

## CRITIQUE AND COMMENT

### THE CRIMINAL LAW — A ‘MILDLY VITUPERATIVE’ CRITIQUE

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*[Criminal law in Victoria is currently plagued by delay, long trials and a high rate of successful appeals. One factor common to these problems is the extraordinary complexity that now attends most aspects of the criminal law, as illustrated by the law in relation to statutory self-defence, the mental state for rape, and jury directions. This complexity can largely be attributed to poorly drafted and highly prescriptive legislative reforms, which have rendered the law in this area virtually incomprehensible to jurors. This piece is a reminder that the criminal law must be accessible and easily understood — a principle which appears to have been forgotten in Victoria in the quest for analytical perfection.]*

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#### I INTRODUCTION

I wish I could claim credit for having come up with the term ‘mildly vituperative’. It is both evocative and well-crafted. Regrettably, I cannot. So far as I can tell, it originated with Sir Rupert Cross who, in 1973, responded (using somewhat intemperate language) to ill-considered criticism of a report which he had authored.<sup>1</sup> He described his response as ‘mildly vituperative’.<sup>2</sup>

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<sup>1</sup> See generally Rupert Cross, ‘The *Evidence Report*: Sense or Nonsense — A Very Wicked Animal Defends the 11<sup>th</sup> Report of the Criminal Law Revision Committee’ [1973] *Criminal Law Review* 329.

<sup>2</sup> *Ibid* 329.

Professor Cross was, as anyone who knew him would attest, the kindest of men. However, he could on occasion let fly. He once famously referred to two decisions of the English Court of Criminal Appeal as ‘gibberish’.<sup>3</sup>

This paper was written in honour of Professor Peter Brett, a most distinguished jurist. Professor Brett had a similar capacity to make his feelings known. For that reason, and because these thoughts reflect my own criticisms of the current state of the criminal law in Victoria, the expression ‘mildly vituperative’ struck me as being an apt title for this memorial paper.

## II BACKGROUND

I spent most of my professional career as a law teacher and practising barrister working in the field of criminal law. Much of my practice was appellate in nature.

In 1998, I was appointed a judge of the Federal Court of Australia. I remained in that position for just over 10 years. During that time, I had only the most sporadic contact with the criminal law.

In 2008, I left the Federal Court and accepted an appointment to the Victorian Court of Appeal. Many of the appeals that come before that Court are criminal in nature.

I thought that my transition to appellate crime would be relatively straightforward. I was, after all, simply returning to what I had spent more than 30 years doing.

Sadly, however, I soon discovered that what I was now confronted with bore little resemblance to the criminal law that I had both taught and practised in over the years. It was not long before I began to think that there was something seriously amiss with the criminal justice system in Victoria.

A number of problems struck me at once. The first was delay. Cases that when I was in practice would have been brought on for hearing expeditiously, now seemed to take an extraordinarily long time to come on for trial. To my great surprise, the same was true of appeals against both conviction and sentence.

I learnt from speaking to other judges that one of the main reasons for delay in the hearing of trials in the County Court was that legislation provided that the trial of a person for a sexual offence had to commence within three months of committal.<sup>4</sup> The County Court was therefore required to give priority to the trial of sexual offences ahead of other matters. My understanding is that this is still the case. I am told that in some parts of regional Victoria, delays are so great that an accused charged, for example, with offences of dishonesty may have to wait years after committal before his or her trial is heard.

<sup>3</sup> Ibid 333, referring to *R v Ryan* (1964) 50 Cr App R 144 and *R v Mutch* [1973] 1 All ER 178.

<sup>4</sup> Previously, the three month time limit applied to trials for sexual offences against children and persons with a cognitive impairment: *Crimes Act 1958* (Vic) s 359A(2AA), repealed by *Criminal Procedure Act 2009* (Vic) s 422(2)(a) (as amended by *Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009* (Vic) s 54(h)). Since 1 January 2010, the three month time limit applies to all trials for sexual offences: *Criminal Procedure Act 2009* (Vic) s 212.

When I joined the Court of Appeal, there were more than 600 criminal appeals waiting to be heard. It took on average between one and a half and two years for an appeal against conviction, and about 18 months for an appeal against sentence, to come before the Court. The situation had become intolerable.

I am pleased to say that that position no longer holds. Through a combination of procedural and other reforms, many of them Court-initiated, the number of criminal appeals pending has been significantly reduced, and now stands at below 300. It must be said, however, that although delay in having appeals heard is now less of a problem than it was when I first joined the Court of Appeal, it still remains a significant concern.

The second thing that I noticed about criminal trials was that they seemed to last much longer than they had done formerly. A trial that perhaps 20 or so years ago would have taken, at most, a few days now seemed typically to stretch into weeks. Even the shortest trial would run for close to a week.

The third change that struck me was that a seemingly high percentage of appeals as to both conviction and sentence were being allowed. Plainly, that was a matter of concern. Any time that a new trial must be had, the effects are significant. There is, of course, great cost to the community. There is also emotional strain upon the accused, the alleged victim, and any witnesses who must go through the ordeal of giving their evidence yet again.

So I asked myself two questions. Why do criminal trials now take so long? And why are so many criminal appeals allowed?

It seems to me that there is one factor common to each of the problems I have identified. Put simply, the criminal law has now become so complex that it is almost the exception rather than the rule that a case runs smoothly, and without significant error.

Of all branches of the law, it is surely the criminal law that should most readily be accessible and easily understood. The reality is quite different. Despite a welter of recommendations — ostensibly directed at simplification of the law — by law reform bodies and advisory councils, many aspects of the criminal law in this State can only be described as incomprehensible.

One theme which I hope to develop is that many of the legislative changes that have been introduced in recent years have rendered the criminal law incapable of being understood, not just by juries, but by highly skilled and intelligent practitioners. There are several reasons for this. Some of the changes that have been brought in appear to have been drafted with a view to appeasing various interest groups. In addition, drafting techniques have, in some cases, left a good deal to be desired. An offence that is defined in a way that attempts to anticipate every conceivable variant of what might constitute criminal conduct might appeal to a legal technician. However, it is unlikely to make very much sense to an ordinary member of the community, and therefore to a prospective juror.

The criminal law that I studied at law school was largely the common law. It is interesting to see how much that has changed. The *Criminal Law and Practice Statute 1864* (Vic) occupied some 89 pages. The *Crimes Act 1890* (Vic) grew to 141 pages. The *Crimes Act 1915* (Vic) ran to 167 pages, and the *Crimes Act 1928* (Vic) totalled 186 pages. By the time I attended law school in the mid 1960s, the

*Crimes Act 1958* (Vic) took up a mere 208 pages. Basically, the rest of the criminal law stemmed from common law principles.

It is a sobering thought that, in its current form, the *Crimes Act 1958* (Vic) runs for some 549 pages. However, that is only the tip of the iceberg. Today, anyone wishing to practise criminal law in this State must also have regard, on a regular basis, to the more than 400 pages of the *Sentencing Act 1991* (Vic); the 289 pages of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic); the 211 pages of the *Evidence Act 2008* (Vic); and the 364 pages of the *Criminal Procedure Act 2009* (Vic). As well, it may be necessary, from time to time, to delve into the 302 pages of the *Confiscation Act 1997* (Vic).

Throw in, for good measure, the 771 pages of the *Criminal Code Act 1995* (Cth), the 357 pages of the *Proceeds of Crime Act 2002* (Cth), the literally thousands of pages of the *Corporations Act 2001* (Cth) (and a number of other Commonwealth statutes that create indictable offences), and the task of keeping abreast of the criminal law in this State, and in this country, becomes apparent.

I would not want it to be thought that I am opposed to reform of the criminal law. The common law was, in many respects, unsatisfactory and in urgent need of legislative attention. To understand precisely what I mean, one has only to consider the shambles into which the law relating to larceny had fallen prior to the introduction in this State, in 1973, of the amendments to the *Crimes Act 1958* (Vic)<sup>5</sup> modelled upon the *Theft Act 1968* (UK) c 60.

Codification of the criminal law, whether in whole or in part, can of course be beneficial. A well-drafted enactment can render the common law more coherent and more readily accessible. That assumes, of course, that the drafting is done in a sensible way, with appropriate input from those with knowledge and experience of a relevant kind.

With these preliminary observations in mind, let me now address just a few examples of where I think the criminal law has gone badly off the rails.

### III STATUTORY SELF-DEFENCE

In 2005, the Parliament of Victoria amended the *Crimes Act 1958* (Vic) by abolishing the partial defence of provocation.<sup>6</sup> It did so, it would seem, partly in response to a particular case that had been widely publicised and that had caused a good deal of consternation.<sup>7</sup>

The legislature also turned its attention to the doctrine of self-defence as a defence to homicide. More specifically, it created a new statutory offence

<sup>5</sup> See *Crimes (Theft) Act 1973* (Vic).

<sup>6</sup> *Crimes Act 1958* (Vic) s 3B, as inserted by *Crimes (Homicide) Act 2005* (Vic) s 3.

<sup>7</sup> See *R v Ramage* [2004] VSC 508 (9 December 2004). James Ramage was acquitted of the murder of his estranged wife, Julie, but convicted of manslaughter in circumstances that caused many in the community to doubt that justice had been done in the particular circumstances of that case. The Victorian Law Reform Commission recommended the abolition of the defence of provocation, as well as the introduction of statutory self-defence provisions, within a month of the completion of Ramage's trial: see Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004).

available as an alternative to murder, which it termed ‘defensive homicide’.<sup>8</sup> However, it did so in a way that has led to confusion and uncertainty.

The key provisions relating to defensive homicide are ss 9AC, 9AD and 9AH of the *Crimes Act 1958* (Vic). Section 9AC provides for a new statutory form of self-defence where the charge is one of murder. Essentially, that section provides that a person is not guilty of murder if he or she carries out the conduct that would otherwise constitute that offence if, at the time, he or she believed that conduct to be necessary to defend himself or herself, or another, from the infliction of death or really serious injury.

Statutory self-defence under s 9AC differs from common law self-defence in at least one key respect. A genuine belief of the kind stipulated by s 9AC constitutes a complete defence to a charge of murder, irrespective of whether that belief is reasonably held.<sup>9</sup> At common law, any belief on the part of the accused that was relied upon as the basis for self-defence had to be ‘reasonable’.<sup>10</sup>

Section 9AD provides that where a person kills another in circumstances that but for the belief specified in s 9AC would have amounted to murder, that person is guilty of defensive homicide if he or she did not have reasonable grounds for that belief. Defensive homicide carries the same maximum penalty as manslaughter, namely 20 years’ imprisonment.

A cursory reading of s 9AD may suggest that defensive homicide was introduced in order to restore what was once the common law offence of manslaughter by excessive force. In *Viro v The Queen* (*‘Viro’*),<sup>11</sup> the High Court rejected the Privy Council’s refusal, some years earlier, to countenance that form of manslaughter.<sup>12</sup> Regrettably, *Viro* turned out to be a disaster for the administration of criminal justice. The directions that it required be given to the jury in relation to self-defence were expressed in language that was confusing at best, and incomprehensible at worst.<sup>13</sup>

Fortunately, the High Court was prepared to revisit the matter. In *Zecevic v Director of Public Prosecutions* (Vic) (*‘Zecevic’*),<sup>14</sup> *Viro* was overruled and self-defence was restored to something like its previous form. And so the law on self-defence stood until 2005.

Whatever the Victorian Law Reform Commission may have intended by recommending changes to the law of self-defence in 2004, it is clear that

<sup>8</sup> *Crimes Act 1958* (Vic) s 9AD, as inserted by *Crimes (Homicide) Act 2005* (Vic) s 6. Section 4 of the *Crimes Act 1958* (Vic) provides that where, on a trial for murder, the jury are not satisfied that the accused has committed that offence, but are satisfied that he or she is guilty of an offence under s 9AD, they may acquit the accused of murder and find the accused guilty of defensive homicide.

<sup>9</sup> It should be noted, however, that statutory self-defence is narrower in some respects than was common law self-defence. Section 9AC requires the accused to have believed that his or her conduct was necessary to meet a threat of death or really serious injury. At common law, a threat of lesser injury would have sufficed.

<sup>10</sup> *Zecevic v DPP* (Vic) (1987) 162 CLR 645.

<sup>11</sup> (1978) 141 CLR 88.

<sup>12</sup> *Palmer v The Queen* [1971] AC 814.

<sup>13</sup> The six propositions put forward by Mason J were replete with double and triple negatives: see *Viro* (1978) 141 CLR 88, 146–7.

<sup>14</sup> (1987) 162 CLR 645.

defensive homicide is not, in fact, a statutory reintroduction of manslaughter by excessive force. At common law, that form of manslaughter was predicated simply upon more force having been used than was reasonably necessary. However, defensive homicide says nothing about excessive force. Rather, it requires an accused to have genuinely but unreasonably believed that his or her actions were necessary. The focus is upon the need for the actions, rather than the amount of force used.

A colleague of mine who sits in the trial division of the Supreme Court, and who was recently obliged to direct a jury in accordance with the new statutory self-defence provisions, told me that, in his opinion, even the indescribably complicated *Viro* formulation of self-defence seemed to be much easier to apply than the current law. His lament spoke volumes.

At present in Victoria, a judge may be required to give the statutory self-defence direction in relation to a charge of murder, followed by a direction as to the availability of defensive homicide as an alternative to that charge. If manslaughter is also available as a further alternative, as is often the case, the judge must then give the jury the quite different statutory self-defence direction required under s 9AE.

The manslaughter self-defence direction, unlike that required for murder, has an objective component. The jury will have to be told that self-defence will fail if the accused did not have reasonable grounds for his or her belief. Under s 9AC, a genuine but unreasonable belief not negated by the Crown affords a complete defence to a charge of murder. However, under s 9AE, an equally genuine but unreasonable belief not negated by the Crown is no defence at all to a charge of manslaughter.

With respect, this is surely nonsense. To compound the difficulty, a jury is likely to be even more confused by the directions that must be given as regards self-defence if the particular facts of the case give rise to the operation of s 9AH. That section creates a series of special rules in relation to self-defence where the circumstances of the killing involved 'family violence'.<sup>15</sup> It was obviously intended to afford 'battered women' the protection that they were considered to have been denied by the common law.<sup>16</sup>

Putting to one side the difficulties associated with definitions of 'family member' and 'family violence',<sup>17</sup> s 9AH allows self-defence to be invoked in response to a charge of murder, or of manslaughter, and for the purposes of defensive homicide, even if the accused was responding to a harm that was not immediate, and even if the response involved excessive force.

<sup>15</sup> *Crimes Act 1958* (Vic) s 9AH(4) defines 'family violence' in relation to a person as 'violence against that person by a family member'.

<sup>16</sup> The introduction of s 9AH may have been a response to cases such as *Osland v The Queen* (1998) 197 CLR 316, where 'battered woman syndrome' had been raised in support of a claim of self-defence, which the jury rejected. It was suggested that the law of self-defence should be broadened to take into account the special position of women faced with the intractable difficulty of living with abusive men but not actually facing imminent death or serious injury at the time of the killing.

<sup>17</sup> See *Crimes Act 1958* (Vic) s 9AH(4).

Thus, in a trial that involves a charge of murder, an alternative charge of manslaughter, and some evidence of family violence, a charge to the jury regarding self-defence will have to encompass no fewer than three separate directions as to the elements of that defence. Moreover, there will have to be a further set of directions as to the elements of defensive homicide. None of this makes any sense.

The problems do not end there, for common law self-defence continues to apply to offences that involve violence, though not actual killing.<sup>18</sup> So a judge trying an accused on a charge of attempted murder must put statutory self-defence in accordance with s 9AC, but put common law self-defence in relation to the alternative offence of intentionally causing serious injury.

The doctrine of self-defence should never have been made so difficult to follow. That defence is, after all, perhaps the oldest, and most basic, of all excuses in the criminal law. It should be possible to explain its operation to a jury in just a few short sentences. In *Zecevic*, the High Court showed that this could be done. The doctrine was explained clearly and concisely by Wilson, Dawson and Toohey JJ as follows:

The question to be asked in the end is quite simple. It is whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did. If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal. Stated in that form, the question is one of general application and is not limited to cases of homicide. Where homicide is involved some elaboration may be necessary.<sup>19</sup>

Most judges make use of the *Victorian Criminal Charge Book* (*‘Criminal Charge Book’*)<sup>20</sup> when preparing their directions to the jury. It is a valuable asset, and enormously helpful to trial judges.<sup>21</sup> It is remarkable to note that it now takes 11 pages of the most elaborate and detailed bench notes to summarise the new provisions of the *Crimes Act 1958* (Vic) that deal with self-defence in relation to homicide.<sup>22</sup> Indeed, the model charge recommended for the new offence of defensive homicide itself runs to more than three pages.<sup>23</sup>

I should add that defensive homicide has, itself, given rise to a number of specific problems. The new offence is essentially an alternative to murder. What is to happen, then, if an accused is tried for murder, acquitted of that offence but

<sup>18</sup> At one point it was thought that common law self-defence continued to run in tandem with statutory self-defence in charges of homicide. That would have added further to the already extraordinary complexity brought about by the new provisions. However, in *Babic v The Queen* (2010) 28 VR 297, the Court of Appeal held that there is no longer scope for common law self-defence in relation to homicide offences.

<sup>19</sup> *Zecevic* (1987) 162 CLR 645, 661.

<sup>20</sup> Judicial College of Victoria, *Victorian Criminal Charge Book* (2012) <<http://www.judicialcollege.vic.edu.au/publications/victorian-criminal-charge-book>>.

<sup>21</sup> I should make it clear that I am a member of the committee of judges that meet regularly to update the *Criminal Charge Book*. Insofar as it is may be regarded as unduly complex or inaccurate, I accept my share of the blame.

<sup>22</sup> See *Criminal Charge Book*, above n 20, ch 8.9.2.1.

<sup>23</sup> See *ibid* ch 8.9.2.3.

convicted of the alternative offence of defensive homicide, and succeeds in having that conviction overturned on appeal? A new trial may be warranted. However, can the Court of Appeal sensibly order a retrial on a charge of defensive homicide? It is one thing for an accused to plead guilty to that offence in answer to a charge of murder. It is a different matter altogether to charge someone with defensive homicide, bearing in mind that it is an element of that offence that the accused genuinely holds the belief set out in s 9AC but has no reasonable grounds for that belief. How is the Crown to establish the existence of that seemingly exculpatory, but entirely subjective, belief?

The problems do not stop there. Can an accused charged with attempted murder be convicted instead of attempted defensive homicide? Is aiding and abetting defensive homicide open as a verdict? If so, how should a judge direct as to the mental element of the aider and abettor?

Putting to one side all the problems associated with the drafting of the statutory self-defence provisions, there are also real questions as to whether the provisions as drafted have given effect to the policy underlying their introduction. My understanding is that virtually all of those who have been convicted of defensive homicide since the introduction of that offence in 2005 have been male. The section clearly is not operating as intended. It has afforded little, if any, additional protection to women charged with killing abusive partners.<sup>24</sup>

There can be no doubt that the law relating to self-defence in this State has been made unnecessarily complex by the various legislative changes brought about in 2005. It is hoped that the Parliament will, at some point in the near future, revisit this matter.

#### IV THE MENTAL STATE FOR RAPE

At common law, the elements of rape were relatively simple, and easily understood. That was true of both the *actus reus* and *mens rea* of the offence. As I will show, it is no longer true for, at least, the mental state required for that offence.

In *R v Flannery*,<sup>25</sup> the Full Court of the Supreme Court made it plain that if an accused genuinely believed that there was consent to sexual intercourse, that negated rape. That was because the state of mind required for that offence was either:

<sup>24</sup> In fact, the first woman to be convicted of defensive homicide in this State was Eileen Creamer, who was convicted in March 2011 and sentenced in April 2011: see *R v Creamer* [2011] VSC 196 (20 April 2011). The only other woman to be convicted of that offence was Karen Black, who pleaded guilty and was sentenced in April 2011: *R v Black* [2011] VSC 152 (12 April 2011). All 18 other persons convicted of defensive homicide have been male: *R v Smith* [2008] VSC 87 (1 April 2008); *R v Edwards* [2008] VSC 297 (13 August 2008); *R v Giammona* [2008] VSC 376 (26 September 2008); *R v Smith* [2008] VSC 617 (15 October 2008); *R v Taiba* [2008] VSC 589 (23 December 2008); *R v Baxter* [2009] VSC 178 (12 May 2009); *R v Trezise* [2009] VSC 520 (31 August 2009); *R v Spark* [2009] VSC 374 (11 September 2009); *R v Wilson* [2009] VSC 431 (21 September 2009); *R v Croxford* [2009] VSC 516 (16 October 2009); *R v Parr* [2009] VSC 468 (16 October 2009); *R v Evans* [2009] VSC 593 (16 December 2009); *R v Middendorp* [2010] VSC 202 (19 May 2010); *R v Ghazlan* [2011] VSC 178 (3 May 2011); *R v Martin* [2011] VSC 217 (20 May 2011); *R v Svetina* [2011] VSC 392 (22 August 2011); *R v Jewell* [2011] VSC 483 (27 September 2011); *R v Monks* [2011] VSC 626 (2 December 2011).

<sup>25</sup> [1969] VR 31.

- an awareness that the complainant was not consenting; or
- a realisation on the part of the accused that the complainant might not be consenting, coupled with a determination to have sexual intercourse irrespective of whether there was consent or not.

A belief in consent was understood to be inconsistent with either of these states of mind.

In *Director of Public Prosecutions v Morgan*,<sup>26</sup> the House of Lords formulated the law in almost identical terms. Their Lordships held that an accused who believed, whether reasonably or not, that the complainant had consented to sexual intercourse could not be guilty of rape.<sup>27</sup>

Of course, the law relating to sexual offences, and in particular the offence of rape, was in need of legislative reform. It was entirely appropriate that any act of sexual penetration done without consent, and not just penile penetration, should be regarded as a most serious offence. It was also entirely appropriate to recast the law in this area in gender-neutral terms. And, of course, it was right that complainants should be afforded protection from the often scandalous and irrelevant cross-examination to which they had been subjected for many years.

However, the legislature went well beyond reforms of this kind. It sought, in effect, to codify each of the elements of rape, making that offence entirely statutory.

Rape is now relevantly defined in s 38(2) of the *Crimes Act 1958* (Vic) in the following terms:

A person commits rape if —

- (a) he or she intentionally sexually penetrates another person without that person’s consent —
  - (i) while being aware that the person is not consenting or might not be consenting; or
  - (ii) while not giving any thought to whether the person is not consenting or might not be consenting; or
- (b) after sexual penetration he or she does not withdraw from a person who is not consenting on becoming aware that the person is not consenting or might not be consenting.

The elements of rape are, more particularly, found in ss 36, 37, 37AAA, 37AA, and 37B.

Section 36 defines ‘consent’ as ‘free agreement’. The section then outlines a non-exhaustive series of circumstances in which a person is deemed *not* to have freely agreed to an act of sexual penetration. For example, a person is deemed not to have freely agreed where they submit to sexual penetration because of

<sup>26</sup> [1976] AC 182.

<sup>27</sup> These principles were restated by the Full Court of the Victorian Supreme Court in *R v Saragozza* [1984] VR 187, and had also been adopted in both South Australia (see generally *R v Wozniak* (1977) 16 SASR 67) and New South Wales (see generally *R v McEwan* [1979] 2 NSWLR 926).

force or the fear of force,<sup>28</sup> or the fear of harm of any type;<sup>29</sup> or where the person is asleep, unconscious or so affected by alcohol or another drug as to be incapable of freely agreeing.<sup>30</sup>

Where consent is in issue, the trial judge is required to direct the jury on matters contained within s 37AAA. Consent must be defined,<sup>31</sup> and the judge must refer to any of the particular circumstances set out in ss 36(a)–(g) as negating free agreement that are relevant on the facts of the particular case.<sup>32</sup> The jury must be told that in those particular circumstances the complainant will be deemed not to have freely agreed to sexual penetration.<sup>33</sup>

With respect, the matters set out in s 36 need hardly have been expressly prescribed as vitiating free agreement. It is surely obvious that anyone subjected to sexual penetration in such circumstances has not ‘freely agreed’, or indeed relevantly ‘consented’, to sexual penetration. A jury would hardly need to be told that the presence of any one or more of these circumstances must be regarded as negating free agreement.<sup>34</sup>

Section 37AA sets out the directions that must be given to a jury if evidence is led or an assertion is made that the accused believed that the complainant was consenting to the sexual act. That section provides that in such circumstances, the jury must be told that they must consider:

- (a) any evidence of that belief; and
- (b) whether that belief was reasonable in all the relevant circumstances having regard to —
  - (i) in the case of a proceeding in which the jury finds that a circumstance specified in section 36 exists in relation to the complainant, whether the accused was aware that that circumstance existed in relation to the complainant; and
  - (ii) whether the accused took any steps to ascertain whether the complainant was consenting or might not be consenting, and if so, the nature of those steps; and
  - (iii) any other relevant matters.

In recent times, this section has given rise to considerable difficulty. Taken on its own, a direction that the jury must consider any evidence of a belief in

<sup>28</sup> *Crimes Act 1958* (Vic) s 36(a).

<sup>29</sup> *Ibid* s 36(b).

<sup>30</sup> *Ibid* s 36(d).

<sup>31</sup> *Ibid* s 37AAA(a).

<sup>32</sup> *Ibid* ss 37, 37AAA(b).

<sup>33</sup> The process is highly circuitous. In dealing with consent, s 37(1) requires the judge to direct the jury on the matters set out in s 37AAA which, in turn, incorporates the matters set out in s 36. Thus, the jury must be told of the circumstances in which, non-exhaustively, the person does not freely agree to an act.

<sup>34</sup> At common law, it was understood that rape could be committed as a result of conduct in which the free and conscious permission of the victim had not been obtained. For example, it was always understood that the offence was committed when a man had sexual intercourse with a woman while she was asleep (see J W Cecil Turner, *Kenny's Outlines of Criminal Law* (Cambridge University Press, 19<sup>th</sup> ed, 1966) 200 n 2), or after he had forced her to consent by threats (*R v Jones* (1861) 4 LT 154).

consent, and whether or not that belief was reasonable in the relevant circumstances, would largely accord with common law principle.

The problem, however, is that the section then goes on to say that in determining whether the belief was reasonable, the jury must have regard to the circumstances specified in s 36. The jury are then to be told that if any of those circumstances are found to exist, they must consider whether the accused was aware that that circumstance existed in relation to the complainant, and whether the accused took any steps to ascertain whether the complainant was consenting or might not be consenting and, if so, the nature of those steps.

Yet none of the circumstances set out in s 36 have anything at all to do with the mental state required for rape. They all relate entirely to the issue of consent or free agreement. That issue is part of the actus reus of the offence, and has nothing at all to do with whether or not the accused had the mental state for that offence.

It is here that real difficulty has arisen. Once the state of mind of the accused is linked to the various ‘deeming provisions’ contained in the definition of ‘consent’ in the way that these provisions now require, there is a genuine conflation of two quite separate elements, actus reus and mens rea.

The task of a trial judge in applying these provisions is by no means simple. One of the factors contributing to that difficulty is that the model charge formerly contained in the *Criminal Charge Book* was held by the Court of Appeal to have been erroneous.

The error was first identified in *Worsnop v The Queen* (‘*Worsnop*’).<sup>35</sup> There, the jury had been directed, in accordance with the model charge, as follows:

Evidence of [the accused’s] belief in consent must be taken into account by you when determining whether the prosecution has proved beyond reasonable doubt that the accused was aware that the complainant was not, or might not be, consenting. Even if you find that the accused did have such a belief, you will still need to decide whether the prosecution has proved this fourth element [of rape]. You might find that the accused believed the complainant was consenting, but still be satisfied, beyond reasonable doubt, that the accused was aware of the possibility that the complainant was not consenting. In that case the fourth element would be met.<sup>36</sup>

The Court of Appeal held that this direction was erroneous, because

if the jury concluded that the applicant believed that [the complainant] was consenting to ... penetration, the Crown necessarily failed to establish the fourth element [of rape] to the criminal standard. It mattered not that the belief was, let it be assumed, unreasonable. It followed that the ... part of the charge just cited was erroneous.<sup>37</sup>

<sup>35</sup> (2010) 28 VR 187.

<sup>36</sup> Ibid 192 [20] (Ashley JA) (emphasis altered), quoting the trial judge’s charge to the jury.

<sup>37</sup> Ibid 192 [21] (Ashley JA, Buchanan JA and Beach AJA agreeing). However, in this case, although the decision below was erroneous on a question of law, the proviso under s 568(1) of the *Crimes Act 1958* (Vic) was applied and the appeal was dismissed.

The decision in *Worsnop* has led to a number of rape convictions being quashed, and new trials ordered.<sup>38</sup>

The sheer complexity of the law relating to the mental element in rape can be seen from a brief perusal of several recent cases decided by the Victorian Court of Appeal.

First, *Neal v The Queen*.<sup>39</sup> There, one of the issues was whether awareness on the part of the accused that a circumstance specified in s 36 existed in relation to the complainant necessarily meant that the accused was aware that the complainant was either not consenting or might not be consenting. The Court held that the judge had erred in directing the jury to that effect, because

[t]he question of whether the accused was aware that the complainant was not consenting or might not be consenting must be determined by the jury on the evidence as a whole.<sup>40</sup>

The Court also held, consistently with *Worsnop*, that notwithstanding the difficulties arising from the drafting of the key provisions, a belief that the complainant was consenting precluded a finding that the accused was aware of the possibility that the complainant was not consenting.<sup>41</sup>

Next, in *Sibanda v The Queen*,<sup>42</sup> the complainant had given evidence that she had been asleep when the applicant had sexual intercourse with her. The applicant's evidence was that the complainant was awake and had consented to intercourse. The applicant sought leave to appeal against conviction. One ground of appeal was that the trial miscarried because the trial judge had directed the jury that:

- (a) even if they found that the applicant believed that the complainant had consented to her sexual penetration by him the jury still needed to decide whether the prosecution had proved that the applicant knew she was not consenting or might not be consenting; and

<sup>38</sup> See, eg, *Gordon v The Queen* [2010] VSCA 207 (23 August 2010); *Wignall v The Queen* [2010] VSCA 327 (29 November 2010); *Roberts v The Queen* [2011] VSCA 162 (2 June 2011); *Walker v The Queen* [2011] VSCA 160 (3 June 2011); *Neal v The Queen* [2011] VSCA 172 (15 June 2011); *LA v The Queen* [2011] VSCA 293 (28 September 2011); *GBD v The Queen* [2011] VSCA 437 (16 December 2011). See also *Getachew v The Queen* [2011] VSCA 164 (2 June 2011), which also concerned a direction on the mental element in rape, albeit one that differed from that which was raised in *Worsnop*. In *Getachew*, the Court of Appeal held by a two to one majority that the proviso under s 568(1) of the *Crimes Act 1958* (Vic) could not be invoked in the particular circumstances of that case; the accused's conviction was quashed and a retrial was ordered. The Crown was granted special leave to appeal to the High Court on 29 September 2011. The appeal was heard on 9 March 2012 and judgment delivered on 28 March 2012: see *R v Getachew* [2012] HCA 10 (28 March 2012). The appeal was allowed, and the conviction restored. The judgment in *R v Getachew* casts very real doubt upon the correctness of the decision in *Worsnop*. The High Court observed that, to the extent that *Worsnop* held that the *Crimes (Rape) Act 1991* (Vic) should be regarded as having 'codified' the common law of rape, that case should not be followed: at [12] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

<sup>39</sup> [2011] VSCA 172 (15 June 2011).

<sup>40</sup> *Ibid* [80] (Nettle and Redlich JJA and Kyrrou AJA). As regards one of the relevant counts, the Court considered that it might be appropriate to apply the proviso. However, in the circumstances it was not necessary to consider that possibility further: at [81].

<sup>41</sup> *Ibid* [87]–[90].

<sup>42</sup> [2011] VSCA 285 (23 September 2011).

- (b) the prosecution would have proved mens rea if the jury found that the applicant believed the complainant was consenting but still were satisfied beyond reasonable doubt that the applicant was aware of the possibility that she was not consenting or might not be consenting.<sup>43</sup>

The parties to the application for leave to appeal agreed, in light of *Worsnop*, that the direction had been erroneous.<sup>44</sup> In the particular circumstances of the case, however, the Court considered that the error ‘did not play any operative part in the jury’s verdict’,<sup>45</sup> and accordingly this ground of appeal was rejected. It is interesting to note, in particular, the following comments of Neave JA:

I also wish to comment that the decision in *Worsnop v R* and the cases following it, demonstrate the need for legislative change to clarify and simplify the required mens rea for rape. The current provisions have failed to implement the recommendations made by the Victorian Law Reform Commission, which were intended to ensure that a person who sexually penetrates another person, whilst being aware that the latter is not or might not be consenting to penetration, is guilty of rape.<sup>46</sup>

In *LA v The Queen*, the parties on appeal agreed that the trial judge had erred by directing the jury in accordance with the model direction that had been the subject of consideration in *Worsnop*.<sup>47</sup> The applicant had told police in his record of interview that he believed that the complainant was consenting. He also gave evidence to that effect at trial. The Court held that the applicant’s belief in consent was a ‘central issue in the trial’, and that ‘it [was] by no means clear that the misdirection could not have been operative in the verdict of guilty.’<sup>48</sup> The conviction was set aside and a retrial ordered.

In *Wilson v The Queen*,<sup>49</sup> the applicant (a naturopath) had been convicted of, inter alia, multiple counts of rape. Each complainant had been a patient of the applicant. Relevantly, the Court of Appeal, applying *Getachew v The Queen*,<sup>50</sup> *Roberts v The Queen*<sup>51</sup> and *Neal v The Queen*,<sup>52</sup> found erroneous a direction by the trial judge that had ‘equated awareness of the circumstances of deemed non-consent under s 36(f) and (g) with awareness of a lack of consent or a possible lack of consent.’<sup>53</sup>

The Court reasoned as follows:

The question of whether the accused was aware that the complainant was not consenting or might not be consenting must be determined by the jury on the

<sup>43</sup> Ibid [20] (Sifris AJA).

<sup>44</sup> Ibid [21].

<sup>45</sup> Ibid [60] (Sifris AJA, Nettle and Neave JJA agreeing).

<sup>46</sup> Ibid [7] (citations omitted).

<sup>47</sup> [2011] VSCA 293 (28 September 2011) [17] (Buchanan JA).

<sup>48</sup> Ibid [19] (Buchanan JA, Mandie JA and Whelan AJA agreeing).

<sup>49</sup> [2011] VSCA 328 (27 October 2011).

<sup>50</sup> [2011] VSCA 164 (2 June 2011).

<sup>51</sup> [2011] VSCA 162 (2 June 2011).

<sup>52</sup> [2011] VSCA 172 (15 June 2011).

<sup>53</sup> *Wilson v The Queen* [2011] VSCA 328 (27 October 2011) [130] (Redlich JA and Kyrou AJA, Maxwell P agreeing).

evidence as a whole. The question cannot be foreclosed solely because the jury is satisfied that the accused was aware of the facts that establish deemed non-consent in accordance with s 36. Depending on the facts as a whole, the possibility that an accused might believe that a complainant was consenting notwithstanding that the accused was aware of the circumstances set out in s 36 is not necessarily hypothetical.<sup>54</sup>

The Court also upheld a ground of appeal to the effect that

the trial judge's directions to the jury pursuant to s 37AA ... failed to allow expressly for the possibility that the applicant may have believed that the complainants were consenting ... notwithstanding that such a belief may have been unreasonable.<sup>55</sup>

The appeal was allowed in part and a retrial ordered. Once again, the Court went out of its way to emphasise that

[t]he fact that there has been an increasing number of successful appeals against conviction in this area of the law, is due in no small measure to the fact that this area of the law is too complex and too difficult to explain to a jury.<sup>56</sup>

The law relating to sexual offences in Victoria has been the subject of numerous changes in recent years. Here, I have sought to demonstrate, using just a few examples, that the provisions governing the mental state required for rape in this State are so confusing and badly drafted as to require urgent reconsideration.

It is interesting to observe that the mental state required for rape barely rated a mention in any text on the criminal law that was written more than 20 or so years ago. This subject was regarded as completely straightforward. It did not cause juries any great difficulty. It did not lead to convictions having to be set aside and new trials having to be ordered. Regrettably, that is no longer the case.

It is not as though legislative reform in this area is particularly difficult. Consider, for example, the position in Western Australia where s 319(2)(a) of *The Criminal Code* (WA)<sup>57</sup> defines the term 'consent' in the context of sexual offences as

consent freely and voluntarily given and, without in any way affecting the meaning attributable to those words, a consent is not freely and voluntarily given if it is obtained by force, threat, intimidation, deceit, or any fraudulent means ...

As regards the mental state for the offence of sexual penetration without consent in Western Australia, that element is satisfied by proof of an intention to

<sup>54</sup> Ibid [132].

<sup>55</sup> Ibid [145].

<sup>56</sup> Ibid [156]. See also at [5] (Maxwell P). The Crown sought special leave to appeal against this decision, and the application was listed to be heard on 9 March 2012. The matter did not proceed on that day: see Transcript of Proceedings, *R v Wilson* [2012] HCATrans 68 (9 March 2012). The High Court ordered that the application be stood out of the list to await the Court's judgment in the matter of *Getachew*. As previously indicated, judgment in *R v Getachew* was delivered on 28 March 2012: see [2012] HCA 10 (28 March 2012). The appeal was allowed and the accused's conviction restored. It is not clear, at this stage, what the consequences of that decision will be for *Wilson*.

<sup>57</sup> *Criminal Code Act Compilation Act 1913* (WA) sch ('*The Criminal Code*') s 319(2)(a).

engage in sexual penetration.<sup>58</sup> It is open to an accused, however, to rely upon an honest and reasonable belief in consent as a defence to a charge of rape.<sup>59</sup>

Whether or not an honest belief that is not reasonable should negate rape is, of course, a matter for legitimate debate. So too is the question of whether the onus should lie upon the accused to establish such a belief or whether, the matter having been raised, it is for the Crown to disprove it. One thing can, however, be said. The Western Australian reforms are simple, clear and easy to understand. That is more than can be said for the hotchpotch of provisions that currently apply in Victoria.

#### V JURY DIRECTIONS

I turn next to the subject of jury directions in general and, in particular, the extent to which, by their sheer length and complexity, they have contributed to the problems with the criminal justice system in Victoria. Much has been written on this subject. For that reason, my comments will be brief.

In a speech delivered by Lord Justice Moses of the English Court of Appeal in late 2010, and presented again at the Berlin Conference of the Australian Bar Association in July 2011, comment was made about the fact that in Scotland the standard jury direction normally takes between 15 and 18 minutes.<sup>60</sup>

The position in the United States is broadly the same. Most jury charges there are in standard form, and are delivered in about half an hour. Of course, judges in that country do not summarise the evidence led at trial.

In Victoria, the position is different. Jury directions typically take hours, if not days, to deliver. If anything, the position is getting worse, as the minimal requirements for a charge that can withstand scrutiny become ever more demanding.

This issue was the subject of an excellent report prepared by the Victorian Law Reform Commission in 2009.<sup>61</sup> The Commission recommended that legislation be enacted containing general principles that guide the content of all jury directions. It emphasised that directions should be clear, simple, brief, comprehensible and tailored to the circumstances of the particular case. Regrettably, a number of the jury directions that I have seen would fail to meet any of these requirements.<sup>62</sup>

How has this come about? The first, and perhaps most important, reason is that judges today are required, whether pursuant to statute or at common law, to give

<sup>58</sup> See *ibid* s 23.

<sup>59</sup> *Ibid* s 24.

<sup>60</sup> Lord Justice Moses, 'Summing Down the Summing-Up' (Speech delivered at the Judiciary of England and Wales Annual Law Reform Lecture, Inner Temple, 23 November 2010) 7 <<http://www.judiciary.gov.uk/media/speeches/2010/speech-moses-lj-summing-down-summing-up>>.

<sup>61</sup> Victorian Law Reform Commission, *Jury Directions: Final Report* (2009).

<sup>62</sup> At the time that this paper is being updated, there are major developments occurring in relation to simplification of jury directions. Several committees have been constituted with a view to recommending significant changes to the law. At the behest of the Chief Justice and the President of the Court of Appeal, I myself will be engaged in that task for a period of three months from mid March 2012, with the support of various judges, members of the *Criminal Charge Book* Committee and others.

juries the most comprehensive and detailed warnings about a host of specific matters, none of which were ever thought necessary in the past.

Some commentators have questioned the need for any such warnings to be given.<sup>63</sup> Others have criticised not so much the fact that the warnings are given, but rather the fact that they are delivered in such prolix terms. They have expressed doubt as to whether these warnings have any beneficial effects at all, or whether they merely enhance the risk that a trial may miscarry.<sup>64</sup>

The Victorian Law Reform Commission's report identified several areas where, in its view, the law requires urgent attention. The first of these is the warning that must be given regarding lies as 'consciousness of guilt'. That warning (which in Victoria, sadly, has been extended to post-offence conduct generally)<sup>65</sup> stems from the well-known decision of the High Court in *Edwards v The Queen* ('*Edwards*').<sup>66</sup>

The Commission was critical of the *Edwards* direction. As its report notes, lies are just a species of circumstantial evidence.<sup>67</sup> No specific warning is required of the dangers of acting upon evidence of that kind, although 'such evidence may be just as incriminating and just as ambiguous' as evidence of lies.<sup>68</sup>

*Edwards*, as understood in Victoria, requires the trial judge to identify with precision every piece of post-offence conduct relied upon by the Crown as evidence of 'consciousness of guilt'.<sup>69</sup> The judge must then warn the jury in the most detailed of terms as to how that evidence can, and cannot, be approached.<sup>70</sup> The need for an *Edwards* direction to be given has led to many convictions being quashed.<sup>71</sup>

The matter is still more complicated. A trial judge must decide whether to give what is sometimes described as the 'full' *Edwards* direction, or whether instead to give only what is known as a '*Zoneff* direction'.<sup>72</sup> If the judge adopts the latter course, the jury must be told that, assuming they find that the accused has told lies, they are not to treat them as an admission of guilt, but rather only as going to credit. Of course, any distinction between an admission of guilt and a finding that the accused is not to be believed is likely in practice to be entirely illusory. In any event, jurors undoubtedly find directions of the kind now required by cases such as *Edwards* and *Zoneff* to be almost incomprehensible.

In the United States, juries are told about the possible significance of lies in just one or two short and simple paragraphs. Certainly, they are not directed in

<sup>63</sup> Geoffrey Flatman and Mirko Bagaric, 'Juries Peers or Puppets — The Need to Curtail Jury Instructions' (1998) 22 *Criminal Law Journal* 207.

<sup>64</sup> See, eg, Justice William Young, 'Summing-Up to Juries in Criminal Cases — What Jury Research Says about Current Rules and Practice' [2003] *Criminal Law Review* 665.

<sup>65</sup> *R v Ciantar* (2006) 16 VR 26; *R v Cavkic [No 2]* (2009) 28 VR 341.

<sup>66</sup> (1993) 178 CLR 193.

<sup>67</sup> Victorian Law Reform Commission, *Jury Directions*, above n 61, 38 [3.14].

<sup>68</sup> *Ibid.*

<sup>69</sup> (1993) 178 CLR 193, 210–11 (Deane, Dawson and Gaudron JJ).

<sup>70</sup> *Ibid.* 211.

<sup>71</sup> Victorian Law Reform Commission, *Jury Directions*, above n 61, 49 [3.78].

<sup>72</sup> See *Zoneff v The Queen* (2000) 200 CLR 234.

anything like the detail set out in the seven or so pages currently stipulated for an *Edwards* direction in the *Criminal Charge Book*.<sup>73</sup>

Warnings which are probably unnecessary, and certainly confusing, must now be given in a host of other areas. Some of these warnings reflect nothing more than common sense.

For example, of course juries should be warned of the dangers of mistaken identification. Courts in this country have long recognised the fallibility of eyewitness identifications, and the need to instruct juries appropriately as to factors that might increase the risk that a witness is mistaken. It does not follow, however, that each and every component of what is known as a ‘*Domican* warning’<sup>74</sup> must be given in every case. It is difficult to understand why a jury, when warned as to the dangers of mistaken identification, should have to be told that they must take into account the fact that memory fades over time. Jurors are not stupid. The law should not treat them as though they were.

Some warnings are couched in language that almost defies understanding. For example, the law relating to propensity evidence used to be quite straightforward. The ‘similar fact’ rule involved a question of admissibility only, to be resolved by the judge. The evidence either met the high threshold necessary for admission, or it did not.<sup>75</sup>

These days, there is considerable pressure upon politicians to enact laws designed to make it easier to convict those charged with sexual offending. Not surprisingly, the legislators have responded accordingly. Evidence of a kind that would never previously have been led by the Crown is now routinely sought to be adduced.

Sometimes, this takes the form of what is described as ‘tendency’ or ‘coincidence’ evidence.<sup>76</sup> On other occasions, it is given a different name, such as ‘relationship’ or ‘context’ evidence.<sup>77</sup> A significant body of jurisprudence has built up in recent years around what are often described as ‘uncharged acts’.<sup>78</sup>

<sup>73</sup> It is understood, as at March 2012, that legislation is being prepared to overcome the difficulties associated with the requirements laid down by the High Court in *Edwards*. It is expected that such legislation will be enacted before the end of 2012.

<sup>74</sup> See *Domican v The Queen* (1992) 173 CLR 555.

<sup>75</sup> There was nothing terribly wrong with the ‘striking similarity’ test laid down by the House of Lords in *DPP v Boardman* [1975] AC 421 and repeatedly followed with relative ease by the High Court and the intermediate appellate courts of the states throughout the 1970s and 1980s. Confusion developed when the High Court reformulated the test for admissibility in *Pfennig v The Queen* (1995) 182 CLR 461. The law in this area arguably reached its nadir with the decision in *HML v The Queen* (2008) 235 CLR 334, a case in which the various members of the Court produced individual judgments that are difficult to reconcile (as well as to understand), and from which no clear ratio can be discerned.

<sup>76</sup> See *Evidence Act 2008* (Vic) ss 97–8.

<sup>77</sup> *Gipp v The Queen* (1998) 194 CLR 106. See also, eg, *WFS v The Queen* [2011] VSCA 347 (11 November 2011).

<sup>78</sup> *R v Vonarx* [1999] 3 VR 618, 622 (Winneke P, Callaway JA and Southwell AJA); *R v Sadler* (2008) 20 VR 69. See also, eg, *BCH v The Queen* [2011] VSCA 350 (14 November 2011). Note that in *HML v The Queen* (2008) 235 CLR 334, the High Court cautioned against the use of the term ‘uncharged acts’ because of its prejudicial nature, particularly bearing in mind the fact that the description of the conduct might not be sufficiently specific to found the laying of a criminal charge: at 389 [129] (Hayne J), 494 [492] (Kiefel J); see also at 349 [1] (Gleeson CJ), 419 [257] (Heydon J), 472 [399] (Crennan J).

Perhaps the relaxation of the formerly more stringent requirements for the admission of evidence of prior sexual misconduct would not of itself matter all that much in terms of adding to the complexity of trials for sexual offences, but for the fact that the legislature now requires a series of highly prescriptive warnings to be given regarding the use of this evidence.<sup>79</sup> The courts themselves have elaborated upon these warnings, and in some cases added to them.<sup>80</sup> They are said to be necessary in order to achieve some form of ‘balance’ in the process.<sup>81</sup>

Unfortunately, the form that these warnings must take is expressed in language that often leaves a good deal to be desired. The theory behind the obligation to give such warnings is no doubt sound. But, frankly, I wonder whether in practice they really serve any useful purpose. In fact, in some cases, they may do more harm than good.<sup>82</sup>

The difficulties that arise in relation to warnings of this kind are exacerbated in the context of the typical case where an accused is charged with multiple offences involving a number of different complainants. As is often the case, the Crown seeks to have all of the charges tried together. It argues that this course should be permitted because the evidence is ‘cross-admissible’. It relies in that regard upon ss 97 and 98 of the *Evidence Act 2008* (Vic), which deal with tendency evidence and coincidence evidence respectively. Assume that the judge rules in favour of the Crown on this issue. Assume further that the Crown also seeks in the same trial to rely upon evidence of ‘uncharged acts’. That evidence is said to be relevant in various ways including, for example, that it provides ‘context’. Assume that, once again, the judge rules in favour of the Crown.

Now, however, the problems really become apparent. The jury must be warned, in appropriate terms, of the ways in which they can, and perhaps more importantly cannot, use such evidence.

Insofar as the evidence is led as tendency evidence, the jury will be told that if they accept the evidence they may infer that the accused had a particular pattern of behaviour, and may further infer that this makes it more likely that he or she committed the offences charged. They will further be told that they must not use the evidence to reason that if the accused had the particular pattern of behaviour, he or she must therefore have committed the offences charged. They will be told that they must not substitute the evidence of the other acts for the evidence of the offences charged. Finally, they will be told that they must not close their minds against the accused, and must not focus upon the evidence of the other acts to the exclusion of the evidence relating to the offence or offences charged.<sup>83</sup>

<sup>79</sup> See *Evidence Act 2008* (Vic) s 95. See generally *R v ATM* [2000] NSWCCA 475 (24 November 2000) [75] (Howie J); *R v Dixon* [2001] NSWCCA 39 (16 March 2001) [85] (Whealy J); *L'Estrange v The Queen* [2011] NSWCCA 89 (1 April 2011) [77] (McCallum J).

<sup>80</sup> See, eg, *R v Grech* [1997] 2 VR 609, 614 (Callaway JA, Phillips CJ and Smith AJA agreeing).

<sup>81</sup> See *HML v The Queen* (2008) 235 CLR 334, 366–71 [56]–[62] (Kirby J).

<sup>82</sup> Warning a jury that evidence of extraneous sexual conduct is admitted solely to establish the relationship between the accused and the complainant, and not as evidence of propensity, is unlikely to do more, in some cases, than draw attention to this evidence and add to its potential prejudicial effect.

<sup>83</sup> See generally *Criminal Charge Book*, above n 20, ch 4.16.2.

If the evidence is led as going to rebut coincidence, the jury will similarly be told how they can and cannot use this evidence. They will be told, for example, that they must not use such evidence to reason that the accused is the kind of person who commits offences of the type alleged against him or her and therefore is more likely to have committed the offences charged.<sup>84</sup>

It is obvious that there will be problems associated with directions of these kinds, particularly if the evidence is led as going to both tendency and coincidence. The jury will have to be told that insofar as it goes to tendency, they must apply a particular form of reasoning which just happens to be prohibited insofar as the evidence goes to coincidence.

The matter is made still more complex if the evidence that is led is adduced not merely as going to tendency or coincidence, but also as going to ‘relationship’ or ‘context’. Now the judge must somehow convey to the jury that insofar as the evidence is considered as going to tendency, they may, within appropriate limits, use propensity reasoning. But when the same evidence is considered as going to relationship or context, propensity reasoning is prohibited. Experience suggests that ordinary jurors would be justifiably mystified by directions of this kind.

It is interesting to note that the bench notes relating to the warnings to be given in relation to tendency evidence now take up 11 full pages of the *Criminal Charge Book*.<sup>85</sup> Although trial judges are repeatedly told by the Court of Appeal to avoid slavish adherence to the language of any model charge contained in the *Criminal Charge Book*,<sup>86</sup> there is always a risk that a departure from the terms of the warnings set out therein will lead to a conviction being quashed. It is hardly surprising, in these circumstances, that most trial judges are cautious and follow the language of the model charge closely. Sometimes, they do so even to the point of directing the jury about matters that are not in issue in the trial. Once again, this is an area that requires close attention.

## VI CONCLUSION

I have sought in this paper to indicate some of my concerns about the current state of the criminal law in Victoria. I have focused, in particular, upon the extraordinary complexity that now attends most aspects of the law in this area.

It is not difficult to work out how this has come about. In part, it is the product of poorly drafted and highly prescriptive legislation that is couched in terms that are entirely unforgiving. When a statute is enacted with a view to anticipating every conceivable eventuality, the result is likely to be a series of provisions that are prolix, opaque, and difficult to apply. More particularly, any Act that purports to lay down, in detail, precisely how trial judges must go about directing juries is an almost certain recipe for trouble.

<sup>84</sup> See generally *ibid* ch 4.16.5.

<sup>85</sup> See *ibid* ch 4.16.1.

<sup>86</sup> See, eg, *Milkins v The Queen* [2011] VSCA 93 (13 April 2011) [41] (Weinberg JA, Mandie and Tate JJA agreeing); *LQ v The Queen* [2011] VSCA 135 (13 May 2011) [20] (Maxwell P, Weinberg and Harper JJA).

Regrettably, appellate courts have contributed in no small measure to the sheer complexity that now bedevils many aspects of the criminal law. For one thing, appellate judgments are often simply much too long. They tend to say a great deal that is unnecessary, and of little use to those who must apply the law on a day-to-day basis. The reasoning they contain may be rigorous and analytically sound, but if it cannot be understood except by other appellate judges, and perhaps expert commentators, its utility is surely limited.

Genuine reform of the criminal law is, of course, highly desirable. However, in our enthusiasm for such reform, we sometimes lose sight of the fact that jurors try serious crimes. They are expected to understand at least the basic legal principles that govern their decisions. If in our quest for analytical perfection we refine those principles to the point of incomprehensibility, we do no service to our system of criminal justice.