

Examinable excerpts of

Jury Directions Act 2015

as at 2 October 2019

Part 1—Preliminary

1 Purposes

The purposes of this Act are—

- (a) to reduce the complexity of jury directions in criminal trials; and
- (b) to simplify and clarify the issues that juries must determine in criminal trials; and
- (c) to simplify and clarify the duties of the trial judge in giving jury directions in criminal trials; and
- (d) to clarify that it is one of the duties of legal practitioners appearing in criminal trials to assist the trial judge in deciding which jury directions should be given; and
- (e) to assist the trial judge to give jury directions in a manner that is as clear, brief, simple and comprehensible as possible; and
- (f) to provide for simplified jury directions in relation to specific issues; and
- (g) to re-enact the **Jury Directions Act 2013** with amendments; and
- (h) to amend the **Evidence Act 2008** in relation to corroboration directions; and
- (i) to make consequential and other amendments.

...

3 Definitions

In this Act—

accused has the same meaning as in the **Criminal Procedure Act 2009**;

alternative offence means an offence in respect of which the jury may, in accordance with any Act or any other law, find the accused guilty if the jury is not satisfied that the accused is guilty of an offence charged;

defence includes an exception, exemption, proviso, excuse or qualification to an offence, whether or not it accompanies any description of the offence in an enactment;

defence counsel means a legal practitioner representing an accused;

direction includes an explanation under section 63 or 64;

general directions means directions concerning matters relating to the conduct of trials generally, including—

- (a) the roles of the trial judge, the jury and counsel; and
- (b) the empanelment of a jury and the selection of a foreperson; and
- (c) trial procedure; and
- (d) the need to decide issues on the basis of admissible evidence only; and
- (e) the need to decide each charge separately according to the evidence relating to that charge; and
- (f) the assessment of witnesses; and
- (g) the presumption of innocence and the burden and standard of proof, including what must be proved beyond reasonable doubt; and
- (h) the drawing of conclusions and the distinction between direct and circumstantial evidence; and
- (i) jury deliberations and verdicts;

legal practitioner has the same meaning as in the **Criminal Procedure Act 2009**;

requested direction means a direction that the trial judge is requested to give to the jury under section 12;

trial judge has the same meaning as in the **Criminal Procedure Act 2009**.

4 Application of Act

This Act applies despite any rule of law or practice to the contrary.

4A Application of Act to criminal proceedings without juries

(1) This section applies to—

- (a) a summary hearing or committal proceeding under the **Criminal Procedure Act 2009**; and
- (b) an appeal or case stated under the **Criminal Procedure Act 2009**; and
- (c) an appeal or case stated under Part 5.4 of the **Children, Youth and Families Act 2005**; and
- (d) a special hearing under Division 3 of Part 5A of the **Crimes (Mental Impairment and Unfitness to be Tried) Act 1997**; and
- (e) an appeal under section 24AA or 38ZE of the **Crimes (Mental Impairment and Unfitness to be Tried) Act 1997**.

(2) The court's reasoning with respect to any matter in relation to which Part 4, 5, 6 or 7 makes provision—

- (a) must be consistent with how a jury would be directed in accordance with this Act; and
- (b) must not accept, rely on or adopt—

- (i) a statement or suggestion that this Act prohibits a trial judge from making; or
- (ii) a direction that this Act prohibits a trial judge from giving."

Part 2—General

5 Guiding principles

- (1) The Parliament recognises that—
 - (a) the role of the jury in a criminal trial is to determine the issues that are in dispute between the prosecution and the accused; and
 - (b) in recent decades, the law of jury directions in criminal trials has become increasingly complex; and
 - (c) this development—
 - (i) has made jury directions increasingly complex, technical and lengthy; and
 - (ii) has made it increasingly difficult for trial judges to comply with the law of jury directions and avoid errors of law; and
 - (iii) has made it increasingly difficult for jurors to understand and apply jury directions; and
 - (d) research indicates that jurors find complex, technical and lengthy jury directions difficult to follow.
- (2) The Parliament further recognises that it is the responsibility of the trial judge to determine—
 - (a) the matters in issue in the trial; and
 - (b) the directions that the trial judge should give to the jury; and
 - (c) the content of those directions.
- (3) The Parliament further recognises that it is one of the duties of legal practitioners appearing in a criminal trial to assist the trial judge in his or her determination of the matters referred to in subsection (2).
- (4) It is the intention of the Parliament that a trial judge, in giving directions to a jury in a criminal trial, should—
 - (a) give directions on only so much of the law as the jury needs to know to determine the issues in the trial; and
 - (b) avoid using technical legal language wherever possible; and
 - (c) be as clear, brief, simple and comprehensible as possible.
- (5) It is the intention of the Parliament that this Act is to be applied and interpreted having regard to the matters set out in this section (to be known as the *guiding principles*).

6 Particular form of words not required for direction

In giving a direction to the jury, the trial judge need not use any particular form of words.

7 Correction of statements or suggestions that are contrary to Act

- (1) Subject to subsection (2), the trial judge must—
 - (a) correct a statement or suggestion by the prosecution or defence counsel (or, if the accused is unrepresented, the accused) that is prohibited by this Act; and
 - (b) correct a statement or suggestion prohibited by this Act that is in a question from the jury.

Note

Sections 33, 42 and 51(1) prohibit certain statements and suggestions.

- (2) The trial judge need not correct a statement or suggestion referred to in subsection (1) if there are good reasons for not doing so.

Example

A good reason may be that counsel has already corrected a prohibited statement or suggestion at the invitation of the trial judge.

...

Part 3—Request for directions

9 Purposes of Part

The purposes of this Part are—

- (a) to assist the trial judge to discharge his or her duty to determine—
 - (i) the matters in issue in the trial; and
 - (ii) the directions that he or she should give to the jury; and
 - (iii) the content of those directions; and
- (b) to ensure that legal practitioners appearing in a criminal trial discharge their duty to assist the trial judge in his or her determination of the matters referred to in paragraph (a); and
- (c) to provide for the directions that the trial judge should give to the jury if the accused is not represented by a legal practitioner.

10 Application of Part

- (1) This Part does not apply to—
 - (a) general directions; or
 - (b) a direction that the trial judge is required to give, or not to give, to the jury under any provision of this or any other Act.
- (2) This Part does not preclude the giving of a direction, that is consistent with this Act, that the trial judge considers necessary at any time before the close of all evidence.
- (3) In determining under subsection (2) whether a direction is necessary, the trial judge must have regard to the submissions, if any, of the prosecution and defence counsel.

11 Counsel to assist in identification of matters in issue

After the close of all evidence and before the closing address of the prosecution—

- (a) the prosecution must inform the trial judge whether it considers that the following matters are open on the evidence and, if so, whether it relies on them—
 - (i) any alternative offence, including an element of any alternative offence;
 - (ii) any alternative basis of complicity in the commission of the offence charged and any alternative offence; and
- (b) defence counsel must then inform the trial judge whether he or she considers that the following matters are or are not in issue—
 - (i) each element of the offence charged;
 - (ii) any defence;
 - (iii) any alternative offence, including an element of any alternative offence;
 - (iv) any alternative basis of complicity in the commission of the offence charged and any alternative offence.

12 Legal practitioners must request that particular directions be given or not given

After the matters in issue have been identified in accordance with section 11, the prosecution and defence counsel must each request that the trial judge give, or not give, to the jury particular directions in respect of—

- (a) the matters in issue; and
- (b) the evidence in the trial relevant to the matters in issue.

...

14 Trial judge must give requested directions

- (1) The trial judge must give the jury a requested direction unless there are good reasons for not doing so.
- (2) In determining whether there are good reasons for not giving a requested direction to the jury, the trial judge must have regard to—
 - (a) the evidence in the trial; and
 - (b) the manner in which the prosecution and the accused have conducted their cases, including—
 - (i) whether the direction concerns a matter not raised or relied on by the accused; and
 - (ii) whether the direction would involve the jury considering the issues in the trial in a manner that is different from the way in which the accused has presented his or her case.

15 Trial judge must not give direction that has not been requested

Subject to section 16, the trial judge must not give the jury a direction that has not been requested under section 12.

16 When trial judge must give direction regardless of parties' views

- (1) The trial judge must give the jury a direction if the trial judge considers that there are substantial and compelling reasons for doing so even though the direction has not been requested under section 12.
- (2) Before giving a direction under this section, the trial judge must—
 - (a) inform the prosecution and defence counsel (or, if the accused is unrepresented, the accused) that the trial judge is considering giving the direction; and
 - (b) invite submissions from the prosecution and defence counsel (or the accused, as the case may be) about the direction and whether there are substantial and compelling reasons for giving the direction.

17 Abolition of common law obligation to give certain directions does not limit section 16(1)

The abolition by section 16(1) of the **Jury Directions Act 2013** of the common law obligation on a trial judge to give certain directions does not limit the obligation of the trial judge under section 16(1) of this Act to give directions.

Notes

- 1 Section 16(1) of the **Jury Directions Act 2013** abolished any rule of common law under which a trial judge in a criminal trial was required to direct the jury about—
 - (a) any defences and alternative offences open on the evidence but which had not been identified as such during the trial; or
 - (b) any alternative basis of complicity in the offence charged and any alternative offence in issue.
- 2 Section 16 of the **Jury Directions Act 2013** abolished the rule attributed to *Pemble v R* [1971] HCA 20; (1971) 124 CLR 107 and the application of *Pemble* in the context of complicity, for example *Gilbert v R* [2000] HCA 15; 201 CLR 414 and *R v Nguyen* [2010] HCA 38; (2010) 242 CLR 491.
- 3 By virtue of section 14(2)(c) of the **Interpretation of Legislation Act 1984** the repeal of section 16 of the **Jury Directions Act 2013** by this Act does not revive anything not in force or existing at the time of the repeal.
- 4 Section 4 applies generally to override any rule of law or practice to the contrary of this Act.

Part 4—Evidential directions

Division 1—Post-offence conduct

18 Definitions

In this Division—

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

incriminating conduct means conduct that amounts to an implied admission by the accused—

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

offence charged includes any alternative offence.

19 Prosecution notice of evidence to be relied on as evidence of incriminating conduct

- (1) The prosecution must give notice of evidence of conduct that it proposes to rely on as evidence of incriminating conduct by serving on the accused and filing in court at least 28 days before the day on which the trial of the accused is listed to commence—
 - (a) a notice of intention to rely on evidence of incriminating conduct, in the form required by rules of court, if any; and
 - (b) a copy of the evidence on which the prosecution intends to rely.
- (2) A notice under subsection (1) must be served in accordance with Part 8.3 of Chapter 8 of the **Criminal Procedure Act 2009**.
- (3) The trial judge may dispense with the requirements of subsection (1)(a) or (b) if—
 - (a) during a trial the prosecution first becomes aware of evidence of conduct that it proposes to rely on as evidence of incriminating conduct; and
 - (b) the prosecution gives oral notice to the court and the accused of its intention to rely on evidence of incriminating conduct; and
 - (c) it is in the interests of justice to dispense with those requirements.
- (4) If under subsection (3) the trial judge dispenses with the requirement of subsection (1)(b), the prosecution must identify orally to the court and the accused the evidence of conduct that it proposes to rely on as evidence of incriminating conduct.

Note

See section 8 for extension or abridgment of time.

20 Evidence of incriminating conduct

- (1) The prosecution must not rely on evidence of conduct as evidence of incriminating conduct unless—
 - (a) the prosecution has given notice in accordance with section 19; and
 - (b) the trial judge determines that, on the basis of the evidence as a whole, the evidence of conduct is reasonably capable of being viewed by the jury as evidence of incriminating conduct.

Note

A trial judge may make a determination under paragraph (b) even where the evidence of conduct relates only to an alternative offence.

- (2) Subsection (1) applies even if the evidence of conduct may be admissible for another purpose.

21 Mandatory direction on use of evidence of incriminating conduct

- (1) If the prosecution relies on evidence of conduct as evidence of incriminating conduct, the trial judge must direct the jury that—
 - (a) the jury may treat the evidence as evidence that the accused believed that he or she had committed the offence charged or an element of the offence charged, or that he or she had negated a defence to the offence charged, only if it concludes that—
 - (i) the conduct occurred; and
 - (ii) the only reasonable explanation of the conduct is that the accused held that belief; and
 - (b) even if the jury concludes that the accused believed that he or she had committed the offence charged, it must still decide, on the basis of the evidence as a whole, whether the prosecution has proved the guilt of the accused beyond reasonable doubt.
- (2) In giving a direction under this section, a trial judge need not refer to each act or omission of the accused.

Note

Section 6 provides that a trial judge need not use any particular form of words in giving a direction to the jury. For example, in relation to the direction referred to in subsection (1)(a)(ii), if the evidence concerns an element of an offence, the trial judge could refer to "knew" rather than "believed" to better describe what the incriminating conduct, if accepted, may prove.

22 Additional direction on incriminating conduct

If the trial judge gives, or proposes to give, a direction under section 21, defence counsel may request under section 12 that the trial judge also direct the jury that—

- (a) there are all sorts of reasons why a person might behave in a way that makes the person look guilty; and
- (b) the accused may have engaged in the conduct even though the accused is not guilty of the offence charged; and

- (c) even if the jury thinks that the conduct makes the accused look guilty, that does not necessarily mean that the accused is guilty.

Note

Section 14 requires the trial judge to give this direction, if requested, unless there are good reasons for not doing so. Section 16 requires the trial judge to give a direction if the trial judge considers that there are substantial and compelling reasons for doing so.

23 Direction to avoid risk of improper use of evidence

- (1) If evidence is given of conduct but the prosecution does not rely on the evidence as evidence of incriminating conduct, defence counsel may request under section 12 that the trial judge—
 - (a) direct the jury that there are all sorts of reasons why a person might behave in a way that makes the person look guilty; and
 - (b) warn the jury that even if the jury thinks that the accused engaged in the conduct, it must not conclude from that evidence that the accused is guilty of the offence charged.

Note

Section 14 requires the trial judge to give this direction, if requested, unless there are good reasons for not doing so. Section 16 requires the trial judge to give a direction if the trial judge considers that there are substantial and compelling reasons for doing so.

- (2) Without limiting section 14, it is a good reason for not giving the requested direction if the trial judge considers that there is no substantial risk that the jury might use the evidence as evidence of incriminating conduct.

24 Abolition of common law rules continues

Except as provided by this Division, a trial judge is not required to give the jury a direction regarding evidence because it is evidence of incriminating conduct or may be improperly used as evidence of incriminating conduct.

Notes

- 1 Section 28(3) of the **Jury Directions Act 2013** abolished rules of common law based on *Edwards v R* [1993] HCA 63; (1993) 178 CLR 193 and *Zoneff v R* [2000] HCA 28; (2000) 200 CLR 234.
- 2 By virtue of section 14(2)(c) of the **Interpretation of Legislation Act 1984** the repeal of section 28 of the **Jury Directions Act 2013** by this Act does not revive anything not in force or existing at the time of the repeal.
- 3 Section 4 applies generally to override any rule of law or practice to the contrary of this Act.
- 4 Section 28(2) of the **Jury Directions Act 2013** has been superseded by sections 61 and 62 of this Act.

Division 2—Other misconduct evidence

25 Application of Division

This Division applies despite any obligation arising from section 95 of the **Evidence Act 2008**.

26 Definitions

In this Division—

coincidence evidence has the same meaning as in the **Evidence Act 2008**;

other misconduct evidence means—

- (a) coincidence evidence; or
- (b) tendency evidence; or
- (c) evidence of other discreditable acts and omissions of an accused that are not directly relevant to a fact in issue; or
- (d) evidence that is adduced to assist the jury to understand the context in which the offence charged or any alternative offence is alleged to have been committed;

tendency evidence has the same meaning as in the **Evidence Act 2008**.

27 Direction on other misconduct evidence adduced by the prosecution

- (1) Defence counsel may request under section 12 that the trial judge direct the jury on other misconduct evidence adduced by the prosecution.
- (2) In giving a direction referred to in subsection (1), the trial judge must—
 - (a) identify how the other misconduct evidence is relevant (whether directly or indirectly) to the existence of a fact in issue in the trial and direct the jury not to use the evidence for any other purpose; and
 - (b) if the evidence forms only part of the prosecution case against the accused, inform the jury of that fact; and
 - (c) direct the jury that it must not decide the case based on prejudice arising from what the jury has heard about the accused.
- (3) In giving a direction referred to in subsection (1), the trial judge need not—
 - (a) explain further what the jury should consider in deciding whether to use the other misconduct evidence; or
 - (b) identify impermissible uses of the other misconduct evidence; or
 - (c) refer to any other matter.

Note

Section 14 requires the trial judge to give this direction, if requested, unless there are good reasons for not doing so. Section 16 requires the trial judge to give a direction if the trial judge considers that there are substantial and compelling reasons for doing so.

28 Direction on other misconduct evidence adduced by accused about a co-accused

- (1) The prosecution or counsel for a co-accused may request under section 12 that the trial judge direct the jury on other misconduct evidence adduced by the accused about the co-accused.
- (2) In giving a direction referred to in subsection (1), the trial judge must—

- (a) identify how the other misconduct evidence is relevant (whether directly or indirectly) to the existence of a fact in issue in the trial and direct the jury not to use the evidence for any other purpose; and
 - (b) direct the jury that it must not decide the case based on prejudice arising from what the jury has heard about the co-accused.
- (3) In giving a direction referred to in subsection (1), the trial judge need not—
- (a) explain further what the jury should consider in deciding whether to use the other misconduct evidence; or
 - (b) identify impermissible uses of the other misconduct evidence; or
 - (c) refer to any other matter.

Note

Section 14 requires the trial judge to give this direction, if requested, unless there are good reasons for not doing so. Section 16 requires the trial judge to give a direction if the trial judge considers that there are substantial and compelling reasons for doing so.

29 Direction to avoid risk of improper use of other misconduct evidence

- (1) If other misconduct evidence (other than tendency evidence) is adduced, the prosecution or defence counsel may request under section 12 that the trial judge warn the jury not to use the evidence as tendency evidence.

Note

Section 14 requires the trial judge to give this direction, if requested, unless there are good reasons for not doing so. Section 16 requires the trial judge to give a direction if the trial judge considers that there are substantial and compelling reasons for doing so.

- (2) Without limiting section 14, it is a good reason for not giving the requested direction if the trial judge considers that there is no substantial risk that the jury might use the evidence as tendency evidence.

30 Abolition of common law rules

- (1) Except as provided by this Division, a trial judge is not required to direct the jury regarding the use of other misconduct evidence.
- (2) Any rule of common law to the contrary of this section is abolished.

Note

Section 4 applies generally to override any rule of law or practice to the contrary of this Act.

Division 3—Unreliable evidence

31 Definition

In this Division—

evidence of a kind that may be unreliable includes—

- (a) evidence in relation to which Part 3.2 (hearsay evidence) or 3.4 (admissions) of the **Evidence Act 2008** applies; and

- (b) evidence the reliability of which may be affected by age, ill health (whether physical or mental), injury or the like; and
- (c) evidence given by a witness who might reasonably be supposed to have been criminally concerned in the events giving rise to the trial; and
- (d) evidence given by a witness who is a prison informer; and
- (e) oral evidence of questioning by an investigating official (within the meaning of the **Evidence Act 2008**) of an accused where the questioning has not been acknowledged by the accused.

32 Direction on unreliable evidence

- (1) The prosecution or defence counsel may request under section 12 that the trial judge direct the jury on evidence of a kind that may be unreliable.
- (2) In making a request referred to in subsection (1), the prosecution or defence counsel (as the case requires) must specify—
 - (a) the significant matters that may make the evidence unreliable; or
 - (b) if the request concerns evidence given by a child, the significant matters (other than solely the age of the child) that may make the evidence of the child unreliable.
- (3) In giving a direction referred to in subsection (1), the trial judge must—
 - (a) warn the jury that the evidence may be unreliable; and
 - (b) inform the jury of—
 - (i) the significant matters that the trial judge considers may cause the evidence to be unreliable; or
 - (ii) if the direction concerns evidence given by a child, the significant matters (other than solely the age of the child) that the trial judge considers may make the evidence of the child unreliable; and
 - (c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.

Notes

- 1 Section 14 requires the trial judge to give this direction, if requested, unless there are good reasons for not doing so. Section 16 requires the trial judge to give a direction if the trial judge considers that there are substantial and compelling reasons for doing so.
- 2 Section 115(7) of the **Evidence Act 2008** and Division 4 of this Part provide for warnings and information about identification evidence.
- 3 Section 164(4) of the **Evidence Act 2008** provides that in a criminal proceeding the judge must not—
 - (a) warn the jury that it is dangerous to act on uncorroborated evidence or give a warning to the same or similar effect; or
 - (b) give a direction relating to the absence of corroboration.

- 4 Section 164(5) of the **Evidence Act 2008** provides that in a criminal proceeding for the offence of perjury or a similar or related offence, the judge must direct the jury that it may find the accused guilty only if it is satisfied that the evidence proving guilt is corroborated.

33 Prohibited statements and suggestions in relation to reliability of children's evidence

The trial judge, the prosecution and defence counsel (or, if the accused is unrepresented, the accused) must not say, or suggest in any way, to the jury that—

- (a) children as a class are unreliable witnesses; or
- (b) the evidence of children as a class is inherently less credible or reliable, or requires more careful scrutiny, than the evidence of adults; or
- (c) a particular child's evidence is unreliable solely on account of the age of the child; or
- (d) it would be dangerous to convict on the uncorroborated evidence of a witness because that witness is a child.

Notes

- 1 Section 7 provides for correction of statements or suggestions to the contrary of this provision.
- 2 Section 164 of the **Evidence Act 2008** relates to corroboration.

34 Abolition of common law rules

- (1) Except as provided by this Division, a trial judge is not required to direct the jury regarding evidence of a kind that may be unreliable.
- (2) Any rule of common law to the contrary of subsection (1) is abolished.

Note

Section 4 applies generally to override any rule of law or practice to the contrary of this Act.

Division 4—Identification evidence

35 Definition

In this Division—

identification evidence means an assertion by a person, or a report of an assertion by a person, to the effect that—

- (a) he or she recognises, or does not recognise, a person or object as the person or object that he or she saw, heard or perceived on the relevant occasion; or
- (b) the general appearance or characteristics of a person or object are similar, or are not similar, to the general appearance or characteristics of the person or object that he or she saw, heard or perceived on the relevant occasion—

and includes—

- (c) visual identification evidence within the meaning of section 114 of the **Evidence Act 2008**; and

- (d) picture identification evidence within the meaning of section 115 of the **Evidence Act 2008**.

Note

Section 115(7) of the **Evidence Act 2008** requires particular jury directions in relation to picture identification evidence.

36 Direction on identification evidence

- (1) The prosecution or defence counsel may request under section 12 that the trial judge direct the jury on identification evidence.
- (2) In making a request referred to in subsection (1), the prosecution or defence counsel (as the case requires) must specify the significant matters that may make the evidence unreliable.
- (3) In giving a direction referred to in subsection (1), the trial judge must—
 - (a) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it; and
 - (b) inform the jury of the significant matters that the trial judge considers may make the evidence unreliable; and
 - (c) inform the jury that—
 - (i) a witness may honestly believe that his or her evidence is accurate when the witness is, in fact, mistaken; and
 - (ii) the mistaken evidence of a witness may be convincing; and
 - (d) if relevant, inform the jury that a number of witnesses may all be mistaken; and
 - (e) if relevant, inform the jury that mistaken identification evidence has resulted in innocent people being convicted.

Note

Section 14 requires the trial judge to give this direction, if requested, unless there are good reasons for not doing so. Section 16 requires the trial judge to give a direction if the trial judge considers that there are substantial and compelling reasons for doing so.

37 Abolition of common law rules

- (1) Except as provided by this Division, a trial judge is not required to direct the jury regarding the unreliability of identification evidence.
- (2) Any rule of common law to the contrary of subsection (1) is abolished.

Note

Section 4 applies generally to override any rule of law or practice to the contrary of this Act.

Division 5—Delay and forensic disadvantage

38 Definition

In this Division—

- forensic disadvantage* means a disadvantage (that is more than the mere existence of delay) to the accused in—
- (a) challenging, adducing or giving evidence; or

(b) conducting his or her case—

because of the consequences of delay due to the period of time that has elapsed between the alleged offence and the trial.

39 Direction on significant forensic disadvantage

- (1) Defence counsel may request under section 12 that the trial judge direct the jury on forensic disadvantage experienced by the accused.
- (2) The trial judge may direct the jury as referred to in subsection (1) only if the trial judge is satisfied that the accused has experienced a significant forensic disadvantage.
- (3) In giving a direction referred to in subsection (1), the trial judge—
 - (a) must inform the jury of—
 - (i) the nature of the disadvantage experienced by the accused; and
 - (ii) the need to take the disadvantage into account when considering the evidence; and
 - (b) must not say, or suggest in any way, to the jury that—
 - (i) it would be dangerous or unsafe to convict the accused; or
 - (ii) the victim's evidence should be scrutinised with great care.

Note

Section 14 requires the trial judge to give this direction, if requested, unless there are good reasons for not doing so. Section 39(2) qualifies the threshold for giving a requested direction. Section 16 requires the trial judge to give a direction if the trial judge considers that there are substantial and compelling reasons for doing so.

40 Abolition of common law rules

Any rule of common law under which a trial judge is required or permitted to direct the jury on a disadvantage to the accused in challenging, adducing or giving evidence or conducting his or her case because of delay is abolished.

Notes

- 1 This provision abolishes the rule attributed to *Longman v R* [1989] HCA 60; (1989) 168 CLR 79, followed in *Crampton v R* [2000] HCA 60; (2000) 206 CLR 161 and applied in relation to the corroborated evidence of a complainant in *Doggett v R* [2001] HCA 46; (2001) 208 CLR 343.
- 2 Section 4 applies generally to override any rule of law or practice to the contrary of this Act.

Division 6—Failure to give evidence or call witness

41 Direction on accused not giving evidence or calling witness

- (1) If the accused does not give evidence or call a particular witness, defence counsel may request under section 12 that the trial judge direct the jury on that fact.
- (2) In giving a direction referred to in subsection (1), the trial judge must explain—

- (a) the prosecution's obligation to prove that the accused is guilty; and
- (b) that the accused is not required to give evidence or call a witness (as the case requires); and
- (c) that the jury should not guess or speculate about what might have been contained in—
 - (i) the evidence that was not given by the accused; or
 - (ii) the evidence that might have been given by a witness who was not called—
 as the case requires; and
- (d) that the fact that the accused did not give evidence or call a witness (as the case requires)—
 - (i) is not evidence against the accused; and
 - (ii) is not an admission by the accused; and
 - (iii) must not be used to fill gaps in the evidence adduced by the prosecution; and
 - (iv) does not strengthen the prosecution case.

Note

Section 14 requires the trial judge to give this direction, if requested, unless there are good reasons for not doing so. Section 16 requires the trial judge to give a direction if the trial judge considers that there are substantial and compelling reasons for doing so.

42 Prohibited statements and suggestions in relation to accused who does not give evidence or call witness

The trial judge, the prosecution and defence counsel (or, if the accused is unrepresented, the accused) must not say, or suggest in any way, to the jury that, because an accused did not give evidence or call a particular witness (as the case requires), the jury may—

- (a) conclude that the accused is guilty from that fact; or
- (b) use the failure of the accused to provide an explanation of facts, which must be within the knowledge of the accused, to more safely draw an adverse inference based on those facts which, if drawn, would prove the guilt of the accused; or
- (c) draw an inference that the accused did not give evidence or call a witness (as the case requires) because that would not have assisted his or her case.

Note

Section 7 provides for correction of statements or suggestions to the contrary of this provision.

43 Direction on prosecution not calling or questioning witness

- (1) If the prosecution does not call or question a particular witness, defence counsel may request under section 12 that the trial judge direct the jury on that fact.

- (2) The trial judge may direct the jury as referred to in subsection (1) only if the trial judge is satisfied that the prosecution—
 - (a) was reasonably expected to call or question the witness; and
 - (b) has not satisfactorily explained why it did not call or question the witness.
- (3) In giving a direction referred to in subsection (1), the trial judge may inform the jury that it may conclude that the witness would not have assisted the prosecution's case.

Note

Section 14 requires the trial judge to give this direction, if requested, unless there are good reasons for not doing so. Section 43(2) qualifies the threshold for giving a requested direction. Section 16 requires the trial judge to give a direction if the trial judge considers that there are substantial and compelling reasons for doing so.

44 Abolition of common law rules

- (1) Except as provided by this Division, a trial judge is not required to direct the jury—
 - (a) when the accused does not give evidence or call a witness; or
 - (b) when the prosecution does not call or question a witness.
- (2) Any rule of common law to the contrary of subsection (1) is abolished.

Notes

- 1 This provision abolishes directions based on the rule attributed to *Weissensteiner v R* [1993] HCA 65; (1993) 178 CLR 217 and applied in *Azzopardi v R* [2001] HCA 25; (2001) 205 CLR 50 and the rule attributed to *Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298 and applied to the accused and prosecution in criminal cases in *Dyers v R* [2002] HCA 45; (2002) 210 CLR 285.
- 2 Section 4 applies generally to override any rule of law or practice to the contrary of this Act.

Division 7—Previous representations

44A Definition

In this Division—

previous representation has the same meaning as in the **Evidence Act 2008**.

44B Direction not required regarding repetition of previous representation

If evidence is given of a previous representation, the trial judge is not required to direct the jury that repeating a previous representation does not make the asserted fact true.

44C Direction not required regarding evidence of person who saw, heard or perceived complaint

- (1) This section applies if—

- (a) evidence is given of a previous representation by a person who saw, heard or otherwise perceived the representation being made; and
- (b) the representation is a complaint, made by the victim of an alleged offence, about the commission of the offence.

(2) The trial judge is not required to direct the jury that the evidence of the previous representation does not independently confirm the victim's evidence of the commission of the alleged offence.

44D Direction not required regarding complaint made in general terms

(1) This section applies if—

- (a) evidence is given of a previous representation; and
- (b) the representation is a complaint, made by the victim of an alleged offence, about the commission of the offence; and
- (c) the complaint is made in general terms.

(2) The trial judge is not required to direct the jury not to substitute the evidence of the previous representation for evidence relating to a specific charge.

44E Abolition of common law rules

Any rule of common law under which a trial judge is required to give the jury a direction referred to in this Division is abolished.

Notes

1 This provision abolishes directions based on—

- *Papakosmas v R* (1999) 196 CLR 297; and
- *R v Stoupas* [1998] 3 VR 645; and
- *R v HJS* [2000] NSWCCA 205.

2 Section 4 applies generally to override any rule of law or practice to the contrary of this Act.

Division 8—Doubts regarding truthfulness or reliability of victim's evidence

44F Prohibited direction in relation to doubts regarding truthfulness or reliability of victim's evidence

In a trial in which more than one offence is charged, the trial judge must not direct the jury that if the jury doubts the truthfulness or reliability of the victim's evidence in relation to a charge, that doubt must be taken into account in assessing the truthfulness or reliability of the victim's evidence generally or in relation to other charges.

Note

This section prohibits the trial judge from giving a particular direction to the jury. This does not limit the obligation of the trial judge to refer the jury to the way in which the prosecution and the accused put their cases in relation to the issues in the trial—see section 65.

44G Abolition of common law rules

Any rule of common law under which a trial judge is required or permitted to give the jury a direction referred to in section 44F is abolished.

Notes

1 This provision abolishes the rule attributed to *R v Markuleski* (2001) 52 NSWLR 82.

2 Section 4 applies generally to override any rule of law or practice to the contrary of this Act.

Division 9—Accused giving evidence, interest in outcome of trial

44H Prohibited statements and suggestions in relation to interest in outcome of trial

The trial judge, the prosecution and defence counsel (or, if the accused is unrepresented, the accused) must not say, or suggest in any way, to the jury that—

- (a) an interest in the outcome of the trial is a factor to take into account in assessing the evidence of witnesses generally; or
- (b) the evidence of an accused is less credible, or requires more careful scrutiny, because any person who is on trial has an interest in the outcome of that trial.

Notes

1 Section 7 provides for correction of statements or suggestions to the contrary of this provision.

2 The trial judge, the prosecution and defence counsel (or, if the accused is unrepresented, the accused) may say or suggest that a witness, or an accused, has a particular interest in the outcome of the trial and this interest does or may affect the credibility of the witness or the accused.

44I Direction on accused giving evidence or interest of accused in outcome of trial

(1) Defence counsel may request under section 12 that the trial judge direct the jury on either or both of the following—

- (a) the giving of evidence by the accused;
- (b) the interest that the accused has in the outcome of the trial.

(2) In giving a direction referred to in subsection (1), the trial judge must explain that—

- (a) the accused is not required to give evidence; and
- (b) the fact that the accused has given evidence does not change the prosecution's obligation to prove that the accused is guilty; and
- (c) the jury must assess the evidence of the accused in the same way that the jury assesses the evidence of any other witness; and
- (d) the jury must not give less weight to the evidence of the accused just because any person who is on trial has an interest in the outcome of that trial.

Notes

1 Section 14 requires the trial judge to give this direction, if requested, unless there are good reasons for not doing so. Section 16 requires the trial judge to give a direction if the trial judge considers that there are substantial and compelling reasons for doing so.

2 Section 41 provides for a direction on an accused not giving evidence or calling a particular witness

44J Prohibited directions in relation to evidence of an accused

The trial judge must not direct the jury about any of the following matters in relation to the evidence of an accused—

- (a) whether the accused is under more stress than any other witness;
- (b) that the accused gave evidence because—
 - (i) a guilty person who gives evidence will more likely be believed; or
 - (ii) an innocent person can do nothing more than give evidence.

Note

This section prohibits the trial judge from giving directions to the jury about particular matters. This does not limit the obligation of the trial judge to refer the jury to the way in which the prosecution and the accused put their cases in relation to the issues in the trial—see section 65.

44K Abolition of common law rules

- (1) Any rule of common law under which a trial judge is prohibited from directing the jury on the interest a witness or an accused may have in the outcome of a trial is abolished.
- (2) Any rule of common law under which a trial judge is required or permitted to direct the jury about the matters referred to in section 44J in relation to the evidence of an accused is abolished.

Notes

1 Subsection (1) abolishes the rule attributed to *Robinson v R* [1991] HCA 38; (1994) 180 CLR 531.

2 Subsection (2) abolishes directions based on—

- *R v Haggag* [1998] VSC 355; (1998) 101 A Crim R 593; and
- *R v McMahon* [2004] VSCA 64; (2004) 8 VR 101; and
- *R v Buckley* [2004] VSCA 185; (2004) 10 VR 215.

3 Section 4 applies generally to override any rule of law or practice to the contrary of this Act.

Division 10—Whether a prosecution witness has a motive to lie

44L Direction on prosecution witness's motive to lie

- (1) If the issue of whether a witness for the prosecution has a motive to lie is raised during a trial, defence counsel may request under section 12 that the trial judge direct the jury on that issue.
- (2) In giving a direction referred to in subsection (1), the trial judge must explain—
 - (a) the prosecution's obligation to prove that the accused is guilty; and
 - (b) that the accused does not have to prove that the witness had a motive to lie.

Note

Section 14 requires the trial judge to give this direction, if requested, unless there are good reasons for not doing so. Section 16 requires the trial judge to give a direction if the trial judge considers that there are substantial and compelling reasons for doing so.

44M Abolition of common law rules

- (1) Except as provided by this Division, a trial judge is not required or permitted to direct the jury on the issue of whether a witness for the prosecution has a motive to lie.
- (2) Any rule of common law to the contrary of subsection (1) is abolished.

Notes

1 Subsection (2) abolishes directions based on *Palmer v R* [1998] HCA 2; 193 CLR 1. 2 Section 4 applies generally to override any rule of law or practice to the contrary of this Act."

Division 11—Language and cognitive skills of child witness

44N Direction on language and cognitive skills of child witness

(1) If, before any evidence is adduced in the trial and after hearing submissions from the prosecution and defence counsel (or, if the accused is unrepresented, the accused), the trial judge considers that the reliability or credibility of a child witness is likely to be in issue, the trial judge—

(a) must direct the jury in accordance with subsection (4) before any evidence by the child is adduced, unless there are good reasons for not doing so; and

Example

A good reason may be that the child is 17 years old and the trial judge considers that the direction is unnecessary because the child has well developed language and cognitive skills.

(b) may give the direction before any evidence is adduced in the trial.

(2) If, at any other time during the trial, the trial judge considers that the reliability or credibility of a child witness is likely to be in issue, the trial judge must direct the jury in accordance with subsection (4) as soon as is practicable, unless there are good reasons for not doing so.

(3) The trial judge may repeat a direction under this section at any time in the trial.

(4) In giving a direction under this section, the trial judge must inform the jury that—

(a) children can accurately remember and report past events; and

(b) children are developing language and cognitive skills, and this may affect—

(i) whether children give a detailed, chronological or complete account; and

(ii) how children understand and respond to the questions they are asked; and

(c) experience shows that, depending on a child's level of development, they—

(i) may have difficulty understanding certain language, whether because that language is complicated for children or complicated generally; and

Examples

1 Hypothetical, ambiguous, repetitive, multi-part or yes/no questions.

2 The use of the passive voice, negatives and double negatives.

(ii) may have difficulty understanding certain concepts, whether because those concepts are complicated for children or complicated generally; and

Example

Relative concepts such as time, duration, measurement or frequency.

- (iii) may not request the clarification of a question they do not understand; and
 - (iv) may not clarify an answer they have given that has been misunderstood.
- (5) This section does not limit what the trial judge may include in any other direction to the jury in relation to the evidence of a child witness.

Part 5—Sexual offences

Division 1—Consent and reasonable belief in consent

45 Application of Division

This Division applies to a criminal proceeding that relates (wholly or partly) to a charge for an offence against any provision in Subdivision (8A), (8B), (8C) or (8D) of Division 1 of Part I of the **Crimes Act 1958** or a charge for an offence of conspiracy, incitement or attempt to commit an offence against any of those provisions.

46 Direction on consent

- (1) The prosecution or defence counsel may request under section 12 that the trial judge direct the jury on consent.
- (2) In making a request referred to in subsection (1), the prosecution or defence counsel (as the case requires) must specify—
 - (a) in the case of a request for a direction on the meaning of consent—one or more of the directions set out in subsection (3); or
 - (b) in the case of a request for a direction on the circumstances in which a person is taken not to have consented to an act—one or more of the directions set out in subsection (4).

Note

Section 36 of the **Crimes Act 1958** provides that consent means free agreement. That section also sets out circumstances in which a person has not consented to an act.

- (3) For the purposes of subsection (2)(a), the prosecution or defence counsel may request that the trial judge—
 - (a) inform the jury that a person can consent to an act only if the person is capable of consenting and free to choose whether or not to engage in or allow the act; or
 - (b) inform the jury that where a person has given consent to an act, the person may withdraw that consent either before the act takes place or at any time while the act is taking place; or
 - (c) inform the jury that experience shows that—
 - (i) there are many different circumstances in which people do not consent to a sexual act; and

- (ii) people who do not consent to a sexual act may not be physically injured or subjected to violence, or threatened with physical injury or violence; or
- (d) inform the jury that experience shows that—
 - (i) people may react differently to a sexual act to which they did not consent and that there is no typical, proper or normal response; and
 - (ii) people who do not consent to a sexual act may not protest or physically resist the act; or

Example
The person may freeze and not do or say anything.
- (e) inform the jury that experience shows that people who do not consent to a sexual act with a particular person on one occasion, may have on one or more other occasions engaged in or been involved in consensual sexual activity—
 - (i) with that person or another person; or
 - (ii) of the same kind or a different kind.
- (4) For the purposes of subsection (2)(b), the prosecution or defence counsel may request that the trial judge—
 - (a) inform the jury of the relevant circumstances in which the law provides that a person does not consent to an act; or

Note
Section 34C of the **Crimes Act 1958** sets out these circumstances.

 - (b) direct the jury that if the jury is satisfied beyond reasonable doubt that a circumstance referred to in section 34C of the **Crimes Act 1958** existed in relation to a person, the jury must find that the person did not consent to the act.

Note

Section 14 requires the trial judge to give this direction, if requested, unless there are good reasons for not doing so.

Section 16 requires the trial judge to give a direction if the trial judge considers that there are substantial and compelling reasons for doing so.

47 Direction on reasonable belief in consent

- (1) The prosecution or defence counsel may request under section 12 that the trial judge direct the jury on reasonable belief in consent.
- (2) In making a request referred to in subsection (1), the prosecution or defence counsel (as the case requires) must specify one or more of the directions set out in subsection (3).
- (3) For the purposes of subsection (2), the prosecution or defence counsel may request that the trial judge—
 - (a) direct the jury that if the jury concludes that the accused knew or believed that a circumstance referred to in section 34C of the **Crimes Act 1958** existed in relation to a person, that knowledge

- or belief is enough to show that the accused did not reasonably believe that the person was consenting to the act; or
- (b) direct the jury that in determining whether the accused who was intoxicated had a reasonable belief at any time—
 - (i) if the intoxication was self-induced, regard must be had to the standard of a reasonable person who is not intoxicated and who is otherwise in the same circumstances as the accused at the relevant time; and
 - (ii) if the intoxication is not self-induced, regard must be had to the standard of a reasonable person intoxicated to the same extent as the accused and who is in the same circumstances as the accused at the relevant time; or
 - (c) direct the jury that—
 - (i) a belief in consent based solely on a general assumption about the circumstances in which people consent to a sexual act (whether or not that assumption is informed by any particular culture, religion or other influence) is not a reasonable belief; and
 - (ii) a belief in consent based on a combination of matters including such a general assumption is not a reasonable belief to the extent that it is based on such an assumption; or
 - (d) direct the jury that in determining whether the accused had a reasonable belief in consent, the jury must consider what the community would reasonably expect of the accused in the circumstances in forming a reasonable belief in consent; or
 - (e) direct the jury that in determining whether the accused had a reasonable belief in consent, the jury may take into account any personal attribute, characteristic or circumstance of the accused.
- (4) A good reason for not giving the direction set out in subsection (3)(e) is that the personal attribute, characteristic or circumstance –
- (a) did not affect, or is not likely to have affected, the accused's perception or understanding of the objective circumstances; or
 - (b) was something that the accused was able to control; or
 - (c) was a subjective value, wish or bias held by the accused, whether or not that value, wish or bias was informed by any particular culture, religion or other influence.

Note

Section 14 requires the trial judge to give this direction, if requested, unless there are good reasons for not doing so.

Section 16 requires the trial judge to give a direction if the trial judge considers that there are substantial and compelling reasons for doing so.

Division 2—Delay and credibility

48 Application of Division

This Division applies to a criminal proceeding that relates (wholly or partly) to a charge for a sexual offence or a charge for an offence of conspiracy, incitement or attempt to commit a sexual offence.

49 Part 3 does not apply

Part 3 does not apply to this Division (except section 53).

50 Definitions

In this Division—

delay in making a complaint includes where—

- (a) the complainant has not pursued, or continued to pursue, the complaint in a timely manner; and
- (b) the complainant has not made a complaint at the first, or a subsequent, reasonable opportunity to complain;

sexual offence has the same meaning as in the **Criminal Procedure Act 2009**;

sexual offence case means a criminal proceeding referred to in section 48.

51 Prohibited statements and suggestions in relation to complainants, delay and unreliability

- (1) The trial judge, the prosecution and defence counsel (or, if the accused is unrepresented, the accused) must not say, or suggest in any way, to the jury that—
 - (a) the law regards complainants in sexual offence cases as an unreliable class of witness; or
 - (b) complainants in sexual offence cases are an unreliable class of witness; or
 - (c) complainants who delay in making a complaint or do not make a complaint are, as a class, less credible or require more careful scrutiny than other complainants.
- (2) The trial judge must not say, or suggest in any way, to the jury that, because the complainant delayed in making a complaint or did not make a complaint—
 - (a) it would be dangerous or unsafe to convict the accused; or
 - (b) the complainant's evidence should be scrutinised with great care.

Notes

- 1 The trial judge is not required to inform the jury about the matters set out in this section.
- 2 Section 7 provides for correction of statements or suggestions to the contrary of section 51(1).
- 3 The trial judge, the prosecution and defence counsel (or, if the accused is unrepresented, the accused) may say or suggest that the particular complainant's delay

in making a complaint or lack of a complaint does, or may, affect the complainant's credibility.

52 Direction on delay in complaint or lack of complaint

- (1) If, before any evidence is adduced in the trial and after hearing submissions from the prosecution and defence counsel (or, if the accused is unrepresented, the accused), the trial judge considers that there is likely to be evidence in the trial that suggests that the complainant delayed in making a complaint or did not make a complaint, the trial judge—
 - (a) must direct the jury in accordance with subsection (4) before any evidence about delay in making a complaint or lack of complaint is adduced; and
 - (b) may give the direction before any evidence is adduced in the trial.
- (2) If, at any other time during the trial, the trial judge considers that there is evidence in the trial that suggests that the complainant delayed in making a complaint or did not make a complaint, the trial judge must direct the jury in accordance with subsection (4) as soon as is practicable.
- (3) The trial judge may repeat a direction under this section at any time in the trial.
- (4) In giving a direction under this section, the trial judge must inform the jury that experience shows that—
 - (a) people may react differently to sexual offences and there is no typical, proper or normal response to a sexual offence; and
 - (b) some people may complain immediately to the first person they see, while others may not complain for some time and others may never make a complaint; and
 - (c) delay in making a complaint in respect of a sexual offence is a common occurrence.
- (5) This section does not limit what the trial judge may include in any other direction to the jury in relation to evidence given by an expert witness.

53 Additional direction on delay in complaint or lack of complaint

The prosecution may request under section 12 that the trial judge direct the jury that there may be good reasons why a person may not complain, or may delay in complaining, about a sexual offence.

Note

Section 14 requires the trial judge to give this direction, if requested, unless there are good reasons for not doing so. Section 16 requires the trial judge to give a direction if the trial judge considers that there are substantial and compelling reasons for doing so.

54 Abolition of common law rules

Any rule of common law under which a trial judge is required to direct the jury that—

- (a) a complainant's delay in making a complaint or lack of complaint may cast doubt on the reliability of the complainant's evidence; and
 - (b) the jury should take this into account when evaluating the credibility of the allegations made by the complainant—
- is abolished.

Notes

- 1 This provision abolishes the rules attributed to *Kilby v R* [1973] HCA 30; (1973) 129 CLR 460 and *Crofts v R* [1996] HCA 22; (1996) 186 CLR 427.
- 2 Section 4 applies generally to override any rule of law or practice to the contrary of this Act.

Division 3—Differences in complainant's account

54A Application of Division

This Division applies to a criminal proceeding that relates (wholly or partly) to a charge for a sexual offence or a charge for an offence of conspiracy or incitement to commit a sexual offence.

54B Part 3 does not apply

Part 3 does not apply to this Division.

54C Definitions

In this Division—

difference in an account includes—

- (a) a gap in that account; and
- (b) an inconsistency in that account; and
- (c) a difference between that account and another account; sexual offence has the same meaning as in the Criminal Procedure Act 2009.

54D Direction on difference in complainant's account

(1) If, after hearing submissions from the prosecution and defence counsel (or, if the accused is unrepresented, the accused), the trial judge considers that there is evidence in the trial that suggests a difference in the complainant's account of the offence charged that is relevant to the complainant's credibility or reliability, the trial judge must direct the jury in accordance with subsection (2).

(2) In giving a direction referred to in subsection (1), the trial judge must inform the jury that—

- (a) it is up to the jury to decide whether the offence charged, or any alternative offence, was committed; and
- (b) differences in a complainant's account may be relevant to the jury's assessment of the complainant's credibility and reliability; and
- (c) experience shows that—

- (i) people may not remember all the details of a sexual offence or may not describe a sexual offence in the same way each time; and
 - (ii) trauma may affect different people differently, including by affecting how they recall events; and
 - (iii) it is common for there to be differences in accounts of a sexual offence; and Example People may describe a sexual offence differently at different times, to different people or in different contexts.
 - (iv) both truthful and untruthful accounts of a sexual offence may contain differences; and
- (d) it is up to the jury to decide—
- (i) whether or not any differences in the complainant's account are important in assessing the complainant's credibility and reliability; and
 - (ii) whether the jury believes all, some or none of the complainant's evidence.
- (3) The trial judge may repeat a direction under this section at any time in the trial.
- (4) This section does not limit any direction that the trial judge may give the jury in relation to evidence given by an expert witness.

Part 6—Family violence

55 Application of Part

This Part applies to a criminal proceeding in which self-defence or duress in the context of family violence is in issue.

56 Part 3 does not apply

Part 3 does not apply to this Part.

57 Definition

In this Part—

family violence has the same meaning as in section 322J(2) of the **Crimes Act 1958**.

58 Request for direction on family violence

- (1) Defence counsel (or, if the accused is unrepresented, the accused) may request at any time that the trial judge direct the jury on family violence in accordance with section 59 and all or specified parts of section 60.
- (2) The trial judge must give the jury a requested direction on family violence, including all or specified parts of section 60 if so requested, unless there are good reasons for not doing so.
- (3) If the accused is unrepresented and does not request a direction on family violence, the trial judge may give the direction in accordance with this Part if the trial judge considers that it is in the interests of justice to do so.

- (4) The trial judge—
 - (a) must give the direction as soon as practicable after the request is made; and
 - (b) may give the direction before any evidence is adduced in the trial.
- (5) The trial judge may repeat a direction under this Part at any time in the trial.
- (6) This Part does not limit what the trial judge may include in any other direction to the jury in relation to evidence given by an expert witness.

59 Content of direction on family violence

In giving a direction under section 58, the trial judge must inform the jury that—

- (a) self-defence or duress (as the case requires) is, or is likely to be, in issue in the trial; and
- (b) as a matter of law, evidence of family violence may be relevant to determining whether the accused acted in self-defence or under duress (as the case requires); and
- (c) in the case of self-defence, evidence in the trial is likely to include evidence of family violence committed by the victim against the accused or another person whom the accused was defending; and
- (d) in the case of duress, evidence in the trial is likely to include evidence of family violence committed by another person against the accused or a third person.

60 Additional matters for direction on family violence

In giving a direction requested under section 58, the trial judge may include any of the following matters in the direction—

- (a) that family violence—
 - (i) is not limited to physical abuse and may include sexual abuse and psychological abuse;
 - (ii) may involve intimidation, harassment and threats of abuse;
 - (iii) may consist of a single act;
 - (iv) may consist of separate acts that form part of a pattern of behaviour which can amount to abuse even though some or all of those acts may, when viewed in isolation, appear to be minor or trivial;
- (b) if relevant, that experience shows that—
 - (i) people may react differently to family violence and there is no typical, proper or normal response to family violence;
 - (ii) it is not uncommon for a person who has been subjected to family violence—
 - (A) to stay with an abusive partner after the onset of family violence, or to leave and then return to the partner;

- (B) not to report family violence to police or seek assistance to stop family violence;
- (iii) decisions made by a person subjected to family violence about how to address, respond to or avoid family violence may be influenced by—
 - (A) family violence itself;
 - (B) cultural, social, economic and personal factors;
- (c) that, as a matter of law, evidence that the accused assaulted the victim on a previous occasion does not mean that the accused could not have been acting in self-defence or under duress (as the case requires) in relation to the offence charged.

Part 7—General directions

61 What must be proved beyond reasonable doubt

Unless an enactment otherwise provides, the only matters that the trial judge may direct the jury must be proved beyond reasonable doubt are—

- (a) the elements of the offence charged or an alternative offence; and
- (b) the absence of any relevant defence.

Notes

- 1 If the trial judge directs the jury about a matter referred to in paragraph (a) or (b) in the form of a factual question under section 67(2) or (3), the trial judge must direct the jury that it must be satisfied of that matter beyond reasonable doubt.
- 2 Section 46(4)(b) of this Act and section 45 of the **Crimes Act 1958** refer to specific matters that must be proved beyond reasonable doubt.

Examples

The trial judge may relate the evidence in the trial to directions under section 61 in many different ways, for example—

- when directing the jury that an element must be proved beyond reasonable doubt, the trial judge may refer to the evidence relied on by the prosecution to prove that element and direct the jury that it must be satisfied that that evidence proves that element beyond reasonable doubt; or
- where the only evidence relied on by the prosecution to prove an element is an alleged admission made by the accused, the trial judge may refer to the alleged admission and direct the jury that it must be satisfied that that evidence proves that element beyond reasonable doubt.

62 Abolition of common law obligation to give certain directions

Any rule of common law under which a trial judge in a criminal trial is required to direct the jury that a matter, other than a matter referred to in section 61, must be proved beyond reasonable doubt is abolished.

Notes

- 1 This provision abolishes—
 - the rule attributed to *Shepherd v R* [1990] HCA 56; (1990) 170 CLR 573 that in appropriate cases a jury must be directed that it must be satisfied beyond reasonable doubt of an indispensable intermediate fact; and
 - the rule attributed to *R v Sadler* [2008] VSCA 198 that a jury must be directed that it must be satisfied beyond reasonable doubt of uncharged acts that the jury would use as a step in their process of reasoning towards guilt; and
 - any other rule that requires a jury to be directed that it must be satisfied beyond reasonable doubt of any matter other than a matter referred to in section 61.
- 2 Section 4 applies generally to override any rule of law or practice to the contrary of this Act.

63 When trial judge may explain "proof beyond reasonable doubt"

- (1) A trial judge may give the jury an explanation of the phrase "proof beyond reasonable doubt" if the jury asks the trial judge—
 - (a) a direct question about the meaning of the phrase; or
 - (b) a question that indirectly raises the meaning of the phrase.
- (2) Subsection (1) does not limit any other power of a trial judge to give the jury an explanation of the phrase "proof beyond reasonable doubt".

64 How explanation may be given in response to jury question

- (1) If the jury has asked a direct question about the meaning of the phrase, or a question that indirectly raises the meaning of the phrase, "proof beyond reasonable doubt", the trial judge may—
 - (a) refer to—
 - (i) the presumption of innocence; and
 - (ii) the prosecution's obligation to prove that the accused is guilty; or
 - (b) indicate that it is not enough for the prosecution to persuade the jury that the accused is probably guilty or very likely to be guilty; or
 - (c) indicate that—
 - (i) it is almost impossible to prove anything with absolute certainty when reconstructing past events; and
 - (ii) the prosecution does not have to do so; or
 - (d) indicate that the jury cannot be satisfied that the accused is guilty if the jury has a reasonable doubt about whether the accused is guilty; or

- (e) indicate that a reasonable doubt is not an imaginary or fanciful doubt or an unrealistic possibility.
- (2) The trial judge may adapt his or her explanation of the phrase "proof beyond reasonable doubt" in order to respond to the particular question asked by the jury.

Division 2—Perseverance and majority verdicts

64A Definition

In this Division—

majority verdict direction means an explanation that it is possible, or may be possible in some circumstances, for the jury to return a majority verdict instead of a unanimous verdict.

Note

Section 46 of the **Juries Act 2000** provides for majority verdicts.

64B Restriction on when direction to persevere may be given

The trial judge must not direct the jury to persevere to reach a unanimous verdict at the same time as (or immediately before or immediately after) the trial judge gives a majority verdict direction.

64C Trial judge need not give direction to persevere before giving majority verdict direction

The trial judge may give a majority verdict direction to the jury whether or not the trial judge has previously directed the jury to persevere to reach a unanimous verdict. **Note**

R v Ahmet; DPP v Ahmet [2009] VSCA 86 includes a statement that it is preferable for the trial judge to direct the jury to persevere to reach a unanimous verdict before the trial judge gives a majority verdict direction. Under this provision, it is not necessary to do so.

64D Abolition of common law rules

Any rule of common law under which a trial judge is required or permitted to direct the jury to persevere to reach a unanimous verdict at the same time as (or immediately before or immediately after) the trial judge gives a majority verdict direction is abolished.

Notes

1 This provision abolishes the rule attributed to *R v Muto & Eastey* [1996] 1 VR 336 and applied in *R v Ahmet; DPP v Ahmet* [2009] VSCA 86.

2 Section 4 applies generally to override any rule of law or practice to the contrary of this Act.

Division 3—Jury deliberations

64E Directions on order in which offences to be considered

(1) This section applies to a trial in which there is more than one offence in respect of which the jury may return a verdict.

Example

Section 421 of the Crimes Act 1958 provides that on an indictment for murder a person found not guilty of murder may be found guilty of other offences, including manslaughter.

(2) The trial judge may direct the jury on the order in which the jury must consider the offences.

Example

In a homicide trial, the trial judge may direct the jury to consider the offence of manslaughter only if the jury first finds the accused not guilty of murder.

(3) Nothing in subsection (2) prevents the trial judge from directing the jury on the order in which the jury may consider the offences.

64F Directions on order in which elements, defences and issues in dispute to be considered

(1) The trial judge may direct the jury on the order in which it must consider the following matters—

- (a) some or all of the elements of an offence charged or an alternative offence;
- (b) defences to an offence charged or an alternative offence;
- (c) the matters in issue;
- (d) an alternative basis of complicity in the commission of an offence charged or an alternative offence.

Note

This may take the form of an integrated direction or factual question under section 67.

(2) Nothing in subsection (1) prevents the trial judge from directing the jury on the order in which the jury may consider the matters referred to in that subsection.

64G Abolition of common law rules

Any rule of common law under which a trial judge is not permitted to direct the jury on the order in which it must consider any of the following matters is abolished—

- (a) the offences in respect of which the jury may return a verdict;
- (b) the elements of an offence charged or an alternative offence;
- (c) defences to an offence charged or to an alternative offence;
- (d) the matters in issue;
- (e) an alternative basis of complicity in the commission of an offence charged or an alternative offence.

Notes

1 This provision abolishes the rule attributed to *Stanton v R* [2003] HCA 29; (2003) 198 ALR 41 and followed in *Medici v The Queen* [2013] VSCA 111 and *Smith v The Queen* [2013] VSCA 112.

2 Section 4 applies generally to override any rule of law or practice to the contrary of this Act.

Part 8—Trial judge's summing up

65 Trial judge's obligations when summing up

In his or her summing up to the jury, the trial judge—

- (a) must explain only so much of the law as is necessary for the jury to determine the issues in the trial; and
- (b) must refer the jury to the way in which the prosecution and the accused have put their cases in relation to the issues in the trial but

need not summarise the closing addresses of the prosecution and the accused; and

- (c) need not give a summary of the evidence but, in accordance with section 66, must identify so much of the evidence as is necessary to assist the jury to determine the issues in the trial; and
- (d) may use a combination of oral and written components.

66 Trial judge required to identify only evidence necessary for determination of issues

- (1) The trial judge is required to identify only so much of the evidence given in the trial as is necessary to assist the jury to determine the issues in the trial.
- (2) In determining whether and if so to what extent identification of evidence is necessary under subsection (1), the trial judge must have regard to—
 - (a) the facts in issue; and
 - (b) the complexity of the facts in issue; and
 - (c) the length of the trial; and
 - (d) the complexity of the evidence; and
 - (e) the submissions and addresses of the prosecution and the accused; and
 - (f) any reference to the way in which the prosecution and the accused have put their cases in relation to the issues in the trial; and

Note

See section 65(b).

- (g) any special needs or disadvantages of the jury in understanding or recalling the evidence; and
- (h) any transcript of the evidence in the trial or any other document provided to assist the jury to understand the evidence.

Note

Section 223 of the **Criminal Procedure Act 2009** provides for the trial judge to give the transcript of the evidence in the trial and certain other documents to the jury for the purpose of helping the jury to understand the issues or the evidence.

- (3) In addition to the requirements of subsection (2), the trial judge may have regard to any other matter that he or she considers appropriate.

67 Trial judge may give integrated directions

- (1) In this section—

integrated directions means directions referred to in subsection (3).
- (2) The trial judge may give to the jury directions that contain, or are in the form of, factual questions that address matters that the jury must consider or be satisfied of in order to reach a verdict, including the elements of the offence and any relevant defences.

- (3) The trial judge may give integrated directions that combine the factual questions referred to in subsection (2) with—
 - (a) directions on the evidence and how the evidence is to be assessed;
or
 - (b) references to the way in which the prosecution and the accused have put their cases in relation to the issues in the trial; or
 - (c) any evidence identified under section 66.
- (4) A trial judge who addresses a matter—
 - (a) by a factual question need not also address the matter in any other direction; or
 - (b) in integrated directions need not also address the matter in directions that are not integrated directions.