

# Judicial College of Victoria Online Journal

*Volume 01 | 2014*



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**Citation:**

This journal can be cited as (2014) 1 JCVOJ.

**Guest Editor:**

The Hon. David Habersberger QC

**ISSN:**

ISSN 2203-675X

Published in Melbourne by the Judicial College of Victoria.

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The *Judicial College of Victoria Online Journal* provides practitioners and the wider legal community with a glimpse into materials previously prepared for the Judicial College of Victoria as part of its ongoing role of providing judicial education. Papers published in this journal address issues that include substantive law, judicial skills and the interface between judges and society. This journal highlights common themes in modern judicial education, including the importance of peer learning, judicial independence and interdisciplinary approaches.

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<http://mulr.law.unimelb.edu.au/go/AGLC3>.

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**Contact:**

Correspondence can be sent to:

<b>Judicial College of Victoria</b>	T: 03 9032 0555
Level 7, 223 William Street	F: 03 9032 0500
Melbourne VIC 3000	E: <a href="mailto:info@judicialcollege.vic.edu.au">info@judicialcollege.vic.edu.au</a>



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# Introduction

The Hon. David Habersberger QC

It is a great pleasure to present this inaugural edition of the *Judicial College of Victoria Online Journal*. Since its inception in 2002, the Judicial College of Victoria has consistently delivered educational programs of the highest quality for Victoria's judicial officers. Through these programs, the College has amassed a wealth of papers from academics and judicial officers on interesting and important areas of the law. Judicial officers have always had access to these papers through JOIN, the judicial intranet maintained by the College. Now, this journal gives practitioners, students and members of the public the chance to see some of the papers delivered at College programs, as well as showcasing papers developed through the College's work with the Victorian jurisdictions.

This first edition of the Online Journal presents two papers from the excellent 'Constitutional Role of the Judge' programme that was delivered in conjunction with the University of Melbourne Law School in 2013. Former members of the High Court of Australia, and current or former members of the Supreme Court of New Zealand, the Federal Court of Australia, the Supreme Court of Victoria and Melbourne Law School gathered to explore issues of statutory interpretation and the judicial role.

Former Chief Justice Murray Gleeson's paper on the judiciary as the third arm of government is, with respect, a considered and thorough analysis of the separation of powers doctrine as it operates within Australia and the important place of the 'judiciary as a separate, and co-equal arm of government'. This paper is particularly timely given the commencement on 1 July 2014 of the *Court Services Victoria Act 2014*, which will see the Victorian courts, the Victorian Civil and Administrative Tribunal and the Judicial College all move under the umbrella of Court Services Victoria as part of new arrangements to provide greater institutional independence to the court system in Victoria.

Justice Susan Kenny, in a paper that is both scholarly and practical, examines the issues of statutory interpretation. With the growth in statutory law, this area is always relevant for lawyers and judicial officers. Justice Kenny addresses the often-complex issue of the notion of legislative intent and provides a clear expression of her views concerning that phrase, and a judge's task in giving meaning and effect to a statute.

These two papers explore issues and themes concerning the judge's role, and the limits of that role when interacting with the other branches of government. Justice Mark Weinberg's paper on Evidence-based law takes a different perspective and considers how non-governmental influences, especially the work of the social sciences, can or should affect the three branches of government. He charts the history of appeals to empiricism in the orderly development and application of the law and reflects on its modern manifestations in the criminal law. In his characteristically balanced and measured way, he identifies some of the strengths which empirical-based law reform can bring and have brought, while warning against the danger of discarding moral and ethical considerations in the process of rule making.

The final paper, by Matthew Weatherston, the Judicial College of Victoria Director, Research and Publications, examines a recent significant reform in Victoria. The *Jury Directions Act 2013* codified the process many judges had already adopted of requiring practitioners to identify, at the end of the trial, the issues in dispute and the necessary directions. This paper, developed for the assistance of judges and practitioners, describes the operation of the Act and the innovative reforms the Act implemented in an effort to reduce the complexity of jury directions in criminal trials.

Collectively, the four papers in this first edition of the *Judicial College of Victoria Online Journal* demonstrate some of the issues the Victorian judiciary has considered in their professional education in the last year, and how well-served the Victorian judiciary is in that respect. Cross-disciplinary learning will be especially important in the early days of the new Court Services Victoria, as judges take greater managerial and administrative control over the court system. Through this journal, and the College's ongoing work, the community will gain a window into the court's educational journey. This journey mixes self-reflection, peer learning and traditional educative methods. I am sure that like the College's other publications, this will become a key resource for courts and the public to learn about the Victorian justice system.

**The Hon. David Habersberger QC**

# Constitutional role of the judge: Statutory interpretation

The Hon. Justice Susan Kenny<sup>1</sup>

Statutory interpretation is something judges do most days. Whilst recognising we must be careful and abide by the rules, we generally interpret statutory provisions as a matter of course. We would not ordinarily consider the constitutional position that judges occupy as interpreters. I propose this afternoon to examine this position.

At the outset, I shall map for you where I intend to go. My choice of route results from a recent discussion with Professor Saunders, co-presenter in this session. We began, as our Chair did today, with Ekins' ideas about legislative intent.<sup>2</sup> We went on to discuss the following questions with respect to the Australian legal situation:

1. What is meant by legislative intent?
2. What, if anything, is the continuing utility of the concept of legislative intent?
3. Has the legislative intent concept any practical effect on how the judge undertakes statutory interpretation?
4. How should the constitutional role of the judge in interpreting statutes best be understood?

I am going to explore each of these questions in turn. My argument is that, for Australian judges, the concept of legislative intent continues to express the constitutionally-defined goal of statutory interpretation; and that, viewed in this light, the concept has a practical effect on the rules and assumptions that govern our task and indicates what we should see as the most desired outcome of our interpretive work.

## **What is meant by legislative intent?**

This is a key question. My first proposition is that the meaning of legislative intent is determined by the function that the concept plays in 'common law constitutionalism', to adopt French CJ's expression in *Momcilovic*.<sup>3</sup>

Amongst legal philosophers, the question has, of course, provoked a variety of answers. As Eskridge said in his book, *Dynamic Statutory Interpretation*, since the early 1980s, in the United States,

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1 BA (Hons) (Melb), LLB (Hons) (Melb), DPhil (Oxon), Judge of the Federal Court of Australia. This paper was delivered at a conference held under the auspices of the Judicial College of Victoria and the Melbourne Law School, University of Melbourne on 15 March 2013.

2 Richard Ekins, *The Nature of Legislative Intent* (Oxford University Press, 2012).

3 *Momcilovic v R* (2011) 245 CLR 1 ('Momcilovic'), 47-48 [46].

'theories of statutory interpretation have blossomed like dandelions in spring'.<sup>4</sup> He might also have said that such theories have blossomed around the common law world, including Australia. Many theories focus on 'legislative intent' and, as Ekins writes in his recently published book, numerous scholars<sup>5</sup> and some judges<sup>6</sup> have challenged the utility of the concept of legislative intent and the validity of the proposition that the 'discovery' of 'legislative intent' is the aim of the game.<sup>7</sup> I am not going to stray further into this philosophical field, however, because it would take me the rest of my time to cover it.

The fact is that Australian courts have almost always described the goal of statutory interpretation as the ascertainment of legislative intention. In a passage in *Federal Commissioner of Taxation v Munro*,<sup>8</sup> in 1926, Isaacs J wrote that '[c]onstruction of an enactment is ascertaining the intention of the legislature from the words it has used in the circumstances, on the occasion and in the collocation it has used them'. Recently, this passage was again relied on in the High Court, in the plurality judgment in *Public Service Association of South Australia Inc v Industrial Relations Commission of South Australia*.<sup>9</sup>

So far as we, the judges, are concerned, theory is usually less informative than practice; and Isaacs J's statement indicates that the meaning of legislative intent depends on what we do when we engage in statutory interpretation. I am, therefore, going to look at what we do in this process.

I first sketch what we do in terms familiar to us all. In a moment I want to explore aspects of the sketch more carefully.

So far as judges are concerned, statutory interpretation is not merely the attribution of meaning to a text, such as a newspaper, a letter, or a book. The authoritative status and legal nature of the text itself is significant. The particular text with which the judge is concerned is a provision forming part of the set of provisions constituting a specific statute; and the significance of a statute is that it is enacted by the legislature as the law. It is the legislature's own constitutional role and authority that impresses a statutory text with its peculiar significance. The very point of the legislature is, of course, to make law and, in our system, it is uniquely constituted to give effect to the principle of representative democracy. Subject to constitutional constraints, an Australian Parliament can

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4 William N Eskridge, Jr, *Dynamic Statutory Interpretation* (Harvard University Press, 1994) 1.

5 See, eg, Ronald Dworkin, 'Statutes' in *Law's Empire* (Becknap Press, 1986); Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999); Jeremy Waldron, *The Dignity Of Legislation* (Cambridge University Press, 1999).

6 See, eg, Michael Kirby, 'Towards a Grand Theory of Interpretation: The case of Statutes and Contracts' (2003) 24 *Statute Law Review* 95, 98-9; Nye Perram 'The perils of complexity: why more law is bad law' (2010) 39 *Australian Tax Review* 179, 180-181.

7 Ekins, 'Legislative Intent', above n 2, 4. See also Dworkin, above n 5 and Waldron, 'Law and Disagreement', above n 5; Waldron, 'The Dignity of Legislation', above n 5.

8 (1926) 38 CLR 153 ('Munro'), 180.

9 (2012) 86 ALJR 862, 876-7 [64] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

make or unmake any law it wishes.<sup>10</sup>

Except when the judge is required to declare that the legislature has passed beyond constitutional limits, the constitutional role of the judge with respect to statutes is, in brief, to apply its provisions to the case at hand and, where necessary, to interpret them to disclose their meaning. In a simple circumstance, to quote Sir Philip Sales of the English High Court, '[t]he judges complete the law promulgated by Parliament by applying it'.<sup>11</sup>

At this point, you may say that I have arrived at my destination since I have identified the constitutional role of the judge in the interpretive context. I have still not given meaning to legislative intent, however; and I am, therefore, not there yet. Indeed, as we all know, the interpretive role is more than that of 'completing' the law made by Parliament. There are occasions when, as the interpreter, the judge departs from the grammar and ordinary meaning of the text in order to give effect to the apparent purpose of the enactment.<sup>12</sup> In this instance, the judge becomes the legislature's 'co-operative partner', to adopt Suzanne Corcoran's expression.<sup>13</sup> More importantly for the route I am taking, these occasions expose the fact that, as Peter Goodrich says in *The New Oxford Companion to Law*, 'the judges in point of practice are the final arbiters of meaning',<sup>14</sup> although this proposition too is subject to qualification.

Whilst the judges are the final arbiters of the meaning of the provision in the case at hand, as some of us are aware from our experience, subject to constitutional constraints, the legislature can amend, overrule or abrogate the effect of judicial interpretation.<sup>15</sup> This is a salutary reminder to the judge of the superior authority of constitutionally valid statute law; and, even more importantly, that in our system of representative democracy, we, like the other branches of government, operate subject to certain checks upon our power.

There is a further point to be made: without what I shall term certain 'rules of engagement', the three branches of government would compete for authority with respect to the interpretation of

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10 See, eg, the discussion in Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010) 226.

11 Phillip Sales, 'Judges and Legislature: Values into Law', (2012) 71(2) *Cambridge Law Journal* 287, 292. As French CJ said in *Momcilovic* (2011) 245 CLR 1, 45 [39]: 'if the words of a statute are clear, so too is the task of the Court in interpreting the statute with fidelity to the Court's constitutional function. The meaning given to the words must be a meaning which they can bear'.

12 *Momcilovic* (2011) 245 CLR 1, 45 [40] (French CJ).

13 Suzanne Corcoran, 'Theories of Statutory Interpretation' in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (The Federation Press, 2005) 8, 15.

14 Peter Goodrich, 'Statutory Interpretation' in Peter Cane and Joanne Conaghan (eds), *The New Oxford Companion to Law* (Oxford University Press, 2008) 1126-1127.

15 See, eg, the history of the litigation under consideration in *Emwest Products Pty Ltd v Automotive, Foods, Metals, Engineering, Printing and Kindred Industries Union* (2002) 117 FCR 588; *Australian Industry Group v Automotive, Foods, Metals, Engineering, Printing and Kindred Industries Union and Others* (2003) 130 FCR 524. The Commonwealth Parliament undid what the Court had decided by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

statute law. The rules of engagement provide various checks. We are well-acquainted with at least two of them. One derives from the nature of the power confided to each branch of government, a limit which receives confirmation in the separation of powers operating most strongly in the Commonwealth constitutional context.<sup>16</sup> Another is the nature of the judge's competence, which is limited to stating how the statute should apply when confronted with the particular case.

In the context of interpreting statutes, there is a third common law constraint: namely, that the common law states that the *only* goal of the judge's interpretive role is to ascertain the legislative intent. The common law defines this legislative intent as the meaning of the statutory provision that the legislature is taken to have intended it to have *in conformity with the rules of construction*, whether common law or statutory. This is implicit in the now familiar statement in *Project Blue Sky*<sup>17</sup> in 1998 that the objective of statutory construction 'is to give the words of a statutory provision the meaning which the legislature is taken to have intended them to have'.<sup>18</sup>

## **What is the continuing utility of the concept of legislative intent?**

This is the second question, which I proposed earlier. The utility of the legislative intent concept is that it operates to constrain the judge in the interpretive role in a constitutionally appropriate way.

By way of the legislative intention concept, the common law provides constitutional orientation for the judge when engaged in statutory interpretation. That is, when the judge says that the goal is to ascertain what the legislature intended, the judge is acknowledging the nature of the judge's constitutional relationship with the legislature, although rarely is this spelt out in intermediate appellate or trial courts.

The legislative intent concept implicitly recognises that the Parliament makes law by its enactment of the statute; that the judge must apply the law; and that, given the limits of language and imagination, it is often impossible to spell out in so many words what the law requires to be done in every situation to which it applies. In the interpretive task, the judge 'bridges the gap' between the statutory provision as enacted by the legislature, and its operation and application in the circumstances of the particular case, via the concept of legislative intent. At the same time, the legislative intent concept acknowledges that, in practice, the judge is the final arbiter of the

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<sup>16</sup> See, eg, Richard Darrell Lumb, *The Constitutions of the Australian States* (University of Queensland Press, 5th ed, 1991) 132, 137 n 103; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 67 (Brennan CJ), 78 (Dawson J) and 92 (Toohey J); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 598-9 [37] (McHugh J), 614 [86] (Gummow J), 655 [219] (Callinan and Heydon JJ); *Wainohu v State of New South Wales* (2011) 243 CLR 181, 212 [52] (French CJ and Kiefel J); and *The Australian Workers' Union of Employees, Queensland v State of Queensland, Industrial Union of Employees & Anor* [2012] QCA 353, [51], [59] (Holmes, Muir and White JJA) (Special leave application to the High Court pending).

<sup>17</sup> (1998) 194 CLR 355 ('Project Blue Sky').

<sup>18</sup> Ibid 384 [78].

meaning of the law and therefore its application to the case at hand. In the interstices of the concept, there may also lurk recognition that, in the Australian context at least, the executive lacks direct power to make domestic law (as the legislature does) or to interpret the law (as the judge does). As the High Court has said in *Zheng v Cai*<sup>19</sup> and numerous cases<sup>20</sup> since then, legislative intent is ‘an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws’.

### **Has the legislative intent concept any practical effect on how the judge undertakes statutory interpretation?**

This is my third question. As I have said, the concept provides the judge with a constitutional compass, but it does a great deal more than this. It also identifies the rules that govern the judge’s interpretive role. In any particular case, the legislative intention is arrived at by the accepted rules of construction, whether sourced in common law or statute. *Momcilovic* makes clear that, in Victoria, this includes s 32(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (‘the Victorian Charter’).<sup>21</sup> As the joint judgment in *Lacey* states, the ‘[a]scertainment of legislative intention is asserted as a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts’.<sup>22</sup> Similar statements can be found elsewhere in the judgments of the High Court since *Zheng*.<sup>23</sup>

Whether or not it is desirable to invoke the putative knowledge of drafters, or as in *Zheng*, to take guidance from the ‘relationship of all arms of government in the system of representative democracy’ is unclear.<sup>24</sup> Perhaps, statements of this kind emphasise that the rules are not just judge-made; rather, they are accepted throughout government. Be this as it may, it is apparent that, by employing a concept of legislative intent, the common law neatly expresses the constitutional relationships that exist between the legislature and the judge when the judge engages in the interpretive task. The use of the expression ‘legislative intent’ is, in a sense, code for some of the most fundamental aspects of the way the legislature and the judge relate to one another in the matter of statutory construction.

When the meaning and function of the legislative intent concept is properly appreciated, it is evident that the actual intentions of the legislators are immaterial. It was for this reason that the

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19 (2009) 239 CLR 446 (*Zheng*), 455 [28].

20 For example, *Public Service Association of South Australia Inc v Industrial Relations Commission (SA)* (2012) 86 ALJR 862, 876 [64].

21 *Momcilovic* (2011) 245 CLR 1. See, eg, French CJ at 44–50 [37]–[51].

22 *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 (*Lacey*), 591 [43]. See also *Momcilovic* (2011) 245 CLR 1, 85 [146] (v) (Gummow J).

23 (2009) 239 CLR 446.

24 See, eg, *Momcilovic* (2011) 245 CLR 1, 210 [545] (Crennan and Kiefel JJ).

Commonwealth's attempt, in the *Malaysian Declaration Case*,<sup>25</sup> to have the Court interpret the critical provision of the *Migration Act 1956* (Cth),<sup>26</sup> by reference to matters known to the promoters of the legislation, was bound to fail. The Commonwealth invited the Court to have regard to the fact that the promoters of the provision had Nauru in view at the time of its enactment and that the promoters knew that Nauru was not a signatory to the *Refugees Convention*.<sup>27</sup> As the plurality judgment said, the 'hopes or intentions' of the promoters of the legislation did not bear on 'curial determination of the question of construction of the legislative text'.<sup>28</sup> The theoretical concerns about the ascertainment of actual intentions are thus misplaced.

Furthermore, as the Court said in *Zheng* and in *Lacey*, the legislative intent concept does not entail 'the attribution of a collective mental state to legislators'<sup>29</sup> or 'an objective collective mental state'.<sup>30</sup> The common law concept, understood in this way, leaves little room for Ekins' idea<sup>31</sup> that the legislators' joint action gives rise to a shared plan and, in consequence, legislative intent is that which is stated by voting for, or against, the plan. Common law legislative intent is an expression of constitutional relationship as opposed to a statement of objective reality.

In interpreting a statutory provision, the judge is not simply engaged in attributing meaning. If this were all that were required, the judge might permissibly choose the meaning that she or he thought best served the common good. Heydon J's statement in *Momcilovic* that 'the common law of statutory interpretation requires a court ... to search, not for the intention of the legislature, but for the meaning of the language it used'<sup>32</sup> is seemingly misconceived because it disregards the function that legislative intention serves.

From the judge's perspective, there is a third way in which the concept of legislative intent has a practical effect on the interpretive role. Because the judge gives content to the concept of legislative intent by acting in conformity with the common law construction rules, as augmented by statute, the judge also proceeds on the basis of the assumptions that these rules entail. These assumptions together constitute a touchstone by reference to which the judge evaluates the interpretive choices, to determine which is the most preferred. Being intimately linked with legislative intent, the touchstone is also part of common law constitutionalism. I am going to explain what I mean.

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<sup>25</sup> *Plaintiff M701 of 2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 ('*Malaysian Declaration Case*').

<sup>26</sup> Section 198A(3).

<sup>27</sup> *Convention relating to the Status of Refugees* (1951) as amended by the *Protocol relating to the Status of Refugees* (1967).

<sup>28</sup> *Malaysian Declaration Case* (2011) 244 CLR 144 at 199 [128] (Gummow, Hayne, Crennan and Bell JJ).

<sup>29</sup> *Zheng* (2009) 239 CLR 446, 455 [28].

<sup>30</sup> *Lacey* (2011) 242 CLR 573, 591 [43].

<sup>31</sup> See Richard Ekins, 'The Intention of Parliament' (2012) *Public Law* 709, 716; Ekins, above n 2, 242-243.

<sup>32</sup> *Momcilovic* (2011) 245 CLR 1, 175 [441] (Heydon J). Further, in a contradictory fashion, in this passage, Heydon J reverts to something approximate to intention when stating that the meaning of the language is to be interpreted by reference to, amongst other things, 'the mischief being dealt with'.

As all of us know, applying these rules of construction, we commence with the text of the statutory provision, having regard to the whole of the statute and the law in the area with which it is concerned. This initial focus on the text of a provision and the salient law assumes that the legislature acts rationally so as to create a law that sits reasonably with, or as one scholar<sup>33</sup> has said, is ‘coherent and consistent’ with the rest of the statute of which it is part and other relevant laws. This is why Crennan and Kiefel JJ said in *Momcilovic* that the statutory direction in s 32(1) of the Charter – to keep Charter rights in mind in statutory construction – is ‘not, strictly speaking, necessary’.<sup>34</sup> An expression of this consistency and coherence assumption is that, to quote Bell in *The New Oxford Companion to Law*, ‘the preferable interpretation is one that makes sense of the specific legislative text as part of a systemic whole’.<sup>35</sup>

Although the first port of call is the text, the history of statutory interpretation shows that this is not the end of the voyage. Statements such as those in the joint judgment in *Alcan*<sup>36</sup> in 2009 and in *Consolidated Media*<sup>37</sup> in 2012 to the effect that the task of statutory construction must begin and end with a consideration of the statutory text go too far if they are intended to assert unyielding primacy to the text. Indeed, in *Consolidated Media*, the authors of this statement also acknowledged that the text must be considered in its context, including its legislative history, although they went on to say that ‘[l]egislative history and extrinsic materials cannot displace the meaning of the statutory text’.<sup>38</sup> This statement is perplexing. Issues of statutory interpretation arise because the text is uncertain. There is circularity in such a statement that may lead one to doubt its true effect.

Furthermore, to give primacy to the text of the kind apparently mandated in *Consolidated Media*<sup>39</sup> and *Alcan*<sup>40</sup> is to ignore another powerful assumption that informs the common law’s rules of construction. This is the assumption that the legislature acts reasonably, having regard to its purpose in making a law, its constitutional role and those of the other branches of government, and the rights, freedoms and immunities that the common law protects because they are seen as key in a liberal, representative democracy.<sup>41</sup>

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33 John Bell, ‘Interpreting Legislation’ in Peter Cane and Joanne Conaghan (eds), *The New Oxford Companion to Law* (Oxford University Press, 2008) 630, 630.

34 *Momcilovic* (2011) 245 CLR 1, 217 [565].

35 Bell, above n 33, 630.

36 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, 46-7 [47] (Hayne, Heydon, Crennan and Kiefel JJ).

37 *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 293 ALR 257, 268-269 [39].

38 Ibid 268 [39].

39 *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 293 ALR 257, 268-269 [39].

40 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, 46-7 [47] (Hayne, Heydon, Crennan and Kiefel JJ).

41 See Ekins, ‘The Intention of Parliament’ above n 31, 709: ‘interpreters infer from the text in its context what the presumptively rational, reasonable legislature intended to convey’. Also Ekins, above n 2, 245, 258.

As judges, we know that the common law rule, confirmed by statutory provisions in the Commonwealth, the States and Territories,<sup>42</sup> requires that, so far as possible, we give effect to the purpose of the provision in question. Further, in the words of *Project Blue Sky*, a provision must not only be interpreted by reference to the statute viewed as a whole but so as to give effect to ‘harmonious goals’.<sup>43</sup> The assumption is that the legislature, being a rational body, can be taken to have intended to give effect to a rational purpose in enacting the provision.

In applying the purpose rule, the judge looks back to the time before the provision was enacted, to identify the purpose to be addressed.<sup>44</sup> As the joint judgment in *CIC Insurance*<sup>45</sup> makes clear, to this end, the common law, as well as statutory provisions,<sup>46</sup> allow the judge to have regard to law reform reports, explanatory memoranda, the Minister’s second reading speech and the like. *CIC Insurance* states that this kind of consideration, which may be called contextual consideration, was to occur ‘at the first instance’ and not at some later stage when an ambiguity was thought to arise.<sup>47</sup>

At this point, I am going to deviate from my route for a moment, to note that, from time to time over recent years, a contrary approach has been countenanced in the High Court. For example, in *Saeed* in 2010, it was said to be ‘erroneous to look at extrinsic materials before exhausting the application of the ordinary rules of statutory construction’.<sup>48</sup> Once again, I consider that such statements would be mistaken if they dissuaded the judge from applying the purpose rule in order to identify the legislative intent in the particular case. The law reports are testament to cases, such as *Wilson v State Rail Authority of New South Wales*,<sup>49</sup> where the text provided misleading information about the mischief the provision was to address. To adhere to a supposed rule that deferred consideration of such extrinsic material until an ambiguity were found would, in some circumstances, preclude the ascertainment of the legislative intent that is the goal of the judge’s inquiry.

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42 See, eg, *Acts Interpretation Act 1901* (Cth), s 15AA and *Interpretation of Legislation Act 1984* (Vic), s 35(a).

43 (1998) 194 CLR 355, 381–382 [69]–[70]. Accordingly, judges may consider ‘the mischief’ that the provision addresses and the remedy that it applies.

44 There are also occasions when the judge does more than look back. The consideration of purpose may require attention to matters that have changed since the enactment of the provision in question. This is because the common law rules of construction proceed on the assumption that the legislature acts reasonably and, so far as possible, its laws operate rationally, to take account of inevitable change in the pertinent facts and law over time. The judge’s interpretive role may sometimes involve updating the operation and application of a provision consistently with this assumption, although necessarily constrained by the concept of legislative intent.

45 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 (‘*CIC Insurance*’), 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

46 *Acts Interpretation Act 1901* (Cth), s 15AB.

47 *CIC Insurance* (1997) 187 CLR 384, 408.

48 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 265 (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

49 (2010) 78 NSWLR 704. In this case, the Court’s ultimate finding that a claim for common law damages in respect of an injury was not a claim for ‘work injury damage’ for the purposes of the relevant workers’ compensation legislation depended on the history of the legislation as opposed to the statutory text.

The assumption that the legislature acts reasonably, having regard to its constitutional role and those of the other branches of government finds expression in various familiar constructional rules. One is ‘the presumption that Parliament did not intend to pass beyond constitutional bounds’.<sup>50</sup>

The rules of construction applied in the *Malaysian Declaration Case*<sup>51</sup> disclose an assumption that the legislature acts reasonably, having regard to its own legislative role, as well as the role of the executive in assuming international law obligations. This was a case, so the Court said, in which the executive had assumed certain obligations under the *Refugees Convention* and the Parliament had legislated with these obligations in view. The result was, so the Court held, that the enactment assumed that Australia had protection obligations to relevant individuals by virtue of the Convention. The critical provision required that certain criteria be met before the Minister could make a declaration in relation to Malaysia, permitting asylum seekers such as the plaintiffs to be taken there. The plurality relied on the fact that the enactment assumed the existence of these protection obligations, in order to conclude that, as a matter of legislative intent, the criteria to be met under the statute were to be objectively satisfied.<sup>52</sup> The plurality’s interpretive approach incorporated rules of construction that required them to proceed on the assumption that the Parliament would act reasonably with respect to known international law obligations incurred by the executive with respect to asylum seekers.

The assumption that the legislature acts reasonably, having regard to the rights, freedoms and immunities protected by the common law is expressed in the interpretive principle of legality. The principle of legality is the common law rule that, in the absence of clear and unambiguous language, the legislature does not intend to diminish or otherwise adversely interfere with common law rights, freedoms or immunities. Unsurprisingly, in view of this, the High Court held in *Hogan v Hinch*<sup>53</sup> and *Momcilovic*<sup>54</sup> that s 32(1) of the Victorian Charter complements the common law rule. Consistently with the concept of legislative intent, which picks up the legality principle, the principle also recognises, however, that, subject to constitutional constraints, the Parliament may legislate so as to undo the common law rights, freedoms and immunities in expressly stated circumstances.

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50 *Munro* (1926) 38 CLR 153, 180 (Isaacs J). Another is that ‘as far as the statutory language admits’, a statutory provision should be interpreted in ‘comity’ ‘with the established rules of international law’: *Polites v The Commonwealth* (1945) 70 CLR 60, 68.

51 (2011) 244 CLR 144, 174 [44], 180 [58]-[59], [61], 185 [65]-[66] (French J); 189-190 [90]-[94], 194 [109], 201-202 [135] (Gummow, Hayne, Crennan and Bell JJ); 234 [246]-[247] (Kiefel J).

52 The same assumption led French CJ to conclude that the Minister’s opinion with respect to the criteria was a jurisdictional fact; and Kiefel J to conclude that the criteria could be satisfied only if Malaysia were under a domestic legal obligation to provide the relevant protections.

53 *Hogan v Hinch* (2011) 243 CLR 506.

54 *Momcilovic* (2011) 245 CLR 1.

These common law rights, freedoms and immunities embrace those aspects of the relationship of citizen and state, which, over time, judges have found – and the legislature has accepted – are inherent in our system of government.<sup>55</sup> The principle of legality is thus concerned with various aspects of this relationship, including the open justice principle and common law freedom of speech (in *Hogan v Hinch*<sup>56</sup>); the expropriation and extinguishment of property rights without fair compensation (in *Jemena Gas*<sup>57</sup>); continued detention at the unconstrained discretion of the executive (in *Plaintiff M61*<sup>58</sup>); and those interpretive perennials, denial of procedural fairness to a person affected by an exercise of public power, and the abrogation of legal professional privilege.

In the search for legislative intent, the judge is, therefore, required to be able to recognise common law rights, freedoms and immunities such as these; to be alert to statutory incursions on them; and to spell out an interpretation that, consistently with the statute, has, to quote French CJ in *Hogan v Hinch*, ‘the least adverse impact’<sup>59</sup> on them. This is a difficult task, although it vindicates Gummow J’s statement that the common law is to an extent ‘the ultimate constitutional foundation in Australia’.<sup>60</sup> For better or worse, the interpretive role of judges makes them vital caretakers of this foundation.

## **How should the constitutional role of the judge in interpreting statutes be best understood?**

This is my last question. As I hope my route today has shown, the constitutional role of the judge in interpreting statutes is mostly defined by the common law and the fact that the judge’s role is, as French CJ’s put it in *Momcilovic*, ‘an expression of common law constitutionalism’.<sup>61</sup> The common law explains this interpretive role as the ascertainment of legislative intention, in conformity with the common law rules of interpretation, as augmented by statute. Legislative intent is the judge’s constitutional compass and also supplies the rulebook as to how it can be ascertained. The rulebook requires the judge to proceed on the basis of assumptions about coherence, consistency and reasonable action. As a consequence, the judge may be required to make difficult evaluations, with a view to finding the most coherent, consistent and reasonable interpretation, in light of the matters identified in the rules, including the text, the statute as a whole, statutory purpose and matters that fall within the umbrella of the principle of legality. This, so it seems to me, is the constitutional role of the judge with respect to interpreting statutes. It is a difficult role.

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55 See, particularly, French CJ’s explanation of the principle of legality in *Momcilovic* (2011) 245 CLR 1, 46-47 [42]-[45].

56 (2011) 243 CLR 506.

57 *Jemena Gas Networks (NSW) Ltd v Mine Subsidence Board* (2011) 243 CLR 558, 571 [37].

58 *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319, 348 [64].

59 (2011) 243 CLR 506 at 526 [5] (French CJ).

60 *Wik Peoples v Queensland* (1996) 187 CLR 1, 182.

61 *Momcilovic* (2011) 245 CLR 1, 48 [46].

Notwithstanding the assumptions on which we are required to proceed, statutory interpretation is often like finding harmony in dissonance and clarity in mud.

There is disconformity between the constitutional ideal and the reality of what passes for legislation. When faced with a seemingly intractable interpretive problem, I have so far followed the advice of Franklin D Roosevelt, ‘When you come to the end of your rope, tie a knot and hang on’.<sup>62</sup>

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62 Franklin D Roosevelt, as recounted in *Kansas City Star*, 5 June 1977.

# The judiciary as the third arm of government

The Hon. Murray Gleeson AC QC<sup>1</sup>

In commentary on the place of judges in the scheme of public authority there is a recurring theme. Whenever the purpose is to criticise or oppose the allocation of power to the judiciary, its members are almost always described as ‘unelected judges’. This is not because it is being suggested that it would be better to have judges who are elected. There is very little support among the public, or within the commentariat, for that idea. Rather, it is because the fact that judges are appointed, not elected, means they lack the credentials to exercise some kinds of authority. That happens to be a proposition with which, in general, I agree. So, I should think, would most judges. The area of possible disagreement is likely to be in identifying the kinds of authority to which the proposition applies.

Because judges are not elected they stand outside the political process; they do not campaign for office; they do not enter into alliances or incur obligations (including financial obligations) that may be necessary in order to gain office; they are not at risk of losing office because they make unpopular decisions; and they can normally be relied upon to do justice without fear or favour, affection or ill-will. Many of the people who complain about ‘unelected judges’ are quick to demand a ‘judicial enquiry’ when some controversy or scandal erupts, and there is a need for open, fair and impartial investigation or resolution. Being unelected is then seen as a qualification, not a failing.

When an issue arises that must be resolved by an exercise of governmental power, the process adopted may be political or judicial, or some intermediate procedure may be adopted. A characteristic of the political process is its responsiveness to public opinion. A characteristic of the judicial process is its impartiality and its commitment to the reasoned application of general rules to particular cases, regardless of popular sentiment. Which process is better adapted to a given issue depends upon the nature of the issue.

Even if, as a matter of history, it may have originated in a French political philosopher’s misunderstanding of the English system of government, Australia imported from the United States, and has embedded in its Constitution, a theory of the separation of governmental powers into legislative, executive and judicial. Not all issues that governments have to resolve are self-evidently better suited to resolution by one process or the other. Some are. Policy decisions about

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<sup>1</sup> Former Chief Justice of the High Court of Australia. This paper was delivered at a conference held under the auspices of the Judicial College of Victoria and the Melbourne Law School, University of Melbourne on 15 March 2013.

the taxes to be imposed on citizens are best made by Parliament. The collection of the revenues is best handled as a matter of administration. Disputes between revenue authorities and individual taxpayers, which cannot be resolved administratively, are best submitted to the judicial process. The judicial arm of government resolves disputes between taxpayers and the executive concerning the application of the relevant laws to the facts and circumstances of the case. In doing so, it finds the relevant facts and applies the statutes in which the will of Parliament is expressed. Where necessary it interprets the statutes. It does not decide issues of fiscal policy. It takes and applies the statutes, which enact the policy, as it finds them. One characteristic of the judicial method is its concentration upon the facts of a particular case. The legislature, and to a lesser extent, the executive, are more likely to be concerned with a broader policy perspective. In terms of a capacity to reach just and effective systems, both methods have strengths and weaknesses. Sometimes it is fair criticism of the work of judges that they pay little attention to the wider implications of their decisions in given cases. Sometimes it is a fair criticism of legislators and administrators that their policy decisions result in unintended and unfair outcomes.

Some issues can be resolved either by legislation or by administrative action, or by judicial power. There was a time in England when marriages were dissolved by Act of Parliament. A modern example, mainly referable to State Governments, is control of land use. That is sometimes done directly by State legislation, sometimes by local councils or other planning authorities, or sometimes as a judicial exercise, such as occurs in the Land and Environment Court of New South Wales. Because of our system of responsible government there is a large overlap between legislative and executive power. Subject to that qualification, it is fair to say that issues that are regarded as exclusively for Parliament are issues which ought to be decided by the political process. Issues that are regarded as exclusively for decision, or, more accurately, final decision, by the judiciary include, for example, the administration of criminal justice. Civil disputes between citizens and governments, or between governments within the Federal structure, including disputes about the application of the Constitution, are finally resolved by the exercise of judicial power. These are normally matters to which political considerations and processes ought to be foreign, and where it is generally accepted that a fair outcome is one that results from an impartial application of legal standards, not from an appeal to popular sentiment.

The boundaries between legislative, executive and judicial power are sometimes difficult to define, but this is not the occasion to explore such difficulties. Nor is this the occasion to consider the constitutional complexities that result from the need to respect the separation of powers required by the Constitution, or the differences in that respect between Federal and State constitutions and, therefore, between Federal and State judiciaries. My present purpose is to examine the implications for judges of the role of the judiciary as a separate, and co-equal, arm of government.

A useful starting point is the concept of legitimacy. The expression ‘political legitimacy’ is used with respect to legislative or administrative action to describe the democratic credentials with which power is exercised. We may disregard action that is unconstitutional or otherwise unlawful.

It fails on other grounds. But action that is technically lawful may be said to lack political legitimacy because, either as a matter of substance or process, it fails to satisfy our expectations of the standards of governance that should apply in a liberal democracy. Those expectations change over time. When we say of an exercise of power that it has political legitimacy we mean that the authority by which the power is exercised is reinforced by the democratic process that lies behind it. Many citizens may be aggrieved by certain laws enacted by Parliament but they respect and obey them because an elected Parliament can claim to reflect, even if imperfectly, the will of the people expressed through the political process.

Governmental authority is also exercised by people who do not have, or claim to have, the kind of legitimacy that is described as political. The Prime Minister has, and depends upon, political legitimacy. The Governor-General's legitimacy is not political; it is constitutional. Governors-General do not come and go according to changes in the fortune of political parties, and they do not appeal to public opinion to reinforce their actions. The Commissioner of Taxation's legitimacy is not political; it is legal. His actions are judged according to their lawfulness and in the light of considerations of administrative efficiency, not their popularity.

Judicial legitimacy, which is essential to the acceptability to the public, and to the other two arms of government, of judicial action, is based upon fidelity to certain legal and ethical standards. The ethical standards are expressed in the judicial oath of office. The essence of those standards is independence and impartiality. The legal standards are found in the laws which control the judicial process and dictate the substance of judicial decisions. Citizens, and governments, obey judicial decisions, even when they may disapprove of them, or be injured by them, because of their legitimacy. That legitimacy is not based to any degree upon popularity. On the contrary, a decision that was seen to be made to attract popular approval, or to foster a political purpose, would be regarded as illegitimate. In the Australian tradition, we commit the exercise of judicial power to unelected judges in order to reinforce the legitimacy of their actions.

In our legal tradition, we also seek to reinforce judicial legitimacy by taking care not to commit to the judicial process decisions upon matters that, in our conception of a democratic society, ought properly to be resolved by political debate and legislative action. There is, of course, room for disagreement when it comes to identifying matters of that kind. That is what lies behind much of the controversy about formal declarations of rights and freedoms. Again, it is sufficient for present purposes to note the area for disagreement. It is generally accepted that some issues raise questions of policy that, in a liberal democracy, ought to be resolved by legislative rather than judicial action because Parliament has, and the courts neither have nor seek, political legitimacy.

In debate about the wisdom of requiring courts to decide some of the issues that may arise from broad statements of rights and freedoms, an expression often used is 'democratic deficit'. It is intended, in conjunction with references to 'unelected judges', to make the point that to commit a decision to the judicial rather than the political process is to bypass public debate and opinion, often in circumstances where public attitudes are thought to be insufficiently 'progressive'.

In some contexts it is calculated that judges may be more likely to act as change-agents than politicians who have to answer to a socially or morally conservative electorate. Whether this is a fair assessment is itself, in the broadest sense, a political question. Such a calculation is often supported by an express or implied re-formulation of the idea of democracy, which may be more or less plausible.

Some issues are so plainly unsuited to resolution by the judicial method that they are, in a technical legal sense, non-justiciable. But among justiciable issues there are differing degrees of suitability. The judicial method is best suited to circumstances where there are reasonably clearly defined issues of fact or law, where factual questions can be satisfactorily addressed by evidence and resolved by reasoned debate and impartial assessment, and where the scope for discretionary judgment, if it exists, is circumscribed by settled and coherent principles. Since the outcome of the judicial process is a judgment between two or more parties, following an adversarial proceeding in which the parties formulate the issues to be decided, and present the evidence and arguments upon which the judge is to act, the judicial method is generally not well adapted to the resolution of controversies where the issues are broad and ill-defined, the facts are diffuse and not amenable to resolution by an adversarial procedure involving a limited number of parties, or the standards to be applied as a matter of judgment are unclear or otherwise contestable.

When courts themselves develop the common law, and when they interpret statutes that confer jurisdiction on judges, they pay attention to considerations of justiciability. They seek to avoid formulating judge-made legal principles that may require resolution of issues ill-suited to determination by the judicial method. In interpreting an Act of Parliament they will be slow to attribute to the legislature an intention to commit to the litigious process questions that are foreign to the techniques judges employ. There are many examples of Acts of Parliament that require or empower courts to take account of various aspects of the public interest when exercising a certain jurisdiction, just as there are principles of the common law that involve the public interest. In most such cases, however, the context, and precedent, will guide a judge to fairly well-defined considerations that are to be taken into account. This helps to preserve the legitimacy of the judicial exercise of power and hence its public acceptability.

The idea of justice according to law is that judges, in the exercise of their powers and discretions, obey the law. Blackstone, in his *Commentaries* said: '[L]aw without equity, though hard and disagreeable, is much more desirable for the public good than equity without law: which would make every judge a legislator, and introduce the most infinite confusion'.<sup>2</sup>

In the administration of criminal justice, the judiciary participates in the exercise of the power, and obligation, of the state to protect citizens, keep the peace, and preserve public morality and order. That participation is at the level of dealing with charges of criminal behaviour against particular defendants, deciding, or presiding over a jury's process of deciding whether such charges are

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<sup>2</sup> William Blackstone, *Commentaries on the Laws of England* (University of Chicago, 4th ed, 1770) 62.

established, and making orders for the punishment of those found guilty. Unlike the judiciary in many civil law systems, in Australia judges stand apart from the investigation and prosecution of crime. They play no part in the decision to prosecute a person, or in the framing of the charges, or in the gathering of evidence or the choice of witnesses. If the trial is by jury, which is still the ordinary way of dealing with most serious charges, the judge presides at the trial, ensures that the procedure is lawful and fair, and instructs the jury upon the principles by which it is to reach its verdict. In the case of summary offences, or trial of indictable offences without a jury, the judicial officer makes all necessary decisions of fact and law. In all cases, the proceedings are conducted as a contest between the prosecution (usually an agency of the executive government, often described on the record as acting in the name of the State or the Queen) and the defence. In such a contest, the requirements of independence and impartiality overlap. One arm of government investigates, charges and prosecutes. Another arm of government judges. The functions of prosecution and adjudication are conspicuously separate. This, incidentally, has implications for the general comportment of judges and their relations with the police and prosecuting authorities.

The same applies to the function of sentencing. Parliament, exercising legislative authority, prescribes the sentencing regime and, in most cases, gives the judge a discretionary range within which decisions as to sentence may be made. While political considerations are not often relevant to the process of deciding guilt or innocence, they commonly emerge in relation to sentencing. Law and order is a political issue, and there may be much public interest in, and opinion about, the way in which particular offences, and sometimes even particular offenders, are dealt with. The media subjects some cases to intense scrutiny and comment. Members of the political class, sometimes even government ministers, may join in the debate. Here again, justice requires the reality and the appearance of both independence and impartiality. A sentencing judge should have no personal stake in the controversy that might attend his or her decision. This can make it difficult for a judge when his or her decision becomes the subject of popular discussion and criticism. One of the challenges for the modern judiciary is to develop techniques to deal with that situation. Judges who are tempted to undertake vigorous self-help need to keep in mind that if they enter the fray they are not likely to be allowed to leave it on their own terms.

That is not to say that a judge deals with sentencing in isolation from community standards. Acting within the area of discretion made available by the legislature, and by common law principles, a judge will bring to the task of sentencing a sense of proportion, and that will have been formed within the social context of a given time and place. Public controversy about sentencing may sometimes serve a useful purpose in reminding judges of community values.

The community demands, in the case of all exercises of government power, what it calls transparency and accountability. Judicial power is exercised openly, and judges must give reasons for their decisions. Openness of process and reasoned decision-making are not qualities that mark all aspects of government administration, but they are essential to the judicial process, both criminal and civil.

The obligation of judges to give reasons for their decisions is related to the requirement of openness. (I prefer the word openness to transparency, which suggests to me that you can see through something). The losing party, in particular, is entitled to know the reason for the loss. It also promotes good decision-making by subjecting the decision-maker to the discipline of explaining the outcome. It is also related to the requirement of accountability. Independence requires that a judge has no hope of reward or fear of reprisals when making decisions. Both the civil and criminal justice systems, however, routinely provide systems of appeals. In another context this might be called peer review. One of the purposes of requiring judges to give reasons for their decisions is to facilitate such review.

There are pressures for additional forms of accountability, not for erroneous decision-making, but for judicial misconduct. Most Australian jurisdictions now have formal mechanisms for receiving and dealing with complaints. The first statutory body created for that purpose was the Judicial Commission of New South Wales, established in 1986. I was its President from November 1988 to May 1998. It also performs important education functions. In the matter of complaints it has, I believe, successfully maintained the delicate but important balance between the imperative of independence and the public demand for accountability. If a judge is accused of committing a crime then the ordinary process of the criminal justice system applies. The matter is one for the police and the prosecuting authorities. There is also in New South Wales an Independent Commission Against Corruption. Allegations of corrupt conduct by a judge fall within its remit. One of the fundamental principles of independence, preserved in the *Constitution Act* of New South Wales and in all other Australian jurisdictions, is that a judge may be removed from office only by the Governor following an address from both Houses of Parliament on the ground of proved misbehaviour or incapacity. In relation to federal judges this protection of independence is in s 72 of the Commonwealth Constitution. In Victoria it is in s 87AAB of the *Constitution Act 1975*. Complaints of conduct which is not criminal, but which is potentially so serious as to warrant Parliamentary consideration of removal, require a process by which the ultimate decision is made by Parliament. The role in such a process of a body like the Judicial Commission of New South Wales, or some similar body set up to receive complaints, needs to be consistent with the constitutional context, which commits the ultimate decision to Parliament.

In my experience, the cases that give rise to the greatest difficulty in reconciling independence and accountability are not the obviously serious cases, such as those which involve allegations of criminal or corrupt conduct or other allegations of serious misbehaviour or incapacity of a kind that would warrant parliamentary consideration of removal. They are complaints about such things as rudeness, or delay, or other conduct falling short of something that could warrant consideration of removal. When Parliament sets up a formal mechanism to deal with complaints of that kind the public is very likely to assume that if such a complaint is made out then some form of punishment will follow. There are, of course, administrative and organisational arrangements that can be made to prevent recurrence of such behaviour, and judges can be warned and admonished. However, the assumption that they can be punished is misplaced. In that respect there is a risk

that formal complaints mechanisms may create expectations that are likely to be disappointed in some circumstances.

In the administration of civil justice, there is a temptation to regard the judiciary and assess its performance, as simply one of a number of alternative dispute resolution mechanisms. This is an error.

I referred earlier to the requirement that courts conduct their business in public and that judges give reasons for their decisions. This is not because there is some principle that all disputes should be conducted and resolved openly and by reasoned decisions. There is no such principle. Most commercial disputes, for example, are resolved privately, by the making of some arrangement that reflects the interests of the parties and the strength of their respective bargaining positions. Of that minority of disputes that result in legal proceedings many, perhaps most, are settled by an agreement of the parties reflected in a consent order which recites that the terms are not to be disclosed. There is no general principle that dispute resolution should take place in public. That would be absurd. Many parties to disputes prefer privacy. The law respects, and in a number of ways encourages, the private settlement of disputes. The requirement is that the judicial power of government, when it is exercised, must be exercised in public. On those occasions when parties invoke the exercise of judicial power as the means of resolving their dispute, then the dispute will be resolved openly and by a reasoned decision.

In deciding civil cases judges apply statutes and the common law. They are often required to determine and declare the meaning of statutes by interpretation. They are sometimes required to declare and develop the common law. In these tasks their guiding principle is legitimacy. That is what sustains the willingness of the public and the other arms of government to trust and accept their decisions. Nobody supposes that the judicial process always yields correct decisions. But people expect that it will make decisions according to law. When a court declared the meaning of an Act of Parliament it reasons according to settled principles of legal interpretation, many of which have been given statutory force by Parliament's own enactment. Those principles direct the court to an understanding of the meaning of the text in which Parliament has, in exercise of its legislative power, expressed its will. Parliament's power to legislate, and the court's duty to interpret, are not in tension; they complement each other. If a judicial interpretation of a statute does not reflect the will of Parliament then, subject to any constitutional inhibitions, Parliament has the capacity to amend the statute. This reflects the democratic foundation of the system of government of which legislative and judicial power both form a part. Similarly, in the exercise of their capacity to develop and refine the common law, courts seek to maintain their legitimacy by acting according to principle and, in the end, subject to any constitutional restraint, the effect of their decisions can be overridden by Parliament.

In the end, that is what it comes down to: the legitimacy of judicial power, and of its exercise. Judicial power is an essential attribute of government, and takes its place alongside legislative and executive power for the public good. It is a distinctive form of power, to be exercised in the administration of criminal justice, and made available in the administration of civil justice, in a way that respects the democratic basis of our government. Courts are not in an adversarial relationship with the other two arms of government; but neither are they their handmaidens. They are independent of external sources of pressure, including pressure from the legislature and the executive, and they are impartial in their decisions, including decisions in disputes between citizens and governments. That independence is, I think, well understood and well respected in the community.

# Evidence-based law: Its place in the criminal justice system\*

The Hon. Justice Mark Weinberg<sup>1</sup>

Legal scholarship, like fashion, is constantly evolving. Much of what was formerly regarded as ‘accepted wisdom’ is now viewed in a very different light. Scepticism abounds, and in its current form, is often described as the need for legal policy to be ‘evidence-based’. In effect, that is simply a demand for what philosophers might describe as empiricism.

It seems to be implicit in the term ‘evidence-based’ that nothing short of that approach, in scholarship or policy making, can possibly be of any real value.

Today’s ‘evidence-based’ scholarship is, of course, greatly assisted by the ready availability, through legal and other databases, of vast amounts of information. Disciples of computerised research typically make use of quantitative surveys of various kinds, suitably organised and displayed, as underpinning their analyses. They see empirical research as being ‘scientific’ and objective. They contrast research of that kind with conclusions arrived at on the basis of intuition, and long-held beliefs, which are, necessarily, of doubtful value.

Modern empiricism is not a new phenomenon. Empiricism itself, as a branch of philosophy, goes back at least as far as Aristotle, whose writings covered many subjects, including ethics, aesthetics, logic, and science.<sup>2</sup> The development of ‘evidence-based law’ is, in some respects, nothing more than the current label for what was once called ‘the revolt against formalism’.<sup>3</sup>

‘Evidence-based’ scholarship represents an attack upon formalism. At one level, it reflects precisely the long-standing debate between the empiricists, such as Hume and John Dewey, and those of a more metaphysical bent, such as Kant.

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\* This paper was first published in (2014) 11(4) *TJR* 415 and is reproduced with the permission of the Judicial Commission of NSW.

1 Justice of Appeal, Victorian Court of Appeal. The author wishes to express his gratitude, as always, to his former associate, Jack O’Connor, for his very considerable assistance in the preparation of this paper. This paper was presented at the ‘Evidence-Based Law’ Workshop hosted by the Judicial College of Victoria, 21 June 2013, Melbourne.

2 Aristotle’s views on the physical sciences profoundly shaped medieval scholarship. Their influence extended well into the Renaissance, although they were ultimately replaced by Newtonian physics. Aristotle’s empiricism can be contrasted with the idealism of his teacher and mentor, Plato. On one view, Plato can be seen as the forerunner of ‘formalism’.

3 The expression ‘revolt against formalism’ stems from the work of Morton White, whose text *Social Thought in America – the Revolt against Formalism* (Viking, 1949) is discussed at some length in Julius Stone, *Social Dimensions of Law and Justice* (Maitland, 1966) 9-10.

In jurisprudential terms, the approach of ‘evidence-based’ scholars is almost the same as that adopted nearly a century ago by the so-called ‘American realists’.<sup>4</sup> These included the extreme ‘fact skeptics’<sup>5</sup> such as Jerome Frank,<sup>6</sup> and the more moderate ‘rule skeptics’ such as Karl Llewellyn.<sup>7</sup> What was remarkable about these men was that they did not confine themselves to abstract theory, but applied their analyses to various areas of substantive law, across a broad range of topics.<sup>8</sup> The realists devoted a good deal of their time and energy to attacking, often in vitriolic terms, those traditionalists who favoured the analytical method, as perhaps best exemplified in the writings of John Austin.<sup>9</sup>

The ‘black letter lawyers’ fought back. Hans Kelsen, in both his *Pure Theory of Law*,<sup>10</sup> and his *General Theory of Law and State*<sup>11</sup> responded to the realists by insisting upon the need for a coherent, and unified, theory of law through a process of careful legal analysis. He argued that the realists failed to understand that no matter how much one focused upon a description of the way in which the law operated in practice, there would still be a gulf between the descriptive and the normative. To put the matter more simply, Kelsen insisted that one could not derive an ‘ought’ from an ‘is’. Kelsen would almost certainly have resisted the notion that there was any great worth, from a jurisprudential viewpoint, in ‘evidence-based’ scholarship.

The debate among legal philosophers is of course interesting. Nonetheless, it might be thought that any attempt to provide an overarching theory that explains both the law in action, and the law as a normative system, is doomed to failure. Legal analysis is not that simple.

Anyone who has read Professor H L A Hart’s classic work, *The Concept of Law*, might be tempted to think that his was a theory that fell squarely within the traditions of Austinian legal formalism. Hart’s own particular insight was to add to those traditions an appreciation of the importance of

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4 Even before the full flowering of the American ‘realist’ movement, there were powerful indications, among leading thinkers, of a concern with the law as it worked in practice rather than in theory. For example the original ‘Brandeis brief’, prepared by Louis Brandeis in support of his argument before the United States Supreme Court in 1908 as to the need for legislation to protect women from excessive working hours, was heavily imbued with the product of social science research. At a later stage, the various briefs prepared in relation to *Brown v Board of Education* 347 US 483 (1954) and subsequently many death penalty cases also followed this pattern.

5 The American spelling is ‘skeptic’.

6 See, eg, Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* (Atheneum, 1963).

7 See, eg, Karl Llewellyn, *Jurisprudence: Realism in Theory and Practice* (University of Chicago Press, 1962).

8 For example, William O Douglas, prior to his appointment to the United States Supreme Court, was a leading figure in the American realist movement who taught, and wrote about, securities law from an economic perspective. Douglas was, at one point, the head of the Securities and Exchange Commission. His interest in the relationship between law and economics was the precursor to much of the work taken up, in later times, by Richard Posner. Llewellyn himself was a principal drafter of the *Uniform Commercial Code*, scarcely the sort of activity that one would expect of a legal philosopher.

9 See, eg, John Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law* (John Murray, 1869).

10 Hans Kelsen, *Pure Theory of Law* (Max Knight trans, University of California Press, 1967) [first published 1934].

11 Hans Kelsen, *General Theory of Law and State* (Anders Wedberg trans, The Lawbook Exchange, 2009) [first published 1945].

language, in context. It is intriguing, therefore, that Hart himself declined to view his work in that way. Indeed, he said, in the preface to *The Concept of Law*, that notwithstanding its concern with analysis, the work could also be regarded as an ‘essay in descriptive sociology’<sup>12</sup>.

Hart’s notion of his work as a form of ‘descriptive sociology’ would seem to be a far cry from the language that a modern empiricist would employ. By that description, Hart meant only that many important distinctions, which are not immediately obvious, between types of social situation might best be brought to light by an examination of the standard uses of the relevant expressions, and of the way in which these depended on a social context rather than simply linguistic analysis.

In recent years, empiricism has come to dominate legal scholarship. Somewhat sadly, conceptual and analytical research appears to have been marginalised. This is exemplified by the fact that, in this country, research funding is generally far more accessible to those who wish to undertake empirical research, whereas ‘black letter’ writing is thought to be of less utility, and certainly to warrant little or no government support.

Professor Jeffrey Rachlinski, in an essay entitled ‘Evidence-based law’ published in the *Cornell Law Review*, commented upon this re-emergence of empiricism in the United States. He stated:

The empirical trend has also hit the legal academy. Empirical legal scholarship has witnessed exponential growth in just the past few years. Law review articles increasingly either rely heavily on empirical research or actually present original empirical evidence in support of their arguments.<sup>13</sup>

Professor Rachlinski went on to note that the modern reliance on empirical methods had resulted in the founding of the *Journal of Empirical Legal Studies*, a law review that publishes only empirical work, and is now one of the most cited peer reviewed law journals in the United States. This is, of course, a far cry from the traditional style of legal scholarship that was dominant in the United States throughout much of the 20th century.

Australian law schools have not been immune from these developments. Law teachers no longer focus exclusively, as they once did, upon detailed analysis of appellate judgments. That, of itself, may not be a bad thing. The common law has been all but superseded in favour of statutory regulation in many fields of legal development. Statutory interpretation is now the first port of call in so much of what we do, and our students need to understand its importance.

However, many law teachers go further. They now seek to incorporate into their course materials work from a host of other disciplines, on the basis that interdisciplinary learning is an indispensable tool for understanding all legal doctrine. Sometimes, this can be taken too far.

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12 H L A Hart, *The Concept of Law* (Clarendon Press, 1961) p v.

13 Jeffrey J Rachlinski, ‘Evidence-Based Law’ (2011) 96 *Cornell Law Review* 901, 904.

I do not intend by this to suggest that the value of interdisciplinary research should be downplayed. One can scarcely imagine teaching competition law without paying detailed attention to aspects of modern economic theory. In the criminal law, particular regard is quite rightly given to criminology and related branches of the social sciences. The human dimension cannot be ignored, and an understanding of at least some of the physical and biological sciences is integral to a proper appreciation of the subject.

In some respects, as I have said, this focus upon interdisciplinary work, and empirical analysis, is all to the good. As Oliver Wendell Holmes once famously said, ‘it is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV’.<sup>14</sup> Our laws should not be based upon ‘dangerous half-truths’, still less ‘total nonsense’.<sup>15</sup> Nothing should be beyond question. That is as true of the law as it is of business, medicine, or almost any other field of human endeavour.

It should be noted that there is a difference between ‘empirical legal scholarship’ and ‘evidence-based law’. Professor Rachlinski, in the article to which I earlier referred, observed that those who publish their research in academic journals direct their thoughts primarily to their academic colleagues. Those who focus upon ‘evidence-based law’ have an entirely different goal. Their object is to see the law, as it works in practice, informed by reality.

So far as the criminal law is concerned, an ‘evidence-based’ approach to law reform is obviously pivotal. Professor Peter Brett, in his work, *An Inquiry into Criminal Guilt*,<sup>16</sup> made exactly that point, and emphasised the importance of what he described as ‘an integrative jurisprudence’. While the great legal scholars of the latter part of the 20th century such as Glanville Williams and John Smith contributed greatly to our understanding of the criminal law as a conceptual discipline, we now understand that their work was, in some respects, incomplete. The criminal law should never be seen merely as ‘black letter’ doctrine, divorced from reality, and unconnected with our understanding of human behaviour.

Other legal scholars such as Norval Morris and Gordon Hawkins,<sup>17</sup> went even further than Professor Brett. They regarded the criminal law as replete with ‘moralistic excrescences’, based upon a distorted view of the way in which human beings behave. They would have said, for example, that if we are to support heavier sentences as a deterrent, we should do so not on the basis of untested assumptions about human responses, but rather in the light of actual empirical data.

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14 Oliver Wendell Holmes Jr, ‘The Path of the Law’ (1897) 10 *Harvard Law Review* 457, 469.

15 Rachlinski, above n 13, 902.

16 (Law Book of Australasia, 1963).

17 See Norval Morris and Gordon Hawkins, *The Honest Politician’s Guide to Crime Control* (University of Chicago Press, 1969).

The law of evidence provides a particularly fertile field for ‘evidence-based analysis’. Many of the rules that govern its application date back centuries. Those rules developed at a time when jurors were illiterate, superstitious, and almost certainly poorly equipped to determine complex factual questions. The hearsay rule provides a classic illustration. That rule developed largely because the common law judges did not believe that jurors could appreciate the deficiencies inherent in what was regarded as an inferior type of evidence.

That same distrust of jurors lay behind the many complex rules regarding competence and compellability. It formed the basis of the rules that developed early on regarding the need for corroboration, and, at a later stage, the requirement that the jury be warned as to the dangers of acting on the uncorroborated evidence of various classes of witness. As we know, the law assumed that young children, in particular, were unreliable. It also assumed that complainants in rape cases should have their evidence carefully scrutinised because they were thought to be either untruthful, or generally lacking in credibility.

The rules of evidence also developed in such a way as to prevent jurors from being made aware of any prior acts of misconduct on the part of the accused. The so-called ‘similar fact rule’ emerged because it was assumed, almost certainly correctly, that evidence of that kind would be unduly prejudicial, and that it would be likely to be misused.

Over time, the common law developed ever more complex rules that governed the admissibility of evidence in criminal trials. A number of these rules were based upon assumptions as to both human behaviour, and the capacity of jurors to deal with particular types of material, that were at best questionable. However, having become entrenched, it became extremely difficult to dislodge them.

As the law of evidence became increasingly irrational, across a number of different areas, voices began to cry out for reform. Evidence scholars such as J H Wigmore and Rupert Cross were at the forefront of those who realised that this particular emperor had no clothes. They asked important questions. Is it really necessary to withhold this particular type of evidence from the jury? Or should relevance be the sole touchstone for admissibility? Each and every exclusionary rule needed to be reconsidered, as did every mandatory direction that was ostensibly intended to assist the jury in their deliberations.

Eventually, the penny dropped. It came to be understood that the rules of evidence, as they had developed, contributed to unnecessarily protracted trials. Their very complexity meant that errors were being made. As a result, a significant number of convictions had to be set aside on appeal, often for reasons that had little to do with questions of substance, but were, rather, concerned solely with technicalities.

Ultimately, it was agreed that nothing short of virtual codification of the law of evidence could overcome these problems. That led to the enactment, at various times in various States and Territories, of the Uniform Evidence Acts.

More recently, the push for reform has gone still further. There is now a recognition, in this country, that jurors are not being given sufficient assistance in the performance of their task, and that there is a need to reduce the complexity of much of what they are told by way of judicial instruction.

That recognition has led to a number of inquiries into the complexity of jury directions.<sup>18</sup> Some of these inquiries have led to reports recommending significant change to the way in which juries are directed. In some cases, the reports rely to a considerable degree upon what might be termed empirical evidence as the basis for their recommendations. It is difficult to think of any other field of law reform which has given such careful attention to evidence of that kind. Studies have been conducted analysing not merely the length of judges' charges, but also their individual components. A vast array of published research into the capacity of jurors to comprehend judicial directions has been examined. Indeed, some of this research has focused upon such seemingly arcane matters as linguistic analysis, with a view to measuring the comprehensibility of these directions.

In 2012, representatives of the Department of Justice, the Judicial College of Victoria, and my own staff assisted in the preparation of a report catchily entitled *Simplification of Jury Directions Project*. The conclusions arrived at were significantly influenced by the results of empirical research widely published throughout many different legal and other journals. The report noted that the academic research presented a bleak picture. It said:

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

jurors appear largely incapable of understanding judicial instructions as they are traditionally delivered by the judge ... [t]he overwhelming weight of the evidence is that [jury] instructions are not understood and therefore cannot be helpful.<sup>19</sup>

The report observed that a considerable body of psycholinguistic research existed which was aimed at identifying linguistic methods of increasing juror comprehension. This research was based upon tests in which persons who had listened to a jury direction were then required to demonstrate their understanding by paraphrasing that direction back to the tester. It sought to isolate certain parts of those standard directions that seemed to cause most difficulty. Not

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<sup>18</sup> See, eg, Victorian Law Reform Commission, *Jury Directions*, Final Report No 17 (2009); New South Wales Law Reform Commission, *Jury Directions*, Report No 136 (2008).

<sup>19</sup> Simplification of Jury Directions Project: a Report to the Jury Directions Advisory Group (August 2012) 8, citing James R P Ogloff and V Gordon Rose, 'The Comprehension of Judicial Instructions' in Neil Brewer and Kipling D Williams (eds), *Psychology and Law: an Empirical Perspective* (Guilford Press, 2005) 407, 425 (citations omitted).

surprisingly, the researchers found that some jury directions were replete with double, and even triple, negatives. This meant that they were almost incomprehensible.<sup>20</sup> In keeping with the psycholinguistic research, the report recommended the use of the active voice in preference to the passive in any proposed reform of jury directions.

Another field of empirical research which proved invaluable in the report's consideration of jury direction reform was that concerning 'reactance theory'. Broadly, that theory explains a psychological phenomenon in which jurors, when specifically warned against reasoning in a particular way, are, in fact, more likely to reason in precisely that way. It raises a question of fundamental importance to the law of evidence: do limiting directions in fact serve their intended purpose?

It is useful to set out an example. In 1959, a study was conducted in which mock jurors were assigned the task of making an award of damages in a tort case. When not told that the defendant had insurance, the jury made an average award of \$33,000. When made aware of the fact of insurance, the average award increased to \$37,000. When the jurors were made aware of the fact of insurance and also given an instruction to disregard that fact, the average award increased markedly to \$46,000.<sup>21</sup>

This example serves to illustrate what I said previously regarding subjecting accepted wisdom to careful testing. In the report, it was noted that this finding suggested that defence counsel might be tactically astute, in certain cases, to request that a limited use warning not be given, and that this did not sit well with the current law stipulating prescriptively, and universally, the content of a trial judge's charge to the jury.

The new *Jury Directions Act 2013*, which came into force on 1 July 2013, can be seen as an example of the influence that empirical research can have upon legislative policy. The Act requires counsel to request the trial judge to 'give, or not give, to the jury particular directions' in respect of the matters in issue and the evidence in the trial.<sup>22</sup> Section 13(b) expressly states that a judge need not give the jury any direction that has not been requested. The judge need only give that direction, notwithstanding its not having been requested, if he or she thinks that the direction is necessary in order to avoid a substantial miscarriage of justice.<sup>23</sup> In this way, a considered decision by counsel not to seek a direction, perhaps so as to avoid the matter being highlighted in the minds of the jury, is given full weight.

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

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

22 *Jury Directions Act 2013* (Vic) s 11.

23 Ibid s 15.

While empirical research has played a vital role in the development of the law with regard to jury directions, it is important to bear in mind that the value of such research has its limitations. For example, many of the studies in the field rely upon testing the responses of mock jurors. These jurors will be aware that their decisions have no practical consequences, and the process is, to that extent, ‘unreal’. Secondly, since such research is often university-based, mock juror pools are often made up of a disproportionate number of university students. They may not, therefore, represent the same cross-section of the community typically found within a jury. Further, and as was noted in the report, sometimes the law may simply be so complex that it is not possible, even with the benefit of access to the best psychological and psycholinguistic research, to articulate it sensibly to anyone, still less to a collection of lay jurors.

Empirical research can also play an important role in other aspects of the criminal justice system. We need to know a great deal more about the effect of certain sorts of prejudicial publicity upon prospective jurors, and how best to overcome the dangers associated with such publicity. We need to accommodate the ready availability of information to jurors through the internet. The abundance of available material makes instructions to the effect that jurors are to confine their deliberations to the evidence actually presented in court somewhat problematic.<sup>24</sup>

That problem came to particular prominence in two recent cases.

In *Benbrika v R*,<sup>25</sup> it had emerged during the trial that jurors had resorted to internet research and printed out ‘Wikipedia’ and ‘Reference.com’ pages relating to the meaning of various statutory terms central to the trial. The Court of Appeal held that, despite this internet research, the trial judge had been entitled to decline to discharge the jury. That was so despite his having refused to poll the jury in order to ascertain how many and which of them had accessed the internet. The reasons on this point demonstrate the importance of psychological assumptions, and their impact upon the jury’s reaction to certain material, when dealing with legal issues of this kind. The court said:

There were good reasons for not having asked the jury whether they had consulted the internet. *For one thing, it would have highlighted the matter, and perhaps elevated the material downloaded from the internet to greater, and more lasting, significance than it would otherwise have achieved.*<sup>26</sup>

The issue also arose in *Dupas v The Queen*.<sup>27</sup> There, an accused had applied for a permanent stay of his trial on a murder charge on the basis that widespread and prejudicial media material would prevent him from receiving a fair trial. The trial judge rejected the application. He then told the

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24 See generally Jacqueline Horan, *Juries in the 21<sup>st</sup> Century* (The Federation Press, 2012).

25 (2010) 29 VR 593.

26 Ibid 643 (Maxwell P, Nettle and Weinberg JJA) (Emphasis added).

27 (2010) 241 CLR 237 (‘*Dupas*’).

jury, at the commencement of the trial, at the request of defence counsel, that the accused had twice previously been convicted of murder. He directed them in the strongest possible terms that they were to put that fact out of their minds when they came to consider their verdict.

On appeal,<sup>28</sup> two members of the Court of Appeal (Nettle and Ashley JJA) considered that, in accordance with ordinary principles, the trial judge should have granted the permanent stay that had been sought. However, Nettle JA resiled from any finding that his Honour had erred in refusing the stay. He did so on the basis of public policy, namely that there was a ‘social imperative’ that the accused be brought to trial which should not be thwarted by the actions of the media. I disagreed with both Nettle and Ashley JJA. I considered that notwithstanding the degree of prejudicial publicity, a permanent stay was not warranted. I should add that I was also in dissent on the question whether, on other grounds, a new trial should be ordered.

Dupas, being dissatisfied with having merely been granted a new trial, sought special leave to appeal against the decision of Nettle JA and myself rejecting his argument for a permanent stay. His appeal to the High Court was dismissed. The court noted the volume of media material which established his reputation as a serial killer, and proceeded to address specifically the capacity of jurors, and the likely effect upon the jury of that prejudicial material. The court said that ‘[i]t is often said that the experience and wisdom of the law is that, almost universally, jurors approach their tasks conscientiously’.<sup>29</sup> It then said:

Whilst the criminal justice system assumes the efficacy of juries, that ‘does not involve the assumption that their decision-making is unaffected by matters of possible prejudice.’ In *Glennon*, Mason CJ and Toohey J recognised that ‘[t]he possibility that a juror might acquire irrelevant and prejudicial information is inherent in a criminal trial.’ What, however, is vital to the criminal justice system is the capacity of jurors, when properly directed by trial judges, to decide cases in accordance with the law, that is, by reference only to admissible evidence led in court and relevant submissions, uninfluenced by extraneous considerations. That capacity is critical to ensuring that criminal proceedings are fair to an accused.

...

However, the reference by their Honours [in *Glennon*] to impermissible prejudice and pre-judgment gives insufficient effect to the policy of the common law respecting the efficacy of the jury system. No doubt that policy must give way, for example, in specific instances of apprehended jury tampering and other criminal misconduct. But that is far from the present case.<sup>30</sup>

28 *R v Dupas* (No 3) (2009) 28 VR 380.

29 *Dupas* (2010) 241 CLR 237, 247 (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

30 Ibid 248-9 (citations omitted).

The judgment refers specifically to the ‘experience and wisdom of the law’<sup>31</sup> in relation to the approach taken by juries. It is noteworthy, however, that no mention is made of any empirical research about the effect that prejudicial material may have on juries, and the way in which they perform their task.

There is, of course, a significant body of published research on that subject. Dr Jacqueline Horan, in her recent book, *Juries in the 21st Century*, referred to two studies in the 1990s which found that jurors were less likely than had previously been thought to be influenced by detail contained in pre-trial publicity.<sup>32</sup> Those studies of course preceded the age of ready availability of information on the internet. Dr Horan concluded that while the research into the present impact of prejudicial publicity is ‘by no means complete’, there have been some indications that the ‘remedial steps available, such as judicial “don’t research” instructions, are not sufficient to reduce the effects of prejudicial publicity on jurors’. The effectiveness of those instructions, she noted, ‘has been weakened by advances in digital technology’.<sup>33</sup>

None of this somewhat pessimistic research diminishes the force of empirical studies which have found that jurors are capable of understanding complex material, and of following the matters raised at trial. As early as 1966, Harry Kalven and Hans Zeisel, after conducting an experiment in which they found that the difference between the jury’s decision and the judge’s decision was no greater in difficult cases than easy ones, concluded that the result was ‘a stunning refutation of the hypothesis that the jury does not understand [what is going on]’.<sup>34</sup> Perhaps influenced by studies of this kind, arguments on appeal that trials had simply been so complex and difficult that the jury could not have followed proceedings and reached a conclusion on the evidence are very rarely accepted.<sup>35</sup>

Much more work remains to be done. Research into jury comprehension must be encouraged, and pursued with vigour. So too must other research into all aspects of the criminal trial process. I include, in particular, in that regard, the need for systematic research into all aspects of the sentencing process.

At the same time, we should remember that empirical analysis can never be sufficient, on its own, to provide a truly principled basis for policy making. There is always a role, in policy development, for what can only be described as a kind of ‘intuitive’, or value-based, assessment. That approach is by no means to be regarded as ‘formalistic’. It is not blind faith under a different name. It is based upon rational thought, heavily influenced by experience accumulated over many years. It is the furthest thing from disconnection with reality.

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31 Ibid.

32 Horan, above n 24, 187.

33 Ibid 192.

34 See ibid 49-50; Harry Kalven and Hans Zeisel, *The American Jury* (Little, Brown and Company, 1966).

35 Cf *Wilson & Grimwade v The Queen* [1995] 1 VR 163.

Despite the vitally important contribution that the ‘legal realists’ made to our understanding of legal institutions and phenomena, it is apparent today that they vastly overstated their case. There is a risk that the empiricists, who represent the dominant force in much legal thinking today, may do the same.

There is much wisdom in Holmes’ famous aphorism that ‘the life of the law has not been logic; it has been experience’.<sup>36</sup> Holmes meant exactly what he said, and nothing more. He did not mean that the law should put to one side questions of principle, or values long-held and based on experience. He most certainly did not subscribe to the view that the law is about nothing more than what the judge had for breakfast that particular day, or that legal problems could be solved by recourse to science, or mechanistic reasoning, alone.

Contrary to the views of at least the extreme realists, the law can never be entirely divorced from questions of principle and morality. At bottom, law is a system of norms. Surveys, and other like techniques, no matter how sophisticated they may be, can tell us something about how those who take part view certain matters. However, they can be misleading. On occasion, they will be a poor guide to what is, in reality, good social policy, and an even worse guide to what is principled, and morally correct. As Kelsen rightly pointed out, the ‘ought’ cannot, as a matter of logic, be derived from the ‘is’. Modern empiricism, if taken to extremes, may render the law nasty, brutish and singularly unpleasant.

In that sense, ‘evidence-based law’ presents a challenge – that of basing legislative reform and common law development upon a combination of science, and principled decision-making. Neither, taken on its own, is sufficient.

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36 Oliver Wendell Holmes Jr, *The Common Law* (Little, Brown and Company, 1881).

# Overview of the Jury Directions Act

Matthew Weatherson<sup>1</sup>

*Trial judges are entitled to expect from defence counsel and prosecutors a clear identification – at the start of the trial, and again before the charge, and again (if necessary) by way of exception to the charge – of what the issues are and what directions are necessary.<sup>2</sup>*

The *Jury Directions Act 2013* codifies the focus seen in recent years on the primacy of forensic decision making by counsel and the need for judges to tailor their directions to the real issues in the case. It also continues the trend towards judges requiring counsel to assist in identifying issues and avoiding miscarriages of justice.

The Act contains four principal reforms and several other provisions of general application. The four reforms are:

- Introduction of a request for directions process
- Providing judges with greater freedom and flexibility in the summing up
- Statutory directions on the meaning of beyond reasonable doubt
- Statutory directions on post-offence conduct (consciousness of guilt).

This paper will examine those four substantive reforms, the general provisions and the resources available for practitioners to help them with the Act, including the Judicial College of Victoria's Criminal Charge Book.

## **Victorian Criminal Charge Book**

The Victorian Criminal Charge Book was released in March 2006 as a one stop shop for jury directions in the State of Victoria. The Charge Book is developed by the Judicial College of Victoria and overseen by a judicial editorial committee, which was first led by Justice Frank Vincent and is currently led by Justice Robert Redlich.

The Charge Book contains jury instructions, checklists and explanatory material to help judges and practitioners comply with the growing body of jury directions law. It is an online resource, which is regularly updated with new or revised content. It covers preliminary and final directions,

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<sup>1</sup> Prepared by Matthew Weatherson, Director, Research and Publications, Judicial College of Victoria.

<sup>2</sup> *MB v R* [2012] VSCA 248, [43] (Maxwell P).

evidentiary directions, inchoate and accessorial liability and directions on substantive offences and defences. The substantive offences chapter alone covers over 50 different offences, with model charges which take account of different commencement dates and historical forms of certain offences.

The aim of the Charge Book is to provide judges with clear and accurate jury instructions which are kept up to date in response to the latest developments in the law. However, these resources are not limited to judicial officers. As a freely available manual which can be accessed from the Judicial College's website,<sup>3</sup> the Charge Book serves as a valuable aid for solicitors and barristers preparing for trials. Some practitioners even refer their clients to it, as the plain language explanations of the Charge Book can help clients understand whether a defence or an issue is viable.

The Charge Book is recognised across the legal system as an authoritative source of legal information. In its 2009 report on Jury Directions, the Victorian Law Reform Commission described the Charge Book as:

... a brilliant resource tool, written by lawyers for lawyers, which is designed to ensure that a judge's directions to the jury about the law are accurate. The JCV Charge Book, which is freely accessible on the internet, contains a series of model directions about the elements of offences and warnings about the use of various types of evidence. Although the authors seek to use plain English, dictates of legal accuracy mean that many of the model directions are long and complex.<sup>4</sup>

The value of the Charge Book has also been recognised on several occasions by the Victorian Court of Appeal. In *R v Hendy*, Justice Maxwell stated:

The language of the directions on self-defence indicates that the learned judge was, prudently, utilising the Charge Book prepared and published by the Judicial College of Victoria. The Charge Book is an invaluable resource for trial judges. The detailed guidance which it provides is a powerful safeguard against error.<sup>5</sup>

Later, in *R v Said*, the Court noted that the appeal was necessary only because the judge departed from the model directions in the Charge Book. Justice Maxwell emphasised the importance of the Charge Book:

This case illustrates just how important a resource the charge book is for trial judges, and how important it is that it be used for its intended purpose, that is, to minimise the risk of appealable error. The charge book contains much more than the model charges. Each part of the charge book provides references to relevant decisions, and guidance

<sup>3</sup> The Judicial College of Victoria <<http://www.judicialcollege.vic.edu.au>>.

<sup>4</sup> Victorian Law Reform Commission, *Jury Directions*, Final Report No 17 (2009), 6.51.

<sup>5</sup> *R v Hendy* [2008] VSCA 231, [18].

as to when and how particular topics need to be addressed (depending always on the circumstances of the particular trial). The charge book is accessible on-line and there is every reason to think that judges can – and should – avail themselves of the assistance which it provides.

The charge book is a living document. For example, following comments which the Court made in *Hendy*, the model charge on self-defence was modified to remove the passage which had given rise to debate in that case. It is also important to emphasise that it is not an academic document. The model charges are reviewed and edited by experienced trial judges and experienced appeal judges, who have worked very hard with the Judicial College of Victoria, over several years, to arrive at formulations which are both faithful to the requirements of the law and cognisant of the practicalities of running trials. I want to express this Court's appreciation of the work that has gone into the charge book, and to reiterate the hope that that work will continue to pay dividends.

Every time appealable error is avoided, every time the community is saved the time and expense of an appeal and a retrial, the vital importance of the charge book is reinforced.<sup>6</sup>

The importance of the Charge Book for both judges and practitioners will increase with the *Jury Directions Act 2013*. The jury directions request provisions in Part 3 of the Act mean that identification and selection of relevant directions is an essential part of trial preparation and trial strategy. Practitioners must become familiar with the range of directions available and the Charge Book is the most accessible and authoritative resource for this purpose.

## Background to the Jury Directions Act 2013

Before turning to substance of the reforms, it is first necessary to examine the background to the Act. The genesis of the *Jury Directions Act 2013* can be traced back to 2006, when then Justices Geoffrey Eames and Frank Vincent, both of the Victorian Court of Appeal, advocated within the Court for action to reduce the alarmingly high rate of successful appeals. As Justice Eames recounts in his paper 'Tackling the complexity of criminal trial directions: What role for appellate courts':

Over the three calendar years from 2004 to 2006, 72 out of 344 conviction appeals from Supreme Court and County Court trials resulted in orders for re-trials. In more than half of those cases the grounds of appeal that succeeded concerned errors that had not been the subject of complaint by defence counsel to the trial judge.<sup>7</sup>

<sup>6</sup> *R v Said* [2009] VSCA 244, [29]-[31]. See also *R v Smart* [2010] VSCA 33, [1] (Warren CJ), [5] (Nettle JA).

<sup>7</sup> Geoffrey Eames, 'Tackling the complexity of criminal trial directions: What role for appellate courts' (2007) 29 *Australian Bar Review* 161.

This led, under the leadership of the Chief Justice, to the formation of an Ad Hoc Criminal Law Working Group, chaired by the President of the Court of Appeal and with trial and appellate judges, the Director of Public Prosecutions, members of the criminal bar and the Director of Victoria Legal Aid. That body produced a discussion paper in December 2006 with a range of recommendations.

In January 2008, the Attorney-General provided a reference to the Victorian Law Reform Commission to:

Review and to recommend any procedural, administrative and legislative changes that may simplify, shorten or otherwise improve the charges, directions and warnings given by judges to juries in criminal trials.<sup>8</sup>

The Commission's report was released in June 2009 and recommended the enactment of legislation to simplify the law relating to jury directions. This legislation would include reforms to the obligation to sum up, along with specific evidentiary directions and steps to improve early issue identification. These matters are reflected in the *Jury Directions Act*.

In 2010, the Department of Justice convened a Jury Directions Advisory Group, with representatives from the Supreme Court, County Court, Office of Public Prosecutions, Criminal Bar Association, Victoria Legal Aid, Judicial College of Victoria and academics with expertise in jury research. This body has systematically examined a series of proposals developed by the Department which have ultimately formed the basis of the *Jury Directions Act*. The group has met regularly over the past three years and has had many fruitful discussions around the policy and practical issues which underlie the Act. The result has been an Act which reflects general consensus among those different stakeholder groups, including judges, prosecutors and defence lawyers.

The *Jury Directions Act* is only part one of the reform process. Last year, the Supreme Court, the Judicial College of Victoria and the Department of Justice produced a joint report entitled 'Simplification of Jury Directions Project'. This report, developed under the leadership of Justice Mark Weinberg of the Court of Appeal, recommends four additional areas of jury direction simplification: secondary liability, circumstantial evidence and inferences, propensity evidence and unreliable evidence. The Jury Directions Advisory Group has continued to meet to discuss those and other recommendations.<sup>9</sup>

## General provisions

Part 2 of the Act is entitled General and contains three sections: a set of guiding principles, explicit recognition that no particular form of words is required and a general power to extend or abridge

8 Victorian Law Reform Commission, *Jury Directions*, Final Report No 17 (2009), 5.

9 Department of Justice, *Jury Directions: A New Approach* (2012), 16.

time. As the Act seeks to promote cultural change in the conduct of criminal trials, the guiding principles section is designed to assist in the interpretation of the Act. The principles include that:

- (1) The Parliament recognises that—
  - (a) the role of the jury in a criminal trial is to determine the issues that are in dispute between the prosecution and the accused; and
  - (b) in recent decades, the law of jury directions in criminal trials has become increasingly complex; and
  - (c) this development—
    - (i) has made jury directions increasingly complex, technical and lengthy; and
    - (ii) has made it increasingly difficult for trial judges to comply with the law of jury directions and avoid errors of law; and
    - (iii) has made it increasingly difficult for jurors to understand and apply jury directions; and
  - (d) research indicates that jurors find complex, technical and lengthy jury directions difficult to follow.
- (2) ... it is the responsibility of the trial judge to determine
  - (a) The matters in issue in the trial
  - (b) The directions that the trial judge should give to the jury; and
  - (c) The content of those directions;
- (3) ... it is one of the duties of legal practitioners ... to assist the trial judge in determination of [these] matters.

As Justice Maxwell has explained, section 5(1) is a remarkable provision which includes an explicit recognition of the effects of academic research into jury directions over many years.<sup>10</sup>

The principles also include a statement of Parliament's intention that, in giving directions, the judge should:

- (a) give directions on only so much of the law as the jury needs to know to determine the issues in the trial; and
- (b) avoid using technical legal language wherever possible; and
- (c) be as clear, brief, simple and comprehensible as possible.

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10 Joint conference, Supreme Court of Victoria and Judicial College of Victoria, 'Jury Directions Act', 19 June 2013.

This last requirement, to be as clear, brief, simple and comprehensible as possible, is critical to understanding the philosophy behind the Act. It demonstrates that Parliament has turned its face against the creeping complexity that has bedevilled the criminal law in recent years,<sup>11</sup> which has been traced in part back to *Bromley v R.*<sup>12</sup>

## Requests for Directions

Part 3 of the Act introduces a novel process of requiring prosecution and defence counsel to specify, after the close of the evidence and before final address, the elements, defences and alternatives that are in issue and to seek direction on the matters in issue.<sup>13</sup>

Taken alone, such a request process is truly an aspect of criminal procedure rather than jury directions, and would not be out of place in the *Criminal Procedure Act 2009*. It is also a process which many judges have already implemented as part of effective trial management. However, the remainder of Part 3 sets out the consequences of making or failing to make a request on the directions a judge should give.

Section 13 relieves the judge from the need to give a direction that:

- (a) relates to a matter that defence counsel has indicated under section 10 is not in issue;
- or
- (b) has not been requested under section 11.

The two limbs of section 13 relate to different aspects of the trial process. The first concerns the elements, defences, alternatives and modes of complicity which are in issue. This is consistent with the common law principle from *Alford v Magee*<sup>14</sup> to direct the jury on only so much of the law as they need to resolve the real issues. As the High Court explained:

If the case were a criminal case, and the charge were of larceny, and the only real issue were as to the asportavit, probably no judge would dream of instructing the jury on the general law of larceny. He would simply tell them that if the accused did a particular act, he was guilty of larceny, and that, if he did not do that particular act, he was not guilty of larceny.<sup>15</sup>

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11 Eames, above n 7.

12 (1986) 161 CLR 315. See Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Report on Uniform Evidence Law* (2005), 598.

13 Unrepresented accused are treated under the Act as if they had informed the trial judge that all matters are in issue and had sought every direction that it was open to seek. Despite this, the judge need not give a direction if the judge considers that there are good reasons for not giving the direction or it is otherwise not in the interests of justice to give the direction: *Jury Directions Act 2013* (Vic) s12. This residual power to avoid giving a direction in the case of an unrepresented accused allows a judge to consider matters such as the wishes of the accused, or where the giving of the direction would itself risk a miscarriage of justice.

14 (1952) 85 CLR 437.

15 Recently endorsed in *Huynh v The Queen* [2013] HCA 6, [31]. This approach, focusing on the particular act, is also supported by fact-based directions under Part 4 of the *Jury Directions Act 2013*.

The second limb goes beyond the common law and provides scope for defence practitioners to seek that the judge does not give certain directions which counsel does not want the judge to give, or wants the judge not to give.

Two examples of such directions are *Azzopardi* directions and criminally concerned witness warnings.

The *Azzopardi* direction<sup>16</sup> is typically given where the accused fails to give evidence and is designed to remind the jury that, due to the onus of proof and the right to silence, the jury cannot use the accused's failure to give evidence as a factor which strengthens the prosecution case. Despite its intended protective purpose, some lawyers believe that the direction calls undue attention to the accused's failure to give evidence and suggests a line of reasoning the jury may not otherwise have considered.

Similarly, the accomplice warning, and its statutory successor, the criminally concerned witness warning,<sup>17</sup> is designed to alert the jury to the dangers of relying on the evidence of an accomplice, including their incentive for overstating the role of the accused and their intimate knowledge of the circumstances of the offence. Again, some consider that this direction can do more harm than good, because the judge will, as a matter of balance, then identify all the evidence which supports the accomplice's account.

Section 13 provides a means for defence practitioners to manage the risks inherent in these directions according to their own trial philosophy. Some will naturally continue to seek such directions, consistent with their protective intention. Others may seek to avoid such directions and instead seek to manage the risks through their closing address.

Section 14 requires judges to give a requested direction 'unless there are good reasons for not doing so'. The Act identifies matters the judge must consider when deciding whether there are good reasons for not giving a requested direction, including the evidence in the case and the manner in which the parties have conducted their cases. A judge is therefore not required to give directions that are requested, but bear little relevance to the case at hand.

The second limb of factors the judge must consider when deciding whether there are good reasons for not giving a requested direction is the manner in which the parties conducted their cases. The Act elaborates on this and specifically identifies that the judge must consider:

Whether the direction would involve the jury considering the issues in the trial in a manner that is different from the way in which the accused has presented his or her case.<sup>18</sup>

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<sup>16</sup> (2001) 205 CLR 50. See Judicial College of Victoria, *Criminal Charge Book*, 4.11.2.2 - Charge: *Azzopardi* direction (1 July 2013) Victorian Criminal Charge Book <<http://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#19666.htm>>.

<sup>17</sup> *Evidence Act 2008* (Vic) s 165.

<sup>18</sup> *Jury Directions Act 2013* (Vic) s 14(2)(b)(ii).

Historically, the obligation on the judge to identify the issues in a case, and possible paths to an acquittal (often referred to as the *Pemble* obligation) meant that an accused could legitimately address the jury on one defence and ask the judge to leave another defence which was factually inconsistent. The Court of Appeal succinctly expressed the point in *Benbrika v R*:

There are, of course, cases where inconsistent defences cannot, as a matter of forensic reality, be advanced but the trial judge must none the less put them to the jury. An accused charged with murder may raise alibi as his defence, but the judge may be required to put self-defence to the jury despite its not having been invoked.<sup>19</sup>

Further, the judge's obligation to direct the jury on all the issues applied based on the evidence which was led, rather than the position of the parties. At common law, a judge was required to direct on a matter which fairly arose on the evidence even if neither party adverted to it as a possibility.<sup>20</sup>

Under section 14, such an approach may be more difficult and practitioners may need to confront and overcome the forensic difficulties of putting both defences to the jury, lest the trial judge reject the request to direct the jury on the factual alternative on the basis that it would 'involve the jury considering the issues ... in a manner that is different from the way in which the accused has presented his or her case'.

Despite the statutory factors which dictate when a judge will have good reasons for not giving a requested direction to the jury, the general rule is likely to be that judges will give the directions sought. This is consistent with the current approach to directions at common law, and is consistent with the recognition under the Act of the importance of forensic decision making.

However, to protect against the risk of miscarriages of justice because counsel fail to ask for directions which should be given, the Act contains a residual obligation on judges to give any direction necessary to avoid a substantial miscarriage of justice even if it is not sought or a party has indicated that the matter is not in issue. Before giving a direction under this residual obligation, the judge must inform the parties of his or her intention to give the direction and invite submissions on whether the direction is necessary to avoid a substantial miscarriage of justice.<sup>21</sup>

The operation of the residual obligation is one area which should be closely watched now that the Act has commenced operation. The starting point to understanding the obligation must be close attention to the language of this provision. It is apparent from not only the text of the Act, but also the second reading speech<sup>22</sup> and the report produced by the Department of Justice<sup>23</sup> that the

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19 (2010) 29 VR 593, [451] (citations omitted).

20 *ISJ v R* [2012] VSCA 321; *R v Georgiou* [2009] VSCA 57.

21 *Jury Directions Act 2013* (Vic) s 15.

22 Victoria Parliamentary Debates, Legislative Assembly, Thursday 13 December 2012, 5558 (Mr Robert Clark Attorney-General).

23 Department of Justice, *Jury Directions: A New Approach* (2012), 55-56.

residual obligation is not intended to merely reflect the common law obligation on trial judges to give any direction necessary to ensure a fair trial. The note to section 16 expressly refers to abolishing the rule attributed to *Pemble v R*<sup>24</sup> and this note forms part of the text of the Act.<sup>25</sup>

The Victorian Law Reform Commission Jury Directions Report, which led to the *Jury Directions Act*, recommended that the *Pemble* obligation be abolished. The Commission argued that:

There can be no ‘unfairness’ in an adversarial context when an accused person makes an informed tactical decision to avoid putting an alternative defence before the jury because of a belief that this will increase the chances of an acquittal. In an adversarial system, counsel should have primary responsibility for identifying the way in which the defence puts its case.<sup>26</sup>

...

A fair trial is one that is fair to both the defence and the prosecution. A rule which requires the trial judge to advance an argument, with the apparent weight of judicial office, that the defence has not raised and to which the prosecution has not had an opportunity to respond does not appear to be even handed.<sup>27</sup>

...

The commission recommends that the *Pemble* obligation be included in legislation and modified in cases where the accused is represented. The trial judge should continue to be obliged to direct the jury about defences and alternative verdicts that defence counsel has mistakenly or inadvertently failed to raise with the jury. The law, however, should remove any obligation from the trial judge to direct the jury about defences or alternative verdicts that defence counsel has chosen not to place before the jury. The legislation should provide that where the trial judge is satisfied that the failure of defence counsel to put a defence was not due to mistake or inadvertence by counsel, the judge is obliged to direct the jury about only those defences that counsel expressly identified and advanced before the jury and for which there is an evidential basis.<sup>28</sup>

The Department of Justice similarly identified problems with the *Pemble* obligation, including the risk of judges seeking to ‘appeal proof’ directions, the uncertainty surrounding the operation of the obligation, the risk of unfairness to the accused and its inconsistency with the adversarial system.<sup>29</sup>

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24 (1971) 124 CLR 107.

25 *Interpretation of Legislation Act 1984* (Vic) s 36(3A).

26 Victorian Law Reform Commission, *Jury Directions*, Final Report No 17 (2009), 4.101.

27 Ibid 5.71.

28 Ibid 5.75.

29 Department of Justice, *Jury Directions: A New Approach* (2012), 39.

As the Court of Appeal explained in *R v Luhan*, there is a strong relationship between the conduct of defence counsel and the judge's obligation to give directions necessary in the circumstances of the case.

His Honour was not required to direct the jury about a matter which the defence had not put in issue (unless – which was not the case here – it could reasonably be seen to have emerged as a real question from the evidence). As this court has said repeatedly, it is the responsibility of the trial judge 'to decide what are the real issues in the case' and, having done so, to explain the law and summarise the evidence only so far as is relevant to those issues.<sup>30</sup>

More recently, Justice Maxwell in *James v R*<sup>31</sup> reviewed a number of cases, including *Patel v R*,<sup>32</sup> *Nudd v R*<sup>33</sup> and *Ali v R*<sup>34</sup> and concluded that the common law recognises the principle that:

rational forensic judgments made by defence counsel constitute an exercise, rather than an infringement, of the accused's right to a fair trial.<sup>35</sup>

While these considerations suggest that the section 15 obligation is intended to be truly residual and to arise only in the minority of cases, there are indications which point the other way. First, the guiding principles section recognises that 'it is the responsibility of the trial judge to determine ... the directions that the trial judge should give to the jury'.<sup>36</sup> The role of legal practitioners is to assist the trial judge determining these matters. Second, as the various reports on the issue have recognised, the *Pemble* obligation is well established at common law. It is the duty of the trial judge to decide on the directions that are required and this cannot be delegated to counsel. As Nettle JA has stated:

it may be that a fair trial according to law demands that the judge give the directions that the law requires to be given, even if failure to give them may result in a better chance of acquittal, and indeed even if defence counsel requests that they not be given.<sup>37</sup>

Finally, while the second reading speech, the explanatory memorandum and the report from the Department of Justice all state that the section 15 obligation is intended to be confined to rare cases, such as where the failure to request a direction raises a concern about the competence of counsel,<sup>38</sup> that narrow field of operation is not expressly reflected in the language of the Act, which instead uses a test of 'substantial miscarriage of justice'.

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30 *R v Luhan* [2009] VSCA 30 (emphasis added). Endorsed in *R v Georgiou* [2009] VSCA 57 per Neave JA.

31 [2013] VSCA 55.

32 [2012] HCA 29.

33 [2006] HCA 9.

34 [2005] HCA 8.

35 *James v R* [2013] VSCA 55, [13].

36 *Jury Directions Act 2013 (Vic)* s 5(2)(b).

37 *R v Cardamone* (2007) 171 A Crim R 207, [60].

38 Department of Justice, *Jury Directions: A New Approach* (2012), 56.

Some guidance may also be found in the use of the phrase ‘substantial miscarriage of justice’ and the note at the bottom of section 15 which states that a substantial miscarriage of justice can be the reason for a successful appeal against conviction. According to the High Court in *Baini v R*<sup>39</sup> a substantial miscarriage of justice includes circumstances where an error possibly affected the result or where there was a serious departure from the proper trial process.<sup>40</sup> How this could operate in the context of the *Jury Directions Act* remains to be seen.

For now, it is sufficient to say that the Act is designed to raise the bar on when directions are necessary compared to the common law and require judges to place greater weight on the views of counsel than was necessary at common law. How much greater weight is a matter that cannot be stated in the abstract, but will depend on the individual case and whether, at the end of the day, the judge, or the Court of Appeal, considers that despite the position of the parties, a particular direction is necessary to avoid a substantial miscarriage of justice.

One key limitation on the request process is contained in section 9 of the Act, which states that Part 3 does not apply to ‘general directions’ or directions which the judges must or must not give under any Act, including the *Jury Directions Act*. General directions are defined in section 3 as ‘directions concerning matters relating to the conduct of trials generally’ and includes most of the matters covered in Part 1 and 3 of Judicial College of Victoria’s Criminal Charge Book. The second limb of section 9 covers the small number of cases where some Act regulates when the direction may be given, or prohibits the giving of certain directions. Examples include statutory directions on identification evidence,<sup>41</sup> post-offence conduct,<sup>42</sup> the relevance of delayed complaint to credibility<sup>43</sup> and others.<sup>44</sup> The newly developed chapter 3.1A of the Criminal Charge Book outlines the operation and the effect of the direction request process.

The request process imposes a greater obligation on all lawyers involved in a criminal proceeding to give thought to the content of the judge’s charge and to indicate what directions are necessary and what matters are in issue. The Act emphasises that the parties must take a proactive role in shaping the judge’s charge, rather than a reactive role of merely taking exceptions to a charge which has been given. This is consistent with recent judicial practice, and gives the parties a greater opportunity to influence the content of the judge’s charge and focus the attention of the jury on the matters in issue. The Act should be seen as evolutionary of existing practices, by codifying the

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39 (2012) 293 ALR 492.

40 *Nudd v R* [2006] HCA 9.

41 *Evidence Act 2008* (Vic) s 116.

42 *Jury Directions Act 2013* (Vic) s 25.

43 *Crimes Act 1958* (Vic) s 61.

44 Several other jury direction provisions are subject to separate statutory request processes, such directions on unreliable evidence under *Evidence Act 2008* (Vic) s 165. While the directions under other statutory request processes are not subject to Part 3 of the *Jury Directions Act 2013* (Vic), any common law analogue which exists alongside those statutory directions will itself be subject to Part 3.

conduct and significance such discussions between the parties.<sup>45</sup>

## **Content of the Summing Up**

Part 4 of the *Jury Directions Act 2013* begins with a statement of the trial judge's obligations when summing up. These are:

- To explain so much of the law as is necessary;
- To refer to the way the prosecution and accused have put their cases; and
- To identify the evidence the judge considers necessary to help the jury determine the issues.<sup>46</sup>

This bears resemblance to the common law obligations expressed in *R v AJS*:<sup>47</sup>

- a) to decide what are the real issues in the case;
- b) to direct the jury on only so much of the law as is necessary to enable the jury to resolve those issues;
- c) to tell the jury, in the light of the law, what those issues are;
- d) to explain to the jury how the law applies to the facts of the case; and
- e) to summarise only so much of the evidence as is relevant to the facts in issue, and to do so by reference to the issues in the case.

However, when compared with *AJS* and the common law, the Act makes three key changes to existing practices regarding summing up.

First, it expressly abolishes the obligation to summarise closing addresses of the parties and the evidence.<sup>48</sup> Instead, judges must 'refer to' the way the parties put their case and must 'identify' so much of the evidence as necessary to help the jury determine the issues. This was designed to cut down on the extent to which judges were required to give a detailed recitation of the evidence, or to repeat substantial portions of the closing addresses of the parties.<sup>49</sup> The Act specifies eight matters the judge must consider when determining what evidence must be identified, including the complexity of the case, the addresses of counsel and any documentary material provided to the jury.<sup>50</sup> Many of these considerations were relevant at common law. These changes are explained in Chapter 3.8 of the Criminal Charge Book, which looks at the effect of Part 4 of the Act, and the continued relevance of many common law authorities.

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45 Some comparison may be drawn between Part 3 of the *Jury Directions Act* and rule 4 of the New South Wales Criminal Appeal Rules. Rule 4 has existed since 1953, and imposed as additional step of requiring leave if a party sought to rely on a direction or omission unless the party objected at the trial. Similar to section 15, rule 4 emphasises the importance of trial conduct.

46 *Jury Directions Act 2013* (Vic) s 17.

47 (2005) 12 VR 563.

48 Though compare *KRI v R* [2012] VSCA 186, [53] - [63] on the limits of the obligation to summarise.

49 See, on the common law obligation, *R v Zilm* (2006) 14 VR 11, [79], *R v Gose* (2009) 22 VR 150; *R v Dao* (2005) 156 A Crim R 459.

50 *Jury Directions Act 2013* (Vic) s 18(2).

Second, the Act expressly recognises that the summing up may use a combination of oral and written directions.<sup>51</sup> This seems intended to overturn the principle from *R v Thompson*,<sup>52</sup> which held that the adequacy of directions must be judged on the oral material only and that written material may supplement oral directions, but cannot rescue an inadequate or defective oral charge. Under section 18(2)(h), the provision of transcript and other documents is relevant to determining whether and to what extent the judge needs to identify evidence for the jury.

The third key reform introduced by Part 4 of the Act is to empower judges to give ‘integrated directions’ and directions in the form of factual questions. These fact-based directions have been discussed for several years in Australia and are known by many names: decision tress, question trails and fact-based charges are just a few. The difference between a traditional direction and a fact-based charge is that whereas a judge usually gives the jury directions on the law and then explain how the law relates to the facts, a fact-based charge starts and ends with the facts. It identifies for the jury the factual issues they need to resolve and explains to the jury the legal consequences of the resolution of those factual issues. The difference is subtle when considered in the abstract, but is more significant in practice. To take a common example such as murder, the elements are causation, voluntariness and intention. In a traditional common law direction, the jury is left to resolve those three questions and the judge points to evidence which relates to each element. In a fact-based charge, the focus shifts to the particular factual questions in the trial. For example, if the medical evidence on the cause of death is uncontested, a fact-based charge based on a stabbing might be ‘did Mr Smith stab Mr Jones’, ‘was the stabbing a conscious, voluntary and deliberate act’ and ‘in stabbing Mr Jones, did Mr Smith intend to kill him or cause him really serious injury’.

In a fact-based charge, the judge and the parties do the work of applying the law to the facts, and leave the jury to apply their expertise of finding the facts. This is a style of charging which has been championed by the late Sir Robert Chambers, previously of the New Zealand Court of Appeal, and has previously received some recognition in Victorian decisions.<sup>53</sup> For example, in *MG v R*,<sup>54</sup> the Court of Appeal demonstrated how such an approach could be used in an incest case, to reduce the question of voluntariness to an easily comprehensible form.

The Act also introduces ‘integrated directions’, where a judge combines fact-based directions with directions on the evidence and how the evidence is to be assessed, or references to the way the parties have put their cases or the trial judge’s identification of relevant evidence. For the avoidance of doubt, the Act states that a judge who addresses a matter using an integrated direction or a fact-based direction does not need to also address that matter with any other direction.

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51 *Jury Directions Act 2013* (Vic) ss 17(d), 18(2)(h).

52 (2008) 21 VR 135, [143], [146]. See also *R v Gose* (2009) 22 VR 150.

53 As noted by Department of Justice, *Jury Directions: A New Approach* (2012), 79, support for such directions existed at common law, with the High Court extracting directions in the form of factual questions in *Stuart v R* (1974) 134 CLR 426.

54 (2010) 29 VR 305, [29].

Question trails have been used in Victorian cases for several years, with judges modifying the standard checklists from the Criminal Charge Book to the facts of the individual case.<sup>55</sup> While at least one New South Wales judge has warned against the use of question trails, and the risk that question trails can hinder the path to a unanimous verdict,<sup>56</sup> fact-based charges have generally enjoyed support in Victoria and the Act gives statutory recognition to such directions as a valid way of directing the jury. Because fact-based charges are so tightly bound up in the particular facts, the Criminal Charge Book does not and cannot include model fact-based charges. However, the Bench Notes and model directions will continue to provide valuable guidance on the legal issues which must be incorporated into a fact-based charge, and the checklists will continue to provide a template which, in some cases, can be readily adapted to form a fact-based charge.

## **Proof beyond reasonable doubt**

Part 5 of the *Jury Directions Act 2013* attenuates the strict common law rule that a judge cannot explain the meaning of those pivotal words, ‘beyond reasonable doubt’. At common law, it has been said that the meaning of the words is the province of the jury and that attempts to explain those words have never prospered.<sup>57</sup> Despite this, it is the experience of judges that jurors often ask for assistance on the meaning of beyond reasonable doubt. Part 5 of the Act responds to that concern, by providing five directions a judge can give a jury which asks a question which directly or indirectly raises the meaning of the phrase ‘beyond reasonable doubt’. A judge can give one or more of the following statutory directions:

- (a) refer to
  - (i) the presumption of innocence; and
  - (ii) the prosecution’s obligation to prove that the accused is guilty; or
- (b) indicate that it is not enough for the prosecution to persuade the jury that the accused is probably guilty or very likely to be guilty;
- (c) indicate that-
  - (i) it is almost impossible to prove anything with absolute certainty when reconstructing past events; and
  - (ii) the prosecution does not have to do so; or
- (d) indicate that the jury cannot be satisfied that the accused is guilty if the jury has a reasonable doubt about whether the accused is guilty; or
- (e) indicate that a reasonable doubt is not an imaginary or fanciful doubt or an unrealistic possibility.

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55 See, eg, *KRI v R* [2012] VSCA 186.

56 Peter Berman, ‘Question trails in jury instruction – a note of caution’ (2012) 24(4) *Judicial Officers Bulletin* 27. See also Robert Chambers, ‘Question trails: A reply to his Honour Judge Berman SC’s “Note of Caution”’ (2012) 24(7) *Judicial Officers Bulletin* 57.

57 *R v Chatzidimitriou* (2000) 1 VR 493; *Green v R* (1971) 126 CLR 28; *Dawson v R* (1961) 106 CLR 1.

The Criminal Charge Book contains model language for judges to use when giving a direction under Part 5 of the Act. Consistent with the structure of section 21, the charge is designed for judges to choose which parts of the direction to use, with no assumption that judges will give all five directions. Consistent with the obligation to provide procedural fairness in responding to jury questions,<sup>58</sup> the parties should be given the opportunity to make submissions on which directions should be given, based on the nature of the jury's question.

Part 5 of the Act is limited to cases where the jury asks a question which expressly or impliedly raises the meaning of 'beyond reasonable doubt'. While no particular form of words is required,<sup>59</sup> the language of section 21 should be closely examined. The Act does not allow judges to give the style of direction on beyond reasonable doubt adopted in New Zealand<sup>60</sup> or Canada<sup>61</sup> when first instructing the jury. It also does not allow judges to substitute the word 'sure' for 'beyond reasonable doubt'.<sup>62</sup> All those existing limitations still apply and the section is limited to addressing the problem of judges repeating themselves when faced with a question on the meaning of beyond reasonable doubt.<sup>63</sup>

## Post-offence conduct

The reforms to post-offence conduct in Part 6 of the Act are the second most significant changes the Act introduces, after the directions request process. The Act confronts the difficulties which have plagued this area of the law for many years and addresses the issues in a manner which should significantly simplify the conduct of trials and the content of directions. There are five steps to the reforms:

1. Introduction of a notice and leave process to rely on post-offence conduct
2. Statutory directions whenever evidence is used as post-offence conduct
3. Optional directions available on request when evidence is used as post-offence conduct
4. Optional directions available on request when evidence is not used as post-offence conduct
5. Abolition of any common law to the contrary, including common law on the application of the standard of proof

58 See *HM v The Queen* [2013] VSCA 100; *LLW v The Queen* [2012] VSCA 54.

59 *Jury Directions Act 2013* (Vic) s 6.

60 *R v Wanhalia* [2007] 2 NZCA 573.

61 *R v Lifchus* [1997] 3 SCR 320.

62 *Thomas v R* (1960) 102 CLR 584; *Dawson v R* (1961) 106 CLR 1; *R v Punj* [2002] QCA 333; *R v Cavkic* (No 2) [2009] VSCA 43; *Benbrika v R* [2010] VSCA 281.

63 See Judicial College of Victoria, *Criminal Charge Book, 1.7.1 - Bench Notes: Onus and Standard of Proof* (1 July 2013) Victorian Criminal Charge Book <<http://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#l1291.htm>>.

## **Definitions**

The Act introduces three definitions which are critical to understanding Part 6.

**Conduct** means the telling of a lie by the accused, or any other act or omission of the accused, which occurs after the event or events alleged to constitute an offence charged;

**Incriminating conduct** means conduct that amounts to an implied admission by the accused:

- (a) of having committed an offence charged or an element of an offence charged;
- (b) which negates a defence to an offence charged;

**offence charged** includes any alternative offence<sup>64</sup>

Thus, the Act introduces a new vocabulary, with ‘incriminating conduct’ replacing old common law staples like the much maligned phrase ‘consciousness of guilt’<sup>65</sup> or the more neutral ‘post-offence conduct’.

## **Notice and leave process**

Under the *Jury Directions Act 2013* the prosecution must give notice when it wishes to lead evidence as incriminating conduct. The notice must be filed in court and served on the accused at least 28 days before the trial is listed to commence, and must include a copy of the evidence on which the prosecution intends to rely.

The obligation, and indeed the nature of the definition, is uni-directional. It applies only to the prosecution in relation to incriminating conduct by the accused. In cases where one accused wishes to rely on post-offence conduct by another accused as evidence of the guilt of the co-accused, the provisions do not apply.

In addition to giving notice of its intention to rely on conduct as incriminating conduct, the prosecution must obtain leave from the judge. The judge must be satisfied that, on the evidence as a whole, the evidence is ‘reasonably capable of being viewed by the jury as evidence of incriminating conduct’.<sup>66</sup> The judge therefore performs a filtering role in deciding whether evidence can be used as incriminating conduct. This process will require the prosecution to decide before the commencement of the case whether they will rely on evidence as incriminating conduct. Where they do not give notice and obtain leave, the prosecution is not allowed to rely on evidence as incriminating conduct and judges will have the usual range of sanctions available where a prosecutor attempts to slip in a consciousness of guilt argument in final address.<sup>67</sup>

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<sup>64</sup> *Jury Directions Act 2013* (Vic) s 24.

<sup>65</sup> *Zoneff v R* (2000) 200 CLR 234 per Kirby J; *R v Nguyen* (2001) 118 A Crim R479.

<sup>66</sup> *Jury Directions Act 2013* (Vic) s 24.

<sup>67</sup> These include extending the period for giving notice of intention to rely on consciousness of guilt evidence, intervening in the prosecutor’s address, giving curative directions and, if necessary, discharging the jury.

### **Mandatory direction on use of evidence as incriminating conduct**

Due to the potential significance of post-offence conduct evidence, the Act departs from its usual principle of making directions subject to request. Instead, a basic direction on the use of evidence as incriminating conduct must be given in every case where the prosecution relies on evidence for that purpose. Separate model directions are available in the Charge Book depending on whether the conduct consists of lies, or other conduct.<sup>68</sup> These directions convey the statutory information that the jury may only use the evidence as incriminating conduct if it finds that the conduct occurred and the only reasonable explanation is that the accused held the relevant inculpatory belief, and that the jury must still decide on the evidence as a whole whether the prosecution proved the accused's guilt beyond reasonable doubt.<sup>69</sup> These three short requirements take up less than a page, and should allay concerns that have arisen in the past about onerous requirements laid down in *Edwards*.<sup>70</sup>

At common law, a direction on the use of lies as consciousness of guilt required the following four steps:

- Precise identification of each lie;
- Identification of the evidence which was capable of demonstrating that it was a lie;
- Identification of the issue on which the Crown relies on the lies as evidence of consciousness of guilt;
- Identification of the acts, facts and circumstances which are said to show that the lie demonstrates a consciousness of guilt for the purpose of that issue.<sup>71</sup>

This led to the need for detailed and complex charges which delved into the evidence and the issues in detail. Unlike the common law, the Act expressly provides that the judge does not need to refer to each act or omission of the accused. Instead, the direction is consistent with the nature of post-offence conduct as a species of circumstantial evidence and so post-offence conduct is subject to the usual limitations on the use of circumstantial evidence. The statutory direction also recognises that an accused's belief that he or she committed the offence charged, or an element of the offence charged, may not accurately reflect the accused's legal responsibility.

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<sup>68</sup> Judicial College of Victoria, *Criminal Charge Book*, 4.7.2.1 - Charge: Other Conduct as an Implied Admission of Guilt (Section 25) (1 July 2013) Victorian Criminal Charge Book <<http://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#4085.htm>> and Judicial College of Victoria, *Criminal Charge Book*, 4.7.2.2 - Charge: Lies and Other Conduct as an Implied Admission of Guilt (Section 25 direction) (1 July 2013) Victorian Criminal Charge Book <<http://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#4086.htm>>.

<sup>69</sup> *Jury Directions Act 2013* (Vic) s 25.

<sup>70</sup> *Edwards v R* (1993) 178 CLR 193.

<sup>71</sup> *Ellis v R* (2010) 30 VR 428, [3].

### ***Optional direction on use of evidence as incriminating conduct***

The statutory direction on incriminating conduct contains little warning about the possibility of misusing post-offence conduct evidence. As explained above, the direction contains a circumstantial evidence component and a warning against succumbing to the fallacy that if the accused believed that he or she was guilty, then he or she must be guilty.

In cases where some further warning is required, defence counsel may request a direction that:

- a) there are all sorts of reasons why a person might behave in a way that makes the person look guilty; and
- b) the accused may have engaged in the conduct even though the accused is not guilty of the offence charged; and
- c) even if the jury thinks that the conduct makes the accused look guilty, that does not mean necessarily mean that the accused is guilty.<sup>72</sup>

While not expressly required by the text of the Act, the Charge Book editorial committee has taken the prudent approach of continuing to encourage judges to detail possible reasons why the accused may have acted as alleged which are consistent with innocence.<sup>73</sup>

This direction is designed to be purely protective of an accused. In many cases, defence counsel will ask the judge for the direction, on the theory that it will improve the accused's chances of acquittal. However, there will be some cases where other possible explanations for the conduct are so implausible that the defence make a forensic choice to downplay the post-offence conduct as much as possible. The Act allows defence counsel to do this and seek to avoid the risk of jurors thinking that extended judicial directions on a piece of evidence demonstrate the importance of that evidence.

### ***Optional direction on impermissible use of evidence as incriminating conduct***

The Act also replaces the common law *Zoneff* warning for use in cases where there is a risk of the jury misusing evidence as evidence of incriminating conduct. This direction only needs to be given where there is a request. The direction contains two components:

- direction that there are all sorts of reasons why a person might behave in a way that makes the person look guilty;
- A warning that even if the jury thinks that the accused engaged in the conduct, it must not conclude from that evidence that the accused is guilty of the offence charged.<sup>74</sup>

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72 *Jury Directions Act 2013* (Vic) s 26.

73 See Judicial College of Victoria, *Criminal Charge Book*, 4.7.2.3 - Charge: Additional direction on Incriminating Conduct (Section 26 direction) (1 July 2013) Victorian Criminal Charge Book <<http://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#4087.htm>>.

74 *Jury Directions Act 2013* (Vic) s 27.

Like the *Zoneff* warning, this direction is reasonably clear and the main benefit will be greater clarity around when the direction is necessary. The combination of the direction request process in Part 3 of the Act and prohibition on the prosecution using evidence as incriminating conduct without leave should reduce the risk of miscarriages of justice flowing from judges failing to give an *Edwards* or *Zoneff* directions when required, or from giving only a *Zoneff* direction when an *Edwards* direction was required.<sup>75</sup>

### ***Abolition of common law***

The final component of Part 6 of the *Jury Directions Act 2013* is the abolition of common law rules on the giving of jury directions about incriminating conduct and the need for directions on the standard of proof that applies to evidence of consciousness of guilt. At common law, there was some uncertainty about the standard of proof that applied to post-offence conduct, with some decisions warning against applying any standard of proof to post-offence conduct evidence<sup>76</sup> and other decisions suggesting that judges need to direct prudentially on the basis that the jury may decide to convict on post-offence conduct alone.<sup>77</sup> This controversy is addressed by section 28(2) which, in three subsections, says that the jury does not need to be satisfied of incriminating conduct beyond reasonable doubt before using it and does not need to treat the evidence as an indispensable intermediate fact.<sup>78</sup>

### **Concluding Remarks**

The *Jury Directions Act 2013* is the product of over five years of work by judges, law reform agencies, justice system stakeholders and the Department of Justice. However, other reforms, including complicity, *Shepherd* directions, other misconduct evidence and unreliable evidence directions, are on the horizon and expected in coming years.<sup>79</sup> The Act is designed to foster a more open and collaborative relationship between the bar and bench, with a greater focus on the obligation of counsel to assist the court in ensuring the trial is fair. In 2007, the Honourable Geoffrey Eames wrote that:

It is not only jurors, however, upon whom unreasonable demands are placed in modern criminal trials. The statutory and appellate court guidelines for the conduct of criminal trials impose considerable demands on trial judges too ... but the burden on one adds to the burden on the other. By simplifying the language and reducing the number of trial directions we would improve the lot of counsel, jurors and trial judges, and such reform

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<sup>75</sup> See *R v Renzella* [1997] 2 VR 88; *R v Nguyen* (2000) 118 A Crim R 479 [17]–[21]; *R v Chang* (2003) 7 VR 236.

<sup>76</sup> *Velevski v R* (2002) 187 ALR 233; *R v Kotzmann* [1999] 2 VR 123.

<sup>77</sup> *R v Laz* [1998] 1 VR 453; *R v Farquharson* (2009) 26 VR 410.

<sup>78</sup> See *Shepherd v R* (1990) 170 CLR 573.

<sup>79</sup> See Simplification of Jury Directions Project: A report to the Jury Directions Advisory Group (2012).

would also significantly reduce the incidence of successful appeals which flow from errors and omissions in jury directions.<sup>80</sup>

It is to be hoped that the *Jury Directions Act 2013* will go some way towards reducing those ‘unreasonable demands’ at the same time as giving the accused greater say over directions and the resulting capacity to avoid directions which are well intended but present a risk of backfiring to the accused’s detriment. In this light, the accused’s legal practitioners have a critical role in identifying the matters in issue and the directions that are necessary. This is a familiar area of responsibility and resources like the Criminal Charge Book will continue to help practitioners fulfil this important obligation towards ensuring that their clients receive a fair trial.

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<sup>80</sup> See Eames, above n 7.