

## Chapter 7

# Judges' Directions To Juries

### INTRODUCTION

7.1 Previous chapters in this Report have recommended procedural and evidentiary reforms which are intended to make it easier for complainants to report sexual offences to the police and to give evidence in court. This Chapter recommends changes to the laws which determine what the judge must tell the jury in a sexual offence case. It also proposes the inclusion of material relevant to these changes in judicial education and prosecutor training.

7.2 The changes are in part recommended because the Commission is satisfied that jury directions too often reflect outdated perceptions. The Commission recognises that those perceptions are often allied to an entirely appropriate concern that no injustice be done to those who are accused of sexual offences. If the recommendations set out in this Report are adopted, the Commission nevertheless believes that accused persons will be appropriately protected while complainants will be treated with that fairness which, in the past, they may have been denied.

7.3 In a criminal trial the judge is responsible for directing the jury about the law and the jury is responsible for deciding whether the accused is guilty of the offence with which he has been charged. For example, in a rape trial the judge will tell the jury that the prosecution must prove beyond reasonable doubt that the accused intentionally sexually penetrated the complainant without her consent and that the accused was aware that the complainant was not consenting, or might not be consenting. The jury will have to decide whether these facts have been established.

7.4 As well as explaining the law to the jury, Victorian judges summarise the evidence and may make comments on it. The jury will be told that they must comply with the judge's directions about the law, but that since it is their role to decide the facts they may accept or reject any comment that the judge makes about the facts.

7.5 A judge who is directing a jury in a sexual offence trial faces significant challenges. In giving jury directions the judge must instruct the jury on the issues about which they must be satisfied before the accused can be convicted. The law also requires the judge to warn the jury about matters which could affect the reliability of evidence given by some witnesses, which the jury may be unaware of and which fall within the special knowledge of the judge.<sup>811</sup> In *R v BWT*<sup>812</sup> Wood CJ at CL referred to at least eight different matters on which it may be necessary to instruct the jury in a sexual offence case.

7.6 The judge will need to charge the jury in clear and comprehensible language that the average juror will understand. In directing juries in sexual offence cases the judge will be particularly concerned to ensure that there is no basis for an appeal, the result of which might require the complainant to go through the ordeal of giving evidence again. This entirely commendable approach nevertheless carries the danger that the jury will be given warnings, of the kind discussed below, when on the facts of the particular case those warnings are inappropriate.

7.7 Historically the sole purpose of jury warnings was to protect the accused against an unfair conviction. In more recent times legislation has been enacted to counter myths about sexual assault<sup>813</sup> and to ensure that complainants, as well as people charged with sexual offences, are treated fairly.

7.8 Courts have also emphasised the importance of recognising the interests of witnesses. Deane J in the High Court decision of *Dietrich v R*<sup>814</sup> noted that a fair trial requires consideration of the 'interests of the Crown acting on behalf of the community as well as to the interests of the accused'. Similarly, in an English sexual assault appeal case, the Lord Chief Justice (Lord Lane) speaking for the Court said that:

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811 For example where a person who gives evidence was an accomplice of the accused, the judge is required to warn the jury against acting on possibly unreliable testimony alone. See generally Andrew Ligertwood, *Australian Evidence* (3<sup>rd</sup> ed) (1998) 178–183.

812 (2002) 54 NSWLR 241.

813 For a discussion of the popular myths surrounding sexual assault, see Denise Lievore, *Non-Reporting and Hidden Recording of Sexual Assault: An International Literature Review* (2003). See also the judgment of L'Heureux-Dube J in *R v Ewanchuk* [1999] 1 S.C.R. 330, 369–70 and the references she cites on that page, for example; Ngairé Naffine, 'Possession: Erotic Love in the Law of Rape' (1994) 57 *Modern Law Review* 10; Richard Andrias, 'Rape Myths: A Persistent Problem in Defining and Prosecuting Rape' (1992) 7:2 *Criminal Justice* 2.

814 (1992) 177 CLR 292.

The learned judge has the duty on this and on all other occasions of endeavouring to see that justice is done. Those are high sounding words. What it really means is, he [sic] has got to see that the system operates fairly: fairly not only to the defendants but also to the prosecution and also to the witnesses. Sometimes he has to make decisions as to where the balance of fairness lies.<sup>815</sup>

7.9 This Chapter evaluates the effects of recent legislative changes which were intended to produce this 'balance of fairness'. Because the Commission believes that judges are likely to find it helpful to receive information about the outcomes of our research, these outcomes are discussed in some detail. The Chapter goes on to recommend some changes to the laws which determine the circumstances in which jury directions must be given and the content of those directions.

## METHODOLOGY

7.10 The main purpose of the Commission's study of jury charges was to evaluate how legislation relevant to sexual offences is reflected in judge's comments and jury directions. In 1991 the *Crimes Act 1958* was amended to introduce a statutory definition of consent<sup>816</sup> and to set out a non-exhaustive list of circumstances in which a person does not freely agree to a sexual act.<sup>817</sup> The new legislation also required judges to give jury directions about consent<sup>818</sup> and delay in reporting.<sup>819</sup> Section 61, which deals with the jury directions which must be given in cases involving a delay in reporting, was further amended in 1997.<sup>820</sup> These provisions operate in conjunction with common law requirements as to jury warnings in cases where there has been a delay in complaint.

7.11 To assess the effect of changes in the law on jury directions the Commission examined 24 charges in sexual offence trials occurring in the three year period between 2000 and 2002 in the County Court of Victoria. This exercise could not have been undertaken without the assistance of the Office of

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815 *R v DJX* (1990) 91 Cr App R 36, 40.

816 *Crimes Act 1958* s 36 inserted by *Crimes (Rape) Act 1991* s 3.

817 This list (s 36(a)–(g)) includes submission due to force, harm or fear of force or harm, and situations where the complainant is asleep, unconscious or so intoxicated by alcohol or other drugs as to be incapable of freely agreeing.

818 *Crimes Act 1958* s 37(1) inserted by *Crimes (Rape) Act 1991*.

819 *Crimes Act 1958* s 61 inserted by *Crimes (Rape) Act 1991*.

820 *Crimes (Amendment) Act 1997*.

Public Prosecutions (OPP) and the Judges of the County Court. The Commission gratefully acknowledges that assistance.

7.12 The study was a qualitative one which did not aim to produce statistically significant results but to provide information on how juries are being directed in a number of cases.

7.13 Potentially relevant cases occurring in this period were identified initially using a database maintained by the OPP known as PRISM. The Commission then asked solicitors from the Sexual Offences Section of the OPP to identify from that list the five most recent rape or serious sexual assault trials where the principal issue in dispute was consent or belief in consent and/or there was a significant delay in complaint.<sup>821</sup>

7.14 Approval was obtained from the Executive Committee of the County Court Judges of Victoria for the Commission to obtain access to the judges' charges in these matters. Judges' directions are audio-recorded but not routinely transcribed unless there is an appeal against conviction. The Victorian Government Recording Service (VGRS) agreed to transcribe the 24 directions. Once transcribed, the charges were sent to individual judges for revision.<sup>822</sup> The transcripts were examined by a research and policy officer from the Commission with social science expertise. The information was recorded in a specially designed Access coding schedule.<sup>823</sup> All transcripts were then independently re-examined and where necessary re-coded by a second research and policy officer, with both legal and social science expertise.

7.15 The jury directions (charges) were examined to ascertain how judges direct juries about the definition of consent, the necessary state of mind of the accused and any delay in complaint. Views about sexual assault which judges expressed in directing the jury on consent and other matters were noted by the researcher.

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821 All but two of the identified cases were rape matters. The non-rape matters were: one case involving three alleged indecent assaults, where both consent and belief in consent were in issue, and one case involving charges of sexual penetration and indecent assault which fell within our criteria as there was an eight year delay in the reporting of the alleged offences. One identified matter was eventually excluded from the study sample on the basis that neither consent, belief nor delay were in issue in the proceedings.

822 It is standard practice in Victoria for judges to revise their directions where a copy of the charge has been requested. Generally, such revisions are only grammatical or semantic and the content of the charge is not altered.

823 A copy of the coding schedule may be viewed at the Commission.

Great care was taken by the researchers to ensure that any quotes taken from the charges were accurate and not used out of context.

7.16 The research examined how amendments to section 61 were reflected in jury warnings in cases in which there was a delay in reporting the alleged offence. We identified the situations in which such warnings were being given and the nature of these warnings and also considered how judges direct juries when complaints are made promptly (the 'recent complaint' principle). The research also examined the clarity of jury directions and the time which was taken in delivering them.<sup>824</sup>

## LIMITATIONS

7.17 Selection of the cases was dependent on OPP solicitors being able to identify their five most recent cases within the period 2000–02. It could be that the cases identified by the solicitors were not the most recent within that period, although for the purposes of our study this was not essential. A random sample of all charges fitting the criteria for examination would have been preferable but the time and cost of such an approach prohibited this method.

7.18 The Commission did not have access to the whole transcript for each matter due to the prohibitive cost of having each case transcribed. We did not, therefore, examine the prosecution or defence opening and closing remarks. However, the current judicial practice in Victoria is that judges summarise the evidence and almost always refer to the way in which the defence and prosecution cases have been argued.

7.19 The charges generally reveal whether the prosecution or defence have taken exception to an aspect of a judge's charge and the judges usually prefaces any re-directions with a comment to that effect. However, the contents of discussions between the judge and counsel were not always recorded by the transcriber, which meant that the Commission did not have access to such information.

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824 We understand that our study is likely to complement national research currently being considered by the Australian Institute of Judicial Administration (AIJA) Jury Charge Committee into the length and comprehensibility of jury charges and methods to aid juries in their deliberations.

## JURY DIRECTIONS ON THE ELEMENTS OF SEXUAL OFFENCES

7.20 In this section we consider jury directions on consent and on the state of mind of the accused.

### CONSENT—*CRIMES ACT 1958* SECTIONS 36 AND 37

#### *THE 1991 CHANGES*

7.21 The 1991 amendments to section 36<sup>825</sup> of the *Crimes Act 1958* defined consent as ‘free agreement’ and provided a non-exhaustive list of circumstances in which a person does not freely agree to a sexual act.<sup>826</sup>

7.22 Section 37<sup>827</sup> requires the judge to direct the jury that the fact that a person did not say or do anything to indicate free agreement to a sexual act is normally enough to show that the act took place without that person’s free agreement.<sup>828</sup> Under section 37(1)(b) the judge is required—if relevant to the facts in issue—to direct the jury that a person is not to be regarded as having freely agreed to a sexual act just because she did not protest or physically resist<sup>829</sup> or sustain physical injury<sup>830</sup> or that she agreed on a previous occasion to a sexual act with the accused or another person.<sup>831</sup>

7.23 These reforms made significant changes to the concept of consent. Section 37(1)(a) introduced the concept that inactivity or silence now indicates lack of consent rather than the opposite. Bernadette McSherry has suggested that the new definition reinforces a ‘communicative model of sexuality’.<sup>832</sup> The former Law

825 *Crimes Act 1958* s 36 inserted by *Crimes (Rape) Act 1991* s 3.

826 See n 817 for what is included in this list.

827 Inserted by *Crimes (Rape) Act 1991* s 3.

828 *Crimes Act 1958* s 37(1)(a).

829 *Crimes Act 1958* s 37(1)(b)(i).

830 *Crimes Act 1958* s 37(1)(b)(ii).

831 *Crimes Act 1958* s 37(1)(b)(iii). The *Crimes Act 1958* s 37 was later amended further by *Crimes (Amendment) Act 1997* s 4 to add at the end of s 37(1) that the judge is must ‘relate any direction given to the facts in issue in the proceeding so as to aid the jury’s comprehension of the direction.’ Section 37(2) was also inserted: ‘A judge must not give to a jury a direction of a kind referred to in sub-section (1) if the direction is not relevant to the facts in issue in the proceeding.’

832 See Bernadette McSherry, ‘Legislating to Change Social Attitudes: The Significance of Section 37 (A) of the Victorian Crimes Act 1958’ (Paper presented at the Conference: Without Consent: Confronting Adult Sexual Violence, held 27-29 October 1992, Melbourne, 1993); and Simon Bronitt, ‘The Direction of Rape Law in Australia’ (1996) 18 *Criminal Law Journal* 249.

Reform Commission of Victoria stated: 'Another benefit of expressing these directions in legislative form is that the community in general will be made aware of what type of evidence is, or is not, sufficient to prove lack of consent'.<sup>833</sup>

### *JURY DIRECTIONS ON THE MEANING OF CONSENT*

7.24 Our research showed that judges gave the mandatory directions on consent required by section 37 in all but one of the directions considered.<sup>834</sup> An example of a standard direction under section 37(1)(a) is:

Consent obviously is a state of mind. It means free agreement. It may be evidenced by what the woman says or does or what she does not say or do. But evidence that a woman does not say or do anything to indicate consent is normally enough to show the act takes place without that person's free agreement...<sup>835</sup>

7.25 Most judges then referred to the relevant parts of section 37(1)(b)<sup>836</sup> which sets out the situations in which a person is 'not to be regarded' as having freely agreed to a sexual act.

7.26 A person is not to be regarded as having freely agreed to a sexual act because he or she freely agreed to engage in a sexual act with the accused or another person on another occasion.<sup>837</sup> In one case in which the complainant and accused had in the past engaged in consensual intercourse, the judge said that:

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833 Law Reform Commission of Victoria, *Rape: Reform of Law and Procedure* Appendixes to Interim Report No 42 (1991) 8.

834 In this matter (Trial 23) the judge omitted the direction pursuant to s37(1)(a), that the fact that a person did not say or do anything to indicate free agreement is normally enough to show that the act took place without the person's free agreement, when consent was in issue. It does not appear from the transcript that the Prosecutor took exception to this oversight. The judge was clearly asked to re-direct on a number of issues but there was no re-direction on consent.

835 Trial 5.

836 For example, in all nine matters in which the accused and complainant were former/current partners, the judges gave the mandatory direction under s 37(1)(b)(iii), that 'a person is not to be regarded as having freely agreed to a sexual act just because on that or an earlier occasion, she or he freely agreed to engage in another sexual act ...with that person...'

837 Section 37(1)(b)(iii).

...Nor, because on another earlier occasion that she did consent to a sexual act with the accused, does that necessarily mean that she was consenting on the occasion in question.<sup>838</sup>

7.27 While this direction is close to the spirit of the legislation on consent it might be argued that the inclusion of the word ‘necessarily’ implies the *possibility* of prior consent. The inclusion of the word ‘necessarily’ is also inconsistent with the wording of the legislation.

7.28 Trial 20 provides a useful example of a direction on the communicative model of consent:

...you have heard in this case...of previous consensual intercourse with the accused, and there has [sic] been questions about whether or not she had consensual intercourse with another or others, but whatever the answer on that, well, the fact that she may have is not to be regarded as resulting in free agreement on this occasion.

7.29 However in several other instances judicial elaborations on the meaning of consent appeared to undermine the effect of the standard statutory direction that consent means ‘free agreement’.<sup>839</sup> Trial 1 involved the alleged gang rape of a young woman who worked at a fast food outlet by five men who frequented the outlet on a regular basis. The judge gave the standard directions on consent as required by section 37(1)(a) omitting, however, the directions under 37(1)(b)<sup>840</sup> and added:

Victims of rape are not confined to the ranks of the virtuous. A prostitute may be raped as may a lady of loose morals and/or voracious sexual appetite.

7.30 Given the context of the direction—for example the judge’s reference to the complainant as having ‘eccentric sexual habits’<sup>841</sup>—it seems clear that the judge was not implying that the complainant belonged in the ‘ranks of the virtuous’.

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838 Trial 18. In this case, the complainant alleged that her estranged partner arrived at her house demanding to know about her movements and whether she had been sleeping with someone. He then allegedly raped her.

839 Trials 1, 8, 14 and 15 are examples which will be discussed in this section. A discussion of the directions on reasonable belief can be found at paras 7.51–64 below.

840 See above para 7.10.

841 See para 7.145 below. That paragraph contains a quote in which the judge uses the words ‘eccentric sexual habits’. The Prosecutor objected to the use of these words.

The judge made additional comments which seem inconsistent with the purpose of section 37(1)(b)(iii).<sup>842</sup> For example:

The relevance of the gang-bang is two-fold. Firstly it goes to the issue of consent. You are entitled, if you see fit, to infer that a woman who has previously agreed to multiple sexual partners, is more likely to consent to further such activity than a woman who has not.<sup>843</sup>

7.31 Trial 14 was a case which involved three alleged indecent assaults by an accused against his former partner. The accused gave evidence that the complainant had said to him on an earlier occasion that she agreed to him performing sexual acts on her when she was in a state of oblivion from alcohol, in order to test the accused's assertion that when she was in such a condition anyone could do anything to her and she would not know it was happening.<sup>844</sup> The judge again gave all the mandatory consent directions but went on to elaborate about the issue of consent.

What is different about this case is that it is contended that there was consent by [the complainant]. In what I will call the normal case the question of consent centres around the time of the performing of the act. This case is different because the consent that is alleged here is not a consent given at the time of the performing of the act, but a consent said to have been given previously and to be still operative at that time of the commission of the act.

7.32 The defence submitted that consent to a sexual act can legitimately be given at a time prior to the act in question. This was accepted by the judge, who directed the jury accordingly.<sup>845</sup>

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842 *Crimes Act 1958* s 37(1)(b)(iii) reads: 'a person is not to be regarded as having freely agreed to a sexual act just because—(iii) on that or an earlier occasion, she or he freely agreed to engage in another sexual act (whether or not of the same type) with that person, or a sexual act with another person'. This direction *must* be given by the judge where relevant to the facts of the case.

843 The judge went on: 'You are also entitled to more readily accept, if you see fit, an accused statement that he believed a woman was consenting to multiple sexual partners, when she says to him that she had previously enjoyed such activity, or he is aware that she previously so enjoyed such activity.'

844 Trial 14 is also discussed in the Interim Report paras 7.66–70.

845 As the judge directed: 'Remember that [defence counsel] does not have to prove that these things were said [the alleged conversation in which the complainant stated that she could drink herself into such a condition that anyone could do anything to her and she would not know] and that they amount to consent, it is for the Crown to prove beyond reasonable doubt that these things were not said or if they were that they do not amount to consent to the performance of the acts which occurred in the circumstances in which they occurred.'

7.33 The charges in Trials 1 and 14 reveal a notion of ‘blanket consent’ to sexual acts which is inconsistent with the spirit of the communicative model of consent reflected in sections 36 and section 37(1)(a).<sup>846</sup> As noted in the Interim Report, it appears that the intent of the section was to ensure that consent is to be given to sexual relations each and every time such acts are proposed.<sup>847</sup> To suggest otherwise could lead to resurrection of the idea that a woman who consents to sex on one occasion abandons her right to refuse on others.

#### *INTERIM REPORT RECOMMENDATIONS ON CONSENT*

7.34 The Interim Report recommended that the wording of the mandatory jury direction on consent should be changed to remove the word ‘normally’<sup>848</sup> from section 37, to make it clear that the failure of the complainant to say or do anything is sufficient of itself to show lack of free agreement. As Bernadette McSherry<sup>849</sup> has commented :

The use of the word ‘normally’ in this section seems to imply that the presumption of non-consent in such circumstances may be displaced if evidence can be produced showing that for some reason physical inactivity or silence did amount to consent.

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846 This notion of ‘blanket consent’ is arguably similar to that of ‘implied consent’ applied by the trial judge in the Canadian case of *R v Ewanchuk* and upheld by the Alberta Court of Appeal: (1998) 212 A.R. 81. This case is discussed in Gavin Last, ‘Advances Less Criminal Than Hormonal: Rape and Consent in *R v Ewanchuk*’ (1999) 5 *Appeal: Review of Current Law and Law Reform* 18. The existence of implied consent within the law of sexual assault was emphatically denied by the subsequent Canadian Supreme Court decision: *R v Ewanchuk* [1999] 1 S.C.R. 330. The majority held in relation to consent (per Major J, Lamer CJC, Cory, Iacobucci, Bastarache and Binnie JJ concurring): ‘The absence of consent, however, is subjective and determined by reference to the complainant’s subjective internal state of mind towards the touching, at the time it occurred.’ (p348) And in relation to ‘implied consent’ (p349): ‘If the trier of fact accepts the complainant’s testimony that she did not consent, no matter how strongly her conduct may contradict that claim, the absence of consent is established and the third component of the actus reus of sexual assault is proven. The doctrine of implied consent has been recognized in our common law jurisprudence in a variety of contexts but sexual assault is not one of them. Canadian law defines consent very similarly to the Victorian legislation.’

847 Interim Report para 7.74.

848 See Recommendation 77, Interim Report.

849 Bernadette McSherry, ‘Legislating to Change Social Attitudes: The Significance of Section 37 (A) of the Victorian Crimes Act 1958’ (Paper presented at the Conference: Without Consent: Confronting Adult Sexual Violence, held 27-29 October 1992, Melbourne, 1993) 379.

7.35 The submissions opposed to our interim recommendations were those from the Victorian Bar, the Criminal Bar Association and Victorian Legal Aid.<sup>850</sup> The Victorian Bar wrote:

The Bar does not believe it is necessary to change the meaning of consent. We accept the proposition that the definition of consent should reflect contemporary values about sexual relationships, such as mutual respect and communication. But it is simply going too far—in the sense that it is not consistent with these values—to suggest that the fact that a person did not do or say anything to indicate free agreement to the sexual act is evidence that the act took place without that person's free agreement.<sup>851</sup>

7.36 This comment appears to suggest that the 1991 amendment relating to failure to say or do anything to indicate consent should be reversed.

7.37 By contrast, the majority of submissions to the Interim Report on this point were in favour of a change to the definition of consent which underlines the intention of the 1991 reforms.<sup>852</sup> For example, the Department of Human Services submission noted:

Legislative endorsement of a 'communicative model' of sexual relations would help deal with problematic social attitudes towards sexual practices that continue to persist.<sup>853</sup>

### *RECOMMENDATIONS*

7.38 The Commission confirms the recommendation in the Interim Report that section 37 be changed to remove the word 'normally'. This change will reinforce the communicative model of consent and will make it more difficult for an accused to argue that a person who was too frightened or intoxicated to actively

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850 VLA did not give any reasons of its own for disagreeing with the recommendation, but merely referred to the CBA submission.

851 Submission 48.

852 Submissions 19, 24, 26, 30, 40, 44 and 47 to the Interim Report were explicitly in favour of Recommendation 77. Submission 3 appeared to support the recommendation although did not address it specifically. Submissions to the Discussion Paper were less favourable. Submissions 7, 11, and 27 supported the change, while six submissions opposed it. The arguments in the opposing submissions were discussed in the Interim Report para 7.59.

853 Submission 44.

indicate their unwillingness to participate in sex was in fact consenting to the sexual act.<sup>854</sup>

7.39 The proposed change will overcome the decision in *R v Laz*.<sup>855</sup> Here the Court of Appeal upheld an appeal against conviction in a case in which the trial judge had directed the jury that evidence that the woman did not say or do anything *is evidence* that she did not consent. Our recommendation also makes it clear that consent must be given at the time the act occurred.

7.40 In Chapter 3 we recommended prosecutor training and judicial education to assist judges to give jury directions which are consistent with this proposed legislative change.

## ! RECOMMENDATION(S)

169. The mandatory jury direction on consent contained in section 37 of the Crimes Act 1958 should be changed as follows:

‘The fact that a person did not say or do anything to indicate free agreement to the particular sexual act at the time that the act occurred is evidence that the act took place without that person’s free agreement.’

### *JURY DIRECTIONS ON FACTORS NEGATING CONSENT*

7.41 After defining consent as ‘free agreement’ section 36 goes on to provide a non-exhaustive list of circumstances in which a complainant is not to be taken to have freely agreed to an act (‘vitiating factors’). The list includes such factors as where a person is asleep, unconscious or so affected by alcohol or drugs as to be incapable of freely agreeing, where a person submits out of force or fear of force and where a person is mistaken about the sexual nature of the act or the identity of the person.

854 See Helen Jones, ‘Rape, Consent and Communication: Re-Setting the Boundaries?’ (2003) 6 *Contemporary Issues in Law* 23. She writes (p34): ‘In ‘date rape’, the focus is on the woman’s behaviour, her negotiation of risk, her responsibility, her signals, her communication (or lack of it). Little consideration is given to the man’s awareness of the risk he was taking.’

855 [1998] 1 VR 453. The Interim Report explains that the proposed change does not relieve the prosecutor of the obligation to prove the case against the accused and does not affect the right of the accused to remain silent, at para 7.79.

7.42 In the 13 matters in which one or more of the vitiating factors were assessed by the researchers as being relevant to the case<sup>856</sup> only seven charges referred to the factors. The other six made no reference to the vitiating factors at all. See Table 6, Appendix 4.

7.43 It is significant that in the charges examined, judges directed juries on the vitiating factors in only about half the cases where one or more were arguably relevant to the issue of consent. The legislation does not require judges to direct on vitiating factors which may be relevant to the facts in issue. However it is obviously preferable that they do so in cases where one or more of these factors is relevant.

7.44 Trial 15 is a good example of a case in which one of the vitiating factors—intoxication—was clearly relevant to the issue of consent yet the judge did not direct according to section 36(d).<sup>857</sup> This was a case involving the same accused and complainant as Trial 14 (the case involving alleged indecent assaults by a man on his former partner) but concerned separate offences. The judge<sup>858</sup> gave the jury the mandatory consent directions. Among his 24 reiterations of the words 'beyond reasonable doubt' the judge directed the jury on how they might consider the significance of the complainant's state of intoxication at the time of the alleged offences:

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- 856 The expanded categories of non-consensual sex were coded as relevant if:  
 the charge revealed the existence of undisputed facts relating to, for example, the complainant being asleep/unconscious/severely intoxicated at the time of the alleged offence; and  
 the charge revealed disputed facts that relate directly to one or more of the factors, for example where the complainant argued that she submitted through force or fear of force. Presumably, in all genuine rape cases, fear will be an element, so it was only where the complainant said that she *submitted* due to fear that the case was coded as such.  
 In two cases it was not known if the vitiating circumstances were relevant due to lack of adequate fact summaries in the charges.
- 857 Section 36(d) reads: '...Circumstances in which a person does not freely agree to an act include the following:...(d) the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing.'
- 858 The same judge as for Trial 14.

The effect of intoxication on her behaviour may be relevant in two ways in this case, first of all depending on the state of intoxication that you find, it may affect her ability to have been aware of what was going on at the time and on the other hand, to be able to remember accurately, what went on, at the relevant time. Secondly, a state of intoxication may cause a person to do or say things at the time, which she may not have said or done if she had been sober. The state of intoxication may cause a person to more readily agree to do something, which she would not have agreed to, if she had been sober and which she might regret thereafter.<sup>859</sup>

7.45 Given the judge's lengthy exposition on the issue of the complainant's intoxication, it is noteworthy that he did not direct the jury pursuant to section 36(d).<sup>860</sup> It is possible to read the judge's remarks as a suggestion that the complainant may have been so intoxicated that she was not capable of freely agreeing, but did not relate this possibility to the issue of non-consent as defined by section 36. This may have affected the extent to which the jury took into account the complainant's alleged intoxication in considering whether she freely agreed to the sexual acts.

7.46 In Trial 11 the complainant gave evidence that she was asleep and woke up to find the accused penetrating her vaginally. The judge did not direct on section 36(d).

7.47 Trial 22 involved rape allegations by a prostitute against her client. The complainant alleged that after the accused refused to pay for the services up front and she told him that she would not have sex with him he grabbed her by the throat so that she had difficulty breathing. She said that when she struggled he threatened to kill her, upon which she agreed that she would not struggle further and submitted to penetration. The judge did not direct in accordance with section 36(a) or (b).<sup>861</sup>

7.48 These examples appear to be exactly the types of cases envisaged in section 36 as negating free agreement.

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859 Trial 15. Contrast this direction with that of the judge in Trial 5, who referred to a woman not freely agreeing if 'so affected by alcohol that she does not understand her situation and is not capable of making up her mind.'

860 It should be noted here that the directions pursuant to ss 36(a)–(g) are not mandatory.

861 These sections read: Circumstances in which a person does not freely agree to an act include the following:... (a) the person submits because of force or fear of force to that person or someone else; (b) the person submits because of the fear of harm of any type to that person or someone else...

7.49 Our study suggests that judges do not always instruct juries on factors which may negate consent in some cases where such factors are apparently relevant. Nor do prosecutors appear to be objecting to this omission or drawing attention to vitiating factors when arguing the question of actual consent. In Chapter 3 we have recommended judicial education and prosecutor training programs. Such programs should refer to the relevance of vitiating factors in instructing juries in sexual offence trials. Prosecutors should be made aware of the need to refer to relevant vitiating factors in their arguments and to be alert to any omissions by judges to draw attention to such factors in their charges to juries.

### THE ACCUSED'S STATE OF MIND<sup>862</sup>

7.50 In order to obtain a rape conviction the Crown must prove beyond reasonable doubt that the accused intentionally sexually penetrated the complainant without her consent and that the accused knew that the complainant was not consenting or might not be consenting.<sup>863</sup> Under the present law a person who had an honest belief that the complainant was consenting to the act (sexual penetration or an indecent act) cannot be convicted of rape or indecent assault even if that belief was objectively unreasonable.

7.51 Since 1991 the judge has been required (where relevant) to direct a jury that 'in considering the accused's alleged belief that the complainant was consenting to the sexual act, it must take into account whether that belief was reasonable in all the relevant circumstances'.<sup>864</sup>

7.52 In three quarters of the jury charges examined, the judges adhered to the wording of the legislation or paraphrased the legislation in directing juries on reasonable belief. An example of such a standard direction is:

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862 The mental element of rape is discussed in detail in Chapter 8 of this Report. See also Interim Report paras 7.82–113.

863 *Crimes Act 1958* s 38.

864 *Crimes Act 1958* s 37 (1)(c).

The Crown must prove that the accused intended to commit the crime of rape in the sense that at the time he had the act of sexual penetration of the complainant he was aware that she was not consenting or else realised that she might not be consenting and determined to have sexual penetration of her whether she was consenting or not. In determining whether the accused believed the complainant was consenting you must take into account whether that belief was reasonable in all the circumstances.<sup>865</sup>

7.53 In comparison with the consent directions discussed above<sup>866</sup> the judges did not elaborate much, if at all, on the standard direction on belief in consent. In six charges the judges went on to say that reasonableness was ‘one of the many guides the jury could use to determine the accused’s state of mind’.<sup>867</sup>

7.54 In a quarter of the charges examined, the directions on belief were other than ‘standard’. In one, the judge took an objective approach and told the jury that if they were satisfied beyond reasonable doubt that the accused’s belief in the complainant’s consent was not reasonable, ‘then the necessary guilty mind is proved. If you are not satisfied that the accused’s belief was unreasonable, then again you should acquit’.<sup>868</sup> Defence counsel made no objection.

7.55 In the remaining five charges classed as ‘non-standard’ comprehensibility was sometimes an issue.<sup>869</sup> For example, in Trial 14 the judge reiterated several times to the jury how they ought to treat the notion of reasonableness against the subjective standard of honest belief, to the extent that the direction became confusing and entangled. To illustrate:

But remember, the belief itself does not have to be a reasonable belief, if it is in fact held, even though it is unreasonable, then he can not be convicted, and that is so even if it is a mistaken belief.<sup>870</sup>

7.56 In Trial 3, the jury is likely to have found the direction on the accused’s state of mind difficult to follow because of the complex sentence structure used:

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865 Trial 9.

866 Paras.7.25–34.

867 Trials 12, 17, 18, 19, 23 and 24.

868 Trial 5.

869 That is not to imply that the juries in the 18 charges in which a ‘standard’ direction on reasonable belief was given would necessarily have comprehended the somewhat artificial distinction inherent in the notion of an honest but unreasonable belief.

870 Trial 14.

In other words, to put it quite bluntly, if absence of consent which is not communicated may nevertheless satisfy the prosecution proof, any non-communication by a complainant to an accused may be all the more relevant in your eyes to proof or otherwise of an accused's awareness in his mind, what his belief was to the situations that you find in existence in sexual contact between persons where passions may be involved.

7.57 The same judge as for Trial 14, in Trial 15<sup>871</sup> again said on several occasions that an unreasonable belief honestly held must lead to an acquittal. After two and a half pages on this point, the judge went on to instruct the jury that in considering the question of whether it would have been reasonable for the accused to believe that the complainant was consenting to intercourse, '[y]ou should look at all the circumstances, not only the immediate circumstances surrounding that event, but indeed the broader circumstances that encompass their life and relationship in the last ten years and so on'.<sup>872</sup>

7.58 In this case the complainant alleged that the accused (her former de facto partner) dragged her out into the bushland surrounding her home, assaulted then raped her.<sup>873</sup> The direction that the jury consider the past relationship of the parties to determine whether the accused believed that his former partner was consenting is legally correct. However it is clearly inconsistent with the spirit of section 37, which states that a person is not to be regarded as having freely agreed to a sexual act just because she freely agreed on an earlier occasion.<sup>874</sup> We recommend below a change in the law to address this issue.

7.59 In a number of other charges juries were directed that past consensual sexual intercourse between the complainant and accused or complainant and others may be taken into account by the jury in deciding the issue of honest belief in consent. For example in Trial 1 the judge directed the jury as follows:

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871 Trial 15 involved the same complainant and accused as Trial 14 (but separate offences).

872 Trial 15.

873 There were four charges of kidnapping, rape, intentionally causing injury and recklessly causing injury, the last two as alternatives to the first two.

874 *Crimes Act 1958* s 37(1)(b)(iii). The accused was acquitted on all charges in both Trials 14 and 15.

You are also more entitled to more readily accept, if you see fit, an accused statement that he believed a woman was consenting to multiple sexual partners, when she says to him that she had previously enjoyed such activity, or he is aware that she previously so enjoyed such activity.<sup>875</sup>

7.60 In Trial 8 the complainant alleged that the accused orally raped and indecently assaulted her whilst she was falsely imprisoned in a car. The accused argued in his defence that they had engaged in prior acts of consensual oral sex on a number of occasions. The judge gave all the mandatory consent directions, including that prior sexual acts do not equate to free agreement, and made a number of comments on the issue of reasonable belief. He went on to say:

...you must...take into account the past dealings between these people, if any, as you find them to be, to see whether you think it would have been reasonable for him to believe on this occasion that she was consenting to intercourse, given for example, their past sexual history, if you accept that occurred.

7.61 Such directions may be consistent with the present law relating to the accused's state of mind but they illustrate a deficiency in it. Section 36 of the *Crimes Act* says that consent requires 'free agreement' but this provision is undermined by the fact that evidence of previous consensual sexual activity can be taken into account in deciding whether or not the accused on this occasion honestly believed the complainant was consenting. For example if a woman tells two men at a party that she has on a previous occasion enjoyed a threesome and they later that night coerce the woman into having sex with them, the men would be entitled to rely on her statement in support of their argument that they honestly believed that she had consented to sex with them on the later occasion.

7.62 This contradicts the communicative model of consent introduced in section 36 and section 37 of the *Crimes Act 1958* and potentially allows an accused to avoid culpability by relying on previous statements or occurrences which arguably bear no relation to the act in question.

7.63 Chapter 8, which deals with the required mental element for non-consensual sexual offences, makes recommendations to deal with this issue.

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875 This followed on directly from the quote in paragraph 7.30 which was discussed in the context of consent.

## JURY DIRECTIONS ON DELAY IN COMPLAINT

### *THE CURRENT LAW*

7.64 The Discussion Paper referred to the corroboration warnings which were routinely given in sexual offence cases.<sup>876</sup> Until 1980 juries were routinely warned that it was dangerous to convict the accused unless the evidence of the complainant was corroborated. The requirement to give a corroboration warning was abolished by section 62(3) of the *Crimes Act* but this did not prevent judges giving a corroboration warning where they thought it appropriate to do so.<sup>877</sup> In 1988 the former Law Reform Commission of Victoria recommended that the section should be amended to make it clear that the court should not give a warning that complainants in sexual offence cases are an unreliable class of witness.<sup>878</sup> This provision is now found in section 61(1)(a) of the *Crimes Act*.

7.65 It is common for sexual offence victims to delay reporting the offence and in many cases not to report at all.<sup>879</sup> The Commission's previous empirical research found that although just over half the reports of rape were made within a week, a significant proportion of reports were made five years or more of after the alleged offence occurring.<sup>880</sup> Delays in reporting occurred more frequently and tended to be for a longer period in the case of penetrative offences other than rape.<sup>881</sup> These offences often involved child complainants.

7.66 Even when legislation removed the need to give corroboration warnings, the fact that a person did not tell anyone about a sexual assault as soon as it occurred was regarded as affecting the credibility of the complaint. In *Kilby v R*<sup>882</sup> the High Court said that the failure of a complainant to report a rape promptly could be an important factor in deciding on her credibility and that the jury

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876 Discussion Paper para 8.135.

877 The provision did not remove the requirement for corroboration of witnesses with impaired mental functioning or children. This was removed by *Crimes (Sexual Offences) Act 1991*, s 3 which created new offences.

878 Law Reform Commission of Victoria, *Rape and Allied Offences: Procedure and Evidence* Report 13 (1988) 42.

879 Interim Report para 2.43, Graph 3.

880 Ibid 11.5%.

881 In the case of penetrative offences other than rape, only about 16% of offences were reported within a week and over 30% were reported more than five years later. Ibid para 2.35.

882 (1973) 129 CLR 460.

should be instructed accordingly. This decision has been criticised on the basis that it ignored research which says that delay in reporting is common amongst victims of sexual assault.<sup>883</sup>

7.67 In 1991, following the former Law Reform Commission of Victoria's recommendation that judges should be required to warn juries that there may be good reasons for a delay in making a complaint of sexual assault, the Victorian Parliament amended section 61 of the *Crimes Act 1958*.<sup>884</sup> The amended section 61 provided that in cases involving a delay in reporting, a judge be required:

- to warn the jury that delay in complaining does not necessarily indicate that the allegation is false; and
- to inform the jury that there may be good reasons why a victim of sexual assault may hesitate in complaining about it.<sup>885</sup>

7.68 A Department of Justice evaluation of these and other reforms undertaken during the mid 1990s—the Rape Law Reform Evaluation Project (RLREP)—reported that judges were generally giving the direction which was required by the legislation, but that the manner and approach in which this was done varied considerably.<sup>886</sup> The authors expressed concern that some judges were continuing to give what were effectively ‘corroboration warnings’ i.e. directing the jury that it was unsafe to convict an accused on the uncorroborated evidence of a sexual assault victim. Recommendation 35 made by RLREP was that:

The legislature should consider re-wording the delay warning. As currently worded (‘...a delay in making a complaint...*does not necessarily* indicate that the allegation is false...), the direction carries the implication that there *is* a reason to suspect that late complaints may be false.<sup>887</sup>

7.69 Following this recommendation, section 61(1)(b) was amended to remove the word ‘necessarily’. The current section 61 provides that:

883 See Standing Committee on Law and Justice, Legislative Council, New South Wales Parliament, *Report on Child Sexual Assault Prosecutions* Report No 22 (2002) para 4.159. The Report goes on to say about *Kilby*: ‘Instead, the *Kilby* warning allowed conclusions about the complainant’s credibility to be drawn based on stereotypical views of how a victim ‘should’ act after being sexually assaulted.’

884 *Crimes Act 1958* s 61 inserted by *Crimes (Rape) Act 1991* s 3.

885 *Crimes Act 1958* s 61(1)(b).

886 Melanie Heenan and Helen McKelvie, *Crimes (Rape) Act 1991, An Evaluation Report* (1997).

887 *Ibid* 373.

- judges must not warn or suggest in any way to the jury that the law regards complainants in sexual offence cases as an unreliable class of witness;
- if evidence is given or a question or statement is made suggesting that there was a delay in making a complaint about the alleged offence, the judge must inform the jury that there may be good reasons why a victim of sexual assault may delay or hesitate in complaining about it;
- judges may, however, make comments about the reliability of the complainant's evidence if appropriate in the interests of justice;<sup>888</sup> and
- judges may only make 'interests of justice' comments when that is necessary to ensure a fair trial.<sup>889</sup>

7.70 In her Second Reading Speech for the *Crimes (Amendment) Act 1997*, which amended the provisions relating to jury directions on consent and delay, the then Attorney-General Jan Wade said:

The current wording of the direction about delay carries an implication that there is a reason to suspect that late complaints may be false. The amendment removes that implication. This is an important move away from the stereotype of how a sexual assault victim behaves or ought to behave following a sexual assault. Further, there is a need to legislatively acknowledge that features such as delay in complaint, lack of forensic evidence and lack of other corroborative evidence are common to most sexual assault cases.<sup>890</sup>

7.71 The purpose of this legislation was to ensure that juries understood that many sexual assault cases involve delay and lack of corroborative evidence and to remove as far as possible stereotypical assumptions about the unreliability of evidence given by complainants in sexual offence cases.

7.72 However, the High Court in the case of *Crofts v R*<sup>891</sup> held unanimously that section 61(1) of the *Crimes Act* does not prevent a trial judge from making a

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888 Section 61(2) *Crimes Act 1958* states that 'Nothing in sub-section (1) prevents a judge from making any comment on evidence given in the proceeding that it is appropriate to make in the interests of justice'.

889 Section 61(3) *Crimes Act 1958* states that 'Despite sub-section (2), a judge must not make any comment on the reliability of evidence given by the complainant in a proceeding to which sub-section (1) applies if there is no reason to do so in the particular proceeding in order to insure a fair trial'.

890 Jan Wade, Second Reading Speech for the Crimes (Amendment) Bill 1997 (9 Oct 1997).

891 (1996) 186 CLR 427.

*Kilby* direction and commenting that a delay in complaining of sexual assault could affect the credibility of the complainant. Such a warning has become known as the *Crofts* warning. The courts have also said where the complainant delays in complaining, section 61(1) does not remove the need to warn juries about the effect of delay on the ability of the accused to put forward a defence (the *Longman*<sup>892</sup> warning). These warnings are discussed in more detail below.

7.73 The result is that when the statutory directions and common law warnings are combined, juries may receive directions on delay which may seem to them to be contradictory. For example they may hear both that there are good reasons why a complainant may delay making a complaint and also that they should consider such delay when assessing the complainant's credibility.

7.74 Our research examined jury directions to ascertain:

- how judges were applying section 61(1)(a) and (b) of the *Crimes Act*;
- what judges tell the jury if the complaint is made soon after the offence is alleged to have occurred (the 'recent complaint' principle); and
- the circumstances in which *Longman* and *Crofts* common law warnings are being given and the form of those warnings.

#### How Judges Directed the Jury on Section 61

7.75 Where the issue of delay arises in the course of a trial, section 61 of the *Crimes Act* requires the judge to tell the jury that there may be good reasons for a complaint to delay or hesitate in complaining.<sup>893</sup>

7.76 In our study there were 14 cases in which judges gave a direction on delay.<sup>894</sup> In 12 of these 14 cases the old form of warning—that delay does not necessarily indicate that the allegation is false—was given, even though the alleged offences occurred after the 1997 amendment came into effect.<sup>895</sup> The prosecution did not raise an objection to this form of the direction in any of these cases.

892 *R v Longman* (1989) 168 CLR 79. The *Longman* warning is discussed below, paras 7.90–9.

893 See para 7.70 above.

894 It is interesting to note that only five of these were matters where there actually was a delay in complaint. See n 896 below.

895 In the other two the alleged offences occurred prior to 1 January 1998, the implementation date for the 1997 amendments. One of these two cases involved multiple offences occurring over a period of time. As the offence dates were uncertain and as the vast majority were alleged to have occurred prior to 1 January 1998, the old wording of section 61 was taken to be the correct version.

7.77 In four of the five trials in which there was actually a delay in complaint,<sup>896</sup> the old section 61 wording was used. Only one of these matters involved some offences which had allegedly occurred before the 1997 amendment.

7.78 As discussed in 7.68–72 above, section 61(1)(b) was amended in 1997 to remove any implication that there is a reason to suspect that late complaints may be false. For offences allegedly occurring after the implementation date, the trial judge must only direct the jury that there may be good reasons for a delay in complaining. The Commission is concerned that the old version of the delay direction is being used for alleged offences occurring after the legislative amendment. We have made recommendations about training for prosecutors and judges in Chapter 3 of this Report.<sup>897</sup> We make other recommendations about delay below.

### Recent Complaint

7.79 Although many complainants delay in reporting sexual assaults to the police, some complainants do tell someone about the alleged assault shortly after it occurs. The expression 'recent complaint' is used to describe a 'complaint' made at the first available opportunity after the alleged events. In Chapter 4 of this Report we discuss the hearsay rule.<sup>898</sup> 'Recent complaints' of sexual offences are an exception to the hearsay rule, which allow either the complainant or a third person to whom the complaint is made to give evidence of what the complainant said shortly after the alleged assault occurred. Evidence of a 'recent complaint' is not evidence of the truth of the allegation that the assault occurred, but can only be used to show consistency on the part of the complainant. The rule is based on the expectation that a victim of sexual assault can and should complain at the first opportunity. It assumes that as a matter of human experience victims will report immediately, an assumption that does not find support in the research on this issue.<sup>899</sup>

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896 The five trials were: Trial 3 (2½ months), Trial 9 (2½ years), Trial 10 (10 to 11 days), Trial 11 (7½ years) and Trial 13 (6½ to 8½ years—the offences allegedly occurred over a two year period).

897 Recommendation 36–9; Recommendations 40, 41.

898 Chapter 4, paras 4.99–111.

899 See para 5.100 of the Interim Report. Children are even less likely than adults to report sexual assault immediately or even soon after the assault and typically report months or even years later. See Anne Cossins, 'The Hearsay Rule and Delayed Complaints of Child Sexual Abuse: The Law and the Evidence' (2002) 9 (2) *Psychiatry, Psychology And Law* 163. Cossins conducts an extensive review of psychological literature and concludes that delay in reporting sexual assault, rather than being an

7.80 In many charges judges gave lengthy and detailed directions on recent complaint. In nine charges<sup>900</sup> judges explained the rationale and background to the rule. These judges told juries that the reason for the exception to the hearsay rule (which they also explained) is that 'when someone is compelled to sexual conduct they normally complain about it'. For example, the judge in Trial 18 said:

The evidence of the complaint is only given because it might have an effect upon the credibility of her story. In other words, you might think that a victim of a sexual assault is more likely, if it has happened, to complain about it than if she does not complain about it.

7.81 Although judges are required to tell juries that recent complaints are only admissible to bolster the complainant's credibility, the idea that victims of sexual assault normally complain about it promptly is inconsistent with the spirit of section 61.

7.82 Interestingly, Ormiston JA in the recent Court of Appeal case of *R v Munday*<sup>901</sup> commented that he would favour the omission of the explanation—given by 9 judges in our sample of 24—that the reason for the exception to the hearsay rule is that persons subjected to sexual assault generally complain about it:

I would not disagree that this sentence ['The reason for this exception is that it is considered in general that persons who are offended against sexually will complain about it'] might better be omitted from future charges, as appears now to be recognised in the most recent version in the County Court charge book.

7.83 The recent complaint rule is complex. For judges, directing lay people on recent complaint evidence and the use to which it can be put is clearly difficult. Many of the directions we examined were extremely complicated. Simon Bronitt<sup>902</sup> argues that the rules and directions surrounding recent complaint are

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aberrant response, is in fact typical for children. The NSW Standing Committee on Law and Justice in its recent report on child sexual assault prosecutions criticised the rules of hearsay evidence as they apply to children, saying that the 'fresh in the memory requirement' as interpreted by the High Court 'would lead to the exclusion of evidence of complaint of most victims of child sexual assault' because 'delayed disclosure of sexual assault is a *typical* feature of the way that victims respond to child sexual abuse.' Standing Committee on Law and Justice, Legislative Council, New South Wales Parliament, *Report on Child Sexual Assault Prosecutions* Report No 22 (2002).

900 Trials 4, 10, 16, 17, 18, 19, 21, 22 and 24. Only Trial 10 involved a delay.

901 *R v Munday* [2003] VSCA 189, para [18]. Callaway JA and Batt JA agreed with Ormiston JA's judgment.

902 Simon Bronitt, 'The Rules of Recent Complaint: Rape Myths and the Legal Construction of the "Reasonable" Rape Victim' in Patricia Eastal (ed) *Balancing the Scales: Rape, Law Reform and the Australian Culture* (1998).

not only complicated, difficult for judges to explain and hard for the jury to understand, but they are a fertile ground for defence appeals. In particular, he argues that a direction on permissible and non-permissible use of such evidence is a difficult concept for jurors to grasp.<sup>903</sup>

7.84 In Trial 18 the judge gave a standard direction on recent complaint:

Now in considering the evidence which [the complainant] gave of the complaint she made to her friend and the evidence her friend gave of the giving of that complaint, you must bear in mind that that evidence springs from the same source as the evidence of the crime. It may or may not demonstrate consistency but it is not to be regarded as evidence independent of the complaint because it is not independent evidence...<sup>904</sup>

7.85 One has to wonder whether a lay person has any chance at all of understanding what this means. The previous Law Reform Commission of Victoria noted that it is 'unrealistic to expect a jury, no matter how well directed, to use evidence for one particular purpose but not for a more general purpose'.<sup>905</sup>

7.86 In Chapter 4 we recommended changes to the hearsay rule based on the provisions of the Uniform Evidence Act.<sup>906</sup> This change would simplify jury directions by making it unnecessary for judges to explain that such evidence can be used only to demonstrate the consistency of the complainant's evidence.<sup>907</sup>

### The Crofts Warning

7.87 In *Crofts v R*,<sup>908</sup> the High Court held that the trial judge has discretion in individual cases to invite the jury to use lack of recent complaint to impugn the

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903 Ibid 46.

904 Trial 18.

905 Law Reform Commission of Victoria, *Rape and Allied Offences: Procedure and Evidence*, Report No 13 (1988), 43.

906 Recommendations 87–93.

907 Children are even less likely than adults to report sexual assault immediately or even soon after the assault and typically report months or even years later. The NSW Standing Committee on Law and Justice in its recent report on child sexual assault prosecutions criticised the rules of hearsay evidence as they apply to children, saying that the 'fresh in the memory requirement' as interpreted by the High Court 'would lead to the exclusion of evidence of complaint of most victims of child sexual assault' because 'delayed disclosure of sexual assault is a *typical* feature of the way that victims respond to child sexual abuse.' Standing Committee on Law and Justice, Legislative Council, New South Wales Parliament, *Report on Child Sexual Assault Prosecutions* Report No 22 (2002) para 4.105.

908 *Crofts v R* (1996) 186 CLR 427.

complainant's credibility. The judge may give a *Crofts* warning even though section 61(1)(a) of the *Crimes Act* prevents the judge from warning or suggesting to the jury that the law regards complainants in sexual offence cases as an unreliable class of witness and section 61(1)(b) requires the judge in a relevant case to tell the jury that there may be good reasons for a victim of a sexual assault to delay in complaining about it.

7.88 In our study, 11 judges<sup>909</sup> gave the jury the *Crofts* warning—‘The absence of or delay in making a complaint may also be used to suggest inconsistency of conduct’.<sup>910</sup> Only two of these cases involved a delay in complaint. The Commission believes that judges should *not* give these warnings where they are clearly unnecessary.

7.89 Two issues are raised. First, judges may wish to consider whether it encourages jury overload and confusion to give a warning on delay when the facts do not suggest that there was any (or any significant) delay.

7.90 Secondly, there appears to be an inconsistency between the direction required by section 61 (that there may be good reasons why a complaint may delay or hesitate in complaining) and judicial warnings to the effect that delay in complaint may reflect on the complainant’s consistency. As the New South Wales Standing Committee on Law and Justice<sup>911</sup> commented recently:

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909 Nine of these 11 were the judges who explained the background and rationale of the rule of recent complaint. The comment on inconsistency came in close proximity to the direction that victims of sexual assault complain about it.

910 Trial 19. In Trial 17, in the course of his direction on recent complaint, the judge linked aspects of it to ‘common sense’: ‘Absence or delay in making a complaint may also be used to suggest inconsistency of conduct. Of course these are common sense propositions to which you would apply your own view of the evidence in this case. Delay in complaining does not necessarily indicate that a complainant’s allegations are false.’

911 Standing Committee on Law and Justice, Legislative Council, New South Wales Parliament, *Report on Child Sexual Assault Prosecutions* Report No 22 (2002) para 4.174. The section in quotation marks is cited by the Committee as follows: ‘Wood J at CL in *Regina v BWT* [2002] NSWCCA 60 at para 32.’

While the Committee notes the argument that the *Crofts* warning was “not meant to revive the stereotypical view that delay is invariably a sign of the falsity of the complaint,” the Committee is of the opinion that such is the unavoidable result of a warning to the jury that in assessing the complainant’s credibility, they should take into account the complainant’s failure to complain promptly.<sup>912</sup>

7.91 There were a number of examples of jury directions on recent complaint which appear to be inconsistent with the purpose of section 61. In directions on recent complaint in Trial 4 the judge said:<sup>913</sup>

In sexual cases the law looks to see if there is any complaint made by a victim shortly after the alleged incident. That evidence is an exception to the ordinary rules of evidence which exclude self-serving and hearsay evidence. The law does this in order to see whether there is a consistency of conduct on the part of the victim with the alleged offence having occurred, as persons who are compelled to sexual conduct complain about it...

Often allegations are made a significant time after the alleged offence by a girl or a woman that she has been sexually interfered with by a man. Such complaints are made [sic] and very difficult to disprove. Therefore, the law looks to see if immediately after or shortly after the alleged offence, there is a consistency of conduct on the part of the victim with her allegations. It negatives to some measure any suggestion that the victim has made up the story as to what happened. Of course I warn you that a delay in complaining does not necessarily indicate that the allegations are false.

7.92 This direction reinforces the notion that *real* rape victims complain immediately, an assumption which is clearly false. It also reiterates the historical view expressed by the seventeenth century English jurist, Sir Mathew Hale, that rape allegations are easy to make and difficult to disprove.<sup>914</sup>

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912 The Committee recommended that the *Criminal Procedures Act 1986* (NSW) be amended to explicitly prohibit judges from giving *Crofts* warnings in cases of child sexual assault which involved a delay in reporting (Recommendation 22), *Ibid* para 4.176.

913 This case did not involve a delay in complaining.

914 Regina Graycar notes that this comment has been repeated by many judges since, for example King CJ in *R v Sherrin (no.2)* (1979) 21 SASR 250, 254: ‘Human experience has shown that in these courts girls and women do sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute’ and Bollen J in *R v Johns* (Unreported, Supreme Court of South Australia, 26 August 1992): ‘Experience has taught the judges that there have been cases where women have manufactured or invented false allegations of rape and sexual attack. It is a very easy allegation to make. It is often very hard to contradict.’ Cited in Regina Graycar, ‘The Gender of

7.93 The comment that an immediate complaint ‘negatives to some measure any suggestion that the victim has made up the story...’ may imply to the jury that lack of immediate complaint should give them reason to doubt the veracity of the victim’s allegations. The use of the word ‘necessarily’ in the next sentence serves to consolidate these doubts.<sup>915</sup>

7.94 In a recent article for the *Judicial Officers’ Bulletin*, Justice James Wood of the New South Wales Supreme Court<sup>916</sup> expressed his concern about the *Crofts* direction. He recognises the High Court’s justification for the direction—to ‘balance’ the statutory direction on delay<sup>917</sup>—but argues that without some ‘firm basis’ for suggesting that the delay may have affected the complainant’s credibility, or evidence that the accused has in fact suffered actual prejudice as a result of the delay, the *Crofts* direction may tip the balance too far in favour of the accused.<sup>918</sup> In a recent conference on contemporary issues in adult sexual assault in New South Wales,<sup>919</sup> Justice Wood said in relation to the *Crofts* direction:

It is also arguable that the balancing direction in fact entirely negates that direction [section 107 under the NSW legislation, section 61(1)(b) under the Victorian], particularly where there has been no exploration of the complainant’s reasons for delay.

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Judgments: An Introduction’ in Margaret Thornton (ed *Public and Private: Feminist Legal Debates* (1995) 271. For an historical discussion of the belief that women and children were inherently untrustworthy when testifying about sexual assault, see Constance Backhouse, ‘The Doctrine of Corroboration in Sexual Assault Trials in Early Twentieth-Century Canada and Australia’ (2001) 26 *Queen’s Law Journal* 297 para [5].

915 Of course, as this particular complainant had not delayed in making a complaint of sexual assault, the judge’s comments arguably did not affect her case.

916 (Justice) James Wood, ‘Complaint and Medical Examination Evidence in Sexual Assault Trials’ (2003) 15 (8) *Judicial Officers’ Bulletin* 63.

917 *Ibid* 64. Justice Wood refers here to the NSW provision: s 107 *Criminal Procedure Act 1986* which requires the judge to direct the jury that evidence of a failure to complain of an assault at the earliest reasonable opportunity does not necessarily mean that the complaint was untrue. The Victorian provision is contained in s 61(1)(b) of the *Crimes Act 1958* and requires the judge to inform the jury that there may be ‘good reasons why a victim of a sexual assault may delay or hesitate in complaining about it.’

918 *Ibid* 64.

919 (Justice) James Wood, ‘Sexual Assault and the Admission of Evidence’ (Paper presented at the Practice and Prevention: Contemporary Issues in Adult Sexual Assault in New South Wales, 12 February 2003, Sydney) para 51.

7.95 Justice Wood refers to *Suresh v The Queen*,<sup>920</sup> where Gummow and Gaudron JJ described the assumption that a sexual assault victim will complain at the first reasonable opportunity as being of 'doubtful validity'. This may be contrasted with the directions in Trials 17 and 18 from our sample, where the judges described the 'warning' about delayed complaints suggesting inconsistency of conduct on the part of the complainant as 'common sense propositions':

Absence or delay in making a complaint may also be used to suggest inconsistency of conduct. Of course these are common sense propositions to which you would apply your own view of the evidence in this case.<sup>921</sup>

7.96 The Commission believes that Justice Wood's view should be reflected in a legislative amendment which makes it clear that a *Crofts* warning must not be given in the absence of evidence indicating that the complainant's credibility was affected by delay and should not be given unless there is credible evidence to that effect. A formal recommendation to this effect is made in Recommendation 171.

#### *Cases Where Complainants Reported Promptly*

7.97 Where evidence of recent complaint was available and admissible—i.e. where the complainant had reported the alleged assault promptly—judges often told juries to pay little attention to this evidence. For example, in Trial 8 the judge told the jury that the complainant's immediate complaint of sexual assault (to her mother) was:

...no more than a self-serving statement, and an instance if you like of pulling yourself up by your own bootstraps.<sup>922</sup>

At the end of his lengthy direction on recent complaint the judge highlighted his concerns:

I have taken a lot of time over this matter, and I have done so because there is always with evidence such as evidence of this nature, there is always the risk that you will innocently misuse that evidence; that is, by giving it a value which it does not have, and thereby causing an injustice.<sup>923</sup>

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920 (1998) 102 A Crim R 18, cited in *Ibid* 64.

921 Trial 17. The judge in Trial 18 made a similar comment.

922 Trial 8. The judge spent six and a half pages minimising the significance of the recent complaint evidence.

923 Trial 8.

A similar approach was apparent in Trial 15, where the prosecution case was that the complainant had been dragged into the bush near her house and raped by her former partner. The complainant returned to the house where she immediately told her sister what had happened.<sup>924</sup>

### The Longman ‘Dangerous to Convict’ Warning

7.98 In the recent New South Wales Court of Criminal Appeal case of *R v BWT*<sup>925</sup> Wood CJ at CL described the *Longman* warning as follows:

...the *Longman* direction (as reinforced in *Crampton* and *Doggett*), [advises] that by reason of delay, it would be “unsafe or dangerous” to convict on the uncorroborated evidence of the complainant alone, unless the jury scrutinizing the evidence with great care, considering the circumstances relevant to its evaluation and paying heed to the warning, were satisfied of its truth and accuracy...

#### *When is a Longman Warning Required?*

7.99 Although section 61(1)(b) prevents judges warning juries that complainants in sexual offence cases are an unreliable class of witness, it does not prohibit common law warnings such as the *Longman* warning.<sup>926</sup>

7.100 In *R v Longman*<sup>927</sup> the High Court considered the effect of Western Australian legislation<sup>928</sup> which abolished ‘any rule or practice’ that required the judge to warn a jury that it was unsafe to convict an accused in a sexual offence case on the uncorroborated evidence of the complainant.

7.101 Although there was unanimous agreement in *Longman* that there should not be indiscriminate warnings about the dangers of convicting accused on the uncorroborated evidence of sexual assault complainants, the High Court also said

924 This case is discussed in more detail in para 7.58 above.

925 (2002) 54 NSWLR 241, 250.

926 See Kathy Mack, ‘“You Should Scrutinise Her Evidence With Great Care”: Corroboration of Women’s Testimony About Sexual Assault’ in Patricia Eastal (ed *Balancing the Scales: Rape, Reform and Australian Culture* (1998)). As she comments: ‘The statute being interpreted [in the case of *Longman*] was the only one in Australia at that time to specifically state that a judge ordinarily should *not* give a warning. If the High Court could decide that a warning was necessary under that statute, then warnings must surely be required under other legislation which has no such negative language or which expressly recognises that warnings can be given in the trial judge’s discretion.’ (p 67).

927 (1989) 168 CLR 79. Because the *Longman* case was discussed in detail in the Interim Report paras 5.103–24, we will only summarise it briefly here.

928 *Evidence Act 1906* (WA) s 36BE. This section was subsequently repealed by Act No. 70 of 1988, s 39.

that the trial judge *is* required to warn the jury about such danger 'whenever necessary to avoid a perceptible risk of miscarriage of justice arising from the circumstances of the case'.<sup>929</sup> In this case, the factor identified by the majority as necessitating a warning was the accused's lack of means of testing the complainant's allegations due to the long passage of time since the alleged offences.

7.102 Longman was on trial for sexual offences against his step-daughter that were alleged to have occurred 23 years prior to reporting. He was convicted and the Western Australia Court of Criminal Appeal affirmed the trial judge's refusal to warn the jury that it would be dangerous to convict the accused due to the long delay. The High Court, however, allowed Longman's appeal and ruled that such a warning should have been given. It was the possible 'forensic disadvantage' to the accused that was identified as necessitating a warning that it was unsafe to convict:

But there is one factor which may not have been apparent to the jury and which therefore required not merely a comment but a warning be given to them... That factor was the applicant's loss of those means of testing the complainant's allegations which would have been open to him had there been no delay in prosecution.<sup>930</sup>

7.103 *R v Doggett*<sup>931</sup> was an appeal from the Queensland Court of Criminal Appeal. The complainant made a statement to police concerning allegations of sexual abuse relating to the period between 1979 and 1986 when she was between the ages of 8 and 15. There was corroborating evidence, including a tape in which the accused made admissions of a general nature in response to the complainant's accusations of sexual abuse, and evidence from the complainant's mother and brother which supported her allegations. Despite the corroboration the High Court held that, due to the passage of time, the accused was prejudiced by the

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929 (1989) 168 CLR 79, 86; joint judgment of Brennan, Dawson and Toohey J.

930 (1989) 168 CLR 79, 91; joint judgment of Brennan, Dawson and Toohey J. Apart from identifying 'forensic disadvantage' (which was common to both the joint judgments of Brennan, Dawson and Toohey J and the separate reasons of Deane J and McHugh J) as the one factor leading to the need for a warning, the judges referred to other factors as relevant to the question whether in all the circumstances a warning was required: the delay in prosecution, the nature of the allegations, the age of the complainant at the time of the events, the absence of complaint to her parents and the fact that she was said to have been woken from sleep by the assaults. These factors, however, were not considered of themselves enough to warrant a warning. The forensic disadvantage referred to was the defendant's inability to test the allegations which had been made against him, which he would have been able to do had there been no delay.

931 Ibid.

difficulties of recollection and by the lack of opportunity to test the allegations forensically and therefore a warning that it was dangerous to convict was required.

7.104 Since *Longman* and *Doggett* were decided, other ‘special circumstances’ have been identified as requiring a *Longman* warning.<sup>932</sup> At a recent conference, Justice Wood said in relation to the frequent use of *Longman* warnings in delay cases:

Of particular concern, and a regular occasion for appellate review, has been the *Longman* direction (*Longman v The Queen* (1989) 168 CLR 79) which is now required to be delivered in almost every case involving delay, even where there is some corroboration of the plaintiff...<sup>933</sup>

7.105 Ormiston JA in *R v Mazzolini* expressed a similar concern about the widespread use of *Longman* warnings:

As defence counsel catalogue the variety of ‘special’ circumstances seen by appellate judges (including, I confess, myself) as requiring warnings in particular cases, so trial judges will retreat to the safety of issuing *Longman* warnings for every such circumstance and every faintly analogous circumstance...<sup>934</sup>

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932 For example, the age of the complainant, coupled with a long period of delay, has been identified as circumstances warranting a *Longman* warning in *R v TWK* [2003] VSCA 225 and *R v WEB* [2003] VSCA 205. However, Charles JA in *R v WEB*, para [35], cautioned that ‘to say this circumstance [of age] is a factor which underlines the need for a *Longman* warning is not at all to suggest that children are an unreliable class of witness.’ In *R v Salter* [2002] VSCA 128, the court held that a *Longman* warning was required because of the ‘selectivity’ employed by the complainant in making her complaints to the police. See para 7.98 below. In *R v Glennon* [2001] VSCA 17, it was held that the absence of corroboration was not a basis in itself for a *Longman* warning, although the absence of corroboration could be taken to suggest that it would be ‘dangerous to convict’ on the evidence of the complainants alone.

933 (Justice) James Wood, ‘Sexual Assault and the Admission of Evidence’ (Paper presented at the Practice and Prevention: Contemporary Issues in Adult Sexual Assault in New South Wales, 12 February 2003, Sydney), para 21. In this respect Kathy Mack notes that the High Court’s decision in *Longman* was made ‘despite the court’s recognition that “[t]he evidence of the complainant reads convincingly, and it is not surprising that the jury accepted her as an honest witness” and that the same could not be said of the defendant, who appeared to lie in court about the recent police interview, as well as about details of past incidents.’ Kathy Mack, ‘“You Should Scrutinise Her Evidence With Great Care”: Corroboration of Women’s Testimony About Sexual Assault’ in Patricia Eastaugh (ed) *Balancing the Scales: Rape, Reform and Australian Culture* (1998) 67.

934 [1999] 3 VR 113, 130.

7.106 The recent Victorian Court of Appeal judgment in *R v Salter*<sup>935</sup> defines the current state of the law in relation to *Longman* warnings in Victoria:

In general terms, it can be said that such a warning should be given whenever it is necessary to avoid a perceptible risk of a miscarriage of justice arising from the circumstances of the case... There will usually have to be identifiable factors which call for such a judicial direction. They are factors of a nature the significance of which will or might not be readily apparent to the jury—left to their own devices with the assistance of counsels' addresses—but more apparent to the Judge. It should not be thought, however, that the so-called 'Longman warning' is confined to the circumstances which the High Court identified in that case as calling for such a warning.

*How Judges Approached Longman Warnings*

7.107 In our study, of the 24 jury charges examined there were five identified by the researchers as involving a delay in reporting.<sup>936</sup> Of these five cases, two attracted strong *Longman* 'dangerous to convict' warnings. These were the cases which involved the lengthiest delays: 7½ years and 6½–8½ years.<sup>937</sup> In Trial 11, the judge said:

I do so [give the warning] with the authority of my office as trial judge. In circumstances such as those in this case it is dangerous to convict an accused person on the unsupported evidence of the complainant... The reason why I give you the warning in this case is that there was a long delay between the date of the alleged offences and the time in which the allegations were first put to [the accused]... The significance of the delay is that it may result in a person losing the means of refuting a false allegation.

7.108 The judge went on to repeat another three times that it would be dangerous to convict without supportive evidence<sup>938</sup> and then said:

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935 *R v Salter* [2002] VSCA 128, para 10 (Winneke P).

936 The five trials were: Trial 3 (2½ months), Trial 9 (2½ years), Trial 10 (10 to 11 days), Trial 11 (7½ years) and Trial 13 (6½ to 8½ years—the offences allegedly occurred over a two year period).

937 Trial 11 (7½ years) and Trial 13 (6½–8½ years) respectively.

938 The judge did not inform the jury pursuant to s 61(1)(b) that there may be good reasons for the delay. Clearly some exception to this omission had been taken by the Crown prior to the summary of the evidence. The judge after this went on to direct the jury that there may be good reasons for delay.

In this case I direct you that there is no evidence which is capable as a matter of law of amounting to such supportive evidence.

7.109 Although a *Longman* warning is not intended to be akin to a direction to acquit, such a strongly worded warning as given here followed by the direction as to lack of evidence, may well be seen by the jury as just that—a direction to acquit. The judge in Trial 11 spent over a page talking about the ‘common human experience that memory fades with the passage of time’<sup>939</sup> and mentioned that ‘[a]fter a considerable delay, a person might acquire a false memory’.<sup>940</sup>

7.110 Trial 13 was the other case involving delay in which a *Longman* warning was given. The accused was charged with seven counts of wilfully committing an indecent act and three counts of sexual penetration of a child under 16. The delay involved was between 6½ and 8½ years, the offences having been alleged to have occurred over a two year time period. The judge directed the jury in accordance with section 61 and went on to make a *Longman* warning, which he described as ‘not comments’...[but] ‘directions of law’:

This matter now arises out of the fact of the passage of so many years since these alleged events and it is a warning that I am giving you that it would be dangerous to convict [the accused] on the evidence of [the complainant] alone, unless after scrutinising her evidence with great care and considering the circumstances...you are satisfied beyond reasonable doubt of its accuracy and reliability.

In the same way as the judge in Trial 11, the judge spoke of the fallibility of human recollection in the context of ‘common experience’:

Experience has shown that human recollection, and perhaps particularly the recollection of events occurring in childhood and adolescence, is frequently erroneous and liable to distortion by reason of various facts.<sup>941</sup>

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939 On the issue of judges’ construction of ‘common human experience’, see below paras 7.135–40.

940 In this context, the judge drew the jury’s attention to a number of conflicts in the evidence.

941 The reference in these two charges to common human experience brings to mind some infamous charges in rape matters, for example Bollen J in *R v Johns* (Unreported, Supreme Court of South Australia, 26 August 1992): ‘Experience has taught the judges that there have been cases where women have manufactured or invented false allegations of rape and sexual attack. It is a very easy allegation to make. It is often very hard to contradict.’ Or Bland J in a Victorian County Court case in 1993: ‘it does happen, in the common experience of those who have been in the law as long as I have anyway, that no often subsequently means yes’. Both these cases are cited in Regina Graycar, ‘The Gender of Judgments: An Introduction’ in Margaret Thornton (ed *Public and Private: Feminist Legal Debates* (1995) 270–1.

7.111 There was one case (Trial 7) which attracted a *Longman* warning despite lack of delay in reporting. The warning was given on the basis of the 'unsatisfactory' nature of the complainant's evidence. The judge said to the jury: '[The complainant] had told a series of untruths and her memory was extraordinary in respect of what she did not remember'.

### When Judges Gave the 'Scrutinise With Great Care' Warning

7.112 In the other three cases in our study where a delay in reporting was identified:

- In one (delay of 2½ months)<sup>942</sup> no warning was given and the judge directed the jury on how recent complaint evidence could have been used, had it been available. The judge reminded the jury several times that such evidence was not available.
- In two cases (delays of 10–11 days<sup>943</sup> and 2½ years)<sup>944</sup> the judges stopped short of a *Longman* warning and instead warned the jury to 'scrutinise' the complainant's evidence with great care.<sup>945</sup>

7.113 In three further charges that did not involve delay, judges also directed the jury to 'scrutinise' the complainant's evidence carefully.<sup>946</sup>

7.114 In the RLREP, Heenan and McKelvie reported on their interviews with judges in relation to delay and corroboration.<sup>947</sup> In that study two thirds of the judges said that since the most recent amendment on corroboration warnings they had not directed juries that a complainant in a sex offence matter was 'an unreliable class of witness'. However they had regularly exercised their discretion to make a 'compromise' warning to juries 'to look very closely at the evidence of the complainant' and any corroborating evidence in the case.<sup>948</sup> One judge commented that a warning to scrutinise the complainant's evidence closely was a 'compromise that you will find a lot of judges have fixed upon'.<sup>949</sup>

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942 Trial 3.

943 Trial 10.

944 Trial 9.

945 In Trial 10 the judge made it clear that this was a non-binding comment.

946 Trials 8, 18 and 20.

947 RLREP, above n 886, 329–32.

948 Ibid 330.

949 Ibid.

7.115 The jury charge in Trial 9 from our study is worth examining in more detail. The accused, who was convicted of six counts of rape and acquitted of three,<sup>950</sup> appealed on the basis that the trial judge failed to give a *Longman* warning and/or failed to adequately direct the jury as to the significance of the delay. The complainant and accused had been in a de facto relationship at the time the offences were alleged to have occurred. It appears that the relationship was characterised by a strong mutual sexual attraction but also by frequent bouts of physical violence by the accused towards the complainant. Throughout the relationship the complainant made several complaints about these assaults to friends and the police, which led eventually to the accused being imprisoned.<sup>951</sup> It was not until March 1999 that the complainant reported that the accused had in fact raped her several times dating back to September 1997, once at knife point. In explanation of her previous omission of these allegations, she said that she was afraid of the accused's threats, embarrassed and ashamed about the events and was apprehensive about the court process should she complain of rape.

7.116 The trial judge gave a detailed direction on delay. He directed the jury that there may be good reasons why a victim of sexual assault may delay complaining about it. He outlined the complainant's (above) explanations for her delay and pointed out that the fact that she was living in a de facto relationship with the accused:

might have meant that she would not readily complain of intimate matters in the relationship even though she was prepared to complain to her neighbours and to the police about physical assaults to her.<sup>952</sup>

7.117 The judge then went on to ask the jury to consider whether the accused had been significantly disadvantaged in defending himself because of the delay or whether the fact that the accused had been able to recall all but one of the alleged incidents and respond in detail meant that he was not so disadvantaged. Counsel for the accused asked that the judge make a *Longman* warning, but the judge declined to do so and instead directed as follows towards the end of his charge:

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950 He was also acquitted of one count of assault with intent to rape. He was sentenced to 8½ years' imprisonment.

951 The complainant made her first complaint of physical assault in October 1997. This related to events which had allegedly occurred in September 1997.

952 Trial 9.

The nature of sexual offences often means that it is only the complainant and the accused who will have been present. For this reason you will obviously need in this case to carefully scrutinise the evidence of the complainant.<sup>953</sup>

7.118 The Court of Appeal, in a 2:1 majority, allowed the accused's appeal and ordered a new trial. In Winneke P's majority decision, with which Buchanan JA concurred, he discussed the purpose of the 1991 introduction of section 61 of the *Crimes Act 1958* and the abolition of the corroboration warning and commented:

However, as the courts have pointed out in many cases, the abolition of the rule was not intended to suddenly convert complainants in sexual cases into specially trustworthy witnesses.<sup>954</sup>

The judge went on to say that in the 'peculiar circumstances of this case'<sup>955</sup> the trial judge's directions were 'altogether too bland to avoid the perceptible risk of a miscarriage [of justice] which was inherent in the circumstances of the case'<sup>956</sup> and that the case called for:

a direction by the judge that it would be dangerous or unsafe to convict the applicant upon the evidence of the complainant alone unless, having thoroughly scrutinized her evidence, and paying heed to the warning, they were satisfied of its truth and accuracy.

7.119 This decision may be contrasted with *R v GTN*,<sup>957</sup> another recent Victorian Court of the Appeal decision. In this case, the applicant was convicted in the County Court on three sexual offences committed against his grandniece and appealed on the basis that the trial judge did not direct correctly in relation to

953 Trial 9.

954 Victorian Court of Appeal decision, 2002. We have not provided the citation for this case as that would lead to the identification of the trial judge from our study. It was agreed that no judges who provided charges for our study would be identified.

955 The 'peculiar circumstances' referred to here by the judge were: 1. the nature of the complainant and applicant's relationship, which was characterised by a great deal of consensual activity but also physical violence; and 2. that the complainant had reported the physical assaults to various people but omitted mentioning the rapes which happened contemporaneously with the assaults.

956 The circumstance identified by Winneke P as prejudicial to the accused was the complainant's 'selectivity' in making her complaints to the police, which not only undermined her credibility as a truthful witness, but caused the situation whereby the accused came before the jury as a person convicted of violent offences which were inextricably linked with the events upon which the prosecution relied to prove the rape charges.

957 [2003] VSCA 38.

the *Longman* warning<sup>958</sup> and also that the verdicts were unsafe and unsatisfactory. The complainant was five years old at the time of the VATE interview and the offences were allegedly committed two to 14 months prior to this. The Court of Appeal dismissed the appeal unanimously. Callaway JA said:

In my opinion it is inappropriate to speak of a *Longman* warning in a case where the delay between the alleged offences and the accusation is at most sixteen months. The question is simply whether there were features of the case that required a direction to the jury that was not given.<sup>959</sup>

... There must be a forensic disadvantage, or other factor, that makes a direction 'necessary and practical, in the circumstances of the case, to avoid a perceptible risk of miscarriage of justice' [*R v Miletic*<sup>960</sup>] There was no such disadvantage or other factor arising from the delay in this case.<sup>961</sup>

Ormiston JA commented:

There *was* no delay or other factor of a kind which required the judge to inform the jury of the dangers of convicting the applicant.<sup>962</sup>

And Eames JA, after a lengthy examination of the necessity for and parameters of a *Longman* direction, concluded:

In my opinion, it would be moving a long way from *Longman* to conclude that as a matter of prudence a full *Longman* warning was to be given in almost every case (including this case) where there was some delay, even where no actual forensic disadvantage could be identified and where any potential disadvantage was of relatively limited significance.<sup>963</sup>

7.120 Appendix 6 contains a table setting out other recent Victorian Court of Appeal decisions concerning *Longman* warnings.

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958 The trial judge did not use the words 'dangerous to convict' but he did instruct the jury about the dangers of convicting someone on the uncorroborated evidence of the complainants without first giving it the requisite close scrutiny. The specific disadvantage pointed to by defence counsel in the trial was that the accused deprived of being able to find an alibi because there was no certainty about when the offence was meant to have occurred. The other main factor relied on by defence counsel as necessitating a *Longman* warning was the complainant's young age.

959 Ibid para [6].

960 [1997] 1 VR 593, 605–6.

961 *R v GTN* [2003] VSCA 38, para [9].

962 Ibid para [1].

963 Ibid para [126].

7.121 The difficulty with the current law is that it offers almost no guidance to trial judges on the circumstances in which a warning might be required and is likely to produce broad variation in approach amongst trial judges. We have been told that trial judges may give *Longman* warnings in cases where the law may not require such a warning to be given, in order to minimise the possibility of appeal and protect complainants against the possibility that they may have to give evidence in a second trial if an appeal by the accused is successful.

#### **SHOULD THE LAW ON LONGMAN WARNINGS BE CHANGED?**

7.122 Not all judges agree with the current state of the law on *Longman* warnings. For example, Wood CJ at CL in *R v BWT*<sup>964</sup> noted:

...any direction, framed in terms of it being 'dangerous or unsafe' to convict, risks being perceived as a not too subtle encouragement by the trial judge to acquit, whereas what in truth the jury is being asked to do is to scrutinize the evidence with great care.

7.123 Justice Wood, in his 2003 article for the *Judicial Officers' Bulletin*,<sup>965</sup> criticises the assumption on which the *Longman* warning is based, namely that a delay in complaining means that the accused is not able to adequately test and meet the complainant's evidence. His Honour argues that this assumption is illogical where the accused is in fact guilty of the offence or where 'there was no evidence available capable of contradicting the complainant' and a better approach is to allow the warning to be given 'in terms that the delay might have created forensic difficulties for the accused in meeting the complaint'<sup>966</sup> or confining the warning to cases in which there is some actual evidence of disadvantage to the accused.<sup>967</sup>

7.124 Ormiston JA in *R v Mazzolini* addresses the danger of warnings in sexual offence cases in a more general sense:

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964 *R v BWT* (2002) 54 NSWLR 241, 251.

965 (Justice) James Wood, 'Complaint and Medical Examination Evidence in Sexual Assault Trials' (2003) 15 (8) *Judicial Officers' Bulletin* 63.

966 *Ibid* 63.

967 See also submission of County Court judge discussed in para 7.129–30.

Juries will not be left to resolve ordinary though serious issues of fact about which they must be and are always told to be satisfied beyond reasonable doubt. Instead they will become ‘punch-drunk’ with a miscellany of indiscriminate warnings in trials of sexual offences, such as will suggest, as before, that a complainant’s testimony is indeed unreliable. Since the issue seems only (or almost only) to arise on trials for sexual offences (and appeals therefrom), the impression might be given, if the distinction emphasised in the preceding paragraph [between circumstances that it is well within the ability of the jury to assess for themselves, and those the full significance of which may be more apparent to the judge] is not maintained, that judges are again, by a back door, treating complainants in such cases as ordinarily unreliable witnesses...<sup>968</sup>

### ***SUBMISSIONS TO THE INTERIM REPORT***

7.125 In the Interim Report the Commission recommended that the law on *Longman* warnings should be changed to prevent use of the words ‘dangerous to convict’ in a jury warning because these words were likely to be interpreted by juries as a direction to acquit.<sup>969</sup> The Interim Report also recommended that the warnings about delay should not be given except in cases where the accused had in fact suffered a significant forensic disadvantage as the result of delay.

7.126 Submissions to the Commission on the issue of judicial warnings were mostly in favour of the proposed recommendations on jury directions from the Interim Report.<sup>970</sup> For example, one complainant expressed her feeling that *Longman* warnings are ‘extremely unfair to the complainant’:

In particular it could be seen as discriminatory to women, as it sounds as though women are unable to be trusted and created allegations concerning sexual assault with no evidence. This would be extremely ruining to a victim/survivor and it is extremely unfair.<sup>971</sup>

7.127 The Department of Human Services in its submission specifically supported both recommendations, saying in relation to Recommendation 42:

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968 [1999] 3 VR 113, 130.

969 Interim Report Recommendation 42.

970 Interim Report Recommendations 42 and 43. The submissions explicitly in favour of Recommendations 42 and 43 of the Interim Report were Submissions 7, 28, 30 and 44. Those explicitly in favour of Recommendation 42 only were Submissions 26, 40 and 47. Submissions 6 and 15 did not address the recommendations specifically but were supportive of the ideas behind them.

971 Submission 6.

The nature of sexual assault offence cases, particularly in circumstances of childhood sexual abuse, means that most often there would not be independent evidence to substantiate the events having occurred.<sup>972</sup>

7.128 The Federation of Community Legal Centres commented in relation to Longman warnings:

The use of Longman warnings is a means of giving a corroboration warning in a variety of cases where it is not appropriate. We share the concerns expressed by Wood J in *R v BWT* and strongly support the Commission's Recommendation 42...<sup>973</sup>

7.129 A submission from a County Court judge stated that although warnings are probably necessary in some cases, particularly in cases involving long, unexplained delays in reporting:

...Those matters should be specifically brought to the attention of the jury. The actual warning should be given in clear and simple language. The words 'dangerous' or 'unsafe to convict' should not be used, and some better guidance should be given as to when a warning is likely to be required.<sup>974</sup>

7.130 This judge went on to say that section 61(1)(a)—the provision that a judge must not warn or suggest in any way to the jury that the law regards complainants in sexual cases as an unreliable class of witness—has little effect in operation due to sub-section (2).

7.131 Four submissions opposed the recommendations made in the Interim Report.<sup>975</sup> The Criminal Bar Association said:

The *Longman* warning in its current form should be retained. It contains a measure of flexibility to ensure judges can tailor the direction to the circumstances. The mere fact of delay may prevent a person from being able to point to identifiable or specific forensic disadvantage apart from the obvious and logical matters to which the direction is currently aimed.<sup>976</sup>

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972 Submission 44.

973 Submission 47.

974 The Commission will make a recommendation in this regard. See Recommendation 171 below.

975 Submissions 39, 42, 48 and 54.

976 Submission 42. Victorian Legal Aid (Submission 54) expressly agreed with the Criminal Bar Association's submission regarding Longman warnings.

In a joint submission by Judges Neesham, Nixon, Kelly and Hart, Recommendations 42 and 43 were described as:

...simplistic and [they] do not adequately take account of *Longman*. *Longman* goes beyond mere delay...

...The effects of the proposed recommendation would be to prevent a judge giving such a warning in cases where far more is involved than mere delay. The recommendation is an invitation to injustice and should be abandoned.<sup>977</sup>

### RECOMMENDATIONS

7.132 The Commission remains of the view that the phrase ‘unsafe/dangerous to convict’ is likely to be interpreted by juries as a direction to acquit.<sup>978</sup> Widespread use of *Longman* warnings may also serve to perpetuate old assumptions surrounding female victims of sexual assault—in particular that women lie about rape and are therefore unreliable witnesses.<sup>979</sup> Such jury warnings should be restricted to situations where the judge is satisfied that certain specific situations exist—where there is evidence that the accused has suffered a forensic disadvantage as a result of a delay in reporting, or where there is evidence that the accused has been prejudiced in some other way as a result of other circumstances in the case. Ideally, judges will rarely, if ever, need to use the words ‘dangerous or unsafe to convict’ in warning juries in these circumstances. The Commission agrees with the submission of the County Court judge referred to above<sup>980</sup> that warnings should be delivered in ‘clear and simple language’.

977 Submission 39.

978 In Geoffrey Flatman and Mirko Bagaric, ‘Juries Peers or Puppets—The Need To Curtail Jury Instructions’ (1998) 22 *Criminal Law Journal* 207 210–11, the authors say that judges arguably should not be making any warnings about the dangers inherent in certain types of evidence, in that the accused is already sufficiently protected by the ‘best safeguard of all – proof beyond reasonable doubt.’

979 See Kathy Mack, ‘“You Should Scrutinise Her Evidence With Great Care”: Corroboration of Women’s Testimony About Sexual Assault’ in Patricia Eastal (ed *Balancing the Scales: Rape, Reform and Australian Culture* (1998)). There has been a great deal written on the construction of women in sexual offence cases generally. Penelope Pether, for example, refers to ‘commonplace cultural understandings’ about women and female sexuality which have long been reflected in jury directions in rape trials, including ‘that many women lie about rape’ and that some women are more deserving of protection from non-consensual sex than others. Penelope Pether, ‘Critical Discourse Analysis, Rape Law and the Jury Instruction Simplification Project’ (1999) 24 *Southern Illinois University Law Journal* 53 para [88].

980 Referred to in para 7.129.

7.133 The second limb to the Commission's recommendations concerning delay relates to the *Crofts* warning.<sup>981</sup> This warning is often given in close proximity to a *Longman* warning. Such warnings may also be given in the course of a judicial direction on recent complaint evidence. Again, the Commission recommends that these warnings should be restricted to circumstances where there is evidence to justify the giving of such a warning.

! **RECOMMENDATION(S)**

170. Section 61 of the Crimes Act 1958 should be amended as follows (**proposed amendments in bold text**, existing provisions in normal text):

- (1) On a trial of a person for an offence under Crimes Act 1958 Part 1, Division (8A), (8B), (8C), (8D) or (8E)...
- (a) The judge must not warn, or suggest in any way to, the jury that the law regards complainants in sexual offence cases as an unreliable class of witness; and
- (b) (i) if evidence is given or a question is asked of a witness or a statement is made in the course of an address on evidence which tends to suggest that there was delay in making a complaint about the alleged offence by the person against whom the offence is alleged to have been committed, the judge must inform the jury that there may be good reasons why a victim of a sexual assault may delay or hesitate in complaining about it.  
  
**(ii) The judge must not state, or suggest in any way to the jury that the credibility of a complainant is affected by a delay in reporting a sexual assault unless satisfied that there exists sufficient evidence in the particular case to justify such a warning.**
- (c) **The judge must not warn, or suggest in any way to the jury that it is dangerous or unsafe to convict the accused, unless satisfied that:**

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981 See paras 7.86–7.95 above.



## RECOMMENDATION(S)

- (i) there is evidence that the accused has in fact suffered some specific forensic disadvantage due to a substantial delay in reporting; or
  - (ii) there is evidence that the accused has in fact been prejudiced as a result of other circumstances in the particular case.
- (d) If the judge is satisfied in accordance with sub-section (c) that a jury warning is required, the judge may warn the jury in terms she or he thinks appropriate having regard to the circumstances of the particular case.
- (e) In giving a jury warning pursuant to sub-section (d), it is not necessary for the judge to use the words 'dangerous or unsafe to convict'.
- (2) Subject to s 61(1)(b)(ii), (c), (d) and (e), nothing in sub-section (1) prevents a judge from making any comment on evidence given in the proceeding that it is appropriate to make in the interests of justice.
- (3) Despite sub-section (2), a judge must not make any comment on the reliability of evidence given by the complainant in a proceeding to which sub-section (1) applies if there is no reason to do so in the particular proceeding in order to ensure a fair trial.

## JUDICIAL OPINIONS

### THE RELEVANCE OF JUDGES' EXPERIENCE

7.134 In the course of their jury charges, judges also make statements to juries based on their own knowledge and experience. Such statements often refer to 'common sense' or 'common knowledge'. In our study there were many examples of these statements. For example, the judge in Trial 11 commented that it is 'common human experience that memory fades with time...' in his direction about the complainant's delay in reporting the rapes. In Trial 13 also during the direction on delay, the judge said: 'Experience has shown that human recollection of events occurring in childhood and adolescence, is frequently erroneous and

liable to distortion by reason of various factors'. Comments of this kind may have a powerful influence on the outcomes of sexual offence trials.<sup>982</sup>

7.135 Commentators have drawn attention to the fact that statements of this kind tend to depict the experience of an individual judge as typical or universal<sup>983</sup> and in doing so may ignore or marginalise different patterns of experience. For example, statements based on judges' ideas about likely reactions to sexual assault may not reflect the actual experience of sexual assault victims or may ignore the way in which complainants' cultural or social backgrounds can affect the way they respond. McHugh J drew attention to this problem in the High Court case of *M*<sup>984</sup> when he warned that:

Attitudes towards sexual matters and the behaviour of young people have changed so much in recent years that in many instances the views of appellate judges about how teenagers behave, derived from their own past contact with teenagers, may well be out of date.<sup>985</sup>

7.136 It is unrealistic to expect judges to be uninfluenced by their own experiences, perceptions and values. As the Canadian Judicial Council said in a statement endorsed by six judges in the Supreme Court case of *R v RDS*:<sup>986</sup>

There is no human being who is not the product of every social experience, every process of education and every human contact with those with whom we share the planet. Indeed, even if it were possible, a judge free of this heritage of past experience would probably lack the very qualities of humanity required of a judge.

7.137 It is important that the views expressed by judges on matters such as the effect of passage of time on a person's memory of a traumatic event, and the way

982 See Geoffrey Flatman and Mirko Bagaric, 'Juries Peers or Puppets—The Need To Curtail Jury Instructions' (1998) 22 *Criminal Law Journal* 207.

983 Pia van de Zandt, 'Heroines of Fortitude' in Patricia Eastal (ed *Balancing the Scales: Rape, Reform and Australian Culture* (1998) 138.

984 (1994) 181 CLR 487, 529. McHugh J was one of two dissenting judges in this case. The case is discussed in Kathy Mack, "'You Should Scrutinise Her Evidence With Great Care": Corroboration of Women's Testimony About Sexual Assault' in Patricia Eastal (ed *Balancing the Scales: Rape, Reform and Australian Culture* (1998) 68.

985 McHugh J's comments relate to teenagers, but could apply equally to the sexual behaviour of any of the younger generations.

986 *R v RDS* [1997] 3 SCR 484, cited in (Justice) Keith Mason, 'Unconscious Judicial Prejudice' (2001) 75 *Australian Law Journal* 676–678.

in which victims of sexual assault are likely to behave, are based on accurate information.

7.138 Judicial education can expose judges to research about sexual assault and to the perspectives of people who have been victims of sexual assault and family violence. In Australia the importance of providing judges with information of this kind is now well recognised. Informing judges on social and cultural issues relevant to their work enhances public confidence in the judiciary without exposing judges to political interference. The Australian Institute of Judicial Administration and the Judicial Commission of New South Wales have been running programs to inform judges about social issues for some time. For example, recent programs offered by the Judicial Commission include sessions on migrants, ethnicity, gender and the Islamic religion as practices in Australia. The Judicial College of Victoria has also presented seminars on cultural and social issues.

7.139 In Chapter 3 we recommend that the Judicial College of Victoria should continue to offer regular programs for judges and magistrates which facilitate discussion of issues commonly arising in sexual offences committals and trials. We recommend that such programs should not be confined to legal issues but should draw on research and other information on the circumstances in which sexual assault occurs and its psychological and other effects.

#### JUDICIAL COMMENTS ON THE FACTS

7.140 Judges' views may also be reflected in expressions of personal opinion about the facts of the particular case. In almost one third of the charges examined in our study, judges revealed or at least strongly hinted at personal opinions or beliefs in the course of making comments on the facts.<sup>987</sup>

7.141 In the RLREP, the researchers interviewed legal personnel about a number of matters including judicial directions on consent in sex offence matters. Prosecution barristers, defence barristers and solicitors reported that the personal views of the judges affected the way in which they delivered their directions, and also spoke of the subtle ways judges convey their opinions to juries. For example, one solicitor said:

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987 See discussion below paras 7.144–8. Assuming the importance of non-verbal cues such as tone of voice—see para 7.141 below—it is possible that the true figure here is higher.

You don't pick it up from the transcript, but judges can get across to the jury that they think what she was saying was a lot of bunkum...the whole trial can run and there is nothing objectionable on paper...It's all the unwritten stuff that makes the difference.<sup>988</sup>

7.142 In an article in the Australian Law Journal, Justice Keith Mason (President, New South Wales Court of Appeal) discusses the problem of unconscious judicial prejudice in relation to the duties of neutrality and impartiality.<sup>989</sup> He remarks:

...duties of neutrality and impartiality are concerned with more than avoiding the appearance of bias or even the risk of actual bias being found. They are also ethical legal duties and they go beyond compliance with external yardsticks like the rules of evidence, procedural fairness and the like, however much those yardsticks promote impartiality.<sup>990</sup>

...We have all encountered judges who did not transgress the boundaries of apprehended bias, but who appeared to display generalised dispositions for or against classes of litigants: women, black persons, immigrants, workers...and so on....<sup>991</sup>

7.143 Judges must ensure that juries understand the presumption of innocence and are aware of issues relevant to the complainant's credibility. However, jury directions should also ensure that complainants are treated fairly. We refer below to jury directions which included comments about the complainant's sexual morality or which repeatedly emphasised points unfavourable to the complainant, while making little reference to the prosecution case. In some of these cases the directions given to the jury may not have achieved the appropriate 'balance of fairness'<sup>992</sup> between the interests of the accused, the complainant and the community.

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988 RLREP, above n 886, 329. See also Pether's discussion of Bordieu's theory of language in: Penelope Pether, 'Critical Discourse Analysis, Rape Law and the Jury Instruction Simplification Project' (1999) 24 *Southern Illinois University Law Journal* 53 89.

989 (Justice) Keith Mason, 'Unconscious Judicial Prejudice' (2001) 75 *Australian Law Journal* 676.

990 Ibid 677.

991 Ibid 681.

992 See paras 7.7–8 above.

### Comments on the Complainant's Sexual Morality or Credibility

7.144 The trial judge is faced with a dilemma in a case where s/he perceives that issues of sexual morality may influence the jury's determination process. Should the judge bring attention to these issues in order to remind the jury that they should not be relevant in assessing the guilt or otherwise of the accused, or is it better to say nothing about them? The danger with the former approach is that the judge risks giving unnecessary emphasis to issues which may or may not be of concern to the jurors, thereby potentially influencing their decision-making process. Jurors may also perceive such comments as an expression of personal opinion from the judge. The danger with the second approach is that potential juror prejudice may go unchecked. In Trial 1, the judge chose the former approach by drawing attention to evidence of 'sexual eccentricity' on the part of the complainant in the context of reviewing the background facts of the case.<sup>993</sup> The judge, in directing the jury to decide the case 'free of bias or prejudice', then proceeded to draw to their attention to certain aspects of the complainant's sexual behaviour:

There has been talk of nipple rings and play about shaven pubic hair. There has been much evidence of sexual immorality on any view. There has been evidence of use of language which you may think is inappropriate. There is evidence of a willingness by all concerned to indulge in sequential sex. There is evidence of eccentric sexual habits on the part of [the complainant]. There is evidence of words like "Lebo cock," all those things may add colour to the canvas, but they are not matters that you should take into account in assessing the dilemma before you.

7.145 The judge in Trial 23 used words such as 'revulsion', 'disgust', 'distaste', 'normalcy' and 'common decency' in discussing the complainant's sexual background. This trial was somewhat unusual in that the jury observed two videos of the acts in question—12 counts of rape and two of indecent assault—that the accused had filmed as the complainant lay unconscious throughout.<sup>994</sup> In alerting the jury to the fact that the court was not a 'court of morals', the judge nevertheless made clear his own moral stance through his choice of language:

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993 It is clear from the transcript that counsel made objection to this description of the complainant, whereupon the judge after the break mentioned the matter again and directed that such 'sexual eccentricities' are irrelevant. This charge is discussed in detail in para 7.31 above.

994 The accused pleaded guilty to the two counts of indecent assault, however argued that he believed the remainder of the sexual acts were committed with the complainant's consent. He maintained that she had told him he could do anything he liked with her when she was 'out of it'.

There are a number of features in this case which might evoke an emotional response from ordinary people who have lifestyles where normalcy is the norm and common decency and normalcy are the norm and in particular, normalcy of sexual behaviour...

...you may experience distaste and indeed disgust at the conduct of a young woman in exposing the most intimate parts of her anatomy and allowing herself to be photographed in such poses as you observed in the Penthouse magazine and you might equally experience some personal revulsion that such a person could be so uninhibited in her approach to and conduct of sexual matters.

7.146 Although the judge allowed certain evidence relating to the complainant's work in the sex industry to be admitted<sup>995</sup>—the jury were shown explicit pictures of the complainant posing in Penthouse magazine and heard evidence that the complainant worked as a table top dancer at the time of the alleged offences—the judge was at pains to point out to the jury that the material was not relevant to the issue of consent in this case:

No matter how promiscuous the complainant may have been, she was still nevertheless entitled to place some limitations as she saw fit...

7.147 In another trial, Trial 13, the judge fairly early in his charge 'commended' to the jury the defence counsel's case on the complainant's credit:

The question for you is not really, it seems to me, whether she is being honest or truthful, it is not suggested that she is deliberately lying, as I understand it. In other words, she may well believe what she says...In addition to any deficiencies which you find in her evidence, and many were suggested by [defence counsel], for example...[the judge lists the alleged inconsistencies in the complainant's evidence]...and I commend to you all the matters put by [defence counsel].<sup>996</sup>

7.148 The judge spent the remainder of the relatively short charge drawing the jury's attention to issues which could potentially prejudice the accused—for example the effects of delay in reporting (it was 7½ years). He made no reference

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995 As we were not privy to a full transcript, it is not possible to know on what basis the evidence was ruled admissible. Further, we do not know if the Prosecutor objected to admission of the evidence.

996 The judge went on to present to the jury 'other matters' for the jury's consideration, including 'her age at the relevant time and her level of maturity at that time, coupled with that is that fact of her being a child at one stage, and subsequently an adolescent with all the factors which your own experience of human behaviour tell you arise in childhood and adolescence...', 'her relationship with her mother, 'her relationship with her grandparents' and the 'years which have elapsed before she complained in the first instant [sic]'.

to the arguments put by the prosecution. Despite having summarised the defence case in relative detail and not touched on the prosecution case, at the end of his charge the judge told the jury: ‘...save to the limited extent that I have, I am not going to endeavour to summarise for you the arguments or submissions that each counsel made...’

### Emphasis and Repetition

7.149 In Trial 11 the judge said, and repeated on three occasions, that it would be ‘dangerous to convict’ without supportive evidence (a ‘*Longman* warning’). He went on to direct the jury that there was no evidence capable of being seen as supportive evidence.

7.150 In Trials 2 and 8 the judge repeatedly told the jury that the accused does not have to prove anything and that it is up to the prosecution to prove the case beyond reasonable doubt. Counsel for the prosecution in Trial 2 took objection. He described the:

...constant urging by Your Honour to the jury to not forget the role that the Crown plays in this particular trial, in terms of the burden on the Crown and the fact that it’s the Crown’s duty to satisfy the jury beyond reasonable doubt was, in my respectful submission...so powerful...[that it has] moved the balance of this particular case to a point where this jury would have some difficulty now...the goal posts were moved from the middle of the Bar table down to the defence end of the Bar table as a result of your Honour’s charge.

The judge replied:

I’m grateful to you, because it...may be that I’ve just got into a particularly bad habit, or just tend to be repetitive, or too firm, or something or other.

7.151 The judge in Trial 14 repeated the phrase ‘beyond reasonable doubt’ a total of 24 times in his charge to the jury. It is, of course, appropriate that the judge instruct the jury on the importance of the concept of ‘beyond reasonable doubt’ but when the phrase is repeated on so many occasions, the judge not only risks losing the jury’s attention<sup>997</sup> but also risks being seen to be placing undue emphasis on one particular, albeit important, aspect of the case.

7.152 In Trial 8, the judge summarised only the accused’s case in detail towards the end of the charge, before repeating his warning to ‘scrutinise’ the

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997 See paras 7.155–9 below.

complainant's evidence very carefully and repeating several times that the jury had to be convinced beyond reasonable doubt of guilt. The judge summarised the Crown case in the following brief words: 'The Crown case is as I understand it, put very briefly, [the complainant] is telling the truth, accept what she says and find [the accused] guilty'. He spent over a page detailing the accused's arguments.<sup>998</sup>

7.153 Towards the end of the charge in Trial 7 the judge asked the jury to consider a range of questions, all of which seemed directed at supporting the defence propositions:

Can we be satisfied beyond reasonable doubt that the complainant was asleep at the time bearing in mind that the evidence is that the intercourse went on for some two minutes, there is no evidence that it was painful and bearing in mind the awkward position [man behind the woman] which was adopted here for sexual intercourse? Was there cooperation on the part of the complainant, and if so could she have been asleep?

### Guiding Juries

7.154 In some cases judicial comments on the facts suggested lack of confidence in the juries they were directing. Some judges seemed to feel the need to 'steer' the jury in the 'right' direction. 'Steering' can easily slip into dangerous territory. Flatman and Bagaric describe the nature of this danger:

The gravest risk which follows as a result of a judge expressing his or her own views of the evidence and arguments is that the jury will not interpret such views as opinions but as fact, and in effect relinquish their judgment by adopting the convictions of the judges. This risk is ever present due to the standing of the judge and the authority that this standing brings to bear on judicial instruction.<sup>999</sup>

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998 The charge in Trial 13 was similar. See para 7.147 above.

999 Geoffrey Flatman and Mirko Bagaric, 'Juries Peers or Puppets—The Need To Curtail Jury Instructions' (1998) 22 *Criminal Law Journal* 207 212.

7.155 The authors cite a passage from the 1953 case of *Pavlukoff*:

...it seems an absurdity for a judge after telling the jury the facts are for them...then to volunteer his opinions of the facts...If his [or her] opinion ought not to govern or influence the jury then why give his opinion to the jury. A judge who expresses his own opinion is in effect...undermining the plain instruction he has given to the jury that the 'facts are for them and not for him'...<sup>1000</sup>

7.156 In reporting on its research into juries in criminal trials in New Zealand, the New Zealand Law Commission said: 'The danger is that juries could interpret remarks on factual issues by the judge as being directions on the law which they are bound to apply'.<sup>1001</sup> In a study for the Australian Institute of Judicial Administration in 1994 based on juror surveys, Mark Findlay<sup>1002</sup> found that significant numbers of respondents felt that judges' comments had affected their views about the facts or as to the guilt or innocence of the accused.

7.157 Judges have also warned against judges making detailed comments on the facts. Kirby J has spoken of the danger of 'factual errors and the risks of undue influence that may sometimes arise, even unconsciously, from judicial elaboration of the facts...'<sup>1003</sup> In *R v Mazzolini*<sup>1004</sup> Ormiston JA said:

Bearing in mind that the jury is the constitutional body entrusted with the duty of resolving issues of fact in criminal trials, it can only be where principle requires additional instruction to the jury that it is proper to interfere further with that function.

1000 Pavlukoff (1953) CCC249 at 267, cited in Ibid 213

1001 New Zealand Law Commission, *Juries in Criminal Trials—Part Two* Preliminary Paper 37, Vol. 1 (1999) para 60.

1002 Mark Findlay, *Jury Management in New South Wales* (1994), 89. 53% (as against 31%) felt that the judge's comments did not influence their view of the facts and 63% (as against 17%) felt that the judge's comments did not influence their view of the guilt or innocence of the defendant.

1003 (Justice) Michael Kirby, *'Speaking to the Modern Jury —New Challenges for Judges & Advocates: A Reflection on Changes in the Occupational, Ethnic and Age Make-Up of the Jury Today and their Implications for Communication with Jurors for Generation-X'* High Court of Australia 3. Justice Kirby comments that Australian judges follow the English practice, whereby judges are ordinarily expected to summarise the relevant facts and relate those facts to the legal principles involved. He describes this state of affairs as 'an added burden on judges...' (p3).

For another judge's perspective on this topic, see (Justice) Keith Mason, 'Unconscious Judicial Prejudice' (2001) 75 *Australian Law Journal* 676.

1004 Ormiston JA in *R v Mazzolini* [1999] 3 VR 113, 130.

7.158 Extended judicial comments on the facts may confuse the jury about the nature of their role. In Recommendations 7 and 172 we have recommended judicial education on social context issues. Judicial education should also address the extent to which it is appropriate for judges to guide juries.

## CLARITY, LENGTH AND UNDERSTANDABILITY OF JURY DIRECTIONS

### CLARITY

7.159 Earlier in this Chapter we referred to the complexity of directing a jury in a sexual offences case.<sup>1005</sup> The duty of the trial judge is to direct the jury accurately on the law<sup>1006</sup> so that the prospect of a successful appeal against conviction by the accused is minimised. The judge will also aim to deliver the jury charge in language that can be understood by jurors who may have little knowledge about legal matters. At a recent conference, Justice Eames made some pertinent comments on the trade-off between legal accuracy and jury comprehensibility:

Judges are well aware of the obligation that their directions be correct as to fact and law. If their directions in that respect cannot be faulted by the keenest eyed appellate court advocate, or by the Court of Appeal, most judges would regard their job as having been satisfactorily performed. Much less importance, if any at all, would be placed by many judges on the question whether by their directions they had met their additional obligation to communicate clearly with the jury.<sup>1007</sup>

1005 See paras 7.5–6.

1006 County Court and Supreme Court judges in Victoria have available to them a book authored by Judge Kelly entitled: 'A Book of Directions to Judges in the Criminal Jurisdiction of the Supreme Court and County Court in the State of Victoria'. It contains sample directions. The judge with whom the Commission spoke about this issue believes that some judges use the sample charges almost word for word, while others craft their own directions. There is also in existence a Victorian Charge Book, which contains sample directions on rape. These directions do not cover recent complaint evidence or delay, two areas in which we found significant variation in charges.

1007 (Justice) Geoffrey Eames, 'Towards a Better Direction —Better Communication with Jurors' (Paper presented at the Supreme Court and Federal Court Judges Conference, 22 January 2003, Adelaide), 3. Justice Eames goes on to say: 'In common with most trial judges, I was often acutely aware when charging a jury that far from my instructions being clear, comprehensible and minimalist, they were usually replete with complex and elaborate discussion of questions of law, frequently involving over-subtle distinctions.' (p 3).

7.160 Justice Eames also pointed out that there has been little research on the comprehensibility of jury charges in Australasia.<sup>1008</sup> In 1998 the New Zealand Law Commission undertook some important research into jurors in criminal trials.<sup>1009</sup> They tracked a sample of 48 criminal trials over a period of nine months, during which jurors were surveyed and interviewed. Although jurors generally reported finding the judges' directions on the law helpful, in 35 of the 48 trials there were widespread misunderstandings about important aspects of the law, which significantly influenced the juries' deliberations.<sup>1010</sup> The New Zealand Commission also reported that although over 80% of jurors said that the judge's summing up was helpful, several criticised the presentation on the ground that it was boring and 'conducive to sleep'.<sup>1011</sup>

7.161 The New Zealand findings are supported by Australian research. Findlay, for example, found that fewer than 20% of jurors reported having understood legal terms and complex facts thoroughly<sup>1012</sup> and further, several indicated that they were confused after the judge's charge.<sup>1013</sup> The RLREP reported that 88.9% of the directions they examined included long words and complex language.<sup>1014</sup> A number of barristers interviewed were concerned that jury charges were usually long and complicated:

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1008 However there is a large body of North American research which suggests that jury directions are poorly understood. See for example: Geoffrey Kramer and Dorean Koenig, 'Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project' (1990) 23 *University of Michigan Journal of Law Reform* 401. This article refers to numerous other studies.

1009 The findings of the project are published in: New Zealand Law Commission, *Juries in Criminal Trials—Part Two* Preliminary Paper 37, Vol. 1 (1999).

1010 Warren Young, Yvette Tinsley and Neil Cameron, 'The Effectiveness and Efficiency of Jury Decision-Making' (2000) 24 *Criminal Law Journal* 89. This article summarises some of the principal findings of the New Zealand Law Commission's jury research project. One of the misunderstandings listed on page 98 is that many jurors 'did not understand the nature or significance of a number of the standard instructions from the judge about the way in which they were to approach the evidence – for example, the direction on drawing inferences or on the weight to be attached to the fact that the accused had lied.'

1011 New Zealand Law Commission, *Juries in Criminal Trials—Part Two* Preliminary Paper 37, Vol. 1 (1999) paras 7.3–7.4. [p51].

1012 Mark Findlay, *Jury Management in New South Wales* (1994) 78.

1013 *Ibid* 88. 14% of respondents reported feeling confused as a result of the judge's summing up.

1014 *Above n* 886, 302.

The simpler you can keep the charge the better—the longer judges go on charging juries with the complications of the law, the more confused the jury get and the more likely they are to say, 'Bugged if I can understand this', and let him off. They're not going to convict a person if they don't know what's going on and if they get confused...

The thing is they go through the provisions but they don't put the book down, look at the jury, and explain them. I've never heard them do that – in other words, put it into layman's terms – because they're worried about being appealed and exceptions being made to their charge so they find it more comfortable to run through the provisions and do what they have to do.<sup>1015</sup>

7.162 Kirby J has spoken about the challenges for judges in communicating effectively with generation X'ers<sup>1016</sup> who are accustomed to instantaneous communication via email and SMS and as a result have a different attitude to time than earlier generations, less tolerance for long-windedness and little practice in passive listening:

So far as judges are concerned, it argues strongly for briefer directions to juries; the avoidance of unnecessary repetition of descriptions of the evidence; the simplification and clarification of judicial directions on law; and the conduct of proceedings with a briskness suitable to the digital age.<sup>1017</sup>

7.163 The charges we examined often failed to meet Kirby J's ideal. The language used to explain legal concepts was often repetitive, convoluted and confusing. For example, in Trial 14, the judge repeated several times (over a space of over two pages) how the jury ought to treat the notion of reasonableness against the subjective standard of belief, to the extent that the direction became entangled, repetitive and circular.<sup>1018</sup> Directions on recent complaint were also very complex.<sup>1019</sup> In nine charges judges referred to the rationale for and historical

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1015 Ibid 328.

1016 These people are born between 1961 and 1981.

1017 (Justice) Michael Kirby, *Speaking to the Modern Jury—New Challenges for Judges & Advocates: A Reflection on Changes in the Occupational, Ethnic and Age Make-Up of the Jury Today and their Implications for Communication with Jurors for Generation-X* High Court of Australia 12.

1018 Refer to paras 7.32–4 for a discussion of these cases.

1019 Refer to para 7.81 above for a discussion of our findings on recent complaint directions.

background to the recent complaint principle.<sup>1020</sup> It is debatable whether this information assists jurors in their decision-making.

7.164 As Ormiston JA in the Court of Appeal said, in the context of discussing the trial judge's direction on recent complaint:

One should say immediately that, on the whole, it is undesirable to try to explain to a jury the reasons which underlie propositions of law which have to be explained to them in the course of a charge. From time to time one sees examples of judges reading extracts from High Court judgments and textbooks to juries and ordinarily that has led to confusion at least. On the other hand a simple explanation or a pertinent example sometimes gives life to a rule which otherwise might appear a stark statement of some legal proposition.<sup>1021</sup>

### LENGTH OF CHARGES

7.165 As we were not privy to starting and finishing times of charges, an estimate of the time taken for each charge was made based on the number of pages. The charges were all transcribed using identical font and spacing, which allowed these time estimates to be made. The time taken to read one page of charge out loud in a clear and unhurried manner was approximately one minute 40 seconds.

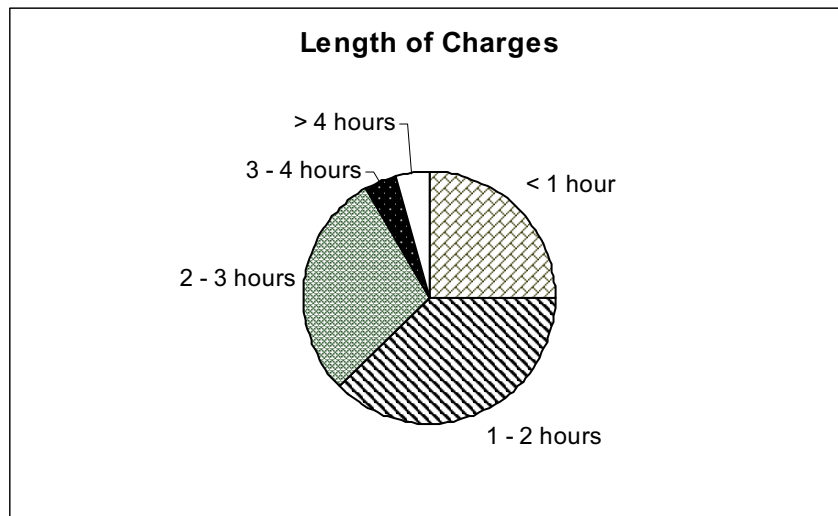
7.166 The charges we examined were generally quite lengthy, with eight extending into a second day.<sup>1022</sup> Table 7 in Appendix 5 details the number of pages and estimated time taken to deliver each charge. The average length of charge was 60 pages and 101 minutes and the median 49 pages and 82 minutes. Only six charges were under an hour, with nine lasting between 1 and 2 hours, seven between 2 and 3 hours, one 3 to 4 hours and one over 4 hours.

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1020 Trials 4, 10, 16, 17, 18, 19, 21, 22 and 24.

1021 *R v Munday* [2003] VSCA 189 (Unreported, Ormiston, Callaway and Batt JA, 26 November 2003) [18] (Ormiston JA).

1022 However, we did not have information on the time at which the charges commenced, so it is likely that some of these charges commenced later than the usual court start time.



7.167 It is interesting to compare our findings with those of the New Zealand Law Commission.<sup>1023</sup> It reported that the time taken for charges 'varied enormously', with the one extreme being charges that lasted for 20 minutes or less in 4% of trials, and the other extreme being the 20% of charges that were longer than one hour. As many as a third of jurors found the judge's charge to be too long.<sup>1024</sup> Given that the charges we examined were significantly longer than the New Zealand charges, one would expect that many jurors found them too long. As one judge commented in the RLREP:

It must be a painful experience for a juror to have to sit and listen for this that goes on for no less than hour or an hour and a half, maybe extending to even two hours...the complexity and number of issues to be placed before a jury in a rape trial has increased and multiplied to an extent that a charge in a rape trial takes an inordinate length of time.<sup>1025</sup>

1023 New Zealand Law Commission, *Juries in Criminal Trials—Part Two* Preliminary Paper 37, Vol 2 (1999) paras 7.6–7.8 [p52].

1024 *Ibid.* Half of these longer charges lasted more than 90 minutes.

1025 Above n 886, 315.

## AIDS FOR THE JURY

7.168 In its 2001 Report on *Juries in Criminal Trials*, the New Zealand Law Commission reported that juries found written and visual aids a helpful aid to decision-making. In New Zealand juries are given a copy of the indictment, a list of witnesses and the relevant sections of the *Crimes Act*. New Zealand practitioners reported that they often used other aids such as flow charts to encapsulate the evidence.<sup>1026</sup> The Commission recommended that the use of aids by practitioners should be encouraged and that consideration should be given to the publication of a practice note providing guidance on the various types of written and visual aids which should be made available to the jury as a matter of course.<sup>1027</sup>

7.169 In addition, the New Zealand Law Commission commented that giving the jury a written copy of the judge's directions or a summary of key points was likely to be helpful in many cases.<sup>1028</sup> While it approved of this practice, the Commission did not believe it was possible to be prescriptive about when such aids should be provided or the form that they should take. It was suggested that it should be left to the trial judge to decide what was appropriate in the particular case.<sup>1029</sup>

7.170 In its 2003 *Guide to Jury Trial Practice* the New Zealand Criminal Practice Committee noted that '[t]he practice of giving juries flowcharts or written sequential issues as a structure for making decisions is becoming common and is generally a useful thing to do. Obviously such material is part of the summing up and will form part of the trial record'.<sup>1030</sup>

7.171 In the charges we looked at, it was uncommon for judges to give juries written materials. The jury received parts of the transcript (usually at their request) in only a few cases. In two cases the jury was able to play back the accused record of interview. In only one case (Trial 9) a judge gave the jury some written material other than transcript to assist them in their deliberations. The jury was handed a document headed 'Elements of the offences, statutory provisions and matters to be proved by the Crown beyond reasonable doubt'. According to one County Court

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1026 New Zealand Law Commission, *Juries in Criminal Trials* Report No 69 (2001), paras 355–9.

1027 Ibid para 359.

1028 Ibid paras 313–4.

1029 Ibid. The Report also supported providing the judge's notes to the jury; paras 341–51.

1030 Warren Young, Neil Cameron and Yvette Tinsley, *Guide to Jury Trial Practice* (2003) (Criminal Practice Committee, Ministry of Justice, NZ) 24.

judge with whom the Commission spoke, in the past it was regarded as inappropriate for judges to give the jury written aids, but that attitude is changing. He said that it was now more common for juries to receive copies of presentments and also transcripts upon request. It seems clear, however, that it is most uncommon for juries to be given the type of written aids they were provided with in Trial 9.

7.172 In our study, there were nine cases where the jury asked questions of the judge. Mostly they wanted clarification of specific directions. In one case the jury handed the judge a list of over 100 questions. Despite the obvious confusion or lack of understanding of juries on important matters, in none of these nine cases were the jurors given any written material to help them with their deliberations.

7.173 Trial judges in Victoria, in fact, have considerable discretion at common law to allow material to be provided to the jury which aids its understanding of the evidence and the proceedings generally. Under section 19(1) of the *Crimes (Criminal Trials) Act 1999* the trial judge may order, either on the application of the parties or on his or her own motion, that copies of certain documents be given to the jury 'for the purpose of helping the jury to understand the issues'. These documents may be 'in any form that the trial judge considers appropriate' and may include prosecution opening and closing speeches, the judge's summing up, any schedules, chronologies, charts, diagrams, summaries or other explanatory material, transcripts of evidence or 'any other document that the trial judge thinks fit'.<sup>1031</sup>

7.174 In its review of jury services, the Law Reform Committee of the Victorian Parliament recommended that model jury instructions be developed through a multi-disciplinary approach using the expertise of lawyers (to ensure legal accuracy), psycholinguists (to ensure that the language used is comprehensible) and psychologists (to test comprehensibility). As with the existing sample directions, such model jury instructions would simply be a guide to be adapted by the trial judge according to the circumstances of each case.

7.175 The Commission believes that it would be helpful for juries to receive more assistance in their deliberations in sexual offence trials. It is too much to expect that lay people will be able to apply complicated legal principles to equally complicated sets of facts after listening once to lengthy and complex directions from a judge.

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1031 *Crimes (Criminal Trials) Act 1999* s 19(1).

## SUBMISSIONS AND RECOMMENDATIONS

7.176 Of the seven submissions which addressed question 70 of the Commission's Discussion Paper<sup>1032</sup>—'Should the range of matters dealt with in jury directions be limited, so that greater reliance is placed on the common sense of juries?'—four were against any limitation and three were in favour of limitation. For example, in arguing against the imposition of any limitations on the content of jury directions, the Criminal Bar Association<sup>1033</sup> said: '...juries ought not to be left to deliberate at large in the hope that they know the laws of the land, know the rules of procedure and evidence, and can apply them to the facts as they find them to be'. The Law Institute of Victoria<sup>1034</sup> wrote: '...in the interests of consistency, the existing jury directions should be retained'.

7.177 The Corporate Policy Division of Victoria Police<sup>1035</sup> favoured the approach in the United States, where judges make only very brief directions to juries and do not summarise evidence or facts. And a submission from Peter Rush and Alison Young, two Melbourne University academics,<sup>1036</sup> argued that judicial directions to juries 'be tightly controlled'. In particular, they were of the opinion that:

when directing the jury, the judge should be prohibited from providing a summary of the evidence of the facts. Such evidence has been heard by the jury and is presented by opposing counsel.

7.178 Seven submissions addressed Question 71 of the Discussion Paper—'Are there any changes which could be made to ensure that jury directions and charges are understood by juries?' All stated that they were in favour of such changes. For example, the submission from Peter Rush and Alison Young thought that the judge 'should be required to present to the jury a *written summary* of the *definitional elements* which the jury must find proven, and of the prosecution and defence *arguments* in relation to each element'. John Hinchcliffe<sup>1037</sup> argued that judges should not give any verbal directions at all to juries and all directions

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1032 Discussion Paper para 8.174.

1033 Submission 28 to the Discussion Paper.

1034 Submission 23 to the Discussion Paper.

1035 Submission 9 to the Discussion Paper.

1036 Peter Rush and Alison Young, Submission 5 to the Discussion Paper.

1037 Submission 7 to the Discussion Paper.

should be presented in writing. The Federation of Community Legal Centres<sup>1038</sup> suggested:

Judges should be trained to provide clear and understandable directions and explanations to juries...A court staff member could be appointed to liaise between the judge and jury and ensure that the jury adequately understands the directions and charges. Juries could be given a fact sheet about the legislation or juries in sexual offence cases could be given a training session on the legislation prior to the trial.

7.179 The Australian Institute of Judicial Administration is currently considering a research project on jury directions. In the meantime the Commission recommends that the judicial use of written and visual aids to assist juries should be encouraged. Judicial training should advise judges of the New Zealand Law Commission's research about how juries can be assisted by use of these aids. Training should also be provided on how to ensure that jury directions in sexual offence trials are comprehensible and as succinct as possible and on how to relate directions on legal issues to summaries of the facts and arguments.

7.180 In Chapter 3 we recommended that judicial education should include information on the social, cultural and psychological impact of sexual assault. Such training should include information about why victims of sexual assault may not report assaults or may delay reporting them.

#### ! RECOMMENDATION(S)

171. Judicial education on sexual assault should include:

- information about the social and cultural context of sexual assault (see Recommendation 7) and the factors that result in delays in reporting assault;
- training on the content and comprehensibility of jury directions and the appropriate balance between comments on the facts and discussion of the law; and
- information about the usefulness of providing written and visual aids to assist jury decision-making.

**RECOMMENDATION(S)**

172. Judges should consider providing juries with written and visual aids to assist their deliberation.

**JURY ATTITUDES**

7.181 In making decisions on the facts, juries as well as judges are likely to be influenced by their own experience and attitudes. Judges frequently tell jurors to draw on their own experience and knowledge. In our study, for example, the judge in Trial 14 appealed to the jury's 'common sense and experience of human behaviour' in the context of directing on consent.<sup>1039</sup>

7.182 The perceptions and experiences which juries rely on in making decisions on the facts and assessing the credibility of witnesses may not accurately reflect empirical information about the context in which sexual assault occurs and the behaviour of those who have been assaulted. As Justice Wood has commented:

Of concern is the circumstance that normally expert evidence of human sexual behaviour, whether normal or abnormal, and of victim response, is not admissible, with the consequence that the determination by juries of such cases will to a large measure depend, in a practical sense, upon their own sexual orientation, experience, practices and beliefs. In many instances, although most particularly in relation to child sexual assault, the dynamics of such an assault and of the typical response of the victim may be quite unappreciated by lay jurors, many of whom may believe in several myths which surround such conduct.<sup>1040</sup>

7.183 In the High Court case of *Murphy v The Queen*<sup>1041</sup> Mason CJ and Toohey J questioned the accuracy of a statement by Lawton LJ in *R v Turner*<sup>1042</sup> that jurors do not need experts 'to tell them how ordinary folk who are not suffering from any mental illness are likely to react to the stresses and strains of life'. As they said:

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1039 See para 7.134 above for other examples.

1040 (Justice) James Wood, 'Sexual Assault and the Admission of Evidence' (Paper presented at the Practice and Prevention: Contemporary Issues in Adult Sexual Assault in New South Wales, 12 February 2003, Sydney) 2.

1041 (1989) 167 CLR 94.

1042 [1975] Q.B. 834, 841, cited in *Ibid* 111.

There are difficulties with such a statement. To begin with, it assumes that “ordinary” or “normal” has some clearly understood meaning and, as a corollary, that the distinction between normal and abnormal is well recognized. Further, it assumes that the commonsense of jurors is an adequate guide to the conduct of people who are “normal” even though they may suffer from some relevant disability.<sup>1043</sup>

A similar comment could be made about the experience of people who have been sexually assaulted.

7.184 One way of correcting misapprehensions and ensuring that jury decision-making is based on accurate information would be to allow admission of expert evidence on general matters relating to sexual assault. Such expert evidence could help to explain the behaviour of a complainant, for example the reason why a person may delay in making a complaint of sexual assault.

7.185 Evidence on the dynamics of sexual assault is rarely if ever led in Victoria. Under the present law there are several barriers to the admission of expert evidence about sexual assault. First, such evidence may not be regarded as relevant. The Commission believes that expert evidence will often assist juries in assessing the prosecution case and making judgments about the credibility of the complainant. The fact that juries are frequently advised to draw on their own knowledge and commonsense in reaching their verdict highlights the possible relevance of expert information about the dynamics of sexual assault.

7.186 It is of course important that expert evidence adduced by the prosecution and defence should not overwhelm the jury with information and statistics.<sup>1044</sup> As is the case in all trials the judge will retain his or her discretion to exclude evidence which is not sufficiently related to the facts in issue.

7.187 Secondly, the ‘common knowledge rule’ generally excludes the giving of expert evidence on matters about which ordinary people are able to form a sound judgment, without needing the assistance of a person who has specialised knowledge and experience in the relevant area.<sup>1045</sup> Traditionally the sexual behaviour of men and women has been regarded as falling within this category. Justice Wood’s statement quoted above questions this perception. In the Canadian Supreme Court case of *R v Lavallé* Wilson J said, in relation to cases involving domestic violence:

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1043 (1989) 167 CLR 94, 111.

1044 Roundtable 24 February 2004.

1045 *Clark v Ryan* (1960) 103 CLR 486, 491 (Dixon CJ).

The need for expert evidence in these areas can... be obfuscated by the belief that judges and juries are thoroughly knowledgeable about ‘human nature’ and that no more is needed. They are, so to speak, their own experts on human behaviour.<sup>1046</sup>

This comment is equally applicable to sexual assault.

7.188 Freckleton and Selby<sup>1047</sup> suggest that the ‘common knowledge’ rule has been interpreted fairly liberally. For example, in *Murphy v The Queen*<sup>1048</sup> the test applied by the High Court was whether expert evidence ‘would be likely to assist’ the jury. Despite this liberal interpretation, the Commission believes that it would be desirable to make it clear that expert evidence can be admitted on the dynamics of sexual assault and the typical response of victims, for example the fact that child sexual assault victims rarely report the assault immediately. The Commission understands that child psychologists have sometimes been called in child sexual abuse trials to explain how children who are sexually abused typically react, but that such evidence has rarely been called or admitted in Victoria. Expert evidence about the general dynamics of abusive relationships has been accepted by Australian courts as admissible when it has been relevant to the facts in issue.<sup>1049</sup> A legislative statement making it clear that similar evidence may be admissible in sexual offence trials would encourage counsel to consider whether it should be led.

7.189 Thirdly, for expert evidence to be admissible there must be a ‘body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience’.<sup>1050</sup> As there is now a large body of research on sexual assault, this requirement may not prevent the introduction of expert evidence. This could be put beyond any doubt by legislation.

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1046 [1990] 1 SCR 852, 874, cited in Regina Graycar, ‘The Gender of Judgments: An Introduction’ in Margaret Thornton (ed) *Public and Private: Feminist Legal Debates* (1995) 277–8.

1047 Ian Freckleton and Hugh Selby (ed) *Expert Evidence: Law, Practice, Procedure and Advocacy* (2nd ed) (2002) 160–3.

1048 *Murphy v The Queen* (1989) 167 CLR 94, 110 (Mason CJ and Toohey J), 126 (Deane J), 130 (Dawson J).

1049 *Osland v The Queen* (1998) 197 CLR 316, 376 (Kirby J).

1050 *R v Bonython* (1984) 38 SASR 45, 47 (King CJ), cited approvingly by Gaudron and Dummow JJ in *Osland v The Queen* 197 CLR 316, 336. Under the Commonwealth and NSW Evidence Acts, satisfying a ‘field of expertise’ test is not a prerequisite for admissibility. However, rules regarding irrelevant, prejudicial or misleading evidence would presumably operate to exclude the opinion of specialists in unreliable or unacceptable fields of expertise (Einstein J in *Lakatoi Universal Pty Ltd v Walker* [2000] NSWSC 633).

7.190 Expert evidence can only be given by people who qualify as experts. At common law it is probably unnecessary to show that a person has formal qualifications and in some cases people have been able to give evidence based on their experience alone.<sup>1051</sup> In *R v Gadd*<sup>1052</sup> a social worker who had extensive experience working with women who experienced family violence, and had worked as a coordinator of a women's health centre, a domestic violence resource centre and a women's refuge as well as doing counselling or crisis intervention work, was permitted to give evidence. In her evidence she explained the general nature and dynamics of violence, the difficulty women might experience in leaving violent relationships and women's tendency to hide the abuse. Similar evidence could assist juries in sexual offence cases when they consider factors which are argued to affect the complainant's credibility, for example the way in which she responded following the alleged assault.

7.191 As is the case in the area of family violence, the Commission believes that the concept of a field of expertise should be interpreted broadly.<sup>1053</sup> It might, for example, include academics who have undertaken research on sexual assault and people who have extensive experience working with victims of sexual assault, such as rape crisis centre workers and sexual assault counsellors.

7.192 Under Order 44 of the Rules of the Supreme Court, a person can now be accepted as an expert witness in the civil jurisdiction if their expertise is based on experience alone.<sup>1054</sup> This mirrors the approach taken in jurisdictions adopting the

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1051 For example, in *Weal v Bottom* (1966) 40 ALJR 436 evidence from a truck driver experienced in driving semi trailers was held to be admissible. Barwick CJ held that evidence as to what an articulated vehicle was capable of doing in the circumstances of the case could be put forward by a person who had actual experience, although strictly speaking this evidence is not opinion evidence, nor is the person who gives it 'strictly within the category of expert' (p438). In *Price v The Queen* [1981] Tas R 306 it was held that evidence of addicts' opinions as to whether a drug was heroin were admissible and in *Anderson v The Queen* (1992) SASR 90 evidence given by a police officer as to the potential value of a crop of cannabis was held to be admissible as being to some extent primary evidence and to some extent expert opinion evidence. See also Julie Stubbs and Julia Tolmie, 'Falling Short of the Challenge? A Comparative Assessment of the Australian Use of Expert Evidence on the Battered Woman Syndrome' (1999) 23 *Melbourne University Law Review* 709 731.

1052 Transcript of Proceedings, *R v Gadd* (Unreported, Supreme Court of Queensland, commencing 27 March 1995, Moynihan J) 189–98 cited in *Ibid*, 731.

1053 Freckelton and Selby suggest that there is a recent trend for Australian courts to apply the expertise rule more rigorously, through examining the appropriateness, relevance and parameters of an expert's expertise. Above n 1047, 23–8.

1054 Order 44.01 of the Supreme Court (General Civil Procedure) Rules 1996 defines 'expert' as 'a person who has specialised knowledge based on the person's training, study or experience'.

Uniform Evidence Act,<sup>1055</sup> which deals with expert evidence in both civil and criminal cases. Section 79 of the Act does not define an expert but provides an exception to the rule against witnesses stating opinions ‘if a person has specialised knowledge based on the person’s training, study or experience’.<sup>1056</sup>

7.193 Who may qualify as an ‘expert’ and what that person may give evidence about will depend on the particular qualifications and experience of the individual witness. The Commission therefore does not propose to attempt to define who might be an ‘expert’ for the purposes of giving this evidence, but encourages courts to recognise the broad range of individuals and professional backgrounds who may have expertise on sexual assault. The recommendation below will require an amendment to the *Evidence Act 1958*. It is intended that such amendment would encourage prosecutors to lead expert evidence in appropriate cases.

## ! RECOMMENDATION(S)

173. The *Evidence Act 1958* should be amended to clarify that in sexual offence cases expert evidence about sexual assault is admissible. This evidence may include evidence on:

- the nature and dynamics of sexual assault;
- social, psychological and cultural factors that may affect the behaviour of people who have been sexually assaulted and may result in them delaying in reporting an assault.

1055 *Evidence Act 1995* (Cth) s 79; *Evidence Act 1995* (NSW) s 79; *Evidence Act 2001* (Tas) s 79. *Evidence Act 1995* (Cth) ss 4(1) and 8(4)(a) applies the Commonwealth Act provisions to proceedings in ACT courts, except to the extent they are excluded by regulation.

1056 Section 76 of the *Evidence Act 1995* (Cth) states: ‘Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.’