

**Reform of the law governing jury directions and the determination of  
criminal appeals**

**NSW Supreme Court Judges' Conference**

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In the last decade the Law Reform Commissions of Victoria ("VLRC"), Queensland ("QLRC"), and New South Wales ("NSWLRC") have published reports on jury directions in criminal trials<sup>1</sup>. The references were prompted by the perception that directions 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<sup>2</sup>.

Trial judges are enjoined to sum-up following the deceptively simple injunction in *Alford v Magee*<sup>3</sup>; the judge is to instruct the jury only on so much of the law as is necessary to resolve the "real issues" in the case. The practical difficulty of complying with that

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<sup>1</sup> Victorian Law Reform Commission, *Jury Directions*, Report No 17 (2009) (the "VLRC Report"); Queensland Law Reform Commission, *A Review of Jury Directions*, Report No 66 (2009) (the "QLRC Report"); New South Wales Law Reform Commission, *Jury Directions*, Report No 136 (2012) (the "NSWLRC Report").

<sup>2</sup> VLRC Report at 8.

<sup>3</sup> *Alford v Magee* (1952) 85 CLR 437 at 466 per Dixon, Williams, Webb, Fullagar and Kitto JJ.

injunction is illustrated in *Clayton v The Queen*.<sup>4</sup> Three accused were jointly tried for murder. The prosecution was unable to establish which accused did the act causing death. The prosecution case against each accused was put in any one of three ways: (i) as a participant in a joint criminal enterprise to cause really serious harm; (ii) 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 (iii) as an aider and abettor. Adding further layers of complexity was the requirement to instruct the jury in each case on the alternative verdict of manslaughter and of the necessity to negative self-defence with respect to murder or manslaughter.

On appeal in the High Court, the joint reasons in *Clayton* were critical of the lengthy written and oral directions given to the jury. Their Honours observed that<sup>5</sup>:

"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."

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<sup>4</sup> (2006) 81 ALJR 439; 231 ALR 500.

<sup>5</sup> *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.

Their Honours said that the "real issues" were of fact and were relatively simple<sup>6</sup>: what did the accused agree was going to happen when they went to the deceased's premises; what did the accused foresee was possible; and what did the accused do at the premises, if anything, to aid and abet whomever fatally assaulted the deceased?

Geoffrey Eames, a retired Judge of the Victorian Court of Appeal, took the High Court to task following *Clayton*. Eames suggested that the identification of the issues may be easier for the High Court following their refinement in the intermediate appellate court. Eames pointed out that many grounds of challenge in *Clayton* had been argued and fallen away before the grant of special leave to appeal. Eames doubted that any trial judge would have been game to narrow the issues as the High Court had done<sup>7</sup>. There is force to the criticism.

The proper reach of the law in attaching criminal responsibility to participants in group criminal activity for the acts of fellow participants is controversial<sup>8</sup>. Commonly, it is necessary for the jury

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<sup>6</sup> *Clayton v The Queen* (2006) 81 ALJR 439 at 444 [24]-[25]; 231 ALR 500 at 506.

<sup>7</sup> Eames, "Tackling the Complexity of Criminal Trial Directions: What Role for Appellate Courts?" (2007) 29(2) *Australian Bar Review* 161 at 178.

<sup>8</sup> *Miller v The Queen* (2016) 259 CLR 380.

to consider not only what the accused intended, but what the accused foresaw another might intentionally do. The directions may be given in plain English, but they need to address distinctions of no small refinement. Trial judges are right to have an eye on appellate review lest the endeavour to communicate in a folksy way leads to successful challenge.

Following the VLRC Report, the Criminal Law Review of the Department of Justice (Vic) reported on the "complex, voluminous and uncertain" directions in jury trials<sup>9</sup>. The authors traced this downward trend to *Bromley v The Queen*<sup>10</sup>. In *Bromley*, the High Court declined to create new categories of witnesses whose evidence required a corroboration warning. The Court went on to say that, in a case falling outside a recognised category, 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<sup>11</sup>. The determination of whether a warning is required to avoid a perceptible

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<sup>9</sup> Criminal Law Review, Department of Justice (Vic), *Jury Directions: A New Approach* (2013) at 10.

<sup>10</sup> Criminal Law Review, Department of Justice (Vic), *Jury Directions: A New Approach* (2013) at 10 citing *Bromley v The Queen* (1986) 161 CLR 315.

<sup>11</sup> *Bromley v The Queen* (1986) 161 CLR 315 at 319 per Gibbs CJ, Mason, Wilson and Dawson JJ concurring.

risk of miscarriage of justice does not involve a bright line test, as *Tully v The Queen*<sup>12</sup> is apt to illustrate.

There is a tension between holding parties to their forensic choices and the trial judge's obligation to ensure fairness to the accused in the way required by *Pemble v The Queen*<sup>13</sup>. Regardless of the conduct of the defence case, the "real issues" in the trial are to be understood as including any defence or partial defence that is arguably open on the evidence<sup>14</sup>. Discharge of the *Pemble* obligation can be a trap for young players, as evidenced by *Stevens v The Queen*<sup>15</sup>. The trial judge did not direct on the defence of accident under the *Criminal Code* (Qld). That failure was found to have occasioned a miscarriage of justice<sup>16</sup>. That was so notwithstanding that the Court was closely divided on whether the evidence left open accident as a possibility. McHugh J held that it did, on a view of the evidence that does not appear to have occurred to the parties or the trial judge. His Honour's analysis was posited on the footing that the jury is entitled to refuse to accept the cases of the parties and to

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<sup>12</sup> (2006) 230 CLR 234.

<sup>13</sup> (1971) 124 CLR 107.

<sup>14</sup> *Pemble v The Queen* (1971) 124 CLR 107 at 117-118 per Barwick CJ.

<sup>15</sup> (2005) 227 CLR 319.

<sup>16</sup> *Stevens v The Queen* (2005) 227 CLR 319 per McHugh, Kirby and Callinan JJ, Gleeson CJ and Heydon J dissenting.

"work out for themselves a view of the case which did not exactly represent what either party said"<sup>17</sup>.

*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 and partial defences notwithstanding the exiguous evidentiary support for them and that no party has referred to them. Each of the Law Reform Commissions considered whether to recommend modifying the *Pemble* obligation. In the event, the QLRC and the NSWLRC did not recommend any departure. Victoria, by contrast, adopted a robust approach and has legislatively done away with the obligation.

The QLRC and the NSWLRC surveyed a body of empirical research concerning juror comprehension of legal directions and capacity to apply them. One consistent research finding is that jurors have differing understandings of the concept of "proof beyond reasonable doubt". Jurors reports that they would like the judge to give a more informative explanation of what amounts to a reasonable doubt<sup>18</sup>.

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<sup>17</sup> *Stevens v The Queen* (2005) 227 CLR 319 at 330 [29] citing *Williams v Smith* (1960) 103 CLR 539 at 545 per Dixon CJ, McTiernan, Fullagar, Kitto and Menzies JJ.

<sup>18</sup> Young, Cameron and Tinsley, *Juries in Criminal Trials: Part Two – A Summary of the Research Findings*, Preliminary Paper 37 –

Kitto J's reasons in *Thomas v The Queen*<sup>19</sup> explain the basis for the rule precluding the trial judge from explaining the concept of proof beyond reasonable doubt:

"Whether a doubt is reasonable is for the jury to say; and the danger that invests an attempt to explain what 'reasonable' means is that the attempt not only may prove unhelpful but may obscure the vital point that the accused must be given the benefit of any doubt which the jury considers reasonable."

In *Darkan v The Queen* the joint reasons, in passing, characterised the High Court's stance in requiring that judges refuse to expand on the meaning of the phrase as extreme and exceptional<sup>20</sup>. Pointedly, their Honours observed that it is not an approach that has found favour elsewhere<sup>21</sup>.

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Volume 2 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.

<sup>19</sup> (1960) 102 CLR 584 at 595.

<sup>20</sup> (2006) 227 CLR 373 at 395 [69] per Gleeson CJ, Gummow, Heydon and Crennan JJ.

<sup>21</sup> *Darkan v The Queen* (2006) 227 CLR 373 at 394 [66] per Gleeson CJ, Gummow, Heydon and Crennan JJ.

More recently, in *R v Dookheea*<sup>22</sup>, the High Court acknowledged that views might reasonably differ as to whether the phrase "beyond reasonable doubt" is well-understood given the relative frequency with which juries ask trial judges to define it. Nonetheless, there was no invitation in *Dookheea* to depart from the *Thomas* line of authority.

The impugned direction in *Dookheea* concerned proof of the element of intention of the accused's trial for murder. The jury was instructed<sup>23</sup>:

"You have to consider whether the Crown has satisfied you that Mr Dookheea had the intention that is required. And the Crown has to have satisfied you of this not beyond any doubt, but beyond reasonable doubt."

Slightly easing the levers, the High Court accepted that it will not always be an error for a judge to contrast reasonable doubt with any doubt and, while it may be unwise to do so, it will not necessarily occasion a substantial miscarriage of justice<sup>24</sup>.

In England, the preferred direction requires that the jury be "sure" before returning a verdict of guilty. Research in the United

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<sup>22</sup> (2017) 262 CLR 402.

<sup>23</sup> *R v Dookheea* (2017) 262 CLR 402 at 413 [16].

<sup>24</sup> *R v Dookheea* (2017) 262 CLR 402 at 425-426 [39]-[41] per Kiefel CJ, Bell, Gageler, Keane, Nettle and Edelman JJ.



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"<sup>25</sup>. The lived experience would seem to be less clear<sup>26</sup>. In one case, after the jury sought further assistance on the standard of proof, the trial judge directed that "you do not have to be certain. You have to be sure. Which is less than being certain."<sup>27</sup> The Court of Appeal was understandably critical of the distinction, citing *Archbold*<sup>28</sup>:

"[I]t 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'."

In Victoria, the *Jury Directions Act 2015* (Vic) ("the JDA") 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<sup>29</sup>. In such a

<sup>25</sup> Mueller-Johnson, Dhimi and Lundrigan, "Effects of Judicial Instructions and Juror Characteristics on Interpretations of Beyond Reasonable Doubt" (2018) 24(2) *Psychology, Crime & Law* 117.

<sup>26</sup> *R v JL* [2017] EWCA Crim 621; *R v Smith* [2012] EWCA Crim 702; *R v Ching* (1976) 63 Cr App R 7.

<sup>27</sup> *R v Stephens* [2002] EWCA Crim 1529 at [7].

<sup>28</sup> *R v Stephens* [2002] EWCA Crim 1529 at [11] per Keene LJ quoting Archbold, *Criminal Pleading, Evidence and Practice* (2002) at [4-384].

<sup>29</sup> *Jury Directions Act 2015* (Vic), s 63.

case, the Act sets out a number of matters to which the trial judge may refer: the presumption of innocence and the prosecution's obligation to prove guilt; that it is not enough for the prosecution to persuade the jury that the accused is "probably guilty or very likely to be guilty"; 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; and that a reasonable doubt is not an imaginary or fanciful doubt or an unrealistic possibility<sup>30</sup>.

The power under the JDA to give the explanation is conditioned on the jury first having asked the question. No such question had been asked in *Dookheea*, and so the provision was not engaged. The Court of Appeal recommended that the JDA be amended to delete the condition and leave the trial judge free to give the explanation in any case in which he or she thought it useful to do so. Despite the introduction of extensive amendments to the JDA in 2017, this suggestion was not taken up.

To date, little action has been taken in Queensland or New South Wales following the recommendations of the QLRC and the NSWLRC. Victoria, by contrast, embraced the VLRC's Report with both hands. The JDA is the product of the VLRC's recommendation that the common law governing directions in criminal trials should be abolished and the law codified in a single statute. Among the

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<sup>30</sup> *Jury Directions Act 2015 (Vic)*, s 64.

reforms the VLRC proposed was the use of integrated, or fact-based, directions (in some jurisdictions described as "question trails"). Notably, Geoffrey Eames was a consultant to the VLRC in its jury directions reference. An annexure to the VLRC's Report reproduces the trial judge's directions in *Clayton*, followed by an example of fact-based directions, which might have been given at that trial. The superiority of the latter is evident<sup>31</sup>.

The JDA both permits the judge to give fact-based directions<sup>32</sup> and abolishes any rule of common law precluding the judge from directing the jury as to the order in which it may consider the offences, the elements of an offence or alternative offence, defences to an offence, matters in issue or an alternative basis of complicity<sup>33</sup>. Notes to s 64F of the JDA make clear that the intention is to do away with any rule attributed to the decision in *Stanton v The Queen*<sup>34</sup>.

The first stage of the Victorian reforms 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 simplify and clarify the issues that

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<sup>31</sup> VLRC Report at 172-183 (Appendix F).

<sup>32</sup> *Jury Directions Act 2015* (Vic), s 67.

<sup>33</sup> *Jury Directions Act 2015* (Vic), ss 64E, 64F, 64G.

<sup>34</sup> (2003) 77 ALJR 1151; 198 ALR 41.

juries must determine in such trials; and to clarify the duties of the trial judge in directing the jury<sup>35</sup>. Part 3, dealing with requests for directions, was central to the scheme of the 2013 Act. Part 3 placed an obligation on defence counsel at the close of the evidence to inform the judge whether the following matters were, or were not, in issue: each element of the offence; any defence; any alternative offence; and any alternative basis of complicity<sup>36</sup>. After the defence complied with this obligation, the prosecution and defence were required to 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<sup>37</sup>. 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<sup>38</sup>.

The trial judge was required to give a requested direction unless there were good reasons for not doing so<sup>39</sup>. In determining whether there were good reasons for not giving a requested direction, the trial judge was enjoined to have regard to the evidence and whether the direction concerned a matter not raised or relied

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<sup>35</sup> *Jury Directions Act 2013* (Vic), s 1(a)-(c).

<sup>36</sup> *Jury Directions Act 2013* (Vic), s 10.

<sup>37</sup> *Jury Directions Act 2013* (Vic), s 11.

<sup>38</sup> *Jury Directions Act 2013* (Vic), s 13.

<sup>39</sup> *Jury Directions Act 2013* (Vic), s 14(1).

upon 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<sup>40</sup>. Section 15 stated 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* obligation and any requirement to direct the jury of an alternative offence which had not been identified during the trial<sup>41</sup>. 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. It sufficed for the trial judge to identify only so much of the evidence as necessary to assist the jury to determine the issues<sup>42</sup>. 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 reasonably comprehensive summary of the evidence has proved to be persistent<sup>43</sup>.

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<sup>40</sup> *Jury Directions Act 2013* (Vic), s 14(2).

<sup>41</sup> *Jury Directions Act 2013* (Vic), s 16.

<sup>42</sup> *Jury Directions Act 2013* (Vic), s 18(1).

<sup>43</sup> *R v Zorad* (1990) 19 NSWLR 91.

The abolition of the *Pemble* obligation is controversial. The NSWLRC recommended against that course 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<sup>44</sup>. 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 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*<sup>45</sup>. As held in *James* 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<sup>46</sup>.

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<sup>44</sup> NSWLRC Report at 185 [A.43]ff (Appendix A).

<sup>45</sup> (2014) 253 CLR 475.

<sup>46</sup> (2014) 253 CLR 475 at 490 [37] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ.

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, 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<sup>47</sup>.

Despite reservations of the kind expressed by the QLRC and the NSWLRC, the Victorian Department of Justice considered that the 2013 Act did not sufficiently deliver the quietus to *Pemble*. It characterised the s 15 override as a loophole<sup>48</sup>. In 2015, the JDA ("the 2015 Act") was enacted with the object of extending, restructuring and further refining the 2013 Act<sup>49</sup>. 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.

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<sup>47</sup> QLRC Report at 371-398 [11.53]-[11.143].

<sup>48</sup> Criminal Law Review, Department of Justice (Vic), *Jury Directions: A Jury-Centric Approach* (2015) at 24-25 [5.4].

<sup>49</sup> Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 March 2015 at 679.

Building on the VLRC's work, the Judicial College of Victoria commissioned a report on the simplification of directions governing topics including complicity, inferences, circumstantial evidence, the accused's other misconduct and reliability warnings<sup>50</sup>. Weinberg JA undertook the task of preparing the report. The 2015 Act maintains the framework of its predecessor, and builds on it by enacting a number of the recommendations of the Weinberg Report with respect to directions on tendency and coincidence evidence and unreliable evidence. The 2015 Act seeks to return the law on the standard of proof in circumstantial cases to the position before *Shepherd v The Queen*<sup>51</sup>, and it strips away a requirement for various directions on the assessment of categories of evidence, which were considered to reflect outdated assumptions<sup>52</sup>. A third phase of the Victorian reforms saw significant amendments to the 2015 Act<sup>53</sup>, prompted by a further report by the Department of Justice<sup>54</sup>. The requirement to give directions on a further raft of aspects of the evaluation of evidence has been abolished or simplified.

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<sup>50</sup> Judicial College of Victoria, *Simplification of Jury Directions Project: A Report to the Jury Directions Advisory Group* (2012).

<sup>51</sup> (1990) 170 CLR 573.

<sup>52</sup> Criminal Law Review, Department of Justice (Vic), *Jury Directions: A Jury-Centric Approach* (2015) at 63-65 [10.3.1]-[10.3.2].

<sup>53</sup> *Jury Directions and Other Acts Amendment Act 2017* (Vic).

<sup>54</sup> Criminal Law Review, Department of Justice (Vic), *Jury Directions: A Jury-Centric Approach Part 2* (2017).



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<sup>55</sup> and to the fact that Victoria had the highest rate among the Australian jurisdictions of successful appeals from erroneous directions<sup>56</sup>. 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 results of the Australasian Institute of Judicial Administration's study "*The Jury Project 10 Years On*" supports anecdotal reports that Victorian judges have notably shortened their summing-up in criminal trials<sup>57</sup>. It also appears that Victorian judges have embraced fact-based directions. The results of recent research stimulated by the Law Reform Commissions' work on jury directions

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<sup>55</sup> Australian Institute of Judicial Administration, *The Jury Project: Stage One – A Survey of Australian and New Zealand Judges* (2006) at 26-27.

<sup>56</sup> Tilmouth, *The wrong direction: A case study and anatomy of successful Australian criminal appeals* (2015) 40 *Australian Bar Review* 18 at 20.

<sup>57</sup> Australasian Institute of Judicial Administration, *The Jury Project 10 Years On – Practices of Australian and New Zealand Judges*, (2019) at 33.

provides strong support for fact-based directions as improving the quality of jury deliberations<sup>58</sup>.

In March 2013, the NSWLRC was given a reference "to review current avenues of appeals in all criminal matters, with a view to simplifying and streamlining appeal processes, and consolidating criminal appeal provisions into a single Act"<sup>59</sup>. In its report published in March 2014, the NSWLRC recommended that the *Criminal Appeal Act 1912* (NSW) ("the CAA") and the *Crimes (Appeal and Review) Act 2001* (NSW) should be repealed and replaced with a new Criminal Appeal Act consolidating the provisions governing appeals from criminal proceedings, giving effect to the Commission's recommendations made in its report and using modern language and drafting techniques<sup>60</sup>.

The NSWLRC noted that the separation of the framework for criminal appeals into different pieces of legislation is an historical remnant reflecting the piecemeal development of criminal appeals over the last two centuries<sup>61</sup>. "Stakeholders" were said to strongly

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<sup>58</sup> Spivak, Ogloff and Clough, "Asking the Right Questions: Examining the Efficacy of Question Trails as a Method of Improving Lay Comprehension and Application of Legal Concepts" (2019) 26(3) *Psychiatry, Psychology and Law* 441-456.

<sup>59</sup> NSWLRC, *Criminal Appeals*, Report No 140 (2014) at xii.

<sup>60</sup> NSWLRC, *Criminal Appeals*, Report No 140 (2014) at 37 [4.12].

<sup>61</sup> NSWLRC, *Criminal Appeals*, Report No 140 (2014) at 36 [4.5].

support consolidation. The NSWLRC was not able to identify any disadvantages other than the initial period of transition when judges and practitioners would be required to familiarise themselves with the new legislation<sup>62</sup>.

The NSWLRC identified three problems with the common form provision for the determination of appeals against conviction on indictment in s 6(1) of the CAA<sup>63</sup>. The provision is, of course, taken from the *Criminal Appeal Act 1907* (UK) and the infelicity of the drafting of the provision is notorious.

Breaking s 6(1) into its constituent parts: the court shall allow the appeal if (i) the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence; or (ii) the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law; or (iii) on any other ground whatsoever there was a miscarriage of justice. In any other case the court shall dismiss the appeal subject to the proviso that, even if a ground might succeed, the court may dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

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<sup>62</sup> NSWLRC, *Criminal Appeals*, Report No 140 (2014) at 36 [4.7].

<sup>63</sup> NSWLRC, *Criminal Appeals*, Report No 140 (2014) at 125 [8.25]-[8.26].

As the NSWLRC observed, the grounds overlap; it is unclear whether ground (iii), a miscarriage of justice, is an element of grounds (i) and (ii)<sup>64</sup>. The NSWLRC pointed out that it is hard to see how the proviso can be applied if ground (i) succeeds or the distinction between a "miscarriage of justice" in ground (iii) and a "substantial miscarriage of justice" under the proviso<sup>65</sup>.

The NSWLRC considered that *Weiss v The Queen* has made the application of the proviso uncertain given the Court's recognition that there is no "single universally applicable description" of what amounts to a substantial miscarriage of justice<sup>66</sup>.

*Weiss* has not been without its critics. Two points may be made about the decision. First, it provides a workable, historically satisfying, distinction between the "miscarriage of justice" in ground (iii) and the "substantial miscarriage of justice" to which the proviso is directed. Ground (iii) catches any departure from trial according to law, regardless of its nature or importance. Whereas the proviso, which was enacted to overcome the Exchequer rule,

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<sup>64</sup> NSWLRC, *Criminal Appeals*, Report No 140 (2014) at 126 [8.29].

<sup>65</sup> NSWLRC, *Criminal Appeals*, Report No 140 (2014) at 126-127 [8.31]-[8.32].

<sup>66</sup> NSWLRC, *Criminal Appeals*, Report No 140 (2014) at 127 [8.34] quoting *Weiss v The Queen* (2005) 224 CLR 300 at 317 [45] per Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ.

looks to matters of substance in determining whether the departure has actually occasioned a miscarriage of justice<sup>67</sup>.

The second point is that *Weiss* deals with a difficulty inherent in the lost chance of acquittal test<sup>68</sup>. The error in *Weiss* was the ruling that Weiss could be cross-examined along lines that disclosed his affair with an under-age girl. The trial judge was invited to refuse to exclude cross-examination on the topic in the exercise of the *Christie* discretion<sup>69</sup>. As Callaway JA observed, on one view, the trial judge's ruling was a wrong decision on a question of law within ground (ii) and on another view the ruling was a mistaken exercise of the *Christie* discretion, which might be a miscarriage of justice within ground (iii). On either view, it was necessary for the prosecution to demonstrate that the proviso applied<sup>70</sup>.

Callaway JA answered the question of whether Weiss had been deprived of "a real chance of acquittal"<sup>71</sup> adversely to Weiss. His Honour went on to discuss the operation of the proviso making clear that if the test of whether an error or irregularity has

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<sup>67</sup> *Weiss v The Queen* (2005) 224 CLR 300 at 308 [18] per Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ.

<sup>68</sup> *Mraz v The Queen* (1955) 93 CLR 493.

<sup>69</sup> *R v Christie* [1914] AC 545.

<sup>70</sup> *R v Weiss* (2004) 8 VR 388 at 398 [64].

<sup>71</sup> *R v Weiss* (2004) 8 VR 388 at 400 [69].

occasioned a substantial miscarriage of justice was one of the inevitability of conviction, judged by asking whether any reasonable jury, properly instructed, would have reached the same conclusion as the jury at trial, it would not have been open to dismiss the appeal under the proviso<sup>72</sup>.

It was this reasoning, which may be thought to have informed *Weiss*' insistence on returning to the text of the common form provision, which makes clear that it is for the appellate court to determine for itself whether no substantial miscarriage of justice has actually occurred, as distinct from speculating about what "this jury" or "a reasonable jury" might have determined<sup>73</sup>.

Apart from the burden that *Weiss* places on the appellate court, which must review the whole of the record of the trial, the criticism as to the uncertainty of what constitutes a substantial miscarriage of justice, is directed to the absence of causal relation between the error or irregularity and the verdict in the trial that was had. It is the latter consideration that appears to have informed NSWLRC's recommendation.

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<sup>72</sup> *R v Weiss* (2004) 8 VR 388 at 400-401 [70].

<sup>73</sup> *Weiss v The Queen* (2005) 224 CLR 300 at 316 [40] per Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ.

The NSWLRC considered a number of possible models for reform of 6(1). Ultimately, it recommended that s 6(1) be replaced with a provision in these terms<sup>74</sup>:

"The Court of Criminal Appeal must allow an appeal against conviction if the Court is satisfied that:

- (a) the verdict, on the evidence before the court at the time of the verdict, is unreasonable
- (b) there has been an incorrect decision on a question of law or other miscarriage of justice that, in the opinion of the court, deprived the accused of a real possibility of acquittal, or
- (c) the accused did not receive a fair trial."

The NSWLRC noted that the proposed "real possibility of acquittal" test is subject to the established body of pre-*Weiss* case law. This test, which focusses the inquiry on whether the outcome could have been different, was said to enjoy "significant stakeholder support"<sup>75</sup>.

It appears that, to date, there has been no response from the NSW government to the proposal for consolidation of the criminal appeals legislation or the reformulation of the s 6(1) test.

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<sup>74</sup> NSWLRC, *Criminal Appeals*, Report No 140 (2014) at 136 (Recommendation 8.1).

<sup>75</sup> NSWLRC, *Criminal Appeals*, Report No 140 (2014) at 136 [8.74].

In England the determination of appeals against conviction on indictment is now governed by s 2(1) of the *Criminal Appeal Act 1968* (UK), which was inserted in 1995 following the report of the Royal Commission on Criminal Justice<sup>76</sup>:

"2(1) Subject to the provisions of this Act, the Court of Appeal –

- (a) shall allow an appeal against conviction if they think that the conviction is unsafe; and
- (b) shall dismiss such an appeal in any other case."

In the period of settling-down following the enactment of the new provision, the Court of Appeal endorsed the statement of the editors of *Archbold* that neither the misconduct of the prosecution, nor the fact that there has been a failure to observe some general notion of "fair play", were themselves reasons for quashing a conviction<sup>77</sup>. A less restrictive approach has since been adopted. It would seem that the Court of Appeal now proceeds upon the footing that s 2 re-states the practice adopted prior to the amendment<sup>78</sup>. This is in line with Sir John Smith QC's view that the determination

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<sup>76</sup> Royal Commission on Criminal Justice, *Report*, Cm 2263, (1993) at 168-169.

<sup>77</sup> *R v Chalkley* [1998] QB 848 at 869.

<sup>78</sup> *R v Mullen* [2000] QB 520; *R v Togher* [2001] 3 All ER 463; *R v Gordon* [2001] NIJB 50; *R v McArdle* [2000] NI 390; *R v Mohammed* [2004] EWCA Crim 678; *R v Hanratty* [2002] 3 All ER 534.



of an appeal against conviction on indictment under the present provision as with its predecessor has always been whether a miscarriage of justice has occurred; an inquiry that is the same as to ask whether the conviction is unsafe<sup>79</sup>.

Whether the NSWLRC's proposal will make the determination of appeals against conviction on indictment more certain is an open question. The Victorian experience suggests that a more fruitful means of reducing the incidence of unmeritorious, successful appeals may be the enactment of jury directions legislation along the lines of the Victorian model.

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<sup>79</sup> Smith, "The Criminal Appeal Act 1995: Part 1: Appeals against conviction" [1995] *Criminal Law Review* 920 at 924-925.