Jury Directions: the Struggle for Simplicity and Clarity

Banco Court Lecture

Supreme Court of Queensland

20 September 2018

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In recent years the Law Reform Commissions of Victoria ("VLRC"), Queensland ("QLRC"), and New South Wales ("NSWLRC") were each given references requiring them to report on the directions given to juries in criminal trials[1]. The references were prompted by the perception that the directions of law that judges were required to give the jury had become excessively long and complex, reflecting a tendency on the part of appellate judges to over-intellectualise the criminal law. There was a concern that the intended audience had become the appellate court and not the jury.

The Commissions took into account the considerable body of empirical research undertaken in Australia and overseas seeking to assess the level of jurors' comprehension of directions of law and their capacity to apply the directions in the decision-making process.

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[1] Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (May 2009) (the "VLRC Report"); Queensland Law Reform Commission, *A Review of Jury Directions*, Report No 66 (December 2009)(the "QLRC Report"); New South Wales Law Reform Commission, *Jury Directions*, Report 136 (November 2012) (the "NSWLRC Report").

The QLRC commissioned its own psycho-linguist research on the effect of the simplification of directions on juror decision-making[2].

The secrecy of jury deliberations and the statutory restrictions on communicating with jurors present impediments to the conduct of research into jury decision-making. While exemptions can be obtained from those restrictions for the purposes of approved research, there are limitations to the insight that answers to questionnaires or even telephone interviews with jurors provide. The landmark jury study, undertaken by the New Zealand Law Commission in the late 1990s, continues to impress me as the gold standard[3]. The results of that survey were encouraging overall; jurors approached their task conscientiously, endeavouring to understand and apply the law in accordance with the directions. There was little evidence that jurors tempered the rigidities of the law by the application of idiosyncratic notions of justice[4]. Subsequent Australian studies are broadly in line with these conclusions[5]. This positive picture is tempered by the NSWLRC's

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2 QLRC Report at Ch 2.

3 Young, Cameron and Tinsley, *Juries in Criminal Trials: Part Two – A Summary of the Research Findings*, Preliminary Paper 37 - Volume 2 (1999).

4 Young, Cameron and Tinsley, *Juries in Criminal Trials: Part Two – A Summary of the Research Findings*, Preliminary Paper 37 - Volume 2 (1999) at 53 [7.11].

5 Chesterman, Chan and Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales,* Law and Justice Foundation of NSW (2001) at 175-177 [438]-

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observation that, while the empirical evidence suggests that jurors are generally conscientious in their efforts to follow the directions, which they are reported to find helpful, the evidence is less positive about the level of juror comprehension of directions[6].

Trial by jury is at the heart of our system of adversarial criminal justice. In the case of Commonwealth offences tried on indictment, trial by jury is mandated under our *Constitution*[7]. The verdict of the jury confers peculiar legitimacy on the outcome of the trial of an allegation of serious criminal offending. An essential assumption upon which the system depends is that juries act on the evidence and the judge's directions. As McHugh J observed, it is an assumption on which common law courts have staked a great deal[8].

Of course, trial judges should strive to explain the law to the jury in accessible, clear terms. Equally, it is fundamental that the accused is entitled to a trial at which the law is correctly explained to the jury[9]. Given that the deliberations of the jury are secret, and

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[443], 181-182 [455]-[458]; NSWLRC Report at 28 [1.83]; QLRC Report 66 at Appendix E.

6 NSWLRC Report at 28 [1.83].

7 Constitution, s 80.

8 *Gilbert v The Queen* (2000) 201 CLR 414 at 425 [31]; [2000] HCA 15.

9 *Mraz v The Queen* (1955) 93 CLR 493 at 514 per Fullagar J; [1055] HCA 59.

that the jury delivers a general, inscrutable verdict, the failure to give a material direction, or the giving of a wrong direction, is an error which, subject to the proviso, will result in an appeal being allowed and an order for a new trial. Trial judges are right to be mindful of the prospect of appellate review and to seek to ensure that the directions they give are not susceptible to successful challenge.

A common theme that emerges from the research is that jurors have differing understandings of the concept of "proof beyond reasonable doubt" and would like the judge to be able to give a more informative explanation of what amounts to a reasonable doubt[10]. It is notorious that any attempt at explication of the standard of proof provokes appellate challenge. Most recently, special leave to appeal was granted to consider whether a direction on the mental element of murder given in the following terms involved legal error[11]:

> "[Y]ou do not have to work out definitively what [the accused's] state of mind was when he caused the

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[10] Young, Cameron and Tinsley, *Juries in Criminal Trials: Part Two – A Summary of the Research Findings*, Preliminary Paper 37 - Volume 2 (1999) at 54 [7.16], [7.18]; Chesterman, Chan and Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (2001) at 179-180 [450], [453]; NSW Bureau of Crime Statistics and Research, Trimboli, "Juror Understanding of Judicial Instructions in Criminal Trials" (2008) 119 *Crime and Justice Bulletin* 1 at 4, 6; McKimmie, Antrobus and Davis, *Jurors' Trial Experiences: The Influence of Directions and Other Aspects of Trials* (2009) published in QLRC Report at Appendix E, 13-19.

[11] *The Queen v Dookheea* (2017) 91 ALJR 960 at 965 [16]; 347 ALR 529 at 534; [2017] HCA 36.

> injuries that killed [the deceased]. You have to consider whether the Crown has satisfied you that [the accused] had the intention that is required. And the Crown has to have satisfied you of this not beyond any doubt, but beyond reasonable doubt."

The direction, viewed in the context of the summing-up as a whole, was found not to have occasioned a miscarriage of justice[12]. Nonetheless, the decision illustrates the need for circumspection before glossing instructions on the standard of proof. In England the preferred direction requires the jury to be "sure" before it returns a verdict of guilt. Research in the United Kingdom suggests that a direction in these terms leads to a more uniform understanding of the standard of proof than a direction expressed in terms of proof "beyond reasonable doubt"[13]. The experience reflected in the cases is less clear[14]. In one instance, after the jury sought further assistance, the trial judge explained "you do not have to be certain.

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[12] *The Queen v Dookheea* (2017) 91 ALJR 960 at 968 [28]; 347 ALR 529 at 538.

[13] Mueller-Johnson, Dhami and Lundrigan, "Effects of Judicial Instructions and Juror Characteristics on Interpretations of Beyond Reasonable Doubt" (2018) 24(2) *Psychology, Crime & Law* 117.

[14] *JL* [2017] EWCA Crim 621; *R v Smith* [2012] EWCA Crim 702; *Ching* (1976) 63 Cr App Rep 7.

You have to be sure. Which is less than being certain."[15] The Court of Appeal was critical of the distinction, citing Archbold[16]:

> "It is well established that the standard of proof is less than certainty ... As in ordinary English 'sure' and 'certain' are virtually indistinguishable, it savours of what the late Sir Rupert Cross might have described as 'gobbledegook' to tell the jury that while they must be 'sure' they need not be 'certain'."

My experience in working with juries accords with the research finding that jurors tend to be conscientious in the discharge of their duties. It is reasonable to expect jurors to be acutely conscious of the responsibility of determining guilt and it is, perhaps, unsurprising that they should seek guidance about what amounts to a reasonable doubt. It is also unsurprising that individual jurors bring differing understandings of the content of the standard. The resistance which courts have shown to endeavours to explain the concept is more than obduracy. It reflects that it is the jury that sets the standard of what is, or is not, a doubt that is reasonable. As Kitto J pointed out, the danger of attempting to explain what "reasonable" means is that the explanation is apt to obscure that the accused is

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[15] *R v Stephens* [2002] EWCA Crim 1529.

[16] *R v Stephens* [2002] EWCA Crim 1529 at [11] per Keene LJ, quoting Archibold, *Criminal Pleading, Evidence and Practice* (2002) at [4-384].

to be given the benefit of any doubt which the jury considers reasonable[17].

Empirical evidence is said to support the practice of encouraging jurors to ask questions as a way of increasing their comprehension[18]. The QLRC found that jurors tended to report that they were discouraged from asking questions or were unsure if they could ask questions and the procedure to follow in such a case[19]. Plainly it is important that jurors are told how they may ask questions, whether to clarity the law or the evidence. However, it is important that they do not become actively involved in the questioning of witnesses[20]. To the extent that jurors report frustration in this respect, the answer lies in providing them with a better understanding of the function of the criminal trial. While it is wrong to suggest that our trial process is not concerned with the truth[21], we recognise the natural limitations on the ascertainment of historic fact. This recognition is reflected by the presumption of innocence and the onus and standard of proof which frame the ultimate issue in any criminal trial.

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17 *Thomas v The Queen* (1960) 102 CLR 584 at 595; [1960] HCA 2.

18 NSWLRC Report at 127 [6.67] citing Reifman, Gusick and Ellsworth, "Real Jurors' Understanding of the Law in Real Cases" (1992) 16 *Law and Human Behavior* 539, 549.

19 QLRC Report at 337 [10.161].

20 *Tootle v R* (2017) 94 NSWLR 430.

21 Spigelman, *Truth and the Law* (Winter 2011) Bar News 99.

The point was famously made by Barwick CJ in *Ratten v The Queen*[22]:

> "'Under our law a criminal trial is not, and does not purport to be, an examination and assessment of all the information and evidence that exists, bearing on the question of guilt or innocence.' ... It is a trial, not an inquisition: a trial in which the protagonists are the Crown on the one hand and the accused on the other. Each is free to decide the ground on which it or he will contest the issue, the evidence which it or he will call, and what questions whether in chief or cross-examination shall be asked; always, of course, subject to the rules of evidence, fairness and admissibility. The judge is to take no part in that contest, having his own role to perform in ensuring the propriety and fairness of the trial and in instructing the jury in the relevant law. Upon the evidence and under the judge's directions, the jury is to decide whether the accused is guilty or not."

The jury, like the judge, is to take no part in the contest. Importantly, the jury is not concerned to determine whether the accused is innocent; its function is to determine whether, on the evidence the parties place before it, the state has discharged its onus. It is no part of the function of the jury to assume the mantle of investigator. As the Supreme Court of Minnesota observed, allowing an appeal following a trial at which the jury had been invited to submit questions to the witnesses, "although it is impossible to guarantee that jurors will remain open-minded until the

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[22] (1974) 131 CLR 510 at 517 per Barwick CJ; [1974] HCA 35.

presentation of all of the evidence and instructions, passive detachment increases that probability."[23]

The duty of the trial judge in summing up to the jury was stated with beguiling simplicity in *Alford v Magee*: the judge is to identify the "real issues" in the trial and explain only so much of the law as is necessary to guide the jury to a decision on those issues[24]. In recent years, the High Court has repeatedly stated the obligation in the terms of *Alford v Magee*[25]. Notably, it did so in *Clayton v The Queen*, a case involving the joint trial of three accused for murder.[26] As not uncommonly occurs, the prosecution was unable to establish who did the act causing death. The prosecution contended that each accused was guilty of murder in any one of three ways: as a participant in a joint criminal enterprise to cause really serious harm; as a party to an agreement to assault the deceased having foresight of the possibility that death or really serious injury might be inflicted by one of their number; or as an aider and abetter. Adding further layers of complexity was the requirement to direct the jury in each case of the alternative verdict of manslaughter and of the necessity

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[23] *State of Minnesota v Costello* 646 NW 2d 204 at 211 (Minn 2002) per Blatz CJ.

[24] *Alford v Magee* (1952) 85 CLR 437 at 466 per Dixon, Williams, Webb, Fullagar and Kitto JJ; [1952] HCA 3

[25] See e.g. *R v Getachew* (2012) 248 CLR 22, fn [35]; [2012] HCA 10.

[26] *Clayton v The Queen* (2006) 81 ALJR 439; 231 ALR 500; [2006] HCA 58.

to negative self-defence. The joint reasons were critical of the lengthy written and oral directions given to the jury, observing that[27]:

> "It may greatly be doubted that it was essential to identify the issues which the jury had to consider according to a pattern determined only by the legal principles upon which the prosecution relied."

Their Honours said that the "real issues" were of fact and were relatively simple[28]: what did the accused agree was going to happen when they went to the deceased's premises; what did the accused foresee was possible; what did the accused do at the premises, if anything, to aid and abet whomever fatally assaulted the deceased?

Geoff Eames, an experienced judge of the Victorian Court of Appeal, took the High Court to task following *Clayton*. Eames pointed out that the articulation of the issues in a trial may be easier for the High Court following their refinement by the intermediate appellate court. Many grounds of challenge in *Clayton* had been argued and fallen away before special leave was granted. Eames

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[27] *Clayton v The Queen* (2006) 81 ALJR 439 at 444 [23] per Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ; 231 ALR 500 at 506.

[28] *Clayton v The Queen* (2006) 81 ALJR 439 at 444 [24]-[25]; 231 ALR 500 at 506.

doubted that any trial judge would have been game to narrow the issues as the High Court had done[29]. There is force to the criticism.

In the case of group criminal activity, the principles governing the circumstances in which one person will bear criminal responsibility for the acts of another involve fine distinctions, which do not lend themselves to simple encapsulation. At a joint trial of multiple accused held sometime after *Clayton*, the jury asked for a written description of the components of murder, joint enterprise, aiding and abetting and manslaughter. With the assistance of counsel, the trial judge responded to the request with a 17-page typewritten document. In dismissing an appeal to the sufficiency of the directions, the only suggestion that the Court ventured as to how they might have been simplified was for the trial judge to raise with the prosecutor the utility of putting the prosecution case on every conceivable basis of liability[30].

The principles of criminal responsibility governing offences against Commonwealth law are codified in Ch 2 of the *Criminal Code* (Cth). They substantially follow the recommendations of the Model

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[29] Eames, "Tackling the Complexity of Criminal Trial Directions: What Role for Appellate Courts?" (2007) 29 *Australian Bar Review* 161 at 178.

[30] *Huynh v The Queen* (2013) 87 ALJR 434 at 441 [34] per French CJ, Crennan, Kiefel, Bell and Gageler JJ; 295 ALR 624 at 632-633; [2013] HCA 6.

Criminal Code Officers' Committee[31], which gave detailed consideration to the policy of the law respecting the extensions of criminal liability[32]. The Committee explained in its Final Report that it had attempted to draft provisions in a way that was "comprehensive and yet concise and capable of being understood not only by legal practitioners but also by the general public." The Committee was mindful of the need for the criminal law to be accessible to the public. Parliamentary Counsel assisted the Committee to ensure the draft employed plain English drafting conventions[33]. It remains that the instructions on complicity given to a jury under the *Criminal Code* (Cth) are no simpler than instruction in the like concepts under common law or the Griffith Code.

The proper reach of the law in attaching criminal responsibility to participants in group criminal activity for the acts of fellow participants is controversial[34]. Commonly, it is necessary for the jury to consider not only what the accused intended, but what the

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31 *R v LK* (2010) 241 CLR 177 at 219-223 [96]-[102]; [2010] HCA 17.

32 Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Final Report December 1992, Chapter 2: General Principles of Criminal Responsibility* (1993), Part 4.

33 Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Final Report December 1992, Chapter 2: General Principles of Criminal Responsibility* (1993) at iii.

34 *Miller v The Queen* (2016) 259 CLR 380; [2016] HCA 30.

accused foresaw another might intentionally do. The directions may be given in plain English, but they need to address distinctions of no small refinement. The difficulty of simplifying the law of complicity is highlighted by the radically different approaches to codification proposed by the NSWLRC[35] and the Victorian Simplification of Jury Directions Project[36].

An experienced Victorian judge, trying an accused for murder in a case in which the accused was alleged to be one of a number of persons present during a prolonged, fatal assault on the deceased, decided to cut through "a galaxy of legal concepts of concert" with a bespoke, simple direction on complicity[37]. The jury was directed that the accused's guilt of murder would be established if it was satisfied that the actions resulting in the death of the deceased were performed by the accused or "otherwise under his control"[38]. As the Court of Appeal explained, among the difficulties with this economical approach to the instruction in the law, was the absence of any test of what amounted to "control".

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35 NSWLRC, *Complicity*, Report 129 (December 2010) at xi.

36 Department of Justice, *Simplification of Jury Directions Project: A Report to the Jury Directions Advisory Group*, (August 2012) at 53-54 [2.127], 64 [2.144].

37 *R v Franklin* (2001) 3 VR 9 at 12 [5] per Phillips CJ.

38 *R v Franklin* (2001) 3 VR 9 at 12 [2].

Just as the law of complicity takes account of nuanced distinctions, so do the defences and partial defences. Criticism of appellate courts for over-intellectualising the criminal law is exemplified by *Viro v The Queen*[39]. Underlying the majority view in *Viro* was the concern that the law fairly reflect the lesser moral culpability of the person who acts in self-defence but whose actions are excessive in all the circumstances. On the trial of a person for murder, the majority considered the lesser culpability in such a case should be reflected by permitting the jury to return a verdict of manslaughter. The model directions stated by Mason J sought to step the jury through self-defence as a complete defence and, in the event it failed, as a partial defence, while taking account of the onus of proof at each stage[40].

When the Court revisited self-defence in *Zecevic v Director of Public Prosecutions (Vic)*[41], Mason CJ acknowledged that the *Viro* directions were unduly complex[42]. His Honour adhered to his earlier view that the law should allow a partial defence in the case of excessive self-defence but for the sake of the clear statement of the

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[39] (1978) 141 CLR 88; [1978] HCA 9.

[40] *Viro v The Queen* (1978) 141 CLR 88 at 146-147.

[41] (1987) 162 CLR 645; [1987] HCA 26.

[42] *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645 at 653.

law he agreed with the formulation proposed in the joint reasons. So stated, the law of self-defence is readily able to be understood[43]:

> "[W]hether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did. If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal."

Zecevic brought the common law of Australia into conformity with the Privy Council's analysis in *Palmer v The Queen*[44], contrary to the High Court's earlier analysis in *The Queen v Howe*[45]. The majority reasoned that, while there was a risk an accused may be convicted of murder in circumstances in which he or she lacked reasonable grounds for his or her belief that the degree of force used was necessary, this risk was ameliorated by the recognition that, as a practical matter, a jury would be slow to make that finding[46].

Despite the elegance and simplicity of *Zecevic*'s statement of the law, a number of jurisdictions have chosen to codify self-defence. Notably, the Parliament of New South Wales has restored

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[43] *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645 at 661 per Wilson, Dawson and Toohey JJ.

[44] *Palmer v The Queen* [1971] AC 814.

[45] *R v Howe* (1958) 100 CLR 448; [1958] HCA 38

[46] *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645 at 654 per Mason CJ, and at 664 per Wilson, Dawson and Toohey JJ

the concept of excessive self-defence in the case of murder[47]. Simplicity in the statement of the law has given way to the legislature's judgment that the law should provide for the lesser culpability of the accused whose acts done in self-defence are disproportionate. It is a judgment that accords with *Howe*.

The partial defence of provocation requires careful, commonly lengthy directions. Their complexity stems from the need for the law to provide a "uniform standard of the minimum powers of self-control" before murder may be reduced to manslaughter[48]. In my experience, it is not difficult to convey the concepts underlying the doctrine in any case in which provocation is a live issue. We should not underestimate our fellow citizens' ability to apply directions that require them to work through subjective and objective tests in determining criminal responsibility. It is when provocation is raised for the first time in the course of summing up in a case in which it is, in truth, barely raised by the evidence that jurors' eyes are apt to glaze over.

There is a tension under our adversarial system of justice between holding parties to the forensic choices that they make and the judge's obligation on the trial of a criminal charge to ensure

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47 *Crimes Act 1900* (NSW), ss 420-421.

48 *Stingel v The Queen* (1990) 171 CLR 312 at 327 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ; [1990] HCA 61.

fairness to the accused in the way explained in *Pemble v The Queen*[49]. The "real issues" in a criminal trial are to be understood in light of *Pemble* as including any defence or partial defence regardless of the conduct of the defence case[50]. Discharge of the *Pemble* obligation can be a trap for young players. In *Stevens v The Queen*, the failure to direct on the defence of accident under s 23(1)(b) of the *Criminal Code* (Qld) was held to have occasioned a miscarriage of justice[51]. The Court was closely divided on whether the evidence left open accident as a possibility. McHugh J considered that it did on a view of the evidence that does not appear to have occurred to the parties or the judge at the trial. His Honour's analysis was posited on the recognition that the jury is entitled to refuse to accept the cases of the parties and "work out for themselves a view of the case which did not exactly represent what either party said"[52].

Pemble has not been without critics. Its application tends to add to the length and complexity of the summing up, not infrequently one suspects, to the mild bewilderment of the jury. Trial judges are constrained to give elaborate directions on defences

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[49] (1971) 124 CLR 107; [1971] HCA 20.

[50] *Pemble v The Queen* (1971) 124 CLR 107 at 117-118 per Barwick J.

[51] (2005) 227 CLR 319; [2005] HCA 65.

[52] *Stevens v The Queen* (2005) 227 CLR 319 at 330 [29], quoting *Williams v Smith* (1960) 103 CLR 539 at 545 per Dixon CJ, McTiernan, Fullagar, Kitto and Menzies JJ; [1960] HCA 22.

notwithstanding exiguous evidentiary support for them. It is not surprising that each of the Law Reform Commissions has given attention to the desirability of retaining the *Pemble* principle.

Another focus of the Law Reform Commissions' Reports is the desirability of stripping away the requirement to give directions and warnings about how to evaluate the evidence of particular witnesses. In recommending the codification of jury directions in criminal cases, the Victorian Department of Justice referred to the increase in recent years of "complex, voluminous and uncertain" directions[53]. The starting point of this downward trend was traced to the decision of the High Court in *Bromley v The Queen*[54]. In that case, the Court declined to create a new category of witness whose evidence required a corroboration warning. Rather, in any case in which the evidence of a witness was potentially unreliable, but which was not within an established category necessitating a warning, it was held that the jury must be made aware, in words which meet the justice of the case, of the dangers of convicting on the evidence of the witness[55].

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[53] Victoria, Criminal Law Review, Department of Justice, *Jury Directions: A New Approach* (2013) at 10.

[54] Victoria, Criminal Law Review, Department of Justice, *Jury Directions: A New Approach* (2013) at 10 citing *Bromley v The Queen* (1986) 161 CLR 315; [1986] HCA 49.

[55] *Bromley v The Queen* (1986) 161 CLR 315 at 319 per Gibbs CJ (Mason, Wilson and Dawson JJ concurring).

The determination of whether a warning is required to avoid a perceptible risk of a miscarriage of justice does not involve a bright line test. So much is illustrated by the analysis in *Tully v The Queen*[56] respecting the need for a warning as to the possible unreliability of the complainant's evidence. No application for such a direction had been made by defence counsel. Nonetheless, the Court was divided on the question of whether a warning was required. The desirability of keeping the summing up short, clear, and comprehensible, and the requirements of ensuring a fair trial in a given case, calls for judgments of considerable discernment.

Despite the difficulties for the trial judge in preparing a summing up, its length would seem to reflect matters of judicial culture. In 2006, the Australian Institute of Judicial Administration surveyed Australian and New Zealand judges on aspects of the conduct of criminal jury trials. Judges were asked to estimate the average duration of a summing up in a five-day, ten-day and 20-day trial. The judge was asked to estimate the number of minutes spent on the law, the evidence, and in summarising the addresses of counsel[57]. Some judges refused to answer the question, and some pointed out that a five-day trial may involve more complex issues than a 20-day trial. Nonetheless, as the authors of the report

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[56] (2006) 230 CLR 234; [2006] HCA 56.

[57] Australian Institute of Judicial Administration Incorporated, *The Jury Project: Stage One – A Survey of Australian and New Zealand Judges* (2006) at 26-27.

observed, judges in each jurisdiction had been faced with the same difficulty. The significant differences across jurisdictions were considered to be a reliable indicator of differing practices. The differences did not depend on whether the judge was instructing the jury on the common law or the Griffith Code. Judged by the standard that the shorter, the better, South Australia and Western Australia were the best-performing Australian jurisdictions. Victoria was the worst performer in relation to five and ten day trials, followed closely by New South Wales. New South Wales had the distinction of being the worst performer for 20-day trials.

The length of the summing up turns to no small extent on the degree to which the judge summarises the evidence. It would seem the practice differs between jurisdictions with respect to furnishing the jury with a copy of the transcript. The good sense of giving the trier of fact the transcript is to my mind evident. Among other considerations, it permits more economical reference to the evidence in the course of the summing up.

To date, little action has been taken in Queensland or New South Wales to act on the recommendations of the QLRC and NSWLRC. By contrast, Victoria has embraced radical reforms. Following the publication of the VLRC's Report, the Judicial College of Victoria commissioned a report on the simplification of directions governing complicity, inferences, circumstantial evidence, evidence of an accused's other misconduct and warnings respecting unreliable

evidence[58]. Weinberg JA conducted the review. The VLRC's Report and the Weinberg Report fed into a further report by the Criminal Law Review Division of the Department of Justice, which recommended the enactment of legislation to provide a new framework for determining the directions that a trial judge is required to give in a criminal trial[59].

The Victorian reforms have been brought about in three stages. The first was the enactment of the *Jury Directions Act 2013* (Vic) ("the 2013 Act"), the stated purposes of which included: to reduce the complexity of jury directions in criminal trials; to simply and clarify the issues that juries must determine in such trials; and to clarify the duties of the trial judge in directing the jury[60]. Central to the scheme of the 2013 Act was Part 3, which dealt with requests for directions. An obligation was imposed on defence counsel at the close of the evidence to inform the judge whether matters were or were not in issue: namely, each element of the offence; any defence; any alternative offence; and any alternative basis of complicity[61]. After the defence counsel complied with this obligation, the prosecution and defence counsel were required to

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[58] Judicial College of Victoria, *Simplification of Jury Directions Project: A Report to the Jury Directions Advisory Group* (2012).

[59] Victoria, Criminal Law Review, Department of Justice, *Jury Directions: A New Approach* (2013).

[60] *Jury Directions Act 2013* (Vic), ss 1(a), (b), (c).

[61] *Jury Directions Act 2013* (Vic), s 10.

request the judge to give, or not to give, particular directions in respect of the matters in issue and the evidence relevant to those matters[62]. The trial judge was relieved of the obligation to give the jury a direction that related to a matter which defence counsel had indicated was not in issue or which had not been requested by the parties[63].

The trial judge was required to give a requested direction unless there were good reasons for not doing so[64]. In determining whether there were good reasons for not giving a requested direction, the trial judge was enjoined to have regard to the evidence, whether the direction concerned a matter not raised or relied on by the accused, and whether it would involve the jury considering the issues in a manner that departed from the way the defence case had been put[65]. Section 15 in Pt 3 of the 2013 Act provided an override: the trial judge was required to give the jury any direction that was necessary to avoid a substantial miscarriage of justice.

The 2013 Act purported to abolish the *Pemble* principle and any requirement to direct the jury of an alternative offence which

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62 *Jury Directions Act 2013* (Vic), s 11.

63 *Jury Directions Act 2013* (Vic), s 13.

64 *Jury Directions Act 2013* (Vic), s 14(1).

65 *Jury Directions Act 2013* (Vic), s 14(2).

had not been identified during the trial[66]. While the trial judge was required in summing up the case to refer to the way in which the prosecution and defence cases were put, he or she was relieved of the obligation to summarise the closing address of counsel and of the obligation to give a summary of the evidence[67]. It sufficed for the trial judge to identify only so much of the evidence as necessary to assist the jury to determine the issues[68]. The importance of the latter provision should not be overlooked. The view that a summing up in a criminal trial is deficient if the judge fails to give a detailed summary of the evidence has proved to be persistent[69].

The abolition of the *Pemble* principle is controversial. The NSWLRC recommended against it, taking into account cases in which defence counsel may be embarrassed by relying on inconsistent defences or in which counsel prefer to pursue an outright acquittal rather than a guilty verdict for an alternative, lesser offence[70]. The difficulty of inconsistent defences may be accommodated under the Victorian model by a request that the judge direct the jury on a defence or partial defence on which

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66 *Jury Directions Act 2013* (Vic), s 16.

67 *Jury Directions Act 2013* (Vic), s 17(b).

68 *Jury Directions Act 2013* (Vic), s 18(1).

69 See, eg, *R v Zorad* (1990) 19 NSWLR 91 at 105E per Hunt, Enderby and Sharpe JJ; *R v Piazza* (1997) 94 A Crim R 459 at 64-65 per Hunt CJ at CL, 65 per Smart J, 67 per Grove J.

70 NSWLRC Report, Appendix A at 185 ff [A.43] ff.

counsel has not relied. In a case where there are evident forensic reasons for not relying on a defence which is clearly raised by the evidence, it would seem unlikely that the trial judge would refuse the request. The concern with respect to the forensic choice not to address the jury on a lesser alternative verdict is now to be assessed in light of *James v The Queen*[71]. As the High Court held in that case, it is not the function of the court to direct a jury on a lesser, alternative verdict in circumstances in which the defence has made a choice to seek an outright acquittal and the prosecution has not sought to have the jury's verdict on the alternative charge[72].

While the QLRC recommended amendments to the *Criminal Code* (Qld) along the lines of the Victorian model – requiring prosecution and defence to inform the judge of the directions as to specific defences and warnings which they wished the judge to include in, or omit from, the summing-up – it did not propose departure from *Pemble*. The QLRC favoured relieving the trial judge of the obligation to give a direction that is not requested *unless* the direction was required to ensure a fair trial[73].

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[71] (2014) 253 CLR 475; [2016] HCA 6.

[72] *James v The Queen* (2014) 253 CLR 475 at 490 [37] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ.

[73] QLRC Report at 371-398 [11.53]-[11.143].

Despite reservations of the kind expressed by the QLRC and the NSWLRC, the Victorian Department of Justice considered the 2013 Act did not sufficiently deliver the quietus to *Pemble*. It characterised the s 15 override as a "gap" in the scheme. In 2015, the Victorian Parliament enacted the *Jury Directions Act 2015* (Vic) ("the 2015 Act") to extend, restructure and further refine the 2013 Act[74]. Under the 2015 Act, the override, now found in s 16, confines the trial judge's obligation to give a direction that has not been requested to a case in which there are "substantial and compelling reasons for doing so". The threshold for successful appellate challenge on the ground of the failure to give a direction that was not requested is a high one.

The 2015 Act maintains the framework of its predecessor and builds on it by enacting a number of the recommendations of the Weinberg Report respecting the directions on tendency and coincidence evidence, and unreliable evidence. It seeks to return the law on the standard of proof in circumstantial cases to the position before the decisions of the High Court in *Chamberlain v The Queen [No 2]*[75] and *Shepherd v The Queen*[76] and it strips away the requirement for various directions that bear on the assessment of

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[74] Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 March 2015 at 679.

[75] (1984) 153 CLR 521; [1984] HCA 7.

[76] (1990) 170 CLR 573; [1990] HCA 56.

categories of evidence, which were considered to reflect outdated assumptions[77].

The third phase of the Victorian reforms saw amendments to the 2015 Act[78] prompted by a further report by the Department of Justice[79]. The requirement to give directions on a further raft of aspects of the evaluation of evidence have been abolished or simplified. The uncertainty as to the extent to which the judge may instruct the jury on the approach to its deliberations[80] is resolved by s 64G, which abolishes any rule of the common law which prevents the trial judge from directing the jury on the order that it is to consider the offences; the elements of the offences; defences; matters in issue; or alternative bases of complicity.

The 2015 Act permits the trial judge to give the jury an explanation of the phrase "proof beyond reasonable doubt" if the jury asks the trial judge a question which directly or indirectly raises the matter[81]. In such a case, s 64(1) sets out a number of matters to which the trial judge may refer. The trial judge may refer to the

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77 See e.g. Department of Justice, *Jury Directions, A Jury-Centric Approach* at 64-65.

78 *Jury Directions and Other Acts Amendment Act 2017* (Vic).

79 Victoria, Criminal Law Review, Department of Justice, *Jury Directions, A Jury-Centric Approach Part 2* (2017).

80 *Stanton v The Queen* (2003) 198 ALR 41; [2003] HCA 29.

81 *Jury Directions Act 2015* (Vic), s 63.

presumption of innocence and the prosecution's obligation to prove guilt, and may indicate that it is not enough for the prosecution to persuade the jury that the accused is "probably guilty or very likely to be guilty". The trial judge may explain that it is almost impossible to prove anything with absolute certainty when reconstructing past events and that the prosecution is not required to do so. Perhaps, more controversially, the judge may tell the jury that a reasonable doubt is not an imaginary or fanciful doubt or an unrealistic possibility.

It is tempting to see the impetus for the embrace of reform of jury directions in Victoria as stemming from the tendency of Victorian judges to sum up at greater length than their colleagues in other jurisdictions and to the fact that Victoria had the highest rate among the Australian jurisdictions of successful appeals from erroneous directions[82]. Whatever prompted the embrace of reforms, they have been well received. Substantial aspects of the scheme have now been in operation for a number of years. Any concern that the scheme places too much emphasis on party autonomy at the cost of fair trial principles has not to date proved to be well founded. The Victorian reforms provide a workable template for reform.

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[82] Tilmouth, "The Wrong Direction: A Case Study and Anatomy of Successful Australian Criminal Appeals" (2015) 40 Australian Bar Review 18 at 20.

The elimination of directions which seek to guide the jury's evaluation of categories of evidence and the use of integrated directions should reduce the length and complexity of summing up a criminal trial to a jury in Victoria. It remains that instruction in the applicable law will not always be capable of reduction to simple formulae. This is to recognise the inherent complexity of the task of assigning criminal responsibility on occasions and the subtlety of many of the key concepts. It is also to recognise that courts are at the mercy of the legislature in relation to the statutory statement of offences. The prescriptive approach to drafting is at times at odds with the Parliament's stated intention to simplify and clarify the issues that the jury is to determine. The byzantine provisions of the *Crimes Act 1958* (Vic), inserted in 2007, which govern the matters relating to consent in sexual offences, considered in *R v Getachew*[83], are a case in point.

A randomly selected group of members of the community may be expected to include individuals of greater and lesser capacity to follow the evidence and the directions of law at a criminal trial. It is to be kept in mind that the verdict reflects the corporate state of mind of the jury at the end of a process of joint deliberation. How individual juries approach their deliberations is not known, but in my experience, it is rare to disagree with the outcome of those deliberations.

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[83] (2012) 248 CLR 22; [2012] HCA 10.