Magistrates and the *Jury Directions Act*[1]

The title of this presentation, Magistrates and the *Jury Directions Act*, is designed to confront head on the seeming paradox. Why would a Jury Directions Act have any relevance for the Magistrates' Court? Magistrates don't have trials, they have hearings. They don't have juries, they are judges of both the facts and the law. And they only have directions that they give themselves.

But the answer to this seeming paradox lies in section 4A. Introduced as part of the 2017 reforms, section 4A extends the *Jury Directions Act 2015* (Vic) ('*JDA*') to non-jury trials. Subsection (1) states, relevantly, that 'This section applies to a summary hearing or a committal proceeding under the *Criminal Procedure Act 2009*'.

Then we get the operative provision in sub-s (2):

> The court's reasoning with respect to any matter in relation to which Part 4, 5, 6 or 7 makes provisions
>
> (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.

That sets the groundwork for this paper.

First, I will identify the statements, suggestions and directions that trial judges are prohibited from giving under sub-s (b)(ii).

Second, I will give a tour of the matters covered in Parts 4, 5, 6 and 7 which require that a magistrates' reasoning be consistent with those directions.

Third, I'll demonstrate two resources the College has produced which help Magistrates give effect to these obligations.

Before we move to the substance of the topic, it is important to emphasise that s 4A is concerned with magistrates' reasoning process, not with their reasons. As Priest and Weinberg JJ both explained in *Makeham v Sheppard*,[2] the content of a magistrates' reasons is dictated by the scope and complexity of the case, taking into account the high volume of cases dealt with by the Magistrates' Court. Section 4A doesn't change that. Further, the process of requesting directions that occurs in trials, in accordance with Part 3 of the *JDA*, is not incorporated into the Magistrates' Court. The extent to which magistrates need to mention any of the topics covered in this paper in their statement of reasons is governed by basic principle, and not simply by whether counsel have invited the magistrate to direct themselves in accordance with certain provisions.

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[2] [2020] VSCA 242, [49]–[51].

With those preliminary matters out of the way, we can move to the substance.

Prohibited reasoning

There are six clauses in the *JDA* which prohibit certain statements or suggestions to a jury, and hence prohibit a magistrate from adopting certain modes of reasoning.

The first is s 33.

A decision maker must not reason:

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

There is an equivalent prohibition in s 51 for complainants in sexual offence cases. Decision makers must not treat complainants as an unreliable class of witness and must not treat complainants who delay, who provide commercial sexual services, have a particular sexual orientation or who have a particular gender identity, as a class, as less credible or requiring more careful scrutiny than other complainants. Subsection (2) also requires that magistrates do not reason that it is dangerous or unsafe to convict, or that the complainant's evidence requires scrutiny with great care, because the complainant delayed in making a complaint.

This isn't a very onerous obligation. Consistent with the modern understanding of witnesses, magistrates must assess a child witness or a sexual offence complainant as an individual, rather than bring assumptions based on their membership of that class.

Magistrates are still able to conclude that a witness in these classes is unreliable. To adopt the language of the High Court from *Crofts v The Queen*,[3] the purpose was not to convert children or complainants into an especially trustworthy class of witness, or immune from criticism. But it must be because of features of the witness' evidence – lack of memory, inconsistent statements, other contradictory evidence. A magistrates' conclusion will be based on those factors, rather than on the basis that the witness is a child or a sexual offence complainant.

The third prohibition is s 39. Where the accused has suffered a significant forensic disadvantage, a magistrate must not say or suggest that it would be dangerous or unsafe to convict, or that the victim's evidence should be scrutinised with great care.

There are two things to say about this. First, the *JDA* has a drafting style where it sometimes uses the word victim, rather than complainant. I've used the word victim here deliberately because it's what is said in the Act. But I think the provision is only capable of sensible operation if magistrates treat the word victim as if it read 'complainant'. Since, at the time of the hearing, there is no determination of whether the complainant is a victim, and it would be perverse to treat the Act as being incapable of operation since there is no known victim.

[3] (1996) 186 CLR 427, [48].

Second, when giving effect to this clause for the purpose of s 4A, I suggest it is important to understand its purpose and background. As the notes to s 40 indicate, the *JDA* abolishes the rule from *Longman v The Queen* ('*Longman*'),[4] *Crampton v The Queen*[5] and *Doggett v The Queen.*[6] The *Longman* warning had been criticised historically 'as a not too subtle encouragement by the trial judge to acquit'.[7] As s 39(3)(a) recognises, forensic disadvantage is still a factor magistrates must take into account. A magistrate may still, I suggest, engage in careful scrutiny of the evidence. A magistrate might even decide, having considered all the evidence, that it is dangerous or unsafe to convict. Thus, my conclusion on s 39 is that it only prohibits magistrates from approaching the evidence of a complainant given in circumstances of significant forensic disadvantage with inherent scepticism which they don't bring to other evidence.

The fourth prohibition is s 42. This is the most significant one for magistrates in my opinion, because it describes modes of reasoning they would otherwise be most likely to adopt. It contains three clauses.

Where the accused does not give evidence or call a particular witness, a magistrate must not reason that:

1. The accused is guilty from that failure; or
2. That the failure to explain facts which must be within the accused's knowledge allows the decision maker to more safely draw an adverse inference based on those facts which, if drawn, would prove the accused's guilt; or
3. The accused did not give evidence or call a witness because that would not have assisted his or her case.

The notes to s 44 make it clear that this is abolishing two cases magistrates are probably very familiar with – *Weissensteiner v The Queen*[8] and *Jones v Dunkel*[9] as it relates to the accused.

Due to s 4A, those kinds of inferences are not available to magistrates as decision makers in criminal proceedings.

The fifth prohibition is in s 44F.

If a magistrate doubts the complainant's truthfulness or reliability in relation to one charge, they must not treat themself as required to take that doubt into account in assessing the complainant's account generally or on other charges.

From s 44G, we see this is an abolition of the *R v Markuleski* direction.[10] That's a direction that was rejected in Victoria, and so the prohibition on decision makers adopting that reasoning will be easy to adopt. And the section must be read strictly. It is a prohibition on an **obligation** to take doubts in relation to one charge into account when assessing evidence on another charge. A magistrate is of course able to choose to do that. But they must not treat themselves as required to do so.

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[4] (1989) 168 CLR 79.
[5] (2000) 206 CLR 161.
[6] (2001) 208 CLR 343.
[7] *R v BWT* [2002] NSWCCA 60, [34] per Wood CJ at CL. A consideration that was taken up by the Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law* (Final Report, December 2005), and by Neave J in *R v RW* (2008) 18 VR 666, [57]–[58].
[8] (1993) 178 CLR 217.
[9] (1959) 101 CLR 298.
[10] (2001) 52 NSWLR 82.

The sixth prohibition is 44J.

A trial judge must not tell a jury, and therefore magistrates must not direct themselves, to consider whether the accused is under more stress than any other witness, or reason that an accused gives evidence because a guilty person who gives evidence is more likely to be believed and an innocent person can do nothing more than give evidence.

Again, looking at the notes to s 44K, we can see what this provision is doing. It is abolishing principles that developed in Victoria in *R v Haggag*,[11] *R v McMahon*[12] and *R v Buckley*.[13] The end point is that, if the accused gives evidence, magistrates should treat them like any other witness, while at the same time giving effect to the onus and standard of proof.

Consistent reasoning

Those are all the negative obligations under the *JDA*. Let's now turn to the positive obligations.

Turning to the table of contents of the *JDA*, we see that the Act provides directions on the following topics:

1. Post-offence conduct
2. Other misconduct evidence
3. Unreliable evidence
4. Identification evidence
5. Forensic disadvantage
6. Failure to give evidence or call a witness
7. Previous representations
8. Accused giving evidence
9. Prosecution witness motive to lie
10. Language and cognitive skills of child witnesses
11. Consent
12. Reasonable belief in consent
13. Delay
14. Differences in account
15. Continuation of a relationship
16. Distress while giving evidence
17. Family violence
18. Proof beyond reasonable doubt

Let's now look through each of those.

[11] (1998) 101 A Crim R 593.
[12] (2004) 8 VR 101.
[13] (2004) 10 VR 215.

Post-offence conduct

Starting with post-offence conduct, this is the modern name for consciousness of guilt. The *JDA* abolished the principles from *Edwards v The Queen*[14] and *Zoneff v The Queen*,[15] and replaced them with a clearer and cut down direction, which carries the same philosophy. Starting with s 18, we see that conduct includes lies and other acts or omissions after the alleged offending, and incriminating conduct is conduct that amounts to an implied admission of the offence, an element of the offence, or the absence of a defence.

If the prosecution are relying on incriminating conduct, a magistrate is required by s 21 to direct themselves that they can only use it as evidence that the accused believed he or she committed the offence, an element of the offence or the absence of a defence, if they conclude that the conduct occurred and the only reasonable explanation of that conduct is that the accused held that belief. The magistrate also needs to tell themselves that even if they conclude that the accused believed they are guilty, the magistrate must still decide on the whole of the evidence whether the prosecution has proved guilt beyond reasonable doubt. They must also, in accordance with s 22, direct themselves that there are all sorts of reasons why a person might behave in a way that makes them look guilty, that the accused may have engaged in the conduct even though they are not guilty and that the accused is not necessarily guilty even if they engaged in conduct that makes them look guilty.

If the prosecution are not relying on conduct as incriminating conduct, then a magistrate must direct themselves that there are all sorts of reasons why a person might behave in a way that makes them look guilty, and that they must not conclude from the conduct that the accused is guilty.

Section 20 requires a party to file a notice of intention to rely on evidence of incriminating conduct. Beale J, in *DPP v Dyke*,[16] held that this notice requirement does not apply in the Magistrates' Court. Parties are not required to file notices before they can rely on evidence as incriminating conduct in the Magistrates' Court.

Other misconduct evidence

Next is other misconduct evidence. This is the statutory replacement for directions about tendency evidence, coincidence evidence and what is sometimes called relationship evidence and context evidence.

These provisions require a magistrate to remind themselves of how the evidence is relevant, that it may only be one part of the prosecution case and not to decide the case on the basis of prejudice. This is ss 27 and 28. And s 29 is to provides a direction not to use evidence as tendency evidence unless it is admissible for that purpose.

Unreliable evidence

Under s 32, if a magistrate has evidence that meets the definition of 'evidence of a kind that may be unreliable', then they must remind themselves that the evidence may be unreliable, remind themselves of the significant matters that may cause the evidence to be unreliable, and warn themselves of the need for caution in deciding whether to accept the evidence and the weight they give the evidence.

[14] (1993) 178 CLR 193.
[15] (2000) 200 CLR 234.
[16] (2020) 61 VR 207.

Identification evidence

Next is identification evidence. This is s 36. Section 36 is largely a codification of the *Domican v The Queen*[17] warning. When evaluating identification evidence, a decision maker must remind themselves:

- To be cautious in deciding whether to accept the evidence and what weight they give it;
- Whatever, in the circumstances of the case, are the significant matters that may make the evidence unreliable;
- That witnesses may honestly believe their evidence is accurate when they are mistaken;
- That the mistaken evidence of a witness may be convincing;
- That several witnesses may all be mistaken; and
- That mistaken identification evidence has resulted in innocent people being convicted.

Forensic disadvantage

Next is the forensic disadvantage warning in s 39. I mentioned section 39 earlier in the context of prohibited reasoning. As I said, this is the statutory replacement for *Longman* warnings, and the old *Crimes Act 1958* (Vic) s 61 and *Evidence Act 2008* (Vic) s 165B directions. Where the accused suffers a significant forensic disadvantage, magistrates must remind themselves of the nature of that disadvantage and the need to take it into account when considering the evidence.

For this purpose, forensic disadvantage is defined in s 38 as a disadvantage to the accused in challenging, adducing or giving evidence or conducting their case which arises because of the passage of time between the alleged offence and the trial. The disadvantage must be more than the mere existence of delay.

Failure to give evidence or call a witness

Our next topic is an accused not giving evidence or calling witnesses. This is s 41. It is a codification of the *Azzopardi v The Queen*[18] direction. If the accused doesn't give evidence or call a particular witness, magistrates must remember the prosecution carries the onus of proof, the accused isn't required to give evidence or call witnesses, magistrates should not guess or speculate on what evidence might have been given. The fact that the accused doesn't give evidence or call a witness is not evidence is not an admission, cannot fill gaps in the prosecution case and does not strengthen the prosecution case.

When it comes to the prosecution, s 43 preserves to a limited extent *Jones v Dunkel* directions in relation to the prosecution. Now, hopefully, the prosecution does all the things they are supposed to do. And calls all material witnesses necessary to fully present the narrative of the case, in the sense explained in cases like *R v Apostilides*[19] and *Whitehorn v The Queen*.[20] But if they don't, and the magistrate is satisfied that the prosecution should have called someone and have not adequately explained why it did not call or question the witness, then the magistrate would direct themselves that it is open to conclude the witness would not have assisted the prosecution's case.

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[17] (1992) 173 CLR 555.
[18] (2001) 205 CLR 50.
[19] (1984) 154 CLR 563.
[20] (1983) 152 CLR 657.

Previous representations

Sections 44A to 44E operate to remove the need for certain directions that developed at common law. They do not prohibit a decision maker from reasoning in certain ways.

When I was writing this presentation, I was initially puzzled by how these provisions interact with s 4A and the common law. Section 4A(2)(a) requires a magistrates' reasoning to be consistent with how a jury would be directed in accordance with the Act. And s 44E abolishes any common law rule which requires a judge to give a jury a direction referred to in the Division.

Taking the sections in turn, it appears to me that s 44B is designed to counter the direction that had been given by the trial judge in *Papakosmas v The Queen*[21] that repeating a claim does not make it true, and which on my reading passed without comment in the High Court. Section 44C then is responding to the point made by Winneke P in *R v Stoupas*[22] that there is a risk of a jury thinking complaint evidence would be independent and hence corroborative, and the need to counter that risk. And s 44D deals with the point from *R v HJS*[23] that a complaint in general terms can support generally similar alleged offences, but could not be substituted for evidence of a specific occurrence.

The result, I think, is that when applying these sections in the context of s 4A, a magistrate remains free to remind themselves:

- that repetition does not indicate truthfulness;
- that evidence of complaint is not independent of the complainant; and
- that complaints in general terms require caution before being used in relation to specific charges.

This is because the sections are phrased in negative terms – the trial judge 'is not required to'. It does not prohibit directions, and so s 4A(2)(b) is not engaged. And it does not specify how a jury 'would be' directed, and so s 4A(2)(a) is not engaged.

That said, I respectfully doubt Magistrates will find much value in reminding themselves of those matters. As legally trained decision makers, there is little risk a Magistrate needs reminding to avoid those errors of reasoning.

Accused giving evidence

Section 44I regulates directions that flow when the accused gives evidence, and about the interests of the accused in the outcome of the trial. While the Act does not make the distinction between those two classes of direction particularly clear, my sense is that under s 4A a magistrate would apply them all whenever the accused gives evidence. The purpose of the distinction lies, in my view, in managing a risk of a backlash effect, where a jury perversely engages in the opposite mode of reasoning which is being suggested. But as experienced judicial officers, there is no such risk for magistrates, and so all directions are appropriate. The result is that when an accused person gives evidence, a magistrates' reasoning must be consistent with:

- The fact that the accused is not required to give evidence;

[21] (1999) 196 CLR 297.
[22] [1998] 3 VR 645.
[23] [2000] NSWCCA 205.

- The principle that that the accused choice to give evidence doesn't change the prosecution's onus of proof;
- That a magistrate must assess the evidence of the accused in the same way as they assess the evidence of any other witness;
- That a magistrate must not give the accused's evidence less weight just because any person who is on trial has an interest in the outcome of that trial.

Prosecution witness motive to lie

Section 44L cements the law on directions about a prosecution witness' motive to lie and replaces the principles the High Court set down in *Palmer v The Queen* ('*Palmer*').[24] The statutory direction is more bare bones than the common law had been. Where an issue about a witness' motive to lie is raised, the only things magistrates need to remind themselves of are that the prosecution has the obligation to prove the accused's guilt and the accused does not have to prove that the witness had a motive to lie. Magistrates are no longer required to direct themselves about the need to consider other possible motives, the fact that people might have many reasons to lie, that an accused doesn't need to identify a motive or that rejection of a motive does not affect a witness' credibility. Those were all parts of the *Palmer* directions, but have been discarded by s 44L.

Language and cognitive skills of child witnesses

Section 44N specifies a series of matters a decision maker must take into account when evaluating the evidence of children. They are largely designed to counter common law perceptions that children as a class are unreliable. While that is prohibited by s 33, s 44N then goes a step further by providing positive considerations. These are:

- That children can accurately remember and report past events
- That children's language and cognitive skills are developing and that may affect their ability to give detailed, chronological or complete accounts, and how they understand and respond to questions
- That, depending on a child's level of development, they may have difficulty understanding certain language or certain concepts, and may not ask for a question to be clarified if they don't understand it and may not clarify an answer which has been misunderstood.

These are all potential matters magistrates may need to take into account when evaluating the credibility and reliability of a child's evidence.

Consent

The topics I've mentioned so far have all been in Part 4 of the *JDA*. Part 5 is next, and is entitled Sexual Offences. In applying these provisions, it is important to be aware of the definition provisions. 'Sexual offence' is defined in s 3 by adopting the definition of sexual offence from the *Criminal Procedure Act 2009* (Vic). Section 3 of the *Criminal Procedure Act* says that sexual offence has the meaning given by s 4. And then section 4 provides 3 pages of definition which covers both offences in particular parts of the *Crimes Act 1958* and *Sex Work Act 1994* (Vic), an offence with certain elements, such as sexual activity, indecency or child abuse material, or an attempt, incitement or conspiracy to commit any of these offences.

[24] (1998) 193 CLR 1.

Turning to the substance of Part 5, we start in s 46 with directions on consent. A magistrates' reasoning in relation to consent, where it is an issue is a sex case, must be consistent with the principle that a person can consent only if the person is capable of consenting and free to choose, and that the person may withdraw consent. Further, if a magistrate is satisfied beyond reasonable doubt of a deemed non-consent circumstance from the *Crimes Act 1958*, then they must find the person did not consent.

Reasonable belief in consent

When assessing whether the prosecution has proved that the accused had no reasonable belief in consent, a decision maker must take account of the following under s 47:

- First, if the decision maker concludes that the accused knew or believed that a deemed non-consent circumstance existed, then that is enough to show the accused did not reasonably believe the other person was consenting. On this, it is worth noting that in *Hubbard v The Queen,*[25] the Court of Appeal held that where the prosecution proves the accused knew or believed that a non-consent circumstance existed, they cannot rely on a so-called defence of reasonable belief in consent;
- The second point under s 47 is that for the purpose of deciding whether a belief is reasonable, self-induced intoxication is excluded from the standard of a reasonable person. Conversely, if the intoxication is not self-induced, then the standard is that of a reasonable person intoxicated to the same extent;
- Finally, in deciding whether the accused had a reasonable belief in consent, a magistrate must consider what the community would reasonably expect of the accused in the circumstances in forming a reasonable belief.

There is one final limb of the directions on reasonable belief, but it is qualified by s 47(4) which provides good reasons for not giving such a direction. How that qualification interacts with s 4A is not entirely obvious, but I think it works as follows. Section 47(4) sets out three matters that would provide a judge with a good reason not to give a direction that the jury may take into account personal attributes, characteristics and circumstances. My understanding is that since s 4A requires that magistrates reason consistently with how a jury **would be directed**, then magistrates do need to take the s 47(4) factors into account, because they influence how a jury **would be directed**. The result is that magistrates may take into account any personal attributes, characteristics and circumstances of the accused in deciding whether the accused had a reasonable belief, **unless** they consider that those matters did not affect or likely did not affect the accused's perception or understanding of the objective circumstances, or were matters the accused could control, or were subjective values, wishes or biases.

After ss 46 and 47, we move into what we can call the counterintuitive behaviour directions. These are jury directions designed to counter assumptions about how victims of sexual violence behave.

Several years ago, when the College ran a program about counterintuitive behaviour, one of the questions I remember being raised was whether a magistrate needed expert evidence in order to be able to take such matters into account in a given case. Or whether research about counterintuitive behaviours could be taken into account in how the magistrate exercises their common sense evaluation of evidence. At least in relation to the following matters, that problem is solved by the *JDA*.

The directions are:

[25] [2020] VSCA 303, [37], [64].

- There are many different circumstances in which people do and do not consent to a sexual act.
- People who do not consent may not be physically injured, subjected to violence, or threatened with injury or violence.
- There is no typical, proper or normal response to a non-consensual sexual act.
- People who do not consent to a sexual act may not protest or physically resist the act, such as where they freeze.
- A person might not consent to a particular sexual act even if they have consented to other sexual acts on other occasions with the same person or a different person, or to the same or a different kind of sexual act.
- Do not assume that a person consented to a sexual act just because the person wore particular clothing, had a particular appearance, drank alcohol, took drugs, went to a particular location or acted flirtatiously.
- Sexual acts can occur without consent between all sorts of people, including people who know each other, are married, are in a relationship, who provide commercial sexual services and their customers, people of the same or different sexual orientations or gender identities.

That brings us to s 47I, which is a direction about reasonable belief in consent. The section provides that a belief in consent based solely on a general assumption about the circumstances in which people consent is not a reasonable belief, and a belief based on a combination of matters, including general assumptions is, to the extent that it is based on that general assumption, not a reasonable belief. In other words, when a magistrate is assessing the reasonableness of a belief in consent, they must exclude any elements of the belief which are based solely on general assumptions. They then look at what is left as providing the basis for the belief and decide whether a belief on that basis is reasonable.

Delay

The next topic is delayed complaint. Provisions about delayed complaint have been on the statute books for decades, and so these provisions will not be surprising. When dealing with delayed complaint, a magistrate will direct themselves in accordance with s 54(4) – that people react differently to sexual offences and there is no typical, proper or normal response. Some people complain immediately to the first person they see, while others may not complain for some time and some people never make a complaint. Delay in making a complaint is a common occurrence and there may be good reasons why a person may not complain, or may delay in complaining about a sexual offence.

Differences in account

Provisions regarding the significance of differences in a complainant's account are comparatively more recent. Section 54D requires magistrates to remind themselves, in a relevant case, that people may not remember all the details of a sexual offence and may not describe a sexual offence in the same way each time. Trauma may affect people differently, including how they recall events. It is common for there to be differences in accounts of a sexual offence. Both truthful and untruthful accounts of a sexual offence may contain differences. It is up to the decision maker to decide whether any differences are important in assessing the complainant's credibility and reliability and whether they will believe all, some or none of the complainant's evidence.

Continuation of a relationship

Next is s 54H – directions on evidence of a post-offence relationship. This provision deals with the relatively common phenomenon in acquaintance sexual offences, where the people involved continue to associate after the alleged offence. On their face, the directions are straightforward. People react differently to a sexual act to which

they did not consent, and there is no typical, proper or normal response. Some people will never again contact the person while others may continue a relationship with that person or may otherwise continue to communicate with them. There may be good reasons why a person subjected to a non-consensual sexual act may continue a relationship with the other person or may otherwise continue to communicate with that person.

There is one complexity of this provision to be aware of. Unlike many parts of the *JDA*, the operative phrase used here is 'sexual act without their consent'. This is different to the provisions on differences in account or delay in complaint, which use the phrase 'sexual offence'. As I understand it, the practice in the County Court is that this provision is inapplicable to child sex offence cases, because consent is irrelevant to such cases.

Distress while giving evidence

The next section to look at is s 54K, which is about whether the complainant is distressed or emotional when giving evidence. This requires a magistrate to remind themselves that because trauma affects people differently, some people may show obvious signs of emotion or distress when giving evidence about a sexual offence, while others may not. Both truthful and untruthful accounts of a sexual offence may be given with or without obvious signs of emotion or distress.

As I read it, this direction is warning about giving too much weight to displays of emotion, or an absence of emotion, while giving evidence and instead recognising that there are too many factors that can affect a complainant to take emotional congruence as a reliable guide to assessing a witness. This is, I understand, consistent with modern psychological research that reduced affect is a common consequence of trauma.

Family violence

Sections 59 and 60 provide directions on family violence. The directions relevant to magistrates reasoning are:

- That evidence of family violence may be relevant to determining whether the accused acted in self-defence or under duress;
- That family violence is not limited to physical abuse, and may include sexual or psychological abuse, may involve intimidation, harassment and threats of abuse, may consist of a single act, or may consist of separate acts that form part of a pattern of behaviour that amounts to abuse even though some or all of those acts may, when viewed in isolation, appear minor or trivial;
- That people react differently to family violence and there is no typical, proper or normal response;
- It is not uncommon for a person subjected to family violence to stay with an abusive partner, or to leave and then return to the partner and not report family violence to police or seek assistance to stop the violence;
- That decisions made by a person subjected to family violence about how to address, respond to or avoid family violence may be influenced by the family violence itself, as well as cultural, social, economic and personal factors;
- That evidence that the accused assaulted the victim on a previous occasion does not mean the accused could not have been acting in self-defence or under duress in relation to the offence charged.

Proof beyond reasonable doubt

This brings us to Part 7. There are two provisions in Part 7 of the *JDA* that are capable of being relevant to magistrates.

The first is s 61. The section provides that the only matters that must be proved beyond reasonable doubt are the elements of the offence charged or an alternative offence and the absence of any relevant defence.

As the notes to s 62 make clear, this provision was introduced to abolish the *Shepherd v The Queen*[26] principle of indispensable intermediate facts, and the *R v Sadler*[27] prudential warning regarding uncharged acts. I think it is fair to say that the provision is not without its critics. Croucher J in *R v Wong*[28] described ss 61 and 62 as, in his Honour's opinion, 'misguided provisions'. This occurred in the context of him trying to work out how to describe to a jury the appropriate mode of reasoning in a case where there was agreement that certain evidence was only relevant if used in a sequential path. In the end, he settled on 'satisfied' without any elaboration on the standard of proof.

In two judge alone trials before Incerti J,[29] her Honour used this formulation when directing herself about the standard of proof:

> The onus of proof is on the prosecution and the accused comes to this Court with the presumption of innocence in his favour. The accused is regarded as innocent unless and until the prosecution has proved his guilt beyond reasonable doubt. In order to do so, the prosecution must prove each of the elements of the relevant offence beyond reasonable doubt. The prosecution does not need to prove every fact that it alleges to this standard; however, facts must be clearly proved before they can be treated as established.

Her Honour cites *R v Dickson*[30] and *R v Van Beelen*[31] for the last sentence, so I commend those cases as a reminder of how courts thought about the standard of proof and intermediate facts before the influence of *Chamberlain v The Queen*[32] and *Shepherd v The Queen*.

The second provision in Part 7 that is relevant is s 64, which provides an elaboration on the meaning of beyond reasonable doubt. Thanks to the *JDA*, gone is the notion that beyond reasonable doubt is incapable of explanation. Instead, the *JDA* adopts what I call a triangulation method to explain beyond reasonable doubt. To understand beyond reasonable doubt, s 64 directs a decision maker's attention to:

- The presumption of innocence;
- The prosecution's onus of proof;
- The fact that 'probably guilty' or 'very likely to be guilty' are not enough;
- The fact that it is almost impossible to prove anything with absolute certainty when reconstructing past events, and the prosecution doesn't have to do that;
- A reasonable doubt is not an imaginary or fanciful doubt, or an unrealistic possibility
- The fact that a decision maker cannot be satisfied the accused is guilty if they have a reasonable doubt about whether the accused is guilty.

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[26] (1990) 170 CLR 573.
[27] [2008] VSCA 198.
[28] [2023] VSC 153, [95].
[29] *DPP v Arslanian* [2022] VSC 736, [21]. See also *DPP v Cross* [2022] VSC 314, [25]
[30] [1983] 1 VR 227.
[31] (1973) 4 SASR 353.
[32] (1984) 153 CLR 521.

The remaining provisions of Part 7 are so jury centric as to be irrelevant to magistrates in my opinion. They concern perseverance and majority verdicts, the ability of a trial judge to direct the jury to consider offences or issues in a particular order, and the content of the obligation when summing up the case and evidence to a jury.

College resources

The third topic is College resources that help magistrates fulfil these obligations.

The first is the Criminal Charge Book.[33] Just as trial judges can use this when directing juries, Magistrates can use it to remind themselves of the principles, both at common law and under the *JDA*, which regulate their decision making. The most relevant sections, I believe, are Parts 3 onwards. These cover general principles like onus and standard of proof, assessing evidence, separate consideration, then evidentiary directions, complicity, inchoate liability, Victorian offences, defences, Commonwealth offences and I believe Magistrates can safely ignore the material on fitness to stand trial.

The structure of each topic is consistent. First is commentary about the relevant area of law, which is sometimes called Bench Notes. Then, as a subtopic, there is the relevant jury direction and, for offence topics, a jury checklist which summarises the elements. Where there are offences which have been amended frequently, the Charge Book will usually provide multiple versions of the Charge, with indications on the relevant date range for that Charge.

The second relevant College resource are the College's Precedent Builders. One in particular is the Summary Contest Reasons Builder. This application requires a user to complete a short questionnaire about the offences and issues. Based on the answers to that questionnaire, the system will generate a template which a person can use to start their reasons. The most relevant part of this template for today's presentation is the section under 'Directions to self'. This contains short statements based on the answers the user gives in the questionnaire which remind and demonstrate the decision maker's recitation of the relevant legal issues that affect their reasoning process. The template also provides a structure for the decision maker's remaining reasons, including statements about the elements, and the evidence and your findings.

Closing matters

In conclusion, this paper has explained why the *JDA* matters in summary and committal proceedings, even though Magistrates don't have juries, and then identified the forms of reasoning prohibited by the Act, those required by the Act and the College resources which exist to help Magistrates give effect to the Act.

[33] Judicial College of Victoria, 'Victorian Criminal Charge Book' <https://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#19193.htm>.