

# Recommendations

1. The law concerning jury directions in criminal trials should be located in a single statute.
2. The legislation should be introduced over time and replace the common law, and it should contain revised versions of all existing Victorian statutory provisions (including relevant Evidence Act 2008 (Vic) provisions) concerning directions.
3. Section 165(5) of the Evidence Act 2008 (Vic), which saves the operation of the common law, should be repealed.
4. The legislation should permit development of a body of law by the courts in accordance with general principles set out in the statute when a particular direction that is necessary for a fair trial, or is otherwise appropriate, is not expressly dealt with by the legislation.
5. The legislation should contain general principles which guide the content of all directions. All directions should be:
  - clear
  - simple
  - brief
  - comprehensible
  - tailored to the circumstances of the particular case.
6. The legislation should clearly indicate those directions that are mandatory and those which are discretionary.
7. The trial judge must give a discretionary direction that has been requested by counsel for the accused unless satisfied that there is good reason not to do so.
8. The legislation should declare that the trial judge has an obligation to give the jury any direction that is necessary to ensure a fair trial.
9. The fact that a direction is not sought, or is opposed, by counsel for the accused must be taken into account by the trial judge when determining whether any direction or warning is necessary to ensure a fair trial.
10. In determining whether any direction is necessary to ensure a fair trial and whether there is good reason to refuse a request by counsel for the accused for a particular direction the trial judge may consider any of the following matters:
  - the content of addresses by counsel and/or by the accused, if unrepresented
  - the capacity of counsel to deal with the matter adequately
  - the submissions of counsel or the accused, if unrepresented
  - any questions or requests made by the jurors
  - the extent to which the issue is a matter of common sense which the jury as a whole may be presumed to appreciate
  - whether the topic will be sufficiently addressed by another direction
  - the rights of both the prosecution and the accused person to a fair trial.
11. The trial judge should have a discretionary power to determine the timing and frequency of the directions given to the jury.
12. The legislation should ultimately govern the content of all directions of a procedural nature such as:
  - burden and standard of proof
  - the role of the trial judge, the jury and of counsel
  - the requirement that the verdict be based solely on the evidence
  - the assessment of witnesses
  - unanimous verdicts

# Recommendations

- those directions which are mandatory when the circumstances require (eg alternative verdicts, separate consideration, and perseverance)
  - Those directions which may be given when the circumstances require (eg majority verdicts)
  - Those directions which are of an administrative nature (eg jury empanelment, selecting a foreperson, trial procedure)
13. The essential elements of directions concerning the use of evidence should be set out in the legislation over time. Once the essential elements of a particular direction are dealt with by the legislation, any common law rule concerning that direction should be abolished. The essential elements of the following directions should be included in the initial legislation:
    - propensity reasoning
    - identification evidence
    - use of post-offence conduct.
  14. Until the legislation deals with a particular direction, or is declared complete, common law rules concerning that direction should continue to apply. If the legislation, once completed, does not refer to the essential elements of any direction the trial judge considers necessary to ensure a fair trial, the trial judge should have a discretionary power to determine the content of that direction guided by the general principles in the legislation.
  15. Directions not dealt with in this report should be reviewed with a view to their removal, or to their consolidation, simplification and inclusion in the new jury directions legislation.
  16. The Victorian Law Reform Commission should undertake this review.
  17. As part of the review of the offences in the *Crimes Act 1958* (Vic) underway by the Department of Justice, the Attorney-General should review the substantive law of sexual offences in order to reduce in number, shorten and simplify the directions and warnings the trial judge must give to the jury in sex offence trials.
  18. In addressing outdated assumptions and prejudices concerning complainants in sexual offence trials, the approach should be to contradict inappropriate arguments, directions or comments being made by counsel and trial judges, rather than requiring positive statements on such topics to be made, in all cases, by way of directions from the trial judges.
  19. Parliamentary Counsel should consider the language in which a jury may be directed about the elements of a particular offence when any changes are made to the criminal law.
  20. It should not be possible to argue on appeal, without the leave of the Court of Appeal, that the trial judge made an error of law when giving or in failing to give a particular direction to the jury, unless the alleged error of law was drawn to the attention of the trial judge prior to verdict.
  21. The Court of Appeal should not grant leave to argue a ground of appeal in the circumstances referred to in Recommendation 20 unless it finds that there is a reasonable prospect that the ground, if made out, would satisfy it that there had been a substantial miscarriage of justice.
  22. The nature and extent of a trial judge's obligation to direct the jury about the elements of the offences, the facts in issue and the evidence so that it may properly consider its verdict should be set out in the legislation.
  23. The legislative statement of this obligation should contain the following principles:
    - a) The trial judge must direct the jury about the elements of any offences charged by the prosecution that are in dispute and may do so by identifying the findings of fact they must make with respect to each disputed element.
    - b) The trial judge must direct the jury about the elements of any defences raised by the accused person which must be negated by the prosecution or affirmatively proved by the accused person and may do so by identifying the findings of fact they must make with respect to each disputed element.

- c) The trial judge must direct the jury about all of the verdicts open to them on the evidence, unless there is good reason not to do so.
- d) The trial judge must refer the jury to the evidence which is relevant to the findings of fact they must make with respect to the contested elements of each offence.
- e) In referring the jury to relevant evidence the trial judge is not required to provide the jury with an oral restatement of all or any of that evidence, unless the judge determines, in the exercise of the judge's discretion, that it is necessary to do so in order to ensure a fair trial.
- f) In determining whether it is necessary to provide the jury with an oral summary of evidence, the trial judge may have regard to the following matters:
- the length of the trial
  - whether the jury will be provided with a written or electronic transcript or summary of the evidence
  - the complexity of the evidence
  - any special needs or disadvantages of the jury in understanding or recalling the evidence
  - the submissions and addresses of counsel
  - such other matters as the judge deems appropriate in the circumstances of the case
- g) The trial judge must direct the jury that they must find the accused not guilty if they cannot make any of the findings of fact referred to in Paragraph (a) beyond reasonable doubt.
- h) The trial judge is under no obligation to direct the jury about the elements of the offence (or any defence) other than to comply with these requirements.
- i) The trial judge must provide the jury with a summary of the way in which the prosecutor and the accused have put their respective cases.
24. The term post-offence conduct should be used to describe conduct which may amount to an implied admission of guilt by the accused and which is now referred to as conduct which may convey a 'consciousness of guilt'.
25. The legislation should require the prosecution to identify, prior to the commencement of addresses, any evidence of particular post-offence conduct of the accused upon which it seeks to rely as demonstrating an awareness of guilt on the part of the accused as to any offence. The judge must decide whether any item of evidence concerning post-offence conduct by the accused is capable of amounting to an implied admission of guilt of any offence before the prosecutor may address the jury about the conclusions it might draw from this evidence.
26. If the trial judge decides to give the jury a warning about the use of evidence concerning post-offence conduct by the accused, the trial judge should be permitted to provide the warning in general terms and should not be required to refer to each particular item of post-offence conduct which may amount to an implied admission of guilt by the accused person.
27. Any warning which a trial judge gives to a jury about the use of evidence concerning post-offence conduct by the accused will be sufficient if it contains reference to the following matters:
- People lie or engage in other apparently incriminating conduct for various reasons
  - The jury should not necessarily conclude that the accused person is guilty of the offence charged just because the jury find that he or she lied or engaged in some other apparently incriminating conduct.
28. Both section 116 and section 165(1)(b) of the *Evidence Act 2008* (Vic) should be repealed and a provision concerning identification evidence directions should be included in the new jury directions legislation.

# Recommendations

29. In the jury directions legislation, 'identification evidence', 'recognition evidence' and 'similarity evidence' should be given distinct definitions. The definitions should extend to the identification of objects.
30. Where 'identification evidence' is admitted and the reliability of that evidence is disputed, the legislation should require the judge to warn the jury about the unreliability of the evidence.
31. Where 'recognition evidence' or 'similarity evidence' is admitted, the legislation should require the judge to warn the jury about the unreliability of the evidence upon the request of counsel for the accused, unless the judge is satisfied that there is good reason not to do so.
32. The warning must, in the case of 'identification evidence', and may, in the case of 'recognition evidence' or 'similarity evidence', direct the jury that there is a special need for caution before accepting the evidence and that:
  - The identification, recognition or similarity evidence depends on a witness receiving, recording and accurately recalling an impression of a person or object
  - A witness, or multiple witnesses, may honestly believe that their identification, recognition or similarity evidence is accurate when it is in fact mistaken
  - Innocent people have been convicted because honest witnesses were mistaken in their evidence concerning identification, recognition or similarity.
33. The judge is not required to use any particular form of words when giving a warning, but must inform the jury of any matter of significance bearing on the unreliability of the evidence in the circumstances of the case.
34. The legislation should provide that a trial judge is not obliged to direct the jury about any 'defence' to a count on the indictment, or about any alternative verdict, which counsel for the accused did not place before the jury in final address unless the trial judge is satisfied that:
  - the defence or alternative verdict is reasonably open on the evidence
  - the failure of defence counsel to address the matter was due to error or oversight by counsel and was not adopted for tactical reasons in the interest of the accused
  - the trial judge is satisfied that it is necessary to direct the jury about the matter in order to ensure a fair trial.
35. When determining whether it is necessary to direct the jury about any 'defence' or alternative verdict in the circumstances referred to in Recommendation 34, it shall be presumed, unless the judge is satisfied to the contrary, that a decision taken by counsel, for tactical reasons, not to advance a 'defence' or alternative verdict to the jury removes any obligation on the trial judge to direct the jury about that matter.
36. In addressing outdated assumptions and prejudices concerning complainants in sexual offence trials, the approach should be to contradict inappropriate arguments, directions or comments being made by counsel and trial judges, rather than requiring positive statements on such topics to be made, in all cases, by way of directions from the trial judges.
37. The issue of delay in complaint in criminal trials should be governed by a provision in the legislation, substantially adopting s.165B of the *Evidence Act 2008* (Vic), in lieu of s 61 of the *Crimes Act 1958* (Vic).
38. The legislation should contain a further provision which states that in any trial for an offence under Subdivision (8A), (8B) (8C) (8D) (8E) of Part 1 of the *Crimes Act 1958* (Vic), the issue of the effect of any delay in complaint, or absence of complaint, on the credibility of the complainant should be a matter for argument by counsel and for determination by the jury.
  - (i) Subject to subsection (ii), save for identifying the issue for the jury and the competing contentions of counsel,<sup>1</sup> the trial judge must not give a direction regarding the effect of delay in complaint, or absence of complaint, on the credibility of the complainant, unless satisfied it is necessary to do so in order to ensure a fair trial.

- (ii) If evidence is given, or a question is asked, or a comment is made that tends to suggest that the person against whom the offence is alleged to have been committed either delayed making or failed to make a complaint in respect of the offence, the judge must tell the jury that there may be good reasons why a victim of a sexual offence of that kind may delay making or fail to make a complaint in respect of the offence.

The legislation should prohibit the trial judge from telling the jury or suggesting in any way:

- ii. that complainants in sexual offence cases are regarded by the law as a class of unreliable witnesses;
  - ii. that on account of delay it would be dangerous or unsafe to find the accused guilty
39. As part of the process of ongoing review of jury directions, consideration should be given to providing for simplified directions on the issue of propensity. The legislation should contain guidance for the trial judge when warning a jury about propensity reasoning, adopting and suitably modifying the model suggested by Leach.
40. Legislation should provide that notwithstanding section 250 of the *Criminal Procedure Act 2009* (Vic) where, after summary inquiry at the conclusion of the trial, in the opinion of the trial judge:
- a. the trial was unnecessarily protracted; or
  - b. the task of the jury made unnecessarily or unreasonably burdensome
- by reason of the failure of counsel for the prosecution or defence or other legal practitioners to comply with the provisions of the *Criminal Procedure Act 2009* (Vic) or the relevant Practice Direction or Practice Notes, the trial judge may send a report to this effect to the Solicitor for Public Prosecution, the Managing Director of Victoria Legal Aid or such other body as the judge deems appropriate.
41. When addressing the jury about the issues that are expected to arise in a trial, the judge may provide the jury with a document known as an 'Outline of Charges' which identifies the elements of the offences charged in the indictment (including alternate offences) and which indicates the elements disputed by the accused.
42. If the trial judge decides to give the jury an 'Outline of Charges' the trial judge may direct the prosecutor to prepare a draft of that document and to attempt to settle the document with counsel for the accused before filing it with the court. Section 223 of the *Criminal Procedure Act 2009* (Vic) should be amended to expressly refer to this document and to provide the trial judge with an express power to direct counsel to prepare a draft of the document.
43. The trial judge should be expressly permitted to provide the jury with a document known as a 'Jury Guide', which contains a list of questions of fact designed to guide them towards their verdict. The jury must not be required to provide answers publicly to the questions in the document, but should be directed that they may use the 'Jury Guide' to assist them to reach a verdict.
44. If the trial judge decides to give the jury a 'Jury Guide' a draft of that document must be shown to the prosecutor and counsel for the accused prior to it being handed to the jury and counsel must assist the trial judge to finalise the questions of fact that will be included in that document.
45. The Victoria Bar Council should consider whether counsel who appear in criminal trials should be able to seek accreditation to conduct such trials.
46. The Victorian Bar Council should consider establishing an assessable skills training course for barristers who wish to obtain specialist accreditation to conduct criminal trials.
47. The Office of Public Prosecutor and Victorian Legal Aid should consider whether barristers who are accredited as specialists in criminal trials should receive a fee loading.
48. The Attorney-General should consider whether a Public Defender scheme should be established.

1. In compliance with *Alford v Magee* (1952) 85 CLR 437.

## Recommendations

49. Because of the complexity of sexual offence trials, the Office of Public Prosecutor and Victorian Legal Aid should consider increasing the fees paid to counsel in these trials in order to ensure that suitable counsel are engaged.
50. Subject to the discretion of the head of jurisdiction, all newly appointed judges who will conduct criminal trials should be required to complete a skills training program concerning the law and practice of criminal trials.
51. The Judicial College of Victoria should provide judges with skills training courses designed to assist them to conduct criminal trials and, in particular, to formulate jury directions and warnings.
52. Ongoing refresher courses concerning the law and practice of criminal trials should be provided to judges who conduct criminal jury trials.