Judicial College of Victoria

JURY DIRECTIONS ACT 2015 EVALUATION

Judicial survey results

Contents

1. Foreword

The enactment of the Jury Directions Act 2013 was a watershed in Victorian criminal law. Unique in Australia, the legislation expressed Parliament's determination to make jury directions simpler and clearer, in order to enhance the capacity of juries to perform their adjudicative function. At the same time, the Act redefined the respective responsibilities of judge and trial counsel for deciding which directions should be given (or not given).

Unusually, too, judges and practitioners had helped shape the content of the new law. The establishment in 2010 of the Jury Directions Advisory Group brought together experienced participants in the criminal justice system, Departmental policy officers and academic experts, in a sustained collaborative effort which continues today.

Early anecdotal reports suggested that the new provisions were improving the conduct of jury trials. But no conclusions could be drawn about the efficacy of the reforms without a proper evidence base, both quantitative and qualitative. The survey conducted by the Judicial College of Victoria has filled that crucial gap.

As this report makes clear, trial judges are overwhelmingly positive about the changes. The results show that the introduction of the "directions request" process, with responsibility resting squarely on trial counsel, has been just as salutary as the provision of simplified directions on difficult topics such as post-offence conduct.

Equally important are the areas for further work which this report identifies. These reforms must be kept under constant review, to ensure that they are working as intended and that appropriate modifications are made when experience in the court room indicates that this is necessary.

Most of all, publication of this report serves to emphasise that future thinking about jury directions reform will continue to be guided by the views of those with first-hand experience of the realities of jury trials.

The Honourable Justice Chris Maxwell AC

President of the Court of Appeal, Supreme Court of Victoria

February 2019

2. Executive Summary

The *Jury Directions Act 2013* and the *Jury Directions Act 2015* made significant changes to both the content and procedure concerning jury directions in Victoria. This evaluation was conducted by surveying Supreme Court and County Court judges to obtain their views on the impact of the reforms. The responses demonstrated a high level of satisfaction with the Part 3 request process and generally high levels of satisfaction with the reforms to the content of directions. However, the survey responses reveal six areas of potential future work.

Directions Request process

Seven out of 19 judges reported that barristers are sometimes or rarely prepared for the directions request process. The request process is arguably the most significant aspect of the reforms, because it reframed the distribution of responsibilities concerning jury directions compared to the common law. Given the importance of the request process, this feedback suggests a need for further education among barristers of their obligations under Part 3 and how to prepare for the request process.

Incriminating conduct

While the incriminating conduct reforms were hailed as an improvement over the common law, judges expressed concerns about the ability of prosecutors to appropriately identify incriminating conduct and file appropriate notices. In particular, one judge reported that prosecutors are seeking to confine the use of evidence to avoid engaging with the rules on incriminating conduct. This suggests a need for further work among prosecutors to understand and apply the relevant provisions.

Forensic disadvantage

The reforms to forensic disadvantage directions continue to require barristers to identify the nature of the disadvantage. Responses to the survey indicated that further work is required among defence practitioners to fulfil their obligations to assist the court in this regard.

Delayed complaint

The revised directions on good reasons for delay seem to have prompted prosecutors to more often ask complainants about their reasons for delay. Consistent with other parts of the Act which require a party to identify significant matters that inform the direction (such as identification evidence directions and forensic disadvantage directions), the Department of Justice and Regulation should

consider whether a similar obligation should be placed on prosecutors to identify, based on the evidence, the possible good reasons for delay which arise in the case.

Application of beyond reasonable doubt

While there were several strongly favourable comments about ss 61 and 62, which modify where the criminal standard applies, a surprisingly high number of responses indicated that the section either had not changed their existing practices or that there were important factual matters which still needed to be proved beyond reasonable doubt. Given the strict terms of the provision, these responses suggest that, for some judges, the sections are not having their intended operation, and further work is required to promote compliance with this aspect of the Act.

Continued monitoring

This survey was conducted approximately four years after the *Jury Directions Act 2013* commenced operation, two years after the *Jury Directions Act 2015* commenced operation and did not include any questions on the operation of the *Jury Directions and Other Acts Amendment Act 2017*. The Department of Justice and Regulation should consider whether to conduct a further evaluation in 2019 or 2020 to measure both the impact of the 2017 reforms and to measure whether any of the issues identified in this evaluation have been addressed.

3. Introduction

Between 3 July 2017 and 18 September 2017, 56 judicial officers of the Supreme Court and County Court had the opportunity to complete a survey on the *Jury Directions Act 2015* ('the Act'). Twenty-one judicial officers completed the survey, giving a 35.7% response rate. For the purpose of the following analysis, one response was excluded as the survey software failed to display mandatory questions to the recipient, with the result that the response contained inadequate data to meaningfully analyse.

The survey asked questions on the following 14 reform areas:[1]

- Overall impressions of the Jury Directions Act
- Preparation and delivery of directions
- The request process
- Incriminating conduct directions
- Other misconduct evidence directions
- Unreliable evidence directions
- Identification directions
- Significant forensic disadvantage directions
- Directions on the accused's silence
- Prohibited statements under section 42
- Prosecution failure to call or question witnesses
- Directions on delay and credibility
- Matters that must be proved beyond reasonable doubt
- Directions on the meaning of beyond reasonable doubt

Participants selected which of these topics had been relevant to their trials. This affected which questions each respondent was asked to answer. As a result, the number of responses on each topic varied between six and 20.

[1] The full list of survey questions with information on responses is attached as Appendix A.

4. Overall impressions of the Jury Directions Act

Of the 19 responses to this question,[2] 18 agreed with the statement that:

> The Act has, overall, **improved** the conduct of criminal trials in Victoria.

In contrast, one respondent stated that:

> The Act has, overall, had a **minimal impact** on the conduct of criminal trials in Victoria.

This demonstrates that the Act is viewed positively by the bulk of Victorian judicial officers. As legislation which has had a significant impact on the management and conduct of trials, this high level of support among judicial officers indicates that the changes introduced by the reforms have been well-managed and that the consultation process leading up to the reforms was very effective in securing judicial buy-in for the reforms.

5. Preparation and delivery of directions

This portion of the survey asked respondents to consider the length and the content of their directions. The responses revealed the following:

- The average length of time spent preparing charges was between five and 10 hours;
- The average length of time spent delivering charges was between 60 and 90 minutes;
- Fifteen judicial officers (88%) considered that their charges were shorter following the Act, while two (12%) considered that their charges were the same length;[3]
- Respondents were almost evenly split on whether the Act had reduced the number of directions of law. Nine (53%) thought that it had reduced the number of directions, while seven (41%) thought it had made no change;[4]
- Most respondents thought the Act had reduced their inclusion of references to the evidence (n = 14, 82%);
- Most respondents indicated that the Act had not affected their inclusion of references to how

[2] One respondent stated that they had not heard trials prior to the *Jury Directions Act 2013*. This response has not been counted for the purpose of this question.

[3] Three respondents stated that they had no delivered charges prior to the *Jury Directions Act 2013*.

[4] One respondent stated that they now give more directions of law compared to before the *Jury Directions Act 2013*.

the parties put their case (n = 11, 65%);

- Most respondents indicated that the Act had not affected their use of written directions (n=12, 71%). However, it was surprising to see that two respondents (12%) now give fewer written directions while only three respondents (19%) now give more written directions;
- Only four respondents (20%) have delivered an 'integrated direction'.

These results suggest that ss 65(c) and 66 have meaningfully reduced the judge's summary of evidence, while other aspects of s 65, such as removing the obligation to summarise the party's case or only explain so much of the law as is necessary, have not led to significant change. Interestingly, of the four respondents who have given integrated directions, two of them indicated that they now tell the jury more about how the parties put their case, while the other two indicated that it either made no change or they tell the jury less about how the parties put their case. This reflects the diversity in how integrated directions may be structured and the relative focus of integrated directions between law, evidence and argument.

Two of the judges who had not given integrated directions commented that:

- I would like to, but inexperience with the format and fear of departure from the charge book discourages their use
- Probably often desirable but takes time. Preparation could be complex. Jury checklists usually suffice

When asked for general comments about the preparation and delivery of directions, judges commented that:

- It works well
- They have freed me up from feeling the need to act like a transcript summary service
- Helpful and sensible and offering far more clarity to the jury
- A significant improvement on the previous position which I greatly welcome

6. The request process

Judicial officers were asked to comment on how prepared barristers were for the discussion that occurs in the request process. Of the 19 responses, 12 (63%) indicated that barristers are generally well prepared for the discussion, four (21%) indicated that barristers are sometimes prepared and three (16%) indicated that barristers are rarely prepared. This suggests that while barristers have generally adapted to their obligations under the request process, there is still room for improvement.

Under the Act's request process, the default position is that a judge will give any direction that is asked for and does not need to give any direction that is not sought. This is subject to two exceptions – a judge need not give a requested direction if there are good reasons to do so; and a judge must give a direction that has not been sought if there are substantial and compelling reasons to do so. Judicial officers indicated that they had rarely used those exceptions, with only six judges (32%) invoking the 'good reasons' exception and four judges (21%) invoking the 'substantial and compelling reasons' exception.

In relation to the 'good reasons' exception, judges noted that:

- Although I haven't used it, it is a helpful safeguard to have it there
- It is vital. Counsel will always seek a direction that favours them whether validly sought or not so which could lead to ridiculous results if there were not this exemption
- It is workable and appropriate
- Informed discussion with counsel usually results in the withdrawal of the request
- It is a sensible provisions, even if it does provide possible appeal points
- It is appropriate

It is not surprising that the 'substantial and compelling' reasons exception has been used so infrequently. As respondents noted:

- I was just making sure the accused got a fair trial by giving a direction not specifically requested by Counsel. It was to do with delay and the disadvantage
- I raise with counsel any matters that I feel need to be ventilated
- If directions have not been requested, I generally raise this with Counsel and it is resolved without needing to exercise the power under s16
- I am fortunate to generally have competent and experienced counsel before me. It is helpful to know the provision is there to utilize if I feel the case requires it in spite of counsel

- Again this is vital, it is perfectly possible for counsel to overlook directions that are vital in a particular trial
- It is workable and appropriate
- If there is no request, and the judge considers the direction should be given, counsel usually agree. I have sometimes suggested a direction when there has been no request, and the suggestion is usually agreed to by at least one party. Presumably the judge can then dispense with the need for substantial and compelling reasons. However, it is unlikely the judge would make the suggestion unless there were such reasons
- It is an important protection for the accused

Judges also made a number of valuable comments about the general operation of the request process:

- I think this is the best part of the changes. It engages counsel for both sides. It generally narrows down the issues and limits the "trawling" for appeal points by the appellate barristers because all issues at trial have been addressed
- Defence counsel are not necessarily as astute as the judge to identify all necessary directions
- I have no problem with it as long as there is plenty of discretion around them for the judge to decide whether or not those directions should be given
- It is workable and appropriate
- I find it helpful (sometimes at least) to raise it with counsel before empanelment and to exhort them to settle between them the content of any contentious jury instructions, so that, by the time the request process begins counsel have been working on it as the trial unfolds
- More often than not, I suggest a number of directions for Counsel's consideration as they haven't turn their minds to this aspect
- I raise it with counsel quite early in the trial, usually. I think that is important – not to wait until the end of the evidence, although I always formally raise it then anyway, and settle everything. I think the process works well, but needs to be judge-led
- It is a useful process and helps focus attention on important matters
- I often have to check if I think there is an obvious direction that has not been requested. Usually it is then requested but sometimes not

These responses indicate that the request process is working well overall. However, it is alarming that 36% of judges indicated that barristers are 'rarely' or 'sometimes' prepared for the discussion.

This suggests that further training of barristers is necessary to improve compliance with the Act's request process. This training is vital, as the request process underpins the whole jury directions process under the Act.

7. Incriminating conduct directions

Division 1 of Part 4 of the Act re-enacted Part 6 of the *Jury Directions Act 2013*, which reformed the law relating to post-offence conduct. Under the new process, prosecutors must file notice of an intention to rely on evidence that, in the language of the common law, shows a 'consciousness of guilt' or, in the language of the Act, shows 'incriminating conduct'. This is conduct by an accused which the prosecution invites the jury to use to draw an inference that the accused knew or believed that he or she had committed the offence charged.

Judicial officers were asked to comment on whether prosecutors were appropriately complying with their obligation to give notice of their intention to rely on incriminating conduct evidence. Thirteen respondents (72%) stated that prosecutors either 'usually' or 'always' file notices on time and in appropriate cases while five respondents (28%) stated that there was inconsistent practice, with some prosecutors complying with the notice requirement and others not.

Judges also made the following general comments about these provisions:

- You cannot apply too much care to this part of the Act
- Although the current law and charge is a vast improvement, the references to "there are many reasons why the accused may believe they are guilty etc" is still confusing for some juries, depending on the context of the case
- They are helpful and add to clarity of directions on this most complex topic
- The provisions are workable and appropriate, but must be applied early, at the direction of the judge in the pre-trial directions process, if necessary
- Not directly on point but I find that the Prosecution are often too reluctant to rely on pieces of evidence for this purpose but still want the evidence in when it's hard to see how else the evidence is relevant – often, it's not credibility type evidence and yet they want directions along these lines which don't properly fit
- It is much better than the old direction. It places an obligation on prosecutors to have considered the matter early, so time is not wasted during the trial – it results in a smoother process, in which there is less likelihood of something being left out or forgotten. It was a bit hit or miss under the old system
- They are an improvement on the pre JDA landscape

- My impression is that practitioners are finding this area unclear particularly the overlap between incriminating conduct and implied admissions

These responses suggest that the reforms have succeeded in bringing greater clarity to an area of the law which caused great difficulties before the *Jury Directions Act*. However, both the quantitative and qualitative feedback indicates that there is scope for further professional development for prosecutors to improve their compliance with the process. As noted above, 28% of judges who completed this section stated that whether prosecutors comply correctly with the notice process appears to depend on the identity of the prosecutor. In addition, one of the free-text responses was that prosecutors are reluctant to use the incriminating conduct provisions and seek to rely on the evidence purely for a credit purpose. This practice was more common before the *Jury Directions Act*, and may have been a reaction to the stringency of the common law *Edwards* direction.[5] However, under the Act, there appears to be less reason for prosecutors to approach the evidence with this same degree of reluctance.

8. Other misconduct evidence directions

Division 2 of Part 4 of the Act reformed the law governing directions on propensity, tendency, coincidence, similar fact, context and relationship evidence. The Act makes directions on these topics subject to the request process, changed the content of the directions and separated out the anti-tendency/anti-propensity component of the direction from the other directions that may be given in relation to 'other misconduct evidence'.

Respondents were asked two associated questions about the new statutory directions on 'other misconduct evidence' – Whether the directions were easier or more difficult to *prepare* and whether the directions provided the jury with more or less *assistance*. There was strong support for the view that the new directions are easier to prepare compared to the common law, with 14 out of 16 respondents (87%) agreeing that the directions were easier to prepare.[6] There was also strong support for the view that the directions provided the jury with more assistance, with 12 out of 16 respondents (75%) saying that the directions provided the jury with more assistance than the equivalent common law directions.[7]

[5] *Edwards v The Queen* (1993) 178 CLR 193.

[6] One respondent said the directions were neither more nor less complex and one respondent said the directions were harder to prepare.

[7] Two respondents (13%) said that the directions provided the jury with less assistance and two respondents (13%) said that the directions provided the jury with the same amount of assistance compared to the common law directions.

Respondents were also asked about the use of s 29, which requires a specific and separate request for a direction warning the jury not to use the evidence for a tendency purpose. Responses to this question were split, with nine respondents (50%) saying that s 29 directions were usually requested where relevant, while eight respondents (44%) said there was no consistent practice on whether s 29 directions were sought. One respondent (6%) stated that s 29 directions are not sought even where relevant.

General comments about these provisions included:

- Too hard to understand[8]
- Workable and appropriate
- The provisions usually prompt a discussion about the need for the direction. E.g. the forensic wisdom of giving the direction, where it might only serve to highlight unnecessarily the other misconduct evidence
- They are appropriate
- Not sure why it doesn't include an anti propensity reasoning wearing [sic] as an option[9]

Overall, these provisions appear to be working well, though there may be scope for further education on the operation of s 29 and its role within Division 2 of Part 4.

9. Unreliable evidence directions

Division 3 of Part 4 of the Act concerns unreliable evidence warnings. These provisions were modelled on ss 165 and 165A of the *Evidence Act 2008*. The *Jury Directions Act 2015* amended ss 165 and 165A so that those provisions were limited to civil proceedings. Unlike the *Evidence Act 2008* provisions, the *Jury Directions Act 2015* requires a person seeking a warning to specify the *significant matters* which may make the evidence unreliable. This is consistent with the goal of the Act of giving practitioners the opportunity and responsibility to inform the content of directions and ensure that directions are tailored to the issues in the case.

[8] The respondent who made this comment considered that the directions were easier to prepare, but provided the jury with less assistance than the common law directions.

[9] As noted above, Division 2 does include the option of an anti-propensity direction, in the form of a s 29 direction. It is therefore difficult to understand this comment, especially as this is the same respondent who stated that s 29 directions are not being requested even where relevant. It may reflect a view that anti-propensity / anti-tendency directions should be given as a matter of course.

Respondents were asked whether the provision had introduced any significant changes in law or practice compared to the *Evidence Act 2008*. Thirteen out of 16 respondents said that the Act had not made any significant changes (84%), while three respondents said that the Act did make significant changes (16%). Respondents who said that the Act had made significant changes commented that:

- They are a real improvement on the evidence act sections
- Greatly increased clarity and systematic integration with other directions

These responses indicate that this Division of the Act is working well, and there is no indication that either legislative reform or further education is required concerning this topic.

10. Identification evidence

Division 4 of Part 4 of the Act replaces the provisions on identification evidence directions that were previously part of the *Evidence Act 2008*. In contrast to the previous *Evidence Act 2008* provisions, the *Jury Directions Act 2015* made the direction depend on a request and requires the requesting party to identify the significant matters that may make the evidence unreliable. The *Jury Directions Act 2015* also explicitly identifies two general considerations relevant to identification evidence directions (the risk that a witness honestly believes that his or her evidence is accurate and that the honest but mistaken witness may be convincing), rather than leaving judges to identify these general considerations from the common law.

Nine judges completed this part of the survey. Of those, seven agreed that barristers generally or always identify the relevant significant matters as part of a request (78%), and two stated that barristers sometimes identify significant matters (22%). On the content of the directions, eight judges (89%) agreed that the directions provide the jury with the right amount of instruction on identification evidence, and only one judge (11%) thought the directions provided the jury with too much information. Five judges said that their identification evidence directions are now shorter than at common law (56%), while two said that directions are the same length (22%) and one said that directions are now longer on average (11%).[10]

In addition to the quantitative feedback, two judges commented favourably on these provisions, saying that they were 'generally a positive step' and 'very helpful'.

These responses indicate that the provisions are working well. The Act has improved identification evidence directions by making them more targeted to the concerns of the parties and less dependent on formulaic invocations of a common law mantra.

[10] One respondent had not heard any criminal trials before the commencement of the *Jury Directions Act 2015*.

11. Significant forensic disadvantage

Division 5 of Part 4 of the *Jury Directions Act 2015* regulates the giving of directions on significant forensic disadvantage. It replaced parts of *Crimes Act 1958* s 61 and *Evidence Act 2008* s 165B. The direction is conditional on a request,[11] the practitioner must identify the significant forensic disadvantage and judicial officers are prohibited from saying or suggesting, as part of the direction, that the complainant's evidence should be scrutinised with great care.

The survey indicated that this provision is generally working well. Eleven out of 14 respondents agreed that barristers always or generally identify the nature of the significant forensic disadvantage (79%), and three respondents said that barristers sometimes identified the nature of the significant forensic disadvantage (21%).

Despite these generally favourable indications, two of the respondents who said that barristers only sometimes identify the disadvantage commented that:

- This question is difficult to accurately answer as I want to say that barristers sometimes ineptly identify the nature of this
- Defence counsel often needs to be pushed to provide the nature of the forensic disadvantage, and it is nearly always opposed by the prosecution. It is often not easy to decide

These responses suggest that this is a further area in which training for the legal profession could be usefully directed. Arguments about forensic disadvantage are intensely fact-specific. Such training would therefore need to grapple with the legal parameters of forensic disadvantage and the forensic considerations which should inform the content of a requested direction.

One respondent opposed the restrictions on the content of the direction, saying:

- I think the mandatory prohibition in the S39(3) are unnecessary and overreach. There are cases where it is appropriate to give a jury a stiff warning or caution about certain evidence

As the Department of Justice and Regulation explained in Jury Directions: A Jury-Centric Approach,[12] the prohibition of saying that it would be 'dangerous to convict' is based on a concern that this

[11] Compare *Greensill v The Queen* (2012) 37 VR 257 [46]-[49].

[12] Department of Justice and Regulation, *Jury Directions: A Jury Centric Approach* (March 2015) <http://assets.justice.vic.gov.au/justice/resources/935d6517-281e-4b0c-ae1e-f5ae69e33e23/jury-directions-a-jury-centric-approach.pdf>.

phrase may be taken as a signal to acquit and so interfere with the jury's fact-finding role.[13] In relation to the phrase 'scrutinise with great care', the Department noted that:

> The QLRC considers that similar concerns are raised by the phrase 'scrutinise with great care', which is also common in Longman directions. As the QLRC noted, the problems with these expressions:
>
> > lie with the use of unusual expressions that could well seem to non-lawyers sitting on juries to convey particular unintended meaning or be laden with particular emphasis or significance. If the warning to be conveyed to the jury is that it should review certain evidence carefully, especially if it is not corroborated, before reaching any conclusions based on it (or on it alone), then these simpler words can be used.
>
> While not as inherently problematic as 'dangerous or unsafe to convict', requiring the jury to scrutinise the complainant's evidence 'with great care' goes considerably further (and is quite different in emphasis) than informing the jury of the need to take the forensic disadvantage to the accused 'into account'. It is also problematic because the jury should be encouraged to scrutinise all the evidence before it with great care, not just particular evidence. Accordingly, the Bill will prohibit the use of this expression in directions on delay and forensic disadvantage.[14]

12. Silence of the accused

Section 41 of the *Jury Directions Act 2015* codified the directions that may be given where the accused chooses not to give evidence. Under the common law, the direction was "almost always … desirable".[15] However, prior to the *Jury Directions Act 2015*, there was a perception among some barristers that the common law direction drew undue attention to the accused's choice to stand silent, and so judges were asked from time to time to refrain from giving the direction.

There appears to still be a degree of scepticism or reluctance concerning the direction on silence under the *Jury Directions Act 2015*. Seven out of 19 respondents stated that there was no consistent practice on whether a s41 direction would be sought and that it would depend on the identity of counsel and the facts of the case (37%), whereas 12 out of 19 said that defence counsel 'usually seek' or 'always seek' a s 41 direction if the accused did not give evidence (63%).

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[13] Ibid 66.

[14] Ibid 68.

[15] *Azzopardi v The Queen* (2001) 205 CLR 50 [51].

Observing the change in practices concerning this direction, one respondent remarked:

- Attitude of defence counsel has changed in the last few years. I no longer encounter much opposition to this direction being given, and defence asks for it much more often than previously. I think that is due primarily to the advent of the Evidence Act, shored up now by the JDA

The spread of practices which judges have reported should be viewed at the Act working as it was intended. The request process is premised on the theory that practitioners should have primary responsibility for deciding what matters should be highlighted to the jury and to weigh the forensic risks involved in the judge giving or not giving a direction.

13. Prohibited statements under s 42

Section 42 of the *Jury Directions Act 2015* prohibits the judge and parties from making certain comments about the accused's choice to not give evidence. These directions prohibit suggestions on various inculpatory paths of reasoning that were, in principle, available under the common law but reserved for exceptional cases.[16]

Seven judges completed this section of the survey, with six saying that barristers 'always' comply with these prohibitions (86%) and one saying that barristers 'generally' comply with these prohibitions (14%).

These results suggest that this prohibition is working appropriately. However, the low response rate to this section of the survey means that the operation of s 42 is an area that will need close monitoring in future years to acquire a more meaningful dataset before reaching any conclusions.

14. Prosecution failure to call witnesses

Section 43 of the *Jury Directions Act 2015* codifies the *Jones v Dunkel*[17] warning that may be given in relation to a prosecution failure to call a witness. Under the section, there must be a request for the warning, the judge must be satisfied that the prosecution was reasonably expected to call the witness and has not satisfactorily explained why they did not call the witness and judge may explain that the jury may conclude that the witness would not have assisted the prosecution's case.

Six judges completed this section of the survey and indicated that either the section is not being used much (17%, n=1) or the section has not led to any changes in practice (83%, n=5).

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[16] See *Azzopardi v The Queen* (2001) 205 CLR 50 and *Dyers v The Queen* (2002) 210 CLR 285 and compare *Weissensteiner v The Queen* (1993) 178 CLR 217.

[17] *Jones v Dunkel* (1959) 101 CLR 298.

These results also suggest that this provision is working appropriately. However, the low response rate to this section of the survey again means that this is an area that will need close monitoring in future years.

15. Delay and credibility

Division 2 of Part 5 of the *Jury Directions Act 2015* regulates the judge's obligation and opportunity to give directions on the significance, in sexual abuse cases, of delay in complaint to the complainant's credibility.

This Division introduced several significant changes to the law. First, it prohibited the judge, prosecution and defence counsel from saying or suggesting that complainants who delay in making a complaint are, as a class, less credible or require more careful scrutiny than other complainants. Second, it provides for mandatory directions about the significance of delay where the judge considers that there is likely to be evidence of a delay in complaint. Third, it makes the warning about the possibility of good reasons for delay contingent on a prosecution request.

Fourteen respondents completed the questions in this section of the survey.

Eight respondents stated that barristers generally comply with the new prohibition regarding the credibility of complainants as a class in circumstances of delay complaint (57%), and six stated that barristers always comply with this prohibition (43%).

Five judges considered that this new provision had changed how parties make arguments about the significance of delay (35%). Their comments revealed mixed views about the appropriateness of the change:

- I would say this has resulted in a weakening or watering down in the manner in which Counsel can address about delay and its significance
- Not so much in defence submissions but it has led to the prosecution being far more explicit about delay not being a factor to be held against complainants. S53 has led to much more careful and explicit submissions by prosecutors about what might constitute good reasons for delay in a case. They are also far more likely to ask a complainant of his/her reasons for the delay
- With greater acceptance in society of the reasons for delay in complaining, this issue has lost its impact. It is now well known that people often delay complaining for many years
- It's not focused on

As the Department explained in *Jury Directions: A Jury-Centric Approach*, the law previously treated delay as an indicator of unreliability in a manner that was contrary to modern empirical research. The Act therefore expanded on the previous law to prohibit broad-brush arguments about the significance of delay while seeking to preserve the ability of parties to make targeted arguments

about the significance of delay in the circumstances of an individual case.[18] As one of the judges noted above, social assumptions about the dynamics of sexual offending are continuing to change. The release of 'Challenging misconceptions about sexual offending'[19] and the work of the Royal Commission into Institutional Responses to Child Sexual Abuse will continue to affect the attitudes and assumptions that citizens bring into the jury room about the circumstances of sexual offences.

Under s 52, the judge must give directions on the significance of delay before the evidence is led, if possible. Generally, judges found it easy to identify whether the direction is needed, with nine saying that it was easy to identify whether the direction was needed in most cases (64%) and one saying that it was easy to identify in all cases (7%). However, three judges said that it was easy to identify the need for the direction in some cases and hard to do so in others (21%), and one judge said that is hard to identify whether the direction in most cases (7%).

There was general support for the direction, with nine saying the direction is clear and helpful (64%). However, one judge said the direction is not needed (7%), one judge said the direction is both not needed and not understood (7%). Three judges gave custom responses (21%) with the following comments:

- It is very hard to assess what the jury make of it when it is given. I doubt they can remember it by the end of the trial
- It must be discussed with counsel – particularly as to the timing of the direction. Sometimes a s53 is foreshadowed
- I am concerned that giving the direction at the start overemphasises the delay when the jury only have a very limited amount of information

As noted above, the direction on the possibility that a complainant has good reasons for a delay is only given in response to a request. Eight judges indicated that most prosecutors usually seek a good reasons for delay direction (57%), while two judges indicated that prosecutors always seek such a direction (14%). However, four judges stated that there was no consistent practice, and it depended on the identity of the prosecutor and the facts of the case (29%).

Case law has established that a judge can and should give examples of possible good reasons as part of this direction.[20] Five judges indicated that prosecutors specify possible good reasons in most cases (36%), while one judge indicated that prosecutors specify possible good reasons in all cases

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[18] Department of Justice and Regulation (n 12) 94, 98.

[19] Australian Institute of Family Studies and Victoria Police, *Challenging misconceptions about sexual offending: Creating an evidence-based resource for police and legal practitioners* (2017) <http://www.police.vic.gov.au/content.asp?a=internetBridgingPage&Media_ID=131829>.

[20] *AC v The Queen* (2014) 42 VR 278 [70]; *R v ERJ* (2010) 200 A Crim R 270 [51].

(7%). However, eight judges stated that whether this occurs depends on the identity of the prosecutor and the facts of the case (57%).

There were a mix of views about the appropriateness of these provisions. One judge said the provisions were 'not necessary', while another was concerned about a 'danger that it has the appearance of a Judge seeking to excuse the delay in complaint and to have a pre-judge[d] view about the accused's guilt'. There were also two judges who commented favourably on the provisions, saying that it is 'excellent' and 'works well. Much better than old system'.

These responses suggest that there is scope for training of prosecutors concerning the range of matters that may qualify as good reasons. Case law, summarised in the Criminal Charge Book, already provides a number of matters that might arise in any given case which could constitute good reasons for a delay, including:

- being ignorant about the nature, quality and character of the act performed upon them;
- feeling powerless (particularly where, as is usually the case, the offender is a family member or close acquaintance);
- trusting the offender, or being emotionally dependent on them;
- fearing family dissolution or punishment for the offender;
- continuing to be in a sexual relationship with the offender;
- feeling that the relationship with the offender is special;
- being sworn to secrecy or compelled to secrecy by threats;
- feeling responsible, guilty or to blame for the acts;
- feeling shame and embarrassment;
- employing psychological strategies to cope with the abuse, such as repression or suppression of the acts; and
- fearing discouragement or disbelief on the part of family and of officials.[21]

As one judge observed, s 53 has led to prosecutors being more likely to ask a complainant about his or her reasons for delay. This will assist in producing evidence about the reasons for the delay, and will equip the prosecutor with the information needed to make submissions about the content of a 'good reasons for delay' submission. The Department of Justice and Regulation, in consultation with judicial officers, barristers and the Director of Public Prosecutions, should consider whether the Act should require prosecutors to identify possible good reasons. At present, a party requesting a direction on unreliable evidence, identification evidence or significant forensic disadvantage, must identify the significant matters said to justify the warning. There is no equivalent requirement in relation to directions on 'good reasons for delay'.

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[21] Judicial College of Victoria, *Victorian Criminal Charge Book*, 4.8.2 – Bench Notes: Effect of Delayed Complaint on Credit (2 October 2017), [45], <http://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#4106.htm>.

16. Matters that must be proved beyond reasonable doubt

Sections 61 and 62 of the *Jury Directions Act 2015* modified the common law principles which govern what matters must be proved beyond reasonable doubt. Following *Chamberlain*[22] and *Shepherd*,[23] the common law developed the concept of an "essential intermediate fact", which was a matter that was not an element or a defence, but which a jury could not act on unless it was proved beyond reasonable doubt. Sections 61 and 62 have removed the concept of "essential intermediate facts" and return the law to the pre-*Chamberlain* position where the standard of proof only applied to elements and the absence of defences.

Thirteen judges completed this section of the survey. Seven said that s 61 had changed their approach to directing juries (54%), while four said that it had not and that s 61 reflected how they previously directed juries (31%). Two judges selected the option of 'other' (15%), saying:

- I have stuck to s61, emphasizing the concept of reasonable alternative explanations for alleged wrongdoing rather than proof beyond reasonable doubt in relation to truly critical issues of fact
- However, as the general direction re the Crown having to prove a matter or the jury has to be satisfied about a matter means proof BRD I've used this terminology in respect of some aspects of the evidence where justice requires it in my view

Respondents made the following free-text comments about the operation of s 61:

- Long overdue and excellent – leading to far shorter and clearer charges
- I welcome them, but more work is needed to understand how they apply
- I wonder whether there should be a little more flexibility for judges to identify pivotal facts as matters that should be established BRD

The four respondents who said that s 61 had not changed their approach to directing juries were surprising. The law relating to "essential intermediate facts" is extensively discussed in the Simplification of Jury Directions Report: A Report to the Jury Directions Advisory Group[24] and is

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[22] *Chamberlain v The Queen (No 2)* (1984) 153 CLR 521.

[23] *Shepherd v The Queen* (1990) 170 CLR 573.

[24] Supreme Court of Victoria, *Simplification of Jury Directions Report: A Report to the Jury Directions Advisory Group* (August 2012) <http://assets.justice.vic.gov.au//supreme/resources/1d13e7b0-898a-449f-8f21-a4eeea0ff75a/simplification+of+jury+directions+project+report+-+weinberg+j.pdf>.

further discussed in the *Jury Directions: A Jury-Centric Approach*.[25] Based on that discussion, the elimination of the legal concept of "essential intermediate facts" should have resulted in judges changing their approach, rather than being a formal reflection of the existing law. These responses therefore suggest there is a need either for further research or further education to ensure this section is achieving its purpose.[26]

17. The meaning of "beyond reasonable doubt"

Sections 63 and 64 of the *Jury Directions Act 2015* provide for a judge to give the jury an explanation of the venerable term "beyond reasonable doubt". Under the Act, a judge can only give the explanation if asked a question about, or if asked a question which raises, the meaning of "beyond reasonable doubt".

Twelve judges completed this section of the survey. Eleven recorded that they had received a question. Those who had received a question were then given six options to choose from in terms of how they responded to the question. The options and number of responses are listed in the following table:

Response	Number of judges who selected this response
Explained that the term was incapable of further definition	0
Explained that beyond reasonable doubt is the highest possible standard of proof	6
Compared beyond reasonable doubt to the balance of probabilities	4
Explained all of the matters referred to in section 64(1) of the *Jury Directions Act 2015*	6

[25] Department of Justice and Regulation (n 12) 114-116.

[26] One member of the Jury Directions Advisory Group has posed the further explanation that, before the *Jury Directions Act 2015* was enacted, not all judges complied with the law laid down in *Shepherd v The Queen* (1990) 170 CLR 573. If that is correct, then the four respondents who had not changed their practices may have always disregarded the law on "essential intermediate facts", which has now been abolished. This hypothesis should also be considered when deciding whether these results raise cause for concern about the operation of *Jury Directions Act 2015* ss 61 and 62.

Explained some of the matters referred to in section 64(1) of the *Jury Directions Act 2015*	5
Other	0

All respondents explained either some or all of the matters referred to in s 64(1) of the *Jury Directions Act 2015*. Beyond that, there are no strong trends in terms of whether additional matters were more likely depending on the judge's approach to the s 64(1) matters.

These responses show that the reform has been successful in terms of giving judicial officers a meaningful response to a question about beyond reasonable doubt, as no judicial officers gave the common law answer that the term was incapable of further definition.

In *Dookheea v R*[27] Maxwell P, Redlich JA and Croucher AJA observed that:

> In due course, consideration should be given to removing the precondition to the power of explanation in the Jury Directions Act. It is not clear to us why, as a matter of policy, the power of a judge to assist a jury in this respect should depend for its exercise upon the jury first having asked a question.[28]

As part of the survey, judges were asked their view about whether judges should only be able to give the s 64 explanation in response to a question, or whether the s 64 explanation should be standard or discretionary in all cases. The responses were as follows:

- Only in response to a question (no change) – 42% (n=5)
- Given if the judge chooses – 33% (n=4)
- Given in all cases – 25% (n=3)

In relation to a free-text prompt, judges stated:

- Juries find it absurd that our initial instructions are so vague ("ie BRD are ordinary English words etc"), and then the moment they ask a question, we give them a long and very helpful explanation about it
- I think it is excellent
- Of all issues beyond reasonable doubt dominates all criminal trials. Over the years numerous juries have asked what it means despite the limited explanation I give of it in my pretrial remarks (i.e. comparing it to the civil standard etc). I like the definition and I don't see why

[27] *Dookheea v R* [2016] VSCA 67.

[28] Ibid [91].

juries should not be given the benefit of it from the outset. As an aid to the jury's comprehension of the law applicable in the trial it would also save a great deal of time

- It is so frequently asked that we should be giving it whether asked or not. This would require a clear legislative statement

The quantitative data shows there are clear divisions between those who think that s 64 directions should be saved for a response to a question, those who think it should be a matter for judicial discretion and those who think the directions should be standard and mandatory. While there is an aggregate of judges who support change, the meaning of beyond reasonable doubt is a matter of intense importance in the criminal trial process, and the responses to this survey do not show widespread support for changing the process adopted under the *Jury Directions Act 2013* at this time.

18. Conclusion

This evaluation demonstrates that, overall, the *Jury Directions Act 2015* is seen as working well by the judiciary. While there several possible areas of further education to improve compliance, there do not appear to be any unintended consequences which have arisen, or significant matters which are impeding the intended operation of the Act. This result demonstrates the exceptional work of the Criminal Law Review unit in the Department of Justice and Regulation to develop and implement this significant and successful law reform, and the value that the Jury Directions Advisory Group has played in the reform process.

19. Appendix A: Aggregate survey data

Jury Directions Act 2015 evaluation survey

Introduction

Thank you for participating in the *Jury Directions Act 2015* evaluation survey. This survey has been prepared by the Judicial College of Victoria for the purpose of reporting to the Jury Directions Advisory Group. The survey aims to assess the extent to which the *Jury Directions Act 2013* and the *Jury Directions Act 2015* have improved the conduct of jury trials in Victoria and whether there have been any unforeseen consequences of the reforms. This information will assist in identifying the need for any further changes to the *Jury Directions Act 2015* and in identifying any training or other needs to support Victoria's criminal jury trial system.

Individual results from this survey are anonymous. Data will be provided to the Jury Directions Advisory Group and may be provided to other research bodies on request. Analysed and aggregated results may be published at conferences and in appropriate journals.

This survey consists of multiple categories addressing different Parts of the *Jury Directions Act 2015*. You may find it useful to have a copy of the Act on hand for reference. The survey is expected to take between 15 and 30 minutes, depending on the number of categories chosen, and the length of your free text comments.

For any questions about the survey, please contact Matthew Weatherson at the Judicial College of Victoria - matthew.weatherson@judicialcollege.vic.edu.au.

NOTE: *Your answers cannot be changed once you have left a page. Please ensure that you have selected your intended response before clicking next.*

Based on the trials you have heard over the past 2 years, which of the following topics do you have experience with (choose all that apply):

- ☐ Operation of the directions request process
- ☐ Incriminating conduct directions
- ☐ Other misconduct evidence directions
- ☐ Unreliable evidence directions
- ☐ Identification evidence directions
- ☐ Significant forensic disadvantage directions
- ☐ Directions on the accused's silence
- ☐ Prohibited statements under *Jury Directions Act 2015* s42
- ☐ Directions on the prosecution failure to call witnesses
- ☐ Directions on delay and credibility
- ☐ Matters that must be proved beyond reasonable doubt
- ☐ Directions on the meaning of beyond reasonable doubt

Thinking about the *Jury Directions Act 2015* overall, which of the following statements best describes your view of the **impact** of the Act:

- ○ The Act has, overall, **improved** the conduct of criminal trials in Victoria (18)
- ○ The Act has, overall, had a **mixed impact** on the conduct of criminal trials in Victoria. It has improved some aspects of the process, while introduced problems in other areas (0)
- ○ The Act has, overall, had a **negative impact** on the conduct of criminal trials in Victoria (0)
- ○ The Act has, overall, had a **minimal impact** on the conduct of criminal trials in Victoria (1)
- ○ I did not hear any criminal trials before the commencement of the *Jury Directions Act 2015* (1)

Delivery of the Charge

On average, how long do you spend **preparing** your charge for trials under the *Jury Directions Act 2013* and the *Jury Directions Act 2015*?

- ○ Less than an hour
- ○ 1–5 hours (4)
- ○ 5–10 hours (10)
- ○ 10–15 hours (4)
- ○ More than 15 hours (2)

On average, how long does it take to **deliver** your charge for trials under the *Jury Directions Act 2013* and the *Jury Directions Act 2015*?

- ○ Less than 30 minutes (0)
- ○ 30 – 60 minutes (1)
- ○ 60 – 90 minutes (8)
- ○ 1.5 – 3 hours (7)
- ○ More than 3 hours (4)

On average, which of the following statements best describes the impact of the *Jury Directions Act 2013* and the *Jury Directions Act 2015* on the **length** of your charge:

- ○ My directions are now **shorter** than before the *Jury Directions Act 2013* (15)
- ○ My directions are **about the same length** as before the *Jury Directions Act 2013* (2)
- ○ My directions are now **longer** than before the *Jury Directions Act 2013* (0)
- ○ I did not hear any criminal trials before the commencement of the *Jury Directions Act 2013* (3)

On average, how many **exceptions** do parties take to the charge?

- ○ 0–1 (15)
- ○ 2–4 (5)
- ○ 5–7 (0)
- ○ 8 or more (0)

Summing up

Sections 65 and 66 of the *Jury Directions Act 2015* specify the judge's obligations when summing up. Compared to your practice before the introduction of the *Jury Directions Act 2013*, how have these provisions affected your **directions on law**?

- ○ I now give the jury **more directions** of law than before the *Jury Directions Act 2013* (1)
- ○ I give **the same number** of directions of law than before the *Jury Directions Act 2013* (7)
- ○ I now give the jury **fewer** directions of law than before the *Jury Directions Act 2013* (9)
- ○ I did not hear any criminal trials before the commencement of the *Jury Directions Act 2013* (3)

Compared to your practice before the introduction of the *Jury Directions Act 2013*, how have these provisions affected your **references to the evidence**?

- ○ I now tell the jury **more** about the evidence than before the *Jury Directions Act 2013* (0)
- ○ I now tell the jury the **same** amount about the evidence as before the *Jury Directions Act 2013* (3)
- ○ I now tell the jury **less** about the evidence than before the *Jury Directions Act 2013* (14)
- ○ I did not hear any criminal trials before the commencement of the *Jury Directions Act 2013* (3)

Compared to your practice before the introduction of the *Jury Directions Act 2013*, how have these provisions affected your references to **how the parties have put their case**?

- ○ I now tell the jury **more** about how the parties put their case than before the *Jury Directions Act 2013* (3)
- ○ I now tell the jury **the same amount** about how the parties put their case as before the *Jury Directions Act 2013* (11)
- ○ I now tell the jury **less** about how the parties put their case than before the *Jury Directions Act 2013* (3)
- ○ I did not hear any criminal trials before the commencement of the *Jury Directions Act 2013* (3)

Compared to your practice before the introduction of the *Jury Directions Act 2013*, how have these provisions affected your use of written directions (e.g. question trails, checklists and summaries of legal directions)?

- ○ I now give the jury **more** written directions than before the *Jury Directions Act 2013* (3)
- ○ I now give the jury the **same** number of written directions as before the *Jury Directions Act 2013* (12)
- ○ I now give the jury **fewer** written directions than before the *Jury Directions Act 2013* (2)
- ○ I did not hear any criminal trials before the commencement of the *Jury Directions Act 2013* (3)

Have you given an 'integrated direction' under s67? Do you have any comments about the 'integrated direction' provisions?

- Yes (4)
- No (16)

I have not given a jury an integrated direction (4)

I would like to, but inexperience with the format and fear of departure from the charge book discourages their use (13)

Probably often desirable but takes time. Preparation could be complex. Jury checklists usually suffice (15)

Do you have any general comments about the operation of sections 65 to 67 of the *Jury Directions Act 2015*?

No (2)

No (4)

It works well (21)

No (5)

They have freed me up from feeling the need to act like a transcript summary service (6)

Helpful and sensible and offering far more clarity to the jury (8)

A significant improvement on the previous position which I greatly welcome (9)

No (12)

One day I might tackle it (15)

Operation of the request process

Under *Jury Directions Act 2015* ss11 and 12, the parties must identify the matters in issue and request directions. Which of these statements best describes the readiness of barristers for these discussions:

- ○ Barristers are **never** well prepared for this discussion (0)
- ○ Barristers are **rarely** well prepared for this discussion (3)
- ○ Barristers are **sometimes** well prepared for this discussion (4)
- ○ Barristers are **generally** well prepared for this discussion (12)
- ○ Barristers are **always** well prepared for this discussion (0)

Under *Jury Directions Act 2015* s14, judges must give requested directions unless there are good reasons for not doing so. Have you ever invoked the 'good reasons' exception?

- ○ Yes (6)
- ○ No (13)

Do you have any comments about the operation of the 'good reasons' exception?

No (2)

No (5)

Although I haven't used it, it is a helpful safeguard to have it there (6)

It is vital. Counsel will always seek a direction that favours them whether validly sought or not so which could lead to ridiculous results if there were not this exemption (8)

It is workable and appropriate (9)

Informed discussion with counsel usually results in the withdrawal of the request (13)

It is a sensible provisions, even if it does provide possible appeal points (15)

It is appropriate (18)

Under *Jury Directions Act 2015* s16, judges must give directions that have not been requested if there are substantial and compelling reasons for doing so. Have you ever exercised this power?

- Yes (5)
- No (14)

Do you have any comments about the obligation to give directions that have not been requested if there are substantial and compelling reasons for doing so?

No (2)

I was just making sure the accused got a fair trial by giving a direction not specifically requested by Counsel. It was to do with delay and the disadvantage (4)

I raise with counsel any matters that I feel need to be ventilated (1)

If directions have not been requested, I generally raise this with Counsel and it is resolved without needing to exercise the power under s16 (3)

No (5)

I am fortunate to generally have competent and experienced counsel before me. It is helpful to know the provision is there to utilize if I feel the case requires it in spite of counsel (6)

Again this is vital, it is perfectly possible for counsel to overlook directions that are vital in a particular trial (8)

It is workable and appropriate (9)

If there is no request, and the judge considers the direction should be given, counsel usually agree. I have sometimes suggested a direction when there has been no request, and the suggestion is usually agreed to by at least one party. Presumably the judge can then dispense with the need for substantial and compelling reasons. However, it is unlikely the judge would make the suggestion unless there were such reasons (15)

It is an important protection for the accused (18)

Do you have any general comments about the operation of the request process?

No (2)

I think this is the best part of the changes. It engages counsel for both sides. It generally narrows down the issues and limits the "trawling" for appeal points by the appellate barristers because all issues at trial have been addressed (4)

Defence counsel are not necessarily as astute as the judge to identify all necessary directions (1)

No (5)

I have no problem with it as long as there is plenty of discretion around them for the judge to decide whether or not those directions should be given (8)

It is workable and appropriate (9)

I find it helpful (sometimes at least) to raise it with counsel before empanelment and to exhort them to settle between them the content of any contentious jury instructions, so that, by the time the request process begins counsel have been working on it as the trial unfolds (13)

More often than not, I suggest a number of directions for Counsel's consideration as they haven't turn their minds to this aspect (14)

I raise it with counsel quite early in the trial, usually. I think that is important – not to wait until the end of the evidence, although I always formally raise it then anyway, and settle everything. I think the process works well, but needs to be judge-led (15)

It is a useful process and helps focus attention on important matters (18)

I often have to check if I think there is an obvious direction that has not been requested. Usually it is then requested but sometimes not (19)

Incriminating conduct

Under *Jury Directions Act 2015* section 19 the prosecution must file notice when seeking to rely on incriminating conduct evidence. Which of the following statements best describes the **prosecution's performance** of this obligation:

- ○ Prosecutors **never** comply with section 19. Notices are either **late**, or the prosecution seeks to rely on incriminating conduct in the **absence of a notice** (0)
- ○ Most prosecutors often seek to **file notices late**, or rely on incriminating conduct in the **absence of a notice** (0)
- ○ There is **inconsistent** practice. Some prosecutors comply, while others do not (5)
- ○ Most prosecutors usually files notices **on time** and **in appropriate cases** (12)
- ○ Prosecutors **always** file notices **on time** and **in appropriate cases** (1)

Do you have any general comments about the operation of the incriminating conduct evidence provisions of the *Jury Directions Act 2015?*

No (2)

You cannot apply too much care to this part of the Act (4)

No (5)

Although the current law and charge is a vast improvement, the references to "there are many reasons why the accused may believe they are guilty etc" is still confusing for some juries, depending on the context of the case (6)

They are helpful and add to clarity of directions on this most complex topic (8)

The provisions are workable and appropriate, but must be applied early, at the direction of the judge in the pre-trial directions process, if necessary (9)

No (12)

Not directly on point but I find that the Prosecution are often too reluctant to rely on pieces of evidence for this purpose but still want the evidence in when it's hard to see how else the evidence

is relevant – often, it's not credibility type evidence and yet they want directions along these lines which don't properly fit (14)

It is much better than the old direction. It places an obligation on prosecutors to have considered the matter early, so time is not wasted during the trial – it results in a smoother process, in which there is less likelihood of something being left out or forgotten. It was a bit hit or miss under the old system (15)

They are an improvement on the pre JDA landscape (18)

My impression is that practitioners are finding this area unclear particularly the overlap between incriminating conduct and implied admissions (19)

Other misconduct evidence

Sections 27 to 29 of the *Jury Directions Act 2015* prescribe statutory directions on other misconduct evidence. Which of these statements best describes your view of the difficulty of **preparing** these directions:

- ○ The *Jury Directions Act* directions are **easier to prepare** than the equivalent common law directions (14)
- ○ The *Jury Directions Act* directions are **neither more nor less complex** than the equivalent common law directions (1)
- ○ The *Jury Directions Act* directions are **harder to prepare** than the equivalent common law directions (1)
- ○ I did not hear any criminal trials before the commencement of the *Jury Directions Act 2013* (2)

In your opinion, which of the following statements best describes the **level of assistance** the directions provide the jury:

- ○ The *Jury Directions Act* directions provide the jury with **more assistance** than the equivalent common law directions (12)
- ○ The *Jury Directions Act* directions provide the jury with the **same amount of assistance** than the equivalent common law directions (2)
- ○ The *Jury Directions Act* directions provide the jury with **less assistance** than the equivalent common law directions (2)
- ○ I did not hear any criminal trials before the commencement of the *Jury Directions Act 2013* (2)

Section 29 provides that parties must specifically request a direction against tendency reasoning. In your experience, do parties **usually request** this direction in cases where it is applicable, or do parties opt not to seek this direction?

- ○ Section 29 directions are **usually requested** where relevant (9)
- ○ There is **no consistent practice** on whether section 29 directions are requested (8)
- ○ Section 29 directions are **usually not requested** even where relevant (1)

Do you have any general comments about the operation of the other misconduct evidence provisions of the Jury Directions Act 2015?

Too hard to understand (2)

No (5)

Workable and appropriate (9)

The provisions usually prompt a discussion about the need for the direction. E.g. the forensic wisdom of giving the direction, where it might only serve to highlight unnecessarily the other misconduct evidence (15)

They are appropriate (18)

Not sure why it doesn't include an anti propensity reasoning wearing [sic] as an option (19)

Unreliable evidence

Division 3 of the *Jury Directions Act 2015* was designed to cover similar content to *Evidence Act 2008* ss165 and 165A directions. In your experience, has this provision introduced **any significant changes** in law or practice compared to the *Evidence Act 2008*?

- ○ Yes (3)
- ○ No (13)
- ○ I did not hear any criminal trials prior to the commencement of the *Jury Directions Act 2015* (3)

Do you have any general comments about the operation of Division 3 of the *Jury Directions Act 2015?*

No (2)

I find the direction in the bench book easy to apply to factual scenarios in the trial I have conducted to date. Most useful (3)

No (5)

They are a real improvement on the evidence act sections (8)

Greatly increased clarity and systematic integration with other directions (9)

No (12)

It is useful and flexible (18)

Identification evidence

Section 36 of the *Jury Directions Act 2015* requires a party requesting an identification evidence direction to identify the significant matters that may make the evidence unreliable. Which of these statements best describes the **performance of parties** with this obligations:

- ○ Barristers **never** identify significant matters as part of the request (0)
- ○ Barristers **rarely** identify significant matters as part of the request (0)
- ○ Barristers **sometimes** identify significant matters as part of the request (2)
- ○ Barristers **generally** identify significant matters as part of the request (6)
- ○ Barristers **always** identify significant matters as part of the request (1)

Part of the purpose of section 36 was to ensure identification evidence directions were more focused on the issues in the case. In your opinion, which of the following statements best describes the level of assistance the directions provide the jury:

- ○ The *Jury Directions Act* directions provide the jury with **insufficient** instruction on identification evidence (0)
- ○ The *Jury Directions Act* directions provide the jury with the **right amount** of instruction on identification evidence (8)
- ○ The *Jury Directions Act* directions provide the jury with **too much** instruction on identification evidence (1)

Compared to your practices at common law, are identification evidence directions now:

- ○ **Shorter** on average (5)
- ○ **About the same length** on average (2)
- ○ **Longer** on average (1)
- ○ I did not hear any criminal trials prior to the commencement of the *Jury Directions Act 2015* (1)

Do you have any general comments about the operation of Division 4 of the *Jury Directions Act 2015?*

No (2)

Generally a positive step (4)

Very helpful (8)

No (12)

Significant forensic disadvantage

Section 39 of the *Jury Directions Act 2015* requires a judge to only give a forensic disadvantage direction if satisfied that a party has experienced a significant forensic disadvantage. Which of these statements best describes the **degree of assistance** parties provide with identifying whether there is a **significant forensic disadvantage**:

- ○ Barristers **never** identify the nature of the significant forensic disadvantage (0)
- ○ Barristers **rarely** identify the nature of the significant forensic disadvantage (1)
- ○ Barristers **sometimes** identify the nature of the significant forensic disadvantage (3)
- ○ Barristers **generally** identify the nature of the significant forensic disadvantage (9)
- ○ Barristers **always** identify the nature of the significant forensic disadvantage (2)

Do you have any general comments about the operation of Division 5 of the *Jury Directions Act 2015?*

No (2)

No (5)

The attitude of the CCA to this direction – i.e. that it should generally be given has meant that in most cases involving delay I have given the warning. It is helpful that counsel must be part of identifying the relevant forensic disadvantages (8)

This question is difficult to accurately answer as I want to say that barristers sometimes ineptly identify the nature of this (14)

Defence counsel often needs to be pushed to provide the nature of the forensic disadvantage, and it is nearly always opposed by the prosecution. It is often not easy to decide (15)

No (18)

Silence of the accused

Section 41 allows defence counsel to request certain directions on the fact that the accused does not give evidence. In your experience, how are parties approaching the directions in section 41 on the accused not giving evidence:

- ○ Defence counsel **never** seek a section 41 direction if the accused did not give evidence (0)
- ○ **Most** defence counsel **usually do not seek** a section 41 direction if the accused did not give evidence (0)
- ○ There is **no consistent practice**. Whether defence counsel seeks a section 41 direction depends on the identity of defence counsel and the facts of the case (7)
- ○ **Most** defence counsel **usually seek** a section 41 direction if the accused did not give evidence (9)
- ○ Defence counsel **always** seek a section 41 direction if the accused did not give evidence (3)

Do you have any general comments about the operation of section 41 of the *Jury Directions Act 2015?*

No (2)

I think the mandatory prohibition in the S39(3) are unnecessary and overreach. There are cases where it is appropriate to give a jury a stiff warning or caution about certain evidence (4)

No (5)

No (12)

Attitude of defence counsel has changed in the last few years. I no longer encounter much opposition to this direction being given, and defence asks for it much more often than previously. I think that is due primarily to the advent of the Evidence Act, shored up now by the JDA (15)

It is well drafted in my opinion and juries take note of it (18)

Prohibited statements under s42

Section 42 of the *Jury Directions Act 2015* prohibits a judge or a party from saying or suggesting to a jury that the accused's choice not to give evidence or to not call a witness provides support for a conclusion of guilt. In your experience, are prosecution and defence counsel **complying with these prohibitions**?

- ○ Barristers **never** comply with this prohibition (0)
- ○ Barristers **rarely** comply with this prohibition (0)
- ○ Barristers **sometimes** comply with this prohibition (0)
- ○ Barristers **generally** comply with this prohibition (1)
- ○ Barristers **always** comply with this prohibition (6)

Do you have any general comments about the operation of section 42 of the *Jury Directions Act 2015?*

No (2)

Same as for s.41 (15)

Prosecution failure to call witnesses – s43

Section 43 provides that defence counsel may request a direction about the fact that the prosecution did not call or question a witness. In your experience, has the introduction of s43 **changed practices** among defence counsel about seeking a direction on the prosecution failure to call witnesses? If so, how?

- ○ **Yes**, practices have **significantly** changed(0)
- ○ **Yes**, practices have **somewhat** changed(1)

  This section has clarified what was a rather messy and unclear area. It is not being used much however in my experience (8)
- ○ **No**, practices have not changed (5)
- ○ I did not hear any criminal trials before the commencement of the *Jury Directions Act 2015* (0)

Have you had a case where defence counsel applied for a section 43 direction and you **refused to give** the direction as the circumstances did not meet the preconditions in section 43(2)? If so, briefly describe the case.

- ○ **Yes**, I've refused a direction due to section 43(2) (2)

  I can't remember the case but it related to a witness of limited relevance (8)

  A request was made however I was not satisfied that S43(2)(a) was established (10)
- ○ **No**, I have not refused a direction due to section 43(2) (4)

Do you have any general comments about the operation of section 43 of the *Jury Directions Act 2015?*

No (2)

Delay and credibility

Section 51(1)(c) of the *Jury Directions Act 2015* prohibits parties from saying or suggesting that complainants who delay in making a complaint are, as a class, **less credible** or **require more careful scrutiny** than other complainants. In your experience, are prosecution and defence counsel complying with this prohibition?

- ○ Barristers **never** comply with this prohibition (0)
- ○ Barristers **rarely** comply with this prohibition (0)
- ○ Barristers **sometimes** comply with this prohibition (0)
- ○ Barristers **generally** comply with this prohibition (8)
- ○ Barristers **always** comply with this prohibition (6)

In your experience, has section 51(1)(c) of the *Jury Directions Act 2015* **changed the way** parties make arguments about the **significance** of delay in complaint? If you have noticed a change, please provide examples:

- ○ Yes (5)

  I would say this has resulted in a weakening or watering down in the manner in which Counsel can address about delay and its significance (4)

  Not so much in defence submissions but it has led to the prosecution being far more explicit about delay not being a factor to be held against complainants. S53 has led to much more careful and explicit submissions by prosecutors about what might constitute good reasons for

delay in a case. They are also far more likely to ask a complainant of his/her reasons for the delay (8)
With greater acceptance in society of the reasons for delay in complaining, this issue has lost its impact. It is now well known that people often delay complaining for many years (15)
It's not focused on (20)

- ○ No (9)
- ○ I did not hear any criminal trials before the commencement of the *Jury Directions Act 2015* (0)

Section 52 of the *Jury Directions Act 2015* requires the judge to give preliminary directions in cases involving delayed complaint. In your experience, which of these statements best describes your ability to **identify cases** where this is necessary before the trial starts?

- ○ In **all** cases it is **hard to identify** whether a section 52 direction is needed
- ○ In **most** cases it is **hard to identify** whether a section 52 direction is needed (1)
- ○ In **some** cases it is **easy to identify** and in **other cases** it is **hard to identify** whether a section 52 direction is needed (3)
- ○ In **most** cases it is **easy to identify** whether a section 52 direction is needed (9)
- ○ In **all** cases it is **easy to identify** whether a section 52 direction is needed (1)

Do you think the section 52(4) direction provides jurors with **appropriate guidance** on assessing the **significance of delay in complaint**?

- ○ **Yes**, the direction is **clear** and **helpful** (9)
- ○ **No**, jurors do not seem to **understand** the direction at the start of the trial (0)
- ○ **No**, jurors **do not need** to be told how to assess delay in complaint (1)
- ○ **No**, jurors do not seem to **understand** the direction and in any event **should not be told** how to assess delay in complaint (1)
- ○ **Other** – Please specify: (3)

  It is very hard to assess what the jury make of it when it is given. I doubt they can remember it by the end of the trial (13)

  It must be discussed with counsel – particularly as to the timing of the direction. Sometimes a s53 is foreshadowed (15)

  I am concerned that giving the direction at the start overemphasises the delay when the jury only have a very limited amount of information (19)

In cases where delay in complaint is in issue, does the prosecution seek a section 53 '**good reasons for delay'** direction?

- ○ Prosecutors **never** seek a section 53 direction
- ○ **Most prosecutors** usually **do not seek** a section 53 direction
- ○ **There is no consistent** practice. Whether the prosecution seeks a section 53 direction depends on the identity of prosecution counsel and the facts of the case (4)
- ○ **Most prosecutors** usually seek a section 53 direction (8)
- ○ Prosecutors **always** seek a section 53 direction (2)

In cases where the prosecution seeks a section 53 direction, does the prosecution **provide specific possible reasons** relevant in the case?

- Prosecutors **never** specify possible good reasons
- In **most** cases prosecutors **do not** specify possible good reasons
- **There is no consistent** practice. Whether the prosecution specifies possible good reasons depends on the identity of prosecution counsel and the facts of the case (8)
- In **most** cases prosecutors specify possible good reasons (5)
- Prosecutors **always** specify possible good reasons (1)

Do you have any general comments about the operation of Part 5, Division 2 of the *Jury Directions Act 2015?*

Not necessary (2)

I think there is the danger that it has the appearance of a Judge seeking to excuse the delay in complaint and to have a pre-judge view about the accused's guilt (4)

Again I have answered questions here as no option was given to reflect that the issue had not arisen in trials before me to date

No (5)

I think it's excellent (8)

No (12)

Works well. Much better than old system (15)

What must be proved beyond reasonable doubt

Jury Directions Act 2015 specifies that only the elements and the absence of defences need to be proved beyond reasonable doubt. Has this **changed your approach** to directing juries?

- ○ **Yes** (7)
- ○ **No**, there are **still other matters** that I tell a jury must be proved beyond reasonable doubt (Please provide examples)
- ○ **No**, section 61 reflects **how I have previously directed juries** (4)
- ○ **Other** – Please specify (2)

I have stuck to s61, emphasizing the concept of reasonable alternative explanations for alleged wrongdoing rather than proof beyond reasonable doubt in relation to truly critical issues of fact (9)
However, as the general direction re the Crown having to prove a matter or the jury has to be satisfied about a matter means proof BRD I've used this terminology in respect of some aspects of the evidence where justice requires it in my view (14)

- ○ I did not hear any criminal trials before the commencement of the *Jury Directions Act 2015* (3)

Do you have any general comments about the operation of sections 61 and 62 of the *Jury Directions Act 2015?*

No (2)

Long overdue and excellent – leading to far shorter and clearer charges (8)

I welcome them, but more work is needed to understand how they apply (9)

No (12)

I wonder whether there should be a little more flexibility for judges to identify pivotal facts as matters that should be established BRD (18)

Meaning of beyond reasonable doubt

Have you **received a question** from the jury about the meaning of beyond reasonable doubt since the introduction of the *Jury Directions Act 2013*?

- ○ Yes (11)
- ○ No (1)

Where you have received a question, **did you** (choose all responses that apply):

- ☐ Explain that the term was incapable of further definition (0)
- ☐ Explained that beyond reasonable doubt is the highest possible standard of proof (6)
- ☐ Compared beyond reasonable doubt to the balance of probabilities (4)
- ☐ Explained all of the matters referred to in section 64(1) of the Jury Directions Act 2015 (6)
- ☐ Explained some of the matters referred to under section 64(1) of the Jury Directions Act 2015 (5)
- ☐ Other – Please specify (0)

Section 64 specifies that the explanations can only be given in response to a **question**. In your opinion, should this requirement govern when an explanation can be given?

- ○ **Yes**, the section 64 directions should **only be given** when the jury has a **question** about the meaning of beyond reasonable doubt (5)
- ○ **No**, I should be able to give the section 64 directions in **any case I choose** (4)
- ○ **No**, the section 64 directions should be **standard** (3)
- ○ **Other** – Please specify(0)

Of all issues beyond reasonable doubt dominates all criminal trials. Over the years numerous juries have asked what it means despite the limited explanation I give of it in my pretrial remarks (i.e. comparing it to the civil standard etc). I like the definition and I don't see why juries should not be given the benefit of it from the outset. As an aid to the jury's comprehension of the law applicable in the trial it would also save a great deal of time[29] (8)

Do you have any general comments about the operation of section 64 of the *Jury Directions Act 2015?*

Juries find it absurd that our initial instructions are so vague ("ie BRD are ordinary English words etc", and then the moment they ask a question, we give them a long and very helpful explanation about it (6)

I think it is excellent (8)

It is so frequently asked that we should be giving it whether asked or not. This would require a clear legislative statement (17)

No (18)

[29] Coded as No, the section 64 directions should be standard.

Demographic questions

How long have you been a judge?

- ○ Less than 3 years (2)
- ○ 3–10 years (7)
- ○ 10–15 years (6)
- ○ More than 15 years (5)

Which of the following statements best describes the balance of your judicial work?

- ○ I **mostly** sit in crime (12)
- ○ I **split** my time between both the criminal and non-criminal jurisdiction (7)
- ○ I **rarely** sit in crime (1)

Before being appointed to the court, how many years of experience did you have in running criminal trials?

- ○ None (9)
- ○ Less than 5 years (2)
- ○ 5–10 years (1)
- ○ 10–15 years (1)
- ○ More than 15 years (7)