on jury directions.

4.24 Instead, before identifying possible reforms to the area, it is necessary to first consider the following questions:

- When does the law currently require any such directions to be given?
- What does the law currently require in terms of directions to juries?
- Are such directions necessary?

A. Identifying when directions are required

4.25 The circumstances in which directions on previous misconduct are required at all present significant difficulties for the courts. The clearest statement on this point is the judgment of Callaway JA in *R v DCC*,[21] where his Honour identified four discrete situations where a direction might be required. The effect of this judgment can be summarised in the following table:

Situation	Directions required[22]
Uncharged acts led as relationship evidence led in proof of charged acts	Propensity direction, as per *R v Grech*
Multiple charged acts and single complainant	Separate consideration direction sufficient

19 (2008) 235 CLR 334.
20 (2012) 286 ALR 89 ('*BBH*').
21 *R v DCC* (2004) 11 VR 129, 131.
22 The content of these directions is explained below at [4.59] – [4.66].

Situation	Directions required
Multiple charged acts, multiple complainants and no cross-admissibility	Both propensity warning and separate consideration warning required
Multiple charged acts, multiple complainants and evidence cross-admissible as similar fact evidence	Propensity and anti-substitution warning required, as risk of prejudice at its highest. Judge may also need to explain the distinction between propensity reasoning and probability reasoning.

4.26 Importantly, these statements are limited to the circumstances where a 'propensity direction' was required prior to the commencement of the *Evidence Act 2008*. They have not been updated to explore the position where evidence is admitted as tendency or coincidence evidence and do not address the associated question of when anti-speculation directions are required.

4.27 There have been, however, indications that trial counsel can waive the directions. In *R v Glennon (No 3)*, the trial judge proposed omitting the propensity evidence instruction and gave only an anti-substitution direction in relation to evidence of uncharged acts committed at the time of the offending and the days surrounding the charged acts. Trial counsel agreed with the judge's proposal, saying that the risk of propensity reasoning was 'fanciful'. Despite this, the Court of Appeal noted that there was a 'marked risk of propensity reasoning in cases of paedophilia' and considered that the failure to give the direction, while not erroneous in itself, contributed to a miscarriage of justice in conjunction with other errors.[23]

4.28 Decisions such as *Glennon (No 3)*, and other judgments which describe the direction as mandatory,[24] may discourage trial judges from omitting the

[23] (2005) 12 VR 421, 425-6 (Callaway JA) ('*Glennon No 3)*.

[24] *R v CHS* (2006) 159 A Crim R 560, 581 (Eames JA); *R v DWB* (2006) 163 A Crim R 71.

direction. However, there are also decisions such as *R v Mateiasevici*,[25] *R v Spina*[26] and *FMT v The Queen*,[27] where the Court of Appeal has upheld the judge's decision not to give a propensity direction. This can occur where the uncharged acts are of a different kind to the charged acts, or where there is such a difference in circumstances that there is no real risk of impermissible propensity reasoning.[28]

4.29 These conflicting decisions produce a high level of uncertainty for trial judges and encourage practices such as defensive charging, where the charge is written for the benefit of the Court of Appeal, rather than being for the benefit of the jury.

4.30 The existence of other misconduct evidence in the form of both charged and uncharged acts is another complication for trial judges. Courts have held that in that situation judges must expressly extend the operation of any warnings about the use of uncharged acts to the component of the charged acts which is cross-admissible.[29]

(i) Understanding other misconduct evidence

4.31 The proper and improper uses of other misconduct evidence have always been contentious and poorly understood. As Carter and Cowen explained in 1956, when it is properly understood, the common law has never prohibited propensity reasoning. Their analysis of 60 years of cases since the seminal decision of *Makin v A-G (NSW)*[30] shows that there are some cases where evidence is only relevant via propensity and others where it is relevant

---

25 [1999] 3 VR 185.

26 [2005] VSCA 319, [7]-[11] (Eames JA), [117] (Ashley JA).

27 [2011] VSCA 165.

28 See also *R v DWB* (2006) 163 A Crim R 71; *R v VN* (2006) 15 VR 113; *DLJ v The Queen* [2011] VSCA 389.

29 *R v CHS* (2006) 159 A Crim R 560, 581 (Eames JA). See also *R v Fotis* [2004] VSCA 212, *Paton v The Queen* [2011] VSCA 72; *R v Taylor* [2006] VSCA 53. Cf *R v DD* (2007) 19 VR 143, 163-6 (Neave JA).

30 [1894] AC 57.

otherwise than by propensity.[31] Despite this insight, courts for many years were dismissive of evidence on the basis that it was 'mere propensity evidence'.[32]

4.32 The problem of correctly understanding other misconduct evidence is especially pronounced in the area of sexual offences, as judges seek to identify the permissible and impermissible uses. Judges must determine whether the evidence is led as part of the essential background or circumstances of the offence, and so is context evidence, or is led to show a sexual interest in the complainant, and so is treated as tendency evidence. Alternatively, the evidence might be led for a coincidence purpose, such as to show the improbability that several independent complainants would all tell similar lies. This problem is heightened by the potential impact of the evidence on the jury's verdict.[33]

4.33 Decisions such as *HML*[34] and *BBH*[35] exemplify the difficulty of characterising the use of the evidence. In *HML*, a case on the common law, the High Court split 4-3 on the basic question of whether evidence should be characterised as propensity evidence. Hayne J, with Kirby and Gummow JJ concurring, held that the thesis underlying the exclusionary rule from *Pfennig's* case[36] precluded any attempt to draw fine distinctions between uses of evidence for propensity purposes or context purposes.[37] Their Honours held that the evidence needed to and did pass the *Pfennig* test, and evidence revealing a sexual interest in the complainant and a preparedness to act on it

---

31 Zelman Cowen and P B Carter, 'The Admissibility of Guidance of Similar Facts' in *Essays on the Law of Evidence* (Clarendon Press, 1956) 106. The opening words of the essay: 'Poverty of settled principles in the midst of plenty of conflicting authority has long been the most striking feature of the law relating to the admissibility in criminal cases of evidence of similar facts' remains true over 50 years later and continues to affect the jury directions that must be given when the evidence is admitted. See also David Hamer, 'The Structure and Strength of the Propensity Inference: Singularity, Linkage and the Other Evidence' (2003) 29 *Monash University Law Review* 137, 145.

32 See, eg, *R v Boardman* [1975] AC 421; *R v Rajakaruna* (2004) 8 VR 340.

33 *Qualtieri v The Queen* (2006) 171 A Crim R 463, 483 (McClellan CJ at CL).

34 (2008) 235 CLR 334.

35 *BBH v The Queen* (2012) 286 ALR 89.

36 *Pfennig v The Queen* (1995) 182 CLR 461 ('*Phennig*').

37 *HML* (2008) 235 CLR 334, 362, 370, 383-5.

was circumstantial evidence of guilt. Under their view, there was no scope for admission of context evidence on a basis independent from the propensity evidence exclusionary rule.

4.34 Heydon J considered, that in the circumstances, the use of evidence of previous sexual activity between the accused and the complainant was led to show a sexual interest, though the judge erred by directing the jury not to use it for this purpose and to treat the evidence as only context evidence.[38] However, in *obiter* statements, his Honour raised considerable doubts about the admissibility of context evidence which did not include a tendency component, due to the operation of the rule against a witness bolstering his or her own credit.

4.35 The contrary view was taken by Gleeson CJ[39] and Crennan J,[40] who both held that the evidence was led to provide essential background information to the offending and allow the case to be considered in a realistic framework. Finally, Kiefel J acknowledged that the evidence could have been admitted either to show propensity or to answer questions that it might reasonably be expected that the jury may ask. Her Honour held that the judge's directions confined the use of the evidence to the second purpose only.[41]

4.36 Since *HML*, courts in New South Wales[42] and Victoria[43] have affirmed the continued availability of context evidence as a discrete basis of admissibility under the *UEA*.

4.37 In *BBH*, the accused was charged with the Queensland equivalent of 'persistent sexual abuse'.[44] The High Court split 4-3 on whether evidence that

---

38 Ibid 467.
39 Ibid 361-2.
40 Ibid 490-1.
41 Ibid 503.
42 *JDK v The Queen* (2009) 194 A Crim R 333; *KTR v The Queen* [2010] NSWCCA 271.
43 *Neubecker v The Queen* [2012] VSCA 58.
44 See *Crimes Act 1958* s47A.

the complainant's brother saw the complainant leaning over while she was naked from the waist down and the accused's face six inches from her bottom was relevant. The majority (Heydon, Crennan, Kiefel and Bell JJ) held that it could be used to support an inference that the accused had a sexual interest in the complainant.[45] However, French CJ, Gummow and Hayne JJ[46] all held that the evidence was inconclusive as there could have been an innocent explanation such as a inspecting a bee sting, and so the evidence either had no probative value and was irrelevant, or was excluded because it failed to meet the *Pfennig* test.

4.38 In *R v DCC,*[47] Callaway JA had sought to reconcile some of the difficulty created by the common law's historical aversion to propensity evidence by drawing a sharp distinction between permissible 'probability reasoning' and impermissible 'propensity reasoning'. However, even if this distinction is clear and well-established at common law (and since *HML*,[48] that may be doubted), it is no longer appropriate under the *Evidence Act*, which expressly permits 'propensity reasoning' through the recognition of tendency evidence.[49]

4.39 While the explicit recognition of tendency and coincidence reasoning in the *Evidence Act* has gone some way to addressing the misunderstanding that propensity reasoning in all forms is impermissible, Victorian courts continue to use imprecise language reminiscent of the common law. In *JLS v The Queen*,[50] the Court of Appeal accepted that evidence of uncharged sexual acts against the same complainant which are not remote in time may allow 'probability reasoning' and so was admissible as tendency evidence. In contrast, the Court in *RJP v the Queen*[51] criticised a direction that the jury

45 *BBH v The Queen* (2012) 286 ALR 89, 116, 126, 136.
46 Ibid 105, 106, 110-1.
47 (2004) 11 VR 129, 132.
48 See *HML v The Queen* (2008) 235 CLR 334, 407 (Hayne J), 431-2 (Heydon J).
49 *BP v The Queen* [2010] NSWCCA 303, [132]-[133] (Hodgson JA).
50 *JLS v The Queen* (2010) 28 VR 328, 337 (Redlich JA).
51 *RJP v The Queen* [2011] VSCA 443, [75]-[76] (Coghlan AJA).

could use proof beyond reasonable doubt that the accused engaged in one set of offences to conclude it was more likely that he committed another set of offences on the basis that it was not a 'probability direction', but was probably a kind of propensity direction.

4.40 Tendency and coincidence reasoning can involve two different ways of looking at the one piece of evidence, and in many cases, the evidence is led for both purposes.[52] As Gans and Palmer have explained:

> It is important to recognise that there is a large degree of overlap between tendency reasoning and coincidence reasoning. Both sorts of reasoning rely on the simple generalisation that individual behavior often occurs in patterns, but they rely on that generalisation in contrasting ways. Tendency reasoning involves using evidence about a particular person to infer the likelihood that a pattern of behavior will follow. Coincidence reasoning proceeds in the other direction, using evidence about a particular pattern of behaviour to infer that a person was behind it. What sort of reasoning is used depends largely on what is otherwise known about the pattern in question.[53]

4.41 The key distinction between tendency reasoning and coincidence reasoning is the existence of a clear starting point. Whereas tendency reasoning uses a finding that the accused had a particular tendency to find that he or she acted in a similar way on another occasion, coincidence reasoning does not rely on such a finding. In that way, tendency reasoning is sequential (with the finding of the tendency an intermediate step along the path of the jury's reasoning), whereas coincidence evidence must be examined holistically, along with all other circumstantial evidence. Associate Professor Hamer has explained:

> Where propensity reasoning is employed, the defendant is clearly identified as the perpetrator of one or more of the misdeeds from the outset… . For

---

52 In *R v Nassif* [2004] NSWCCA 433, Simpson J used the metaphor that tendency and coincidence evidence were often referred to together as though they were 'conjoined twins', before noting that the terms refer to different reasoning processes and that the decision on admissibility on one form of evidence did not dictate the result in relation to the other form of evidence: at [51].

53 Jeremy Gans and Andrew Palmer, *Uniform Evidence* (Oxford University Press, 2010), 185. The authors conclude that little matters about the choice of mode of reasoning, because the Act regulates the two forms of evidence in the same way. Even if true in relation to admissibility, the differences between these two modes of reasoning affect the directions a judge must give the jury.

example, in *Pfennig* and *Thompson,* the defendant had pleaded guilty to the other alleged misconduct before the instant charges were laid - the evidence was of the defendant as a convicted paedophile or murderer. The linkage step is taken en route to the guilt finding. With coincidence reasoning, on the other hand, the evidence is not of the defendant as a proven criminal. There is evidence associating the defendant with the other misdeeds, and on the basis of shared singularity this may be added to the evidence implicating the defendant in the charged offence - the 'other evidence'. Only then, as a result of this accumulation, is linkage established. It is a 'by-product' of the finding of the defendant's guilt.' It is only 'after the argument has been made, and because it succeeds, that [the defendant's] bad disposition is established'.[54]

4.42 A similar point is made by McGrath and William Young JJ in their minority judgment in *Mahomed v The Queen*.[55] Adopting the analysis used by Professor Spencer in *Evidence of Bad Character*,[56] they explain that 'propensity evidence' can be grouped into three scenarios:

(a) 'Scenario one', where the Crown can establish by practically irrefutable evidence that the defendant has a particular propensity. An example might be where a male defendant is charged with sexual offending against a female child and the Crown adduces either evidence of convictions for paedophile offences or photographs of the defendant committing such offences. In this situation, the Crown will rely on the defendant's established propensity to support its case. Sometimes the logic invoked is that the propensity is akin to an identifying characteristic. Thus in the example just postulated, the fact that the defendant is a paedophile provides direct support for the complainant's evidence, in the sense that he happens to have the particular characteristic which she attributes to him, and thus increases the probability of her evidence being true. But underpinning, or at least closely associated with, this approach, will usually be coincidence reasoning (whether articulated or not). So, staying with the postulated example, the Crown might stress the implausibility of a complainant who wishes to make a false complaint happening to choose someone who just happens to be a paedophile. The well known case of *R v Straffen* illustrates the point we have just made.… The reality was that either the defendant was the murderer or there were, at the time of the murder and in close proximity to Broadmoor, two people with a very particular and distinct character trait involving the willingness to kill young girls.

(b) 'Scenario two', where the evidence is simply circumstantial. Professor Spencer's example of this is *R v Wallace*, where the defendant was linked by some circumstantial evidence to no less than four robberies,

---

54 Hamer, above n 31, 158-159 (citations omitted). The same point has been made by Professor Spencer in J R Spencer, *Evidence of Bad Character* (Hart Publishing, 2nd ed 2009) 89.

55 [2011] 3 NZLR 145 ('Mahomed').

56 Spencer, above n 54.

all of which had similar features. Other examples which come to mind are the well-known baby farming cases and the 'brides in the bath' case. In such a case, the relevant propensity attributed to the defendant is not really a stepping stone on the way to a conclusion that the defendant is guilty. Instead the conclusion that the defendant has such a propensity is essentially a corollary – and thus down-stream – of a finding that the charges have been made out. In saying this we recognise that where the evidence of guilt in relation to one or more of the incidents is much stronger than in relation to the others, scenario three is similar to scenario two.

(c) 'Scenario three', where a number of witnesses give disputed evidence of broadly similar offending (usually of a sexual nature) by the defendant. The evidence of each witness supports that of the others because of the unlikelihood that independent witnesses would make up similar stories. If the evidence of one of the witnesses is much stronger than that of the others (perhaps because of independent corroboration), scenario three is similar to scenario one. But more commonly, as with scenario two, a conclusion that the defendant has the relevant propensity will simply be a corollary of, and not a stepping stone to, a conclusion that the charges have been proved.[57]

4.43 Under the language of the *Evidence Act*, scenario one describes tendency reasoning, while scenario two describes coincidence reasoning. Scenario three is correctly recognised as being able to shift between tendency and coincidence reasoning, depending on the strength of the individual pieces of evidence and whether the jury can make a preliminary finding of tendency.[58]

4.44 In terms of assessing prejudice, McGrath and William Young JJ noted that the risk of prejudice was highest in category (i) evidence, as the propensity is being used as a stepping stone to guilt, whereas a jury in category (ii) or (iii) cases would not find the accused had a particular propensity until it finds the charges proven. [59]

4.45 Associate Professor Hamer has also noted the difficulty of drawing a sharp line between the two forms of reasoning:

---

57 *Mahomed* [2011] 3 NZLR 145, 173 (citations omitted).
58 Ibid 174 (William Young J).
59 Ibid 175.

> In practice, however, a sharp line between the two forms of reasoning is difficult to draw. In essence, the distinction is one between the stronger notion of 'linkage' and the weaker notion of 'association'; it is one of degree. Classification is rarely straightforward, and most cases will present the possibility of either or both forms of reasoning. Even where cases appear susceptible to clear classification the significance of the distinction is questionable; coincidence reasoning involves the recognition of the defendant's propensity, and the operation of propensity reasoning can be described in terms of the rejection of a coincidence.[60]

4.46 The lack of a bright line distinction leads to parties, especially prosecutors, seeking to characterise evidence as both tendency and coincidence evidence. This can complicate jury directions, as judges feel obliged to spell out the discrete modes of reasoning when the two forms of reasoning, in many cases, are merely two sides of the same coin.

(ii) The probative value of context evidence

4.47 In the case of context evidence, there is an added obligation to warn the jury that:

- It has been admitted for a limited purpose only;
- It may not be used for any other purpose, such as to show a tendency on the part of the accused to commit certain acts; and
- It cannot be used as part of the chain of evidence leading to guilt.[61]

4.48 For several years, the admissibility of context evidence and its interaction with what is now called tendency and coincidence reasoning was contentious. For example, the Court of Appeal had held in *R v Pearce* that evidence of uncharged sexual acts is admissible for a single purpose of 'enabling the evidence relied upon by the Crown in proof of the offences charged to be assessed and evaluated within a realistic contextual setting'.[62] As Byrne AJA noted in *R v BJC*, this view was difficult to reconcile with the numerous cases where uncharged sexual acts were accepted as relevant for

---

60 Hamer, above n 31, 159 (citations omitted).

61 *Boney v The Queen* (2008) 187 A Crim R 167; *Martin v State of Tasmania* (2008) 190 A Crim R 77; *Qualtieri v The Queen* [2006] NSWCCA 95; *CHG v The Queen* [2006] NSWCCA 66; *R v ATM* [2000] NSWCCA 475.

62 [1999] 3 VR 287, 295 (Phillips CJ) citing *R v Vonarx* [1999] 3 VR 618.

purposes other than merely providing context.[63]

4.49 As noted above, in *HML*, Gummow, Kirby, Hayne and Heydon JJ all cast doubt on the independent admissibility of evidence to provide the context of offending. However, since then, Victorian and New South Wales courts have affirmed the availability of context evidence under the *UEA*.[64]

4.50 There has also been some confusion around whether context evidence breaches the rule that the prosecution cannot call evidence purely to bolster the credit of a witness (the 'credibility rule').[65] As the law presently stands, that issue has been overcome by treating context evidence as a matter that supports the reliability of the complainant's evidence, rather than the general question of the complainant's credibility as a witness.[66] Despite this, context evidence is still often said, in a short-hand manner, to support the credibility of the complainant.

4.51 Justice Howie has explained the difference between tendency evidence and context evidence, and how the evidence is relevant:

> Both context evidence and tendency evidence can bolster the credibility of the complainant but they do so in different ways.
>
> Context evidence is relevant to the credibility of the complainant only in that his or her version of the particular incident which is the basis of the charge in the indictment may be more capable of belief when seen in the context of what the complainant says was his or her sexual relationship with the accused. It may explain, on the complainant's version, why the accused and the complainant acted as they did in circumstances where without the context of the relationship those acts might be inexplicable.
>
> But other than generally assisting the complainant's credibility in this way, context evidence does not make the complainant's account more reliable than it would be in the absence of that evidence. *Context evidence does not make it more likely that the accused committed any of the offences charged in the indictment.*

---

63 (2005) 13 VR 407, 416. See also *R v LRG* (2006) 16 VR 89, 98-9 (Callaway JA); *R v Loguancio* (2000) 1 VR 235, 240-1.

64 *JDK v The Queen* (2009) 194 A Crim R 333; *KTR v The Queen* [2010] NSWCCA 271; *Neubecker v The Queen* [2012] VSCA 58.

65 See *Evidence Act 2008* s 102.

66 *Peacock v The Queen* (2008) 190 A Crim R 454..

> Tendency evidence on the other hand is direct evidence relevant to the commission of the offence charged. If accepted by the jury, it makes it more likely that the offence charged was committed by the accused. It bolsters the complainant's credibility because her version is more likely to be true if the accused has a tendency to behave in the way she alleges he did on specific occasions.[67]

4.52 In addition, courts in New South Wales have held that when explaining context evidence, the judge must direct the jury that they cannot use the evidence when deciding whether the elements of the offence have been proven.[68]

4.53 The principle that context evidence does not make it more likely that the accused committed the offences charged is difficult to reconcile with certain cases and has led the Victorian *Criminal Charge Book* to adopt a fourth category of 'relationship evidence'. However, such a category may be unnecessary. Previous cases have held that the admission of context evidence makes the complainant's evidence of the charged acts more credible,[69] supports the guilt of the accused,[70] and that the evidence would be irrelevant and hence inadmissible unless it made the existence of the charged act more likely.[71]

4.54 The distinction between using evidence to provide context and yet not using evidence as 'an element in the chain of proof of the offence charged',[72] is illusive and difficult to explain. The instruction that context evidence cannot be used to decide whether the charged acts are more likely to have occurred is perilously close to describing the evidence as irrelevant. It is also a form of undue subtlety and refinement that is unlikely to assist the jury.

---

67 *Qualtieri v The Queen* (2006) 171 A Crim R 463, 494 (emphasis added). See also *R v ATM* [2000] NSWCCA 475, [76] (Howie J).

68 *JDK v The Queen* (2009) 194 A Crim R 333, 350 (McClellan CJ at CL); *Rees v The Queen* (2010) 200 A Crim R 83, 87 (Beazley JA).

69 *R v AH* (1997) 42 NSWLR 702.

70 *R v Leonard* (2006) 67 NSWLR 545, 557 (Hodgson JA).

71 *HML v The Queen* (2008) 235 CLR 334, 447 (Heydon J). See also *R v Spathis* [2001] NSWCCA 476, [325]-[330] (Heydon JA); *R v FDP* (2008) 74 NSWLR 645, 654 (McLellan CJ at CL, Grove and Howie JJA); *R v PLK* [1999] 3 VR 567.

72 This language is used in the model New South Wales charge and was endorsed in *Qualtieri v The Queen* (2006) 171 A Crim R 463, 487-8 (McClellan CJ at CL).

(iii) Tendency, coincidence and relevance: Phillips v The Queen

4.55 In *Phillips v The Queen*,[73] the High Court held that the prosecution could not rely on similar fact evidence of other complainants in a rape prosecution, where the issue was consent. The Court held that evidence that a complainant did not consent to sexual activity with the accused on some other occasion was unable to assist in proving whether a different complainant consented to sexual activity with the accused on a different occasion.

4.56 This decision has been heavily criticised on the basis that it fails to properly reflect the operation of tendency and coincidence reasoning.[74] It is also inconsistent with the approach that has been adopted in England[75] and New Zealand.[76]

4.57 The Tasmanian Law Reform Institute[77] has recommended legislative change to reverse this aspect of *Phillips*. In contrast, the recent joint report by the Australian Law Reform Commission and New South Wales Law Reform Commission on family violence recommended against any legislative attempt to reverse this aspect of *Phillips*, due to the complexity of doing so and the risk of introducing new uncertainties.[78]

4.58 While acknowledging the strength of the criticisms, this Report does not reach any concluded view on this issue. Any solution to this problem would involve legislative intervention on a question of admissibility of

---

73 (2006) 225 CLR 303 ('*Phillips*').

74 See Jeremy Gans, 'Similar facts after Phillips' (2006) 30 Criminal Law Journal 224; David Hamer, 'Similar Fact Reasoning in Phillips: Artificial, Disjointed and Pernicious' (2007) 30 University of New South Wales Law Journal 609; *Western Australia v Osborne* [2007] WASCA 183; National Child Sexual Assault Reform Committee, Alternative Models for Prosecuting Child Sex Offences in Australia (2010).

75 *R v Wilmot* (1989) 89 Cr App R 341; *R v Z* [2002] 2 AC 483.

76 *R v H* [2007] 3 NZLR 850.

77 Tasmanian Law Reform Institute, *Evidence Act 2001 Sections 97, 98 & 101 and Hoch's case: Admissibility of 'Tendency' and 'Coincidence' Evidence in Sexual Assault Cases with Multiple Complainants*, Report No 16 (2012), v.

78 Australian Law Reform Commission, *Family Violence – A National Legal Response*, Report No 114 (2010).

evidence. That is outside the terms of reference for this Report. Consideration of that issue should instead be part of a review of the *Uniform Evidence Law* or as part of a review of sexual offences.

B. Content of the directions

4.59 Once a judge determines that directions need to be given, the next question involves the content of those directions.

4.60 Before the commencement of the *Evidence Act 2008*, a strong body of authority developed in Victoria around the need for propensity directions and the content of such directions. In *R v Vonarx*,[79] evidence of uncharged acts of sexual abuse was led from a single complainant in support of the charged acts. The trial judge gave the following directions on the use of the evidence:

> The second thing I want to tell you is this, that you've heard evidence from [the complainant] concerning sexual activity between him and his father, other than the sexual activity which is the subject of the charges which the father faces. That evidence of other sexual activity, if you accept it, is relevant to prove that the offences with which the accused man is charged occurred on the basis that the accused man has shown a propensity to engage in sexual activity with his son.
>
> However, you must not reason or jump to the conclusion, that simply because the accused man may have done something wrong on other occasions, that he must have done so on the occasions which are the subject of the offences with which he is being charged.
>
> …
>
> That evidence, if you accept it, is relevant to prove that the offences with which the accused man has been charged occurred on the basis that the accused man had shown a propensity, an inclination if you like, to engage in sexual activity with his son. But, as I said previously, you must not reason or jump to the conclusion that simply because the accused may have done something wrong on other occasions, that he must have done so on the occasions which are the subject of the offences with which he is being charged.[80]

4.61 On appeal, the Court of Appeal noted that because the evidence establishes 'propensity', it has the potential to prejudice the accused. The trial

---

79 [1999] 3 VR 618.

80 Ibid 624 (Winneke P, Callaway JA and Southwell AJA).

judge should therefore carefully explain the permissible and impermissible uses of the evidence. The Court warned that judges should avoid using the word 'propensity' when explaining the evidence to the jury, as the word has a pejorative connotation. In summarising its views on the necessary content of the direction, the Court said:

> Nevertheless we believe that in a case such as the present, where evidence of criminal conduct, other than that which is charged, is being introduced into the evidence on the trial, the jury ought to be clearly told that evidence of such conduct can be used by them only if they are satisfied that it occurred and only for the limited purpose of determining whether a sexual relationship existed between the complainant and the accused, thereby enabling the evidence relied upon by the Crown in proof of the offences charged to be assessed and evaluated within a realistic contextual setting. They should be told not to reason that the accused is the kind of person likely to commit the offence charged.
>
> The jury should also be clearly instructed that evidence of other sexual activity does not itself prove the offences charged. It is of the utmost importance that the jury be told that the accused can be convicted on any count alleged against him on the presentment only if they are satisfied beyond reasonable doubt that the facts alleged in that count occurred. It is impermissible to convict the accused on the basis that, although the conduct so identified has not been proved to the requisite standard, some other conduct alleged by the victim has occurred.[81]

4.62 While the Court in *R v Vonarx* dismissed the appeal, the decision has had a significant impact on the development of jury directions in this area.[82]

4.63 The point was again made in *R v Grech*, where Callaway JA said:

> In my opinion the jury should have been told that:
>
> (a) the evidence of extraneous sexual conduct was admitted solely to establish the relationship between the applicant and his daughter as part of the context and setting in which the offences charged were alleged to have occurred; and
>
> (b) even if the jury accepted that evidence or part of it —
>
> (i) the commission of the offences charged could be proved only by the evidence relating to them, not by evidence relating to the extraneous conduct; and

---

81 Ibid 625 (Winneke P, Callaway JA and Southwell AJA) (citations omitted).

82 Ibid.

(ii) they must not reason that, because the applicant engaged in sexual conduct with his daughter on one or more earlier occasions, he was the kind of person who was likely to have done so on the occasions charged.[83]

4.64 The two directions listed under item (b) in *Grech* have come to be known as the 'anti-substition' direction and the 'propensity' direction, respectively.[84] Following *Grech*, the need for these directions has been described as 'rudimentary'[85] or 'indisputable'.[86]

4.65 While these directions have been most often formulated in relation to sexual offences, the underlying principles seem to apply equally to charges of non-sexual offences.[87]

4.66 These directions have continued to be considered relevant and necessary since the commencement of the *Evidence Act*.[88]

(i) Language of the warning

4.67 While Callaway JA in *Grech* stated that he was not intending to put forward a model charge, the language of the warning has been a persistent issue in Victoria.

4.68 In *R v J (No 2)*, Callaway JA contrasted the language of the propensity warning used in New South Wales with that used in Victoria.[89] The New South Wales direction (commonly called a *Beserick*[90] direction), instructs the jury not to reason that because the accused may have done something wrong on some other occasion, he must also have done so on the occasion which is the subject of the charge.

---

83 *R v Grech* [1997] 2 VR 609, 614 ('*Grech*').

84 *R v Beserick* (1993) 30 NSWLR 510; *R v AH* (1997) 42 NSWLR 702; *R v Greenham* [1999] NSWCCA 8; *R v Grech* [1997] 2 VR 609; *R v Vonarx* [1999] 3 VR 618; *R v ATM* [2000] NSWCCA 475; *WFS v The Queen* [2011] VSCA 347.

85 *R v Fotis* [2004] VSCA 212; *Paton v The Queen* [2011] VSCA 72.

86 *Paton v The Queen* [2011] VSCA 72.

87 See *R v Gangi* [2004] VSCA 244, [16] (Chernov JA); *R v Georgiev* (2001) 119 A Crim R 363, 383 (Ormiston JA).

88 See *WFS v The Queen* [2011] VSCA 347, (Robson AJA).

89 [1998] 3 VR 602, 641.

90 (1993) 30 NSWLR 510.

4.69 The adequacy of the *Beserick* direction has been upheld in numerous cases,[91] and in *R v DCC*, Callaway JA made the point that '[t]he formulation preferred in *Grech* and *R v J (No 2)* is intended to be clearer and more accurate, but that is all'.[92].

4.70 Despite this, courts frequently state that the 'kind of person' language is 'preferred'[93] and there are decisions where there is an implicit rejection of the adequacy of a *Beserick* direction, treating it as only an anti-substitution direction which does not address the risk of propensity reasoning.[94]

4.71 These cases have left the law in a state of considerable confusion regarding the adequacy of a *Beserick* direction in Victoria. Judges will naturally respond in the manner predicted by Severance, Greene and Loftus that 'because appeals based on alleged error in instructing the jury are common, judges are often reluctant to deviate from language approved by higher courts, even where that language is difficult for jurors to understand'.[95]

(ii) Permissible and impermissible reasoning

4.72 In his separate judgment in *R v BJC*,[96] Byrne AJA discussed the difficulty of distinguishing permissible and impermissible propensity reasoning. While the case was decided before the commencement of the *Evidence Act*, the same principles would apply to evidence admitted as tendency evidence. While rejecting an argument that the permissible use

---

91 *R v PZG* (2007) 171 A Crim R 62; *R v DCC* (2004) 11 VR 129; *R v Glennon (No 2)* (2001) 7 VR 631; *R v LRG* (2006) 16 VR 89; *Scetrine v The Queen* (2010) 28 VR 213; *R v CHS* (2006) 159 A Crim R 560.

92 (2004) 11 VR 129, 134.

93 *R v DCC* (2004) 11 VR 129, 137-8 (Callaway JA); *R v CHS* (2006) 159 A Crim R 560, 584 (Eames JA); *Scetrine v The Queen* (2010) 28 VR 213, 225 (Nettle and Redlich JJA and Beach AJA).

94 See *R v Macfie* [2002] VSCA 51, [17]-[19] (Buchanan JA). Callaway and Vincent JJA concurred in the result while expressly noting that a *Beserick* direction is an adequate propensity warning; at [6] (Callaway JA), [24] (Vincent JA); *R v GVV* (2008) 20 VR 395, 403 (Lasry AJA); *WFS v The Queen* [2011] VSCA 347.

95 Laurence J Severance, Edith Greene and Elizabeth Loftus, 'Toward Criminal Jury Instructions That Jurors Can Understand' (1984) 75 *Journal of Criminal Law and Criminology* 198, 200.

96 (2005) 13 VR 407.

directions undermined the propensity warning, he explained that:

> Where evidence of uncharged acts is led in proof of sexual attraction of the accused for the complainant, it will be seen that its purpose is perilously close to the prohibited use of evidence of propensity, so that the propensity warning with respect to this evidence must be crafted in such a way so as not to make a nonsense of the direction as to its lawful use. In cases where the victim of the charged and uncharged acts is the same person, this may not be an easy distinction to make. In such a case, the essence of the logic behind the admission of the evidence in question is that the accused, being a man who lusts after the complainant, is likely to have gratified this lust, as she says he did in her evidence in support of the counts on the presentment. The jury are told that where the uncharged acts show that the accused has a sexual attraction or passion for the complainant, they might use this to conclude that her evidence, that he gratified this attraction or passion on the occasions charged, should be believed. At the same time, they are told that they may not use the evidence of uncharged acts as showing that the accused is the kind of person who was likely to have done so on the occasion charged. The point of distinction, if there be one, is indeed a subtle one. It must lie in that between general and specific propensity. The evidence is admissible, not to prove guilt of the offences charged by a general disposition to commit crime, but to show the nature of the relationship in a manner which bears directly upon the question of guilt. In short what the jury are asked to do is to infer from evidence of uncharged acts that the accused has a disposition to commit the particular crime charged.…
>
> The problem for the trial judge in these circumstances is then how to formulate the propensity warning. The Court of Appeal in this State has made it clear that they must give a warning which, tailored to suit the requirements of the case, satisfies the requirements of the *Grech* guide. It recommends that they avoid using the word 'propensity'. The task of reconciling this with the affirmative direction which is required may be a delicate one. In most cases the distinction will lie in the identification of the particular use which the jury has been instructed they might make of the uncharged acts evidence for the purpose of establishing whether the particular offence charged has been proved.[97]

4.73 The difficulty of avoiding contradictory or inconsistent directions regarding the permissible and impermissible uses of evidence also applies to context evidence, as seen in a case like *R v Gojanovic (No 2)*.[98] In that case, the accused and deceased had been in a de facto relationship. When the relationship ended in July 2000, the accused violently assaulted the deceased. Eight months later, the accused confronted the deceased at her home and

---

97 Ibid 420-1. Osborn AJA (Winneke P concurring) makes the same point at 431 (citations omitted)

98 [2007] VSCA 153.

killed her. At the trial, the accused raised issues of automatism and provocation. The prosecution led evidence of the earlier assault and other evidence to show that the deceased remained in fear of the accused. The trial judge explained that the evidence was led to show that the accused had a motive to kill the deceased and to explain what would otherwise be an extraordinary act of deliberately killing another person. The judge also directed the jury not to reason that 'simply because the accused has previously engaged in some violent behaviour, he is more likely to be guilty of murder'.[99]

4.74 The Court of Appeal upheld that direction as addressing the risk of propensity reasoning. As the Court explained:

> The object of the propensity direction in a case such as this is to preclude the jury from reasoning, from the relationship evidence, that (a) the accused was a person of violent disposition and (b) therefore he was more likely to have murdered the deceased. In this case the direction given by the trial judge contained 'part (b)', but not 'part (a)' of such a direction. However in the context of the issues, as agitated at the trial, and as explained by the trial judge, in our view the direction given by the trial judge did not need to include 'part (a)' to be sufficient to preclude the jury from indulging in impermissible propensity reasoning. In that setting the jury could only have understood the direction given to them — not to reason from the relationship evidence that the accused was more likely to be guilty of murder — as a caution not to indulge in 'propensity' type reasoning. It was not necessary — and perhaps even undesirable — that the judge, in specific terms, outline the type and nature of propensity reasoning in which they were not permitted to indulge.[100]

4.75 This approach carries its own difficulties. By omitting the instruction labelled as 'part (a)', the judge expanded the prohibited use beyond reasoning from general disposition to reasoning from the evidence at all. This conflicted with the judge's earlier direction that the evidence could be used in proof of motive and the jury was left without assistance on how to reconcile the two conflicting directions. The permissible use of the evidence was preserved

---

99 [2007] VSCA 153, [105] (Ashley and Kellam JJA and Kaye AJA). See also *KJR v The Queen* (2007) 173 A Crim R 226, 228 (Simpson J) for another example of a warning that risks eliminating the permissible use of the evidence.

100 [2007] VSCA 153, [112] (Ashley and Kellam JJA and Kaye AJA) (citations omitted).

only by the phrase 'simply because'. A jury considering this direction may not have grasped the subtle distinction between permissible and impermissible reasoning.

(iii) Consideration and criticism of the anti-substitution direction

4.76 The anti-substitution direction warns the jury that 'the commission of the offences charged could be proved only by the evidence relating to them, not by evidence relating to the extraneous conduct.'

4.77 While the direction is well established in both Victoria and New South Wales, there are significant problems with the direction.

4.78 First, the warning is potentially misleading if the judge tells the jury that the offence can only be proven by evidence of the offence and not evidence of extraneous conduct. As Byrne and Osborne AJJA explained in *R v BJC*, the instruction is only concerned with the danger of substitution and is not a direction about relevance.[101] Evidence admitted as tendency, coincidence or context evidence must have met the relevance test. By admitting the evidence, the judge accepts that it bears, directly or indirectly, on the probability that the accused committed the offences charged. In other words, it is evidence that the jury can use in deciding whether the accused committed the offences charged. However, there is a risk that a jury hearing an anti-substitution warning may think that the warning is telling them to disregard the evidence of extraneous conduct as irrelevant.

4.79 Secondly, the risk that the warning seeks to address is that the jury will convict the accused of the offence charged due to proof of the extraneous conduct, despite having a reasonable doubt about proof of the offence. Such a direction may insult the integrity of the jury by suggesting that the jury may convict of the offence despite having a reasonable doubt about the accused's guilt of that offence.

---

101 (2005) 13 VR 407, 419, 430.

4.80 Thirdly, to the extent that the warning is designed to address the risk of the jury convicting despite having a reasonable doubt about the accused's guilt of the offence charged, the direction may be ineffective. If the jury is minded to disregard such a fundamental concept as the requirement that the prosecution must prove its case beyond reasonable doubt, it is difficult to think that a direction telling the jury not to convict merely because of proof of an extraneous event would be effective.

4.81 Fourthly, while the instruction could be modified to warn the jury not to find that the accused is guilty merely because the accused committed extraneous conduct, such a direction carries its own problems. A direction not to treat the evidence as conclusive is already provided in the form of the *Beserick* warning. Also, such a direction may be inappropriate where the prosecution's case relies heavily on coincidence evidence. Finally, such a direction attracts the problems which Wheeler JA succinctly identified in *PIM v Western Australia*:

> The appellant's submissions are based upon cases in which it has sometimes been suggested that the danger with propensity evidence is that the jury will reason that because an offender has offended in the past, he is 'automatically' guilty of the offence charged. Put baldly as that, the suggestion is that if the only evidence at the trial of a person accused of sexually assaulting a child in a particular way on 14 July 2009, is that the same person sexually assaulted the child in a different way on a date some years previously, then even in the absence of any direct or circumstantial evidence that the accused had committed any offence at all on 14 July 2009, the jury would, nevertheless, convict. That, of course, would be a startlingly stupid piece of reasoning, and despite the fact that directions warning against such reasoning have often been given, it seems to me that a direction of the kind suggested is calculated to confuse. It is calculated to confuse because, without lengthy and subtle explanation, the jury may overlook the significance of the word 'automatically' in that direction, and think they are being directed either to disregard the evidence altogether, or, in any event, not to use it for a purpose for which it may properly be used. I would reject the submission that a trial judge is required to give a direction in the terms formulated by the appellant's submissions.[102]

---

102 (2009) 196 A Crim R 516, 524.

(iv) Need for precision in directions

4.82 Courts have consistently required a high level of precision in the directions on permissible and impermissible uses. It is not enough to simply characterise evidence as 'relationship evidence', as that is thought to increase the risk of misuse.[103] Instead, the judge must specify the precise issues on which the evidence is relevant and explain how the evidence must not be used, even if this imposes an 'unreasonable burden' on trial judges. The difficulty of fulfilling this obligation is seen as a reason for refusing to admit the evidence at all.[104]

4.83 Recently, in *Auons v The Queen*, Buchanan JA said that the trial judge erred in his direction regarding uncharged acts that were admitted to place the offence in a 'more complete and realistic context' because that did not provide sufficient elaboration on how the jury could use the evidence.[105]

4.84 The same point about the need for precision in directions also arose in *RR v The Queen*. After finding that evidence was not properly cross-admissible between complainants as coincidence evidence, Redlich JA considered that, even if he was wrong in that conclusion, the directions were insufficiently specific:

> If contrary to my conclusion, the evidence of RD or RT did have the necessary commonality of features or underlying unity with the complainants' RN and RA's accounts, the concept of probability reasoning had to be sufficiently explained to the jury so that the basis for drawing the inference was understood. The direction to the jury did not adequately focus the jury's attention on the question whether the evidence of RT and RD exhibited features which made it improbable that their account and that of the complainants was co-incidence. It referred to a 'consistency of pattern', earlier explained as 'a pattern of systemic sexual conduct' that made it improbable that the evidence of the complainant was not true. There was no instruction that the jury consider whether there were similarities between the accounts of RT or RD and the complainants which rendered it improbable that the complainants' accounts were only coincidence. The jury were left with the impression that if they accepted that the evidence of RT and RD

103 *R v BJC* (2005) 13 VR 407, 428-9 (Byrne AJA).
104 *R v Rajakaruna* (2004) 8 VR 340, 374 (Eames JA).
105 [2010] VSCA 223, [59].

established that there was a sexual connotation, then the sexual acts alleged by the complainants were rendered more likely. That was an invitation to engage in propensity reasoning. The risk that the jury might do so was

> unfortunately exacerbated by his Honour's instruction that their evidence could be viewed as uncharged acts.[106]

4.85 Finally, in *RJP v The Queen*, which concerned sexual offences against four children, the trial judge held that the evidence was cross-admissible between complainants as coincidence evidence. The trial judge directed the jury that:

> if you accept the evidence of one complainant beyond reasonable doubt, you may use that complainant's evidence to more readily accept that the accounts of another complainant are so similar that they cannot be explained by coincidence. In such a situation you may infer that the only rational explanation for the similarities is that each of the complainants is telling the truth.[107]

4.86 On the appeal, the appellant argued that the directions were not sufficiently specific and did not address the purpose for which the evidence was led. Coghlan AJA (Redlich JA and Macaulay AJA concurring) upheld these complaints and stated that the direction did not explain the alleged underlying unity between allegations that would allow the jury to engage in coincidence reasoning. This required the trial judge to identify the features in each complainant's account which were capable of supporting each other. Coghlan AJA recognised that:

> There is a reluctance in cases similar to the present case to go into detail about the counts but proper instructions about underlying unity can only be given after some detailed analysis of the counts has occurred.
>
> The lack of particularity in his Honour's charge left open to the jury that it was appropriate to reason from the relationship evidence, the opportunistic nature of the offending and the position of authority of the applicant that there was an improbability of coincidence on all of the counts. That possibility is unacceptable and has given rise to a miscarriage of justice.[108]

4.87 These judgments show that the current law requires judges to give highly detailed and logically precise instructions to the jury on the use of evidence of previous misconduct and how to avoid misusing such evidence. Any slip in the identification of the evidence, the relevant standard of proof,

---

106 [2011] VSCA 442, [44] (citations omitted).
107 [2011] VSCA 443, [69] (Coghlan AJA).
108 Ibid [105]-[107].

the chain of reasoning permitted or the chain of reasoning prohibited creates a very high risk that a conviction will be overturned.

C. Effectiveness of the direction

4.88 The general research on the effectiveness and comprehension of jury directions is discussed in Chapter 1. While the obligation to give limiting instructions and warnings about prior misconduct evidence is well established at law, it is important to consider the empirical evidence on the effectiveness of such directions.

4.89 As mentioned in Chapter 1, one of the earliest studies on the effectiveness of limiting instructions examined damages awards in a civil case and the impact of irrelevant evidence that the defendant was insured. In the control group, where the evidence was not admitted, the average award of damages was $33,000. When the evidence was admitted, but no instruction was given, the average award rose to $37,000. Finally, when the evidence was admitted and the jurors were told to disregard the evidence, the average damages award rose again to $46,000.[109]

4.90 Subsequent studies have generally confirmed that limiting instructions can create a backfire effect, where the giving of the instruction causes the jury to respond in the opposite direction to that intended by the limiting instruction.[110] This effect applies in both criminal and civil cases, and to both inculpatory and exculpatory evidence. For example, a study by Wolf and Montgomery recorded an increased acquittal rate when the jury were

---

109 Dale Broeder, 'The University of Chicago Jury Project': The Special Feature on Damages' (1959) 38 Nebraska Law Review 744.

110 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; K Pickel, 'Inducing Jurors to Disregard Inadmissible Evidence: A Legal Explanation Does Not Help', (1995) 19 *Law and Human Behavior* 407; Sharon Wolf and David Montgomery, 'Effects of Inadmissible Evidence and Level of Judicial Admonishment to Disregard on the Judgments of Mock Jurors' (1977) 7 *Journal of Applied Social Psychology* 205; Cheryl Oros and Donald Elman, 'Impact of Judge's Instructions Upon Jurors' Decisions: The Cautionary Charge in Rape Trials' (1979) 10 *Representative Research in Social Psychology* 28; Stanley Sue, Ronald E Smith, Cathy Caldwell, 'Effects of Inadmissible Evidence on the Decisions of Simulated Jurors' (1973) 3 *Journal of Applied Social Psychology* 845.

instructed to disregard exculpatory evidence, compared to a control condition. While some studies have produced contrary results, they appear to be the minority and the methodology of those studies has been criticised.[111]

4.91 Specific research has also been carried out on the effectiveness and comprehension of instructions on previous convictions. Much of this research is from America, where the admission of evidence of previous convictions is governed by Rule 404(b) of the *Federal Rules of Evidence*, and its state equivalents.[112] This rule is significantly different to the current tendency and coincidence rule in Victoria and its equivalents in English, Australian and New Zealand jurisdictions. Research on the effectiveness of instructions about rule 404(b) must therefore be read subject to this limitation.

4.92 In research studies on the biasing effect of prior convictions, jurors are directed to use the conviction only when assessing the credibility of the accused and not as an indicator of guilt.[113] This differs significantly to the way evidence of previous misconduct may be used in Victoria. However, a range of studies have shown that conviction rates differed significantly depending on whether or not the evidence was admitted. The studies also produced

---

111 See A P Sealy and W R Cornish, 'Juries and the Rules of Evidence' (1973) *Criminal Law Review* 208; R v Simon, 'Murder, Juries and the Press' (1996) 3 *Trans-Action* 40.

112 For information on the operation of Rule 404(b) and its state equivalents, see Other approaches: United States of America, below [4.178]-[4.191].

113 In one study measuring the comprehensibility of instructions, uninstructed jurors showed a clear misapprehension that previous conviction evidence was simply irrelevant and could not be used for any purpose – See Geoffrey P Kramer and Dorean M Koenig, 'Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project' (1990) 23 *University of Michigan Journal of Law Reform* 401, 419. Instruction raised the jury understanding of the correct use of the evidence, but only to approximately 50% correct on true-false questions. 50% accuracy on true-false questions is the level of accuracy expected if every person guesses which answer is correct.

some evidence that the biasing effect was greater when a limiting instruction was given.[114]

4.93 The prevailing explanation for these results is *reactance theory*. This theory states that:

> [W]hen individuals perceive that their ability to perform behaviors is threatened they will become psychologically aroused… An individual then is motivated to reduce this psychological arousal. The juror may attempt to psychologically aggress against the threatening agent (the judge) or attempt to reestablish his or her freedom by performing the threatened behavior. This could occur if a jury discusses the inadmissible evidence during their deliberation. In addition, if the jurors are not able to restore their freedoms (e.g., rendering a 'just' verdict as they perceive it) by using the excluded information, there will be a reevaluation of the threatened freedom. The result is that the lost freedom is seen as being more attractive. Consequently, jurors may not only fail to ignore the evidence but instead focus additional attention on it.[115]

4.94 Under the reactance theory, the backlash against limiting instructions grows with both the strength of the threat to the juror's freedom and the importance of the freedom. In one study by Wolf and Montgomery, the first group of study participants were given a weak instruction that a piece of evidence was ruled inadmissible. The second group received a stronger instruction that said the evidence 'must play no role in your consideration of the case. You have no choice but to disregard it'. The study found that the biasing effect of the evidence on the outcome was greater in the second group which received the stronger warning.[116]

4.95 Reactance theory is not the sole explanation for any backfire effect and some studies where no backfire effect is observed have cast doubt on its

---

114 See Anthony N Doob and H M Kirshenbaum, 'Some Empirical Evidence on the Effect of S.12 of the Canada Evidence Act Upon an Accused' (1973) 15 *The Criminal Law Quarterly*, 88; Valerie P Hans and Anthony N Doob, 'Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries' (1976) 18 *Criminal Law Quarterly* 235; Roselle Wissler and Michael J Saks, 'On the Inefficacy of Limiting Instructions' (1985) 9 *Law and Human Behavior* 37.

115 Joel D Lieberman and Bruce D Sales, 'What social science teaches us about the jury instruction process' (1997) 3 *Psychology, Public Policy and the Law* 589.

116 S Wolf and D A Montgomery, 'Effects of Inadmissible Evidence and Level of Judicial Admonishment to Disregard on the Judgments of Mock Jurors' (1977) 7 *Journal of Applied Social Psychology* 205.

operation.[117] For example, one a study by Schaefer and Hansen recorded an overcorrection effect rather than a backfire effect. Their study involved a mock manslaughter case against the father of a child. When the judge gave a limited use instruction, the proportion of guilty verdicts recorded in the study significantly dropped compared to the control condition where similar fact evidence was not led. The study found no significant variation between the other conditions on the permissible use of the evidence. Those other conditions included a neutral instruction, instructions on similar fact reasoning without limiting instruction and instructions on use of the evidence as tendency evidence to conclude that the accused was a person of a sadistic nature with a propensity to commit the crime charged.[118] In assessing this study, it is important to note the small sample size used for each condition, as the result may be due to random sampling variation.

4.96 An additional explanation for the backfire effect is that limiting instructions will naturally draw attention to the evidence, 'increasing its salience in the minds of jurors'.[119] While these are different psychological processes, reactance theory and salience theory both point to the risks associated with judges giving detailed and prescriptive instructions regarding tendency and coincidence evidence. Reducing these risks will generally require judges to say less about this kind of evidence.

(i) Continued need for the direction

4.97 While the propensity direction was developed at common law, there are cases that have indicated that even under the *Evidence Act*, judges must warn the jury not to reason that the accused is the kind of person who is likely to commit the offence charged. In *DR v The Queen*, evidence of sexual

---

117 See R K Cush and J Goodman-Delahunty, 'The Influence of Limiting Instructions on Processing and Judgments of Emotionally Evocative Evidence' (2006) 13(1) *Psychiatry, Psychology and Law* 110, 113; J D Casper, K Benedict and J Perry, 'Juror decision making, attitudes and the hindsight bias' (1989) 13 *Law and Human Behavior* 291.

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

119 Cush and Goodman-Delahunty, above n 117, 113.

offending against two sisters by their stepfather was accepted as cross-admissible tendency and coincidence evidence. On appeal, the appellant argued that a 'kind of person' direction was necessary, and the Court held:

> …the direction set out above, in which the jury was told that they should not typecast the applicant, sufficiently warned them against reasoning that if the applicant had committed a particular offence, he was the type or kind of person who must also have committed the other offences.[120]

4.98 The need for such a direction preserves the position that existed at common law where juries were warned against propensity reasoning even though evidence was led for a propensity purpose.[121]

4.99 This issue was highlighted by McHugh J in *KRM v The Queen*, who explained that:

> if evidence has been admitted generally as propensity evidence, it is difficult to see how a propensity direction is ever required. In that class of case, the evidence is tendered to prove that the accused is the type of person who is likely to have committed the crime with which he or she is charged. To require a propensity direction would contradict the basis on which the propensity evidence is admitted. And that is so, whether the propensity evidence consists of uncharged acts or evidence supporting the charge in one count that is also relevant to charges in other counts in the presentment.[122]

4.100 This point was also made by a majority (Gummow, Kirby, Hayne and Heydon JJ) of the High Court in *HML*,[123] which held that evidence could be admitted and used as propensity evidence.

4.101 The difficulty of reconciling a warning against typecasting the offender, or reasoning from propensity, with admitting evidence as permissible tendency evidence has never been fully resolved. The distinction drawn between a general disposition to commit crimes and a specific propensity to commit the kind of crime in question, while sound in principle, is complex and difficult to explain to a jury. As Byrne AJA explained in *R v*

120 *DR v The Queen* [2011] VSCA 440 at [51], [94].
121 See, eg, *R v Camilleri* (2001) 119 A Crim R 106.
122 *KRM v The Queen* (2001) 206 CLR 221, 235.
123 *HML* (2008) 235 CLR 334.

BJC, the described the task of reconciling notions of permissible and impermissible propensity reasoning is a 'delicate one'.[124]

4.102 The New South Wales *Beserick* instruction, described above at [4.68], has been adopted in the Victorian *Criminal Charge Book* in relation to all three forms of evidence, while the classic warning[125] not to reason that the accused is the kind of person likely to commit the act charged is also used in relation to coincidence and context evidence.

4.103 There are three difficulties with this approach. First, to the extent that the *Beserick* direction does not prevent propensity reasoning,[126] the direction may not give effect to the requirement implicit in s 95 of the *Evidence Act 2008* that, where evidence is not admitted as tendency or coincidence evidence, it must not be used for a tendency or coincidence purpose.

4.104 Secondly, the appropriateness of the New South Wales warning is itself questionable when applied to coincidence evidence. Famous cases such as *Makin v A-G (NSW)*,[127] *R v Straffen*,[128] *R v Smith*[129] and *Pfennig v The Queen*,[130] all involved evidence that may now be characterised as coincidence evidence which was substantially the only evidence of guilt. In such cases, a direction that coincidence evidence is 'only part' of the prosecution case would be inaccurate and may leave the jury puzzling over what other evidence there is.

4.105 Thirdly, the direction, so far as it applies to all forms of evidence, may fail to address the real risks associated with evidence of previous misconduct.

---

124 *R v BJC* (2005) 13 VR 407, 420-1.
125 See *R v Grech* [1997] 2 VR 609; *R v Vonarx* [1999] 3 VR 618.
126 *R v Macfie* [2002] VSCA 51, [17] (Buchanan JA); *R v GVV* (2008) 20 VR 395, 403 (Lasry AJA); *WFS v The Queen* [2011] VSCA 347.
127 [1894] AC 57.
128 [1952] 2 QB 911.
129 (1915) 11 Cr App R 229.
130 (1995) 182 CLR 461.

Prejudice associated with prior misconduct evidence may be characterised as either moral prejudice or reasoning prejudice.[131]

4.106 Moral prejudice refers to the risk that the evidence will cause the jury to feel personal animosity towards the accused and may allow that emotional reaction to affect their assessment of the evidence. Moral prejudice also refers to the risk that a feeling of animosity or revulsion will undermine the onus and standard of proof and leave the jury unwilling to give the accused the benefit of the doubt.[132] This incorporates principles such as the regret matrix effect[133] and the halo effect.[134]

4.107 Reasoning prejudice is the risk that the jury will give the evidence more weight than it deserves by over-estimating the extent to which previous actions provide a reliable guide to future actions.[135] It refers to the risk that a jury hearing about other misconduct evidence may assume that because the accused has acted in a similar way in the past, he or she must have repeated the behaviour on the occasion that is the subject of the charge.[136] Instead, psychological research suggests that behaviour is situationally dependent and does not depend on personality traits.[137]

4.108 While the established directions may attempt to counter these diverse forms of prejudice, moral prejudice is notoriously difficult to counter, as it can

---

131 Andrew Palmer, 'The Scope of the Similar Fact Rule' (1994) 16 *Adelaide Law Review* 161; The Law Commission, *Evidence of Bad Character in Criminal Proceedings* Report No 273 (2001) 6.33.

132 Palmer, above n 131.

133 See Australian Law Reform Commission, *Uniform Evidence Law* Report No 102 (2006) 3.13. This refers to the risk that the jury will be less concerned about wrongly convicting a person of previous bad character than a person of unblemished character. The regret matrix is, in this sense, a risk that the evidence will cause the jury to dilute the standard of proof.

134 Ibid. The halo effect is the phenomenon where knowledge of a single facet of a person's character will colour all judgments the jury makes about that person.

135 See also *Harriman v The Queen* (1989) 167 CLR 590, 597 (Dawson J), noting that at common law propensity evidence is not excluded because it is irrelevant, but because of the risk that the jury will think the evidence proves more than it does.

136 Palmer, above n 131.

137 See research summarised in Australian Law Reform Commission, *Evidence* Interim Report No 26 (1985) vol 1, [795]–[800].

operate at a subconscious level.[138]

4.109 Independent of the language of the direction, it is important to clearly identify the kind of prejudice which the court seeks to address and the likelihood of that risk arising. This will vary based on the nature of the evidence and its interaction with other pieces of evidence. As Kenneth Arenson has noted:

> It is important to emphasise that the dangers associated with acts disclosing propensity which occur contemporaneously with the acts charged are generally far less acute than those involved with other types of propensity evidence. Specifically, the reduced prejudicial effect evidence stems from the fact that the charged and uncharged acts are alleged to have occurred contemporaneously and, therefore, it is likely that the fact-finder will either accept or reject the evidence relating to the entire episode. Stated differently, given the close temporal nexus between the alleged charged and uncharged acts, the evidence relating to the latter lacks an independent inculpatory weight. In these instances, there is only a fanciful risk that the jury may engage in a propensity chain of reasoning.[139]

(ii) Timing of the direction

4.110 Regardless of whether there is a backfire effect and the psychological explanation for that phenomenon, the timing of limiting instructions can affect the ability of jurors to comply with the instruction. Jurors generally process evidence as they hear it, rather than waiting until the end of the trial. This means that directions at the end of the trial require jurors to undo their previous processing of evidence. Expecting jurors to perform this task is unrealistic.[140] Courts now require judges to warn jurors about the misuse of other misconduct evidence at the time the evidence is led.[141]

4.111 Some authors have asked whether jurors would be further assisted by receiving limiting instructions *before* hearing the evidence. Psychological

---

138 New Zealand Law Commission, *Disclosure to Court of Defendants' Previous Convictions, Similar Offending and Bad Character*, Report No 103 (2008) 6.40.

139 Kenneth J Arenson, 'The Propensity Evidence Conundrum: A Search for Doctrinal Consistency' (2006) 8 *University of Notre Dame Australia Law Review* 31, 57.

140 Timothy D Wilson and Nancy N Brekke, 'Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations' (1994) 116 *Psychological Bulletin* 117; Cush and Goodman-Delahunty, above n 117.

141 *R v Beserick* (1993) 30 NSWLR 510.

theories such as encoding theory and information integrity theory suggest that pre-instruction should maximise the ability of jurors to retain and apply instructions as they hear and process evidence. Pre-instruction also alerts jurors to the risk of biased reasoning when processing the evidence and allows jurors to attempt to avoid or correct for bias. However, empirical research on the effectiveness of pre-instruction has produced mixed results. Some studies reveal a positive pre-instruction effect[142] while others reveal no effect or a decrease in comprehension.[143] In one study by Cush and Goodman-Delahunty, pre-warning about gruesome evidence in fact resulted in the jury overcompensating for bias and giving other evidence less weight, compared to the group where gruesome evidence was not admitted.

4.112 Results such as the Cush and Goodman-Delahunty study reveal that compensating for bias is a complex and difficult process. Under the Wilson and Brekke model, overcoming bias requires:

- Awareness of bias;
- Motivation to correct for bias;
- Awareness of the direction and magnitude of bias;
- Ability to adjust judgments correctly so that bias is eliminated.[144]

4.113 Backfire effects may be due to jurors not being motivated to correct for bias, whereas overcompensation effects arise where jurors are unaware of the magnitude of bias. These models reveal the complexity of efforts to eliminate biased reasoning, and must be considered when deciding on appropriate jury directions.

---

142 Saul M Kassin and Laurence S Wrightsman, 'On the Requirements of Proof: The Timing of Judicial Instruction and Mock Juror Verdicts' (1997) 37 *Journal of Personality and Social Psychology* 1877; Cush and Goodman-Delahunty, above n 117.

143 Donna Cruse and Beverley A Browne, 'Reasoning in a Jury Trial: the Influence of Instructions' (1987) 114 *Journal of General Psychology* 129; Edith Green and Elizabeth Loftus,' When Crimes Are Joined at Trial' (1985) 9 *Law and Human Behavior* 193.

144 Wilson and Brekke, above n 140.

(iii) Explaining the rationale for the direction

4.114 A common criticism of standard directions on other misconduct evidence is that the directions are a mantra rather than a means of addressing the real concerns of the jury. This may exacerbate problems such as the backfire effect or the overcompensation effect.

4.115 One way to address this problem is to explain the rationale for the direction. This is consistent with the Wilson and Brekke model for overcoming bias, as it is designed to motivate the jury to correct for bias.

4.116 The current charge book includes the following example taken from Justice Harper in *R v Halliday* that judges can adapt to help explain the dangers of other misconduct evidence:[145]

> The risk drawing a conclusion based on what kind of person the accused appears to be can be illustrated by an every-day example that some of you may be able to relate to personally. Assume that as a school child, you had the reputation as a mischief maker. While a teacher is out of the classroom, there is a disturbance. You have had nothing to do with it, but when the teacher returns you are blamed because the teacher assumes, based on your history, that you are responsible. Your sense of injustice at that result, will no doubt rankle with you for days if not longer. You have been unjustly convicted of something simply because you have a reputation as a mischief maker.
>
> Sometimes, it is too easy to assume that a previous wrongdoer is responsible for a present wrong, especially if the present wrong looks something like a past offence. If that were so, the police would solve crimes merely by arresting the nearest person with a matching criminal record and the person actually responsible would escape to continue his or her criminal career. The community would lose both ways: the real criminal is still at large, the person who was not guilty is convicted. Good policing does not work like that. More particularly for our purposes, the courts must not work like that.

4.117 In its Report on Jury Directions, the VLRC recommended that propensity evidence warnings be reformed along the model suggested by Professor Thomas Leach. Such a direction would focus on issues of fairness and the weight which can legitimately be given to the evidence.[146]

---

145 See (2009) 23 VR 419, 439-40 (Buchanan, Ashley and Weinberg JJA).

146 Victorian Law Reform Commission, *Jury Directions: Final Report*, Report No 17 (2009) 109.

4.118 The original Leach direction states:

> Members of the jury, during this trial you have heard evidence that a person was involved in an act similar to the acts involved in this case. It is critically important for you to understand the proper and improper uses of such evidence.
>
> Our system of justice includes as one of its underlying principles that we judge the participants in the trial on the basis of *what they have done or not done, rather than on the basis of what kind of person they are*. To put this another way, we try a criminal defendant by deciding whether or not he did the act charged, not by deciding whether he has a criminal character; we try a civil defendant by deciding whether she did or did not breach the contract in question, or did or did not act negligently in the accident at issues, not by deciding whether she appears generally to be a disrespecter of contracts or a careless person.
>
> Evidence that an act was done at one time, or on one occasion, is not necessarily evidence or proof that a similar act was done at another time, or on another occasion. That is to say, while evidence that a person may have committed an act similar to the acts involved in this case may be considered by you in determining whether the person in fact committed any act involved in this case, such evidence must not be taken as completely answering the question. Instead, you the jury must decide whether (a) the person did or did not commit the prior acts, and (b) if so, whether that factor appears to you to make it more or less likely that the person committed any act involved in this case.
>
> To put this another way, it would be improper for you to decide simply that 'because the person did it once before, he probably did it again.' Instead – and this is assuming that you do find that he did it before, which, as I have said, is a decision you must make first – you may include that fact in your entire discussion of whether or not he did any act involved in this case, but it is only one fact, entitled only to the weight you believe it deserves in comparison to and in combination with all the other facts presented in the case.
>
> You should use your experience of human nature and human behaviour in assessing this evidence of other prior acts. For example, you must ask yourselves, and each other, whether a person who is careless on one occasion is necessarily always or often careless after that – or, instead, whether he has 'learned from his mistake' and therefore is less likely, rather than more likely, to be careless the next time. Similarly, you must ask yourselves, and each other, whether someone who has committed an act that is generally looked down on by our society in general – whether it be a criminal or merely 'anti-social' act – is necessarily always or often likely to repeat such act in the future – or, instead, whether she too has 'learned from her mistake.' Then you must apply your thoughts on these issues to the person here, and ask yourselves, and each other, whether his prior acts (if you find it proved that he committed them), make it more or less likely that he did or did not do any act involved in this case.

> [Three] further issues are important for you to know and consider in your weighing of this evidence of other acts by the person.
>
> First, to ensure that the person is not unfairly characterized by the admission of such evidence of other acts, it is important that you be persuaded that the other acts did in fact occur, and that the person was the actor. The law requires that, in order to make such a finding, you must be persuaded by 'clear and convincing evidence.' Clear and convincing proof leaves no substantial doubt in your mind. It is proof that establishes in your mind, not only that the proposition at issue is probable, but also that it is highly probable. It is enough if the party with the burden of proof establishes his claim beyond any 'substantial doubt'; he does not have to dispel every 'reasonable doubt.'
>
> Second, the law also requires that such evidence of other acts by the person, standing alone, is not in itself sufficient (a) to prove that the person was the actor in the acts involved in this case, or (b) to prove that the acts involved in this case did actually occur, or (c) to prove that the person acted with the level of intent required by the instructions I have given you on intent. In other words, if you do not find any other credible evidence on any of these points to add to and support whatever findings you are prepared to make based on the evidence of the person's other acts, then you must find one or more of the elements of the acts involved in this case have not been proved.
>
> *[This portion of the instruction is applicable to criminal cases only.]* Third, you must not seek to punish the defendant for any other act or conduct that has been presented in this case. He is being tried here only for the charges you have been instructed on, not for other acts. The evidence of other acts must be considered by you only for determining whether he committed the present charges.

4.119 The value in the Leach direction is that it explains the risk of bias and impermissible reasoning in common sense terms, using relevant analogies, and encourages the jury to approach the case fairly. In its current form, it is designed for use in both civil and criminal proceedings, but it could be modified to focus on criminal cases. This would reduce its length slightly.

4.120 Several years after first producing his model charge, Professor Leach produced a shorter version of his suggested direction. This shorter direction was developed after he realised that the first version was 'clearly much too long'.[147] The revised Leach direction states:

---

147 Thomas J Leach, 'How do Jurors React to 'Propensity' Evidence? – A Report on a Survey' (2004) 27 *American Journal of Trial Advocacy*, 559.

> Members of the jury, during this trial you have heard evidence that a person was involved in an act or acts similar to the acts involved in this case.
>
> While evidence that a person may have committed an act similar to the acts involved in this case may be considered by you in determining whether the person in fact committed any act involved in this case, such evidence must not be taken as conclusively answering that question. It is only one fact to be considered in combination with all the other facts presented in the case.
>
> It would be improper for you to decide *simply* that 'because the person did it before, he probably did it again,' without considering all the other evidence in the case.
>
> You the jury must decide whether (a) the person did or did not commit the prior acts, and (b) if so, whether that factor appears to you to make it more or less likely that the person committed any act involved in this case. Before you may consider evidence that a person committed an act similar to that in this case, you must be persuaded by clear and convincing evidence that the other acts did in fact occur, and that the person was the actor. 'Clear and convincing' means evidence that leaves no substantial doubt in your mind of the truth of the matter. It is proof that establishes not only that the proposition at issue is probable, but also that it is highly probable.
>
> [*This portion of the instruction is applicable to criminal cases only*] You must not seek to punish the defendant for any other act or conduct that has been presented in this case. He is being tried here only for the charges you have been instructed on, not for other acts. The evidence of other acts must be considered by you only for determining whether he committed the present charges.

4.121 This revised version removes the explanation of the policy of the law and instead directs the jury on the need for caution and the limitations on the evidence using ordinary everyday language. It may therefore be subject to the same criticisms as traditional directions as failing to motivate jurors to correct for bias and may maintain the risk of backfire and overcompensation effects.

Other Approaches

4.122 A review of the approaches in other jurisdictions demonstrates that there is no universal approach to the difficulties posed by other misconduct evidence. Even between the Uniform Evidence Law jurisdictions, there is divergence in issues such as the language of the directions and the necessary

content of any warnings. As discussed in Chapter 3, there is also variation in the relevant standard of proof.

(i) New South Wales

4.123 New South Wales, like Victoria, operates under the Uniform Evidence Law and characterises evidence as tendency or coincidence evidence, along with the residual common law category of 'context' evidence.[148]

4.124 As in Victoria, NSW trial judges must warn the jury against the impermissible uses of evidence. This often involves a warning against substitution and a warning against moral prejudice. As discussed above, Victoria and NSW have diverged on the exact language of the warning against moral prejudice, with the NSW direction being not to 'reason that, because the accused may have done something wrong with the complainant on some other occasion or occasions, he must also have done so on the occasion which is the subject of the offence charged'.[149]

4.125 Due to the structure of the Uniform Evidence Law, with ss 97 and 98 prohibiting the *use* of evidence for a specified purpose, NSW courts have held that evidence may be admissible to provide context and not admissible for its tendency use. In such situations, the judge must carefully direct the jury on the permissible and impermissible uses of the evidence.[150]

4.126 The Judicial Commission of New South Wales has published the following specimen directions for use of evidence as tendency evidence and as coincidence evidence:

Tendency Evidence

> [*The accused*] is charged only with the offence(s) stated in the indictment. You have before you evidence that the Crown relies upon as establishing that

148 See *R Leonard* (2006) 67 NSWLR 545; *R v Quach* (2002) 137 A Crim R 345; *KTR v The Queen* [2010] NSWCCA 271.

149 *R v Beserick* (1993) 30 NSWLR 510, 516 (Hunt CJ at CL).

150 See *Qualtieri v The Queen* (2006) 171 A Crim R 463; *DJV v The Queen* (2008) 200 A Crim R 206.

[*he/she*] committed [*that/those*] offence(s). However, you also have before you evidence that the accused … [*specify*].

That evidence is before you because the Crown says there is a pattern of behaviour that reveals that the accused has a tendency to act in a particular way (or to have a particular state of mind) namely … [*specify*]. The evidence of the accused having that tendency can only be used by you, in the way the Crown asks you to use it, if you make two findings beyond reasonable doubt. The first finding is that you are satisfied beyond reasonable doubt that one or more of those acts occurred. In making that finding you do not consider each of the acts in isolation but consider all the evidence and ask yourself whether you are satisfied that a particular act relied upon actually took place. If you cannot find that any of these acts is proved beyond reasonable doubt, then you must put aside any suggestion that the accused had the tendency advanced by the Crown. If you do find beyond reasonable doubt that one or more of those acts occurred, then you go on to consider the second finding. You ask yourself whether, from the act or acts that you have found proved, you can infer or conclude beyond reasonable doubt that the accused had the tendency that the Crown alleges. If you cannot draw that inference or conclusion beyond reasonable doubt, then again you must put aside any suggestion that the accused had the tendency alleged.

So, if having found one or more of the acts attributed to the accused to have been proved beyond reasonable doubt and you can from the proved act or acts infer or conclude beyond reasonable doubt that the accused had the tendency to act in the particular way (or have the state of mind) that the Crown alleges, you may use the fact of that tendency (or state of mind) in considering whether the accused committed the offence (offences) charged.

The evidence must not be used in any other way. It would be completely wrong to reason that, because [*the accused*] has committed one crime or has been guilty of one piece of misconduct, [*he/she*] is therefore generally a person of bad character and for that reason must have committed the offence(s). That is not the purpose of the evidence at all.

Coincidence evidence

[*The accused*] is charged only with the offence(s) stated in the indictment. You have before you evidence that the Crown relies upon as establishing that [*he/she*] committed [*that/those*] offence(s). However, you also have before you evidence that the accused … [*specify*].

That evidence is before you because sometimes there may be such a similarity between two different acts and the circumstances in which they occurred that a jury may be satisfied that the person who did one act (or set of acts) must have done the other(s). That is to say, there is such a similarity between the acts, and the circumstances in which they occurred, that because of the improbability of the events occurring coincidentally, it establishes that the accused committed the act (*or* had the state of mind) that is the subject of the offence(s), because coincidence is a very unlikely explanation for the similarity(ies).

> In this case, the Crown says that, provided you are satisfied beyond reasonable doubt that [*the accused*] did … [*specify conduct*], then (that/those) act(s), and the circumstances in which (it/they) (was/were) done, were so similar to the act(s) that the Crown says amount(s) to the offence(s) alleged, that you would conclude that [*the accused*] must have committed the offence(s) with which [*he/she*] has been charged.
>
> I repeat that the evidence of the pattern of behaviour can only be used in the way the Crown asks you to if you are firstly satisfied that the accused did the other acts beyond reasonable doubt.[151]

4.127 The Commission also has a separate direction for use where the evidence is led as context evidence:

> It is important that I explain to you the relevance of this evidence of other acts. It was admitted [*if appropriate:* solely] for the purpose of placing the complainant's evidence of the particular acts relied upon by the Crown to prove the charges in the indictment into what the Crown says is a realistic context.
>
> [*Recite the Crown's submission of the issue(s) in the trial which justified the reception of context evidence.*]
>
> Otherwise, you may wonder about the likelihood of apparently isolated acts occurring suddenly without any apparent reason. If a complainant gave evidence of isolated acts of sexual misconduct, you would be entitled to think it was very odd for there to be such isolated acts between these persons. If you had not heard about the evidence that I am talking about now, you may have thought the complainant's evidence was less credible.
>
> [*The following should be adapted to the circumstances of the case:*]
>
> If, however, the particular acts charged are placed in a wider context, that is a context of an ongoing history, then that curious feature would disappear. It is for that reason that the law permits a wider sexual history to be provided. It is to avoid artificiality or unreality in the presentation of the evidence. For one or two incidents to be artificially isolated and selected and for a witness to be confined to them could make it very difficult for [*him/her*] to proceed intelligently with [*his/her*] evidence. To pick out, for example, two incidents separated by lengthy periods could leave you with a very strange and unrealistic account.
>
> Therefore, it is open to the Crown to lead evidence of other acts of a sexual nature between the accused and [*the complainant*] … [*explain by reference to the facts of the case*].

---

151 Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book* [4-200]–[4-230].

> However, I must give you some important warnings with regard to this evidence of other acts [*optional: which we can conveniently refer to as 'context evidence'*].
>
> You must not use this evidence of other acts as establishing a tendency on the part of the accused to commit offences of the type charged.
>
> You must not substitute the evidence of the other acts for the evidence of the specific offences on the indictment.
>
> You must not reason that, because the accused may have done something wrong to [*the complainant*] on another occasion, [*he/she*] must have done so on the occasions on the indictment.
>
> [Note: Attention should be directed to any particular matters that might affect the weight to be given to the evidence.][152]

(ii) Queensland

4.128 The Queensland *Supreme and District Courts Benchbook* contains directions on use of similar fact evidence either as 'sexual interest' evidence or more generally as 'context' evidence. It also includes a standard propensity warning for use where needed.

4.129 Queensland judges must warn juries against propensity reasoning, substitution reasoning and reasoning prejudice.[153]

4.130 Under Queensland law, the propensity warning must be given even where the evidence is led to show a sexual interest in the complainant,[154] though this may be satisfied by the warning that guilt of the particular offences 'does not inevitably follow' from satisfaction of the truth of the uncharged acts.[155]

4.131 Queensland courts have noted, however, that warnings against misuse of evidence as propensity evidence are not necessary in every case where there is a potential for such misuse. For example, in *MBO v The Queen*, the prosecution led evidence of the accused's physical violence towards his

---

152 Ibid [5-1620].
153 See, for example, the direction given in *R v CAH* (2008) 186 A Crim R 288, 292-8 (McMurdo P).
154 *R v UB* (2007) 187 A Crim R 450.
155 See *R v UC* [2008] QCA 194, [17] (McMurdo P).

family to demonstrate the nature of the relationship and support its case that the accused had engaged in sexual abuse. The Court held that this evidence was relevant to matters such as whether there was a caring relationship of father and daughter and whether the complainants would complain. The evidence could not and would not be used as propensity evidence and there was no need for a direction on that point.[156]

4.132 The Queensland model directions are extracted below:

Sexual interest direction

> The defendant is charged with only the [number] offences set out in the indictment. You must consider each charge separately. If you find that you have a reasonable doubt about an essential element of a charge, you must find the defendant not guilty of that charge.
>
> In addition to the evidence of the complainant concerning the [number] offences charged on the indictment, you have also heard evidence from him or her of other alleged incidents in which he or she says sexual activity involving the defendant occurred, [describe evidence if necessary].
>
> As you have heard, the complainant has not been specific about when that activity occurred or in what circumstances. You can only use this evidence if you accept it beyond a reasonable doubt. If you do not accept it then that finding will bear upon whether or not you accept the complainant's evidence relating to the charges before you beyond a reasonable doubt. If you do accept the complainant's evidence that these other acts of a sexual nature took place then you can only use that against the defendant in relation to the charges before you if you are satisfied that the evidence demonstrates that the defendant had a sexual interest in the complainant and that the defendant had been willing to give effect to that interest by doing those other acts. If persuaded of that, you may think that it is more likely that the defendant did what is alleged in the charge(s) under consideration. If you are not so satisfied then the evidence cannot be used by you as proof of the charges before
>
> Of course, whether any of those other acts occurred and if they did, whether those occurrences make it more likely that, on a different occasion, the accused did the act(s) with which he/she is charged, is a matter for you to determine. Remember even if you are satisfied that some or all of those other acts did occur, it does not inevitably follow that you would find him/her guilty of the act(s) the subject of the charge(s). You must always decide whether, having regard to the whole of the evidence the offence(s) charged has/have been established to your satisfaction beyond reasonable doubt.

---

156 *MBO v The Queen* [2011] QCA 280.

Context evidence

> The defendant is charged with only the [number] offences set out in the indictment. You must consider each charge separately. If you find that you have a reasonable doubt about an essential element of a charge, you must find the defendant not guilty of that charge.
>
> The prosecution has also placed before you evidence of other conduct by the defendant which it says proves certain matters which may be relevant to your consideration of the charges [describe evidence if necessary].
>
> You can only use that evidence if you are satisfied of it beyond a reasonable doubt. If you do not accept the evidence then that finding will bear on whether or not you accept the complainant's evidence relating to the charges before you beyond a reasonable doubt. If you do accept this evidence then it can only be used by you in relation to the charge(s) before you in the specific way in which I now direct.
>
> The evidence may be used by you to find (specify the use to which the prosecution say the evidence is relevant) e.g. why the complainant acquiesced to the offences or did not make a complaint or to rebut accidental touching etc.

Propensity warning

> You should have regard to the evidence of the incidents not the subject of charges only if you find it reliable. If you accept it, you must not use it to conclude that the defendant is someone who has a tendency to commit the type of offence with which he is charged; so it would be quite wrong for you to reason you are satisfied he did those acts on other occasions, therefore it is likely that he committed a charged offence or offences.
>
> Further, you should not reason that the defendant had done things equivalent to the offences charged on the other occasions and on that basis could be convicted of the offences charged even though the particular offences charged are not proved beyond reasonable doubt.
>
> Remember that the evidence of incidents not the subject of charges comes before you only for the limited purpose mentioned, and, before you can find the defendant guilty of any charge, you must be satisfied beyond reasonable doubt that the charge has been proved by evidence relating to that charge.
>
> If you do not accept the complainant's evidence relating to incidents not the subject of charges, take that into account when considering her evidence relating to the alleged events the subject of the charges before you.[157]

(iii) Western Australia

4.133 While there is no publicly available charge book for Western Australia,

---

157 Queensland Courts, *Supreme and District Courts Benchbook* [66.1]-[66.5].

the Western Australian courts have considered the question of relevant jury directions on several occasions.

4.134 Western Australia has legislative provisions on the admissibility of 'propensity evidence' and 'relationship evidence'.[158] Such evidence is admissible under s 31A of the *Evidence Act 1906* (WA) if:

- the evidence would, either by itself or having regard to other evidence adduced or to be adduced, have significant probative value; and
- the probative value of the evidence compared to the degree of risk of an unfair trial, is such that fair-minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial.

4.135 Western Australian courts have held that where evidence is admitted as propensity evidence, there is no need to give a 'propensity warning', as the purpose of admitting the evidence is to prove that the accused is the kind of person likely to commit the offence charged.[159] In *PIM v Western Australia*, Pullin JA reviewed the state of the law in Victoria, New South Wales and South Australia on the need for propensity directions, before turning back to consider an argument based on the pre-s 31A case of *Cookv The Queen*[160] that the judge needed to give specific directions on the use of evidence of uncharged acts. His Honour held:

> In my opinion, the Cook direction would now be erroneous if given in relation to evidence of uncharged sexual acts admitted pursuant to s 31A. The evidence which the parties agree was admitted under s 31A was not relevant 'only to show the nature of the relationship' between the appellant and the complainant. It was not admitted for a 'limited purpose'. The evidence was admitted as circumstantial evidence as proof of the charges and it was evidence of 'significant probative value'. It was not admitted only for the purpose indicated in Anderson J's second point. A direction in terms of the third point, that is to tell the jury that it was 'not direct evidence of the

158 *Evidence Act 1906* (WA) s 31A. The terms 'propensity evidence' and 'relationship evidence' are defined, with the definition of 'propensity evidence' bearing strong resemblance to the definition of tendency evidence under the *UEA*.

159 *Noto v Western Australia* (2006) 168 A Crim R 457, 464 (McLure JA); *Upton v Western Australia* [2008] WASCA 54, [65] (Steytler P); *KMB v Western Australia* [2010] WASCA 212, [59] (Buss JA).

160 (2000) 110 A Crim R 117, 131 (Anderson J).

offence charged' would be an erroneous direction because it would contradict the very basis on which it was admitted pursuant to s 31A.[161]

4.136 The Court in *PIM* ultimately concluded that where evidence of other sexual acts is admitted on a charge of sexual offences, it is not necessary to give a *Cook* direction or *Beserick* direction. Pullin JA noted that this avoided many of the problems historically associated with propensity warnings, including the difficulty of sensibly instructing the jury on the difference between permissible and impermissible propensity reasoning and the risk that the direction would be counterproductive by suggesting a path of impermissible reasoning the jury would not otherwise have considered.[162]

4.137 Despite the general opposition in Western Australia to propensity directions, judges have held that other directions may be necessary in a particular case to avoid a perceptible risk of a miscarriage of justice.[163] This may include a warning against substitution.[164]

(iv) New Zealand

4.138 In New Zealand, the law defines 'propensity evidence' as evidence of acts, omissions, events or circumstances which tends to show a person's propensity to act in a particular way or to have a particular state of mind.[165]

4.139 Under the *Evidence Act 2006* (NZ), the prosecution can lead propensity evidence against the defendant where the probative value of the evidence outweigh the risk of unfair prejudice. The Act provides statutory guidance on the factors the court may consider when assessing probative value and unfair prejudice.[166]

4.140 New Zealand legislation is silent on the question of what directions

---

161 *PIM v Western Australia* (2009) 196 A Crim R 516, 545 ('*PIM*').
162 Ibid 547.
163 *Upton v Western Australia* [2008] WASCA 54, [65] (Steytler P). See also *PIM v Western Australia* (2009) 196 A Crim R 516, 524 (Wheeler JA).
164 *Mansell v Western Australia* [2009] WASCA 140, [47] (Miller JA).
165 *Evidence Act 2006* (NZ) s 40(1).
166 *Evidence Act 2006* (NZ) ss 43(3), (4).

should accompany properly admitted propensity evidence. The New Zealand *Criminal Jury Trials Bench Book* states that judges need to cover the following matters in their directions on propensity evidence to:

1. Explain the tendency the evidence is trying to establish;
2. Explain (if not obvious) how such a tendency is said to assist the prosecution case;
3. Identify the evidence relied upon, and the strengths and weaknesses of that evidence;
4. Tell the jury it is for them to decide if the tendency is established, and what weight to give it;
5. Remind the jury it is only one item of evidence, and they must also consider the evidence that more directly relates to the present alleged offence;
6. Warn the jury to guard against deciding the case on prejudice because of what the jury has learned about the accused;
7. Tell the jury to ignore the evidence if they are not satisfied it establishes the tendency contended for.[167]

4.141 The *Bench Book* contains separate guidance where the evidence is led in the form of 'mutually supporting allegations'. It also contains specimen directions for each type of evidence. The specimen direction on mutually supporting evidence states:

> The accused faces allegations from two complainants who each give a similar account of what happened to them. There are three counts in relation to A, and two in relation to B. All five counts require separate consideration, and verdicts.
>
> Because of the similarities between these complaints, you are entitled to consider all the evidence from both complainants when you consider the charges. That is because the Crown says these similarities make it more likely the accused has committed the offences. They show he has a tendency to act that way, that his behaviour follows a pattern.
>
> That is a legitimate argument only if you first accept that the similarities or pattern actually exist. In this case, the similarities are alleged to be [insert].

---

167 Institute of Judicial Studies, *Criminal Jury Trials Bench Book* 10.44 ('*Criminal Jury Trials Bench Book*').

> If you agree that those similarities are present, then you can give such weight to them as you consider appropriate. If you disagree and think [that the similarities are not there/that the pattern has not been established], then it is important that you consider A and B separately. So, if you accept the similarities, you can have regard to all the evidence. If not, look at each complainant separately from the other.
>
> Here it is known that A and B knew each other. They played together and clearly were friends. You must therefore also be satisfied that the similarities in their allegations are not because the two of them have got together and made it up [or, as is suggested here, that B has made up her complaint to support A]. If that is what you think, then there would be no value in the similarities because they would not be real. Common sense may tell us that similar complaints make it more likely the complainants are telling you the truth, but they must be real similarities.
>
> Remember, you must in the end look at each charge. Do not reason that just because the accused has done bad things, he must be guilty of this charge. You cannot decide the case on prejudice or dislike of the accused.[168]

4.142 While the New Zealand *Criminal Jury Trials Bench Book* provides guidance on the directions, New Zealand courts are still in the process of working through the question of what directions are required. In 2008, the Law Commission of New Zealand reviewed the previous conviction, propensity and bad character provisions and noted that limited guidance had emerged at that point. The Commission suggested that:[169]

> After identifying the propensity evidence allowed in, the direction must identify the issue or issues to which that propensity evidence is said to relate, and how it is said to be relevant. The points of similarity, timing, unusual features, or the like advanced by the prosecution should be summarised, and their potential implications explored. The jury should be reminded that the sufficiency of such matters to prove the contended propensity, and the weight to be given to that propensity if the jury is satisfied it exists, are questions of fact entirely for them. If there is room for a possibility of collusion, the jury must be directed to consider that possibility. The jury should be warned that: mere propensity to offend, by itself, cannot be sufficient to prove the offending beyond reasonable doubt; to treat propensity as only one item of evidence to be considered along with all the others; and not to be swayed by feelings of prejudice it may engender.

168 Ibid.

169 Law Commission of New Zealand, above n 138, 3.93.

4.143 The two leading cases on jury directions under the 2006 Act are *R v Stewart*[170] and *Mahomed*.[171] In *Stewart*, the Court of Appeal approved the seven step process to summing up on propensity evidence which the defence proposed. The seven steps are:

1. State the purpose of the witness's evidence;
2. Explain what propensity evidence is, preferably by describing it as a tendency;
3. Identify the factors relied upon by the Crown to establish the propensity in question and any defence arguments on the point;
4. Direct the jury that it is a matter for them to decide whether the propensity exists;
5. Explain that if the jury does find the accused had the propensity in question, it may use that finding as circumstantial evidence in conjunction with all other evidence when assessing the issues, including the reliability and credibility of the complainant;
6. Explain that if the jury does not accept that the propensity is established, then it should put the evidence aside and not consider it further;
7. Warn the jury not to jump to a conclusion that because the accused offended on a previous occasion, he must have done so in the manner alleged in the charge.[172]

4.144 In the course of discussing this process, the Court of Appeal rejected a prosecution submission based on pre-*Evidence Act 2006* law that step 5 should be:

> The jury should be told that if they find the necessary distinctive similarity in the accounts of the complainants, they may use the evidence given by the other complainant(s) to help them in deciding whether the charge or charges against the accused in respect of the complainant whose case they are considering is established beyond reasonable doubt.[173]

4.145 In the course of the judgment in *Stewart*, the Court quoted with

---

170 [2010] 1 NZLR 197 ('Stewart').
171 [2011] 3 NZLR 145.
172 *R v Stewart* [2010] NZLR 197, 206 [30] (Baragwanath J).
173 *R v Sanders* [2001] 1 NZLR 257, 261 [20] (Blanchard J).

approval the New Zealand Law Commission report *Disclosure to the Courts of Defendant's Previous Convictions, Similar Offending and Bad Character*.[174]

4.146 The guidance offered in *Stewart* was challenged in *Mahomed*, with the Supreme Court splitting 3-2 on the question of what guidance to give trial judges on propensity directions. The trial concerned allegations of murder and intentionally causing grievous bodily harm of the accused's 11 week old daughter. Evidence of other acts of mistreatment or neglect were called and the judge gave the jury the following direction:

> The fourth area is the car park incident. Mr Hamlin says it is directly relevant to the murder charge. That is for you to determine. The issue is whether you consider it shows that Mr Mahomed was in the habit of acting negligently towards Tahani and had an uncaring attitude towards her. Whether or not you reach that conclusion or whether you form a view that in all the circumstances he was prepared to risk the baby's health, even her life, by leaving her unattended in a hot car while he worked is for you to decide. What you make of his apparent indifference to Ms Trevena's reference to Tahani's condition when he arrived is again for you to decide. Mr Hamlin says this incident illustrates how Tahani had assumed a nuisance value for her parents. Again whether you agree or whether you think it is relevant to the murder charge is entirely for you.[175]

4.147 The majority criticised the direction for failing to explain that negligence, indifference and 'nuisance value' were not elements of the offence of murder. Instead, the judge should have reminded the jury what the elements of murder were and how these lesser states of mind were relevant to the question of whether the prosecution had proven the necessary states of mind. The majority then divorced itself from the minority's discussion of the general question of jury directions in propensity cases, preferring to wait until a suitable case arose.[176]

4.148 In contrast, the minority discussed the 7-step approach recommended in *Stewart*. The minority started by reiterating the proposition that mandatory jury directions should be reserved for cases where they are essential to ensure

---

174 New Zealand Law Commission, above n 138.

175 *Mahomed* [2011] 3 NZLR 145, [40].

176 *Mahomed* [2011] 3 NZLR 145, 154 [14] (Tipping J).

a fair trial and otherwise the content of directions should be left to the discretion of the judge, even if this leads to uncertainty or inconsistency.[177] Similar fact evidence is recognised as a class of evidence requiring special care, due to the risk that the jury will misapprehend the true relevance of the evidence and may reason directly to guilt from general bad character or propensity.

4.149 The minority reformulated the three categories of similar fact evidence set out by Professor Spencer.[178]

4.150 The first category is evidence that conclusively establishes a particular propensity may be led where that propensity is relevant to proof of the accused's guilt. Cases such as *Straffen* fall into this category. The Court also noted a coincidence element to the use of this evidence, where a jury can reason on the improbability of coincidence in a complainant making a false allegation against a person who just happens to have the propensity to engage in the exact conduct in question.

4.151 The second category is evidence which is purely circumstantial, such as where the accused is alleged to have committed a number of offences and there is an accumulation of detail across separate charges. Cases such as *Makin* and *Smith* fall into this category and the finding of a propensity is a corollary to the conclusion of guilt, rather than a stepping stone on the path to guilt.

4.152 The third category is evidence from a number of witnesses who give disputed evidence of similar allegations. The evidence is considered supporting due to the improbability that a number of independent witnesses would all make up similar stories. As with the second category, a finding of propensity is a corollary of the conclusion of guilt, rather than an intermediate

177 *Wi v The Queen* [2010] 2 NZLR 11, 27 [40] (Tipping J).
178 Spencer, above n 54.

finding of fact. This class of evidence commonly arises in sexual offence cases.

4.153 The minority treated cases involving misconduct against a single complainant as a separate category, and identified four ways in which such evidence may be relevant:

(a) The propensity evidence may be relevant for reasons associated with coincidence, such as the implausibility of a young child receiving a number of injuries by accident. In a broad sense, this situation is similar to Professor Spencer's scenario two.

(b) The propensity evidence may have important explanatory value, as bearing on the background or relationships between those involved in or affected by the alleged offending.

(c) As a subset of (b), the propensity evidence may be relevant to establishing hostility on the part of the defendant to the victim or a motive for the defendant to harm the victim.

(d) As a further subset of (b), events may be so interconnected with the offending that the jury will not be able to understand properly what happened without hearing evidence about those events.[179]

4.154 As the minority recognises, only category (a) of such evidence involves reasoning from coincidence, and the jury's reasoning on the misconduct evidence is so closely connected to the offences charged to leave little scope for unfair prejudice.

4.155 The minority ultimately held that:[180]

A propensity evidence direction is required where the Crown is:

(a) relying on propensity reasoning and in doing so is invoking ideas about coincidence or probability; and/or

(b) the evidence involves aspersions on the character of the appellant in respects not directly associated with the alleged offending.

---

179 *Mahomed* [2011] 3 NZLR 145, 176 [90] (McGrath and William Young JJ) (citations omitted).

180 Ibid 177 [91]-[92].

> As well, a propensity evidence direction should be given where, without it, there is a danger that the jury will not realise the relevance of the evidence in question or there is some particular risk of unfair prejudice associated with the evidence.
>
> On the other hand, and as the corollary of what we have just said, where the evidence in question, although still falling within the Act's 'propensity evidence' definition, is not led primarily in reliance on coincidence or probability reasoning, a specific direction may well not be required.

4.156 The minority noted that, in common with the UK and Canada, a direction is not required where the evidence involves other misconduct against the same victim.[181]

4.157 Having concluded that propensity evidence could take a wide variety of forms, the minority rejected the 'one size fits all' approach from *Stewart* and instead set down the following requirements for directing a jury on propensity evidence:

> (a) Identify the evidence in question and explain why it has been led and the legitimate respects in which it might be taken into account by the jury. We see no need for the judge to define 'propensity' (compare step (2) of Stewart). In cases in which a demonstrated propensity could legitimately be a stepping stone in the reasoning process of the jury, that should be identified using concrete language addressed not to 'propensity' as an abstract concept, but rather specifically to the particular pattern of behaviour or thinking which is in issue. In most cases, the legitimate reasoning available to the jury will be based around coincidence or probability. That should be explained to the jury in simple and direct language addressed to the particular facts and what is said to be the implausible coincidence or how the evidence otherwise bears on the probability of the defendant being guilty. This is likely to require a discussion of the similarities involved in the conduct alleged. Where there are factors which may explain the postulated coincidence (for example, suggested collusion between the witnesses) that too should be addressed. We see no need for the judge to otherwise go through the s 43(3) criteria (compare step (3) of Stewart). These criteria are addressed to the admissibility decision the judge must make and not the factual assessment which is for the jury.

---

181 Citing *R v Krugel* (2000) 143 CCC (3d) 367 (Ontario Court of Appeal), *R v Holtam* (2002) 165 CCC (3d) 502; *R v Merz* (1999) 46 OR (3d) 161 (Ontario Court of Appeal) and Professor Birch 'Evidence: Murder - Admissibility of Previous Violence by Defendant to Deceased' [1995] *Criminal Law Journal* 651; *R v M* [2000] 1 WLR 421, 426 (Kennedy LJ) and James Richardson (ed) *Archbold: Criminal Pleading Evidence and Practic*e (Sweet and Maxwell, 2002), [13-34].

(b) Put the competing contentions of the parties.

(c) Caution the jury against reasoning processes which carry the risk of unfair prejudice associated with the propensity evidence. This should usually be along the lines that the fact that the defendant has or may have offended on other occasions does not establish guilt and that the only legitimate reasoning process available to the jury is the one which has been outlined.[182]

4.158 The minority ultimately concluded that there was no need to warn the jury about misusing the evidence of other misconduct against the same complainant, as the relevance of the evidence was obvious as a matter of common sense and similarly, a warning against jumping to a conclusion of guilt was obvious and therefore unnecessary.[183]

4.159 In another judgment handed down at the same time as *Mahomed*, the Supreme Court in *Hudson v The Queen* upheld a judge's charge where evidence of the accused's propensity for sexual jealousy was led to establish a motive for murder. The judge directed the jury that they could only use the evidence if satisfied that the propensity evidence established that the motive for previous assaults was jealousy and that the accused was jealous of the relationship between the deceased and a third party. The judge explained that if the jury were not satisfied that the evidence established jealousy in this regard, then the evidence was irrelevant. The judge also told the jury that just because the accused may have behaved badly on a previous occasion, that did not mean that he killed the deceased.[184]

4.160 The Court rejected the complaint that the direction failed to explain how the jury could use the evidence, noting that the structure of requiring the jury to first consider whether the accused was jealous of the deceased meant that once the jury resolved that threshold question, the evidence became part of the whole circumstantial case, to be assessed holistically.[185] Similarly, the Court rejected the argument that by telling the jury not to reason to guilt from

182 *Mahomed* [2011] 3 NZLR 145, 178 [95].
183 Ibid 179 [101]–[104].
184 *Hudson v The Queen* [2011] 3 NZLR 289, [51] (William Young J).
185 Ibid.

the 'mere fact' that the accused had engaged in other discreditable conduct (relating to drug dealing, gang involvement and fleeing police) that the judge left open the risk that the jury would misuse those matters as part of its reasoning process. The Court considered that the judge's direction that the jury would not normally hear the evidence due to the risk of misuse, and the instruction that the jury could not use this evidence of other discreditable conduct to say that the accused is the kind of person to commit the offences charged, protected against the asserted risk.[186]

4.161 The New Zealand approach to context evidence is currently in flux. Despite initial judgments that the legislative provisions on propensity evidence do not apply to 'background evidence',[187] such an approach was rejected by the minority in *Mahomed*.[188] According to the minority in *Mahomed*, the admissibility of such evidence must be assessed in accordance with the probative value and prejudicial effect balancing exercise required for propensity evidence generally, but that specific warnings against propensity reasoning may not be necessary.[189]

(v) England

4.162 In England, tendency, coincidence and context evidence is regulated through the 'bad character' provisions of s 101 of the *Criminal Justice Act 2003*, which allows evidence of bad character if the evidence passes through one of seven 'gateways'. Of these seven gateways, it is necessary to focus on two. These are:

- Important explanatory evidence, and
- Evidence that is relevant to an important matter in issue between the defendant and the prosecution.[190]

---

186 Ibid.

187 *R v R* [2008] NZCA 342, [49]-[50] (Robertson J); *R v Gooch* [2009] NZCA 163; *Daken v The Queen* [2010] NZCA 212.

188 *Mahomed* [2011] 3 NZLR 145, 165 [58]-[62] (William Young J).

189 Ibid.

190 *Criminal Justice Act 2003* (UK) c 44, ss 101(1)(c)- (d).

4.163 By s 103, a propensity to commit offences of the kind charged and a propensity to be untruthful are, subject to limited exceptions, treated as relevant to the matters in issue between the defendant and the prosecution.

4.164 This legislation involved a 'sea change' to the law on similar fact in England. One facet of that was that, while the common law did not allow evidence of 'mere propensity' and required something more, the 2003 Act set aside the common law and evidence of propensity became admissible.[191]

4.165 Following a number of cases where the English courts laid down guidance on the content of jury directions, the English charge book included a model charge on bad character evidence. However, in 2007, the Court of Appeal sounded a warning against model charges, and the tendency of appellate counsel to seek to overturn a verdict based on a failure to follow a model charge. The Court explained that the cycle occurs as follows:

- An appellate court criticises a summing up and suggests an alternative approach;
- The Judicial Studies Board incorporates the appellate court's guidance into a specimen direction;
- Failure to give the specimen direction is treated as erroneous and leads to a successful appeal without any consideration of whether the failure to give the direction affected the outcome.[192]

4.166 Following this decision, the *Crown Court Bench Book* was revised to no longer contain model charges and instead provide sample directions that would need to be adapted to particular cases.

4.167 The *Bench Book* includes the following illustration on the use of previous convictions as tendency evidence:

> You have heard evidence that the defendant has convictions for …. Let me remind you of the agreed facts of those convictions…. They are set out in your bundles in the formal admissions.

---

191 *R v Chopra* [2007] 1 Cr App R 225, 233 (Hughes LJ).

192 *R v Campbell* [2007] 1 WLR 2798, 2806 (Lord Phillips CJ).

> You have heard of the defendant's previous behaviour because it is relevant to the question of whether he has a propensity, in other words a tendency, to commit offences of the kind with which he is now charged. The particular features of those convictions on which the prosecution relies are….. The prosecution submits that if the defendant does have a propensity to act in this way, then it is more likely than mere coincidence that V described him as acting in a similar way on this occasion. It makes it more likely that he behaved as V has described.
>
> The purpose of this evidence is not to generate unfair prejudice towards the defendant and you must guard against that. The fact that the defendant has convictions cannot of itself prove his guilt of this offence and should not convict him just because or mainly because of them.
>
> First, you should consider whether the evidence of the defendant's previous convictions establishes that the defendant has a propensity or a tendency to …. You must first decide whether the propensity is proved so that you are sure. If it is proved you must, secondly, decide whether and to what extent that helps you when you are discussing whether the defendant is guilty of the offence charged. If you are not sure the propensity is proved it cannot assist you in this way. Even if you accept that the defendant has a propensity to commit offences of this kind it does not necessarily follow that he is guilty on this occasion.
>
> The second way in which evidence of the defendant's character may assist you is in considering whether he has given truthful evidence. The defendant has convictions for dishonesty. That does not establish that the defendant is necessarily or is always an untruthful person, nor does it mean that he cannot be telling the truth now. Whether the evidence provides you with any assistance in this respect is also for you to judge.
>
> The defence say that the defendant's past behaviour cannot or should not assist you because….
>
> Please bear in mind that this evidence of the defendant's previous behaviour is but a small part of the evidence in the case. You will appreciate that it is not direct evidence that the defendant committed the offence but of circumstances concerning the defendant which you are entitled to take into account when deciding whether he did.[193]

4.168 The *Bench Book* also includes a charge on disputed evidence of bad character adduced to support the credibility of a complainant and to establish tendency to offend:

> You have heard evidence from V. Her evidence is central to the prosecution case and forms the basis of the charges in the indictment. You cannot convict the defendant unless you accept V's evidence. You have also heard from A and B about incidents unconnected with the charges, save, say the

[193] Judicial Studies Board, *Crown Court Bench Book: Directing the Jury* (2010), 178.

prosecution, for the similarity which the defendant's conduct towards them bears to V's description of his conduct towards her. The evidence of A and B is relevant because it may assist you to decide whether you can accept V's evidence as truthful and accurate.

Let me explain how you should approach this evidence.

First, the prosecution contends that it is no coincidence that all three of these witnesses describe similar conduct by the defendant towards them. If three women, unknown to one another, make complaints of a similar kind against the same man, and collusion between them can be excluded, it makes it more likely that each of them is telling the truth. The closer the similarity of the conduct alleged the less likely it is that the evidence can be explained away as coincidence or malicious invention. You must examine the evidence with care. If you are sure that collusion or influence by any one witness over another, deliberate or unintentional, can be excluded, then you are entitled to regard the evidence of each witness as supportive of the others. You are not bound to treat the evidence as supportive of V. That is your decision. Furthermore, the extent to which it may be supportive is also for you to judge.

Secondly, the prosecution submits that the evidence of A and B, both women with whom the defendant had enjoyed sexual relationships in the past, establishes that the defendant has a propensity, or tendency, to behave in a particular way towards women when his wishes are thwarted. If you accept that submission, they say the fact that the defendant possessed such a tendency makes it more likely that he behaved towards V as she says he did towards her. You must decide whether A and B gave truthful evidence. If they did, do you conclude that the defendant did have the propensity alleged? If you are sure that is the right conclusion, you must assess whether and, if so, to what extent it helps you to decide whether the defendant is guilty of the charge you are considering. Even if you do decide that the defendant has a propensity to act as the prosecution allege it does not follow that he must be guilty of the offences charged. I shall remind you in more detail later of the evidence of V, A, B and the defendant, but for the moment let me summarise for you (1) the similarities relied on by the prosecution and (2) the evidence relevant to the issue of independence of the prosecution witnesses from one another.....

The submissions made on behalf of the defendant were.....

Remember that the evidence of A and B is relevant only for the purposes I have described. It would be wrong to take a short cut and say to yourselves, 'There is no smoke without fire'. That would amount to unfair prejudice. Remember also that the critical evidence is that of V. The evidence of past behaviour is capable of supporting the prosecution case but it cannot alone prove guilt.[194]

194 Ibid 179.

4.169 Unlike Australian courts, English courts have not adopted a requirement to warn the jury against substitution reasoning or moral prejudice.[195]

4.170 English courts have often emphasised that the use of propensity evidence accords with common sense and that directions to the jury should make that clear:

> Where evidence of bad character is introduced the jury should be given assistance as to its relevance that is tailored to the facts of the individual case. Relevance can normally be deduced by the application of common sense. The summing up that assists the jury with the relevance of bad character evidence will accord with common sense and assist them to avoid prejudice that is at odds with this.[196]

4.171 English cases have also warned that the use of the evidence as circumstantial evidence generally and its use as propensity evidence may need to be kept separate. Where the evidence shows that a series of offences were all committed by the same person, and that the defendant is that person, the English position is that it may not be helpful to concentrate on whether the evidence establishes that the accused has a propensity to commit the offences charged.[197]

4.172 Similarly, when the evidence is led to support the credibility of multiple complainants in sexual offence prosecutions, on the basis that it would be improbable that several independent complaints are all the product of coincidence or malice, it will rarely be necessary to direct the jury about the use of such material as tendency evidence and the judge should generally concentrate on coincidence reasoning.[198]

---

195 In *R v Weir* [2006] 1 WLR 1885, the Court upheld in the Somanathan appeal at [48] what appeared to be minimalist directions that explained the application of probability reasoning in the circumstances (improbability of similar complaints all being false) and that it was a matter for the jury to consider whether the evidence demonstrated a particular style of conduct: at 1902-3 (Kennedy LJ).

196 *R v Campbell* [2007] 1 WLR 2798, 2807 (Lord Phillips CJ).

197 *R v Freeman & Crawford* [2009] 1 WLR 2723, 2730 (Latham LJ) ('*Freeman & Crawford*').

198 *R v N* [2011] EWCA Crim 730, [31] (Pitchford LJ). See also *R v McAllister* [2009] 1 Cr App R 129, 134 (Moses LJ). Cf *R v Spencer* [2008] EWCA Crim 544, [24] (Dyson LJ).

4.173 This willingness to direct on only one facet of the evidence has led English judges to generally prefer the coincidence aspect of the evidence, because the tendency use attracts a higher standard of proof which is seen as providing an unnecessary complication.[199]

4.174 Another example of the application of the English bad character evidence provisions is *R v Tirnaveanu*.[200] There, the accused was charged with offences relating to forging UK passports and certificates of residency for illegal immigrants from Romania. The specific charges related to a number of customers who had purchased or agreed to purchase such documents. The defence asserted that it was an elaborate framing exercise and so disputed the issue of identity. In response, the prosecution sought to adduce evidence of other documentation found at the accused's house relating to illegal immigrants, as well as circumstantial evidence that the accused was involved in meeting freshly arrived illegal immigrants and offering his services to arrange passports and other documentation.

4.175 The Court of Appeal accepted that this evidence was rightly admitted as relevant to rebutting the defence case and made three important points. First, that while directions on the relevance of evidence are important, they can often be achieved in a 'simple sentence or two'.[201] Secondly, that in the circumstances of this case, the jury needed to be 'sure of the reliability'[202] of the evidence before using it. This suggests the application of the beyond reasonable doubt standard, a point the later judgment of *Freeman & Crawford* rejects. Thirdly, directions warning against propensity uses of evidence are

---

199 See *R v McAllister* [2009] 1 Cr App R 129, 135 (Moses LJ). Under English law, the jury must be satisfied of the tendency beyond reasonable doubt before using the evidence for that purpose. This standard does not apply to the use of the evidence as general circumstantial evidence in a coincidence reasoning manner.

200 [2007] 2 Cr App R 295.

201 Ibid 308 (Thomas LJ).

202 Ibid.

not necessary or appropriate where the issue is only one of identity and not propensity.[203]

(vi) Canada

4.176 The Canadian charge book lists four directions on the use of 'similar fact' evidence. Two relate to using similar fact evidence to establish identity[204] and two relate to its use to enhance the credibility of a complainant.[205] The Canadian charge book contains two directions on each topic as one relates to evidence of extrinsic misconduct and the other is for use when the relevant evidence is cross-admissible from another charge on the indictment.

4.177 The cross-admissibility direction for proof of identity states:

> [1] *NOA* is charged with (*specify number*) offences. The Crown must prove each charge beyond a reasonable doubt. Do not assume that just because the offences are similar that they must all have been committed by *NOA*.
>
> [2] You may use the evidence on one count to reach your verdict on the other (any) count only if you conclude that the acts involved are so similar that the same person likely did both (all) of them.
>
> [3] If you do not conclude that the acts charged in one (some) count(s) are so similar to those charged in another (others) that the same person committed both (all) of them, you must not use the evidence on that (those, each) count(s) in reaching your verdict on the (any) other charge. You must then reach your verdict using only the evidence that corresponds to each count.
>
> [4] You should consider these circumstances:
>
> (*List alleged similarities and dissimilarities between counts.*)[206]

4.178 The cross-admissibility direction on credibility states:

> [1] *NOA* is charged with (*specify number*) offences. There are (*specify number*) complainants. The Crown must prove each charge beyond a reasonable doubt.

---

203 Ibid.
204 Canadian Judicial Council, *Model Jury Instructions* [11.15]-[11.16].
205 Ibid [11.17]-[11.18].
206 Ibid [11.16].

[2] You must decide whether the offence alleged by each complainant (or any of them) ever actually took place.

[3] Do not assume that just because you conclude that one complainant is telling the truth, the others must be telling the truth as well. Nor should you assume that just because the complainants testified that *NOA* committed similar acts, they all must have occurred if any one of them is proved.

[4] You should consider whether there is a pattern of similar behaviour that confirms each complainant's testimony that the offence took place. It is for you to say. In considering this evidence, bear in mind the relationship between *NOA*, the complainants (or *NOC*), as well as the circumstances of both (each) of the situations.

[5] You should consider these circumstances:

(*List alleged similarities and dissimilarities between counts.*)[207]

4.179 Canadian law draws the distinction between a prohibition on 'general' propensity evidence, which does nothing but engender moral prejudice in the jury towards the accused, and evidence which is sufficiently situation-specific as to hold legitimate probative value. The test for admissibility is that the probative value of the evidence must outweigh its prejudicial effect, with the common law presumption that propensity evidence is inadmissible.[208]

4.180 The admissibility of similar fact evidence in Canada depends on the prosecution clearly identifying the fact in issue which the evidence is led to support and demonstrating how it may legitimately prove that fact.[209] The probative value of the evidence depends on its ability to prove that matter, which in turn depends on the degree of similarity or dissimilarity between the previous conduct and the conduct in question. When assessing prejudicial effect, Canadian judges adopt the dichotomy of moral prejudice and reasoning prejudice and often explicitly use that terminology when ruling on the admissibility of evidence.[210]

4.181 Like Victoria prior to the *Evidence Act*, Canada has struggled with

---

207 Ibid [11.17].

208 *R v Handy* [2002] 2 SCR 908 ('*Handy*'). See also *R v Shearing* [2002] 3 SCR 33.

209 See *Handy* [2002] 2 SCR 908, 934 (Binnie J).

210 Ibid; *R v Shearing* [2002] 3 SCR 33.

clearly identifying and articulating the difference between permissible and impermissible propensity reasoning. As the majority in *Handy* explain, this is partially an issue of nomenclature:

> Part of the conceptual problem with similar fact evidence is that words like 'disposition' or 'propensity' are apt to describe a whole spectrum of human character and behaviour of varying degrees of potential relevance. At the vague end of the spectrum, it might be said that the respondent has a general disposition or propensity 'for violence'. This, by itself, proved nothing of value in this trial. The respondent was not charged with having a brutal personality, and his general character was, in that sense, irrelevant.
>
> At a more specific level, it is alleged here that the propensity to violence emerges in this respondent in a desire for hurtful sex. This formulation provides more context, but the definition of so general a propensity is still of little real use, particularly when it is sought to use 'propensity' not to predict future conduct in a general way, but to conclude that the respondent is guilty of acting in the specific way under the specific circumstances on December 6, 1996 alleged by this complainant.[211]

4.182 The leading authority on the necessary jury directions for propensity evidence, *R v Arp*,[212] set down a seven step process to apply where similar fact evidence is led to prove identity:

> (1) The trial judge should instruct the jury that they may find from the evidence, though they are not required to do so, that the manner of the commission of the offences is so similar that it is likely they were committed by the same person.
>
> (2) The judge should then review the similarities between the offences.
>
> (3) The jury should then be instructed that if they conclude it is likely the same person committed more than one of the offences, then the evidence on each of those counts may assist them in deciding whether the accused committed the other similar count or counts.
>
> (4) The trial judge must instruct the jury that if it accepts the evidence of the similar acts, it is relevant for the limited purpose for which it was admitted.
>
> (5) The jury must be warned that they are not to use the evidence on one count to infer that the accused is a person whose character or disposition is such that he or she is likely to have committed the offence or offences charged in the other count or counts.

---

211 *Handy* [2002] 2 SCR 908, 941 [85]-[86].

212 [1998] 3 SCR 339 ('*Arp*').

(6) If they do not conclude that it is likely the same person committed the similar offences, they must reach their verdict by considering the evidence related to each count separately, and put out of their minds the evidence on any other count or counts.

(7) Finally, the trial judge must of course make it clear that the accused must not be convicted on any count unless the jury are satisfied beyond a reasonable doubt that he or she is guilty of that offence.[213]

4.183 Canadian law on directions has since been refined to requires judges to warn against two discrete forms of prejudice. First, the jury must not reason to guilt from the accused's general disposition. This corresponds with the *Grech* 'kind of person' warning. Secondly, the jury must not punish the accused for previous misconduct. Both are directed to the risk of moral prejudice and there is not a discrete requirement that judges warn the jury to refrain from engaging in substitution reasoning.[214]

4.184 While *Arp* was an identity case, subsequent cases have held that the need for a limiting instruction applies in any case where the danger of reasoning from general disposition exists, whether in identity cases or credibility cases.[215]

4.185 Indeed, in *R v B(C)*,[216] the trial judge refused to give a direction at the end of the trial, warning the jury not to reason that the accused was a person of bad character and therefore more likely to have committed the offences charged. According to the Ontario Court of Appeal:

> In his view, once it was accepted that the similar fact evidence was admissible to show a pattern of behaviour which the jury could use to infer that the appellant's conduct was both intentional and committed for an improper purpose, the bad character instruction would make it 'hard [for the jury] to distinguish that from the permissible use.' [217]

---

213 Ibid 384 (Cory J).

214 *R v MR* (2005), 195 CCC (3d) 26, [64] (Cronk JA) (Ontario Court of Appeal). See also *R v Malanca* [2007] ONCA 859 (7 December 2007; *R v McDonald* (2000) 148 CCC (3d) 283 [46] (Sharpe JA).

215 *R v B(C)* (2003) 171 CCC (3d) 159, [24]-[25] (Labrosse, Moldaver and Feldman JJA) (Ontario Court of Appeal).

216 Ibid.

217 Ibid [20] (Labrosse, Moldaver and Feldman JJA).

4.186 The Court held that this concern 'fails to take into account the difference between specific and general propensity reasoning' and noted that the necessary instruction prohibits general propensity reasoning while leaving specific propensity reasoning intact and permissible.[218]

(vi) United States of America

4.187 American jurisdictions have adopted an exclusionary rule on other misconduct evidence, with specific exceptions. In Federal Courts, rule 404(b) of the *Federal Rules of Evidence* applies and states:

> **(1)** ***Prohibited Uses.*** Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
>
> **(2)** ***Permitted Uses; Notice in a Criminal Case.*** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:
>
> **(A)** provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and
>
> **(B)** do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

4.188 The American Federal Court system has developed several different model charges regarding evidence that is admitted under rule 404(b) including:

First Circuit

> You have heard [will hear] evidence that [defendant] previously committed acts similar to those charged in this case. You may not use this evidence to infer that, because of [his/her] character, [defendant] carried out the acts charged in this case. You may consider this evidence only for the limited purpose of deciding:
>
> (1) Whether [defendant] had the state of mind or intent necessary to commit the crime charged in the indictment; or
>
> (2) Whether [defendant] had a motive or the opportunity to commit the acts charged in the indictment; or

---

218 Ibid [28] (Labrosse, Moldaver and Feldman JJA).

(3) Whether [defendant] acted according to a plan or in preparation for commission of a crime; or

(4) Whether [defendant] committed the acts [he/she] is on trial for by accident or mistake.

Remember, this is the only purpose for which you may consider evidence of [defendant]'s prior similar acts. Even if you find that [defendant] may have committed similar acts in the past, this is not to be considered as evidence of character to support an inference that [defendant] committed the acts charged in this case.[219]

Seventh Circuit

You have heard evidence of acts of the defendant other than those charged in the indictment. You may consider this evidence only on the question of _____. You should consider this evidence only for this limited purpose.[220]

Eighth circuit

You [are about to hear] [have heard] evidence that the defendant (describe evidence the jury is about to hear or has heard). You may consider this evidence only if you [unanimously] find it is more likely true than not true. This is a lower standard than proof beyond a reasonable doubt. It is instead proof by the greater weight of the evidence. If you find that this evidence of other acts is proved by the greater weight of the evidence, you may consider it to help you decide (describe purpose under 404(b) for which evidence has been admitted.) You should give it the weight and value you believe it is entitled to receive. You must disregard it unless you find it is proved by the greater weight of the evidence.

Remember, even if you find that the defendant may have committed [a] similar [act] [acts] in the past, this is not evidence that [he] [she] committed such an act in this case. You may not convict a person simply because you believe [he] [she] may have committed [a] similar act[s] in the past. The defendant is on trial only for the crime[s] charged, and you may consider the evidence of similar acts [he] [she] committed in the past only on the issue of (state proper purpose under 404(b), *e.g.*, intent, knowledge, motive).[221]

4.189 This rule is one of the most frequently litigated provisions in American criminal law. It is a fertile source of appellate authority and academic

---

219 Pattern Criminal Jury Instructions Drafting Committee, *Pattern Criminal Jury Instructions for the District Court of the First Circuit* 2.05.

220 Criminal on Federal Criminal Jury Instructions for the Seventh Circuit, *Pattern Criminal Federal Jury Instructions for the Seventh Circuit* 3.04.

221 Committee on Model Jury Instructions for the Eighth Circuit, *8th Circuit Jury Instructions* 2.08.

commentary and is considered poorly understood.[222] According to one commentator:

> judges and practitioners alike cannot understand [Rule 404] well enough to apply it soundly-not because they are unintelligent, but because the Rule is hopelessly opaque.[223]

4.190 The strict opposition to propensity reasoning while allowing the admission of evidence on enumerated bases prompts an approach which, in *Uniform Evidence Law* terminology, allows tendency reasoning by stealth, as judges try to fit the evidence into one or more of these recognised exceptions while giving jury instructions that provide minimal assistance on how the evidence is relevant.[224] This process is also reminiscent of the categories approach that applied in England until the decision in *DPP v Boardman*.[225]

4.191 In addition to the enumerated exceptions to the exclusionary rule, American cases have also adopted the 'doctrine of chances'[226] as an explanation for allowing the evidence, though this doctrine is rarely explained to the jury. This doctrine is analogous to coincidence reasoning under the *UEA*. While American jurisdictions have historically opposed tendency reasoning, there have been recent moves to allow this form of reasoning for specific classes of cases.[227] These moves have started in the area

---

222 Thomas Reed, 'Admitting the Accused's Criminal History: The Trouble with Rule 404(b)' (2005) 78 Temple Law Review 201, 211.

223 Thomas J Leach, 'Propensity' Evidence and FRE 404: A Proposed Amended Rule With An Accompanying 'Plain English' Jury Instruction' (2001) 68 Tennessee Law Review 825, 825

224 Reed, above n 224, 248; ibid, 842; Andrew J Morris, 'Federal Rule of Evidence 404(b): The Fictitious Ban on Character Reasoning from Other Crime Evidence' (1998) 17 *Review of Litigation* 181, 182; David J Kaloyanides, 'The Depraved Sexual Instinct Theory: An Example of the Propensity for Aberrant Application of the Federal Rule of Evidence 404(b)' (1992) 25 *Loyola of Los Angeles Law Review* 1297, 1298. For examples, see *United States v Scott* 37 F 3d 1564 (1994) (evidence of previous tax offences led to prove the accused's intention to engage in tax evasion in a fresh scheme); *United States v Crump* 934 F 2d 947 (1991) (evidence of other offences used to rebut a defence of entrapment); *People v Ewoldt* 867 P 2d 757 (1994) (prior sexual acts against the complainant led ostensibly to show a common design or plan to commit offences in a similar manner).

225 [1975] AC 421.

226 See Edward J Imwinkelried, 'An Evidentiary Paradox: Defending the Character Evidence Prohibition By Upholding a Non-Character Theory of Logical Relevance, the Doctrine of Chances' (2005) 40 *University of Richmond Law Review* 419.

227 See *Federal Rules of Evidence* rr 413-414. These provisions were introduced in 1995.

of sexual and violent offences, though there are fears that the reforms will spread more widely and eliminate the general prohibition on propensity reasoning.[228]

Reform Options

6.1 In light of these issues, there appear to be three principal options to consider for improving the quality of directions on other misconduct evidence:

(i) Change the language of the current charges without substantive law changes;

(ii) Remove the obligation to explain the positive uses of the evidence;

(iii) Codify and reform the content of the charge.

A. Option 1 – Language changes

4.192 Even without any changes to the substantive law, the existing directions could be simplified if the Charge Book Committee were willing to be courageous and step out from the language used in previous decisions while still addressing the underlying concerns. As Leach has argued,

> in explaining the complexity of proper and improper use of character evidence, plain talk is the only way to achieve comprehension by the jurors. Otherwise the standard 'you may use it for this but not for that' will wash over them as an opaque wave of words.[229]

4.193 In reforming the language of the charge without statutory intervention, it is important to remember that *Vonarx* and *Grech* (i) were context evidence cases, and (ii) did not propose to set down a mandatory form of words.

4.194 Paragraph (a) of the *Grech* formulation is a statement of the judge's role in marshalling the arguments of each party and explaining how evidence is relevant. This is consistent with the requirement to identify precisely any conduct relied as consciousness of guilt, or explaining the relevance of a prior inconsistent statement. It also contributes to a balanced charge that where the

---

228 Imwinkelried, above n 226, 447.

229 Leach, above n 223, 868-9.

judge is required to direct the jury on the impermissible uses of a piece of evidence the judge must also direct the jury on how the evidence is permissible. Doing otherwise risks producing an unbalanced charge and a jury, having been given a negative direction, might wonder at the residual positive use of the evidence.

4.195 Paragraph (b)(i) has been elevated to a sacrosanct status as a 'substitution warning', and, in its most extreme form, has been condemned as warning against a 'startlingly stupid piece of reasoning' if the jury considered convicting the accused where the *only* evidence was a previous similar act.[230] However, the underlying principle is a warning against 'moral prejudice'. That is, warning against the risk of the jury reacting to the evidence emotively, seeking to punish the accused for previous misconduct and losing sight of the obligation on the Crown to prove the specific offence charged beyond reasonable doubt. The Canadians address that risk in a warning that also covers the risk of 'reasoning prejudice':

> You have heard evidence that NOA has (might have) committed other acts that are similar to that for which s/he has been charged in this case. You are not trying NOA for that other conduct. Do not assume that just because the acts are similar that the offence charged must have taken place.[231]

4.196 It may be that a similar direction would be acceptable in Victoria and fulfil the need to warn the jury against substitution reasoning.

4.197 Similarly, the concern in (b)(ii) is a classic warning against what is now called tendency reasoning and makes sense when evidence is not admissible as tendency evidence (as in *Grech*). The difficulty with the direction, which has been amplified with the commencement of the UEA, is that it is either not suitable where evidence has been admitted as tendency evidence or requires substantial explanation and nuance. Unfortunately, before the commencement of the *Evidence Act*, there was looseness in terminology

---

230 *PIM* (2009) 196 A Crim R 516, 523-4.

231 Canadian Judicial Council, above n 204, 11.15.

around the notion of 'propensity evidence' which has obscured the use of evidence and the content of any necessary directions.

4.198 If the direction can refocus on the concerns underlying the *Grech* formulation and it is written to be given at the time the evidence is led, then the following formulations may be adequate:

Tendency evidence

> As you have just heard, NOW says that NOA [*describe previous conduct*]. Ultimately, the prosecution will explain how they say this evidence is relevant. In broad terms, it is led to show that NOA has previously shown that he [is willing to / has a tendency to] [*describe relevant action*]. If you are satisfied beyond reasonable doubt the evidence does show this [tendency / willingness], then you might think that it is more likely that s/he did so again, by committing the offences charged. If you are not satisfied beyond reasonable doubt that the evidence shows this [tendency /willingness], then you must disregard this evidence.
>
> When you are deciding whether the evidence shows a tendency to [*describe relevant action*], you should consider the following factors. [*Summarise relevant prosecution and defence evidence and arguments. Be sure to include reference to relevant similarities and dissimilarities between the charged acts and the evidence*].
>
> Remember that you are not trying NOA for [*describe previous conduct*]. You are trying him for the offences charged on the indictment. Even if you accept NOW's evidence on this point, do not jump to the conclusion that NOA must have committed the offences charged.

Coincidence evidence and not tendency evidence

> As you have just heard, NOW says that NOA [*describe previous conduct*]. Ultimately, the prosecution will explain how they say this evidence is relevant. In broad terms, it is led to show that NOA has previously [*describe relevant action*] and so it would be an unlikely coincidence if [*describe relevant unlikely coincidence, e.g. 'five independent people all wrongly accused him of doing the same kinds of acts'*]. The prosecution will say that it is therefore more likely that [*describe relevant conclusion, e.g. 'these five witnesses' allegations are true'*].
>
> You may only use the evidence in this way if you are satisfied beyond reasonable doubt that [*describe any matter the jury must be sure of before using the evidence. This may include proof that multiple offences were committed by the same person, or that several complainants are independent and are not affected by collusion or contamination*]. If you are not satisfied of this matter, you must disregard the evidence.
>
> When you are deciding whether the evidence shows such an unlikely coincidence, you should consider the following factors. [*Summarise relevant prosecution and defence evidence and arguments. Be sure to include reference to*

relevant similarities and dissimilarities between the charged acts and the evidence].

Remember that you are not trying NOA for [*describe previous conduct*]. You are trying him for the offences charged on the indictment. Even if you accept NOW's evidence on this point, do not jump to the conclusion that NOA must have committed the offences charged. You also must not say that NOA is more likely to be guilty because he has shown a [willingness / tendency] to [*describe previous conduct*] before. Such a path of reasoning would be unfair, as the accused is not on trial for these other acts.

Tendency and coincidence evidence

As you have just heard, NOW says that NOA [*describe previous conduct*]. Ultimately, the prosecution will explain how they say this evidence is relevant. In broad terms, it is led for two purposes.

The first is to show that NOA has previously shown that he [is willing to / has a tendency to] [*describe relevant action*]. If you are satisfied beyond reasonable doubt the evidence does show this [tendency / willingness], then you might think that it is more likely that s/he did so again, by committing the offences charged. If you are not satisfied beyond reasonable doubt that the evidence shows this [tendency /willingness], then you must not use the evidence in this way.

The second purpose is to show that NOA has previously [*describe relevant action*] and so it would be an unlikely coincidence if [*describe relevant unlikely coincidence e.g. 'five independent people all wrongly accused him of doing the same kinds of acts'*]. The prosecution will say that it is therefore more likely that [*describe relevant conclusion, e.g. 'these five witnesses' allegations are true'*].

You may only use the evidence in this second way if you are satisfied beyond reasonable doubt that [*describe any matter the jury must be sure of before using the evidence. This may include proof that multiple offences were committed by the same person, or that several complainants are independent and are not affected by collusion or contamination*]. If you are not satisfied of this matter, you must disregard the evidence.

When you are deciding whether to use this evidence, you should consider the following factors. [*Summarise relevant prosecution and defence evidence and arguments. Be sure to include reference to relevant similarities and dissimilarities between the charged acts and the evidence*].

Remember that you are not trying NOA for [*describe previous conduct*]. You are trying him for the offences charged on the indictment. Even if you accept NOW's evidence on this point, do not jump to the conclusion that NOA must have committed the offences charged.

Context evidence and not tendency or coincidence evidence

As you have just heard, NOW says that NOA [*describe previous conduct*]. Ultimately, the prosecution will explain how they say this evidence is relevant. In broad terms, it is led because otherwise you would not get the

full picture and NOW's evidence describing [*describe charged acts*] would sound like they occurred out of the blue.

[*The following paragraph only needs to be included where the context evidence involves previous sexual activity between the complainant and the accused*]

You may only use this evidence as part of your decision-making process if you are satisfied beyond reasonable doubt that it is true. Otherwise, you must disregard this evidence.

Remember, you are not trying NOA for [*describe previous conduct*]. You are trying him for the offences charged on the indictment. Even if you accept NOW's evidence on this point, do not jump to the conclusion that NOA must have committed the offences charged. You also must not say that NOA is more likely to be guilty because he has shown a [willingness / tendency] to [*describe previous conduct*] before. Such a path of reasoning would be unfair, as the accused is not on trial for these other acts.

4.199 While these directions include a statement about the standard of proof, those statements will likely disappear, if the recommendations in Chapter 3 are adopted. Under those recommendations, statements about the standard of proof for intermediate findings of fact are only necessary in exceptional cases where the intermediate finding of fact is logically essential to a finding of guilt. In most cases, other misconduct evidence does not have that character. Doubts about the existence of the tendency or the independence between multiple witnesses for the purpose of coincidence reasoning will weaken the evidence, but under the recommendations in Chapter 3, a judge will not need to direct the jury that it must apply the criminal standard of proof to the resolution of such issues.

4.200 One advantage of this formulation is that by adopting the Canadian and New South Wales approaches to the issue of anti-substitution, the direction does not assert that the jury may be false to their oath and convict the accused of an offence due to proof of an uncharged act. Instead, the direction addresses the underlying risk, which is that the jury will think that evidence of another act can prove guilt of the charged act by itself.

4.201 While these changes could be made without any legislative support, it is likely that judges will be concerned about the possibility of being

overturned on appeal under the current law. However, it is uncertain how such changes could be implemented by legislation, given that they are designed to preserve the current law using language that is simpler and easier for the jury to understand. Any attempt to reflect the current law in legislation will likely carry with it current practices in relation to jury directions.

B. Option 2 – Remove the obligation to explain how the evidence may be used, while maintaining the need to warn against misuse

4.202 The Queensland Law Reform Commission, in its Report on Jury Directions, recommended that judges should no longer be required to give specific directions the jury on what inferences it may draw from propensity evidence. This recommendation was made in the context of recommending that the *Pfennig* exclusionary rule be removed. The Commission also recommended that the judge have the option of giving the following directions either on request or where the judge thinks there is a risk of the jury engaging in unfair propensity reasoning:

> (a) evidence that the defendant has engaged in other criminal or other misconduct is not conclusive of guilt. It is no more than one fact to be considered in combination with all the other facts;
>
> (b) it would be improper to decide that, simply because the defendant has engaged in other criminal or other misconduct before, he or she is probably guilty, without considering all the other evidence; and
>
> (c) the jury must not seek to punish the defendant for any other act — the defendant is only on trial, and liable to be punished, for the charges currently against him or her.[232]

4.203 This option seeks to address the risk of confusion and contradictory directions by omitting the positive component of the direction. The jury can then use the evidence in any manner it sees fit, except the specific forms of reasoning identified by the judge.

---

232 Queensland Law Reform Commission, *A Review of Jury Directions*, Final Report No 66 (2009) xix.

4.204 The Commission was concerned that the positive component of the direction risks overshadowing the important warning against ''mere' propensity reasoning'.[233] The Commission considered that warning to be of crucial significance and that:

> rather than continue to burden juries with difficult distinctions between permissible and impermissible uses of 'propensity evidence', the focus should be on ensuring that the evidence that is admitted for the jury's consideration is relevant and probative to an issue in the trial so that its use and weight can be left to the jury, subject only to a general warning against unfair propensity reasoning. As with evidence of lies or other post-incident conduct, the Commission considers that propensity evidence is highly variable, context-dependent and properly a matter for the jury.[234]

4.205 Given the difficulties inherent in this kind of evidence, this Report does not consider that this is a viable solution to the problems posed by other misconduct evidence. It obscures the permissible use and the complex distinctions that exist between permissible and impermissible uses. It instead requires the jury to discern the permissible use of the evidence for themselves out of the judge's negative directions and the arguments of the parties. Given the subtleties that commonly arise in this context, there is a significant risk that even if the prosecution gives a perfect explanation of permissible tendency reasoning, the jury will interpret the judge's directions as a repudiation of that argument.

C. Option 3 – Codify and reform the necessary content of the warnings

4.206 Academic commentary and research with mock jurors reveals that propensity evidence directions are difficult to apply and may be counter-productive.[235]

4.207 The Report therefore recommends that the relevant directions are codified in a manner that takes account of the empirical research on jury directions and the limitations on conveying highly complex concepts to a lay jury.

---

233 Ibid 441.

234 Ibid.

235 See 'Effectiveness of the direction' above, [4.88] – [4.96].

4.208 The codified directions will be designed to operate in a manner consistent with the proposed reforms to the *Pemble* obligation. The provisions would therefore provide that no direction is required unless requested and specify the instructions that will constitute a sufficient direction if one is requested. The judge should ask the parties, both at the time the evidence is led and before final addresses, whether the parties want the judge to say anything about the evidence. In addition, the judge will not need to give the direction if there are good reasons for not doing so. Good reasons may include the fact that the judge has already given directions that cover the same content in relation to other evidence that has already been led.

4.209 Reform here is necessary because tinkering with language in a search for some way of explaining to 12 lay people concepts which have troubled evidence scholars for over 100 years is unrealistic. The Report shares the view of the English Court of Appeal that directions on such evidence should accord with common sense and can usually be achieved with a few simple sentences.[236]

4.210 This option eschews complex concepts like substitution reasoning and the distinction between general and specific propensity in favour of a general warning about fairness and the weight of evidence.

4.211 This is consistent with the recommendations of Tanford who, in response to the vast research showing that limiting instructions are either ineffective or counterproductive, recommended that the directions should only be given where trial counsel take on part of the responsibility for educating the jury on the limitations of the evidence. The warning then becomes a tool to reinforce the arguments of defence counsel, while giving

---

236 [2007] 1 WLR 2798, 2807 (Lord Phillips CJ); *R v Tirnaveanu* [2007] 2 Cr App R 295, 306 (Thomas LJ).

those counsel who wish to minimise the impact of the evidence the chance to do so by saying nothing and having the judge say nothing.[237]

4.212 It also accords with the advice of Professor James Ogloff, who has explained that jurors often look to the judge for guidance on how to assess evidence. There is a risk currently that jurors see extended directions on other misconduct evidence as an indication of the importance of the evidence. Giving the defence the choice whether to receive the directions is therefore a better response than the current approach.[238]

D. Draft amendment provisions

4.213 The amendment provisions could operate in the following manner:

> **PART 00—OTHER MISCONDUCT EVIDENCE**
>
> **A Definitions**
>
> In this Part—
>
> ***coincidence evidence*** has the same meaning as in the **Evidence Act 2008**;
>
> ***other misconduct evidence*** means—
>
> (a) coincidence evidence;
>
> (b) tendency evidence;
>
> (c) evidence of other discreditable acts of an accused that are not directly relevant to a fact in issue;
>
> (d) evidence that is adduced to assist the jury to understand the context in which the alleged offence was committed;
>
> ***tendency evidence*** has the same meaning as in the **Evidence Act 2008**;
>
> ***trial judge*** has the same meaning as in the **Criminal Procedure Act 2009**.

237 J Alexander Tanford, 'The Law and Psychology of Jury Instructions' (1990) 69 Nebraska Law Review 71 (1990).

238 Interview with Professor James Ogloff (Melbourne, 26 April 2012).

B Application

(1) This Part applies to other misconduct evidence that is adduced by the prosecution in a criminal trial.

(2) This Part applies despite any rule of law or practice to the contrary, including any obligation arising from section 95 of the **Evidence Act 2008**.

C When jury direction regarding use of other misconduct evidence is to be given

(1) If other misconduct evidence is adduced, the trial judge must ask the parties whether a direction to the jury regarding the use of the evidence is required.

(2) The trial judge must give a direction regarding the use of the other misconduct evidence if a party so requests.

(3) A trial judge need not comply with subsection (2) if there are good reasons for not doing so.

(4) If no party requests a direction regarding the use of other misconduct evidence, a trial judge need not give a direction unless the giving of a direction is necessary to avoid a substantial miscarriage of justice.

(5) Failure to comply with subsection (1) does not of itself constitute a ground of appeal.

Note: See also Part 3.6 of the **Evidence Act 2008**.

D Content of direction

(1) In giving a direction regarding the use of other misconduct evidence, it is sufficient if the trial judge—

(a) summarises how the evidence is relevant (whether directly or indirectly) to the existence of a fact in issue in the trial and directs the jury not to use the evidence for any other purpose; and

(b) warns the jury that it must be careful in how it uses the evidence; and

(c) informs the jury that the evidence forms only part of the prosecution case against the accused; and

(d) warns the jury to guard against deciding the case on prejudice because of what the jury has learned about the accused.

(2) Subsection (1) does not require a trial judge—

(a) to identify the evidence or explain the matters that the jury should consider in deciding whether to use the other misconduct evidence; or

(b) to identify impermissible uses of the other misconduct evidence.

(3) In giving a direction regarding the use of other misconduct evidence, a trial judge need not use a particular form of words.

E Warning not to use certain evidence as tendency evidence

(1) If other misconduct evidence (except tendency evidence) is adduced, a party may request that the trial judge warn the jury not to use the evidence as tendency evidence.

(2) The trial judge must give a warning referred to in subsection (1) if a party so requests.

(3) A trial judge need not comply with subsection (2) if there are good reasons for not doing so.

Commentary on the Proposed Legislation

4.214 The Law Institute of Victoria, Victoria Legal Aid and the Director of Public Prosecutions all indicated support for this proposal. The Criminal Bar Association considered that while there is a need for urgent reform in this area, this proposal is not desirable.

(i) Proposed Section A

4.215 The first section identifies the subject-matter of the provision. Tendency evidence and coincidence evidence are defined in the *Evidence Act 2008*, and this provision will pick up those definitions. The residual category of background or context evidence has not previously been defined and so it must be defined in a way that captures the breadth of this class of evidence.

4.216 The inclusion of context evidence within this definition is designed to address the difficulties discussed earlier in this chapter under the heading 'The probative value of context evidence'. The reference in section D(1) to evidence being indirectly relevant is designed to pick up and describe how context evidence is relevant and probative.

4.217 The response from Victoria Legal Aid raised an issue regarding the absence of a reference to "discreditable acts" in subclause (d) of the definition. This omission is intentional and is designed to avoid the risk of being under-inclusive. The problems of over-inclusion can be dealt with by judges finding good reasons for not giving directions that are not suited to certain pieces of evidence. An under-inclusive definition risks unintentionally preserving the common law and may undermine the effective operation of these reforms.

(ii) Proposed Section B

4.218 These reforms will only apply to other misconduct evidence led by the prosecution. While the defence can call other misconduct evidence, this has not historically given rise to any challenges in the area of jury directions. Such evidence can include matters such as tendency evidence of a co-accused or an alternate suspect, or of the victim to support a defence of self-defence.

4.219 The directions listed in proposed section D are designed to address dangers in the use of the evidence where it is led by the prosecution. Directions about the need for care and the need to keep the evidence in perspective would risk undermining the significance of the evidence where such evidence is called as part of the defence case.

4.220 While proposed section D could be redesigned to apply equally to prosecution and defence led other misconduct evidence, there does not appear to be any clear benefit in doing so.

(iii) Proposed Section C

4.221 This section carries over the general *Pemble* reforms to the area of other misconduct evidence.

4.222 Under this proposal, a direction only needs to be given when it is sought. To protect against the risk of parties overlooking the need for a direction, the judge must specifically ask the parties whether a direction is required. Where a direction is sought, the judge must give the direction unless there are good reasons for not doing so. However, failure to ask whether the parties want a direction will not of itself be examinable on appeal. This provision was modified due to the response from Victoria Legal Aid, which expressed concern that it was previously expressed as a privative clause that could raise constitutional concerns. This provision is designed to express a legislative intention that failure to comply with the obligation will not invalidate the trial. This is appropriate as subclause (1) is a procedural provision designed to assist in the smooth running of the trial and is not a protection for the benefit of the accused. [239]

4.223 The proposal will also pick up the proviso retained in the *Pemble* reforms which deals with substantial miscarriages of justice due to incompetence of counsel. However, given the reforms to the content of the direction as well as the increased focus on forensic decision making, it is expected that these provisions will reduce the circumstances in which a court will conclude that a direction was essential to ensure a fair trial.

4.224 Unlike the general *Pemble* provisions, the judge is not required to assume that an unrepresented accused has requested any direction that is available. Given the potential for directions on other misconduct evidence to backfire and disadvantage the person the directions are designed to protect, it

---

239 See *Tasker v Fullwood* [1978] 1 NSWLR 20 at 23-24; *Project Blue Sky Pty Ltd v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390-391. It is intended that clause C(5) will operate in a similar manner to *Sentencing Act 1991* s.103.

is appropriate for even an unrepresented accused to make a forensic choice whether to take this risk.

4.225 The Criminal Bar Association response states that, in its view, backfire and overcorrection effects are not as common as researchers believe. The Association states that an accused requires the protection of a direction that identifies both the permissible and impermissible uses of the evidence and that the decision to give the direction should not depend on the request of a party. The Report respectfully differs from this view and notes that this view conflicts with the responses from other organisations and would be inconsistent with other reforms already approved by the Jury Directions Advisory Group.

(iv) Proposed Section D

4.226 This proposed section specifies the minimum necessary content of any direction a judge gives in relation to other misconduct evidence. While some judges may choose to give more directions, this paragraph is designed to state what is sufficient.

4.227 The proposed section abandons the *Grech* approach of requiring detailed instructions on the permissible and impermissible uses of the evidence and instead focuses on the need to explain the relevance of the evidence. It abandons the requirement of express warnings against substitution reasoning and propensity reasoning in favour of two warnings about the need for care in using the evidence and a general instruction not to use the evidence for any other purpose.

4.228 Proposed subsection (1)(a) requires the judge to summarise how the evidence is relevant in the case. It is not intended that this statement would require a high level of specificity, and this is reinforced by proposed subsection (2)(a). Historically, judges have been required to identify in detail the chain of reasoning that underlies the evidence. In the case of coincidence

evidence, this required the judge to compare and contrast the alleged similarities and dissimilarities.[240]

4.229 The requirement to identify similarities and dissimilarities poses a trap for judges and distracts from the adversarial nature of criminal trials. The obligation to make arguments about the strength of evidence and whether evidence proves a matter alleged should primarily rest on the parties and the judge's obligation should be limited to correcting any arguments that are unsound in law. The judge's corrective role is designed to address issues that arise when parties make tendency or coincidence arguments where the evidence is not admitted for that purpose. It is intended that this subsection be interpreted in a way that supports the principles inherent in the *Pemble* reforms by placing greater onus on the parties to identify the issues the jury must consider and to put the competing arguments.

4.230 Correct application of proposed subsection (1) will require parties and the judge to clearly identify the permissible uses of the evidence. Given the complexity of this area of the law, there is some risk that judges will fall into appealable error in their attempts to comply with this obligation when they do not receive adequate assistance from counsel.[241] That risk is unavoidable given the subtle distinctions that exist in this area of the law, but will be reduced by the process of requiring parties to request a direction and the judge discussing with the parties the proposed terms of the directions.

4.231 Proposed subsection (1)(c) is designed to address both reasoning prejudice and moral prejudice. The model is inspired by the English approach to bad character evidence which recognises that once the evidence is led, the most practical approach to jury directions is to encourage the jury to be fair in how they treat the evidence. This approach is designed to reduce the risk of a backfire effect by avoiding instructions that are counterintuitive or that appear to prohibit the kind of common sense reasoning that juries are

240 *RR v The Queen* [2011] VSCA 442; *RJP v The Queen* [2011] VSCA 443.
241 See, eg, *RGM v The Queen* [2012] NSWCCA 89, [77] (Fullerton J).

meant to employ. Instead, the instructions aim to appeal to the common sense of juries by reminding them that the evidence is only one part of the prosecution's case and that the evidence must be kept in perspective.

4.232 Subsection (1)(d) requires the judge to warn the jury against the risk of deciding the case on the basis of prejudice. This follows the approach currently adopted in the New Zealand *Criminal Jury Trials Bench Book* and was amended from the original draft based on the response of the Director of Public Prosecutions.

4.233 An alternative approach would be to adopt the minority view from *Mahomed* [242] and state that a direction is sufficient if the judge:

- Identifies the evidence in question and explains the legitimate way in which it may be used;
- Puts the competing contentions of each party;
- Caution the jury against unfairly prejudicial lines of reasoning.

4.234 The danger with that approach is that the obligation to 'explain the legitimate way in which it may be used' may maintain the judge's obligation to spell out the chain of reasoning underlying the evidence, rather than putting this obligation on the parties.

4.235 Similarly, the obligation to 'caution the jury against unfairly prejudicial lines of reasoning' is vague and may either maintain the current level of uncertainty in the law or add to it.

4.236 To minimise the uncertainty, a statement could be added that in the ordinary case, a warning against unfair prejudice will be sufficient if the judge tells the jury that the mere fact that the accused has or may have committed criminal offences, or engaged in discreditable conduct, on other occasions does not establish guilt and that the only legitimate reasoning process is the one the judge has outlined. However, this approach will not eliminate the

242 [2011] 3 NZLR 145.

uncertainty and instead move it to the question of what is meant by the 'ordinary case' and how unusual the issues or the evidence needs to be before a more elaborate warning is required. It may also obscure the fact that cases may be extraordinary because it is a pure similar fact case where the coincidence evidence is so strong that it is capable of establishing guilt by itself.

(v) Proposed Section E

4.237 Given the widespread concern around the common law world about the misuse of propensity reasoning, it is appropriate to maintain a separate provision which allows parties to request a warning against tendency reasoning.

4.238 This paragraph is expressly limited to cases where the evidence is not admitted under s 97 of the *Evidence Act*. This is designed to address the uncertainty that exists following *DR v The Queen*[243] regarding the need for an anti-typecasting direction where evidence is led as tendency evidence. While the distinction between general and specific propensity has been put forward as a way of reconciling directions on permissible and impermissible use, such distinctions are difficult for jurors to understand and this Report does not propose that such directions will continue to be necessary under these reforms. The response of the Director of Public Prosecutions expressly supports this change.

4.239 One consequence of proposed Section E is that the current model directions on separate consideration must be revised.[244] The current separate consideration warning incorporates a warning against propensity reasoning which, under these reforms, will only be necessary where a request is made. In addition, the propensity warning in the separate consideration direction will cease being appropriate where evidence of other counts is led as tendency evidence.

---

243 *DR v The Queen* [2011] VSCA 440.

244 *Criminal Charge Book* 1.8.2.2.

4.240 Historically, there has not been a perception that coincidence evidence poses the same risks as tendency evidence. It is therefore not thought necessary to include an equivalent provision where evidence is not admitted under s 98 of the *Evidence Act*. Such a direction would also be very difficult to formulate and carry a high risk of confusing the jury or causing a backfire effect, as it would involving telling the jury that they must not use some pieces of evidence to reason that the charged act is more likely because of the improbability of coincidence.

Sample Directions

4.241 The proposed legislation is designed to allow the following form of directions to be sufficient:

(i) Tendency evidence

> Members of the jury, some of the evidence you just heard concerned NOA's conduct on occasions that are not directly related to any of the offences. I'm speaking in particular about [*identify relevant evidence*]. The prosecution have led this evidence to show that NOA has a tendency to [*describe relevant tendency*] and for that reason, is more likely to have committed the offence(s) charged.
>
> You must be careful in how you use this evidence. If you do not think that it shows NOA had a tendency to [*describe relevant tendency*], then you will disregard it. You must also keep this evidence in perspective. It is only one part of the prosecution's case and you must not decide the case on the basis of prejudice because of what you've learned about the accused. The evidence has been led for the limited purpose of showing that NOA has a tendency to [*describe relevant tendency*] and so is more likely to have committed the offence(s) charged. You must not use the evidence for any other purpose.

(ii) Coincidence evidence led to prove Identity – Not cross-admissible

> Members of the jury, some of the evidence you just heard concerned NOA's conduct on occasions that are not directly related to any of the offences. I'm speaking in particular about [*identify relevant evidence*]. The prosecution have led this evidence to show that, because of the similarities between the various events, it is likely that the same person was involved in each event. According to the prosecution, that person is the accused, and so you may use the evidence of these other events to find that s/he is guilty of the offence(s) charged. The prosecutor will explain how s/he says the evidence is relevant in more detail at the end of the trial.
>
> You must be careful in how you use this evidence. If you do not think that it

shows that the same person was involved in each event, then you will disregard it. You must also keep this evidence in perspective. It is only one part of the prosecution's case[245] and you must not decide the case on the basis of prejudice because of what you've learned about the accused. You must not use the evidence to say that NOA has a tendency [*describe relevant tendency, eg, to be violent*], and so s/he is more likely to be guilty.

Remember, the evidence has been led for the limited purpose of showing that, because of the similarities between the various events, it is likely that the same person was involved in each, and according to the prosecution, that person is the accused. You must not use this evidence for any other purpose.

(iii) Coincidence evidence led to prove Identity – Cross-admissible

Members of the jury, NOA is charged with [X] offences. The Crown must prove each charge beyond reasonable doubt and it would be wrong to assume that if NOA committed one offence, s/he committed all the offences charged. You will recall that at the start of the trial, I told you that you must consider the offences separately, using only the evidence relevant to that offence.

However you may, if you believe it appropriate to do so, think that because of the similarities between the various offences, it is likely that the same person committed all of these offences. If you draw that conclusion, then you can use the evidence on each charge to prove that the accused committed the other charges.

However, you must be careful in how you use the evidence and must not decide the case on the basis of prejudice of what you've learned about the accused.[246]

In deciding whether you will use the evidence in this way, you must consider the similarities and differences between the various offences.

(iv) Coincidence evidence led to prove credit – Cross-admissible

Members of the jury, NOA is charged with [X] offences. The Crown must prove each charge beyond reasonable doubt and it would be wrong to assume that if NOA committed one offence, s/he committed all the offences charged. You will recall that at the start of the trial, I told you that you must consider the offences separately, using only the evidence relevant to that offence.

---

245 In an extreme case, the instruction 'You must also keep this evidence in perspective. It is only one part of the prosecution's case' should be omitted.

246 In this model charge, the direction in clause D(1)(c) has been omitted on the basis that, in this kind of case, the use of coincidence evidence to prove identity may well be the only evidence in relation to some charges. A judge would then have good reasons for omitting the direction in clause D(1)(c).

However you may, if you believe it appropriate to do so, think that it would be an unlikely coincidence that [X] independent people all invented such similar allegations against the accused. The closer the similarities between the conduct alleged, the less likely it is that the evidence can be explained away as coincidence or invention. So if you that it is an unlikely coincidence that [X] complainants bring such similar allegations, then you could use that to decide that it was more likely that the complainants were telling the truth.

You must be careful using the evidence in this way. If you do not think that the similarities are such that it is unlikely that several independent people might invent the same allegations, then you must consider the charges separately and one complainant's allegations will have no bearing on another complainant's allegations. You must also keep this use of the evidence in perspective. The evidence of other complainants is only one part of the prosecution's case and you must not decide the case on the basis of prejudice because there are multiple allegations against the accused. Finally, you must not use the evidence to say that NOA has a tendency [*describe relevant tendency, e..g, to be violent*], and so s/he is more likely to be probably guilty.

[Similarly, if you think there is a risk that the complainants are not independent, then you must consider the charges separately. Complainants will not be independent if they got together and invented their allegations, or if one or more of the complainants changed their allegations after discussing them with others. If you cannot exclude the possibility that this occurred, then there would not be anything surprising about the existence of similarities between the allegations.][247]

In deciding whether you will use the evidence in this way, you must consider the similarities and differences between the various allegations.

(v) Context evidence

Members of the jury, some of the evidence you just heard concerned NOA's conduct on occasions that are not directly related to any of the offences. I'm speaking in particular about [*identify relevant evidence*].

This evidence has been led for a narrow purpose – to set the scene in which the offences took place. Without such evidence, there is a risk that NOC's evidence would be incomplete and may even be incomprehensible. The evidence also [*describe any other relevant use*].

You must be careful in how you use this evidence. It is only one part of the prosecution's case and you must not decide the case on the basis of prejudice because of what you've learned about the accused.

Those are the only ways you can use this evidence. You must not use it for any other purpose. In particular, you must not use the evidence to say that NOA has a tendency [*describe relevant tendency, e..g, to be violent*], and so s/he

247 This paragraph is only appropriate if collusion or unconscious influence is raised as a real issue in the proceeding.

> is more likely to be guilty. You are also not being asked to find that these other events took place. Even if you were satisfied that these events took place, that would not prove that NOA is guilty of the offence(s) charged. The only permissible use is to allow you to assess the allegations in the context which NOC says these events took place.

4.242 These directions do not include a statement about the standard of proof. Based on the recommendations in Chapter 3, the obligation to direct the jury on the standard of proof for use of other misconduct evidence will only arise in an exceptional case. As explained in Chapter 3, the Report considers that statements about the standard of proof for intermediate findings of fact are only necessary in exceptional cases where the intermediate finding of fact is logically essential to a finding of guilt. In most cases, other misconduct evidence does not have that character.

4.243 If the recommendations in Chapter 3 are not adopted, then standard of proof directions would need to be added to these warnings. Models for such instructions are included under Option 1.[248]

4.244 The Criminal Bar Association disagrees with this approach and argues for a beyond reasonable doubt standard. In their view, this "will encourage greater discrimination [in] prosecutors whether to try and introduce such evidence". This would involve adopting a variation of Options 5 outlined in Chapter 3, which includes a special rule for other misconduct evidence. For the reasons given in that Chapter, the Report respectfully disagrees with this view and prefers the view that beyond reasonable doubt instructions should be given only where a fact is logically indispensible to the prosecution's case.

[248] Above, [4.193]-[4.202].

5. JURY WARNINGS / UNRELIABLE EVIDENCE

5.1 Jury warnings direct the jury about 'how they should *not* reason or about particular care that must be shown before accepting certain kinds of evidence'.[1]

5.2 In Victoria, warnings are required in relation to a range of evidence, including identification evidence, unreliable evidence, corroborating evidence, delay in complaint by sexual offence complainants, and evidence of specific classes of witnesses, in particular, children and sexual offence complainants.

5.3 Directions on identification evidence, delay in complaint and evidence of sexual offence complainants are the subject of separate Criminal Law Review consultation papers. Accordingly, this Chapter focuses on:

- Unreliable evidence warnings under s 165 of the *Evidence Act 2008* (the *Evidence Act*);
- Warnings in relation to children's evidence under s 165A of the *Evidence Act*;
- Corroboration warnings under s 164 of the *Evidence Act*.

Unreliable Evidence

A. The current law in Victoria

5.4 In Victoria, directions on unreliable evidence are primarily given under s 165 of the *Evidence Act*, however a residual common law requirement to give such directions remains. This dual system increases complexity for trial judges, may result in unnecessary or unhelpful directions, and has proved 'a fertile ground for successful appeals'.[2]

---

1 *RPS v The Queen* (2000) 199 CLR 620, 637 (Gaudron ACJ, Gummow, Kirby and Hayne JJ).

2 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC Report No 102, NSWLRC Report No 112, VLRC Final Report (2005) 641 [18.175] ('*UEL Report*').

5.5 Section 165 of the *Evidence Act* requires a trial judge to warn the jury about the potential unreliability of certain evidence if:

- A party in a jury trial requests such a warning;
- The evidence in question is 'of a kind that may be unreliable'; and
- There are no good reasons for not doing so.

5.6 The *Evidence Act* does not define 'unreliable'. However, s 165(1) contains an inclusive list of categories of evidence that are 'of a kind that may be unreliable'. These are:

- Evidence that is exceptionally admitted under the regular rules of evidence:
    - Hearsay; and
    - Admissions;
- Evidence from traditionally suspect categories:
    - Identification evidence;
    - A suspect's unacknowledged admissions to investigators;
    - Accomplices (people who may be criminally concerned in the events being tried);
    - Prison informers; and
    - Evidence in deceased estate claims about matters within the deceased's knowledge; and
    - General unreliability: 'evidence the reliability of which may be affected by age, ill health (whether physical or mental), injury or the like'.[3]

5.7 Evidence that falls within one of these categories will not necessarily be covered by s 165.[4] A warning will only be necessary if the judge finds that the

---

3 As summarised in Jeremy Gans and Andrew Palmer, *Uniform Evidence* (Oxford University Press, 2010) 369.

4 Judicial College of Victoria, *Victorian Criminal Charge Book*, 4.18.1 [20] ('*Criminal Charge Book*').

specific evidence in the case is 'of a kind that may be unreliable'.[5] As the list is inclusive, other types of evidence may also be covered by the section.

5.8 If the section applies, s 165(2) requires a trial judge to direct the jury:

- That certain evidence may be unreliable;
- On what may cause that evidence to be unreliable; and
- That caution is needed in determining whether to accept the evidence and the weight to be given to it.

5.9 In *Bromley v The Queen*,[6] the High Court held that trial judges must give any warning necessary to avoid a perceptible risk of miscarriage of justice. Section 165(5) of the *Evidence Act* provides that s 165 does not affect any other power of the judge 'to give a warning to, or to inform, the jury'. This has been interpreted to mean that in certain circumstances, the common law obligation to give a warning, as required by *Bromley*, continues to operate.[7]

5.10 Accordingly, even if a warning is not required pursuant to s 165, under the common law, a judge may be required to give a warning about the subject matter covered by s 165 where:

- Evidence is adduced that is 'of a kind that may be unreliable' under s 165(1); and
- A warning is necessary and practical to avoid a miscarriage of justice; but
- Neither party requests the warning under s 165(2).

5.11 As s 165 does, the common law requires the trial judge to:

- Describe a source of evidence as 'unreliable';
- Inform the jury of reasons why that source may be (or is) unreliable; and

---

5 *R v Clark* (2001) 123 A Crim R 506, 548 (Heydon JA).
6 (1986) 161 CLR 315 ('*Bromley*').
7 *Singh v DPP* (NSW) (2006) 164 A Crim R 284; *R v Stewart* (2001) 52 NSWLR 301.

- Warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.

5.12 The content of the common law warning differs from s 165. The common law requires the warning or comment to be tailored to the circumstances of the case.[8] However, two main issues are usually addressed, in addition to the requirements in s 165(2):

- The trial judge not only directs the jury about the need for caution in determining whether to accept the evidence and the weight to be given to it, but also tells the jury how to exercise caution, i.e. by informing the jury to scrutinise the witness's evidence with great care;[9] and
- The trial judge may also direct the jury on the issue of 'supporting evidence' by warning the jury that it is dangerous to convict the accused on the unsupported evidence of the witness in question.

5.13 The differences between s 165 and the common law can be summarised as follows:

- A warning is only required under s 165 if it is requested by a party, whereas the common law duty on a trial judge to give a warning may arise even if it is not requested;
- A warning may be required under s 165 where it is requested by the prosecution, whereas the common law has traditionally focused on the needs of defendants; and
- The contents of a warning under s 165 need (only) comply with the terms of s 165(2) while the contents of a warning (or comment) required by the common law will depend on the circumstances of the case,[10] and may include a warning to scrutinise the evidence with great care or a warning that it is dangerous to convict the accused on the evidence.

B. Why examine this topic?

5.14 Unlike the other topics discussed in this report, s 165 does not appear to be creating significant problems in practice.

---

8 *Bromley* (1986) 161 CLR 315.

9 *Robinson v The Queen* (1999) 197 CLR 162; *R v Miletic* [1997] 1 VR 593; *R v Ali* [2002] VSCA 194.

10 *Bromley* (1986) 161 CLR 315.

5.15 However, it is timely to review the provision (and ss 164 and 165A of the *Evidence Act*), given that the Jury Directions Advisory Group (the Advisory Group) has recently discussed reforms to related warnings such as the *Longman* and *Kilby/Crofts* warnings, and identification evidence warnings.

5.16 Like these related warnings, it is worthwhile considering whether s 165 could be improved to help to limit unreliable evidence directions to appropriate cases, and to streamline their content. Such reforms could assist to reduce delay by shortening jury directions and reducing re-trials.

5.17 If unreliable evidence warnings are given where unnecessary, they may become 'diluted by other information and thus become counter-productive'.[11] Length of directions is also relevant. As Justice Neave has said, '(m)ost of us would not contemplate listening to a lecture that might go on for hours or even days. Comprehension fades, boredom sets in and people stop listening after a relatively short period'.[12]

5.18 It is also appropriate to consider whether the directions achieve their aim of lessening the danger that the jury will misuse or overestimate the probative value of the evidence. As the ALRC, NSWLRC and VLRC observed in their 2006 *Uniform Evidence Law* Report (the *UEL Report*), given that a significant portion of the content of evidentiary law is premised on assumptions about the abilities and behaviour of juries, it is crucial that these assumptions be evaluated critically in light of empirical research.[13]

5.19 In particular, the Commissions noted that the issue of when unreliable evidence warnings should be given should be considered in light of empirical

---

11 Queensland Law Reform Commission, *A Review of Jury Directions*, Report No 66 (2009) 511 [16.21].

12 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, 23 January 2012).

13 *UEL Report*, above n 2, [18.8].

research on the effect of these warnings on juries, and whether these impede or enhance juror comprehension.[14]

5.20 Where relevant, empirical research is discussed below, in the context of possible reform of s 165. However, most empirical studies on the psychology of jury decision making in relation to unreliable evidence come from the United States. Victorian juries may differ in composition. The length and content of the directions given to Victorian juries would also differ from those given to American jurors. Further, the American studies often use mock jurors, and quite often college students. There will therefore be limitations on the applicability of these studies to the situation in Victoria.

5.21 Some possible areas for reform include whether:

- interpretation of phrases such as 'of the kind that may be unreliable' pose any difficulties;
- the categories of evidence in s 165 should be amended, or be exhaustive;
- the content of directions can be shortened or simplified; and
- the influence of the common law should be scaled back, e.g. by discouraging phrases such as 'scrutinise with great care' and 'dangerous to convict', or abrogated altogether.

These are discussed below.

5.22 As indicated in the Executive Summary, however, the Report concludes that no significant amendments to s 165 are required, but recommends some amendments to streamline unreliable evidence directions, and to abolish the common law to the contrary of the provision. The proposed new section is discussed below, from paragraph [5.129].

C. 'Evidence of a kind that may be unreliable'

5.23 Under s 165, the trial judge must assess whether the evidence in question is 'of a kind that may be unreliable'. The *Evidence Act* does not

[14] Ibid [18.54].

define the term 'unreliable', instead it provides an inclusive list of categories of evidence that may be unreliable. The class is often interpreted to cover evidence that has been accepted as potentially unreliable by the common law, as well as any other evidence that is 'of a kind that may be unreliable'.

5.24 The *UEL Report* noted that although case law differed on the test for statutory unreliability, it did not appear to be a matter of significant concern in practice and therefore did not recommend any change in this regard.[15] The open-ended nature of s 165 clearly has a measure of uncertainty. However, as the *UEL Report* notes, this does not seem to have created significant difficulties in practice. Flexibility is required to cover all the different types of potentially unreliable evidence, given that the assessment of such evidence will depend largely on its context.

5.25 It is also open to the courts to interpret the wording of the provision as appropriate. In New South Wales, the provision is applied narrowly to focus on evidence about which the court has special knowledge or where there is a particular risk of the jury placing undue weight on the evidence. In *R v Stewart*, Howie J (Hulme J agreeing) said that the section applies:

> …to the evidence if the trial judge considers that the court has some special knowledge or experience about that kind of evidence which the jury may not possess and which may affect its reliability, or because it is the kind of evidence to which a jury may attribute more weight that it really deserves. The risk… may arise because of the nature of the evidence itself or because of the significance which may be attached to it by the jury having regard to the evidence in the context of the trial as a whole.[16]

This also appears to be the approach taken in Victoria.[17]

5.26 The New Zealand provision, s 122 of the *Evidence Act 2006* (NZ), refers simply to 'evidence which may be unreliable', rather than 'evidence *of a kind* that may be unreliable' (emphasis added). It is unclear what value the words 'of a kind' add, but considering that the phrase has been read down and there

---

15 Ibid.

16 *R v Stewart* (2001) 52 NSWLR 301, 322 (Howie J).

17 *Criminal Charge Book*, above n 4, 4.18.1 [28]-[30].

do not appear to be any practical issues arising from its interpretation, the Report recommends keeping the current wording. This would also maintain uniformity with other *Uniform Evidence Act* ('*UEA*') jurisdictions.

D. Categories of evidence listed in s 165

(i) Should the categories of evidence be exhaustive?

5.27 The ALRC initially recommended an exhaustive list of categories.[18] As noted above, however, this appears to be an area requiring more flexibility than an exhaustive list can provide. The Report therefore recommends keeping the current formulation, which gives trial judges a broad discretion to warn the jury in relation to evidence that may be unreliable. This would also maintain uniformity with other *UEA* jurisdictions.

(ii) Should the categories be amended?

5.28 The categories of evidence in ss 165(1)(a)-(g) mirror the equivalent provisions in the other UEA jurisdictions. The exception is s 165(1)(f) in Tasmania, which differs slightly.[19] Each category is discussed below.

5.29 The New Zealand provision also lists categories of evidence that may be unreliable. While there is clear overlap with the UEA categories, there are also differences. The New Zealand provisions are discussed below where relevant.

(iii) Hearsay/Admissions

(a) Legislation

5.30 The rationale for including this category of evidence seems to be to compensate for the more relaxed admissibility provisions introduced by the *Evidence Act*.[20]

---

18 Australian Law Reform Commission, *Evidence*, Report No 38 (1987), app A (cl 140 of draft Evidence Bill 1987).

19 *Evidence Act 2001* (Tas) s 165(1)(f) reads 'acknowledged by the defendant' rather than 'acknowledged in writing by the defendant'.

20 *UEL Report*, above n 2, [18.23].

5.31 Hearsay evidence is also seen to be unreliable because it relies on a witness recalling and repeating a statement allegedly made by another person. This process raises concerns regarding a range of matters including accuracy of the witness's recall, the inability to gauge the honesty of the person who originally made the statement and the motivations of the witness. These issues can be compounded when the evidence is of an admission, and therefore detrimental to the accused's case.

5.32 There is some evidence to suggest that instead of overvaluing hearsay evidence, juries place little weight on this type of evidence.[21] In a 1992 Minnesota study, mock jurors received a combination of eyewitness and/or hearsay evidence and were given standard Minnesota hearsay jury directions. The overall verdict pattern in this study indicated that the mock juror verdicts were not influenced by hearsay testimony.[22]

5.33 However, the data in that study, and other studies like it, did not distinguish between whether the mock jurors did not use the hearsay evidence because they believed it was unreliable, or because they heeded the judge's cautionary instructions to discount the hearsay evidence. Evidence was found to support both sides.[23] The study concluded that further research should be done focusing on distinguishing these two interpretations more conclusively.[24]

5.34 Concerns about the reliability of hearsay evidence have resulted in specific provisions on hearsay evidence in a number of jurisdictions. For example, Queensland does not have a general unreliable evidence provision,

---

21 Lisa Dufraimont, 'Evidence Law and the Jury: A Reassessment' (2008) 53 *McGill Law Journal* 199, 224, citing a mock jury study by Angela Paglia and Regina A Schuller, 'Jurors' Use of Hearsay Evidence: The Effects of Type and Timing of Instructions' (1998) 22 *Law and Human Behavior* 501. In agreement are Peter Miene, Roger C Park and Eugene Borgida, 'Juror Decision Making and the Evaluation of Hearsay Evidence' (1992) 76 *Minnesota Law Review* 683 and Richard F Rakos and Stephan Landsman, 'Researching the Hearsay Rule: Emerging Findings, General Issues, and Future Directions' (1992) 76 *Minnesota Law Review* 655.

22 Miene, Park and Borgida, above n 21, 692.

23 Ibid 695.

24 Ibid 698.

but does have a specific hearsay provision. Section 93C of the *Evidence Act 1977* (Qld) is substantially similar to s 165 but is limited to hearsay.

5.35 Hearsay is a specific category in the New Zealand provision. The New Zealand Act also contains a separate category for 'evidence of a statement by a defendant, if that evidence is the only evidence implicating the defendant'.[25] In Scotland, a hearsay direction is also required.[26]

5.36 This category does not appear to be creating practical difficulties, or to be attracting criticism. Given this, and in light of the other reasons for singling out this type of evidence noted above, the Report recommends retaining the hearsay/admissions category as it is.

(b) Charges

5.37 The model charge on the unreliability of hearsay evidence is at 4.14.2 of the *Criminal Charge Book*.

5.38 The hearsay direction in Victoria appears to be more comprehensive than the direction in other jurisdictions. If the hearsay evidence is admissible, for example, as complaint evidence (s 66), a prior inconsistent statement (ss 103 or 106) or prior consistent statement (s 108), depending on the circumstances, the trial judge may need to:

- Tell the jury how they may use the evidence;
- Warn the jury about the potential unreliability of the evidence under s 165 which in turn involves warning the jury that the evidence may be unreliable, informing the jury of *all* matters that may cause it to be unreliable and warning the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it;
- Identify any other factors that may have a bearing on the reliability of the evidence in the case, such as any inconsistencies that exist between different representations that have been made, or the lack of opportunity to cross-examine the person who made the original statement; and

---

25 *Evidence Act 2006* (NZ) s 122(2)(a) and (b).

26 *Higgins v Her Majesty's Advocate* 1993 SCCR 542.

- Warn the jury that they must take this potential unreliability into account when considering the hearsay evidence.[27]

5.39 In Queensland, the trial judge must tell the jury that: '(Source's) statement reaches you through the perceptions, interpretations and recollections of the witness, not through the recollections of (source). A witness who tells you of what somebody else said may have misheard or misinterpreted what was said. Or the witness might not recall things accurately because of faulty memory'. The jury must be also alerted to the point that the statement was not made on oath and cannot be examined or cross examined. Then the judge is to 'add any particular consideration which may affect reliability, for example, motive in the source to concoct or exaggerate, or any other reason there may be to call into question the source's veracity'. Finally the jury is told to exercise caution in whether to accept the evidence and the weight given to it.[28]

5.40 In New Zealand, if a warning is required, the jury is told to consider the hearsay evidence 'carefully'. The trial judge should instruct the jury that they should be satisfied that the statement was actually made, and should point out that the maker of the statement has not been available to confirm that he or she said what has been attributed to them, or to be cross-examined.[29] The New Zealand specimen direction includes less detail than the Victorian direction.

5.41 In Scotland, where it is appropriate for hearsay evidence to go to the jury, the trial judge must:

- Remind the jury that they may not have had the opportunity to assess the credibility and reliability of the maker of the statement;
- Point out that the truth of the statement has not been tested by cross-examination, or by the witness's demeanour;

---

27 *Criminal Charge Book*, above n 4, 4.14.2.

28 Queensland Courts, *Supreme and District Courts Benchbook*, 58.1 ('*Queensland Courts*').

29 Institute of Judicial Studies, *Criminal Jury Trials Bench Book*, 10.59.

- If the statement was not made under oath or affirmation, comment on that fact;
- Direct the jury to assess the weight of such evidence with care; and
- If there are dangers special to the facts of the case, such as the age or state of mind of the maker of the statement, any interest in the outcome, any improper motive, or any factor bearing on credibility and reliability, give explicit directions on that.[30]

5.42 In Canada, juries are told to consider whether the source actually said the things he or she said. In doing so, the jury is told to use their 'common sense'. If the jury is satisfied that what the source said was accurately reported, the jury is told that they can rely on those parts of the witness's testimony. The jury is told that the evidence may be less reliable than other evidence that has been given. In particular, the jury is told that the source was not under oath or affirmation, he or she did not promise to tell the truth, the jury did not see or hear the source testify, and the source was not cross examined. Finally, the jury is told not to consider the evidence by itself but with the other evidence in the case. The jury is told that it is up to them to decide how much or how little of it they believe to decide the case.[31]

5.43 The most significant difference between the Victorian directions and directions in other jurisdictions is that Victorian judges are required to identify *all* of the risks of unreliability posed by the evidence in the particular case. This issue will be addressed by the proposal to ensure that a judge need only point out significant matters affecting reliability that have been raised by counsel (see proposed section B(4) below at [5.150]). This should enable judges to give shorter and simpler hearsay directions, while still acknowledging that care needs to be taken with such evidence.

5.44 In addition, paragraphs [5.171] to [5.178] discuss possible changes to the wording of the general unreliable evidence charge. For consistency, the same changes should be considered in relation to the hearsay charge.

---

30 Judicial Studies Committee for Scotland, *Jury Manual: Some Notes for the Guidance of the Judiciary* (2011), 28.1.

31 Canadian Judicial Council, *Model Jury Instructions* 11.7.

(iv) Evidence the reliability of which may be affected by age, ill health (whether physical or mental), injury or the like

(a) Legislation

5.45 This category of evidence appears to be modelled on *Stephen's Test*[32] which holds that all persons should be considered competent unless they are 'prevented from understanding the questions put to them or from giving rational answers to those questions by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind'.

5.46 With regard to persons of old age, the reason for concluding that the evidence may be unreliable is primarily a concern about long-term memory.[33] The ALRC considered studies conducted on the memory of the elderly. It found that age differences in short term memory functioning are not substantial[34,] but that the elderly perform more poorly than younger persons in assessments of long term memory.[35]

5.47 The ALRC also considered empirical evidence on persons with mental illness and found that mental disorders can affect sound memory, or in some cases a person may have little grip on reality, such as person with schizophrenia, which can result in the making of statements that are untrue.[36] In its discussion of physical ill health or injury, the ALRC refers to physical injuries causing brain damage such as amnesia.

5.48 New Zealand does not have an equivalent provision, nor do other Australian states and territories which do not have the UEA.

5.49 The provision does not seem to be creating practical problems, nor does it seem to have attracted criticism. However, as the *Criminal Charge Book* notes, in contrast to some other categories of witness that were historically

---

32 *Evidence Ordinance 1955* (Singapore) s 119 as applicable to the Cocos (Keeling) and Christmas Islands as cited in Australian Law Reform Commission, *Evidence*, Interim Report No 26 (1985) [237] ('*1985 ALRC Report*').

33 *1985 ALRC Report*, above n 32, [242].

34 Ibid, citing Elizabeth F Loftus, *Memory* (Addison Wesley Publishing, 1980) 112.

35 Ibid, citing M W Laurence, 'A Developmental Look at the Usefulness of List Categorization as an Aid to Free Recall' (1967) 21 *Canadian Journal of Psychology* 153.

36 *1985 ALRC Report*, above n 32, [242].

regarded as inherently unreliable (e.g. child witnesses), the law never regarded cognitively impaired witnesses as inherently unreliable.[37]

5.50 Juries in California are given a direction favourable to witnesses who may have 'a developmental disability, or cognitive, mental, or communication impairment':[38]

> In evaluating the testimony of a person with a (developmental disability[,]/ [or] [a] (cognitive[,]/ [or] mental[,]/ [or] communication) impairment), consider all of the factors surrounding that person's testimony, including his or her level of cognitive development.
>
> Even though a person with a (developmental disability[,]/ [or] [a] (cognitive[,]/ [or] mental[,]/ [or] communication) impairment)[,] may perform differently as a witness because of his or her level of cognitive development, that does not mean he or she is any more or less credible than another witness.
>
> You should not discount or distrust the testimony of a person with a (developmental disability[,]/ [or] [a] (cognitive[,]/ [or] mental[,]/ [or] communication) impairment)[,] solely because he or she has such a (disability/ [or] impairment).[39]

5.51 In the case of age, the ALRC noted that even if the elderly have poorer long term memories overall, 'individual differences play a very important role in the cognitive process of the aged'. One person might have a significant decline in memory, whereas another shows virtually none.[40] Also, the age of a witness may not be a good measure of whether the witness's evidence is reliable. An elderly witness may be testifying on an event that happened recently, while a 40 year old may testify on an event that happened 25 years ago. The time that has lapsed since the event may be of more importance.[41] (Specific directions on delayed complaint in sexual offence cases have already been discussed with the Advisory Group).

---

37 *Criminal Charge Book*, above n 4, 4.18.7 [34].

38 Cal Pen Code, § 1127g.

39 Judicial Council of California Advisory Committee on Criminal Jury Instruction, *Criminal Jury Instructions* 103.

40 *1985 ALRC Report*, above n 32, [242].

41 New Zealand has a separate category of evidence of the conduct of the defendant that is alleged to have occurred more than 10 years previously: see *Evidence Act 2006* (NZ) s 122(2)(e).

5.52 However, it is clear that a person's age, ill health or injury may sometimes affect reliability. As noted, this provision does not seem to be creating problems. If retained, trial judges will still consider whether the particular evidence in the case is of a kind that may be unreliable, and will still be able to exercise their discretion to not give a warning in appropriate cases, even if one is requested.[42] Accordingly, the Report recommends retaining the category as it is.

(b) Charges

5.53 There is currently no model charge available in relation to this category in Victoria or other UEA jurisdictions. It may not be necessary to develop a model charge given that this appears to be a straightforward direction.

(v) Accomplice/criminally concerned witness

(a) Legislation

5.54 In Victoria, the 'criminally concerned witness' category in s 165 would include most witnesses who would have formerly been treated as accomplices.[43]

5.55 Evidence from accomplices or criminally concerned witnesses can be unreliable due to the witness's motive to lie, bad character and ability to fabricate evidence. The empirical studies on prison informers (see below) indicate that jurors overvalue accomplice evidence in the same way as they overvalue evidence from prison informers.

5.56 The New Zealand provision refers more generally to 'evidence given by a witness who may have a motive to give false evidence that is prejudicial to a defendant'.[44] This would include criminally concerned witnesses, as well as witnesses who are not involved in the alleged offence, but who have other motivations to give false evidence against the accused.

---

42 See, for example, *R v Flood* [1999] NSWCCA 198 in relation to cognitive impairment and *Mitchell v The Queen* [2008] NSWCCA 275 in relation to drugs and alcohol.

43 *Criminal Charge Book*, above n 4, 4.18.3.

44 *Evidence Act 2006* (NZ) s 122(2)(c).

5.57 While this broader application may have its advantages, the Report does not recommend amending the Victorian provision. Witnesses with a motive to lie other than criminally concerned witnesses are adequately covered by the inclusive unreliability provision. The focus on criminally concerned witnesses is consistent with the other UEA jurisdictions, and there do not appear to be concerns with the wording of this provision, or its application. Accordingly, the Report recommends retaining the provision as it is.

(b) Charges

5.58 The model charge on criminally concerned witnesses is at 4.18.4 of the *Criminal Charge Book*.

5.59 The trial judge would briefly describe the basis upon which the witness was asserted to be criminally concerned in the relevant event. The trial judge would then tell the jury that such evidence may be unreliable and outline the factors that may be relevant in that case, for example, that such witnesses may be seeking to shift the blame for offending or people who are involved in criminal activities may be less trustworthy.

5.60 An additional 'dangerous to convict' warning is given where the dangerousness of relying on the witness's evidence should be emphasised. Finally, if there is evidence capable of 'supporting' the witness's evidence, a further direction can be given on supporting evidence.

5.61 Juries in New South Wales must be told if the witness has received indemnities or sentencing benefits.[45] In Victoria, this is not mandatory,[46] but is strongly encouraged by the *Criminal Charge Book*, which includes shaded sections that can be added if the witness has received a sentencing benefit or an indemnity from prosecution.[47]

---

45 *R v Stewart* (2001) 52 NSWLR 301; *Kanaan v The Queen* [2006] NSWCCA 109 ('*Kanaan*'); *R v Sullivan* [2003] NSWCCA 100.

46 *R v Weiss* (2004) 8 VR 388.

47 *Criminal Charge Book*, above n 4, 4.18.4.

5.62 In California, the jury must be directed that they must not convict the defendant based on the accomplice's testimony alone, i.e. there must be supporting evidence. New York also requires the jury to be directed that the defendant may not be convicted of any crime upon the testimony of an accomplice unless there is corroborative evidence. The charges in these two states focus on directions on corroboration/supporting evidence.

5.63 A number of other American jurisdictions require the trial judge to instruct the jury to use particular care or caution when considering accomplice evidence.[48] The Seventh Circuit, for example, states that the trial judge should instruct the jury, 'You may give his/her testimony such weight as you feel it deserves, keeping in mind that it must be considered with caution and great care'.[49] The Ninth Circuit *Manual of Model Criminal Jury Instructions* state that if a witness has received immunity or other benefits in exchange for his or her testimony, or is an accomplice, the jury should consider the extent to which or whether their testimony may have been influenced by such factors. In addition, the jury is told to examine that witness's testimony with greater caution than that of other witnesses'.[50] Juries in Hawaii are given similar directions.[51]

5.64 The word 'suspicion' is also used in directions. For example, in Illinois, the pattern jury instruction for accomplices states:

> 'When a witness says he was involved in the commission of a crime with the defendant, the testimony of that witness is subject to suspicion and should be considered by you with caution. It should be carefully examined in light of the other evidence in the case'.[52]

---

48 Clifford S Fishman, 'Defense Witness as "Accomplice": Should the Trial Judge Give a "Care and Caution" Instruction?' (2005) 96 *Journal of Criminal Law and Criminology* 1, 7.

49 Seventh Circuit Judicial Council, *Pattern Criminal Federal Jury Instructions* (1998) 3.13 http://www.ca7.uscourts.gov/Rules/pjury.pdf.

50 Ninth Circuit Jury Instructions Committee, *Ninth Circuit Manual of Model Criminal Jury Instructions* (2003) 4.9 http://www.ce9.uscourts.gov/web/documents.nsf/crim.

51 Hawaii Supreme Court, Hawaii Criminal Jury Instructions, (2005) 6:01A http://www.courts.state.hi.us/.

52 Illinois Supreme Court Committee on Jury Instructions, *Illinois Pattern Jury Instructions: Criminal*, (2003) 3.17 http://www.state.il.us/court .

5.65 In Canada, these warnings are discretionary and no specific formula has to be followed. However, the format of the suggested direction is quite similar to the direction in Victoria. The jury is told that testimony from accomplices must be approached with 'the greatest care and caution', followed by a list of reasons why evidence from these witnesses is suspect. The jury is told that it would be dangerous to base a conviction on unconfirmed evidence of this sort and is asked to look for other evidence confirming the accomplice's testimony. However, the jury is also told that if they find the testimony trustworthy, they may rely on it even if it is not confirmed by other evidence – Victoria does not take this approach.[53]

5.66 In England, the jury is told about any advantage the accomplice has to gain in giving evidence and that whenever a witness has an advantage to gain, his or her evidence needs to be examined with 'particular care'. The jury is asked to resolve the question of whether they are 'sure' the accomplice has told the truth about the involvement of the defendant. To do this, the jury is asked to look for evidence from other sources that may support what the accomplice said. However, ultimately, the jury is told that they are entitled to act on the accomplice's evidence, whether it is independently supported or not, provided that they have regard to the need for caution.[54]

5.67 It appears that most jurisdictions have strong directions in relation to evidence from criminally concerned witnesses. The approach in Victoria is similar to that taken by other jurisdictions, in particular, New South Wales. However the Victorian sample charge is more comprehensive than the directions given in the United States, and does not include a statement to the jury that they may rely on such evidence whether it is independently supported or not, as is the case in Canada and England.

5.68 Paragraphs [5.172] to [5.178] discuss possible changes to the wording of the general unreliable charge. For consistency, the same changes should be considered in relation to this charge. The proposal to provide that trial judges

---

53 Canadian Judicial Council, above n 31, 11.23.

54 Judicial Studies Board, *Crown Court Bench Book: Directing the Jury* (2010), 159.

need only point out significant matters affecting unreliability raised by counsel (see proposed section B(4) below at [5.151) will assist to streamline directions on this issue. Otherwise, there do not appear to be concerns with the wording of this charge.

(vi) Prison Informers

(a) Legislation

5.69 The term 'prison informer' is not defined in the *Evidence Act*, and has been given its common law meaning by the courts (i.e. a prisoner who gives evidence of an oral confession or admission by another prisoner while in custody).[55]

5.70 Prison informer evidence is seen as inherently unreliable for a range of reasons. These include the bad character of the witness (if they are convicted criminals), the ease with which admissions can be concocted, the motivations of the witness, the pressures of the prison environment, and the difficulty of denying an admission.[56]

5.71 The *Report of the 1989-90 Los Angeles County Grand Jury* (the LA Grand Jury Report)[57] conducted an investigation into prison informer evidence by conducting interviews and obtaining documentary evidence from defence attorneys, prosecutors, correction personnel and the informants themselves. It found that most informants had no qualms about violating the so-called principle of 'honor among thieves' or about lying under oath. The Grand Jury also found that informants could use elaborate strategies to obtain information about a crime to prop up the confession that was fabricated. Also troubling was the involvement of law enforcement officials and prosecutors in securing the false confession – the Grand Jury found that sometimes defendants were deliberately placed in an 'informant tank', a section of the prison that housed informants.

---

55 *Criminal Charge Book*, above n 4, 4.18.5, [8]-[9].
56 Ibid [18]-[19].
57 Cited in Robert M Bloom, 'Jailhouse Informants' (2003) 18 *Criminal Justice* 20, 20.

5.72 Aside from the inherent unreliability of the evidence, juries are also at risk of giving it more value than it deserves. A number of studies have shown that jurors view confessions, in general, as 'extremely persuasive, often conclusive, evidence of guilt'.[58] For example,

- A series of mock juror studies by Kassin and Neumann showed that confession evidence was seen as more important by jurors and had more of an effect on verdicts than other kinds of evidence;[59]
- In a study by Kassin and Sukel, 'the presence of any confession powerfully increased the conviction rate'. This was so in this mock juror study even when the confession was perceived as coerced, when the evidence was inadmissible and even when participants claimed that it did not affect their verdicts.[60]

5.73 These findings are true even when the confession is conveyed by a prison informer. In a relatively recent study,[61] across two experiments, participants read a trial transcript that included a secondary confession[62] either from an accomplice witness, a jailhouse informant, or a member of the community, or a no confession control. In half of the experimental trial transcripts, the participants were made aware that the cooperating witness providing the secondary confession was given an incentive to testify.

5.74 The results of both experiments revealed that information about the cooperating witness's incentive (e.g. leniency or reward) did not affect participants' verdict decisions. In the second experiment, participant jurors appeared to commit a fundamental attribution error, i.e. they attributed the motivation of the accomplice witness and jailhouse informant almost

---

58 Lisa Dufraimont, 'Regulating Unreliable Evidence: Can Evidence Rules Guide Juries and Prevent Wrongful Convictions?' (2008) 33 *Queen's Law Journal* 261, 270.

59 Saul M Kassin and Katherine Neumann, 'On the Power of Confession Evidence: an Experimental Test of the Fundamental Difference Hypothesis' (1997) 21 *Law and Human Behavior* 469.

60 Saul M Kassin and Holly Sukel, 'Coerced Confessions and the Jury: An Experimental Test of the 'Harmless Error' Rule' (1997) 21 *Law and Human Behavior* 27, 44.

61 Jeffrey S Neuschatz, Deah S Lawson, Jessica K Swanner, Christian A Meissner, Joseph S Neuschatz, 'The Effects of Accomplice Witnesses and Jailhouse Informants on Jury Decision Making' (2008) 32 *Law and Human Behavior* 137.

62 Secondary confession was defined as a confession provided by a cooperating witness (as opposed to that obtained directly from the suspect by police investigators) garnered through conversations with the accused.

exclusively to personal factors as opposed to situational factors.[63] Furthermore, both experiments revealed that mock jurors voted guilty significantly more often when there was a confession relative to a no confession control condition.[64]

5.75 The authors, however, acknowledged that it was possible that future research could show that giving participants the resources and motivation that allow them to consider the incentive more carefully might moderate the non-significant effects of incentive seen in this study.

5.76 A number of reports overseas have recommended even stricter means of ensuring the jury does not misuse the evidence:

- In Canada, the Commission on Proceedings Involving Guy Paul Morin (1998) and the Report of the Commission of Inquiry Regarding Thomas Sophonow (2001) recommended that the Canadian criminal justice system exclude jailhouse informant testimony unless it was crucial and there was an independent basis to trust its credibility.[65]
- In the United States, a report from Illinois, Report of the Governor's Commission on Capital Punishment published in 2002 proposed that the reliability and admissibility of the testimony of a jailhouse informant be determined at an evidentiary hearing.[66]

5.77 Admissibility of evidence, including prison informer evidence, is governed by Chapter 3 of the *Evidence Act* and is not the subject of this Report. However, it seems clear that many jurisdictions require strong directions on prison informer evidence. This accords with the common law, which requires a full unreliable witness warning in prison informer cases except in exceptional cases.[67]

5.78 There do not appear to be concerns with the wording of this provision, or its application. Given this, and the policy reasons why prison informer

---

63 Jurors are more likely to attribute the confession to the fact that the defendant committed the crime because 'only a guilty person would confess to such a crime' regardless that the witness had an enormous motivation to fabricate the evidence (having been provided with a situational incentive).

64 Neuschatz, Lawson, Swanner, Meissner and Neuschatz, above n 61, 137.

65 Bloom, above n 57, 26.

66 G H Ryan, *Report of the Governor's Commission on Capital Punishment* (2002) 122.

67 *Pollitt v The Queen* (1992) 174 CLR 558.

evidence is seen as inherently unreliable, the Report recommends retaining this category of evidence as it is.

(b) Charges

5.79 The model charge on confessions to prison informers is at 4.18.6 of the *Criminal Charge Book*.

5.80 The jury is first given a direction that they must be satisfied that the accused actually made the confession in the terms described by the prison informer, that the accused's confession was truthful and that he or she meant to confess to the crime. The jury is told to disregard the confession if they cannot be satisfied of these factors.

5.81 The judge also gives an unreliability warning in relation to the evidence by telling the jury that it is the experience of the courts that the evidence of a prison informer may be unreliable. The judge must state the reasons for unreliability which could include the bad character of prison informers, their motive to lie and the ease of fabricating evidence. The *Criminal Charge Book* includes explanations of each of these reasons.

5.82 The prison informer warnings in Victoria generally include detail of any benefit the prison informer has received from testifying.[68] Although judges are not required to warn the jury about the dangers of convicting on uncorroborated or unsupported evidence, the *Criminal Charge Book* says that in many cases it will be 'prudent' to direct the jury in such terms.[69] The *Criminal Charge Book* also includes a direction for the trial judge to draw the jury's attention to supporting evidence that the accused made the confession or that the confession was truthful,[70] although there may not be many instances where such evidence is available.

---

68 *R v Stewart* (2001) 52 NSWLR 301; *Kanaan* [2006] NSWCCA 109; *R v Sullivan* [2003] NSWCCA 100.

69 *Criminal Charge Book*, above n 4, 4.18.5.

70 Ibid.

5.83 In contrast, New Zealand is not as prescriptive on the topic of cell mate confessions. The New Zealand legislation includes a prison informer category (although it is worded differently from the Victorian provision).[71] The New Zealand *Bench Book* says:

> Presumably the context of the confession will indicate the nature of any warning to be given. A concern with cell mate confessions that has often been expressed relates to the incentives that the alleged recipient of the confidence might have to falsify evidence. Presumably also there may be issues about the genuineness of the alleged confession, in terms of whether it was just bravado or something else. Finally, the evidence of the confession will presumably be oral, and so comment might be required as to the dangers involved in that— there is no written record; the recipient presumably has no training in taking and remembering statements, and so on.[72]

5.84 In the United States, many state and federal courts have jury instructions suggesting to the jury that it should weigh the testimony of a prison informant with caution and close scrutiny.[73] In California, Pen. Code, § 1127(a) says:

> In any criminal trial or proceeding in which an in-custody informant testifies as a witness, upon the request of a part, the court shall instruct the jury as follows: 'The testimony of an in-custody informant should be viewed with caution and close scrutiny. In evaluating such testimony, you should consider the extent to which it may have been influenced by the receipt of, or expectation of, any benefits from the party calling that witness. This does not mean that you may arbitrarily disregard such testimony, but you should give it the weight to which you find it to be entitled in light of all the evidence in the case'.

The Californian direction is noticeably shorter than the Victorian direction.

5.85 In Canada, these warnings are discretionary and no specific formula has to be followed. The approach taken is similar to Victoria: the caution should single out the 'unsavoury witness' for scrutiny, highlight the reasons why the witness may be untruthful (although these reasons are not elaborated on, unlike Victoria) and alert the jury to the danger of relying upon his or her testimony unless they find other evidence to support it. The jury is told that if

---

71 *Evidence Act 2006* (NZ) s 122(2)(d).

72 Institute of Judicial Studies, above n 29, 10.59.

73 Bloom, above n 57, 25.

they find the prison informer's testimony trustworthy, they may rely on it even if it is not confirmed by other evidence.[74]

5.86 In England, if the admission or confession is admissible, any evidence which is reasonably capable of undermining the reliability of a confession should be pointed out to the jury.[75] As is the case in Victoria, there is no general requirement in England that confession evidence, including cell mate confessions, be supported or corroborated by other evidence.[76]

5.87 The directions in other jurisdictions, e.g. California and Canada, are generally shorter than the sample charge in Victoria, as they elaborate less on the reasons for unreliability. The proposal to limit directions to significant matters affecting reliability that have been identified by counsel (see proposed section B(4), below at [5.151]) should assist to shorten directions in an appropriate way, and will have flow on effects on the model charge.

5.88 As discussed above, the *Criminal Charge Book* says that in most cases it will be 'prudent' to direct the jury about the dangers of convicting on uncorroborated or unsupported evidence.[77] Since the trial judge is no longer required to do this under the *Evidence Act*, it is worth considering whether the Charge Book should encourage trial judges to do so.

5.89 Also, paragraphs [5.172] to [5.178] discuss possible changes to the wording of the general unreliable evidence charge. For consistency, the same changes should also be considered in relation to this charge.

(vii) Evidence of police questioning not acknowledged in writing by accused

(a) Legislation

5.90 Unacknowledged evidence of police questioning can be unreliable for a number of reasons. Such evidence may have been obtained involuntarily. If

---

74 Canadian Judicial Council, above n 30, 11.23.
75 Judicial Studies Board, above n 54, 238.
76 Jeremy Dein, 'Non Tape Recorded Cell Confession Evidence – On Trial' [2002] *Criminal Law Review* 630, 638.
77 *Criminal Charge Book*, above n 4, 4.18.5.

fabricated, police officers are more experienced at giving evidence in court and could come across as more convincing than any evidence available to challenge what they have said.[78] There is empirical research showing that juries give more credit to police testimony when faced with conflicting testimony regarding the interrogation.[79] Also, confession evidence is difficult to rebut given that juries tend to believe that a person would not confess a crime he or she did not commit (this is discussed above at paragraph [5.72]).

5.91 It is unclear whether juries would misuse oral evidence of questioning. Drizin and Reich,[80] found that when the jury is left to rely on conflicting testimony between police investigators and a criminal defendant, the jury usually favours the police version. However, in a case study by David Rohde,[81] the jury rejected the police version of circumstances surrounding the interrogation. It does seem like this was an unusual case. In another study,[82] Drizin and Leo found that juries convicted approximately four in five defendants who later recanted their confessions. Significantly, these were defendants whose confessions were later proven to be false.

5.92 Some overseas courts consider that warnings on such evidence are insufficient, choosing instead to exclude such evidence altogether. Alaska requires the electronic recording of interrogations. Confessions not electronically recorded are excluded from evidence at trial.[83] Minnesota has a similar law.[84] Some commentators are of the view that while jury instructions telling the jury to exercise 'caution and care' when dealing with unrecorded

---

78 Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book*, [2-140].

79 Shannon L McCarthy, 'Case Comment: Criminal Procedure – Not There Yet: Police Interrogations Should Be Electronically Recorded or Excluded from Evidence at Trial – *Commonwealth v DiGiambattista*, 813 N.E.2d. 516' (2005) 39 *Suffolk University Law Review* 333, 340.

80 Steven A Drizin and Marissa J Reich, 'Heeding the Lessons of History: The Need for Mandatory Recording of Police Interrogations to Accurately Assess the Reliability and Voluntariness of Confessions' (2004) 52 *Drake Law Review* 619, 638.

81 David Rohde, 'Jurors Faulted Police Work in Murder Case of a Teacher' *New York Times* (New York), 13 February 1999.

82 Steven A Drizin and Richard A Leo, 'The Problem of False Confessions in the Post-DNA World' (2004) 82 *North Carolina Law Review* 891, 922-23.

83 *Stephen v State*, 711 P 2d 1156, 1164 (Burke J) (Alaska, 1985).

84 *State v Scales* 518 NW 2d 587, 592 (Wahl J) (Minn, 1994).

statements during interrogation are a step in the right direction, the ideal standards are those set by the Minnesota and Alaskan Supreme Courts.[85] As with prison informer evidence, the Report does not deal with admissibility issues.

5.93 It seems clear that there is need for directions in relation to such evidence in this area. Accordingly, the Report recommends retaining this specific category of evidence in the legislation. However, it may be possible to improve the wording of the current provision.

5.94 Section 165(1)(f) currently refers to 'oral evidence of questioning by an investigating official of an accused that is questioning recorded in writing that has not been signed, or otherwise acknowledged in writing, by the accused.'

5.95 On its face, the provision refers to evidence where a record of the questioning was made in writing at the time, which the suspect has not signed as a correct record. These situations are unlikely to be encountered in Victoria as s 464H of the *Crimes Act 1958* ensures that confessions or admissions that are not recorded or confirmed by audio or audiovisual means will be admitted only in exceptional circumstances. However, the current provision would not cover exceptional circumstances where the confession or admission is admitted without having been recorded in writing.

5.96 The ALRC's draft provision referred to 'oral evidence of questioning a suspect where no signed record of interview is tendered',[86] but this was not reflected in the UEA.

5.97 The ALRC wording would include situations covered by the Victorian provision, as well as cases where no written record has been made at all. Similarly, the Tasmanian provision reads 'acknowledged by the defendant' rather than 'acknowledged in writing by the defendant'.[87]

---

85 Ibid 339.

86 *1985 ALRC Report*, above n 32, app A [375].

87 *Evidence Act 2001* (Tas) s 165(1)(f).

5.98 Adopting the ALRC and Tasmanian approach gives the provision a broader application in practice, to cover the exceptional cases referred to above. Accordingly, the Report recommends amending the wording of the Victorian provision (see proposed section B(1)(e) below at [5.143]).

(b) Charges

5.99 Victoria does not have a model charge for this category of evidence. With the exception of New South Wales, other UEA jurisdictions do not have a model charge available.

5.100 In New South Wales, the trial judge must tell the jury to treat the evidence of the police with caution and warn them of the possibility that evidence of this kind may be unreliable. The jury is told that the reliability of the evidence is a matter for them to decide. However, the trial judge will give the jury a number of reasons why the evidence may be unreliable, for example, that it is easier for policy officers to fabricate their evidence than it is for the accused to have evidence available to challenge what they have said and that the police did not use the equipment available to them to record the interview.

5.101 Where applicable, the trial judge will also tell the jury that police officers are generally experienced in giving evidence in court and may come across as confident and self-assured. The jury is cautioned again on approaching the evidence. However, the jury is reminded that the reliability of the evidence is a matter for them to decide, and told that the warning is given not because of any opinion the judge may hold, but because the warning is one which is given in every case where this type of evidence is relied upon.[88]

5.102 In Queensland, the *Bench Book* provides for a model direction where the circumstances of an oral admission are disputed or unrecorded. The jury is told to treat such evidence with 'great caution' as a person in that position is

[88] Judicial Commission of New South Wales, above n 78, [2-130].

at a very grave disadvantage. The jury is informed of what these disadvantages may be, including that the accused has no independent means of establishing what happened and that police officers are experienced in giving evidence.

5.103 The jury is also asked to query why the officers, knowing in advance that they would be speaking to the accused, made no arrangements to ensure that the conversation was recorded. The jury is informed of the standard procedure in Queensland to electronically record all interviews with suspects and to query whether the officers' explanations as to why they were unable to do so were convincing.

5.104 Finally, the jury is told to scrutinise the evidence very carefully in deciding whether to accept it. Where a confession is the only, or substantially the only, evidence indicating guilt, the judge should tell the jury to consider whether there is any independent evidence which would satisfy the jury that the admissions were made and that it would be dangerous to convict on that evidence alone.[89] However, the jury is told that they may act on the evidence if, having scrutinised it carefully, they are satisfied of its truth and accuracy.

5.105 Scotland has sample directions where a challenge is made by the accused on the basis of denial that the statement was made to the police; where it is alleged that the statement made to the police was a lie; and where there is a challenge that the statement was unfairly obtained. The sample directions are considerably more brief than the directions in Queensland and New South Wales. For example, where a challenge is made on the basis of denial that the statement was made to the police, all the trial judge is asked to say is:

> The defence say these things were never said by the accused. You've heard evidence from the police and from the accused about this. You decide who's telling the truth. If you thought the accused hadn't said anything, exclude that part of the police evidence from your consideration. If you thought he

[89] Queensland Courts, above n 28, 36.1.

had said what the police say he did, that's part of the evidence in the case. You've then to consider its significance.[90]

5.106 While the Scottish direction is brief, it may not sufficiently address the risk of the jury giving too much weight to such evidence. A Victorian charge could be modelled on the charges in New South Wales. Queensland requires a stronger warning which is inconsistent with the language of s 165.

E. No good reasons for not giving a direction

5.107 Section 165 provides that the trial judge need not give a direction on unreliable evidence where there are good reasons for not doing so. Odgers considers that the question of what may constitute 'good reasons' is controversial.[91] It appears that this concern is due to the myriad of situations where 'good reasons' may exist.[92]

5.108 Alternatives such as 'where it is not necessary to ensure a fair trial' risk introducing further complexity due to 'fair trial' considerations, and do not provide trial judges with any more guidance than is currently the case.

5.109 Accordingly, the Report does not recommend amending this aspect of the provision. Although case law differs on what may constitute 'good reasons', it does not appear to be a matter of significant concern in practice. The current wording is also consistent with the proposed *Pemble* reforms.

F. The residual common law obligation – s 165(5)

5.110 Section 165(5) explicitly preserves the common law powers of trial judges to warn or inform juries. As the *Criminal Charge Book* notes, in exceptional cases, a judge may still be required to give a common law warning about subject matter captured by s 165 where there is evidence of a

---

90 Judicial Studies Committee for Scotland, above n 30, 30.2.

91 Stephen Odgers, *Uniform Evidence Law* (Lawbook, 8th ed, 2009) [1.4.2900].

92 For example, where the evidence is undisputed, where the evidence is not important in the proceeding, where the evidence is unlikely, in the circumstances of the case, to be unreliable, where there has been a 'lack of enthusiasm' in the request for a warning, where the jury is unlikely to overestimate the probative value of the evidence etc.

kind that may be unreliable, a warning is required to avoid a miscarriage of justice and neither party requests a warning.[93]

5.111 The need to give warnings in such circumstances is uncontroversial, and accords with the residual obligation in the proposed *Pemble* reforms. However, s 165(5) contributes to uncertainty about other aspects of the law in this area, particularly given the relationship between ss 164 and 165 of the *Evidence Act*.

5.112 In their 2005 Discussion Paper, *Review of the Uniform Evidence Acts*, the ALRC, NSWLRC and VLRC observed that s 164 abolishes the common law mandatory corroboration regime, replacing it with the warning requirements set out in section 165.

5.113 The Commissions cited Spigelman CJ's comments in *R v Stewart*[94] that ss 164 and 165 'constitute reform of the law of a fundamental kind' and that a 'significant change in the law was intended'.[95] The Commissions noted, however, that s 164 does not prohibit a trial judge from warning that it would be dangerous to convict on uncorroborated evidence.

5.114 Although s 164 and 165 were an attempt at a fresh start, the provisions have preserved the common law in two ways:

a) S 164, while abolishing the necessity for a corroboration warning, does not prohibit the trial judge giving such a warning;[96] and

---

93 *Criminal Charge Book*, above n 4, 4.18.1 [6]-[7].

94 (2001) 52 NSWLR 301, 304.

95 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission *Review of the Uniform Evidence Acts* ALRC Discussion Paper No 69, NSWLRC Discussion Paper No 47, VLRC Discussion Paper (2005) 464, [16.46] – [16.47] ('*Uniform Evidence Acts Discussion Paper*').

96 *Conway v the Queen* (2002) 209 CLR 203, 223-5 (Gaudron ACJ, McHugh, Hayne and Callinan JJ). Section 164 of the *Evidence Act 2008* provides that, except for the offence of perjury or a similar or related offence, 'it is not necessary that evidence on which a party relies be corroborated.' Subsection (3) provides that 'despite any rule, whether of law or practice, to the contrary, but subject to the other provisions of this Act, if there is a jury, it is not necessary that the judge: (a) warn the jury that it is dangerous to act on uncorroborated evidence or give a warning to the same or similar effect; or (b) give a direction relating to the absence of corroboration.'

b) S 165(5) preserves the common law power to warn when the evidence may be unreliable in the particular circumstances.[97]

5.115 Further, s 9 of the *Evidence Act* states that the *Evidence Act* does not affect the operation of the common law, except so far as the Act provides otherwise expressly or by necessary intendment.

5.116 The law was summarised in *Kanaan*[98]. In that case, the accused argued that the common law warning (that it is dangerous to convict on accomplice evidence without corroboration) has survived 'in appropriate circumstances'. The Court disagreed, stating that the necessity for such a direction (or the duty to give such a direction) has not survived. The Court noted:

> In our view, the effect of ss 164–165 (as now interpreted by the High Court) is as follows:
>
> It is not necessary for the evidence of a witness who may reasonably be supposed to have been criminally concerned in the events giving rise to the trial to be corroborated.
>
> The judge, if requested to do so and unless of opinion that there are good reasons not to do so, is:
>
> (a) to give a warning that the evidence of that witness may be unreliable,
>
> (b) to inform the jury of matters that may cause it to be unreliable, and
>
> (c) to warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.
>
> The matters to which reference was generally made in directions which accompanied the common law accomplice warning should, when appropriate, generally be used when informing the jury of the matters which may cause the evidence of that witness to be unreliable.[99]

5.117 The Court in *Kanaan* went on to note that

> '(t)he Judge may, if satisfied that it is necessary in the interests of justice to do so in the particular case, give a warning that it would be dangerous to convict on the uncorroborated evidence of such a witness, but the judge is never under a duty to do so'.[100]

---

97 See J D Heydon, *Cross on Evidence* (LexisNexis, 8th ed, 2010) [15260]. Section 165(5) provides that the 'section does not affect any other power of the judge to give a warning to, or to inform, the jury.'

98 [2006] NSWCCA 109, [217]

99 Ibid.

100 Ibid.

5.118 The result of preserving the common law power to give a direction is that trial judges must pay close attention to a number of overlapping and contradictory regimes.[101] In the *UEL Report*, the ALRC, NSWLRC and VLRC say that a 'near mandatory warning regime' exists in relation to a number of categories of evidence, including unrecorded admissions to investigators, prosecution evidence given by prison informers and identification evidence.[102] The Commissions observed:

> The failure to give an adequate warning may found a successful appeal if it is shown that the failure has resulted in a miscarriage of justice. The strict pronouncements of the High Court, combined with the uncertainties as to the requirements of the warning in order to avoid a miscarriage of justice, mean that this area has recently proved a fertile ground for successful appeals.[103]

5.119 The *UEL Report* proposed two alternative solutions:

- Subject s 165(5) to a request requirement, like s 165(2); or
- Amend the UEAs to provide that the judge's common law obligations to give warnings continue to operate unless all the parties agree that a warning should not be given.[104]

5.120 However, following consultation, the Commissions concluded that neither of the suggestions would have provided a solution but recommended further consideration of the issue.[105]

5.121 Preserving the common law in this area can also lead to uncertainty over the content of directions. As discussed below, there can also be significant differences between statutory warnings and common law warnings in terms of the content and language used in warnings.

5.122 Given these issues, and consistent with the general approach to jury directions reforms, the Report recommends abolishing any common law to the contrary of the unreliable evidence provisions (see proposed section B(7) below at [5.165]-[5.169]). This will clarify that in the vast majority of cases

---

101 Gans and Palmer, above n 3, 373.
102 *UEL Report*, above n 2, 598 [18.27].
103 Ibid 641 [18.175].
104 Ibid 643 [18.181].
105 Ibid 645 [18.188]-[18.190].

(including those involving types of evidence requiring a mandatory or near mandatory common law warning), a warning will only be given if counsel request a warning. Counsel are best placed to determine whether a warning is appropriate in the particular case. However, in line, with the proposed *Pemble* reforms, there will still be a residual obligation on the trial judge to give a direction where one is necessary in the interests of justice, even if a direction has not been requested (due to the incompetence of counsel, for example).

G. Content of a direction

5.123 Section 165 requires the trial judge to warn the jury about the potential unreliability of the evidence. A repetition of the language of s 165(2)(a) is likely to be sufficient to comply with this requirement[106] and no particular form of words is required.

5.124 The trial judge must also inform the jury about 'the matters that may cause (the evidence) to be unreliable'. It is not entirely clear what this requires. On its face, it may require the trial judge to point out any matter that could be capable of causing the evidence to be unreliable, although this seems to have been read down by the courts.[107]

5.125 The *Criminal Charge Book* provides that if a s 165 warning is sought by counsel on a particular basis (e.g. because the witness is an accomplice), the witness's evidence may also be unreliable for a different reason (e.g. because a sentencing benefit was given in return for co-operation). In such cases, the judge may need to inform the jury about *all* of the matters affecting the witness's reliability, not just those matters that gave rise to the need to warn and were adverted to in the request for a warning.[108] The model charges advise the trial judge to 'include *any* of the following factors that are relevant

---

106 *R v Stewart* (2001) 52 NSWLR 301, 331-2 (Howie J).

107 *Kanaan* [2006] NSWCCA 109, [182] (Hunt AJA, Buddin and Hoeben JJ), provides that the direction should inform the jury of matters which may be outside their general experience and understanding, in as much detail as is required to achieve that purpose.

108 See *Criminal Charge Book*, above n 4, 4.18.1 [65] and *R v Stewart* (2001) 52 NSWLR 301, 309 (Howie J).

in the circumstances of the case' (emphasis added).[109] If trial judges are required to list any matter that may affect reliability, this may be unhelpful to the jury and/or unnecessarily prolong the direction.

5.126 Accordingly, the Report recommends limiting the provision to significant matters that have been raised by the counsel who made the request for a direction. This is discussed further below at [5.151].

5.127 The wording of directions can also be controversial, particularly because of the residual common law obligation. The content of common law warnings is based on the requirements of justice and therefore can differ from case to case, causing uncertainty. Further, certain components of the common law warning may be incorporated into a s 165(2)(c) warning, for example:

- The common law direction 'to scrutinise evidence with great care' is allowed and is not inconsistent with the policy of s 165;[110]
- Judges are not prohibited from directing the jury to look for evidence that corroborates, confirms or supports the evidence of a potentially unreliable witness;[111] and
- There is no prohibition on the trial judge from giving a warning that it is dangerous to act on uncorroborated evidence.[112]

5.128 Corroboration requirements are discussed below, under 'Corroboration warnings'. Terms such as 'scrutinise with great care' and 'dangerous to convict' have been said to cause jurors to disregard the evidence completely or be treated as an invitation to acquit.[113] This issue is also discussed further below, under proposed section B(6) at [5.153]-[5.164].

H. Proposed Section – Unreliable Evidence Direction

5.129 As noted above, s 165 does not appear to be causing significant practical problems, or to be attracting criticism from commentators or law

---

109 *Criminal Charge Book*, above n 4, 4.18. 4, 4.18.6 (Criminally concerned witness and prison informer charges).

110 *R v Stewart* (2001) 52 NSWLR 301, 302, 338-94 (Howie J).

111 *Conway v the Queen* (2002) 209 CLR 203; *Robinson v The Queen* (2006) 162 A Crim R 88.

112 Ibid.

113 Queensland Law Reform Commission, above n 11, 511 [16.21].

reform commissions. There are also advantages in maintaining consistency with the other UEA jurisdictions, wherever possible.

5.130 Accordingly, no major changes are recommended. However, the Report recommends amendments to improve aspects of the current provision, reduce uncertainty about the interplay between the provision and the common law, and to make it more consistent with the other jury directions reforms supported by the Advisory Group. The Report also recommends locating the provision in the new *Jury Directions Act* rather than the *Evidence Act*.

5.131 Section 165 (except for subsections (1)(d), (e) and (f), which only relate to criminal proceedings) can remain in the *Evidence Act* so that it continues to apply to civil cases.

5.132 Locating the provision in the *Jury Directions Act* would result in unreliable evidence provisions in two separate Acts that are similar (but not the same). The provisions should work effectively in practice as long as it is clear that the *Evidence Act* provision applies in civil trials, and the *Jury Directions Act* provision applies in criminal trials. A legislative note in the *Evidence Act* would help to clarify this.

5.133 These changes would also make the Victorian *Evidence Act* inconsistent with the other UEA jurisdictions. The provisions on unreliable evidence in the Commonwealth, New South Wales and Australian Capital Territory are currently the same as Victoria, as will be the provisions in the Northern Territory once its UEA commences.[114] Tasmania also has equivalent provisions, however its s 165(1)(f) differs slightly.[115] While not ideal, the benefits will outweigh these drawbacks.

---

114 *Evidence Act 1995* (Cth) ss 164-5; *Evidence Act 1995* (NSW) ss 164-5; *Evidence Act 2011* (ACT) ss 164-5. The *Evidence (National Uniform Legislation) Act 2011* (NT) has been passed by the NT Legislative Assembly and is scheduled to commence later this year.

115 *Evidence Act 2001* (Tas) ss 164-5. Section 165(1)(f) reads 'acknowledged by the defendant' rather than 'acknowledged in writing by the defendant' (this is discussed further below).

5.134 Locating specific jury directions provisions in the new *Jury Directions Act*, rather than the *Evidence Act* would be consistent with the proposal to move s 165B of the *Evidence Act* (the significant forensic disadvantage direction) and the identification evidence provisions to the *Jury Directions Act*.

5.135 There is logic in grouping all specific jury directions provisions together in the *Jury Directions Act*, and it will be easier to find the relevant provisions. It would also ensure that these provisions have the benefit of the guiding principles in the new Act, and reinforce that directions on unreliable evidence should be considered in the context of the cultural shift that the new Act aims to encourage.

5.136 The Advisory Group supports amendments to the Longman provision (s 165B of the *Evidence Act*) and the identification evidence provisions (ss 116 and 165(1)(b) of the *Evidence Act*) that will depart from the *UEA* model. It is also noted that the UEA is not entirely uniform. For example, s 165B in New South Wales differs from the equivalent sections in the other UEA jurisdictions, and Tasmania does not have ss 114 and 115 of the UEA, which deal with visual identification evidence and picture identification evidence.

I. Draft amendment provisions

5.137 A revised provision could be as follows. The changes from the current provision are discussed below.

PART 00—WARNINGS AND INFORMATION

A Definitions

In this Part—

investigating official has the same meaning as in the **Evidence Act 2008**;

trial judge has the same meaning as in the **Criminal Procedure Act 2009**.

B Unreliable evidence

(1) This section applies to evidence of a kind that may be unreliable, including the following kinds of evidence—

(a) evidence in relation to which Part 3.2 (hearsay evidence) or 3.4 (admissions) of the **Evidence Act 2008** applies;

(b) evidence the reliability of which may be affected by age, ill health (whether physical or mental), injury or the like;

(c) evidence given by a witness who might reasonably be supposed to have been criminally concerned in the events giving rise to the criminal proceeding;

(d) evidence given by a witness who is a prison informer;

(e) oral evidence of questioning by an investigating official of an accused where the questioning has not been acknowledged by the accused.

(2) A party may request that the trial judge give a direction to the jury on evidence that may be unreliable.

(3) A party making a request under subsection (2) must specify the significant matters that may make the evidence unreliable.

(4) If a party makes a request under subsection (2), the trial judge must—

(a) warn the jury that the evidence may be unreliable; and

(b) inform the jury of the significant matters identified by the party that may cause the evidence to be unreliable; and

(c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.

(5) A trial judge need not comply with subsection (4) if there are good reasons for not doing so.

(6) In giving a warning and information under subsection (4), a trial judge need not use a particular form of words *[but must not in any way suggest that it would be dangerous or unsafe to convict the accused solely on the evidence]*.

(7) Any rule of law or practice in relation to jury directions or warnings on evidence that may be unreliable to the contrary of this section is abolished.

Notes

1 Sections *[115(7), 116 and 165 of the* ***Evidence Act 2008****]* provide for warnings and information about identification evidence.

2 Section 164(3) of the **Evidence Act 2008** provides that it is not necessary for a judge—

(a) to warn the jury that it is dangerous to act on uncorroborated evidence; or

(b) to give a direction relating to the absence of corroboration.

C Warning about age of child

(1) Section B(4) does not permit a trial judge to warn or inform a jury in a proceeding before it in which a child gives evidence that the reliability of the child's evidence may be affected by the age of the child.

(2) A warning or information referred to in subsection (1) may be given only in accordance with section D.

(i) Section A

5.138 Section A provides that 'investigating official' has the same meaning as in the *Evidence Act* and 'trial judge' has the same meaning as in the *Criminal Procedure Act 2009*.

(ii) Section B(1)

5.139 Paragraph B(1) retains the wording of current s 165(1) except for the changes discussed below. Like s 165, it governs directions in relation to any evidence of a kind that may be unreliable, including evidence that falls within one of the listed categories.

5.140 Two existing categories have been removed from the proposed provision:

- Section 165(1)(b), which relates to identification evidence, in line with the proposed reforms to identification evidence, discussed with the Advisory Group;
- Section 165(1)(g), which relates to proceedings against deceased estates, as it is not relevant to criminal trials.

5.141 The proposed section does not intend to abolish identification evidence as a category of evidence that may require a direction. The Advisory Group discussed reforms to the law on identification evidence at its June 2012 meeting (see also Note 1 in the proposed section).

5.142 The category relating to evidence of questioning (s 165(1)(e)) has been amended, in light of the discussion above (at paragraphs [5.90]–[5.98]). The current provision reads 'oral evidence of questioning by an investigating official of an accused that is questioning recorded in writing that has not been signed, or otherwise acknowledged in writing by the accused'.

5.143 The proposed s (1)(e) focuses on oral evidence of questioning, regardless of whether the questioning has been recorded in writing, and now refers to questioning that the accused has not acknowledged in any way (c.f. 'in writing'). This broadly reflects the original ALRC recommendation[116] and the Tasmanian provision.[117]

5.144 It could be argued that this type of evidence is already covered by s 165(1)(a) which relates to hearsay. However, it seems worthwhile retaining this as a separate category given research indicating that jurors often favour the police version of events,[118] and given that s 464H(2) of the *Crimes Act 1958* allows unrecorded admissions to be admitted into evidence in limited circumstances.

5.145 As discussed above, the remaining categories in s 165(1) seem justified and uncontroversial. Accordingly, the proposed section replicates these categories without amendment.

(iii) Section B(2)

5.146 Section B(2) requires a party to request an unreliable evidence direction. This is consistent with the current law and the proposed *Pemble* reforms.

---

116 *1985 ALRC Report*, above n 32, app A [375].
117 *Evidence Act 2001* (Tas) s 165(1)(f).
118 See, eg, Drizin and Reich, above n 80; 638; Drizin and Leo, above n 82, 922-23.

5.147 This requirement encourages the parties to consider, discuss and focus on the real issues at trial. It emphasises the forensic decision making of counsel, and assists the trial judge to decide which directions to give. It also reduces the likelihood of unnecessary or undesirable warnings (especially as the judge does not need to give a warning if there are good reasons for not doing so).

5.148 In New Zealand, although a party may request that the trial judge give an unreliable evidence warning, the trial judge is under a duty to consider whether a warning is appropriate even if there is no request.[119] Consistent with the proposed *Pemble* reforms, under the proposed provision, it will be rare for the trial judge to give an unreliable evidence direction if neither party has requested the direction. However, the limited residual obligation on the trial judge to give a direction where necessary in the interests of justice (which is also covered by the proposed *Pemble* reforms) will remain.

(iv) Section B(3)

5.149 This provision requires a party who requests a direction to also inform the trial judge of the significant matters that may affect the reliability of the evidence. This is consistent with the increased focus on forensic decision making by the parties. It reflects what is likely to occur in discussions between the trial judge and counsel in any event, but makes the duty on counsel explicit. It is appropriate that a party that requests a direction also identify the matters that they consider should be covered in the direction. This ties in with s B(4)(b), below. (The proposed *Pemble* reforms provide safeguards for unrepresented defendants).

(v) Section B(4)

5.150 This provision is based on current s 165(2).

---

119 *Evidence Act 2006* (NZ) s 122(3).

5.151 However, subparagraph (b) has been amended. The current provision requires the trial judge 'to inform the jury of matters that may cause (the evidence) to be unreliable'. It is not necessary, or helpful to the jury, to require judges to raise every matter that may affect reliability. This may result in unnecessarily long directions, and may result in some evidence being given more weight than is warranted. It is also not consistent with the new focus on forensic decision making by the parties. Accordingly, the proposed provision is narrower, requiring the trial judge to inform the jury of significant matters that have been identified by the party that may cause the evidence to be unreliable. The proposed provision, however, would not prevent the trial judge from informing the jury of matters that may cause the evidence to be unreliable, but have not been identified by the parties.

(vi) Section B(5)

5.152 Like s 165(3), the provision requires the trial judge to give a direction, unless there are good reasons for not doing so. In this context, good reasons may include if the trial judge considers that the particular evidence is not of a kind that may be unreliable (in line with the current common law 'threshold test').

(vii) Section B(6)

5.153 In line with the general approach to be taken in the *Jury Directions Act,* the Report does not recommend that any specific wording be required in directions on unreliable evidence. This reflects both the common law and current s 165(4).

5.154 It would not be appropriate (or possible) to stipulate the precise wording of a direction given that each direction must be tailored to the relevant case. This approach leaves scope for the Judicial College to develop model charges, and will minimise appeals based on wording.

5.155 In the context of other directions, however, the Advisory Group has considered whether particular wording should not be allowed in a direction.

5.156 The majority of the Advisory Group supports precluding 'dangerous or unsafe to convict' and 'scrutinise with great care' and similar phrases from *Longman* directions. However, the majority of the Advisory Group does not support precluding these terms from identification evidence directions.

5.157 'Dangerous or unsafe to convict' is a term that may cause jurors to disregard the evidence completely, or be taken by jurors as a coded direction to acquit the accused.[120] It could be seen as encroaching on the jury's role to assess all the evidence presented to it in reaching a verdict. Directing the jury that it is (or may be) dangerous to convict due to certain evidence is also quite different in emphasis from warning the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it (as the legislation requires).

5.158 The Bench Notes provide that the 'dangerous to convict' form of warning that was sometimes regarded as mandatory may now never be regarded as mandatory, due to s 164(3) of the *Evidence Act*. However, it remains a permissible form of warning at the discretion of the trial judge, unless excluded by a different statutory provision (such as s 165B of the *Evidence Act*).[121]

5.159 'Scrutinise with great care' is another term that can be problematic in directions. Cases have held that the common law direction 'to scrutinise evidence with great care' is allowed, and is not inconsistent with the policy of s 165.[122]

5.160 Although less problematic than 'dangerous or unsafe to convict', 'scrutinise with great care' can raise similar concerns in relation to possible misinterpretation by jurors. In addition, members of the Advisory Group have noted (in the context of the *Longman* warning) the significant conceptual difficulty in singling out particular types of evidence for this type of scrutiny,

---

120 Queensland Law Reform Commission, above n 11 [16.21] (in relation to the *Longman* warning).

121 *Criminal Charge Book*, above n 4, 4.18.1.

122 *R v Stewart* (2001) 52 NSWLR 301, 320, 338-9 (Howie J).

given that that the jury should be scrutinising all the evidence before it 'with great care'.

5.161 On the other hand, there is greater justification for excluding these terms from *Longman* warnings due to the particular nature and history of sexual offence trials, and the need to combat common misconceptions about sexual offence complainants.

5.162 Outside the sexual offence context, trial judges may consider the evidence to be so unreliable in particular cases that use of the term 'dangerous or unsafe to convict' or 'scrutinise with great care' is warranted. Some concern has been expressed about restricting the discretion of trial judges where there are no specific policy reasons for doing so (other than general consistency with other jury directions provisions). Particular concerns were raised about restricting the use of 'scrutinise with great care', and the Report does not recommend precluding that term from unreliable evidence directions.

5.163 It is acknowledged, however, that most unreliable evidence directions should not contain these phrases. The *Criminal Charge Book* provides that 'it has been suggested that a jury should only be directed that a particular factor makes it "dangerous to convict in the absence of corroboration" in exceptional circumstances. This formula is too likely to be mistaken by a jury as a direction to acquit.' Further, that 'if a judge wishes to direct the jury about the dangers of acting on uncorroborated evidence, it is preferable that he or she instead directs them about the "dangers of convicting", with reference to the asserted dangers)'.[123]

5.164 The Report does not have a concluded view on whether the term 'dangerous or unsafe to convict' should be prohibited, but recommends that the issue be discussed by the Advisory Group.

---

123 *Criminal Charge Book*, above n 4, 4.18.1 [83]-[84]. See also the 'Dangers of Convicting' sections in the charges at 4.18.4 (Criminally Concerned Witness) and 4.18.6 (Prison Informer).

(viii) Section B(7)

5.165 Section 165(5) currently provides that the section does not affect any other power of the judge to give a warning to, or to inform, the jury. As discussed above, this means that mandatory, or near mandatory, common law warnings continue to be required in relation to some forms of evidence. This provision may also contribute to uncertainty in relation to the content of unreliable evidence warnings.

5.166 In contrast, s B(7) abolishes any rule or practice of law to the contrary of the provision. Abolishing common law to the contrary is consistent with the general jury direction reforms, and should help to clarify the law in this area.

5.167 This will mean that if a party requests an unreliable evidence direction, the trial judge must give the direction (unless there are good reasons not to do so). Otherwise, no direction is required, subject to the limited residual obligation on the trial judge to give a direction that is necessary in the interests of justice. (This obligation is covered in the proposed *Pemble* reforms).

5.168 Section 164 of the *Evidence Act*, which allows judges to give corroboration warnings, is discussed below.

5.169 As noted above, separate proposals relating to identification evidence have been discussed with the Advisory Group, and are likely to result in specific provisions in the *Jury Directions Act*. This provision is not intended to inadvertently abolish the law in relation to identification evidence.

(ix) Section C

5.170 Section C reflects current s 165(6).

J. Possible reforms to the Criminal Charge Book

Amend the wording of the model charges

5.171 The general unreliable evidence charge (4.18.2) currently provides:

> I have already told you the general rules for assessing witnesses' evidence. I must now warn you about the need for caution when considering the evidence of NOW. I must give you this warning because [*identify bases of unreliability, e.g., "NOW's evidence may have been affected by her history of drug use"*].
>
> My warning to you is as follows. It is the experience of the law that the evidence of a witness [*identify basis of unreliability, e.g., "who was drug affected at the time of the events"*] may be unreliable. This unreliability can arise due to [*list reasons for potential unreliability, e.g., "the effects drug use can have on the user's perceptions and recollections"*].
>
> [*If necessary, explain the grounds of unreliability in further detail, and relate to the facts and arguments in the case*]
>
> The law says that every jury must take this potential unreliability into account when considering the [type of evidence given by NOW / evidence of a witness such as NOW]. You must take it into account in determining whether you accept NOW's evidence at all, and if you do accept it, in whole or in part, in deciding what weight to give to that evidence.
>
> [Shaded sections relating to supporting evidence also form part of the model charge, to be added where relevant. These are not set out here.]

5.172 The reference to '*every* jury' seems overly strong, and does not coincide with the requirements of s 165 (which does not require a warning in relation to evidence that may be unreliable in every case).

5.173 The charge also seems to focus heavily on the reliability of the class of evidence, rather than on the reliability of the particular witness's evidence. In particular, the charge provides that 'if necessary', the judge should relate the grounds of unreliability to the facts and arguments in the case.

5.174 In the UEL report, the ALRC, NSWLRC and VLRC noted that s 165 'shifts the emphasis away from generalised warnings towards the particular risk in the circumstances of the case.'[124] An exclusive focus on the unreliability of classes of evidence as a whole can also be problematic in theory. The reliability of evidence should be assessed in context, not just on the basis of the class to which it belongs. In 2005, the Law Council submitted

---

124 *UEL Report*, above n 2, 597 [18.24].

that 's 165 should be clarified to at least discourage judges from warning that evidence of a certain class is generally unreliable.'[125]

5.175 The warning could be amended along the following lines:

> I have already told you the general rules for assessing witnesses' evidence. I must now give you a specific warning about the evidence of NOW because [*identify basis of unreliability, e.g., "NOW's evidence may have been affected by her history of drug use"*].
>
> You need to be cautious in deciding whether to accept NOW's evidence. If you accept his/her evidence, you must also be cautious in deciding what weight to give to that evidence. This is because the experience of the law is that the evidence of a witness [*identify basis of unreliability e.g. "who was drug affected at the time of the events"]* may be unreliable.
>
> NOW's evidence may be unreliable because [*list reasons for potential unreliability, both generally and in the context of the case*].

5.176 This wording reflects the wording of s 165(2) more closely. It also makes it clear at the start what the jury is being asked to do with the evidence (i.e. use caution in deciding whether to accept it, and what weight to give to it), before then explaining why the evidence may potentially be unreliable. This may accord better with the research suggesting that charges should address the most important things first, and address the general before the specific.[126]

5.177 For consistency, similar changes could be considered for the specific unreliable evidence charges, i.e. criminally concerned witness (4.18.4), confession to prison informer (4.18.6) and hearsay evidence (4.14.2).

5.178 As discussed above, jurors in England and Canada (in relation to accomplice and prisoner informer evidence) are directed that they may ultimately act on the evidence whether it is independently supported or not. This option could be considered to 'balance' out directions that include the phrases 'dangerous or unsafe to convict' or 'scrutinise with great care', if required.

---

125 *Uniform Evidence Acts Discussion Paper*, above n 95, 472 [16.88].

126 Peter M Tiersma, 'Communicating with Juries: How to Draft More Understandable Jury Directions: How to Draft More Understandable Jury directions' (2006) 10 *Scribes Journal of Legal Writing* 1.

Warnings in relation to children's evidence

A. The current law

5.179 Section 165(6) of the *Evidence Act* provides that warnings in relation to the reliability of children's evidence may only be given in accordance with s 165A of the *Evidence Act*.

5.180 Section 165A(1) of the *Evidence Act* prohibits trial judges from warning or suggesting to juries that children are inherently unreliable witnesses, that they are inherently less reliable witnesses than adults, or that their evidence requires greater scrutiny than that of adults. It also prohibits the giving of corroboration warnings in relation to a child's evidence.

5.181 However, s 165A(2) provides that subsection (1) does not prevent the judge, at the request of a party from:

- Informing the jury that the evidence of a particular child may be unreliable, and the reasons why it may be unreliable; and
- Warning or informing the jury of the need for caution in determining whether to accept the evidence of the particular child and the weight to be given to it

if the party has satisfied the judge that the information or warning is warranted by circumstances (other than solely the age of the child) particular to the child that affect the reliability of the child's evidence.

5.182 Section 165A(3) provides that the section does not affect any other power of a judge to give a warning to, or to inform, the jury.

5.183 Section 165A was enacted to address concerns that judges were giving inappropriate warnings in relation to children's evidence under s 165 of the *Evidence Act*, despite the statutory abolition of the common law corroboration warning in respect of child witnesses across Australia.[127]

5.184 Each of the other UEA jurisdictions has an equivalent s 165A (with minor differences, e.g. the ACT refers to telling the jury, rather than informing it, in subsection (2)).

---

127 *UEL Report*, above n 2, 605-10 [18.55]-[18.69].

5.185 South Australia provides that the judge must not warn the jury that it is unsafe to convict on the uncorroborated evidence of a child unless:

- The warning is warranted because, in the circumstances of the particular case, there are cogent reasons, apart from the fact that the witness is a child, to doubt the reliability of the child's evidence; and
- A party has requested the warning.[128]

5.186 In Western Australia and the Northern Territory, s 106D of the *Evidence Act 1906* and s 9C of the *Evidence Act*, respectively, provide that the judge is not to warn the jury, or suggest in any way, that it is unsafe to convict on the uncorroborated evidence of a child because children are classified by the law as unreliable witnesses.[129]

5.187 In New Zealand, s 125 of the *Evidence Act 2006* provides that:

> In a criminal proceeding tried with a jury in which the complainant is a child at the time when the proceeding commences, the Judge must not give any warning to the jury about the absence of corroboration of the evidence of the complainant if the Judge would not have given that kind of a warning had the complainant been an adult.
>
> In a proceeding tried with a jury in which a witness is a child, the Judge must not, unless expert evidence is given in that proceeding supporting the giving of the following direction or the making of the following comment:
>
> (a) instruct the jury that there is a need to scrutinise the evidence of children generally with special care; or
>
> (b) suggest to the jury that children generally have tendencies to invent or distort.

5.188 Subsection (3) of the New Zealand provision provides that the section does not affect any other power of the judge to warn or inform the jury about children's evidence exercised in accordance with the requirements of regulations. Regulation 49 of the *Evidence Regulations 2007 (NZ)* gives specific guidance to judges who decide to give a direction in relation to evidence of

128 *Evidence Act 1929* (SA) s 12A.

129 As noted above, the *Evidence (National Uniform Legislation) Act 2011* (NT) has been passed and will commence later this year.

very young children (i.e. children under six years of age). In brief, it refers to ways in which the memory of very young children can differ to adults, but includes that 'this does not mean that a child witness is any more or less reliable than an adult witness'.

5.189 In England, corroboration of the evidence of children is not required. This requirement was abolished by s 34(2) of the *Criminal Justice Act 1988*. The *Crown Court Bench Book* notes that while there may be a need to advise the jury of the need for caution before accepting the evidence of a young child where the nature or quality of the evidence appears to require it, such warnings are no longer routinely given.[130]

5.190 Section 659 of the Canadian *Criminal Code*[131] abrogates any requirement for the court to give the jury a warning about convicting an accused on the evidence of a child.

5.191 In California, an instruction on child witnesses must be given on request and the wording of the direction is determined by the *Californian Penal Code*.[132]

B. Why examine this provision?

5.192 As with s 165, s 165A of the *Evidence Act* does not appear to be causing significant practical problems, or to be attracting criticism. However, it is appropriate to examine the provision in light of proposed reforms to related warnings provisions, such as ss 116 and 165 of the *Evidence Act*, and s 61 of the *Crimes Act 1958*.

C. Proposed section – Children's evidence directions

5.193 Section 165A reflects contemporary understanding of children's cognitive and recall skills. It is based on research demonstrating that

130 Judicial Studies Board, above n 54, 366-70.
131 RSC 1985 c C-46.
132 Cal Pen Code § 1127.

'children's evidence is not inherently less reliable than that of adults, but that its reliability may be influenced by particular factors'.[133]

5.194 Overall, s 165A appears to be working well. In addition, as with s 165 of the *Evidence Act*, there are advantages in maintaining consistency with the other UEA jurisdictions, wherever possible.

5.195 Accordingly, the Report does not recommend any major change to the provision except to:

- Abolish any common law rules to the contrary of the provision; and
- Locate the provision in the new *Jury Directions Act* rather than the *Evidence Act*.

5.196 As noted above, the Advisory Group supports moving s 165B to the *Jury Directions Act* and the Report recommends enacting the general unreliable evidence direction provision in that Act. For the same reasons as s 165 (see [5.131]-[5.136]), the Report proposes enacting this provision in the *Jury Directions Act.*

5.197 Section 165A (except for subsection (1)(d), which only relates to criminal trials) will need to remain in the *Evidence Act*, so that it can continue to apply to civil trials. As with the unreliable evidence provision, this would result in similar, but not identical, provisions on children's evidence in the *Evidence Act* and the *Jury Directions Act*. It would be helpful to include a note in the *Evidence Act* referring to the new provision.

D. Draft amendment provisions

5.198 A revised provision could be as follows. The changes from the current provision are discussed below.

> **D Warnings in relation to children's evidence**
>
> (1) A trial judge in a proceeding in which evidence is given by a child before a jury must not do any of the following—

133 *UEL Report*, above n 2, 605-10 [18.55]. See also 605-6, [18.55]-[18.58].

(a) warn the jury, or suggest to the jury, that children as a class are unreliable witnesses;

(b) warn the jury, or suggest to the jury, that the evidence of children as a class is inherently less credible or reliable, or requires more careful scrutiny, than the evidence of adults;

(c) give a warning, or suggestion to the jury, about the unreliability of the particular child's evidence solely on account of the age of the child;

(d) give a general warning to the jury of the danger of convicting on the uncorroborated evidence of a witness who is a child.

(2) Subsection (1) does not prevent the trial judge, at the request of a party, from—

(a) informing the jury that the evidence of the particular child may be unreliable and the reasons why it may be unreliable; and

(b) warning or informing the jury of the need for caution in determining whether to accept the evidence of the particular child and the weight to be given to it—

if the party has satisfied the court on the balance of probabilities that there are circumstances (other than solely the age of the child) particular to the child that affect the reliability of the child's evidence and that warrant the giving of a warning or the information.

(3) Any rule of law or practice in relation to jury directions or warnings on children's evidence to the contrary of this section is abolished.

(i) Section D(1)

5.199 This reflects current s 165A(1), except for the removal of the words 'in the case of a criminal proceeding' in s 165A(1)(d).

5.200 Section 165A(1) appears to be working as intended, and is more comprehensive than the provisions in some other Australian jurisdictions e.g. Western Australia. Therefore, the Report does not recommend any amendments to the provision.

(ii) Section D(2)

5.201 Section 165A(2) allows the judge, at the request of a party, to warn or inform the jury in relation to the evidence of a particular child. There is empirical research that justifies the ability of judges to comment on the

potential unreliability of a particular child's evidence.[134] A number of studies have shown that young children can be suggestible, and that suggestive interviewing techniques can exacerbate this suggestibility, creating some risks in the fact finding process. It does not appear that the application of s 165A(2) is giving rise to any significant concerns.

5.202 Accordingly, the wording of the proposed provision is the same as s 165A(2), except for the addition of 'on the balance of probabilities'. This reference to being satisfied 'on the balance of probabilities' reflects the current law. Section 142 of the *Evidence Act* requires the judge to be satisfied on the balance of probabilities. This is an appropriate threshold, and should be retained. This will require specific reference in the provision, as s 142 of the *Evidence Act* will no longer assist if this provision is in the *Jury Directions Act*.

5.203 The *UEL Report* discussed whether warnings or information on the evidence of a particular child in s 165A(2) should be limited to 'exceptional circumstances'.[135] However, it is unclear whether referring to 'exceptional circumstances' would add much to the current formulation, which provides that the warning must be 'warranted by circumstances particular to the child'. Another possible option would be to require expert evidence before a warning is given, along the lines of the New Zealand approach. However, s 79 of the *Evidence Act* and s 388 of the *Criminal Procedure Act 2009* (in sexual offence cases) already allow for expert evidence to be adduced.

5.204 Accordingly, such amendments do not seem warranted, particularly given there are no practical concerns with this subsection. Also, the benefits of any amendments would need to be balanced against the advantages of uniformity with the other UEA jurisdictions.

---

134 Stephen Ceci and Richard Friedman, 'The Suggestibility of Children: Scientific Research and Legal Implications' (2000) 86 *Cornell Law Review* 33, 34. There is, however, some criticism of this view. See, eg, Thomas D Lyon, 'The New Wave in Children's Suggestibility Research: A Critique' (1999) 84 *Cornell Law Review* 1004.

135 *UEL Report*, above n 2, 606 [18.60].

(iii) Section D(3)

5.205 Section 165A(3) currently preserves the common law power of judges to warn or inform juries. As noted above, it does not appear, from commentators or a review of case law, that this is being relied upon to give inappropriate or questionable directions in relation to children's evidence.

5.206 However, there seems no reason to retain the common law in this area, particularly given the wide scope of s D(2). Accordingly, s D(3) abolishes any rule or practice of law to the contrary of the provision.

5.207 Abolishing common law to the contrary is consistent with the general jury direction reforms. This should help to clarify that there is only a limited power to warn or inform the jury about the reliability of a particular child's evidence under s D(2). (This is subject to the limited residual obligation on a trial judge to give a direction that is required to be given in the interests of justice, as covered in the proposed *Pemble* reforms).

E. Possible reforms to the Criminal Charge Book

5.208 The unreliable child witness warning charge (at 4.4.2) provides:

> At the start of the trial, I told you that you must consider the evidence logically and dispassionately without sympathy or prejudice. I also told you that you should use your common sense when deciding whether witnesses are telling the truth. Some of you may have children or grandchildren of your own, or may have experience dealing with children. Others may not. Because of that, I'm going to mention some matters for you to consider when assessing the evidence of [*identify child witnesses*].
>
> The experience of the law is that the age of a witness is not determinative of his or her ability to give truthful and accurate evidence. Like adults, some children will provide truthful and accurate testimony and some will not. However, children are not miniature adults and you should judge them using criteria appropriate to the witness' development, understanding and ability to communicate.
>
> There are, however, other reasons for being cautious about accepting NOW's evidence, because it is potentially unreliable.
>
> [*Identify reasons for potential unreliability and relate to the facts*]
>
> ▸ If the reason for the potential unreliability is suggestibility, adapt the following shaded section
>
> NOW's evidence may be unreliable because children, such as NOW, can be more suggestible than adults and may give answers they believe an adult

> wants to hear. You should consider whether NOW's evidence was obtained by neutral, non-suggestive questions and, if not, whether the manner of questioning may have affected his/her answers.
>
> Because NOW's evidence is potentially unreliable, I must warn you to take care in determining whether you accept NOW's evidence at all, and if you do accept it, in whole or in part, in deciding what weight to give to that evidence.[1]
>
> [Shaded sections relating to supporting evidence also form part of the model charge, to be added where relevant. These are not set out here.]
>
> Notes
>
> 1. Under s165A(2), a judge may choose to 'warn' or 'inform' the jury of the need for caution. This charge is drafted on the basis that the judge has chosen to give a warning. If he or she has instead chosen to simply provide information about the risks, the charge will need to be modified accordingly.

5.209 The wording of the charge may inadvertently imply that children as a class are unreliable witnesses, or may be less reliable than adults, or that their evidence requires more scrutiny than that of adults. For example, the reference to children not being miniature adults may bring with it these negative connotations.

5.210 The charge on child witnesses in California may provide an example of wording that is more neutral:

> You have heard testimony from a child who is age 10 or younger. As with any other witness, you must decide whether the child gave truthful and accurate testimony. In evaluating the child's testimony, you should consider all of the factors surrounding that testimony, including the child's age and level of cognitive development. When you evaluate the child's cognitive development, consider the child's ability to perceive, understand, remember, and communicate. While a child and an adult witness may behave differently, that difference does not mean that one is any more or less believable than the other. You should not discount or distrust the testimony of a witness just because he or she is a child.

5.211 The wording of the charge could also be simplified (e.g. to refer to evidence rather than testimony).

5.212 The first part of the charge could be amended along the following lines:

> At the start of the trial, I told you that you must consider the evidence logically and dispassionately without sympathy or prejudice. I also told you that you should use your common sense when deciding whether witnesses

are telling the truth. I am now going to mention some matters for you to consider when assessing the evidence of [*identify child witnesses*].

Like adults, some children will give truthful and accurate evidence and some will not. In considering the child's evidence, you should consider all of the factors surrounding that evidence, including his/her age, development, understanding and ability to communicate. You should not discount or distrust the testimony of a witness just because he or she is a child.

However, there are other reasons why NOW's evidence is potentially unreliable. Accordingly, you need to be cautious in deciding whether to accept NOW's evidence. If you accept his/her evidence, you must also be cautious in deciding what weight to give to that evidence.

NOW's evidence may be unreliable because [*list reasons for potential unreliability in the context of the case*].

Corroboration warnings

A. The current law

5.213 Sections 164(1) and (2) of the *Evidence Act* provide that, except for perjury and related or similar offences, it is not necessary that evidence on which a party relies be corroborated.

5.214 Section 164(3) provides that:

> Despite any rule, whether of law or practice, to the contrary, but subject to the other provisions of this Act, if there is a jury, it is not necessary that the judge –
>
> (a) warn the jury that it is dangerous to act on uncorroborated evidence or give a warning to the same or similar effect; or
>
> (b) give a direction relating to the absence of corroboration.

5.215 The provision has abolished the *requirement* to give corroboration warnings (in all cases except for perjury). However, the section continues to *allow* judges to give common law corroboration warnings.[136]

5.216 The provisions on corroboration and corroboration warnings in the other UEA jurisdictions are the same as Victoria.[137]

---

136 *Conway v The Queen* (2002) 209 CLR 203, 223 (Gaudron ACJ, McHugh, Hayne and Callinan JJ).

137 *Evidence Act 1995* (Cth) ss 164-5; *Evidence Act 1995* (NSW) ss 164-5; *Evidence Act 2011* ss 164-5 (ACT); *Evidence Act 2001* (Tas) ss 164-5; *Evidence (National Uniform Legislation) Act 2011* (NT) ss 164-5 (not yet commenced).

5.217 Section 632 of the Queensland *Criminal Code Act 1899* removes the corroboration requirement for most offences, with the exception of sedition, perjury and false verified statements or false declarations.[138]

5.218 In South Australia, there is no corroboration requirement in relation to the evidence of children.[139] In a charge of a sexual offence, the trial judge is not required to warn the jury that it is unsafe to convict the accused on the uncorroborated evidence of the alleged victim.[140] The corroboration rule has not otherwise been abolished.

5.219 Section 50 of the *Evidence Act 1906* (WA) abolishes any common law requirement to give a corroboration warning, and provides that the judge shall not give a corroboration warning to the jury unless the judge is satisfied that such a warning is justified in the circumstances.

5.220 Section 121 of the *Evidence Act 2006* (NZ) is similar to s 164 of the *Evidence Act*, but abolishes corroboration requirements except in relation to perjury, false oaths, false statements or declarations and treason.

5.221 In England, a corroboration direction is required in limited cases involving perjury[141] and attempts to commit perjury.[142]

5.222 In California, there is still a duty to give a corroboration direction in cases involving evidence from accomplices and prison informers.[143] In New York, corroborative evidence is still required to support accomplice evidence and confession evidence.[144]

B. Why examine this provision?

5.223 It is appropriate to examine s 164(3) given its relationship with s 165 of the *Evidence Act*. The section itself also raises a number of issues.

---

138 *Criminal Code Act 1899* (Qld) ss 52, 125, 195.
139 *Evidence Act 1929* (SA) s 12A.
140 *Evidence Act 1929* (SA) s 34L(5).
141 *Perjury Act 1911* (UK) 1 & 2 Geo 5, c 6, s 13.
142 *Criminal Attempts Act 1981* (UK) c 47, s 2(2)(g).
143 Cal Pen Code §1111, 1111.5.
144 *NY Criminal Procedure Laws* §60.22, 60.50.

5.224 As noted above, s 164 (in conjunction with s 165) was intended to constitute a significant change in the law. The *Criminal Charge Book* notes a full corroboration warning is undesirable in all but exceptional cases.[145] However, the ability to give a warning remains.

5.225 Allowing judges to give a direction when a direction has not been requested by counsel or where counsel has requested a direction not be given is, on its face, inconsistent with the proposed *Pemble* reforms, and the increased focus on forensic decision making by the parties in the general jury direction reforms. It is unclear, however, whether this is a problem in practice.

5.226 There is a concern that corroboration warnings can often be detrimental to the accused (contrary to their intent). This is because the judge gives a warning, but then proceeds to list all the evidence capable of constituting corroboration. The ALRC has observed that if the jury is given a corroboration warning, it may focus its attention on the question whether there is corroborative evidence and may be more willing to convict as soon as it is satisfied that such evidence exists.[146]

5.227 There is also concern that the complexity of corroboration warnings may lead to errors (and appeals) and make it more likely that the jury will ignore such warnings. Corroboration warnings generally require the trial judge to:

- Warn the jury about the danger of convicting the accused on the uncorroborated evidence of the witness in question;
- Identify the evidence capable of constituting corroboration;
- Explain the role of the jury;
- Explain the conditions under which the jury may act upon uncorroborated evidence; and
- Note any dangers that persist despite corroboration.

---

145 *Criminal Charge Book*, above n 4, 4.8.1 [8]. See also 4.18.1 and 4.18.7 (Bench Notes: Unreliable Evidence Warnings and Unreliable Witness Warnings at Common Law).

146 *1985 ALRC Report*, above n 32 , [489].

5.228 The ALRC has criticised the common law corroboration warning requirements saying:

> The present law is too rigid and technical. There is a strong case for saying that it does not adequately serve the rationale of minimising the risk of wrongful convictions. Warnings can be required when not necessary and avoided when they should be given in the circumstances of the particular case. In addition, warnings in their present form distract attention from the issue of the reliability of the evidence in question. Finally, the directions to be given are so complex that they are likely to be ignored… What is required is a simpler regime, under which the trial judge must consider whether a direction appropriate to the circumstances should be given.[147]

5.229 Gans and Palmer have observed:

> Ideally, the law of corroboration should no longer be mentioned in uniform evidence law jurisdictions. But, unfortunately, trial judges are still permitted to issue corroboration warnings if they want to. In doing so, they become subject to two difficult regimes. First, any such direction must comply with the previous technical law, which requires the trial judge to identify all evidence that is or is not 'capable' of being corroboration (including negotiating a set of convoluted rules about self- or mutual corroboration). Second, trial judges must be careful to comply with statutory rules enacted to bar some corroboration warnings, notably in relation to children and sexual assault complainants [citations omitted].[148]

5.230 Odgers also questions whether these 'complex and technical directions' should be avoided.[149]

5.231 As Gans and Palmer note, a significant complexity relates to the identification of evidence that is capable of being corroboration. A misidentification of non-corroborative evidence as capable of being corroborative will constitute a misdirection, even if the corroboration direction was not required at law.[150]

5.232 This aspect of the law does not appear to have changed due to the *Evidence Act*. That is, where a corroboration direction is given, the law still

147 Ibid [1015].
148 Gans and Palmer, above n 3, 374.
149 Odgers, above n 91, [1.4.2880].
150 *Conway v The Queen* (2002) 209 CLR 203.

relies on the classic statement from *R v Baskerville*[151] that corroborative evidence must

> '[tend] to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused'. It is sufficient for the corroborative evidence to confirm or tend to confirm or render that person's evidence in a material particular more probable.[152]

5.233 Misidentification of corroborative evidence has been an appeal point in a number of Victorian cases. However, based on a review of case law over the past five years, it does not appear that any appeals have been successful on this point.[153]

5.234 Accordingly, despite the concerns raised by commentators, it does not appear that this aspect of s 164(3) is creating significant problems in practice. The section allows trial judges to give corroboration warnings, but does not require them to do so. The *Criminal Charge Book* makes it clear that a full corroboration warning should only be given in exceptional cases.

C. Recommendation – no change to s 164(3)

5.235 If reforms were considered necessary, one option would be to make corroboration warnings conditional on a request by a party. However, the proposal to require parties to inform the trial judge of which directions they want the judge to give, or not give (under the proposed *Pemble* reforms), makes it less likely that a corroboration warning will be given against the wishes of counsel in any event.

5.236 In addition, requiring trial judges to give corroboration warnings on request (except if there are good reasons not to, and subject to the limited residual obligation to give directions that are necessary in the interests of

---

151 [1916] 2 KB 658.

152 *Sumner v The Queen* (2010) 29 VR 398, *R v Kuster* (2008) 21 VR 407, *Goussis v The Queen* [2011] VSCA 117.

153 See, eg, *Sumner v The Queen* (2010) 29 VR 398, *Goussis v The Queen* [2011] VSCA 117, *R v Kuster* (2008) 21 VR 407, *R v Holmes* [2008] VSCA 128.

justice) may result in more corroboration warnings than the current provision. This would be undesirable.

5.237 Providing that a corroboration warning is 'not necessary' is consistent with the other UEA jurisdictions and New Zealand. It is also consistent with the provisions in Western Australia, Queensland and South Australia, which provide that such warnings are 'not required'.[154]

5.238 Accordingly, on balance, the Report recommends that s 164(3) remain as it is.

5.239 The Report also recommends that s 164(3) remain where it is. As subsections (1) and (2) of s 164 relate to substantive corroboration requirements, it is appropriate that they remain in the *Evidence Act*. It seems more logical to keep subsection (3) with these substantive provisions, rather than moving it to the *Jury Directions Act*. If this is the case, it would be helpful to include a note in the *Jury Directions Act* (e.g. alongside the unreliable evidence provisions) referring to s 164(3) of the *Evidence Act*.

Responses from stakeholders

5.240 In general, stakeholders did not raise any concerns with the reforms proposed in this Chapter. The Criminal Bar Association expressed reservations with the UEA provisions but took the view that as they are now law, there is no need to amend them. As discussed above, the Report considers that the reforms proposed to the UEA provisions are justified to simplify and clarify this area of the law, and to be consistent with related reforms supported by the Advisory Group.

---

154 *Evidence Act 1929* (SA) s 34L(5); *Criminal Code Act 1899* (Qld) s 632; *Evidence Act 1906* (WA) s 50.

SCHEDULE

A SELECTION OF RESPONSES PROVIDED ON BEHALF OF ORGANISATIONS CONSULTED DURING THE COURSE OF PREPARATION OF THE REPORT

Victoria Legal Aid

Lawyers And Legal Services

SIMPLIFICATION OF JURY DIRECTIONS

COMMENTS ON DRAFT REPORT DATED 19 JUNE 2012

INTRODUCTION

The Draft Report is an impressive and important piece of work. We support the direction and approach to the proposed reforms. We particularly endorse the extent to which the Draft Report has reviewed and relied on the psychological research in this area, balancing it with the accumulated experience of those who operate in the criminal justice system.

While the current jury directions reform process is important and overdue, it is equally important to ensure that the complexity of directions does not inexorably evolve such that another 'clean slate' reform process is needed in another 20 years.

In this regard, it is impossible not to be struck by the extent to which the use of formal language in appellate decisions comes to infect jury directions. On a number of occasions the Draft Report refers to cases in which the Court of Appeal has noted that 'no particular form of words is required', yet that has not prevented the content and language of the judgment being treated as if it was a statute. While intermediate appellate courts should not become the drafters of the charge book, nonetheless, an attempt to put concepts into language that more easily translate into good jury directions could be made.

The process of translating statutory language into intelligible jury directions causes problems as well. Converting technical – or even simply formal – language into jury directions carries the risk of translation error and encourages Judges to 'stick to the statute' rather than promote jury understanding. When drafting provisions that will provide the substantive content of jury directions (including offences, defences, warnings and other directions) simple, active and commonly used language should be used. The less translation required the better.

The comments that follow are directed towards further simplification consistent with the approach taken in the Draft Report. The vast majority of comments relate to the proposed complicity reforms. There are no comments in relation to Jury Warnings where the proposals are consistent with the approach taken in related areas by the Advisory Group.

COMPLICITY

We support the thrust of the proposals and, in particular, strongly agree that improving jury directions in relation to complicity cannot be achieved without statutory reform of the substantive law.

The issues raised below – and reflected in the two alternative sets of proposed amended provisions that follow – are intended to promote further simplification of the statutory regime. The first part deals with substantive issues, the second with the structure of the proposed provisions and the third comments on possible consequential changes.

Substantive Issues

Does "procure" need a successor?

The Draft Report proposes that "procure" become "bring about". The latter is simpler and more modern and should be preferred given that an important goal of this reform is to simplify this subject for juries.

However, given the extent to which Australian law has treated "aid, abet, counsel and procure" collectively, and given the consistency and force of the calls for an approach recognising only assistance and encouragement as modes of complicity, it should be asked whether "procure" could be dispensed with rather than modernised.

The only way to resolve the issue is ask whether any conduct that would amount a "procuring" would not be captured under a simple assistance and encouragement formulation. It is difficult to conceive of a situation in which a person might "procure" the commission of an offence without "encouraging" it unless an extremely narrow (and highly unlikely) construction of "encourage" was adopted. The difficulty in finding an example of "procuring" that would not amount to "assisting" or "encouraging" is illustrated by the facts of *Giorgianni*. The reason why the Crown sought to identify the allegedly negligent conduct in that case as procuring is because it was the only available mode of complicity that could reasonably be argued to not require intention. Once it was made clear – and as is proposed in the Draft Report – that procuring also requires proof of intention then any remaining reason for maintaining procuring as a separate mode of complicity disappears.

Most references in Victorian cases to "procure" are not as an independent basis for liability, but partnered with "counsel"[1]. This is consistent with the way in which Australian law – comprehensively reviewed in the Draft Report – has treated "aid, abet, counsel and procure" as conveying a single concept not a list of separate bases for derivative liability. The only legal distinction between counseling and procuring is that causation has at times been thought necessary for procurement but not for counseling. The Victorian Court of

[1] See, for example, *Likiardopoulos* at [26]

Appeal in *Likiardopoulos* rejected the existence of this distinction – although, as noted at paragraph 2.72 there is English authority to the contrary.

This distinction is either maintained or created (depending on the view taken of the current state of the law) by the explicit rejection of the need for causation in relation to "encouraging" in the proposed provisions. The strongest argument for requiring causation is that causation is implicit in the language of "procure" or "bring about" (paragraph 2.256).

However, the problem only arises if a successor to procure is, as a matter of policy, required. If, as is submitted, no such concept is required because the field is covered by "encouragement" and "assistance" then the need for a distinction based on causation disappears. This would also have the happy consequence of simplifying the directions that would otherwise need to be given to a jury about the need for causation (or not) depending on the basis for liability.
Stepping back and looking at the formulation without a successor to "procure", there is coherence and – subject to the discussion below about "knowingly concerned" – apparent completeness to liability being founded on assistance or encouragement.

What does "knowingly concerned" add?

The Draft Report proposes an additional "knowingly concerned" basis for complicity. As the Draft Report notes, this phrase has been explored in other contexts, most notably in relation to customs and trade practices.

Again, with an eye to reducing the number of concepts and phrases that a jury has to grapple with, the need for "knowingly concerned" in the way that the Draft Report proposes to deploy it should be examined:

1. At the very least "knowingly concerned" would take in all of the ground covered by "encourage", "assist" or "bring about" – particularly given that each of these modes of complicity require proof of intention.

2. Based on *R v Campbell* (2008) 73 NSWLR 272, it seems clear that "knowingly concerned" can capture a broader scope of conduct than "encourage", "assist" or "bring about". In that case, the conduct occurred after the process of "importing" had formally concluded. Such conduct could, as the decision in *Campbell* recognises, be captured through 'after the fact' accessorial liability. It follows that there is no pressing policy reason to include the phrase in order to capture a *Campbell* like situation. The real question is whether there is any other type of conduct that should be captured as a matter of policy but which is not captured by "assisting" and "encouraging".

3. The best argument for not including "knowingly concerned" in the way proposed is that it does not, on its face, tell a jury in language likely to be understood what range of additional conduct is intended to be caught. While the existing body of case law

on the phrase is, on one argument, a good reason for including it, it also demonstrates the likelihood of substantial litigation about the meaning of the phrase which is in turn likely to give birth to increasingly complex jury directions.

4. If there is a type of conduct which, as a matter of policy, should be included beyond "assist, encourage or bring about" then it would be preferable to identify that precisely and describe it in as simple a way as possible. However, it may be that there is no such area of conduct.

The proposed section 324(1) uses the word "involved" as the introduction to the three modes of complicity. As the Draft Report notes at 2.221, the phrase "knowingly concerned" and "knowingly involved" are synonyms.

If the phrase "knowingly concerned" is preferred, then it may be better to treat as the overall description of the conduct required with the proposed first and third modes of complicity being examples of it. However, this is not our preferred approach for the reasons set out above.

If the concept underlying "knowingly concerned" is enacted as a separate mode of complicity then we would favour "knowingly involved". It seems likely to be better understood by a jury than "knowingly concerned" which carries an arguable connotation of interest short of involvement.

"Of a general character"

The first limb of the proposed modes of complicity is put in the following way:

> "If the person:
>
> > intentionally assists, encourages or brings about the commission of the offence or an offence of the same general character, believing that the offence or an offence of the same general character is being, or is to be, committed; or"

This is a complex provision. We query whether anything of substance would be lost if the second part of the formulation ("believing that the offence or an offence of the same general character") was removed. It seems logical that person who intentionally assists the commission of a robbery must necessarily have believed that robbery (or an offence of the same general character) is being or is to be committed.

"**Assists" or "helps"?**

The draft provision uses "assists" in place of "aids" which represents a major improvement on the current language. However, given that the underlying goal of this work is to find the simplest and most effective way of helping juries to understand this concept – while

still ensuring the intellectual coherence of the law – the word "help(s)" should be considered as an alternative. It has the advantage of common usage and is a less formal way of describing what seems to be an identical concept[2]. As a result, the meaning may come more intuitively to juries than the alternatives.

"Rendered"

Proposed section 324(2)(b) uses the word "rendered". In the interests of choosing simple language that can itself be used in a jury direction as is, we propose that "made" be substituted.

Structure of the Proposed Provisions

There are always options as to how to structure a set of provisions such as this one. The structure currently proposed is entirely reasonable, but the following suggestions identify possible ways of simplifying it.

Section 324A contains the central rule underpinning the regime. However, to understand that rule the reader needs to return to the earlier interpretation section. It would be preferable to combine the rule with its content in one provision. This is possible without creating an overly long provision by separating out other topics currently within those provisions that easily stand-alone. The most obvious example is withdrawal.

At a more minor level the word "offence" could easily be included as a definition ("means an offence whether summary or indictable").

The first of the amended provisions set out on the next page makes these structural changes only, while the second makes these plus the substantive changes discussed above.

Consequential Changes: Incitement and Conspiracy

At paragraph 2.263 the sensible proposal is made to make the law of incitement consistent with the proposed changes to complicity. The same argument can be made in relation to conspiracy. If group activity is, in effect, the completed conspiracy then there seems no reason why the operative language used to capture the 'agreement' should be any different.

PROPOSED PROVISIONS – STRUCTURAL CHANGES ONLY

00 Complicity

For Subdivisions (1) and (2) of Division 1 of Part II of the **Crimes**

[2] The word "assist" is invariably defined by reference to the word "help". See, for example, *Macquarie Dictionary* (Macquarie Library, North Ryde, 4th ed, 2005) 79.

Act 1958 substitute—

"(1) ***Involvement in commission of offences***

323 Definitions

In this Subdivision—

principal offender means a person who actually performs the physical elements of an offence.

Offence means a summary offence or an indictable offence.

324 Person involved in commission of offence taken to have committed the offence

(1) Subject to section 324D, if an offence is committed, a person who is involved in the commission of the offence by

(a) intentionally assisting, encouraging or bringing about the commission of the offence or an offence of the same general character, believing that the offence or an offence of the same general character is being, or is to be, committed; or

(b) being in any way knowingly concerned in the commission of the offence or an offence of the same general character; or

(c) entering into an agreement, arrangement or understanding with another person to commit the offence or an offence of the same general character.

is taken to have committed the offence.

(2) A person may be involved in the commission of an offence, by act or omission—

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

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

(3) In determining whether a person has encouraged the commission of an offence, it is irrelevant whether or not the principal offender in fact was encouraged to commit

the offence.

324A Person may withdraw from involvement in commission of offence

(1) Despite section 324, a person is not taken to have committed an offence if—

(a) before the conduct constituting one or more of the physical elements of the offence commences, the person—

(i) terminates his or her involvement in the commission of the offence; and

(ii) takes all reasonable steps to prevent the commission of the offence; and

(b) the person's prior actions have not rendered the commission of the offence unavoidable.

324B Other offenders need not be prosecuted

A person who is involved in the commission of an offence may be found guilty of the offence whether or not any other person is prosecuted for or found guilty of the offence.

324C Offender's role need not be determined

A person may be found guilty of an offence by virtue of section 324A if the trier of fact is satisfied that the person is guilty either as a principal offender or as a person involved in the commission of the offence but is unable to determine which applies.

324D No liability for certain persons

Nothing in this [Part/Division] imposes liability on a person for an offence that, as a matter of policy, is intended to benefit or protect that person.

324E Abolition of complicity at common law

(1) The law of complicity (aiding, abetting, counselling or procuring the commission of an offence) at common law is abolished.

(2) The doctrines at common law of acting in concert, joint criminal enterprise and common purpose (including extended common purpose) are abolished."

PROPOSED PROVISIONS – STRUCTURAL AND SUBSTANTIVE CHANGES

00 Complicity

For Subdivisions (1) and (2) of Division 1 of Part II of the **Crimes Act 1958 substitute**—

"(1) ***Involvement in commission of offences***

323 Definitions

In this Subdivision—

principal offender means a person who actually performs the physical elements of an offence.

Offence means a summary offence or an indictable offence.

324 Person involved in commission of offence taken to have committed the offence

(1) Subject to section 324D, if an offence is committed, a person who:

(a) intentionally helps or encourages the commission of the offence, or an offence of the same general character; or

(b) enters into an agreement, arrangement or understanding with another person to commit the offence or an offence of the same general character.

is taken to have committed the offence.

(2) A person may be involved in the commission of an offence, by act or omission—

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

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

(3) In determining whether a person has encouraged the

commission of an offence, it is irrelevant whether or not the principal offender in fact was encouraged to commit the offence.

324A Person may withdraw from involvement in commission of offence

(1) Despite section 324, a person is not taken to have committed an offence if—

(a) before the conduct constituting one or more of the physical elements of the offence commences, the person—

(i) terminates his or her involvement in the commission of the offence; and

(ii) takes all reasonable steps to prevent the commission of the offence; and

(b) the person's prior actions have not made the commission of the offence unavoidable.

324B Other offenders need not be prosecuted

A person who is involved in the commission of an offence may be found guilty of the offence whether or not any other person is prosecuted for or found guilty of the offence.

324C Offender's role need not be determined

A person may be found guilty of an offence by virtue of section 324A if the trier of fact is satisfied that the person is guilty either as a principal offender or as a person involved in the commission of the offence but is unable to determine which applies.

324D No liability for certain persons

Nothing in this [Part/Division] imposes liability on a person for an offence that, as a matter of policy, is intended to benefit or protect that person.

324E Abolition of complicity at common law

(1) The law of complicity (aiding, abetting, counselling or procuring the commission of an offence) at common law is abolished.

(2) The doctrines at common law of acting in concert, joint criminal enterprise and common purpose (including extended common purpose) are abolished."

INFERENCES AND CIRCUMSTANTIAL EVIDENCE

We support the proposed reforms in relation to proof of non-elemental issues.

Many – but not all – of the issues surrounding inferences, circumstantial evidence and direct evidence relate to the language used. We support the removal from usage of both "inference" and "circumstantial". The Draft Paper currently proposes removing the former but not the latter. While there is no obvious substitute phrase for "circumstantial case", such a case is essentially one which is proved by a combination of indirect evidence and perhaps it should be described in that way. This avoids the occasionally pejorative connotations that the phrase carries.
However, regardless of the language used, the Draft Report is convincing in concluding that juries can:

1. Undervalue circumstantial evidence; and

2. Overvalue direct evidence.

This is a very important issue given that all evidence is either direct or circumstantial. These risks go to the heart of the proper functioning of the jury system and it is critical that effective techniques to reduce these risks are put in place. The proposals in the Draft Report effectively deal with the undervaluing of circumstantial evidence. They do not deal with the overvaluing of direct evidence and should do so. A version of the sort of warning proposed by the Jury Directions Advisory Group in relation to identification evidence could be considered, as could a direction in accordance with the Heller recommendations reproduced at paragraph 3.253.

OTHER MISCONDUCT EVIDENCE

For the reasons set out in the Draft Report, we support Option 3.

Proposed section A defines "other misconduct" evidence. There may be an issue with the absence of a reference to "discreditable acts" in subclause (d) of the definition. On its face (d) does not require the evidence to be of a discreditable and it would – at least theoretically – include neutral context evidence. While reasonable arguments could be made to limit the meaning of (d) to discreditable acts, the need to do so could be removed through a simple amendment.

Proposed section C (1) requires the Trial Judge to ask the parties whether a direction is required and C(5) makes a failure to comply with that requirement un-examinable on appeal or review. In relation to tendency and coincidence evidence a Notice of intention to call the evidence will have been filed or the requirement to do so positively dispensed with by the Trial Judge. Accordingly, it should always be clear whether there is such evidence in a trial. The potential complexity arises in relation to categories (c) and (d)

evidence, particularly context evidence. We support the primary obligation to identify issues requiring directions falling to counsel and query whether this obligation on a Trial Judge is genuinely required.

The phrase "not subject to review" appears intended to operate as a privative clause ousting the jurisdiction of the Supreme Court in Judicial Review. If so, it may fall foul of the extension of constitutional protection of the supervisory jurisdiction to State decisions in *Kirk v Industrial Relations Commission of New South Wales* (2010) 84 ALJR 154. While judicial review could technically be taken for such a failure it is difficult to imagine the circumstances in which that might occur.

Kindly convey to his Honour our views as follows:

Complicity

- We agree with the conclusion expressed in para. 2.213, that the "only realistic way in which jury directions regarding complicity can be simplified is through significant statutory reform".

- The proposed legislative model at para. 2.267 is an improvement on the current law. We query, however, the use of the term "offence of the same general character". Is that term meant to convey an offence of the same general legal character, or one that factually fits generally within what the person had in contemplation?

Inferences and Circumstantial Evidence

- It has been our experience that – with one exception – directions on circumstantial evidence or inferential reasoning are not accompanied by any difficulty in their delivery to juries. The one exception is in identifying indispensable intermediate facts spoken of in *Shepherd* (which might be accommodated by a simple change to the Charge Book reflecting the notion that it those facts which *the jury* regard as indispensable which are important). Apart from that, however, and with respect to those who hold differing views, we see no compelling need to alter the directions currently given with respect to circumstantial evidence and inferences.

Other Misconduct (Tendency, Coincidence and Context)

- This area of the law is, we think, a mess, and in urgent need of legislative reform. Not only is it difficult to reconcile authority across different jurisdictions, but a deal of what has been said by the Victorian Court of Appeal is inconsistent.

- Much of the difficulty in this area flows from the imprecision of the UEA provisions, and the continuing recognition of somewhat nebulous categories of evidence such as "context".

- Based on our observation, we do not think that the "backfire" effect or "overcorrection" effect are as common as researchers would have it. In our view, when evidence of other misconduct is admitted, it is essential that an accused person be given the protection of a direction not only as to the permitted uses of the evidence but as to the uses which are not permitted. For the

sake of consistency, such directions ought to be given whether they are asked for by a party or not.

- We respectfully disagree with the suggestion (para. 4.238) that there not be a mandatory direction as to the standard of proof. A direction that all "other misconduct" evidence must be established on the criminal standard will encourage greater discrimination n prosecutors whether to try and introduce such evidence, and, it is to be hoped, more consistency in approach to the various categories of evidence encompassed under the general umbrella.

Jury Warnings – Unreliable Evidence

- Had we been asked our view prior to the introduction of the UEA, we may well have expressed the view that the UEA provisions should not be adopted.
- The UEA provisions now, however, being a *fait accompli*, we see no reason for making any further modification to them. As the Draft Report recognises (para. 5.129), the changes effected by the UEA do not appear to be causing significant practical problems.

Should his Honour desire it, we would be pleased to discuss (and expand upon) any of the above.

Phillip Priest QC & Paul Holdenson QC

5 July 2012

Justice Mark Weinberg
Court of Appeal
Supreme Court of Victoria
210 William Street

By email: Maria.Luzza@supremecourt.vic.gov.au

Dear Justice Weinberg

Simplification of Jury Directions Project – Draft Report

Thank you for consulting with us in relation to the Simplification of Jury Directions Project.

We note that due to the strictly confidential nature of this consultation, our comments here may not necessarily reflect the position of the LIV Criminal Law Section as a whole.

We also note that the report is quite extensive and complex so our comments will be brief and restricted to one or two issues in the recommended legislative amendments.

Broadly, we agree with the suggested recommendations as outlined in the report's careful analysis of the four most problematic areas of the law.

We agree with the underlying principles of the report, that simplifying jury directions in a realistic manner requires substantial modification to the law and the language in which legislation is currently written.

One example of this is in the report's analysis of complicity. We agree with the abolishment of archaic terms such as 'aid', 'abet', 'counsel and procure'. We agree that adopting a simple, all-encompassing phrase such as 'knowingly involved' or even just 'involved in' is sufficient and self-explanatory.

However, there is a slight issue in relation to the wording in the proposed amendments to the *Crimes Act 1958*.

The proposed section 324 (3)(b) states that, *"a person may be involved in the commission of an offence, by act or omission whether or not the person realises that the facts constitute an offence."*

We understand that this provision seeks to avoid doubt in the case of distinguishing acts and omissions, but suggest that it may cause some confusion where it is read that a person is guilty of an offence even if they were unaware there was an offence committed. For example, a person whose friend has asked him for a lift to the bank, but is unaware that this friend intends to rob the bank.

The Law Institute of Victoria is a member of
Law Council OF AUSTRALIA

Law Institute of Victoria Ltd
ABN 32 075 475 731
Ph (03) 9607 9311 Fax (03) 9602 5270
Email lawinst@liv.asn.au
470 Bourke Street Melbourne 3000 Australia
DX 350 Melbourne GPO Box 263C Melbourne 3001
Website www.liv.asn.au

We suggest that the wording in this provision be reviewed and perhaps amended for further clarity.

In relation the proposed changes in the Criminal Charge Book, we agree with the replacement of the word 'inference' with 'conclusion'. We also agree with the recommendation for the judiciary to explicitly explain to jurors the misconception that circumstantial evidence is weaker than direct evidence.

We agree with the drafted provisions outlining 'previous misconduct evidence' and approve of the proposal for the judiciary to provide directions relating to evidence of this nature when a specific direction is sought by defence counsel.

In conclusion, we are generally supportive of the overall recommendations in this report and commend the JDAG on its thorough and careful analysis. We are grateful for the opportunity to participate in the consultation.

If you wish to discuss this in more detail, please contact James Dowsley, Co-Chair of the Criminal Law Section on jamesd@dowsleyassociates.com.au.

Yours sincerely

Michael Holcroft
President
Law Institute of Victoria